

Some considerations on command responsibility and criminal liability

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Abstract

Under international humanitarian law commanders have been entrusted with the task of ensuring respect for that body of law by their subordinates. This responsibility includes not only the training in IHL of those under their command, but also the taking of necessary measures to prevent or punish subordinates committing violations of IHL. Failure by a commander to do so will give rise to criminal liability, often termed superior responsibility. The following article reviews some of the issues arising from the application and development of this form of responsibility, from both a practical and a legal perspective.

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For Princes are the glass, the school, the book
Where subjects' eyes do learn, do read, do look.¹

Under international humanitarian law (IHL) commanders have a duty to ensure that their troops respect that body of law during armed conflict and hostilities. Failure to do so may give rise to liability. A mere “breach of duty”, whereby the commander has not fulfilled the responsibilities expected of his rank, is usually dealt with through disciplinary action. However, where a commander fails to prevent or punish violations of IHL by subordinates, criminal proceedings are likely, and the punishment to be meted out will reflect the gravity and nature of the crime committed by the subordinate.² Indeed, because of their position of command over troops and subordinates and their influence and responsibilities as

* This article reflects the views of the author and not necessarily those of the ICRC.

superiors, military commanders and other superiors have an affirmative duty to act in preventing violations of IHL by their subordinates. In essence, the commander acquires liability by default or omission. Having evaded his responsibility as a superior to intervene in ensuring the respect of IHL, he will be seen as accountable for his subordinates and, in certain circumstances, as even more culpable than them. This does not mean that subordinates are absolved from all blame: they too as individuals are bound to respect IHL and will be held personally accountable for breaches.

The present paper will consider certain issues stemming from the application and development of this form of liability, termed “command responsibility” or “superior responsibility”, which entails criminal liability for the commander. After a summary review of the principle of command responsibility, a brief comment will be made on the *mens rea* standards applicable to military superiors and civilian officials, the “necessary and reasonable” measures that they are expected to take to prevent the commission of the crime, the scaling of applicable sentences and the connected issue of illegal orders.

Command responsibility

Whether a commander can be held criminally responsible for the breaches of IHL committed by his subordinates was a central issue in the *Yamashita* case, which was reviewed by the US Supreme Court in 1946.³ In this case, General Tomuyuki Yamashita, the commander of the Japanese forces in the Philippines in 1944–5, was charged with having failed to discharge his duty to control the operations of persons under his command who had violated the laws of war. The majority judgment, delivered by Chief Justice Stone, enounced the principle that the laws of war impose upon an army commander a duty to take such appropriate measures as are within his power to control the troops under his command and prevent them from committing violations of the laws of war. In the view of the court, the absence of such an affirmative duty for commanders to prevent violations of the laws of war would defeat the very purpose of those laws. To quote the Court,

1 William Shakespeare, *The Rape of Lucrece*.

2 See International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Judgement in *Čelebići Case*, Case No. IT-96-21-A, 20 February 2001, at 226: “Article 7(3) of the [ICTY] Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”

3 *In Re Yamashita No. 61*, Misc. Supreme Court of the United States 327 US 1; 66 S. Ct. 340; 90 L. Ed. 499; 1946 U.S. LEXIS 3090. The relevant charge held against General Yamashita was that “the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for his failure to take such measures when violations result.”

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

Commanders thus were deemed to have a clear responsibility to control subordinates and to ensure that they respected IHL. Failure to do so where violations of IHL were committed warranted penal action and punishment fitting the crimes.⁴ As aptly stated in the post-Second World War case of the *United States v. Wilhelm von Leeb et al. (High Command Case)*, “under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.”⁵

From an IHL perspective, it took another thirty years or so to have these principles codified in a convention. The precedents set by the post-Second World War cases, including the above and those from the International Military Tribunal for the Far East (Tokyo Tribunal) and the US Military Tribunal at Nuremberg, to a certain degree influenced the drafting of the text of Article 86 (failure to act) of the 1977 Protocol I Additional to the 1949 Geneva Conventions (Additional Protocol I):

1. 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.
2. 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.

Command responsibility is now recognized in many national military manuals and has been the subject of further developments in particular by the various international criminal tribunals, both in their constitutive documents and

4 The US Supreme Court ultimately upheld the death sentence imposed by the Military Commission on General Yamashita.

5 *United States v. Wilhelm von Leeb et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI* (US Govt. Printing Office, Washington, 1950), at 1230, 1303.

in their jurisprudence.⁶ The Statute of the International Criminal Tribunal for Rwanda (ICTR) and that of the International Criminal Tribunal for the former Yugoslavia (ICTY) read,

The fact that any of the acts referred to in ... the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.

The main reason for the development of this form of responsibility, notably in the international criminal arena, lies in the recognition that crimes are often committed by low-level officials or military personnel because their superiors failed to prevent or repress them.⁷ As mentioned above, it is generally agreed that command responsibility is necessary to enable prosecutions beyond the direct perpetrators of the crimes. Without this form of responsibility, superiors could absolve themselves of any wrongdoing, for instance by arguing that the subordinates were not following orders when they committed crimes, or that they were at no time at the scene of the violations. Today the law is clear: one is duty-bound as a commander to intervene when acts of subordinates constituted or would constitute violations of IHL, and to prevent or repress these.

Conditions for establishing command responsibility

From the jurisprudence emanating from the international criminal tribunals, it is generally agreed that in order to establish command responsibility three key elements must be met. First, there has to be a superior/subordinate relationship. As explained in the ICRC Commentary on Article 86 of Additional Protocol I, “we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control.... The concept of the superior ... should be seen in terms of a hierarchy encompassing the concept of control.”⁸ This relationship can be *de jure* or *de facto*, with the exercise of effective command, control or authority being

6 For instance the United Kingdom’s *Manual of the Law of Armed Conflict* explains, “Military commanders are responsible for preventing violations of the law (including the law of armed conflict) and for taking the necessary disciplinary action. A commander will be criminally responsible if he participates in the commission of a war crime himself ... particularly if he orders its commission. However, he also becomes criminally responsible if he “knew, or owing to the circumstances at the time, should have known” that war crimes were being or were about to be committed and 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 authority for investigation and prosecution”. Ministry of Defence, *Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, para. 16.36.

7 See A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 205.

8 *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (Commentary), ICRC/Martinus Nijhoff Publishers, Leiden, 1987, p. 1013.

determinative.⁹ Second, the superior knew or had reason to know that one or several subordinate(s) committed or were about to commit criminal acts. Third, the superior failed to take the necessary and reasonable measures to prevent or punish the commission of said acts. As discussed below, the latter two elements have been the subject of much jurisprudence.

The knowledge requirement: military commanders versus other superiors

Traditionally, the extent and nature of the “knowledge” required of a superior regarding the actions of subordinates was the same for both military commanders and other superiors (for instance ministers, mayors and directors of factories), irrespective of office held. This is reflected in Rule 153 of the ICRC’s customary law study: for both categories of superiors to attract liability, it had to be shown that the superior either *knew* or *had reason to know*.¹⁰

Whilst establishing that the superior *knew* has not been particularly contentious, the concept of *had reason to know*, a form of constructive knowledge, has been the subject of some jurisprudential debate. Article 86(2) of Additional Protocol I sheds some light on this concept, in that superiors will be deemed responsible if they had information which should have enabled them to conclude, in the circumstances at the time, that their subordinates were committing or were going to commit a breach. Due to a slight divergence between the English and French texts of Additional Protocol I, the ICRC Commentary on the Protocol explains that the information available to the superiors should be such as *to enable* them to conclude rather than *should have enabled them* to conclude.¹¹

In other words, there must be some information available to the superiors that puts them on notice of the commission of IHL violations by subordinates. This standard has been favoured by both the ICTR and ICTY Appeals Chambers:

[R]eason to know standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied

9 See ICTY Appeals Judgement in *Prosecutor v. Delalić et al. (Čelebići)*, Case No. IT-96-21-A, 20 February 2001, at 195: “The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.”

10 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Geneva and Cambridge, 2005, I, pp. 558–562.

11 Commentary, above note 8, p. 1013.

that the accused had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates”.¹²

Interestingly, the Rome Statute of the International Criminal Court (ICC), in its Article 28, advances two separate standards. For military commanders, the test remains that the person either knew or, owing to the circumstances at the time, should have known that the forces under his or her command were committing or about to commit such crimes. The *should have known* is not dissimilar to the traditional *had reason to know*.

By contrast, for other superiors – that is non-military commanders – to incur liability, it must be shown that the person either knew, or *consciously disregarded information that clearly indicated* that the subordinates were committing or about to commit such crimes. This approach was followed in the ICTR’s *Kayishema & Ruzindana* case. Here the trial chamber, having cited ICC Article 28 approvingly, stated with regard to the command responsibility of civilian superiors,

In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the Chamber finds that the Prosecution must prove that the accused in this case either knew, or *consciously disregarded information which clearly indicated or put him on notice* that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal’s Statute.¹³ (Emphasis is not in original).

The ICC Statute thus introduces additional elements that must be met to establish that a non-military superior had the requisite *mens rea* to be held liable through command responsibility. It must be shown not only that the superior had information in his possession regarding acts of his subordinates, but that the superior *consciously disregarded* such information, in other words, that he chose not to consider or act upon it. The information must also *clearly indicate* that the subordinates committed or were about to commit the crimes. To some extent this goes further than the majority standard elaborated by the ICTR or the ICTY by which the information need merely put the superior on notice of *possible* unlawful acts by his subordinates. An element of *certainty* rather than *possibility* vis-à-vis the commission of the crimes will therefore have to be met under the ICC Statute for non-military superiors.

Notwithstanding the merits of the ICC and *Kayishema & Ruzindana* standard, it does beg both legal as well as policy questions. As mentioned above, one of the principal aims of superior responsibility is to punish those individuals higher up the hierarchical ladder who, whilst not the direct weapon wielders, are

12 *Prosecutor v. Bagilishema*, Judgement (Reasons), Case No. ICTR-95-1A-A, 3 July 2002 (*Bagilishema* Judgement), para. 28.

13 *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Judgement, Case No. ICTR-95-1-T, 21 May 1999, at 228.

deemed nonetheless to be criminally responsible for failing to act appropriately in controlling and punishing subordinates. Superior responsibility has proved to be a particularly vital conduit for prosecutors at the international tribunals to bring to trial heads of government, ministers and other civilian superiors who, in their capacity as civilian superiors, clearly played a substantial role in overseeing and directing violations of IHL, crimes against humanity and genocide, without necessarily setting foot in the arena of combat or where the crimes were committed.

By requiring it to be shown that non-military commanders “consciously disregarded” information which “clearly indicated” that subordinates were taking certain unlawful actions, the burden of proof to establish superior responsibility for such commanders becomes that much more exigent. Consequently, it might become more difficult effectively to prosecute non-military commanders for violations of IHL through command responsibility. Some may argue that to so apply a different and stricter *mens rea* requirement for non-military superiors can only weaken the fight against impunity, as many of the accused before international criminal tribunals are civilian leaders.

Yet it could also be contended that this differentiation is justified to the extent that, in civilian contexts, superior–subordinate relationships are more often than not premised on *de facto* rather than *de jure* control. The existence of comparatively more formal and institutionalized relationships in military situations places a greater onus on military superiors to act on information, even where such information merely suggests rather than clearly indicates that IHL violations are committed by their subordinates.

“Necessary and reasonable” measures

Under Article 86(2) of Additional Protocol I, superiors are required to take all *feasible measures* within their power to prevent or repress a breach of IHL by their subordinates. In international criminal law, the standard that has been introduced is one of a failing by the superior to take the *necessary and reasonable* measures within his power to prevent or repress the commission of the crimes by his subordinates. Most domestic legal systems provide succinct definitions of “reasonable” and also, but to a lesser extent, of “necessary”. International criminal jurisprudence speaks of a “reasonableness in the circumstances” test, and tends to treat “reasonable” and “necessary” in unison.¹⁴ Yet the application of such a test in relation to serious violations of IHL, crimes against humanity and genocide could be problematic.

14 Although it should be noted that in some ICTY cases the prosecution has sought to define both: ““Necessary measures” are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time. “Reasonable” measures are those which the commander was in a position to take in the circumstances prevailing at the time.” See *Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, Case No. IT-95-14, at 333.

Cases in which serious violations of IHL, crimes against humanity and genocide have been committed, when compared with most domestic criminal cases, present a complicated set of facts, often implicate several perpetrators and involve numerous victims. They usually occur in situations where the normal fabric of society and recognizable chains of command have been destroyed, with civilians and military, and victims and executioners, commingled. As Justice Murphy, in his dissent in *Yamashita*, reasoned,

Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished actor. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty.¹⁵

A perusal of factual findings from judgments of the ICTY, the ICTR and the Special Court of Sierra Leone (SCSL) confirms that, due to the complexity of events on the ground, attempting to transpose these facts to a court environment and seeking to define which measures were reasonable and necessary in the circumstances can be a fraught exercise. Such a determination cannot be made *in abstracto* and is dependent on the nature and extent of evidence presented in court. Yet despite myriad procedural and evidential safeguards it may still be questionable whether, in the light of the chaotic nature of the events during which most violations were committed, it is realistic to rely on the statements of “a reasonable man in the position/circumstances of the accused” in order to assess whether the accused took the necessary and reasonable measures. It could be argued that without the benefit of H. G. Wells’s time machine, there remains the risk that accused persons are in a “no-win situation”, with judges painstakingly evaluating and imputing the measure of an accused’s authority over his subordinates.¹⁶

By way of example, the ICTR trial chamber’s reasoning in *Musema* merits mention, with suggestions by the judges of measures which, in their view, the defendant could have taken against his subordinates in the circumstances:

The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their

15 Justice Murphy was concerned that desires for vengeance would permeate “victors’ justice” and lead to unfair trials.

16 See, e.g., the different conclusions reached in the *Bagilishema* Judgement, above note 12, on the one hand by Judge Asoka de Z. Gunawardana in his Separate Opinion and on the other by Judge Mehmet Guney in his Separate and Dissenting Opinion, with regard to the authority and responsibility of the accused during massacres in his commune.

positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.¹⁷

The judges have been sensitive to the rights of the accused and to the risk of expecting more than was within the capacity of a superior at the time of the violations. As the ICTY reasoned in *Čelebići*, it must “be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures within his powers ... [or] within his material possibility.”¹⁸ In *Blaškić*, the Appeals Chamber added that “necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates”.¹⁹

This approach is in line with Article 86 of Additional Protocol I, which, as indicated above, refers to the taking of “all feasible measures within their power”. The ICRC Commentary on this article explains that the language “reasonably restricts the obligation upon superiors to “feasible” measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those “within their power and only those”.²⁰ These last two words are restrictive, closing the door on possible speculation as to which actions may have been “reasonable”. Many national military manuals reflect the language of Article 86 rather than the combination of “reasonable and necessary” found in some international legal texts.

Case law will undoubtedly further elaborate on the understanding of reasonable and necessary measures. At this stage, though, it would seem that the applicable test is more means-based than results-oriented, and that the measures to be taken must be within the power of the accused. Yet even this pragmatic standard can be subject to varying interpretations. Some would argue that “reasonable and necessary” is synonymous with “practicable or practically possible”. Others, however, suggest that the prevalence of exceptional circumstances (such as genocidal massacres) requires the superior to take extraordinary measures to prevent and punish his subordinates.²¹ Whichever standpoint is

17 *Prosecutor v. Alfred Musema*, Judgement, 27 January 2000, Case No. ICTR-96-13-T, at 880.

18 *Prosecutor v. Delalić et al. (Čelebići)*, Judgement, Case No. IT-96-21-T, 16 November 1998, at 395.

19 *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, 29 July 2004, Case No. IT-95-14-A 29 July 2004, at 72.

20 Commentary, above note 8, p. 1015.

21 See, e.g., above, notes 16 and 17, judgements and proceedings in the ICTR cases of *Bagilishema* and *Musema*.

favoured, any assessment as to effective control has to be cautious and empathetic, with due regard to the rights of the accused.

Heavier sentences for superiors

International humanitarian law and international criminal justice place upon superiors a greater responsibility than that of their subordinates in ensuring that the law is not violated. Superiors, by virtue of their elevated position in the hierarchy, have an affirmative duty to ensure that IHL is duly respected and that breaches are appropriately repressed. Their failure to do so can be interpreted as acquiescence in the unlawful acts of their subordinates, thereby encouraging further breaches and developing a culture of impunity. Courts have taken into account the “command position” of an accused in sentencing. Whilst recognizing that the length of a sentence is to be determined on the basis of the nature and gravity of the crime, case law of the international criminal tribunals seems to dictate that the status as a superior will in itself be considered an aggravating factor.

International criminal tribunals have delved extensively into the issue of appropriate sentencing for commanders. The reasoning in the case law is that a command position may justify a harsher sentence, in particular if the accused held a high position within the civilian or military command structure. The jurisprudence is clear, in that a position of authority, whether civilian or military, gives rise to both duty and trust which, if broken or abused, would tend to aggravate the sentence.²²

The tribunals have further explained that when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof, he should receive a heavier sentence than the subordinates who committed the crime. The justification in imposing a harsher sentence stems from the fact that where a commander fails to punish his subordinates for committing crimes or to prevent them from doing so, this creates an impression of tolerance, acquiescence or even approval vis-à-vis the actions of the subordinates. The tribunals have concluded that it would be inconsistent to punish a simple perpetrator with a sentence equal to or greater than that of the commander:

Therefore, when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander.²³

22 See notably *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence, 4 September 1998; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998.

23 *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-T, 3 March 2000, at 789.

As such, the consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes. Because he is a leader, his conduct is that much more reprehensible:

This Chamber finds as an aggravating circumstance that Kayishema, as *Prefect*, held a position of authority. This Chamber finds that Kayishema was a leader in the genocide in Kibuye *Prefecture* and this abuse of power and betrayal of his office constitutes the most significant aggravating circumstance.²⁴

The case law points to a simple conclusion, namely that civilian and military commanders are deserving of harsher sentences than their subordinates. The mere fact of being in a position of responsibility will be seen as an aggravating factor:

Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime.²⁵

It could be argued that in the above cited precedents too much weight is given to the accused's position as superior in determining the sentence, rather than to the severity of the crime itself. Indeed, taken literally, the case law suggests that a superior who failed to punish a subordinate for murder should face a greater punishment than the murderer, even if such superior did not possess the necessary specific intent to commit murder. However, the jurisprudence does reflect the fact that with rank come responsibility and the duty to intervene.

Manifestly illegal orders

In many contexts in which war crimes are committed by military personnel, subordinates will plead that they were merely following orders when carrying out certain unlawful actions. More often than not, the subordinate will not question the legality of an order, there being an inbuilt presumption that superiors are better placed to determine "wrong from right" in the conduct of hostilities. At other times, though, where the order seems to go beyond what is legally permissible, a subordinate will be faced with a choice: (i) disobey, and face possible reprimand and punishment by the superior or a court-martial; or (ii) obey, and risk criminal punishment by acting upon an order which has unlawful consequences. The lower the rank of the subordinate, the more difficult it may be to disobey an illegal order. This raises a dilemma, both moral and legal, for the subordinate.

24 *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Sentence, Case No. ICTR-95-1-T, 21 May 1999, at 15.

25 *Blaškić* Judgement, above note 23, at 789.

Whilst it is often argued that discipline and the unquestioning execution of orders are essential to succeed in battle, the law recognizes that there are limits to the “blind obedience” expected of subordinates. Subordinates will not be able to escape punishment by virtue of merely acting in pursuance of an order, where the order was manifestly illegal.

Traditionally it was felt that the subordinate, whilst committing the offensive deed, should not incur responsibility for following the illegal order. The rationale behind allowing an accused to raise a defence of superior orders was based on practical common sense. To disobey an order can lead to reprimand, demotion and even court martial. After all, a soldier’s first duty is to obey orders from a superior. Hence allowing a subordinate to raise a defence of superior orders recognizes that subordinates within the military have little or no discretion in questioning orders of superiors.²⁶

However, First World War case law suggested that the defence of superior orders would be unavailable unless the subordinate did not know that the order was in itself illegal and would result in the commission of a crime. The *raison d’être* of this approach is that knowledge of the illegality presupposes a moral choice to obey or not, which in certain circumstances may trump the little discretion subordinates had in not following orders.

Two First World War cases highlight this. In *Dover Castle*, a German submarine commander who torpedoed a British hospital ship successfully raised the defence of superior orders on the basis that German government and Admiralty memoranda had been communicated, indicating that hospital ships were being used for military purposes in violation of the laws of war. Thus the commander did not know that the order was unlawful, as the memoranda suggested that the ships were legitimate targets.²⁷

By contrast, in the *Llandoverly Castle* case two subordinates who followed their submarine commander’s order to open fire on the survivors of the torpedoed *Llandoverly Castle* hospital ship in their lifeboats had their defence of superior orders turned down. Here, the order was seen to be in violation of a universally known rule of international law. The subordinates could not as such claim their ignorance of the illegality.²⁸

After the Second World War the courts also denied access to the defence of superior orders, ruling it to be unavailable where a subordinate has a “moral choice” to obey or disobey the order. This approach assumes that there are clear situations where subordinates should question and not follow certain orders which, by their very nature, are outside the realm of that which is morally and legally permissible. The Nuremberg Principles echoed this standard:

26 See, e.g., L. Oppenheim, *International Law: A Treatise*, Vol. 2, 6th edn, 1940 ed. H. Lauterpacht (London: Longman, Green & Co.).

27 *Dover Castle*, 16 AJIL (1921), 704.

28 *Llandoverly Castle*, 16 AJIL (1921), 708.

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided that a moral choice was in fact possible to him.²⁹

In the recent *Finta* case, the Supreme Court of Canada opined that a defence of superior orders could be raised in certain circumstances, in particular where the subordinate has *no moral choice* as to obeying the order, even where the order was manifestly illegal:

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.³⁰

The ad hoc international criminal jurisdictions have gone further, striking out altogether the possibility of raising a defence of superior orders. Instead, the Statutes of the ICTR and the ICTY allow only for mitigation of sentence:

[T]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.³¹

Article 33 of the ICC Statute does not allow a defence of superior orders if the order was *manifestly* illegal:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b) The person did not know that the order was unlawful; and
 - c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

29 Principle IV of the Nuremberg Principles.

30 *R v. Finta* [1994] 1 SCR [701], Supreme Court of Canada.

31 ICTR Statute, Article 6(4); ICTY Statute, Article 7(4).

This reflects Rule 155 of the ICRC's customary law study, whereby criminal responsibility remains if the manifest illegality of the order was known:

Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful and should have known because of the manifestly unlawful nature of the act ordered.³²

It could be argued, given the ICC's position, that contemporary practice might allow the defence of superior orders if a subordinate can show that the order was not manifestly illegal or that he did not know and could not have known of the order's illegality. Rule 11 of Canada's 2001 military code of conduct explains:

Orders must be followed. Military effectiveness depends on the prompt obedience to orders. Virtually all orders you will receive from your superiors will be lawful, straightforward and require little clarification. What happens, however, if you receive an order that you believe to be questionable? Your first step of course must be to seek clarification. Then, if after doing so the order still appears to be questionable, in accordance with military custom you should still obey and execute the order – unless – the order is manifestly unlawful.

In other words, a subordinate must disobey an illegal order only when he knows that such order is manifestly illegal. A difficulty for the subordinate, though, could be in assessing whether an order is “manifestly unlawful/illegal”.

Jurisprudence and academic treatises define a manifestly illegal order as one which offends the conscience of every reasonable, right-thinking person and which is patently and obviously wrong. Case law refers to the order being blatantly unlawful leaving no reasonable doubt as to its unlawfulness.

The identifying mark of a “manifestly unlawful” order must wave like a black flag above the order given, as a warning saying: “forbidden”. It is ... not unlawfulness that is detectable only by legal experts ... but an overt and salient violation, a certain and obvious unlawfulness that stems from the order itself, ... an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt.³³

Interestingly, under Article 33 of the ICC Statute, orders to commit genocide and crimes against humanity are deemed to be manifestly unlawful, whereas the same is not expressly applicable to orders to commit war crimes. It could thus be inferred that the ICC does allow for a defence of superior orders in situations where war crimes have been committed. To so allow such a defence is arguably understandable, given the complexity of modern-day asymmetrical warfare, with myriad parties involved, the blurring of the distinction between combatants and civilians, and the conduct of hostilities and control of weapons

32 Henckaerts and Doswald-Beck, above note 10, pp. 565–8.

33 Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others* case, Judgement, 13 October 1958.

from distant operation centres rather than in the field of combat. The realities of contemporary warfare may make the task of assessing and distinguishing right from wrong, permissible from manifestly illegal, that much more of an arduous task for subordinates in the midst of combat. Indeed, a number of the war crimes listed in Article 8 of the ICC Statute may not necessarily be that patently obvious without certain specific training or expertise.³⁴ This being so, it could be considered as unjust to punish lay subordinates who acted in good faith.³⁵

Conclusion

The principle that commanders and other superiors should be held criminally responsible for failing to prevent or punish subordinates committing IHL violations has been developed through international criminal jurisprudence, codified in Additional Protocol I and is now arguably considered to form part of international customary law. It is widely accepted that for a commander to turn a blind eye to crimes committed by subordinates can but encourage further violations of IHL. It is also acknowledged that it would be wrong for commanders to be able to escape any form of liability simply because they did not wield the weapon that dealt the fatal blow. Similarly, subordinates who violate IHL should not be able to escape punishment on the pretext that they were merely following orders, when the orders were stained with manifest illegality.

However, despite these advances in repressing perpetrators of IHL violations, irrespective of their hierarchical position, the evolving jurisprudence in this field has given rise to a number of questions, and has highlighted the difficulties in establishing the liability of commanders and assessing which action, if any, they could have taken in the prevailing circumstances to prevent the commission of IHL violations by subordinates. Some would argue that the standards expected of commanders in the midst of battle are untenable, and likewise that it is unrealistic to expect subordinates to question or disobey orders, however unlawful they may seem. It is with such issues considered that the theory of command responsibility has evolved, seeking to strike the right balance between the obligations placed upon superiors, and the individual actions of a subordinate in the midst of battle which escape their remit.

34 For instance, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; or intentionally directing attacks against buildings dedicated to, *inter alia*, science or charitable purposes.

35 See Charles Garraway, "Superior orders and the International Criminal Court: justice delivered or justice denied?", *International Review of the Red Cross*, Vol. 81, no. 836 (1999), pp. 785–94.