The interests of States versus the doctrine of superior responsibility

by
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The doctrine of superior responsibility prescribes the criminal liability of those persons who, being in positions of command, have failed to either prevent or punish the crimes of their subordinates.[1] This concept does not differentiate between military officers and civilians placed in positions of command, since the duty to prevent and punish the offences of their subordinates in situations of armed conflict is considered to be incumbent upon both. This duty is well recognized both in customary and treaty law as far back as the Leipzig trials following World War I. Its contemporary formulation is found in a plethora of legal instruments, such as Articles 7, paragraph 3, and 6, paragraph 3, of the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively, Article 28, paragraph 2, of the Statute of the International Criminal Court (ICC), and Article 86 of 1977 Protocol I additional to the Geneva Conventions.[2]

While there can be little doubt of the necessity of this rule of international law for ensuring command diligence at all levels and thus deterring future violations of humanitarian law, some States have

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voiced their concern about possible abuse of the doctrine for political purposes. It has been strongly argued that (i) prosecution on the basis of the doctrine of command responsibility is contrary to the interests of States in protecting their officials; (ii) heads of State, government members and chiefs of staff may potentially be prosecuted for the actions of persons on the battlefield with whom they have had no interaction; (iii) the ambit of the doctrine has been unnecessarily widened to such an extent that even diligent commanders run the risk of being convicted if one "bad" subordinate violates *jus in bello*.

These concerns, in which the autonomy of the individual in war is set against the maintenance of humanitarian standards in warfare, strike at the core of the laws of war and fuel the Clausewitzian scepticism about their application.[3] If they are eventually to disappear, opening the way to universal and speedy ratification of the ICC Statute, it is the duty of international lawyers to address these issues and either work towards conciliation or demonstrate that in fact the said concerns are without basis in law or fact. A sound understanding of the relevant norms with regard to the problems identified above is hence the focal point of this article.

Command responsibility and the interests of the State

One should not lose sight of the fact that until very recently the vast majority of States abstained from prosecuting nationals accused of fostering criminal acts by their subordinates. This sanctioning of such behaviour was achieved either through the application of domestic standards for the ascertainment of superior liability, or the clouding of responsibility by assigning it to a supposedly national dis-

1 See generally William H. Parks, "Command responsibility for war crimes", *Military Law Review*, vol. 62, 1973, p. 1.

2 See I. Bantekas/S. Nash/M. Mackarel, *International Criminal Law*, to appear shortly (Cavendish Publishing).

3 The same argument has been identified as regards the issue of superior orders, through the balancing of military obedience with the requirement that crimes should not go unpunished. See C. Garraway, "Superior orders and the International Criminal Court: Justice delivered or justice denied?", *IRRC*, No. 836, December 1999, pp. 785-794.

ciplinary context. An example of the former is the case of Captain Medina who was prosecuted for failing to prevent and punish the slaughter of over 100 Vietnamese civilians by his troops during the US campaign in Vietnam. Instead of charging Medina under the customary law of superior responsibility, the US Court-Martial convicted him of involuntary manslaughter under the Uniform Code of Military Justice, on the basis of a test of "actual awareness" which at best represents a bad interpretation of the doctrine.[4] An example of the latter is the massacre of Palestinian refugees at the refugee camps of Chatila and Sabra by Phalangists who were under the control of Israel, and more specifically that of the Chief-of-Staff and Defence Minister. The subsequent commission established to investigate the incident examined the issue of personal liability on an administrative basis and, in the absence of criminal charges, proposed only the imposition of disciplinary penalties.[5]

The decline in the use of the doctrine of superior responsibility at the national level was closely connected to the political intricacies of the Cold War: on the one hand, States did not wish their military affairs to become the subject of international scrutiny and criticism, especially by their enemies, and on the other they refused to discourage their officers by prosecuting them for the offences of their troops. It was reasonably feared that if military personnel were prosecuted in strict accordance with the doctrine of command responsibility, enemy States would find ample ground for accusing the former of violating international law in general. In such an atmosphere of political animosity, instead of doing justice the prosecuting jurisdiction would have found itself in the dock. It was felt that this would subsequently undermine the trust and allegiance of a State's military officers. The examples referred to above confirm these conclusions.

With the demise of the Cold War, such fears have largely been allayed by the enhancement and development of the interna-

4 United States v. Medina, 43 C.M.R., 1971, p. 243.

5 Final Report of the Kahan Commission (authorized English translation), 22 ILM, 1983, p. 473.

tional criminal justice system. This system can succeed only if all States, and especially the more influential ones, effectively contribute to its application. In furtherance of this cause, it seems irrational to adopt resolutions at the Security Council[6] and commend judgments of the ICTY which uphold the doctrine of command responsibility, and thereafter dispense with prosecutions at the domestic level. Prosecutorial or judicial authorities should be stopped from preventing the correct application of the doctrine, since as agents of the State they are bound to respect a well-established rule of customary international law. Although the International Court of Justice noted as far back as 1948 that a State does not have an individual interest in the international protection of human rights,[7] the same should not apply to their protection by means of criminal sanctions, even less so if the rule violated is one of *jus cogens* and the incumbent obligation is *erga omnes*,[8] as would be the case with any serious violation of the laws of war. Such a position is consonant with recent developments, especially after the adoption of General Comment No. 24 by the UN Human Rights Committee[9] calling for a prohibition of reservations to multilateral treaties with a humanitarian content.[10]

Whatever the merits of the legal arguments just advanced, the fact remains that States will be much more inclined to shield their officials in times of armed conflict than to give priority to upholding criminal justice. To remedy this situation the international criminal justice system must be seen as targeting the acts of individuals rather than accusing peoples, States or governments. To a large extent, the assimilation of the Serbian people with the (small number of) planners and executioners of the Bosnian massacres contributed to their hostile stance towards the ICTY and the international community in general,

6 S.C. Res. 808 (1993).

7 Advisory Opinion Concerning Reservations to the Genocide Convention, I.C.J. Reports 1951, p. 15.

8 Belgium v. Spain, Barcelona Traction Light and Power House Co. Ltd. (Second Phase), I.C.J. Reports, 1970, p. 3.

9 *ILR*, vol. 101, 1997, p. 64. See also C. Redgwell, "Reservations to treaties and Human Rights Committee General Comment No. 24", *ICLQ*, vol. 46, 1997, p. 390.

10 This is particularly evident as regards the Statute of the ICC (Art. 120) and the 1998 Ottawa Convention on Anti-Personnel Mines.

even though President Milosevic carried little support in the Federal Republic of Yugoslavia (FRY). The recent rejection by the International Law Commission (ILC) of the term "State crime" is an encouraging step in that direction.[11]

This change in perception must be followed by firm guarantees that the State's interests will not be jeopardized, whether a trial is taking place at a national or international level. Such a task may be accomplished in a number of ways: non-admission of classified information or testimony of public officials,[12] protection of the rights of the accused, third-party supervision or adjudication.[13] Similarly, in the case of multinational military operations, it would serve the same purpose if jurisdiction over military discipline were not left to the State of the offender but were ceded to a multinational body, to be established in advance for each operation.[14] The fact that non-State players are increasingly responsible for violations of *jus in bello* has helped to bring about closer inter-State assistance in criminal matters. Furthermore, it should be noted that while States were apprehensive of the domestic enforcement of international human rights law in its infancy, such enforcement is at present vigorously undertaken by the majority of States. Few, if any, democratic governments perceive it as personal attack against themselves if violations of human rights are brought before national or international fora. This is evidenced by the growing enhancement of international and regional human rights enforcement mechanisms. Rigorous adherence to the guarantees mentioned above could accomplish the same for the purposes of international humanitarian law.

11 See R. Rosenstock, "The fiftieth session of the International Law Commission", *AJIL*, vol. 93, 1999, p. 237.

12 Arts. 72 of the ICC Statutes, relating to protection of national security interests, and 73, relating to disclosure of documents in the hands of third parties, are good examples of protective mechanisms.

13 See Prosecutor v. Blaskic, Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, 18 July 1997, *ILR*, vol. 110, 1998, p. 607.

14 This was suggested by the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions in his Report to ECOSOC, UN Doc. A/51/457 7 October 1996.

Finally, it is submitted that it is doubtful whether the shielding of culprits has any real positive effect for a State's military or civilian hierarchy. It is well recognized that impunity breeds contempt for the law and indiscipline, which can hardly be described as positive attributes of a State's armed or police forces.

Civilian and military leaders before the doctrine of command responsibility

The tribunals established at the end of World War II did not hesitate to hold high-ranking military officers[15] criminally liable under the doctrine of command responsibility as well as civilians, both distinguished industrialists[16] and senior government members[17]. What this emphazises is that no individual can henceforth consider himself immune from prosecution for violations of the laws of war, whether perpetrated directly or through lack of adequate supervision. In recent years this has been reflected in the practice of both national and international tribunals. Thus the rejection of immunity has been upheld both in the case of heads of State both in and out of office, the former with regard to President Milosevic (FRY)[18] and the latter with regard to erstwhile Prime Minister Kambanda of Rwanda[19] and former Chilean President Augusto Pinochet.[20]

15 United States v. von Leeb *(High Command* case), *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10,* vol. 11 (Trials), 1950, p. 1462.

16 Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling (*Roechling* case), vol. 14 (Trials), 1950, p. 1097.

17 United States v. von Weizsaecker (*Ministries* case), *ibid,* p. 308.

18 ICTY Prosecutor v. Milosevic and Others, Indictment of 22 May 1999, at www.un.org/icty/indictment/english/24-05-99milo/htm

19 ICTR, Prosecutor v. Kambanda, 37 ILM, 1998, p. 1411.

20 Regina v. Bartle and the Commissioner of Police for the Metropolis and Others; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (*ex parte* Pinochet Ugarte Respondent), 2 All ER 97 (1999). It is doubtful, however, that a municipal court will ever deny immunity to an acting head of State.

However, it is possible to distinguish certain inherent safeguards limiting the imposition of individual responsibility on heads of State or high-ranking officials. Interestingly, recent practice has shown that State leaders have been accused of, or held criminally liable for, gross violations of human rights and humanitarian law only insofar as these have been connected to the initial use of force in armed conflicts. Cases in point are the former President of the Republika Srpska, Karadzic, and also the President of Iraq, Sadam Hussein. The former was officially arraigned by the ICTY,[21] while there exists a growing consensus among certain States, with strong support from non-governmental organizations, to establish some sort of international judicial authority to try those responsible for the invasion of Kuwait by Iraq. However, it has also been consistent practice to accord secret immunity to those leaders who are able to secure the peaceful settlement of a conflict. This was presumed for the Japanese Emperor Hirohito after his country's capitulation in 1945, and at various stages for Karadzic, Milosevic and Hussein.[22]

The criminal proceedings instituted in Tokyo at the end of World War II held Japanese Prime Minister Tojo and Foreign Minister Hirota criminally responsible for their failure to prevent and punish crimes perpetrated by Japanese troops against captured prisoners of war.[23] It is true that both men had no direct interaction with the perpetrators of those horrific offences. Nonetheless, their positions of authority rendered them competent to avert the said crimes and punish those directly responsible for them. It was also confirmed that they had received ample information about the incidents, which had received widespread attention both in Japan and worldwide. Consequently, on the basis of their indisputable knowledge of the crimes concerned and their positions of authority the International

21 ICTY, Prosecutor v. Karadzic and Mladic, *ILR*, vol. 108, 1998, p. 86.

22 See A. D'Amato, "Superior orders vs. command responsibility", *AJIL*, vol. 88, 1994, p. 500.

23 Record of Proceedings of the International Military Tribunal for the Far East (1946-1949), vol.20, pp.49, 791 and 49, 831, reprinted in J.R. Pritchard (ed.), *The Tokyo War Crimes Trial*, Garland, New York, 1981-1988.

Military Tribunal for the Far East held the two accused to be responsible for their failure to act. The same finding was upheld in the case of former ex-Prime Minister Kambanda of Rwanda.

None of the aforementioned persons was convicted for random and individual criminal acts committed by persons directly under their control. Their liability was grounded on widespread criminal activity of which they ought to have been aware. Indeed, had they under the given circumstances attempted to prevent further crimes against prisoners of war, or initiated criminal proceedings against the culprits and given orders to remedy the situation, they would have been free from guilt even though such measures eventually proved to be unsuccessful. In practical terms, a head of State or a member of a government is required to make sure that an effective reporting system which would enable the authorities to take appropriate action is in place. Accordingly, military leaders are required to ensure that the reporting system functions at ground level, through effective and independent military investigations and the existence of courts martial. The measures taken by heads of State and chiefs of staff are judged in accordance with the knowledge they had or ought to have acquired under the circumstances. Hence, it is not an impossible test, or one that unnecessarily overburdens these officials. It is submitted in this regard that there is a pressing need to establish, in law, a presumption of knowledge where there exists an overwhelming and widespread incidence of criminality, in which case every superior should have become aware of such occurrences.[24]

Furthermore, it is clear that liability of heads of State and chiefs of staff for failure to act is not adjudged in the same way as that of officers at the operational or tactical level. The former are entrusted with the task of supervising the entirety of a State's civilian and mili-

24 In ICTY, Prosecutor v. Delalic and Others (*Celebici* case), 38 ILM, 1998, p. 57, the Trial Chamber categorically stated that such a presumption does not exist under customary international law. The present author is in disagreement with the opinion of the ICTY, as there are numerous examples that confirm a contrary view. See I. Bantekas, "The contemporary law of superior responsibility", *AJIL*, vol. 93, 1999, pp. 588-589.

tary machinery, but the latter only small portions of it.[25] Strategic commanders are required to ensure, to the best of their ability under the prevailing circumstances, that operational and tactical commanders fulfil their obligations to prevent and punish violations of international humanitarian law. They cannot be made responsible for not preventing random acts of violence. It is clear that the doctrine of command responsibility does not contemplate vague connections between superior officers and random crimes committed far from their reach on the battlefield. They are required to show no more than a minimum of diligence and care, far less than what is required of operational and tactical commanders. Even further, it seems good law to suggest that if policy and strategic command take proper and reasonable action to prevent or punish the commission of widespread and notorious offences, no liability can be attached.

The ambit of superior responsibility

If one takes the view of the *Celebici* Judgment of the ICTY that the doctrine of command responsibility refers to "vicarious liability",[26] it follows that superiors will be criminally liable for the crimes of their subordinates regardless of their knowledge and subsequent action. If this were so, no person could escape such a strict liability test if subordinates overrode his/her best efforts to prevent and punish their actions. It seems doubtful that any State would agree to such a doctrine being established to judge its military and civilian officers. The test which has been derived through international custom, and especially through the subsequently endorsed case law of the military tribunals that followed World War II, attests to a doctrine of "imputed liability" as a result of an omission to fulfil a feasible and binding obligation.[27]

25 *Ibid.*, pp. 584-587.

26 *Loc. cit.* (note 24), para. 645.

27 See *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, para. 56; Bantekas, *op. cit.* (note 24).

It is a potent argument that commanders on the battlefield have a hard enough task facing the exigencies of military operations, which leaves little time for ensuring compliance with the laws of war or for gathering information on their subordinates' criminal activity. Again, we wish to note that international law requires nothing impossible of operational or tactical commanders either, but it does require an effective reporting system. As far back as the *High Command* case, it was recognized that operational commanders in an executive position could not be expected to be aware of all occurrences within their sector of command.[28] For the doctrine to find application, it must be proven that commanders have knowledge of crimes, or lack feasible knowledge, and that they have failed to take preventive or punitive action when it was in their capacity to do so. Military superiors are bound by their office to conduct operations to the best of their ability, and this can only be accomplished through the diligent preservation of discipline among their troops. Hence, it is ludicrous to maintain that while such a system of discipline can be sustained as the cornerstone of every army, especially in battle, discipline cannot be enforced for the purpose of ensuring compliance with their national military instructions.

Unfortunately, the concern of States has impaired the normal evolution of the doctrine of superior responsibility. Whereas in any national criminal justice system the issue of "causation" would be paramount in assessing culpability, the international system has found it difficult to apply it accordingly. International law makes sense only when construed in accordance with the concept of "State consent". Even if moral norms can be said to have some part to play in determining the content of national legal rules, the same is not true in the case of international rules. Let us not forget that until the *Tadic* Jurisdiction Decision[29] and the evolution of the relevant law thereafter, the protection of civilians and combatants in internal armed conflicts was far weaker than that afforded to the same persons in international conflicts. In essence, this comes down to the recently formulated "duty

28 *Loc. cit.* (note 15), p. 533.

29 ICTY, Prosecutor v. Tadic, Interlocutory Appeals Decision on Jurisdiction, *ILR*, vol. 105, 1997, p. 453.

to control" theory.[30] It holds that the commander of an undisciplined unit, whose members have not perpetrated any crimes, should be held criminally liable for crimes committed by such members later on, under a different commander.

Neither the normal use of the doctrine of superior responsibility nor the "duty to control" theory unnecessarily widen the ambit of the liability of military or civilian superiors. They follow general principles of the criminal law of the vast majority of States, as well as the dictates of logic. They express what is expected of all those persons who, in a position of authority, must take every measure in their power to prevent or punish that which they would expect others to repress if they themselves were the victims.

Conclusion

While the doctrine of superior responsibility seems to be gradually acquiring a clearly defined field of application, the fact nonetheless remains that a number of States conceive it to be a threat to their military and civilian forces. These fears will be justified if their concerns are not met and remedied. It should not be forgotten that international criminal law must aim to target the acts of individuals, and should not attempt to "criminalize" governments or States.

The benefits of application of the doctrine are immense as regards the prevention not only of breaches of international humanitarian law but also of transnational crimes in general. In a related field it is worth mentioning in this context that the German Federal Constitutional Court recently held a foreign ambassador criminally liable for omitting to take appropriate action when aware that embassy premises were used by terrorists for the storage of explosives and other illegal material.[31] It is hoped that the entirety of the international community will give its full endorsement to the customary principles relative to criminal liability, thus promoting international justice.

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30 See Bantekas, *op. cit.* (note 24), p. 593.

31 Former Syrian Ambassador to the German Democratic Republic case, *ILR*, vol. 115, 1996, p. 601.

Résumé

L'intérêt des États par rapport à la doctrine de la responsabilité des supérieurs

par ILIAS BANTEKAS

Selon la doctrine de la responsabilité des supérieurs, un commandant qui n'a pas pris les mesures nécessaires pour prévenir ou punir un crime commis par ses subordonnés encourt une responsabilité pénale en droit international. L'auteur retrace l'histoire de ce concept et examine les derniers développements, notamment la jurisprudence des deux Tribunaux pénaux pour le Rwanda et pour l'ex-Yougoslavie. Il tient également compte des débats qui ont abouti à l'adoption du Statut de Rome de la Cour pénale internationale. L'auteur démontre l'intérêt des États à disposer d'une règle qui est un outil puissant pour prévenir et sanctionner le crime. Toutefois, il ne faut pas en abuser et essayer de rendre les gouvernements eux-mêmes, ou même les États, responsables de tels crimes. Ce sont les individus qui sont pénalement responsables devant la loi.