

**INTERNATIONAL CRIMINAL LAW  
& PRACTICE**

**TRAINING MATERIALS**

**MODES OF  
LIABILITY:  
SUPERIOR  
RESPONSIBILITY**

*Supporting the Transfer of Knowledge and Materials  
of War Crimes Cases from the ICTY to National  
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services



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# MODULE 10: MODES OF LIABILITY: SUPERIOR RESPONSIBILITY

*Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”*

**Developed by International Criminal Law Services**

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## 10. MODES OF LIABILITY: SUPERIOR RESPONSIBILITY

### 10.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each Module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

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#### 10.1.1. MODULE DESCRIPTION

The aim of this Module is to equip participants to understand and apply the international doctrine of superior responsibility in their domestic systems, where possible. The doctrine is particularly suited to the prosecution of international crimes committed in times of armed conflict. Even though it may not be specifically provided for in national laws, there still may be possibilities for applying the doctrine to charge those in superior positions. The Module will explain the doctrine as it has been defined under international law and by international courts before turning to its application in national systems.

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#### 10.1.2. MODULE OUTCOMES

At the end of this session, participants should understand:

- The difference between individual responsibility and superior responsibility;
- That “effective control” is the central element of the doctrine;
- The differences between superior responsibility for military and civilian superiors;
- The term “necessary and reasonable measures”;
- The issue of causation as applied by the ICC;
- The two forms of knowledge required to prove superior responsibility;
- How to prove constructive knowledge; and

- How the doctrine could be applied under domestic law, if at all.

*Notes for trainers:*

- This Module discusses the well-established doctrine of superior responsibility under international law.
- Participants need to understand the practicalities of proving each of the elements of the doctrine, which has unique requirements. It will be useful to introduce real examples to illustrate the legal requirements.
- It is often more difficult to establish criminal liability under this doctrine than other modes of liability.
- The *Čelebići* case, cited below, provides a good example of how substantial influence over persons is not sufficient to satisfy the effective control test required between superior and subordinate. It may be of interest to ask participants if they think that Mr Delalić (who was acquitted of superior responsibility in the *Čelebići* case) should rather have been charged as a participant in a JCE or as an aider and abettor. This will stimulate discussion on the differences between individual responsibility and superior responsibility. The knowledge requirement can be dealt with in the same way, using examples of how commanders may have discovered information about crimes or the potential for the commission of crimes.
- The ICRC commentary on AP I provides an excellent overview of the elements of superior responsibility with many useful examples that could be helpful for participants. See more in section 10.8, Further Reading.
- In order to achieve these objectives you will find “Notes to trainers” in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, make references to the parts of the case study that are relevant, and identify which case studies can be used as practical examples to apply the legal issues being taught.

## 10.2. INTERNATIONAL LAW AND JURISPRUDENCE

### 10.2.1. OVERVIEW

Superior responsibility is a form of liability at the international level that does not have a parallel general principle of liability in most national systems.<sup>1</sup> Superior responsibility is a form of liability for omissions. It covers situations when a commander fails to take action.

### 10.2.2. ELEMENTS OF SUPERIOR RESPONSIBILITY

*Notes for trainers:*

- This section covers each of the elements of superior responsibility that must be proven by the prosecution to hold someone criminally responsible as a superior. It deals with the superior-subordinate relationship, the knowledge requirement (or *mens rea* for superior responsibility) and the measures required to prevent or punish perpetrators. Thereafter, the section deals with the application of the doctrine of superior responsibility to civilian leaders.
- This section incorporates the laws and case law from the ICTY and ICTR. The provisions applicable before the ICC are dealt with in a separate part at the end of this section.
- In order to understand the key elements of superior responsibility and their application in practice, participants should be referred to the case study and asked to consider whether the accused in that case could be prosecuted using the doctrine of superior responsibility. In particular, participants should concentrate on whether there is sufficient evidence of effective control over the perpetrators and of the accused having knowledge of their crimes and failing to act. Participants can also be asked to identify areas where further evidence could be obtained where it may be lacking in the statement of facts provided in the case study.
- Questions that could be discussed by the participants in general are the following:
  - What are the differences between *de facto* and *de jure* command, and to what extent do they need to be established to rely on the doctrine of superior responsibility?
  - What is the *mens rea* required for command responsibility?
  - Would serious forms of negligence be sufficient?
  - How should necessary and reasonable measures to prevent or punish be defined?
  - Can commanders be held responsible if they have taken some measures but not all of those available?

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<sup>1</sup> ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 387 (2d ed. 2010).

The rationale of superior responsibility is to enhance and ensure compliance with IHL.<sup>2</sup> The implementation of IHL depends on those in command and it is therefore necessary to hold commanders criminally liable for failing to ensure that the law is respected. The purpose of superior responsibility is to hold superiors responsible for failure to prevent a crime, deter the unlawful behaviour of their subordinates or punish their unlawful behaviour.

The principle that military and other superiors (including civilian leaders) may be held criminally responsible for the acts of their subordinates is well established in treaty and customary law.<sup>3</sup> The principle applies in international and non-international armed conflicts.<sup>4</sup>

*Superior responsibility does not impose strict liability on a superior for the offences of subordinates.*

Superior responsibility does not impose strict liability on a superior for the offences of subordinates.<sup>5</sup> An accused is not charged with the crimes of his subordinates—he is liable for his failure to carry out his duty as a superior to prevent or punish them.<sup>6</sup>

The doctrine of superior responsibility is provided for in ICTY Statute Article 7(3), ICTR Statute Article 6(3) and Rome Statute Article 28. The ICTY and ICTR provisions are identical. The differences between these provisions and the Rome Statute are discussed below in section 10.2.8.

In order to invoke criminal responsibility under ICTY Statute Article 7(3) (identical to ICTR Statute Article 6(3)) on the basis of superior responsibility, three elements must be satisfied:<sup>7</sup>

- (1) the existence of a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;
- (2) the accused knew or had reason to know that the crime was about to be or had been committed; and
- (3) the accused failed to take the necessary and reasonable measures to prevent the crime or punish its perpetrator.

The doctrine of superior responsibility has been directly incorporated into the law applicable before the Court of BiH, but not in the laws applied by other courts in BiH, Croatia and Serbia for the crimes committed during the conflicts in the former Yugoslavia. However, the courts in

<sup>2</sup> Geneva Convention Additional Protocol I, Arts. 86(1) and 87.

<sup>3</sup> Zejnir Delalić (“Čelebići”), Case No. IT-96-21-A, Appeal Judgement, 20 Feb. 2001, ¶ 195. Several other national, hybrid and international jurisdictions apply the principle. The ICC Statute, Art. 28, definition is stricter in some respects than the definition under customary law and in some other jurisdictions.

<sup>4</sup> Enver Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeal Chamber, 16 July 2003, ¶¶ 13, 31.

<sup>5</sup> Čelebići, AJ ¶¶ 239, 313.

<sup>6</sup> Milorad Krnojelac Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003, ¶ 171.

<sup>7</sup> Čelebići, AJ ¶¶ 189-198, 225-226, 238-239, 256, 263; Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, ¶ 72; André Ntagerura, Case No. ICTR-99-46-A, Appeal Judgement, 7 July 2006, ¶ 26.

Croatia have found commanders liable for acts committed by their subordinates under Croatia's laws. See sections 10.5 (BiH), 10.6 (Croatia) and 10.7 (Serbia), respectively.

Participants should be aware of the ways in which the doctrine of superior responsibility is applied before international courts as compared with the means by which commanders may be held liable for the acts of their subordinates under their national laws.

### 10.2.2.1. INDIVIDUAL CRIMINAL RESPONSIBILITY VIS-À-VIS SUPERIOR RESPONSIBILITY

Individual responsibility and superior responsibility connote distinct categories of criminal responsibility.

Individual criminal responsibility arises when a person directly commits or contributes to the commission of a crime (see Module 9, which discusses, *inter alia*, forms of individual criminal responsibility such as co-perpetration, aiding and abetting, planning, ordering, instigating, inciting, and joint criminal enterprise).

*Superior responsibility is distinct, and arises where a superior failed to prevent or punish the commission of a crime by one of his subordinates.*

Superior responsibility is distinct, and arises where a superior failed to prevent or punish the commission of a crime by one of his subordinates. Thus, the commander is not charged with committing the crime—but can be responsible for his or her omission relative to his or her subordinates who did commit the crime.

Where an accused is charged with both types of liability for a particular crime, any conviction should be entered pursuant to individual criminal responsibility, with the accused's command/superior position being regarded as an aggravating factor in sentencing.<sup>8</sup> For example, where a military commander ordered a crime perpetrated by his subordinates, he should be convicted for "ordering" the offence and not for superior responsibility for failing to prevent or punish that offence.

*The commander is not charged with committing the crime.*

An accused may be held responsible as a superior not only where a subordinate physically committed a crime, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime.<sup>9</sup>

### 10.2.3. SUPERIOR-SUBORDINATE RELATIONSHIP

A superior-subordinate relationship is characterised by a hierarchical relationship between the superior and subordinate.<sup>10</sup> The hierarchical relationship may exist by virtue of a person's *de jure*

<sup>8</sup> *Čelebići*, AJ ¶ 745; Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, ¶¶ 89, 91.

<sup>9</sup> Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Appeal Judgement, 9 May 2007, ¶ 280; Ferdinand Nahimana, Case No. ICTR-99-52-A, Appeal Judgement, 28 Nov. 2007, ¶¶ 485-6; Naser Orić, Case No. IT-03-68-A, Appeal Judgement, 3 July 2008, ¶ 21.

or *de facto* position of authority.<sup>11</sup> The superior-subordinate relationship need not have been formalised or determined by formal status alone.<sup>12</sup> Both direct and indirect relationships of subordination within the hierarchy could suffice.<sup>13</sup>

The definitions of *de jure* and *de facto* control, as adopted by the ICTY, are the following:

*De Jure*: formal “authority to command and control their subordinates; superiors with control over subordinates”.<sup>14</sup>

*De Facto*: “Informal authority and command and control; however in order for the court to consider a *de facto* exercise of authority, the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control”.<sup>15</sup>

### 10.2.3.1. IDENTIFICATION OF SUBORDINATES

The existence of culpable subordinates must be established<sup>16</sup> and identified with a degree of specificity.<sup>17</sup> However, a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes.<sup>18</sup> If the prosecution is unable to identify those directly participating in such events by name, it will be sufficient to identify them at least by reference to their “category” (or their official position) as a group.<sup>19</sup>

### 10.2.3.2. EFFECTIVE CONTROL

*Effective control is the material ability to prevent or punish the commission of the offence.*

Critically, the prosecution must establish the superior’s effective control over the persons committing the offence.<sup>20</sup> Effective control is the material ability to prevent or punish the commission of the offence.<sup>21</sup>

A superior who has effective control but fails to exercise it bears superior responsibility.<sup>22</sup> A superior who only had temporary control bears superior responsibility when that control coincided with the *actus reus* of the underlying crime.<sup>23</sup>

<sup>10</sup> *Čelebići*, AJ ¶ 303.

<sup>11</sup> *Čelebići*, AJ ¶ 193; *Aleksovski*, AJ ¶ 76.

<sup>12</sup> *Čelebići*, TJ ¶ 370.

<sup>13</sup> *Čelebići*, TJ ¶ 252; *see also* *Sefer Halilović*, Case No. IT-01-48-A, Appeal Judgement, 16 Oct. 2007, ¶ 59.

<sup>14</sup> *Čelebići*, TJ ¶ 354.

<sup>15</sup> *Čelebići*, AJ ¶ 193.

<sup>16</sup> *Orić*, AJ ¶ 35.

<sup>17</sup> *Blagojević and Jokić*, AJ ¶ 287.

<sup>18</sup> *Ibid.* at ¶ 287.

<sup>19</sup> *Hadžihasanović*, TJ ¶ 90. The *Orić* Appeal Judgement serves as good example of the specificity of identification required.

<sup>20</sup> *Čelebići*, AJ ¶ 197.

<sup>21</sup> *Ibid.* at ¶ 256.

<sup>22</sup> *Ibid.* at ¶ 266.

<sup>23</sup> *Dragoljub Kunarac*, Case No. IT-96-23-T, Trial Judgement, 22 Feb. 2001, ¶ 399.

If two or more superiors have effective control, they can both be found criminally liable. It is not a legal defence that someone else had effective control.<sup>24</sup>

Effective control is different from substantial influence. Substantial influence over subordinates that does not meet the threshold of effective control is insufficient.<sup>25</sup>

Moreover, even “official” commanders or superiors may not have actual effective control over their subordinates. A superior vested with *de jure* authority who does not actually have effective control over his subordinates would not be liable under the superior responsibility doctrine, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences, might incur such responsibility.<sup>26</sup>

In general, the possession of *de jure* power in itself, like legal authority to issue orders alone, may not suffice for the finding of superior responsibility if it does not manifest in effective control.<sup>27</sup> However, a court may presume that the possession of such power *prima facie* results in effective control unless proof to the contrary is produced.<sup>28</sup>

#### 10.2.3.2.1. REMOTENESS OF CONTROL

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An accused can still incur criminal responsibility as a superior when the link to the perpetrators of the crimes at issue is remote. For example:

Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate. The separate question of whether – due to proximity or remoteness of control – the superior indeed possessed effective control is a matter of evidence, not of substantive law. Likewise, whether the subordinate is found to have participated in the crimes through intermediaries is immaterial as long as his criminal responsibility is established beyond reasonable doubt.<sup>29</sup>

#### 10.2.3.2.2. FACTORS RELEVANT TO THE DETERMINATION OF EFFECTIVE CONTROL

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Criteria indicating the existence of authority relevant to effective control include:

- the formality of the procedure used for appointment of a superior;
- the power of the superior to issue orders or to take disciplinary action;

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<sup>24</sup> Krnojelac, TJ ¶ 93.

<sup>25</sup> *Ibid.* at ¶ 266.

<sup>26</sup> *Ibid.* at TJ ¶ 197.

<sup>27</sup> *Orić*, AJ ¶ 91.

<sup>28</sup> *Krnojelac*, TJ ¶ 197; *Halilović*, AJ ¶ 85. This does not shift the burden of proving effective control to the defence, but simply acknowledges that the possession of *de jure* authority constitutes evidence which goes to show a superior’s effective control over his subordinates. *Orić*, AJ ¶¶ 91-2; *Hadžihasanović*, AJ ¶ 21.

<sup>29</sup> *Orić*, AJ ¶ 20.

- proof that the members of the group or unit involved in crimes reported to the accused
- control over the finances and salaries of perpetrators;
- the fact that in the superior's presence subordinates show greater discipline than when he or she is absent;
- the capacity to transmit reports to competent authorities for the taking of proper measures;
- the capacity to sign orders provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others, but that the indicated power is supported by the substance of the document or that it is obviously complied with;
- an accused's high public profile, manifested through public appearances and statements or by participation in high-profile international negotiations;<sup>30</sup> and
- proof that an accused is not only able to issue orders but that his orders are actually followed; conversely, if orders were not followed this may undermine a finding of effective control.<sup>31</sup>

An ICTY trial chamber found that Delić, as commander within the BiH Army (ABiH), had effective control over a group of foreign fighters (the El Mujahedin Detachment, or EMD) for certain conduct based on the following factors:

- EMD compliance with ABiH orders in general;
- Participation of the EMD in ABiH combat operations and its compliance with ABiH combat orders;
- EMD compliance with ABiH procedure concerning the handling of captured prisoners;
- Access to EMD premises and captured enemies;
- Recruitment of locals by the EMD and replenishment with ABiH soldiers;
- Mutual assistance and between ABiH and EMD;
- Procedure of reporting followed by the EMD;
- EMD relationship with ABiH units and soldiers;
- Relationship between the EMD and authorities outside the ABiH;
- The ability to investigate and punish EMD members;
- Appointments and promotions of, and awards to, EMD members by the ABiH; and
- Disbandment of the EMD.<sup>32</sup>

The material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.<sup>33</sup>

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<sup>30</sup> See, e.g., Hadžihasanović, TJ ¶ 83; Orić, TJ ¶ 312.

<sup>31</sup> Halilović, AJ ¶ 207.

<sup>32</sup> Rasim Delić, Case No. IT-04-83-T, Trial Judgement, 15 Sept. 2008, ¶¶ 364 - 8.

<sup>33</sup> Halilović, AJ ¶ 210.

A showing that an accused is in overall control of combat operations is not an express requirement of this mode of liability. However, if such a fact is pleaded it will be considered as a way of showing or disproving that a superior-subordinate relationship existed.<sup>34</sup>

#### 10.2.3.2.3. EXAMPLES OF EFFECTIVE CONTROL

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Proving effective control is highly dependent on the facts of each case, and is thus a critical aspect of any case involving superior responsibility. Specific examples at the ICTY and ICTR of persons who were found to have effective control over their subordinates include:

- The *prefect* of a *prefecture* in Rwanda who had *de jure* authority over the *bourgmestre*, the communal police and members of the *gendarmierie nationale* by virtue of a general power of supervision over the communal authorities, and who had an overarching duty to maintain public order and security and a specific power of direct control over the communal police.<sup>35</sup>
- A *de facto* prison camp commander who had the powers to discipline or remove guards and to take measures to ensure the maintenance of order.<sup>36</sup>
- A *de facto* warden of a military prison, who had the power to give the guards orders and initiate disciplinary or criminal proceedings against guards who committed abuses, by reporting to the military police commander and the president of the military tribunal. The guards obeyed the accused's instructions and were answerable to him for their acts.<sup>37</sup>

#### 10.2.3.2.4. EXAMPLES OF NO EFFECTIVE CONTROL

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Specific examples at the ICTY of persons who were found to have no effective control over their subordinates include:

- In *Hadžihasanović*, the appeals chamber found that the accused, a senior officer of the Army of Bosnia and Herzegovina, had no effective control over the foreign El Mujahedin forces operating in the same area as the Bosnian forces between August 13 and November 1, 1993, and reversed his convictions for crimes committed by this unit during that period.<sup>38</sup> The trial chamber had based its finding on three indicia of effective control:
  - the power to give orders to the El Mujahedin detachment and have them executed,
  - the conduct of combat operations involving the El Mujahedin detachment, and
  - the absence of any other authority over the El Mujahedin detachment.

The appeals chamber found that the trial chamber's findings confirmed that the El Mujahedin forces took part in several combat operations during the relevant time, but

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<sup>34</sup> *Ibid.* at ¶ 69.

<sup>35</sup> Clemént Kayishema, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, ¶¶ 479-489.

<sup>36</sup> *Čelebići*, TJ ¶¶ 722-767.

<sup>37</sup> *Aleksovski*, TJ ¶¶ 90-106.

<sup>38</sup> *Hadžihasanović*, AJ, ¶ 231.

that was not sufficient to show effective control. The appeals chamber found, in relation to the above indicia:

- The power to give orders and have them followed is an indicia of effective control, but the evidence relied on by the trial chamber was not sufficient to establish the existence of effective control.<sup>39</sup>
  - Although the El Mujahedin cooperated and fought alongside the accused's detachment, the El Mujahedin maintained a significant degree of independence, which belied the trial chamber's conclusion that the accused had effective control.<sup>40</sup>
  - "[E]ffective control cannot be established by process of elimination. The absence of any other authority over the El Mujahedin detachment in no way implies that Hadžihasanović exercised effective control in this case".<sup>41</sup>
- In *Blagojević and Jokić*, the appeals chamber upheld a trial chamber finding that the accused, a commander with de jure control over a brigade, did not have effective control over his subordinates because they were acting under the control of Main Staff security organs.<sup>42</sup>

#### 10.2.4. KNEW OR HAD REASON TO KNOW

There are two forms of knowledge in superior responsibility cases:

- Actual knowledge, established through either direct or circumstantial evidence, that subordinates were about to commit or had committed crimes.
- Constructive or imputed knowledge, meaning that the superior possessed information that would at least put him on notice of the present and real risk of such offences and alert him to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by his subordinates.<sup>43</sup>

##### 10.2.4.1. ACTUAL KNOWLEDGE

The superior's actual knowledge, in terms of awareness that his subordinates were about to commit or have committed crimes, cannot be presumed.<sup>44</sup> Absent direct evidence, however, actual knowledge may still be established by way of circumstantial evidence.

##### 10.2.4.2. CONSTRUCTIVE KNOWLEDGE

Having "reason to know" is a form of imputed or constructive knowledge, which can be proved through direct or circumstantial evidence.

<sup>39</sup> *Ibid.* at ¶¶ 198 – 201.

<sup>40</sup> *Ibid.* at ¶¶ 202 – 214.

<sup>41</sup> *Ibid.* at ¶¶ 215 – 217.

<sup>42</sup> *Blagojević and Jokić*, AJ ¶ 303.

<sup>43</sup> *Čelebići*, AJ ¶¶ 223, 241.

<sup>44</sup> *Halilović*, TJ ¶ 66.

A showing that a superior had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he ‘had reason to know.’”<sup>45</sup> The information does not need to provide specific details about unlawful acts committed or about to be committed by subordinates.<sup>46</sup>

This “reason to know” determination does not require the superior to have actually acquainted himself with the information in his possession, nor that the information would compel the conclusion of the existence of crimes. It is sufficient that the information was available to him and that it indicated a need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.<sup>47</sup>

It is important to note that criminal negligence has been rejected by the ICTY and ICTR as a basis for superior responsibility.<sup>48</sup> A higher standard—reason to know—must be proven. As noted by the ICTR Appeals Chamber in *Bagilishema*:

References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought [...]. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.<sup>49</sup>

*Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.*

Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so (i.e., he was wilfully blind to the offence). However, what must be shown is the superior’s factual awareness of information which, due to his position, should have provided a reason to avail himself of further knowledge.

Although the information may be general in nature (be it in written or oral form), it must be sufficiently specific to demand further clarification. This does not necessarily mean that the superior may be held liable for failing to personally acquire such information in the first place. However, as soon as the superior has been put on notice of the risk of illegal acts by subordinates, he is expected to inquire about additional information, rather than doing nothing or remaining “wilfully blind”.<sup>50</sup>

<sup>45</sup> *Orić*, TJ ¶ 322; *Čelebići*, AJ ¶¶ 223, 241.

<sup>46</sup> *Ignace Bagilishema*, Case No. ICTR 95-1A-A, Appeal Judgement, 3 July 2002, ¶ 42.

<sup>47</sup> *Orić*, TJ ¶ 322.

<sup>48</sup> *Bagilishema*, AJ ¶ 34; *Blaškić*, AJ ¶ 63.

<sup>49</sup> *Bagilishema*, AJ ¶ 35; see also *Blaškić*, AJ ¶ 63; *Hadžihasanović*, TJ ¶ 96.

<sup>50</sup> *Orić*, TJ ¶¶ 321-3.

A superior cannot be presumed to have knowledge by virtue of his position alone.<sup>51</sup>

#### 10.2.4.3. RELATIONSHIP TO INCITEMENT TO GENOCIDE

The *mens rea* of superior responsibility does not require direct personal knowledge of what is being said when the subordinate is involved in the crime of direct and public incitement to genocide.<sup>52</sup> It is not required that the accused had direct personal knowledge, or full and perfect awareness of the criminal discourse, to establish his superior responsibility for a subordinate's incitement to genocide.<sup>53</sup>

#### 10.2.4.4. FACTORS TO ESTABLISH KNOWLEDGE

Chambers at the ICTY and ICTR have relied on the following categories of evidence to establish superiors' knowledge:<sup>54</sup>

- the number, type and scope of illegal acts;
- the time during which they occurred;
- the number and type of troops or militia members involved;
- the logistics involved, if any;
- the geographical location of the acts, and their widespread occurrence;
- the tactical tempo of operations;
- the *modus operandi* of similar illegal acts;
- the officers and staff involved and their character traits;
- the location of the commander at the time;
- oral evidence of subordinates, third-party international observers, opponents and foreign politicians stating that they discussed the commission of crimes in the superior's area of control or troops with the accused;
- international and national press reporting the commission of mass crime;
- the reporting and monitoring systems of a military commander; and
- prior similar conduct (not preventing or punishing earlier crimes).<sup>55</sup>

The more physically distant a superior was from the scene of the crime, the more evidence may be required to prove he had actual knowledge of the crimes.<sup>56</sup>

As a general rule, the circulation of rumours or general press reports are insufficient to establish the required knowledge.<sup>57</sup>

<sup>51</sup> See GUENAELE METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY*, (English edition) section 10.3.2.

<sup>52</sup> *Nahimana*, AJ ¶ 791.

<sup>53</sup> *Bagilishema*, AJ ¶¶ 28, 42; *Čelebići*, AJ ¶¶ 223, 238, 241.

<sup>54</sup> *Halilović*, TJ ¶ 66; *Hadžihasanović* TJ ¶ 83; *Orić* TJ ¶ 319; *Ntagerura*, TJ ¶ 648; *Nahimana*, AJ ¶ 840.

<sup>55</sup> See, e.g., *Hadžihasanović*, AJ 267.

<sup>56</sup> *Halilović*, TJ ¶ 66.

<sup>57</sup> *Hadžihasanović*, TJ ¶ 1223.

### 10.2.5. FAILURE TO PREVENT OR PUNISH

The superior must have failed to take the necessary and reasonable measures to prevent or to punish the crimes of his subordinate.

#### 10.2.5.1. NECESSARY AND REASONABLE MEASURES

Necessary measures are the measures appropriate for the superior to discharge his obligation, showing that he genuinely tried to prevent or punish. Reasonable measures are those reasonably falling within the material or actual powers of the superior.<sup>58</sup>

The measures required of the superior are limited to those within his power. He has a duty to exercise the measures reasonably possible in the circumstances, including those that may be beyond his formal powers.<sup>59</sup> What constitutes such measures is not a matter of substantive law but of evidence.<sup>60</sup>

The kind and extent of measures to be taken by a superior ultimately depends on the degree of effective control over the conduct of subordinates at the time a superior is expected to act.<sup>61</sup> He must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the prospective crime. The more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react.<sup>62</sup> However, a superior is not obliged to do the impossible.<sup>63</sup>

#### 10.2.5.2. DUTY TO PREVENT

A superior's duty to prevent arises from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime.<sup>64</sup> Therefore, if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish it afterwards.<sup>65</sup> The duty to prevent exists at any stage before the commission of a subordinate crime if the superior acquires knowledge or has reason to know that such a crime is being prepared or planned.<sup>66</sup>

Given the seriousness of international crimes, the superior must act with some urgency from the time of learning of the crime or intended commission of the crime.<sup>67</sup>

<sup>58</sup> *Halilović*, AJ ¶ 63.

<sup>59</sup> *Čelebići*, TJ ¶ 395.

<sup>60</sup> *Blaškić*, AJ ¶ 72.

<sup>61</sup> *Orić*, TJ ¶ 329.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Pavle Strugar, Case No. IT-01-42-T, Trial Judgement, 31 Jan. 2005, ¶ 373.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Halilović*, TJ ¶ 79; *Orić*, TJ ¶ 328.

<sup>67</sup> Miroslav Kvočka et al., Case No. IT-98-30/1-T, Trial Judgement, 2 Nov. 2001, ¶ 317.

### 10.2.5.3. PUNISHMENT NO SUBSTITUTE FOR PREVENTION

The failure to take the necessary and reasonable measures to prevent a crime cannot be remedied simply by later punishing the subordinate for the crime.<sup>68</sup> The obligation to prevent or punish does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.

### 10.2.5.4. DUTY TO PUNISH

The duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected.<sup>69</sup> Under these conditions, the superior has to order or execute appropriate sanctions or, if not yet able to do so, he must at least conduct an investigation and establish the facts in order to ensure that offenders under his effective control are brought to justice.

The superior need not conduct the investigation or dispense the punishment in person, but he must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction. As in the case of preventing crimes, the superior's own lack of legal competence does not relieve him from pursuing what his material or actual ability enables him to do. Since the duty to punish aims at preventing future crimes of subordinates, a superior's responsibility may also arise from his failure to create or sustain, amongst the persons under his control, an environment of discipline and respect for the law.

### 10.2.5.5. EXAMPLES OF BREACHES OF DUTIES TO PREVENT AND PUNISH

Breaches of commanders' duties have been found by the military tribunals set up in the aftermath of WW II to include the failure to:

- secure reports that military actions have been carried out in accordance with international law;
- issue orders aiming at bringing the relevant practices into accord with the rules of war;
- protest against or to criticise criminal action;
- take disciplinary measures to prevent the commission of atrocities by the troops under their command; and
- insist before a superior authority that immediate action be taken.<sup>70</sup>

A superior's duty may not be discharged by issuing routine orders; more active steps may be required.<sup>71</sup> Thus, necessary and reasonable measures may include giving special orders aimed at bringing unlawful practices of subordinates in compliance with the law and to secure the implementation of these orders. Where information indicates unlawful practices, a superior may be required to, for example:

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<sup>68</sup> *Blaškić*, AJ ¶¶ 78-85.

<sup>69</sup> *Orić*, TJ ¶ 336; see also *Halilović*, AJ ¶ 182.

<sup>70</sup> *Strugar*, TJ ¶ 374.

<sup>71</sup> *Ibid.*

- investigate whether crimes are about to be committed;
- to protest against or criticise criminal action; or
- to take disciplinary measures against the commission of atrocities.<sup>72</sup>

#### 10.2.6. PROOF OF CAUSATION NOT NECESSARY

Causation is not a necessary condition for superior responsibility.<sup>73</sup> Hence, it is not necessary that the commander's failure to act caused the commission of the crime. The essence of this form of criminal responsibility is the participation in or contribution to the alleged crime by failing to act in breach of the superior's duty to prevent and punish the crimes of subordinates.

#### 10.2.7. APPLICABILITY TO MILITARY AND CIVILIAN LEADERS

##### *Notes for trainers:*

- It is important for participants to consider how the superior responsibility doctrine, which was developed in a military context, has been extended to apply to civilian leaders as well.
- In this regard, participants could consider the case study, in which the accused performs a mixed civilian and military role to determine whether the doctrine would apply to his position.

Superior responsibility applies to both military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their subordinates.<sup>74</sup> Hence the term "superior" responsibility, which indicates that responsibility is not limited to military commanders.

As with military superiors, civilian superiors will only be liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one. A showing that the superior was merely an influential person will not be sufficient. However, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior's position of authority.

The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted more broadly. It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position.

<sup>72</sup> *Orić*, TJ ¶ 331.

<sup>73</sup> *Čelebići*, TJ ¶ 398.

<sup>74</sup> See generally *Čelebići*, TJ ¶¶ 355-363; *Čelebići*, AJ ¶ 387; *Kayishema*, TJ ¶¶ 213-224; *Kayishema*, AJ ¶¶ 35, 51; *Nahimana*, TJ ¶¶ 976-7; *Nahimana*, AJ ¶ 605; Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 Sept. 2004, ¶ 281; Mladen Naletilić, Case No. IT-98-34-T, Trial Judgement, 31 March 2003, ¶ 68.

For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, there is the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures. A civilian superior may, under some circumstances, discharge his or her obligation to punish an offending subordinate by reporting to the competent authorities when a crime has been committed, provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.<sup>75</sup> However, this is subject to the facts and circumstances of an individual case—if the superior knows, for example, that the appropriate authorities are not functioning or knows that a report was likely to trigger a sham investigation, such a report would not be sufficient to fulfil the obligation to punish offending subordinates.<sup>76</sup>

In situations of armed conflict, it is often the case that civilian superiors assume more power than that with which they are officially vested. In such circumstances, *de facto* authority may exist alongside, and may turn out to be more significant than *de jure* authority. The capacity to sign orders will be indicative of some authority. However, it is necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon.

There is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander: every civilian superior exercising effective control over his subordinates, that is, having the material ability to prevent or punish the subordinates' criminal conduct, can be held responsible.

A pertinent example of civilian superior responsibility arose before the ICTR, which held that a civilian tea-factory manager, Alfred Musema, was a superior who was responsible for his employees who participated in genocide.<sup>77</sup>

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#### 10.2.8. ICC

Article 28 of the Rome Statute sets out superior responsibility liability for military commanders and civilian superiors. The rule explicitly separates military from civilian command situations and applies a different *mens rea* requirement to these situations. The applicable law differs from that at the ICTY and ICTR. It has also added a fourth element, causation, to the three elements required by the ICTY and ICTR.

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##### 10.2.8.1. MILITARY COMMANDERS

In order to prove superior responsibility of a military commander, the prosecution must establish:

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<sup>75</sup> Ljube Boškoski et al., Case No. IT-04-82-A, Appeal Judgement, 19 May 2010, ¶ 231; See also *Blaškić*, AJ ¶ 72.

<sup>76</sup> *Boškoski*, AJ ¶ 234.

<sup>77</sup> Alfred Musema, Case No. ICTR-96-13-A, Trial Judgement, 27 Jan. 2000.

- (1) The accused was either a military commander (*de jure* commander) or a person effectively acting as such (*de facto* commander)<sup>78</sup> and had effective command and control (or effective authority and control) over the subordinates who committed the crimes.
- (2) The accused either knew, or under the circumstances, should have known, that the subordinates were committing or were about to commit crimes.
- (3) The accused failed to take the necessary and reasonable measures within his power to prevent or repress (stop and punish) the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution.
- (4) The crime resulted because of the accused's failure to properly control the forces under his or her command.

#### 10.2.8.2. EFFECTIVE CONTROL

Effective command and control (or effective authority and control) is the material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.<sup>79</sup> The ICC has followed ICTY jurisprudence that substantial influence is not enough.<sup>80</sup> Examples of effective control at the ICC include the ability to promote or remove people, and the ability to require people to engage in or withdraw from hostilities, although no single factor is necessarily determinative.<sup>81</sup>

#### 10.2.8.3. FAILURE TO PREVENT OR PUNISH

What constitute necessary and reasonable measures will depend on the material possibilities of the superior to act and will therefore depend on his or her effective control over the forces.<sup>82</sup>

#### 10.2.8.4. MENTAL ELEMENT

The term "knew" requires actual knowledge, while the term "should have known" means that the superior was negligent in failing to acquire knowledge of his subordinates' illegal conduct. As noted above, negligence is not a basis for superior responsibility at the ICTY and ICTR. If the superior exercises due diligence in the fulfilment of his duties and still lacks knowledge, he cannot be held responsible under Article 28.<sup>83</sup>

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<sup>78</sup> Jean-Pierre Bemba, Case No. ICC-01/05-01/08, Confirmation of Charges Decision, Pre-Trial Chambers, 12 Jan. 2009, ¶¶ 408-410.

<sup>79</sup> *Ibid.* at ¶¶ 411-419.

<sup>80</sup> *Ibid.* at ¶¶ 414 – 6.

<sup>81</sup> *Ibid.* at ¶ 417.

<sup>82</sup> *Ibid.* at ¶¶ 435-443.

<sup>83</sup> *Ibid.* at ¶¶ 427-434.

#### 10.2.8.5. CAUSAL ELEMENT

The ICC has held that the causation element only applies to cases where a commander or superior failed to prevent crimes. In such cases, the failure to act by the superior must have increased the risk of the commission of the crimes.

No causal link between the omission of the superior and the commission of the crimes is required when responsibility is imputed on the basis of the superior's failure to repress the commission of the crimes or to submit the matter to the competent authorities.<sup>84</sup>

#### 10.2.8.6. CIVILIAN SUPERIORS

In order to establish responsibility of a non-military superior, the prosecution must prove:

- (1) The accused is a civilian who was in a superior-subordinate relationship with the persons who committed the crimes.
- (2) The accused either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit crimes.
- (3) The crimes concerned activities that were within the effective responsibility and control of the superior.
- (4) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (5) There must be a causal link between the superior's failure to prevent the crime and the commission of the crimes.

The mental element for civilian superiors is distinct from that required for military commanders. The standard for military commanders is that the commander knew or should have known. The standard for civilian superiors is that the superior "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit crimes".<sup>85</sup> This is a higher *mens rea* standard.

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<sup>84</sup> *Ibid.* at ¶¶ 420-426.

<sup>85</sup> Rome Statute, Art. 28(b)(i).

### 10.3. REGIONAL LAW AND JURISPRUDENCE

*Notes for trainers:*

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references should be made between the international section and the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- As the SFRY Criminal Code is still relevant to modes of liability, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- Trainers should bear in mind that Module 5 provides an in-depth overview of the way in which international law is incorporated within the national laws. For this reason, such issues are not dealt with in detail in this section of this Module, and it would be most helpful to have trained Module 5 in advance of Modules that deal with substantive crimes and modes of liability.
- After the section on the SFRY Criminal Code, the Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- **Tip to trainers:** One effective method to engage the participants is to ask them to analyse one of the most important cases in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

## 10.4. SFRY

When trying war crimes cases arising out of the conflicts in the former Yugoslavia, the BiH entity level courts and Brčko District courts apply the adopted SFRY Criminal Code as the law applicable at the time of the commission of the crimes. These courts, as well as the Court of BiH, can also apply the SFRY Criminal Code as the law more favourable to the accused.

Courts in Croatia apply the OKZ RH, reflecting the SFRY Criminal Code, as the law applicable at the time of the commission of the crimes.

Courts in Serbia apply either the SFRY Criminal Code or the FRY Criminal Code (also reflecting the SFRY Criminal Code), as either as *tempore criminis* or more lenient laws.

For more on this, see Module 5.

It is necessary, therefore, to note the manner of perpetration of the crimes as set out by the SFRY Criminal Code. The 1977 SFRY Criminal Code<sup>86</sup> did not contain an explicit provision on superior responsibility. However, Article 30, dealing with the manner of perpetration of crimes, applicable to all the crimes contained in the Code, set out as follows:<sup>87</sup>

**Article 30 of the SFRY Criminal Code**

- (1) A criminal act may be committed by a positive act or by an omission.
- (2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

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<sup>86</sup> SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

<sup>87</sup> Other modes of liability set out in the SFRY Criminal Code are discussed in Module 9.4.

## 10.5. BIH

### *Notes for trainers:*

- This section focuses on BiH law. Only the Court of BiH directly applies the doctrine of superior responsibility as set out in the BiH Criminal Code in cases involving crimes committed during the conflicts in the former Yugoslavia. The BiH entity level courts and the Brčko District courts generally apply the SFRY Criminal Code.
- The main elements of the doctrine as they have been applied by the Court of BiH are set out in this section under the same headings as the international section, but where different aspects of the law have been highlighted by the courts in BiH, they have been discussed under separate sub-headings that do not necessarily correspond to the international section.
- The relevant case law, as far as it is known, is also highlighted. Participants should be encouraged to discuss the decisions taken in these cases and whether they will be followed in future cases.
- Participants can also discuss the application of their national laws and case law to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted in their domestic jurisdictions using the doctrine of command responsibility.
- It will be useful for participants to compare the law and jurisprudence of BiH with the jurisprudence of ICTY and the provisions in the ICC Rome Statute.

### 10.5.1. INTRODUCTION

The concept of superior responsibility is expressly part of the BiH Criminal Code and has been since Article 180(2) of the Criminal Code of BiH incorporated Article 7(3) of the ICTY Statute.<sup>88</sup> The BiH Criminal Code<sup>89</sup> is applied only by the Court of BiH in respect of the conflicts in the former Yugoslavia. The Court of BiH may apply the SFRY Criminal Code as the law more favourable to the accused, as the BiH entity level courts and the Brčko District courts generally do when trying war crimes cases arising from these conflicts, the BiH.<sup>90</sup>

<sup>88</sup> Court of BiH, Rašević et al., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 104 (p. 115 BCS) (upheld on appeal).

<sup>89</sup> BiH Criminal Code, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, *available at* [www.sudbih.gov.ba](http://www.sudbih.gov.ba).

<sup>90</sup> For more on this see Module 5.3.2.

Superior responsibility is set out in Article 180(2) of the BiH Criminal Code:

The fact that any of the criminal offences referred to in Article 171 through 175 (*genocide, crimes against humanity, war crimes against civilians, war crimes against wounded and sick, war crimes against prisoners of war*) and Article 177 through 179 (*unlawful killing or wounding the enemy, marauding the wounded and killed at the battlefield, violating the laws and practices of warfare*) of this Code was perpetrated by a subordinate does not relieve his superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Article 180(2) sets out the ways in which personal liability for the crimes of subordinates is incurred by a superior who fails to prevent or punish subordinates who commit particular crimes set out in Chapter XVII.<sup>91</sup>

Article 180(2) is derived from and identical to Article 7(3) of the ICTY Statute.<sup>92</sup>

As held by the trial panel in *Rašević et al.*, Article 180(2) should be interpreted in the same way that the ICTY interprets its Article 7(3).<sup>93</sup>

*Article 180(2) of the BiH Criminal Code should be interpreted the same way that the ICTY interprets its Article 7(3).*

### 10.5.2. LEGALITY

In the *Rašević et al.* case, the trial panel noted that, under the principle of legality, an accused cannot be held responsible under a theory of liability that did not exist at the time of the perpetration of the crimes.<sup>94</sup>

It needed therefore to be established that the accused in that case were subject to the law of superior responsibility.<sup>95</sup> Compliance with the principle of legality requires proof that at the time the crimes were committed:

- (1) the accused were subject to superior responsibility under customary international law; and
- (2) prosecution under superior responsibility was foreseeable.<sup>96</sup>

<sup>91</sup> *Rašević et al* 1st inst., p. 104 (p. 115 BCS) (upheld on appeal).

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* at p. 105 (p. 117 BCS).

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* at p. 105-106 (p. 117 BCS).

### 10.5.2.1. THE ACCUSED WERE SUBJECT TO CUSTOMARY INTERNATIONAL LAW AT THE TIME THE CRIMES WERE COMMITTED

The trial panel in the *Rašević et al.* case, in line with the ICTY's *Kunarac* Appeal Judgement<sup>97</sup> held that customary international law had been “an integral part of national law” accepted by “all national legal systems” long before 1992.<sup>98</sup>

In addition, the former Yugoslavia and its successor states were parties to international humanitarian law treaties, including the Geneva Conventions of 1949 and both Additional Protocols, and hence subject to the “Martens Clause” as it appeared in its various forms in these treaties and protocols.<sup>99</sup>

The Constitution of the SFRY, Article 210, provided for the direct application of treaty law, stating:

Treaties shall be applied as of the date of their entry into force, unless otherwise determined by a ratification act or by a contract signed pursuant to the powers of an authorized body. *The courts shall directly apply the treaties that have been published.*<sup>100</sup>

*The accused were expressly under the “authority of the principles of international law derived from established custom” at the time the offences were committed.*

The trial panel found that the accused were expressly under the “authority of the principles of international law derived from established custom” at the time the offences were committed, and that the courts were under an obligation to “directly apply” that law.<sup>101</sup> As discussed below, superior responsibility was a form of liability under customary international law.

### 10.5.2.2. PROSECUTION UNDER SUPERIOR RESPONSIBILITY WAS FORESEEABLE AT THE TIME THE CRIMES WERE COMMITTED

In the *Rašević et al.* case, the trial panel held that the accused could reasonably foresee criminal liability under the principle of superior responsibility at the time they committed the crimes.<sup>102</sup>

In addition to the case law that developed in the post-World War II period, the principle of superior responsibility was expressly incorporated in Additional Protocol I to the Geneva Conventions, which was duly published in 1978 in the Official Gazette and made part of the enforceable domestic law.<sup>103</sup> Although Additional Protocol I itself would not directly apply to civilian superiors, the principle of superior responsibility was sufficiently accessible through the

<sup>97</sup> *Kunarac*, AJ ¶ 95.

<sup>98</sup> *Rašević et al.*, 1st inst., p. 106 (p. 118 BCS).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.* (emphasis in the verdict).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* at p. 108 (p. 120 BCS).

<sup>103</sup> *Ibid.*

existing treaty law for the accused to be on notice that activities of the type in which they were engaged carried criminal consequences under this principle.<sup>104</sup>

The trial panel also referred to the principles set out in:

- Article 15(2) of the ICCPR;
- Article 7(2) of the ECHR; and, in particular,
- Article 21 of the 1988 Instruction on the Application of Rules of International Law of War in the Armed Force, which implemented provisions of the Geneva Conventions and Additional Protocol I and which explicitly established superior responsibility in the then JNA.

The trial panel concluded that the accused were on notice that they could be criminally prosecuted under principles of international humanitarian law at the time the offences were committed.<sup>105</sup>

Furthermore, the trial panel noted that superior responsibility formed part of Article 30 of the Criminal Code of the SFRY, applicable at the time the crimes were committed, as it included “omission” to act as a mode of liability for all criminal offences, including the crimes against international law referred to in Chapter XVI of the Criminal Code of the SFRY.<sup>106</sup>

### 10.5.2.3. SUPERIOR RESPONSIBILITY UNDER CUSTOMARY INTERNATIONAL LAW

In order to establish the position of superior responsibility as part of customary international law, the trial panel in *Rašević et al.* examined various authoritative materials. The panel found that this form of liability arose from several WWII cases.<sup>107</sup> The panel also considered that “command responsibility” was developed from the concept of “responsible command” which was included in the early conventions on humanitarian law.<sup>108</sup>

The trial panel further examined the content of Additional Protocol I. It held that Article 87(3) of Additional Protocol I set out the principle of superior responsibility as it has come to be understood in customary international law.<sup>109</sup> Referring to ICRC literature, the trial panel concluded that although Additional Protocol I articulated the principle of superior responsibility as it existed in customary international law, that principle was by no means constrained to the context of Additional Protocol I, which was limited to military commanders in international conflicts.<sup>110</sup> Likewise, the panel held that as early as the post WWII cases, in the Far East and Germany, the tribunals and courts recognised liability of non-military superiors for failing to

<sup>104</sup> *Ibid.* at pp. 108-109 (pp. 120-121 BCS).

<sup>105</sup> *Ibid.* at p. 109 (p. 121 BCS).

<sup>106</sup> *Ibid.*

<sup>107</sup> *E.g.* the Trial of Wilhelm List and others (“Hostage Case”) and the High Command Case.

<sup>108</sup> Including the 1899 Hague Convention with Respect to the Laws and Customs of War on Land and Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land. *Rašević et al.*, 1st inst., p. 113 (pp. 126-127 BCS).

<sup>109</sup> *Rašević et al.*, 1st inst., p. 113 (p. 127 BCS).

<sup>110</sup> *Ibid.* at p. 114 (p. 127 BCS).

prevent their subordinates from committing war crimes and for failing to punish those who did.<sup>111</sup>

As a principle of customary international law, the panel held, superior responsibility was applicable to any hierarchical organization which existed in a context wherein its members could violate international humanitarian law.<sup>112</sup> Therefore, the principle, as a doctrine of customary international law, applies to any hierarchical structure where there is:

*Superior responsibility was applicable to any hierarchical organization which existed in a context wherein its members could violate international law.*

- 1) the subordinate-superior relationship, and
- 2) a risk that the subordinate will commit violations of international humanitarian law.<sup>113</sup>

### 10.5.3. ELEMENTS OF SUPERIOR RESPONSIBILITY

As held by the Court of BiH, the elements of superior responsibility set out in Article 180(2) are identical to those recognised by customary international law at the time of the commission of the offences.<sup>114</sup> These elements are:<sup>115</sup>

- 1) The commission of one of the criminal acts specified in Articles 171 - 175 and 177 - 179 of the BiH Criminal Code:
  - a) Genocide;
  - b) Crimes against humanity;
  - c) War crimes against civilians;
  - d) War crimes against the wounded and sick;
  - e) War crimes against prisoners of war;
  - f) Unlawful killing or wounding the enemy;
  - g) Marauding the killed and wounded on the battlefield; or
  - h) Violating the laws and practices of warfare.
- 2) The existence of a superior-subordinate relationship between the accused and the perpetrators who carried out the criminal act.
- 3) The superior knew or had reason to know that:
  - a) the subordinate was about to commit the crime; or
  - b) the subordinate had committed the crime.
- 4) The superior failed to take reasonable and necessary measures to:
  - a) prevent the crime; or
  - b) punish the perpetrator of the crime after the commission of the crime.

<sup>111</sup> *Ibid.* at p. 114 (p. 128 BCS).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at p. 115 (p. 129 BCS).

<sup>115</sup> *Ibid.* at p. 146 et seq (p. 168 et seq BCS) (upheld on appeal); Court of BiH, Stupar et al., Case No. X-KRZ-05/24-3, 2nd Instance Verdict, 28 April 2010, ¶ 25 et seq; Court of BiH, Momčilo Mandić, Case No. X-KR-05/58, 1st instance Verdict, 18 July 2007, p. 151 (p. 145 BCS) (upheld on appeal).

Each of these elements will be discussed in turn below.

### 10.5.3.1. COMMISSION OF A CRIMINAL ACT

Article 180(2) of the BiH Criminal Code provides that superior responsibility applies to the crimes specified in Articles 171 – 175 and 177 – 179 of the BiH Criminal Code, namely:<sup>116</sup>

- a) Genocide;
- b) Crimes against humanity;
- c) War crimes against civilians;
- d) War crimes against the wounded and sick;
- e) War crimes against prisoners of war;
- f) Unlawful killing or wounding the enemy;
- g) Marauding the killed and wounded at the battlefield; or
- h) Violating the laws and practices of warfare.

The underlying crime must be one of those specified, and all of its elements must be proven.<sup>117</sup>

*A superior-subordinate relationship must have existed between the perpetrator of the underlying crime and the accused.*

The perpetrator of the crime must be a subordinate of the accused, which means that a superior-subordinate relationship must have existed between the perpetrator of the underlying crime and the accused.<sup>118</sup> The trial panel in the *Rašević et al.* case noted that the ICTY had concluded it was not necessary that the subordinate was the “principle” perpetrator; it was sufficient that the subordinate was an aider or abettor.<sup>119</sup> The crime itself, however, must be a completed crime.<sup>120</sup>

### 10.5.3.2. SUPERIOR-SUBORDINATE RELATIONSHIP

The second element required for superior responsibility is the existence of the subordinate-superior relationship and the superior must have held some degree of authority over his subordinate(s) and supervised his or their actions.<sup>121</sup>

*The superior must have held some degree of authority over his subordinate(s) and supervised his or their actions.*

It is not necessary that the perpetrator was the immediate subordinate to the accused.<sup>122</sup> More than one person may be held responsible under the principle of superior responsibility for the same crime committed by a subordinate.<sup>123</sup>

<sup>116</sup> *Rašević et al.*, 1st inst., p. 146 (p. 168 BCS); *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 26.

<sup>117</sup> *Rašević et al.*, 1st inst., p. 146 (p. 168 BCS).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* referring to *Orić*, TJ ¶¶ 300-302 and *Blagojević and Jokić*, AJ ¶ 280.

<sup>120</sup> *Rašević et al.*, 1st inst., p. 146 (p. 168 BCS) (upheld on appeal).

<sup>121</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 27; see also *Mandić*, 1st inst., pp. 152-153 (pp. 145-146 BCS).

<sup>122</sup> *Rašević et al.*, 1st inst., p. 150 (p. 173 BCS) referring to *Mandić*, 1st inst., p. 153.

The accused must have been working within a hierarchical structure in which they held a superior position to the perpetrators of the offence, either formally (*de jure*) or practically (*de facto*).<sup>124</sup>

#### 10.5.3.2.1. DE JURE CONTROL

*A de jure superior-subordinate relationship means that the superior has been appointed, elected or otherwise assigned to a position of authority for the purpose of commanding or leading other persons who are, thereby, legally considered to be his subordinates.*

*De jure* control is that which comes from official appointment to a position of leadership over subordinates within a hierarchical structure.<sup>125</sup> A *de jure* superior-subordinate relationship, for the purpose of the doctrine of superior responsibility, means that the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are, thereby, legally considered to be his subordinates.<sup>126</sup>

Documentation establishing such an official position is good evidence that the position was officially conferred, but absence of documentation is not fatal to establishing the official position if there is other evidence that the authority of a superior position was officially conferred.<sup>127</sup>

However, whether established with or without documentation, the position should not be a symbolic one, but must carry with it the authority to exercise “effective control” over the subordinate who committed the offence.<sup>128</sup> The appellate panel in the *Stupar et al.* case held that the fact that someone is in the possession of *de jure* power may not, in itself, suffice for the finding of superior responsibility if it does not manifest in effective control.<sup>129</sup>

Referring to the ICTY appeal judgement in *Čelebići*,<sup>130</sup> the trial panel in *Rašević et al.* noted that it did not agree that *de jure* authority shifts the burden to the accused in any way. Rather, the trial panel held that *de jure* authority was an important factor in establishing the element of a superior-subordinate relationship between the accused and the perpetrators to be considered along with other evidence to determine whether the accused had the requisite degree of control of the subordinate to prevent and/or punish crimes.<sup>131</sup>

<sup>123</sup> *Ibid.* at p. 150 (p. 173 BCS) referring to *Strugar*, TJ ¶ 365.

<sup>124</sup> *Ibid.* at p. 146 (p. 168 BCS).

<sup>125</sup> *Ibid.* at p. 149 (p. 171 BCS).

<sup>126</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 31 (emphasis in the original), referring to GUENAELE METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, Open Society Fund of Bosnia and Herzegovina, Humanitarian Law Fund of Serbia, Sarajevo 2010 (BCS edition), p. 139.

<sup>127</sup> *Rašević et al.*, 1st inst., p. 149 (p. 171-172 BCS), referring to *Kordić*, TJ ¶ 424.

<sup>128</sup> *Rašević et al.*, 1st inst., p. 149 (p. 171 BCS) referring to *Čelebići*, AJ ¶¶ 197, 306.

<sup>129</sup> *Stupar et al.*, 2nd inst., ¶ 32, referring to *Čelebići*, AJ ¶ 197 and Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 173 and *Rašević et al.*, 1st inst., p. 149 (pp. 171-172 BCS).

<sup>130</sup> *Čelebići*, AJ ¶ 197 (stating “a court may presume that possession of [*de jure*] power prima facie results in effective control unless proof to the contrary is produced”).

<sup>131</sup> *Rašević et al.*, 1st inst., p. 149 (p. 172 BCS).

In the *Stupar et al.* case, the appellate panel found that the accused had been relieved of his duties and that another person had taken the command at the time the offences were committed.<sup>132</sup> The appellate panel held that the documentary evidence in which the accused was referred to as the commander, was not, in itself, sufficient to conclude that the accused was the *de jure* commander.<sup>133</sup>

The appellate panel concluded that an official document on the assignment of an individual to a position did not necessarily have to mirror the real situation, particularly after a certain period had elapsed.<sup>134</sup> Guided by the *in dubio pro reo* principle, the appellate panel concluded that the accused had not been the *de jure* commander of the 2nd Detachment during the period covered by the indictment and immediately before that.<sup>135</sup>

The appellate panel noted the following evidence:

- A number of the documents did not bear the signature of the accused, while other documents bore signatures of dubious authenticity.<sup>136</sup>
- Two reports had the signature of the accused affixed, but they pertained to the period before the relevant date, when the accused was actually the commander of the Detachment.<sup>137</sup>
- None of the documents amongst those presented could have been taken to establish beyond a reasonable doubt that the accused was the *de jure* commander of the Detachment, given that none of these documents amounted to an effective order.<sup>138</sup>
- None of the documents indicated that the accused had any sort of official authority.<sup>139</sup>
- The evidence strongly suggested that the accused was verbally relieved of his command over the 2nd Detachment.<sup>140</sup> The appellate panel noted that in a time of war many orders are executed verbally, a fact that cannot be ignored.<sup>141</sup>

#### 10.5.3.2.2. DE FACTO CONTROL

The formal conference of *de jure* authority is one important indication of a superior-subordinate relationship; however, it is not dispositive and, likewise, it is not critical.<sup>142</sup> The trial panel of the Court of BiH in the *Rašević et al.* case quoted the ICTY Trial Chamber in the *Čelebići* case.<sup>143</sup>

<sup>132</sup> *Stupar et al.*, 2nd inst., of 28 April 2010, ¶ 46.

<sup>133</sup> *Ibid.* at ¶ 52.

<sup>134</sup> *Ibid.* at ¶ 54.

<sup>135</sup> *Ibid.* at ¶ 56.

<sup>136</sup> *Ibid.* at ¶ 52.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* at ¶ 54.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Rašević et al.*, 1st inst., p. 150 (p. 172 BCS); see also *Mandić*, 1st inst., pp. 152-153 (p. 146 BCS) referring to *Halilović*, TJ ¶ 60.

<sup>143</sup> *Rašević et al.*, 1st inst., p. 150 (p. 172 BCS), referring to *Čelebići*, TJ ¶ 742.

The mere absence of formal legal authority to control the actions of subordinates should, therefore, not be deemed to defeat the imposition of criminal responsibility.

The panel also emphasised the *Čelebići* trial chamber's reference to the International Court of Justice:

In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.<sup>144</sup>

In the *Stupar et al.* case, the appellate defined a *de facto* relationship of command as:

- a relationship in which the superior has acquired enough authority over one or more people to prevent them from committing crimes or to punish them when they have done so;<sup>145</sup>
- an expectation of obedience to orders, on the part of the superior; and
- an expectation of subjection to his authority on the part of his subordinates.<sup>146</sup>

The appellate panel considered that the possibility of exercising effective control on the basis of an accused's *de facto* position of authority was an essential element under the principle of superior responsibility.<sup>147</sup>

Although such authority can have dual *de facto* as well as *de jure* characteristics, the accused must exercise a certain degree of control over his subordinates or other similar authority to control them.<sup>148</sup> Only then can the superior be held responsible *de facto* for the acts of his subordinates.<sup>149</sup>

*A duty is placed upon the superior to exercise his power in order to prevent and repress any crimes about to be committed by his subordinates.*

The appellate panel concluded that the doctrine of superior responsibility was, ultimately, dependent upon the power of the superior to control the acts of his subordinates.<sup>150</sup> A duty is placed upon the superior to exercise this power in order to prevent and repress any crimes about to be committed by his subordinates. A failure by the commander to diligently punish them for a committed offence gives rise to individual criminal

<sup>144</sup> *Rašević et al.*, 1st inst., p. 150 (p. 172 BCS), referring to *Čelebići*, TJ ¶ 742, relying on the ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, 1971, p. 16 at ¶ 118.

<sup>145</sup> *Stupar et al.*, 2nd inst., of 28 April 2010, ¶ 34.

<sup>146</sup> *Ibid.* at 34, referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 142.

<sup>147</sup> *Stupar et al.*, 2nd inst., of 28 April 2010, ¶ 35.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

responsibility.<sup>151</sup> A threshold exists at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, could not be considered as their superiors.<sup>152</sup>

Evidence of civilian superiors having *de facto* authority sufficient to exercise effective control over subordinates can include:

- the manner in which their authority is demonstrated and acknowledged;
- whether they show control over their subordinates similar to that exercised by *de jure* authorities;<sup>153</sup>
- whether the context in which they exercise their authority and their manner of control is similar to that of military commanders, as evidenced, for example, by their practice of issuing orders with the expectation that they will be obeyed.<sup>154</sup>

The appellate panel in the *Stupar et al.* case concluded that it had not been proven, beyond a reasonable doubt, that the accused had been the *de facto* commander of the 2nd Detachment at the time the crimes were committed.<sup>155</sup> The evidence produced at the trial suggested that it was another person who had been the *de facto* commander of the 2nd Special Police Detachment.<sup>156</sup>

#### 10.5.3.2.3. EFFECTIVE CONTROL

The superior must have effective control over the subordinates committing the underlying crimes, with the specific understanding that the superior must have the material ability to prevent and punish the commission of these offences.<sup>157</sup> Effective control means that “there is an enforceable expectation of obedience on the part of the giver of that order, and a mirror expectation of compliance on the part of those receiving that order”.<sup>158</sup>

*Effective control means that “there is an enforceable expectation of obedience on the part of the giver of that order, and a mirror expectation of compliance on the part of those receiving that order.”*

In the *Rašević et al.* case, the trial panel held that regardless of whether the authority held by the accused is *de facto* or *de jure* or whether the accused is in a military or civilian hierarchy, the

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Rašević et al.*, 1st inst., p. 150 (p. 173 BCS) referring to *Kajelijeli*, AJ ¶ 87.

<sup>154</sup> *Rašević et al.*, 1st inst., p. 150 (p. 173 BCS) referring to *Bagilishema*, AJ ¶ 59.

<sup>155</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 57.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* at ¶ 35, referring to *Čelebići*, TJ ¶ 354; see also *Mandić*, 1st inst., pp. 152-153 (p. 145-146 BCS).

<sup>158</sup> *Rašević et al.*, 1st inst., p. 148 (p. 171 BCS) referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY; see also *Mandić*, 2nd inst., ¶ 107, referring to *Sadaichi* case, reported in XV LRWTC 175 (1949); IV LRWTC 411, 480 (1950) and METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 157.

accused must have had effective control over the subordinate(s).<sup>159</sup> Effective control arises where the accused has:

- The power and the possibility to take effective measures to prevent the commission of a crime and punish the crimes that the subordinates have committed or plan to commit;<sup>160</sup> or
- “The material ability to prevent and punish the commission of these offences”.<sup>161</sup>

The appellate panel in the *Stupar et al.* case held that a “substantial influence” over subordinates did not meet the threshold of “effective control” and was not a sufficient basis for superior responsibility under customary law.<sup>162</sup> A commander vested with *de jure* authority alone who does not, in reality, have effective control over his subordinates will not incur superior responsibility. However, a *de facto* commander, who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences, could incur superior responsibility.<sup>163</sup>

Similarly, the appellate panel in the *Mandić* case held that effective control must be distinguished from lower or lesser forms of influence or authority which charismatic, respected or otherwise persuasive individuals may be able to exercise over others without their relationship being one of superior to subordinates as understood under the doctrine of superior responsibility.<sup>164</sup>

In that case, the appellate panel stressed that the authority which the superior had over the perpetrators had to be “effective”, as opposed to being merely theoretical or potential.<sup>165</sup> In that sense, the appellate panel held that the existence of such power may not be presumed nor be subject to any sort of assumption. It must be established beyond a reasonable doubt as a concrete exercise of superior authority.<sup>166</sup> The appellate panel further noted that there must be evidence that the accused was actually and effectively capable of exercising the effective authority and of enforcing it in the concrete circumstances of the case.<sup>167</sup> The appellate panel held:

Distinguishing between groups of people or various chains of command may also be important and necessary where the activities of such groups or chains of

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<sup>159</sup> *Rašević et al.*, 1st inst., p. 148 (p. 171 BCS).

<sup>160</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶¶ 36-37 referring to *Čelebići*, TJ ¶ 354; see also *Mandić*, 2nd inst., ¶ 106 referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 157 and *Čelebići*, TJ ¶ 354, as well as *Orić*, TJ ¶ 311 (“effective control” as “the ability to maintain or enforce compliance of others with certain rules and orders”).

<sup>161</sup> *Rašević et al.*, 1st inst., p. 148 (p. 171 BCS), referring to *Čelebići*, AJ ¶ 197; see also *Mandić*, 1st inst., p. 152 (p. 146 BCS) referring to *Čelebići*, AJ ¶ 256.

<sup>162</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 37; see also *Mandić*, 1st inst., p. 152 (p. 146 BCS) referring to *Čelebići*, AJ ¶ 266.

<sup>163</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 37 referring to *Blagojević and Jokić*, TJ ¶ 791.

<sup>164</sup> *Mandić*, 2nd inst., ¶ 121 referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 183.

<sup>165</sup> *Ibid.* at ¶ 108, referring to *Kordić*, TJ ¶ 442 and *Čelebići*, AJ ¶ 197.

<sup>166</sup> *Ibid.* at ¶ 108.

<sup>167</sup> *Ibid.*

command overlap in part but not in whole. It may, therefore, be concluded that in all cases proof of superior responsibility requires conclusive evidence of the actual exercise of command and control over an identifiable group of subordinates. And those subordinates must be those who committed the crimes that form the basis of the charges.<sup>168</sup>

The appellate panel noted that the prosecution need not establish that the accused had been appointed to a position of command to be found liable under the doctrine of superior responsibility.<sup>169</sup> However, the appellate panel held, this relationship with the perpetrators must be shown on the totality of the evidence to be of such *intensity* as to be similar in that regard to a functioning and effective relationship of *de jure* command.<sup>170</sup> In relation to that, the appellate panel stressed:

[I]n all cases and regardless of the *de [j]ure* or *de facto* nature of the authority being exercised, the superior must be able to exercise effective control over those who committed the crimes with which he is charged. Any evidence which tends to suggest a departure from such a standard will therefore be relevant in principle as evidence that no such relationship existed.<sup>171</sup>

In the *Mejakić et al.* case, the trial panel found that the accused Mejakić “had effective control over the work and conduct of all Omarska camp guards and other persons working within the camp, as well as most camp visitors [...]”.<sup>172</sup> The appellate panel in this case found, however, that the accused was not superior to and had no effective control over any persons other than regular and reserve police officers who served at Omarska camp. The panel found that he had no effective control over the camp's kitchen and maintenance workers, TO members, interrogators and soldiers.<sup>173</sup>

Effective control must have existed precisely at the time of the commission of the crime.<sup>174</sup>

Evidence of effective control can be direct or circumstantial.<sup>175</sup> Direct evidence of effective control can include:<sup>176</sup>

*Effective control must have existed precisely at the time of the commission of the crime.*

- the title used by the accused, whether or not formally appointed;

<sup>168</sup> *Ibid.* at ¶ 109 referring to Alex Brima, Case No. SCSL-04-16-T, Trial Judgement, 20 June 2007, ¶¶ 1656, 1659 and METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 161.

<sup>169</sup> *Mandić*, 2nd inst., ¶ 110 referring to *Orić*, TJ ¶ 312.

<sup>170</sup> *Ibid.* at ¶ 110.

<sup>171</sup> *Ibid.* referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 163-164.

<sup>172</sup> Court of BiH, *Mejakić et al.*, Case No. X-KRZ-06/200, 2nd Instance Verdict, 16 Feb. 2009 (published on 16 Jul. 2009), ¶ 79 referring to *Mejakić*, 1st inst., p. 2.

<sup>173</sup> *Ibid.* at ¶¶ 82-86.

<sup>174</sup> *Stupar et al.*, 2nd inst., ¶ 80 referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, pp. 179-180 and fn 215; see also *Mejakić et al.*, 2nd inst., ¶ 80, referring to *Hadžihasanović*, TJ ¶¶ 76-77.

<sup>175</sup> *Rašević et al.*, 1st inst., p. 149 (p. 171 BCS).

<sup>176</sup> *Ibid.*; see also *Mejakić et al.*, 2nd inst., ¶¶ 81, 86, 91, referring to *Hadžihasanović*, TJ ¶¶ 82-83.

- the job description for that title;
- statements made by the accused regarding his authority;<sup>177</sup>
- statements made by others about his authority;<sup>178</sup>
- his issuance of orders to the perpetrators or those in the same class as the perpetrators, and obedience to those orders;<sup>179</sup>
- witnesses testimony that he inquired about and otherwise assumed investigative functions regarding the possible commission of misconduct; or
- conference by him of rewards and or punishments on those lower in the hierarchy.

Titles used by others are not always reliable to establish a position in which effective control exists.<sup>180</sup> The appellate panel in the *Mejakić et al.* case noted that the accused was given various titles by the prisoners and guards, and these signs of respect were indicative of the accused holding a supervisory position, but that did not automatically mean that the accused held the positions of Chief of Security or Camp Commander.<sup>181</sup>

Indirect evidence of effective control can include:<sup>182</sup>

- the accused was frequently present;
- rules were broken primarily when he was not present;
- efforts were made to conceal from the accused that rules were broken; or
- the ability of the accused to assist selected detainees, release them from confinement where they were placed by subordinates, and protect them.<sup>183</sup>

The trial panel in the *Rašević et al.* case noted the ICTY Appeals Chamber's comments on indirect evidence of effective control: "Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which [the Accused] exercised and thus of his authority".<sup>184</sup>

In the *Stupar et al.* case, the appellate panel held that the evidence did not indicate that the accused had effective control over the members of the 2<sup>nd</sup> Detachment.<sup>185</sup> The appellate panel relied on witness testimony on the following:

- that another person, not the accused, had been in command of the Detachment;<sup>186</sup>
- that the accused complained he no longer had control over the Detachment and that, therefore, the accused did not go to field missions with the Detachment;<sup>187</sup>

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<sup>177</sup> See also Cantonal Court, Sarajevo, *Borislav Berjan*, Case No. 009-0-K-06-000088, 1st Instance Verdict, 15 Oct. 2007 p. 47 (upheld on appeal, SC of FbiH, *Borislav Berjan*, Case No. 070-0-KZ-08-000002, 2nd Instance Verdict, 5 March 2008, p. 7).

<sup>178</sup> See also *Berjan*, 1st inst., p. 47.

<sup>179</sup> See also *Berjan*, 2nd inst., p. 6-7.

<sup>180</sup> *Mejakić et al.*, 2nd inst., ¶ 72.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Rašević et al.*, 1st inst., p. 149 (p. 171 BCS).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.* referring to *Čelebići*, AJ ¶ 213.

<sup>185</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 58.

<sup>186</sup> *Ibid.* at ¶¶ 59-60.

- that the accused was relieved of command because he did not have the necessary educational background;<sup>188</sup>
- that another person took over command prior to the departure to the field mission in the area of Srednje, in mid-June;<sup>189</sup>
- that the accused had never been with the Detachment during the relevant period;<sup>190</sup>
- that the accused did not, in any way, participate in the activities of the Detachment during the unit's permanence in the area of Srednje, although he had been noticed on the Bratunac–Konjević Polje route on 13 July;<sup>191</sup>
- that the accused wore civilian clothes at the relevant time;<sup>192</sup>
- that the order to kill all able bodied men and to escort the remaining civilians was received from the person in command, not the accused;<sup>193</sup> and
- that the accused exercised the duty of commander for a very short period of time, 15 July to 18 July, until the person in command recovered from hand injuries.<sup>194</sup>

The appellate panel in the *Stupar et al.* case held that the presence of the accused in the area where the crime was committed might not, on its own, be conclusive evidence that he was the assigned commander of the Detachment.<sup>195</sup> The panel considered that the accused's presence in the area while dressed in civilian clothes must be examined in a broad context, including his personal status at the time—relieved of duty as commander, but still a member of the 2nd Detachment.<sup>196</sup> Thus, the accused may have been present as a conscript, but this alone did not demonstrate that he enjoyed superior responsibility.<sup>197</sup> The appellate panel also held that the actions taken by the accused, such as organization of transportation and the funeral of one person and contacting the family of the deceased, which occurred immediately after the incident, did not amount to actions that could be interpreted as exercising the duties of a commander.<sup>198</sup>

The appellate panel also held that effective control must exist at the time of the commission of the crime:<sup>199</sup>

[T]o hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts

<sup>187</sup> *Ibid.* at ¶ 61.

<sup>188</sup> *Ibid.* at ¶ 62.

<sup>189</sup> *Ibid.* at ¶¶ 62, 65.

<sup>190</sup> *Ibid.* at ¶ 63.

<sup>191</sup> *Ibid.* at ¶¶ 64, 69.

<sup>192</sup> *Ibid.* at ¶ 69.

<sup>193</sup> *Ibid.* at ¶ 71.

<sup>194</sup> *Ibid.* at ¶ 74.

<sup>195</sup> *Ibid.* at ¶ 72.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 73.

<sup>199</sup> *Ibid.* at ¶ 80; see also *Mejakić et al.*, 2nd inst., ¶ 80 referring to *Hadžihasanović*, TJ ¶¶ 76-77.

charged in the indictment were committed, these troops were under the effective control of that commander.<sup>200</sup>

The panel also noted that the ICTY Appeals Chamber in *Hadžihasanović* had been satisfied that, under customary law, effective control must have existed at the *time when the crimes were alleged to have been committed*.<sup>201</sup> The appellate panel concluded that a commander could not be charged under superior responsibility for the crimes committed prior to taking office or after leaving the position.<sup>202</sup>

It was not sufficient to establish that at a certain point in time, either prior to or after the commission of the crime, the accused was capable of exercising effective control over the perpetrators. The panel held that:<sup>203</sup>

[A]lthough the duty to prevent and the duty to punish may be split, both of them overlap with the commander's mandate.<sup>204</sup>

In the *Stupar et al.* case, the appellate panel determined that the accused had been, temporarily, the commander of the 2nd Šekovići Special Police Detachment after a meeting held in Zvornik, on the 15th of July 1995, and that he had exercised that duty while members of the 2nd Detachment were in the field in Baljkovica, up to the 18th of July 1995.<sup>205</sup> The appellate panel concluded that the accused could not be held criminally liable for his failure to punish his subordinates for criminal offences perpetrated before his temporary take-over, while they were under the command of another person, regardless of whether the accused had learned about the crime and the perpetrators before he took over the command.<sup>206</sup> The appellate panel therefore acquitted the accused.<sup>207</sup>

In the *Mandić* case, the appellate panel held that the establishment of civilian superior responsibility requires that the accused exercised a degree of effective control over his subordinates similar to the degree of control of military commanders.<sup>208</sup> The appellate panel stressed that effective control will not necessarily be exercised by a civilian superior and by a

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<sup>200</sup> *Stupar et al.*, 2nd inst., ¶ 81 referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, pp. 179-180 and fn 215.

<sup>201</sup> *Stupar et al.*, 2nd inst., ¶ 81 (emphasis in original) referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 190 and reference therein to *Hadžihasanović*, Appeals Chamber Decision under Art. 7(3), ¶ 37(ff); the appellate panel noted that this position had been repeatedly stated in various decisions and judgements of the ICTY and ICTR and referred to *Kunarac*, TJ ¶¶ 399, 626-8; *Aleksovski*, AJ ¶ 76 (in which the chamber noted "This certainly implies that a superior must have such power prior to failing to exercise it;") *Naletilić*, TJ ¶ 160; *Hadžihasanović*, TJ ¶ 1485; see also *Mejakić et al.*, 2nd inst., ¶ 80 referring to *Hadžihasanović*, TJ ¶¶ 76-77.

<sup>202</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 82 and references cited therein.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 82 referring to *Hadžihasanović*, Appeals Chamber Decision under Art. 7(3) ¶ 55.

<sup>205</sup> *Ibid.* at ¶ 78.

<sup>206</sup> *Ibid.* at ¶ 79.

<sup>207</sup> *Ibid.* at ¶ 83.

<sup>208</sup> *Mandić*, 2nd inst., ¶¶ 122-123.

military commander in the same way, and that it may not necessarily be established in the same way.<sup>209</sup>

The appellate panel in this case concluded that while a court could, in some cases, draw inferences concerning a military commander's authority over his subordinates from the existence and proper functioning of a military chain of command between them, such inference will be drawn with the greatest of caution in the context of a civilian relationship of authority or will require such corroboration to meet the relevant threshold of effective control.<sup>210</sup>

On the basis of the evidence presented in the case, as well as international jurisprudence with regard to superior responsibility, the appellate panel in *Mandić* case found:

It is [...] not possible to draw a reliable conclusion that the Accused Momčilo Mandić, as the Minister of Justice, either de [j]ure or de facto, exercised effective control over the events or actions related to the arrest, detention and treatment of prisoners, their transfer or release, which took place outside the premises of the penal and correctional institutions that the Ministry of Justice, headed by the Accused, ran under the law.<sup>211</sup>

### 10.5.3.3. KNOWLEDGE

The *mens rea* element for superior responsibility is that the accused knew or had reason to know that the crime(s):

- were about to be committed; or
- had been committed

by the subordinate.<sup>212</sup>

*Mens rea for superior responsibility: the accused knew or had reason to know that the crimes were about to be committed or had been committed.*

Relying on the ICTY's *Brđanin* trial judgement, the trial panel in the *Rašević et al.* case held that the same knowledge requirement to establish superior criminal responsibility applied to both civilian and military superiors.<sup>213</sup>

The trial panel also noted that criminal negligence was not sufficient to invoke liability. However, relying on the ICTY's trial judgement in *Halilović*, the panel stressed that "a commander is not permitted to remain 'wilfully blind' of the acts of his subordinates".<sup>214</sup>

<sup>209</sup> *Ibid.* referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 188.

<sup>210</sup> *Ibid.* at ¶ 124 referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, p. 189.

<sup>211</sup> *Mandić*, 2nd inst., ¶ 125.

<sup>212</sup> See, e.g. *Rašević et al.*, 1st inst., p. 153 (p. 176-177 BCS); *Stupar et al.*, 2nd inst., ¶ 28; see also *Mandić*, 1st inst., p. 153 (pp. 146-147 BCS).

<sup>213</sup> *Rašević et al.*, 1st inst., p. 153 (p. 176-177 BCS) referring to *Brđanin*, TJ ¶ 282.

<sup>214</sup> *Ibid.* referring to *Halilović*, TJ ¶ 69.

### 2.1.1.1.3. ACTUAL KNOWLEDGE

In line with ICTY jurisprudence, the trial panel in the *Rašević et al.* case defined *actual knowledge* as the awareness that the relevant crimes were committed or were about to be committed.<sup>215</sup>

*Actual knowledge is the awareness that the relevant crimes were committed or were about to be committed.*

The panel held that awareness of the crimes can be proven by direct evidence, such as:<sup>216</sup>

- statements made by the accused indicating awareness; or<sup>217</sup>
- testimony of witnesses who observed them to be present when the crimes were committed.

With regard to the latter, although some witnesses in the *Predrag Kujundžić* case claimed they saw the accused at the time and place of the commission of the crimes, the appellate panel, on the basis of all the facts presented, found that it could not infer a reliable conclusion on the presence of the accused at the relevant time. The appellate panel concluded it could not have been expected from the accused to prevent forbidden conduct, as it was not proven whether he had been familiar with the plan regarding the prisoners and whether he had been able to prevent such conduct.<sup>218</sup>

Awareness of the crimes can also be proven by circumstantial evidence, such as:<sup>219</sup>

- the types of criminal acts, the repetition of the crimes and the similarity of the manner in which the crimes were committed;
- the geographic proximity of the superior;
- the reporting and monitoring structures in place; and
- the number of subordinates involved.

The trial panel also held that in order for circumstantial evidence to establish actual knowledge, it must be sufficient to conclude that the superior *must* have known of the crimes.<sup>220</sup>

### 10.5.3.3.1. REASON TO KNOW / THE ACCUSED WAS PUT "ON NOTICE"

Citing ICTY jurisprudence, the trial panel in the *Rašević et al.* case held that in the absence of actual knowledge:

<sup>215</sup> *Ibid.* at p. 153 (p. 177 BCS) referring to *Kordić*, TJ ¶ 427; see also *Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 30; see also *Mandić*, 1st inst., p. 153 (pp. 146-147 BCS).

<sup>216</sup> *Rašević et al.*, 1st inst., p. 153 (p. 177 BCS).

<sup>217</sup> See also *Berjan*, 2nd inst., p. 7 BCS.

<sup>218</sup> Court of BiH, *Predrag Kujundžić*, Case No. X-KRZ-07/442, 2nd Instance Verdict, 4 Oct. 2010, ¶¶ 130-142.

<sup>219</sup> *Rašević et al.*, 1st inst., p. 153 (p. 177 BCS) referring to *Galić*, TJ ¶ 174, Fatmir Limaj, Case No. IT-03-66-T, Trial Judgement, 30 Nov. 2005, ¶ 524 and *Blagojević and Jokić*, TJ ¶ 792.

<sup>220</sup> *Rašević et al.*, 1st inst., p. 153 (p. 177 BCS) (emphasis in original) referring to *Kordić*, TJ ¶ 427.

[A] superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates.<sup>221</sup>

*A superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.*

Relying on jurisprudence from the ICTR, the trial panel further noted, that information did not have to be specific, and it was enough that the accused had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates”.<sup>222</sup>

The information need not be in any particular form. It can be written or oral, or it can come to the superior through his own senses.<sup>223</sup>

The information available to the superior need not be sufficient to compel the conclusion that the crime has been, or is about to be, committed by the subordinate; it need only be sufficient to justify further inquiry.<sup>224</sup>

The trial panel noted evidence relevant to determining whether the superior had reason to know of the crimes, including:<sup>225</sup>

- The proximity of the superior to the place where the offences were committed;<sup>226</sup>
- Observable physical evidence that crimes were being committed;
- Reports from superiors and subordinates;
- The widespread nature of the crimes;
- Personality traits of the subordinates that might suggest a propensity toward criminal behaviour; or
- The commission of crimes in the past under similar circumstances or involving the same people.

#### 10.5.3.4. FAILURE TO PREVENT OR PUNISH

Relying on ICTY jurisprudence, the trial panel in the *Rašević et al.* case analysed what constituted reasonable and necessary measures, and what the obligations of prevention and punishment were under customary international law.<sup>227</sup> It held that:

<sup>221</sup> *Rašević et al.*, 1st inst., p. 153 (p. 177 BCS) (emphasis in original) referring to *Čelebići*, AJ ¶ 241; *See also Stupar et al.*, 2nd inst., of 28 April 2010 ¶ 30; *Mandić*, 1st inst., p. 153 (pp. 146-147 BCS).

<sup>222</sup> *Rašević et al.*, 1st inst., p. 153 (p. 177 BCS) referring to *Bagilishema*, AJ ¶ 28.

<sup>223</sup> *Rašević et al.*, 1st inst., p. 154 (p. 177 BCS) referring to *Galić*, TJ ¶ 175.

<sup>224</sup> *Rašević et al.*, 1st inst., p. 154 (p. 178 BCS) referring to *Halilović*, TJ ¶ 68.

<sup>225</sup> *Rašević et al.*, 1st inst., p. 178 BCS) referring to *Krnjelac*, AJ ¶¶ 154, 171, 175-77, *Kvočka*, TJ ¶ 318.

<sup>226</sup> *See also Berjan*, 2nd inst., p. 6.

<sup>227</sup> *Rašević et al.*, 1st inst., p. 157 (p. 182 BCS).

- The failure to prevent a crime and the failure to punish are two separate duties, and not alternatives.<sup>228</sup>
- A superior cannot allow a crime to be committed by a subordinate which he knew or had reason to know would be committed, and then “cure” his breach by punishing the subordinate.<sup>229</sup>
- If a superior takes reasonable and necessary preventive measures and they fail, the superior may also incur separate liability for failing to punish.<sup>230</sup>

*The failure to prevent a crime and the failure to punish are two separate duties, and not alternatives.*

The duty to prevent and punish may be evidentially related: for example, superiors who give orders prohibiting violations of international humanitarian law, but who do not then punish subordinates for violations of those orders, may be seen as implicitly accepting “that such orders are not binding”, which in turn may be evidence of failure to prevent subsequent violations.<sup>231</sup>

In determining what measures are necessary and reasonable, the trial panel must be guided by those measures which are within the material control of the superior.<sup>232</sup> A superior will not be held liable for failing to do what was outside his effective control.<sup>233</sup> As the same time, “the question of whether the superior had the *explicit legal capacity* to act is irrelevant if it is proven that he had the material ability to act”.<sup>234</sup>

In the *Borislav Berjan* case, the Supreme Court of FBiH held that the commander’s obligations extended not only to the units under his command and other persons under his control, but also to units that were not under his command but which had been sent to him for support for a specific task and for a determined period of time.<sup>235</sup> The Supreme Court held that as long as they were present in the territory under the commander’s control, the commander was obliged to oversee that they respected the rules under the Conventions and Protocols.<sup>236</sup>

What is reasonable and necessary must be considered within the context of the actual events, but the measures taken by a superior must, under international law, be “legal, feasible, proportionate and timely”.<sup>237</sup>

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*; see also *Mandić*, 1st inst., p. 153 (p. 147 BCS).

<sup>231</sup> *Rašević et al.*, 1st inst., p. 157 referring to *Halilović*, TJ ¶ 96; *Orić*, TJ ¶ 326; *Hadžihasanović*, TJ ¶¶ 1778-1780.

<sup>232</sup> *Rašević et al.*, 1st inst., p. 158 (p. 182 BCS).

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.* (emphasis in original) referring to *Čelebići*, TJ ¶ 395.

<sup>235</sup> *Berjan*, 2nd inst., p. 7 BCS.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Rašević et al.*, 1st inst., p. 158 (p. 182-183 BCS) referring to METTRAUX, THE LAW OF COMMAND RESPONSIBILITY.

## 2.1.1.1.4. DUTY TO PREVENT THE CRIME

*A superior has a duty to act to prevent the commission of a crime from the point at which the superior knew or had reason to know that a crime was being “prepared or planned” by a subordinate.*

A superior has a duty to act to prevent the commission of a crime from the point at which the superior knew or had reason to know that a crime was being “prepared or planned” by a subordinate.<sup>238</sup>

The trial panel in the *Rašević et al.* case concluded that as part of the duty to prevent subordinates from committing crimes, a superior also has the obligation to prevent his subordinates from following unlawful orders given by other superiors.<sup>239</sup> The trial panel found:

Both Accused understood that the orders the KP Dom guards received to continue to hold Dz.B. in a segregation cell in inhumane conditions were illegal. They were obliged [...] to ensure that their subordinates did not obey such illegal orders. They both further had the material ability to ensure that their subordinates did not obey such illegal orders. [...] [B]oth Accused possessed effective control over the KP Dom guards. Specifically, it is clear that the KP Dom guards understood that they had an enforceable obligation to carry out the orders of both Accused. Neither Accused issued orders to the KP Dom guards to disobey the illegal orders of the interrogators. [...] Accordingly, the Panel concludes that both Accused failed to prevent the commission of the crime of other inhumane acts by the KP Dom guards against Dz.B.<sup>240</sup>

## 10.5.3.4.1. DUTY TO PUNISH PERPETRATORS OF THE CRIMES

In the *Rašević et al.* case, relying on ICTY jurisprudence, the trial panel held that the duty to punish arose after the commission of the crime by a subordinate and at such time as the superior knew or had reason to know of its commission.<sup>241</sup>

The superior is required to undertake all measures that are possible to punish the subordinates who committed the crimes; the superior is not limited to those measures that are strictly within his legal competence if in reality he can exceed those measures.<sup>242</sup> If the measures open to the superior to punish are materially limited, he is still required to do everything within his capacity to see that the perpetrator is punished.<sup>243</sup> That includes, as a minimum:

<sup>238</sup> *Rašević et al.*, 1st inst., p. 158 (p. 183 BCS) referring to *Kvočka*, TJ ¶ 317.

<sup>239</sup> *Rašević et al.*, 1st inst., p. 158 (p. 183 BCS) referring to *Moinina Fofana et al.* (CDF), Case No. SCSL-04-14-T, Trial Judgement, 2 Aug. 2007, ¶ 248.

<sup>240</sup> *Rašević et al.*, 1st inst., p. 158 (p. 183 BCS).

<sup>241</sup> *Rašević et al.*, 1st inst., p. 158 (p. 183 BCS), referring to *Limaj*, TJ ¶ 527.

<sup>242</sup> *Rašević et al.*, 1st inst., p. 158 (p. 183 BCS), referring to *Halilović*, TJ ¶ 100.

<sup>243</sup> *Rašević et al.*, 1st inst., pp. 158-159 (p. 184 BCS) referring to *Kvočka*, TJ ¶ 316, stating “The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process”. It needs to be noted here that in the *Hadžihasanović* judgement, the ICTY Appeals

- the duty to further investigate;
- the duty to establish the facts;<sup>244</sup> and
- the duty to “exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities”.<sup>245</sup>

Civilian superiors have the same duty to punish as do military commanders.<sup>246</sup> However, the measures which civilian superiors may materially take may involve reporting to authorities outside the hierarchy, and their compliance with the duty may require consideration of their ability to “require the competent authorities to take action”.<sup>247</sup>

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Chamber held that “It cannot be excluded that, *in the circumstances of a case*, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute”. *Hadžihasanović*, AJ ¶ 33.

<sup>244</sup> *Rašević et al.*, 1st inst., p. 159 (p. 184 BCS), referring to *Halilović*, TJ ¶ 100.

<sup>245</sup> *Rašević et al.*, 1st inst., p. 159 (p. 184 BCS), referring to *Limaj*, TJ ¶ 529; see also *Berjan*, 2nd inst., p. 7.

<sup>246</sup> *Rašević et al.*, 1st inst., p. 159 (p. 184 BCS).

<sup>247</sup> *Ibid.* referring to *Brđanin*, TJ ¶ 283.

## 10.6. CROATIA

*Notes for trainers:*

- This section focuses on Croatian law. The courts in Croatia apply the OKZ RH (identical to the provisions of the SFRY Criminal Code) for the crimes committed during the conflict in the former Yugoslavia. Therefore both the OKZ RH and the 1998 Criminal Code are outlined below. The extent to which those provisions may be taken into account in prosecutions should be considered by the participants.
- The requirements of superior responsibility under the 1998 Criminal Code are discussed in this section together with relevant case law, as far as it is known.
- The elements of the doctrine as they have been applied by the Croatian courts are set out in this section under the same headings as the international section on the main elements of the doctrine.
- Participants should be encouraged to discuss the decisions taken in these cases and whether they will be followed in future cases.
- Participants can also discuss the application of their national laws and case law to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted in their domestic jurisdictions using the doctrine of command responsibility.
- It will be useful for participants to compare the law and jurisprudence of Croatia with the jurisprudence of ICTY and the provisions in the ICC Rome Statute.

## 10.6.1. INTRODUCTION

When trying cases arising from the conflicts in the former Yugoslavia, courts in Croatia do not apply the current 1998 Criminal Code. Rather, they apply the OKZ RH, which incorporate the modes of liability of crimes as set out by the SFRY Criminal Code.<sup>248</sup>

However, the relevant provision under the 1998 Criminal Code will be set out here for comparison.

## 10.6.2. CRIMINAL CODE OF THE REPUBLIC OF CROATIA

Article 167a of the 1998 Criminal Code<sup>249</sup> criminalises command/superior responsibility as a mode of liability:

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<sup>248</sup> For more on the temporal applicability of laws see Module 5.3.3.

### Article 167a of the 1998 Croatian Criminal Code

- (1) A military commander or another person acting in effect as a military commander or as a civilian in superior command or any other person who in a civil organization has the actual power of command or supervision shall be punished for the criminal offenses referred to in Articles 156 through 167 of this Code if he knew that his subordinates had been committing these criminal offenses or were about to commit them and failed to take all reasonable measures to prevent them. The application of his Article excludes the application of the provision contained in paragraph 3, Article 25 of this Code.
- (2) The persons referred to in paragraph 1 of this Article who had to know that their subordinates were about to commit one or more criminal offenses referred to in Articles 156 through 167 of this Code and failed to exercise due supervision resulting in failure to take all reasonable measures to prevent the perpetration of these criminal offenses shall be punished by imprisonment for one to eight years.
- (3) The persons referred to in paragraph 1 of this Article who do not refer the matter to competent authorities for investigation and prosecution against the perpetrators shall be punished by imprisonment for one to five years.

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#### 10.6.3. SUPERIOR RESPONSIBILITY

When trying war crimes cases arising out of the conflicts in the former Yugoslavia, the courts in Croatia apply the OKZ RH as *tempore criminis* law.

Article 28 of the OKZ RH is identical to Article 30 of the SFRY Criminal Code, which provides that a criminal offence can be committed either by “acting” or “non-acting” and that a criminal offence could be committed by “non-acting” only when the perpetrator omitted to undertake activity which he was obliged to undertake.

Article 28 of the OKZ RH represents the legal basis for the courts in Croatia when dealing with “command responsibility” cases.

The *Ademi and Norac* case was the first case to combine this legal basis enshrined in Article 28 of the OKZ RH with the elements of superior responsibility as recognised under international law. The *Ademi and Norac* case will be examined below.

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<sup>249</sup> Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08.

In contrast to this case, the court in the *Koprivna* case did not discuss superior responsibility elements as recognised under international law when finding the accused guilty on the basis of their *de jure* position. This case will also be discussed below.

#### 10.6.3.1. LEGALITY

In the *Ademi and Norac* case, the trial panel held that the responsibility of a commander to implement international humanitarian law stemmed from Articles 39 and 48(1) and (2) of the Law on Defence,<sup>250</sup> as well as from Articles 86(2) and 87 of Additional Protocol I.<sup>251</sup> The panel noted that the Republic of Croatia succeeded to the Geneva Conventions and Additional Protocols on 8 November 1991.<sup>252</sup> According to Article 140 of the Constitution, international treaties concluded and confirmed in accordance with the Constitution and which are published and remain in force form part of the domestic legal system and take precedence over domestic laws.<sup>253</sup> The panel concluded that the responsibility of commanders for the implementation of international law relative to prisoners of war, security and protection of civilians and their property arose from these provisions.<sup>254</sup>

On appeal, Norac argued that the trial panel erred in law when it applied Article 28 of the OKZ RH (the manner of committing the criminal offence) in conjunction with Articles 120 and 122 of the OKZ RH (war crimes against civilians and war crimes against prisoners of war).<sup>255</sup> The appellant argued that such conduct under the 1993 Criminal Code was not anticipated as criminal, as both Articles 120 and 122 incriminated only ordering and the actual perpetration of war crimes.<sup>256</sup> He maintained the applicability of Article 28 was narrowly limited because the competencies within the military were clearly determined, especially during the war.<sup>257</sup> The appellant also argued that he was convicted on the basis of indirect, retroactive application of Article 7(3) of the ICTY Statute.<sup>258</sup> According to the appellant, the “had reason to know” standard enshrined in Article 7(3) of the ICTY Statute was a “dilatatable, incomplete and illogic formulation aiming at punishing commanders for everything that happened in his commanding area even if he was not aware that a war crime would occur or had occurred”.<sup>259</sup> The appellant further argued that, in accordance with the Croatian legislation, the accused had to be aware that the crimes would occur or had already occurred and not that he “had reason to know”.<sup>260</sup> The appellant contended that the awareness had to relate to a specifically determined person or

<sup>250</sup> Law on Defence, Official Gazette of Croatia „Narodne Novine“ No. 49/91, 53A/91, 73/91, 19/92, 55/92 and 49/93.

<sup>251</sup> Zagreb County Court, Medački džep (Ademi and Norac), Case No. II-K-rz-1/06, 1st Instance Verdict, 29 May 2008 (published on 30 May 2008), p. 97 (upheld on appeal).

<sup>252</sup> *Ibid.* at p. 98.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> SC of Croatia, Medački džep (Ademi and Norac), Case No. I Kz 1008/08-13, 2nd Instance Verdict, 18 Nov. 2009, p. 8.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.* at p. 9.

<sup>259</sup> *Ibid.* at pp. 8-9.

<sup>260</sup> *Ibid.* at p. 9.

that his specifically determined soldier would commit a war crime or had committed it, rather than some unspecified person committing the crime.<sup>261</sup>

The appeals panel, dismissing this ground of appeal, first held that the accused was not convicted on the basis of Article 7(3) of the ICTY Statute (dealing with superior responsibility), but on the basis of Article 28 of the OKZ RH, as clearly established in the trial verdict.<sup>262</sup> The appeals panel concluded that the trial panel correctly applied *tempore criminis* provisions when it found the appellant guilty of committing the offence by “omission”.<sup>263</sup>

Regarding the appellant’s argument that the conduct for which he was found guilty was not criminal at the time of the commission of the crimes, the appeals panel concluded that because Articles 120 and 122 included “ordering” and “committing” as modes of perpetration did not mean that perpetration of such crimes was not also possible by “omission”. The panel reasoned that Article 28 represented a general provision applicable to all criminal offences which could be perpetrated by “omission”.<sup>264</sup> The appeals panel added that commission of the offence by “omission” was possible only when the perpetrator omitted to undertake the action which he was obliged to undertake.<sup>265</sup>

In order for application of Article 28 to be triggered, the panel held, it was necessary that the perpetrator have a special relationship and obligation to a protected value (the so-called “guaranty obligation”).<sup>266</sup> The special relationship in this case was based on the obligation of supervision over a third person, or, from the position of a superior, over subordinates.<sup>267</sup> This position meant that the “supervisor” was responsible for his subordinates.<sup>268</sup>

### 10.6.3.2. ELEMENTS OF SUPERIOR RESPONSIBILITY

#### 10.6.3.2.1. SUPERIOR-SUBORDINATE RELATIONSHIP

##### 10.6.3.2.1.1. DE JURE CONTROL

*Genocide could be perpetrated both by active conduct and by omitting to undertake an act that a person had a duty to undertake.*

In the *Koprivna* case, the trial panel held that genocide, as well as any other criminal act, could be perpetrated both by active conduct (commission) and by omitting to undertake an act that a person had a duty to undertake (omission).<sup>269</sup> The trial panel inferred the accuseds’ participation in the crime from their omission to

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.* at p. 10.

<sup>264</sup> *Ibid.* at p. 9.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.* at p. 10.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> Osijek County Court, *Koprivna* (Stojan Živković et al.), Case No. K-104/94-123, 1st Instance Verdict, 12 Dec. 1994, p. 8 (upheld on appeal).

prevent the crime.<sup>270</sup> The panel reached this conclusion on the basis of their *de jure* position (their civilian and political positions in Sodobovac and Koprivna).<sup>271</sup> The panel in this case did not discuss either the accuseds' *de facto* authority or their effective control over the subordinates.

In the *Ademi and Norac* case, the accused Ademi had been a high officer of the Croatian Army with the rank of brigadier and was deputy commander of a military district, while the accused Norac had been an officer of the Croatian Army with rank of colonel and was commander of the 9<sup>th</sup> Guards Motorised Brigade of the Croatian Army within the Gospić military district.<sup>272</sup>

The panel, however, noted that the following issues were disputed during the trial:

- who actually commanded the operation “Džep ‘93”;
- which units participated in the military operation;
- who had commanding authorities and powers over “Džep ‘93”; and
- what the scope of the authority was in relation to the units participating in the operation.<sup>273</sup>

The panel concluded that, despite his *de jure* control, Ademi had reduced authority in relation to the operation “Džep ‘93” itself, even though he was in a position of Deputy Commander of the military district and empowered to issue orders.<sup>274</sup>

#### 10.6.3.2.1.2. DE FACTO AND EFFECTIVE CONTROL

In the *Ademi and Norac* case, the panel held that a superior's command must have a scope: it must refer to specific units over which the commander has command and which are formally and factually subordinated to him, and over which he has authority.<sup>275</sup>

*A superior's command must have a scope: it must refer to specific units over which the commander has command and which are formally and factually subordinated to him, and over which he has authority.*

This means that:

- the accused's command is not brought into question by the command of someone else who is higher up, at the same level or even lower in the chain of command, and
- in situations of *de facto* control, the accused exercises the command power(s) of a formal commander, with the result that the formal commander actually loses his formal position.<sup>276</sup>

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> *Medački džep*, 1st inst., p. 98.

<sup>273</sup> *Ibid.* at pp. 98, 137.

<sup>274</sup> *Ibid.* at p. 139.

<sup>275</sup> *Medački džep*, 1st inst., p. 204.

<sup>276</sup> *Ibid.*

Although the trial panel did not expressly use the term “effective control”, it did discuss the power and ability of the accused to take effective steps to prevent and punish the crimes committed by others.

The trial panel concluded that Ademi did not have the authority required for him to bear criminal responsibility for the crimes committed, while Norac did have such authority with regard to the 9<sup>th</sup> Guards Motorised Brigade of the Croatian Army and the units attached to it, excluding the Special Police units.<sup>277</sup>

In reaching this decision, the trial panel found that it was decisive that the Chief of the Croatian Army Main Staff (Chief of CAMS) had transferred the commanding powers to his envoy, thus limiting Ademi’s authority.<sup>278</sup> In determining the role of Ademi within operation “Džep ‘93”, the panel relied on evidence with regard to:<sup>279</sup>

- the Chief of the CAMS envoy *de facto* leading the action;
- the Chief of the CAMS envoy composing orders;
- the Chief of the CAMS envoy issuing orders in authoritative manner;
- the Chief of the CAMS envoy issuing orders to the units participating in the attack, while Ademi issued four orders, all of them relating to the areas not covered by the offensive operation “Džep ‘93”;
- the Chief of the CAMS envoy directly communicating with the liaison officer;
- the Chief of the CAMS envoy undertaking the analysis of the operation and submitting it to the CAMS, while Ademi was not even present at the meeting at the CAMS;
- the Chief of the CAMS envoy was authorised to issue orders and, in terms of ranks, was positioned above the commander of a military district;
- refusal to act upon Ademi’s order and refusal of his request to deploy an anti-terrorist platoon; and
- during the meeting of operation “Džep ‘93” participants, General Bobetko commended Norac for the action, but told to Ademi “you sit down, you have nothing to do with this”.<sup>280</sup>

In addition, the Chief of CAMS had particularly pointed out the importance of the command role of Norac, but had given Ademi a reduced scope of authority.<sup>281</sup> The panel found that with regards to operation “Džep ‘93”, Ademi had a reduced and diminished scope of command authority, even though he was Deputy Commander of the military district and was authorised to issue orders.<sup>282</sup> The panel concluded:

All the aforementioned circumstances point to the conclusion that first-accused Rahim ADEMI did not have full command authority in the required scope over all

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<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.* at p. 125.

<sup>279</sup> *Medački džep*, 1st inst., pp. 125, 137 -139, 140.

<sup>280</sup> *Ibid.* at p. 125.

<sup>281</sup> *Ibid.* at p. 139.

<sup>282</sup> *Ibid.*

military district subordinated and attached units and formations, because command authority was taken over by the deputy of the Chief of CAMS, who used it. In other words, the scope of command authority of the first Accused was diminished and reduced to such an extent that it also reduced the command power of the first Accused.<sup>283</sup>

The panel concluded that Ademi could not, therefore, be held criminally responsible under the doctrine of superior responsibility.<sup>284</sup>

The panel concluded that Norac had not been in command of the Special Police during or immediately after the operation "Džep '93".<sup>285</sup> The panel found that the fact that the Special Police forces were mentioned in the orders did not mean that Norac had also been in command of the Special Police forces, since only the Chief of the CAMS could command the Special Police, and when performing the Special Police tasks, a Special Police officer was in command.<sup>286</sup> In addition, Norac could not issue tasks to the Special Police.<sup>287</sup> The panel concluded that Norac, like Ademi, could not be held criminally responsible under superior responsibility for the unlawful behaviour of the Special Police members.<sup>288</sup>

However, the trial panel found Norac guilty for the crimes committed by the units under his command (9<sup>th</sup> Guards Motorized Brigade and the units attached to it) and held that Norac did have legal obligations to protect civilians, civilian property and prisoners of war.<sup>289</sup> The trial panel held that Norac had effective command and knowledge of the unlawful conduct, and yet had failed to act in accordance with his legal duty. This was upheld on appeal.<sup>290</sup>

The Supreme Court held that:

[t]he guarantor, the military commander [...] can be held criminally responsible for 'non-acting' only if he had real, effective possibility of acting in the manner of preventing unlawful conduct of his subordinates and undertaking such activities to assure that unlawfulness would not occur again, and with the further cumulative requirement that he had knowledge about the unlawful conduct of his subordinates.<sup>291</sup>

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<sup>283</sup> *Ibid.* at p. 140.

<sup>284</sup> *Ibid.* at p. 141.

<sup>285</sup> *Ibid.* at pp. 142-144.

<sup>286</sup> *Ibid.* at p. 143.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.* at p. 144.

<sup>289</sup> *Medački džep*, 2nd inst., p. 10.

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.* at p. 17.

### 10.6.3.2.2. KNEW OR HAD REASON TO KNOW

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The trial panel in the *Ademi and Norac* case held that responsibility for criminal offences perpetrated by non-acting can exist only if the accused knew about the irregularities and did nothing to prevent, suppress or punish them.<sup>292</sup>

The trial panel determined that there existed a well-established reporting system regarding the events on the ground.<sup>293</sup> The panel also found that during the operation, a communication system (land lines, portable radio-stations) existed and was used by the commanders to inform about the events on the ground.<sup>294</sup> This reporting system existed also in relation to the Special Police.<sup>295</sup>

The trial panel found that Ademi could not be held criminally responsible because he did not have command authority over the units subordinated to him, but also because it was not proven that he knew about the suffering of civilians.<sup>296</sup> The panel added that having in mind such diminished and reduced scope of his commanding authorities and powers, it could not be expected that Ademi would have received all the reports in time and that the reports and protests he received from the UNPROFOR did not contain the circumstances which would point to unlawful suffering of civilians.<sup>297</sup>

Further, the two visits Ademi made on the ground were not sufficient to conclude that he was personally aware of the mistreatment of civilians.<sup>298</sup>

The panel found that Norac was in a different position. The panel established that Norac had been present in the area when seven civilians were unlawfully killed.<sup>299</sup> Although the panel held that it was possible that the accused did not know about each of the seven killings, it concluded that “it was logical and common sense leads to the only possible conclusion in this specific situation” that Norac knew on the first day of operation about at least one unlawful killing of a civilian.<sup>300</sup> Such knowledge was sufficient for establishing the criminal responsibility, as the accused, upon acquiring such knowledge, was obligated to take the necessary measures to prevent the repetition of the acts.<sup>301</sup>

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<sup>292</sup> *Medački džep*, 1st inst., p. 265.

<sup>293</sup> *Ibid.* at p. 167.

<sup>294</sup> *Ibid.* at pp. 167-168.

<sup>295</sup> *Ibid.* at p. 168.

<sup>296</sup> *Ibid.* at p. 264.

<sup>297</sup> *Ibid.* at pp. 264-265.

<sup>298</sup> *Ibid.* at p. 265.

<sup>299</sup> *Ibid.* at p. 266.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

## 10.6.3.2.3. FAILURE TO PREVENT OR PUNISH

The trial panel in the *Ademi and Norac* case held that responsibility for criminal offences perpetrated by “non-acting” can exist only if the accused knew about the irregularities and did nothing to prevent, suppress or punish them.<sup>302</sup>

The charges against the accused in *Ademi and Norac* were also based on poor or inadequate preparation of the operation “Džep ‘93”,<sup>303</sup> including acquiescence to damage and destruction of houses and other facilities of the civilians of Serb ethnicity by planned artillery activities, pillaging and killings of the civilians of Serb ethnicity.<sup>304</sup>

The trial panel held that both accused participated in planning, developing and training with regard to operation “Džep ‘93”.<sup>305</sup> Although the orders to attack did not contain a specific order on the duty to respect international humanitarian law, this was not determinative in the given situation.<sup>306</sup>

*The responsibility for criminal offences perpetrated by non-acting can exist only if the accused knew about the irregularities and did nothing to prevent, suppress or punish them.*

Rather, the determinative issue was whether the soldiers had been familiarised with the duty to respect the rules of war, *i.e.* whether they knew what was allowed in the context of the war activities and what was not.<sup>307</sup> The panel concluded that:

- training on international humanitarian law had been conducted;
- its elements had been elaborated;
- the accused had issued a warning on the duty to respect those provisions; and
- the soldiers knew what was and what was not allowed in the context of combat activities.<sup>308</sup>

The appeals panel noted that there was no evidence indicating that the accused had reason to think that the soldiers had not been familiarised with international humanitarian law.<sup>309</sup>

The panel held that the accused could not be held responsible for failing to secure sufficient support from the Military Police as part of the inadequate preparation of the operation.<sup>310</sup> Adequate actions had been undertaken through:

- trainings and warnings about respecting humanitarian law and the laws of war;
- the established reporting system; and

<sup>302</sup> *Ibid.* at p. 265.

<sup>303</sup> *Ibid.* at p. 151.

<sup>304</sup> *Ibid.* at p. 152.

<sup>305</sup> *Ibid.* at p. 151.

<sup>306</sup> *Ibid.* at p. 160.

<sup>307</sup> *Ibid.* at pp. 160, 161.

<sup>308</sup> *Ibid.* at p. 161.

<sup>309</sup> *Medački džep*, 2nd inst., p. 19.

<sup>310</sup> *Medački džep*, 1st inst., p. 169.

- securing the support of the Military Police, although a request to broaden this support was not approved.<sup>311</sup>

The panel concluded that, considering that it was not proven that the accused had failed in the context of planning the operation and issuing orders for combat activities, it was not proven that the accused acquiesced to the crimes.<sup>312</sup>

Moreover, the trial panel also held that the allegation that Ademi failed to undertake measures to prevent, suppress and punish impermissible acts had not been proven.<sup>313</sup> On the contrary, the panel held, the statements of witnesses and documents presented showed that Ademi issued the appropriate orders when UNPROFOR complained about the looting and burning of property.<sup>314</sup> Moreover, the panel found that Ademi asked the Chief of Gospić Police Administration to send civilian police to the liberated territory, and he also reported the irregularities to the Chief of the CAMS and orally requested an investigation into the matter.<sup>315</sup> The accused acted as soon as he found out about the unlawful acts and, had action been taken on the basis of his initiative, at least some of the irregularities would have been prevented.<sup>316</sup> The panel held that the accused was not responsible for the failure of the police to act on his request and the clear failure to act on the order he issued. Rather, the panel held, these represented additional circumstances that indicated how the scope of his command authority and power had been reduced.<sup>317</sup>

The panel held that Ademi could not be held criminally responsible for this failure to punish the perpetrators of the crimes.<sup>318</sup> This was not because he did not know who the specific perpetrators of these unlawful acts were, but because it was not necessarily the superior who administers punishment in person.<sup>319</sup>

Relying on the ICTY appeals panel finding in the *Hadžihasanović* case, the panel held that it was enough that the accused reported the unauthorised conduct to the responsible body.<sup>320</sup> The panel concluded:

[T]he responsible body according to military establishment is the Chief of CAMP and the first Accused reported the irregularities and asked for an investigation to be initiated. The Court finds that such a report and oral request for an investigation is sufficient action to punish the perpetrators of the irregularities, who were unknown at the time. It therefore follows that the first Accused did everything he could objectively do in order to prevent, eradicate and punish

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<sup>311</sup> *Ibid.* at p. 171.

<sup>312</sup> *Ibid.* at p. 182.

<sup>313</sup> *Ibid.* at p. 265.

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.* referring to *Hadžihasanović*, AJ.

unauthorised conduct. He issued orders, reported the unlawful conduct and asked for an investigation to be initiated. Therefore the charge in the indictment that the first Accused *did not take any action to prevent, suppress or punish this type of unauthorised conduct* has not been proven.<sup>321</sup>

Consequently, the panel concluded that it had also not been proven that Ademi acquiesced to the commission of the crimes.<sup>322</sup>

With regard to Norac, the panel held, upon establishing that he had knowledge of at least one unlawful killing, that such knowledge was sufficient for establishing criminal responsibility, because the accused, upon acquiring such knowledge, was obligated to undertake the necessary measures to ensure such conduct would not be repeated.<sup>323</sup>

As a commander of the 9<sup>th</sup> Guards Motorised Brigade of the Croatian Army and the units attached to it, he was a guarantor of the lawful and correct conduct of the units subordinated to him and he had to ensure such conduct.<sup>324</sup>

The panel held that by issuing orders prior to the start of the operation, the accused undertook what was necessary in relation to the order to attack and therefore was not responsible for “acting” or for the unlawful activities that took place on the first day of the operation. However, upon acquiring knowledge about even one unlawful action against civilians, as the commander, he had to undertake all that was necessary to prevent such unlawful conduct, to find the principal perpetrators and to punish them.<sup>325</sup>

*Upon acquiring knowledge about even one unlawful action against civilians, as the commander, he had to undertake all that was necessary to prevent such unlawful conduct, to find the principal*

The panel concluded that Norac failed to undertake such actions and was therefore criminally responsible for the unlawful conduct against civilians that occurred the following days in the zone of his responsibility.<sup>326</sup>

The panel did not undertake any commanding action which would have suppressed, prevented or punished such unlawful behaviour.<sup>327</sup> The panel determined that this omission meant that, as the commander, he provided a sample to the soldiers in accordance with the principle “the aim justifies the means”, which was not acceptable under the international laws of war, or under basic civilization and human postulates.<sup>328</sup>

<sup>321</sup> *Medački džep*, 1st inst., p. 265 (emphasis in original).

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.* at p. 266.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*

Unlike Ademi, the panel concluded that by his failure to undertake the necessary commanding activities, Norac acquiesced to the commission of the crimes.<sup>329</sup> The panel also concluded that the accused acted with “indirect intent”.<sup>330</sup>

In its appeal, the prosecution argued that the *Ademi and Norac* trial panel was not consistent in the application of superior responsibility, as it departed from the provisions of Articles 86 and 87 of the Additional Protocol I, which include a preventive element which was not addressed by the trial panel.<sup>331</sup>

The appeals panel dismissed this ground of appeal and held that the trial panel had not concluded that superior responsibility did not encompass a preventive component, but rather had not found that the omissions of the accused were included within the preventive component.<sup>332</sup>

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<sup>329</sup> *Ibid.* at pp. 266-267.

<sup>330</sup> *Ibid.* at p. 267.

<sup>331</sup> *Medački džep*, 2nd inst., p. 3.

<sup>332</sup> *Ibid.* at p. 4.

## 10.7. SERBIA

*Notes for trainers:*

- This section focuses on Serbian law. As the courts in Serbia apply the SFRY Criminal Code for the crimes committed during the conflict in the former Yugoslavia, much of what is covered in this section will not be directly applicable to those prosecutions.
- However, the relevant provisions of the 2006 Criminal Code are outlined and the extent to which those provisions may be taken into account in prosecutions should be considered by the participants.
- The requirements of superior responsibility under the 2006 Criminal Code are discussed in this section.
- Participants could be asked to discuss the effect of the 2006 Criminal Code on war crimes cases arising out of the conflicts in the former Yugoslavia, including whether the introduction of regulations on command responsibility demonstrate anything about the existence of command responsibility under the SFRY Criminal Code.
- Participants could also be asked to discuss the relevance of the practice in Croatia, described above, with regard to its use of Article 30 of the SFRY Criminal Code in cases concerning command responsibility and omissions.
- Participants can discuss the application of their national laws to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted in their domestic jurisdictions using the doctrine of command responsibility.
- It will be useful for participants to compare the law of Serbia with the jurisprudence of ICTY and the provisions in the ICC Rome Statute.

**10.7.1. INTRODUCTION**

When trying war crimes cases arising from the conflicts in the former Yugoslavia, the Serbian judiciary does not apply the current 2006 Criminal Code. Rather, it applies either the SFRY Criminal Code or the FRY Criminal Code, which incorporates the provisions on modes of liability in the SFRY Criminal Code.

However, the relevant provision under 2006 Criminal Code will be set out here for comparison.

### 10.7.2. CRIMINAL CODE OF THE REPUBLIC OF SERBIA<sup>333</sup>

Article 384 of the 2006 Criminal Code (Failure to Prevent Crimes against Humanity and other Values Protected under International Law) provides:

#### Article 384 of the 2006 Serbian Criminal Code

- (1) A military commander or person who is *de facto* discharging such function, knowing that forces under his command or control are preparing to commit or have commenced committing offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have undertaken and was obliged to undertake to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.
- (2) Any other superior who knowing that persons subordinated to him are preparing to commit or have commenced committing, in the course of the execution of duties in which they are subordinated to him, offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have undertaken and was obliged to undertake to prevent the commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.
- (3) If the offence specified in paragraphs 1 and 2 of this Article is committed by negligence, the offender shall be punished by imprisonment of six months to five years.

The offences referred to by this Article are:

- Genocide (Article 370);
- Crimes against humanity (Article 371);
- War crimes against civilian population (Article 372);
- War crimes against the sick and wounded (Article 373);
- War crimes against prisoners of war (Article 374);
- Use of prohibited means of warfare (Article 376);
- Unlawful killing and wounding of the enemy (Article 378);
- Marauding of dead and wounded (Article 379);
- Violation of protection granted to bearer of flag of truce/emissary (Article 380); and

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<sup>333</sup> Official Gazette of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

- Cruel treatment of wounded, sick and prisoners of war (Article 381).

As it can be seen from the aforementioned article, the 2006 Criminal Code envisages superior responsibility as a separate criminal offence and not as a mode of criminal responsibility as is the case before the ICTY and other international tribunals.

To date, no person has been charged with superior responsibility before the courts in Serbia.

## 10.8. FURTHER READING

### 10.8.1. BOOKS

- Ambos, K., *Superior Responsibility in Cassese, A., Gaeta P, and Jones, J.R.W.D. (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* p. 823 (Oxford, 2002).
- Bantekas, I., *PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW* (Manchester University Press, 2003).
- Mettraux, G., *THE LAW OF COMMAND RESPONSIBILITY* (Oxford University Press, 2009).
- *Superior Responsibility, Joint Criminal Enterprise and the ICTY (Topic 5)* in Houghton, S., et al., *HUMANITARIAN LAW PERSPECTIVES 2009* (Australian Red Cross, Mallesons Stephen Jaques, 2009).

### 10.8.2. ARTICLES

- Ambos, K., *Joint Criminal Enterprise and Command Responsibility*, 5 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 159, 179 (2007).
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- Ronen, Y., *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 313 (2010).

### 10.8.3. REPORTS

- OSCE Mission to Croatia, *Background Report: Domestic War Crimes Trials*. Organization for Security and Co-operation in Europe (2005). Available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2005032310135484eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2005032310135484eng.pdf).
- OSCE, *DELIVERING JUSTICE IN BOSNIA AND HERZEGOVINA: AN OVERVIEW OF WAR CRIMES PROCESSING FROM 2005 TO 2010*, OSCE MISSION TO BOSNIA AND HERZEGOVINA (2011), Available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2011051909500706eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf).