

The impact of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia on the development of the commander's individual liability under international criminal law¹

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Abstract

The issue of military command is an issue, which under the rules of international criminal law involves numerous issues, related to the regime of commander liability. Since the Nuremberg Tribunal, the issue of *superior responsibility* has undergone extensive changes. The article presents the influence of the jurisprudence of the Yugoslav Tribunal on the formation of regulations on military command. This is because it was the first international court that had to face this issue. The International Criminal Court built on its experience, clarified the concept of commander's liability and supplemented it with new components.

Keywords: military order, army, commander, International Criminal Tribunal for the former Yugoslavia, international criminal law, criminal liability.

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Wpływ orzecznictwa Międzynarodowego Trybunału Karnego dla byłej Jugosławii na rozwój koncepcji odpowiedzialności dowódcy na podstawie międzynarodowego prawa karnego

Streszczenie

Problematyka rozkazu wojskowego jest zagadnieniem, które na gruncie przepisów międzynarodowego prawa karnego wiąże się z szeregiem licznych zagadnień, powiązanych z reżimem odpowiedzialności dowódcy. Od czasu Trybunału Norymberskiego problematyka *superior responsibility* została poddana szerokim zmianom. W artykule zaprezentowano wpływ orzecznictwa Trybunału Jugosłowiańskiego na ukształtowanie się uregulowań dotyczących rozkazu wojskowego. Był to bowiem pierwszy międzynarodowy sąd, któremu przyszło się zmierzyć z tą problematyką. Na jego doświadczeniach bazował Międzynarodowy Trybunał Karny, który doprecyzował koncepcję odpowiedzialności dowódcy i uzupełnił ją o nowe komponenty.

Słowa kluczowe: rozkaz wojskowy, wojsko, dowódca, Międzynarodowy Trybunał Karny ds. byłej Jugosławii, międzynarodowe prawo karne, odpowiedzialność karna.

One of the most important issues of international criminal law is the principle of individual criminal liability, according to which those who commit international crimes are personally liable for them, regardless of their position or function.

One of the most interesting issues in this matter remains the problem of the military order, the origins of which date back as far as the 15th century (see: International Criminal Tribunal for the former Yugoslavia 2003). As an example, we can cite the provisions of the French Criminal Code of 1439, in which it was indicated that according to the king's order – every captain and lieutenant is to be held liable for abuses and misdemeanors committed by members of his company, and in the event of receiving a complaint about such abuse, he is obliged to punish the perpetrator (Cryer et. al 2010: p. 387).

This text provides an opportunity for a discussion on how the path to the formation of the commander's liability provisions under international criminal law looked like.

The aim of this article is to analyse the influence of International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence on the formation of the legal framework, concerning the issue of military command, and to answer the question: what is the basis of the commander's liability and whether the regime of this liability is also subject to the so-called non-military superiors, as well as whether the commander can be held liable, for the actions of subordinates whom he does not know personally?

The author uses the dogmatic-legal method for analysis of the legal provisions contained in the statute of the ICTY, as well as their impact on the formation of aspects of criminal liability of the commander and superior in the international context.

1. The first legal regulations on the commander's liability

The doctrine of commander's liability was overlooked for a long time under the rules of international criminal law. The seeds of the modern concept of this liability can be found in the *Report of the Commission on the Responsibility of the Authors of the [First World] War*

and on enforcement of Penalties, which stated that superiors could be held criminally liable, for crimes committed by their subordinates (see: Report 1919). This document became the basis for the creation of lists of individuals who were to answer to German courts for crimes committed during the First World War. The atrocities that occurred at that time shocked public opinion and brought the issue of punishing war criminals back into the public discourse. In the Leipzig trials, military commanders were held criminally liable for crimes committed by their subordinates (Bantekas, Nash 2003). However, after the Second World War, International Military Tribunal in the area of *superior liability* did not introduce new solutions. However, in the text of the Nuremberg Judgment we can find annotations referring to these issues (see: International Military Tribunal... 1946).

In the Geneva Conventions of 1949, there is no clear indication of the liability of the commanders. The wording of Article 49 of the Geneva Conventions of 12 August 1949 regarding the protection of victims of war indicates: "The High Contracting Parties undertake to enact the necessary legislation to establish appropriate criminal sanctions against those who have committed or ordered the commission of any of the grave violations of this Convention specified in the following article. Each Contracting Party shall be obliged to seek out persons suspected of having committed or ordered the commission of any of these grave violations and should prosecute them before its own courts without regard to nationality..." (see: Konwencje 1956/171: Article 49). Instead, detailed regulations were found in the 1977 Additional Protocols to the Geneva Conventions (see: Protocol Additional I, 1977; Protocol Additional II, 1977). According to Article 86(2): "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." (Protocol Additional I 1977: Article 86(2)). The duties of commanders are set forth in the wording of the provision of Article 87, in which it is indicated that superiors have the duty "to prevent and, where necessary, to suppress and report to the competent authorities" – violations that have been committed by their subordinates (Protocol Additional I, 1977: Article 87(1)).

2. Nature of the commander's liability

The issue of the earlier lack of explicit regulation of the commander's liability was dictated by the high degree of complexity of such cases and the close relationship between the subordinate and the superior. In the early days, the commander's liability was treated as some form of incitement or aiding and abetting in the commission of crimes by direct perpetrators. Superiors were held criminally liable for the support they provided to their subordinates or for their participation in international crimes.

In the course of time, however, there has been an inclination to distinguish the commander's independent liability. In this regard, M. Damaška noted that in military jargon

"command" is a kind of term – an umbrella, under which various models of individual criminal liability are hidden (Damaška 2001: p. 455). At the same time, the commander's liability is supported by the numerous "privileges, honors and responsibilities that command entails" (Cryer et.al. 2010: p. 387). His role may come down to initiation and execution of the intent to commit an international crime. Primary tasks include: making decisions on behalf of the collective, identifying the goals of the collective, as well as creating a management structure and enforcing certain ways of functioning of the organised body. This is a kind of qualified liability, as the commander is liable not only for his own acts, but also for the acts or omissions of those he commands. The justification for his overriding liability in this regard is to ensure compliance with the norms of international humanitarian law.

3. Commander's liability in ICTY jurisprudence

A new perspective on commander's liability has been proposed in the statutes of *ad hoc* criminal tribunals. The pioneer in this regard was the Yugoslav Tribunal (see: Statute 1993). Judges adjudicating in this tribunal had to face many aspects of criminal liability related to acting on orders. At the same time, a number of cases heard under the jurisdiction of this tribunal were not reflected in the provisions of international criminal law, hence the great difficulty associated with the formation of the framework of the commander's liability regime.

A key item in these considerations is the provision of Article 7(3) of the ICTY Statute, according to which the fact that any act listed in Articles 2-5 of the Statute was committed by a subordinate does not relieve a superior from criminal liability if he knew or should have known that the subordinate intended to commit such an act or committed it, and the superior did not take the necessary and reasonable measures to prevent such act or to punish its perpetrator (Statute 1993: Article 7(3); see also: Judgement of the International Criminal Tribunal 1998).

The issue of the commander's liability regime was first considered by the ICTY in the case of *Mucić et al.* (Judgement of the International Criminal Tribunal 1998). At the time, the Tribunal emphasised that holding military commanders and other persons in positions of authority criminally liable is a well-established norm of customary and treaty international law, whereby a commander's liability may result from direct actions or may take the form of indirect prescriptive liability (culpable omission). The basis for a commander's criminal liability here is his initial act or culpable negligence. Thus, a superior is liable for his orders to commit crimes, as well as for failing to take measures that would have prevented criminal acts committed by subordinates or for failing to stop them from such actions (Judgement of the International Criminal Tribunal 1998: item 333). In this ruling, the ICTY clearly emphasised the dual nature of the liability of the commander on whom the duty to prevent and punish subordinates for crimes committed by them rests, and failure to carry out such actions is sanctioned by the imposition of individual criminal liability on the superior officer.

3.1. Civilian superiors vs. military commanders

At this item, the question arises: will only military officers be tried under this regime, or does this liability extend to civilian superiors as well? In the case of the war in the former Yugoslavia, this issue seems particularly pertinent given the strong militarisation of Yugoslav society, the breakdown of state structures and the lack of precise definition of control and leadership formations at that time (Judgement of the International Criminal Tribunal 1998: item 434). In considering this issue, the ICTY stated that the responsibilities of military commanders or those resulting from the fulfillment of military orders were not subject to limitation (Judgement of the International Criminal Tribunal 1998: item 424). As a result, the lack of existence of formal structures of a superior nature should not result in the exclusion of such liability. Moreover, in determining the question of a commander's liability, attention should be paid to the effective exercise of authority or control, not formal titles (Judgement of the International Criminal Tribunal 2001: item 196). Indeed, in many modern armed conflicts, there can only be self-appointed governments, and thus subordinate armies and paramilitary groups. Command structure organised in haste can be disorderly and primitive (Judgement of the International Criminal Tribunal 2001: item 193). Accepting as evidence of authority the existence of only formal structures would nullify the enforcement of humanitarian law (Judgement of the International Criminal Tribunal... 2001a).

The wording of Article 7(2) of the ICTY Statute indicates that: „The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.“ (Statute 1993: Article 7(2)). The phrases used in this provision: "head of state or government", "a responsible government official", allow its scope to be extended beyond the liability of military commanders to include political leaders and other civilian superiors. In *Strugar* case, the ICTY stressed that the relationship of superiority need not be based on formal subordination (Judgement of the International Criminal Tribunal 2005: item 375). An additional argument for this position is the distinction between the concepts of command and control. Command is a power that is associated with a military superior, while the definition of control includes civilian commanders (Judgement of the International Criminal Tribunal 2001: item 195).

The ICTY made a distinction between *de jure* and *de facto* control. It defined *de jure* control as the formal power to issue orders and control subordinates (Judgement of the International Criminal Tribunal... 2001a: item 197). Mere possession of *de jure* authority is not a sufficient prerequisite for establishing a commander's liability if it does not manifest itself in the exercise of effective control. *De facto* control, on the other hand, implies informal authority, command and control over subordinates, with the person issuing the orders having to be of higher rank than the subordinates. This position was challenged by the appellant in the *Aleksovski* case, where the accused claimed that in his role as a civilian superior he was not subject to liability under the provision of Article 7(3) of the ICTY Statute. This statement was criticised by the ICTY Appeals Chamber (Judgement of the International Criminal Tribunal 1999: item 103), which said that it was irrelevant

whether the supervisor was a civilian or military officer, what was relevant was the ability to prove that he had the authority to prevent or punish subordinates (Judgement of the International Criminal Tribunal... 2000a: item 76).

Summarising the above considerations, it should be stated that persons, who effectively command of informal structures and have the authority to prevent and punish crimes committed by persons under their control, may be held, under certain conditions, criminally liable specific to military commanders. The mere lack of formal legal authority to control actions cannot be understood as an exclusion of such liability (Judgement of the International Criminal Tribunal 1998: item 354; Galand et al. 2016: p. 56).

3.2. Superior's knowledge

The key issue in terms of the liability of a commander for the actions of the subordinate is his or her knowledge, which includes the information or objective reasons for being aware of criminal act (Judgement of the International Criminal Tribunal... 2001b: item 465). Elies van Sliedregt writes about liability before and after the crime (van Sliedregt 2011: p. 382). The ICTY took the position that a superior would be liable for neglecting his or her duties, provided that the information was available to him or her (Judgement of the International Criminal Tribunal... 2001a: item 241).

In this regard, two forms of knowledge can be distinguished:

- 1) Superior's actual knowledge, established through direct or circumstantial evidence, that his subordinates intended to commit or have committed offences;
- 2) Constructive or implied knowledge, meaning that the superior had information that would have at least alerted him to the current and real risk of such crimes and alerted him to the need for additional investigation to determine whether such crimes had been committed by his subordinates.

The superior's knowledge must be based on objective considerations. The term "know" requires actual knowledge, whereas the phrase "should have known" implies that the superior was negligent by failing to acquire knowledge regarding the unlawful conduct of his subordinates. In this regard, there is a presumption of knowledge on the part of the superior, when he or she had the means to obtain relevant information about the offence and deliberately failed to do so.

A commander/superior's command liability, therefore, materialises when he or she fails to take the necessary measures available to him or her, and which he or she could have used to prevent the commission of unlawful acts by his or her subordinates, or which could have been used to punish them (van Sliedregt 2011: p. 379; ICLS 2018: p. 4). Commander's liability is related to negligence resulting from the failure to perform one's duties properly, such as maintaining discipline (see: International Criminal Tribunal for the former Yugoslavia 2003). Thus, if the commander takes immediate steps to punish the guilty, he himself will avoid criminal liability. The liability of the superior is limited by his authority in relation to his superiors, which means that he is not obliged to do the impossible, i.e. to apply measures that are beyond his capacity. The obligation to prevent a crime, arises as soon as the superior (or commander) has knowledge or

reasonable grounds for suspicion that crime can be committed, while the obligation to punish arises after it has been committed (Judgement of the International Criminal Tribunal... 2005: item 373).

Due to the seriousness of international crimes, the superior must act with urgency. This is not equivalent to the obligation to personally investigate or impose sanctions. It is his liability to investigate the case and report back to the competent authorities for further investigation or repressive measures. The superior's lack of legal competence does not exempt him from pursuing what his material or actual capacity allows him to do. A superior's liability may also arise from a failure to create or maintain an environment of discipline and respect for the law among his or her subordinates.

3.3. Soldiers' anonymity

Due to the large number of soldiers in each formation, there is a possibility that the superior will not know them personally. This situation raises a fundamental question: can a commander be held liable, for the actions of subordinates who are anonymous to him? In the *Hadžihasanović* case (Judgement of the International Criminal Tribunal... 2006), the ICTY took the position that a superior may be liable for crimes committed by anonymous perpetrators, as long as such a perpetrator can be identified by his or her membership in a group or individual. This has already been noted by the Nuremberg Tribunal, which penalised the very membership in organisations such as the Gestapo, SA, SS or NSDAP. According to the content of Article 10 of the *International Military Tribunal Charter*: "In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned." (Agreement 1945: Charter of the International Military Tribunal, Article 10).

The *Statute of the International Criminal Tribunal for Rwanda* (ICTR), with regard to command liability (Article 6 ICTR), has directly reflected the provisions included in the content of Article 7 of the ICTY Statute and has not introduced innovative regulations in this regard. Following the termination of the ICTY and the ICTR, their functions were taken over by the *International Residual Mechanism for Criminal Tribunals* (see: Statute 2010). It is mandated to perform most of the tasks previously performed by the International Criminal Court for Rwanda and the International Criminal Court for the former Yugoslavia. According to the content of Article 1 of the ICTR Statute, it will continue the substantive, territorial, temporal and personal jurisdiction of the ICTY and the ICTR, in accordance with Articles 1-8 of the ICTY Statute and Articles 1-7 of the ICTR Statute. It has the power to prosecute individuals among the most senior leaders and indicted by these tribunals (Statute 2010: article 1(3)). In performing these core functions, the *Mechanism* preserves the legacy of these two pioneering *ad hoc* International Criminal Courts and seeks to reflect best practices in international criminal justice.

4. Order in the Rome Statute of the International Criminal Court

The statutes of *ad hoc* criminal tribunals have significantly influenced the International Criminal Court's framing of the issue of command liability (e.g. see: Rome Statute 1998). Influenced by the jurisprudence of these tribunals, the ICC has made these provisions more specific and supplemented them with new components. The Hague Tribunal was aware that previous tribunals had insufficiently clarified the issue of command liability and superior liability (Królikowski 2011: p. 246).

The provisions in Article 28 of the *Rome Statute of the International Criminal Court* (RSICC) separate military commanders from other superiors and introduce alternative form of criminal liability (van Sliedregt 2011: p. 17). The content of Article 28(a) refers to military commanders or other individuals, actually acting as military commanders, while the liability of other superiors is regulated in the content of the provision of Article 28(b) of RSICC.

Military commander or any other individual, who is actually acting as a military commander, shall be criminally responsible for crimes committed by subordinate armed forces, when they were "under his or her effective command and control, or effective authority and control" (Rome Statute 1998: Article 28(a)). It is necessary that there is a relationship between the commander (or the individual performing his role) and the subordinate soldiers, which in turn is related to the commander's ability to influence the behaviour of the subordinate forces. These aspects have been repeatedly highlighted by the ICTY and the ICCR.

The key requirement for this form of liability is the element of the existence of knowledge or duty that the commander should have known of the criminal acts of subordinate forces. Such liability also materialises in the event of failure to take reasonable measures within commander's powers to prevent or deter the commission of international crimes (Rome Statute 1998: Article 28(a)). An individual actually acting as a commander may include police officers (who are given command of armed police units) or individuals, who are in charge of paramilitary units that are not part of the armed forces. The term also applies to individuals, who have taken over the role of armed forces, armed police units or paramilitary units (Klamberg 2017: p. 283). On the backdrop of the *Bemba* case, the ICC noted that the notion of an individual effectively acting as a commander is intended to include individuals, who are not elected by law to act as a military commander, but who do so by exercising *de facto* effective control over a group of individuals within the chain of command (Judgement of the International Criminal Court 2016: item 409).

The ICC introduced the concept of a superior being "criminally responsible for crimes within the jurisdiction of the Court committed by his subordinates under his or her effective authority and control" (Rome Statute 1998: Article 28(b)). Unlike a military commander (and an individual actually acting as a military commander), a superior will be liable when he or she knew or knowingly disregarded information clearly indicating that subordinates had committed or intended to commit crimes that are under the actual liability and control of the superior. Moreover, such a superior is subject to the jurisdiction of the ICC, when he or she has failed to take necessary and reasonable measures within

his or her power to prevent or deter his or her subordinates from committing such acts, or as a result of failing to refer the matter to the competent criminal prosecution authorities.

It should be recalled that ICTY jurisprudence has introduced a three-tiered test for determining whether an individual can be convicted under the command liability regime, including such elements as the existence of a superior-subordinate relationship, a subjective element and actual knowledge (Klamberg 2017: p. 279). The same components are indicated in the content of the provision of Article 28 of the RSICC, but they differ in some respects from the standards that have been set out in ICTY jurisprudence (Klamberg 2017: p. 280). Pursuant to the content of the provision in question, proof of an order or action taken by a superior is not required. Therefore, he or she is liable for his or her omission or failure to prevent the commission of the crimes or to punish their perpetrators (Judgement of the International Criminal Court 2016: item 432).

Furthermore, the RSICC introduced the requirement of a causal link, which was not present in previous regulations relating to a military order (van Sliedregt 2011: p. 8). This comes down to the obligation of existence of causal link between the commander's conduct and the act, for which criminal liability is attributed to him. This issue has already been highlighted in the *Blaskić case* (Judgement of the International Criminal Tribunal... 2000b). The ICTY noted that the very principle of a superior's liability for failure to punish subordinates set out in Article 7(3) of the ICTY Statute, as well as in common law, indicates that there is no separate element of causation in the regime of superior liability (Judgement of the International Criminal Tribunal... 2004: item 77).

Neither should it be forgotten that the RSICC included, for the first time under International Criminal Court rules, circumstances excluding criminal liability in a normative framework, as they were not present in the statutes of *ad hoc* tribunals. Pursuant to the content of Article 33 of RSICC, an order issued by a government, civilian or military superior leads to the exclusion of criminal liability on the cumulative occurrence of the following conditions: the perpetrator was under an obligation to carry out the order, the perpetrator did not know that the order was unlawful, the order was not obviously unlawful. Whereby the commission of crimes of genocide and crimes against humanity does not lead to the exclusion of the unlawfulness of the act if the perpetrator was aware of their commission.

Conclusions

Although command liability has grown out of the practice of International Criminal Courts, national judicial efforts on these issues should not be forgotten. Following the completion of the work by the *ad hoc* tribunals, some cases were referred to the national courts, which are today supported by the Residual Mechanism. The ICC operates independently of it, which considers the criminal liability of individuals for the commission of international crimes committed after 1 July 2002.

In this regard, it should be recalled that the establishment of *ad hoc* tribunals has been met with numerous criticisms, including with regard to their legitimacy (Chmura-Piwowarczyk 2011: p. 40; Żarna 2011: p. 301). It has been noted that neither the UN Charter nor any other

international agreement gave the Security Council explicit authority to establish international courts (Matyasik, Domagała 2012: p. 78). This aspect of functioning of the ICTY, or the ICTR, has often been raised in individual cases under their jurisdiction. One should, however, agree with M. Matyasik and P. Domagała, who justify such a basis for the establishment of the tribunals by the need for an immediate response to the crimes (Matyasik, Domagała: 2012: p. 79). In this regard, it should be recalled that similar allegations have been made against the IMT in the past. Senator R. Taft in 1946, for example, described the tribunal's verdict as "a miscarriage of justice which the American people will long regret" (Grosz 1948: p. 7).

The Yugoslav Tribunal did a tremendous amount of work, which is being continued by MR today. A particularly important achievement is the establishment of cooperation with prosecutors' offices in Bosnia, Serbia and Croatia. This ensures that cooperation in combating impunity and bringing justice to victims continues (Brammertz 2021: p. 48). The Court was confronted with many cases that had not previously been dealt with in international criminal law. The issue of commander's liability has taken shape over many years. In the past, it was not singled out, but over time it has been shaped, as an independent act. Influenced by the experience of *ad hoc* tribunals, the *Rome Statute of the International Criminal Court* distinguished its various forms and stipulated that, when specific conditions are met, the commander's liability regime also applies to individuals actually acting in that capacity, but also to civilian superiors. Due to the large number of soldiers, there may be times when an individual in a leadership role does not know them personally, but this is not an automatic indication that the commander/superior is not immediately to blame for the orders/commands he/she has given.

Serge Brammertz (Prosecutor of the ICTY and the ICTR) emphatically states that international crimes are not committed by nations or people, but by individual persons, who must be held personally liable for them (Brammertz 2021: p. 43). Holding individuals for criminal liability, when they hold managerial positions or supervise subordinates, can have a valuable deterrent effect against future crimes.

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