

# The Extend of Criminal Responsibilities of a Superior for the Commission of Offences by the Subordinates

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## Abstract

The superior is responsible for atrocities committed by the subordinates violating International Humanitarian Law is not a new concept in the legal arena but it was applied even in the ancient time among the leaders of the tribe. Although the doctrine of superior responsibility was applied in many cases before and after the Second and First World War but it was first codified in articles 86&86 of the Additional Protocol 1 of the Geneva Conventions 1949. Now, it is established by many international instruments i.e. Statute of International Criminal Tribunal for Former Yugoslavia. and case laws that the superior is liable for committing international crimes i.e. crimes against humanity, war crime and genocide, by the subordinates but from beginning to today a debate is continuing either the superior is responsible for the offences committed by the subordinates or for a separate offence committed by superior through omission to discharge his duty to prevent, control and punish the subordinates for violating war laws. In This paper intends to establish that the superior is not responsible for the offences committed by the subordinates as a mode of liability or as an accomplice but he/she is liable for separate offence for his/her failure to prevent and suppress the subordinates. Secondly the authors want to clear that superior and principal offender is not the same person but if a superior by orders, abets, instigates in any other modes participate in the commission of the offences then the superior is responsible for the offences committed by the subordinates.

**Key words:** Superior responsibility, command responsibility, responsibility, subordinates. International Humanitarian Law

## Introduction

It is same under both National and International law that a person who commits crimes shall be personally responsible for his/her act, but it is a continuous debate that a person who did not commit the offence directly shall be liable or not. But now it is almost settled in national legal system in most of the countries of the world that the persons who did not directly take part in the atrocities but in any way, either by abetting or assisting or ordering or instigating or presenting himself in the place of atrocities or soliciting or non-performing the duty, helped the principal offender to commit the offence shall be liable for that what has been committed by others under his indirect participation. In international arena concerning international crimes mainly war crimes, crime against humanity and genocide, which are usually held in the armed conflict either the superior is liable for the offences of the subordinates, is almost settled positively that the superior is responsible for the offences committed by the subordinates but there is debate regarding the extant of liability of the superior he/she is responsible either for the offences committed by subordinates or for his/her omission to discharge the duty. In the earlier stage of the International Criminal justice System the commander was generally held as liable as the subordinate is for the commission of the offence but later on this situation was changed with the development of criminal justice system and the commander is considered as accomplice and held responsible as accomplice for tolerating the commission of the offences by the subordinates. After ward war ii in some cases the superior was held liable not as a principal offender but for separate offence of permitting the subordinates to commit the offences and not to prevent and control them from committing the offensive activities.

## Superior/ Command Responsibility

In International crimes, very often it happens that those who plan to commit those offences don't physically take part in the hostilities as a result many of whom remain unidentified. In **Prosecutor vs Blasic** (2004) case it was held that the development of the principle of superior responsibility paved the way for the International Courts

and Tribunal to hold the superiors responsible for the crimes of their subordinates to avail them to commit the offences whether or not the latter are identified by name. There is an open question regarding superior responsibility and a continuous debate is running either the superior is responsible for the atrocities committed by the subordinates or he/she is responsible for the failure to discharge his duty to prevent and repress the subordinates. In Halilovic case, the court accepted the second option that the command responsibility imposes criminal responsibility for a superior's failure to act when under a duty to do so, (Prosecutor vs Halilovic, 2006). So, Prosecutor vs Aleksovski (2000) it was declared that a person to be held responsible under command responsibility for an international crime, the prosecutor must prove following three things:

1. The existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as subordinate.
2. That the superior knew or had reason to know that the crime was about to be or had been committed:  
and
3. That the superior had failed to take necessary and reasonable measures to prevent the criminal acts or punish the perpetrator thereof.

In Celebici appeal Judgement the court declared that the superior responsibility indicates the power of superior to control the acts of his/her subordinates. The subordinates are under the obligations, they must act following the rules and regulations of the International Humanitarian Law and the superior is under an obligation to keep his forces bound to comply with the International Humanitarian law and it is the responsibility of the superior to punish the troops if they violate the International Humanitarian Law. If the superior fails to discharge anyone of these two duties then he/she is responsible under the superior responsibility and to be punished. In this respect, the command responsibility applies not only to military commanders but also to political leaders and other civilians' superiors in possession of authority, Prosecutor vs Baglishema. So under this provision the high profile political leaders will also be liable and can not go unpunished on the ground of non-participation in the commission of the offence.

### **Background of Superior Responsibility**

Although the first codification regarding the superior responsibility is the Additional Protocol I, 1977 relating to Geneva Conventions 1949 but it was applied in many trials from many years ago. **William, A Schabas** () mentioned that the trial of Peter von Hagenbach by an ad hoc tribunal of the Holy Rome Empire in 1474 was the first "international" recognition of commanders' obligations to act lawfully. Hagenbach was put on trial for atrocities committed during the occupation of Breisach, found guilty of war crimes and beheaded. Since he was convicted for crimes "he as a knight was deemed to have a duty to prevent. In narrower sense the command responsibility has been inserted in the Lieber Code which was drafted by Francis Lieber during civil war in the United States of America. The Hague Convention of 1899 & 1907 implicitly create a doctrine of command responsibility, it does uphold a notion that a superior must account for their actions of his subordinates. **Sienho Yee (2003, p.117)** states that military superiors have a duty to ensure that their troops act in accordance with international law and if they fail to command them lawfully, their respective states may be held criminally liable. **Stuart e Hemdin (2003, p.6)** mentions that in the post world war II era, the notion of command responsibility has been inserted in many domestic legislations and case law. Later the command responsibility has been codified in articles 86 & 87 of the Additional Protocol I, 1977 and today this concept has been included in statutes of all major International Tribunals i.e. Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY", the International Criminal Tribunal for Rwanda (ICTR). And the recent most important document on the superior responsibility is the article 28 of the Statute of the International Criminal Court 2000. Now it is established that a superior is responsible for the offences of the subordinates by different International Instruments which we have mentioned earlier and many international decisions i.e. **Yamashita case, Halilovic case, Hadzihasanovic case Kayishema & Ruzindana and Musema, Celebici** case etc.

### **The extent of Superior's Liability**

It is established that the superior is liable under International Law for the commission of the offences by the subordinates but what is the extent of liability has not been finally determined even after codification of Rome Statute. To determine the extent of liability of the superior it needs to consider three matters: (i) Is it responsibility for complicity? (ii) is it a separate crime for dereliction of a superior's duty to control, prevent or punish? (iii) Is it a special mode of liability for the crimes committed by subordinates?

**Responsibility of the Superior as Accomplice:** In the earlier stage the superior was held responsible for the same crimes committed by his/her subordinates. Curving several precedents it was found that the national

legislation on war crimes enacted after World War II considered command responsibility as a form of accomplice liability. 1944, for instance, declared responsible as an ‘accomplice’ the superior who ‘tolerated’ the criminal acts of his subordinates; a verb which implied that, to be held responsible, the superior actually knew about the crimes and consciously decided not to take action to prevent or repress them (**Meloni Chantal**, 2012). In this regard, in **Halilovi Judgement** it was held that most of the rules referring to the responsibility of superiors adopted during this period can be considered only *lato sensu* forms of command responsibility, in that they generally implied a kind of positive participation of the superior in the subordinates’ crime: the superior was therefore correctly held responsible for the crime as an accomplice, having contributed directly to the commission of the crime. So in these documents it was indicated that the superior is responsible as an accomplice for the offences done by the subordinates but it was not cleared either a superior who didn’t take part in the commission of the offences in any modes (i.e. ordering, instigating, soliciting or assisting) will be yet liable as accomplice or just as superior for omission to perform his duties properly.

### **Responsibility of the Superior for omission to discharge the duty**

The second question relating to the liability of the superior is, is it a separate crime for dereliction of a superior’s duty to control, prevent or punish? This is the central issue of discussion of this paper and the authors intend to show that the superior is not directly responsible for the crimes committed by his subordinates, but for his omission and failure to properly discharge his duty. Even though the superior is considered responsible in connection with the same crimes committed by the subordinates (i.e. if they have committed war crimes, the superior is also charged with war crimes), it does not mean that the superior becomes an accomplice and actually committed these crimes. This matter has been clearly discussed in the famous case, **Yamashita case** (1946) which was reviewed by the US Supreme Court in 1946. In this case, General Tomuyuki Yamashita, the commander of the Japanese forces in the Philippines in 1944–5, was charged with having failed to discharge his duty to control the operations of persons under his command who had violated the laws of war. The majority judgment, delivered by Chief Justice Stone, denounced the principle that the laws of war impose upon an army commander a duty to take such appropriate measures as are within his power to control the troops under his command and prevent them from committing violations of the laws of war. In the view of the court, the absence of such an affirmative duty for commanders to prevent violations of the laws of war would defeat the very purpose of those laws. To quote the Court,

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

Commanders thus were deemed to have a clear responsibility to control subordinates and to ensure that they respected IHL. Failure to do so where violations of IHL were committed warranted penal action and punishment fitting the crimes. **United States v. Wilhelm von Leeb et al.**(1950) (High Command Case), “under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. In these two cases it was held that the superior is responsible for his failure to discharge his duty to control, prevent and punish the subordinates for violating the Geneva Conventions and Additional Protocol. Later, after many years of judgment of Yamashita case, the superior responsibility for omission was inserted in articles 86 of the Additional Protocol I, 1977 which state:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress.

The Statute of the International Criminal Tribunal for Rwanda (ICTR) and that of the International Criminal Tribunal for the former Yugoslavia (ICTY) read, The fact that any of the acts referred to in ... the present Statute, was committed by a subordinate does not relieve his or her superior of criminal Responsibility if he or

she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The language of ICTY and ICTR statutes indicate that a superior shall be prosecuted not for the offences of the subordinates, he will be punished for his negligent or omission to perform his obligation properly and this omission leads the subordinates to commit the international offence. But in this respect, the UN Commission of Experts, in its Final Report on the ICTY Statute, affirmed that superiors are ‘individually responsible for a war crime or a crime against humanity committed by a subordinate’, which entails that they considered the superior responsible for the same crime committed by the subordinate. The International Law Commission in its Commentary to the Draft Code of Crimes against the Peace and Security of Mankind of 1996 also stated that a ‘military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime’ and that he ‘contributes indirectly to the commission of a crime by his subordinate by failing to prevent or repress the unlawful conduct. This view has also been supported by ICTY judgment whether command responsibility is a mode of liability for the crimes of subordinates or responsibility of a commander for dereliction of duty has not been considered at length in the jurisprudence of the Tribunal. However, the consistent jurisprudence of the Tribunal has found that a commander is responsible for the crimes of his subordinates under article 7(3). Notwithstanding previous findings whereby superior responsibility was seen as a kind of accessory liability and ‘therefore . . . the superior was described as responsible “for the acts of his subordinates. But in many judgments it was held that the superior is not responsible for the acts committed by the subordinates but he is liable for the dereliction of his duty to prevent, control and punish the subordinates for committing the offences.’ In *Sefer Halilovic* (2005) case, Command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus “For the acts of his subordinates.” as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. In *Zlatko Aleksovski* (1999, para.67), *Milorad Krnojelac* (2003, Para. 171), *Enver Hadzihasnovic* and *Amir Kubura* (2008, para.39) cases have also accepted this position. Now under at least ICTY and Special Tribunal, the superior is held responsible for their failure to prevent and punish the subordinates. To determine the nature of liability of the superior it is essential not only in respect of theoretical perspective but also from a practical point of view. On one hand, there is an impact on sentencing in international proceedings. Limiting a superior’s responsibility to his failure to prevent or punish may have a substantial impact on sentencing to the extent that the superior would be convicted not for the principal crime (e.g. crimes against humanity, war crimes and genocide), but for a separate offence of omission. This can be observed in the recent conviction of Naser Oric, a former commander of the Srebrenica armed forces, who was sentenced by the Trial Chamber of the ICTY to two years of imprisonment (instead of the 18 years requested by the Prosecutor) for failure to prevent the crimes committed by his soldiers (**Meloni Chantal**).

The superior is responsible not ‘for the crime committed by subordinates’ but ‘merely’ for ‘his neglect of duty’ with regard to the crimes committed. To this extent, the neglect of duty seems to be considered as a separate crime of omission. And the superior is not liable as mode of liability for the commission of the offence by the subordinates but it is the liability for the dereliction of his duty.

Under the Rome Statute, the nature of superior responsibility is slightly different, as article 28 of the Rome Statute of the International Criminal Court states:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and  
(ii) That military commander or person 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.

(b) With respect to superior and subordinate relationships not described in paragraph

(a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) 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.

Article 28 provides that. "Military commander shall be criminally responsible for crimes.... committed by forces under his or her effective command and control .... as a result of his or her failure to exercise control properly over such forces.". This implies that the crimes of subordinates are imputable to the superior, which is more similar to complicity (e.g. aiding, abetting) than to the form of liability discussed above. In other words, the superior is responsible and should be punished for the principal crime committed by his subordinates. However, it is necessary to avoid the risk of holding someone guilty for an offence committed by others in violation of the principle of individual and culpable criminal responsibility.

Article 28 of the Rome Statute of the International Criminal Court has kept an ambiguity that it can be explained that the superior will be held responsible for the offences committed by the subordinates and there is a scope that this article can be explained in this way that the superior will be responsible for omission to discharge his duty to prevent, control and suppress the subordinates as it was mentioned in article 28(a) (iii).

The ICRC or the world communities shall have to take necessary steps to make this article clear removing the ambiguity.

### Conclusion

In the conclusion stage we can say that the development of Superior responsibility is a great development in the International Criminal Justice System. because in most of cases the subordinates violate International Humanitarian Law, with the thinking that they have been engaged in the battlefield to do anything what causes harms to the opposite party and they will be congratulated for their atrocities and will have not to face any punishment, for omission of the superior to discharge his duty properly. Now with the development of superior responsibility, the superior will think that if the subordinates do any international crimes for his failure to perform the duty then he will have to go through the trial and punishment as a result the superior to absolve himself from the punishment he will do the following activities:

1. To teach the subordinates the basic International Humanitarian Law
2. To train them regarding conducting the war in the battlefield.
3. The superior must warn them if anyone violates IHL then he will have to take the responsibility for committing the offence.
4. If the superior knows that the subordinates are committing or about to committing the offences the he must take steps to prevent them from committing these offences.
5. If anyone violates IHL then the superior shall punish him.

So if the superior fails to do any one of these activities then it will be considered that he/she has failed to discharge his functions which have been vested on him and for this failure he will be prosecuted and punished but the superior, without order or abate or instigation or assisting or soliciting, only for omission shall not be liable as principal or as an accomplice which has been declared in many cases by various international courts and tribunals and in many international instruments which the authors have mentioned in the earlier discussion. So the superior responsibility does not mean the superior is responsible for the principal crime with the subordinates who committed the offences but he is responsible for separate offence for dereliction of his duty to prevent, control and punish the subordinates.

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