

VIEW FROM THE HAGUE

LOCAL AND MILITARY LAW FAMILIAR WITH COMMAND RESPONSIBILITY DOCTRINE

Lately, command responsibility is constantly discussed in the media and there are practically no state officials who have not offered their comments on this doctrine of international law. However, all those statements indicate that the notion of command responsibility is misunderstood.

The doctrine of command responsibility is simple: military commanders are responsible for the acts of their subordinates. If subordinates commit violations of the laws of war and their commanders fail to prevent or punish these crimes, then the commanders also can be held responsible. This doctrine is not new in military codes or national law. Its genesis dates back to the 15th century, while its more recent mention can be found in various international and national legal instruments that were in force in the SFRY and are in force now in the territories of the countries that were created as a result of its breakup.

Local Military Regulations

For example, the Instructions on the Application of Rules of International Laws and Customs of War in its armed forces, adopted by the JNA in 1988 (Military Official Gazette no. 7, 28 April 1988) described the doctrine in the following terms:

Article 20 of the Instructions envisages individual responsibility for violations of the laws and customs of war: "Every individual, military or civilian, who breaches the rules of the law of war or orders for it to be carried out, is personally responsible for this violation. Not being familiar with the stipulations of the rules of the law of war does not exclude responsibility of those who breached those stipulations."

Article 21 deals with the responsibility of commanders: "Military superior officer is personally responsible for breaches of the rules of the law of war if he knew or could have known that his subordinate or other units or individuals are preparing or have been preparing commission of such breaches, therefore at the time when it was still possible to prevent such commission did not undertake measures to prevent those breaches.

Military superior officer who knows that the breaches of the rules of the war law have been committed and does not initiate a disciplinary or criminal procedure or, if he is not authorised to initiate such procedure if personally responsible if he does not report to the relevant military officer."

Command responsibility is defined in the same way under the Statute of the ICTY - article 7, and all indictments issued by the Tribunal have been raised in accordance with that Statute. In each case, in order for an individual to be convicted on the basis of command responsibility, the Prosecution has to prove the following:

1. crimes that fall under the jurisdiction of the ICTY were committed (those are: Grave Breaches of the Geneva Conventions of 1949, Violations of the Laws and Customs of War, Genocide and Crimes against Humanity);
2. those who committed the crimes were under the command of the accused;
3. the accused knew or should have known, based on the circumstances at the time, that his/her subordinates were engaging in impermissible conduct; and

4. the accused failed to prevent or punish those responsible for the commission of such crimes.

Therefore, those who claim that the ICTY indicts individuals solely on the basis that they held an official position at a certain time are simply wrong. As already stated, under the provisions of the Statute and the above criteria, an individual can be indicted for command responsibility if s/he knew or should have known that individuals under his/her command committed crimes and s/he failed to punish those crimes or to prevent future crimes from occurring. Therefore, for example, this means that if a military commander took immediate steps to punish his/her subordinates who committed a crime, s/he will not be held accountable. Simply stated, a commander is responsible if s/he was negligent in exercising his/her duties as a commander. These duties include maintaining discipline amongst his troops and ensuring that they do not attack civilians or destroy their property.

Power and Responsibility

There are also those who suggest that the Tribunal indicts individuals because they defended the country. Wrong again: an individual can only be indicted if s/he violated international humanitarian law, as laid out in the ICTY Statute, either by planning, ordering or in some other way actively participating in committing the crime, or through a failure to exercise their duty as commanders. Individuals who defend their country from a military threat in accordance with international and national laws cannot be indicted by the ICTY or national courts.

Yet others claim that the Tribunal indicts individuals "only" for command responsibility. In fact, the practice of the Tribunal demonstrates that individuals are typically indicted both for command responsibility and for acts such as planning, ordering, aiding and abetting, etc. (for more information and an overview of all indictments the Tribunal issued to date, please visit the ICTY website in BCS at <http://www.un.org/icty/index-b.html>).

Finally, commanders of armed forces, both military and police, are in a very specific position: these individuals hold great power - that of life and death through armed force. In addition to that, due to the very hierarchical nature of these organisations, these commanders can count on absolute discipline of their subordinates under threat of sanction.

As a result, these men are burdened with an added responsibility - besides being responsible for what they do themselves, senior Army and Police officers are also responsible for the act of their subordinates. Holding commanders responsible for the acts of their subordinates is not only logical, it is also vitally important in order to protect civilians from abuse of military and police power during armed conflict.

Outreach Programme
outreach@icty.org