

Halilović on Appeal: The intricate concept of ‘effective control’

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Superior responsibility is an important concept in international humanitarian and criminal law. It conveys the concern that those who engage in a risky and dangerous enterprise - like waging war - should be governed by responsible command which should prevent the commission of atrocities and punish the culpable whenever things have gone astray. Superiors will be held accountable if they fail to take those measures.

The doctrine requires a superior-subordinate (hierarchical) relationship, knowledge on the part of the superior of (imminent) war crimes - or at least the possibility to acquire this knowledge - and failure to take the ‘necessary and reasonable’ measures to prevent them. At first blush, the logic of these constituent elements and their inter-relation is perfectly self-evident. While criminal responsibility is ultimately triggered by failure to act, the legal obligation to take appropriate measures presupposes both the power and authority to steer and correct the conduct of others and awareness of their acts. The normative doctrine is predicated on and reflects the reality of military organizations with clear-cut chains of command, channels of communication and reporting systems which equips those organizations to tackle their demanding tasks in the first place.¹

In spite of the conceptual soundness of the doctrine, its application in practice has been far more cumbersome. One of the bones of contention has been the exact nature of superior responsibility. Whereas in previous case law the ICTY has held the superior – usually a Commander or, as in the case of Sefer Halilović, a Deputy Commander - responsible for the very crimes committed by his subordinates, suggesting that superior responsibility amounts to a form of participation *sui generis*, Trial Chambers in more recent cases have qualified superior responsibility as a separate crime of omission.² Partially related to the former issue is the question whether the crimes should have been caused by the superior’s failure to exercise effective control over his men. Although the ICTY, in the famous Čelebići -case, has denied such a causal relationship, Article 28 of the Rome Statute indicates that the crime committed by the subordinate must be the *result* of the superior’s failure to exercise control properly over that subordinate.³ The required *mens rea*-standard has been contested as well, as courts have vacillated between ‘a duty to know’ under all circumstances, bordering on strict liability (*Yamashita*-case) and actual knowledge of (impending) atrocities in the *Medina*-case.⁴

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The *Halilović* case under scrutiny addresses the element of a superior-subordinate relationship and the ensuing ‘material ability to prevent or punish the crimes’.⁵ According to the Trial Chamber, the Prosecutor had not succeeded in proving beyond a reasonable doubt that Mr. Halilović had exercised effective control over soldiers who had committed war crimes in the village of Grabovica. On appeal, the Prosecutor challenged the Trial Chamber’s holding, contending that the Trial Chamber had incorrectly premised Halilović’s responsibility on his being in command of the Operation Neretva. Apparently, and contrary to the law of superior responsibility, the Trial Chamber had assumed that ‘command’ is a necessary element of the doctrine.⁶

In assessing the Prosecutor’s point of view, the Appeals Chamber sheds some light on the first element of the doctrine. The gist of superior responsibility is ‘effective control’ over subordinates which implies the ‘material ability to prevent the crimes or punish the perpetrators’.⁷ This ability is predicated on subordinate relation, but this need not involve formal command. Furthermore, one should be careful not to invert the relationship between the ability to prevent or punish and the requirement of hierarchy: the policeman who has the capacity to prevent crimes and punish the perpetrator cannot incur superior responsibility in the event that he fails to do so, because he does not exercise effective control over a subordinate in the sense of article 7(3) ICTY Statute. Contrary to the Prosecutor’s assumptions, the Trial Chamber had not insisted on formal command being a requirement for superior responsibility. It was rather the other way round: the Prosecutor had built its case on the premise that Halilović was in (formal) command of Operation Neretva and the Trial Chamber simply had to investigate whether the power to prevent or punish crimes ensued from Halilović’s legal position. The Prosecutor’s submissions that Halilović was the most senior ranking officer within the army of Bosnia-Herzegovina and that he occupied the position of Team Leader within the Inspection Team merely served to support the allegation that he was in command of the Operation.⁸

The next issue which required investigation was whether Halilović’s position as *de facto* commander of the Operation offered him the opportunity to prevent or punish the war crimes committed in Grabovica. Here, the main objection of the Prosecutor was that the Trial Chamber erroneously deduced from its finding (that Halilović had not initiated or carried forward investigations) the conclusion that he lacked the ability to punish the perpetrators of the crimes.⁹ The Appeals Chamber responded that the Trial Chamber had not *solely* based its finding that Halilović did not have the material ability to punish on its conclusion that the evidence did not show that he had initiated investigations. Rather, this conclusion was predicated on a thorough inquiry of all the investigations which indeed had been conducted. This survey included the order of Halilović’s superior, Rasim Delić, to start investigations and Halilović’s instruction to *his* subordinate Dzanković “to collect as much information as possible and send it and inform the Serajevo command about it”. Recalling the opinion of the Appeals Chamber in the *Blaškić*-case that ‘reporting criminal acts of subordinates to appropriate authorities is evidence of the material ability to punish them in the circumstances of a certain case, albeit to a very limited degree’, the Appeals Chamber sought to investigate if Halilović’s efforts indeed met this minimum threshold.¹⁰ For this inquiry, the Appeals

Chamber relied on a number of factual findings, made by the Trial Chamber, like the fact that Delić's order had only been issued three days after the Grabovica murders were committed (Judgement, § 192) and the Trial Chamber's finding that several officials had initiated investigations (Judgement, § 194) to corroborate its conclusion that Halilović's ability did not even meet this threshold.

Even assuming that Halilović had the ability to contribute to an investigation or the punishment of the perpetrators, the evidence did not reveal that this ability ensued from his position of *de facto* commander.¹¹ In this respect, the Appeals Chamber observed that the orders which Halilović had issued and which indeed might indicate that he had 'effective control', rather pointed to monitoring and coordinating functions of the Inspection Team and not necessarily included the power to discipline subordinates. The Appeals Chamber referred to the famous *High Command* Case in which the Military Tribunal held that the functions of commander-in-chief Wilhelm Von Leeb were strictly operational in nature and that 'his authority in the field of executive power was more in the nature of a right to intervene than a direct responsibility'.¹² In the end, the Appeals Chamber apparently considered it decisive whether a causal relationship between the two components of 'effective control' could be established: 'effective control' could only be assumed if the military commander had the material ability to prevent or punish (perpetrators of) crimes *by virtue* of his superior position over his subordinates.

Because the Appeals Chamber had to address myriads of highly complicated military situations, the judgement is not always easy to understand and at times rather arcane. Nevertheless, the judgement has at least one strong asset. It shows that the first element: the superior-subordinate relationship, and the third element: (the failure to take) 'necessary' and 'reasonable' measures, are intricately related. Although the Appeals Chamber emphasised that both elements should be distinguished and should be dealt with separately (Judgement, § 175), the reasoning itself demonstrates the dialectical relationship between these aspects. The first part of the relationship is obvious. One has to determine the material ability of the superior to prevent and punish crimes in order to assess whether his performance lived up to required standards.¹³ But this material ability can hardly ever be assessed in the abstract and therefore the influence is reciprocal. A trier of fact must consider the concrete position of the accused, his functions, tasks and responsibilities and the efforts he actually made to ensure that crimes were not committed by his subordinates. Moreover, such a court must assess the accused's precise relations with his 'brothers in arms', and whether his orders were followed or disobeyed, before it can conclude whether the accused indeed had the capacity to prevent the crimes, or discipline or punish his subordinates. These factual and normative considerations are difficult to disentangle. They reverberate in a final judgement which can take three directions:

- 1) the accused did what he could do and is therefore not to blame;
- 2) the accused incurs criminal responsibility, because he failed to exploit his position of (relative) authority to prevent the crimes;

- 3) the accused is not to blame, because he lacked the capacity to interfere and change the situation for the better.

Each assessment of superior responsibility requires a solid knowledge of the facts and – preferably – some expertise in military situations. Therefore, the remark of the Appeals Chamber in the *Blaškić* Case that (the indicators of) effective control are ‘more a matter of evidence than of substantive law’ seems particularly apposite.¹⁴

Both the Trial Chamber and the Appeals Chamber in the Halilović case have meticulously investigated the chains of command, in search of an answer to the question whether the accused indeed exercised effective control. Their findings evince that the multi-coloured reality of power relations often eludes the crude, binary approach of the doctrine which insists that military people are either ‘under control’ or ‘in control’. The problem of coming to grips with the difficult concept of ‘effective control’ and applying it in practice is probably the main reason why prosecutors at the ICTY have shied away from the doctrine of superior responsibility, in favour of the more comprehensive, but arguably more blunt instrument of participation in a Joint Criminal Enterprise.¹⁵

¹ Although superior responsibility for civilians has been recognized in the case law of the *ad hoc* tribunals and in the Rome Statute (Article 28, sub b), the construction has been more problematic outside the military realm; compare for instance A. Zahar, ‘Command Responsibility of Civilian Superiors for Genocide’, *14 Leiden Journal of International Law* (2001), 591.

² Compare for instance, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, § 171: ‘It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty to exercise control.’

³ For a more elaborate discussion of this rather confusing requirement, compare G. Werle, *Principles of International Criminal Law*, Berlin 2005, pp. 136/137.

⁴ For a useful and comprehensive survey, compare Matthew Lippman, ‘The Evolution and Scope of Command Responsibility’, *13 Leiden Journal of International Law* (2000), 139.

⁵ The prior judgement of the Trial Chamber (*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T) dates from 16 November 2005.

⁶ Appeals Chamber, Judgement, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, 16 October 2007. § 57 (herein after ‘Judgement’).

⁷ Judgement, § 59.

⁸ Judgement, §§ 82 and 102.

⁹ Judgement, § 168.

¹⁰ Judgement, § 182.

¹¹ Judgement, § 210.

¹² Judgement, § 212, quoting *United States v. Wilhelm von Leeb et al.* (“High Command Case”), in TWC, Vol. XII, p. 554.

¹³ This is exemplified by the precise wording of Article 28 of the Rome Statute that the military commander or person only incurs criminal responsibility ‘for failing to take all necessary and reasonable measures *within his or her power*’ (emphasis added).

¹⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement 29 July 2004, § 69.

¹⁵ On these developments, compare the profound reflections of Marc Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’, *105 Columbia Law Review*, 1751, 1774-1784.

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