



Recurrent crimes:

The commander's duty to prevent?

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In 1993, Enver Hadžihasanović was commander of the 3rd Corps of the Army of Bosnia and Herzegovina (ABiH), and Amir Kubura was commander of the 7th Brigade in the same Corps. They were the first Bosnian commanders of the ABiH to stand trial at the International Criminal Tribunal for the former Yugoslavia (ICTY).

The case started in November 2003 and ended on 15 March 2006, when the judgement was rendered. Both Accused were charged and sentenced for violating the laws or customs of war pursuant to Article 3 of the ICTY Statute. Hadžihasanović was sentenced to five years in prison; Kubura received a sentence of two and a half years.

One of the most note-worthy features of this case was that both Accused were indicted solely on the basis of their command responsibility. This presented the judges with a difficult task. The complexity of the issue is illustrated by the sheer length of the judgement, which – with a total of 807 pages – is the longest in the Tribunal's history. Nearly 60 pages are devoted to the law on command responsibility.

The central and most hotly debated issue during the trial was whether foreign fighters known as the “*Mujahedin*” were subordinated to the 7th Brigade of the 3rd Corps (144 pages). The Trial Chamber found that *Mujahedin*, which included fighters from North African and Middle Eastern countries as well as locally recruited Bosnians, were subordinated to the 3rd Corps only *after* the creation of a unit called “*El Mujahed*” in August 1993; before that period, subordination had not been proven beyond reasonable doubt. As the most heinous crimes were committed by the *Mujahedin* before August 1993, both Accused were acquitted for the majority of the crimes charged.

However, after August 1993, one event involving the *Mujahedin* is of particular significance. This commentary will only focus on this event, which demonstrates a practical application of many of the criteria set out in the Trial Chamber's legal findings regarding the law on command responsibility.

As a reminder, in order to hold a superior responsible for his command responsibility, three elements must be satisfied: (1) the existence of a superior-subordinate relationship; (2) the



commander knew or had reason to know that a subordinate was about to commit or had committed a crime; and (3) the commander failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Chamber conclusions on the Mujahedin camp in Orašac

In October 1993, *Mujahedin* in their camp in the village of Orašac had on two occasions abducted and mistreated civilians; the second time, beatings were more severe and one civilian was beheaded. Regarding this second incident, the Trial Chamber concluded that Hadžihasanović should have ordered the *use of force* as the sole necessary and reasonable means to prevent crimes from being committed against the civilians in the *Mujahedin* camp.

Effective control

In October 1993, the *Mujahedin* were under the *de jure* and *de facto* control of the 3rd Corps. It was established that *Mujahedin* executed orders given by subordinates of Hadžihasanović. The Chamber stressed that the functioning of an army highly depends on the execution of orders by its troops. If a subordinate refuses to obey an order, a commander should not hesitate to enforce that order by force. In the current case, Hadžihasanović had the duty to ensure that his orders concerning strict obedience to the rules of international humanitarian law were respected.

Knowledge

Hadžihasanović had knowledge regarding prior criminal conduct of the *Mujahedin* against civilians, and knew that *Mujahedin* had taken civilian hostages to their camp. He also knew that previous orders by his subordinates to the *Mujahedin* forbidding taking hostages had failed. When the *Mujahedin* had flouted that order the second time, threats to attack their camp had failed. Hadžihasanović was aware the *Mujahedin* were not instructed on rules of international humanitarian law, and that their crimes thus far had always gone unpunished. There was a “real and reasonably foreseeable risk” that members of the *El Mujahed* detachment were about to commit crimes.

Duty to punish

The Chamber cites, *inter alia*, the WW II *Rauer* case as a specific example of a commander who had no knowledge of killings that were about to be committed, and which he therefore could not prevent. Nonetheless, the court in *Rauer* found that he could have punished the perpetrators; not having done so, he was found guilty of failing to prevent similar killings committed by his (same) troops later on. In the current case, Hadžihasanović was not held responsible for failing to punish the perpetrators of the crimes at Orašac, as he had no *actual* knowledge of those crimes; he only became aware of them when he no longer was commander of the 3rd Corps. Moreover, according to the ICTY Appeals Chamber, Hadžihasanović’s successor equally cannot be held responsible for failing to punish crimes that were not committed under his command; this reveals a significant gap



in command responsibility for crimes¹, to which the Trial Chamber (which was not seized of the task of judging the successor) offered no solution.

Duty to prevent – general comment

Once a commander has (“prior”) knowledge of particular crimes, he is under a duty to actively prevent their recurrence. According to the Chamber, once a commander is put “on notice” that crimes have been committed by one unit (or “identifiable group of subordinates”) in a detention centre located in one geographical zone, he is under a duty to prevent the recurrence of similar future crimes committed by *that* unit in detention centres in that geographical zone.² However, if a commander is put on notice that crimes are committed in detention centre X by one brigade, that does not mean he is thereby automatically put “on notice” that crimes are or will be committed in detention centre Y located elsewhere in his area of responsibility by another brigade (and accordingly he will not be under a duty to prevent their recurrence).³ If it *were* held that he was put on notice, it would result in a commander’s “duty to know” *everything* that transpires in his area of responsibility, a rigid approach that was taken in the *Yamashita* case (1946) but which has explicitly been rejected by the *Čelebići* Appeals Chamber.

Necessary and reasonable measures

Any decision to attack the *Mujahedin* could only be taken at the level of the 3rd Corps command. Hadžihasanović had sufficient time to put *specific* measures into effect in order to obtain the release of the abducted civilians. General measures, such as orders addressed to all the army troops commanding respect for the laws and customs of war, may not be sufficient to prevent certain crimes from occurring. Hadžihasanović had the material capacity (i.e. weaponry and manpower) to use force against the *Mujahedin* who flouted his orders, and should have ordered such use of force as the sole necessary and reasonable means to prevent the crimes that were about to be committed in the *Mujahedin* camp. It was not up to the Prosecution to prove that such measures would have been effective; it was for the Accused to prove that they would not have been.⁴

¹ Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, partial dissenting opinion Judge Shahabudeen, para. 24.

² The Trial Chamber added that the detention centre must fall under the authority and supervision of the same ‘managing power’.

³ As an example: In the municipality of Bugojno, there were 6 detention centres. Hadžihasanović was put on notice that crimes were committed by one of his units in one detention centre in Bugojno. From that moment on, by his omission to adequately punish the perpetrators and to take specific preventive measures, he was held responsible for failing to prevent future crimes by that unit with respect to all detention centres in that zone. However, this did not put him “on notice” that crimes were also being committed in a detention centre located in another municipality.

⁴ The Trial Chamber reasoned that, if a commander exercising effective control over his subordinates has reason to know that crimes are about to be committed by his troops, his omission to act creates or enlarges a risk that such crimes will be committed; he thereby substantially contributes to the commission of those crimes. Reasoning such, a nexus between the omission to act and the crimes committed is presumed to exist; according to the Chamber, it is therefore not for the Prosecution to prove that nexus, but for the Accused to refute it.



With respect to the Orašac camp, Hadžihasanović was found guilty of failing to take necessary and reasonable measures to prevent cruel treatment of civilians, as well as the ritual beheading of one of them, Dragan Popović.

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