

Public Annex G

THE LAW OF COMMAND RESPONSIBILITY

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Finally, as noted above, a commander could, in principle, be held criminally responsible for failing in his duty to prevent and for failing to punish the same crime if indeed he has breached both of his duties in relation to that crime.²¹

11.2 Dereliction of duty

It has been pointed out above that superior responsibility requires proof of a gross and personal dereliction on the part of the supervisor, whereby he culpably and deliberately failed to carry out his duties to prevent or punish crimes committed by his subordinates.²² How this is determined in each case will be examined below.

11.2.1 General remarks—failure to adopt ‘necessary and reasonable’ measures

Superior responsibility depends on proof of a failure on the part of the superior to take ‘necessary and reasonable measures to prevent or punish the crimes of his subordinates’.²³ What is ‘necessary and reasonable’ in a specific case will depend a great deal on the circumstances of that case, and in particular on the extent of the commander’s *actual* and *proven* material ability to act to prevent or punish those crimes.²⁴

According to the *Strugar* Trial Chamber, factors relevant to the Chamber’s assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.²⁵

In all cases when superior responsibility charges are brought, measures relevant to assessing the criminal responsibility of the accused are limited to those which are ‘feasible in all the circumstances and are “within his power”’.²⁶ As the ICRC

²¹ See above, 11.1.1 Two distinct duties—to prevent and to punish crimes.

²² See, above, 4.4.4 Gravity of breach of duty and, below, 11.3 Seriousness of the breach of duty relevant to superior responsibility.

²³ See, e.g., *Čelebići* Appeal Judgment, par 226; *Krnjelac* Trial Judgment, par 95.

²⁴ See, e.g., *Blaškić* Trial Judgment, par 302; *Aleksouksi* Trial Judgment, 78; *Čelebići* Trial Judgment, pars 302, 394–5; *Strugar* Trial Judgment, par 378.

²⁵ *Strugar* Trial Judgment, par 378.

²⁶ *Krnjelac* Trial Judgment, par 95 (‘It must be shown that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. The

differently from one country to another. International law's general imprecision on that point may also be explained by the fact that commanders who are in the field are generally better placed to decide what measures are likely, in a given situation, to achieve the goal for which they are being adopted than would a court of law years or months after the events.⁵⁸

11.2.4.3 Evaluation in context

Determining whether in a particular case a superior has complied with his obligations to prevent and punish crimes is not an objective test drawn in the abstract. Instead, the tribunal will have to conduct a very concrete assessment of the situation of the commander and the means at its disposal at the time relevant to the charges, taking into account all relevant circumstances. As noted by the *Toyoda* Tribunal when discussing this matter, '[t]his is not a trial of a man for events that took place under calm and academic conditions—conditions were essentially, intensely and grimly practical'.⁵⁹ 'In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander,' the same Tribunal pointed out, 'consideration must be given to many factors. The theory is simple, its application is not.'⁶⁰

What measure or measures a superior should adopt in a particular context will be dictated primarily by the material powers which the superior had and in the circumstances that prevailed at the time.⁶¹ This means that before a superior may be found to have failed to adopt a particular measure, it must be established that he was in fact materially able to adopt it and that this measure was at least capable of contributing to the prevention or punishment of a particular crime. In *Hadžihasanović*, for instance, the Trial Chamber pointed out that it could not be concluded that a superior had failed to take a 'necessary and reasonable' measure when he failed to personally conduct an investigation of the matter as he had not been shown to have had the capacity either to conduct such an investigation or to influence an investigation that was being conducted at the time.⁶²

The extent of a superior's ability to adopt certain measures will, in turn, depend a great deal on the nature of his role and position as well as the means at his disposal at the time to respond to risk of crimes to which he has been alerted. Where a superior holds his position of authority over the perpetrator as a result of a legal appointment or election, i.e. that he does so *de jure*, the law relevant to his position will set out the framework within which he will be required to act.⁶³

⁵⁸ See, also, above, 11.2.3 'Reasonable'.

⁵⁹ See, e.g., *Toyoda* case, p 5001.

⁶⁰ *Ibid.*, p 5006.

⁶¹ See, e.g., *Strugar* Trial Judgment, par 378. See also, *Delić* Trial Judgment, Dissenting Opinion of Judge Moloto, par 27, concerning the nature of the inference that can be drawn from the fact that a superior did not take any measures.

⁶² See *Hadžihasanović* Trial Judgment, par 1061.

⁶³ See, e.g., *Halilović* Appeal Judgment, par 183. See also, Article 3(2)(b) of the Statute of the Special Tribunal for Lebanon which provides that a superior may be held criminally responsible