



EUROPEAN UNIVERSITY INSTITUTE
LAW DEPARTMENT

Working Group on International Criminal Law

Meeting of 5 March 2007

Introduction

The WG on International Criminal Law benefited, during its session of 5 March, from the presence and expertise of **Professor Paola Gaeta**, professor of International Law at the University of Florence, who kindly agreed to participate as a special guest.

Participants to the meeting were:

Prof. Pierre-Marie Dupuy, Prof. Francesco Francioni, Prof. Annalisa Ciampi, Noora Arajärvi, Silvia D'Ascoli, Ivona Josipovic, Ottavio Quirico, Axelle Reiter, Johannes Schauble (visiting student from the University of Freiburg, Germany), Mark Toufayan.

Prof. Gaeta introduced the topic of the meeting:

'Principles of Superior Responsibility in International Criminal Law'

and started her guest lecture by describing the main features of the doctrine of superior responsibility and the way it is regulated under the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).

The doctrine of command or superior responsibility¹ renders the superior liable for a failure to prevent or to punish the criminal acts of his/her subordinates. The superior is punished for a lack of control and supervision of his/her own subordinates, who are

¹ The term 'superior' is broader than 'command,' as it refers also to civilian superiors as well as to military ones; whereas the term 'command' seems limited to the military context. On the doctrine of superior responsibility, cf. for instance: M. Damaska, 'The Shadow Side of Command Responsibility', in *The American Journal of Comparative Law*, 49 (2001), pp.455-496.

the persons actually committing the crime(s). Prof. Gaeta observed that one of the problems at stake with regard to superior responsibility is whether it is a form of imputing responsibility to superiors for the crimes of the subordinates, therefore a form of *indirect liability* for the criminal acts of others; or a proper form of responsibility for lack of supervision/control imputable directly to superiors, therefore a sort of *direct liability* for omission.

Traditionally, commentators have mainly argued that the doctrine of superior responsibility establishes a form of vicarious or indirect responsibility of the superior, who is held accountable for the crimes committed by his/her subordinates. This interpretation seems to derive from the *Yamashita* case, the first judgment based on the superior responsibility doctrine.²

The ICTY and ICTR Statutes regulate superior responsibility respectively at Article 7.3 and Article 6.3, which state as follows:

‘... The fact that any of the acts referred to in articles ... of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he 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.’

Before the ICTY and the ICTR the requirements of superior responsibility are thus the following: - the existence of a superior-subordinate relationship; - the superior’s knowledge (or ‘having reason to know’) that the act was about to be or had been committed; - the superior’s failure to take all the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Prof. Gaeta presented an interesting overview of the ICTY case-law, starting from the first cases that dealt with superior responsibility (*Delalic et al.*, *Blaskic*)³ and then commenting more recent ones (the *Krnjelac* case or the *Halilovic* case, for instance)⁴ that show a certain evolution of the superior responsibility doctrine from *indirect liability* to *direct liability* of the superior.

² The trial against General Tomoyuki Yamashita of the Japanese Army. See for more details: Kai Ambos, ‘Superior Responsibility’, in CASSESE A., GAETA P., JONES J., *The Rome Statute of the International Criminal Court – A Commentary*, Oxford University Press, 2002, pp.825-828; B.D. Landrum, ‘The Yamashita War Crimes Trial: Command Responsibility Then and Now’, in *Military Law Review*, 149 (1995), pp.293 *et sequ.*.

³ *Prosecutor v. Delalic et al.*, Trial Judgement, Case No.IT-96-21-T, 16 November 1998; *Prosecutor v. Blaskic*, Trial Judgement, Case No.IT-95-14-T, 3 March 2000.

⁴ *Prosecutor v. Krnjelac*, Trial Judgement, Case No.IT-97-25-T, 15 March 2002; *Prosecutor v. Halilovic*, Trial Judgement, Case No.IT-01-48-T, 16 November 2005.

Another problematic aspect of the issue at hand is certainly the one related to the subjective element and status of mind of superiors: the *mens rea*.

Clearly, in cases where the commander 'wilfully' disregarded relevant information at his disposal (on the commission of crimes by subordinates) and decided not act, the superior is considered as a wilful agent and certainly acts with *mens rea*. Differently, when superior responsibility is considered as a form of responsibility for omission, then the problem of ascertaining the commander's state of mind is at stake.

According to the interpretation given by Chambers of the ICTY, with regard to the subjective element, the superior must either have actual knowledge that his/her subordinates were committing (or about to commit) crimes, or possess information sufficient to alert him/her of the risk of such offences.

These requirements become disputed as to how actual knowledge can be proved. The ICTY rejected a presumption of knowledge by permitting that such knowledge be proved by means of circumstantial evidence.

Prof. Gaeta subsequently illustrated the relevant provisions on superior responsibility contained in the Rome Statute of the International Criminal Court (ICC), in particular Article 28, which seems to return to a form of 'vicarious/imputed' responsibility for superiors. Moreover, this provision introduces a distinction between military (and *de facto* military) commanders and other non-military or civilian superiors. While the former would be held responsible for knowledge or negligence (the 'should have known' standard), the latter would be liable for knowledge or for having 'consciously disregarded' information. The *mens rea* requirement is therefore less stringent for military commanders. The double standard introduced by Article 28 is criticisable and raises a number of questions.

The lecture by Prof. Gaeta was followed by an interesting and animated discussion about all the issues at stake, in particular the one of *mens rea*.

Ivona Josipovic (EUI researcher, LLM programme), who is currently working on the topic of superior responsibility, presented her views in a substantial presentation focused specifically on the issue of the *subjective element*.

An interesting discussion followed Ivona's presentation, and different points were raised and debated, such as the difference between the 'should have known' and the

‘had reasons to know’ standards; the problem of defining the duties of a commander and the exact standards of his due diligence, and so on.

Date of the next meeting

It was agreed that the WG-ICL would meet again in the month of March for discussing the recent judgement delivered on 27 February 2007 by the International Court of Justice in the case of Bosnia-Herzegovina v. Serbia and Montenegro.

Date and place to be decided, further details will shortly be posted on the website of the ICL working group.

The meeting was closed at 17,00.

General List of Participants (in alphabetical order):

Noora Arajärvi; Christine Bakker; Prof. Bruce Broomhall; Prof. Annalisa Ciampi; Prof. Luigi Condorelli; Silvia D’Ascoli; Francesca De Vittor; Sara Dezalay; Prof. Pierre-Marie Dupuy; Valentina Falco; Prof. Francesco Francioni; Prof. Micaela Frulli; Prof. Paola Gaeta; Elsa Gopala Krishnan; Amna Guellali; Suzan Huttemann; Dov Jacobs; Ivona Josipovic; Patricia Pinto Soares; Dr. Ottavio Quirico; Axelle Reiter; Prof. Luisa Vierucci; Cristina Villarino Villa; Prof. Salvatore Zappalà.