COMMAND RESPONSIBILITY

This article discusses the issue of criminal liability of commanding officer for the war crimes and crimes against humanity. Differences are noted in assessing the responsibility in connection with the „vertical chain of command“. Special part of the text is dedicated to responsibility of a commanding officer for omission to exercise his/her authorities arising from the duty to command the subordinates, with special attention to cases when during a war or an armed conflict a crime by his/her subordinates has been only planed or actually committed. It is recognized that such crimes may be committed by acting and by failing to act; therefore they fall within the mixed category of crimes. The article elaborates on necessary elements for determining the criminal liability of a commanding officer in the light of his/her guaranteeing responsibility in relation to the opposite side in a war or armed conflict.

Conflict. Fight. War. As brutal as it may sound, these notions may almost be equalized with the very existence of human civilization. Movie fans will recall the impressive opening sequences of the Stanley Kubrick's „2001: A Space Odyssey“ in which the first primates, in the wake of birth of the first conscious thoughts, direct those thoughts to combat, fight, and metaphorically even to war, by throwing a bone – their only weapon at the time – into the air and by actively engaging in a conflict with unknown object arriving from the skies.

Not wishing to analyze at this moment the question of aggressive or defensive war; nor justified vs. unjustified one, it has to be accented however that the international community has, probably based on the remark stated in the opening sentence and within the overall evolution of the society, been developing general frameworks within which a conflict, combat or a war may be deemed as justified and when such justification can not be found. A separate issue within this is the question of allowability of the actions by individuals – military persons as perpetrators and direct actors in a conflict – and related question of responsibilities of those who are controlling such a „war machine“, who are directing it, or simply, those in command.

The first traces of normative regulation of behavior of individuals in war campaigns can be traced back to 1493 when Charles VII of France promulgated certain principles of

1 Judge of the Supreme Court of the Republic of Croatia
warfare which also regulated responsibility of commanding officers. According to his Ordinances, all members of his troops must act in compliance with these principles, and any offender must be prosecuted by an officer in command. If a commanding officer fails to do so, according to Charles VII of France, he shall be held responsible for the offence.2

Recognizing the war as a part of life, contemporary international community has set to draft a number of international treaties which regulate obligatory behavior during a war or armed conflict and denominate certain behavior as unallowable. This activity on comprehensive and complete codification of procedures which would either form an obligation to parties in conflict or would regulate impermissible behavior is, of course, far from being completed even today. It is a continuing activity parallel to the evolution of the society as a whole and is mirrored either in development of new international treaties that states are acceding to, or in declarations and resolutions issued by international conferences. The latter acts are not strictly binding on the states participating in such conferences, but still, they should affect the internal legislative procedures within the states.

There are numerous acts of international humanitarian law regulating certain types of conduct in war,3 prohibiting or restricting the use of certain means of warfare,4 protecting persons during the war,5 protecting certain objects during the war, and especially those

3 Declaration on the Law of the Sea (the Paris Declaration); Convention on Laws and Customs of War on Land (Hague Convention IV. of 1907); Convention on Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention VI. of 1907); Convention on Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague Convention VI. of 1907); Convention on Conversion of Merchant Ships into War-Ships (Hague Convention VII. of 1907); Convention on Bombardment by Naval Forces in Time of War (Hague Convention IX. of 1907); Convention on Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague Convention XI. of 1907); Convention on Rights and Duties of Neutral Powers in Naval War (Hague Convention XIII. of 1907); Protocol on Submarine Warfare (the London Protocol).
5 Geneva Convention for Amelioration of the Condition of the Wounded and Sick in armed Forces in the Field of August 12, 1949. (Geneva Convention I.); Geneva Convention on Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II.); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III.); Geneva Convention Relative to the Protection of
regulating the responsibility for violations of the international humanitarian law.\textsuperscript{7} The time frame within which all these acts have emerged may be marked by the St. Petersburg Declaration of 1868 on renouncing the use of certain projectiles in time of war, through the Hague Conventions of 1907 and Geneva Conventions of 1949 with Protocols, to the most recent Rome Statute of the International Criminal Court – which was signed and ratified by the Republic of Croatia. The Republic of Croatia has also adopted a special internal legislative act – the Law on Implementation of the ICC Statute and Prosecution of International War Crimes and Crimes Against Humanity.

Several international tribunals have been adjudicating on criminal liability of individuals for their conduct during the armed conflicts which was contrary to the international law and their decisions may represent an object of a separate discussion. However, regulating and prosecuting unallowed behavior of individuals during armed conflicts in the context of international humanitarian law should be seen as a duty of every national legislation and judiciary in the widest sense of these terms.

In its criminal legislation the Republic of Croatia, be it as a part of the former federal state or today, has had, and today has a well defined catalogue of such criminal acts and a system of criminal responsibility of persons who would, through their conduct during the war,\textsuperscript{8} armed conflict,\textsuperscript{9} or occupation\textsuperscript{10} and contrary to the rules f international law lead to the occurrence of the prohibited consequences. These were categorized by the legislator into several criminal acts against the international law and against the humanity. By this I refer to

\textsuperscript{6} Convention for the Protection of Cultural Property in the event of Armed Conflict of May 14, 1954; Convention on the Prohibition of Use of Military or Any Other Hostile use of Environmental Modification Techniques.

\textsuperscript{7} The UN General Assembly Resolution on Confirmation of Principles of International Law Recognized in the Statute of Nuremberg Tribunal; Convention on Prevention and Punishment of the Crime of Genocide; Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the ICTY Statute; the Rome Statute of the ICC.

\textsuperscript{8} Defined as mutual conflict of at least two states characterized with the use of armed force and with disruption of friendly relations.

\textsuperscript{9} - with international character – hostile conduct of one country towards the other by use of armed force but without the declaration of war or suspension of mutual relations;

- without the international element – an armed conflict in the territory of one state between its armed forces and dissident armed forces or other organized armed groups which, under a responsible command, exercise control over a part of the territory which enables them to lead sustained and concentrated military operations.

\textsuperscript{10} Occupation and seizure of a whole state or a part of it by armed forces and establishment of the system of civil authorities (along with the military control), but without obtaining sovereign rights over the occupied territory.
criminal act of genocide – Art. 156.; aggressive war – Art. 157.; war crimes against the civilians – Art 158.; war crimes against the wounded and sick – Art. 159.; war crimes against the prisoners of war – Art. 160; unlawful killing and wounding of the enemy – Art. 161.; unlawful taking of belongings of those killed or wounded on the battlefield – Art. 162; use of forbidden means of combat – Art. 163.; injury of an intermediary – Art. 164; brutal treatment of wounded, sick and prisoners of war – Art. 165.; unjustified delay of repatriation of prisoners of war – Art. 166.; destruction of cultural objects or facilities containing cultural objects – Art. 167. This list of criminal offenses has existed in criminal legislation of the former state to which the Republic of Croatia was a federal part as well.\textsuperscript{11}

If the composition of the abstract norm of these criminal acts is closely examined it can be seen that most of these acts can be committed either by active conduct of the perpetrator, i.e. by a direct activity which directly leads to the sanctioned consequence, or by issuing an order to undertake unlawful action to those who have to act directly in order to fulfill the elements of criminal culpability.\textsuperscript{12} Since all these criminal acts have a common element in protecting, from the position of international humanitarian law, the human person as such with his cultural, economic and other heritage in times of war – regardless of the fact whether he/she is a member of the other side in the conflict – for the purposes of this article I will hereinafter use the term war-humanitarian crimes for these crimes.

Since in the territory of the Republic of Croatia during the past 70 years alone – or one life span – two major and bloody wars were fought (WW 2 and the Homeland War), Croatian judiciary was unavoidably faced, and still is, with the need to adjudicate on criminal responsibility of individuals for their conduct during these wars, conducts that were

\textsuperscript{11} Art. 156 KZ = art. 119 OKZ RH; art. 157 KZ = art. 131 OKZ RH; art. 158 KZ = art. 120 OKZ RH; art. 159 KZ = art. 121 OKZ RH; art. 160 KZ = art. 122 OKZ RH; art. 161 KZ = art. 124 OKZ RH; art. 162 KZ = art. 125 OKZ RH; art. 163 KZ = art. 126 OKZ RH; art. 164 KZ = art. 127 OKZ RH; art. 165 KZ = art. 128 OKZ RH; art. 166 KZ = art. 129 OKZ RH; art. 167 KZ = art. 130 OKZ RH. Where KZ is the Criminal Code of 1997.; and OKZ HR is the Basic Criminal Code of the Republic of Croatia of 1991 as taken over from the former SFR Yugoslavia.

\textsuperscript{12} Exeptions to this represent only the provisions of art. 164; 165; and 167 of the Criminal Code, where the issuance of the superior order to act unlawfully is not explicitly sanctioned; and the provision of art. 161 of the Criminal Code where command responsibility is limited only to an order „there shall be no surviving members of the enemy soldiers in this battle“ or where combat is conducted with the same objective.
representing violation of the principles of international law and have resulted in consequences forbidden by the law.\textsuperscript{13}

While on one hand the court practice had no serious difficulties in deciding on the liability of immediate perpetrators of crimes against international law (apart from difficulties connected with establishment of facts) in which consequences sanctioned by domestic law as well have occurred, a far more serious problem was encountered in determining the responsibility of persons charged with ordering such forbidden conduct or those who have failed to exercise actions within their commanding authorities to prevent the immediate perpetrators from committing any of the war-humanitarian crimes.

In connection with, conditionally speaking, the „direct perpetrators“, it can be noted that their most common defense was that they were acting under the direct orders issued by their superiors. However, although the „war machinery“ is structured on a strict hierarchy and on a duty to obey the orders, in response to such defenses, and apart from the fundamental legal logics, it must be said that even the criminal legislation has explicitly provided for a possibility to disobey the superior order that would represent an order to subordinate to commit a criminal act. Therefore it s not the „blind obeying“ that is requested from a subordinate, rather a subordinate has a right, even a duty, to question the permissibility of an order by which he is ordered to commit a crime. By disobeying such an order the „immediate perpetrator“ would not even enter the sphere of criminal law.

On the other hand, a person that would issue an order by which a subordinate is ordered to perform an action with legally forbidden consequences during a war or an armed conflict, and which actions are at the same time against the rules of international law, would most certainly enter the area of criminal liability.\textsuperscript{14}

\textsuperscript{13} In applying these legal norms to particular perpetrators of these crimes the provisions of criminal legislation in effect at the time of committal was applied, or if subsequently changed, the later provision if it was favorable for the perpetrator – in accordance with art. 3. of the Criminal Code.

\textsuperscript{14} Theoretically, and with possible numerous objections, the responsibility of a superior may be structured in four possible forms, although all four could open space for certain objections of theoretical nature: a) indirect perpetrating (which questions the criminal status of the immediate perpetrator who is entitled to question the order which, if carried out, would represent a crime); b) instigating (this modality reduces superior's role down to accomplice with a minor role in committing a crime); c) accomplice (which leads to a question of a joint decision to commit a crime); and d) parallel committal of a crime (opens a question of their independent acting, without the awareness of each other and without a decision on joint action).
The legislative solution listing forbidden conduct in relation to the war-humanitarian criminal acts during a war, armed conflict or occupation, establishes liability in two parallel and even separate tracks. Regardless of its consistence, the legislator in case of such acts sanctions both the responsibility for the order issued and the responsibility for actually obeying such order and committing a crime. In such a legislative structure each and every person-perpetrator becomes directly liable for such crimes.\textsuperscript{15}

As was mentioned earlier, the court practice had no major problems with determining the liability of persons who were actively involved and who have through such actions fulfilled the criminal qualifications of the war and humanitarian crimes. On the other hand, in determining the liability of commanding structures\textsuperscript{16} of the „war machinery“; the courts were facing numerous problems. There were very few orders issued by commanding officers either in written form, or expressed in some unequivocal verbal form, which could then be proven by material or personal evidence, and which orders would contain an order to subordinates to behave in a way that would result in fulfillment of legally forbidden consequences also forbidden by international law. There were many more cases of conduct of subordinates or military units that could have been qualified as war-humanitarian crimes without any trace of an explicit written or verbal order issued by the commanding officer. And it is exactly this part of possible liability of a commanding officer, i.e. his omission to act in relation to his subordinates in cases when they were planning or committing some action that could be qualified as war-humanitarian crime, that is the object of this paper and that represents a question that I will try to find an optimal answer to within the frameworks of the applicable law.

**Responsibility of a Commanding Officer for War Crimes and Crimes Against Humanity**

When speaking of the responsibility of a commanding officer for war-humanitarian crimes, or shorter - command responsibility, there exists a common misunderstanding that this responsibility represents an objective responsibility arising from the very duty to command which he or she is entrusted with. Such a thesis is notoriously ungrounded, since the criminal


\textsuperscript{16} Every person in a position to which authority to command over subordinates is imminent may be considered as a commanding officer.
liability of commanding officer for war-humanitarian crimes, same as criminal liability of any other person for any other crime, must be based on conscious and intellectual component of the perpetrator. Having in mind the fundamental legal standards in determining the possible criminal liability of a person, in relation to the command responsibility for war-humanitarian crimes I would lean to those authors who argue that the command responsibility always represents an independent form of committing a crime and that it always must be based on *dolus*.

**Vertical Responsibility**

The hierarchy within a military force and existence of the commanding structure represents one of the differentiating characteristics necessary for implementation of the rules of international law onto a military force. Since the organization of the military in every state is based on a strict hierarchical structure and is founded on principles of subordination, i.e. subordinates are obliged to obey the orders, a question may be asked to what level within such a vertical hierarchy can command responsibility be traced and determined?

It has already been noted that even within the military organization the obligation of blind obeying does not exist. Namely, subordinates have the right to refuse to carry out an order if its fulfillment would represent a crime. By the same token, the mere direct performance of the activity that was ordered and by which the elements of a war-humanitarian criminal act have been fulfilled shall not be deemed allowed and justified just because it was ordered by the superior.

As was already stated, even within the chain-of-command structure the modality of independent committing of a crime must be taken into account. Therefore even the transmission of such order "from top to the bottom" – or down to those who have actually carried it out – includes the criminal responsibility of all persons participating in such a

---

17 Article 1. of the Rulebook on Laws and Customs of War on Land, which forms an appendix to the Convention on Laws and Customs of War on Land (Hague Convention IV. of 1907) regulates that the rights and duties of laws on war shall be applied to formations fulfilling the following requirements:

1. that there exists a person responsible for the subordinates, i.e. the commanding officer;
2. that they have a permanent insignia which can be recognized from distance;
3. that they openly carry weapon;
4. that in their military operations they abide to laws and customs of war.
"chain-of-command". Namely, in relation to the persons within such a chain-of-command the criteria of their right, and their duty, to question orders issued to them by their superiors must be applied, followed by their duty not to "pass" such order further if its fulfillment would result in an act of a war crime. Criminal liability of persons participating in a chain-of-command can be found even if such a chain would be interrupted by some occurrence out of their control that would prevent the performing of an action that would otherwise result in forbidden consequences, but contrary to the will of those participating in transmission of such an order.

**Command Responsibility Based on Omission to Act**

The problems in court practice arise in determining the criminal liability of a commanding officer superior to an individual or a military unit when they – the subordinates – undertake actions during a war or an armed conflict which are contrary to international law and when such actions result in consequences forbidden by law, but a strict order issued by a commanding officer does not exist.

It must be stated in the introduction that consequences sanctioned by the legislator in the case of war-humanitarian criminal acts are also forbidden by some other provisions of criminal law. The element differentiating the war-humanitarian crimes can be found in the circumstance that these consequences are the result of individuals' actions that are contrary to the international law.

Further specific of these crimes is a circumstance that they were committed during a war, armed conflict or occupation. But this feature does not merely refer to a time-frame in

18 On responsibility of a person who has participated in the chain-of-command the Supreme Court of the Republic of Croatia has found the following: "A particular accomplice therefore does not have to fulfill all of the elements of a criminal act by his/her action if he/she has objectively contributed to its committal and if was acting based on a joint agreement. And this is exactly the situation in case of the accused M. N. who has, as a Deputy Commander of the Naval Military Zone Split, authorized the support of military ships and aircraft, i.e. has approved their use, although he knew that they shall be firing upon civilian targets. Therefore, he is an accomplice in a war crime against the civilian population."

19 The Constitutional Court of the Republic of Croatia, in its decision no. U-III-386/98 of 05. 07. 2000., has clearly stated its position that a necessary precondition for determining liability for these criminal acts is a clear statement that an act by individual represented a violation of a particular provision of the international law. Such a provision must be contained in the factual description of a crime, and the quoted decision reads as follows: "Since a war crime against the civilian population from article 120. of the OKZ RH may be committed only by violation of the rules of international law, in a verdict by which the plaintiff has been found guilty of this crime the court must precisely state which rules of the international law were violated by the plaintiff."
which the act that has resulted in fulfillment of elements of such crime was performed. It is
significant for determination of a specific intent of perpetrator at the moment of committal of
a particular war-humanitarian criminal act. Notably, the very action of an individual that is
contrary to provisions of the international law must have its ratio in proceedings that are
normally directed towards achieving goals for which the war, armed conflict or occupation is
being led for.\textsuperscript{20}

In determining the liability of an individual for such criminal acts, and if reading only
the text of this legal norm without linking it to the general part of criminal legislation, one
could easily make an error and interpret these acts purely through the activity of an individual.
But the legislator envisages for these crimes the responsibility of the „one who commands“ or
the „one who commits“ forbidden actions. On the first glance, one could conclude that these
represent clear cases of delicta commissiva.

However, having in mind the norms of international law mentioned in the introduction
to this chapter, which regulate a set of obligations on the part of an individual who is
physically performing certain activities during a war or armed conflict, based on a strictly
hierarchical relation they also regulate a set of obligations on the part of a person who is in
command – a person superior to the individuals or military units participating in a war or
armed conflict. It is exactly this segment of possible determination of liability, and partly the
very norms of international law themselves,\textsuperscript{21} that cast a different light on possible modalities
of committal of these crimes – primarily in relation to the person of a commanding officer.

The fundamental right of a superior to command and hence to direct the activities of a
„war machinery“, and partly the norms of international law, entrust a commanding officer
with certain set of obligations aimed at protection of the opposite side – both the civilians and
property as well as the enemy soldiers in certain circumstances – giving a person in command

\textsuperscript{20} The issue of looting the belongings of civilian population, which represents one modality of a war crime
against the civilian population, may be problematized within this. Namely, not every action that would result in
looting – forbidden as such by the international law – should be qualified as a war crime against the civilian
population. In order to qualify for this crime, a court must establish a specific form of intent of the individual
who is performing the activities of looting. This intent should not only be expressed in a desire to acquire an
unlawful material gain, but must contain some additional elements as well – i.e. that such individual is looting
civilian population which is in an inferior position, that such actions are undertaken in the times of war, armed
conflict or occupation, and within a very goal for which such a war, armed conflict or occupation is being
conducted by the military force to which an individual is a member. Therefore, establishment of a special form
of intent on the part of the accused is being sought for these crimes.

\textsuperscript{21} Art. 86. and 87 of the Additional Protocol to Geneva Conventions of August 12, 1949 on Protection of
Victims of International Armed Conflicts (Protocol I, June 8, 1977).
certain guaranteeing roles. In this light such criminal acts in relation to their committal by commanding officers, i.e. the person „who orders”, receive a character of mixed crime and should be seen as *delicta commissiva per ommisionem*.

These responsibilities of commanding officers are regulated quite clearly and unambiguously in provisions of arts. 86. and 87. of the Additional Protocol to Geneva Convention of 1947 on Protection of Victims of International Armed Conflicts (Protocol I, June 8, 1977). These norms, as *blankette* norms, may and should be incorporated in an indictment whenever possible, in order to enable the contradictory review of these parts of indictment as well. However, it must be noted that the scope of implementation of the Protocol I is limited to international conflicts only and does not apply to conflicts that have no international character.

But inexistence of such explicit provisions on responsibility of a commanding officer for actions undertaken by his/her subordinates does not mean that there is no such responsibility of a commanding officer in non-international conflicts. Command responsibility in such cases should be viewed through the fundamental *ratio* of the commanding function, and in connection with that through some general principles of the criminal legislation applicable to the modalities of performance of a crime, i.e. it can be committed either by acting or by failing to act. And it is exactly in this light that the responsibility of a commanding officer should be viewed through the prism of him/her as guarantor towards the opposite side – the side he/she is attacking.

**Guaranteeing Responsibility of a Commanding Officer**

The provision of article 25. of the Criminal Code\(^{22}\) should be consulted for determining the responsibility of a commanding officer - already defined as a person who performs duty characterized with the authority to command\(^{23}\) his subordinates - for actions

---

\(^{22}\) Article 25 of the Criminal Code:

(1) A criminal offense can be committed by an act or an omission to act.
(2) A criminal offense is committed by omission when the perpetrator, who is legally obligated to avert the consequence of a criminal offense defined by law, fails to do so, and such failure to act is tantamount in its effect and significance to the perpetration of such an offense by an act.
(3) The punishment of a perpetrator who commits a criminal offense by omission can be mitigated, except in the case of criminal offense which can be committed only by failure to act.

\(^{23}\) Commanding can be understood as a right and a duty to issue verbal and written orders to a particular person or group of persons for performing or not performing certain activities by which goals of the service – regulated by law or some other regulation - are achieved.
undertaken by his/her subordinates and which actions may be qualified as war-humanitarian criminal offenses. But in practice, since court proceedings being conducted in the Republic of Croatia, or that could be conducted in near future, are proceedings relating to the events from the Homeland War or the 2. World War, the most favorable law that can be applied is the General Criminal Law of the Republic of Croatia (OKZ RH) which similarly regulates the modes of committal of these acts.  

It can be noted that in both norms there exists a possibility of committing a criminal offense by omission to act where perpetrator was obliged to act, with the provision of the Criminal Code normatively requiring what the court practice has previously already determined as necessary, i.e. that such failure to act may be equalized in effect and significance with committing the same offense by acting.

And it is exactly in this domain that the answers to the possible liability of a commanding officer for actions of his subordinates against the war-humanitarian principles should be searched for.

In general, when speaking of criminal liability for the so-called guaranteeing criminal offenses, some general requirements that need to be fulfilled in order to enable such form of criminal responsibility must be analyzed. These can be categorized in five categories, of which all five must be undoubtedly established in order to enable further deliberations on responsibility of a commanding officer for war-humanitarian crimes committed by his/her subordinates. These are the following:

- the existence of a person with guaranteeing responsibilities, i.e. a person who has a duty to prevent the forbidden consequences from occurring;
- awareness of the guaranteeing person of the circumstances on which his/her guaranteeing responsibilities are based on;
- the substance of omission to prevent the consequences described in war-humanitarian crimes;
- the very consequence that is included in a structure of a war-humanitarian crime;

---

(1) A criminal offense can be committed by an act or an omission to act.
(2) A criminal offense can be committed by an omission to act only if perpetrator fails to act where he had a duty to act.
- the clause of equal value of acting compared to failing to act, i.e. the non-right materialized by the guarantor through his failure to act must have an equal value as the acting would have had within the same war-humanitarian criminal offense.

1. The existence of a person with guaranteeing responsibilities, i.e. a person who has a duty to prevent the forbidden consequences from occurring

   It has already been stated that the existence of a person in command is a prerequisite for certain military force to be deemed as army in regards to its rights and duties in accordance with the international law. Since in the widest sense of that word the whole hierarchical pyramid of the chain-of-command can be deemed as „soldiers“ – ranging from the highest ranking chief-in-command down to a private – the rights and duties arising from the international law can be applied to all of them. Of course, within such a hierarchically structured organization there is a well established system of who issues executive orders, who transmits them and who is bound to carry them through. Based on such distribution of roles in a state of war or armed conflict our criminal legislation also differentiates responsibilities of immediate perpetrators of war-humanitarian criminal offenses from responsibilities of those who issue or transmit such orders, without the immediate, physical connection with such activity. As mentioned earlier, there were very few orders found in the court practice that contain an explicit order to subordinates to act in a manner that would fulfill the elements of war-humanitarian crimes, and that would, in turn, point to the existence of the responsibility of a commanding officer who has ordered such unlawful action.

   There is by far larger number of war-humanitarian criminal offenses committed by immediate perpetrators for which no explicit order can be found. And it is exactly for these crimes that a question of responsibility of a commanding officer for acts committed by his/her subordinates may be opened, along with a question whether such a commanding officer can be held criminally liable for these acts. I am of an opinion that it is possible to open this question of command responsibility in such cases as well.

   Namely, the criminal legislation of the Republic of Croatia, on top of providing for the possibility of criminal responsibility of an individual in cases of failure to act, also forms a part of international legal order. Having in mind the distribution of tasks and duties within a „war machinery“, it is a duty of commanding officers to prevent their subordinated
individuals and units from acting in a way that would lead to conduct that could qualify as war-humanitarian crime, and they should, in relation to the enemy state, army and civilians, act as guarantors of their fundamental rights.25

A special problem in determining the existence of a guaranteeing person in relation to war-humanitarian crimes represents the issue of parallel lines of command. In such cases there are persons in one vertical chain-of-command that issue executive orders that are in fact being obeyed – and possibly actions performed in accordance with such orders qualify for war-humanitarian crimes – and there are persons in another vertical chain-of-command to whom the immediate perpetrators are formally subordinated and who should be the ones preventing them from unallowable activities.

In such a situation I find that the realistic answer would entail determination of responsibility of a person that has actually acted and the person who has issued such an order – a person who is structured in some parallel, non-institutional chain-of-command but has a factual power to command, as well as the person who is charged with (formally) commanding the subordinates within the institutional system. The liability of the latter one, who is (only) a formal commander to the immediate perpetrator, is possible only if all other prerequisites for his liability are met, such as the factual power to direct the activities of his subordinates through orders, availability of the efficient means to command, and awareness of the fact that activities by which war-humanitarian crimes were committed were performed. Inexistence of any of these circumstances would exculpate such a person from the liability for war-humanitarian criminal offense.

Therefore, in determining the content of the failure to act by a commanding officer – as a guarantor of fundamental human rights of the members of the enemy – it is necessary to determine the scope of his actual ability to prevent the materialization of forbidden consequences by issuing orders. For such determination it is necessary to primarily establish that it is a person who, on top of his/her formal duty and right to command, also has

25 The Supreme Court of the Republic of Croatia, in its decision no. I Kž-743/03 of October 23, 2003, states the following on the same matter: „The guarantors of protection of civilian persons, when they find themselves in an inferior position during a war or armed conflict – be it in protection of their physical integrity or their property – according to these international standards are the commanding officers. They must control their military units operating in the area where these civilians live – what was concretely established in the case of the plaintiff. His function of a commanding officer is not exhausted only in relation to the military personnel under his command, rather the international law enlarges it to civilian persons in the territory where units under his command operate as well.”
possibilities and means to exercise this right and duty in reality. Therefore his function which includes the right to command must be efficiently enforceable in practice. If it is not such – and war-humanitarian crime committed has been ordered through a parallel chain-of-command – the passivity of such a commanding officer should not enter the qualifications of a war-humanitarian crime, but possibly some other criminal offense.

2. **Awareness of the guaranteeing person of the circumstances on which his/her guaranteeing responsibilities are based on**

   The previously mentioned provisions of international law to which the Republic of Croatia has acceded either directly or by taking over international obligations of the former state, form certain obligations on the part of the authorities and the citizen of the Republic of Croatia even in the part regulated through numerous conventions of the international humanitarian law.

   These conventions represent the attempt made by the international community to regulate (and/or limit) the conduct that shall be deemed allowable or not in a situation of war, armed conflict or occupation. These limitations are necessary from the humanitarian aspect. Namely, wars and armed conflicts are always motivated by attaining certain recognizable goal – be it in case of an aggressive or a defense war. In reaching these goals, as history teaches us, the parties at war were often not above the conduct that was completely negating human and cultural achievements of the opposite side, set to destroy not only enemy's armed forces, but also civilian population, economy, cultural objects and anything that could have been linked to the opposite side in war. This was the reason for the international community to regulate and codify some minimal norms of conduct by opposing parties in the situation of a war or armed conflict, all in order to protect at least some level of humanity in warfare and avoid inflicting of unnecessary suffering, humiliation or destruction of historical, economical and cultural substance of the other party.

   Following such logics the norms of international law are excluding the principle „objective justifies means“ and provide for numerous limitations in conduct of military forces towards the opposing forces, towards the civilian population which is inferior to them, or towards the prisoners of war.
These limitations must inevitably be connected with the fact that a war, an armed conflict or occupation are conducted primarily by the armed forces which, as already stated, operate in a strictly hierarchical system of subordination. Namely, this relation of subordination within an armed force that is engaged in a war or an armed conflict represents one of the fundamental requirements for an armed force to be even considered as such in the sense of rights and duties arising from the international law. In contrary, they would be viewed as disdendent and rogue groups of individuals who are acting out of any organizationally structured authority, and with goals that are not imminent to any state – member of the international community.

Since such a „war machine“ – organized on a hierarchical system of operation – is in attaining specific goals of war or armed conflict subjected to certain limitations in its conduct towards the opposite side by the rules of international law, it is evident that such rules can be violated primarily by the immediate executors of warfare assignments – the soldiers. And while in case of soldiers this requirement regarding the existence of the awareness of the fact that particular conduct is contrary to the rules of international law is not necessary – rather the common awareness that such conduct is unlawful suffices\(^{26}\) - in case of commanding structures of the military hierarchy it is necessary to establish the existence of their awareness of their guaranteeing role.

This form of their consciousness can be determined by their institutional position which in any organized army includes the familiarity with the provisions of the international humanitarian law, as well as by their awareness of the scope of their commanding rights and duties – all in connection with the common awareness of unlawfulness of particular conduct.

3. The substance of omission to prevent the consequences described in war-humanitarian criminal offenses

\(^{26}\) On this the Supreme Court of the Republic of Croatia in its decision no. I Kž-247/01 of September 4, 2001 states the following:

„The circumstance that the act in question represents violation of the rules of international law does not have to be included in perpetrators intent, i.e. by his awareness and knowledge that by acting in particular way he is breaching the international law, for in such a case this act could be committed only by individuals with a good knowledge of international law – what was obviously not the intention of the legislator. On the contrary, for existence of the criminal offense described in article 120. of the OKZ RH it is needed only that the behavior of the perpetrator objectively represents the breach of international law, namely that objective precondition for culpability exists by which a special character of this criminal offense is being materialized, i.e. that the act is considered as unlawful in the sense of international law as well, which is all objectively beyond any doubt in this case.“
The substance of omission may be in a form of not issuing orders for correct and legally permitted use of military forces under one's command in order to prevent or avoid the committal of a war-humanitarian crime that was not yet committed, as well as in a form of not exercising commanding functions such as sanctioning or initiating legal proceedings against persons who have committed such offense.

- **omission to act when the war-humanitarian criminal offense has not yet been committed**

Criminal responsibility of a commanding officer for not issuing orders for correct and legally permitted use of military force in order to prevent the committal of a war-humanitarian crime may be considered only if commanding officer could have reasonably concluded from all circumstances that have existed prior to committal of such a crime that his subordinates are about to commit it. His criminal responsibility – as a guarantor of permissible and legal use of the „war machine“ against the opposite side – would exist if he knew of future activities of his subordinates by which elements of certain war-humanitarian crime have subsequently been fulfilled, and he failed to prevent such activity by his orders.

Within this there is a special issue of command responsibility in situations where, based on the circumstances, a commanding officer could have known of the future crime, but has not consumed his duty to issue orders which would prevent it. I am of an opinion that such responsibility of a commanding officer could exist, but this form of responsibility is connected with severe difficulties in proving it. Namely, as was already mentioned, such a liability must be based on *dolus*, therefore this form of liability should be determined on objective criteria applicable to any average person. In such a case it should be established that the commanding officer, based on all realistic circumstances within the unit under his command, could have known that his subordinates are about to commit a war-humanitarian criminal offense and he – although aware of this fact - is not exercising his authority and duty to prevent it by issuing orders, thus manifesting his consent with the subsequent conduct of his subordinates.
- omission to sanction subordinates when war-humanitarian crime has been committed

Responsibility of a commanding officer as perpetrator of a crime in cases when his omission consists of failure to sanction impermissible actions of his subordinates by which they are fulfilling the qualifications of war-humanitarian crimes represents a special problem.

As mentioned before, each and every military operation, or armed conflict, in order to fall under the rules of the international law, must have in its ratio a particular objective. Every officer commanding a military force is directing his commands towards attaining a particular goal. For reaching this goal commanding officers are ordering units under their command to proceed in certain ways within the territory of their operational engagement. But the totality of events in such a territory usually does not form a mere sum of commander's orders, rather there are always a number of activities performed by his subordinates independently. These activities are often undertaken under the motto „cause justifies means“ within the overall objective of military engagement. Members of military units, individual soldiers, in an attempt to attain the overall objective for which their unit was engaged are also undertaking actions that were not explicitly envisaged in formal orders. When in performing such actions they enter the domain of committal of a war-humanitarian crime, and their commanding officer – although aware of such conduct - does nothing, he is actually broadening his sphere of responsibility by tolerating such behavior of his subordinates.

It is exactly in this segment that I find the criminal liability of a commanding officer possible, i.e. in omission to prosecute the perpetrator of unallowed actions, which represents the essence of an active commanding duty. Notably, in war situations a duty of a commanding officer is to prevent the forbidden conduct as well. This prevention may be effectuated in relation to the activities that have yet not been undertaken, but also in relation to an event that has already occurred – it is a duty of a commanding officer to explicitly state his position regarding the unallowed conduct by ordering sanctioning or prosecuting the perpetrator.\footnote{On this the Supreme Court of the Republic of Croatia, in its decision I Kž-743/03 of October 23, 2003, states the following: „Failure to sanction actions of his subordinates, which they were performing for fulfilling the goal for which the „Krajina Army“ was formed in the first place, and which were against the rules of international law, and have led to consequences such as death, grave injuries, destruction of property and similar, and tolerating such behavior, represents in fact the broadening of the orders issued in relation to such actions to persons who have not participated in similar activities until then as well. The fact that other persons – immediate performers of activities qualified under the article 120. OKZ RH – have understood this tolerance as an addition to or an}
By tolerating such unallowed conduct he is in fact broadening, extending or amending his order to now include impermissible activities by which the desired goal should be attained even in relation to persons who, until then, have not been engaged in similar impermissible activities.

For determining the criminal liability of a commanding officer for actions undertaken by his subordinates – which actions have elements of a war-humanitarian criminal offense – it is necessary to establish the existence of efficient mechanism for sanctioning impermissible conduct of the subordinates. Such determination always represents a factual question differing from case to case, but in this it is necessary to keep in mind that we are speaking of a military force in the sense of international law, where one of the preconditions is also the existence of efficient means of command – and sanctioning and prosecuting of the subordinates represents an integral part of this.

A special situation may be found in determining the commanding responsibility for the actions committed by subordinates in cases of incidental and detached excesses of an individual or a unit who have acted outside of commanding framework and their act is limited both territorially and in time.

In the absence of commanding responsibility based on principles described above, i.e. if the commanding officer undoubtedly knew or could have known that his subordinates are about to commit a war-humanitarian crime – which is always a question of facts – his liability extension of the original order issued may be proven by the factual situation on the grounds. Namely, the first instance court has clearly established during the evidence procedure that such behavior of the members of the army under plaintiff’s command has continued in looting the houses of refugee Croatians throughout the incriminated time period and in which time the civilian authorities of the quasi-state have not been organized yet, and the plaintiff was a member of the army of that quasi-state.”

28 These are questions pertaining to establishment of facts, on which the Supreme Court of the Republic of Croatia, in its decision no. I KZ-743/03 of October 23, 2003, states the following:

„The fact that plaintiff actually had at his disposal efficient means for sanctioning unallowable actions that were not part of his orders may be seen from the decision on punishment for breach of military discipline (page 150 of the file), and from statements given in his defense, by which he is wishing to mitigate his responsibility. To this end the plaintiff stated that his soldiers knew him as an authority (page 638/b), explaining that with this motive in mind he was also signing orders that were not actually drafted by him. However, such efficient mean of sanctioning he did not use. Statement made by a defense witness, that he was dissatisfied with certain conduct of his subordinates, or a statement contained in a document sent to him (page 136 of the file) on a need to press criminal charges against persons who were looting the property in the Blagaj village, all this, without any military-disciplinary actions immediately taken (which were, on the other hand, instituted for far lesser offenses), is contrary to efficient prevention of unallowed conduct of his subordinates“.
would not be possible neither according to the principle of broadening his orders to include the unallowable conduct in regards to future actions.

Namely, the principle of silent broadening of order to include impermissible conduct may be applied only in cases when unallowable actions by subordinates by which elements of war-humanitarian crimes are being fulfilled are taking place over certain period of time in continuity and must be always accompanied by determination that the person in command knew of the activity that was already undertaken, but has done nothing to prevent it or sanction it. Determination of the fact that he knew of the behavior of his subordinates is a question of facts, and may be established in different ways.29

4. The existence of a consequence included in a structure of a war-humanitarian criminal offense

The provisions of criminal legislation of the Republic of Croatia regulating war crimes and crimes against humanity have in their descriptions certain forbidden consequences occurring as a result of conduct impermissible by international law. A duty of a commanding officer during a war or an armed conflict is to prevent actions that are contrary to the international law and that could result in legally forbidden consequences to the opposite side, its civilian population, prisoners of war, property, cultural objects and similar.

It is towards these protected objects that a commanding officer has a guaranteeing role, being a person who has a functional power of commanding his subordinates in a manner that should prevent their unallowable actions during a war or an armed conflict. In a proper interpretation of legal norms regulating the war-humanitarian criminal offenses his guaranteeing role includes a duty of undertaking all measures necessary for prevention of occurrence of such forbidden consequences, which basically form the structure of such criminal offenses.

In regards to the volume of factually materialized consequences it must be noted that the legislator – in legal description of these acts – taxatively lists these consequences.

29 On this the Supreme Court states the following:
„The evidence submitted during the trial clearly shows that the plaintiff was regularly informed on the events in the zone of his responsibility: by couriers, through radio contact and similar, and part of the destruction – as can be seen on a video footage viewed during the hearing – was directly visible (fire and smoke rising from the villages where no resistance was met).“
However, for the existence of such a crime – for example war crime against the civilian population – it is sufficient that even only one of the listed consequences has occurred.  

5. **The clause of equal value of acting compared to failing to act**

As elaborated above, the commanding officer has certain guaranteeing responsibilities towards the members of the opposite side in a conflict. His commanding duties are not exhausted only in directing the operation of the „war machine“ by issuing orders that should make the fulfillment of the goal underlying the war efforts possible. Because of this factual possibility to command the troops, which is a precondition for the existence of a military structure, he also has guaranteeing responsibilities towards the enemy side and civilian population found in the zone of military operation. Omission to undertake measures and activities which would prevent occurrence of consequences described in legal description of these crimes, and which would occur as a result of conduct of his subordinates, represents a non-right which is equal in value as the actual conduct of his subordinates.

Therefore, it is important to note that failure to act on the side of a commanding officer, i.e. not consuming his authorities to command subordinates who are directly undertaking activities which enter the zone of criminal liability for war-humanitarian crimes, should be equalized with the very act or with the possibility of committing the crime by direct acting.

**INSTEAD OF THE CONCLUSION**

The very provisions of the international law, which are incorporated in the legal system of the Republic of Croatia either directly or through the Constitution, regulate that statutory limitations shall never apply to certain criminal offenses from the sphere of war-humanitarian crimes. By this the international community, as well as the internal Croatian legislation, has clearly demonstrated the position that certain forms of impermissible conduct,

---

30 The Supreme Court has decided on this, in a decision no. I Kž-211/98 of April 1, 1999 as follows: „In any case, for the existence of this crime, regardless of the volume of damages, it is sufficient that only one consequence has occurred, and in a particular case the drinking water installations have been made useless, as well as the reserves of drinking water and the irrigation system. All these objects were not military targets – on the contrary, these were the objects important for survival of the population and therefore specially protected by the international law.”
regardless of the time elapsed from the committal of a crime, shall permanently be deemed impermissible and shall always be prosecuted, and perpetrators – if found guilty - punished.

Although the determination of criminal liability of immediate perpetrators of war-humanitarian crimes is by far more often case in the court practice, the composition of legal norms in Croatian Criminal Code puts a commanding responsibility – i.e. the responsibility of a person who orders certain impermissible conduct – in the first place, and the responsibility of a person who has actually performed the ordered action in the second. From the very diction of these legal norms it is obvious that the legislator – both domestic and international – requests primarily the determination of responsibility of persons who have been commanding the „war machine“. For this reason the question of command responsibility appears as a very important issue.

The problems that judiciary is facing in the process of determining the responsibility of a commanding officer for actions undertaken by his/her subordinates and which enter the scope of war-humanitarian criminal offenses can be recognized in the previous text. The responsibility of a commanding officer can never, and under no circumstances, be solely based on his objective responsibility arising from the very duty he/she holds, rather it is always necessary to determine his subjective relation – both willful and intellectual – to the concrete act committed by his subordinates. In the process of determining and proving his possible liability it should be started from the frameworks set forth by international humanitarian law as codified by the international community – to which the Republic of Croatia is a member – and from possible forms of such crimes as regulated by Croatian legislation.

The Law on Implementation of the Statute of the International Criminal Court and on Prosecution of Criminal Offenses Against the International War and Humanitarian Law is no exception to this. This law has opened space for taking over of the criminal proceedings from the ICTY by the local judicial systems. Namely, although this Law in article 6., paragraph 2. regulates that „Laws and other regulation of the Republic of Croatia which are applied in activities of cooperation shall be interpreted and applied in accordance with the legal order of the Republic of Croatia and in a manner that is in harmony with the goals and sense of the ICC Statute“, this provision does not exclude the interpretation of the norm as stated in the text above.
Namely, the concept of responsibility as presented here is based on principles of criminal legislation which excludes the existence of objective or collective responsibility, and can be summarized in a thesis that a court must determine, within a due process, whether a particular person has committed a criminal offense defined as such by law, and if yes, then to sentence him/her with a sanction provided by the law and individualized to fit the particular case. This fundamental principle can not be altered even in case of international tribunals.

Responsibility for these criminal offenses, with an aim to prevent them from occurring again, must primarily be determined in relation to persons who are commanding the „war machine“, and who – as such – represent the reification of that first rational idea of a humanoid depicted by Stanley Kubrick in „2001: A Space Odyssey“. Namely, although war is almost imminent to the very existence of humans, it should be purged from behavior that falls short of being human, rather tends to be a characteristic of a beast.