Chapter VII

Omissions. Special Reference to the Responsibility of Military Commanders

Omissions are one fact of human conduct and, thus, can give rise to individual criminal responsibility. This is why criminal law is not only comprised of norms which prohibit certain actions, but it is also comprised of norms which mandate performing certain actions – for instance, preventing subordinates from launching attacks against civilians or civilian objects or disproportionate attacks, or punishing subordinates for having launched such attacks. Such norms are violated by the failure to undertake the prescribed actions, which may bring about a socially harmful result.⁷⁴⁰

Nevertheless, for an omission to give rise to individual criminal liability, it is necessary that the person who fails to carry out the required action is in a position that enables him to undertake such action. Furthermore, it is necessary that such a person has a duty to carry out the required action and, thus, the action is expected from him.⁷⁴¹

In criminal law, there are two types of offences of omission. On the one hand, offences of mere omission are those in which criminal liability arises from a breach of the duty to undertake a certain action – for instance, the duty to assist a person whose life is at risk.⁷⁴² The structure of these offences is similar to that of the offences of mere action – as opposed to the offences causing a result – in which criminal liability arises from carrying out the forbidden action. In the offences of mere omission, criminal responsibility arises from omitting an expected action in a situation in which the duty to undertake such an action has been triggered.⁷⁴³

On the other hand, in the offences of omission causing a result, an omission only gives rise to individual criminal responsibility if it is causally linked to a for-

⁷⁴³ Muñoz Conde, Derecho Penal, supra note 741, pp. 269–70.
bidden result.\textsuperscript{744} In this second type of offences of omission, one can distinguish between those cases in which the expected action and the forbidden result are expressly referred to in the relevant penal norm – such as the norm mandating a record keeper to take all action within his power to prevent third parties from accessing confidential documents – and those other cases (traditionally referred to as commission by omission) in which the expected action and the forbidden result are not mentioned by the relevant penal norm – for instance, the norm criminalizing the killing of a person does not expressly refer to a specific scenario in which a person causes the death of a newborn by not feeding him.\textsuperscript{745} In this last group of cases, criminal liability only arises if: (i) the person who failed to take action had a duty to act in order to prevent the forbidden result (for instance, the death of the newborn) because he was the guarantor of the societal value undermined by the result and (ii) there is a causal link between the omission and the forbidden result such that the expected action would have likely avoided the forbidden result.\textsuperscript{746}

The RS regulates omissions in art. 28 RS where it deals with the criminal liability of military commanders and other superiors for war crimes actually committed by their subordinates, including the launch of attacks against civilians or civilian objects and disproportionate attacks. Military commanders are only criminally liable if there is a superior-subordinate relationship between them and the actual perpetrators of the crimes. Regardless of the specific term used to describe this superior-subordinate relationship (be it “command” or “authority”),\textsuperscript{747} such relationship is based on the effective control that the military commander must have over the actual perpetrators of an unlawful attack.

The question arises as to the content of the notion of effective control and, in particular, as to whether this notion requires operational control (power to prevent), disciplinary control (power to punish) or both operational and disciplinary control. Furthermore, the question arises as to the level of operational and/or disciplinary control required (total or partial) and the criteria to distinguish it from a mere ability to influence the behaviour of the actual perpetrators of an unlawful attack.

Given the lack of definition of the notion of effective control in the RS, the case law of the Ad hoc Tribunals becomes a useful tool for its interpretation. The

\textsuperscript{744} Smith, Smith & Hogan: Criminal Law, supra note 742, p. 60.
\textsuperscript{745} Fletcher, Rethinking Criminal Law, supra note 740, pp. 611 et seq. See particularly the arguments in favour and against the notion of commission by omission at pp. 628-31.
\textsuperscript{746} J. Silva Sánchez, El Nuevo Código Penal: Cinco Cuestiones Fundamentales 51 (1997). Concerning the necessary causal link, see Smith, Smith & Hogan: Criminal Law, supra note 742, p. 61.
\textsuperscript{747} Art. 28(a) RS refers to “forces under his or her effective command and control, or effective authority and control”.