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ANNEX I

Individual Criminal Responsibility in International Law

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This book examines the responsibility for serious crimes such as aggression, genocide and war crimes. These crimes are committed by single individuals. Responsibility can be attributed to the execution of the crime and masterminded by the crimes who can be held responsible. For a determination of a fair assessment of those persons is indicated.

By setting out the principles of such as joint criminal enterprise, duress, and the defence of necessity, the book provides a framework for bringing to light the crimes committed merely in earlier periods of criminal law but also in the present. The book also criticizes the current international criminal law and illuminates and addresses the responsibility in

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them. As such, this type of superior responsibility is closely related to complicity/criminal participation.⁸³

When the superior lacks knowledge and 'should have known', the two omissions of Article 28 cannot be aligned in the same way. A negligent failure to intervene cannot easily be combined with intentional subordinate liability. Ambos refers to it as 'a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates'.⁸⁴ A way out of this illogical impasse would be to regard superior responsibility as a separate offence, a 'failure to supervise'.⁸⁵ Consider Schabas's statement with regard to superior responsibility and the crime of genocide:

Indeed, even the ICC will probably be required, in practice, to treat command responsibility as a separate and distinct offence. In the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent. Accordingly, the Court, if Article 28 of the Statute is to have any practical effect, will be required to convict commanders of a crime other than genocide, and one that can only be negligent supervision of subordinates who commit genocide.⁸⁶

However, the solution suggested by Schabas does not comport with the text of the ICC Statute. After all, Article 28 stipulates that the superior is 'criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command'. [emphasis supplied] As Meloni points out, under Article 28 a superior is responsible and punished for the principal crime.⁸⁷

The compromise solution would be to view negligent superior responsibility as generating liability for a failure to exercise control properly where the (intentional) subordinate crime is a point of reference that triggers liability and provides a basis for determining the sentence. Nerlich formulates it somewhat differently. In his view, negligent superior responsibility provides for parallel liability: it regards the subordinate crime as well as the superior's failure to act.⁸⁸ The superior can be blamed for the subordinate's crime as a wrongful consequence of his failure to act, even if it was an unintentional result of that failure to act.

8.4.2.1 Differentiating between military and non-military superiors

The most striking innovation of Article 28 is the creation of two concepts of command responsibility: one for military superiors and persons effectively acting as such in subparagraph (a), and one for non-military superiors in subparagraph (b). This novelty, which deviates from prior international statutory and case law, was

⁸³ V. Nehrlich, 'Superior Responsibility under Art. 28 ICCSt: For What Exactly is the Superior Held Responsible?' (2007) 5 *JICJ* at 672–3.

⁸⁴ Ambos, 'Superior Responsibility' in Cassese et al. (eds), *Commentary*, at 852.

⁸⁵ *Ibid.*, at 871.

⁸⁶ W. A. Schabas, 'Canadian Implementing Legislation for the Rome Statute' (2000) 3 *YIHL* 342. See also M. Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *AJCL* 455.

⁸⁷ Ch. Meloni, 'Command Responsibility. Mode of Liability for the Crimes of Subordinates or Separate offence of the Superior' (2007) *JICJ* at 633.

⁸⁸ Nehrlich, *Superior Responsibility under Article 28*, 682.

introduced by the delegation of the United States to the Rome conference just a few months before the *Čelebići* Trial Chamber issued its judgment and initiated the line of authority premised on a uniform approach to superior responsibility.⁸⁹

The two concepts of command responsibility differ fundamentally on the cognitive aspect. While they both provide for an intent/knowledge element ('knew'), negligence suffices for military superiors by providing for 'should have known' in Article 28(a)(i). For non-military superiors there is the stricter 'consciously disregarded information' requirement, which equals a wilful blindness/recklessness test. The United States representative, who drafted the text of Article 28, stated that the 'negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility'.⁹⁰ The negligence standard for a military commander, on the other hand, 'appeared to be justified by the fact that he was in charge of an inherently lethal force'.⁹¹

At the ICTR, where the majority of the defendants qualify as 'civilian' or non-military, the bifurcated approach to superior responsibility was welcomed. In *Kayishema and Ruzindana*, the Trial Chamber noted the rejection by the *Čelebići* Trial Chamber of the 'should have known' standard.⁹² As it did not protest against this interpretation, it may be assumed—reasoning *a contrario*—that it adopted the *Čelebići*-reasoning. However, it, adopted a different knowledge standard for civilian superiors:

On this issue, the Chamber finds the distinction between military commander and other superiors embodied in the Rome Statute an instructive one... The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of very activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to [of] the Geneva Conventions and Additional Protocol II thereto; the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or where about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.⁹³

The different knowledge standard was justified by referring to a difference in scope of duty, as the United States delegation had done in introducing its draft proposal for Article 28. The Trial Chamber relied on the ICC standard for non-military superiors in Article 28(b)(i) of the ICC Statute and decided to incorporate it into the law of the Rwanda Tribunal.

The *Kayishema and Ruzindana* finding on the cognitive aspect of superior responsibility for non-military superiors and the differentiated superior

⁸⁹ Schabas, *Commentary*, at 457. Boas et al, *International Criminal Law Practitioner*, Vol. I, at 244–58.

⁹⁰ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the 1st Meeting of the Committee of the Whole*, UN Doc A/CONF.183/C.1/SR.1 (20 November 1998), para. 67. The US delegation also referred to the difference in disciplinary power and the power to supervise a person outside of work. A military superior has these broad powers because he/she is 'in charge of a lethal force': paras 67–8.

⁹¹ *Ibid.*, para. 68.

⁹² *Čelebići*, Appeals Judgment, para. 241.

⁹³ *Kayishema*, Trial Judgment, paras 227–8.

responsibility concept at the ICC should be regarded as erroneous. A bifurcated approach is at odds with the law on command responsibility, recognized and endorsed in the *Čelebići* case.⁹⁴ Despite its 'military starting point', the *Čelebići* case, an authoritative precedent and reflecting customary international law,⁹⁵ pronounces on the principles of superior responsibility. As such its findings go beyond the boundaries of the case. Moreover, the parameters of superior responsibility set out in *Čelebići* leave room for variation. *De facto* and *de jure* command, the element of 'control', and the 'material ability' to prevent crimes, are all designed to accommodate differing circumstances and persons. This way the Trial and Appeals Chambers in *Čelebići* devised a uniform superior responsibility concept. In effect, what Article 28 of the ICC Statute has done in codifying two knowledge standards for superior responsibility, is transform matters of evidentiary inference into conditions of liability.⁹⁶ This is regrettable, if only because it is likely to lead to time-consuming litigation on who qualifies as non-military superior and who does not. And what to do with superiors that have a hybrid military/civilian nature—those who, as civilians, functioned high up in a military hierarchy and command structure such as Karadžić? This issue was brought up by the Australian delegation during the negotiations on the text of Article 28 but ultimately had little effect on the text of Article 28.⁹⁷

8.5 Superior responsibility in national law

According to Werle, command responsibility is 'an original creation of international criminal law'.⁹⁸ While the concept may be seen to originate from (national) military law, it has indeed been developed as a criminal law concept in the case law of international courts. With the adoption of the ICC Statute and its implementation at the national level, many states now provide for command responsibility in their domestic legal systems.

German ICC implementing legislation⁹⁹ contains three provisions relating to command responsibility and identifies it by its nature and blameworthiness. A superior who intentionally (knowingly) omits to prevent the commission of crimes deserves the same punishment as the subordinate (Article 1 paragraph 4(1)) and can be qualified as an accomplice, whereas the failure to supervise the

⁹⁴ For a different view: Nybondas, *Command Responsibility and its Applicability*, ch. 4.

⁹⁵ In a critical evaluation of the law on superior responsibility at the ICTR, Zahar observes that, although the accused in the cases at issue were non-military superiors, the *Čelebići* standard reflects the customary law concept of superior responsibility that provides for one uniform doctrine. Zahar, *Command Responsibility of Civilian Superiors*, at 613–16.

⁹⁶ Mettraux, *The Law on Command Responsibility*, at 196.

⁹⁷ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the 1st Meeting of the Committee of the Whole*, UN Doc A/CONF.183/C.1/SR.1 (20 November 1998) para.82. See Boas et al, *International Criminal Law Practitioner*, Vol. I, at 256–7.

⁹⁸ G. Werle, *Principles of International Criminal Law*, margin No. 368, at 128.

⁹⁹ 'Gesetz zur Einführung des Völkerstrafgesetzbuches', 26 June 2002, *Bundesgesetzblatt Jahrgang 2002 Teil II*, Nr 42, 2254.