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ANNEX F

COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

by

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of command responsibility that departs from the general rule of Article 30 in that, besides criminal intention and knowledge, it also provides for forms of *dolus eventualis* (or recklessness) and culpable negligence.[195]

4.6.1 The commander or superior knew

Pursuant to Article 28 ICC Statute, the superior is responsible for the crimes committed by his subordinates if he 'knew […] that the forces were committing or about to commit such crimes […]' The first mental element, which is valid both for the military commander and for the civilian superior, is a standard of *actual (*or *positive) knowledge.* This is integrated when the superior has full knowledge of the fact: he is aware that his subordinates are committing, or are about to commit, crimes that are within the Court's jurisdiction and despite this knowledge he does not take the reasonable and necessary measures in his power to prevent or repress their crimes. As the *ad hoc* Tribunal's jurisprudence clarified, this knowledge can be ascertained by means of direct or circumstantial evidence, but it can never be presumed.[196] We also noted that international law recognises various factors that can be taken into consideration to ascertain, in the absence of direct proof, the actual knowledge of the commanders with regard to their subordinates' crimes.[197] The Pre-Trial Chamber of the ICC acknowledged the existence of such factors, which 'are instructive in making a determination on a superior's knowledge within the context of Article 28 of the Statute'.[198] Among them the Chamber expressly considered: the number and scope of illegal acts, whether their occurrence is widespread, the time and geographical location of the occurrence of the acts, the number and type of armed forces involved, the means of available communication, whether there was a pattern in the *modus operandi*, the

thus sets a higher standard. On the contrary, the definition of some war crimes according to the Elements of Crimes entails that, with regard to some of their elements, negligence is a sufficient mental standard (for instance in relation to the recruitment of child soldiers, with regard to the age of the child recruited, Art. 8(2)(b)(xxvi) ICC Statute); see G. WERLE, F. JESSBERGER, '"Unless otherwise provided": Article 30 of the ICC Statute and the mental element of crimes under international criminal law', *Journal of International Criminal Justice* (2005) (hereinafter *Unless otherwise provided*). pp. 35 et seq.

[195] See *infra* sec. 4.6.2; cf., G. WERLE, *Principles*, pp. 152-164.

[196] In the *Blaškić* case the ICTY judges declared expressly that 'knowledge cannot be presumed […]' (it) 'may be proved through either direct or circumstantial evidence', *Blaškić TC Judgment*, para. 307. See also the ICTY, *Čelebići TC Judgment*, paras. 384-386 which rejected the presumption of superior's knowledge, denying that this presumption which had been used, for example, in the *Yamashita* case and in the *High Command* case, is recognised in international law. See also ICTY, *Aleksovski TC Judgment*, para. 80. See *supra* Chapter 3, sec. 3.5.1. This has been now confirmed by ICC, *Bemba Gombo Decision*, para. 430.

[197] A precise list of *indicia* to deduce the superior's *actual knowledge* was compiled by the Commission of Experts of the Security Council. The report spoke in this regard of 'presumed knowledge' to mean that knowledge which is deduced from circumstantial evidence. The list was then taken up by the *ad hoc* Tribunals jurisprudence (see *supra* Chapter 3, sec. 3.5.1). Cf., W. FENRICK, *Article 28,* p. 519; M. NEUNER, *Superior responsibility and the ICC*, p. 268.

[198] ICC, *Bemba Gombo Decision*, para. 431.

scope and nature of the superior's position and responsibility in the herarchical structure and the location of the commander at the time the crimes were committed.[199]

As already noted, however, there is a certain amount of confusion about the two standards.[200] Some scholars define the knowledge that is established through *indicia* (circumstantial evidence) as *constructive knowledge*.[201] Instead others consider that, although such knowledge has been proved in court by means of circumstantial evidence, once it has been ascertained it fulfills the standard of actual knowledge.[202] The latter should therefore not be confused with the *constructive knowledge* standard, which is represented at the normative level by formulas such as '*had reason to know'* or (pursuant to some interpetations) '*should have known*'.[203] This opinion seems correct: once knowledge has been established, even if by means of circumstantial evidence, it should be considered as actual knowledge.[204] The confusion in fact arises because the jurisprudence tends to resort to the same *indicia* for the purpose of establishing both the actual knowledge standard and the 'had reason to know' or 'should have known' standard.[205]

It should be stressed that the importance of having a clear idea of the dividing line between the two forms of knowledge depends on the fact that whereas actual knowledge is one of the elements required to fulfil the standard of *dolus* (i.e., intention or purpose), the mere possibility of knowing lies at the foundation of a standard of culpable negligence (or, at most, of recklessness).[206] We must therefore be aware of the risk, which is inherent in the establishment of the superior's knowledge (of his subordinates' crimes) by means of *indicia* i.e., through circumstantial evidence). The risk is

[199] Ibid. Moreover the Chamber, quoting the findings of the ICTY Trial Chamber in the *Halilović* case, considered that actual knowledge may also be proven if 'a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems', ICC, *Bemba Gombo Decision*, para. 431.

[200] See *supra* Chapter 3, sec. 3.5.2.

[201] In this regard I. BANTEKAS, *The contemporary law*, pp. 587-588; A.M. MAUGERI, *La responsabilità da comando nello Statuto della Corte Penale Internazionale* (Milano: Giuffrè, 2007) (hereinafter *La responsabilità da comando*), pp. 351 et seq.; K. KEITH, The *mens rea of superior*, p. 620.

[202] Cf., K. AMBOS, *Superior responsibility*, pp. 863 et seq.

[203] On the contrary *constructive knowledge* is when, although the superior lacks real knowledge, nevertheless he *should have had knowledge* of the situation. Cf., C.A. HESSLER, 'Command responsibilty for war crimes', *Yale Law Journal* (1973), pp. 1278 et seq.

[204] See in this regard para. 58 of the *ICTY Commission Final Report*.

[205] See *supra* Chapter 3, sec. 3.5 with regard to the *ad hoc* Tribunals' jurisprudence. The same error is now made by the ICC judges: see ICC, *Bemba Gombo Decision*, para. 434. When referring to the *indicia* relevant for the determination of the mental standard of the superior, the Chamber mentions in particular two circumstances, namely (i) that the superior had general information to put him on notice of crimes committed or of the possibility of occurrence of unlawful acts; and (ii) that such available information was sufficient to justify further inquiry which is also at the basis of the determination of the actual knowledge through circumstantial evidence. This practice of referring to the same factors to determine the actual knowledge or the *should have known* standard risks confusing the standards and making the differences irrelevant.

[206] See G. MARINUCCI, 'Politica criminale e codificazione del principio di colpevolezza', in *Prospettive di riforma del codice penale e valori costituzionali* (Milano: Giuffrè, 1996) p. 145.

to consider predictability equivalent to actual prediction, for example by considering that *predictability* is in fact proof of knowledge, 'or better, the presumption of an effective prediction, as the consequences that are generally predictable are generally predicted'.[207]

Strangely enough, the ICC introduced a distinction between the knowledge required under Article 30(3) and that under Article 28(a) of the Statute, condidering that the former regards the forms of participation under Article 25, while the latter applies to cases of command responsibility under Article 28, where the person does not participate in the commission of the crime.[208] As far as we understand it, this finding is not convincing: it is unclear why the cognitive element under Article 30 of the Statute and that under Article 28 should be different *per se*.[209] Rather it seems to us that what is different is not the knowledge as such, but the object of the knowledge (i.e., the mental object). While in the case of Article 30 it is the crime in itself, under Article 28 it is the criminal conduct of the subordinates (see *infra* sec. 4.6.4).

4.6.2 **The commander should have known**

The interpretation of the second mental element provided under the Rome Statute specifically for military commanders is more complex. Article 28 ICC Statute provides that the military commander is responsible, besides in the case where he actually knew, also in the case in which 'owing to the circumstances at the time' he 'should have known' that the armed forces were committing or were about to commit crimes within the jurisdiction of the Court.

This standard, at least as regards its wording, is different from that of *had reason to know* which was utilised by the Statutes of the *ad hoc* Tribunals. Nor does it coincide with the provision of Article 86(2) Add. Prot. I ('had information which should have enabled them to conclude in the circumstances at the time').[210] Indeed it was precisely during the negotiations of Additional Protocol I that the wording 'should have known' was rejected twice, as it was considered too broad: the current wording of the Rome Statute on the point is substantially identical to the second proposal put forward by the United States, which had been rejected during the negotiations of the aforesaid Protocol.[211] Thus some indications relevant for an interpretation of the requirement in question under the ICC Statute can also be obtained from those pertaining to the

[207] Ibid.

[208] ICC, *Bemba Gombo Decision*, para. 479.

[209] For a critique see K. AMBOS, *Critical issues*, pp. 715 et seq.

[210] As we have seen, there is a linguistic discrepancy in the formulation of Art. 86(2) between the English version ('had information *which should have enabled*') and the French one (*des informations leur permettant de conclude*), see *supra* Chapter 2, sec. 2.6.

[211] The formula proposed on that occasion was 'knew or should reasonably have known in the circumstances at the time', which differs therefore from Art. 28 ICC Statute only in the addition of the term 'reasonably'. See the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 1974-77, Vol. III, p. 328 (CDDH/I/306, 27 April 1976).

rejected *mens rea* formulation regarding Additional Protocol I. The 'should have known' standard had been proposed on that occasion for reasons that were merely practical: in effect it was feared that the standard of actual knowledge would have been practically impossible to demonstrate at trial and that, consequently, the provision would have become inapplicable and ineffective as a deterrent.[212] The idea behind the proposal of the 'should have known' standard was to clearly charge those in positions of command with a 'duty of knowledge' (i.e., of always being informed about the actions of their subordinates); thus ignorance could never be granted as a defence with regard to superior responsibility. However, the majority of the delegates at that time were not persuaded by the opportunity of adopting such a standard, which seemed to overturn the burden of the proof by introducing a presumption of knowledge by the superior. In the opinion of some commentators the same form of presumed knowledge was later introduced by Article 28(a)(i) ICC Statute.[213]

The Pre-Trial Chamber of the ICC also seems to share this view. In the *Bemba Gombo Decision* the judges affirmed that

> 'The should have known standard requires the superior to "ha[ve] merely been negligent in failing to acquire knowledge" of his subordinates' illegal conduct'.[214]

The Chamber further considered that, *vis-à-vis* the 'had reason to know' embodied in the Statutes of the ICTR, ICTY and SCSL, the 'should have known' pursuant to Article 28(a) ICC Statute 'sets a different standard'.[215] However, the judges deemed not necessary to address the difference in question.[216] On the contrary, it is important to analyse whether and what differences are introduced by Article 28(a)(i) ICC Statute *vis-à-vis* the *mens rea* standards set by previous international instruments.

As regards the 'had reason to know' standard, we have seen that after some uncertainness the Appeals Chamber of the *ad hoc* Tribunals took the position that there is not such a 'duty of knowledge' that is imposed on a superior under international customary law.[217] In other words it was denied that there exists a duty for the superior to be informed about all the activities of his subordinates, whose violation automatically

[212] Ibid. In this regard see I. BANTEKAS, *The contemporary law*, p. 589.

[213] See I. BANTEKAS, *The contemporary law*, p. 589, who considers that in fact Add. Prot. I did not in substance reject the standard of *should have known*, it only changed the formulation, considering the former insufficiently clear. This form of responsibility, when overwhelming circumstances indicate that a commander *must have known* about the crimes of his subordinates is, in the author's opinion, widely recognised in international law.

[214] ICC, *Bemba Gombo Decision*, para. 432.

[215] ICC, *Bemba Gombo Decision*, para. 434. See also para. 433: 'the *should have known* standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime', referring to the ICTR judgment in the *Kayishema & Ruzindana* case (in particular note 567).

[216] ICC, *Bemba Gombo Decision*, para. 434.

[217] For an opposite opinion see J.S. MARTINEZ, *Understanding mens rea*, pp. 639-664.

entails command responsibility.[218] The 'had reason to know' standard should therefore be interpreted as substantially equivalent to the formula adopted by Article 86(2) Add. Prot. I: namely, in the sense that the actual presence of alarming information about the crimes is required for superior responsibilty to be established.[219] This interpretation of 'had reason to know' provided by the Appeals Chamber of the ICTY appears closer to a standard of constructive knowledge than to one of ignorance.[220] It is debated whether this interpretation of 'had reason to know' may apply also to the 'should have known' standard adopted by the Rome Statute. Some commentators consider in fact that there are no substantial differences between the two standards in question, at least not in the intentions of the Statute's drafters.[221] Therefore, 'should have known' would be equivalent to the standard of knowledge adopted by the *ad hoc* Tribunals and which referred in turn to Article 86(2) Add. Prot. I. Instead, a different opinion maintains that there *is* a difference between the two standards.[222]

From what has been explained above it is possible to conclude that while the 'had reason to know' standard may oscillate, depending on the interpretations, from forms of *dolus eventualis* (or recklessness)[223] to forms of negligence,[224] the 'should have known' standard adopted by the Rome Statute is more clearly a standard of negligence.[225] Indeed, given that strict liability has been banned by the Rome Statute and that a standard of *dolus eventualis* (or recklessness) is provided for civilian superiors on the basis of different requirements (as we shall see immediately *infra*), the only

[218] 'The customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes', ICTY, *Čelebići AC Judgment*, para. 230, thus dissociating itself from the formulation adopted by the Trial chamber in *Blaškić*. See also paras. 227-239, where to reach this conclusion the Appeals Chamber examined all of the significant precedents on the issue.

[219] ICTY, *Čelebići AC Judgment*, paras. 230 et seq.

[220] But see I. BANTEKAS, *The contemporary law,* pp. 589 et seq., where it is maintained that, although this standard rejects any presumption of knowledge, the superior could not invoke in his defence his ignorance of the crimes if he did not adopt all the measures in his power in order to know. Presumption of knowledge would have been used, exceptionally, by international jurisprudence in relation to the standard of 'should have known'.

[221] See in this regard K. AMBOS, *Superior responsibility*, p. 866, where the author remarks that the substantial similarity between the two standards is supported by the fact that both the formula 'had reason to know' of the ICTY, based on Art. 86(2) Add. Prot. I, and that of 'should have known' of the ICC Statute were introduced on proposals put forward by the United States. *Contra* G.R. VETTER, *Command responsibility of non military*, pp. 120 et seq.

[222] See in this regard M. NEUNER, *Superior responsibility and the ICC*, p. 278. In the sense of a difference existing between the two standards it can be noted that, although the ICTY judges in the *Čelebići* case stated that the standard of *had reason to know* represented the customary law at the moment of the crimes, they nevertheless acknowledged that the *should have known* standard of the Rome Statute could have introduced a new *mens rea* standard, see ICTY, *Čelebići TC Judgment*, paras. 387 et seq.

[223] See, for example, ICTY, *Čelebići AC Judgment*, paras. 216 et seq.

[224] See the reconstruction by I. BANTEKAS, *The contemporary law,* pp. 589 et seq.

[225] In this regard see K. AMBOS, *Superior responsibility*, p. 867. That 'plainly, this provision envisages culpable negligence' is affirmed by A. CASSESE, *International Criminal Law*, pp. 74 and 251-252.

plausible interpretation of the 'should have known' standard appears to be the one founded on the requirement of negligence.[226]

The commander who, according to Article 28(a)(i), *should have known* about the actions of the armed forces under his control, therefore simply *ignored* the situation of risk (he is not even required to have consciously disregarded information in that regard). However, even though it was not deliberate such ignorance can be culpable, to the extent that it is the outcome of the violation of the superior's first duty to exercise control properly over his subordinates. In this sense even negligent ignorance of the crimes may be a source of responsibility for the superior (who will be accountable for his failure to take the necessary measures to prevent or punish the crimes that he negligently ignored).[227]

In order to prove the 'should have known' standard in the actual case, it is decisive to establish that the superior would have been able to know about the crimes if he had discharged his duties of vigilance and control. Consequently, if it is ascertained that, even though the superior had properly fulfilled his duty to control his subordinates, in any case he would not have been able to know about his subordinates' crimes, his ignorance of the crimes should not be deemed culpable.[228]

All the factors present at the moment of the crime must be taken into consideration in order to assess whether, according to Article 28 ICC Statute, a superior *should have known*.[229] This is expressly required by the formulation of the provision: '*owing to the circumstances at the time*'.[230] The term 'circumstances' has a broader meaning than the term 'information':[231] therefore the superior has to consider all the circum-

[226] Arguments for an interpretation of *should have known* according to the parameters of negligence come also from the American *Model Penal Code,* which at Art. 2.02(2)(d) states that: 'a person acts negligently when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from its conduct'. Therefore, a subject acts negligently when he should know about an unacceptable risk. This marks the basic difference that lies between the standard of negligence and that of *recklessness*: while in the former the subject does not perceive the risk, and is not aware of it (although he should be), in the latter the risk is perceived, but ignored. We shall see that this is also the difference that lies between the broader standard of responsibility of the military commander and the more restricted one of the civilian superior.

[227] This duty is also known as the *duty to inquire*: see, for instance, M. NEUNER, *Superior responsibility and the ICC Statute*, p. 272. For a critique of the should have known standard which is considered to be a departure from customary law, see G. METTRAUX, *The Law of Command*, pp. 210-213; for an opposite opinion J.S. MARTINEZ, *Understanding mens rea*, pp. 463-467.

[228] As a consequence, if the mental element of command responsibility has not been established, the superior is not responsible for not having prevented or repressed his subordinates' crimes, pursuant to Art. 28 ICC Statute.

[229] The ICC Pre-Trial Chamber in the *Bemba Gombo* case considered the superior's *failure to punish* past crimes committed by the same group of subordinates as a possible indication of the future risk of commission of crimes, hence a possible circumstance to take into account in assessing the should have known standard, see ICC, *Bemba Gombo Decision*, para. 434. This finding, however, risks confusing the responsibility of the superior for future crimes with that for past crimes, see *infra* Part 2.

[230] See in this regard G.R. VETTER, *Command responsibility of non military*, pp. 120 et seq., where the author emphasises that the presence of the phrase '*owing to the circumstances at the time*' in the 'should have known' standard of the ICC Statute can considerably reduce the distance between the two standards.

[231] M. NEUNER, *Superior responsibility and the ICC*, p. 276.

stances that come under his sphere of responsibility, regardless of whether they are more or less indicative of unlawful conduct by his subordinates. Besides, this is already a consequence of the superior's duty of control, which is not limited just to the gathering of information but also to its assessment.

4.6.3 **The superior consciously disregarded the information**

Letter *b*) of Article 28 ICC Statute introduces a far more restricted *mens rea* standard for the civilian superior than the one provided for the military commander. While culpable lack of knowledge is sufficient for the military commander to be held responsible for his subordinates' crimes, this is not the case with regard to the civilian superior. The latter may be responsible for the crimes of his subordinates only if he actually knew, or 'consciously disregarded information which clearly indicated [...] that the subordinates were committing or about to commit such crimes'.

In order for this mental element to be established, a weightier coefficient of culpability than the negligence standard described above is required. In the jurisprudence of the *ad hoc* Tribunals this standard is often indicated by the expression 'wilful blindness', which is fulfilled when a superior 'simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or about to be committed'.[232]

In fact the provision of Article 28 letter *b*) ICC Statute appears to be similar to the definition of recklessness as contained in the American Model Penal Code. There it is provided that: 'a person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct'. [233]

In light of the above, in order for superior responsibility to be established with regard to civilian superiors the Rome Statute requires that they acted – at least – recklessly (or with *dolus eventualis*).[234]

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[232] ICTY, *Čelebići TC Judgment*, para. 387; nevertheless, it has been maintained that *consciously disregarded* indicates something less than the standard of *wilful blindness*. This latter would imply that the superior wants the consequences of wilful ignorance to lead to the commission of the crimes, while for the first standard it would be sufficient for the superior who, though not desiring the criminal consequence, foresees it as a possibility deriving from his failure to consider the information at his disposal (which clearly indicated the existence of the risk). See M. NEUNER, *Superior responsibility and the ICC*, p. 276.

[233] The *Model Penal Code* at Art. 2.02(2)(c) provides that a person acts '*recklessly*' when the actor consciously disregards the risk. As we shall see, this is precisely the standard adopted by Art. 28 ICC Statute with regard to the civilian superior.

[234] It is debated whether the *mens rea* of recklessness and *dolus eventualis* are exactly the same concept. On the concept of recklessness see G. FLETCHER, *Rethinking criminal law*, pp. 442 et seq.; according to some authors' opinion recklessness can be equated to *dolus eventualis*, see A. CASSESE, *International Criminal Law*, pp. 66 et seq.; a different opinion argues that recklessness has its civil law equivalent in the mental standard of conscious (or advertent) negligence, cf., G. FLETCHER, J.D. OHLIN, 'Reclaiming Fundamental Principles of Criminal law in the Darfur case', *Journal of International Criminal Justice* (2005), p. 554. See also J.S. MARTINEZ, *Understanding mens rea*, pp. 463-467.