Public Annex B6: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Mettraux, G., *The Law of Command Responsibility*, 1st ed. OUP 2009, p. 210

The Law of Command Responsibility

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ignorance is insufficient to attribute imputed knowledge'.[80] Where, however, he has received information pertaining to the alleged commission of crimes by his troops, a commander may not remain wilfully blind to those reports.[81]

10.2.4.3 'Should have known'

In contrast to the situation that prevails under customary law, Article 28(a)(i) of the ICC Statute provides that a 'military commander or a person effectively acting as a military commander' could be held criminally responsible where, all other conditions being met, he 'should have known' of the crimes of his subordinates.[82] This standard of *mens rea* effectively replaces the requirement of knowledge with a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law.[83] Whilst the 'had reason to know' standard requires proof that the accused possessed some information that should have allowed him to draw certain conclusions as regards the commission of a crime or the risk thereof, the ICC standard goes one step below that standard and attributes knowledge based on a set of circumstances which, it is assumed, should have put the accused on notice of the commission of a crime or of the risk thereof.[84]

[80] *Brima* Trial Judgment, par 796. Somewhat counter-intuitively, however, the same Trial Chamber added that superior responsibility will attach when the superior remains wilfully blind to the criminal acts of his subordinates (*Brima* Trial Judgment, par 796; see also, *Čelebići* Trial Judgment, par 387 and *Halilović* Trial Judgment, par 69, which the *Brima* Chamber cites as authority for that proposition). The first statement to that effect (*Čelebići* Trial Judgment, par 387), later cited as authority by both the *Halilović* and *Brima* Trial Chambers did not provide for any authority or precedent as would support such a position. In fact, a superior who has received no information as would put him on—sufficient—notice of the crimes may not be held criminally responsible for his failure to acquire such knowledge. Where, however, he has obtained sufficient notice, although not necessarily a full record of the events, his deliberate failure to obtain 'further information' may be relevant to drawing any inference as regard an allegation that he had 'reason to know' of the crimes (see, e.g., *Mrkšić* Trial Judgment, par 564). The validity of the *Brima* finding and those cited as authority for it is therefore open to question.

[81] See, e.g., the holding of the Superior Military Government Court of the French Occupation Zone in Germany in the *Roechling* case: 'The defense of lack of knowledge—No superior may prefer this defense indefinitely; for it his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.' (Superior Military Government Court of the French Occupation Zone in Germany, Judgment of 25 January 1949 in the case versus Hermann Roechling and others, Decision on Writ of Appeal against the Judgment of 30 June 1948, reprinted in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council law No.10, Vol XIV, 1097, at 1106).

[82] See above, 3.2 Superior responsibility in the ICC Statute.

[83] See, e.g., Ambos, *Superior Responsibility*, 853–863; M. Damaška, 'The Shadow Side of Command Responsibility', 49(3) *American Journal of Comparative Law*, 455 ('Damaska, *Shadow Side*'), at 471–2 (2001). It has been pointed out in the literature that the loosening of legal standards might have the effect of weakening the stigmatizing effect of a criminal conviction (see Ambos, *Superior Responsibility*, 871). The broadening of the scope of criminal liability would also have the effect of exaggerating the ability of international justice, understood in its broadest sense, to process even a small fraction of the cases that might come within its scope (see Darcy, *Collective Responsibility*, 356–7).

[84] The propriety of adopting what, in effect, is a 'negligence' standard of liability in relation to international crimes and the adequacy of such a standard of liability in that context has been