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ANNEX E

FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

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Volume I

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3.4.1.2 Mental element: a higher standard for civilian superiors

The core of the bifurcated approach in the Rome Statute is the different mental states that are sufficient to ground liability for military and civilian superiors. Under Article 28(a)(i), assuming all other elements of the test are satisfied, a *de jure* or *de facto* military commander is responsible for subordinates' conduct if he or she 'knew or, *owing to the circumstances at the time, should have known*' that the crimes in question were being committed or about to be committed. Under Article 28(b)(i), on the other hand, a civilian superior is only responsible if he or she 'knew, or *consciously disregarded information which clearly indicated*' that subordinates were committing or about to commit such crimes. The addition of an alternative mental state for civilian superiors, short of actual knowledge, was the only major deviation from the American proposal.

Although much could be (and has been) made of the fact that the phrase 'should have known' suggests a negligence standard for military superiors,[634] the deliberate inclusion of the qualifying phrase 'owing to the circumstances at the time' by the drafters invokes both the terms of Article 86(2) of Additional Protocol I to the Geneva Conventions,[635] and the 'had reason to know' standard of the *ad hoc* Statutes. Accordingly, it is possible that this alternative mental state for military superiors will be construed so as to bring it relatively close to the *ad hoc* jurisprudence relating to the 'had reason to know' standard.[636] Such an interpretation would avoid a direct conflict between eventual ICC jurisprudence and the *ad hoc* Appeals Chambers' explicit rejection of negligence as an appropriate standard for superior responsibility.[637] On the other hand, even the earliest drafts of the eventual Article 28 used the phrase 'should have known' – which had been specifically abandoned by the diplomatic conference negotiating the Additional

[634] See *supra* notes 377–379 and accompanying text; see also, e.g., Nicola Pasani, 'The Mental Element in International Law', in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court: Volume II* (2004), p. 135.

[635] This sub-paragraph of Additional Protocol I provides:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

(Emphasis added.)

[636] See *supra* text accompanying notes 378–459.

[637] See *supra* notes 377–379 and accompanying text. See also Vetter, *supra* note 622, p. 122 n. 190 (arguing that the Rome Statute's reference to 'circumstances' and not 'information' could result in the consideration of a broader range of clues to the superior about the crimes in question, and might therefore even extend liability beyond the reach of the *ad hoc* standard).

Protocol[638] – as the alternative mental standard, perhaps indicating the purposeful adoption of a lower standard, similar to negligence, by the plenipotentiaries in Rome.[639]

Turning to the second subparagraph of Article 28, it is apparent that the Rome Statute's drafters intended to create a standard for the civilian superior's alternative mental state that is higher than the corresponding alternative for military superiors, as indicated by the use of the terms 'consciously disregarded' and 'clearly indicated'. Given the direction, however, that *ad hoc* jurisprudence has taken on its 'had reason to know' alternative standard, it is unclear whether a civilian superior before the ICC would be treated any differently than he or she would before the ICTY or ICTR. The Commentaries to the Geneva Conventions and their Protocols have been given considerable weight in the jurisprudence of the *ad hoc* Tribunals, and the Commentary to Article 86(2) of the Additional Protocol states that '[i]t seems to be established that a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him', a reading of the law that ostensibly imposes a duty on a superior to be apprised, at least, of information that is made directly available to him.[640] Although both this approach and the Rome Statute's formulation have been interpreted as referring to impermissible wilful blindness on the part of a superior,[641] a duty to remain apprised would demand more of

[638] See IRC Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) ('Additional Protocol Commentary'), p. 1006, para. 3526 & n. 2 (noting that the draft article presented to the conference provided that superiors would not be absolved of penal responsibility 'if they knew or *should have known*' of a subordinate's crime); Vetter, *supra* note 622, pp. 121–122 and n. 190 (noting that in the negotiations on Additional Protocol I, another formulation of the phrase – 'should reasonably have known in the circumstances at the time' – was specifically rejected in favour of the finalised text quoted in note 635 above). Note that the English text of Article 86(2) retains a 'should have' reference, this time to the information itself, which 'should have enabled' the superior to conclude that crimes were going to be or being committed. Any hint of the consequent re-introduction of a negligence standard is probably excluded by the Commentary's direction that the French version '*leur permettant de conclure*' ('enabling them to conclude') best encapsulates the object and purpose of the treaty. Additional Protocol Commentary, p. 1014, para. 3545.

[639] See also Summary Record, *supra* note 628, pp. 10–12 (repeated implicit references to 'should have known' as a negligence standard appropriate for military superiors, but not civilian superiors).

[640] The drafters of the Additional Protocol Commentary relied on the *Hostages* case as authority for this statement. *See* Additional Protocol Commentary, *supra* note 5, p. 1014, para. 3545, nn. 35–36; *supra* text accompanying notes 97–105. See also *Čelebići* Appeal Judgement, *supra* note 32, para. 241 ('[A] superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.').

[641] See *supra* note 375 and accompanying text; Vetter, *supra* note 622, p. 124. Note, however, that in explicitly rejecting the *Blaškić* Trial Judgement's negligence standard, the Appeals Chamber held that '[n]eglect of a duty to acquire such knowledge . . . does not feature in the provision [Article 7(3)] . . . and a superior is not therefore liable under the provision for such failures'. *Čelebići* Appeal Judgement, *supra* note 32, para. 226. See also *Blaškić* Appeal Judgement, *supra* note 170, para. 64. Under ICTY jurisprudence, which has been followed in the ICTR, the duty of the superior is not therefore to seek out admonitory information, but rather to be aware of such information available to him; an obligation to investigate possible or probable criminal activity is triggered only after the admonitory information is already available. See *supra* text accompanying notes 375–383.

a superior than that he or she not consciously disregard information clearly indicating criminal activity, because this latter formulation appears to assume that the superior is already aware of that information. As this chapter's survey of the recent *ad hoc* jurisprudence shows, however, the concern of various chambers to avoid enunciating a standard that even implies negligence would seem to mean that mere possession of a report addressed to the superior would be insufficient to ground liability.[642] Moreover, since the *ad hoc* chambers use different terms to describe the requisite nature of the admonitory information and its suggestiveness of subordinate criminal conduct,[643] the Rome Statute's requirement that the information in question 'clearly indicate' (imminent) criminal activity is not necessarily that much stricter.[644]

Most of these questions will only be resolved once the ICC begins to issue judicial statements on the meaning and scope of Article 28. Nonetheless, two conclusions may still be drawn about the future application of these different mental elements. First, in light of the drafting history of the Article, the chambers of the ICC are supposed to apply different alternative mental standards to military and civilian superiors, though there may be some room for judicial discretion in the interpretation of those standards so as to reduce the starkness of the distinction. Second, the alternative mental state in the unitary superior responsibility standard of the *ad hoc* Tribunals turns on inquiry notice; that is, the admonitory information available to the superior need not establish the certainty of subordinate criminal activity, but need only trigger the superior's investigation.[645] The plain text of Article 28(b)(i), however, requires that the information 'clearly indicate . . . that the subordinates were committing or about to commit such crimes', a constraint that is likely to be read as referring to a situation where investigation of the sort discussed in ICTY judgements is unnecessary. Since the *ad hoc* jurisprudence on superior responsibility would hold a superior responsible if he had been in possession of information falling short of 'clear indication' of ongoing or imminent criminal activity,[646] it extends liability to situations ostensibly forbidden to the ICC by the Rome Statute.

3.4.1.3 Causation

Another point of textual divergence between the *ad hoc* Statutes and the Rome Statute is the latter's requirement, applicable equally to military and civilian

[642] See *supra* text accompanying notes 377–379. But see *Čelebići* Appeal Judgement, *supra* note 32, para. 239 ('[T]he relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information.').

[643] See *supra* text accompanying notes 395–401.

[644] See especially *Strugar* Trial Judgement, *supra* note 179, para. 416; *Brđanin* Trial Judgement, *supra* note 179, para. 278.

[645] See *supra* text accompanying notes 376–380.

[646] See *supra* text accompanying notes 395–398.