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ANNEX J

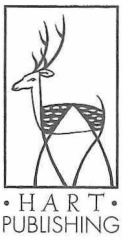
The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes

Héctor Olásolo

with a Foreword by
Judge Sir Adrian Fulford

an Introduction by
Judge Ekaterina Trendafilova

and an Epilogue by
Professor Dr Kai Ambos



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E-mail: orders@isbs.com
Website: http://www.isbs.com

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for breaches of his duty to prevent the commission of crimes by subordinates.[109] However, article 28(a) and (b) RS explicitly requires the existence of a causal link between the superior's failure to prevent the commission of crimes by subordinates by providing that military and non-military superiors shall be criminally liable for those crimes committed by his subordinates' as a result of his or her failure to exercise proper control over them.[110]

The exact nature of this causal link would depend on whether a superior's failure to prevent gives rise to principal liability for the subordinate's crimes because they are considered cases of 'commission by omission'; or whether, on the contrary, they give rise to accessorial or derivative liability because they are considered cases of participation in the crimes committed by the subordinates. The first scenario would require showing that those measures available to the relevant superior would have likely prevented his subordinates from committing the crimes,[111] whereas the second scenario would require a less stringent causal link.[112]

d Subjective Requirements: The 'Should Have Known' Standard versus the 'Had Reasons to Know' Standard

From a subjective perspective, article 28(a)(i) RS establishes that criminal liability arises when military superiors:

[109] The *Blaskic Case* Appeals Judgment reversed the finding of the ICTY Trial Judgment in the Celebici case that required the existence of a causal link between the superior's failure to prevent and the commission of crimes by subordinates. As the *Blaskic Case* Appeals Judgment (*Ibid*), at para 77, explained: 'The Appeals Chamber is therefore not persuaded by the Appellant's submission that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. Once again, it is more a question of fact to be established on a case-by-case basis, than a question of law in general'.

This position was already hinted by the *Krnojelac Case* Appeals Judgment (*Ibid*), at paras 170–72, where the defendant (the warden of the KP Dom prison facility) was convicted for his failure to prevent the commission of torture by his subordinates without discussing the potential causal link between the defendant's omission and the acts of torture for which he was convicted (the Appeals Chamber did not discuss the need for the Prosecution to adduce evidence of this causal link). This position has been ratified in the *Hadzihasanovic Case* Appeals Judgment (Above n 55), at paras 38–40. This is also the solution adopted in national systems with such different legal traditions, such as Germany and the United States. Concerning Germany see, German Code of Crimes against International Law § 13(a) and (b). In relation to the United States, see *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), specifically rejecting the argument that proximate cause is a required element of the doctrine of command responsibility. The same decision was also held in *Hilao v Estate of Marcos*, 103 F.3d 767 (9th Cir 1996).

[110] Triffterer, *Causality* (Above n 79), at 179; C Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *Journal of International Criminal Justice* 636 [hereinafter Meloni].

[111] See Ch 3, s II.A.

[112] For instance, refer to the 'substantial effect' requirement for aiding and abetting, or the 'clear contributing factor' requirement for instigation. Logically, due to the fact that in this scenario the superiors' failures to prevent would constitute a distinct theory of accessorial or derivative liability, it is not necessary to adopt the same causal link of other forms of accessorial liability such as aiding and abetting or instigation.

> [E]ither knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.[113]

According to this provision, military superiors' failures to prevent or punish give rise to criminal liability no matter whether such failures are intentional or negligent.[114] The inclusion of negligence through the 'should have known' standard is surprising given that, according to article 30 RS, negligence is excluded from the realm of the general subjective element of most crimes provided for in the RS. Moreover, this is also in contrast with the general subjective element provided for in article 28(2) RS for non-military superiors, according to which, criminal liability only arises when they:

> [E]ither knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.[115]

[113] Art 28(a) RS applies to both military superiors and to persons effectively acting as military superiors. As P Saland, 'International Criminal Law Principles' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (The Hague, Kluwer, 1999) 203, has explained, the delegates at the Rome Conference considered it unacceptable to have less stringent requirements for de facto military superiors than for *de iure* military superiors in regular armed forces.

[114] In relation to their duty to prevent, the 'should have known' standard used in this provision makes military superiors criminally liable if they do not act with the diligence required from an average military superior in the same circumstances to: (i) obtain information about the fact that subordinates were about to commit crimes within the ICC jurisdiction (negligence in learning about the situation that activates their duty to prevent); (ii) assess the measures within their power to prevent subordinates from committing crimes (negligence in the appreciation of the extent of their power to intervene); and (iii) apply the measures available to them. With regard to their duty to punish, the 'should have known' standard used in this provision makes military superiors criminally liable if they do not act with the diligence required from an average military superior in the same circumstances to: (i) obtain information about the fact that subordinates were committing, or had committed, crimes within the ICC jurisdiction (negligence in learning about the situation that activates their duty to prevent punish); (ii) assess the measures within their power to punish his subordinates (negligence in the appreciation of the extent of their power to intervene); and (iii) apply the measures available to them. A negligence standard was already applied in relation to the notion of superior responsibility in certain post WW II cases, such as in the case of *United States v Wilhelm List et al* (1948) in Trial of the Major War Criminals? before the International Military Tribunal under Control Council Law No 10, Vol XI (US Government Printing Office, 1951) 957, 1236. The interpretation of the expression 'should have known' in Art 28(a)(i) RS as setting out a negligence standard would be consistent with the view held by a number of writers that the notion of superior responsibility creates criminal liability for negligence. See WA Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute, Part III' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 417 [hereinafter Schabas, *General Principles*]; I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 590; KMF Keith, 'The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence' (2001) 14 *Leiden Journal of International Law* 632. However, for Van Sliedregt (Above n 24), at 186, the expression 'should have known' in art 28(a)(i) RS introduces a recklessness standard. The same view is also held by BD Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now' (1995) 149 *Military Law Review* 300, where he affirms that there is no distinction between the 'should have known' standard and the 'had reasons to know' standard. As a result, the only point of agreement among writers is that the 'should have known' standard is not a strict liability standard. See BB Jia, 'The Doctrine of Command Responsibility: Current Problems' (2000) 3 *Yearbook of International Humanitarian Law* 161–2.

[115] See Fenrick (Above n 85), at 520–22; Ambos, *Superior Responsibility* (Above n 81), at 870–71. This standard was also originally followed in relation to non-military superiors by the *Kayishema Case* Trial Judgment (Above n 71), at paras 227–8. Van Sliedregt (Above n 24), at 164, and A Zahar, 'Command Responsibility for Civilian Superiors for Genocide' (2001) 14 *Leiden Journal of International Law* 613–16, refer to this finding as 'erroneous'.

In this regard, it is worth noting that not even the case law of the *Ad hoc* Tribunals, which in general has enlarged the scope of responsibility of military superiors provided for in articles 86 and 87 AP I, supports the choice made by the drafters of the RS. Indeed, the ICTR and ICTY Appeals Chambers in the *Celebici, Bagilishema, Krnojelac, Blaskic, Halilovic, Oric and Strugar* cases rejected the attempt of the Trial Chamber in the *Blaskic* case to give the same meaning to the expressions 'had reason to know' and 'should have known'.[116] The Appeals Chambers of the *Ad hoc* Tribunals have held that 'had reasons to know' is a higher standard than 'should have known' because it does not criminalise the superiors' mere lack of due diligence in complying with their duty to be informed of their subordinates' activities.[117] According to the ICTR and ICTY Appeals Chambers, the 'had reason to know' standard provided for in article 7(3) ICTYS and 6(3) ICTRS requires superiors to, at the very minimum, have had information of a general nature available to them that should have put them on notice of the risk of offences by their subordinates and of the consequent need to set in motion an inquiry to determine whether crimes were about to be or had been committed.[118]

[116] The reasons given by the *Blaskic Case* Trial Judgment (Above n 48), at para 332, for giving the same meaning to the standards 'should have known' and 'had reason to know' are the following: 'If a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute'. According to MR Lippman, 'The Evolution and Scope of Command Responsibility' (2000) 13 *Leiden Journal of International Law* 157, the 'should have known' test, providing for a negligence standard for superior responsibility, was introduced by the findings of the Kahan Commission in 1983, which was subsequently relied on by the Trial Chamber in the Blaskic case. See also N Keijzer and E Van Sliedregt, 'Commentary to Blaskic Judgment' in A Klip and G Sluiter, *Annotated Leading Cases of International Criminal Tribunals* (Vol 4, Oxford, Hart Publishing, 2001) 656–7; MF Tinta, 'Commanders on Trial: The Blaskic Case and the Doctrine of Command Responsibility' (2000) 47 *Netherlands International Law Review* 293–322.

[117] *Celebici Case* Appeals Judgment (Above n 1), at para 226. From this perspective, *Prosecutor v Bagilishema* (Appeals Chamber Judgment) ICTR-95-01A-A (3 Jul 2002) para 35 [hereinafter *Bagilishema Case* Appeals Judgment] has highlighted that '[r]eferences to negligence in the context of superior responsibility are likely to lead to confusion of thought'.

[118] *Bagilishema Case* Appeals Judgment (*Ibid*), at paras 35–42; *Celebici Case* Appeals Judgment (Above n 1), at para 241; *Krnojelac Case* Appeals Judgment (Above n 51), at para 151; *Blaskic Case* Appeals Judgment (Above n 32), at para 62; *Galic Case* Appeals Judgment (Above n 37), at para 184; *Hadzihasanovic Case* Appeals Judgment (Above n 55), at paras. 26–29; *Oric Case* Appeals Judgment (Above n 48), at para 51; Strugar Case Appeals Judgment (Above n 41), at para 297; *Hadzihasanovic Case* Trial Judgment (Above n 65), at para 95; *Strugar Case* Trial Judgment (Above n 32), at para 399; See also E Carnero Rojo and F Lagos Polas, 'The Strugar Case before the International Criminal Tribunal for the Former Yugoslavia' (2005) 2 *Journal of International Law of Peace and Armed Conflict* 140–142; S Hinek, 'The Judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Pavle Strugar' (2006) 19 *Leiden Journal of International Law* 477–90.

It is important to highlight the emphasis placed by the recent *Oric Case* Appeals Judgment (Above n 48), at para 55, on the fact that the accused's knowledge or reasons to know of his subordinate's criminal conduct constitutes a 'crucial element of the accused's criminal liability under Article 7 (3)'. In applying this principle to the facts of the case, the ICTY Appeals Chamber held: '[T]he Appeals Chamber considers that, read in context, the finding on Oric's "prior notice" relates to his knowledge that "Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed." Thus the finding did not concern Oric's rreason to know of his subordinate's conduct,

In applying the 'had reasons to know' standard, the *Strugar Case* Appeals Judgment has recently held:

> The Trial Chamber erred in finding that Strugar's knowledge of the risk that his forces might unlawfully shell the Old Town was not sufficient to meet the mens rea element under Article 7(3) and that only knowledge of the 'substantial likelihood' or the 'clear and strong risk' that his forces would do so fulfilled this requirement. In so finding, the Trial Chamber erroneously read into the mens rea element of Article 7(3) the requirement that the superior be on notice of a strong risk that his subordinates would commit offences. In this respect, the Appeals Chamber recalls that under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute.[119]

The information available to superiors needs not be of a nature such that it alone establishes that crimes were about to take place or had already taken place, and needs not contain specific details about the offences that were about to be committed or had been committed.[120] Furthermore, the awareness of a superior that his subordinates have previously committed offences could be, depending on the circumstances of the case, sufficient to alert him that other crimes of a similar nature might be committed by the same 'identifiable group of subordinates' who operate in the same geographical area. In this regard, the ICTY Appeals Chamber has recently explained:

> In Krnojelac, the Trial Chamber found that '[t]he fact that the Accused witnessed the beating of [a detainee, inflicted by one of his subordinates], ostensibly for the prohibited purpose of punishing him for his failed escape, is not sufficient, in itself, to conclude that the Accused knew or [. . .] had reason to know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes'. The Appeals Chamber rejected this finding and held that 'while this fact is indeed insufficient, in itself, to

but, instead, his notice of the crimes committed by others at the Srebrenica Police Station.' See Oric Case Appeals Judgment (Above n 48), at paras 55 and 174.

[119] Strugar Case Appeals Judgment (Above n 41), at para 304.

[120] *Bagilishema Case* Appeals Judgment (Above n 118), at para 28; *Celebici Case* Appeals Judgment (Above n 1), at para 238; *Krnojelac Case* Appeals Judgment (Above n 51), at paras 154–5; *Galic Case* Appeals Judgment (*Above n 37*), at para 184; Strugar Case Appeals Judgment *(Ibid)*, at para 298; *Kordic Case* Trial Judgment (Above n 31), at paras 436–7; *Strugar Case* Trial Judgment (Above n 32), at paras 360–70; *Hadzihasanovic Case* Trial Judgment (Above n 65), at para 97. Information of a general nature which meets the 'had reason to know' standard in relation to the fact that subordinates were about to commit a crime exists, for instance, when: (i) a superior has been informed that some soldiers under his command were drinking prior to being sent on a mission or have a violent or unstable character (*Celebici Case* Appeals Judgment (Above n 1), at para 228); or (ii) a superior has been informed of the low level of training, the character traits or habits of some of his subordinates (*Kordic Case* Trial Judgment (Above n 31), at para 247). Issuing orders to comply with international humanitarian law is not per se sufficient to show that a superior knew or had reason to know that subordinates were about to commit crimes. See *Celebici Case* Appeals Judgment (Above n 1), at para 238; *Hadzihasanovic Case* Trial Judgment (Above n 65), at para 100, fn 199. Moreover, such orders are only relevant to the issue of whether a superior is criminally liable under the notion of superior responsibility if they have been issued because the superior knew or had reason know that subordinates were about to commit crimes. See *Blaskic Case* Appeals Judgment (Above n 32), at para 486.

conclude that Krnojelac knew that acts of torture were being inflicted on the detainees, as indicated by the Trial Chamber, it may nevertheless constitute sufficiently alarming information such as to alert him to the risk of other acts of torture being committed, meaning that Krnojelac had reason to know that his subordinates were committing or were about to commit acts of torture' [] In Hadzihasanovic and Kubura, the Trial Chamber found that 'the Accused Kubura, owing to his knowledge of the plunder committed by his subordinates in June 1993 and his failure to take punitive measures, could not ignore that the members of the 7th Brigade were likely to repeat such acts. The Appeals Chamber in that case found that the Trial Chamber had erred in making this finding as it implied that the Trial Chamber considered Kubura's knowledge of and past failure to punish his subordinates' acts of plunder in the Ovnak area as automatically entailing that he had reason to know of their future acts of plunder in Vares'. The Appeals Chamber thus applied the correct legal standard to the evidence on the trial record: 'While Kubura's knowledge of his subordinates' past plunder in Ovnak and his failure to punish them did not, in itself, amount to actual knowledge of the acts of plunder in Vares, the Appeals Chamber concurs with the Trial Chamber that the orders he received on 4 November 1993 constituted, at the very least, sufficiently alarming information justifying further inquiry.'[121]

Furthermore, in the particular situation of multiple offences of a similar nature, a superior's awareness that his subordinates have committed a crime is sufficient to alert him to the fact that other similar offences might have been previously committed by the same identifiable group of subordinates.[122]

Concerning those crimes requiring an ulterior intent or a *dolus specialis*, such as genocide or torture, the superior himself does not need be motivated by such an ulterior intent. On the contrary, as the ICTY Appeal Judgment in the *Krnojelac* case indicated, it is sufficient if the superior had available to him information of a general nature which should have put him on notice that subordinates might have

[121] *Strugar Case* Appeals Judgment (Above n 41), at paras 299 and 300. According to the *Hadzihasanovic Case* Appeals Judgment (Above n 55), at para. 30: 'While a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry'. In this regard, the *Hadzihasanovic Case* Trial Judgment (Above n 65), at paras 115–16, rejected the Prosecution's argument that this rule should be extended to all subordinates, regardless of whether they belong to the same group. As the Trial Chamber explained: 'To adopt such a position misconstrues the reasoning of the *Krnojelac* Appeals Chamber, in that it is silent about taking into account one same group of subordinates and the geographical aspects related to that group (for example, the location of a subordinate unit), which fall within the scope of Krnojelac's prior knowledge'. As a result, the Trial Chamber, in light of the structure and operations of the 3rd Corps of the ABiH, limited the 'identifiable group of subordinates' to a brigade battalion, and this assuming that a battalion 'has a geographical location different from that of the other units of the brigade to which it belongs'. See *Hadzihasanovic Case* Trial Judgment (*Ibid*), at para 117. See also on this matter *Krnojelac Case* Appeals Judgment (Above n 51), at para 155; *Strugar Case* Appeals Judgment (*Ibid*), para 301.

[122] *Hadzihasanovic Case* Trial Judgment (Above n 65), at para 185 referring to the treatment of this issue in the *Krnojelac Case* Appeals Judgment (Above n 51), at paras 156–69.

been motivated by the required ulterior intent.[123] Following the same rationale, article 28(a)(i) RS would only require that military superiors either knew or, owing to the circumstances at the time, should have known that their subordinates had the required ulterior intent. In the case of non-military superiors, it would be sufficient if they either knew or consciously disregarded information, which clearly indicated that their subordinates had the requisite ulterior intent.

e Nature of Criminal Liability under the Notion of Superior Responsibility

The most salient feature of the notion of superior responsibility in the ICTY and ICTR case law is the absence of any causal connection between a superior's failure to prevent or punish, and the commission of crimes by his subordinates. As a result, as the ICTY Appeals Chamber in the *Krnojelac* case has explained:

> [W]here superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.

[123] The question as to whether criminal liability for superiors' failures to prevent the commission by subordinates of offences requiring an ulterior intent (such as genocide or torture) only arises if the superiors' omissions are also motivated by such ulterior intent was dealt with by *Prosecutor v Stakic* (Decision on the Defence Rule 98 *bis* Motion for Judgment of Acquittal) ICTY-97-24-T (31 Oct 2002) para 92 [hereinafter *Stakic Case* Rule 98 *bis* Decision]. The Trial Chamber stated: 'It follows from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3) as well'. This question was not further elaborated upon in the *Stakic* Trial and Appeals Judgments. Subsequently, in the *Krnojelac* case, the Prosecution argued in the appeal that a superior could be found guilty of an ulterior intent crime even if the superior did not posses the requisite ulterior intent. According to the Prosecution, Krnojelac (the warden of the KPDom detention camp at the relevant time) was informed that prisoners were beaten in the camp by his subordinates, and this information amounted to putting him on notice of the risk that subordinates were mistreating prisoners for one of the specific purposes required by the crime of torture (Prosecution Appeals Brief in the *Krnojelac* case, third and fifth grounds of appeal; this position had already been advanced by the Prosecution in an implicit manner in the *Bagilishema* appeal). The ICTY Appeals Chamber accepted the argument of the Prosecution and stated that in the case of torture, the information available to the superior must put him on notice not only of the beatings committed or about to be committed by his subordinates, but also of the ulterior intent which must motivate this treatment by his subordinates. See *Krnojelac Case* Appeals Judgment (*Ibid*), at para 155.

In applying this standard to the facts of the case, the Appeals Chamber came to the conclusion that: 'Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Article 7(3) of the Statute. It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control. There is no doubt that, given the information available to him, Krnojelac was in a position to exercise such control, that is, to investigate whether acts of torture were being committed, especially since the Trial Chamber considered he had the power to prevent the beatings and punish the perpetrators. In holding that no reasonable trier of fact could have made the same findings of fact as the Trial Chamber, the Appeals Chamber takes the view that the Trial Chamber committed an error of fact'. See *Krnojelac Case* Appeals Judgment, at para 171.

As a result, it can be affirmed that the *Krnojelac Case* Appeals Judgment took the approach that in cases of ulterior intent crimes, such as torture, a superior can be found liable for having failed to prevent subordinates from committing such crimes even though his omission was not motivated by the requisite ulterior intent. It is sufficient for the superior to have had information available to him that should have put him on notice that subordinates might be acting with the requisite ulterior intent.