



# COMMAND RESPONSIBILITY FOR OMISSION WHEN THE MILITARY COMMANDER “SHOULD HAVE KNOWN”

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## I. INTRODUCTION

The Rome Statute of the International Criminal Court establishes in its article 28 (a) the responsibility of the military commander *de jure* or *de facto*, regarding the crimes under the jurisdiction of the Court, when s/he knew or should have known about the crimes perpetrated by her/his forces, and did not act according to her/his duty of vigilance by not taking the necessary and reasonable measures to prevent, repress, or, report the crimes committed by her/his troops.

Unlike from the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the Rome Statute uses the expression “should have known,” as the second situation in which the military commander would be held responsible for the crimes committed by her/his troops. This formula differs from the expression “had reason to know” contained in the former Statutes.

What does this “new” expression mean? Which *mens rea* does it encompass? Is there any difference between “should have known” and “had reasons to know”?

This paper pretends to answer these questions in a brief way, by analyzing the two figures and by reminding criminal concepts of *mens rea*.

## II. ANALYSIS OF ARTICLE 28 (A)

Article 28 (a) states:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

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\* Andrea Mateus-Rugeles, *Genocidio y Responsabilidad Penal Militar: Precisiones en torno al artículo 28 del Estatuto de Roma (Genocide and Command Responsibility: Certainties around article 28 of the Rome Statute)*, (Centro Editorial Universidad del Rosario eds., Colombia 2006) (Excerpt in English of chapter 3 of the book with some modifications and inclusions). Andrea Mateus-Rugeles is a recent graduate of the Master of Laws in International Legal Studies at New York University School of Law. She obtained her first law degree from the Universidad Colegio Mayor de Nuestra Señora del Rosario, School of Law in Colombia, South America.

- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>1</sup>

This provision states two different circumstances: the first one refers to the situation when the military commander or the person effectively acting as a military commander, “knew,” this means, had a real knowledge of the behavior of the forces under her/his effective command or authority (depending on the case) and control; and in spite of it, s/he did not take the necessary and reasonable measures within her/his power to prevent or repress the commission of the crimes.<sup>2</sup> In this case it is clear that the military commander with knowledge omits to prevent or repress the crimes. S/he may commit her/his omission with intent to, or, at least “foreseeing that her/his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting.”<sup>3</sup> That is, the military commander recklessly omits to take any necessary, reasonable and feasible measure.

In civil law countries, this figure will perfectly fit into the concept of *dolus*, where—depending on the theory adopted by the country—generally knowledge and intent are necessary to consider that a conduct was committed with *dolus*. Now, this encompasses the different categories of *dolus*, namely, direct *dolus*, indirect *dolus*, or *dolus eventualis*. In this last sense the two legal systems coincide since recklessness is the same *dolus eventualis*.<sup>4</sup>

In conclusion, it may be said that this situation of omission in spite of having knowledge, requires real knowledge, and may be committed with *dolus*, with knowledge, or with *dolus eventualis*.

The second situation that the article states is that the military commander or the person effectively acting as such, “should have known” of the misconducts of the forces under her/his effective command or authority (respectively) and control. This paper will focus on this hypothesis.

In order to understand the situation that this hypothesis presents, first it is necessary to establish the meaning of that expression. “Should have known” means that having the duty to know, the person did not know due to her/his lack of diligence. The *de jure* or *de facto* military commander was not sufficiently diligent as to be informed in an appropriate way—according to her/his commander position—of the conducts that her/his forces were going to commit or were committing. This lack of attention may be thought as committed with the knowledge and maybe the intention to avoid her/his duty, or when in spite of foreseeing that criminal consequences may arise for her/his omission, s/he still did not act. In that case, it would be clear that the hypothesis here corresponds to a situation in which the military commander (or the person effectively acting as such), has the knowledge of what is occurring inside her/his forces, and, intentionally or recklessly ignored the facts of which

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<sup>1</sup> Rome Statute art. 28 (a), *opened for signature* July 17, 1998.

<sup>2</sup> *See id.*

<sup>3</sup> Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* 169 (Oxford University Press 2003).

<sup>4</sup> *See id.*

s/he has knowledge. If this is the case, then it would be repeating the same *mens rea* necessary to be before the first figure expressed in the article (“knew”) and there would be no reason to establish a second category (“should have known.”)

For this, it is clear that the “should have known” cannot be understood neither as knowledge or intent as stated in article 30 of the Rome Statute, nor as *dolus*, in any of its categories, namely, direct, indirect and *dolus eventualis*. This last category, although is the closest to the concept of negligence—more exactly to the culpable negligence (in common law) or *negligence consciente*, or with representation (in the civil law system)—is also excluded from the figure that we are analyzing, as stated above.

Article 30 of the Rome Statute, establishes an exception of the intent and knowledge categories of *mens rea*, as the mental element required for the commission of the crimes contemplated in articles 5 to 8 of the Rome Statute. When the Statute expressly establishes a provision containing this exception, the negligence will be admitted as the *mens rea* required for the commission of a crime or the omission that results in a crime. Professor Kai Ambos recognizes this exception.<sup>5</sup> Granados Peña<sup>6</sup> goes further in the analysis of this provision. He considers that the phrase “unless otherwise provided” not only refers to the possibility of the Rome Statute to have jurisdiction over a crime—those within its competence—committed with negligence; but that this provision states the adoption of the *Numerus Clausus* system for the negligence. This means that the general rule is that “intent and knowledge” is the *mens rea* required for the crimes within the competence of the International Criminal Court, unless there is a provision that expressly admits the negligence as the mental element required to commit the illegal conduct.<sup>7</sup>

According to this analysis and to the fact that “should have known” is an example of this exception, it must be concluded that this figure entails a negligent omission, since it is for the negligence or the carelessness of the military commander that the omission in her/his duty to supervise and control her/his forces, occurred. S/he infringes the duty of care, incurring therefore, in an element of the negligence.<sup>8</sup>

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<sup>5</sup> Kai Ambos, Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität, Address at the Seminary Criminal Responsibility and Colombian Study at the Univ. Javeriana of Colombia (Mar. 25, 2004).

<sup>6</sup> Jaime Enrique Granados Peña, *La responsabilidad de los jefes y otros superiores en la Corte Penal Internacional y el conflicto Colombiano* (The Responsibility of the military commanders and others superiors in the International Criminal Court and the Colombian Conflict), *Derecho Penal Contemporáneo – Revista internacional*, 179, 179-217.

<sup>7</sup> Although Professor Granados does not make any mention in his article regarding the *Numerus Clausus* system, he does refer to the definition of this system.

<sup>8</sup> I Claus Roxin, *Derecho Penal, Parte General*, (Criminal Law, General Part) 999 (Diego Manuel Luzón Peña, Miguel Díaz y García Conlledo, Javier de Vicente Remesal trans., Civitas, 1997).

### III. SUBJECTIVE ELEMENT THAT ENCOMPASSES THE TERM “SHOULD HAVE KNOWN”

Having this clear is necessary to precise which type of negligence does this figure encompasses. Is the “should have known” a *negligence consciente* or *negligence inconsciente*? To answer this question a reminder of the concept of these figures is important. The *negligence consciente*, or negligence with representation of the civil law, and the culpable negligence or gross negligence of the common law, has been defined as the situation in which the actor foresees the occurrence of a criminal consequence, as a result of the infraction to duty of care but negligently has confidence on being able to avoid it.<sup>9</sup>

According to Roxin,<sup>10</sup> in spite of the relevance of the risk created, the *negligence consciente* is present only when the actor has had anticipated the possibility of the criminal consequences; it is not enough that s/he should have anticipated this possibility.

On the other hand, the *negligence inconsciente*, or negligence without representation of the civil law, and the inadvertent negligence of the common law, occurs when the actor did not anticipate the criminal consequence, due to her/his lack of awareness to the general accepted standards of conduct.<sup>11</sup> In words of Muñoz Conde, the actor “should have foreseen the criminal consequences, if s/he should have behaved with the required diligence.”<sup>12</sup>

Although the delimitation of these two terms is blurry in the practice, “should have known” is a concept that fits better into the definition of *negligence inconsciente* of the civil law, since according with what has been stated by Roxin, the *negligence consciente* does not allow that the anticipation of the criminal consequence should have been done by the actor, but that s/he actually has done it; while the *negligence inconsciente* occurs precisely when should having foreseen the criminal consequence, s/he did not do it due to her/his lack of diligence.

### IV. FACTUAL SITUATION THAT ARTICLE 28 (A) ENCOMPASSES

Having stated this, it is relevant now to define the situation that article 28 (a) encompasses when the *de jure* or *de facto* military commander “owing to the circumstances at the time, should have known that the forces were committing or about to commit” the crimes established in articles 5 to 8 of the Rome Statute.

#### Theory of Command Responsibility

This article establishes the criminal responsibility of the military commander or the person effectively acting as such, for the crimes within the jurisdiction of the Court; in other words, the commander, whether *de jure* or *de facto*, is responsible for the crimes committed with intention or/and knowl-

<sup>9</sup> *Id* at 426, 1019.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.* (citing German Criminal Code section 18 I).

<sup>12</sup> Francisco Muñoz Conde, *TEORÍA GENERAL DEL DELITO* (General Theory of the Crime) 182 (Temis 2d ed. 2002).

edge<sup>13</sup> by her/his troops under her/his effective command or authority (respectively) and control, due to her/his negligent omission of vigilance and control. This means that even though the commander had not committed by action the crimes, according to the theory of responsibility of the superiors, s/he is responsible for those crimes since her/his omission can be equated to the commission of the crime.

This theory implemented by the criminal international tribunals in their decisions, establishes that the military commander is criminally responsible for the criminal conducts committed by her/his forces.

That responsibility has its origin in the positive acts of the military commander or in her/his negligent omissions when “failing to take measures to prevent or repress the unlawful conduct of his subordinates.”<sup>14</sup>

The responsibility for omission occurs only when there is a duty to act.<sup>15</sup> According to what has been stated by the Tribunal for the Former Yugoslavia, article 87 of Additional Protocol I to the Geneva Conventions of 1949 (AP. I) imposes for the military commanders “an affirmative duty . . . to prevent persons under their control from committing violations of international humanitarian law . . .” It is precisely this obligation the basis to establish and define the command responsibility stated in the statutes for the international criminal tribunals; such as the Statute for the Former Yugoslavia in its article 7 (3), the Statute for Rwanda in its article 6 (3), and the Rome Statute in its article 28 (a).<sup>16</sup>

This affirmation was also stated in the trial of the Admiral Toyoda, in which the Tokyo Tribunal asserted:

...this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has

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<sup>13</sup> Although article 30 of the Rome Statute establishes that the mental element required for the crimes within the jurisdiction of the Court is the intent *and* knowledge, Cassese affirmed that: “in international law the standard of construction applies that a purely grammatical construction must yield to a logical interpretation whenever this is dictated by the principle of effectiveness . . . and is consonant with the object and purpose of the rule. It is therefore admissible to construe the word ‘and’ as also including the word ‘or’ when this is logically required.” Cassese, *supra* note 4, at 176-7.

<sup>14</sup> Prosecutor v. Delalic et al, Case No. IT-96-2 I, II, Judgment, ¶ 333 (Nov. 16, 1998).

<sup>15</sup> See Juan Carlos Forero, *EL DELITO DE OMISIÓN EN EL NUEVO CÓDIGO PENAL (The Crime of Omission in the New Criminal Code)* (Legis, 2002).

<sup>16</sup> In article 28 of the Rome Statute, this theory is applicable to the military commanders, *de jure* and *de facto*, as well as the other superiors. However the “should have known” figure is pertinent only to the former.

failed in his performance of his duty as a commander and must be punished.<sup>17</sup>

As a conclusion, the Tribunal for the Former Yugoslavia affirmed that “the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.”<sup>18</sup>

Having stated these general enunciations regarding the theory of the superior responsibility, it is important to go further and study the description of the elements of this theory, in order to decipher the right meaning of the figure “should have known.”

According to the Prosecutor in the judgment that is being analyzed in this paper, the elements of the theory of command responsibility are the following:

The existence of a superior-subordinate relationship, where the superior exercises “direct and/or indirect command or control whether *de jure* and/or *de facto*, over the subordinates who commit serious violations of international humanitarian law . . .<sup>19</sup>

The superior must know or have reason to know, which includes ignorance resulting from the superior’s failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.<sup>20</sup>

The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.<sup>21</sup>

Although the Defence for the accused Delalic and Delic proposed other elements to establish a superior responsibility,<sup>22</sup> the Trial Chamber agreed with the elements presented by the Prosecutor and concluded that from Article 7(3) of the Statute for the Tribunal for the Former Yugoslavia the elements that compose the theory of superior responsibility when s/he did not act, are the following:

The existence of a superior-subordinate relationship.

The superior knew or had reason to know that the criminal act was about to be or had been committed.

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<sup>17</sup> Delalic et al, *supra* note 15, ¶ 339 (citing, *United States v. Soemu Toyoda*.)

<sup>18</sup> *Id.* ¶ 343.

<sup>19</sup> *Id.* ¶ 344.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 345.

The superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.”<sup>23</sup>

Although this last enunciation stated in general terms the elements extracted from Article 7(3) from the Statute for the Tribunal for the Former Yugoslavia, and did not establish expressly two important issues stated by the Prosecutor, the Trial Chamber recognized in the following paragraphs that the *de jure* and *de facto* superior can be responsible under the theory of superior responsibility,<sup>24</sup> which is one of the issues the Prosecutor refers to, and, the other one, is related to the fact that “have reason to know. . . includes ignorance resulting from the superior’s failure to properly supervise his subordinates.”<sup>25</sup>

Making the same analysis—that has been done with article 7 (3), with article 28 (a) of the Rome Statute, the elements of the superior responsibility, extracted from this article, are the following:

The existence of a superior-subordinate relationship.

The military commander *de jure* or *de facto* knew, or owing to the circumstances at the time, “should have known” that her/his subordinates “were committing or about to commit the crimes under the jurisdiction of the International Criminal Court;”<sup>26</sup>

The military commander *de jure* or *de facto* failed to take the necessary and reasonable measures at her/his disposal to prevent or repress the criminal conducts, or to submit the matter to the competent authorities.<sup>27</sup>

The second element is the one that directly deals with the topic of this paper. It should be noticed that it presents a difference with the way it is enunciated in the first case, namely in the Statute of the International Tribunal for the Former Yugoslavia, and in the Rome Statute. In the case of the Statute of the International Tribunal for Rwanda, article 6 (3) contains the same formula of the former. Then the following question arises: is there any essential difference, of meaning, among these enunciations? In other words, does “had reason to know” has the same meaning as “should have known” owing to the circumstances at the time?<sup>28</sup>

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<sup>23</sup> *Id.* ¶ 346.

<sup>24</sup> *Id.* ¶ 354.

<sup>25</sup> *Id.* ¶ 344.

<sup>26</sup> Rome Statute, *supra* note 1, (see *supra* note 17).

<sup>27</sup> *Id.*

<sup>28</sup> Here I am not referring to the difference between “superior” and “military commander,” since in the Statutes of the Former Yugoslavia and of Rwanda, the word superior refers to the military commander. Although when the *de jure* and *de facto* categories were recognized, the Trial Chamber, for instance in the Judgment analyzed in this paper, established that the *de facto* superior refers to a civilian. In the case of the Rome Statute, article 28 establishes the responsibility of military commanders *de jure* or *de facto* in part a, and the responsibility of superiors, namely, civilians, in part b; with different degree of responsibility.

In order to answer this question, is necessary to make an analysis of each of the concepts to arrive to a conclusion.

### Had Reason to Know

The international jurisprudence has stated the scope and definition of the element of the superior responsibility, “had reason to know.” In the *Delalic et al* case, the Trial Chamber arrived to the conclusion that the *mens rea* that the superior must have in order to incur in criminal responsibility, is either to have real knowledge of the situation occurring among her/his subordinates (obviously in relation to the crimes under the jurisdiction of the International Tribunal for the Former Yugoslavia), or to have in her/his possession information of a nature, which at the least, would put her/him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by her/his subordinates.<sup>29</sup> The Appeals Chamber affirmed this conclusion of the Trial Chamber.<sup>30</sup>

This Appeals Chamber also explained that the superior has an international duty of taking the necessary and reasonable measures to prevent and punish, and that when the breach of this duty occurs—for the omission of the superior in spite of having access to information which leads her/him to have knowledge of the behavior or conducts of her/his troops—the superior is responsible for the crimes committed by her/his forces, according to the theory of the superior responsibility.<sup>31</sup>

Taking into account what has been explained, it is clear that the expression “had reason to know” is not an open door for a strict liability, given that only if the superior has—or has access to—information which glimpses the possibility of an illegal situation from or among her/his forces, there can be stated that s/he had reason to know that her/his troops were about to commit, were committing or already committed criminal conducts. And then, depending on the type of information s/he accessed and the result of the study of the specific case, the superior may be held responsible according to the theory of the superior responsibility as recognized by the international criminal tribunals.

It is evident that the superior cannot be held responsible for the crimes committed by her/his troops, under the expression “had reason to know,” merely for the fact of being a superior or for considering that s/he has an absolute duty of information by which if s/he did not know, but “should know or had reasons to know” (due to her/his absolute duty of information) is anyway held responsible for the crimes committed by her/his subordinates; and her/his ignorance of the facts or lack of access to information (for not having the possibility to, in spite of her/his diligence) is not taken into account when holding her/his responsibility. If that would be the case, this responsibility would allow a strict liability; therefore when the International Tribunal for the Former Yugoslavia stated that the expression “had reason to know” does not contemplate this kind of responsibility, it is evident that the latter assump-

<sup>29</sup> *Delalic et al.*, *supra* note 15, ¶ 383.

<sup>30</sup> *Prosecutor v. Delalic et al*, Case No. IT-96-21, Appeals Chamber, par.241 (Feb. 20, 2001).

<sup>31</sup> *Id.* ¶¶ 222, 223, 225, 241.

tions are not considered by that expression, but only the former one, namely, had information or access to information which guide the superior to know the illegal situation occurring among or by her/his troops. This is supported by the importance and necessity to respect and recognize the guarantees and limits established by the legal order.

Any legal construction must tend to the existence and respect of minimum guarantees when interpreting and applying the norms of a legal system. This is in accordance with the prescription of the concept of strict liability from the criminal law in both the common law and the civil law systems.

### Should Have Known

In the negotiations of the AP. I, the International Committee of the Red Cross (ICRC) recommended that regarding the superior responsibility, the expression "should known" would be included when dealing with the hypothesis in which the superior should be responsible for the crimes committed by her/his forces. That expression was rejected when adopting the criteria "had information which should have enabled them to conclude," which, has been stated, does not presents any substantive difference with the expression used in the Statutes of the International *ad hoc* Tribunals. However, the International Law Commission considers that the latter "enables a more objective evaluation than the expression established in the AP. I."<sup>32</sup>

The Pamphlet No. 27-10 of the Armed Forces of the United States, when dealing with the Command Responsibility, incorporates the expression "should have had it" (knowledge.) This is the same expression as the one suggested by the ICRC, and the one incorporated in the Rome Statute. Regarding this expression the Department of the Army of the United States has stated that this concept is too ambiguous.<sup>33</sup>

So here we are confronted by the question; what does the Rome Statute mean by "should have known"? Which situation does this expression encompasses?

This question may have one of two possible answers: first, the expression "should have known" is too vague but in the end it has the same meaning as "had reason to know" and then we are just before a change of words but not of meaning; or, second, this expression, besides of its ambiguity, establishes a different or a further meaning than the one contemplated by the expression "had reason to know," establishing a wider responsibility than the one stated with the later expression, and leaving an unclear limit with the strict liability.

The second answer seems to fill better the gaps left by the innovation in the expression and by the rejection of it when proposed by the ICRC. In fact, it has been stated that the expression "had reason to know" which implies that the superior has information or access to information that let her/him conclude the past, present or future commission of a crime by her/his troops, has the same meaning as "had information which should have enabled them to

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<sup>32</sup> Kai Ambos, TEMAS DEL DERECHO PENAL INTERNACIONAL (Topics of the International Criminal Law) 199 (Fernando del Cacho, Karayán, Oscar Julián Guerrero trans., Universidad Externado de Colombia 2001)

<sup>33</sup> *Id.*, at 152-3 (citing, Pamphlet No. 27-1-1).

conclude.” Now, it also was established that the expression “should know” was rejected and replaced by the former one. Up to this moment, this leads us to think that the “new” expression of the Rome Statute does not have the same meaning of the expression stated on the AP. I, or that, at least, it does not comprehends the same or only that situation. In this sense, one could assume that “should have known” includes not only the situations in which the military commander has information, but also those situations in which s/he has neither information nor access to any information, but based only in his position of military commander,<sup>34</sup> “should have known” of the crimes committed by her/his troops. This means that the military commander would be held responsible under that criteria even though s/he did not accessed to any information in spite of her/his diligence, based for instance in the affirmation that her/his position compel her/him to know every circumstance related to her/his forces; this would include situations in which the military commander loses every communication with her/his troops. In more informal language this means: although not knowing, should know. It must be noticed that I have said “not knowing,” and not “having reasons to know,” or “having information that would enable her/him to know.” This, points to a strict liability.

As absurd as the last affirmation may appear, it is clear that the answer regarding the meaning of the expression “should have known” cannot be that this phrase has the same meaning as “had reason to know.” If that is the case, there would be no reason for “innovating” with this formula instead of maintaining the expression contemplated by the Statutes of the *ad hoc* tribunals. Furthermore, there would be no reason for rejecting the “should have known” formula and replace it for “had information which should have enabled them to conclude,” in the AP. I. Another argument in favor of the above conclusion is the expression contained in article 28 (b) of the Rome Statute. This provision establishes the superior responsibility for those superiors not contemplated in section (a), namely military commanders *de jure* or *de facto*. This second section considers the responsibility for those civilians that have a position of superior. Taking into account that the civilian superiors do not have the same structure, professionalism or discipline a military commander and a military organization has; this second section of article 28 of the Rome Statute does not impose the same parameters of responsibility to the civilian superiors, and in a certain degree, makes them lower than those imposed to the military commanders.

Article 28 (b) establishes that this category of superiors shall be criminally responsible for the crimes committed by their subordinates when “[t]he superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; . . .”<sup>35</sup>

Two things can be concluded from this section: the underlined formula is the same as “had information which should have enabled them to conclude;” and, in case this expression is the same as “should have known” there would

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<sup>34</sup> For the purpose of this paper, herein whenever the military commander is mentioned, it refers to the *de jure* as well as the *de facto*.

<sup>35</sup> Rome Statute, *supra* note 2, art. 28 (b) (i). Emphasis added.

be no reason to use one expression in the first section and different words pretending to mean the same, in the second section.

However, arguing on behalf of the reason and the logic, it is likely that the will of the negotiators of the Rome Statute was not that of establishing a strict liability for the military commanders through the expression “should have known;” it is more probable that what they wanted with this “innovation”—if it was made consciously and it is not merely the product of a mistake—was to include other situations besides that of having information or access to information which should have enabled them to reach conclusions. In this sense, it is clear that only the International Criminal Court with its Judgments can clarify or establish the significance and scope of the expression “should have known.”

### **What would a military commander be responsible for under Article 28 (a)?**

The expression “should have known” contained in article 28 (a) of the Rome Statute, cannot encompass situations as the one explained above, namely, hold that the military commander is responsible only because of her/his position without taking into account the *mens rea* and with any further consideration of, for instance, her/his possibility to access to information that enable her/him to conclude that her/his troops were committing or about to commit the crimes under the jurisdiction of the International Criminal Court.

Stating otherwise would ignore recognized principles of the criminal law accepted by the majority of the domestic criminal law systems, and by the international law, such as the eradication of the strict liability. Therefore, the International Criminal Court has the task of either clarify the truly meaning of the expression that is being analyzed by explaining which situations this figure encompasses, and making its interpretation in accordance with the recognized principles of criminal law; or by replacing that expression—in an implicit or explicit way—with the one contained in the Statutes of the *ad hoc* international tribunals.

Until any interpretation is made by the International Criminal Court, it can be considered that the expression of article 28 (a) includes the concept of the expression used by the Statutes of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda. One can arrive to this affirmation by applying the theory of the superior responsibility and the interpretation established by those tribunals of a figure by which the superior (military commander *de jure* or *de facto*) is held responsible for the crimes committed by her/his forces under effective command or authority (respectively) and control. However, this does not mean that this is the only situation that figure encompasses, because for the reasons stated in previous pages, it has been shown that these two expressions are different, or at least encompass different situations. Therefore, up to this moment, the military commander would held responsible under the Rome Statute, when: (i) not knowing s/he should had reasons to know—of the crimes that her/his troops were committing or about to commit—due to her/his access to information that would enable her/him to create at least a doubt regarding the unlawful behavior of her/his forces, and lead her/him to develop a further investigation; and (ii) did not take the neces-

sary and reasonable measures at her/his disposal to prevent, repress, or submit the matter to the competent authorities.

This means that the military commander would be held responsible for the crimes committed by her/his forces with intent and knowledge—or with intent or with knowledge—<sup>36</sup> for her/his negligent omission of not taking the necessary and reasonable measures within her/his power. This is what results from the application of the theory of the superior responsibility and the analysis of article 28 of the Rome Statute. In other words, if her/his forces committed a genocide, the military commander who—should have known<sup>37</sup> of those criminal conducts—did not act as it is demanded from her/his duty, would be held responsible for the genocide committed with intention or knowledge, due to her/his negligent omission. This, by no means, signifies that the military commander commits a negligent genocide, which is an absurd affirmation and impossible situation.<sup>38</sup>

## V. CONCLUSIONS

Article 28 of the Rome Statute must be understood and interpreted within the context of the theory of superior responsibility, which has been accepted and applied by the international criminal tribunals. This theory establishes three elements to hold that a military commander *de jure* or *de facto* is responsible for the crimes committed by her/his forces, and determines that s/he has an international duty to act by taking the necessary and reasonable measures before the crimes committed by the troops. Therefore the omission of this duty generates responsibility for the military commander.

Since the theory of the superior responsibility does not accept strict liability in order to hold the military commander responsible for the crimes committed by the troops, s/he must have had reasons to know that the crimes were committed or about to be committed (in the *ad hoc* International Tribunals.) The reasons to know can be derived from the existence or possibility to access to information that enables her/him to fulfill her/his duty.

The parallel expression introduced by the Rome Statute, namely, “should have known” is different from the former contained in the Statutes of the *ad hoc* Tribunals, but may encompass, among others, the situation of accessing to information.

The International Criminal Court must state the correct concept and scope of this figure, in accordance with the principles and guarantees of the criminal international law; in this sense, it cannot establish any situation that implies a strict liability.

Finally, it must be stated that under article 28 (a), the negligent conduct is the omission of the military commander *de jure* or *de facto*, but not the crime committed by her/his forces.

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<sup>36</sup> If one is to accept the consequence of the rule of construction applied by Cassese in this matter. See *supra* note 14.

<sup>37</sup> Assuming that, up to this point the only situation—in accordance with the criminal law principles—we can suggest this figure encompasses is that of having access to information that enable to conclude what is going on with or among her/his forces.

<sup>38</sup> Genocidio y Responsabilidad Penal Militar, *supra* note 1.