



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

*Andrea Mateus-Rugeles\**

## 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

---

\* 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.