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Topic: ICC Statute Article 28(b)

Level: Introductory

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PURL of English transcript: www.legal-tools.org/doc/91ed38/

Whereas article 28(a) deals with military commanders and persons effectively acting as military commanders, article 28(b) deals with those superiors that are not covered under article 28(a). Those, so called, non-military superiors or civilian superiors.

In the jurisprudence from the ad hoc tribunals, it was early on suggested that the term “superior”, as used in various treaties, not only includes military commanders *de jure*, but also *de facto* superiors. The conclusions that were drawn from these assertions was that the doctrine does not only cover military commanders, but also civilian superiors. This conclusion was later on upheld in many different judgments. However, the different judgments have different take on the application of the doctrine to civilian superiors. One example of such dispute was, for instance, that one case argued that in order for the doctrine to be applicable to civilian superiors, there had to be proven to be a military style command, rather than only that the command should be similar to that of military commanders. Here the latter of the two won upon appeal.

The elements of article 28(b) differ to some extent from those found in article 28(a). In this video, I am only going to address those elements that differ from article 28(a), since I have already thoroughly gone through the previous ones. However, at this point I am going to list all of them:

- First of all, crimes under the Statute have to have been committed.
- The accused has to be a superior.
- The superior has to have effective authority and control over the direct perpetrators of the crime.
- The superior has to have “actual knowledge” or has to have “consciously disregarded information which clearly indicated” the commission of the crimes.
- The crimes have to be within the effective responsibility and control of the superior.
- And the superior has to have failed to take all necessary and reasonable measures within his or her power to repress or submit the crime.
- And finally, of course, there has to be a causal link between the crimes and the failure of the superior to take all reasonable measures to prevent the crimes.

In order to be held responsible the defendant has to qualify as a superior within the meaning of article 28(b). In this regard, a superior may be the leader of the non-military com-

ponents of, for instance, government and political parties. It could also be a business leader or senior civil servants.

In this commentary, we explore how far the responsibility of the civilian superior stretches; and, accordingly also, how far article 28(b) stretches. If the defendant is considered to be a military or quasi-military leader, or a person effectively acting as such, then as you know article 28(a) is applicable. However, if these criteria in article 28(a) are not fulfilled, then the civilian superior could be held responsible for the acts of the subordinates if he or she has effective control, with material ability to prevent or repress the crimes of his or her subordinates. That is, the superior has to have the ability to direct the work, or work-related activities of his or her subordinates.

The civilian superior may, however, not be held responsible for anything but activities that were within the effective responsibility and control of that superior. If a civilian superior merely has power of influence, or the ability to assert psychological pressure over the perpetrators, then he or she may not be held responsible under the doctrine.

So, now we need to look closer at what actually is meant by effective authority and control, and just as with article 28(a), this needs to be evaluated on a case-by-case basis. The central question under assessment is whether or not the superior has the material ability to prevent, repress, or submit the matter to the competent authorities. The defendant can thus incur responsibility only if he or she has effective control in the sense that he or she can prevent the crimes from being committed, or to punish the perpetrator after their commission.

The effective authority and control could be either *de jure* or *de facto*. Both of these do not have to be present as long as the *de facto* control has theappings of the exercise of *de jure* authority. That means that the perpetrator is the subordinate of a person of a higher rank, under his or her direct or indirect control. The Bagilishema Trial Chamber took this rather far in the sense that it held that theappings of *de jure* control needed to be demonstrated by a military-style command situation. However, the Bagilishema Appeals Chamber corrected this finding by stating that there was no need for military-style command for the doctrine to be applicable to civilian superiors. It was merely necessary to prove that the control was similar, was similar to that of military commanders.

The *mens rea* standard required for a civilian superior to be held responsible is much higher than that available under article 28(a). When it comes to the “actual knowledge” standard, the criteria are basically the same. However, when it comes to the alternative *mens rea* standard available for civilian superiors, it is much higher than the should have known standard that exists in article 28(a). For a civilian superior to be held responsible, the prosecution needs to prove that the superior “consciously disregarded information” which clearly indicated that the subordinates were committing, or were about to commit certain crimes.

This consciously disregarding information standard is similar to the willful blindness standard, which means that the defendant has an awareness of a high probability of a certain fact or a certain risk, yet chooses to turn a blind eye to that fact or risk. The standard available in 28(b), lies somewhere between actual knowledge and recklessness. It is yet not clear specifically what this means, but there have been suggestions that this could entail, for instance, that information which clearly indicated a significant risk that subordinates were committing, or were about to commit offences existed; that this information was available to the superior; and that the superior while aware that such a category of information existed, he or she declined to refer to that category of information. Alternatively, it could also mean that the superior had a duty to be informed, yet he or she failed to avail him or herself of this information that had been sent to his or her office.

Actions that are within the superior’s effective responsibility and control is the last element which we are going to address in this video lecture. This element is a new element

which has not been present in the ICTY or the ICTR, for instance. Arguments in support of this new criteria is that the civilian superior cannot be held responsible for things and actions which are outside of his or her ambit of control. As supposed to a military commander, a civilian superior does not wield authority over his or her sub-ordinates 24/7 -that is day and night, seven days a week. Hence, the responsibility of the civilian superior has been limited to solely cover the time that the subordinates are present at work or engaged in work related activities elsewhere, or at other times. For example, we could look at a superior or a boss in a paint factory. If the subordinates in this paint factory are engaged in, for instance, genocidal activities outside of the work place, and during off work hours that are not related to their assignments at work, then that superior could not be held responsible for the actions undertaken by these sub-ordinates, if he or she, the superior that is, is not directly involved in these activities in another fashion.