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Topic: ICC Statute Article 28(b)

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Greetings from the seat of the International Criminal Court in the Hague. My name is Jelena Plamenac, and I work here in the Office of the Prosecutor. In the next half an hour in my personal capacity, I will talk about article 28 paragraph (b) of the Rome Statute.

For a comprehensive understanding of article 28 and the command responsibility doctrine under the statute, I invite you to also listen to the lecture about paragraph (a) of the same provision.

This lecture is divided in three parts. The first part addresses the purpose and historical background of the provision. The second part explains elements required to prove the criminal responsibility of a superior and finally, the third part, briefly outlines the potential of this provision and its future application in the ICC litigations.

Talking about the purpose of article 28, the ICC Trial Chamber in the case of Jean-Pierre Bemba considered that it is designed “to reflect the responsibility of superiors by virtue of the powers of control they exercise over their subordinates... These responsibilities of control aim at ensuring the effective enforcement of fundamental principles of international humanitarian law, including the humanitarian law, including the protection of protected persons and objects during armed conflict.”

The most significant novelty in the definition of the command responsibility doctrine codified in the statute is that article 28 explicitly distinguishes between two categories of superiors. The first category is defined in paragraph (a), and relates to a military commander or a person effectively acting as a military commander. The second category includes all other superior and subordinate relationships not described in paragraph (a).

Before we move to the historical background of this division, I would like to clarify the terminology that I will use throughout this lecture. The language of paragraph (b) does not explicitly mention civilian superiors, but suggests a broader category, as just mentioned, defined as every relationship that is not one of *de jure* or *de facto* military command. This can be of whatever kind, but since the drafting history of the statute demonstrates that the drafters focused on civilian superiors when creating this division in article 28, when referring to superiors under (b), for the purposes of this lecture, I will refer to civilian superiors.

Situations of mass atrocities in worlds contemporary history involved civilians not only as victims but also as perpetrators and superiors. Indeed, the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Akayesu* Judgement confirmed that the doctrine of command responsibility also applies to civilians holding *de facto* positions of authority in situations of international and non-international armed conflicts.

If we look back at the post Second World War jurisprudence, already military tribunals in Nuremberg established in the aftermath of the war, applied a command responsibility doctrine on civilian superiors.

For example in the *Flick* case, six civilian industrialists were accused of war crimes and crimes against humanity for their direct and indirect involvement in enterprises involving the enslavement of civilians from occupied territory. It was alleged that the accused used tens of thousands of slave labourers in the businesses that they owned or controlled.

International Military Tribunal for [the] Far East also found guilty of international crimes a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the compliance of law and customs of war, and to prevent their breach.

International Criminal Tribunals for the Former Yugoslavia and Rwanda have also tried civilian superiors. Statutes of these tribunals as well as the Statute of the Special Court for Sierra Leone responsibility of a superior who may be a civilian or military without setting any separate requirements or limitations when applying the provision to civilians. Certainly, differences is in the nature and degree of control of subordinates were taken into account when determining whether a particular element of the responsibility was proven.

The Rome Statute, however, did not follow this trend of applying the same standard for all categories of superiors. The distinction between military and other superiors is a direct result of the intervention of the United States delegation at the diplomatic conference that negotiated and agreed on the text of the Rome Statute back in 1998. Among others, there were two interesting arguments in favour of applying different standards that [the] US held. First, there are different rules governing civilian and military organizations, especially with regard to disciplinary structure of civilian authority that is usually weak, as opposed to that of the military, which has a penal dimension within a strict and rigid command structure. Second, the US delegation argued that a military commander is in charge of a lethal force, which is inherent and unique to the military as a basis for the existence of negligence when proving the criminal responsibility.

That's the accepted final version of the text of article 28. It establishes two main differences between the two categories of superiors. First is related to the scope of the authority and second, to the alternative knowledge of a superior about the commission of crimes. Meaning that the burden of responsibility for a superior falling under (b) is much lower. We will come to this in a moment.

There is still no ICC case law that would help us to interpret paragraph (b). The court did however deliver jurisprudence relevant for the application of paragraph (a) in the case of Bemba, finding him guilty as a military commander of the army for the liberation of the Congo for crimes of his subordinates committed in the Central African Republic. As you will see, since many elements of command responsibility are common for superiors under both paragraphs, the Trial Chamber judgment is useful for understanding and applying its interpretation requirements of paragraph (b) where these two provisions overlap.

Before continuing with the elements of superior responsibility, let me briefly explain the relationship between article 28 and 25 of the statute. Article 28 reflects a form of criminal responsibility other than those found in article 25, in the sense that a superior may be held responsible for the prohibited conduct of his or her subordinates for failing to fulfil his duties. In other words, article 28 establishes liability for violations of duties in relation to crimes committed by others, while article 25 establishes liability for one's own crimes.

Now, let us look at the elements. For an individual to be held criminally responsible under 28(b), the prosecutor needs to prove that the following seven elements are fulfilled. First, crimes within the jurisdiction of the Court have been committed by forces. Second, the superior must be other than a military commander or a person effectively acting as a military commander. Third, the superior had effective authority and control over the forces that committed the crimes. Fourth, the crimes concerned activities that were within the effective control and responsibility of the superior. Five, the person either knew or consciously disregarded information which clearly indicated that the subordinates were committed or about to commit such crimes. Sixth, the superior 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. And finally seventh, the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.

With regard to the first element, that crimes within the jurisdiction of the court have been committed by forces, it is required that relevant forces committed the crimes listed in article 5 of the Statute, that is: war crimes, crimes against humanity, and genocide. These crimes have to be actually committed. In *Bemba*, the Trial Chamber held that the commission by subordinates in the context of superior responsibility includes modes of liability beyond "commission" in the strict sense of its meaning. It means that the commission of crimes would also include, for example, planning, instigating, or aiding and abetting crimes.

The second element is related to the status of the superior. Since it distinguishes between two categories of superiors and their relationships, mainly, a military or military-like commanders on one hand and all other superiors, article 28 requires that this status of the superior is firstly established prior to going further into the required elements of criminal responsibility. The ICC jurisprudence is yet to establish underlying criteria for the assessment of whether an individual qualifies as a superior under (b). Some examples include political leaders, business leaders, and senior civil servants. The ICTR, for example, convicted a business leader under the command responsibility provision, Mr. Alfred Musema, in the context of the widespread attack against Tutsis and moderate Hutu civilians in 1994. The accused was the director of a tea factory.

It is important to note, however, that the civilians who are effectively part of a command structure that involved military or paramilitary forces would fall within the category of persons "effectively acting as a military commander" under (a). This would also include political leaders of a state who under national law become commanders in chief during armed conflicts. The ICC Prosecutor, for example, charged the former president of the Ivory Coast, Mr. Laurent Gbagbo, as the military commander in the context of a non-international armed conflict in Ivory Coast in 2011. The Trial Chamber in *Bemba* also interpreted the phrase to include individuals who do not perform exclusively military functions, but may exercise a similar authority over the forces. In conclusion, the status of a superior would have to be determined on a case by case basis.

The third element that the superior had effective authority and control over the forces that committed the crimes, involves determining the superior-subordinate relationship. Both categories

of superiors under (a) or (b) are required to be in a position of “effective control and authority”, while military commanders, in addition, need to exercise “effective command and control” indicated the difference in the scope of the authority mentioned earlier.

As the *Bemba* Trial Chamber held, the “authority” refers to the modalities, manner, or nature in which the superior exercised the control over his or her forces. The “effective control” refers to the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities. Any lower degree of control such as the ability to exercise influence even substantial influence over the forces who committed the crimes would be insufficient to establish the superior responsibility. When establishing the existence of a superior-subordinate relationship, it is not required to identify principal perpetrators by name, although such a determination would be helpful to prove such existence, it is sufficient to identify the perpetrators by group or unit in relation to a particular crime. The perpetrators need however to be identified at least to the extent necessary to assess the existence of the relationship. Also there is no minimum number of superiors that are required to be involved to trigger the responsibility.

The effective control does not need to be exclusively exercised over the forces who committed the crimes. Instead, it is possible that multiple superiors can be held concurrently responsible for actions of their subordinates. The existence of effective control will depend on the circumstances of each case. Some factors that could indicate such control include:

- The official position of the superior within the structure or organization in question and the actual tasks that he or she carried out;
- The capacity to issue orders or binding decisions to its subordinates;
- The capacity to ensure compliance with such orders or decisions;
- The power to promote, replace remove or discipline any person within the organization;
- The control over finances;
- His or her capacity to represent the organization and subordinates when interacting with external partners;
- Whether he or she represents the ideology of the movement and has a certain level of profile, manifested through public appearances and statements.

If we go back to our example of Mr. Musema, the Trial Chamber found that in his function as the director of the factory and because of the poverty of the region, Musema exercised considerable authority in relation to the people he employed, but also in relation to the communal authorities, which were dependent on the tax income from the factory employees. The Chamber found that Musema exercised *de jure* authority and *de facto* control over employees while they were on the factory premises and while they were engaged in their professional duties as employees of the factory, even if those duties were performed outside factory premises. The accused exercised the legal and financial control over these employees, particularly through his power to appoint and remove employees from their positions at the factory.

The fourth crucial requirement of the superior responsibility is that the crimes concerned activities that were within the effective responsibility and control of the superior, limiting the scope of the superior responsibility to those acts that would be committed for example only during their working hours or were related to their working. This is one of the two key differences that the categories of superiors in the paragraph (a) whose responsibility has no limitation with regard to

the crimes, as long as the superior had the effective control over subordinates at the time of the commission of the crime.

Article 28 (b) encompasses two standards of fault element. The first, which is encapsulated by the term “knew”, for both categories of superiors, requires the existence of actual knowledge. The second, “alternative or constructive knowledge”, requires that the superior consciously disregarded information which clearly indicated, that subordinates were committing or about to commit such crimes. Actual knowledge can be established either by direct or indirect (so-called circumstantial) evidence. Examples of direct evidence include the accused’s admission of knowledge or statements he may have made in relation to the crimes.

Article 28 does not require that the superior knew the identities of the specific individuals who committed the crimes. And it is also unnecessary to establish that the accused mastered every detail of each crime committed by the forces.

Instead, relevant factors that may indicate knowledge include any orders to commit crimes, or the fact that the accused was informed personally that his subordinates were involved in criminal activity. Other indicia include the number, nature, scope, location and timing of the illegal acts, and other prevailing circumstances; the means of available communication; the *modus operandi* of similar acts; the scope and nature of the superior’s position and responsibility within the organisation; the notoriety of illegal acts, such as whether they were reported in media coverage of which the accused was aware.

As mentioned, the core of the division in article 28 is in two separate alternative knowledge requirements that depend on the civilian or superior status of the status of the military status of the superior. Such an explicit provision aims at creating a higher standard of proof when the superior falls under (b).

If we compare the language of two sub-paragraphs under (a), a *de facto* or *de jure* military commander is responsible for subordinates conduct if he 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 (b) a 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 highest standard is indicated in the terms *consciously disregarded* and *clearly indicated*. As explained before, one of the main reasons for this distinction is that military commanders within a strictly hierarchical or organized structure would have far more possibilities to receive information on the conduct of their subordinates. Thus, while article 28 imposes a more active duty upon the superior to inform himself of activities of his subordinates, if he falls under (a), this is not required for other superiors. The ICTR Trial Chamber in *Hategekimana* also agreed with this view. It is instead necessary to establish first, that information clearly indicating a significant risk that subordinates were committing or were about to commit offences existed. Second, that this information was available to the superior. Three, that the superior, while aware that such a category of information existed, declined to refer to the category of information. And four, that it involved crimes concerning activities within the effective responsibility and control of a superior, as explained earlier.

This impermissible, wilful blindness of the part of a superior is also referred to in the commentary of the International Committee of the Red Cross to article 86 paragraph (2) of the first additional protocol. A superior cannot absolve himself from responsibility by pleading

ignorance of reports addressed to him. In other words, the superior has a duty to be apprised at least of information that is made directly available to him.

The sixth element related to necessary and reasonable measures require that the superior failed at least to fulfil one of the three duties listed: the duty to prevent crimes; the duty to repress crimes; or the duty to submit the matter to the competent authorities for investigation and prosecution. These three duties arise at three different stages in the commission of crimes: before, during and after. Thus, a failure to fulfil one of these duties is itself a separate crime under (b).

The duty to prevent arises before the commission of the crimes and it includes crimes in progress and crimes which involve ongoing elements. A superior would violate his or her duty to prevent when he fails to take measures to stop crimes that are about to be committed or crimes that are being committed.

The duty to repress encompasses two separate duties arising at two different stages of the commission of crimes. First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed. Second, the duty to repress includes an obligation to punish forces after the commission of crimes. The aim is to bring the perpetrators to justice in order to avoid impunity prevent future crimes.

This duty to punish may be fulfilled in two different ways. Either by the superior himself taking necessary and reasonable measures, or, if he doesn't have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish constitutes an alternative to this third duty of referral.

What constitutes "all necessary and reasonable measures" to prevent or repress the crimes is established on a case-by-case basis and must be addressed in *concreto*.

The Trial Chamber in Bemba followed the jurisprudence of the *ad hoc* tribunals that "necessary" measures are those appropriate for the superior to discharge his obligation, and "reasonable" measures are those reasonably falling within the commander's material power and the exercise he or she makes of this power. In case the superior took all necessary and reasonable measures within his power, he cannot be held responsible.

Since in most cases of civilian superiors, it is unlikely they would have disciplinary powers, unlike military commanders, it is reasonably expected from them to report the misconduct to the competent authorities. A superior may dismiss his subordinates, but once dismissed, a criminal proceeding against the employee should be opened.

In our example of Musema, the Chamber found that Musema was in a position, by virtue of his powers, to appoint and remove employees, to take reasonable measures, such as removing or threatening to remove an individual from his or her position at the tea factory if he or she was identified as a perpetrator of crimes within the ICTR jurisdiction. The Chamber also found that Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of factory vehicles, uniforms or other factory property in the commission of such crimes.

This brings us to the third part of this lecture. It is yet to be seen how article 28 (b) will be applied before the Court. It is obvious, however, that by setting a high standard of proof for establishing the criminal responsibility of civilian superiors, this provision raises a high bar to the successful prosecution of civilian leaders. This is particularly true when establishing the alternative knowledge of a superior also taking into account the additional requirement that the scope of that knowledge is limited to crimes under his effective responsibility and control, which makes the case even harder. The wording *consciously disregarded information* which clearly indicated brings the

threshold of alternative knowledge very close to actual knowledge or in other situations, wilful blindness for crimes committed.

In case of interest, I encourage you to explore article 28(b) further. It would be interesting to have research done on this topic with the aim to identify indicators of an alternative knowledge that could assist in future prosecutions, in particular with regard to situations of wilful blindness. Also it would be helpful to identify merging points of the two paragraphs that could ease the division and bring the two categories of superiors even closer. Let me conclude here and wish you the best of luck in your studies. Bye.