

# COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: The “should have known standard” and the subsequent gulf between liability and culpability

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*The objective of the present article is to make a focused analysis of the “should have known” standard of the mental element in command responsibility. The article attempts to answer what the connotation of the “should have known” standard of command responsibility implies, the demerits of this standard of knowledge and prescribes the ways through which this standard of knowledge can be brought in tune with the guiding principles of criminal law philosophy. Inevitably, the doctrinal shortfalls of this standard will be examined, especially with regard to the resultant gulf between liability and culpability.*

## I. INTRODUCTION:

### ***The “Should Have Known” Standard of Command Responsibility in ICL***

Command responsibility is a form of imputed liability for the crimes of one’s subordinates. For engaging command responsibility, the following three conditions must be fulfilled:

- That there existed a superior-subordinate relationship between the accused and the perpetrator of the crime,
- That the accused knew or had reason to know that the crime was about to be, was being or had been committed by subordinates, and;

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- That the accused failed to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrators thereof.

Of these three criteria, this article deals specifically with the prong of knowledge, i.e. about the liability of the category of superiors who “had reason to know” (or “should have known”, in the phraseology of the ICC Statute) of their subordinates’ crimes. While direct instigation or ordering to commit a crime would engage the superior’s responsibility as a co-perpetrator<sup>1</sup>, the imputation of liability through the medium of command responsibility when the superior neither ordered nor instigated but merely “should have known” about their crimes is sought to be examined herein. This touches upon core concerns of criminal law philosophy and the larger issue of the actual and perceived legitimacy of ICL. The “should have known” standard presents many difficulties on being viewed from the standpoint of the philosophical foundations of ICL. Some of these legal and philosophical conflicts are sought to be elucidated in the following sections.

## II. A BRIEF OVERVIEW OF THE LAW RELATING TO THE “SHOULD HAVE KNOWN” STANDARD

### *The “Should Have Known” Standard as laid down in International Criminal Statutes*

Art. 7(3)<sup>2</sup> of the ICTY Statute imposes liability on superiors for acts of subordinates which they knew or had reason to know. Art. 6(3)<sup>3</sup> of the ICTR Statute lays down the “should have known” standard, echoing the language of the ICTY Statute. It forms the basis of liability by way of omission. On the

<sup>1</sup> ICTY Statute. Art. 7(1); ICTR Statute. Art. 6(1); ICC Statute. Art. 25(3)(b). See also *Prosecutor v. Kordic & Cerkez*, (Case No. IT-95-14/2), (2001), ¶371: where the liability of a commander who planned, instigated, aided or abetted the crime is discussed.

<sup>2</sup> ICTY Statute. Art. 7(3): The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew *or had reason to know* that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. (Emphasis added).

<sup>3</sup> Art. 6(3): The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew *or had reason to know* that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. (Emphasis added).

other hand, Art. 86(2)<sup>4</sup> of the Additional Protocol I to the Geneva Conventions<sup>5</sup> significantly refrains from laying down a “should have known” standard but bases liability on the actual knowledge or the information which is available to the commander for the purpose of concluding whether the subordinate was committing or going to commit such a breach as was proscribed.<sup>6</sup>

The Rome Statute of the International Criminal Court, 1998 lays down the provisions relating to command responsibility in Art. 28. The Rome Statute, unlike its predecessors, has dealt with superior responsibility more comprehensively and in a separate provision from the one on individual criminal responsibility.

### ***Difference in the Standard of Knowledge required for Civilian Superiors vis-a-vis Military Commanders***

The standard of knowledge is different according to the military or civilian nature of the relationship between the superior and the subordinate. In the case of a military superior, a high duty of care, so to speak, is placed upon the superior, engaging his liability if he knew or “should have known”<sup>7</sup> that the forces under his command were committing or about to commit crimes under ICL. However, in the case of civilian superiors, the only actual knowledge or “conscious disregard” of information which clearly indicated that the subordinates were committing or about to commit such crimes<sup>8</sup> engages the criminal responsibility of the superior. Therefore, we can see

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<sup>4</sup> Art. 86(2): The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, *if they knew, or had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. (Emphasis added).

<sup>5</sup> Geneva Conventions Relative to the Protection of Victims of International Armed Conflicts, Protocol I, August 12, 1949, 1125 UNTS 3, 16 ILM 1391 (1977).

<sup>6</sup> ICRC Commentary on Protocol I Additional to the Geneva Conventions of 1949 at 10314, states that all negligence may not give rise to liability; but that the negligence may engage liability only if it is so serious that it amounts to malicious intent, apart from any causal link between the conduct and the damage that took place. See also Allison Marston-Danner, Jenny S. Martinez, *GUILTY ASSOCIATIONS: JOINT CRIMINAL ENTERPRISE, COMMAND RESPONSIBILITY AND THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW*, 93 CALIF. L. REV. 75 – 170 (2005), pp. 125 – 126.

<sup>7</sup> Rome Statute. Art. 28(a)(i).

that under the ICC rubric, the “should have known” standard is applicable to military commanders and not to civilian superiors.

The establishment of a more stringent standard for military commanders vis-a-vis civilian superiors can be justified due to two reasons: firstly, there is a more tightly-knit, hierarchical command and control structure in the military as opposed to civilian institutions whereby the military commander enjoys a higher degree of *de facto* and *de jure* control over the troops than a civilian superior ordinarily exercises over his subordinates. Secondly, the duty of military commanders to supervise their troops and prevent them from committing war crimes or crimes against humanity is arguably higher than that of civilian superiors. The likelihood of commission of such crimes in the theatre of war also provides a justification for lowering the threshold of knowledge to “should have known” in the case of military commanders when juxtaposed to the higher threshold of knowledge (consisting of actual knowledge or wilful blindness) required on the part of a civilian superior.

There are some ambiguities in the jurisprudence of the ICTR on whether it applies the same standard of knowledge for civilian and military commanders alike. The ICTR in *Musema*<sup>9</sup> considered that the applicable standard for criminal responsibility under Art. 86(2) (of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions) does not distinguish between civilian and military commanders. However, in *Kayishema and Ruzindana*<sup>10</sup>, the ICTR seems to favour a differentiated knowledge requirement for civilian and military superiors as envisaged under Art. 28 of the Rome Statute:

“... the distinction between military commanders and other superiors embodied in the Rome Statute is an instructive one. In case of the former it imposes a more active duty upon the superior to inform himself of the activities of the subordinates when he “knew, or owing to the circumstances at the time, should have known that the forces were committing, or about to commit such crimes.”

This is juxtaposed with the mensrea element demanded of all other superiors, who must have, “(known) or consciously disregarded information

<sup>8</sup> *Ibid.*, Art. 28(b)(i).

<sup>9</sup> *Infra* n. 25 at ¶ 147.

<sup>10</sup> Prosecutor v. Kayishema & Ruzindana, (Case No. ICTR-95-1-T), Judgment, 21 May 1999.

which clearly indicated, that the subordinates were committing, or about to commit such crimes”.<sup>11</sup>

This ambiguity is also reflected in the ICTY standpoint. In the *Delalic* appeal<sup>12</sup>, the ICTY held that:

“Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law.”<sup>13</sup>

However, in *Krnjelac*<sup>14</sup>, the Trial Chamber took a different view and held that:

“The same state of knowledge is required for both civilian and military commanders.”<sup>15</sup>

The ICC however, as discussed above, has definitively laid this controversy to rest by delineating clearly the different grades of the mental element required in the case of civilian and military commanders. Therefore, civilian leaders unlike military leaders are not imposed with a “*prima facie* duty” to be seized of every activity of their subordinates.<sup>16</sup> The following examination will seek to see how far the imposition of this requirement on military superiors is fair and how far the imputation of criminal liability is sustainable on the “should have known” standard.

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<sup>11</sup> *Ibid.* at ¶ 227.

<sup>12</sup> Prosecutor v. Delalic et al, (Case No. IT-96-21-A), Judgment, 20 February 2001.

<sup>13</sup> *Ibid.* at ¶ 240.

<sup>14</sup> Prosecutor v. Krnojelac, (Case No. IT-97-25), Judgment, 15 March, 2002.

<sup>15</sup> *Ibid.* at ¶ 94.

<sup>16</sup> *Cf. supra* n. 10 at ¶ 228.

## ***The Connotation of the “Had Reason to Know” Requirement: An Overview of the Jurisprudence***

For holding a superior criminally responsible for the conduct of subordinates, the requisite mensrea is that the superior knew or had reason to know of such conduct. Both direct and circumstantial evidence may be adduced to prove the knowledge requirement.<sup>17</sup> However, difficulties arise as to the level of proof required to show that a superior had “reason to know”.

The ICTY, in *Delalic*<sup>18</sup>, did not follow an expansive reasoning and was of the opinion that “it preferred it to be proven that some information be available that would put the accused on notice of an offence and require further investigation by him.” The tribunal was inclined to confine imputed responsibility to those cases where a superior wantonly disregarded specific information available to him of a character that should have alerted him that his troops were about to commit criminal activities.<sup>19</sup> In effect, the *Celebici* appeals judgment negated any liability based on a standard of negligence. The tribunal held that under customary international law, a commander was liable only if some specific information relating to subordinates’ crimes was available to him. The Chamber proscribed wilful blindness and admitted the difficulties in dealing with scenarios where a commander failed to properly supervise his troops and thereby did not acquire the necessary information. Knowledge of the commander can be proved by direct or circumstantial evidence. *Celebici* case lays down essentially a *doluseventualis* requirement (recklessness is the relevant mental element), which is triggered if the commander fails to follow up on any information indicating that his subordinates are committing crimes. Vicarious nature or strict liability of command responsibility was negated by the ICTY.

However, in the *Blaskic*<sup>20</sup> case, the ICTY lowered the standard to one of simple negligence, whereby the commander would be liable even if he did not have information of the kind which alerts him to the imminent criminal

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<sup>17</sup> Prosecutor v. Bagilishema, (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, ¶ 46.

<sup>18</sup> Supra n. 12. Also known as *Celebici* camp case.

<sup>19</sup> ¶ 388-89.

<sup>20</sup> *Infra* n. 32.

acts of his troops. It is sufficient that he did not take measures to obtain this kind of information; provided that he “should have known” that failure to do so was a criminal dereliction of duty.<sup>21</sup> This lowering of the standard of knowledge required to impute command responsibility raises some fundamental questions, which are discussed in the following sections of this article. The ICTY overturned the *Blaskic* Trial Judgment in appeal<sup>22</sup>, influenced perhaps by Damaska’s powerful critique of the ignoring of the personal culpability of the accused.<sup>23</sup> The position was restored to the *Celebici* appeals standpoint.

The ICTR, in *Kayishema & Ruzindana*<sup>24</sup>, came to the conclusion that a superior would have “had reason to know” where he or she “consciously disregarded information” that his subordinates had committed or were about to commit breaches. In *Musema*<sup>25</sup>, the ICTR noted that the drafters of Art. 86(2) of the First Additional Protocol of the Geneva Conventions had been of the opinion that a “should have known” standard “was too broad and would subject the commander, a posteriori, to arbitrary judgments”. The Chamber conceded that Art. 6(3) of the ICTR Statute which lays down the knowledge requirement “closely resembles in spirit and form” Art.86(2) of the 1<sup>st</sup> Additional Protocol. This seems to be a drifting away from the rigours of a “should have known” standard, which the Chamber perceives to be too broad in scope.

In *Akayesu*<sup>26</sup>, the ICTR expressed concerns over a rule of strict liability or negligence for command responsibility. It was laid down that command responsibility is premised on individual criminal responsibility and that such responsibility should be based on malicious intent, or even on negligence

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<sup>21</sup> *Ibid.* at ¶ 310 -22.

<sup>22</sup> Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, Judgement, 29 July 2004.

<sup>23</sup> *Infra* n. 45.

<sup>24</sup> *Supra* n. 10.

<sup>25</sup> Prosecutor v. Musema, (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, ¶ 146.

<sup>26</sup> Prosecutor v. Akayesu, Judgment, ICTR-96-4-T (Sept. 2, 1998), at U 488: “According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement.”

provided such negligence is “so serious as to be tantamount to acquiescence or even malicious intent.”<sup>27</sup>

The *Bagilshema*<sup>28</sup> decision is quite instructive. It was observed that though an individual’s command position may be a significant indicator of knowledge, such knowledge cannot be presumed on the basis of that position alone.<sup>29</sup> The Chamber outlined the following conditions under which “a superior possesses or will be imputed the *mensrea* required to impute criminal liability”:

“He or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or

He or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,

The absence of knowledge is the result of negligence in the discharge of the superior’s duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.”<sup>30</sup>

Therefore, under the third prong, there is a “duty to know” on the part of the superior. Responsibility will be imposed upon the superior where he or she “should have known” of the offences, or in other words, where he or she was negligent in his or her duty and with the means available to obtain information relevant to the offences.<sup>31</sup> Therefore, a superior need not necessarily incur responsibility if he or she was diligent in his duty but yet the subordinates committed crimes. The Chamber adopted this position by referring to the decisions of the ICTY Trial Chambers in *Blaskic*<sup>32</sup> and *Aleksovski*<sup>33</sup>. The entire tenor of the judgment seems to lean in favour of a

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<sup>27</sup> *Ibid.* at ¶ 489.

<sup>28</sup> *Supra* n. 17.

<sup>29</sup> *Ibid.* at ¶ 45.

<sup>30</sup> *Ibid.* at ¶ 46.

<sup>31</sup> Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda*, 13 CRIMINAL LAW FORUM 365-384 (2002), p. 377.

negligence standard. However, the *Bagilishema* appeals judgment<sup>34</sup> requires a standard of knowledge of something more than mere negligence. Therefore, as of now, the *Bagilishema* standard requires something more than mere negligence.

The law is therefore well-settled in ICTY and ICTR that command responsibility is triggered by level of knowledge starting at the minimum threshold of at least *doluseventualis* and not a bare negligence standard.<sup>35</sup>

### III. DOCTRINAL CONCERNS SURROUNDING THE “SHOULD HAVE KNOWN” STANDARD

#### *The “Should Have Known” Standard: Toning down the mensrea from knowledge to negligence?*

The “should have known” standard actually would amount to penalizing a person for being in the wrong place at the wrong time (i.e. being in a position of command when a crime under ICL was committed) if liability attaches notwithstanding the actual amount of involvement. It raises a question of whether command responsibility amounts to a matter of liability for negligence. Here, the observation of Gerhard Werle that the concept of superior responsibility is “an original creation of international criminal law”<sup>36</sup> for which there are no paradigms in national legal systems<sup>37</sup> is

<sup>32</sup> *Prosecutor v. Blaskic*, (Case No. IT-95-14), Judgment, 3 March 2000, ¶1332: “(I)f 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.”

<sup>33</sup> *Prosecutor v. Aleksovski*, (Case No-IT-95-14/1), Judgment, 25 June 1999, ¶180: “Admittedly, as regards ‘indirect’ responsibility, the Trial Chamber is reluctant to consider that a ‘presumption’ of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems, however, that an individual’s superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium, however, depends inter alia on the geographical and temporal circumstances.”

<sup>34</sup> *Prosecutor v. Bagilishema*, Judgment (Reasons), ICTR Appeals Chamber, Case No. ICTR-95-1A-A (July 3, 2002), ¶135: “References to negligence in the context of superior responsibility are likely to lead to confusion of thought...”

<sup>35</sup> Allison Marston-Danner, Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75 – 170 (2005), p 129.

pertinent. At first blush, a researcher might feel inclined to compare command responsibility with vicarious liability, i.e. the liability of a master for a tort committed by a servant. However, the comparison is misplaced and it is soon discarded on submitting it to analysis. Tort liability is a civil liability. The doctrine of *respondentsuperior* is based on the pragmatic consideration that the master has deeper pockets to pay damages. However, in command responsibility, especially in its imputed form under the “should have known” standard, criminal (as opposed to civil) liability is imposed on the commander on the actions of the subordinate. This might result in toning down the mens rea requirement even of a specific intent crime like genocide to mere ignorance that the crimes were being committed, taking recourse to the “should have known” standard. This results in an anomalous situation of a negligent commander being ascribed full criminal responsibility as a perpetrator of genocide. Vicarious liability as a concept is generally unfit for application in the sphere of criminal law, which is premised on individual criminal responsibility.

To transfer the *actus reus* and *mens rea* of a person wholesale to another person (the commander), who “should have known”, imputes a liability for crime where the actual mental element is lacking, or in any event, short of that required for actual commission of that crime. Toning down the *mens rea* requirement from intent, or knowledge as the case may be, is an exercise that should be embarked upon with great caution. “*Actus non facit reum nisi mens sit rea*” is an axiomatic principle, one of the cornerstones of the entire edifice of criminal law. Any dilution of the required standard of *mens rea* for attributing liability for any crime should be done only after the greatest circumspection. Otherwise we may have the anomalous situation of the ‘negligent war criminal’: is a superior to be penalized for intentional crimes of the most serious nature if he would not have condoned these crimes of his subordinates had he but had knowledge of them?<sup>38</sup>

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<sup>36</sup> K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002), p. 667.

<sup>37</sup> Gerhard Werle, *Principles of International Criminal Law*, (The Hague, Netherlands: T. M. C. Asser Press, 2005), p. 128.

<sup>38</sup> *Infra* n. 45 at p. 463.

### ***“Should Have Known” Standard and the Conflict with the Principle of Autonomy of the Individual***

Holding a person (i.e. the commander) liable for the actions of another person (i.e. the subordinate) happens in the case of imputed command responsibility. In the case of such imputed responsibility, there is a fundamental philosophical conflict with the Kantian ideal of the autonomy of the individual, according to which a person is held to account for his own actions, and not for the actions of other persons. However, this is reconcilable with the fact that often in the backdrop of war or conflict, it is the commanders who issue orders or who are the driving force behind crimes under ICL. So some amount of the moral responsibility can be traced back to the commanders who instigate or acquiesce in crimes in a direct or indirect manner.

However, when liability is extended to a commander under the “should have known” standard, he is imputed liability for which he can by no stretch of imagination be held to be morally responsible. This would be a flagrant violation of the principle of moral autonomy of individuals, according to which a person should be liable only to the extent of his own involvement in the crime. It is difficult to establish this nexus of moral responsibility in the case of imputed liability under the “should have known” standard. This idea is closely related with the principle of culpability, which is discussed hereafter.

### ***“Should Have Known” Standard and the Principle of Culpability***

The principle of culpability is a logical corollary of the idea of the autonomy of the individual. As each individual is a free moral agent who should *ipso facto* be liable for and liable only for his own actions (made pursuant to his own free moral choices), liability must not be attributed where there exists no moral blameworthiness (knowledge or acquiescence of the crimes of subordinates in the context of command responsibility). Here it may be argued that there is moral blameworthiness even where a commander who

“should have known” of subordinates’ crimes, nevertheless failed to discover and prevent them, as he is in breach of his legal obligation to supervise his subordinates properly and prevent and punish any crimes under ICL committed by them. It is here, however, that it is to be noted that the liability attaching to the commander is *not for* failure to supervise his troops, but individual criminal responsibility for the crime(s) committed by the subordinate(s). This translates into imputing liability which is disproportionate to the level of blameworthiness.

To illustrate the above with an example, let us assume that soldier ‘B’ who is under the command of commander ‘A’ commits a crime of genocide which requires a specific intent (*dolus specialis*). In imputing responsibility, commander ‘A’ is treated as if he himself has committed genocide. If he was called to account for failing to supervise ‘B’ properly, it would have been proportionate; a fair imposition of liability to the extent of culpability. But transferring the *mensrea* of the soldier ‘B’ to commander ‘A’ and calling him a perpetrator of genocide, would be disproportionate and a liability far in excess of culpability. This also connects to the problem of fair labelling. ‘A’ is labelled a perpetrator of genocide, while in all fairness he should be labelled as a negligent commander or as having failed in his supervisory (preventive and punitive) duties in his capacity as commander.

In the case of liability in excess of culpability, legality degenerates into mere legalism. Legal responsibility should run concurrent with moral responsibility. It is true that law aims to be precise where morality may be vague or ambiguous. However, there should not be a broad gulf between the moral responsibility and legal responsibility. This is because the duty of law is to formulate and translate on ground the “minimum morality”. Ignoring this would undermine the basic legitimacy and justification of the imposition of legal responsibility. Legal responsibility suffers in validity sans its underpinning of moral responsibility. This is why the “should have known” standard of command responsibility must be carefully scrutinized to ensure that it should not impose liability far in excess of culpability. There should at least be a broad concurrence between liability and culpability.

There is also a gulf between the national law standard of liability of commanders and the standard of liability under ICL. This is because national law systems tend to have a greater regard to notions of culpability than ICL. However, the goal of ICL is basically to promote human rights, and it cannot do so by ignoring the idea of culpability-based liability which is very much a part of fairness, thus having a human rights dimension.

***Lack of a Differentiated Model Based on the Qualitative Nature of the Mental Element on Applying the “Should Have Known” Standard***

The following table is an attempt to illustrate how the criminal liability remains uniform over a gamut of differing states of knowledge and consequently differing mental element (*mensrea*).

Figure 1<sup>39</sup>

<b>State of Knowledge</b>	<b>Mental Element/ <i>Mens Rea</i></b>	<b>Liability</b>	<b>Degree of Culpability</b>
Self-induced ignorance (wilful blindness)	Tantamount to intent or knowledge	Full criminal responsibility for subordinate's crime	High (Equal to actual knowledge)
Conscious disregard	Recklessness ( <i>doluseventualis</i> )	Full criminal responsibility for subordinate's crime	Lower than above
“Should have known”	Inadvertent negligence	Full criminal responsibility for subordinate's crime	Lower than both of the above

We can see that though there are gradations in culpability as we go down the list, liability remains the same across the board. By punishing/ castigating crimes equally regardless of the mental element involved, we are diluting the law by applying it indiscriminately. This also ties in with the concerns of fair

<sup>39</sup> *Infra* n. 45 at pp. 462 – 463. Figure 1 is a tabular representation of the three bands of the knowledge spectrum and the corresponding mental element, as discussed by Mirjan Damaska,.

labelling and norm projection. There should be a differentiated model for apportioning liability based on the level of culpability. Liability should strictly be based on culpability *pro tanto* if the law is to be fair, just and reasonable in its formulation and application. There should be a differentiated model of apportioning liability commensurate with the *mens rea*, i.e., based on the qualitative nature of the mental element. The “should have known” standard is unduly harsh in this regard.

### ***The Concern for Fair Labelling***<sup>40</sup>

The concern for fair labelling arises because the liability which is imputed to the superior under command responsibility is individual criminal responsibility for the offence committed by the subordinate, not individual criminal responsibility for his own failure to properly supervise his subordinates. Are we ascribing unfairly to him liability which rightly should have attached to another? This is the crucial question of “fair labelling”.

The different degrees of blameworthiness in command responsibility do call for different labelling. It would not be fair to call those who breach command responsibility under the “should have known” standard as war criminals. This is also brought out by the illustration employed in the preceding Section using scenario of the commander ‘A’ and soldier ‘B’.<sup>41</sup>

There is a good reason why labelling should be commensurate with blameworthiness. A question may be raised why labelling should matter if the different degrees of culpability are taken into account while sentencing. However, it should not be forgotten that with labelling there is an element of moral condemnation and resultant stigmatization. The imputation of criminal liability tarnishes more than that of civil liability, and the label applied also determines the degree of stigma attaching to that individual. Therefore it needs to be borne in mind that while imputing command responsibility under the “should have known” standard, we are imputing to a person the moral stigma and condemnation of another individual’s crime.

<sup>40</sup> *Infran.*45. This section is based chiefly on Mirjan Damska’s highly influential article.

<sup>41</sup> See *supra* § 7: “Should Have Known” Standard and the Principle of Culpability.

The argument herein is not that stigma and liability should not attach to a commander for the crimes of his subordinates, but rather that such stigma and liability must be commensurate with his own degree of blameworthiness and not a direct transplantation of that of his subordinates to him.

Another concern of fair labelling concerns the attribution of liability for crimes of the most serious and intentional nature to commanders whose standard of culpability is based on negligence. In most national jurisdictions, liability for negligence is limited to crimes which do not involve serious moral condemnation.<sup>42</sup> However, all crimes in ICL are among the gravest of crimes contemplated by humanity and do involve serious moral condemnation and moral outrage on labelling. Therefore, ICL should be cautious in labelling because of the existing gulf between the actual culpability and the liability imposed in the case of imputed command responsibility under the “should have known” standard.

### ***The Problem of Over-deterrence***<sup>43</sup>

Deterrence is one of the well-recognised purposes of ICL. Imposing command responsibility on a “should have known” standard undoubtedly furthers the goal of deterrence. It serves to signify to commanders that as persons in a position of responsibility, they are under a special duty of care<sup>44</sup> to prevent their subordinates from committing crimes under IL. However, projecting the norm that they are as responsible for the crimes they “should have known” about as they are for crimes which they have committed, ordered, planned or instigated, stretches the limits so that it amounts to “over-deterrence” rather than deterrence. It would prevent morally upright persons from occupying positions of command, which they otherwise might have taken up.<sup>45</sup> This would be a loss on a cost-benefit analysis, if ICL itself deters morally upright persons from taking up positions fraught with most

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<sup>42</sup> *Commonwealth v. Kocwara*, 397 Pa. 575 (1960). However, the felony murder rule in America runs against the principle of culpability by extending vicarious liability for the serious crime of murder committed by another.

<sup>43</sup> This part is based substantially on *infra* n. 45.

<sup>44</sup> The expression is used here in a generic sense, not in a technical sense.

<sup>45</sup> Mirjan R. Damaska, *The Shadow Side of Command Responsibility*, 49 *American Journal of Comparative Law* 455 (2001).

responsibility, in a scenario where morally upright persons are badly needed at the helm of affairs to prevent international crimes.

Holding a person accountable to the extent of (and not beyond) their culpability would help to solve the problems posed by over-deterrence. As liability is still attached, this would not dilute the effect of deterrence.

***“Just Desserts”: The Impact of the “Should Have Known” Standard on the Perceived Legitimacy of ICL<sup>46</sup>***

Many national law systems have provisions which restrict liability in tune with culpability. Flying in the face of this: if ICL seeks to impute liability in excess of culpability by taking recourse to the “should have known” standard, it might be widely perceived that it is not meting out “just desserts”. The important thing to be borne in mind is that ICL is a human rights endeavour from start to finish. Therefore, it cannot take on a utilitarian angle and weigh the rights of one in the balance and find it to be less weightier than the rights of many. Each individual must be given “just desserts”, i.e. only that moral condemnation which they deserve for their own actions. No less a standard can be imposed, no lower a benchmark can be set for apportioning blame to a commander as the culpability principle runs like a golden thread through the human rights guarantees of the accused.

It is to be noted that any deviation, actual or perceived, from the idea of “just desserts” would dilute the norm projection function of ICL. This is because the intrinsic merit or validity of a norm is difficult to judge and the only perceptible yardstick is the perceived validity or acceptance of a norm. If people at large, i.e., individuals, who are ultimately the subjects of ICL, feel that it metes out some liability on technical grounds and not according to what the individual deserves, the entire normative endeavour of ICL is thereby foiled. This concern emphasizes yet again the importance of culpability and “just desserts.”

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<sup>46</sup> This part is substantially based on *supra* n. 45.

Given the many arguments raised against ICL such as selectivity, victors' justice etc., it should be like Caesar's wife: above suspicion. For this, justice must not only be done but also seen to be done. If the widespread perception is that ICL holds individuals criminally liable under fanciful doctrines or laborious constructs, then public perception of its legitimacy would be irrevocably eroded. Therefore, it is in the interests of the larger enterprise of ICL to reduce its reliance on doctrines which have only a veneer of legality, like the "should have known" standard. The "should have known" standard is a legal fiction, and painfully so, in the chaotic conditions surrounding armed conflict. This is exemplified by the *Yamashita Case*<sup>47</sup>, where a commander was literally a martyr to the "should have known" standard of imputed responsibility. If the public feels that commanders are made martyrs of for things over which they had no control, the moral authority of ICL would suffer. Of course, the last thing ICL as a form of transitional justice would want to do is to make martyrs out of those whom it tries to hold accountable.

Here, a question naturally arises as to how far ICL can afford to be populist or pander to public notions of what are "just desserts". As a form of justice, ICL cannot afford to bow to public opinion. It should not be a "mob" justice, but nor can it afford to ensconce itself in a cocoon of doctrine far removed from reality and relegate itself to being an "ivory tower" form of justice. It should derive its legitimacy from strict adherence to legality and the axiomatic principles of criminal law like the principle of culpability and "just desserts." The "should have known" standard needs to be reassessed from a doctrinal standpoint.

### ***Jurisprudential Dilemma in the "Should Have Known" Standard***

The "should have known" standard of liability is a classic case of human rights jurisprudence gaining an upper hand over criminal law jurisprudence. A human rights friendly approach is always victim-oriented and would seek to enlarge the liability net to make sure that the maximum number of

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<sup>47</sup> *In re Yamashita*, 327 U. S. 1 (1946): It involved the application of strict liability and resulted in imposition of liability far in excess of culpability. The factual matrix was a poignant reminder of how the "should have known" standard looks more and more like a quaint legal fiction in the chaotic conditions of battle.

persons in responsible positions are held accountable for gross human rights violations. In stark contrast, the criminal law model is highly conscious of the rights of the accused and places a high premium on liability being linked with culpability. This is because of the inherently different yet not inconsistent objectives of the two legal frameworks. The criminal law model attaches great importance to the substantive and procedural safeguards to be provided for the accused, while the human rights model focuses on giving justice to the victims.

ICL cannot afford to ignore either model. ICL is a vehicle for the vindication of human rights through the instrument of criminal law. Criminal law itself cannot be seen as divorced from human rights; as the safeguards for the accused are very much a part and parcel of human rights. How far can we vindicate human rights if we ignore some of them in the process? The debate of 'ends' versus 'means' has been the classical ethical dilemma. However, as for ICL, both the ends and means must be human rights friendly if its larger goals are to be attained. Imputing liability in excess of culpability, and the various problems outlined herein should not take away from the perceived legitimacy of ICL. Enthusiasm to nail all the culprits must not result in superiors being hauled up for crimes for which they bear no moral responsibility whatsoever. This might step up the conviction rate but it would weaken the moral authority of the entire enterprise of ICL.

### ***Absence of the Necessary Nexus of Causality under the "Should Have Known Standard"***

All forms of criminal justice generally contain some requirement of causality, in that the conduct of the accused should have caused the criminal consequence sought to be avoided. For instance, under the English law, criminal responsibility hinges on the "but for" test: but for the acts of the defendant, would the harmful result have come about? It should be remembered that the act of the defendant which precipitates the harmful result need not be direct.<sup>48</sup> However, such act must be substantial<sup>49</sup>, that the act of the defendant was not the only cause is irrelevant.<sup>50</sup>

<sup>48</sup> *R. v. Mackie*, [1973] 57 Cr App. R 453.

<sup>49</sup> *R. v. Hennigan*, [1971] 3 All E.R. 133.

<sup>50</sup> *R. v. Pagett*, [1983] 76 Cr. App. R 279.

The law depends on the concept of causality to justify the criminal liability of the person who engages in certain conduct, when such conduct causes the harm inherent in the offence under consideration. The nexus between the harm and the act in question is imperative in establishing criminal liability, unless the chain of causality has been broken by an intervening act.

The earlier jurisprudence on command responsibility has not gone into the relevance of causality for engaging command responsibility. A superior's culpable omission having a link of causality with subordinates' wrongful conduct is relevant in determining command responsibility, but it has more often been assumed than weighed and factored in carefully. The approach of the ICTY in *Delalic*<sup>51</sup> dismissed any causality connection in the command responsibility doctrine and this has generally been the stand of other ICTY Chambers too. Further, the ICTR in the *Akayesu*<sup>52</sup> decision has negated causation as a necessary element of command responsibility. Gunal Mettraux has opined that causality is a *sine qua non* for command responsibility under customary international law.<sup>53</sup>

Thus, accepting as a working premise that causality is a general requirement to engage criminal responsibility, the exercise is to be embarked upon to examine how far the connection of causality is present in the "should have known" standard of command responsibility. The nexus of causality under the "should have known" standard is nebulous, to say the least. When a commander actively aids, instigates, orders or abets subordinates' crimes, the causality is as plain as daylight. Even when he is wilfully blind or in conscious disregard of information enabling him to know of subordinates' crimes, there is a reasonably concrete nexus of causality.

However, this nexus of causality<sup>54</sup> becomes something intangible or merely *in potentia* in the case of imputed liability based on the "should have known"

<sup>51</sup> *Supra* n. 12.

<sup>52</sup> *Supra* n. 26 at ¶398: "Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates."

<sup>53</sup> Gunal Mettraux, *The Law of Command Responsibility*, (Oxford: Oxford University Press, 2009), p. 336.

<sup>54</sup> Which is arguably, a *sine qua non* for engaging criminal responsibility in general, and command responsibility in particular.

standard. While it can incontrovertibly be said that the turning of a blind eye (“wilful blindness”) or conscious disregard on the part of the commanders “causes” the harmful consequences of the crimes of the subordinates, this proposition becomes illogical and untenable in the case of the “should have known” standard. It cannot be said that the harmful results of the crime occurred because the commander “should have known” about the crime committed by his subordinates. Criminal responsibility must be predicated on a tangible standard rather than an imaginary standard, which the “should have known” standard rather borders on.

### ***The “Should Have Known” Standard and Personal Predilections of the Subordinates***

The question naturally arises whether, under the “should have known” standard, the commander is required to know the personal predilections of his subordinates, such as criminal tendencies, inherent cruelty, mental perversity etc. An example which readily springs to mind is Jelusic, a Serb commander of a detention camp, who was of such an unnaturally cruel nature that he notoriously “could not drink his coffee in the morning unless he had executed between 20 and 30 detainees.”<sup>55</sup> Should the commander of a person like him have known about the criminal tendencies of his subordinates? Or should he have the standard of knowledge assuming that his subordinates are rational human beings?

Arguments can be advanced both ways, i.e., either tending to the view that it is the duty of commanders to know the peculiarities of the people that they are to supervise (subjective knowledge requirement) or the more permissive view, that the commanders are required to know only in general the nature of their subordinates or of circumstances under which their subordinates are going to commit crimes (objective knowledge requirement). The objective knowledge requirement seems to be more fair, especially as we go higher up in the chain of command, where it is unrealistic to expect the commander to know of the personal quirks (which may tend to criminality) of his subordinates.

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<sup>55</sup> GuglielmoVerdirame, *The Genocide Definition in the Jurisprudence of the ad hoc Tribunals*, 49 ICLQ 578 – 598 (2000), p. 587, at n. 45.

### ***The Practice of Non-Penal Sanctions for some forms of Command Responsibility***<sup>56</sup>

It is difficult to canvass a view that non-criminal sanctions should be imposed for the lesser breaches of command responsibility, viz. those under the “should have known” standard. However, there is some national practice in this regard, though not directly bearing on the “should have known” standard. Failure to report war crimes<sup>57</sup> or to supervise troops<sup>58</sup> are crimes under the German code of crimes under international law. These are eligible for conditional dismissal<sup>59</sup>, i.e., on a showing of imposition of non-criminal sanctions. It is noteworthy that conditional dismissal is not available for felonies with a minimum term of imprisonment of one year. There seems to be some conflict herein. How can, what might amount to a *jus cogens* crime be let off without even a prosecution? If the provision is intended to mitigate the rigours of ascription of equal liability despite different levels of blameworthiness, then the solution would lie in rethinking the normative framework of command responsibility. Can the alternative of non-penal sanctions be availed of in case of breaches under the “should have known” standard?

Conditional dismissal under the German law is resorted to when there is no overly blameworthy action or the public’s demand for prosecution is satisfied through the application of non-criminal sanctions. Given the absence of great culpability (moral blameworthiness) and *mens rea* in the “should have known” category of offenders, it is worthwhile to explore whether non-criminal sanctions would suffice to deal with them. This would be in keeping with the scholarly opinion that ICL must limit prosecutions to those who are “most” responsible for perpetrating heinous or egregious crimes. It can be argued that those superiors who fell short of actually ordering, instigating or planning crimes, those who did not even have any information that enabled them to come to the conclusion that their subordinates would indulge in war crimes or crimes against humanity, though doubtless bearing some

<sup>56</sup> This Section relies to some extent on Frank Meyer, *Complementing Complementarity*, 6 INT’L CRIM. L. REV. 549 (2009).

<sup>57</sup> Section 13, VstGB – *Verletzung der Aufsichtspflicht*.

<sup>58</sup> Section 14, VstGB – *Unterlassen der Meldung einer Straftat*.

responsibility, can be said to be not the persons “most” responsible for the international crimes. It is also felt that as command responsibility under the “should have known” standard is more akin to a vicarious liability than criminal liability strictosensu, when examined under the lens of jurisprudence, civil consequences are not unsuited for such a kind of liability. The imposition of non-criminal sanctions for responsibility under the “should have known” standard, would not, therefore, be inappropriate.

However, as the goal of ICL is to end impunity, weakening the norms or circumscribing the set of persons who can be prosecuted is not advocated hereby. However, it is desirable to explore alternative mechanisms of accountability for those who might not be as liable as the others, without bracketing them all together.

#### IV. CONCLUSION AND SUGGESTIONS

The ascription of imputed criminal liability through command responsibility under the “should have known” standard appears, from the above analysis, to be iniquitous and unduly harsh. It is also not in keeping the ground realities of war situations. Therefore, the following suggestions are advanced by the present researcher<sup>60</sup> to remedy the anomalies created by the “should have known” standard:

- Command responsibility under the “should have known” standard should involve criminal liability *for failing to supervise* the subordinates properly, and *not for* the crimes committed by the subordinates.
- The role of the commander in causing or encouraging the subordinates’ criminal conduct is always to be evaluated separately. It is not to be assumed solely relying on the “should have known” criterion (Independent evaluation of the causal nexus).

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<sup>59</sup> Section 153a of the German Code of Criminal Procedure.

<sup>60</sup> Based on the literature referred to.

- A differentiated model for ascribing responsibility based on degree of mensrea is to be arrived at.
- The perceived legitimacy of ICL must not be eroded by indiscriminate imputation of liability under the “should have known” standard.
- The imposition of non-criminal sanctions for command responsibility under the “should have known” standard is well-worth exploring as this liability is almost a kind of vicarious liability rather than criminal liability in its classic form.

On an examination of the text, the ICC Statute (Art. 28: “knew or, owing to the circumstances at the time, should have known”) seems to impose liability on military commanders of a broader scope<sup>61</sup> than does the ICTY and ICTR Statutes (Arts. 7(3) and 6(3) respectively: “knew or had reason to know”). Much will, however, depend on the construction placed on the “should have known” standard in the process of its judicial interpretation by the ICC. Will it rely on the ICTR and ICTY standard of “had reason to know” or will it make a break with that jurisprudence and enter new doctrinal ground? Only time will tell but the indications are that with a more detailed provision in Art. 28 and its different wording of the required standard of knowledge, the prognosis seems to be that the ICC may interpret the “should have known” standard after its own fashion.

It is indeed a daunting task to work out a fair model of liability without leaving loopholes of impunity. This is the challenge before the ICC while operating on the “should have known” standard. The idea is advanced herein that commanders should be held liable and accountable for their conduct in supervising their subordinates and not for the crimes of their subordinates *per se*. This would give due deference to the fundamental philosophical underpinnings of criminal law: namely culpability, fair labelling and responsibility for one’s own acts. The legal fiction of “should have known” must be demystified and a concrete normative framework for commanders’ liability must be established.

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<sup>61</sup> *Op. cit* Marston-Danner, Martinez, *Supra* n. 6 at pp. 129 – 130, where this standard is described as “less demanding and closer to negligence”.