Public Annex B1: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Ambos, K., *Treatise on International Criminal Law, Volume I: Foundations and General Part*, OUP 2016, pp. 220-229

control and, 'as a result',[367] the ensuing subordinates' crimes.[368] Thus, under the ICC Statute, the explicit causal link between the superior's control and the commission of the crimes demands a coincidence between the two.[369] Criminal responsibility of a successor superior could only arise if a separate offence of failure to punish (previous crimes) existed.[370] While such an offence certainly better accommodates the different degree of wrongfulness and blameworthiness of the superior's failure-to-punish conduct as compared to the failure-to-prevent conduct,[371] it does not exist and thus the successor superior could not be held responsible for a failure to punish previous crimes by an international criminal tribunal.[372]

(c) Subjective requirements of superior responsibility

Article 28 has a peculiar structure in that it extends the superior's *mens rea* beyond his own failure to supervise to the concrete acts of the subordinates. While these have to act with 'intent and knowledge' within the meaning of Article 30(1) of the ICC Statute, the superior need not necessarily be (fully) aware of their crimes, but something less—'should have known' (Article 28(a)(i)) or 'consciously disregarded information . . . ' (Article 28 (b)(i))—suffices. This has two consequences. On the one hand, Article 28 makes use of the 'unless otherwise provided' clause in Article 30(1), establishing lower subjective standards[373] and even a completely new standard for the non-military superior. This section attempts, taking into account earlier codifications, jurisprudence and doctrine, to clarify the different standards. On the other hand, Article 28 provides for a negligence (lower than knowledge) responsibility with regard to crimes of intent.[374] This is logically only possible, as already explained above,[375] if the superior is not directly liable for the subordinates' crimes but primarily for his dereliction of duty.[376]

(i) Military and non-military superior: positive knowledge

According to Article 30(3) of the ICC Statute, knowledge means the 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Contrary to the *Bemba* PTC,[377] Article 28 does not provide for a different knowledge

[367] Section (4)(b)(iii) of this Part C.

[368] cf. Sander, *LJIL*, 23 (2010), 134.

[369] *Bemba Gombo*, No. ICC 01/05–01/08, para. 419 ('effective control at least when the crimes were about to be committed'). Conc. Meloni, *Command Responsibility* (2010), p. 163. Contrary to van Sliedregt, *Criminal Responsibility* (2012), pp. 198–9 the 'submitting' countermeasure does not encompass successor superior responsibility either, since it cannot sever the causal link between the superior's control and the crimes.

[370] See § 14 VStGB (*supra* note 233): 'Omission to report a crime'. See also the similar provisions cited by van Sliedregt, *Criminal Responsibility* (2012), pp. 193 with fn. 59 and 202–4. Of course, this is the better alternative than to consider the 'accessory after the fact' a party to the original crime, that is, founding accomplice liability on *ex post facto* conduct, for a discussion see Damaška, *AJCompL*, 49 (2001), 468–70.

[371] For more detail, see Section (4)(d)(iii) of this Part C.

[372] Of course, he may be prosecuted at the national level on the basis of provisions like § 14 VStGB, *supra* note 370.

[373] See Piragoff and Robinson, 'Article 30', in Triffterer, *Commentary* (2008), mn. 14–5. According to Darcy, *Collective Responsibility* (2007), p. 351 'the door is left open for recklessness or negligence'.

[374] Ambos, 'Superior Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), pp. 852–3 with further references.

[375] Notes 214, 234 and corresponding text.

[376] Crit. Weigend, *FS Roxin* (2001), 1397. See also Nerlich, *JICJ*, 5 (2007), 676, 680, 682 arguing for a parallel structure of liability between the superior and the subordinates on the basis of a distinction between the subordinates' conduct ('base crime') and the result produced by this conduct. Conc. van Sliedregt, *NCLR*, 12 (2009), 430; id, *Criminal Responsibility* (2012), pp. 200, 206; for a mitigation of punishment, see Meloni, *Command Responsibility* (2010), p. 202.

[377] *Bemba Gombo*, No. ICC 01/05–01/08, para. 479.

standard.[378] The awareness refers to *all objective requirements* of superior responsibility, in particular to effective control.[379] As to the subjective elements of the subordinates' crimes, it follows from the wording of Article 28—knowledge with regard to commission—that the superior need only be aware of the existence of the crimes, that is, he does not need himself possess their subjective elements. The same applies to the special intent requirement in the crime of genocide, that is, the superior need not himself possess the intent to destroy, but only be aware of its existence.[380] Of course, this view presupposes, as explained a moment ago, that the superior is not directly responsible for the subordinates' crimes but rather for his dereliction of duty. Otherwise, if he were to be qualified as a perpetrator of genocide, he would himself have to possess the intent to destroy element.[381]

The superior's actual knowledge may, of course, not be presumed, but be inferred from indicia, that is, by using *circumstantial evidence.*[382] Thus, for example, the *de facto* position of the superior may constitute a strong presumption of his knowledge about the subordinates' crimes.[383] In any case, the existence of knowledge must be based on facts, not on mere presumptions.[384] Otherwise, one would violate the principle of *individual* responsibility and culpability. Actual knowledge proven by circumstantial evidence has to be strictly distinguished from so-called 'constructive knowledge'. This concept belongs to the lower 'should have known' standard, to be discussed in turn.

(ii) Military superior: 'should have known'

The 'should have known' standard can be traced back to the *Hostages* and *Justice* cases,[385] Article 86(2) of AP I ('information which should have enabled them to conclude'; 'des informations leur permettant de conclure'),[386] and the '*had reason to know*' standards of

[378] Crit. already Ambos, *LJIL*, 22 (2009), 720; conc. Meloni, *Command Responsibility* (2010), p. 182.

[379] *Orić*, No. IT-03-68-T, para. 316.

[380] ICTY: *Brđanin*, No. IT-99-36-T, paras. 717 ff.; ICTR: *Prosecutor v Akayesu*, No. ICTR-96-4-A, Appeals Chamber Judgment, para. 865 (1 June 2001); *Musema*, No. ICTR-96-13-T, paras. 895 ff.; *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 555 ff.; see on the case law also Nybondas, *Command Responsibility* (2010), pp. 169–72; conc. Burghardt, *Vorgesetztenverantwortlichkeit* (2008), pp. 448–52; Meloni, *Command Responsibility* (2010), pp. 189–90; Ambos, *Internationales Strafrecht* (2011), § 7 mn. 150; critically Darcy, *Collective Responsibility* (2007), pp. 351 ff. (stating that 'the architects of the Rome Statute may have left its judges with the task of forcing the square peg of command responsibility into the round hole of specific intent crimes', p. 354).

[381] cf. Ambos, *IRRC*, 91 (2009), 857; in the same vein Nybondas, *Command Responsibility* (2010), pp. 168, 180 on the basis of the 'act *sui generis*' approach (*supra* note 235).

[382] Such indicia have for example been developed by the UN Commission of Experts for the Former Yugoslavia (UN Doc. S/1994/674 of 27 May 1994), quoted in Bassiouni, *Crimes Against Humanity* (1999), p. 483. See already note 198 with main text. See also *Delalić et al.*, No. IT-96-21-T, para. 386; also *Blaškić*, No. IT-95-14-T, para. 307 (number, type, and scope of illegal acts; time during which the illegal acts occurred; number and type of troops involved; logistics involved, if any; geographical location of the acts; widespread occurrence of the acts; tactical tempo of operations; *modus operandi* of similar illegal acts; officers and staff involved; location of the commander at the time). For the subsequent case law, see *Strugar*, No. IT-01-42-T, para. 368; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 427; *Mrkšić et al.* No. IT-95-13/1-T, para. 563; *Ntawukulilyayo*, No. ICTR-05-82-T, paras. 421–2; *Perišić*, No. IT-04-81-T, paras. 150, 153. See also Fenrick, 'Article 28', in Triffterer, *Commentary* (1999), mn. 10; Bantekas, *AJIL*, 93 (1999), 587–9; Meloni, *Command Responsibility* (2010), pp. 108–10, 180; *Vest, Völkerrechtsverbrecher* (2011), p. 242.

[383] *Aleksovski*, No. IT-95-14/1-T, para. 80; Blaškić, No. IT-95-14-T, para. 308; *Delić*, No. IT-04-83-T, paras. 63 ff.; *Šainović et al.*, No. IT-05-87-T, para. 119; *Popović et al.*, No. IT-05-88-T, para. 1040; *Bagosora et al.*, No. ICTR-98-41-T, para. 2013; *Renzaho*, No. ICTR-97-31-T, paras. 746 ff.; *Ntagerura*, No. ICTR-99-46-T, para. 421.

[384] In this vein, however, apparently Preux, 'Commentary on Articles 86 and 87', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 3546, referring to the war crimes jurisprudence, he states: '[. . .] taking into account the circumstances, a knowledge of breaches committed by subordinates could be presumed'. See also Green, *Contemporary Law* (2008), pp. 309 ff. Bantekas, *AJIL*, 93 (1999), 590, 594 goes even further, identifying an 'emerging rule of customary law' in this sense.

[385] See Chapter IV, B. (1)(c) and *US v von List et al.* (Hostages trial) (case 7), in US GPO, *TWC*, xi (1950–53), 1230–319 (especially 1281).

[386] For the full text, see (1) of this Part C.

the ILC[387] and ICTY/ICTR.[388] In fact, the same wording was unsuccessfully proposed by the ICRC during the negotiations of AP I[389] and is contained in the US and British military manuals.[390] If the different formulas used do not imply or are not intended to imply a difference in substance, it seems to be most logical to interpret the 'should have known' criterion in light of AP I—as the original source of superior responsibility—and the ICTY/ICTR's 'reason to know' standard. With regard to the former, the problem is that Article 86 (2) is far from clear. Arguably, the AP's vague and ambiguous formula is the cause of all subsequent problems of interpretation. While there is a slight linguistic difference between the English and French wording,[391] it does not entail major interpretative consequences. In fact, the ILC interpreted both versions equally[392] and the ICTY did not see a difference 'of substance'.[393] Thus, both versions make equally clear that *conscious* ignorance in the sense of *wilful blindness* is sufficient to incur criminal responsibility.[394] In other words, Article 86 (2) AP I was written with *negligence* in mind.[395]

If one takes a closer look, things get more complicated. In a very thoughtful study Wu/Kang offer four interpretations of Article 86(2) AP I:

(1) A superior has an obligation to monitor the actions of his subordinates and will be held responsible for the knowledge that a reasonable agent in his position would have possessed;

(2) The superior must be guilty of 'willful blindness' in order for knowledge to be assumed, because deliberate ignorance and positive knowledge are equally culpable;

(3) Knowledge must be constructively imputed based on his position, if there is no way that he could not have known;

(4) Actual knowledge must be proved, but may be inferred from circumstantial evidence such as the defendant's position.[396]

[387] Supra note 256.

[388] See the wording of Articles 7(3) ICTYS and 6(3) ICTRS in this section, subs. (2) and on the case law note 188 and corresponding text; see also *Perišić*, No. IT-04-81-T, para. 149; *Milošević*, No. IT-98-29/1-A, paras. 278, 280; *Đorđević*, No. IT-05-87/1-T, paras. 1884–6; *Prosecutor v Bagosora and Nsengiwmva*, No. ICTR-98-41-A, Appeals Chamber Judgment, paras. 202, 204, 384 (14 December 2011).

[389] ICRC Draft Article 76(2) proposed a 'should have known' standard, but was rejected as too broad (see Preux, 'Commentary on Articles 86 and 87', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 3526; also Levie, *JLS*, 8 (1997/1998), 8; Landrum, *MLR*, 149 (1995), 249; Crowe, *URichLR*, 29 (1994), 225); Meloni, *Command Responsibility* (2010), p. 182.

[390] See Ambos, 'Superior Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), pp. 841–2, 864 with further references.

[391] Partsch, 'Commentary on Articles 86 and 87', in Bothe, Partsch, and Solf, *New Rules for Victims* (1982), pp. 525–6, takes the view that the French text differs from the English in that it does not permit subjective considerations in determining whether the superior should have drawn the right conclusion from the information available. According to the dominant view, the French verson should prevail (Preux, 'Commentary on Articles 86 and 87', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 3545; Partsch, 'Commentary on Articles 86 and 87', in Bothe, Partsch, and Solf, *New Rules for Victims* (1982), p. 525; Fenrick, 'Article 28', in Triffterer, *Commentary* (1999), 119; *Vest, Völkerrechtsverbrecher* (2011), pp. 223–4; also *Blaškić*, No. IT-95-14-T, para. 326).

[392] ILC, *YbILC*, i, 40 (1988), 288–9, paras. 59 ff. (Mr Tomuschat, chairman of the Drafting Committee); also Rogers, *Battlefield* (1996), p. 139.

[393] See *Delalić et al*., No. IT-96-21-T, para. 392 (referring to the *travaux*).

[394] Preux, 'Commentary on Articles 86 and 87', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 3545–6. For a recent comparative (Spanish–Anglo–American) study of the concept of wilful blindness, see Ragués i Vallès, *Derecho Penal* (2007); Burghardt, *Vorgesetztenverantwortlichkeit* (2008), p. 242.

[395] cf. Preux, 'Commentary on Articles 86 and 87', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 3541.

[396] Wu and Kang, *HarvILJ*, 38 (1997), 284–5.

While (1) and (2) are straightforward standards of negligence or recklessness respectively, in (3) and (4) knowledge is 'constructed' on the basis of objective events or circumstantial evidence. Unfortunately, Wu/Kang do not further examine these standards because they consider that 'the specification of a single, rigorously defined, unambiguous *mens rea* requirement [...] would be a fruitless exercise as it is almost impossible to discern the precise holdings of derivative liability cases with respect to *mens rea* in practice'.[397] However, this surrender to practical considerations—without even attempting to develop a theoretical solution less ambiguous than the existing one—comes too quick. Although it is correct that each case 'is decided largely on its particulars',[398] this should not preclude more profound efforts to develop a theoretical model that would allow more foreseeable solutions. If one takes a closer look at the standards developed by Wu/Kang, one can easily exclude standards (3) and (4) in the present context. While standard (3) would amount to a violation of the culpability principle by relying exclusively on objective facts and presuming knowledge on this basis,[399] standard (4), in reality, does not deal with the *mens rea* requirement at all but only with the admission of circumstantial evidence for the proof of actual knowledge.[400] As far as standards (1) and (2) are concerned, the 'should have known' formula constitutes a *negligence* rather than a recklessness[401] standard. This view is not only supported by the above interpretation of Article 86(2) AP I but also by various official and private statements, according to which the superior responsibility doctrine creates liability for criminal negligence.[402]

As to the '*had reason to know*' standard, applied by the ICTY/ICTR case law, it does not substantially differ from the earlier AP I formula. Although the ILC argued that 'had reason to know' permits a more objective assessment than the AP I standard,[403] it explained the former with the words of the latter, explicitly referring to the commentary on Article 86(1) of AP I. Accordingly, in these circumstances, a superior lacks actual knowledge of the criminal conduct of his subordinates, but there does exist *sufficient, relevant information of a general nature* that would enable him to conclude that such conduct takes place. The reference to (concrete) information goes back to a US proposal with regard to the ICTYS referring to possible knowledge 'through reports to the accused person or through other means',[404] thereby, in turn, relying on the Hostage case and the AP I.[405] Accordingly, a superior who simply ignores information which clearly indicates the likelihood of such a criminal conduct is seriously *negligent* in failing to perform his duty to prevent or repress it if he does not make a reasonable effort to obtain the necessary information that will enable him to take appropriate countermeasures. Thus, the superior must possess *information which puts him on notice* of the risk that such crimes might occur or have occurred. Yet, contrary to the *Blaškić* Trial Chamber, the superior must not actively try to get hold of this information—it must already be available to him.[406] The information must indicate the

[397] Wu and Kang, *HarvILJ*, 38 (1997), 286.
[398] Wu and Kang, *HarvILJ*, 38 (1997), 287.
[399] See also Parks, *MLR*, 62 (1973), 90; similar Rogers, *Battlefield* (1996), p. 139 and text with n. 435.
[400] See notes 382–4 and accompanying text.
[401] Garner, *Law Dictionary* (2007), pp. 1298–9, defines recklessness as '[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk... [it] invokes a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing'. See also § 2.02(2)(c) MPC, § 20 CCA, § 18(c) DCCB.
[402] See Hessler, *YaleLJ*, 82 (1973), 1284: 'type of criminal negligence'; Schabas, *EJCCLCJ*, 6 (1998), 417: 'liability for negligence'; also Bantekas, *AJIL*, 93 (1999), 580–1, 590.
[403] ILC, *YbILC*, ii/2, 48 (1996), 26, para. 5.
[404] Quoted according to Crowe, *URichLR*, 29 (1994), 229–30.
[405] Crowe, *URichLR*, 29 (1994), 230.
[406] See note 193 with main text.

need for additional investigation in order to ascertain whether crimes will be or have been committed.[407] On the basis of this case law, Parks concludes that the superior is responsible if 'he failed to exercise the means available to him to learn of the offense and under the circumstances, he should have known . . . '.[408] Crowe distinguishes between 'reports made to the commander' and 'widely published press accounts of the atrocities'.[409] However, this distinction is not relevant since the opportunity to learn of atrocities depends on the quality of the information, not on the source. A thoroughly researched press report can certainly make the superior aware of irregularities and oblige him to order further investigation. Similarly, the argument brought forward by Rogers that '[t]he fact that a report is addressed to a commander does not mean that he sees it or is even aware of its existence'[410] does not necessarily absolve the superior of liability since he is responsible for an effective reporting system within his command. In sum, one may conclude that an ignorant superior cannot be held liable if he took information which indicated the commission of crimes seriously, but still did not find evidence of the crimes committed by the subordinates.[411] In other words, such a superior complies with his duty of supervision and does not act negligently. Against this background, it is not surprising that the UN Secretary General's Report on the establishment of the ICTY describes the 'had reason to know' standard as 'imputed responsibility or criminal *negligence*'.[412]

Taking into account these considerations, it is clear that the '*should have known*' standard—as well as the 'consciously disregarded' standard of Article 28(2)(a), to be looked at in the next section—requires, on the one hand, no awareness,[413] nor suffices, on the other, in the imputation of knowledge on the basis of purely objective facts. The key requirement is the *information available to the superior*. This follows, first of all, from the wording of Article 28(2)(a) which explicitly refers to information. Secondly, the 'should have known' standard of Article 28(1)(a) essentially corresponds to the 'had reason to know' standard of the ad hoc tribunals, for both standards were proposed by the USA and one can safely assume that they did not want to change them substantially.[414] More importantly, the 'should have known' standard corresponds to negligence as understood in general criminal law.[415] According to s. 2.02(2)(d) MPC,[416] a person acts negligently 'when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from its conduct'. Negligence is distinguished from the other forms of *mens rea* (purpose, knowledge, or recklessness) in that it does not involve a state of awareness. A person acts negligently if the person creates a risk of which he or she is not,

[407] *Delalić et al*., No. IT-96-21-T, para. 383; see also *Orić*, No. IT-03-68-T, para. 322 with further references to the abundant case law and examples of such information in para. 323 and text with note 363; confirmed by *Perišić*, No. IT-04-81-T, para. 152; *Popović et al*., No. IT-05-88-T, paras. 1045–6. On a possible customary rule, see *Blaškić*, No. IT-95–14-T, paras. 309 ff.

[408] Parks, *MLR*, 62 (1973), 90, referred to in *Blaškić*, No. IT-95–14-T, para. 322 (translated into French).

[409] Crowe, *URichLR*, 29 (1994), 226.

[410] Rogers, *Battlefield* (1996), p. 139.

[411] *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 332.

[412] UN SC Res 827 (25 May 1993), UN Doc. S/RES/827 (reprinted in *ILM*, 32 (1993), 1203 para. 56) (emphasis added).

[413] As wrongly implied by Article 87(2) and (3) AP I by using the term 'aware'. According to Rogers, *Battlefield* (1996), p. 142, this standard covers actual and constructive knowledge. However, this is only true if constructive knowledge is understood as construction of knowledge on the basis of facts which enable the superior to know of the commission of crimes, see infra note 431 with corresponding text.

[414] cf. Levie, *JLS*, 8 (1997/1998), 10: 'reason to know' and 'should have known' as 'strikingly similar'; Landrum, *MLR*, 149 (1995), 300 (AP I and ICTY standard as 'quite similar'); Tsagourias, 'Command Responsibility', in Eboe-Osuji, *Protecting Humanity* (2010), p. 834. Dissenting apparently Vetter, *YaleLJ*, 25 (2000), 122–3.

[415] Conc. Meloni, *Command Responsibility* (2010), pp. 184–5; Vest, *Völkerrechtsverbrecher* (2011), p. 261.

[416] *MPC I* (1985), § 2.06, p. 226.

but ought to be, aware.[417] The person is liable if the failure to perceive the risk 'involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation' (s. 2.02(2)(d) MPC). While a more profound analysis is not possible here, it may be pointed out that the vague 'reasonable man standard'[418] can be complemented by certain subjective criteria, that is, it can be 'individualized in order to achieve a fair standard of judging individual behavior'.[419] In any case, there is a clear-cut *distinction between negligence and recklessness* in terms of the actor's awareness of the risk involved:[420] a negligent actor fails to perceive the risk, that is, is not aware of it; a reckless actor 'consciously' disregards the risk (s. 2.02(2)(c) MPC), that is, perceives but ignores it.[421] Thus, recklessness and negligence can be equated to the German concepts of *conscious and unconscious (inadvertent) negligence* ('bewußte und unbewußte Fahrlässigkeit').[422] However, this difference between conscious recklessness and unconscious negligence is ignored where such contradictory notions as 'wilful', 'wanton', or even 'conscious' negligence are used.[423] This accounts for much of the confusion with regard to the mental element involved in superior responsibility.[424]

All in all, one can conclude that the *common denominator* of the superior responsibility *mens rea* standards below positive knowledge constitutes the *information requirement*. The superior must possess information—he is not required to actively seek this information[425]—enabling him to conclude that the subordinates are committing crimes or at least indicating the need for additional investigation in order to ascertain the commission of offences.[426] Whether indeed the superior has drawn an erroneous conclusion from the information available is ultimately a normative question[427] which depends on the quality

[417] *MPC I* (1985), § 2.06, p. 240.

[418] Critical in this context Parks, *MLR*, 62 (1973), 90; Hessler, *YaleLJ*, 82 (1973), 1285. For a different reasonableness standard in the case of military defendants, see Green, *CanYbIL*, 27 (1989), 169.

[419] Fletcher, *Basic Concepts* (1998), p. 119; see also the subjective criteria with regard to command responsibility proposed by Parks, *MLR*, 62 (1973), 90 ff.; see also Bassiouni, *Crimes Against Humanity* (1999), p. 469.

[420] *MPC I* (1985), § 2.06, p. 242.

[421] cf. Fletcher, *Basic Concepts* (1998), p. 115. For a definition of recklessness see note 401.

[422] See Fletcher, *Basic Concepts* (1998), p. 115 pointing out, however, that the English law uses the term 'reckless' not to denote risk-consciousness, but to refer to egregious cases of negligence. See also Pradel, *Droit Pénal Général* (2010), pp. 210 ff. who distinguishes between conscious risk-creation ('la mise en danger délibérée', pp. 411–12) and negligence ('*négligence*', pp. 413 ff.) including in the latter conscious and unconscious negligence ('faute consciente' and 'inconsciente', pp. 417–18).

[423] *MPC I* (1985), § 2.06, p. 242.

[424] A good example of this terminological confusion is the often quoted study of Parks who opts for a 'wanton negligence' involving the 'doing of an inherently dangerous act or omission with a heedless disregard of the probable consequences' (Parks, *MLR*, 62 (1973), 97) and a negligence 'so great as to be tantamount to the possession of the necessary mens rea to so become such an active party to the offense' (99).

[425] See on these two different approaches note 194 with main text.

[426] *Orić*, No. IT-03-68-A, para. 321; see also *Mrkšić et al.*, No. IT-95-13/1-T, para. 564; *Bagosora et al.*, No. ICTR-98-41-T, para. 2013; *Renzaho*, No. ICTR-97-31-T, para. 746; *Ntawukulilyayo*, No. ICTR-05-82-T, para. 421; *Delić*, No. IT-04-83-T, paras. 63, 65 ff., where it was stated that regarding the 'be put on notice' criteria, no detailed information is needed ('does not need to be detailed', para. 66); see also *Šainović et al.*, No. IT-05-87-T, para. 120 ('need not be specific') and *Popović et al.*, No. IT-05-88-T, para. 1042; *Đorđević*, No. IT-05-87/1-T, para. 1886. See previously Ambos, 'Superior Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 867–8; see also Landrum, *MLR*, 149 (1995), 301 ('"had reason to know" appears to mean "had the information from which to conclude"'); Levie, *JLS*, 8 (1997/1998), 12 (information about violations of the law of war available to a commander); Fenrick 'Article 28', in Triffterer, *Commentary* (1999), mn. 11 (arguing that the 'should have known' standard is satisfied, if the superior 'fails to obtain or wantonly disregards information of a general nature within his or her reasonable access indicating the likelihood of actual or prospective criminal conduct on the part of subordinates [...]'); Arnold, 'Article 28', in Triffterer, *Commentary* (2008), mn. 97 (concluding that 'notwithstanding a slightly different wording, the applicable test is still whether someone, on the basis of the available information, *had reason to know* in the sense of Add. Prot. I' (emphasis in the original)).

[427] cf. Vest, *Völkerrechtsverbrecher* (2011), p. 241.

and precision of the available information[428] and, in principle, must be decided on a case-by-case basis. Against this background it is difficult to agree with the PTC's obiter-like statement in *Bemba* that the 'had reason to know' criterion embodied in the statutes of the ICTY, the ICTR, and the SCSL is different from the 'should have known' standard under Article 28 ICC Statute.[429] In any case, if a difference between the two standards existed in the sense that the 'should have known' standard 'goes one step below' the 'had reason to know' standard,[430] it would be the ICC's task to employ a restrictive interpretation which brings the former standard in line with the latter.[431]

The information requirement has two further consequences. First, the concept of *constructive knowledge*, already mentioned at the end of the previous section, also relates to information in that it must be understood as requiring *reliable and concrete information* enabling the superior to know about the commission of crimes. Hessler correctly states that constructive knowledge consists of a duty to make inferences from actually known facts and to carry out reasonable investigation of actually known 'suspicious' facts.[432] On this basis, he formulates his Rule Three, according to which the superior has the duty to know of specific crimes and policies on the basis of such facts. Constructive knowledge is defined with regard to the mental objects used in rules One and Two, that is, known crimes or policies which must be prevented.[433] Additionally, the superior has the duty to eliminate more than negligible risks of future crimes, which Hessler considers to be the third mental object.[434] Against this background it should be clear that constructive knowledge does not encompass the imputation of knowledge on the basis of purely objective facts,[435] for example, because of the large-scale and widespread commission of the atrocities. Such a standard would be a *fiction*, since knowledge is presumed even though it did not exist or, at least, cannot be proven. In fact, in such a situation the superior can only be punished for negligently not having known of the crimes, that is, because he *should have known*. Yet, this standard, too, is, as we have demonstrated, predicated on available information.

The second consequence produced by the information requirement relates to the tricky issue of the legal treatment of the *erroneous evaluation* of existing information. A superior may, for example, analyse the information thoroughly, but draw an erroneous conclusion with regard to the imminent commission of crimes by subordinates. In this case, one has first to determine the basis of the superior's error. If he made a *mistake of fact*—although an unlikely assumption, if there is sufficient (factual) information—he would act or rather not act (omit) without *mens rea* within the meaning of Article 30 of the ICC Statute. Consequently, he must be exempted from criminal responsibility. In the light of the 'should have known standard', however, the superior would be criminally liable since, following the information available, he should have known. If he made *a mistake of law*, misunderstanding his legal obligations, the superior would be criminally responsible since international criminal law has opted for the *error iuris* doctrine, according to which a mistake of law does

[428] For a good discussion of the quality of the information, see Burghardt, *Vorgesetztenverantwortlichkeit* (2008), pp. 239–42; conc. with regard to the necessity of further discussion on this issue, see Vest, *Völkerrechtsverbrecher* (2011), p. 243.

[429] *Bemba Gombo*, No. ICC 01/05–01/08, para. 434.

[430] Mettraux, *Command Responsibility* (2009), p. 210.

[431] Mettraux, *Command Responsibility* (2009), p. 212.

[432] Hessler, *YaleLJ*, 82 (1973), 1278–9, 1298–9. See also the similar definition of the UN Commission of Experts, note 382, quoted in Bassiouni, *Crimes Against Humanity* (1999), p. 483.

[433] Hessler, *YaleLJ*, 82 (1973), 1295 ff.

[434] Hessler, *YaleLJ*, 82 (1973), 1299 ff. Concerning this mental element, Hessler considers the law as unsettled (1282); see also his general critical assessment of these mental objects at 1281 ff.

[435] See Parks, *MLR*, 62 (1973), 90; similar Rogers, *Battlefield* (1996), p. 139; Meloni, *Command Responsibility* (2010), p. 181.

not affect criminal responsibility, except if it negates the mental element (Article 32 ICC Statute). We will return to mistakes and their consequences in Chapter VIII.

(iii) Non-military superior: 'consciously disregarded information which clearly indicated . . . '

As we have already said above, and as clearly follows from the wording of this alternative, the non-military superior needs information at his disposal to be held responsible. In general terms, this is a new standard which comes close to the '*wilfully blind*' criterion known from common law and war crimes trials.[436] The 'wilful blindness' standard presents an exception to the positive knowledge requirement in that it is considered to be fulfilled—regarding the existence of a particular fact (no presumption of knowledge)—'if a person is *aware* of a high *probability* of its existence, unless he actually believes that it does not exist' (s. 2.07 MPC).[437] Wilful blindness, thus, stands *between knowledge and recklessness*.

There is certainly a difference between the standard applicable to a military and a civilian superior,[438] but it is only one of degree:[439] while the military superior must take any information seriously, the civilian one must only react to information which 'clearly' indicate the commission of crimes; this latter standard is one of conscious negligence or recklessness (as more clearly expressed by the French version of Article 28(b)(i) ICC Statute: '*délibérément negligé de tenir compte d'informations qui l'indiquaient clairement*').[440] This also follows from the similar formulation of s. 2.02(2)(c) MPC which defines recklessness as 'consciously' disregarding a risk. The second standard developed by Wu/Kang also views wilful blindness as constituting recklessness.[441] Interestingly, the ICTR, drawing on the ICC Statute's distinction between military and civilian superiors,[442] identically held that a civilian superior would be liable if he 'either knew or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed or were about to commit' criminal acts.[443]

Clearly, the higher subjective threshold for non-military superiors as compared with military ones entails that it will be more difficult to prosecute the former for a failure of supervision than the latter.[444] As in the case of military superiors, the *mens rea* will have to be inferred from the same indicia used to prove knowledge;[445] besides, it is, following Arnold,[446] necessary to establish:

[436] See, for example, *Finta*, *ILR*, 98 (1994), 595. See also Eckhardt, *MilLR*, 97 (1982), 14 (yet, with regard to military commanders: 'no room [. . .] for a "stick your head in the sand" approach'); also Vetter, *YaleLJ*, 25 (2000), 124; Damaška, *AJCompL*, 49 (2001), 462 and *supra* note 394.

[437] *MPC I* (1985), § 2.06, p. 248; LaFave, *Criminal Law* (2010), pp. 325–6.

[438] For a higher threshold for a superior 'exercising more informal types of authority' see also *Orić*, No. IT-03-68-T, para. 320. On the practical relevance and in favour of this difference, see Vest, *Völkerrechtsverbrecher* (2011), p. 259; Schabas, *ICC Commentary* (2010), pp. 459–60; in contrast Nybondas, *Command Responsibility* (2010), p. 123 sees 'no higher threshold' for civilians.

[439] Conc. Vest, *Völkerrechtsverbrecher* (2011), p. 260.

[440] For a detailed analysis, see Ambos, 'Superior Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 863 ff.; conc. Meloni, *JICJ*, 5 (2007), 634; id, *Command Responsibility* (2010), pp. 186–7. It goes too far, however, to read into the 'should have known' phrasing a 'duty of knowledge' standard and to justify this strict standard with retributive and utilitarian arguments (Martínez, *JICJ*, 5 (2007), 660 ff.; convincingly against this standard, see Bonafé, *JICJ*, 5 (2007), 606–7).

[441] See Wu and Kang, *HarvILJ*, 38 (1997), 284–5 as quoted note 396 with main text.

[442] *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 227 (calling this distinction 'an instructive one').

[443] *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 228.

[444] See the criticism by Vetter, *YaleLJ*, 25 (2000), 94, 96, 103, 116, 141, who takes the view that the civilian *mens rea* standard of the Rome Statute reduces the efficacy of the ICC (but see also his counter-hypothesis in note 171). Thus, in his view, for example, the Japanese diplomat Hirota, convicted by the IMTFE (Pritchard and Zaide, *Tokyo Trial*, ciii (1981), pp. 49788–92), could not have been held responsible by this new standard (ibid, 126–7; with a further analysis of the *Roechling*, *Akayesu* and *Milošević* cases at 128 ff.).

[445] See note 382 and main text.

[446] Arnold, 'Article 28', in Triffterer, *Commentary* (2008), mn. 128.

- that information clearly indicating 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, declined to refer to the category of information.

(d) Special issues

(i) Command responsibility and ordering

While, on a conceptual level, there exists a clear difference between liability for ordering—as a positive act imposed by a superior on a subordinate[447]—and for superior responsibility—as an omission—in the case law of the ad hoc tribunals, there has been a tendency to use the latter as a kind of *fallback liability* for cases in which a positive act within the framework of a superior-subordinate relationship could not be established.[448] The issue was *implicitly* addressed for the first time in *Kayishema and Ruzindana*, where a Trial Chamber held that Article 6(3) only becomes relevant if the accused did not order the alleged crimes.[449] It was also addressed in *Blaškić,* where it was held that 'l'omission de punir des crimes passés . . . peut . . . engager la responsibilité du commandant au titre de l'Article 7(1) . . . '.[450] However, only in *Kordić and Čerkez* was responsibility under Article 7 (1) more explicitly characterized as 'direct'—in contrast to the rather 'indirect' responsibility under Article 7(3)[451]—and as a *lex specialis*, superseding a simultaneous conviction on the basis of Article 7(3), which is only of subsidiary nature.[452] This approach has been confirmed in the subsequent case law,[453] with the *Krnojelac* Trial Chamber adding that the accused's position as a superior shall only be taken into account as an aggravating factor,[454] and the *Stakić* Trial Chamber considering that it would be a waste of judicial resources to discuss Article 7(3) in such cases.[455]

The ICC should follow these judicial precedents. As has already been said above,[456] the first alternative of subparagraph (b) ('[o]rders') complements the command responsibility provision (Article 28) in that the superior's failure to properly supervise is the flip side of

[447] See the classical ICTR-*Akayesu* definition according to which 'the person in a position of authority uses it to convince (or coerce) another person to commit an offence' (*Akayesu*, No. ICTR-96-4-T, para. 483; see Chapter IV, C. (4)(b)(ii)).

[448] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 670 ff.; id, 'Superior Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), pp. 835–6; see also Damaška, *AJCompL*, 49 (2001), 472, 481; Meloni, *Command Responsibility* (2010), p. 245; for an interesting analysis of the case law between cumulative convictions (pursuant to Article 7(1) and (3) ICTYS) and superior responsibility as an aggravating factor, see Nybondas, *Command Responsibility* (2010), pp. 155–64.

[449] *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 223.

[450] *Blaškić*, No. IT-95-14-T, para. 337 ('the failure to punish past crimes . . . may pursuant to Article 7(1) and subject to the fulfillment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes').

[451] *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 366 ff.

[452] cf. *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 370–1.

[453] **ICTY:** *Delalić et al.*, No. IT-96-21-A, para. 745; *Prosecutor v Krstić*, No. IT-98-33-A, Appeals Chamber Judgment, note 250 (19 April 2004); *Blaškić*, No. IT-95-14-A, paras. 90–92; *Prosecutor v Naletilić and Martinović*, No. IT-98-34-A, Appeals Chamber Judgment (3 May 2006), para. 368 (with regard to JCE and superior responsibility); *Galić*, No. IT-98-29-A, para. 186; *Prosecutor v Milošević,* No. IT-98-29/1-T, Trial Chamber Judgment, para. 984 (12 December 2007); *Prosecutor v Kvočka et al.*, No. IT-98-30/1-A, Appeals Chamber Judgment, para. 104 (28 February 2009). **ICTR:** *Kajelijeli*, No. ICTR-98-44A-A, paras. 81 ff.; *Karera*, No. ICTR-01-74-A, para. 566.

[454] *Krnojelac*, No. IT-97-25-T, paras. 173, 496. In the same vein, *Karera*, No. ICTR-01-74-A, para. 566. See also *Blaškić*, No. IT-95-14-A, para. 91; *Galić*, No. IT-98-29-A, para. 186.

[455] *Stakić*, No. IT-97-24-T, para. 466.

[456] Chapter IV, C. (4)(b)(ii).

his ordering of international crimes. As a consequence, and following the ad hoc tribunals' case law, the recourse to Article 28 is superfluous if the ordering of crimes can be proven. This also means that an investigation should primarily focus on the ordering conduct and only take recourse to superior responsibility as a kind of default rule.

(ii) Command responsibility and JCE

The analysis of JCE and command responsibility shows that the two doctrines differ fundamentally in their conceptual structure.[457] The most striking difference is possibly that JCE requires a *positive act* or contribution to the enterprise while for command responsibility an *omission* suffices. From this perspective the doctrines are mutually exclusive: either a person contributes to a criminal result by a positive act or omits to prevent a criminal result from happening. The existence of both at the same time seems to be logically impossible. Obviously, if one thinks more profoundly about the form of commission in a context where the conduct develops at different times and places, one may imagine cases in which the superior participates actively in a JCE and simultaneously omits to intervene in the execution of crimes committed within the framework of the same JCE. Another important difference lies in the fact that superior responsibility requires, *per definitionem*, a superior and a subordinate, that is, a *hierarchical, vertical relationship* between the person whose duty it is to supervise and the one who directly commits the crimes to be prevented by the supervisor. By contrast, the members of a JCE, at least of a JCE I, which is similar to the co-perpetration mode in a functional sense,[458] normally belong to the same hierarchical level and operate in a *coordinated, horizontal way*.[459] In this sense, neither 'any showing of superior responsibility',[460] nor the 'position of a political leader' is required.[461] As a rule, JCE requires 'a minimum of coordination' and this minimum is 'represented as a horizontal expression of will', which binds the participants together.[462] However, the amplitude and elasticity of the doctrine allows the inclusion of informal networks and loose relationships, and as such stretches well beyond command responsibility.[463] A third difference refers to the *mental object* of JCE and command responsibility. In a JCE I, the participant shares the intent of the other participants, that is, the common *mens rea* refers to the commission of specific crimes and to the ultimate objective or goal of the enterprise; in the other categories, especially JCE III, the participant must, at least, be aware of the common objective or purpose and of the (objective) foreseeability of the commission of certain crimes. By contrast, in the case of command responsibility, the main object of the offence is the superior's failure to properly supervise and, consequently, his or her *mens rea* needs to extend to this failure, but not to the crimes committed by the subordinates.

As has been demonstrated elsewhere,[464] despite these (and other) conceptual differences, the two doctrines are sometimes *simultaneously applied* and, in the more recent case law, the command responsibility doctrine has been displaced by JCE. At least three *conclusions* can be drawn from this case law. First, the simultaneous application of JCE and command responsibility is not limited to cases involving top or high-level accused, but also extends to

[457] See already Ambos, *JICJ*, 5 (2007), 179–80; conc. Nybondas, *Command Responsibility* (2010), p. 145.
[458] See Chapter IV, C. (4)(b)(i)(4).
[459] See also on this structural difference Osiel, *CornILJ*, 39 (2005), 797; id, *ColLR*, 105 (2005), 1769 ff.
[460] *Kvočka*, No. IT-98-30/1-A, para. 104.
[461] *Prosecutor v Babić*, No. IT-03-72-S, Sentencing Judgment, para. 60 (29 June 2004).
[462] *Prosecutor v Perreira*, No. SPS C 34/2005, Judgment, pp. 19–20 (27 April 2005).
[463] Osiel, *ColLR*, 105 (2005), 1786 ff.
[464] See Ambos, *JICJ*, 5 (2007), 162 ff.; see also Nybondas, *Command Responsibility* (2010), pp. 142–7; Meloni, *Command Responsibility* (2010), pp. 244–5; Vest, *Völkerrechtsverbrecher* (2011), p. 226.