Public Annex B18: 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

Robinson, D., "A Justification of Command Responsibility" (2017) *Criminal Law Forum*, pp. 633-668

Criminal Law Forum (2017) 28:633–668 © Springer Science+Business Media B.V. 2017
https://doi.org/10.1007/s10609-017-9323-x

DARRYL ROBINSON *

A JUSTIFICATION OF COMMAND RESPONSIBILITY

ABSTRACT. In this article, I advance a culpability-based justification for command responsibility. Command responsibility has attracted powerful, principled criticisms, particularly that its controversial "should have known" fault standard may breach the culpability principle. Scholars are right to raise such questions, as a negligence-based mode of accessory liability seems to chafe against our analytical constructs. However, I argue, in three steps, that the intuition of justice underlying the doctrine is sound. An upshot of this analysis is that the "should have known" standard in the ICC Statute, rather than being shunned, should be embraced. While Tribunal jurisprudence shied away from criminal negligence due to culpability concerns, I argue that the "should have known" standard actually maps better onto personal culpability than the rival formulations developed by the Tribunals.

I INTRODUCTION

In this article, I advance a principled justification of command responsibility, and in particular of the "should have known" standard. In the last decade, the conversation about command responsibility has become mired in a web of intense, inter-woven controversies. This state of uncertainty is understandable. Other modes of liability have been debated and refined over centuries by jurists and scholars in many countries, and yet they still raise disputes. By contrast, command responsibility is a comparatively recent creation, born in international law, and thus the controversies loom even larger.

* Queen's University, Faculty of Law. I am grateful for the insightful comments received from Kai Ambos, Alexander Greenawalt, and from participants in workshops at Queen's University and at William & Mary Law School. Excellent research assistance was provided by Gillian MacNeil. This research was facilitated by funding from the Social Sciences and Humanities Research Council of Canada. Contact E-mail: darryl.robinson@queensu.ca.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 4/38 EC A A2 A3

Many criticisms and controversies concern command responsibility's modified fault element. The ad hoc tribunals (''Tribunals'') test is ''had reason to know'', whereas the ICC test for commanders[1] is ''should have known''. Are these tests the same or different? Which is doctrinally ''right'' or normatively ''better''? Answers partly hinge on related disputes. One is causal contribution: must the superior's dereliction encourage or facilitate the subordinate's crimes? Another is the *nature* of command responsibility, which has also become a mystery: is it a mode of liability, or a separate offence, or some new thing entirely?

In a previous article, I argued that command responsibility can be greatly simplified.[2] In that article, I focused on causal contribution.[3] I argued that the Tribunals made an early mis-step when, based on hasty reasoning, they rejected the requirement of causal contribution. That choice created an internal contradiction between the doctrine of command responsibility and the culpability principle as recognized by ICL, pursuant to which the accused must contribute in some way to a crime to be a party to it. Subsequent efforts to evade or resolve that initial contradiction have led to increasingly convoluted assertions about command responsibility. To avoid the culpability contradiction, it has been suggested that perhaps command responsibility is not a mode of liability after all, but rather a separate offence,[4] or perhaps it is neither,[5]

[1] For civilian superiors, the ICC Statute offers a more generous subjective test: ''consciously disregarded'': ICC Statute Article 28. I discuss this briefly in Section 4 (Implications).

[2] Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13 Melbourne J Intl L 1.

[3] Causal ''contribution'' is a more modest requirement than but-for causation.

[4] See eg. *Prosecutor v. Hadzihasinovic,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003), separate opinion of Judge Shahabuddeen. The ''separate offence'' characterization would avoid the culpability problem but does not square with the fact that Tribunals charge and convict commanders as parties to the underlying crimes.

[5] Some suggest that command responsibility is an entirely new category that is neither indirect liability nor its own offence. See eg. Guénaël Mettraux, *The Law of Command Responsibility* (OUP 2009) 37–47 & 80–88. These claims do not map out what this new concept is, and recourse to obscurity is not a satisfying solution to the culpability problem, especially given that the known categories (direct liability, indirect liability, or separate offence) appear to be logically jointly exhaustive.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 5/38 EC A A2 A3

or perhaps it is both.[6] As the agreed reference points grow fewer, the conversation grows more complicated and obscure.

I argued that if we undo the first knot, the other knots untangle. The requirement of a contribution to the crime, which is part of the culpability principle, should be respected, just as the ICC Statute and earlier sources suggest. A requirement of causal contribution is not onerous – it requires only that the commander's dereliction elevated the risk of crimes. Command responsibility remains a mode of accessory liability, which is what the jurisprudence has long indicated. The ''mode of liability'' approach also matches what the actual charges and convictions of the Tribunals in fact do (ie. they expressly hold the commander liable as party to the subordinates' crimes). This accessory liability solution instantly harmonizes the ICC Statute, post-WWII and transnational jurisprudence, Tribunal practice, and the principle of personal culpability.[7]

But there is a problem for my account. Or, at least, it seems to be a problem, but perhaps it is something more exciting. The problem is the modified mental element. Are standards like ''had reason to know'' (''HRTK'') or ''should have known'' (''SHK'') justifiable in a mode of liability? Familiar modes of liability require some form of subjective advertence to the crime. *Negligence* in a mode of liability seems to chafe against our usual understanding of our principles: both scholarly literature and Tribunal jurisprudence indicate that negligence would be problematic in command responsibility as a mode of liability. If the ''should have known'' standard cannot be justified in a mode of liability, this would be a problem not only for my account, but also for the ICC Statute, which expressly creates a mode of liability relying on the SHK standard.

A wealth of thoughtful, principled scholarship advances powerful concerns about negligence in command responsibility. This new wave of scholarship, concerned with deeper principles, reflects a welcome maturation of the field. These scholars have rightly pressed beyond a discourse that tended to focus on precedential arguments (parsing authorities) and consequentialist arguments (maximizing impact), to

[6] Some suggested a variegated approach, in which what the commander can actually be held responsible for varies with the facts (knowledge/negligence, causal contribution). See eg. Volker Nerlich, 'Superior Responsibility Under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 JICJ 665. The variegated approach is an advance on others, because it is attentive to culpability, but I suggest that it is unnecessarily complicated as an interpretation of the international instruments.

[7] Robinson, 'Complicated' (n.2).

ICC-01/05-01/08-3590-AnxB18 04-01-2018 6/38 EC A A2 A3

usher in a more sophisticated engagement with deeper principles and the *justice* of the doctrines. For example, Mirjan Damaska, in his ground-breaking work on the ''shadow side of command responsibility'' warned that

> a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds.[8]

He argued that ''it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape.''[9] Many scholars have carefully developed these principled concerns. Some scholars regard both the HRTK and the SHK tests as suspect; others regard only the SHK test as problematic.[10] The strongest objections arise with respect to the crime of genocide, which requires a special mens rea (special intent, *dolus specialis*). Command responsibility liability for genocide without that special mens rea is widely and understandably considered to be contradictory, incoherent, illogical or unfair.[11] These features of command responsibility do indeed require either justification or revision.

---

[8] Mirjan Damaška, ''The Shadow Side of Command Responsibility'' (2001) 49 Am J Comp L 455, 463.

[9] *Ibid* at 466.

[10] For the most careful development of the latter position, see Mettraux, *Command Responsibility* (n. 5) 73–79, 101, 210 (''The ICC Statute greatly dilutes the principle of personal culpability''), 211 (the fault element is ''emptied of its content''), 212 (''the injuries which the text of the Statute appears to have inflicted upon basic principles of personal guilt'').

[11] William A Schabas, 'General Principles of Criminal Law in the International Criminal Court (Part III)' (1998) 6 Eur J Crime Cr L Cr J 400, 417–418; (''doubtful … whether negligent behaviour… can be reconciled with a crime requiring the highest level of intent. Logically, it is impossible to commit a crime of intent by negligence''); Kai Ambos, 'Superior Responsibility' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Vol 1,OUP 2002) 823, 852 (''stunning contradiction''); David L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 Fletcher F Wld Aff 81, 92–96 (''far below what is required.. for… genocide''; inconsistent with personal fault and fair labelling); Mark Osiel, *Making Sense of Mass Atrocity* (CUP 2009) 27 (at n. 50) and 113 (at n. 80) (must prove commander's specific intent for genocide); Maria L Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (TMC Asser Press 2010) 125–139; Thomas Weigend, 'Superior Responsibility: Complicity, Omission or Over-Exten-

ICC-01/05-01/08-3590-AnxB18 04-01-2018 7/38 EC A A2 A3

My contribution in this article is to suggest that a culpability-based justification of the modified fault element is possible. A typical response to culpability concerns would be to argue, in a consequentialist tradition, that the urgent need to reduce mass atrocious crimes overrides such concerns. That is not my argument. I am working within the same principled tradition as the scholars cited above. My contribution here is not in opposition to this body of scholarship; on the contrary I seek to build on it.

Accordingly, my goal is most similar to that of Jenny Martinez, who has lamented that ''sensitivity to criticism about the looseness of the mens rea requirement for command responsibility has been unfortunately coupled with reluctance to explore explicitly the theoretical justifications for the doctrine.''[12] Like her, I seek to help develop that theoretical justification.[13] Whereas Martinez considered precedential, consequentialist, and deontic dimensions, I will focus particularly on the deontic justification, and address the most fre-

---

Footnote 11 continued
sion of the Criminal Law?' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of International Criminal Law* (Kluwer 2010) 80; Elies van Sliedregt, 'Command Responsibility at the ICTY - Three Generations of Case Law and Still Ambiguity' in AH Swart et al (eds), *The Legacy of the ICTY* (OUP 2011) 397 (''incoherence''); Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 205–207 (''conceptually awkward'', ''gap''); Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP 2012) 220–221 and 231 (''logically only possible'' if not a ''direct liability'' but rather liable for his own dereliction); Michael G Karnavas, 'Forms of Perpetration' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013) 97, 137 ''obvious tension between specific genocidal intent… and… 'knew or should have known''''; Joshua Root, 'Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute' (2013) 23 J Transnatl L & Poly 119, 143 (''Negligence is anathema to specific intent, and it is not an appropriate level of culpability to convict a commander of a specific intent crime''), 125 (''offends basic notions of justice and fairness'') and 127 (''objectivize[d]'' mental state ''divorces it from… personal accountability''); Mettraux, *Command Responsibility* (n. 5) 226–227 (commander must share in the special intent). Chantal Meloni, *Command Responsibility in International Criminal Law* (TMC Asser 2010) 200-02 more cautiously describes it as ''theoretically possible although problematic''.

[12] Jenny S Martinez, 'Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaškić* and Beyond' (2007)5 JICJ 638, 641.

[13] The account here is very briefly foreshadowed in Darryl Robinson, 'The Two Liberalisms of International Criminal Law' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser 2010) 115 (n. 76).

ICC-01/05-01/08-3590-AnxB18 04-01-2018 8/38 EC A A2 A3

quently raised objections.[14] (In this article I will use the shorthand term "deontic" to refer to culpability-based justifications, as opposed to consequentialist arguments.)

My argument has three planks. First, I address the unease expressed about negligence in ICL. I show that criminal negligence is a robust concept reflecting personal culpability (it is not concerned with minor slips by a harried commander). Furthermore, criminal negligence is not simply an "absence" of a mental state; it reflects a degree of disregard for the lives and safety of others that is morally reprehensible, socially dangerous, and properly punishable.

Second, I address concerns about liability without the requisite mens rea for crimes such as genocide. I point out that accessories need not share the mens rea for the principal's offence. Importantly, I do not argue that the commander's dereliction is equivalent to "*committing*" war crimes. Accessory and principal liability signify different things and have correspondingly different requirements.

Third, I argue that command responsibility is a justified extension of aiding and abetting by omission. Normally we would consider "mere" negligence to be much less serious than subjective foresight, and perhaps inadequate for accessory liability. But we must look at the context. The activity of overseeing armed forces has repeatedly entailed horrific dangers for vulnerable civilians, giving rise to a duty of vigilance. The commander who criminally neglects such a duty, and such a danger, shows a staggering disregard for the lives and legal interests that he was entrusted to protect. The commander cannot evade responsibility by creating his own ignorance through defiance of this duty. I will try to show that culpability-based justifications of "causation" and "equivalence" furnish sufficient fault for accessory liability.

This is the insight underlying command responsibility. While our normally-reliable heuristic is that criminal negligence is less culpable than subjective advertence, command responsibility delineates and responds to a special set of circumstances where that familiar prioritization breaks down. For example, the negligently ignorant com-

[14] My approach also resonates with more general suggestions of David Luban and others, who have argued that legal rules must be adapted to the special problems of bureaucracy and organized human action. David Luban, 'Contrived Ignorance' (1999)87 Geo L J 957 ; David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Mich L Rev 2348. My prescription is also similar to that of Mark Osiel; he focuses on consequentialist arguments whereas I am focused on the deontic justification. Mark Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity' (2005) 105 Columbia L Rev 1751.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 9/38 EC A A2 A3

mander, who cares so little about the danger to civilians that he does not bother with *even the first step* of monitoring, actually shows *greater* contempt than the commander who monitors and learns of a risk but hopes it will not materialize. Contrary to our normal assumption that ''knowing'' is ipso facto more culpable than ''not knowing'', the relative culpability in these circumstances hinge on *why* the commander does not know.

Accordingly, even though a negligence-based mode of accessory liability may seem to challenge our normal analytical constructs, I think that on closer inspection, the intuition of justice underlying command responsibility is sound. While we should look at post-WWII rules with critical care (as they may reflect over-reaching ''victors justice''), command responsibility reveals a valuable insight and contribution to criminal law. It responds to a particular pathology of human organization. It recognizes that in some circumstances, criminal negligence supplies adequate fault for accessory liability. The criminally indifferent supervisor of dangerous forces does not merely commit his own separate dereliction offence; he is rightly held to account as a culpable facilitator (accessory) of the resulting crimes.

Among the implications of this account is that the SHK standard in the ICC Statute should be defended. The SHK standard has been wrongly equated with strict liability and has fallen under suspicion. The Tribunals shied away from a negligence standard for understandable reasons, and fashioned their own test. But I will argue that the SHK standard is preferable, not only on precedential and consequentialist grounds, but also on deontic grounds. It is less arbitrary than the test developed by the Tribunals and reflects a more meaningful standard of criminal culpability.

In this article I will be discussing the traditional central case of military command relationships, and thus speaking of ''commanders''; I will touch on implications for civilian superiors only at the end. Moreover, I am focusing on organized, hierarchical armed forces (the context in which command responsibility was developed); I will touch below on the extent to which command responsibility can justifiably be applied to less-organized armed groups. Furthermore, in the space available, I will merely *outline* the justificatory account. The article is an initial foray, drawing largely on English-language literature. While this article offers the most detailed deontic account of command responsibility to date (as far as I know), I am acutely aware that I am skimming the surface of many intricate debates. I

ICC-01/05-01/08-3590-AnxB18 04-01-2018 10/38 EC A A2 A3

deal with these issues in more detail in my forthcoming book length treatment, and I will address the most common follow-up questions in that work.

II THE TURN AWAY FROM NEGLIGENCE

2.1 *Unease with Negligence and the Emergence of the ''Possession'' Test*

The bare bones of command responsibility are: (1) a superior-subordinate relationship; (2) the superior knew or ''had reason to know'' (or ''should have known'') of subordinate crimes; and (3) the superior failed to take reasonable measures to prevent such crimes or punish the subordinates. Under international humanitarian law, commanders have a duty to try to remain apprised of possible crimes by subordinates, by monitoring and requiring reports (''duty to inquire'' or ''duty of vigilance'').[15] Should command responsibility take into account the commander's proactive duty to inquire?

Post-World War II jurisprudence, which developed the command responsibility doctrine, had ''almost universally'' held that the commander cannot plead his lack of knowledge where it was created by his criminally negligent breach of his duty to inquire.[16] ICTY jurisprudence acknowledges this clear pattern in the prior case law.[17]

---

[15] Jean-Marie Hencaerts and Louise Doswald-Beck, *Customary International Law, Vol II – Practice* (CUP 2005) 3733–3791.

[16] I will not embark here on a doctrinal review of those precedents here, as my focus here is normative justification not precedential support, but many other scholars have admirably demonstrated this pattern in the jurisprudence. For example, the massive survey by William Parks concludes, ''[a]lmost universally'' that post-World War II tribunals adopted the ''knew or should have known'' standard: William H Parks, 'Command Responsibility for War Crimes' (1973) 62 Mil L Rev 1, à 95. See also Martinez, 'Understanding' (n. 12) 647–654; Meloni, *Command Responsibility* (n. 11) 33–76; Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot 2002) 97–101, 133–136 and 147–150; Otto Triffterer and Roberta Arnold, 'Article 28' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3d ed, CH Beck, Hart, Nomos 2016) 1070–1073 & 1089–1091.

[17] For example, the *Blaškić* trial judgment reviews authorities including the Tokyo judgment, *Toyoda*, *Roechling*, the *Hostage* case, the *High Command* case, as well as the Commission of Experts (which noted the duty to remain informed and that ''such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences'' would satisfy the mens rea requirement). *Blaškić*, Trial Judgment, IT-95-14-T, 3 March 2000, paras 309–330

ICC-01/05-01/08-3590-AnxB18 04-01-2018 11/38 EC A A2 A3

Nonetheless, the ad hoc Tribunals departed from those precedents and struck a different path. In an early case, *Čelebići*, the Prosecution argued, consistently with prior transnational jurisprudence, that the fault requirement is satisfied where the commander did not know of the crimes because of a "serious dereliction" in his duty to obtain information within his reasonable access.[18] The Appeals Chamber demurred. The Chamber held that failure to set up a reporting system "may constitute a neglect of duty which results in liability within the military disciplinary framework", but the Chamber was unwilling to incorporate such failures into command responsibility.[19] The Chamber felt that the Prosecution position "comes close to the imposition of criminal liability on a strict or negligence basis".[20]

To avoid the perceived pitfalls, the Appeals Chamber required that the commander must have in his "*possession*" information sufficient to put him on notice that crimes were being committed ("alarming information").[21] Thus, a commander can generally remain passive. It is only once alarming information makes it into his "possession" that he is required to take steps.

Other trial chambers in early cases – *Bagilishema* (ICTR) and *Blaškić* (ICTY) – attempted to adopt interpretations consistent with earlier jurisprudence (i.e. the SHK test).[22] Again, in both cases, the

---

Footnote 17 continued
('*Blaškić* Trial Judgment'). Similarly, *Čelebići*, Trial Judgment, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgment')held "from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was 'at fault in having failed to acquire such knowledge'" (para 388).

[18] *Čelebići,* Appeal Judgment, IT-96-21-A, 20 February 2001 *(*'Čelebići Appeals Judgment') para 224.

[19] *Ibid* para 226.

[20] *Ibid.*

[21] *Ibid* para 231–233.

[22] *Bagilishema,* Trial Judgment, ICTR-95-1A-T, 7 June 2001, para 46 ('*Bagilishema* Trial Judgment') held that the fault element is met where "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*." *Blaškić* Trial Judgment, (n. 17) para 322: the fault element is satisfied if the commander "*failed to exercise the means available* to him to learn of the offence and, under the circumstances, he *should have known* and such failure to know constitutes *criminal dereliction*." Notice that both of these formulations match the test reflected in the Rome Statute and the World War II jurisprudence, and would harmonize the HRTK and SHK standards.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 12/38 EC A A2 A3

Appeals Chamber rejected those attempts. In *Bagilishema*, the Appeals Chamber warned that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought".[23] In *Blaškić*, the Chamber again "rejected criminal negligence as a basis of liability in the context of command responsibility".[24] The Appeals Chamber reconfirmed that the commander is liable "only if information was available to him which would have put him on notice of offences committed by subordinates".[25]

I have three points about the Chamber's reasoning. First, it was entirely appropriate and commendable that the Chambers showed concern for personal culpability. Their caution was preferable to the often-seen tendency (especially in early jurisprudence) to use reasoning techniques that maximized liability with inadequate attention to fundamental principles.[26] Working in the early days of ICL, and confronted with the unexplored implications of incorporating negligence and the duty to inquire, it was a prudent reflex for the judges to steer clear. Now, however, with the luxury of more time, and given that the Rome Statute expressly reaffirms the SHK standard, we can and must study with more care whether that standard may in fact be deontically justified.

Second, the Chamber seems to have misunderstood or misstated the Prosecution submission. Whereas the Prosecution was arguing for the SHK standard, the Chamber instead refuted a "duty to know" about "all" crimes.[27] For brevity, I will refer to this as "DTKE" (Duty To Know Everything). The Chamber eviscerated the DTKE standard, and rightly so. DTKE would indeed pose an unfair "Catch-22": the commander would either *know*, and be liable, or *not know*, and be liable. DTKE would indeed be a strict liability standard,

[23] *Bagilishema*, Appeal judgment, ICTR-95-1A-A, 3 July 2002 para 35 ('*Bagilishema* Appeal Judgment').

[24] *Blaskic,* Appeal Judgment, IT-95-14-A, 29 July 2004 ('*Blaškić* Appeal Judgment') para 63.

[25] *Ibid* para 62.

[26] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925.

[27] *Čelebići* Appeals Judgment(n. 18) para 227–230. Similarly, the Chamber also overstated the question as whether failure in this duty will "*always*" (para 220) or "*necessarily*" (para 226) result in criminal liability. Obviously the answer must be "no". The failure would have to be due to criminal negligence, and all of the other requirements of command responsibility would also have to be met.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 13/38 EC A A2 A3

because its logically jointly exhaustive alternatives would always be met.

Crucially, however, the Prosecution was *not* arguing for a DTKE, nor was that the upshot of prior jurisprudence. Notice the following three nuances of the SHK test. First, it is a duty of conduct (effort), not a duty of *result*. In other words, it is not a duty to *know*, it is a duty to *inquire*.[28] One is exculpated if one exercises due diligence. Second, the SHK test requires not only that commander failed to exercise due diligence to inquire, but also that the commander had the "*means* to obtain the knowledge".[29] In other words, the commander *would have found out* had he tried.[30] Third, the dereliction must be "serious".[31] In other words, it is a standard of criminal negligence, not simple civil negligence. Notice also that the commander is not instantly liable if he inherits a force with poor reporting mechanisms; the requirement is simply that he exercise appropriate *diligence* to stay apprised, to the extent that can be expected in the circumstances.

Thus, the liability standard in the prior law, and as advanced by the Prosecution, was not *strict liability*, but rather *criminal negligence*. These are not synonyms. Unfortunately, following the Appeals Chamber's analysis, jurists and scholars frequently equate the SHK standard with DTKE and strict liability. The SHK is often regarded as having been decisively discredited in *Čelebići*. But it was not: *Čelebići* discredited DTKE, not SHK. One of my aims here is to untangle these very different ideas so they can be seen afresh on their own merits.

Third, even though the Tribunals emphatically purported to reject a negligence standard, the HRTK test actually still entails constructive knowledge. The Chambers have held that "possession" does not mean "actual possession"[32] – which sounds contradictory, but presumably means that the commander doesn't need reports physically in hand. More importantly, the commander need not have "*actually*

[28] See for example the *High Command* case, which rejected a DTKE, recognizing that a "commander cannot keep completely informed" of all details, and can assume that subordinates are executing orders legally. The commander's disregard must amount to "criminal negligence". *High Command (von Leeb)*, (1950) 11 TWC 462, 543–544.

[29] *Celebici* Appeals Judgment (n. 18) para 226. See also the proposed requirement that the information be within his "reasonable access" (para 224).

[30] *Ibid* para 226.

[31] *Ibid* para 224.

[32] *Ibid* para 238.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 14/38 EC A A2 A3

acquainted himself'' with the information; the information only needs to ''*have been provided or available*'' to the commander.[33] Thus, it would suffice, for example, that reports made it to the commander's immediate office. Accordingly, the HRTK test is not actually subjective. The test purports to be subjective, but effectively fixes the commander with knowledge of all information that made it to his vicinity.

2.2 *The ''Possession'' Test is an Awkward Fit with Culpability*

Here is a particularly stark example to illustrate the problem with the ''possession'' requirement. Suppose a commander instructs his team at the outset, ''No one is to report to me any information about any crimes by our forces''. As a result, his subordinates manage to keep from him any information about the ongoing crimes. On the Tribunals' approach, he would be acquitted, because he does not have such information, thanks to the egregiously inadequate reporting system he himself created.[34]

By contrast, the SHK test, in earlier jurisprudence and in the ICC Statute, is understood as slightly broader.[35] The SHK test can be satisfied where the commander does *not* possess information about

[33] *Ibid* para 239.

[34] However, one line in the *Blaškić* Appeals Judgment (n. 24) para 62 seems to suggest otherwise. The line asserts that the commander can be liable if he ''*deliberately refrains*'' from obtaining information. This is a welcome suggestion, consistent with the normative position I recommend here. However, the assertion cannot be reconciled with the actual rule laid down by the Tribunals, since the central requirement is that alarming information must be in the commander's ''possession''. Everything I say in this article is based on taking the ''possession'' test at face value.
Alternatively, however, if future interpreters were to breathe life into the ''deliberately refrains from obtaining'' line, that would introduce a large and welcome exception to the ''possession'' requirement. Creating that exception would reduce the gap between the ICC approach and the Tribunal approach. As I argue here, a ''deliberately refraining'' test would be deontically justified. (Furthermore, while ''criminally negligent'' failure and ''deliberate'' failure sound like very different thresholds, they are not so different. Any criminal negligence requires a gross dereliction, which means there had to be available alternatives, and thus a choice not to inquire. In other words, the criminal negligence standard already requires a deliberate failure.) Thus, if the ''deliberately refrains'' alternative is taken seriously, it leads to a test very much like the test I advocate here. However, it would also contradict the rest of the Tribunal's jurisprudence on the matter, such as its requirement of possession, the rejection of the proactive duty and the rejection of SHK.

[35] See *Čelebići* Trial Judgment (n. 17) para 393; *Čelebići* Appeals Judgment (n. 18) para 222–242 and *Bemba,* Confirmation Decision, ICC-01/05-01/08, 15 June 2009,

ICC-01/05-01/08-3590-AnxB18 04-01-2018 15/38 EC A A2 A3

subordinate criminal activity, if that lack is due to a gross dereliction of his duty to try to stay apprised, showing a culpable indifference to the lives and interest he was entrusted to protect.[36]

In consequentialist terms, it is fairly evident that the Tribunal test creates a perverse incentive: to avoid receiving reports. This achieves the opposite of the purpose of the command responsibility doctrine. The SHK test better advances the aims of the law, i.e. to incentivize diligent monitoring and supervision of troops and thereby reduce crimes.[37] However, my focus here is not on *consequentialist* arguments but on *deontic* ones. My aim here is to ask whether the SHK test is justified, in terms of the personal culpability of the commander. My conclusion is that the SHK test is not only *justified* (ie. permissible): it is actually *preferable* on deontic grounds, because it actually corresponds better to personal culpability.

The HRTK test, as developed by the Tribunals, is actually both *under-inclusive* and *over-inclusive*. The test is *under-inclusive* because it acquits the commander who contrives his own ignorance, by creating a system that keeps him in the dark about subordinate crimes.[38] But the test is also *over-inclusive*, because it fixes the commander with knowledge of reports that made it to his desk, even if exigent demands of his work understandably delayed him from reading the reports.[39] In that case, he is fixed with knowledge even though he was

---

Footnote 35 continued
para 433–434 ('*Bemba* Confirmation Decision'). For analysis see Meloni, *Command Responsibility* (n. 11) 182–186.

[36] *Bemba* Confirmation Decision (n. 35) para 433: ''the 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime….''. The *Bemba* decision describes the 'should have known' standard as one of negligence: *Ibid* para 427–434. On negligence see Section 3.1.

[37] Osiel, 'Banality' (n. 14).

[38] Subject to one untested passage in the *Blaškić* Appeal Judgment (n. 24) which in any event is difficult to reconcile with the overarching requirement that information must be in the commander's ''possession''.

[39] I am referring here to the rule *as stated* by the Tribunals. It might be that, confronted with such a case, the judges would rein in the stated rule to avoid the possible injustice. In that eventuality, however, the test would collapse into simple ''knowledge'' and thus the ''HRTK'' alternative would become nugatory. Or, a more sensible alternative would be to embrace the criminal negligence standard advocated here.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 16/38 EC A A2 A3

not negligent in the circumstances. The Tribunal test hinges too dramatically on whether other actors or external events bring the alarming information into the nebulously-defined "possession" of the passive commander. It lurches from *too little* of an expectation – indulging and even encouraging the commander to be passive – to *too much* of an expectation – deeming knowledge of all submitted reports, even where the commander was not negligent in not getting to the report.

A metaphor may illustrate the problem. Imagine that an airline pilot has a duty (1) to activate the warning light system and (2) to follow up on any warning lights. On this metaphor, the Tribunal approach rightly reaches pilots who ignore a warning light, but acquits pilots who choose not to turn the system on in the first place.[40] That narrowness is not required by deontic principles.[41] The duty to stay apprised logically entails requiring subordinates to report crimes; it is artificial to try to divide the two.

The SHK standard much more simply and faithfully tracks the proper contours of fault for this mode of liability. It recognizes the commander's basic duty of diligence in requiring reports and monitoring activity. The SHK standard does not require heroic measures; it simply requires *non-criminally-negligent* efforts. The SHK standard does not deem the commander to have read reports he had no reasonable opportunity to read. It applies a single, consistent yardstick, which reflects both the purpose of command responsibility and a recognized criminal law fault standard.

Both the Tribunals and the ICC now understand the SHK test and the HRTK test as differing.[42] Accordingly, I will use the labels as a descriptive shorthand. However, just to be clear, I don't think that the wording of these two extremely similar formulations ever required

[40] You might object that there is a difference between "choosing" not to turn on the system and negligently "forgetting". In Section 3 we will look at the morality of "forgetting" to monitor whether troops are killing and raping civilians.

[41] The Tribunal approach departed from precedent, and went against the consequentialist aims of the provisions, but it would have been right to do both of those things if it were necessary to comply with the culpability principle. However, the restriction is not required by the culpability principle; indeed the Tribunal creation is actually a *worse* match for culpability.

[42] See *Čelebići* Trial Judgment (n. 17) para 393; *Čelebići* Appeals Judgment (n. 18) para 222–242 (contrasting with the SHK test); *Bemba* Confirmation Decision (n. 35) para 427–434.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 17/38 EC A A2 A3

divergent interpretations.[43] I think that a national or international court applying the words ''had reason to know'' in future could choose to incorporate post-WWII and ICC jurisprudence. Moreover, while the literature often presents Tribunal jurisprudence as unquestioned customary law, and thus the ICC test as a departure, it is actually the Tribunal jurisprudence that departs from prior sources, with the ICC Statute being a return to the previously established standard of criminal negligence.

III A PROPOSED JUSTIFICATION OF COMMAND RESPONSIBILITY

I will now offer a defence of command responsibility, as a mode of liability that includes a criminal negligence standard. My argument has three planks. First, I respond to unease about criminal negligence, showing that it can be an appropriate standard for criminal liability, reflecting personal culpability. Second, I address concerns that the commander may not share the mens rea for the offence by highlighting the different standards and implications of accessory and principal liability. Third, I will use Paul Robinson's helpful framework for assessing inculpatory doctrines[44] to show that culpability-based justifications can account for the novel doctrine of command responsibility.

3.1 *The Personal Culpability of Criminal Negligence*

As was seen above, Tribunal jurisprudence (and some ICL literature) expresses discomfort with negligence as a basis for liability.[45] Jenny Martinez discusses the tendency in ICL discourse to denigrate the command responsibility standard as ''simple negligence'' and to

[43] The Tribunal judges thought that the words ''had reason to know'' in Additional Protocol I marked a movement away from criminal negligence and the SHK standard. But actually the delegates accepted criminal negligence and were debating its proper parameters. See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1012 ('ICRC, *Commentary*'); Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 AJIL 573, 589–590; Charles Garraway, 'Command Responsibility: Victors' Justice or Just Deserts?' in Richard Burchill et al (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP 2005) 81.

[44] Paul Robinson, 'Imputed Criminal Liability' (1984) 93 Yale LJ 609.

[45] See Section 1 for concerns of scholars and Section 2 for Tribunal jurisprudence.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 18/38 EC A A2 A3

conflate it with strict liability.[46] Indeed, to describe the standard as "simple" negligence understates the rigour and nuance of criminal negligence. George Fletcher describes the common "disdainful attitude toward negligence as a basis of liability" as a source of "major distortion of criminal law".[47]

This wariness toward negligence may reflect traces of the "subjectivist bug" – the belief that subjective mental states are the only *proper* grounds for criminal culpability.[48] On the "subjectivist" view, one needs, at minimum, conscious advertence to a risk in order to ground criminal liability. Thus, where a person did not advert at all to a risk, he or she cannot be held responsible. On this view, negligence is seen as non-awareness, a mere "absence" of thought, a "nullity", which does not correspond to any mental state deserving punishment.[49] It is also sometimes argued that negligence cannot be deterred, a view that seems to equate negligence with accidents or mindlessness.[50] Such arguments conclude that there is neither a consequentialist nor a deontic justification for punishing negligence.

To respond to such concerns, I offer a very rudimentary sketch of criminal negligence, to distinguish criminal negligence from mere blunders or simple civil negligence. For this quick sketch, I draw heavily on my own tradition (the common law). If I were attempting to advance a definitive doctrinal interpretation of "should have known" in ICL, I would need a much more detailed survey of different legal traditions. But that is not my aim; I am simply providing enough of a sketch to address the preliminary normative objections noted above. Criminal negligence requires two things. First, the ac-

[46] Martinez, 'Understanding' (n. 12) 660.

[47] George Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (Vol. 1, OUP 2007) 309.

[48] Rupert Frost, 'Centenary Reflections on Prince's Case' (1975) 91 LQRev 540, 551; Celia Wells, 'Swatting the Subjectivist Bug' Crim L Rev 209.

[49] Jerome Hall, *General Principles of Criminal Law* (The Bobbs-Merrill Company1947) 366–367; Glanville Williams, *Criminal Law: The General Part* (2nd ed, Stevens 1961) 122–123. More recently, careful arguments for the subjectivist approach are advanced in Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (OUP 2009) 59–97 and in Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP 2011) 69–85. See also the counter-arguments advanced by Fletcher, *Grammar* (n. 47) 313.

[50] Hall, *General Principles* (n. 49); Williams, *General Part* (n. 49). This thinking is echoed in command responsibility literature. For example, Root, 'Mens Rea' (n. 11) 152 argues "deterrence… will not deter individuals from inaction when they were not aware there was a need to act".

ICC-01/05-01/08-3590-AnxB18 04-01-2018 19/38 EC A A2 A3

cused must be engaged in an activity that presents an obvious risk to others – such as driving, performing surgery, or supervising factory workers. Second, the accused must not only fail to meet the requisite standard of care, but fail "by a considerable margin".[51] The requirement has been described as a "marked" departure[52] or a "gross" departure.[53] This standard excludes, inter alia, a "momentary lapse of attention" consistent with a good faith effort to fulfill one's responsibilities.[54] Criminal law is only concerned with transgressions that warrant *penal* sanction.

For a long time, I was convinced by the argument that criminal negligence does not correspond to any personal mental state. After all, a negligence analysis seems to simply compare the accused's conduct to an objective standard. However, as many scholars have shown, criminal negligence does indeed display a particular blameworthy mental state, for which personal culpability is rightly assigned. A *gross* departure from the standard of care, in the course of an activity bearing *obvious risks* for others, demonstrates a "*culpable indifference*"[55] or "*culpable disregard*"[56] for the lives and safety of others. HLA Hart's careful discussion is still illuminating today. He reminds us that failure to advert to a risk can indeed be blameworthy. Sometimes "I just didn't think" is no excuse, when we have a responsibility to *exert our faculties*, to be mindful and to take pre-

[51] AP Simester et al, *Simester and Sullivan's Criminal Law; Theory and Doctrine* (6th ed, Oxford, 2016) 160.

[52] See eg. *R v Creighton*, [1993] 3 SCR 3 (Supreme Court of Canada).

[53] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th ed, Oxford 2016) at 196; US Model Penal Code s. 2.02(2)(d) ("gross deviation"); Ambos, *Treatise* (n. 11) 225 ("gross deviation").

[54] Kenneth Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994) 5 J Contemp Legal Issues 365, 365. For a helpful illustration see *R v Beatty*, [2008] 1 SCR 49 (Supreme Court of Canada).

[55] Antony Duff, *Intention, Agency and Criminal Liability* (Blackwell 1990) 162–163 ("practical indifference"); Simons, 'Culpability' (n. 54) 365 ("culpable indifference"); Jeremy Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 UTLJ 495 ("indifference").

[56] See eg. s 219 of the Canadian *Criminal Code*. See also *R v Bateman* (1925), 19 CrAppRep 8 (Court of Criminal Appeal): "the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the state and conduct deserving of punishment."

ICC-01/05-01/08-3590-AnxB18 04-01-2018 20/38 EC A A2 A3

cautions.[57] Thus where a driver pays absolutely no attention to the road, or a railway switch operator plays cards and completely forgets about the incoming train, we don't take these failures to advert as mere non-culpable "absences" of a mental state. We punish the persons for *failing to exert their faculties* to advert to risks and control their conduct, when their activity required them to exert their faculties.[58]

As Antony Duff points out, "what I notice or attend to reflects what I care about; and my very failure to notice something can display my utter indifference to it."[59] Kenneth Simons notes that the culpable indifference standard "asks *why* the actor was unaware. If the reason for the actor's ignorance is itself blameworthy, then the actor might satisfy the culpable indifference criterion."[60] Criminal negligence shows a disregard for others that is morally reprehensible, socially dangerous, and properly punishable.[61]

These arguments also address the claim that negligence cannot be deterred, because they remind us that criminal negligence is confined to serious transgressions, and that it can be avoided through effort. Criminal sanctions can remind people that they have to *pay attention* when they engage in certain activities, and exert themselves to try to fulfill their duties. Hart, for example, gives the example of a man driving his car while gazing at his girlfriend's eyes rather than the road. It is not unrealistic that punishment could remind him and others in future that "this time I must attend to my driving."[62]

A recurring concern in the ICL literature about a "mere" negligence standard is that minor slips, or ineptness, or falling behind in reading, or taking an ill-timed vacation, could lead the hapless

[57] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2d ed, OUP 2008) 136.

[58] *Ibid* 150–157.

[59] Duff, *Intention* (n. 55) 162–163.

[60] Simons, 'Culpability' (n. 54) 388 (emph added). See also George P Fletcher, 'The Fault of Not Knowing' (2002) 3 Theoretical Inq L 265, and Horder, *Ashworth's Principles* (n. 53) 204–206.

[61] Some scholars and some systems (eg. Germany, Spain) distinguish between "advertent" versus "inadvertent" (or "conscious" versus "unconscious") negligence, depending on whether the accused was aware of the risk to others. But as these arguments show, even with "inadvertence", the legal and moral question is *why* the accused did not advert to the risk and whether this itself was rooted in culpable disregard.

[62] Hart, *Punishment and Responsibility* (n. 57) 134.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 21/38 EC A A2 A3

commander to be held liable as party to serious crimes.[63] Scholars are quite right to consider such scenarios in order to test doctrines. I hope that the above clarifications address these concerns. Precedents on command responsibility rightly emphasize that the negligence must be of an extent showing a criminally blameworthy state (eg. a culpable disregard for the lives and interests that the duty is intended to safeguard).[64]

While the philosophical debate about criminal negligence is of course not conclusively settled, for present purposes I simply point out that most legal systems, and most of the scholarly literature, reflects the analysis and intuition that criminal negligence is a suitable basis for liability, reflecting personal culpability.[65]

3.2 *Accessories Need Not Share the Paradigmatic Mens Rea of the Offence*

The major concern in ICL literature is not with the appropriateness of criminal negligence liability per se, but rather with negligence linking the accused to serious crimes of subjective mens rea.[66] The

[63] See eg. Nersessian, 'Whoops' (n. 11) 93 (''getting drunk at the wrong time, taking an ill-advised holiday, or being woefully incompetent, careless, or distracted''); Ann B Ching, 'Evolution of the Command Responsibility Doctrine in light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25 NCJ Int'l L & Com Reg 167, 204; Yuval Shany & Keren Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2002) 34 NYUJILP 797, 841.

[64] For example, the *High Command* case required ''criminal negligence'', i.e. ''personal neglect amounting to a wanton, immoral disregard''. *High Command* (n. 28) 543–544. The *Commentary* to Additional Protocol I required negligence ''so serious that it is tantamount to malicious intent'': ICRC, *Commentary* (n. 43)t 1012. Many of these precedents use what we would today regard as clumsy terminology. This reflects, I believe, the relative nascence of ICL. Today, we would not equate criminal negligence with ''malicious intent'' (*dolus specialis*). I think these and other passages were struggling to convey that the departure is so severe that it shows a culpable attitude worthy of criminal punishment.

[65] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing 2013) 66–68, 116–118, 145–146, 166, 186–188; Kevin Jon Heller & Markus D Dubber, *The Handbook of Comparative Criminal Law* (Stanford Law Books 2011) 25–27, 59, 109, 148–149, 188, 216–219, 263, 294–295, 326–328, 365–666; Ambos, *Treatise* (n. 11) 94–95 (esp n. 113).

[66] Most ICL scholars accept the appropriateness of criminal negligence, for example in a separate dereliction offence. See eg. Ambos, *Treatise* (n. 11) 231 (see esp n. 477); Root, 'Mens Rea' (n. 11) 136; Schabas, 'General Principles' (n.11) 417.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 22/38 EC A A2 A3

objection is raised with particular force for crimes with special intent such as genocide. As noted above, the mismatch between the commander's mental state and the mental state required for genocide is considered by many to be a contradiction or incoherence.[67]

This seeming mismatch is indeed striking, and scholars are right to raise principled concerns. In the next section I will defend negligence in a mode of liability (Section 3.3); in this section I simply recall that it is not problematic (or even unusual) that an accessory does not satisfy the *dolus specialis* or special intent required for the principals' crime. Many criticisms of command responsibility apply standards expected for *principal* liability, but command responsibility is a mode of *accessory* liability and should be evaluated accordingly.

Like most criminal law systems, ICL distinguishes between principals and accessories.[68] Those parties who are most directly responsible are liable as *principals*. Other, more indirect, contributors may be liable as *accessories*. Systems have drawn the dividing line in different ways; each approach has different strengths and shortcomings.[69] ICL has avoided a purely mental or a purely material approach, and has instead emphasized "control" over the crime as a distinguishing criterion. This approach was explicitly adopted in some ICC decisions drawing on German legal theory,[70] but it is also

[67] See citations above note 10.

[68] ICL does not include fixed sentencing discounts; rather the difference is a factor reflected in sentencing. See eg. Héctor Olásolo, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 339; Ambos, *Treatise* (n. 11) 144–148 & 176–179; Kai Ambos, 'Article 25' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3d ed, CH Beck, Hart, Nomos 2016); van Sliedregt, *Individual Criminal Responsibility* (n. 11) 65–81; Neha Jain, *Principals and Accessories in International Criminal Law* (Hart 2014).

[69] See eg. Markus Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 JICJ 977; Gerhard Werle and Boris Burghardt, 'Introductory Note' (2011) 9 JICJ 191.

[70] See eg. *Katanga and Chui,* Decision on Confirmation of Charges, ICC-01/04-01/07, 30 September 2008 at para 480-486 ('*Katanga* Confirmation Decision'); *Lubanga,* Decision on Confirmation of Charges, ICC-01/04-01/06, 29 January 2007 at paras 322–340 ('*Lubanga* Confirmation Decision'). See also Héctor Olásolo, 'Developments' (n. 68); Dubber, 'Criminalizing Complicity' (n. 69); Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 JICJ 91; Ambos, *Treatise* (n. 11) 145–160.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 23/38 EC A A2 A3

implicit in Tribunal jurisprudence,[71] and has support in other legal systems and traditions of criminal theory.[72]

There are two main differences between accessories and principals. One difference is *material*: principals make an 'essential' (*sine qua non,* integral) contribution to some aspect of the crime,[73] whereas accessories may contribute more indirectly, by influencing or assisting the acts and choices of the principals.[74] The more important difference for this article is the *mental* requirement. Principals must satisfy all mental elements stipulated for the crime. In other words, they satisfy the ''paradigm'' of mens rea for the crime.[75] For accessories, the requisite mental state in relation to the crime is stipulated not by the definition of the crime, but by the relevant mode of accessory liability.[76]

As a result, accessories need not share in the paradigmatic mens rea for a given offence.[77] As the ICTR noted in *Akayesu*, ''an accomplice to genocide need not necessarily possess the *dolus specialis*

[71] For example, *Furundžija* explains that a principal must participate in an ''integral part'' of the actus reus, whereas an accessory need only ''encourage or assist'' (making a ''substantial contribution''). A principal must ''partake in the purpose'' (ie. the paradigmatic mens rea for torture) whereas the aider and abettor need only ''know'' that torture is taking place. *Furundžija*, Trial Judgment, IT-95-17/1-T, 10 December 1998, para 257 ('*Furundžija* Trial Judgment').

[72] To take some prominent examples from the English-language literature, see Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California L Rev 323; Michael S Moore, 'Causing, Aiding, and the Superfluity of Accomplice Liability' (2007) 156 U Pa L Rev 395, 401; Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 Hastings LJ 91, 99–102.

[73] *Lubanga,* Confirmation Decision, (n. 70); *Katanga,* Confirmation Decision, (n. 70); *Furundžija,* Trial Judgment, (n. 71) (''integral part''); Kadish, 'Complicity' (n. 72), Moore, 'Causing' (n. 72); Dressler, 'Reassessing' (n. 72); Dubber, 'Criminalizing Complicity' (n. 69).

[74] As John Gardner explains, ''Both principals and accomplices make a difference, change the world, have an influence.... [A]ccomplices make their difference through principals, in other words, by making a difference to the difference that principals make''. John Gardner, 'Complicity and Causality' (2007) 1 Criminal Law and Philosophy 127, 128. See also Kadish, 'Complicity' (n. 72)328 and 343–346; Dressler, 'Reassessing' (n, 72) 139; Ambos, *Treatise* (n. 11) 128–130 &164–166.

[75] Robinson, 'Imputed Criminal Liability' (n. 44).

[76] Of course, the mode of liability must itself be deontically justified, for liability to be just.

[77] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3d ed, OUP 2014) 219.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 24/38 EC A A2 A3

of genocide''.[78] In *Kayishema*, the ICTR held that aiders and abettors ''need not necessarily have the same mens rea as the principal offender''.[79] ICTY cases, including Appeals Chamber judgments, have repeatedly confirmed that an accessory need not share the mens rea for the crime itself. For example, an aider and abettor must know of the crime but need not personally satisfy the mental elements, such as special intent elements.[80] The Appeals Chamber has also shown the support of national systems for this approach.[81] National systems seem largely to converge in this respect,[82] with limited exceptions.[83]

---

[78] *Prosecutor v Akayesu,* Trial Judgment, ICTR-96-4-T, 2 Sept 1998, para 540. See discussion in Harmen van der Wilt, 'Genocide, Complicity in Genocide and International v Domestic Jurisdiction: Reflections on the van Anraat Case' (2006) 4 JICJ 239, 244–246.

[79] *Prosecutor v Kayishema*, Trial Judgment, ICTR-95-1T, 21 May 1999 para 205.

[80] *Aleksovski*, Appeal judgment, IT-95-14/1-A, 24 March 2000 para 162; *Krnojelac*, Appeal judgment, IT-97-25-A, 17 September 2003 para 52 (for aiding and abetting persecution, need not share the discriminatory intent, but must be aware of discriminatory context); *Simić*, Appeal Judgment, IT-95-9-A, 28 November 2006 para 86; *Blagojević and Jokić*, Appeal judgment, IT-02-60-A, 9 May 2007 para 221; *Seromba,* Appeal judgment, ICTR-2001-66-A, 12 March 2008 para 56. See also Werle and Jessberger, *Principles*, (n. 77) 220.
There is currently a lively debate now as to whether aiding and abetting requires ''knowledge'', ''purpose'' (or something in between, such as ''specific direction''). That debate is not pertinent to this article; my point here is that, whatever the ultimately correct details for aiding and abetting may be, the accessory does not have to share the mens rea for the crime.

[81] *Kristić,* Appeal Judgment, IT-98-33-A, 19 April 2004 para 141.

[82] van der Wilt, 'Genocide' (n. 78) notes that in ''both national criminal law systems and international criminal law'', ''the intentions and purposes of accomplice and principal need not coincide'' (246). For example, ''Dutch criminal law… explicitly allows the mens rea of accomplices and principals to differ'' (249). See also Ambos, *Treatise* (n. 11) 288–289 and 299–300.

[83] Some US states take a ''shared intent'' approach, in which the aider and abettor must share in the mens rea for the crime itself. See Anita Ramasastry and Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries* (FAFO 2006). The Model Penal Code (s. 2.06(4)) suggests that, for consequence elements, an aider and abetter must have the level of culpability required for a principal. If one is convinced that it is a bedrock principle that an accessory must have the same level of fault as a principal, then my account fails. Not only does my account fail, but any account of command responsibility as a mode of liability will fail.
There are reasons to doubt that ''shared intent'' is indeed a bedrock principle. Such a principle would partially negate the point of distinguishing accessories from principals. It is not followed in most legal systems. Even US jurisdictions that declare a ''shared intent'' approach do not actually adhere to ''shared intent'' for all acces-

ICC-01/05-01/08-3590-AnxB18 04-01-2018 25/38 EC A A2 A3

You may be familiar with the criticism commonly made against joint criminal enterprise (JCE), that it enables conviction without satisfaction of special mental elements. Why can't that criticism be transplanted to command responsibility? The answer is: the criticism is sound in relation to JCE, because JCE is a form of *principal* liability. The Tribunals assert that JCE is implicit within the term "committed", and thus they maintain it is a form of *commission*, rendering one a principal and "equally guilty" with all JCE members.[84] The extended form (JCE-III) is therefore rightly criticized for imposing principal liability without meeting the culpability requirements for principal liability. But command responsibility is accessory liability, and thus does not require paradigmatic mens rea. Modes of accessory liability must be evaluated under the respective standards.

The accessory-principal distinction has been frequently overlooked in command responsibility discourse. For example, Joshua Root objects that command responsibility as a mode of liability involves "pretending [the commander] committed the crime himself".[85] Judge Shahabuddeen disparaged the plausibility of a commander "committing" hundreds of rapes in a day.[86] Guénaël Mettraux argues that "turning a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair."[87] Mirjan Damaska objects that the

---

Footnote 83 continued
sories. For example, under the Pinkerton doctrine, or "intention in common" liability, one can become an accomplice to foreseeable ancillary crimes, without the fault required for a principal. Thus, even those jurisdictions don't uphold a fundamental principle that accessories must have the mens rea of a principal.

[84] *Vasiljević,* Appeal Judgement, IT-98-32-A, 25 February 2004, at para. 111 ("*equally guilty* of the crime regardless of the part played by each in its commission"). Notice that I am taking no position on whether JCE would be fine if it were a mode of accessory liability. I am simply pointing out that criticisms and standards appropriate for doctrines of principal liability cannot necessarily be transplanted to doctrines of accessory liability.

[85] Joshua Root, 'Mens Rea' (n. 11) 156 ("pretending he committed the crime himself"), 123 ("as if he had committed the crimes himself"), 146 ("there is nothing in this language to suggest that the commander is responsible as if he committed the crimes himself").

[86] *Hadžihasinović*, Decision on Interlocutory Appeal, Shahabuddeen Opinion (n. 4) para 32. Alas, as ICL cases show, even if physical perpetration of that volume of crimes is implausible, it is entirely possible for a person to be an accessory, or indeed even a principal, to hundreds of crimes in a day.

[87] Mettraux, *Command Responsibility* (n. 5) 211.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 26/38 EC A A2 A3

negligent commander is ''stigmatized in the same way as the intentional perpetrators of those misdeeds''.[88]

As for the first two objections, it is an error to equate all modes of liability with ''commission''. Modes are much more varied and nuanced in what they signify. The latter two objections were valuable correctives in the debate at the time, but on reflection they are slightly overstated. Command responsibility doesn't ''turn'' a commander into a ''murderer'' or ''rapist''. Interestingly, even ordinarily language tracks the difference between principal and accessory. As for the stigma concern, command responsibility is a form of accessory liability, which simply conveys that the commander facilitated crimes in a criminally blameworthy manner.

You might object that I am placing too much emphasis on the distinction between accessories and principals. For example, James Stewart has argued against the distinction, emphasizing that accessory and principal alike are still held criminally liable in relation to ''one and the same crime''.[89] My answer is that *roles matter*. It is the same crime, but one's *role* in the crime is also very important. The intuition that roles matter is reflected in ICL and in most national systems.[90] When Charles Taylor is convicted of ''aiding and abetting'' crimes, or Jean-Pierre Bemba Gombo is convicted for command responsibility for sexual violence, that expresses something more indirect than ordering the crimes. There are many different roles a person might play in relation to a given crime. These different roles entail different censure and different legal consequences, and they have correspondingly different standards. Accessories are condemned, not for perpetrating or directing the crime, but for encouraging or facilitating the crime in a culpable manner. The requirements of accessory liability track that diminished level of blame.

---

[88] Damaška, 'Shadow Side' (n. 8) 463.

[89] James G Stewart, 'The End of Modes of Liability for International Crimes' (2012) 25 LJIJ 165, 212; see also *Ibid* at 168 and 179 (n. 59). James Stewart argues for an abolition of modes of liability. For a response see Miles Jackson, 'The Attribution of Responsibility and Modes of Liability in International Criminal Law' (2016) 29 LJIJ 879, drawing a helpful illustrative analogy to being the *author* of a work versus *assisting* the author. See also, Ambos, 'Article 25' (n. 68) 985 (n. 11).

[90] Gardner, 'Complicity' (n. 74) 136 argues that the distinction between principals and accessories reflects an important moral difference, ''embedded in the structure of rational agency''.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 27/38 EC A A2 A3

3.3 *In the Command Context, Culpable Neglect is Sufficiently Blameworthy for Accessory Liability*

That still leaves the hardest question. So far I have shown that (i) criminal negligence is an appropriate building block in criminal law and (ii) accessories need not share the paradigmatic mens rea for the principal's offence. But you may still ask: is it justified to use that particular building block – negligence – in a mode of liability for serious crimes?

An understandable initial reaction to that question would be to answer in the negative. One might react that that negligence is categorically less blameworthy than subjective foresight, and not blameworthy enough to use in a mode of liability. But our reflexes are likely conditioned and predicated on the ''normal'' context of typical private citizens interacting in a polity. Before answering, we must give measured consideration to the command context.

In my discussion of the first two planks, I simply recalled familiar understandings from general criminal law thinking. Now we venture into new territory. Perhaps ICL, by focusing on unusual contexts, can lead us to reconsider how building blocks may be put together in new ways that still respect underlying principles.

3.3.1 *A Framework to Assess Deontic Justification of Inculpatory Doctrines*

How do we even embark on this assessment? Criminal law theorist Paul Robinson has provided a useful framework for the principled analysis of inculpatory doctrines in his writings on ''imputed criminal liability''.[91] He notes that for any given offence, the 'paradigm of liability' – ie. the satisfaction of every element of the offence – does not always determine criminal liability. Even where all of the elements of the paradigm are proven, there are exceptions that can *exculpate* the accused. These exceptions are commonly grouped together and analysed as 'defences'.[92] The key insight from Robinson was to look at the *mirror image* of defences.

Robinson pointed out that there is another type of exception to the 'paradigm of liability', namely *inculpatory* exceptions, whereby a person can be convicted even though he or she did not personally satisfy some elements of the offence. Examples include acting through an innocent agent or transferred intent. These inculpatory doctrines

[91] Paul Robinson, 'Imputed Criminal Liability' (n. 44).

[92] *Ibid* at 611.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 28/38 EC A A2 A3

are not traditionally grouped together and analysed as a category. Robinson proposed a search for consistent principles underlying these established inculpatory exceptions, in order to assess the justifiability of the doctrines and to elaborate appropriate doctrinal details.[93]

Robinson identified two deontic (culpability-based) justifications. The first is 'causation': the actor is held responsible despite the absence of an element because he is causally responsible or causally contributed to its commission by another.[94] The second is 'equivalence', arising for example where the accused had a mental state that is equally blameworthy to the requisite mental state.[95] Some doctrines may rely on an aggregation of rationales to cumulatively provide an adequate level of culpability.[96] For example, some doctrines inculpate the accused who creates the *absence* of an element in a blameworthy manner (for example, willful blindness, or deliberate self-intoxication in preparation for an offence).[97] This rationale will be particularly pertinent to the military commander who creates his own absence of knowledge through culpable disregard for lives and legal interests that he was obligated to protect.

3.3.2 *An Activity with Extraordinary Social Dangers*

Because the institution of armed forces is a familiar one to us, we might be tempted to think about "mere" negligence as a minor failure in a mundane activity. However, we should try to see with fresh eyes the extraordinary risks of this remarkable activity.

Contemporary international law tolerates armed conflict, because there are instances where the use of force may be beneficial to society, such as in self-defence or for collective security.[98] However, armed conflict is rife with horrific social costs and dangers: it not only unleashes deliberate and collateral killing and destruction, but it also routinely entails serious crimes initiated by subordinates. Armed conflict creates a toxic mix of dehumanization, groupthink, vengeance, and habituation to violence. Accordingly, while international

[93] *Ibid* at 676.

[94] *Ibid* at 619, 630 and 676.

[95] An example would be a mistake of fact, where the accused would still be guilty of a comparably serious crime if the facts were as supposed.

[96] *Ibid* 644.

[97] *Ibid* 619 and 639–642.

[98] UN Charter, Art. 2(4), 48, 51.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 29/38 EC A A2 A3

law gives certain licenses to military leaders, it accompanies this license with duties to monitor and restrain the tragically-frequent criminal violence of subordinates who exploit their power.[99]

Many factors aggravate the grievous risks for society. First and most obviously, military leaders *train* men and women to make them proficient in the use of violence, and *equip* them with weapons that magnify their power. Second, military leaders *indoctrinate* soldiers to desensitize them to violence, in order to make them more effective fighters. As Martinez notes, military leaders are

> given licence to turn ordinary men into lethally destructive, and legally privileged, soldiers; indeed, military training and command structures are expressly designed to dissolve the social inhibitions that normally prevent people from committing acts of extreme violence, and to remove their sense of moral agency when committing such acts.''[100]

In warfare, many of the normal moral heuristics (don't kill, don't destroy) are displaced by more complicated rules that regulate the special contexts in which collective violence may be justified. Thus military leaders break down normal inhibitions against violence and even instincts of self-preservation, replacing them with habits of obedience and loyalty to the group. The result is a more effective fighting force, but it also breeds pathological organizational behavior.

The danger is never far away. Even the most well-trained armies, acting for humanitarian ends, have frequently committed serious international crimes. Even in peacetime, standing armed forces present a danger to the public, as their relative power, desensitization to violence and cadre loyalty often fuel crimes against civilians.

3.3.3 *The Culpability of Not Inquiring*

Command responsibility is a justified extension of aiding and abetting by omission, to recognize the special duty of commanders. In normal contexts, ''I didn't know'' would often exculpate. But it does not exculpate where the commander has created his own ignorance, through a criminal dereliction of the duty of vigilance entrusted to him to guard against precisely this danger. Culpability-based ratio-

[99] Martinez, 'Understanding' (n. 12) 662; Parks, 'Command Responsibility' (n. 16) 102 (''massive responsibility'').

[100] Martinez, 'Understanding' (n. 12) 662.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 30/38 EC A A2 A3

nales of causation and equivalence apply to the commander who, contrary to this duty, buries his head in the sand.

You may still understandably object that there is a quantum difference between negligent ignorance and subjective foresight, so that the causation/substitution rationale requires too great a leap. But let's look more closely. First, we must not overestimate what the subjective standard requires. Accessory liability does not and cannot require knowledge of a *certainty* of a crime, because the crimes typically have not started (or finished) at the time of the accessory's contribution. Thus it must always be a matter of risk. Different legal systems contemplate different *degrees* of subjective awareness or foresight, such as recklessness, willful blindness, or dolus eventualis.[101] Furthermore, even on a subjective test, the accessory need not anticipate the "precise crime"; it is adequate if one is "aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed".[102] Thus the subjective standard must deal in uncertainties about the *likelihood* and the *nature* of crimes by principals.

Second, we must not underestimate the culpability of criminal negligence. Criminal negligence does not encompass modest lapses and imperfect choices. As discussed above, the fault standard appears to require a gross dereliction showing a culpable disregard for the lives and legal interests of others.[103]

Third, in the aggravating context of command responsibility, that culpable disregard is especially wrongful. In the context of the exceptional dangerousness of the activity, the repeatedly-demonstrated risks of egregious crimes, and the imbalance of military power and civilian vulnerability, a culpable disregard for the dangers is simply staggering. In sum, the commander does not get exonerated

[101] International Commission of Jurists, *Corporate Complicity and Legal Accountability, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (ICJ 2008) 25; van der Wilt, 'Genocide' (n. 78) 247–249.

[102] *Blaškić* Appeal Judgment, (n. 24) para 50; *Simić* Appeal Judgment, (n. 80) para 86.

[103] See Section 3.1. As noted above, I am not attempting to advance a definitive doctrinal interpretation of the fault standard in ICL. Some legal systems do not require a "gross" dereliction for criminal negligence. If ICL were to follow that route, then deontic justification might be more difficult, as this particular safeguard would be absent. As noted in Section 3.1, ICL precedents tend to emphasize that the negligence must be "serious", conveying that the dereliction must be severe enough to show a criminally culpable disregard.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 31/38 EC A A2 A3

by creating his own ignorance through defiance of a duty of vigilance which exists because of the glaring danger.

When I first began this project, I accepted the standard prioritization that subjective fault is in principle worse than objective fault. However, command responsibility reveals a set of circumstances in which that prioritization does not hold. To see that negligence can sometimes involve greater culpability than foresight, consider two commanders.[104] **Commander A** requires proper reporting. As a result, he learns of a strong risk that crimes will occur. He decides to run that risk and hopes it will not materialize. **Commander B** does not care at all about possible crimes. Thus he does not even bother to set up system of reporting. As a result, he doesn't even get the reports and he doesn't learn of the specific risk. Under the classical prioritization, Commander A is more culpable because he has ''subjective'' foresight. But who is actually more culpable? Unlike Commander A, Commander B did not even bother to take the first steps. It is Commander B who has shown even greater disdain for protected persons. He created his own lack of knowledge thanks to that disdain. On a subjective approach (and on the HRTK test), he would get exonerated for that lack of knowledge, but that outcome is the reverse of the actual disregard for legal interests shown by the two commanders.

The implication may be surprising. Normally, ''knowing'' would be considered categorically worse than ''not knowing''. But there can be very grave criminal fault in not knowing.[105] To assess it, we have to go back a step and ask *why* the commander doesn't know. ''*Not knowing*'' includes the commander too contemptuous to find out, or even the commander who sets up systems at the outset to frustrate reporting.[106] The ''knowing'' commander includes the commander who runs a risk with the hope it will not materialize. We would be wrong to consider ''knowing'' to be in principle worse than ''not

[104] Obviously there are many other possible scenarios, with different gradations of culpability. The hypothetical commander described in Section 2.2, who takes steps to frustrate reporting to himself, seems more blameworthy than either of these examples. The point is: relative culpability will depend on many factors, and a blanket rule that knowledge is always worse than negligence would not be correct.

[105] Fletcher, 'Not Knowing' (n. 60).

[106] One line in the *Blaškić* Appeal Judgment, (n. 24) suggests that a deliberate system to frustrate reporting might qualify, but it is not explained how this is reconciled with the actual legal test, which still requires ''possession''.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 32/38 EC A A2 A3

knowing''. Any of these hypothetical commanders are rightly held accountable for the harms within the risk they culpably created.

My main two points are as follows: (1) Criminal negligence is *adequately* blameworthy, at least in this special context, to meet the fault required for accessory liability. (2) Criminal negligence is *sufficiently equivalent* to subjective foresight to be included in the same doctrine; in other words they are close enough to address ''fair labeling'' objections. When I embarked on this work, I initially thought that negligence would still be *generally somewhat less blameworthy* than knowledge, and that the differences should be teased out at sentencing. However, I am no longer certain that even this in-principle ranking applies in command responsibility. The negligently ignorant commander may often be *just as bad or worse* than the commander with subjective foresight of crimes. Thus there is all the more reason to include both mental states within the doctrine, with details to be addressed at sentencing. The actual severity in any case may depend on many factors, including *why* the commander does not know, and the degree of disregard that produced that ignorance.

IV IMPLICATIONS

4.1 *The ''Should have Known'' Standard is Justified*

The foregoing account of command responsibility has several implications.

Rather than disavowing criminal negligence as an aspect of command responsibility, ICL should openly defend and embrace it. The incorporation of criminal negligence is the core innovation of command responsibility, and it is a justified and valuable innovation. Moreover, it is perfectly appropriate for command responsibility to encompass the commander's proactive duty to inquire. Early Tribunal jurisprudence shied away from a negligence standard and the proactive duty to inquiry, which was understandable in those early days, given the unexplored normative implications. For example, perhaps jurists envisioned hectic circumstances in which it would be perfectly reasonable that the commander did not have time to set up reporting systems, and concluded that incorporating the proactive duty would be too harsh. But the response is: any scenario in which the conduct was reasonable is not criminal negligence. By recalling the rigour of criminal negligence, we address plausible concerns.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 33/38 EC A A2 A3

Moreover, the point of command responsibility is that it can address egregious breaches of the duty to inquire. The doctrine is deontically justified in doing so. Insofar as Tribunal jurisprudence has excised such cases from its ambit, it misses the point of the doctrine. Thus, it is not surprising that the HRTK test has not played a significant role in prosecutions.

Accordingly, command responsibility need not and should not hinge on the requirement that information made it to the commander's "*possession*". The Tribunals invented the "possession" requirement in their efforts to disavow negligence and to make the "had reason to know" test appear subjective. While the caution was understandable, we can now say on reflection that the requirement of "possession" is not required by the precedents, nor by consequentialist considerations, nor by deontic considerations (culpability). The "possession" test is *unclear*: "possession" does not mean "actual" possession.[107] The test is *misleading*: despite the vocal disavowals of negligence, the test is actually not subjective but constructive, since the commander need not actually be "acquainted" with the information.[108] The test is *unfair (over-reaching)*, because the commander is deemed to have knowledge of all reports made available to him, even if exigent demands at the time meant that he was not negligent in not getting to the reports. The test is *inadequate (under-reaching)*, because where a commander arranges inadequate reporting so that no alarming information makes it to his "possession", he gets an acquittal.[109] The test does not reflect individual desert, and it also creates perverse incentives to avoid receiving reports of criminal activity. We must be grateful for the many helpful contributions of Tribunal jurisprudence,[110] but I hope that in coming decades national and international courts will reconsider the ambiguous "possession" test and its unnecessary indulgence of the passive commander.

The "should have known" test – which overtly embraces criminal negligence and the duty to inquiry – should be openly defended. The SHK test is a better match with precedents, and has better conse-

[107] *Blaškić* Appeal Judgment, (n. 24) para 58.

[108] *Čelebići* Appeal Judgment,(n. 18) para 239.

[109] A line in the *Blaškić* Appeals Judgment, (n. 24) para 62 asserts that the commander can be liable if he "deliberately refrains" from obtaining information, which is a welcome suggestion, consistent with what I advance here, but difficult to square with the actual rule posited in that case.

[110] Including on the requisite degree of control and the measures expected of a commander.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 34/38 EC A A2 A3

quences, but was rejected because it was thought to be unfair. However, on closer reflection, the SHK test is not only deontically *justifiable*: it actually maps *better* onto personal culpability.[111] Thus, ICL should return to the post-World War II jurisprudence: where the commander has created his own ignorance deliberately or through criminal negligence in his duty to inquire, that is adequate to establish the fault element for command responsibility.[112] The ICC seems to have returned to this path in its early jurisprudence.[113] Even for courts and tribunals whose statute uses the phrase "had reason to know", that phrase can be interpreted in better accordance with the World War II jurisprudence and the ICC Statute, as Tribunal prosecutors initially urged.[114]

Finally, it follows that command responsibility can be recognized as a *mode of liability*. Thoughtful scholars, uncertain about whether negligence in a mode of liability can be justified, have suggested that it should be recast as a separate offence. I have attempted here to address the principled concerns, or at least to outline the path to do so. The account I have offered complies with personal culpability. It also maintains fidelity to the long line of precedents indicating that command responsibility is a mode of accessory liability, so that creative re-interpretation is not needed. Command responsibility, as a mode of liability, rightly expresses the commander's indirect responsibility for the crimes facilitated by his culpable dereliction.[115] A "separate offence" approach understates the harm unleashed and the indirect liability for the crimes facilitated by one's dereliction.

4.2 *The Outer Limits of Command Responsibility*

Three additional implications flow from the account I have outlined. First, careful thought is needed as to the outer limits of the doctrine. I have argued that a mode of liability incorporating criminal negligence can be justified within the context of an organized, hierarchical military command relationship. That is the context in which command

[111] The "had reason to know" test fixes the commander with knowledge of all reports submitted to him – which does not take into account that there may be circumstances where it was not criminally negligent that he did not have an opportunity to acquaint himself with the report.

[112] See above Section 2.1.

[113] *Bemba* Confirmation Decision, (n. 35) para 433–434.

[114] See above, Section 2.1.

[115] The mode approach, I argue, also entails that the causal contribution requirement must be respected – see Robinson, 'Complicated' (n. 2).

ICC-01/05-01/08-3590-AnxB18 04-01-2018 35/38 EC A A2 A3

responsibility doctrine initially developed. What are the outer parameters of that justifying context? There are diverse forms of armed groups, with different degrees of organization (professional armies, paramilitaries, loose armed groups). When interpreting the terms that define the scope of command responsibility (eg. ''superior'', ''subordinate'', ''control''), it is not enough to employ familiar textual, precedential, and teleological analyses. One must also consider the deontic underpinnings. In other words, what are the conditions and responsibilities that make command responsibility liability *fair*?[116] At some point, an inadequate level of control, hierarchy, or danger should mean that command responsibility is no longer justifiably applicable. For persons in less organized groups, one must turn to more generally applicable complicity doctrines. My aim here is not to pronounce on the outer limits, but to highlight that the deontic underpinnings must figure heavily in determining the appropriate limits.

Second, the ''should have known'' standard should likely be applied with sensitivity to individual and contextual variables. I have emphasized above that, with criminal negligence, we condemn persons for *failing to exert their faculties* as the activity obviously required, and for thereby showing a culpable disregard for the lives and legal interests safeguarded by the duty.[117] However, if the person's gross dereliction was due not to a culpable disregard, but for example, a lack of capacity (such as severe mental limitations), then blame and punishment would not be appropriate.[118] In such a case, the problem is not that they failed to exert their faculties, but that their faculties were limited. Given that the SHK standard is being applied

[116] Some scholars have already started to helpfully explore these parameters. Harmen van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (CUP 2014) 144; René Provost, 'Authority, Responsibility, and Witchcraft: From Tintin to the SCSL' in Jalloh (ed), *The Sierra Leone Special Court, Ibid* 159; Ilias Bantekas, 'Legal Anthropology and the Construction of Complex Liabilities' in Jalloh (ed), *The Sierra Leone Special Court, Ibid* 181; Alexander Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001)14 LJIJ 591, 602–612; Nybondas, *Command Responsibility*(n. 11) 191–194.

[117] Hart, *Punishment and Responsibility* (n. 57) 150–157.

[118] Hart, *Ibid* 149–154; Horder, *Ashworth's Principles* (n. 53) 186; *Creighton*(n. 52). Chinese criminal law reaches the same conclusion – ''should have'' entails both a duty and capacity: Badar, *Mens Rea* (n. 65) 186–188. See also Parks, 'Command Responsibility' (n. 16) 90–93 suggesting some subjective factors pertinent in the command responsibility context.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 36/38 EC A A2 A3

globally to a very diverse group of persons, an approach mindful of each individual's situation seems warranted.

In that same vein, the SHK standard must also be applied mindfully of the circumstances faced by the individual. For example, appropriate diligence in setting up reporting systems might mean different actions in different circumstances. In some highly organized armies, it might be routine and readily-expected that a commander set up systems; in other armed forces it might be very difficult to do. The standard is not one of guaranteeing outcomes (eg. success in setting up a system), but exercising the diligence appropriately expected in the circumstances.

Third, it should not be assumed that the fault standard should be the same for civilian superiors as it is for military commanders. The ICC Statute distinguishes between military and non-military superiors, and gives non-military superiors a more generous test (that the superior "consciously disregarded" information). The bifurcation in the Rome Statute has been strongly criticized.[119] Commentators often take for granted that the fault standards should be the same for military and civilian superiors, and thus they assume that the more generous test for civilian superiors must represent a watering down of liability in order to protect political leaders.[120]

But perhaps the bifurcation in Article 28 warrants more open-minded consideration. ICL scholars often assume that harsher, unilaterally-imposed rules are the "true" law, and dismiss negotiated, more permissive, rules as mere political "compromise".[121] Where such assumptions are too hastily applied, they may lead us to favour rules rooted in victors justice and to overlook fundamental constraining principles. An alternative explanation of Article 28 is that an issue of principle was raised and delegates were persuaded of its

[119] The *legal* criticism is that the Rome Statute differs from the Tribunal approach and therefore from customary law. Such arguments may under-estimate the nuance of the broader body of transnational precedents. Early ICTY and ICTR jurisprudence acknowledged these uncertainties. Thus the custom question may not be as conclusively settled as some suggest.

[120] See eg. Greg Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court' (2000) 25 Yale J Intl L 89; Emily Langston, 'The superior responsibility doctrine in international law: Historical continuities, innovation and criminality: Can East Timor's Special Panels bring militia leaders to justice?' (2004) 4 Intl Crim L Rev 141, 159–161.

[121] Robinson, 'Identity Crisis' (n. 26).

ICC-01/05-01/08-3590-AnxB18 04-01-2018 37/38 EC A A2 A3

merits.[122] It could be that the deliberative process unearthed a plausible intuition of justice.

There may be a principled case for the bifurcated approach. The considerations given above – extreme danger of the activity, training and equipping for violence, indoctrination and desensitization, extensive control, military discipline, explicit duties of active supervision – do not apply to most civilian superiors. Before purporting to extend the SHK standard to civilians, one would need very careful work on the precise parameters of the deontic justification. At this time, it seems to me quite plausible that the SHK test is justifiable for persons effectively acting as military commanders, whereas a subjective test may be appropriate for other superiors.[123] Thus, the account here may cast a more understanding light on the bifurcated approach in the Rome Statute.

4.3 *The Insight of Command Responsibility*

In conclusion, the mental element of command responsibility may differ from familiar national *doctrines*, but it is not a departure from the deeper underlying *principles*. The concept of complicity by omission, by those under a duty to prevent crimes, is already established. Command responsibility extends this concept with a modified fault element. That modified fault element is rooted in individual desert, recognizing the responsibilities assumed by the commander and the dangerousness of the activity.

Given the extraordinary danger of the activity, the historically demonstrated frequency of abuse, and the imbalance of power of vulnerability, the commander has a duty to try to monitor, prevent and respond to crimes. The baseline expected of a commander is diligence in monitoring and repressing crimes, and a failure to meet that baseline effectively facilitates and encourages crimes. Command responsibility rightly conveys that the commander defying this duty is indirectly responsible for the harms unleashed, just as a person criminally derelict in monitoring a dam may be responsible if the dam bursts on civilians below. This message of command responsibility is expressively valuable and deontically justified. Furthermore, the

[122] See eg Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 189, 203.

[123] Also noting the different context and responsibilities, see Nybondas, *Command Responsibility*(n. 11) 183–188; Meloni, *Command Responsibility* (n. 11) 250; Martinez, 'Understanding' (n. 12) 662; Weigend, 'Superior Responsibility' (n. 11) 73–74.

ICC-01/05-01/08-3590-AnxB18 04-01-2018 38/38 EC A A2 A3

commander choosing[124] not to try to require reports makes a choice every bit as dangerous and reprehensible as those who ignore warning signs, because that initial choice already subsumes and enables all the harms within the risk and removes the possibility of responding properly. The driver who dons a blindfold is inculpated, not exculpated, for the harms within the risk generated. Command responsibility may seem at first to chafe against our normal analytical constructs, but I believe that the many men and women who shaped the doctrine over the years were articulating an intuition of justice that is, on careful inspection, justifiable and valuable.

[124] One might object that criminal negligence does not entail a "choice", but that line of thought looks at criminal negligence in the abstract rather than considering how concrete cases will unfold in command responsibility. A criminally negligent failure to require reports will always involve a choice; without a choice there can be no gross departure.