Exploring justice in extreme cases: Criminal law theory and international criminal law

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7
The Genius of Command Responsibility

OVERVIEW

This chapter provides a second illustration of my methodology in action. I examine another controversy in command responsibility: the mental element. Whereas the preceding chapter dealt with causal contribution (the *material* aspect of culpability), this chapter considers the modified fault element, for example the 'should have known' standard the *mental* aspect of culpability).

Scholars and jurists have raised powerful, principled objections to the modified fault standards in command responsibility, such as the 'should have known' standard in the ICC Statute. They are right to raise such questions, because a negligence standard in a mode of accessory liability seems to chafe against our normal analytical and normative constructs. However, I advance, in three steps, a culpability-based justification for command responsibility. I argue that the intuition of justice underlying the doctrine is sound.

I argue 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. This is an instance in which ICL, by highlighting special contexts and problems, can lead us to reconsider some of our initial reactions and assumptions. Command responsibility responds to a set of circumstances in which our normal reflexes about the lesser culpability may be unsound.

7.1 PROBLEM, OBJECTIVE, AND THEMES

7.1.1 Principled Concerns About Fault in Command Responsibility

In Chapter 6, I argued that command responsibility can be greatly simplified. I argued that the Tribunals made an early mis-step when, based on hasty reasoning, they rejected the requirement of causal contribution. I argued that command responsibility can be greatly simplified: it remains a mode of accessory liability, and it accordingly requires that the commander at least elevated the risk of the crimes through her derelictions.

But there is a problem for my account. Or, at least, it seems to be a problem, but perhaps it is something more exciting – an opportunity for discovery. The apparent problem is the modified mental element. The fault element departs from normal subjective standards of awareness: the Tribunal test is 'had reason to know' ('HRTK'), whereas the ICC test for commanders[1] is 'should have known' ('SHK'). Are such standards justifiable in a mode of liability? Both scholarly literature and Tribunal jurisprudence assert 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 that standard.

A wealth of thoughtful, principled scholarship advances strong concerns about negligence in command responsibility. These scholars have rightly pressed beyond a discourse that tended to focus on precedential arguments (parsing authorities) and consequentialist arguments (maximizing impact). They helped usher in more sophisticated scholarship engaging with deeper principles and the *justice* of the doctrines. For example, Mirjan Damaška, 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

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

of those misdeeds.[2]

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.'[3] 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.[4] The most forceful criticisms arise with respect to the crime of genocide, because it requires a special intent. Command responsibility liability for genocide without that special intent is widely and understandably considered to be contradictory, incoherent, illogical or unfair.[5] These features of command responsibility do indeed require either justification or revision.

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[2] M Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *Am J Comp L* 455 at 463.

[3] Ibid at 466.

[4] For the most careful development of the latter position, see G Mettraux, *The Law of Command Responsibility* (OUP, 2009), above at 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').

[5] W A Schabas, 'General Principles of Criminal Law in the International Criminal Court (Part III)' (1998) 6 *Eur J Crime, Crim L & Crim Just* 400 at 417-18; ('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'); K Ambos, 'Superior Responsibility' in A Cassese et al, eds, *The Rome Statute of the International Criminal Court: A Commentary, Vol 1* (OUP, 2002) 823 at 852 ('stunning contradiction'); D L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher F World Aff* 81 at 92-96 ('far below what is required... for... genocide'; inconsistent with personal fault and fair labelling); M Osiel, *Making Sense of Mass Atrocity* (CUP, 2009) at 27 (n. 50) and at 113 (n. 80) (must prove commander's specific intent for genocide); M L Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (TMC Asser Press, 2010) at 125-39; T Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in C Burchard, O Triffterer, and J Vogel, eds, *The Review Conference and the Future of International Criminal Law* (Kluwer, 2010) at 80; E van Sliedregt, 'Command Responsibility at the ICTY - Three Generations of Case Law and Still Ambiguity' in A H Swart et al (eds), *The Legacy of the ICTY* (OUP, 2011) at 397 ('incoherence'); E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012) at 205-07 ('conceptually awkward', 'gap'); K 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); M G Karnavas, 'Forms of Perpetration' in P Behrens and R Henham, *Elements of Genocide* (Routledge, 2013) 97 at 137 'obvious tension between specific genocidal intent... and... 'knew or should have known''; J Root, 'Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute', (2013) 23 *Transnat'l L & Policy* 119 at 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*, above at 226-227 (commander must share in the special intent). C Meloni, *Command Responsibility in International Criminal Law* (TMC Asser, 2010) at 200-02 more cautiously describes it as 'theoretically possible although problematic'.

7.1.2 Summary of Argument: A Deontic Justification

My contribution in this chapter 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 they are overridden by the urgent need to reduce mass atrocious crimes. 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.'[6] Like her, I seek to help develop that theoretical justification.[7] Whereas Martinez considered precedential, consequentialist, and deontic dimensions, I will focus particularly on the deontic justification, developing it in more detail. Other scholars, such as David Luban and Thomas Weigend have also touched on the deontic justification of command responsibility.[8] In this chapter, I develop what I believe to be the most detailed normative account of command responsibility to date. The account will address the most frequently raised objections.

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,

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

[7] The account here is very briefly foreshadowed in D Robinson, 'The Two Liberalisms of International Criminal Law' in C Stahn and L van den Herik, eds, *Future Perspectives on International Criminal Justice* (TMC Asser, 2010) 115 at note 76.

[8] Weigend, 'Superior Responsibility', above, at 73 succinctly outlines the deontic case for the commander's duty. 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. D Luban, 'Contrived Ignorance' (1999) 87 *Geo L J* 957; D Luban, A Strudler and D 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. M Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity'' (2005) 105 *Columbia L Rev* 1751.

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. Many of the criticisms of command responsibility overlook the distinction between principal and accessory liability; they condemn command responsibility for not satisfying the requirements for principal liability, but it is actually a mode of accessory liability.[9] Accessories need not share the mens rea for the principal's offence. 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 she was entrusted to protect. The commander cannot evade responsibility by creating her 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.

I argue that this is the 'genius' of command responsibility: that it recognizes that criminal negligence is sufficiently culpable for accessory liability in this context. (I use the term 'genius' in its older and less-used sense, such as in Frederick Pollock's lectures on the 'genius of the common law'.[10] It refers to an underlying, emergent character of a collective endeavour over time, which may be discerned in retrospect even if not consciously intended by its participants.) My point is that the many different practitioners who shaped the doctrine were actually reflecting a deontically sound

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[9] Importantly, I do not argue that the commander's dereliction is equivalent to '*committing*' war crimes. The idea that command responsibility 'deems' a commander to have 'committed' the crimes is one of the persistent misunderstandings in the command responsibility discourse; see §7.3.2.

[10] F Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) esp at 4-5. This is similar to the usage that refers, for example, to the genius of an era. Interestingly, Pollock's proposed usage also includes looking for a 'clarified' image that brings forth the 'best possible' underlying values. This matches well with the coherentist method (see Chapter 4); and with Dworkin's coherentist approach in *Law's Empire* (looking for theory with analytical fit and values that put the practice in the best possible light: R Dworkin, *Law's Empire* (Harvard University Press, 1986)).

intuition of justice about culpability in a particular set of circumstances, even if the groundwork for that intuition was neither explicitly articulated nor analytically developed.

While our normally-reliable understandings tell us 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. The negligently ignorant commander, who cares so little about the danger to civilians that she 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 hinges 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 her own separate dereliction offence; she 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 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 consistent, meaningful standard of criminal culpability.

7.1.3 Linkage to Themes

In this chapter, I demonstrate the application of the coherentist method. The coherentist method draws on all available clues, including patterns of juridical practice, normative argumentation, practical reason, and casuistic testing. These considerations are familiar in both legal and normative argument; I am simply parsing these techniques to lay bare that coherentism is the best explanation of the underlying methodology.

The inquiry will also illustrate some of the main themes of the thesis. First, ICL can benefit from careful application of the tools of criminal law theory. Second, ICL can in turn illuminate general criminal law theory by presenting new doctrines and problems.[11] Third, the study of deontic principles can be *enabling* as well as restraining, by helping to avoid unnecessarily conservative approaches that overstate the constaints.[12] Fourth, a seemingly anomalous area of practice can sometimes reveal a sound insight about justice.[13]

7.1.4 Scope and Terms

In this chapter, I focus on the traditional central case of military command relationships, and thus speak of 'commanders'. I will touch on implications for civilian superiors only at the end.[14] In this chapter, I merely *outline* the justificatory account. I am acutely aware that I am skimming the surface of many intricate debates. This chapter offers the most detailed deontic account of command responsibility to date (as far as I know), and yet it is also still just a preliminary sketch.

[11] A negligence-based mode of liability seems to depart from our principles, but if we return to the basic building blocks bearing in mind the specific context, we may make some discoveries.

[12] The study of deontic constraints reveals not only the zone of prohibition but also the zone of permission to pursue sound policy.

[13] Normally, where there is a conflict between a practice and our understanding of our principles, it is the practice that we will consider 'wrong' and in need of alignment. However, sometimes the anomaly may prove to be an appropriate adaptation to a distinct circumstance. In that case, we can articulate a new and better understanding of our principles. The improved understanding takes into account not just the familiar and normal cases, but also more diverse circumstances. In so doing, we learn about our principles and build a more general theory

[14] §7.4.

7.2 THE AVERSION TO NEGLIGENCE

7.2.1 The Tribunals Turn Away from Negligence

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?[16]

Post-World War II jurisprudence, which developed the command responsibility doctrine, had 'almost universally' held that the commander cannot plead her lack of knowledge where it was created by her criminally negligent breach of her duty to inquire.[17] ICTY jurisprudence acknowledges this clear pattern in the prior case law.[18]

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 her duty to obtain

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[15] J-M Hencaerts and L Doswald-Beck, *Customary International Law, Vol II – Practice* (CUP, 2005) at 3733-91.

[16] As discussed in Chapter 6, 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.

[17] 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: W H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Mil L Rev* 1 at 95. See also Martinez, 'Understanding', above at 647-54; Meloni, *Command Responsibility*, above at 33-76; K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot, 2002) at 97-101, 133-6 and 147-50; O Triffterer and R Arnold, 'Article 28' in O Triffterer and K Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (CH Beck, Hart, Nomos, 2016) at 1070-73 & 1089-91.

[18] For example, the *Blaškić* trial Judgement 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). *Prosecutor v Blaškić,* Judgement, ICTY T.Ch, IT-95-14-T, 3 March 2000, paras 309-330 ('*Blaškić* Trial Judgement'). Similarly, *Prosecutor v Delalić et al. (Čelebići* Judgement), ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement') 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).

information within her reasonable access.[19] 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.[20] The Chamber felt that the Prosecution position 'comes close to the imposition of criminal liability on a strict or negligence basis'.[21]

To avoid these perceived pitfalls, the Appeals Chamber required that the commander must have in her '*possession*' information sufficient to put her on notice that crimes were being committed ('alarming information').[22] Thus, a commander can generally remain passive. It is only once alarming information makes it into her 'possession' that she 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).[23] Again, in both cases, the 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'.[24] In *Blaškić*, the Chamber again 'rejected criminal negligence as a basis of liability in the context of command responsibility'.[25] 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'.[26]

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[19] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY A.Ch, IT-96-21-A, 20 February 2001 ('*Čelebići* Appeals Judgement') para 224.

[20] Ibid para 226.

[21] Ibid para 226.

[22] Ibid para 231-33.

[23] *Prosecutor v Bagilishema,* Judgement, ICTR T.Ch, ICTR-95-1A-T, 7 June 2001, para 46 (*Bagilishema* Trial Judgement) 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 Judgement, above, 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.

[24] *Prosecutor v Bagilishema,* Judgement, ICTR A.Ch, ICTR-95-1A-A, 3 July 2002, at para 35 ('*Bagilishema* Appeal Judgement').

[25] *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004 (*Blaškić* Appeal Judgement) para 63.

[26] *Blaškić* Appeal Judgement, above, para 62.

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.[27] (As I noted in Chapter 2, these techniques reflect a 'tendency' but are not an 'iron rule', i.e. I in no way suggest that jurists always fall afoul of them.[28]) 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.[29] For brevity, I will refer to this as the 'duty to know everything'. The Chamber vigorously rejected the 'duty to know everything' standard, and rightly so. A 'duty to know everything' would indeed pose an unfair 'Catch-22': the commander would either *know*, and be liable, or *not know*, and be liable. Such a standard would indeed be a strict liability standard, because its logically jointly exhaustive alternatives – knowing or not knowing – would always be met.

Crucially, however, the Prosecution was *not* arguing for a 'duty to know everything', 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 simply is a duty to *inquire*.[30] One is exculpated if one exercises due diligence. Second, the SHK test requires not only that the commander failed to exercise due diligence to inquire, but also that the commander had the '*means* to obtain the

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[27] See Chapter 2.

[28] § 2.1.3.

[29] *Čelebići* Appeals Judgement, above, 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.

[30] See for example the *High Command* case, which rejected a 'duty to know everything' standard, 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'. *United States v Wilhelm von Leeb et al (High Command Trial)*, (1950) 11 TWC 462 at 543-44.

knowledge'.[31] In other words, the commander *would have found out* had she tried.[32] Third, the dereliction must be 'serious'.[33] In other words, it is a standard of criminal negligence, not simple civil negligence. Notice also that the commander is not instantly liable if she inherits a force with poor reporting mechanisms; the requirement is simply that she exercise 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 strict liability and a 'duty to know everything'. The SHK is often regarded as having been decisively discredited in *Čelebići*. But it was not: *Čelebići* actually discredited the 'duty to know everything', not the SHK standard. 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'[34] – which sounds contradictory, but presumably means that the commander does not need reports physically in hand. More importantly, the commander need not have '*actually acquainted* himself' with the information; the information only needs to '*have been provided or available*' to the commander.[35] 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 her vicinity.

7.2.2. The 'Possession' Test is a Poor Fit with Actual Culpability

[31] *Čelebići* Appeals Judgement, para 226. See also the proposed requirement that the information be within her 'reasonable access' (para 224).

[32] Ibid para 226.

[33] Ibid para 224.

[34] Ibid para 238.

[35] *Čelebići* Appeal Judgement, above, para 239.

Here is a particularly stark example to illustrate the problem with the 'possession' requirement. Suppose a commander instructs her team at the outset, 'No one is to report to me any information about any crimes by our forces'. As a result, her subordinates manage to keep from her any information about the ongoing crimes. On the Tribunals' approach, she would be acquitted, because she does not have such information. Yet the *reason* should does not have the information is the egregiously inadequate reporting system she herself created.[36]

By contrast, the SHK test, in earlier jurisprudence and in the ICC Statute, is slightly broader.[37] The SHK test can be satisfied where the commander does *not* possess information about subordinate criminal activity, *if* that lack is due to a gross dereliction of her duty to try to stay apprised, showing a culpable indifference to the lives and interest she was entrusted to protect. [38]

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

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[36] However, one line in the *Blaškić* Appeals Judgement, above, para 62 seems to suggest otherwise. The line asserts that the commander can be liable if she '*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.

[37] See *Čelebići* Trial Judgement, above, para 393; *Čelebići* Appeals Judgement, above, para 222-242 and *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('B*emba* Confirmation Decision'); para 433-434. For analysis see Meloni, *Command Responsibility* 182-186.

[38] *Bemba* Confirmation Decision, above, 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 below Part 3.1.

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.[39] 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* (i.e. 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 her own ignorance, by creating a system that keeps her in the dark about subordinate crimes.[40] But the test is also over-inclusive, because it fixes the commander with knowledge of reports that made it to her desk, even if exigent demands of her work understandably delayed her from reading the reports.[41] In that case, she is fixed with knowledge even though she was 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.[42] That narrowness

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[39] Osiel, 'Banality', above.

[40] Subject to one untested passage in the *Blaškić* Appeal Judgement, above, which in any event is difficult to reconcile with the overarching requirement that information must be in the commander's 'possession'. See above.

[41] 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.

[42] You might object that there is a difference between 'choosing' not to turn on the system and negligently 'forgetting'. In §7.3.3, we will look at the morality of 'forgetting' to monitor whether troops are killing and raping civilians.

is not required by deontic principles.[43] 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. Moreover, the SHK standard does not require heroic efforts; it simply requires *non-criminally-negligent* efforts. The SHK standard does not 'deem' the commander to have read reports she 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. That yardstick is contextually sensitive to the circumstances faced by the commander.[44]

Both the Tribunals and the ICC now understand the SHK test and the HRTK test as differing.[45] Accordingly, I will use the labels as a descriptive shorthand. However, just to be clear, I do not think that the wording of these two extremely similar formulations ever required divergent interpretations.[46] 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 academic literature often portrays Tribunal jurisprudence as unquestioned customary law, and thus the ICC test as a departure, I argue that it is actually the Tribunal jurisprudence that departs from prior sources, whereas the ICC Statute returns to the previously-established standard of criminal negligence.

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[43] 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.

[44] See § 7.3.1 and §7.3.3. For example, it is not criminally negligent if a commander takes over a group in harried circumstances and does not yet have a realistic opportunity to set up reporting systems. A commander would also not be considered criminally negligent simply because she operates within a dysfunctional army; we would look at her diligence in its context to assess what measures could be expected of her (and thus which derelictions meet the criminal negligence threshold).

[45] See *Čelebići* Trial Judgement, above, para 393; *Čelebići* Appeals Judgement, above, para 222-242 (contrasting with the SHK test); *Bemba* Confirmation Decision, above, para 427-434.

[46] 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) at 1012 (ICRC, *Commentary*); I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 589-590; C Garraway, 'Command Responsibility: Victors' Justice or Just Deserts?' in R Burchill et al, eds, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP, 2005) at 81.

7.3. A PROPOSED JUSTIFICATION OF COMMAND RESPONSIBILITY

I will now offer a normative account 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[47] to show that culpability-based justifications can account for the novel doctrine of command responsibility.

7.3.1 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.[48] Jenny Martinez rightly questions the tendency in ICL discourse to denigrate the command responsibility standard as 'simple negligence' and to conflate it with strict liability.[49] 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'.[50]

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.[51] On the 'subjectivist' view, one needs, at minimum, conscious advertence to a risk in order

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[47] P Robinson, 'Imputed Criminal Liability' (1984) 93 *Yale LJ* 609.

[48] See Part 1 for concerns of scholars and Part 2 for Tribunal jurisprudence.

[49] Martinez, 'Understanding', above at 660.

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

[51] R Frost, 'Centenary Reflections on Prince's Case' (1975) 91 *LQR* 540 at 551; C Wells, 'Swatting the Subjectivist Bug' 1 *Criminal Law Review* 209.

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.[52] It is also sometimes argued that negligence cannot be deterred, which seems to equate negligence with accidents or mindlessness.[53] 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[54] of criminal negligence, to distinguish criminal negligence from mere blunders or simple civil negligence. Criminal negligence requires two things. First, the accused 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'.[55] The requirement has been described as a 'marked' departure[56] or a 'gross' departure.[57] This standard excludes, inter alia, a 'momentary lapse of attention' consistent with a good faith effort to fulfill one's responsibilities.[58] Criminal law is only concerned with transgressions that warrant *penal* sanction.

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[52] J Hall, *General Principles of Criminal Law* (The Bobbs-Merrill Company,1947) 366-67; G Williams, *Criminal Law: The General Part*, 2nd ed (Stevens, 1961) at 122-23. More recently, careful arguments for the subjectivist approach are advanced in A Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (OUP, 2009) at 59-97 and in L Alexander and K Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP, 2011) at 69-85. See also the counter-arguments advanced by Fletcher, *Grammar*, above at 313.

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

[54] 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.

[55] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (Hart, 2007) at 146.

[56] See e.g. *R v Creighton*, [1993] 3 SCR 3 (Supreme Court of Canada).

[57] J Horder, *Ashworth's Principles of Criminal Law*, 8thh ed (Oxford, 2016) at 196; The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C.*, May 24, 1962. (Philadelphia, PA: The Institute, 1985). s. 2.02(2)(d) ('gross deviation'); Ambos, *Treatise*, above at 225 ('gross deviation').

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

The argument that criminal negligence does not correspond to any personal mental state seems initially to be convincing. 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*'[59] or '*culpable disregard*'[60] 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 precautions.[61] 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 do not 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.[62]

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.'[63] 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

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[59] A Duff, *Intention, Agency and Criminal Liability* (Blackwell, 1990) at 162-163 ('practical indifference'); Simons, 'Culpability', above at 365 ('culpable indifference'); J Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto L J* 495 ('indifference').

[60] See e.g. s. 219 of the Canadian *Criminal Code*. See also *R v Bateman* (1925), 19 *Cr App Rep* 8 (UK): '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.'

[61] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law,* 2nd Ed (OUP, 2008) at 136.

[62] Hart, ibid, at 150-157.

[63] Duff, *Intention*, above, at 162-163.

culpable indifference criterion.'[64] Criminal negligence shows a disregard for others that is morally reprehensible, socially dangerous, and properly punishable.[65]

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.'[66] The claim that criminal negligence cannot be deterred is simply untrue.

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 commander to be held liable as party to serious crimes.[67] 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 (e.g. a culpable disregard for the lives and interests that the duty is intended to safeguard).[68]

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[64] Simons, 'Culpability', above, at 388 (emph added). See also G P Fletcher, 'The Fault of Not Knowing' (2002) 3 *Theoretical Inq L* 265, and Horder, *Ashworth's Principles,* above at 204-06.

[65] Some scholars and some systems (e.g. 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.

[66] Hart, *Punishment and Responsibility*, above at 134.

[67] See e.g. Nersessian, 'Whoops', above at 93 ('getting drunk at the wrong time, taking an ill-advised holiday, or being woefully incompetent, careless, or distracted'); A B Ching, 'Evolution of the Command Responsibility Doctrine in light of the Čelebići Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25 *North Carolina Journal of International Law and Commercial Regulation* 167 at 204; Y Shany & K Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2002) 34 *NYU JILP* 797 at 841.

[68] For example, the *High Command* case required 'criminal negligence', i.e. 'personal neglect amounting to a wanton, immoral disregard'. *High Command,* above at 543-44. The Commentary to Additional Protocol I required negligence 'so serious that it is tantamount to malicious intent': ICRC, *Commentary*, above at 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.

Of course, the philosophical debate about criminal negligence is not conclusively settled; there are some theorists who argue against it, and insist on subjective advertence.[69] For present purposes, rather than digressing further into this debate, we can observe that most legal systems, and most of the scholarly literature, backed by convincing normative arguments as outlined above, supports the analysis and intuition that criminal negligence is a suitable basis for criminal liability.[70] On a coherentist account, we accept that we may not arrive at complete consensus or Cartesian certainty. Instead we make best judgments drawing on all available clues, and the clues overwhelmingly support criminal negligence as a basis for personal culpability.

7.3.2 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. The major concern is with negligence linking the accused to serious crimes of subjective mens rea.[71] That objection is particularly acute 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.[72]

This seeming mismatch is indeed striking, and scholars are right to raise principled concerns. However, many of the criticisms of command responsibility judge it by the standards expected for *principal* liability. Command responsibility is a mode of *accessory* liability and should be evaluated accordingly. I will point out in this section that it is not problematic, or even unusual, that an accessory does not satisfy the *dolus specialis* or special intent required for the principal's crime.

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[69] See e.g. Alexander and Ferzan, *Crime and Culpability*, above, at 69-85.

[70] M E Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013) at 66-68, 116-18, 145-46, 166, 186-88; K J Heller & M D Dubber, *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011) at 25-27, 59, 109, 148-49, 188, 216-19, 263, 294-95, 326-28, 365-66; Ambos, *Treatise* at 94-95 (esp n. 113).

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

[72] See citations above §7.1.1.

Like most criminal law systems, ICL distinguishes between principals and accessories.[73] 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.[74] 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,[75] but it is also implicit in Tribunal jurisprudence,[76] and has support in other legal systems and traditions of criminal theory.[77]

There are two main differences between accessories and principals. One difference, as discussed in Chapter 6, is the *material* requirement. Principals make an 'essential' (*sine qua non,* integral) contribution to some aspect of the crime,[78] whereas accessories merely 'contribute' more indirectly, by influencing or assisting the acts and

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[73] ICL does not include fixed sentencing discounts; rather the difference is a factor reflected in sentencing. See e.g. H Olásolo, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court' in C Stahn and G Sluiter, eds, *The Emerging Practice of the International Criminal Court* (Brill, 2009) at 339; Ambos, *Treatise*, above at 144-148 & 176-179; K Ambos, 'Article 25' in O Triffterer and K Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary,* 3rd ed (CH Beck, Hart, Nomos, 2016); van Sliedregt, *Individual Criminal Responsibility*, above at 65-81.

[74] See e.g. M Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *JICJ* 977; G Werle and B Burghardt, 'Introductory Note' (2011) 9 *JICJ* 191.

[75] See e.g. *Prosecutor v Katanga and Chui*, Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/07, 30 September 2008 ('*Katanga* Confirmation Decision') at para 480-486; *Prosecutor v Lubanga,* Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007 ('*Lubanga* Confirmation Decision') at paras 322-340. See also H Olásolo, 'Developments', above; Dubber, 'Criminalizing Complicity' above; T Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91; Ambos, *Treatise* at 145-160.

[76] 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' (i.e. the paradigmatic mens rea for torture) whereas the aider and abettor need only 'know' that torture is taking place. *Prosecutor v Furundžija,* Judgement, ICTY T.Ch, IT-95-17/1-T, 10 December 1998, para 257 ('*Furundžija* Trial Judgement').

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

[78] *Lubanga* Confirmation Decision, above; *Katanga* Confirmation Decision, above; *Furundžija* Trial Judgement, above ('integral part'); Kadish, 'Complicity', above, Moore, 'Causing', above; Dressler, 'Reassessing', above; Dubber, 'Criminalizing Complicity', above.

choices of the principals.[79] The more important difference for this chapter 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.[80] For accessories, the requisite mental state in relation to the crime is not stipulated by the definition of the crime; it is stipulated by the relevant mode of accessory liability.[81]

As a result, accessories need not share in the paradigmatic mens rea for a given offence.[82] As the ICTR noted in *Akayesu*, 'an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide'.[83] In *Kayishema*, the ICTR held that aiders and abettors 'need not necessarily have the same mens rea as the principal offender'.[84] 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.[85] The ICTY Appeals Chamber has also shown the support of

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[79] 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'. J Gardner, 'Complicity and Causality' (2007) 1 *Criminal Law and Philosophy* 127 at 128. See also Kadish, 'Complicity', above at 328 and 343-346; Dressler, 'Reassessing', above at 139; Ambos, *Treatise*, above at 128-30 &164-66.

[80] Robinson, 'Imputed Criminal Liability', above.

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

[82] G Werle and F Jessberger, *Principles of International Criminal Law,* 3rd Ed (OUP, 2014) at 219.

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

[84] *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1T, 21 May 1999 ('*Kayishema* Trial Judgement') para 205.

[85] *Prosecutor v Aleksovski,* Judgement, ICTY A.Ch, IT-95-14/1-A, 24 March 2000 ('*Aleksovski* Appeal Judgement') para 162; *Prosecutor v Krnojelac*, IT-97-25-A, Appeal Judgement (17 September 2003) para 52 (for aiding and abetting persecution, need not share the discriminatory intent, but must be aware of discriminatory context); *Prosecutor v Simić,* Judgement, ICTY A.Ch, IT-95-9-A, 28 November 2006, ('*Simić* Appeal Judgement') at para 86; *Prosecutor v Blagojević and Jokić,* Judgement, ICTY A.Ch, IT-02-60-A, 9 May 2007 ('*Blagojević* Appeal Judgement'); *Prosecutor v Seromba,* Judgement, ICTR A.Ch, ICTR-2001-66-A, 12 March 2008 ('*Seromba* Appeal Judgement') para 56. See also Werle and Jessberger, *Principles*, above at 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.

national systems for this approach.[86] National systems seem largely to converge in this respect,[87] with limited exceptions.[88]

You may be familiar with one of the criticisms commonly made against joint criminal enterprise (JCE), that JCE enables conviction without satisfaction of special mental elements. But that criticism cannot simply be transplanted to command responsibility. That criticism is sound in relation to JCE, because JCE is a form of *principal* liability.[89] The extended form (JCE-III) is 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.

Unfortunately, the accessory-principal distinction has been frequently overlooked in command responsibility debates. For example, Joshua Root objects that command

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[86] *Prosecutor v Krstić,* Judgement, ICTY A.Ch, IT-98-33-A, 19 April 2004 para 141 ('*Krstić* Appeals Judgement').

[87] van der Wilt, 'Genocide', above, 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* at 288-9 and 299-300.

[88] 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 A Ramasastry and R 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.

Fortunately, there are reasons to doubt that 'shared intent' is a necessary requirement. Such a requirement 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 accessories. 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 do not uphold a fundamental principle that accessories must have the mens rea of a principal.

I think that the passage in the MPC commentary was made in the context of a particular debate (where a mode of liability requires subjective advertence, one would not include liability for result offences with more inclusive fault elements not satisfied by the accessory). I do not believe it was not intended contradict the more general proposition that the level of fault for an accessory is stipulated by the mode of liability. If that was the intent, it would contradict extensive juridical practice, and it would be normatively unconvincing, not least because it treats one type of material element differently from others.

[89] 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; *Prosecutor v Vasiljević,* Judgement, ICTY A.Ch, IT-98-32-A, 25 February 2004, ('*Vasiljević* Appeal Judgement') 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.

responsibility as a mode of liability involves 'pretending [the commander] committed the crime himself'.[90] Judge Shahabuddeen disparaged the plausibility of a commander 'committing' hundreds of rapes in a day.[91] 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.'[92] Mirjan Damaška objects that the negligent commander is 'stigmatized in the same way as the intentional perpetrators of those misdeeds'.[93]

As for the first two objections (Root, Shahabuddeen), it is an error to equate all modes of liability with commission, and especially with personal commission.[94] Modes are much more varied and nuanced in what they signify. The latter two objections (Mettraux, Damaška) were valuable correctives in the debate at the time, as the debate sometimes overlooked deontic constraints. However, on reflection those objections are also slightly overstated. Command responsibility does not 'turn' a commander into a 'murderer' or 'rapist'. Interestingly, even ordinary language tracks the difference between principal and accessory. Nor does it apply a stigma equal to perpetrators. Command responsibility is a form of accessory liability, which signifies – accurately – 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

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[90] Root, 'Mens Rea', above at 156 ('pretending he committed the crime himself'), 123 ('as if he had committed the crimes himself'), 146 ('Despite Robinson's assertion, there is nothing in this language to suggest that the commander is responsible as if he committed the crimes himself'). The objection overlooks the difference between accessory liability and commission; accessory liability does not entail 'pretending' that the accessory committed the offence.

[91] *Prosecutor v Hadžihasinović,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY A.Ch, IT-01-47-AR72, 16 July 2003, Shahabuddeen Opinion, para 32 ('*Hadžihasinović* Interlocutory Appeal').

[92] Mettraux, *Command Responsibility* at 211.

[93] Damaška, 'Shadow Side', above at 463.

[94] Alas, contrary to the Shahabudden argument, ICL cases demonstrate all too often that it is in fact entirely possible for a person to be an accessory, or indeed even a joint principal, to hundreds of crimes in a day.

in relation to 'one and the same crime'.[95] 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.[96] 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.

7.3.3. Culpable Neglect is Sufficiently Blameworthy for Accessory Liability in the Command Context

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. A standard reflex in criminal law thinking is that that negligence is categorically less blameworthy than subjective foresight, and probably 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

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

[96] Gardner, 'Complicity', above, at 136 argues that the distinction between principals and accessories reflects an important moral difference, 'embedded in the structure of rational agency'.

focusing on unusual contexts, can lead us to reconsider how building blocks may be put together in new ways that still respect underlying principles.

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'.[97] He notes that for any given offence, the 'paradigm of liability' – i.e. 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'.[98] The key insight from Paul Robinson was to look at the *mirror image* of defences.

Paul 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 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.[99]

Paul Robinson identified two deontic (culpability-based) justifications. The first is 'causation': the actor is held responsible despite the absence of an element because she is causally responsible or causally contributed to its commission by another.[100] The second is 'equivalence', arising, for example, where the accused had a mental state that is equally blameworthy to the requisite mental state.[101] Some doctrines may rely on an aggregation of rationales to cumulatively provide an adequate level of culpability.[102] For example, some doctrines inculpate the accused who creates the *absence* of an element in

[97] Robinson, 'Imputed Criminal Liability', above.

[98] Ibid at 611.

[99] Ibid at 676.

[100] Ibid at 619, 630 and 676.

[101] 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.

[102] Ibid at 644.

a blameworthy manner (for example, willful blindness, or deliberate self-intoxication in preparation for an offence).[103] This rationale will be particularly pertinent to the military commander who creates her own absence of knowledge through culpable disregard for lives and legal interests that she was obligated to protect.

An activity posing extraordinary dangers to others

Because the institution of armed forces is a familiar one to us, we might be tempted to fall back on our usual habits of thought about liability for 'mere' negligence. But those habits of thoughts emerged in a different context, of normal interactions between civilians. We should try to see with fresh eyes the extraordinary risks of this remarkable activity. The institution of military command is a socially created institution, not a natural 'given', and it grants licenses for activity that would otherwise be seriously criminal.

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.[104] 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 law gives a certain license to military leaders, it accompanies this license with duties to monitor and restrain the tragically-frequent criminal violence of subordinates who exploit their power. [105]

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

[103] Ibid at 619 and 639-42.

[104] *Charter of the United Nations,* 26 June 1945, 1 UNTS XVI, Art. 2(4), 48, 51.

[105] Martinez, 'Understanding', above at 662; Parks, 'Command Responsibility', above at 102 ('massive responsibility').

> from committing acts of extreme violence, and to remove their sense of moral agency when committing such acts.'[106]

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 behaviour.

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. Thus, even if modern law has good reasons to accept the creation of armed forces, the law must recognize that the activity bristles with danger, and that engagement in it comes with serious responsibilities.

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 her own ignorance, through a criminal dereliction of the duty of vigilance entrusted to her to guard against precisely this danger. Culpability-based rationales of causation and equivalence apply to the commander who, contrary to this duty, buries her 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 there are three reasons why, on closer inspection, the gulf is not as stark as it seems on first glance.

First, we must not overestimate what the subjective standard requires. As a matter of practical reason, 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

[106] Martinez, 'Understanding', above at 662. See also Weigend, 'Superior Responsibility', above, at 73.

time of the accessory's contribution. Thus it must always be a matter of risk. Hence, juridical practice across legal systems contemplates different *degrees* of subjective awareness or foresight, such as recklessness, willful blindness, or dolus eventualis.[107] Not only is there leeway with respect to the degree of certainty, the accessory also 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'.[108] Thus even the subjective standard must deal in uncertainties about the *likelihood* and the *nature* of crimes.

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 requires a gross dereliction that shows a culpable disregard for the lives and legal interests of others.[109]

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 by creating her own ignorance through defiance of a duty of vigilance which exists precisely 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. Consider two commanders. Commander A requires proper reporting. As a result, she learns of a strong risk that crimes will occur. She decides to run that risk and hopes it will not materialize. Commander B does not care at all about possible crimes. Thus she does not even bother to set up system of reporting. As a result, she does not even get the

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[107] 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) p. 25; van der Wilt, 'Genocide', above at 247-49.

[108] *Blaškić* Appeal Judgement, above, para 50; *Simić* Appeal Judgement, above, para 86.

[109] See §7.3.1. As noted above, I am not attempting to advance a definitive doctrinal interpretation of the fault standard in ICL. In some legal systems, 'gross' dereliction may not be required for criminal negligence. If ICL were to follow that route, then deontic justification might be slightly more difficult, as this particular safeguard would be absent. As noted in §7.3.1, 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.

reports and she does not learn of the specific risk. Under the classical prioritization, Commander A is more culpable because she has 'subjective' foresight. But who is actually more culpable? Unlike Commander A, Commander B did not even bother to take the first steps. Contrary to the standard prioritization, it is Commander B who has shown even greater disdain for protected persons. She created her own lack of knowledge thanks to that disdain. On a subjective approach (and on the HRTK test), she 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 categorically worse than 'not knowing'. But there can be very grave criminal fault in not knowing.[110] To assess the actual degree of fault, we have to go back a step and ask *why* the commander does not know. '*Not knowing*' includes the commander who is too contemptuous to find out, or even the commander who sets up systems at the outset to frustrate reporting.[111] 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 ipso facto worse than 'not knowing'. Any of these hypothetical commanders are rightly held accountable for the harms within the risk they culpably created.

My two main points are as follows: First, criminal negligence is *adequately* blameworthy, at least in this special context, to meet the culpability requirement for accessory liability. Second, criminal negligence is also *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 subjective foresight, 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. In the context of command responsibility, the two standards are more equivalent than I initially thought. The actual ranking may depend on the facts of any particular case, including *why* the commander does not know, and the

[110] Fletcher, 'Not Knowing', above.

[111] One line in the *Blaškić* Appeal Judgement, above, 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'. See note 33.

degree of disregard that produced that ignorance.

7.4. IMPLICATIONS

7.4.1. The resulting conception of command responsibility

The foregoing account of command responsibility has several implications for how we understand command responsibility.

1. Criminal negligence: First, rather than disavowing criminal negligence as an aspect of command responsibility, ICL should openly defend and embrace it. Tribunal jurisprudence has led people to shun criminal negligence as somehow inappropriate in command responsibility. However, the incorporation of criminal negligence is the core innovation of command responsibility, and it is a justified and valuable innovation.

2. Duty to inquire: Second, it is perfectly appropriate for command responsibility to encompass the commander's proactive duty to inquire. Early Tribunal jurisprudence shied away from this, which was understandable in those early days, given the unexplored normative implications. For example, one might imagine hectic circumstances in which it would be perfectly reasonable that the commander did not have time to set up reporting systems. Thus, incorporating the proactive duty might have seemed too harsh. But the response is: any scenario in which the conduct was reasonable is, by definition, not criminal negligence. By recalling the rigour of criminal negligence, we address plausible concerns. Moreover, the point of command responsibility is that it can address egregious breaches of the duty to inquire. It is deontically justified in doing so. Insofar as Tribunal jurisprudence has excised such cases from its ambit, that jurisprudence misses the point of the doctrine. Thus, it is not surprising that the HRTK test has not played a significant role in prosecutions.

3. The 'possession' test: Third, 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 deontic considerations (culpability), nor by consequentialist considerations. The 'possession' test is muddled, misleading, unfair, and

inadequate. It is *muddled* because 'possession' does not mean 'actual' possession.[112] It is *misleading*, because despite the vocal disavowals of negligence, the test is actually still constructive knowledge, since the commander need not actually be 'acquainted' with the information.[113] The test is *unfair (over-reaching)*, because the commander is deemed to have knowledge of all reports made available to her, even if exigent demands at the time meant that she 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 her 'possession', she gets an acquittal.[114] 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,[115] 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.

4. The 'should have known' test: Fourth, 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 consequences, 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.[116] Thus, ICL should return to the post-World War II jurisprudence: where the commander has created her own ignorance deliberately or through criminal negligence in her duty to inquire, that is adequate to establish the fault element for command responsibility.[117] The ICC seems to have returned to this path in its early jurisprudence.[118] Even for courts and tribunals whose statute uses the phrase 'had

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[112] *Blaškić* Appeal Judgement, para 58.

[113] *Čelebići* Appeal Judgement, para 239.

[114] A line in the *Blaškić* Appeals Judgement, above, para 62 asserts that the commander can be liable if she '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. See note 33.

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

[116] The HRTK test fixes the commander with knowledge of all reports submitted to her – which does not take into account that there may be circumstances where it was not criminally negligent that she did not have an opportunity to acquaint herself with the report.

[117] See §7.2.1 for pre-Tribunal jurisprudence.

[118] *Bemba* Confirmation Decision, above, paras 433-34.

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.[119]

5. Mode of liability: Fifth, and finally, command responsibility can indeed 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 her culpable dereliction.[120] A 'separate offence' approach understates the harm unleashed and the indirect liability for the crimes facilitated by one's dereliction.

7.4.2. Future Refinement

If the general account I have outlined is correct, then there are three additional implications for our interpretation and refinement of the doctrine. These pertain to (1) recognizing a capacity exception, (2) the scope of the doctrine (and which types of organizations it covers), and (3) civilian superiors. For each of these three implications, I am simply outlining an area for future study: in none of them am I attempting to provide an answer.

1. Capacity exception: First, because this account endorses a criminal negligence standard, it should also recognize a potential exception, where the commander lacks the *capacity* to meet the requisite standard. I have emphasized above that, with criminal negligence, we condemn persons for *failing to exert their faculties* as the activity obviously required, and thereby showing a culpable disregard for the lives and legal interests safeguarded by the duty.[121] However, if the person's gross dereliction was due not to a culpable disregard, but rather a lack of capacity (such as severe mental limitations), then

[119] See §7.2.1.

[120] The mode approach, I argue, also entails that the causal contribution requirement must be respected – see Chapter 6.

[121] Hart, *Punishment and Responsibility,* above at 150-57.

blame and punishment would not be appropriate.[122] In such a case, the problem is not that they failed to exert their faculties, but that their faculties were limited.

2. Scope of doctrine (what context)?: Second, the account provides additional guideposts for interpreting the scope of the doctrine, and particularly the types of organization within which it applies. I have argued that a mode of liability incorporating criminal negligence can be justified within the special context of a military command relationship. What are the outer parameters of that justifying context? After all, there are very diverse forms of armed groups, with different degrees of organization (professional armies, paramilitaries, loose armed groups). In determining the outer parameters of the doctrine, we must be sensitive not only to doctrinal and teleological considerations but also the *deontic justification*.[123] When consider what types of group or level of organization is needed, we have to consider at what point the rationale for the deontic justification for this mode of liability no longer pertains. Beyond that outer limit, one must fall back on the other remaining complicity doctrines that deal with collective action.

3. Civilian superiors: Third, the account here may not apply to civilian superiors. Accordingly, this account may cast a more positive light on the bifurcated approach of the ICC Statute. 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.[124] The dominant criticism is that the more generous test for civilian superiors

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[122] Hart, ibid at 149-54; Horder, *Ashworth's Principles*, above at 186; *Creighton,* Supreme Court of Canada, above. Chinese criminal law reaches the same conclusion – 'should have' entails both a duty and capacity: Badar, *Mens Rea*, above, at 186-88. See also Parks, 'Command Responsibility' above at 90-93 suggesting some subjective factors pertinent in the command responsibility context.

[123] Some scholars have already started to helpfully explore these parameters. H van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in C C Jalloh, ed, *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (CUP, 2014) 144; R Provost, 'Authority, Responsibility, and Witchcraft: From Tintin to the SCSL' in Jalloh, ed, *The Sierra Leone Special Court,* ibid 159; I Bantekas, 'Legal Anthropology and the Construction of Complex Liabilities' in Jalloh, ed, *The Sierra Leone Special Court,* ibid 181; A Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001)14 *LJIJ* 591 at 602-12; Nybondas, *Command Responsibility,* above, at 191-94.

[124] The *legal* criticism is that the Rome Statute differs from the Tribunal approach and therefore from customary law. Such arguments may underestimate 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.

represents a tragic watering down of liability for the self-serving reasons of protecting political leaders.[125]

But perhaps the more generous treatment for civilian leaders should not be so quickly condemned. One of the tendencies I discussed in Chapter 2 is that ICL scholars often assume that harsher, unilaterally-imposed rules are the 'true' law, and that negotiated, more permissive, rules are mere political 'compromise'.[126] Where such an assumption is too hastily applied, it may lead us to favour rules rooted in victor's justice and to overlook fundamental constraining principles. I argued that we should pause to consider that the problematic rule might be the unilaterally-imposed one; perhaps potential exposure can have a salutary effect of sharpening drafters' sensitivity to unfairness.[127] Article 28 presents an illustration. An alternative explanation of Article 28 is that an issue of principle was raised and delegates were persuaded of its merits.[128] It could be that the deliberative process unearthed a plausible intuition of justice.

Further study may show that there is 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.[129]

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[125] See e.g. G Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89; E 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 *International Criminal Law Review* 141 at 159-61.

[126] See § 2.4.

[127] Ibid.

[128] See e.g. P Saland, 'International Criminal Law Principles' in R Lee, ed, *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999) 189 at 203.

[129] Also noting the different context and responsibilities, see Nybondas, *Command Responsibility*, above at 183-88; Meloni, *Command Responsibility*, above at 250; Martinez, 'Understanding' at 662; Weigend, 'Superior Responsibility', above at 73-74.

7.5 CONCLUSION

At first glance, command responsibility seems problematic, because it does not comport with our usual heuristics and constructs developed in typical criminal law settings. However, this an instance where ICL settings and doctrines can enable us to reconsider our normal reflexes in criminal law theory (as per a major theme of this thesis). The command responsibility doctrine was created in international law to deal with a specific set of circumstances that are not the usual context of citizens interacting. The doctrine takes account of specific responsibilities that are necessary to avert a special pathology of human organizations. This is the 'genius' of command responsibility: the practice reveals an underlying insight of justice, shared by the many jurists who helped create it, even if they did not articulate the deontic justification.

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 personal culpability, 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 commander choosing 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.[130] 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.

[130] 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.