Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes

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INTRODUCTION

International crimes often consist of ordinary domestic offenses—such as rape, battery, or murder—writ large. The criminal conduct at issue either is aimed at a larger entity, such as a protected group of individuals, or is committed on a massive scale or within the context of a larger event, such as an armed conflict or a widespread or systematic attack on a civilian population. One need look no further than the Holocaust to recognize that the reality of international offenses is that culpability for such crimes can extend across tens or even hundreds of thousands of individuals, ranging from the highest-level actors planning the crimes to individual offenders carrying them out.

International criminal law responds to this reality in three ways. First, it takes a broad view of how international crimes can be committed and rec-

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ognizes several forms of joint criminal enterprise, where multiple offenders work together to achieve a particular crime. Second, it casts a wide net of secondary or participatory liability to cover those who aid and abet or otherwise facilitate international offenses by others. Third, it provides for a unique species of constructive liability that holds military and civilian commanders directly liable for crimes committed by subordinates (as opposed to grounding responsibility in a separate offense of dereliction of duty).

This article analyzes the inherent theoretical tension between these forms of constructive liability and criminal responsibility premised upon the direct commission of serious international crimes. Such offenses typically require proof that the offender engaged in specific prohibited conduct with the narrowest form of specific intent. Theories of constructive liability, on the other hand, allow conviction for the same offense even though the requisite conduct and mental state are absent. These issues are explored in the context of the crime of genocide, which has been held to require clear evidence of specific intent before a direct offender can be convicted of the crime.

THE PERPETUATION OF INTERNATIONAL OFFENSES

Direct Commission and Joint Criminal Enterprise

For any crime, the most compelling basis for individual criminal responsibility is actual commission, where the offender engages in specified prohibited conduct (the *actus reus* of the crime) with the requisite mental state (the *mens rea* of the crime). Commission is the broadest form of perpetration and includes both the actual execution of a crime and culpable omissions leading to it.[1]

It often is the case, however, that international crimes are prosecuted on the basis of the offender's participation in a "joint criminal enterprise" (JCE). JCE covers situations where multiple actors participate in the crime with the requisite *mens rea,* such that their individual fault is not reduced.[3] Each participant is liable for the offense, provided that he actually participates and intends "to engage in the common criminal action."[4]

Liability premised upon JCE has three components. First, there must be multiple offenders, although there is no requirement of group organization or of administrative, military, or political structure.[5] Second, the collective must share the common goal of committing the offense in question.[6] Third, the offender must actually contribute to or assist in the commission of the offense.[7] He need not be deeply involved or play a "key coordinating role," however.[8]

THE CATEGORIES OF *MENS REA*

There are five broad categories of criminal *mens rea* reflected in the American Model Penal Code, each calibrated to approximate personal blameworthiness:[2]

1. "Purpose" is the subjective positive desire to engage in wrongful conduct or to have a wrongful result occur. If perpetrator D detonates a bomb in victim V's car with the desire to cause V's death, D has acted purposefully with respect to that crime. *See* MODEL PENAL CODE § 2.02(a).
2. "Knowledge" is a subjective, practical certainty that a particular result will occur in the ordinary course of events, but without any positive desire to bring it about. If D knows that A is a passenger in V's car and detonates the car bomb with the desire to kill V and an awareness of the virtual certainty that the bomb also will kill A, D has acted with purpose toward V and with knowledge toward A. *See* MODEL PENAL CODE § 2.02(b).
3. "Recklessness" is the conscious disregard of an objectively substantial and unjustifiable risk. If D detonates his car bomb in a public place, there is an objective and substantial risk that bystanders may be seriously injured or killed in the explosion. If D is aware of this risk and proceeds anyway, D has acted with recklessness toward the bystanders. *See* MODEL PENAL CODE § 2.02(c).
4. "Criminal negligence" applies when a person objectively should be aware of a substantial and unjustifiable risk of injury but nevertheless fails to account for it. Culpability is premised upon the gross departure from the standard of care that would be adopted by a reasonable person in the same situation. Thus, if D is fumbling with his car stereo when his vehicle crashes into another motorist, killing him in the process, D may be criminally liable for grossly deviating from the standard of a reasonably prudent driver. *See* MODEL PENAL CODE § 2.02(d).
5. "Strict liability" (also known as "absolute liability") essentially means no mental state at all. Liability is imposed based solely upon *actus reus,* without regard to the offender's personal culpability with respect to the conduct in question. Strict liability typically is reserved for regulatory or administrative violations that provide only for minor criminal sanctions. *See* MODEL PENAL CODE § 2.05.

There are three types of JCE.[9] Type-1 covers groups like the *Einsatzgruppen*, the Nazi killing squads that massacred Jews in occupied territories,[10] and the *Hadamar* defendants, who poisoned over 400 allied prisoners in a sanatorium.[11] Although the participants play different roles, each has the requisite mental state and works with other members to achieve the common crimes.[12]

JOINT CRIMINAL ENTERPRISE

A classic example of JCE is a criminal gang robbing a bank, where the participants in the heist divide up the necessary tasks among themselves. One member might plan the robbery and route of escape, another procure plans of the bank's vault, another pull a weapon and announce the robbery, another nullify security measures, another handle "crowd control" of bank customers, another grab the cash, another operate as lookout, another serve as getaway driver, another as procurer and operator of a "hideout" after the robbery, etc. What matters is that each of the tasks undertaken forms part of the overall transaction of "bank robbery" and that each gang member engages in his tasks with the requisite *mens rea* (the shared intent to effect the robbery).

Type-2 JCE is a variant of Type-1 where members participate in a system of ill treatment, such as a concentration camp or a slave labor factory. The offender must actively participate with personal knowledge of the system and the intent to further its aims.[13] The common focus is participation in the system, as opposed to jointly committing a particular offense. Unlike a Type-1 JCE, the offender need not have reached any formal or tacit agreement with other perpetrators.[14]

Type-3 JCE is a form of constructive liability and will be discussed in greater detail below.

Planning, Instigating, Ordering, Aiding, and Abetting

In addition to direct commission and JCE, international criminal law also recognizes several forms of secondary or accessorial criminal responsibility.[15] The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, provides that a "person who planned, instigated, ordered . . . or otherwise aided and abetted in the planning, preparation, or execution of a crime . . . shall be individually responsible for the crime."[16] Planning occurs when one or more persons design a course of criminal conduct, provided that the offender is substantially involved in formulating or endorsing the plan.[17] Instigating is prompting another to commit a crime where the prompting substantially contributes to the commission of the offense.[18] Ordering is using a formal or informal position of authority to instruct another to commit a crime.[19]

Criminal responsibility indisputably is established if the offender intends the outcome of his planning, instigating, or ordering.[20] Within the context of a JCE, planning, instigating, or ordering actually constitute direct "commission." Secondary responsibility arises when the offender lacks the *mens rea* of the crime or does not participate in its *actus reus*. In such cases, criminal responsibility can be established if an offender has ordered, instigated, or planned a crime with the knowledge of a substantial likelihood that the offense will be committed in execution of that particular order, plan, or instigation.[21] Premised upon a *mens rea* of advertent recklessness, engaging in such conduct "with such awareness has to be regarded as accepting that crime."[22]

The other key form of secondary liability—aiding and abetting—has three components:[23]

1. The accessory (A) acts specifically to assist, encourage, or lend moral support to the commission of a specific offense;[24]
2. A's efforts have a substantial effect on the perpetration of the crime;[25] and
3. A knows that his acts will assist in the commission of a specific crime by the principal (P).

A's liability is independent—P need not be convicted or even identified in order for A to be prosecuted.[26] Indeed, P need not even become aware of A's assistance.[27] It is also not necessary for A to know the precise nature of P's crimes; if A gives P a "blank check"[28] to offend and contemplates a defined range of potential offenses, he can be held liable for aiding and abetting any of them.[29] *Mens rea* links to foreseeability, not to desires

or results.[30] A need not share P's desire for a particular criminal outcome and even may be entirely indifferent to it.[31]

DISTINGUISHING AIDING AND ABETTING FROM JCE

To return to an earlier example, the aider and abetter of a bank robbery is distinguished from JCE participants based upon his mental state. He might provide gang members with weapons, building plans for the bank, getaway vehicles, etc. If he performs these acts with intent to facilitate the robbery, he can be held liable as a JCE participant. But if his intentions are otherwise, such as financial profit, and the use of the weapons, car, or other items in the robbery was foreseeable, his liability is that of an accessory. *See Krnojelac (TC)* [2002] ICTY ¶ 75 ("a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a [JCE] with the principal offender must *share* that intent.") (emphasis added).

CONSTRUCTIVE LIABILITY— "EXTENDED" JOINT CRIMINAL ENTERPRISE

As discussed above, criminal responsibility typically is predicated upon the personal activities and blameworthiness of the offender—engaging in certain prohibited conduct with the requisite mens rea. These rules are relaxed in cases of constructive liability, which allow an offender to be held liable based largely on the fact that harm resulted from his conduct, regardless of his desires or personal culpability. Under certain circumstances, criminals can be convicted and punished for offenses committed by others, even where they themselves lack the requisite mental state and did not even participate in the *actus reus* of the crime.

Constructive liability is well-rooted in domestic criminal law, arising principally in the context of homicide. In Anglo-American law, for example, murder arises not only from intentional killing, but also when the perpetrator intends to cause grievous bodily harm and the victim dies as a result.[32] It also can arise from deaths occurring when the offender is "reckless under circumstances manifesting extreme indifference to human life."[33] In all such cases, the offender's aims are incongruent with the injury that actually results. Nevertheless, he is deemed to have sufficiently passed a moral threshold of wrongdoing to justify holding him liable for the irreversible consequences of his conduct.[34]

Two principal forms of constructive liability are recognized in international law. The first is Type-3 "extended" joint criminal enterprise. This doctrine holds an offender liable for foreseeable crimes outside the scope of a JCE committed by other members of the venture.[35] Extended JCE thus always involves multiple offenses—the joint crime pursuant to a Type-1 or Type 2 JCE plus the "collateral" offense.[36] The criminal venture blankets JCE participants with special culpability and justifies punishment for collateral offenses as "a special form of complicitous participation."[37] The theory reflects a general legal hostility to criminal organizations, which present a special risk of injury that warrants extended liability.[38] Liability can be so constructed for any crime, even the most serious international offenses such as genocide.[39]

Extended JCE is not a form of strict liability. The collateral offense must be a "natural and foreseeable consequence of the effecting of that common [criminal] purpose."[40] It is irrelevant, however, that the offender did not intend the collateral offense, that he was not actually aware it would occur, and that he did not even assist or encourage its commission.[41] Liability is "constructive" because the *actus reus* and *mens rea* that establish liability fall outside the ordinary legal definition of the crime. But for the overarching context of the Type-1 or Type-2 JCE, the offender would not be liable for the collateral offense at all.

Mens rea for extended JCE consists of objective and subjective components. The risk that a collateral offense could be perpetrated must be foreseeable, and the offender must be advertently reckless or indifferent to the risk of that injury.[42] He is "responsible for such crimes only if the Prosecution proves that [he] . . . had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence *to him*."[43] By continuing to participate in the Type-1 or Type-2 JCE, the offender willingly accepts that foreseeable collateral offenses might be committed.[44]

Holding criminals responsible for collateral offenses is not novel in criminal law. The "felony murder" rule, now abolished in England, still exists in the United States.[45] Even for deaths caused by others, the offender is held strictly liable for all homicides that occur when he commits, flees from, or is an accessory to certain serious felonies.[46] The felony murder rule is harsh because it eliminates *mens rea* entirely with respect to the homicide.[47] International criminal law and domestic jurisprudence in many nations therefore temper such stringency by imposing the foreseeability requirement.[48] The offender must appreciate the risks of the injury and subjectively choose to run them. In contrast to the felony murder rule, if an offender reasonably dismisses collateral offenses as negligible or remote, he will not be held liable for them.[49]

Although extended JCE ultimately involves constructing liability for the collateral crimes, not much "assembly" is truly necessary. The offender already has traveled far off the beam of acceptable conduct by participating in a joint criminal venture. Given his foresight of the collateral offenses, his willingness to proceed is separately blameworthy conduct that justifies punishing him for the collateral crimes, even when he neither desired nor acted to bring them about.[50]

DISTINGUISHING EXTENDED JCE AND FELONY MURDER

To return to an earlier example, consider a JCE to commit a bank robbery in which a patron is shot and killed by one of the gang members. Under the principles of extended JCE, the other gang members can be held criminally responsible for this murder if the death was objectively foreseeable (as it would be, for example, if a gun was to be used in the robbery). But in jurisdictions that adopt the felony murder rule, such foreseeability is irrelevant. Each other participant is liable even if the killing was entirely unanticipated—to him or to any reasonable person in his situation.

That noted, the extended JCE doctrine is anomalous when applied to international offenses, like genocide, that require the narrowest form of specific intent to support a criminal conviction.[51] The *mens rea* and limited conduct requirements for constructive liability via JCE differ widely from what must be proven at trial to convict direct perpetrators. It is odd, to say the least, to require specific intent before directly convicting an accused of the offense itself but simultaneously to allow him to be convicted of the *identical crime* in circumstances where he: (i) has not fulfilled the conduct elements of the crime itself; and (ii) is far less culpable with respect to its commission *by another.*

As discussed below, this analytical tension is exacerbated when liability is constructed pursuant to the second theory—the doctrine of command responsibility.

CONSTRUCTIVE LIABILITY—COMMAND RESPONSIBILITY

Perhaps no concept stretches traditional notions of individual criminal responsibility as far as superior or command responsibility for criminal conduct by underlings.[52] Superior responsibility is omissions liability, in

that offenders are punished for *not* acting. But it goes much further. The superior is held liable for a particular crime not because his conduct falls within its definition, but because he failed to prevent its commission by others.[53] What is significant is that the superior is held liable for the *actual crime* of the subordinate—not for a separate offense focused upon the commander's dereliction of duty.

Three criteria establish command responsibility:

1. A superior-subordinate relationship between the offender and the perpetrators;
2. The superior knew or had reason to know the offense was about to be or had been committed; and
3. The superior failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators.[54]

The Superior-Subordinate Relationship

There are two types of command—*de jure* (based on position) and *de facto* (based on circumstances).[55] In either case, command responsibility—which extends to civilians as well as military commanders—is premised on hierarchy. The offender is liable for crimes committed by others only if he actually is their superior, which depends in turn upon whether he has "effective control" over the perpetrators.[56]

The superior is held liable for the actual crime *of the subordinate—not for a separate offense focused upon his dereliction of duty in failing to prevent the subordinate's crime.*

Effective control is the "material ability to prevent or punish the commission of the offenses."[57] This is a question of fact that depends upon circumstances.[58] Effective control can be lost, for example, when a *de jure* commander experiences a mutiny or where communication is impossible. On the other hand, effective control exists even when a person without formal authority has *de facto* power to control the conduct of others. Where effective control is absent, the commander cannot be held liable for subordinates' offenses.[59]

The Commander's Knowledge

The second element relates to the offender's mental state. Indeed, *mens rea* is the determining factor in ascertaining whether the command responsibility doctrine is even necessary. A commander that intentionally refrains from stopping offenses by subordinates in order to have the crimes committed, for example, is properly treated as a direct offender. Theories of constructive liability are unnecessary because he shares the requisite *mens rea* of the crime and his culpable omission forms part of the overall JCE transaction comprising the offense.

The command responsibility doctrine comes into play when such intent is lacking and the vehicle of JCE is unavailable. Actual knowledge[60] of criminal offenses by subordinates provides the strongest basis for liability. Indeed, this can be viewed as a form of traditional secondary liability for aiding and abetting or the like. The commander whose knowing omission in failing to stop crimes by subordinates has a substantial effect on the commission of those crimes is properly held criminally liable.[61] This basis of liability is no more problematic than any case in which accessorial liability is imposed.

The principal analytical tension arises [because] a commander can be punished for what he should *have known, but nevertheless failed to discover.*

The principal analytical tension arises with respect to other applications of the command responsibility doctrine. Apart from what a superior knew or must have known under the circumstances, a commander can be punished for what he *should* have known but nevertheless failed to discover. He is responsible when "information was available to him which would have put him on notice of offenses committed by subordinates."[62]

There is an ongoing debate over the scope of the commander's duty in such cases. In the Celebici case, for example, the ICTY Appeals Chamber rejected a broad duty for commanders to remain generally well-informed.[63] Its decision was based principally upon Additional Protocol I to the Geneva Conventions, which predicates liability on the failure to act upon available information.[64] The provisions of Protocol I do not necessarily reflect customary international law, however,[65] and other authorities suggest that commanders do have a general duty of due diligence.[66]

The International Criminal Court (ICC) Statute appears to adopt the broader general duty for military commanders: they are responsible if

they knew or should have known that subordinates were committing or were about to commit the crimes.[67] In contrast, civilian superiors are responsible only if they knew or consciously disregarded information that clearly indicated a crime was being committed.[68] The specific reference to "information" for civilian superiors, together with its absence in the provision on military commanders, suggest a broader scope of duty for the latter. The ICC Statute predates the Celebici decision, however, and it remains to be seen whether the ICC itself will interpret "should have known" as applying only to circumstances where actual information is available to the superior.[69]

Whatever the scope of the duty, it is important to note that commanders cannot legitimately claim lack of knowledge when they are responsible for its absence. Ignorance procured by willful blindness or the deliberate failure to obtain necessary details is sufficient for criminal liability.[70] As in domestic criminal law, willful blindness is the functional equivalent of actual knowledge.[71]

The inquiry itself is objective and depends upon information available to the commander—whether or not he actually acquaints himself with it.[72] Commanders are charged with constructive knowledge of reports transmitted to their headquarters and are obligated to investigate facially deficient transmissions.[73] "Information" is broadly construed and can be acquired before, during, or after the events in question.[74] The closer offenses are geographically and temporally, the more likely that information about them will require action on the commander's part.[75] Even indicia of the propensity of subordinates to commit offenses can suffice. If the commander knows his underlings have been consuming alcohol or possess violent or unstable characters, he has "reason to know" of offenses committed by them.[76] This extends even beyond the scope of formal command, as superiors can be held liable for crimes within territory they control, even if the actual perpetrators fall outside their formal authority.[77]

Regardless of the circumstances under which a commander is obligated to know about his subordinates' conduct, the follow-on inquiry is identical—did he sufficiently discharge his duty to prevent or punish the offenses of his subordinates? The answer depends upon the "reasonableness" of the commander's response.

The Commander's Response

If the commander has effective control and becomes aware (or constructively aware) of crimes by his subordinates, he becomes liable for

those offenses if he fails to prevent the crimes or to punish them after the fact.[78] He must take all measures within his power that are necessary and reasonable under the circumstances.[79] The scope of his effective control is considered,[80] but the commander is not limited solely to measures authorized under his formal command authority.[81]

A commander's obligations thus vary depending upon the factual circumstances and his individual command situation.[82] A gross breach of duty is required,[83] which has been described as "a personal neglect amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence."[84] If the commander's preventative or punitive response deviates sufficiently from that of a reasonable commander in the same position, he can be held personally liable for the subordinates' offenses.[85]

COMMAND RESPONSIBILITY FOR GENOCIDE— THE THEORETICAL ANOMALY

The Crime of Genocide

Genocide is defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> a. Killing members of the group;
> b. Causing serious bodily or mental harm to members of the group;
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d. Imposing measures intended to prevent births within the group;
> e. Forcibly transferring children of the group to another group."[86]

Genocide thus covers a narrowly-defined range of prohibited conduct only when that conduct is intentionally undertaken. The strong trend in international jurisprudence is to interpret "intent" as strictly as possible. This standard imposes direct liability for genocide only when the prosecution establishes that it was the offender's actual purpose or aim to destroy the group. When such "purpose" cannot be established, the court will substitute a conviction for aiding and abetting genocide, even where the defendant knows or is virtually certain that the group would be destroyed in the ordinary course of events.[87]

Command responsibility for genocide is inconsistent in several respects with the understanding of the crime of genocide as a narrow offense of specific intent. There are multiple issues warranting critique, as the theoretical inconsistencies extend across: (i) the fault requirements war-

ranting conviction; (ii) the scope of the offender's pre-existing duty; (iii) inherent notions of personal responsibility and a general hostility in the criminal law to vicarious liability; and (iv) the proper labeling of the criminal conduct at issue.

Each of these will be discussed in turn.

Divergent Fault Requirements

The strongest basis for command responsibility is where a commander knows about his subordinates' offenses and deliberately refrains from preventing or punishing them. As noted previously, this head of command responsibility essentially amounts to a form of aiding and abetting. Culpability is even stronger if the commander intends for his subordinates to commit the offenses, which in many cases warrants direct liability as a principal (assuming a Type-1 or Type-2 JCE).

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Constructing liability based upon what a commander should have known is an entirely different proposition.[88] Culpability in that instance is driven by the commander's failure to become aware of his subordinates' crimes. This includes any conduct leading to his lack of awareness—getting drunk at the wrong time, taking an ill-advised holiday, or being woefully incompetent, careless, or distracted, for example. Liability is predicated on the failure to become aware of what a "reasonable" commander in similar circumstances would have perceived.

Similar considerations apply to the commander's response to the subordinates' crimes. As noted above, commanders must take all necessary and reasonable steps to prevent or punish the offenses. If the measures are objectively unreasonable or the commander fails to do what is "necessary," he becomes liable even if he honestly believed his response was sufficient. A commander could, for example, erroneously conclude that no offenses would be committed (and hence fail to respond beforehand) or be mistaken about the sufficiency of preventative measures.

These concerns are exacerbated in cases of "pure"[89] failures to punish offenses that a commander learns about after the fact.[90] The lens of hindsight could reveal that the commander's punishment was objectively insufficient under the circumstances. Here, even the legal fiction that the

commander somehow perpetrated the crimes fails, as the offenses already were a historical fact when he became aware of them.[91] Holding commanders liable for offenses committed in the past violates even the most fundamental notions of concurrence in criminal law—the requirement of temporal coincidence between *actus reus* and *mens rea.*[92]

These shaky grounds are undermined even further when the commander lacks knowledge but has "reason to know" about his subordinates' past offenses. In such cases, he is punished for previous crimes that he never even knew about. Liability here is built upon multiple layers of legal fiction—that a superior somehow is culpable for prior offenses committed by others of which he was unaware by failing to punish the commission of those offenses after the fact.[93]

Command responsibility stigmatizes direct perpetrators and negligent commanders equally and allows them to be convicted of the identical crime.

At a minimum, the commander's conduct must be judged under a gross negligence standard.[94] Given the serious criminal liability at stake, a commander is liable only when his failure to become aware of his subordinates' conduct or to respond to their crimes constitutes "a personal neglect amounting to a wanton, immoral disregard . . . amounting to acquiescence."[95] But even this standard is far below what is required under international law for serious offenses of specific intent, such as genocide.

Genocide via command responsibility is constructed from completely different conduct (not preventing or punishing genocide by others) and vastly lower personal fault (criminal negligence). Genocide can be attributed vicariously to commanders simply because the commander was grossly misinformed, misguided, or unaware. This makes little sense. Although gross negligence is blameworthy and certainly deserves criminal sanction,[96] there is an unmistakable difference between intentional conduct and culpable inadvertence.[97] Yet command responsibility stigmatizes direct perpetrators and negligent commanders equally and allows them to be convicted of the identical crime. Constructing liability in this manner is incongruous with genocide as a narrow offense predicated upon the specific intent to destroy a protected group.[98]

Scope of the Commander's Duty—De Facto *Command*

As explained above, command responsibility imposes criminal liability based upon two forms of hierarchy—the right and duty to control (*de*

jure command) and the practical ability to control (*de facto* command). The latter is premised exclusively upon the authority that a commander *could have* exercised, independent of whether he voluntarily put himself into a superior position.

The imposition of a general duty to prevent crime is not unheard of, and such a duty can be triggered spontaneously by circumstances. French law, for example, imposes a general obligation to prevent certain crimes.[99] Police officers have similar obligations under English law.[100] But international liability via *de facto* command is broader in two respects. First, when an offender fails to discharge such a duty under domestic law, he is convicted for that dereliction—not for the offense he failed to prevent.[101] The command responsibility doctrine takes the opposite approach and convicts commanders for the un-prevented offense, artificially treating them as perpetrators.

Second, domestic offenses require a willful breach of duty, whereas command responsibility can be premised upon negligence.[102] The superior is responsible even for failing to realize that he should act in the first place. As noted previously, whether *de facto* control exists over "subordinates" is a question of fact.[103] The duty to control thus stems from the *ability* to control. The international criminal tribunals appear to impose no mental state on this element and apparently would hold commanders liable for the failure to control "subordinates" even if they mistakenly concluded that they had no power to do so.[104] This contrasts with analogous domestic jurisprudence, which presupposes an awareness of the duty by requiring a willful breach.[105]

At a minimum, there should be a requirement that commanders have actual knowledge of their effective control (and hence an awareness of the duty to act) or that they be grossly negligent in concluding that no such control exists. As noted previously, the commander's knowledge of subordinates' crimes and the reasonableness of his response already are governed by principles of gross negligence. It is sensible to impose similar parameters on the existence of the duty in the first place, particularly where liability is being constructed for such serious crimes.

Personal Fault and Vicarious Criminal Responsibility

Vicarious liability—holding one person responsible for the conduct of another—has long been disfavored in domestic criminal law, which typically refrains from imposing such responsibility for serious crimes.[106] As noted previously, there are limited exceptions where the offender's personal culpability is high.[107] In most cases, however, vicarious liability is limited to regulatory and public nuisance offenses.[108]

Criminal law is premised upon personal conduct amounting to poor moral choice. To be sure, there are instances where offenses derive from the fortuity of a "bad luck" result, where an offender is held liable for causing harm even where his mental state fails to correspond. Many domestic systems impose liability for manslaughter, for example, when deaths arise from unlawful acts that present some objective risk of injury, even if the offender had no wish for the victim to die and the death itself was unforeseeable.[109]

Imposing liability based upon injurious results alone is controversial.[110] But even when precise correlation between the offender's mental state and the resulting injury is relaxed, some requirement of personal blameworthiness remains. In essence, the offender creates his own "bad luck" result.[111] In contrast, it is "ludicrous to make the shirker [of a duty] a party to the crimes involved for which he has played no part in their commission. He is to be punished for an omission to prevent harm; he is not to be artificially treated as its cause."[112]

As applied to genocide, the command responsibility doctrine allows a wide departure from the personal fault principle in the context of one of the world's most serious crimes. Positing that a commander *perpetrated* genocide by *not preventing* genocide by others is a legal fiction constructed almost exclusively from results, not personal culpability. As outlined above, a conviction for genocide in such cases vastly overstates the actual conduct and degree of fault at issue.[113]

Representative Labeling[114]

The various methodologies through which international offenders can be held criminally responsible provide many charging options to prosecuting authorities. Each of these alternatives generally carries its own label, which ought to communicate both the result that the offender caused and his mental state at the time he caused it.[115] Broadly stated, the fair labeling principle requires crimes to fairly represent both the injury[116] and the wrongdoing at issue—what the offender did and what he meant to do.[117] Although not an element of any crime per se, fair labeling nevertheless is viewed as a fundamental principle of criminal law:[118] that "justice not only must be done, but must be *seen* to be done."[119]

Labels reveal the story of an offender's criminality.[120] The more specific the label, the more we know—from the label alone—about his conduct. This requires sensible delineation between broad and narrow offenses. A proper label reflects both the *essence* and the *totality* of the criminal conduct at issue. It is an amalgam of several factors: the interest

invaded (bodily integrity, or property interests); the gravity of harm (taking human life, or destroying a shed); the mechanism of injury (stealing versus swindling, or arson versus vandalism); and the offender's mental state in connection with his conduct.[121] The latter is critical because offenses usually are "calibrated" to individual blameworthiness.[122]

Labeling relates to punishment but is not the sole determinant of an ultimate penalty. If punishment must "fit the crime," murder clearly deserves greater sanction than spitting on the sidewalk. But this is more a question of hierarchy and comparative seriousness among crimes. Although the labels of offenses typically are paired with sentencing ranges, the link between them is more rhetorical than substantive. Criminals are punished not for the label itself, but rather for the transgression of the societal and legal norms that the label represents.[123]

If punishment must "fit the crime," murder clearly deserves greater sanction than spitting on the sidewalk.

The principal function of labeling, then, is expression.[124] Labels stigmatize the offender for his culpable conduct and convey the "nature of his transgression" to the public.[125] They express society's revulsion at the transgression of certain shared (and important) norms and values.[126] The label of an offense constitutes an indelible historical record of what the offender did. The conviction ensures that the offender's conduct is not forgotten[127] and that the "precise nature" of the criminal conduct at issue can be ascertained later from the label itself.[128]

The strongest ground for criminal conviction lies with perpetrators—those who actually commit crimes, either individually or through a JCE. The offender is convicted of the offense itself (genocide, persecution, etc.), which reflects that he engaged in prohibited conduct with the requisite mental state. The next level of responsibility is secondary liability, where he knowingly facilitates specific offenses by another. Aiders and abetters are overtly convicted as such (e.g., "aiding and abetting genocide"),[129] and their less culpable participation and mental state are reflected in a separate label.[130]

Command responsibility is much further removed from the traditional grounds of criminal responsibility because it constructs liability when the offender lacks the requisite mental state and does not even participate in the conduct elements of an offense. The doctrine holds commanders directly liable for the conduct and *mens rea* of others.[131] But unlike secondary offenses, there is no concomitant label denoting the

commander's lesser fault or reflecting the attribution of the subordinate's conduct. Negligent commanders are stigmatized equally with perpetrators even though their conduct and mental state are far less culpable. When applied to a serious international crime like genocide, which covers only a narrow range of underlying conduct accomplished with specific intent,[132] such labeling makes little sense.[133]

[In command responsibility,] there is no concomitant label detailing the commander's lesser fault or reflecting the attribution of the subordinate's conduct.

CONCLUSION

The very nature of international crimes makes some form of command responsibility an essential tool in the prosecutorial arsenal. Indeed, command responsibility often is justified by naked utilitarian necessity.[134] But the legitimacy of the existing structure of the doctrine is open to debate on multiple grounds, not the least of which is the ironic departure from ordinary measures of fault and just deserts in an international context overtly "inspired by humanistic concerns."[135] It also comes into direct tension with the principles of fair labeling because it contemplates equally-stigmatizing convictions for the most serious of crimes based on widely divergent conduct and culpability.

The divergent fault elements involved in command responsibility would be better reflected in a separate label that communicates the true measure of the commander's fault in connection with his subordinates' crimes. A more precise label would avoid conflating the constructed liability of commanders with that of actual perpetrators. Such an offense might be denoted "dereliction of duty with respect to genocide" or something similar. Whatever the label, focusing the revised offense on the commander's actual fault—the dereliction of duty—would better emphasize the proper nature and degree of culpability at issue. It also would avoid the confusion created when a superior's negligence is conflated with direct liability for genocide—a narrowly-defined offense that covers limited acts committed with the highest degree of specific intent.[136]

The mechanics of actually drafting and implementing such a separate offense obviously raise many complex issues, the analysis and resolution of which are not possible here. What is clear, however, is that the doctrine of command responsibility creates anomalous results when applied to serious international crimes of specific intent. That anomaly ought to be revisited. ■

ENDNOTES

1 Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 764 (Dec. 1, 2003) [hereinafter Kajelijeli (TC)]; Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Adopted by the International Law Commission at its Forty-eighth Session, in Report of the International Law Commission on the Work of Its Forty-eighth Session, U.N. G.A.O.R., 51st Sess., Supp. No. 10, at 87, art. 2(3)(b), cmt. ¶ 7, U.N. Doc. A/51/10 (1996) [hereinafter [1996] Draft Code].

2 For additional discussion, *see* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals,* 37 TEX. J. INT'L L. 231, 263–64 (2002).

3 The term "accomplice" sometimes describes JCE perpetrators as well as secondary participants. Prosecutor v. Krnojelac, Case No. ICTY-97-25-A, Appeals Judgment, ¶ 70 (Sep. 17, 2003). To maintain clarity, "co-perpetrator" herein refers to JCE participants and "accomplice" denotes secondary participants and accessories.

4 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 181–82 (Oxford Univ. Press 2003) [hereinafter CASSESE, ICL].

5 Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, ¶ 466 (Dec. 13, 2004) [hereinafter Ntakirutimana (AC)].

6 *Id.*

7 Prosecutor v. Vasiljevic, Case No. ICTY-98-32-A, Appeals Judgment, ¶ 100 (Feb. 25, 2004) [hereinafter Vasiljevic (AC)]. Membership alone in a criminal enterprise or organization is insufficient. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 263 (Sep. 1, 2004) [hereinafter Brdjanin (TC)].

8 Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeals Judgment, ¶ 260 (May 20, 2005) [hereinafter Semanza (AC)].

9 Vasiljevic (AC), *supra* note 7, ¶ ¶ 95, 102.

10 Prosecutor v. Ohlendorf, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1 (U.S. Mil. Trib. at Nuremberg—Case No. 9) (1947).

11 *United States v. Klein,* I LAW REPORTS OF TRIALS OF WAR CRIMINALS COMPILED BY THE UNITED NATIONS WAR CRIMES COMMISSION 46 (U.S.M.T. 1945) (W.S. Hein & Co. 1997) ("production line of death" involving an administrator, a doctor, three nurses, clerical employees who falsified death records, and a caretaker who disposed of the bodies); CASSESE, ICL, *supra* note 4, at 182–85 (discussing case in additional detail).

12 CASSESE, ICL, *supra* note 4, at 181.

13 Vasiljevic (AC), *supra* note 7, ¶ ¶ 100–101. Such intent can be inferred from a position of authority in the system. Prosecutor v. Tadic, Case No. ICTY-94-1-A, Appeals Judgment, ¶ 203 (Jul. 15, 1999) [hereinafter Tadic (AC)—Merits].

14 Ntakirutimana (AC), *supra* note 5, ¶ ¶ 466–67.

15 In varying circumstances, depending on the crime at issue and the forum trying the case, international criminal law also provides liability when, for reasons independent of the offender, the crime itself remains unrealized. The inchoate offenses covering this contingency—attempts, conspiracy, and incitement—fall beyond the scope of analysis here and will not be discussed further.

16 ICTY Statute art. 7(1). The ICC statute is similar. *See* ICC Statute art. 25(3)(a)-(c).

17 Kajelijeli (TC), *supra* note 1, ¶ 761. Unlike conspiracy, which is premised upon a criminal agreement, planning can be accomplished by one person.

18 Prosecutor v. Kordic & Cerkez, Case No. ICTY-95-14/2-A, Appeals Judgment, ¶ 27 (Dec. 17, 2004) [hereinafter Kordic & Cerkez (AC)]. Unlike incitement, instigation need be neither direct nor public.

19 *Id.* at ¶ 28. Ordering is an abuse of authority involving twin wrongs: the failure to ensure lawful conduct by subordinates and the separate breach of the obligation to exercise authority lawfully. See [1996] Draft Code, *supra* note 1, art. 2(3)(b), cmt. ¶ 8.

20 Kordic & Cerkez (AC), *supra* note 18, ¶ 29.

21 *Id.* at ¶ ¶ 30–32.

22 *Id.*

23 Tadic (AC)—Merits, *supra* note 13, ¶ 229.

24 This includes culpable omissions. *See* Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 47 (Jul. 29, 2004) [hereinafter Blaskic (AC)]. Mere presence at the scene is insufficient for liability, *see* Brdjanin (TC), *supra* note 7, ¶ 271, but can suffice when cumulated with additional conduct. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 693 (Sep. 2, 1998) (presence at scene plus prior encouraging behavior).

25 Prosecutor v. Brdjanin, Case No. IT-99-36-T, Interlocutory Appeal, ¶ 7 (Mar. 19, 2004) [hereinafter Brdjanin (Interlocutory Appeal—AC)]. The ICC Statute is broader and punishes aiding and abetting when an offense is attempted as well as when it is committed. *See* ICC Statute art. 25(3)(c).

26 Prosecutor v. Krstic, Case No. ICTY-98-33-A, Appeals Judgment, ¶ 143 (Apr. 19, 2004) [hereinafter Krstic (AC)]. This reflects the growing movement away from treating secondary liability as derivative of P's fault in favor of "the increasing trend of determining each party's liability separately." *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW, 4th Ed. 443 (Oxford Univ. Press 2003).

27 Tadic (Merits—AC), *supra* note 13, ¶ 229. This principle is well rooted in domestic criminal law. In *State v. Tally* 15 So. 722 (Ala. 1894), a judge was impeached for intercepting a telegram warning that the judge's brothers in law planned to kill their sister's paramour. The judge was found guilty of complicity in the murder, even through the brothers in law were unaware of his assistance. *Id.* at 741.

28 *Regina v. Maxwell*, 68 Cr. App. R. 128 (H.L. 1979).

29 Blaskic (AC), *supra* note 24, ¶ 50. If P tells A he wishes to "teach V a lesson" and A hands P a gun, A could be held liable for aiding and abetting murder, assault and battery, wounding, transporting a concealed weapon, etc.

30 Brdjanin (Interlocutory Appeal—AC), *supra* note 25, ¶ 6 (to aid and abet genocide, for example, A must reasonably foresee that the prohibited acts comprising the offense would be committed with genocidal intent).

31 *Regina v. Gamble* [1959] 1 Q.B. 11, 23 ("[A]n indifference to the result of the crime does not of itself [negate] abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor."). Some domestic systems impose a higher standard. *See, e.g.*, Model Penal Code § 2.06(3)(a) (Proposed Official Draft 1962) (requiring actual purpose to assist).

32 *Regina v. Cunningham*, 73 Cr. App. R. 253 (H.L. 1981).

33 MODEL PENAL CODE § 210.2(1)(b).

34 Professor Horder calls this the "malice principle"—that the wrongful infringement of another's personal interests justifies punishment for the consequences of that infringement, regardless of whether the offender intended or even foresaw that degree of injury. Jeremy Horder, *Two Histories and Four Hidden Principles*, 113 L.Q.R. 95, 96, 100–03 (1997).

35 *See, e.g.*, Prosecutor v. Milosevic, Case No. ICTY-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ ¶ 246, 248 (Jun. 16, 2004) [hereinafter Milosevic (Motion to Acquit—TC)]. The theory is recognized in domestic law as well. *See, e.g., Regina v. Powell and Daniels* [1998] 1 Cr. App. R. 261 (H.L.) (upholding murder conviction where killing during a drug deal was foreseeable); *Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946) (holding co-conspirators liable for *foreseeable* offenses committed in furtherance of the conspiracy).

36 A.P. SIMESTER AND G.R. SULLIVAN, CRIMINAL LAW THEORY AND DOCTRINE, 2nd Ed. 219 (Hart 2003).

37 *Id.* at 224–25.

38 *Id.* at 225–26.

39 Milosevic (Motion to Acquit—TC), *supra* note 35, ¶ ¶ 246, 248. A similar analysis applies to foreseeable offenses committed outside the scope of a "system" of ill treatment in a type-2 JCE. *See* Steven Powles, *Joint Criminal Enterprise—Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 OXFORD J. INT'L CRIM. JUSTICE 606, 609-10 (2004).

40 Vasiljevic (AC), *supra* note 7, ¶ ¶ 96–99. This includes, for example, deaths that occur when citizens are forcibly removed at gunpoint. *Id.*

41 SIMESTER & SULLIVAN, *supra* note 36, at 219.

42 Tadic (Merits—AC), *supra* note 13, ¶ 220.

43 Prosecutor v. Kvocka, Case No. ICTY-98-30-30/1-A, Appeals Judgment, ¶ 86 (Feb. 28, 2005) (emphasis added) [hereinafter Kvocka (AC)].

44 Vasiljevic (AC), *supra* note 7, ¶ ¶ 96–99, 100–101.

45 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW, 3rd Ed. 272 (Oxford Univ. Press 1999).

46 MODEL PENAL CODE § 210.2(1)(b).

47 *State v. Maldonado*, 645 A.2d 1165, 1170 (N.J. 1994) (accused is liable "notwithstanding that he did not purposefully, knowingly, recklessly, or negligently" cause the death).

48 *See, e.g.,* Milosevic (Motion to Acquit—TC), *supra* note 35, ¶ ¶ 246, 248; *Regina v. Powell and Daniels* [1998] 1 Cr. App. R. 261 (H.L.) [hereinafter *Powell and Daniels*]; Pinkerton, *supra* note 35, at 646–48 (holding co-conspirators liable for foreseeable offenses committed in furtherance of the conspiracy).

49 *Powell and Daniels*, *supra* note 48, at 268.

50 It is only fair to notify an accused of the potential application of the doctrine, however. *See* Prosecutor v. Krnojelac, Case No. ICTY-97-25-T, Judgment, ¶ 86 (Mar. 15, 2002) [hereinafter Krnojelac (TC)] (extended JCE must be pleaded explicitly in the indictment).

51 Krstic (AC), *supra* note 26, ¶ 268. The analysis herein would apply *mutatis mutandis* to other specific intent crimes such as the crime against humanity of persecution. *See* Prosecutor v. Vasiljevic, Case No. ICTY-98-32-T, Judgment, ¶ 248 (Nov. 29, 2002).

52 The criminal responsibility at issue here is distinct from the framework of the military discipline process.

53 An accused cannot be convicted both directly and as a commander for the same course of conduct (e.g., for ordering killings and also for not preventing them as a commander). *See* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Appeals Judgment, ¶ 81 (May 23, 2005) [hereinafter Kajelijeli (AC)]. This makes sense—there is no need to construct liability for commanders who are co-perpetrators or accessories. Abuse of command is an aggravating factor in sentencing, however. *Id.*

54 Prosecutor v. Blagojevic and Jokic, Case No. ICTY-02-60-T, Judgment, ¶ 790 (Jan, 17, 2005) [hereinafter Blagojevic (TC)].

55 The concepts can overlap—as, for example, with a respected general who influences troops outside his formal command.

56 Blagojevic (TC), *supra* note 54, ¶ 791. *De jure* authority creates a rebuttable presumption of effective control that the commander must disprove. Prosecutor v. Delalic, Case No. ICTY-96-21-A, Appeals Judgment, ¶ 197 (Feb. 20, 2001) [hereinafter Celebici (AC)].

57 Blagojevic (TC), *supra* note 54, ¶ 791. This limits criminal responsibility "for the actions of troops which are recalcitrant, remote, subject to another chain of command, or incommunicado." *See* Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 163 (2000).

58 Blaskic (AC), *supra* note 24, ¶ ¶ 67, 69 ("The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.").

59 Celebici (AC), *supra* note 56, ¶ 256.

60 Actual knowledge will not be presumed, but can be established by circumstantial evidence. Prosecutor v. Delalic, Case No. ICTY-96-21-T, Judgment, ¶ 386 (Nov. 16, 1998) [hereinafter Celebici (TC)]. Circumstantial evidence that a commander "must have known" of offenses by subordinates includes the number, type, and scope of illegal acts, the number and type of troops and logistics involved, the widespread nature of the offenses and the speed with which they are carried out, the officers and staff involved, the methods by which the acts were committed, and the location of the commander at the time. *See* Brdjanin (TC), *supra* note 7, ¶ 275 n. 736.

61 The requirement that an accessory's omission have a "substantial impact" on the principal's offense appears subsumed within the mandate that a commander must exercise "effective control" over subordinates.

62 Blaskic (AC), *supra* note 24, ¶ 62; Celebici (AC), *supra* note 56, ¶ 238.

63 Celebici (AC), *supra* note 56, ¶ 226 ("[A]lthough a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.").

64 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 86(2) (1979) [hereinafter Additional Protocol I] ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors . . . if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."). *See* also [1996] Draft Code, *supra* note 1, art. 6, cmt. 5 ("The phrase 'had reason to know' is taken from the statutes of the *ad hoc* tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude,' which is used in Additional Protocol I.").

65 For a critique of the Appeals Chamber's analysis, *see* K.M.F. Keith, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 LEIDEN J. INT'L L. 617, 622-32 (2001).

66 *See, e.g.*, CASSESE, ICL, *supra* note 4, at 205; *United States v. Toyoda*, Judgment 4999, 5006 (U.S. Mil. Trib.—General Headquarters, Supreme Commander for the Allied Forces) (1949) (excerpted pages from judgment on file with author, courtesy of R.J. Pritchard) ("If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain."); *In re Yamashita*, 327 U.S. 1, 24-25 (1946) (failure to prevent atrocities in the Philippines). But *see id.* at 51-52 (Rutledge, J. dissenting) ("[V]agueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offense, whether that was [a] willful, informed, and intentional omission to restrain and control troops known by [the] petitioner to be committing crimes or was only a negligent failure on his part to discover this and take whatever measures he then could to stop the conduct.").

67 ICC Statute art. 28(1)(a).

68 *Id.* at art. 28(1)(b). The standard is higher in three respects: (1) the limited scope of the offender's obligation only to persons and activities within his effective responsibility; (2) the requirement of conscious disregard; and (3) the heightened specificity of the information itself.

69 The ICC's divergent text weighs against such a restrictive interpretation, however.

70 Blaskic (AC), *supra* note 24, ¶ 406.

71 *See* Tadic (Merits—TC), *supra* note 13, ¶ 657; MODEL PENAL CODE § 2.02(7) (knowledge is established by the offender's awareness of a high probability of a particular fact's existence "unless he actually believes that it does not exist.").

72 Celebici (AC), *supra* note 56, ¶ 239.

73 *Prosecutor v. List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 759, 1230, 1271 (U.S. Mil. Trib. at Nuremberg—Case No. 7) (1948) [hereinafter *Hostages* Case].

74 Celebici (AC), *supra* note 56, ¶ ¶ 238–39.

75 Brdjanin (TC), *supra* note 7, ¶ 275 n. 736.

76 Celebici (AC), *supra* note 56, ¶ 238.

77 *See, e.g., Hostages* Case, *supra* note 73, at 1272; *Prosecutor v. von Leeb*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 3, 487 (U.S. Mil. Trib. at Nuremberg—Case No. 12) (1948) [hereinafter *High Command* Case].

78 Celebici (AC), *supra* note 56, ¶ 198. Prevention and punishment are separate obligations. Commanders cannot exculpate themselves from a culpable failure to prevent simply by punishing after the fact. Blaskic (AC), *supra* note 24, ¶ 85.

79 Blagojevic (TC), *supra* note 54, ¶ 793.

80 Blaskic (AC), *supra* note 24, ¶ 72. In some circumstances, it is sufficient to report the offenses to other competent authorities. Blagojevic (TC), *supra* note 54, ¶ 793.

81 Celebici (TC), *supra* note 60, ¶ 395. If no other option is available, he may have to resign. Prosecutor v. Simic, Case No. ICTY-95-9-T, Judgment, ¶10 (Oct. 17, 2003) (Lindholm, J. dissenting).

82 Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 48 (Jun, 7, 2001).

83 Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeals Judgment, ¶ 36 (Jul. 3, 2002) [hereinafter Bagilishema (AC)].

84 *High Command* Case, *supra* note 77, at 543-44.

85 Bagilishema (AC), *supra* note 83, ¶ 35 (The commander must fail "to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.").

86 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. II.

87 Krstic (AC), *supra* note 26, ¶ 268.

88 Constructive liability itself is controversial, although a detailed discussion of this issue is beyond the scope of this writing. For additional analysis, *see* SIMESTER & SULLIVAN, *supra* note 36, at 167-91.

89 Where it amounts to sanctioning or encouraging criminal conduct beforehand, the failure to punish may well constitute direct perpetration in a JCE or secondary participation. As noted above, these grounds of liability are entirely distinct from criminal responsibility predicated upon the failure to prevent crimes under the command responsibility doctrine.

90 Presumably, commanders become obligated to punish offenses whenever they discover them. Theoretically, commanders even could be held liable for "inherited" offenses committed by subordinates before they assumed command if they subsequently fail to punish the offenders. This obligation is temporally indefinite, as there are no statutory limitations on the prosecution of genocide, crimes against humanity, or war crimes. *See, e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 Nov 1968, U.N. Doc. A/7218, art. 1.

91 The commander could not have known nor had "reason to know" about the crimes beforehand. Otherwise, he would be liable for failure to prevent in the first place. At most, the fault at issue here amounts to a tacit ratification of the offenses after the fact.

92 Simester & Sullivan's classic example clarifies the principle. D intends to murder V and drives to V's house. On the way, he accidentally strikes a bicyclist with his car, who turns out to be V. D shoots V through the heart, unaware that V died in the collision. D is not liable for murder. When D actually caused V's death, he lacked the requisite *mens rea.* When he had *mens rea,* there was no *actus reus* because D was already dead. *See* SIMESTER & SULLIVAN, *supra* note 36, at 161. Limited exceptions to the doctrine—when death occurs in a different mode as part of the same transaction, *see Thalbo Meli* [1954] 1 All E.R. 373 (P.C.), or where earlier conduct when the offender had *mens rea* contributed to the death, *see* SIMESTER & SULLIVAN, *supra* note 36, at 164 (collecting cases)—do not apply here.

93 The ICTY Appeals Chamber split 3-2 in holding such "inherited" command liability impermissible under customary international law. *See* Prosecutor v. Hadzihasanovic, Case No. ICTY-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 51 (Jul. 16, 2003) (majority opinion holding obligations to prevent and punish "coterminous with the commander's tenure") and ¶ ¶ 33–44 (Hunt, J. dissenting) (dissenting opinion suggesting that such liability was permissible).

94 Bagilishema (AC), *supra* note 83, ¶ 36.

95 *High Command* Case, *supra* note 77, at 543–44.

96 Under domestic law, gross negligence typically supports (at most) conviction for "involuntary" manslaughter, not murder. *See, e.g.,* Adomako [1995] 1 A.C. 171 (H.L.). Even that premise of liability for homicide is controversial. *See* ASHWORTH, PRINCIPLES, *supra* note 45, at 306–09 (discussing debate).

97 As Justice Holmes famously remarked, "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, THE COMMON LAW 3 (Dover 1991) (1881).

98 Professor Schabas, for example, concurs in punishing "negligent execution of duties," but notes that "[i]t is considerably more doubtful . . . whether negligent behavior in a failure to exercise command responsibility can be reconciled with a crime requiring the highest level of intent. Logically, it is impossible to commit a crime of intent by negligence." WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 312 (Cambridge Univ. Press 2000).

99 *Code Penal 1997-98* art. 223–6 [1] (Dixieme Ed. 1997), *reprinted in* Vol. I, THE AMERICAN SERIES OF FOREIGN PENAL CODES (FRANCE) (Edward A. Tomlinson, trans. 1999) [hereinafter Code Penal (France)].

100 *Regina v. Dytham,* 69 Cr. App. R. 387 (C.A. 1979).

101 *Id.* at 394 (fining constable £150 for deliberately failing to prevent a violent assault where V was kicked to death); Brian Hogan, *Omissions and the Duty Myth,* in CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH 86-87 (Peter Smith, ed. Butterworths 1987) (the law should punish the offender for his dereliction and "not artificially treat him as a cause of the event he has not brought about by his conduct."). Such cases of domestic "moral complicity" in criminal offenses are subject to less serious punishment. *See* Andrew Ashworth and Elizabeth Steiner, *Criminal Omissions and public duties; the French experience,* 10 LEGAL STUD. 153, 162 (1990).

102 *Compare* Code Penal (France), *supra* note 99, art. 223–6 [1] (*willfully abstaining* from preventing felony or misdemeanor) and *Dytham, supra* note 100, at 394 (C.A. 1979) (same) *with* ICTY Statute art. 7(3) (offender *should have known* subordinates were committing offenses), ICTR Statute art. 6(3) (same) and ICC Statute art. 28(1) (same).

103 Blaskic (AC), *supra* note 24, ¶ ¶ 67, 69 (effective control is "more a matter of evidence than of substantive law").

104 The other side of this issue is when a commander believes that he has effective control and deliberately refrains from preventing or punishing when in reality he had no material ability to do so (e.g., if his subordinates would have ignored any orders to stop). Presumably, he could not be held liable as a superior because of the factual absence of effective control. But he should be liable for an attempt. He had the requisite *mens rea* and had things been as he believed them to be, his omission would have facilitated the un-prevented offenses by his subordinates with the requisite mental state. The factual impossibility preventing this culpable omission from impacting the final result should not preclude liability.

105 *See, e.g.,* Ashworth & Steiner, *supra* note 101, at 158 (mistake of fact and unawareness of peril exculpate under French law); *Lambert v. California,* 355 U.S. 225, 229–30 (1957) (given heavy criminal penalties, due process requires actual knowledge of the duty to register as a felon before the accused could be convicted for failure to comply).

106 *See, e.g., Commonwealth v. Kocwara,* 155 A.2d 825, 830 (Pa. 1960) ("A man's liability cannot rest on so frail a reed as whether his employee will commit a mistake in judgment. . . . It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes"); *Regina v. Huggins,* 93 E.R. 915, 917 (H.L. 1730) ("[I]n criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts and stand or fall by their own behavior.")

107 In such cases the offender is advertently reckless to the risk of "collateral" offenses occurring. *See* MODEL PENAL CODE § 210.2(1)(b). His mental state is sufficient to hold him liable even for such serious offenses as murder. It is not a wide departure from ordinary principles of criminal responsibility to likewise hold him liable for the foreseeable result of reckless participation in a Type-1 or Type-2 JCE.

108 SIMESTER & SULLIVAN, *supra* note 36, at 243–62 (discussing vicarious liability and collecting cases).

109 *See, e.g., Regina v. Goodfellow*, 83 Cr. App. R. 23, 27 (H.L. 1986). A corollary is that one takes his victim as he finds him. *See Regina v. Blaue*, 3 All E.R. 446, 450 (C.A. 1975) (convicting an offender of manslaughter instead of wounding for stabbing a Jehovah's Witness, who subsequently refused life-saving medical treatment).

110 Horder, *Two Histories*, *supra* note 34, at 100–03; ASHWORTH, PRINCIPLES, *supra* note 45, at 306–09.

111 Jeremy Horder, *A Critique of the Correspondence Principle*, [1995] CRIM. L. REV. 759, 764–65 ("By doing something intended to harm V, D changes her own normative position, making the bad luck of V's serious injury her (D's) own. There is thus nothing inappropriate in holding D criminally liable for the serious injury actually inflicted, if there was any risk of such injury resulting from D's intended conduct.").

112 Hogan, *supra* note 101, at 86.

113 The grounds of liability are more legitimate where the commander intentionally or knowingly fails to prevent the offenses. As noted above, such omissions already can be punished as a form of direct or secondary responsibility, irrespective of the application of the command responsibility doctrine.

114 Limited aspects of the following discussion appear in other writing by the author and are drawn upon here to make different points about fair labeling. *Cf.* David Nersessian, *Comparative Approaches to Punishing Hate—The Intersection of Genocide and Crimes Against Humanity* 67–80 (manuscript on file with author).

115 Simester & Sullivan, *supra* note 36, at 191.

116 "Injury" in criminal law includes potential harm and actual injury. *See* Barry Mitchell, *Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labeling*, 64 MODERN L. REV. 393, 405 n. 2 (2001).

117 Glanville Williams, *Convictions and Fair Labeling*, 42 CAMBRIDGE L.J. 85, 85–86 (1983). It also is called "representative labeling." Andrew Ashworth, *The elasticity of mens rea*, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS 49 (C.H.F. Tapper, ed. Butterworths 1981).

118 Williams, *supra* note 117, at 49. *See also A New Homicide Act for England and Wales?*, Law Commission Consultation Paper No. 177 ¶ ¶ 1.45–1.47 (2006) (noting application of fair labeling principles in connection with proposed revisions to English criminal law).

119 Simester & Sullivan, *supra* note 36, at 44.

120 Mitchell, *supra* note 116, at 405 (labeling "attempts to encapsulate in a very few words D's wrongful behavior.").

121 Ashworth, *Elasticity*, *supra* note 117, at 54–55 (discussing modes of offenses and labeling).

122 JAMES B JACOBS AND KIMBERLY POTTER, HATE CRIMES—CRIMINAL LAW AND IDENTITY POLITICS 79 (Oxford Univ. Press 1998). *See* also Williams, *supra* note 117, at 89 (offender must "be punished according to his *mens rea* and not solely in accordance with the degree of injury he inflicted . . . ."). Indeed, with inchoate offenses, there is no tangible injury at all—criminal sanction arises as a function of the offender's mental state and the potential for harm.

123 The proxy is incomplete proxy at best. Punishment increases and decreases independent of the offense itself, depending on whether mitigating factors (e.g., remorse, cooperation with investigatory authorities, guilty plea, youth, infirmity, etc.) or aggravating factors (abusing a position of authority, nefarious motive, especially vulnerable victims, etc.) are present. *See* Prosecutor v. Babic, Case No. ICTY-03-72-S, Sentencing Judgment, ¶ 47 (Jun. 29, 2004). *See* also Kajelijeli (AC), *supra* note 53, ¶ ¶ 320–24 (reducing sentence from life imprisonment to 45 years to remedy violations of the offender's rights during pre-trial detention).

124 *See, e.g.*, John Steele, *A Seal Pressed in the hot wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J. LAW & RELIGION 35, 40 (2001) (describing the expressive theory of punishment).

125 SIMESTER & SULLIVAN, *supra* note 36, at 45.

126 FREDERICK M. LAWRENCE, PUNISHING HATE 163 (Harvard Univ. Press 1999) ("Criminal punishment carries with it social disapproval, resentment, and indignation . . . [and] inherently stigmatizes the offender.").

127 "Who can but agree—forgetting makes a mockery of the dead." Antonio Cassese, *Reflections on International Criminal Justice,* 61 MODERN L. Rev. 1, 3 (1998).

128 Ashworth, *Elasticity, supra* note 117, at 56. *See* also Prosecutor v. Deronjic, Case No. ICTY-02-61-S, Sentencing Judgment, ¶ 133 (Mar. 30, 2004) (international tribunal must "search for and record, as far as possible, the truth of what happened . . . ." in addition to bringing justice to the victims and survivors).

129 *See, e.g.,* Krstic (AC), *supra* note 26, ¶ 268 (vacating genocide conviction and substituting aiding and abetting).

130 *See Krnojelac (TC), supra* note 50, ¶ 75 ("The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender."). Punishment also is less harsh for accessories. *See* Krstic (AC), *supra* note 26, at ¶ 275 (reducing sentence from 46 to 35 years). *See* also Semanza (AC), *supra* note 8, ¶ 389 (increasing sentence from 15 years to 25 to reflect substitution of conviction for ordering genocide in place of conviction for complicity).

131 Brdjanin (Interlocutory Appeal—AC), *supra* note 25, ¶ 5.

132 Krstic (AC), *supra* note 26, ¶ 134.

133 *See, e.g.,* Law Commission Paper, *supra* note 118, ¶ 2.5 ("Morally significant labels . . . should not be used to cover such a broad range of conduct that, as it were, their currency becomes debased, and the label becomes unfair or lacking in proper meaning.").

134 *See, e.g.,* Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War,* 86 CAL. L. REV. 944, 1040 (1998) (breadth of liability for "atrocity by connivance," while problematic, "is necessary to prevent superiors from slipping between the cracks of criminal liability by insulating themselves from detailed knowledge of their subordinates criminal activities."). The broader empirical justification of all forms of vicarious liability is more questionable, however. *See* NICOLA LACEY, CELIA WELLS, AND OLIVER QUICK, RECONSTRUCTING CRIMINAL LAW, 3rd Ed. 67–68 (Lexis-Nexis 2003).

135 Mirjan Damaska, *The Shadow Side of Command Responsibility,* 49 AM. J. COMP. L. 455, 456, 471–74 (2001) (analyzing deterrence, evidentiary, and practical justifications for command responsibility).

136 *Cf.* CASSESE, ICL, *supra* note 4, 206. There already is long-standing public confusion over the definition of the offense itself. It has been misapplied, for example, to "[so-called] 'race mixing' (integration of blacks and non-blacks); drug distribution; methadone programs; and the practice of birth control and abortions among Third World people; sterilization and 'Mississippi appendectomies' (tubal ligations and hysterectomies); medical treatment of Catholics; and the closing of synagogues in the Soviet Union." *See* Jack N. Porter, *Introduction,* in GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY 2 (Jack N. Porter, ed., Press of America 1982).