# COMPLICITY, NEGLIGENCE, AND COMMAND RESPONSIBILITY

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Darryl Robinson's book is a remarkable combination of theoretical insights and doctrinal clarifications.[1] It is certainly one of the most original books ever published on international criminal justice; every page contains valuable and surprising insights. Robinson defends a highly original methodology that relies on coherentism rather than foundational, a priori analysis.[2] The result is a study that is as philosophically sound as it is doctrinally relevant. In this brief essay, I offer a few comments inspired by his arguments about the causation and mental element requirements for command responsibility under international law.

## I. CAUSATION AND COMMAND RESPONSIBILITY

Although Robinson discusses many doctrinal controversies, he reserves his greatest intellectual firepower for the doctrine of command responsibility—a doctrine that has animated his concern previously.[3] In his book, Robinson correctly notes that the jurisprudence of the ad hoc tribunals has gotten hopelessly muddled,[4] and he bravely charts a way forward with a simple solution.[5]

The problem, briefly, is that command responsibility often includes liability for failure to punish past offenses.[6] It is impossible that a pure failure to punish—which

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1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 63, 92–96, 101–06 (2020).

2. *Id.* at 101 ("Foundationalism is the more traditional understanding of justification in which each of our beliefs should be supported by a more basic belief below (in the classical conception, one should reach down to a bedrock of self-evident premises) . . . . Coherentism differs from th[is] because it does not require that single underlying theory, but rather draws on all clues.").

3. *See, e.g.*, Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELBOURNE J. INT'L L. 1 (2012) (arguing that coherentism is actually the principal rival to foundationalism as a method for justifying beliefs).

4. *See, e.g.*, ROBINSON, *supra* note 1, at 169 ("Command responsibility discourse then become even more fractured and convoluted. Positions on the nature of command responsibility proliferated: mode of liability separate offence, neither-mode-nor-offence, sort-of-mode-sort-of-offence, and sometimes-mode-sometimes-offence. In the resulting climate of uncertainty, Tribunal judgments began to include muddled and self-contradictory statements about the nature of command responsibility.").

5. *See, e.g.*, *id.* at 174–76 (prescribing a resolution to unresolved contradiction in Tribunal jurisprudence of recognizing command responsibility as a mode of liability but rejecting the contribution requirement).

6. *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 83 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) ("The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed

necessarily occurs or does not occur after the crime—could causally contribute to a subordinate's commission of the crime.[7] To solve this problem, some cases at the ad hoc tribunals have concluded that causation is not required for command responsibility.[8] Robinson considers this a mistake,[9] and he is right about that. The solution, Robinson says, is to reverse this mistake by recognizing that causation is required in command responsibility cases.[10] To the extent that some cases held otherwise, those cases were wrongly decided.

So far, so good. Robinson is right to insist that command responsibility is a form of accessorial liability (i.e., a form of complicity that makes the defendant responsible for the crimes committed by his or her underlings).[11] For this reason, Robinson considers accessorial liability inappropriate in the absence of a causal connection between the commander's failure of due diligence and the perpetrators' commission of the crime.[12] His argument is a significant contribution to the academic literature on command responsibility.

One thing I would add to the discussion is that causation is not all or nothing—there are different types of causal requirements, and the analysis should focus on the different styles and how they might relate to command responsibility. For example, the United States does not generally require a tight causal connection for complicity to apply.[13] Although this might sound surprising, this can be seen most clearly in cases where an accomplice is present at the scene of the crime, but his assistance

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by subordinates, whereas the failure to prevent concerns future crimes of subordinates.").

7. *See* Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMPAR. L. 455, 468 (2001) ("[F]ailure to punish marks the most conspicuous departure of the ICTY Statute from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability.").

8. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 398 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.").

9. Curiously, however, the Trial Chamber went on to note that: "This is not to say that, conceptually, the principle of causality is without application to the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed." *Id.* ¶ 399.

10. *See, e.g.*, ROBINSON, *supra* note 1, at 174 (introducing Robinson's solution and canvassing possible objections to it).

11. *See id.* (stating that command responsibility's status as a mode of accessorial liability reconciles imperative principles and precedent).

12. *See, e.g.*, *id.* at 155 ("On my account – an account that respects the contribution requirement – the commander cannot be retroactively liable as party to the isolated crime, because she did not contribute to it.").

13. *See, e.g.*, State v. Collins, 886 P.2d 243, 246 (Wash. Ct. App. 1995).

turns out to be unnecessary.[14] In these cases, under an old but venerable common law rule, the actor is still responsible as an accomplice even if no assistance is rendered.[15]

The theoretical claim that causation is not required is best defended by Christopher Kutz, and the doctrinal point is reflected in the case law.[16] This is not to say that causation is utterly irrelevant to accessorial liability. Rather, as Kutz demonstrates, the law requires a very general form of causation, which is that the type of behavior performed by the actor must be the type of behavior that can assist in the commission of the crime.[17] There is no requirement, however, that the specific behavior of the actor must have causally assisted the actual perpetrator in the commission of the crime.[18] In other words, it is no defense that the principal perpetrator would have found a way to commit the crime anyway. This is how most people read the famous Judge Tally case.[19] Robinson views Kutz's normative position as an outlier,[20] though it should be noted that Kutz's position was both normative *and* descriptive in the sense that he was defending causeless complicity from a philosophical perspective but was also describing the state of the law in the United States.[21] And Kutz's descriptive point is correct; U.S. law requires that accessories engage in actions that typically facilitate the crime in question,[22] but it is no defense that the crime would have occurred anyway without the assistance of

14. *See id.* at 246 ("Accomplice liability exists if the defendant either aids or agrees to aid the primary actor in a crime . . . . Aid can be accomplished by being present and ready to assist.").

15. The rationale for this doctrinal rule is that presence with the intent to provide assistance generally functions to encourage a principal perpetrator to carry out the crime, though it is not required to prove that the presence had this effect in each and every case. *See, e.g.*, United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). Consequently, the causal requirement remains in the background as a general requirement, rather than a specific requirement that must be satisfied in every case.

16. *See* Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 289 (2007) (arguing that accomplice liability does not need to be a causal relation and framing the argument through example cases).

17. *See id.* at 293–94 (describing accomplice liability in the common law and underlying concepts of causation).

18. *See id.* at 295 ("[A]ssistance can be a basis of complicity without communication; and assistance can suffice for responsibility even if the assistance does not play a causal role in the crime.").

19. State v. Tally, 15 So. 722 (Ala. 1894). In the *Tally* case, a local judge stopped a telegram operator from delivering a message to the victim of a homicide. The message would have warned the victim that the perpetrators were pursuing him to kill him. Tally was guilty as an accessory even though his intervention was largely irrelevant, as the perpetrators would have completed the crime anyway. Admittedly, the court's reasoning was vague and it said that "Ross' predicament was rendered infinitely more desperate, his escape more difficult, and his death of much more easy and certain accomplishment by the withholding from him of the message.'' *Id.* at 741. However, most commentators have read this passage as indicating that specific causation is not required for accessorial liability.

20. *See* ROBINSON, *supra* note 1, at 188 (describing Robinson's interpretation and analysis of Kutz's normative argument for culpability without causal contribution).

21. *See* Kutz, *supra* note 16, at 293 (outlining the state of accomplice law in the United States).

22. *See id.* (discussing what is required for one to be considered an accomplice of another person in the commission of an offense).

the facilitator.[23]

As Robinson recognizes, most of these arguments are styled as debates about "but-for" causation.[24] American law generally does not require but-for causation in cases of overdetermination.[25] If a crime would have occurred anyway, it is enough that the defendant's contribution was a "substantial factor" in the outcome, even if the resulting crime was sufficiently caused by someone else's contribution.[26] So, for example, Judge Tally was responsible as an accomplice even though he was not a but-for cause of the murder, since it would have occurred anyway.[27]

However, the substantial factor doctrine excludes contributions which occur *after* the crime is committed;[28] those contributions make the actor guilty as an accessory after the fact, which is no longer a mode of liability and is now a separate offense generating a modest punishment[29]—in part because the law recognized that, by definition, accessories after the fact make no causal contribution to the commission of the crime—not even under the substantial factor test.

This scheme is highly relevant for command responsibility. A failure to punish should not generate accessorial liability because although it is the type of behavior that typically encourages subordinates to commit crimes, it cannot make a causal contribution to crimes that occurred in the past. It could only causally influence future crimes. It is for this reason that several jurists have argued that command responsibility—at least for failure to punish—should be considered a separate offense, analogous to being prosecuted as an accessory after the fact.[30] Under this approach, the commander would be responsible for the separate but lesser crime of "command responsibility" but not responsible for the underlying crimes performed by the subordinates, just as an accessory after the fact is guilty of a separate crime but not held responsible for the domestic crime of, say, murder.[31]

Robinson dismisses the "separate offense" solution for reasons I largely agree with. It cannot be implemented by judicial invention because that would transgress

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23. *See id.* at 294–95 (explaining that common law does not require an accomplice to have done more than intend to assist).

24. ROBINSON, *supra* note 1, at 178 n.4.

25. *Id.* at 183–84; *see* Kutz, *supra* note 16, at 289–90 (describing the troubling aspect of "complicity" liability wherein one is punished regardless of whether the wrong would have occurred without their action).

26. ROBINSON, *supra* note 1, at 183 (noting Kadish's conclusion that, within common law jurisprudence, the contribution requirement is met when the accused does something that could have made a difference).

27. State v. Tally, 15 So. 722, 741 (Ala. 1894).

28. ROBINSON, *supra* note 1, at 185.

29. Damaška, *supra* note 7, at 469.

30. *See* Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Trial Judgment, ¶ 1777–80 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (holding former officer liable under a criminal statute that provides a separate offense for failing to punish subordinates that he knew had committed a criminal act).

31. For a discussion of this approach, see Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 620 (2007); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 255 (2009).

the four corners of the relevant treaties or statutes, which fail to list command responsibility as a separate offense triable by these tribunals.[32] Nor is it realistic to assume that the Security Council would amend the Statute for the Residual Mechanism or that the Assembly of State Parties will amend the Rome Statute to add a separate offense called "command responsibility" to the jurisdiction of the ICC.[33] So, the separate offense solution is good in theory but unlikely to be implemented in reality.

When comparing Robinson's approach to the American approach, a strategic difference becomes apparent. American law imposes a weak causation requirement that is "balanced" by a very strong mental element requirement for accessorial liability.[34] As will be described in greater detail below, American law generally requires that accessories act with the "purpose" to facilitate the principal's commission of the crime, or something similar to it.[35] Sometimes knowledge is sufficient, but recklessness or negligence is not enough.[36] So, any anxieties over a weak causation requirement are tempered by the rigidity of the high mental element. However, Robinson basically moves for the opposite approach.[37] He wants a strong causation requirement but a weak mental element requirement.[38] In the following section, I sketch out some concerns about his proposal, and I argue in favor of imposing a higher mental element requirement for command responsibility.

## II. IS NEGLIGENCE AN APPROPRIATE MENTAL ELEMENT FOR COMMAND RESPONSIBILITY?

Robinson's most aggressive doctrinal conclusion is his defense of negligence as the required mental element in command responsibility cases.[39] Despite persistent criticisms from scholars that negligence is too low a standard, Robinson offers an innovative defense of the negligence standard.[40] He says that tribunals can fairly

32. ROBINSON, *supra* note 1, at 165.

33. *See id.* at 166 (noting that Rome Statute negotiations made it clear that command responsibility was solely a mode of liability).

34. *See* MODEL PENAL CODE § 2.06 (AM. L. INST. 2019) ("A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do . . . .").

35. *Id.*

36. *See* State v. Williams, 298 N.J. Super. 430, 440 (1997) (holding that acting with "purpose" to promote or facilitate means with knowledge and the conscious objective that the crime be committed).

37. ROBINSON, *supra* note 1, at 206 (offering an account of command responsibility that relies on a negligence standard).

38. *See id.* at 209 (stating that, under his theory, accessories will not need to have the same mental state as principals to be found liable).

39. *See id.* at 254 ("I will now offer a normative account of command responsibility as a mode of liability that includes a criminal negligence standard").

40. *See, e.g.*, Kai Ambos, *Superior Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 852 (2002) (criticizing the negligence standard for command responsibility as imputing blame on superiors whose negligent conduct is

prosecute military commanders under a "should have known" standard, which approximates a negligence standard because it does not require proof of subjective awareness of the risk that the troops would commit the crimes in question as recklessness or *dolus eventualis* would require.[41]

The Rome Statute, which governs prosecutions for the International Criminal Court, applies a negligence standard for command responsibility.[42] The mens rea provision of the Rome Statute, Article 30, lists the "default" mens rea for all prosecutions as acting with intent and knowledge "unless otherwise provided."[43] The Rome Statute provision for command responsibility says that the liability for military commanders will apply if the commander "should have known" that his or her subordinates would commit the crimes.[44] Although this language is a bit vague, most commentators have correctly interpreted the language as codifying a negligence standard because "should have known" suggests that the commander need not have subjective awareness of the possibility that the subordinates would commit crimes.[45] And this lower mental state falls within Article 30's "unless otherwise provided" exception because the lower mental state is codified in Article 28.[46]

The Rome Statute is not the end of the story, though. The Rome Statute does not bind ad hoc, hybrid, and domestic tribunals, which apply either their own statutes, customary international law, or domestic law enacted to implement international legal obligations.[47] Consequently, there is heated debate over the mens rea for command responsibility under customary international law.[48] However, even if there were no daylight between the Rome Statute and customary international law, there is still the normative question of what the law ought to be. It is perfectly coherent to recognize the Rome Statute's answer while lamenting it as a theoretical mistake. This normative question is especially relevant given Robinson's methodology, which is to identify the "deontic constraints" that should apply in

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less blameworthy); GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 218 (2009) (arguing that the "should have known" standard "dangerously dilutes" the mental element).

41. ROBINSON, *supra* note 1, at 239.

42. *See* Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) [hereinafter Rome Statute].

43. *See id.* art. 30(1) (entered into force July 1, 2002) ("Unless otherwise provided, a person shall be criminally responsible . . . only if the material elements are committed with intent and knowledge.").

44. *Id.* art. 28(a) ("(i)That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.").

45. *See, e.g.*, GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 229–30 (3d ed. 2014) (stating that the supervisor negligence standard is a direct consequence of the mens rea requirement under art. 28 of the Rome Statute).

46. *See* Rome Statute, *supra* note 42, art. 28(a) (outlining the mental state required to find military superior culpable for crimes committed by their forces).

47. *See, e.g.*, Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Trial Judgment, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (applying the Statute of the Tribunal).

48. ROBINSON, *supra* note 1, at 21.

international criminal prosecutions.[49]

Robinson has multiple reasons for supporting the negligence standard.[50] One reason he offers is that the lower mental element is appropriate because command responsibility is a form of accessorial liability and, as such, involves a lower form of responsibility, distinct from principal liability.[51] It is true that several legal commentators—including myself—have emphasized that the distinction between principal and accomplice liability is essential for international criminal law to retain and emphasize.[52] That is certainly true, and it is important that modes of liability are used in such a way that they distinguish between different levels of participation and different degrees of blameworthiness.[53] Nonetheless, it is also true that, as Robinson notes, accessories are convicted of the crime that they assisted, because accessorial liability is derivative in nature and depends on the principal's commission of the crime.[54] And indeed, it is one of Robinson's core conclusions that command responsibility is a mode of liability (requiring causation) rather than an inchoate crime or a separate offense.[55]

So, this still leaves open the question of the correct mental element requirement. Robinson notes that several scholars, including Werle, agree with the statement that an accomplice need not meet all of the mental element requirements required for conviction as a principal perpetrator.[56] So, for example, Werle and others agree that an accomplice can be convicted of supporting the crime of genocide as long as the accomplice acts with the purpose of facilitating the principal perpetrator's act of genocide, even if the accomplice is simply aware of the principal perpetrator's genocidal intent but does not share it.[57] However, there is a big step from this

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49. *See id.* at 16 (explaining that the text will explore deontic constraints of international criminal law).

50. *See id.* at 254 (stating that his argument for a criminal negligence standard of command responsibility has three "planks").

51. *Id.* at 263.

52. *See, e.g.*, Jens David Ohlin, *Searching for the Hinterman: In Praise of Subjective Theories of Imputation*, 12 J. INT'L CRIM. JUST. 325 (2014) (discussing how to distinguish between principals and accessories).

53. *See* James Stewart, *The End of Modes of Liability for International Crimes*, 25 LEIDEN J. INT'L L. 165 (2012) (discussing an alternative approach to distinguishing levels of participation and blameworthiness).

54. *See* ROBINSON, *supra* note 1, at 167 ("When we look at the actual charges, convictions, and sentences entered by the Tribunal, we see that the commanders are *expressly* charged, convicted, and sentenced for the underlying offences of genocide, crimes against humanity, and war crimes.").

55. *Id.* at 175 (claiming that command responsibility should be recognized as a mode of accessory liability).

56. *See, e.g.*, Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 969 (2007) ("Consequently, and consonant with the jurisprudence of the ad hoc Tribunals, it is not necessary that the accomplice share particular mental elements possessed by the perpetrator, such as the special intent to destroy required for genocide. It suffices that he or she knows of such intent.").

57. Incidentally, this is a controversial point and not everyone shares it. For example, in his later writings, even Cassese came around to the position that JCE III liability was not appropriate in genocide cases unless the defendant exhibited genocidal intent. *See* Antonio Cassese, *The Proper*

descriptive point to the normative conclusion that negligence is appropriate as a mental element requirement for complicity.

Robinson mentions the U.S. Model Penal Code (M.P.C.) standard for accomplice liability but does not give it sustained treatment, instead suggesting that his negligence approach is more consistent with national legal systems.[58] But the U.S. approach deserves sustained reflection. The M.P.C. adopts a heightened mens rea approach, requiring that the accomplice act with the purpose to facilitate the principal perpetrator's commission of the crime.[59] This is the most demanding standard possible. For all other mental element requirements, the accomplice must act with the kind of culpability otherwise required for the offense.[60] Again, this is a high standard indeed. Although the U.S. approach could be dismissed as an artifact of the common law unified approach, which deems principals and accomplices as equally culpable (rather than the differentiated model that reigns in many civil law jurisdictions), the U.S. approach is not atypical.[61] Many legal systems require that accomplices act with either purpose or knowledge, and even consider reckless complicity an outlier position.[62] Certainly, the use of negligence as a standard for complicity is the outlier, not the norm. For this reason, the international debate over purpose versus knowledge for aiding and abetting is hardly irrelevant.[63] International tribunals, scholars, and U.S. federal courts hearing Alien Tort Statute

*Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 121 (2007) ("Resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires a special or specific intent (*dolus specialis*), that is, the crime charged is one of genocide, persecution or aggression . . . ."). Robinson responds that JCE is a form of principal liability and therefore different than accessorial liability. ROBINSON, *supra* note 1, at 252. While it is true that it is sometimes referred to as a form of "commission" as that term is used in the ICTY Statute, it is probably more accurate to refer to it as a form of conspiracy or common design liability and therefore constitutes a form of international complicity.

58. ROBINSON, *supra* note 1, at 260 n.89.

59. *See* MODEL PENAL CODE § 2.06(3) (AM. L. INST., Proposed Official Draft 1962) ("A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do . . . .").

60. *Id.* at § 2.06(4) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.").

61. *See* 18 U.S.C. § 2(a) (1951) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); *see also* Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 370 (1997) (discussing the general legal requirement that an accomplice's aid be intentional).

62. *See* Kadish, *supra* note 61, at 370 ("[T]he doctrine of reckless complicity can be made compatible with the requirement of culpability by restricting it to cases where [the principal's] crime is one of recklessness or can be committed recklessly.").

63. *See, e.g.*, Sabine Michalowski, *The* Mens Rea *Standard for Corporate Aiding and Abetting Liability – Conclusions from International Criminal Law*, 18 UCLA J. INT'L L. FOREIGN AFF. 237, 252 (2014) ("The controversial issue therefore does not seem to have been the Trial Chamber's reference to intent, but rather the definition of intent as requiring a volitional element that is directed towards the commission of the offence.").

claims have all struggled over this purpose versus knowledge standard.[64] Although that debate is tough to resolve, *both* sides of the debate are unified that negligence is too low a standard for complicity.[65] The existence of this debate over higher mental states should raise a red flag for any doctrine that imposes accessorial liability under negligence—the lowest possible mental element standard.

Robinson also suggests that some international judges have offered odd and implausible replacements for the "should have known" standard, and that none of these replacements are clear or workable.[66] Robinson is especially critical of a proposal that he considers clever but ultimately misguided: the suggestion from Judge Morrison and Judge Van den Wyngaert in the *Bemba* Appeal Judgment that command responsibility for failure to punish is only appropriate when it is "virtually certain" to the commander that the troops committed crimes and failed to punish them.[67] Robinson dislikes the "virtually certain" formulation.[68] Without defending the "virtually certain" proposal, I would simply note that it comes from a laudable impulse, which is to harmonize the mental element for command responsibility with the Rome Statute's Article 30 default mental element provision, which requires that a defendant act with intent and knowledge. The common law standard for knowledge is awareness of a virtual or practical certainty, and jurisdictions that have the concept of oblique intent often use similar language of "virtual certainty."[69] Morrison and Van den Wyngaert were simply trying to bring the law of command responsibility in line with the prevailing best practice of international criminal law, the leading edge of Article 30 and its default mens rea standard.

In my view, recklessness is a more defensible standard for command responsibility than negligence, though even recklessness gives me some pause as it conflicts with Article 30 and its requirement of acting with intent and knowledge. But at least recklessness throws into sharp relief that a military commander or

64. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 278 n.15 (2d Cir. 2007) (noting the tension in international tribunals definition of the mens rea in these crimes as being "knowing assistance," yet requiring the act to be carried out with purpose towards a specific crime).

65. *Id.* at 282.

66. ROBINSON, *supra* note 1, at 207 (stating that judges' decisions in the field of command liability were "muddled and self-contradictory").

67. *See* Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's Judgment Pursuant to Article 74 of the Statute, ¶ 46 (June 8, 2018) (separate opinion of Van den Wyngaert, J. and Morrison, J.) ("[T]he language of Articles 28 and 30 of the Statute requires that the commander is virtually certain of the guilt of his or [her] subordinates."); *see also* ROBINSON, *supra* note 1, at 291 ("On the one hand, this is commendable, as it shows an impulse to respect deontic constraints and the rights of the accused, and the narrow conception also has support in national practice. On the other hand, the ICC Statute differs from other jurisdictions, as it does not have the broader forms of mens rea that typically supplement the 'intent' standard (such as recklessness and *dolus eventualis*).").

68. ROBINSON, *supra* note 1, at 291–92 (providing reasons to stray from the "virtually certain" formation).

69. *See* MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

civilian superior must foresee a risk that troops will engage in wrongdoing and then consciously disregard that risk.[70] This is a more defensible standard than negligence and its associated formulation that the commander "should have known" about the risk that subordinates would criminally misbehave. To the extent that the Rome Statute allows for a lower mental element, this decision should be regarded as an unfortunate mistake by its drafters.

A recklessness standard would not gut command responsibility, as some might worry. Many—indeed, most—cases of command responsibility could and should yield convictions under this standard. Subjective awareness can be inferred from the context, and the prosecution need not introduce "smoking gun" evidence of a commander writing an email stating that they had this subjective awareness. It would be enough for a fact finder to conclude that the commander was aware of a substantial risk that a lack of unit discipline would result in the commission of international crimes by subordinates. Many cases that fall within our shared folk understanding of command responsibility would result in convictions under this standard of conscious disregard of risk. What would be eliminated would be the few situations where the commander really had no subjective awareness at all regarding a risk of misbehavior. These cases of utter cluelessness would not meet the recklessness standard.

One might worry that some commanders would escape liability under a recklessness standard if they deliberately avoided acquiring information regarding the risk of misbehavior. However, this is a separate point. Where a defendant deliberately avoids acquiring information, common law courts apply the doctrine of willful blindness and treat these situations as functional equivalents of knowledge—and rightfully so.[71] Other jurisdictions reach a similar result using different labels.[72] If a commander deliberately avoids acquiring information about the risk of unit misbehavior, a military tribunal could apply the notion of willful blindness without resorting to the lower mental state of negligence in all cases of command responsibility.[73] Willful blindness is far different from negligence because the former involves intentionally avoiding the acquisition of information, while the latter could involve simple inadvertence.[74]

I do not believe that military commanders who exhibit negligence should escape liability entirely. I would prefer a system, as is the case of German domestic law, where command responsibility has two flavors: it is both a form of accessorial liability and a separate offense.[75] Under the separate offense, the commander would

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70. ROBINSON, *supra* note 1, at 240.

71. *See* United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004) (holding that the jury can consider willful blindness the functional equivalent of knowledge).

72. *See* ROBINSON, *supra* note 1, at 216 ("[J]uridical practice across legal systems contemplates different degrees of subjective awareness or foresight, such as recklessness, willful blindness, or *dolus eventualis*.").

73. *See id.* at 244 (asserting that commanders who negligently fail to monitor their troops show more contempt than those who monitor in order to assess risks).

74. *Florez*, 368 F.3d at 1044.

75. Völkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], art. 1, § 13–14 (Ger.), *translated in Germany, International Criminal Code*, INT'L COMM. RED CROSS,

be guilty of a lesser crime based on the notion of dereliction of duty, and it would not generate vicarious responsibility for the underlying crimes performed by the principal perpetrators.[76] The separate offense would generate a modest punishment.[77]

As discussed in the prior section, Robinson and I agree that there are substantial obstacles to implementing this bifurcated approach in international criminal law. Where I disagree with Robinson is what to do as a second-best solution. In the absence of a separate offense based on negligence, Robinson would rather use negligence as the standard for the mode of liability.[78] I, on the other hand, would stick to my guns and insist upon recklessness as the standard for the mode of liability, and keep fighting for a separate offense based on the mental state of negligence.

One of the great contributions made by Robinson's book is talk of "deontic" constraints to the legal doctrine.[79] He argues, correctly, that the substance of international criminal law doctrine should respect these deontic constraints but should tread carefully before extending beyond those constraints.[80] I agree with this abstract framework, though I believe that anything below recklessness violates one of those deontic constraints when it comes to command responsibility.

I should clarify that I support negligence as a mental state in the criminal law and do not count myself as a general skeptic of criminal negligence. Kim Ferzan and Larry Alexander, among others, have written an urgent appeal to rid the criminal law of negligence because it is not an appropriate basis for criminal punishment.[81] I myself have never been concerned with cases of negligence, nor do I find them particularly perplexing. Critics have said that it is wrong to make an actor criminally responsible in the absence of any mental state.[82] But this is an inexact way of putting the point. It is not quite true that the negligent actor has no mental state at all—the actor simply has no *awareness* of a particular risk, and indeed that lack of awareness is its own mental state.[83] Fletcher once called negligence a form of "normative" mens rea because it involves the legal system's conclusion that the actor should have been more attentive.[84] In that sense, the legal system is holding negligent actors

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https://casebook.icrc.org/case-study/germany-international-criminal-code (last accessed Oct. 3, 2020); *see also* ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 204–05 (2012) (comparing the actual knowledge standard with the "should have known" standard across multiple domestic jurisdictions).

76. *See* VStGB, *supra* note 75, at art. 1, § 14 (punishing those who fail to report a crime with up to five years' imprisonment).

77. *Id.*

78. ROBINSON, *supra* note 1, at 254 (offering an account of command responsibility that relies on a negligence standard).

79. *Id.* at 67 (describing the "deontic turn").

80. *Id.* at 7.

81. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 81–82 (2009) (arguing that there is no practical way of preventing punishment for negligence from collapsing into strict liability).

82. Model Penal Code §2.02 cmt. 4 (AM. LAW INST., Proposed Official Draft 1962).

83. *Id.*

84. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 396 (1978) ("The proposed federal criminal code refers to negligence as a 'state of mind' even though inadvertent negligence

responsible for their cluelessness, inattentiveness, self-absorption, or general failure to pay attention to things that we believe they should have been paying attention to. I find liability under those circumstances no more mysterious than the general phenomenon of criminal liability for omissions, which is appropriate when the actor has a legal duty to act.[85] The similarity is that omissions involve the absence of an act, while negligence involves the absence of awareness.[86] In both situations, the law draws the conclusion that there was a duty to act or a duty to be more aware.[87]

With all that being said, why then do I not support negligence as a mental state for command responsibility? One could say that commanders have a legal obligation to exercise due diligence in their supervision of subordinates and that their failure to act and failure to be aware is morally blameworthy. The answer, again, is that command responsibility in its current manifestation is a form of accessorial liability, making the defendant guilty of the crimes committed by the subordinates, including crimes against humanity, war crimes, or genocide. It produces an odd result to make a negligent actor guilty of a crime—even as an accessory—that usually requires a much higher mental element such as intent and knowledge. Indeed, if anything, given the fact that the accessory need not satisfy the actus reus requirements for the underlying offense (only the principal perpetrator does),[88] arguably, the mens rea requirement for the accomplice should be higher, rather than lower, in order to "compensate" for the reduced actus reus requirement. Negligence should be reserved for command responsibility as a separate offense, which makes clear that the commander is liable for a failure of due diligence and is not being convicted for the underlying crimes perpetrated by the subordinates.

## III. CONCLUSION

Robinson is generally correct that international criminal lawyers are in danger of "over-correcting" and are tightening doctrines too far, making prosecution and conviction impossible even in cases where conviction and punishment are morally and legally justifiable, based on the deontic principles that Robinson identifies.[89] Staying faithful to deontic principles may require tightening up some doctrines, but there is also the risk that the tightening process will go too far. Robinson thinks that this has occurred in the case of command responsibility and negligence. While I am open to being persuaded, I still think that negligence is too low a standard for justifiably imposing punishment in command responsibility cases—at least when it is styled as a form of accessorial liability.

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requires, above all, a normative judgment that the actor should have known of the risk.").

85. *See also* 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 44 (2007) (describing how the MPC suppressed the normative feature of the mens rea requirement in criminal law).

86. ROBINSON, *supra* note 1, at 181.

87. *Id.*; *see also* Model Penal Code §2.02 cmt. 4 (AM. L. INST., Proposed Official Draft 1962) ( "[Negligence] does not involve a state of awareness").

88. *See* ROBINSON, *supra* note 1, at 181 (stating that an omission derives from a duty to act); *see also* Model Penal Code § 2.02 cmt. 4 (AM. L. INST., Proposed Official Draft 1962) (stating that negligence implies a duty to be more aware).

89. ROBINSON, *supra* note 1, at 8.