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## The Shadow Side of Command Responsibility

### INTRODUCTION

“Command responsibility” is an umbrella term used in military and international law to cover a variety of ways in which individuals in positions of leadership may be held accountable. In its broadest sense the term refers to the liability of a military commander for failure properly to discharge his duties. The failure need not necessarily imply insufficient control over the conduct of subordinates: a commander could be punished, for example, because he exposed his troops to undue risk. But in a narrower sense, the term refers to the commander’s liability for the criminal conduct of his underlings. This type of liability may in turn be variously structured, and be either civil, disciplinary or criminal in nature. Of late, however, the term is usually reserved to denote a species of this latter type — a species in which not only a military commander, but also a non-military leader, is held *criminally* liable for the conduct of his subordinates as if he personally had executed the criminal deed. Problems related to this particular species of command responsibility, as it has developed in international law, are the subject-matter of this essay.

At first glance, there seems to be nothing special about a legal doctrine that holds a commander primarily liable for the delinquency of his subordinates. Although, as a matter of general principle, one is not criminally liable for how somebody else acts, provisions establishing liability for the conduct of another are not limited to international criminal law. Under all modern systems of domestic criminal law a superior can be punished for the misdeeds of his underlings, provided that he directed, abetted, or aided the immediate perpetrators.<sup>1</sup> Holding him responsible in this way seems especially appropriate in war, or armed conflict, whose criminal aspects are of primary concern to international criminal law. This is because higher-ups in organizations form plans and issue orders whose execution by others results in crime: they typically have more opportunity for deliberation and reflection than their subordinates. In short, in this context the supe-

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1. It is only in some ancient legal systems that criminal liability requires personal commission of the criminal deed. According to the Talmud, for example, criminal sanctions are restricted to perpetrators: accomplices are, as a rule, not subject to a punishment by a human court. See, 2 *Encyclopedia Talmudica* 154-64 (1974.)

rior's contribution to crime exceeds in significance that of hands-on perpetrators. To a large extent, then, the primary responsibility of commanders under international law is but a perfectly justified application of municipal criminal law doctrines on complicity, or various modalities of perpetration, to a special organizational setting. But this is not always the case. A comparative *tour d'horizon* quickly reveals that the lower boundaries of command responsibility in municipal and international law are not identical: under international law, commanders are sometimes held primarily liable in circumstances where the imposition of this type of liability finds no support in principles accepted by systems of national criminal law. Generally speaking, international criminal law on this point seems to be somewhat more hospitable to notions of vicarious liability and other legal constructs which, in their practical application — if not already in their formulation — display a measure of insensitivity to the degree of the actor's own personal culpability.

This raises delicate and insufficiently explored questions. Is it proper for international criminal justice, given its humanistic orientation, to disregard widespread culpability-restricting principles of municipal law — principles that are themselves inspired by humanistic concerns? Is it proper for international judicial bodies to employ legal doctrines that are less responsive to notions of “just desserts” than those of national legal systems? If just punishment is a prominent goal of international humanitarian law, this is an obvious and pressing question. Or can the greater harshness of international criminal law be justified on utilitarian grounds, as a necessary deterrent measure to combat massive violations of human rights that occur within the context of complex organizations?

It suffices to raise these questions to realize how remarkable it is that command responsibility, as it evolved in international law, has failed to provoke more discussion of its harmony with fundamentals of municipal criminal law. Since preparations are under way to inaugurate permanent institutions of international criminal justice, the time is surely ripe to begin exploring these issues. First and foremost, greater clarity is needed about the contours and the magnitude of divergence between municipal and international rules that impact on command responsibility. Those aspects of international doctrine that strike a discordant chord with widely shared principles of municipal law should be identified and accurately described, rather than passed over in silence or masked by rhetorical legerdemain. Only after this propaedeutic can the question properly be addressed of whether the discord between municipal and international criminal law is warranted because of some special features of international criminality, or the context in which it takes place. And if it turns out that the discord is warranted, the propaedeutic remains useful for another

purpose: made familiar with the scope and character of the discord, international judges can adequately explain the grounds, perhaps even the necessity, for the departures from municipal legal principles. The benefits of giving reasons for such departures is important and should not be underestimated — especially when international judges apply culpability notions that are alien to the legal culture of the country directly affected by crimes of the accused commander. Providing adequate and convincing reasons for deviations from municipal law can remove perceptions of undue severity, disarm local opponents of international justice, and increase the legitimacy of international judicial bodies.

The following essay represents the first skirmish with these themes. Its initial part is devoted to mapping the discrepancy between the approach to command responsibility of international criminal law and the approach taken toward this subject by municipal criminal law of general application. The special case of the relationship of international criminal law to national systems of military justice will be temporarily postponed. A threshold difficulty is that international legal sources do not now speak with a single voice on issues of command responsibility. Provisions of the Rome Statute of the International Criminal Court, for example, differ in important respects from provisions of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for Rwanda. The first part of the essay will ignore this variance, and focus almost exclusively on provisions of the ICTY Statute as presently applied by its judges. The main reason for this cynosure is that ICTY decisions are the foremost source of recent command responsibility jurisprudence. Although the Rwanda Tribunal has been quite effective in securing convictions on command responsibility charges, the decisions of its Hague counterpart provide more useful material for the study of the relation between international and municipal criminal law. The narrowed focus will reduce the *longueur* of textual exegesis, and more quickly unveil two aspects of international command responsibility doctrine that depart from widely accepted principles of municipal criminal law.

The second part of the essay will then examine arguments that can be advanced in favor and against these two aspects. While acknowledging that the international context may require *sui generis* solutions, this part of the essay will bring to light several nagging difficulties to which these two aspects of command responsibility give rise. It will conclude by sprinkling some skeptical salt on the notion that these difficulties constitute the necessary price international criminal justice must pay in order to achieve its legitimate objectives.

This skepticism leads to the third and final part of the essay: an inquiry into the possibility of better aligning international and do-

mestic perspectives on the subject of command responsibility. More specifically, the question will be explored whether international doctrine can be made more responsive to culpability notions, and whether the discord with advanced systems of municipal law can be reduced. The search for an answer will call for an examination of the status of command responsibility in the international legal order: is the entire doctrine firmly anchored in the law? At this point, the narrow focus on the ICTY Statute will be abandoned: the historical antecedents of its provisions will be traced, and the relationship of international doctrine to national systems of military justice investigated. New perspectives will also have to be acknowledged that are opened up by the more recent adoption of the Rome Statute of the International Criminal Court. The essay will close with some conjectures about the future of the uneasy relationship between municipal and international criminal law.

### I. THE CONTOURS OF THE DISCORD

The home of command responsibility provisions in the ICTY Statute is its article 7. The article covers — along with some other matters — the entire range of situations in which military commanders or civilian superiors may be held criminally liable for the crimes of their subordinates.<sup>2</sup> From the standpoint of municipal law, some forms of responsibility recognized here are quite unexceptional, while others reveal controversial features when observed from this perspective. Paragraph 1 of article 7 harbors mainly forms of the former kind, and paragraph 3 forms of the latter variety.

A. *Article 7(1)*. Paragraph 1 establishes the responsibility of commanders who “plan, instigate, order, commit, or otherwise aid and abet” crimes within the Tribunal’s jurisdiction.<sup>3</sup> Although this particular litany of ways in which a commander may be held criminally liable is not without its infelicities, they are unimportant for our purposes.<sup>4</sup> For whatever the precise meaning and interrelationship of the concepts enumerated in this paragraph, it is clear that its drafters intended that it extend to cover a range of culpable conduct which can also be covered by conventional concepts of municipal criminal law. The primary responsibility of commanders for the crimes of their subordinates is here clearly justified and beyond dispute. It is impor-

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2. For simplicity sake, I shall hereinafter use the terms “commander” and “superior” to refer both to military and non-military leaders, unless a context requires greater precision.

3. The full text of article 7(1) reads as follows: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

4. Literally construed, for example, the enumeration would suggest that “commission” is a form of “aiding and abetting”.

tant to note, however, that the paragraph does not classify different forms of contribution to crime in terms of their severity: it subjects them all to the same general framework of punishment and places them all in the same stigmatizing category. This is significant for the theme of this essay because it leads to a discord with some systems of criminal law — a discord that must be briefly remarked upon and evaluated.

The indiscriminate approach that paragraph 1 adopts toward participation in crime accords with conventional Anglo-American criminal law doctrine and to an extent also with the law of a few countries, such as France, that belong to the continental legal tradition. However, a much larger group of national legal systems requires, that perpetration be sharply differentiated from complicity, and that the forms of complicity so identified be ranked in terms of their seriousness. Under the widely influential German law, for example, “aiding” (rendering assistance to) a perpetrator is regarded as deserving a categorically milder punishment than “instigating” (or soliciting) the commission of crime.<sup>5</sup> This particular scheme was also traditional in the law of former Yugoslavia and is currently followed by all of its successor states.<sup>6</sup>

On first inspection, the resulting discrepancy between the ICTY Statute and the law of so many countries ( including those directly affected ) appears unfortunate. Let us set aside as less significant that lawyers habituated to a discriminating approach may be rush to interpret the failure to distinguish minor from major forms of participation as a sign of harsh and unsophisticated criminal law. More significant should be concern about the potentially negative echo of this discrepancy in popular culture. Since ordinary people find the stigma and psychological significance of perpetration greater than that of aiding — perhaps even of soliciting an offense — they too might

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5. For an in-depth comparative analysis of the promiscuous and more discriminating approaches, see George Fletcher, *Rethinking Criminal Law* 634-82 (1978). For a broader but more general overview, see Jean Pradel, *Droit Pénal Comparé* 276-78, 283 (1995).

6. For a detailed discussion of modes of participation in the criminal law of former Yugoslavia, see Nikola Srzentić & Aleksandar Stajić, *Krivično Pravo* 160-90 (5th ed. Sarajevo 1968). In addition to aiding and instigating, the law of former Yugoslavia acknowledged a third form of complicity, limited to individuals who set up criminal organizations: they were accountable for all crimes that followed from the criminal scheme of organizations they had established. See article 26 of the 1976 Yugoslav Criminal Code. This form of complicity, believed by the Code’s drafters to be of Anglo-American pedigree, was recognized by most commentators as nearing strict liability and thus objectionable, but was nonetheless retained by the powers-that-be as a convenient instrument for combating political opposition (which was largely criminalized). It is noteworthy that successor states of former Yugoslavia which underwent democratic transformation have dropped this form of complicity from their criminal law. The Slovenian Criminal Code of 1995, and the Croatian Code of 1997, for example, no longer contain any provisions on the vicarious responsibility of those who organize criminal associations.

share the lawyers' impression of international justice as unduly severe.

In fact, however, this particular inconsistency of the ICTY Statute with a large family of national systems is not likely to affect the standing of international justice in a negative way. For when superiors in an organization have contributed to the delinquency of their underlings, the discord pales to insignificance: the domineering or controlling position of higher-ups induces even those national systems that employ the discriminating approach to elevate minor acts of assistance to the level of serious forms of participation. Even the otherwise cherished distinction between perpetration and complicity is sometimes blurred in these cases, and superiors who instigated a crime of their subordinates can find themselves responsible as "perpetrators behind the perpetrator."<sup>7</sup> In short, more refined distinctions that are available in some national systems will seldom be applied in practice.

Nor can the drafters of paragraph 1 be faulted for having creating the discrepancy under discussion. Since national laws evolved two different approaches to partnership in crime, a discord of international law with one of them was, of course, inevitable. And when it came to choosing one of these approaches, the equivalence theory was a shoo-in: it is traditional in the two legal cultures — Anglo-American and French — that are by far most influential among experts on public international law.<sup>8</sup> The choice also suited the drafters' preference for harsh substantive rules that obliterate subtle distinctions — a preference we shall increasingly encounter as we proceed to unpack article 7.

This preference is reflected in the interpretations paragraph 1 has received at the hands of ICTY judges. Some of them have opined, for example, that superiors can instigate by omission,<sup>9</sup> although this view has only sporadic support in the case-law of a few jurisdic-

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7. The controversial legal construct of "perpetrator behind the perpetrators" ("Täter hinter dem Täter") has received the blessing of the German Supreme Court. See (critically), Thomas Rotsch, "Tatherrschaft kraft Organisationsherrschaft," 112 *Zeitschrift für die gesamte Strafrechtswissenschaft* 518-62 (2000). The most widely debated decisions employing this construct involved members of the East German Defense Council who authorized the use of deadly force to prevent illegal border crossings from East to West Germany. For a brief comment in English, see George Fletcher, *Basic Concepts of Criminal Law* 198-99 (1998).

8. The very sophisticated German criminal law doctrine, widely followed by national legal systems around the world, has for a variety of historical reasons left no marks on the body of international criminal law.

9. See, e.g., the Trial Chamber's judgment in the matter of Prosecutor v. Blaškić, ICTY, Case No. IT-95-14-T, para 280. All ICTY decisions are available on-line at <http://www.un.org/icty/judgment.htm>. They will be cited hereinafter only by the accused's name and the paragraph of the respective decision, unless the context requires a more detailed citation.

tions.<sup>10</sup> Their position is also unusually strict on the requirement of causation in complicity: they have repeatedly held that no causal link needs to be proven between a superior's act of assistance and the crime committed by subordinates.<sup>11</sup> The prevailing rule in national systems is again to the contrary. Individuals who render acts of assistance to crime tend to be held responsible as accomplices only if their acts actually contributed to the success of the criminal enterprise: while the causality requirement may be relaxed — especially when assistance is rendered by way of omission — it is never abandoned.<sup>12</sup>

*B. Article 7(3).* In contrast to paragraph 1, paragraph 3 of article 7 extends the boundaries of liability in international criminal law substantially beyond limits established by national legal systems. A superior who does not take “necessary and reasonable” steps to prevent a crime of his underlings, or does not punish them after they have committed it, may be made personally liable for that crime, even if he did not “plan, instigate, order, commit, or otherwise aid and abet” the criminal activity.<sup>13</sup> The basis of liability under this paragraph is hence not participation in terms of conventional categories of municipal law: rather, the superior is held accountable for the criminal acts of his underlings on stricter, more exotic grounds — the failure to prevent and the failure to punish. Both have ramifications that are difficult to reconcile with principles that inform municipal criminal law. The type of liability they establish — let us call it “imputed responsibility”<sup>14</sup>— is central to the concern of this essay and requires close scrutiny.

1. *Failure to prevent.* This ground of liability comprises two variants. The first relates to those situations in which superiors “know” that their subordinates are about to commit a crime, but fail to take appropriate measures to prevent them. The second relates to the

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10. The prevailing position is that instigation requires a positive act. Some authorities attack the very idea of instigating by omission as conceptually incoherent, or grotesque. See, e.g., Hans Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts* 691 (5th ed. 1996). For a similar view in the criminal law literature of former Yugoslavia, see Srzentić & Stajić, *op. cit. supra* n. 6, at 178. For a broad comparative survey, see J. Pradel, *op. cit. supra* n. 5, at 278-79.

11. See, e.g., the ICTY's Trial Chambers in the cases of Furundjija (para 233), Aleksovski (para 61) and Blaškić (para 285).

12. See, Jescheck & Weigend, *op.cit. supra* n. 10, at 694.

13. Article 7(3) reads: “The fact that any of the acts referred to in articles 2 to 5 of the present Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”. Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda contains an identical provision.

14. For the use of this term, see, e.g., M. Cheriff Bassiouni & Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* 345 (1996). See also Report of the Secretary General of the United Nations to the Security Council Pursuant to Paragraph 2 of the Security Council Resolution 808, S/25704, of 3 May 1993 (para 56).

same constellation of facts, with the difference that superiors have “reasons to know” (rather than actual knowledge) that their subordinates are about to commit a crime.

The first variant is of little practical importance. When superiors are aware of the impending delinquency of their subordinates and do nothing to stop them, their omission shades into conventional complicity — aiding by omission — and has therefore hardly any independent purchase. Someone might object by saying that although conventional complicity and failure to prevent ultimately blend into each other, a residual difference between them still remains: many national laws require that an accomplice “intend” (or affirmatively seek) to further the perpetrator’s crime, whereas paragraph 3 is satisfied with a commander’s mere “knowledge” of this pending act. Observe, however, that the actual effect of these different requirements — one purely cognitive, the other comprising a volitional component — cannot be realistically assessed without reference to the implementing context. And when one’s vision extends to the procedural arena, it becomes apparent that fact-finders who establish a commander’s knowledge of impending criminal activity will seldom fail to make the further inference to his intent to further this activity.<sup>15</sup> It is thus safe to conclude that forms of complicity from paragraph 1 of article 7 crowd out and orphan the first variant of imputed responsibility for failure to prevent.

By contrast, the second variant of failure to prevent is of great practical significance: it expands the accountability of commanders for criminal acts of their underlings beyond the sphere encompassed by conventional complicity doctrines. A small digression is in order here, to perceive clearly the contours of the resulting divergence. A spectrum of situations must be imagined in which commanders can be said to “have reason to know” that their subordinates are about to engage in criminal activity. The spectrum will illustrate significant modulations of commanders’ guilt under paragraph 3 of article 7.

At one end of the spectrum is the case of a scheming superior who condones the delinquency of his underlings and engineers his own ignorance (of their specific criminal plans) in order to evade responsibility for failure to intervene and prevent the crime. At this point, there is as yet no discrepancy between results reachable under national and international law: most municipal systems also treat self-induced ignorance as tantamount to intent or knowledge. The schemer can be easily convicted for the crime of his underlings.<sup>16</sup>

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15. For indications that this attitude comes natural to ICTY judges, see the trial judgments in the Tadić (para 674) and Celebić (para 326) cases.

16. In Anglo-American systems of municipal law, the commander could be found guilty as having been “willfully ignorant,” or “willfully blind”. See, e.g., Wayne LaFare, *Criminal Law* 232, 628 (3rd ed. 2000). Continental legal systems can reach the same result by applying the *dolus eventualis* doctrine. *Dolus eventualis* is usually

Proceeding further along the spectrum, however, we come across the case of a commander who consciously disregards a perceived risk of subordinate delinquency: aware of the possibility that his underlings might commit a crime, he yet fails to take necessary and reasonable crime-preventing measures. Here, municipal law and paragraph 3 begin to diverge. The latter holds a reckless commander accountable for the crime of his subordinates, while municipal laws hesitate to follow suit: they reject the concept of reckless complicity — especially for complicity in crimes committed intentionally.<sup>17</sup> The divergence gains in intensity as we move still further down the spectrum to superiors who fail to recognize the risk of subordinate delinquency through inadvertent negligence. As interpreted by ICTY judges, paragraph 3 finds even this lowest form of culpability sufficient for the imputation of responsibility,<sup>18</sup> while municipal doctrine rejects complicity predicated on unconscious risk creation (inadvertent negligence) even more resolutely than it does complicity resting on its advertent (reckless) forms. The discord reaches its highest point in the case of a morally upright but unconsciously negligent superior who does not condone the crime of his subordinates, and who would have opposed their wrongdoing if he were aware of their criminal intentions.

One might wonder why national complicity laws refuse to hold a commander guilty of his subordinates' intentional crimes unless he is familiar with their criminal plans, or unless he willfully ignores information to this effect. The short answer to this question is that the extension of responsibility beyond this point can be faulted on culpability grounds. To see this, pause for a moment to consider the case of a commander who is convicted of a war crime committed by his underlings on the ground that he negligently failed to obtain information capable of putting him in position to prevent their criminal activity. What has taken place here? *Sub silentio*, as it were, a negli-

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defined as a mental state in which the actor is reconciled with a crime, or acquiesces in it. See, Jescheck & Weigend, *op. cit. supra*, n. 10, at 299-301. For an illuminating analysis of this legal construct, geared to the cognitive needs of common lawyers, see Fletcher, *op. cit. supra* n. 5, at 445-46.

17. For continental systems, see, Jescheck & Weigend, *op. cit. supra* n. 10, at 695; Pradel, *op. cit. supra* n. 5, at 278; Srzentić & Stajić, *op. cit. supra* n. 6, at 191. Regarding Anglo-American law, see the authorities cited in Kadish, "Reckless Complicity," 87 *J. Crim. L. & Criminology*, 369, 381 (1997).

18. Early on in the Tribunal's jurisprudence on command responsibility, some ICTY judges were inclined to limit imputed responsibility to those cases where a superior "wantonly" disregarded specific information available to him of a character that should have alerted him to the impending criminal activity of his troops. Celebići case, paras 388-89. However, in a subsequent, more extensively reasoned case, a standard of simple negligence was established. Under this stricter standard, the commander need not be in possession of "telling" information. It suffices that he failed to implement measures which could have yielded this kind of information, provided that he "should have known" that the failure to implement these measures was a "criminal dereliction". Blaškić case, paras 310-22.

gent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds. As a result of this dramatic escalation of responsibility, a commander's liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*.

This is troubling to national systems because they all subscribe to the general principle that people should be held accountable according to their own actions and their own mode of culpability. It is true, as we shall see in a moment, that the doctrinal apparatus based on this principle differs across national legal systems, and that requirements flowing from it are not equally demanding. It is also true that special provisions are to be found in most national systems that extend liability for the conduct of another beyond the limits set by conventional complicity doctrine. Yet, despite all these qualifications, the principle continues to exert a strong pull. It is openly disregarded only with regard to minor or morally neutral offences. When it comes to crimes entailing serious moral condemnation — and war crimes must fall into this category<sup>19</sup> — sporadic avoidance of the principle is almost universally treated as an embarrassing aberration.

So much can be bracketed out by way of general orientation. Within that, another difference can be discerned between countries in the Anglo-American and continental legal traditions. In the latter, the culpability principle is taken very seriously: occasionally it is even accorded constitutional stature.<sup>20</sup> Some jurisdictions go so far as to allow no avoidance of full culpability requirements — no matter what the gravity of crime. Most jurisdictions are less rigid, and tolerate a measure of vicarious liability for less serious offenses. However, conviction for egregious crimes, such as murder or rape, can never result from attribution to a negligent actor of someone else's wrongdoing.<sup>21</sup> Anglo-American criminal law takes a more casual attitude to

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19. It is true that crimes under the developing international criminal law comprise an *omnium gatherum* of heterogeneous conduct: like amoebas in the primordial biological soup, crime definitions are still poorly differentiated. War crimes and crimes against humanity, for example, encompass within themselves entire sub-classes of prohibited conduct — ranging in seriousness from mass murder to destruction of civilian property. Despite this internal variation in gravity, however, all convictions for crimes within ICTY's jurisdiction entail serious stigmatization. Convicted persons are all viewed as morally flawed.

20. The latter is the case in Germany, for example. For wide-ranging references to the culpability principle in Austria, Belgium, Germany, Italy and Spain, see Jescheck & Weigend, *op. cit. supra* n. 11, at 23-24. On the exalted position of the principle in the legal doctrine of former Yugoslavia, see Bogdan Zlatarić & Mirjan Damaška, *Rječnik Krivičnog Prava i Postupka* 197, 202, 356 (1966). See also Fletcher, *op. cit. supra*, n.7, (Basic Principles,) at 191.

21. In some continental countries, employers and corporate officers can be liable for the delinquency of their employees on a theory that seems strikingly similar to the doctrine of imputed command responsibility. It is argued in these countries that cor-

culpability requirements. Not only does it more readily embrace strict and vicarious liability for lesser offenses,<sup>22</sup> but it sporadically also dispenses with full culpability requirements in the realm of serious crime. An extreme illustration of this tendency in American law is the felony murder rule which permits vicarious liability for homicide of any participant in a dangerous felony.<sup>23</sup> The rule embodies a disregard of individual culpability similar to the disregard manifested by the variant of imputed command responsibility now under consideration here. Yet, a significant difference remains. Those actors whose culpability can be escalated under Anglo-American law, or to whom a serious misdeed of another person can be attributed, are themselves at fault by reason of their *conscious* involvement in a morally objectionable or dangerous criminal scheme. As a result, when liability for this scheme is imputed to them, or when their actual *mens rea* is disregarded, a less dramatic shift in the register of culpability occurs than in the case of a commander whose negligent omission is used as a vehicle for the attribution of war crimes to him. Nor should it be forgotten that in the Anglo-American tradition, simple negligence remains a somewhat suspect foundation for imposing criminal liability: “wanton” or “heedless” disregard of probable consequences is usually required as a prerequisite for punitive sanction.<sup>24</sup>

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porate officers can be made liable for the wrongdoing of their employees, because it is not unfair, or too onerous, to expect them to supervise those who work for them. In significant contrast to imputed command responsibility, however, omission of control is typically required to involve more than mere negligence. In addition, employers are usually prosecuted only for negligent delicts of their employees, or for those intentional offences that do not carry serious moral stigma (like murder or rape). For German law see Bernd Schünemann, *Unternehmenskriminalität und Strafrecht* 70 (1979). For France, see Jean Pradel, 1 *Droit Pénal* 416 (6th ed. 1998). Only the contemplated Corpus Juris for the protection of the European Union’s financial interests takes a step further toward vicarious liability. In its article 12(3) it provides for the employer’s liability even if he omitted to supervise his underling through mere negligence. In this case, however, the employer’s framework of punishment is one-half of that provided for the perpetrator. See Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l’Union, Européenne, (1996).

22. American courts have repeatedly upheld the constitutionality of strict and vicarious liability for “public welfare offenses” and misdemeanors. See LaFave, *op. cit.* supra n. 16, at 265-72. In an often cited decision, the Pennsylvania Supreme Court has declared that the imposition of vicarious liability is unconstitutional if it leads to punishment entailing serious moral condemnation. *Commonwealth v. Kocwara*, 397 Pa. 575 (1960). For pockets of vicarious liability in the United Kingdom, see Pradel, *op.cit.* supra n. 5, at 273.

23. Several common law countries, including Great Britain, have abolished the felony murder rule in the second part of the twentieth century. Nevertheless, significant discrepancies between liability and culpability for some serious offences can still arise even in these countries, mainly because of lesser concern of their substantive criminal law with excusing conditions. The last section of this essay will have more to say about this peculiar feature of criminal law in legal cultures deriving from England.

24. See Fletcher, *supra* n. 7, at 117. Even in civil lawsuits, a punitive sanction often requires more than simple negligence. Interesting to mention in this regard is the jury instruction in a recent case brought under the Torture Victim Protection Act. (28 U.S.C. Section 1350). The civil plaintiffs, relying on the theory of command re-

A source of possible misunderstanding should be addressed at this point. The fact that national criminal law is reluctant to saddle negligent superiors with heinous crimes of their underlings, should not be taken to mean that this law fails to recognize the need on some occasion to criminalize the negligent exercise of supervisory duties by hierarchical superiors. Refusal to hold parents responsible for egregious crimes committed by their neglected child does not mean that they will escape criminal punishment altogether: the special offense of child neglect can draw their blameworthy behavior within the pale of criminality.<sup>25</sup> In the same way, by a special statute, municipal criminal law sometimes criminalizes reckless or negligent control of one's subordinates. But under such a statute, the responsibility of a superior is not at odds with the culpability principle: the stigma and framework of punishment are determined by his culpable omission, rather than by the intentional wrongdoing of his underlings.

So much for municipal legal doctrine. It should not be forgotten, however, that its tenor is generally endorsed by ordinary people: the escalation of negligent omissions into responsibility for egregious crime is at odds with deeply ingrained moral intuitions. It is also alien to ordinary linguistic practices: to call someone a "negligent war criminal" sounds strange to lay ears. As seen through the lenses of lay observers, then, it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape. War crimes entailing conduct of this nature seem to presuppose purposeful human action, or an intentional mode of commission. As Holmes has famously remarked, "even a dog distinguishes between being stumbled over and being kicked."<sup>26</sup>

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responsibility, sought damages for wrongful death from a Salvadorian military leader. The judge instructed the jury that while "ordinary negligence" suffices for the award of compensatory damages, an award of punitive damages requires "wanton or reckless" conduct. See *Ford v. Garcia*, United States District Court for the Southern District of Florida, Case No. 99-8359-Civ.Hurley. (The Salvadoran Nuns case). The case is now on appeal, filed on grounds pertaining to unrelated errors in the jury instruction.

25. It has been said that some American statutes, or municipal ordinances, make parents criminally liable for offenses committed by their children. See, e.g., Comment: "Parental Delinquency Laws," 74 *U. Det. Mercy L. Rev.* 93 (1996). But it is wrong to regard these provisions as exemplars of vicarious liability in criminal law. In fact, these provisions make parents liable for their own omissions (child neglect), rather than responsible for the substantive offence of their (neglected) children. If a minor commits an act of vandalism or burglary, for example, his parents will not be convicted for vandalism or burglary. The minor's offense is only an "objective condition of liability," or an event of evidentiary significance, indicating insufficient parental supervision. The confusion surrounding these laws illustrates very well the ambiguity of the expression "superiors are responsible for the crimes of their subordinates"—an ambiguity to which we shall revert in the last section of this essay.

26. Oliver W. Holmes, Jr., *The Common Law* 3 (1881). That people should separate intent and negligence is scarcely surprising: rather than being hairbreadth emo-

It will be the task of the next section to speculate about the impact of these and similar moral intuitions on the fortunes of international criminal law doctrine that departs from them. For the moment, it is enough if the foregoing remarks have brought out the incongruities of imputed responsibility for failure to prevent. The harshness involved can be further increased, of course, if hierarchical superiority is treated as an aggravating circumstance in sentencing.<sup>27</sup>

2. *Failure to punish.*<sup>28</sup> Liability of a superior for failure to punish also embraces two variants. If this internal variation is overlooked, as is often the case, an insight can be lost into an additional aspect of imputed command responsibility that creates tensions with municipal systems of criminal law. The first variant covers situations in which a commander's failure to punish contributes to the criminal activity of those under his command. How this can happen is fairly easy to see: if he does not take his aberrant subordinates to task, his troops can interpret the omission as a sign that he condones, perhaps even encourages, the commission of war crimes. As a result, his failure to punish can be linked causally to the subsequent criminal activity of those he did not punish, or of others under his command.

This first variant of failure to punish is by far the most commonly found, and tends to monopolize the attention of commentators. Even so, it is of little independent significance. Observe that a commander who does not repress war crimes of his soldiers can in most circumstances be held accountable as an accomplice in their repetition.<sup>29</sup> And even if the prerequisites for complicity are missing, he can often be found responsible for failure to prevent the recurrence of war crimes. This is because he can no longer profess ignorance of criminal propensities among his troops, and because it will be easy for this reason to establish that he failed to take necessary and reasonable measures to prevent these propensities from being acted out again. In short, the first variant of failure to punish can, most of the

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tional distinctions, *dolus* and *culpa* belong to discriminations on which our whole sense of life relies. This is true despite the fact that it is often unclear where the line between them should properly be drawn.

27. ICTY judges have adopted the view that superiors merit harsher punishment than "hands-on" perpetrators. See Blaškić judgment (paras. 789 and 791). This strict position has much to recommend itself when superiors are accomplices to the crime of their underlings in terms of conventional complicity law. But if hierarchical superiority is treated as an aggravating circumstance in situations where a superior is linked to subordinate crime by inadvertent negligence only, the position becomes problematic.

28. For simplicity's sake I speak only of "failure to punish", although it also embraces failure of a commander to submit the matter of subordinate delinquency to competent authorities.

29. In many constellations of facts, his omission can be *intended* to encourage war crimes, so that requirements of some forms of complicity can be met even under conventional municipal legal doctrine.

time, be preempted by a species of participation from paragraph 1 of article 7, or by a species of failure to prevent from paragraph 3.

Failure to punish acquires independent practical significance only in its second variant, when it is separated from failure to prevent. In this second form it often passes unnoticed because of the widespread but faulty assumption that the two failures are as inseparable as Castor and Pollux. It is true, of course, that the two often go hand in hand, especially in prosecutions of individuals who occupied command positions for an extended period of time. Yet, failure to punish can also stand alone, as in the case of an atrocity that occurs in the final spasms of a war, or remains for some other reason an isolated incident. In other words, failure to punish *tout court* is not a mere theoretical possibility. Let us then see what the doctrine of failure to punish requires when it is detached from failure to prevent. It holds a commander responsible for the crime of his soldiers for the sole reason that he failed to call them to task after he had learned about what they had done. There is no need to establish that he was in any other way implicated in the crime. Thus, for example, if soldiers committed war crimes by murdering civilians, their commander is also guilty of these atrocities. And if his superior status is regarded as an aggravating circumstance, his punishment can even surpass that of actual perpetrators.

In this second form, failure 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. For this departure is precisely what must happen when a superior is convicted of a war crime of his subordinates on the sole ground that he omitted to punish them: the opprobrium attaches to him for heinous conduct to which he has in no way contributed, and he is also subject to punishment within the same sentencing framework as the "hands-on" perpetrators of the criminal deed.

When this severe treatment of the commander is observed from the perspective of just desserts,<sup>30</sup> the only plausible ground on which it can be justified is that his failure to punish implies a superior's approval, or subsequent ratification, of his subordinates' transgression. Used as a vehicle for vicarious liability, however, approval of a transgression is alien to the tenets of modern criminal law. True, there was a time when the notion was widely accepted that a person who condoned a crime *ex post* ought to be treated as a party to the crime, even if he was in no other way connected to the criminal enter-

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30. Utilitarian justifications for this harshness will be canvassed in the next section.

prise.<sup>31</sup> This notion was most prominently manifest in early doctrines regarding accessories after the fact. In more recent times, however, a chilly darkness fell on the background ideas supporting this legal construct. Anglo-American jurisdictions have rejected it in everything but name. They now refuse to regard the accessory after the fact as a party to the crime, and no longer subject him anymore to the punishment prescribed for it. They treat him instead as an “obstructor of justice”— a perpetrator of another, less serious offense.<sup>32</sup> In countries belonging to the civil law tradition the situation is very much the same: rendering assistance *après coup* is no longer punishable as a form of participation in crime; it falls instead under variously defined “offenses against the administration of justice”. The very term “accessory after the fact” has acquired an old-fashioned flavor, and is in most contemporary civilian jurisdictions no longer in use.<sup>33</sup> These changes are interesting for the purposes of this essay, because command responsibility for mere failure to punish emanates from the same ideological source as complicity after the fact: both were hatched from the same ideological egg. No wonder, then, that both strike specialists in national criminal law as being antiquarian relics.

Turning now to popular attitudes, one again finds that the accountability for mere failure to punish does not accord with ordinary understanding either. It is difficult for lay-persons to follow a doctrine that leads to the branding of an individual as a war criminal just because he failed to punish those who actually contributed to its occurrence: the distinction between committing a crime and punishing its perpetrator belongs to a body of distinctions to which ordinary people attach their ideas of just deserts. This is not to say, however, that ordinary understanding absolves from blame those superiors who fail to punish their criminal subordinates. Much as ordinary people are capable of blaming parents who fail to discipline their wayward children, they are also capable of blaming commanders who omit to punish delinquent underlings. In and of itself, then, making failure to punish criminal is not at odds with ordinary moral intuitions. But the discord arises when the law uses this omission as a

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31. Responsible for the spreading of this notion was the influence of medieval Roman-Canon law: “consent” to the criminal activity of another was at the heart of its complicity doctrines. See, S. Kuttner, *Kanonische Schuldlehre* 41-42 (1935).

32. See Philip Johnson, *Criminal Law* 638 (5th ed. 1995); Paul Robinson, Imputed Criminal Liability, 93 *Yale L.J.* 609, 633 (1984); Joshua Dressler, “Reassessing the Theoretical Underpinnings of Accomplice Liability,” 37 *Hastings L.J.* 91, 92, 111 (1985).

33. In only in a few continental jurisdictions is assistance to a perpetrator *ex post* made criminal in ways other than through special offenses. An example is the Spanish Penal Code, with its provisions on “*encubridores*” (article 17). It may be of some interest that the doctrine of accessory after the fact was criticized and rejected in the criminal law scholarship of former Yugoslavia. See, e.g., Srzentić & Stajić, *op. cit. supra* n. 11, at 185.

vehicle for escalating criminal liability, mandating the conviction of a commander for the crime he failed to punish. Although ordinary people are unwilling to stigmatize a parent as a thief when his child commits a larceny, they are ready to blame him for failing to reprimand the child. The greater the stigma that attaches to the child's crime, the greater the reluctance to hold the parent vicariously liable for it. And so it is with a military or civilian superior: the more loathsome the crime of his subordinates, the greater the reluctance to hold him accountable for their wrongdoing — despite his culpable omission to punish.

*C. Summary and Outlook.* At this point, a backward glance is in order. The proper response to criminal actions involving military and political organizations often requires that hierarchical superiors be held primarily responsible for what their subordinates have done. Although the foregoing survey cast no doubt on this general proposition, it revealed that the lower limits of this responsibility appear problematic — both from the standpoint of national criminal laws and moral intuitions of ordinary people. Two aspects of the doctrine are in this category. The first is the rule that a superior be treated as a perpetrator of intentional crimes committed by his subordinates if he negligently failed to discern and thus to prevent their criminal activity. The second is the rule that he be treated as a perpetrator of crimes committed by his underlings on the sole basis that he failed to punish them.

From the standpoint of national criminal laws, these two aspects of command responsibility are suspect because they spread the actor's liability and personal fault so widely apart that a tension arises with the culpability principle — a principle from which municipal laws are ready to deviate only in regard to offenses that do not entail serious moral condemnation. Architects of the developing international criminal law should not lightly dismiss this tension. For if one were to catalog general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list.<sup>34</sup>

Nor should departures from ordinary perceptions of justice be taken lightly. Institutions of international criminal justice are in their infancy and their place in the life of the world community is not yet firmly established. The nature and functions of international relations are in a state of ferment, and they may or may not undergo redefinition. In this volatile milieu, as the effects of decisions made by

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34. I am alluding here, of course, to article 38(1)c of the Statute of the International Court of Justice. To the extent that they are not pre-empted by treaties or contrary international custom, general principles of municipal law deserve consideration as guideposts in shaping international criminal law doctrine.

international criminal tribunals become increasingly felt, the harmony of international criminal law with ordinary moral intuitions becomes more and more important: a discord between the two could have a corrosive potential impact on the public support for international criminal justice. This warrants inquiry into the reasons for the discord. Is there something peculiar in the circumstances in which international criminal tribunals operate, in the nature of massive human rights violations, or in the criminal liability for outcomes of complex organizations, that calls for and justifies the exceptional severity of imputed forms of command responsibility? These and similar questions require a good deal more critical attention than they have received so far, before we accept imputed command responsibility as a desirable component of the evolving international criminal code. And it is to these questions that we now turn.

## II. IS DISCORD WITH NATIONAL LAW NECESSARY?

*The Deterrence Rationale.* The argument most frequently advanced in support of imputed command responsibility is the special deterrence needs of international criminal justice. Because this argument is taken seriously by many thoughtful and well-meaning people, it deserves to be examined carefully. It begins by taking note of the fact that the most serious crimes within international jurisdiction tend to relate to the operation of military or civil organizations. An effective reaction to the large-scale human rights violations these organizations are capable of, requires that deterrence efforts of international judicial institutions be centered on those individuals who lead such organizations, or occupy important positions in them. For even if such highly placed individuals have not originated plans for massive human rights violations, they are in any event well positioned to prevent them, or stop them after they have started. And it is the utility of going after these individuals that provides two major pragmatic reasons for widening the scope of criminal liability beyond the familiar limits established by municipal criminal law.

The first rationale relates to proof difficulties that arise in attempts to convict hierarchical superiors: the more removed they are in ranks of authority from immediate perpetrators, the more the hierarchical *hauteur* enables them to evade punishment by concealing either their complicity or acquiescence in crimes of their subordinates, or by disingenuously pleading ignorance of criminal activity. Paper trails leading to higher-ups can be missing, or other circumstances arise that bedevil efforts to establish their links to the wrongdoing in lower echelons. These complications, in turn, can lead to acquittals of major war criminals — acquittals that impair the inhibitory effect of international justice on those whom it is most important to deter.

How such evidentiary complications can be used to justify widening the scope of liability can best be shown by the example of a commander held accountable for a war crime of his soldiers because he negligently disregarded information capable of alerting him to their impending criminal activity. If you evaluate this extension of liability solely from the vantage of substantive doctrine, the extension may appear unduly harsh and over-inclusive. This is because the putative class of negligent commanders includes not only those who are morally flawed and condone their subordinates' war crimes, but also morally upright individuals who do not deserve to be branded as war criminals by reason of their negligent failures. But if you include proof difficulties in your assessment of the situation, the negative impression of its desirability begins to change. Suppose that primary liability were limited to commanders who consciously (knowingly) disregard information about the criminal intentions of their troops. If this were the applicable legal standard, the difficulty of proving the element of knowledge could lead to the impunity of major criminals who willfully refrained from taking steps to prevent large-scale brutalities of their soldiers. If, on the other hand, the negligent disregard of information suffices for responsibility, major criminals can still be brought to justice: although their knowing participation in the wrongdoing of their underlings cannot be proved, they can still be held on negligence grounds. Nor is this all. The negligence standard opens the way for predicating convictions on alternative findings: a superior may be found guilty either for being directly responsible for the crime of his troops, or for being responsible on an imputed liability basis.<sup>35</sup> In short, imputed liability can be useful as a fallback position.

There is, of course, an obvious cost to be paid for thus reducing major criminals' openings for impunity. For when the texture of justice's net is strengthened to prevent these criminals from getting

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35. Illustrative of this possibility is the ICTY's trial judgment in the Blaškić case. Having found the accused guilty of direct involvement in war crimes, the Chamber also found that he is "in any event" guilty on imputed responsibility basis. ("*En tout état de cause, il a, en tant que supérieur hiérarchique, omis de prendre les mesures nécessaires et raisonnables qui auraient permis d'empêcher que ces crimes soient commis ou d'en punir les auteurs.*"). Blaškić case, penultimate paragraph of the judgment's ordering part. The War Crimes Tribunal for Rwanda also employs alternative findings of guilt. See, e.g., Prosecutor v. Kayishama, ICTR, Case No.-95-1-T (Judgment of 21. May 1999). By contrast, most municipal procedural systems prohibit alternative findings whenever the charges involved are of unequal seriousness. The reason for this prohibition is that alternative findings imply uncertainty about the more serious charge — an uncertainty that requires acquittal of the more serious charge on the ground of reasonable doubt (*in dubio pro reo*). See Theodor Kleinknecht & Karlheinz Meyer, *Strafprozessordnung*, comment to para 260 Stpo., p. 904 (38th ed. 1987). In the minority of jurisdictions where alternative findings of unequal seriousness are allowed, the sentence must be determined with the less serious charge in mind. It is not clear whether the Hague and Arusha War Crimes Tribunals endorse this view.

through, lesser culprits can also be entangled in the net and thus be exposed to more severe treatment than they deserve. Yet, this cost is amply compensated — or so we are told — by the benefit of enabling international courts to convict those on whom the deterrence effort of international criminal justice properly focuses. All in all, concludes this deterrence-based argument, international criminal law cannot afford to respond to the fine points, or tonal gradations of culpability. Command responsibility must be “formally over-inclusive, to make up for severe practical dangers of under-inclusiveness.”<sup>36</sup>

It is fairly obvious that this justification for imputed forms of command responsibility hinges in large measure on trust in the good judgment of officials in charge of international judicial institutions. If only reprehensible individuals, deserving of no sympathy, are caught in the prosecutor’s widening net, and if international judges are capable of minimizing undesirable outcomes that might flow from the severity of imputed liability, its potential for over-reaching is no cause for concern. Nor should one worry too much, some might be willing to add, about the number of individuals treated with undeserved harshness: as saints are few in war and demons are legion, the number of superiors treated too harshly is likely to be small.

The second deterrence-based argument can be expressed in only a few words, because it relies on a variant of the general-preventive theory of punishment that is so well known that it barely needs re-statement. Adapted to the subject matter of present concern, this argument runs as follows. If hierarchical superiors can be held responsible for subordinates’ delinquency on an imputed liability basis, they must realize that their conviction for hideous crimes critically depends on *ex post* assessments of what was predictable in the disorienting conditions of combat. They also realize that these assessments are likely to be made by judges without experience with pressures of acting under conditions of warfare. The disturbing uncertainty flowing from this realization will induce such superiors to closely monitor subordinate behavior, and be constantly on the look out for signs of potential criminality. Like snails with their antennae directed toward possible menace, they will be quick to retreat to the house of caution.

What is one to make of these two deterrence-based justifications for imputed forms of command responsibility? Misgivings about them come naturally, of course, to all who do not believe in the restraining effect of punishment on military and political leaders — especially those in cultures with traditions of patriotic banditry and little sym-

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36. See, Mark Osiel, *Obeying Orders* 193 (1999). The rejection of fine distinctions is reminiscent of Descartes’ witticism that the main point of finesse is our unwillingness to use it. (“*La principale finesse est de ne vouloir point de tout user de finesse*”). See 4 Descartes, *Oeuvres Complètes* 357 (1910).

pathy for contemporary notions of acceptable conduct in armed conflict. We need not follow these doubting Thomases: despite the merely anecdotal character of supportive evidence, a measure of deterrent influence on leaders appears intuitively plausible and should be conceded even for backward and lacerated corners of the world.<sup>37</sup> But the concession does not prove that the doctrine of imputed responsibility deserves to be part of international criminal law on deterrence grounds. Let us pause for a moment with misgivings that are expressed in the idiom of deterrence, to consider two sources of skepticism as to whether expanding criminal liability beyond the range permitted by municipal law produces, on the whole, a desirable set of behavioral motivations.

One source of doubt relates to the possibility of over-deterrence. The concern is that some thoughtful superiors — people whom one would like to see in leadership positions — might be unwilling to run the risk of being tarred with egregious wrongdoing by their underlings on the basis of *ex post* judicial assessments of what was discernible in the fog of combat. The easy attribution of responsibility, coupled with the harshness with which hierarchical superiority is treated, could drive these individuals away from military or civilian positions of influence, rather than induce them to monitor their subordinates with greater care.<sup>38</sup> The possibility of another perverse incentive arises in specific regard to the liability for failure to punish: some superiors could be discouraged from punishing their aberrant underlings for fear of turning attention to crimes for which they could

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37. The attitude of ICTY officials toward deterrence as the goal of international justice has undergone an interesting change over time. Initially, they were inclined to accord pride of place to deterrence. This emphasis was probably due to their hope that the mere threat of punishment will produce moderating effects on the brutalities of the then on-going conflict in the Balkans. But since this threat failed to prevent some of the worst monstrosities of the war — the hecatomb at Srebrenica, for example — the ebullient early clouds of optimism dissipated, and emphasis of ICTY officials has shifted to other objectives of international justice. The first prosecutor of the Tribunal even went so far as to recently opine that it is “hopelessly idealistic” to maintain that international courts serve an effective deterrent purpose. See Richard Goldstone, Letter to the Editor, *The Wall Street Journal* of July 3, 2000, p. A-13. For a more balanced assessment of the deterrent potential of international tribunals on military and political leaders, see Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,” 95 *Am.J.Int.L.* 7-31 (2001).

38. The possibility of exit from an organization as a consequence of vicarious liability is strongly suggested by current law and economics literature. Although much of this literature deals with tort liability in the sphere of business organizations, most of its findings are readily applicable to criminal responsibility in political and military hierarchies. See, e.g., Hansman & Kraakman, “Toward Unlimited Shareholders Liability for Corporate Torts,” 100 *Yale L.J.* 1879, 1928-29 (1991); Renier Kraakman, “Corporate Liability: Strategies and the Cost of Legal Control,” 93 *Yale L.J.* 857, 869-71 (1984); Sykes & Fishel, *Corporate Crime*, 25 *Journal of Legal Studies* 319-49 (1996).

themselves be held responsible for failure to prevent the criminal activity of lower ranks.<sup>39</sup>

In assessing the significance of this skepticism for the over-all deterrent value of imputed responsibility, it should be borne in mind that the negligent exercise of supervisory duties in military and other organizations may be deterred in other ways. We already saw that national systems of criminal law, while foregoing imputed liability, also employ the threat of criminal punishment for this purpose. But they attack this species of negligence by way of lesser offenses that specifically target negligent omission of superior control. International criminal justice, by contrast, exercises jurisdiction over this genre of omissions under the mantle of vicarious responsibility, provided, of course, that the negligence of superiors can somehow be linked to the crimes committed by their underlings.

*Broader Preventive Effects.* As the foregoing remarks indicate, the superiority of imputed forms of command responsibility over alternative approaches is not nearly so certain on deterrence grounds as first inspection might lead one to believe. But the policy of influencing conduct by instilling fear of punishment is only part of the diffuse conglomerate of ends which international criminal justice purports to serve. Among its other preventive goals, a prominent one is to propagate values that humanize armed conflict. Convictions for war crimes seem useful in furthering this goal, because they represent a solemn expression of moral outrage over conduct that tramples on these values, indicating the commitment of international institutions to their protection. The expression of outrage increases the likelihood that violations of human rights will increasingly be perceived as seriously wrongful behavior — even when perpetrated by those engaged in a just war, or those induced to violate the laws of war for patriotic motives.<sup>40</sup> Little by little, it is hoped, inhibitions against war crimes will be internalized by an increasing number of people and greater conformity with civilized rules of armed conflict achieved, even without relying on calculated responses to the threat of punishment.<sup>41</sup>

How does imputed command responsibility fare as a means to achieve these broader preventive goals? At first blush, the doctrine

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39. For perceptive remarks on this subject, see Osiel, *op. cit. supra*, n. 36, at 155-56.

40. This particular goal displays an obvious affinity with presently influential “expressive” theories of punishment. See Joel Feinberg, *The Expressive Function of Punishment*, in Gertrude Ezorsky (ed.), *Punishment* 25, 31 (1972); Kahan, “What do Alternative Sanctions Mean?,” 63 *U.Chi.L.Rev.* 591 (1996).

41. In this hope, criminal law specialists will not fail to discern the influence of the “socio-pedagogic” theory of punishment as articulated in the 1960’ by the Norwegian scholar Andenaes. See, Johannes Andenaes, *Punishment and Deterrence* 36 (1974). His insights were creatively applied to the context of international criminal justice by Payam Akhavan. See Akhavan, *op. cit. supra* n. 37, at 15.

strikes one as a valuable instrument by virtue of its capacity to facilitate the conviction of individuals in highly visible positions. Their conviction and punishment seem to be excellent means of spreading the message which international criminal justice wants to impart *urbi et orbi* — the message, that is, that leadership positions in government, or the military, do not provide sufficient protective cover from responsibility for serious violations of human rights. On closer inspection, however, one realizes that the escalation of guilt, implicit in the imputation of criminal liability, may actually weaken the pedagogical effect of convictions rendered by international judgments. For these convictions can safely be regarded as an effective means of moral propaganda only so long as they are based on legal standards congruent with prevailing notions of just deserts. If convictions appear unduly harsh in light of these notions, they may perhaps satisfy blind desires for vengeance, but are no longer a good vehicle for the transmission of humanistic values. Truth be told, they are even capable of compromising the moral authority of international decision-makers.

While attentiveness to popular opinion is thus important for the success of international criminal justice, it can produce perplexing difficulties for international tribunals set up, *inter alia*, to contribute to the pacification and stabilization of a troubled region. The difficulties spring from a tension between the pedagogical ambition of international justice (to humanize conflict) and the fulfillment of the special role of these tribunals (to contribute to peace). Because War Crimes Tribunals for former Yugoslavia and Rwanda were also given stabilization tasks, the matter is important enough to require a digression.

The pacification role requires international tribunals to keep a watchful eye on reactions to their judgments of people in the territory engulfed by conflict. Disregard of these reactions can stir resentment against international judges, and complicate efforts to stabilize the region and secure local cooperation with international authorities. Under the worst-case scenario, tribunals established for the purpose of laying the ghost of war to rest, may provoke renewed conflict, or otherwise endanger peace. But look at the matter from the standpoint of international justice's mission to propagate values that humanize behavior in armed combat. From this vantage, at least some clashes with local opinion are the ineluctable accompaniment of an outside effort to adjudicate crimes committed in an armed conflict between cohesive groups. For in any such conflict, some people within each group will regard their leaders, when and if convicted of war crimes, as blameless heroes, or martyrs to a just cause — no matter how deeply implicated they might be in heinous wrongdoing. The

more group loyalty is regarded as a high virtue, the greater the number of these people.

How should this tension be resolved? It stands to reason that international judges cannot be swayed by negative reactions to their decisions, which are prompted by values whose transcendence lies at the very heart of the preventive tasks of international justice. From the legal perspective, then, these adverse reactions must be ignored, despite the negative impact this might have on the stabilization of the area. This is not to say, however, that local opinion should be entirely neglected. While rightly disregarding reactions stemming from unacceptable or atavistic beliefs, international judges should be doubly attentive to local reactions based on opinion that cannot be faulted on humanistic grounds. For in regard to these reactions, the lack of congruence between international and local assessments of just procedural outcomes is highly undesirable. Observe that the discord can no longer be justified by the larger pedagogical objectives of international justice, especially when local standards are more finely-grained than international ones. (As the previous section has shown, this is not a mere theoretical possibility). Moreover, the discord is now gratuitously harmful to the pacification of the war-torn region: when acceptable local opinion is not weighed, or neglected, the image of international justice is tarnished even among local people who are unaffected by the venomous brew of group hatred. Even when refracted through the optic of such local *bien-pensants*, the judgments of international tribunals can appear faulty, and international judges, ready to adjudicate in the teeth of enlightened local opinion, run the risk of being perceived as (a reverse) Pontius Pilate reincarnated. Support for international justice can thus be utterly eroded in the environment most directly affected by war crimes.

Let us now pick up again the thread of imputed command responsibility. As the preceding section has shown, results to which it leads depart not only from national legal doctrine but also from popular beliefs which cannot be dismissed as without weight or contrary to humanistic values. According to these beliefs, superiors who participated in war crimes and those who inadvertently failed to prevent these crimes, or omitted to punish their perpetrators, do not deserve identical treatment: placing all these superiors in the same stigmatizing category appears harsh and insensitive. Now, because such beliefs are likely to be shared by people whose ethical gyroscopes remain in order, individuals convicted on the imputed liability basis could become objects of sympathy even in the opinion of the moral elite in the troubled region. In this state of affairs it becomes a vain hope — an *ignis fatuus* — to expect that convictions of leaders on imputed liability grounds would carry a meaningful pedagogical message. All in all, then, the employment of imputed forms of command

responsibility could be detrimental to the socio-pedagogical mission of international criminal justice.

What about the goal of providing satisfaction to victims of war crimes? This goal is increasingly emphasized by human rights advocates as important to international judicial institutions. No wonder. We know that the impunity of war criminals has serious adverse effects on the well-being of aggrieved persons. We also know, at least since the days of Achilles, that impunity can provoke self-help, leading, in turn, to a widening circle of violence. Can providing satisfaction to victims of war crimes, then, justify the extension of superior responsibility beyond the limits set by municipal criminal law? It is probably true that a punitive reaction whose severity exceeds the transgressor's moral blameworthiness can exert a cathartic effect on his victims (provided, of course, that they can meaningfully link him to their predicament). It follows that punishment of a superior, no matter how disproportionate to his guilt, can satisfy the urge of persons harmed by war crimes to see the individual suffer who failed to prevent his underlings from harming them. Yet, few would be prepared to argue that international criminal law should turn into a blunt instrument for the satisfaction of untamed, raw feelings of vengeance — no matter how monstrous the criminal act that gave rise to them. What applies to the limiting role of retribution in modern municipal criminal law, seems to apply in the sphere of international criminal justice as well: even when aimed at providing satisfaction to victims of crime, convictions and penalties should be calibrated to the blameworthiness of criminals — including hierarchical superiors in military and political organizations. If punitive responses of international judicial institutions exceed what is appropriate in terms of just deserts, they signal a regression to historically older stages in the development of criminal law.

*C. Culpability Redux.* Assume that imputed forms of command responsibility are of some pragmatic utility in influencing social behavior. Now, it is clearly not the case that pragmatic utility is the sole measure in terms of which the desirability of criminal law doctrines is assessed in our time. If given undue prominence in criminal law, pragmatic considerations quickly run up against values that require limits on treating individuals as means or instruments for the realization of social policy. Like municipal systems of criminal justice, then, international judicial institutions must navigate the divide between preventive and retributive impulses: they too must seek to adjust convictions otherwise desirable on preventive grounds to prevailing ideas on the proper apportionment of blame.<sup>42</sup> But it is

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42. Even if the threat of punishment to innocents (e.g., an actor's family members,) had a powerful deterrent value on potential war criminals, it is clear that an humane system of criminal justice would reject this pragmatically useful measure.

precisely in this regard that imputed forms of command responsibility are most vulnerable to criticism. The basic character of this vulnerability was intimated earlier, in discussing the culpability principle of contemporary municipal law. The vulnerability resurfaced in the immediately preceding section, as it became apparent that neither the pedagogical mission of international justice, nor its goal of providing satisfaction to victims of crime, could be disentangled from popular notions of just deserts. Now this most sensitive point of imputed command responsibility deserves consideration on its own: its uneasy relationship with moral intuitions of culpability must be revisited and elaborated upon.

For a start, it should be conceded that the doctrine avoids grotesque extremes of failure to adjust criminal liability to personal culpability. It does not permit, for example, that completely blameless superiors be convicted (for the sake of deterrence, or victim catharsis) of heinous crimes of their subordinates. But short of such extremes, the doctrine creates disparities between liability and culpability that are large enough to make room for problematic outcomes. The greatest disparities arise from the operation of that variant of imputed command responsibility which is predicated of the mere failure to punish. If a commander is convicted for a war crime of his soldiers on this basis, a huge disproportion emerges, on the one hand, between the stigmatization to which he is subjected, and, on the other, the conduct in which he actually engaged and the blame he really deserves. It was noted before that the disproportion is large enough to becloud the distinction between a criminal actor and failing to punish one — a distinction that comes naturally to ordinary lay observers. What we must examine at this point is the expedient used to achieve such enhancement of responsibility. The expedient mechanism consists in taking the constituent elements of a war crime — its *actus reus* and *mens rea* — from actual perpetrators and transferring these elements to a superior who is causally unrelated to the actual wrongdoing of his underlings. The superior's criminality is thus "borrowed" from actual culprits, despite the high interest payable for this procedure in the currency of just desserts. To be sure, the disparity between criminal liability and actual culpability is not nearly as gross as it would have been if a completely innocent person were convicted of an egregious act perpetrated by someone else. This is because a superior who fails to punish his criminal underlings is not entirely blameless: his failure to impose discipline is a serious dereliction of duties. Military commanders in particular are obliged to organize and control their subordinates in such a way as to maximize the likelihood of maintaining discipline over them, and preventing the com-

mission of criminal acts on their part.<sup>43</sup> But the superior's dereliction of duties (and the blame attaching to it) deserves (from the retributive standpoint) a separate charge, carrying a substantially lesser stigma: he could be sanctioned for misprision of felony, for example, or for some special offense under general or military criminal law. When his culpable omission is used instead as a vehicle for raising his criminality to a higher register, a legal falsetto is produced that is conspicuously inappropriate from the standpoint of just desserts. Nor can the resulting disparity between culpability and liability be removed by modulation of punishment: the disparity stems from the stigma of subordinates' crime that attaches to their superior.

So much for the responsibility based on mere failure to punish. A less pronounced incongruity between liability and personal fault arises in regard to responsibility for failure to prevent. It places a superior who negligently omitted to prevent a war crime in the same classificatory niche as his subordinates who intentionally perpetrated the criminal deed. The disparity is less pronounced, because the superior stands convicted and punished for a misdeed to whose realization his culpable omission has in fact contributed. No full-scale transfer of crime-constituting elements thus takes place from the actual perpetrators to their superior. Even so, pronounced insensitivity to culpability remains plainly visible here: the line is blurred between negligent and intentional crime. Another distinction that is highly important to proper culpability assessment is ignored. And by tolerating the obfuscation, this variant of imputed command responsibility is vulnerable as well to charges of moral obtuseness.

But there is more. The variant's insensitivity to personal fault can be considerably augmented by the way in which the minimum threshold of "superior negligence" is likely to be set in practice. To see this likelihood, remember that ICTY judges view any dereliction of a commander's duty to be informed as sufficient to establish his negligence and therein also his primary responsibility for the war crimes of his troops.<sup>44</sup> But this minimal standard provides a slippery basis for a finding whose consequence is to enhance a superior's culpability to the point where it meshes with intentional wrongdoing. The main reason for this is the widespread human tendency to exaggerate in hindsight what could have been anticipated in foresight.<sup>45</sup> The tendency is especially likely to manifest itself among adjudicators who, ensconced in the calm of their chambers, try to divine what a commander should have foreseen amidst the confusions and pressures of

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43. See Richard Wasserstrom, "The Relevance of Nuremberg," in Marshal Cohen et al. (eds.), *War and Moral Responsibility* 126 (1974).

44. See *supra*, n. 18.

45. The existence of this tendency is amply supported by research in cognitive psychology. For ample references to relevant literature, see Rachlinski, "A Positive Theory of Judging in Hindsight," 65 *U. Chi. L.R.* 571, 591 (1998).

warfare — especially if it happens to be of the non-professionalized kind. Under these circumstances, the minimum threshold of negligence can easily begin to shade into liability without culpability. And even if well-meaning international judges disavow strict liability, the disturbing possibility cannot be ruled out that a hapless commander be convicted as a scapegoat for atrocities committed on the territory formally under his control.<sup>46</sup>

*D. Taking Stock.* There is no need to press the inquiry any further to make it plain that imputed command responsibility raises a host of troublesome issues. Its preventive impact is less certain than a superficial glance suggests, and whatever marginal gains the doctrine achieves in this regard could be offset by its harshness, which can be questioned on culpability grounds. Why then, one wonders, do so many swoon enthusiastically into the doctrine's broad arms? The main reason seems to be their fear that individuals who are most responsible for massive violations of human rights might slip between the cracks of international criminal law, if it were narrower in scope, more responsive to notions of just desserts, and more sensitive to degrees of personal culpability. As an antidote to these anxieties, the doctrine of imputed responsibility appears very attractive indeed: it provides prosecutors with a fall-back position when they experience difficulties in proving the direct involvement of highly placed individuals in the barbarities of our age. Many people also take the good judgment of international prosecutors entirely for granted. And if you believe that only truly unsavory political and military figures will be targeted for such prosecution, the doctrine of imputed responsibility seems over-inclusive only *in potentia*.

It is difficult to tell whether imputed responsibility is really necessary in order to bring major war criminals to justice: the procedural and evidentiary complexities of the matter rebuke any confident pronouncement. Yet it appears unlikely that these individuals would escape from the clutches of international justice scot-free if their liability were determined under rules more consonant with national criminal law and ordinary understanding of just desserts. As the first section of this essay has shown, international tribunals are not governed by overly demanding rules for establishing complicity in crime: the reach of direct forms of command responsibility in international law is quite impressive.<sup>47</sup> Nor should it be forgotten that evidentiary barriers to conviction before international tribunals are not as high as they are in the courts of many municipal legal systems, most nota-

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46. This may have happened in the notorious Yamashita case, at least according to Justice Murphy's opinion. See *Yamashita v. U.S.*, 327 U.S. 1, 35 (1946). For a similar assessment, see Wasserstrom, "The Responsibility of the Individual for War Crimes," in Virginia Held et al. (eds.), *Philosophy, Morality and International Affairs* 68 (1974).

47. See *supra* n. 10-12, and accompanying text.

bly those in the Anglo-American legal tradition.<sup>48</sup> In this less demanding legal environment, it is not very likely that abandonment of imputed responsibility would lead to outright acquittals of military and political leaders implicated in massive violations of human rights. A more probable consequence of this abandonment would be their acquittal on a few counts of indictments that are currently brought against them. While regrettable, this loss would seem an acceptable price for the rejection of a legal doctrine that can adversely affect the reputation of international tribunals.

The contrary view, finding the loss unacceptable, rests on the unspoken assumption that no heinous crime should go unpunished, and that otherwise applicable legal doctrines can be abandoned in order to facilitate conviction for egregious misdeeds. But it suffices to articulate this silent assumption to realize that it has little to recommend itself: if criminal law principles fail under the pressure of heinous crime, they are like a sprinkler system that turns itself off when the fire gets hot. It is sobering to note that the demand “no crime should remain unpunished” (*ne crimina remaneant impunita*) has a long and ignominious history of association with authoritarian systems of law enforcement. So does the companion notion that legal rules can be relaxed in proceedings that involve atrocious crime (*in delictis atrocissimis jura transgredi liceat*). Both the demand and its companion notion were routinely employed in continental criminal justice of the *ancien régime* to justify its repressive features.<sup>49</sup> Liberal democracies profess a strong dislike of ideas of this genre, and so should fledgling institutions of international criminal justice. In order to create a climate of opinion in which they can properly function and flourish, they should acquire the image of dispensers of justice that is no less sensitive to notions of just deserts than justice dispensed by national criminal courts.

It will be said that the doctrine of imputed liability is not only a fail-safe for catching major war criminals, but also an independently useful instrument for punishing lesser culprits — superiors who negligently failed to prevent war crimes, or to punish those who perpetrated them. Abandon imputed forms of responsibility, it will be objected, and these people will escape the arm of international jus-

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48. The primary reason is the liberal use of hearsay. In a recent judgment, for example, a Trial Chamber of the ICTY has justified its finding that the accused ordered a massacre, inter alia, by the testimony of a witness who had overheard someone say “we all know that the accused has ordered that no prisoners be taken”. See Blaškić judgment, para 472.

49. For the historical roots of the demand that no crime should go unpunished, see Richard M. Fraher, “The Theoretical Justification for the New Criminal Law of the High Middle Ages: *Rei Publicae Interest, Ne Crimina Remaneant Impunita*,” 1984 *U. Ill.L. Rev.* 577-95. On the companion notion, developed from the medieval doctrine of *transgressio legis*, see Benedict Carpozov, *Practica Nova Imperialis Saxonica Rerum Criminalium*, Pars. 3, Questio 102, no. 68, p. 16 (1677).

tice. In response, remember that imputed command responsibility is only one of several ways to reach these culpable omissions. As noted already, another way to achieve this objective — a way sensitive to degrees of culpability — is to treat these omissions as a special offense of reckless or negligent supervision of one's subordinates. The adoption of this alternative would not imply extension of international criminal jurisdiction into a novel area.<sup>50</sup> And because the offense of faulty supervision carries a lesser stigma than imputed responsibility for war crimes resulting from this supervision, the innovation could even be applied retroactively: the principle *nullum crimen sine lege praevia* does not bar the use of milder criminal laws enacted after the event.

### III. CAN THE DISCORD BE REMOVED?

If the lower reaches of command responsibility doctrine are in fact as problematic as the foregoing discussion suggests, the question then becomes whether the doctrine can be modified to remove its questionable aspects and establish a greater harmony with principles of contemporary criminal law. The prospects for such a change look rather grim. Even those who concede that imputed forms of responsibility are problematic and over-inclusive will argue that no change is really necessary. International judicial organs, they are likely to say, can avoid the severity of the doctrine by exercising self-restraint. Prosecutors can choose not to indict for mere failure to punish, rendering this most questionable form of imputed responsibility innocuous.<sup>51</sup> Or, they can establish a policy of charging on imputed liability grounds only those superiors who either knew or willfully ignored that their subordinates were committing war crimes. Consistently followed, this policy would align the decisions of international tribunals with limitations on responsibility mandated by conventional participation doctrine of municipal law. And although such arguments seem no more than a precarious palliative for a perceived deficiency in the law, they are capable of sapping the energy required to institute a change that is not likely to generate much political and legal support in the first place.

There is more, however. Even assuming, rather optimistically, the willingness to remove the over-breath of command responsibility, serious obstacles could still lie in the path of reform. They are foreshadowed by the widespread belief that the entire doctrine, including its problematic parts, is firmly rooted in existing international hu-

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50. See *supra*, text following n. 39.

51. Despite the language of some indictments that might suggest the contrary, it seems that the prosecutors of the two Hague Tribunals have so far relied only on the variant of failure to punish which is connected to the failure to prevent.

manitarian law.<sup>52</sup> ICTY judges, for example, have repeatedly opined that imputed forms of command responsibility are a part of international customary law.<sup>53</sup> If the *entire* doctrine of command responsibility is indeed so deeply entrenched in the international legal order, its alignment with national criminal law would be a difficult project indeed: repudiating a customary rule of international law is a formidable task.<sup>54</sup>

In assessing the status of command responsibility in international law, it is first useful to examine whether its imputed forms were definitely settled at the time when the War Crime Tribunals for former Yugoslavia and Rwanda appeared on the international scene. Continuing ferment in this area is suggested by partial modifications of minimal standards for command responsibility by the Rome Statute of the International Criminal Court (of which more later in this section).<sup>55</sup> The rush to attribute customary character to the *entire* doctrine may well have been motivated by the desire to show that the two *ad hoc* Tribunals apply only established international law, and thereby forestall the objection that they retroactively apply new rules in an area in which this would be objectionable. Our purposes require, however, that the status of imputed command responsibility be examined *sine ira et studio* — independently from pressures of transient political expediency. But in order to do so, we must go upstream in time, to the infancy of imputed command responsibility for anamnesis. A cursory sketch of the main signposts of the doctrine's historical development until the last decade of the past century cannot be avoided.<sup>56</sup>

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52. The Secretary-General of the United Nations shares this belief. For he has declared that the ICTY applies only established "international humanitarian law." See the Report of the Secretary General pursuant to Paragraph 2 of the Security Council Resolution 808, S/25704, paras 35-35 and 56, of 3 May 1993.

53. See the trial judgments in Aleksovski (para 69), Celebići (para 343), and the Blaškić (para 290) cases.

54. Because the requirements for establishing a customary rule of international law have lately been relaxed, one might be tempted to think that the *contrarius actus* — that is, the repudiation of a customary rule — has also been made easier. In fact, however, repudiation of an established custom raises greater difficulties. Consider only that the initial act that contradicts a customary rule can be perceived as illegal. For brief but illuminating remarks on the subject, see Antony D'Amato, *The Concept of Custom in International Law* 61 (1971).

55. See *infra*, text accompanying notes 77-80. Indicative of continuing flexibility surrounding the lower limits of command responsibility are also some judgments (involving civilian leaders) of the International Criminal Tribunal for Rwanda. See, e.g., *Prosecutor v. Akayesu* (para. 488).

56. Of importance for our purposes are only forms of imputed command responsibility with continuity to present law. Direct forms of command have a very long history, extending back to Greek tragedy. The notion of holding a superior vicariously responsible for acts he has ordered existed also in classical Rome. Aulus Gellius, for example, writes approvingly of the view that a master can be convicted of theft who ordered his slave to steal. See 2 P.K. Marshall (ed.), *Auli Gellii Noctes Atticae*, 11.18.24, p. 357 (1940). There is also evidence that Roman military officers were responsible for acts committed by their soldiers. See Daube, "Defense of Superior Or-

A. *The Ancestry of Imputed Responsibility.* Some advocates of the doctrine like to trace its origin to the treaty law of the period preceding World War I. Truth be told, however, one vainly leafs through dusty volumes containing these treaties for any trace of the notion that a military commander is *primarily* liable for war crimes committed by his soldiers. The language of these treaties suggests no more than that a superior whose troops commit a war crime is subject to some form of disciplinary or criminal punishment: its nature remains undetermined.<sup>57</sup> In fact, as late as the immediate post-World War II period, treaty law still limited the scope of command responsibility to those superiors who either personally committed war crimes, were accomplices in them, or ordered those crimes to be committed. Consequently, the harmony with municipal criminal law was as yet undisturbed.<sup>58</sup> It was only in 1977 that a specific reference to the responsibility of military commanders for failure “to prevent or repress” war crimes appeared in Additional Protocol I to the 1949 Geneva Conventions. Yet, by this time, several military and civilian leaders were already convicted on imputed responsibility grounds, and their convictions were more than three decades old.

Thus, rather than being an invention of international treaty law, imputed command responsibility (in its clearly recognizable form) is the offspring of post-World War II military courts in Germany and Japan. Charters that set them up in the mid-forties did not provide for this novel legal construct: it came to life later — spontaneously, so to speak — in the form of caselaw. But following completion of proceedings against World War II civilian and military leaders, there was a long pause in the vital signs of the newly crafted doctrine: until 1993, when the Security Council of the United Nations established the War Crime Tribunal for former Yugoslavia, no international judicial body considered the issue of imputed command responsibility. During this long hiatus, the only significant development on the international plane was the adoption in 1977 of Additional Protocol I to

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ders in Roman Law,” 72 *L. Q. Rev.* 494, 514 (1956). But the answer whether this responsibility was imputed (in our present sense) is hard to retrieve from the clutches of time: its meaning eludes confident determination. For a cursory overview of command responsibility since the seventeenth century, see Parks, “Command Responsibility for War Crimes,” 62 *Mil. L. Rev.* 4-19 (1973).

57. An early Hague Convention states, for example, that “troops must be commanded by a commander who is responsible for his soldiers” without specifying what his responsibility entails. See Regulation Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907 (article 43 of the Annex). This Regulation is often cited because it was relied upon by the majority of the United States Supreme Court in the Yamashita case. See 327 U.S. 1, 14(1946).

58. The specification of the nature of punishment visited on these directly responsible commanders was left to national legal systems. See Bassiouni, “Repression of the Breaches of the Geneva Conventions,” 8 *Rutgers-Camden L.J.*, 185, 205 (1977). For a good overview of the developments in treaty law, see also Rolling, “Aspects of the Criminal Proceedings for Violations of the Laws of War,” in A. Cassese (ed.), *New Humanitarian Law of Armed Conflict* 219 (1979).

the 1949 Geneva Conventions. As just mentioned, the Protocol ushered into treaty law the responsibility of commanders for failure to prevent and to repress the criminal activity of their subordinates.

A significant novelty in relation to the caselaw of post-World War II military courts was that the Protocol clearly profiled the failure to prevent and the failure to repress as independently sufficient grounds for a superior's conviction. Contrary to what is sometimes maintained, however, this treaty still refrained from determining the character of responsibility entailed by these two failures: its provisions only stipulated that superiors who fail to prevent or repress the crimes of their subordinates shall not be absolved from responsibility for these crimes. The more specific determination of this responsibility — penal or disciplinary, primary or vicarious — was left to the domestic law of the ratifying states.<sup>59</sup> Moreover, whatever the intended import of these provisions might be, it is not altogether clear that they entered into customary international law.<sup>60</sup>

All in all, it turns out that prior to the adoption in 1993 of the ICTY Statute, support for the doctrine of imputed command responsibility was largely confined to the case law of military courts set up in the aftermath of World War II. Their cardinal importance for the theme of this essay requires a closer look at their character and at the weight of precedents they established.

*B. Post World War II Military Courts.* It does not require deep immersion into the study of decisions rendered by post World War II military courts to realize that they are not the most obvious well-spring from which one would expect the demiurges of modern international law to drink for inspiration. That these courts faced unsavory individuals charged with horrendous crimes should not blind us to the fact that the legal standards they crafted (especially in

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59. See Bassiouni, *op cit. supra* n. 58, at 185, 205. The relevant provision of the Protocol's article 86(2) reads as follows: "The fact that a breach of the Convention or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, 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 Article 86 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. Reprinted in 1125 UNTS (1979) at 3-602.

60. It bears remarking in this connection that a commission of international law experts opined, prior to the establishment of the ICTY, that Additional Protocol I had only in an (unspecified) part "undoubtedly" become part of customary law. See Annex, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, para 53 (1992). It may have been due to this expert opinion that the Secretary General of the United Nations, in setting out the legal sources of the two Hague War Crimes Tribunals, excluded Additional Protocol I from the list of conventions incorporated into international customary law. See Report of the Secretary-General to the Security Council, pursuant to Paragraph 2 of Security Council Resolution 808, S/25704, Appendix B, para 35 (3 May 1993).

the Far East) were deficient in terms of our current understanding of criminal law with humanitarian aspirations. As a well-known international scholar remarked long ago, these standards were frequently such as "to make a lawyer wish to forget all about them at the earliest possible moment".<sup>61</sup> Their general characteristic, most relevant for present purposes, was an unabashed severity that can rightly be regarded as the principal source of the escalations of culpability inherent in imputed command responsibility. On first audit, an observer is inclined to attribute this harshness solely to the nature of military justice. After all, courts martial are an adjunct to military discipline and tend generally to be stricter and less responsive to nuances of culpability than institutions of regular (civilian) criminal justice.<sup>62</sup> A closer inquiry reveals, however, that another factor contributed mightily to the harshness of military legal doctrine, creating an intellectual climate hospitable to imputed forms of command responsibility. This factor was the influence of Anglo-American criminal law (as it existed prior to reforms instituted in the second part of the twentieth century) on the work of military judges: it can hardly be denied that the United States was the dominant accusatorial presence at and behind the military courts. Those interested in the relationship of international to national criminal law cannot afford to overlook this influence.

It is important to emphasize in this connection that the conceptual armature of Anglo-American law at that time was much more receptive than it is today to legal constructs of the type to which imputed command responsibility belongs. The older doctrine of conspiracy, for example, discouraged serious attention to the proper limits of complicity, and facilitated the extension of responsibility for the criminal acts of others. Most congenial to imputed responsibility was the continuing infatuation of Anglo-American law of the period with the notion, barnacled with ancient associations, that a person who engages in wrongful conduct should take all its consequences — whether or not he foresaw or desired them.<sup>63</sup> How this notion favored imputed forms of liability can best be seen on the example of the felony murder rule — a rule which is but a specific application of this notion to the law of homicide. Consider that if it appears legitimate to

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61. Schwarzenberger, "The Problem of International Criminal Law," 3 *Current Legal Problems* 30 (1950). Some military tribunals in the Far East, including the tribunal that tried general Yamashita, did not even include law members among its judges. The complete transcripts of the more carefully set up International Military Tribunal for the Far East are reprinted in R. John Pritchard & Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial* (1981).

62. See M. Osiel, *op. cit. supra* n. 36, at 67-69

63. The source of this notion is again medieval canon law scholarship. On the early history of the maxim "whatever follows from crime should be attributed to those who engage in an illicit act," ("*versanti in re illicita imputatur omnia quae sequuntur ex delicto,*") see Kuttner, *op. cit. supra* n. 31, at 201.

convict a person who embarked on a forbidden path of murder (committed by someone else), it also appears legitimate to convict a superior of an intentional war crime (committed by his soldiers) if he negligently failed to control them, or culpably failed to punish them. A superior's negligence in supervision and his failure to exert discipline exemplify "forbidden paths" taken by a superior.

Fairness requires, however, acknowledgment of a significant difference in harshness between Anglo-American criminal law of the period and the caselaw of post-World War II military courts. The harshness of the former was tempered by several features imperfectly duplicated by or entirely absent from the latter. Most important among them was the Anglo-American institutional environment, in which the fine-tuning of the law — even its nullification — is entrusted to a body of lay adjudicators. The impact of this arrangement should not be underestimated: throughout the history of common law, the jury of defendants's peers cushioned the severity of substantive criminal law. Where the jury of one's peers is absent, Anglo-American substantive doctrines can indeed produce strikingly harsh results.<sup>64</sup> No account of the Anglo-American presence at the cradle of imputed command responsibility would be complete if the still surviving traces of its influence were left out of the picture. They surface in current attitudes of Anglo-American lawyers toward the doctrine. Although, as previously noted, its broad sweep is now problematic, even from the perspective of Anglo-American legal systems, the severity of the doctrine strikes Anglo-American lawyers less than it does lawyers from countries that belong to the legal tradition of continental Europe. The reason for these differing reactions is that current Anglo-American criminal law is a palimpsest from which ancient ideas, congenial to imputed forms of command responsibility, have been incompletely erased.<sup>65</sup>

But let us return to the uneven reputation of legal standards crafted by post-World War II military courts. Because of this reputation alone, one would expect authorities capable of shaping international criminal law to take a critical stance toward the jurisprudence

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64. Much more could be said, of course, about the reasons for the traditional severity of Anglo-American substantive criminal law, but only one additional point deserves mention, because of its relevance to the theme of this essay. The arrested bureaucratization of the Anglo-American state apparatus has prevented the development of sharp distinctions between private and public spheres. As a result, vicarious forms of liability — whose natural habitat is the private law of agency — spilled over into the public realm of substantive criminal law.

65. This is especially the case with jurisdictions within the United States. Observe that only a few states have followed the United Kingdom in abolishing felony murder. The great majority of them still cling to the old *versari in re illicita* rationale for the rule, satisfied by greatly narrowing the scope of felony murder by legislative and judicial interventions. The important difference is, however, that a rule routinely used at the time of post World War II military courts is now applied by the judges rather grudgingly. See the authorities in P. Johnson, *op.cit.* supra n. 33, at 213.

of these courts. One would expect them carefully to explore whether rules distilled from military court decisions are compatible with general principles of contemporary criminal law, before acknowledging them as binding precedents, and using them as building blocks of incipient international custom. After all, resorting to general principles of law is the proper step to take in developing general doctrines of international criminal law, provided, of course, that a particular matter is not preempted by custom or treaty. Strange to report, however, the builders of current international criminal law take a rather uncritical stance towards the aging caselaw of post-World War military courts. They stop deferentially before each decision as if it were a station in a pilgrimage, and treat each rule discerned in the decision as if it were unarguable as a papal bull.

Contributing to the bewilderment over this attitude is the fact that all convictions based on imputed command responsibility were rendered by military courts that operated as jurisdictions of occupying powers, co-sovereign in Germany and Japan, rather than as truly international judicial bodies.<sup>66</sup> In justifying these convictions, moreover, judges of those courts relied mainly on the authority of their respective charters and municipal criminal law.<sup>67</sup> For both substantive and formal reasons, then, one would expect at least a modicum of uncertainty over whether the legal output of these courts, by virtue of some sort of *dédoublement fonctionnell*, should count towards the formation of international custom.

But let us follow the prevailing opinion and assume that decisions of post-World War II military courts constitute controlling authority and binding precedents for contemporary international criminal law. *Unda fert non regitur*. The question then becomes whether these decisions in fact support all the variants of imputed command responsibility which we have identified in the text of article 7 of the ICTY Statute. So far as imputed command responsibility for failure to prevent is concerned, the answer is in the affirmative. There is ample support for this variant of imputed responsibility, even in those constellations of facts in which ordinary municipal systems of criminal law refuse to follow suit, because of their hostility to reckless and especially negligent complicity in crime. Only the lower

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66. In the Far East, the Tokyo Tribunal was set up in 1946 by a proclamation of General MacArthur. So were two earlier Courts Marshal that convicted the Japanese Generals Yamashita and Homma. In the West, the military courts trying "lesser" war criminals acted under Control Law No. 10.

67. International law was mainly invoked for the purpose of rebutting defense arguments that the founding documents of military courts defined new crimes. It was widely accepted at the time that these founding documents (charters) were in the nature of national legislation. See the Hostage Case, decided by the United States Military Tribunal in 11 United States War Crimes Commission, *Law Reports of Trials of War Crimes* 52-53 (1948).

limits of this responsibility are not clearly signposted.<sup>68</sup> Unlike failure to prevent, however, military court decisions provide little, if any, support for the proposition that a superior is primarily responsible for the crimes of his underlings on the sole basis that he failed to punish them. Only two points related to the failure to punish were actually decided. The first is that a superior's failure to punish can constitute evidence of his failure to prevent subsequent criminality in lower ranks.<sup>69</sup> The second point is that this failure can constitute evidence of the superior's mental state (acquiescence, or approval) required with respect to other charges brought against him.<sup>70</sup>

The absence of precedential support for mere failure to punish is easy to understand. As inspection of imputed liability charges brought against German and Japanese officials quickly reveals, they were all prosecuted for criminal events that continued over a considerable period of time. To the extent that judgments based on these charges referred to failure to punish at all, they quite naturally tended to approach this failure as a symptom of the overarching failure of a commander to prevent war crimes committed within the time-frame set by the indictments. Phrased differently, the accused were held accountable on the ground that by failing to enforce discipline, they contributed to war crimes committed by their troops. And because no charge against a superior related to an isolated criminal event, never repeated by those under his control, it is difficult to find a single passage in the judgments of these courts that is devoted to

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68. For a detailed discussion of these uncertainties, see Parks, *op. cit. supra* n. 56, at 95-97. It should not be assumed, however, that responsibility for failure to prevent was accepted by all military court judges. In the Tokyo trial, for example, two powerful dissents were voiced on this point, one by the French justice Bernard and the other by the Indian Justice Pal. The transcript of the former is in the Treasure Room of the Harvard Law School Library. For the transcript of the latter, see International Tribunal for the Far East, *Dissenting Judgment of Justice R.B.Paul*, at 620 (1953).

69. This is well illustrated by the "Hostage" case, involving several high-ranking German military officers. In proceedings against the highest ranking among them, Field Marshall Wilhelm List, failure to punish was treated as a necessary but not sufficient element of failure to prevent. Hostage case, *supra* n. 67, at 1272. In the case against General Walter Kuntze, charges related to his failure to prevent the recurrence of criminality, rather than failure to punish crimes committed in the past. *Id.* at 1279. In the trial of Lieutenant General Ernst Dehner, (accused, by the way, of war crimes in Croatia) the Tribunal faulted the accused for failing to prevent his subordinates' criminal acts, or, in the alternative, failing to prevent the recurrence of such acts — without ever mentioning failure to punish. See 11 *Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 1298 (1949). In the Tokyo trial, involving 28 former leaders of Japan, failure to punish was also placed in the context of failure to prevent. See, 1 *Official Transcript of the International Japanese War Crimes Trials in the International-Military Tribunal for the Far East*, 29 April 1946-12 November 1948, at 49, 845 (1977).

70. A telling illustration is the case of Field Marshal von Kuechler. His failure to punish was treated as evidence of his approval of criminal orders that his troops had received from other authorities. See *United States v. von Leeb et al. (High Command Case)*, 11 *United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, at 568 (1949). See also the case of General von Roques. *Id.* at 632.

failure to punish in isolation from the role it played in encouraging or facilitating the further criminal activity of subordinates. In a rare case in which post-World War II military judges attempted to enumerate the elements of imputed responsibility in an abstract fashion, they listed failure to prevent and failure to punish as *jointly* required for conviction.<sup>71</sup> It can thus safely be said that the most problematic form of imputed command liability from article 7 of the ICTY Statute — the responsibility for mere failure to punish — is also the form with the weakest backing in the case law of post-World War II military courts.

*C. National War Manuals and National Practice.* Since post-World War II military precedents provide only shaky evidence that all aspects of imputed command responsibility were deeply rooted in international criminal law at the time when the War Crime Tribunals for former Yugoslavia and Rwanda were established, those who maintain this position seek additional support in provisions of various national war manuals. They claim that these provisions demonstrate that imputed command responsibility has for a long time been an accepted norm in national systems of military justice.<sup>72</sup> But a quick sampling of such war manuals casts doubts on this conclusion — especially in regard to mere failure to punish.

It is true that a few war manuals contain language which could be construed as recognizing both failure to prevent and failure to punish as independent grounds for holding a commander vicariously liable for war crimes of his subordinates.<sup>73</sup> Many other war manuals,

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71. The case is that against the Japanese admiral Toyoda. The relevant passages from the judgment are quoted in Parks, *op. cit.*, supra n. 68, at 72. Remember in this connection that it was only in 1977 that Additional Protocol I to the Geneva Conventions defined failure to prevent and failure to “repress”(punish) as being each *independently* sufficient for conviction.

72. For an assertion of this claim by ICTY officials, see the Prosecutor’s Response to Blaškić’s Preliminary Motion to Strike Portions of Amended Indictment of 17 January 1996, pp. 15-18. (Case No. IT-95-14-T). The prosecutor’s claim was (partially) accepted by the Trial Chamber. See Blaškić judgment, para 323.

73. This is true of the British and U.S. Manuals, for example. Whether this language proves the claim is, however, not entirely clear. Consider article 501 of the U.S. Department of the Army Field Manual FM 27-10, The Law of Land Warfare (1958). The article provides, *inter alia*, that a commander is “personally” responsible if he should have had knowledge that his troops are about to commit or have committed a war crime, and if he fails to take adequate steps to insure compliance with the law of war or to punish its violators. But does “personal” responsibility to which the article refers equal vicarious liability for any crime of one’s soldiers? If they committed rape, for example, is the negligent commander to be convicted of this crime?

In *Koster v. United States*, 685 F.2d 407, the Secretary of the Army imposed administrative sanctions on a general who received reports describing the My Lai massacre and then conducted an inadequate investigation into the matter. The Secretary indicated in a memorandum, “[in] my view General Koster, although free of personal responsibility for the murders themselves, is personally responsible for the inadequacy of subsequent investigations. . .”(Id. at 410). An authority on U.S. military law has plausibly argued that a commander is responsible (at the domestic level) for the offense of his troops only on a showing of wanton negligence, and that his failure

however, do not incorporate such provisions: while they acknowledge that commanders are responsible for failing to prevent or punish, they leave the nature of this responsibility unspecified.<sup>74</sup> The parallel to the stance of Additional Protocol I to the Geneva Conventions is far from coincidental: most national war manuals currently in force have been issued (or revised) for the purpose of fulfilling the obligation of national governments to incorporate international humanitarian law into the domestic legal system.

But there is more to be said on this issue. Even if national war manuals specifically provided for imputed command liability, in many jurisdictions this would not be the last word on the state of national law. War manuals, typically issued by defense ministries, are administrative regulations, low in the normative hierarchy: they cannot displace the culpability principle, widely regarded in many countries of the world as a cornerstone of *statutory* criminal law. Whether these administrative regulations are internally binding depends on whether a given country incorporates international law directly into its domestic order, or requires an act of legislation (perhaps even a constitutional amendment) to achieve this effect. In the latter alternative, it should cause no surprise if military codes of legislative provenance, presently contemplated in some countries, were to create special (less serious) offenses of culpable failure to restrain or punish one's subordinates. The idea underlying these offenses is, of course, to punish commanders for what they did not do, rather than for what others have done.

Generally speaking, it is treacherous to suppose that any reference to the responsibility of commanders for the misdeeds of their underlings implies that this responsibility should be vicarious. As was indicated at the outset of this essay, various spheres of meaning have been construed around the term "command responsibility", and disregard of its protean nature easily leads to mistaken conclusions. A monument to this mistake is the use of findings by an Israeli Commission of Inquiry as evidence that imputed command responsibility

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to report allegations of war crime to proper authority does not give rise to his responsibility for this crime, but constitutes instead a violation of special military law provisions. See Parks, *supra* n. 68, at 98-99.

74. An illustration that the meaning of "personal responsibility" in war manuals need not be synonymous with imputed responsibility is provided by the "Regulation Concerning the Application of International Law of War" issued by the Defense Ministry of former Yugoslavia in 1988. It is true that article 21(1) of the Regulation provides that a commander is "personally" (*lično*) responsible for failure to prevent and failure to punish. But article 32, dealing with responsibility for war crimes, obligates (*ovlašćuje*) state authorities to hold only those military persons criminally accountable who "*ordered or perpetrated*" war crimes. Failure to prevent and to punish are conspicuously absent from this latter provision. For the (somewhat flawed) English translation of this Regulation, see M.C. Bassiouni & P. Manikas, *op. cit. supra* n.14, at 633-77.

has acquired customary status in international criminal law.<sup>75</sup> The Commission in question had been charged with investigating the responsibility of the Israeli military for the massacre of Palestinians by Phalangists in two Beirut refugee camps in 1982. Several high officers, including the Israeli Chief of Staff, were found responsible for failure to prevent the massacre on the ground they should have known that the entry of hostile Phalangists into the camps might lead to atrocities. But while the Commission's findings do stand for the proposition that mere negligence in *preventing* criminal acts of one's subordinates can engage superior responsibility, the findings are completely silent on the issue of superior responsibility for *failure to punish*. More importantly, there is no reference whatsoever in the Commission's Report as to the specific nature of superior responsibility. As careful reading of the Report attests, its members never contemplated endorsing the concepts of primary responsibility of a commander for crimes committed by those under his control. It was never their intention to suggest that the atrocities perpetrated by the Phalangists could be attributed to the Israeli military brass by operation of the imputed responsibility doctrine.<sup>76</sup>

*D. Closing Remarks.* What does the swift historical scan we have just overseen suggest about the status of imputed command responsibility doctrine in international law prior to the last decade of the twentieth century? One is understandably reluctant to make confident pronouncements on the subject: there are too few fixed stars in the firmament of international law. Even so, the just completed sketch compels the conclusion that this aspect of the doctrine, in the period under consideration, was neither so deeply rooted in international practice nor so widespread, as to deserve recognition of customary status. The conclusion applies with special force to the responsibility of superiors for mere failure to punish. Claims that the doctrine in all its forms was earlier firmly entrenched in international law seem therefore unjustified.

This diagnosis applies, however, only for the period we have examined thus far. In the last decade of the twentieth century, important developments took place in the international arena that have a special bearing on imputed command responsibility. To begin with, the Security Council of the United Nations has (implicitly) given its stamp of approval to the doctrine by adopting the founding documents of two *ad hoc* War Crimes Tribunals with specific provisions on imputed responsibility. On the basis of these provisions, judges of

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75. In the Blaškić case, for example, the Trial Chamber used these findings as "additional evidence" (*un indice supplémentaire*) of the doctrine's customary status. See Blaškić judgment, para 331.

76. See Y. Kahan, A. Barak & Y. Efrati, "Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut, February 7, 1983" (authorized translation), in 22 *International Legal Materials* 473-520 (1983).

these Tribunals have already convicted several military and non-military leaders on imputed responsibility charges, and many more prosecutions on these charges are currently in progress with considerable chances of success.<sup>77</sup> In addition, provisions on imputed responsibility now figure prominently in the International Law Commission's draft Code on Crimes against the Peace and Security of Mankind.<sup>78</sup>

Last but not least, these provisions have found their way into the recently adopted Rome Statute of the International Criminal Court.<sup>79</sup> It is true that the Statute has reduced the discord of the imputed responsibility doctrine with municipal criminal law by departing, to a degree, from provisions of the ICTY Statute we have canvassed in the preceding pages. Under the Rome Statute, a superior's inadvertently negligent disregard of information indicating that a crime of his subordinates is impending will no longer suffice for imputed responsibility. Only his "conscious disregard" of such information produces the responsibility-escalating effect. Expressed in the vocabulary of conventional municipal law, this means that negligent complicity in the crime of one's subordinates is no longer punishable. Only reckless and intentional complicity remain within the pale of punishable conduct.<sup>80</sup> But this milder approach applies only to civilian superiors: the responsibility of military commanders remains unchanged.<sup>81</sup> So does the responsibility of both civilian and military leaders for failure to punish.<sup>82</sup> By and large, then, the Statute has retained, and thereby affirmed, the imputed responsibility doctrine in both its variants. This affirmation is significant in light of the great number of states that have signed this treaty setting up the first permanent international criminal court in history.

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77. As was mentioned at the outset, the Rwanda Tribunal in Arusha has exceeded its Hague counterpart in the number of such convictions, including convictions for genocide on command responsibility grounds. It should be emphasized, however, that most of these convictions found superiors guilty in the alternative —either on direct or imputed liability theory. See *supra* n. 35.

78. According to Article 6 of the Draft Code, a superior is not "relieved from criminal responsibility" if he "knew or had reasons to know" that his subordinates were going to commit a crime, and failed to take necessary measures to "prevent or repress". Report of the International Law Commission on the Work of Its Forty-Eight Session, 6 May-26 July 1996, UN Doc. A/51/10, at 36-37. The relevant text of the Code is also available in Lyal Sunga, *The Emerging System of International Criminal Law* 437 (1997).

79. Article 28 of the Rome Statute. See U.N. Doc. A/CONF.183/9 (17 July 1998), reprinted in I.L.M. 999 (1998).

80. *Id.* article 28(2).

81. *Id.* article 28(1).

82. The Statute replaces the words "failure to punish" used in the ICTY Statute with the expression "failure to submit the matter [of subordinate delinquency] to the competent authorities for investigation and prosecution". This change captures the interpretation given to "failure to punish" by ICTY judges. For a detailed comparison of the provisions of the Rome Statutes with those of the ICTY Statute, see Vetter, "Command Responsibility of Non-military Superiors in the International Criminal Court," 25 *Yale J. Int. L.* 89, 113-22 (2000).

Taken together, these developments provide ample ammunition for votaries of imputed responsibility to assert that the entire doctrine of command responsibility, including its imputed forms, is now part of customary international law. This new diagnosis seems plausible even if earlier proclamations about the customary nature of the doctrine are off the mark — as our historical sketch suggests. But this diagnosis is deeply regrettable to all those who share the moving spirit of this essay and take the moral foundations of criminal responsibility with utmost seriousness. From their point of view, the embrace of imputed responsibility by international law fails to advance a model of international justice whose institutions operate on the best principles contemporary criminal law has to offer, and thus interact on this basis with national systems of criminal law. From their perspective, acceptance of imputed responsibility is a step in the direction of a type of law enforcement that is used as a club to administer rough justice — a type in which trust in the proper exercise of prosecutorial discretion is the main safeguard against potentially indiscriminate severity.

It may well be that we have blundered into a bad situation, by following post-World War II military justice without sufficient reflection about available and practically acceptable alternatives that better accord with our present humanistic aspirations. There is, in fact, little evidence that the compatibility of imputed command responsibility with the culpability principle has received much attention in the deliberations that have accompanied an exuberant *accelerando* of international criminal jurisdiction in recent years. By and large, specialists in public international law have labored in acoustic isolation from their brethren working the vein of municipal criminal law. If that is so, can the more recent trend toward acceptance of imputed forms of responsibility be reversed, and the tension reduced between the lower limits of command responsibility and municipal principles of criminal law? Muted voices can be heard suggesting that, because the tribunals for former Yugoslavia and Rwanda were set up for special situations, the law they have spawned has only limited significance for the developing international criminal law of general application. But these whisperings are not likely to find much resonance: they cannot easily be disentangled from the background notion that harsh legal doctrines, legitimately applied to small and weak nations in turmoil, require reconsideration and correction when contemplated for broader use. For even if it is true that the small and the weak have smaller wings in heaven, the open admission of this background notion is incompatible with the formal equality of states under international law.

Which leads the present essay to the melancholy conclusion that international criminal law is not likely to adopt more refined notions

of just desserts culpability in the near future. Discrepancies between municipal and international criminal law, traced on the foregoing pages, are likely to persist for some time. Over the long haul, however, the gradual refinement of international criminal law cannot be halted. When the budding institutions of international criminal justice go into full bloom, their present insensitivity to degrees of personal culpability will increasingly be perceived as anomalous. So will the indebtedness of its imputed responsibility doctrine to post-World War II military courts. For with respect to these courts, there is a measure of truth in Clemenceau's dictum that military justice relates to its civilian cousin as a brass band does to a symphonic orchestra.

(Completed in February 2001)