Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice

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I. INTRODUCTION

The command responsibility doctrine criminalizes a failure by a superior to exercise necessary care to prevent or punish crimes by subordinates.[1] The modern formulation of this doctrine permits criminal liability to be based upon a minimum

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1. *See* Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 174 (2000).

mens rea of negligence and an *actus reus* of omission.[2] This article proposes that such a combination of negligence and omission is incompatible with a deontological, retributive theory of criminal law that values the individual as the necessary unit of moral accountability. Under this doctrine, liability is established without conduct that exhibits strong individualized choice and without a mental element that reflects a guilty mind.[3] As such, it persists as a utilitarian tool of victor's justice favoring deterrence[4] of crimes and the punishment[5] of superiors over the principle of individualized fault.

International lawmakers and scholars must concern themselves with realigning the command responsibility doctrine with this bedrock principle. Absent such concern, support for international criminal justice may erode as the discord between principles of individualized liability and legal doctrines raises doubt regarding the justness and efficacy of the emerging framework of international criminal law. Admittedly, the tradition of positivism and the prevailing dynamic of compromise in international lawmaking may hinder the realignment proposed here. Nonetheless, greater attention must be given to deriving criminal doctrines from individualized fault principles and rooting them in a philosophy of law rather than succumbing to the appeal of utilitarian objectives.

Building upon a historical overview of the origins and evolution of the command responsibility doctrine and a discussion of the philosophy of criminal law, this article provides a normative critique of the elements of command responsibility and suggests an approach that international legislators should adopt to improve the doctrine in light of its normative failings and the peculiar nature of international law.

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2. *See* KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 254-55 (2001).

3. *Id.*

4. An objective of international criminal law should be the deterrence of gross violations of human rights and humanitarian law. Such a practical objective benefits from an international legal system that creates incentives and encourages those in power to prevent and prosecute international crimes. The command responsibility doctrine creates such an incentive by holding civilian superiors and military commanders criminally liable for failing to prevent crimes and for failing to prosecute guilty subordinates. *See* Smidt, *supra* note 1, at 174. However, such a punishment-based incentive should observe and be circumscribed by the reasoned dictates of a philosophy of criminal law that values the individual. The principle of individual criminal fault should be preserved and respected in creating the legal tools necessary to achieve effective deterrence.

5. Another objective of international criminal law should be the prosecution of criminals, including civilian and military superiors who order, aid, or are otherwise complicit in the commission of international crimes. It is often difficult to link commanders and superiors directly to the crimes carried out by their subordinates. Prosecutors may be forced to rely on circumstantial evidence and strained inference to prove that a commander ordered or committed a criminal act. The command responsibility doctrine lowers the legal and evidentiary hurdles to conviction by criminalizing the failure to prevent or punish the underlying crime. *See* Smidt, *supra* note 1, at 174. However, such prosecutorial efficiency should not be purchased at the expense of principles that form the foundation of law.

II. A HISTORICAL ACCOUNT

The origins of command responsibility are ancient with a long history of development and practice in the laws of various nations.[6] As early as the 17th century, Hugo Grotius articulated the basic precept that the "[C]ommunity, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it."[7] Command responsibility as a coherent international legal doctrine, however, has emerged more recently.[8] While receiving some treatment in the Conference of Versailles to indict Kaiser Wilhelm II after the First World War,[9] it matured as a theory of international criminal responsibility in the international tribunals following the Second World War.[10] In the Tokyo trials, the theory was used to hold commanders liable for war crimes and crimes against humanity committed by subordinates.[11] It is from this point in time that this article explores the historical development and current treatment of the modern doctrine of command responsibility.

A. *Emergence of the Command Responsibility Doctrine in the Tokyo Tribunals: A Legacy of Victor's Justice*

Perhaps the most frequently cited World War II command responsibility case is the Trial of General Tomoyuki Yamashita.[12] The *Yamashita* trial affirmed the principle of individual accountability for crimes against international law advanced

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6. *See* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320–28 (1995) (discussing the historical development of the doctrine of command responsibility including Charles VII of France in the sixteenth century, the prosecution of Napoleon, The Lieber Code of the American Civil War, and the *Yamashita* and *Abbaye Ardenne* cases).

7. HUGO GROTIUS, THE LAW OF WAR AND PEACE, bk. II at 523 (Francis W. Kelsey trans., Bobbs-Merrill 1925) (1625) (italics omitted).

8. *See, e.g.*, Arce v. Garcia, No. 99-8364 (S.D. Fla. July 23, 2002), http://www.cja.org/cases/Romagoza_Docs/Ramagoza_Trial_Transcripts/RamagozaTrans7.23.htm; Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002) (using the doctrine as a basis for civil liability).

9. *See* Report Presented to the Preliminary Peace Conference, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 121 (1920) (affirming that high rank and distance from the battlefield could not be used as a defense to charges of "*[v]iolations of the Laws and Customs of War or the Laws of Humanity*"); *see also* James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 70 (1920).

10. *See, e.g.*, RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 6 (1971).

11. *See, e.g., id.*

12. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 6 (1997) (stating that the trial was a "watershed for the development of the principle of accountability for human rights . . . ").

during the Nuremburg trials.[13] More importantly, it was the first international war crimes trial to find a commanding officer criminally liable without any direct evidence affirmatively linking him to the crimes committed by his subordinates.[14]

Articulating what is now regarded as the doctrine of command responsibility, the *Yamashita* trial included a charge of "negative criminality,"[15] or liability for a failure to act, stating that the general:

> [U]nlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war.[16]

The prosecution appealed to this theory of liability because it had no direct evidence that Yamashita participated in or had knowledge of the atrocities committed by soldiers under his command.[17] While international lawmakers had considered this theory of liability, it had not been widely accepted before the Tokyo Trials.[18] In fact, the United States representatives to the 1919 Commission of Responsibilities at

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13. *See* RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY xi (1982); ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 6 (1962).

14. LAEL, *supra* note 13, at xi. *But see Smidt, supra* note 1, at 169-70 (quoting William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973)) ("Many are under the impression that the doctrine of command responsibility originated in World War II. This, however, is not the case. International recognition of the concept 'occurred as early as 1474 with the trial of Peter Von Hagenbach.'").

15. *See* MINEAR, *supra* note 10, at 67 (discussing the reasons and application of "negative criminality" in Count 55).

16. LAEL, *supra* note 13, at 80 (quoting AG 000.5 (9-24-45) JA, "Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki," p. 31).

17. MINEAR, *supra* note 10, at 67.

> None of the defendants at Tokyo was accused of having personally committed an atrocity. Such offenders were prosecuted, and over nine hundred of them were condemned to die, in separate tribunals. Rather, the defendants at the Tokyo trial were accused on three other counts: that they conspired to "order, authorize, and permit" Japanese officials "frequently and habitually to commit" breaches of the laws and customs of war (Count 53); that they actually "ordered, authorized, and permitted" such acts (Count 54); and that they "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war (Count 55)—negative criminality. Count 54 was borrowed from Nuremberg; Count 55 was new at Tokyo, almost an admission of the difficulty of convicting these defendants under Count 54.

Id.

18. *See* MINEAR, *supra* note 10, at 72.

Versailles explicitly rejected negative criminality.[19] These representatives intimated that liability was improper without an overt criminal act, or knowledge of the criminal acts of others and proof of the power to prevent their commission.[20]

In his petition to the United States Supreme Court, Yamashita argued that negative criminality was not recognized under the laws of war, and therefore was not within the jurisdiction of the tribunal.[21] The Court rejected this argument claiming that the charge fulfilled the general purpose of the law of war to deter criminality, stating:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[22]

The Court cited the Hague Convention of 1907, as well as Article 26 of the Geneva Red Cross Convention of 1929 to support its position that commanders have affirmative duties and are responsible for their subordinates under international law.[23]

In a vigorous dissent, Justice Murphy criticized the Court's ruling, stating that war atrocities "have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples,"[24] and that Yamashita's

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19. *Id.*

20. *See id.* at 67-68 (quoting "Violation of the Laws and Customs of War: Reports of the Majority and Dissenting Reports of American and Japanese Members of Commission of Responsibilities, Conference of Paris, 1919," Carnegie Endowment for International Peace (Division of International Law), Pamphlet 32 (Oxford: Clarendon, 1919), p. 72).

> To this criterion of liability the American representatives were unalterably opposed. It is one thing to punish a person who committed, or, possessing the authority ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offense. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission.

Id.

21. *See generally In re* Yamashita, 327 U.S. 1, 13-18 (1946).

22. *Id.* at 15.

23. *Id.*

24. *Id.* at 29 (Murphy, J., dissenting).

conviction was based on standards created unilaterally by the victors rather than standards evinced from international law.[25]

The Tokyo Tribunal's acceptance of negative criminality as an established legal theory was questionable considering its limited treatment in international legal documents and lack of customary recognition.[26] "Neither . . . [the Hague Convention nor Geneva Convention], on their faces, authorized the tribunals to prosecute commanders who failed to prevent the commission of atrocities."[27] Even more troubling was the tribunal's finding of guilt without precisely defining or applying the evidence to constitutive elements of negative criminality.[28] The charge made no attempt to define the essential elements of negative criminality and the tribunal failed to state the *mens rea* standard it chose to apply.[29] Justice Rutledge noted:

> This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offense, whether that was willful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part to *discover* this and take whatever measures he then could to stop the conduct.[30]

While General Yamashita was probably morally culpable as a military commander,[31] his conviction was not based on a principled approach to criminal justice.[32] The tribunal's judgment can be seen as an example of judicially sanctioned vengeance, rather than justifiable retribution.[33] As such, the doctrine of command

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25. *See id.* at 35-36.

26. *See* Smidt, *supra* note 1, at 174.

27. *Id.* at 175.

28. *See Yamashita*, 327 U.S. at 43 (Rutledge, J., dissenting).

29. *See id.* at 40 (Murphy, J., dissenting).

30. *Id.* at 51-52 (Rutledge, J., dissenting).

31. *See* LAEL, *supra* note 13, at 98 (considering the widespread nature of the crimes committed by the soldiers under his command, it is likely that Yamashita was aware of the crimes and failed to prevent or punish them).

32. *See id.* at 97.

33. *See* JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 10 (1954).

> Punishment should not be considered until guilt is established, nor should an offense be termed a crime before criminality is established. And one approaching such a matter while embroiled in passion is scarcely apt to give an accused a fair trial, or, if he actually does do so, few will believe it. The cry then seems to be for vengeance, rather than for punishment. Punishment should be conceived as a vastly different thing than vengeance. It is not approached with a mental state of hostility or of wrath, however righteous; it is approached judicially, even as Jehovah must have acted when, with sorrow in his heart, he condemned his children of Sodom and Gomorrah.

Id.

responsibility began as an instrument of victor's justice,[34] rather than as a well-considered theory of criminality.[35]

B. *The Additional Protocol to the Geneva Convention of 1949: Command Responsibility Codified*

The doctrine of command responsibility has gained widespread recognition since its application in the *Yamashita* trial.[36] Adopted in 1977, Article 86 of Additional Protocol I to the Geneva Convention of 1949 "Additional Protocol" was the first international treaty to codify the doctrine, creating an affirmative duty to repress grave breaches and imposing penal and disciplinary responsibility on superiors for breaches committed by subordinates.[37] Article 86 states:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions 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.[38]

Article 86 punishes a failure to prevent or repress breaches of the protocol where a superior has information that should have enabled him to conclude that breaches of the Convention occurred or were about to occur.[39]

During drafting, the representatives to the convention raised a number of objections to Article 86.[40] Many representatives opposed the creation of an

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34. *See generally* MINEAR, *supra* note 10.

35. *See* Prosecutor v. Blaskic, Int'l Crim. Trib. for Former Yugoslavia, Case No. IT-95-14-T, ¶ 322 (2000), *available at* http://www.un.org/rcty/blaskic/trialc1/judgment/index.htm.

36. *See* KITTICHAISAREE, *supra* note 2, at 251.

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 86, 1125 U.N.T.S. 42-43 [hereinafter Additional Protocol].

38. *Id.*

39. *See id.*

40. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1011 (Claude Pilloud et al. eds., 1987) [hereinafter COMMENTARY].

affirmative duty on commanders and the imposition of liability for an omission rather than action.[41] While this was a major issue, the commentary on the Additional Protocols reveals that the strongest objections were to the imposition of liability for a failure to act where the *mens rea* was negligence.[42]

The language of the statute clearly indicates that the *mens rea* requirement is met where the superior has information that "should have enabled him to conclude" that a breach would be or had been committed.[43] However, the commentary reveals that the delegates ultimately concluded that a mere negligence standard was too low.[44] "[T]his does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent[.]"[45] The drafters of the Protocol intended a *mens rea* that approached recklessness or willful blindness, rather than mere negligence.[46] They wanted to ensure that a superior who "deliberately wishes to remain ignorant"[47] would not avoid criminal liability.[48]

While the intent of the drafters is reasonably clear, it is not certain that a recklessness standard would prevail in practice. As seen in the *Yamashita* trials, zealous victors may be tempted to manipulate ambiguous standards to achieve objectives they perceive to be just.[49] Although the legislative history of Article 86 may prescribe an elevated *mens rea*, the statutory language can easily be interpreted to only require an objective negligence standard.[50]

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41. *See id.*

42. *See id.*

43. Additional Protocol, *supra* note 37, art. 86(2).

44. *See* COMMENTARY, *supra* note 40, at 1012-13.

45. *Id.* at 1012.

46. *See id.* at 1012-13.

47. *Id.* at 1014.

48. *See id.* (stating that "a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him," nor can he claim ignorance of the "tactical situation, the . . . training and instruction of subordinate[s], . . . and their character traits").

49. *See* MINEAR, *supra* note 10, at 207.

50. *See* RATNER & ABRAMS, *supra* note 12, at 128. The standard could be interpreted in a manner that would create strict liability:

> To a certain extent, the difference between the current negligence-type standard and strict liability may be small in practice, if prosecutors or other investigators successfully argue that very little information is in fact needed for a commander to have the ability to know of the existence of abuses. For instance, if the commander knew that many of the persons under his command were poorly trained and disciplined and likely to have scant regard for the dictates of human rights or humanitarian law, he could reasonably be held responsible for their abuses.

Id.

C. *The International Criminal Tribunal for the Former Yugoslavia*

In the wake of human rights atrocities committed in the former Yugoslavia,[51] the international community sought an ad hoc criminal statute that would allow for the prosecution of those who orchestrate atrocities along with those who carry out the violations.[52] Article 7(3) of the Statute of the International Tribunal for the Former Yugoslavia (ICTY) provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was 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.[53]

Despite the debate raised during the command responsibility doctrine's initial codification in the Additional Protocol, Article 7(3) of the ICTY preserves—at least facially—a "negligence" *mens rea* standard.[54]

Although the jurisprudence of the tribunal demonstrates an institutional concern with allowing simple negligence to suffice for criminal liability, ICTY cases have adopted a fairly low *mens rea* requirement.[55] In *Prosecutor v. Delalic*, the trial chamber indicated that a purely objective standard of negligence was not intended.[56] The court examined the legislative history of the statute and found that the drafters rejected such a standard when they refused to adopt language assigning liability if the commander "knew or should have known."[57] Instead, the trial chamber found that the prosecution must show that the individual actually possessed specific "information" that would put him on notice of the crimes of his subordinates.[58]

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51. *See* KITTICHAISAREE, *supra* note 2, at 22.

52. *See id.*

53. Statute of the International Tribunal for the Former Yugoslavia, as adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at art. 7(3), U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 192 (emphasis added), http://un.org/icty/legaldoc/index.htm.

54. *Id.* Most commentators and courts assert that this standard is not a form of strict liability. *See, e.g.*, KITTICHAISAREE, *supra* note 2, at 254. *But see* RATNER & ABRAMS, *supra* note 12, at 128 (noting that the difference between negligence and strict liability may be minimal in reality).

55. *See* KITTICHAISAREE, *supra* note 2, at 255.

56. Int'l Crim. Trib. for Former Yugoslavia, Case No. IT 96-21-T, ¶¶ 387-393 (1998), *available at* http://www.un.org/icty/cases/judgmentidex-e.htm.

57. *Id.* at ¶ 391 (emphasis omitted); *see also* M. CHERIF BASSOUINI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 485 (1998). Interestingly, "had reason to know" and "should have known" are not always distinguished. At one point the two were viewed as interchangeable expressions of a negligence standard. *Id.* at n.16.

58. *Delalic*, Case No. IT 96-21-T at ¶ 393.

The precise contours of this "information" requirement are not clear. However, it appears to create a *mens rea* standard that resides somewhere between simple negligence and recklessness.[59] The tribunal cases reveal that a principal objective underlying the *mens rea* requirement of ICTY Article 7(3) is to prevent a superior from remaining willfully blind to the acts of his subordinates.[60] The trial chamber in *Delalic* stated that, "[t]here can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction . . . of superior responsibility."[61] However, the tribunal advocated a standard that is more burdensome on the superior than a recklessness/willful blindness *mens rea* that would be adequate to meet this objective. Instead of requiring a showing of gross negligence or negligence tantamount to malicious intent, the trial chamber in *Delalic* stated that the *mens rea* requirement is met if the accused possesses information that,

> need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[62]

In a more recent case, the trial chamber in *Prosecutor v. Blaskic* retreated from the already low "information" standard in *Delalic*.[63] It prescribed a negligence-type *mens rea* stating that, "ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties[.]"[64] A court need only assess the "particular position of command and the circumstances prevailing at the time" to determine if the commander had reason to know.[65]

D. *The International Criminal Tribunal for Rwanda*

As in Yugoslavia, the massive human rights atrocities and genocide committed in Rwanda prompted the creation of a statute that permitted the prosecution of leaders as well as subordinates.[66] Although virtually identical to the statute of the ICTY, the

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59. *See generally* KITTICHAISAREE, *supra* note 2, at 255.

60. *See generally id.*

61. *Delalic,* Case No. IT 96-21-T at ¶ 387.

62. *Id.* at ¶ 393.

63. Prosecutor Blaskic, Int'l Crim. Trib. for Former Yugoslavia, Case No. IT-95-14-T, ¶ 322 (2000).

64. *Id.* at ¶ 332.

65. *Id.*

66. *See* SAMANTHA POWER, "A PROBLEM FROM HELL:" AMERICA AND THE AGE OF GENOCIDE

ICTR has treated the *mens rea* requirement of command responsibility in somewhat different and varied ways.[67] Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda states that:

> [t]he fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.[68]

In *Prosecutor v. Musema*, the trial chamber examined the legislative history of the Additional Protocol and adopted a comparatively high *mens rea* requirement.[69] It found that:

> the requisite *mens rea* of any crime is the accused's criminal intent. This requirement, which amounts to at least a negligence that is so serious as to be tantamount to acquiescence, also applies in determining the individual criminal responsibility of a person accused of crimes defined in the Statute, for which it is certainly proper to ensure that there existed malicious intent, or, at least, to ensure that the accused's negligence was so serious as to be tantamount to acquiescence or even malicious intent.[70]

In marked contrast to the position held in *Musema*, the trial chamber in *Prosecutor v. Bagilishema* advocated a reduced negligence-type *mens rea* requirement.[71] It found that a superior possesses the requisite *mens rea* where:

> he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or, the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior

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484 (2002).

67. *Compare* The Statute of the International Criminal Tribunal for Rwanda, as adopted by S.C. Res. 955, U.N. SCOR, 3453rd mtg., at art. 6(3), U.N. Doc. S/ES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1604 (1994), *with* Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 53, at art. 7(3).

68. The Statute of the International Criminal Tribunal for Rwanda, *supra* note 67, at art. 6(3).

69. Prosecutor v. Musema, Int'l Crim. Trib. for Rwanda, Case No. ICTR-96-13-A, ¶ 131 (2000), http://ictr.org/ENGLISH/cases/musema/judgment/index.htm.

70. *Id.*

71. Prosecutor v. Bagilishema, Int'l Crim. Trib. for Rwanda, ICTR-95-1A-T, ¶ 46 (2001), http://ictr.org/ENGLISH/cases/Bagilisham/judgement/index.htm.

failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.[72]

E. *The International Criminal Court*

The Rome Statute of the International Criminal Court ("ICC") is the first international instrument that establishes, in a comprehensive way, a general code of international criminal law.[73] Article 28 of the ICC statute codifies the command responsibility doctrine:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
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> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
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> > (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> >
> > (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
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> > (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

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72. *Id.*

73. *See* Maria Kelt & Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 20 (Roy S. Lee ed., 2001).

> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[74]

Article 28 is the first international statute that distinguishes between civilian and military superiors.[75] It assigns different standards of culpability based on this division.[76] It is not entirely clear what practical, political, or philosophical reasons prompted this division.[77] However, it is clear that this aspect was a source of considerable debate during negotiations.[78] Irrespective of motivations, the explicit recognition of both a reckless-type "consciously disregard" standard and a negligence standard requires the interpretation that military commanders be held to a negligence standard.[79]

F. *The Future of the Doctrinal Elements of Command Responsibility*

Prior to the creation of the ICC, the relative statutory ambiguity in the Additional Protocol and tribunal statutes permitted interpretive flexibility and minimum *mens rea* standards that resided somewhere between negligence and recklessness.[80]

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74. Rome Statute of the International Criminal Court, at art. 28, U.N. Doc. A/Conf.183/9 (1998), http://www.un.org/law/icc/statute/contents.htm.

75. *Id.* at art. 28(a), (b).

76. *Id.* at art. 28(a)(i)-(ii), (b)(i)-(iii).

77. Some drafters may have desired a higher *mens rea* because civilians are perceived as having less control and consequently, less of a duty than military commanders. *See, e.g.*, Prosecutor v. Kayishema, Int'l Crim. Trib. for Rwanda, Case No. ICTR-95-1-T, ¶ 216 (1999), http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm (stating that "[t]he crucial question in those cases was not the civilian status of the accused, but of the degree of authority he exercised over his subordinates."); Prosecutor v. Akayesu, Int'l Crim. Trib. for Rwanda, Case No. ICTR-96-4-T, ¶ 490 (1998), http://ictr.org/ENGLISH/cases/Akayesu/judgement/akay001/htm (noting that judges in the Tokyo trials expressed concern with holding civilian officials responsible for the behavior of the army in the field and that considerations of justice and expediency indicate that responsibility for civilian superiors should be restricted).

78. *See* Kelt & Von Hebel, *supra* note 73, at 21.

79. *But see* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 122 (2000). Vetter seems to argue that the ICC statute does not give a simple negligence standard. *Id.* He feels that the clause "owing to the circumstances at the time" makes the *mens rea* distinguishable from a "mythical should have known" standard. *Id.* This argument does not make much sense. A negligence standard bases liability on what a reasonable person would do under the circumstances. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02(2)(d) (1985).

80. *See* Additional Protocol, *supra* note 37, at art. 86(2); Statute of the International Criminal

However, the codification of distinct negligence and reckless-type standards in the ICC statute makes such flexibility improbable in the immediate future.[81] The ICC statute will influence the customary development of the command responsibility doctrine because it is considered compelling evidence of the practice and policies of states.[82] The likely result will be that negligence is recognized as the minimum *mens rea* for military commanders, and recklessness is recognized as the minimum *mens rea* for civilian superiors.[83]

III. A NORMATIVE CRITIQUE

The preceding historical account reveals that the command responsibility doctrine, in its various customary and statutory manifestations, creates liability based on a combination of omission and a minimum *mens rea* defined along the negligence/recklessness continuum. This section will assess the justness of such a combination.[84]

A. *A Philosophy of Criminal Law*

The philosophy underlying criminal law establishes the parameters that should constrain lawmakers in the creation and punishment of crimes.[85] Therefore, any critique of the "justness" of a particular criminal law doctrine must proceed from a philosophical starting point.

"[L]aw is a purposeful social institution, meaningful and fully comprehensible only in a context of [established] social aims and values. . . ."[86] A community, whether it be local, national, or international, develops norms that reflect some conception of "the good."[87] Society criminalizes behavior in order to announce these

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Tribunal for the Former Yugoslavia, *supra* note 53, at art. 7(3).

81. *See* Rome Statute of the International Criminal Court, *supra* note 74, at art. 28.

82. *See id.* at pmbl.

83. The influence of the ICC is already evident in recent decisions on command responsibility. *See, e.g.*, Prosecutor v. Blaskic, Int'l Crim. Trib. for Former Yugoslavia, Case No. IT-95-14-T, ¶ 322 (2000) (prescribing a negligence standard; decided after completion of the ICC statute).

84. *See* Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 456 (2001) (noting that it is remarkable that troublesome issues in command responsibility have failed to provoke more discussion regarding its harmony with fundamentals of 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." *Id.*

85. *See* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 224 (1987).

86. C.T. SISTARE, RESPONSIBILITY AND CRIMINAL LIABILITY 2 (1989).

87. *See generally* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 681 (1997). What constitutes "the good" is outside the scope of this article. While this article assumes that law attempts to promote this conception of "the good," it does not make any judgments

norms, to punish conduct that it deems reprehensible, and to discourage socially unacceptable behavior.[88] Thus, criminal law serves many goals including the deterrence and punishment of crimes, incapacitation, denunciation of wrongfulness, and rehabilitation.[89]

The myriad aspirational goals of criminal law should be distinguished from the goals and limitations required by a particular philosophy or theory of criminal law. For example, a utilitarian-based deterrence theory of criminal law allows an individual to be used to promote and ensure conformity to societal standards.[90] Conversely, a deontological retributive theory of criminal law generally requires that liability be grounded in individual guilt and that the individual not be used solely for the pursuit of societal ends.[91] It is possible to conceive of law as proceeding from a singular philosophy with certain mandates, but having consequences that are the aspirational objectives of many different philosophies.[92] However, these consequences are merely coincidental and may not override the mandates of the theory that guides the creation of legal norms.[93]

This article presumes the soundness of a deontological retributive theory of criminal law.[94] Under this theory, only wrongful and blameworthy conduct should be

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regarding what should be considered "the good."

88. *See* APPLEMAN, *supra* note 33, at 9 (noting that "[t]he purposes of the criminal law are rather to punish the wrongdoer for his offense against the mores of society and to deter others from acting likewise.").

89. *See* SISTARE, *supra* note 86, at 11.

90. *See* MOORE, *supra* note 87, at 84.

91. *See* Husak, *supra* note 85, at 225. Collective responsibility can also be considered a criminal legal theory that is deontological. *See* Joel Feinberg, *Collective Responsibility, in* INDIVIDUAL AND COLLECTIVE RESPONSIBILITY 69 (Peter A. French ed., 2nd ed. 1998). However, the moral fault involved is transferred across a group and is not necessarily restricted to the individual. *See id.* at 60. Collective responsibility has a rich historical tradition in pre-modern societies. *See id.* at 51 (stating that "[a]ll primitive legal systems, and our own common law until about the fifteenth century, abound with examples of liability without contributory fault."); *see also* Joanna Waley-Cohen, *Collective Responsibility in Qing Criminal Law, in* THE LIMITS OF THE RULE OF LAW IN CHINA 112 (Karen G. Turner et al. eds., 2000) (describing the history of collective responsibility in China including its experience with command responsibility).

92. *See* SISTARE, *supra* note 86, at 12.

93. *See id.*

94. *See* MOORE, *supra* note 87, at 28.

> [T]here are two considerations that suggest that the only function of our criminal law is the achievement of retributive justice. One is the tension that exists between crime-prevention and retributive goals. This tension is due to retributivism's inability to share the stage with any other punishment goal. To achieve retributive justice, the punishment must be inflicted because the offender did the offence. To the extent that someone is punished for reasons other than that he deserves to be punished, retributive justice is not achieved.

Id.

criminalized and punished.[95] There must be some moral justification for imposing suffering upon another person.[96] This theory implicitly recognizes the value of the human person as the "subject, end, and intellectual point of reference in the idea of law."[97] It is a well-established principle of western legal traditions that the individual is considered a moral actor whose will and choices help define the blameworthiness of actions and justify his punishment.[98]

Although criminal punishment may have the added benefit of deterring future conduct, deterrence and other utilitarian objectives of punishment are coincidental and should not override the moral justifications for law and punishment.[99] That justice requires a respect for moral rights, and therefore that criminal law must be rooted in moral justifications "need not purge utilitarian thinking."[100] Criminal justice should be concerned with deterring crime and protecting society. However, "these utilitarian benefits should *not* be purchased by violations of the fundamental principles of criminal liability or the moral rights they respect."[101]

B. *A Normative Critique of the Doctrine of Command Responsibility*

The scope of the command responsibility doctrine is one of the most important issues in international criminal law.[102] Interpreted liberally, the command responsibility doctrine can have a powerful deterrent effect, giving superiors and commanders the incentive to prevent and punish violations of human rights and humanitarian law.[103] It can also help improve the chances of prosecuting superiors and commanders who are complicit in criminal activity but, due to their elevated positions, are able to avoid liability.[104] While the doctrine has proven effective as a prosecutorial tool and may deter crime, an analysis of the jurisprudence defining and applying the elements of the doctrine reveals that it has not been consistently

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95. *See* HUSAK, *supra* note 85, at 225.

96. *See id.* at 226.

97. Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 20 (1990). *See generally* Janet E. Smith, *Natural Law and Personalism in Veritatis Splendor*, *in* JOHN PAUL II AND MORAL THEOLOGY: READINGS IN MORAL THEOLOGY NO. 10, 67–84 (Charles E. Curran & Richard A. McCormick, S.J., eds., 1998) (comparing natural law and personalism).

98. *See* Wieacker, *supra* note 97, at 20; *cf.* WALTER G. JEFFKO, CONTEMPORARY ETHICAL ISSUES 18 (1999) (recognizing the moral importance of will and intention, but disagreeing that the total morality of an action can be reduced to its intention). Rather, "[b]oth motive and consequences have moral significance as elements of action." *Id.*

99. *See* MOORE, *supra* note 87, at 89 (noting "[t]hat future crime might also be prevented by punishment is a happy surplus for a retribuvist, but no part of the justification for punishing.").

100. HUSAK, *supra* note 85, at 51.

101. *Id.* at 52.

102. *See* RATNER & ABRAMS, *supra* note 12, at 128.

103. *See* Damaška, *supra* note 84, at 461.

104. *See id.* at 471.

developed in a manner that respects a deontological retributive theory of the criminal law.[105]

The scope of the doctrine depends upon the elements of the crime.[106] First, there must be a superior-subordinate relationship.[107] Second, the superior knew, *should have known*, or *willfully ignored* information that would cause him to know that a subordinate was about to commit a crime or had committed a crime.[108] Finally, the superior failed to take necessary and reasonable measures to prevent the crime or punish the perpetrator.[109]

As discussed, the statutes and cases combine a low minimum *mens rea* of negligence (arguably reckless depending upon the court and statute) with an *actus reus* of omission.[110] Although these are independently valid bases for criminal liability, the confluence of omission and negligence is problematic because the retributive theory normally requires a respect for moral principles and a justification for punishment grounded in the blameworthiness of the individual.[111] This combination of elements does not ground liability in individual fault. Rather, the combination assigns liability based on whether the person had the power to prevent the crime. This formulation values deterrence of crime over the importance of the person, using the person as a means to an end. Such a use is anathema to the retributive theory. In those instances in which the doctrine has been interpreted to require a mental element that is more than negligence, the command responsibility doctrine is more consistent with a retributive theory of law.

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105. *See generally* RATNER & ABRAMS, *supra* note 12, at 3-8 (outlining the development of command responsibility).

106. *See* Vetter, *supra* note 79, at 97.

107. *See id.*

108. *See id.* at 97-98.

109. *See id.*

110. *See, e.g.*, Rome Statute of the International Criminal Court, *supra* note 74, at art. 28; Statute for the International Criminal Tribunal for Rwanda, *supra* note 67, at art. 6(3); Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 53, at art. 6; Prosecutor v. Bagilishema, Int'l Crim. Trib. for Rwanda, ICTR-95-1A-T, ¶ 46 (2001).

111. *See* MOORE, *supra* note 87, at 79.

> [A] prerequisite of deserved punishment is the active responsibility of an individual person for his wrongful action. The relation of active responsibility that exists between a person and his wrong consists of the properties of wrongdoing and culpability, and these properties in turn consist of the properties of voluntariness and causation, and intentionality and lack of excuse, respectively. Voluntariness, in turn, consists in the willing of a bodily movement. A coarse-grained theory of individuating actions is presupposed; the essence of actions is given in terms of a causal theory whereby willings (or volitions) causing bodily movements are seen as the essence of human actions.

Id.

1. Negligence: A Weak Basis for Liability Under the Retributive Theory

Criminal liability generally requires a guilty mind or "*mens rea*" causally linked to some form of affirmative voluntary conduct.[112] The law recognizes various degrees of *mens rea* including intent, knowledge, recklessness, and negligence with differing levels of agreement regarding their appropriateness as a basis for criminal liability.[113]

The *mens rea* of intent is paradigmatic of the guilty mind.[114] It is the best indication of a conscious choice to commit a crime.[115] Together with affirmative action, intent "evidence[s] the highest degree of imputative responsibility."[116] Knowledge rivals intent as a paradigm of the guilty mind.[117] Aside from theoretically reasoned justifications, it seems intuitively correct to hold a person criminally liable who acts with knowledge of the consequences of his conduct.[118] Recklessness is also a well-accepted theory of criminal culpability.[119] An actor is reckless if he consciously disregards a substantial risk.[120] "[T]he culpability of disregarding a risk derives from a conscious departure from a level of legally permissible risk-taking."[121]

Negligence is a highly debated, but well-established, basis for imposing criminal liability.[122] It is a concept that seems infused with overtones of a utilitarian-based, deterrence philosophy of criminal law.[123] Assigning liability for negligence may increase deterrence by forcing people to act with greater consideration for the consequences of their actions.[124] A law that contains a negligence standard ascribes liability if a reasonable person "should have known" that his conduct would have certain consequences.[125]

The debate over negligence as a just basis for imposing criminal liability is best examined in two analytical stages. The first stage assesses whether persons who act negligently ever deserve criminal liability.[126] The second stage accepts that

112. *See* HUSAK, *supra* note 85, at 14.

113. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02, § 2.02 cmt. 2 (1985).

114. SISTARE, *supra* note 86, at 93.

115. *See id.*

116. *Id.*

117. *See id.* at 119.

118. *See* MOORE, *supra* note 87, at 591-92.

119. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02(2)(c) (1985).

120. SISTARE, *supra* note 86, at 119.

121. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 262 (1978).

122. *See* HUSAK, *supra* note 85, at 132; *see also* MODEL PENAL CODE AND COMMENTARIES § 2.02(2)(d).

123. *See* HUSAK, *supra* note 85, at 132.

124. *But see id.* (noting that theorists disagree over whether negligence stimulates the offender to become more careful).

125. FLETCHER, *supra* note 121, at 484.

126. *See* HUSAK, *supra* note 85, at 132.

negligence can be a valid basis for criminal liability, but assesses the conditions under which individuals properly may be held liable based on this objective, rather than individualized, standard.[127]

From a deontological, retributive approach:

> [T]he legitimacy of criminal condemnation is premised upon personal accountability of the sort that is usually and properly measured by an estimate of the actor's willingness consciously to violate clearly established societal norms. Those who hold this view argue that the actor who does not perceive the risks associated with his conduct presents a moral situation different in kind from that of the actor who knows exactly what he is doing and what risks he is running and who nevertheless makes a conscious choice condemned by the penal law.[128]

The choice to do wrong is therefore the "touchstone of culpability."[129] Accordingly, negligence may be considered, prima facie, an improper basis for liability because it does not create a sufficient link between the criminal liability imposed and an individualized awareness of responsibility.[130] Culpability is assigned based on a failure to perceive a risk rather than a deliberate choice to disregard a risk or commit a wrongful act.[131]

Although not reflecting a guilty mind that is rooted in some conscious choice, it nevertheless seems to make some sense to morally condemn a failure to carefully consider a particular situation and to disregard cognizable risks. "[F]ailures to take sensible precautions and to consider circumstances are kinds of choices. These are not the paradigmatic choice of intended action, but they are choices about the reasonable exercise of capacities in conduct and they are ordinary grounds for moral censure."[132] However, this kind of culpability is distinguishable from other forms of

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127. *See* Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 278 (1997).

> While it is apparent that situations exist where there is a prosecutorial need for the command responsibility doctrine, the deeper question is when (if at all) it is fair or appropriate to hold the superior liable for the crimes of a subordinate. In this respect, there are two conceptual problems that must be addressed by any satisfactory analysis: first, how can the superior be held liable for the acts of another person, especially when he does not share the same *mens rea*? Second, when can it be fair to hold a superior liable in the absence of any affirmative action on his part?

Id.

128. MODEL PENAL CODE AND COMMENTARIES § 210.4 cmt. 3 (1985).

129. MOORE, *supra* note 87, at 412.

130. *See* SISTARE, *supra* note 86, at 137.

131. *See id.* at 133.

132. *Id.* at 139.

culpable choice, and so should be viewed as a lesser form of culpability, even if not completely inconsistent with a morally-rooted theory of law.[133]

> [I]nadvertent risk creation cannot be accommodated within the choice model of culpability. Such inadvertent risk creation is rather a culpability of unexercised capacity, not of choice . . . Although we can be somewhat culpable in not seeing the world more clearly, such culpability pales before that of wrongdoers who choose to do their wrongs in a world they see clearly.[134]

Despite theoretical arguments that question the validity of negligence as a state of mind sufficient for imposing criminal liability, it does exist and is actually quite common.[135] However, even accepting that negligence can be a legitimate basis for imposing liability, the circumstances and conditions under which negligence liability generally operates is necessarily "circumscribed in keeping with the low level of responsibility involved."[136] For example, many negligence-based criminal laws only permit a liability finding for negligence that is considered a "gross" deviation from the standard of conduct:

> The Model Code definition of negligence insists on proof of substantial fault and limits penal sanctions to cases where "the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong." Justice is safeguarded by insisting upon that gross deviation from ordinary standards of conduct which is contemplated by the Model Code definition of negligence. Liability for inadvertent risk creation is thus properly limited to cases where the actor is grossly insensitive to the interests and claims of other persons in society.[137]

In addition, punishment for crimes with a negligence *mens rea* is also generally more lenient, possibly reflecting an inherent uneasiness with apportioning punishment equal to those crimes with a higher *mens rea* and a stronger indication of

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133. *See* MOORE, *supra* note 87, at 414.

134. *Id.*

135. *See* MODEL PENAL CODE AND COMMENTARIES § 210.4 cmt. at 83 (1985). Notably, the commentary on the Model Penal Code reports that the trend is to require something more than ordinary negligence, and that gross negligence is a better standard. *Id.*

136. SISTARE, *supra* note 86, at 141.

137. MODEL PENAL CODE AND COMMENTARIES § 210.4 cmt. at 86-87 (quoting Henry M. Hart, Jr., *The Aims of Criminal Law,* 23 L. & CONTEMP. PROBS. 401, 417 (1958)).

individualized guilt.[138] Finally, most criminal laws require some affirmative conduct that strongly reflects a deliberate choice to act negligently.[139]

2. *Actus Reus*: Omissions Under Criminal Law

Despite the focus on a guilty mind, criminal law does not impose liability for thoughts alone. Rather, there must be some manifestation of that guilty mental state in the form of conduct.[140] This conduct is an elemental requirement of the criminal law known as the *actus reus*.[141]

While the *actus reus* element can be understood as merely a requirement of affirmative physical action, it can be viewed less formalistically, in a manner that examines the purpose of the element. It can be understood as, "a defeasible (negative) principle. Its import lies in what it is intended to preclude from criminal liability and legislation. Thus, it has functioned as a bar against status offenses, liability based on condition or propensity, and 'punishment for mere thoughts.'"[142] Viewed in this way,[143] omissions can meet this defeasible principle, even if they are not the paradigm of *actus reus*.[144]

Although generally accepted as a legitimate form of *actus reus*, criminal liability for an omission is, nevertheless, less common than criminal liability for affirmative conduct.[145] There are a number of reasonable explanations for this. For instance, omissions are often harder to identify than commissions.[146] Consequently, legislators may be reluctant to create crimes that are difficult to prove. Additionally, there may be a general reluctance to ascribe a duty to act due to the tradition of liberalism in the criminal law that places a societal emphasis on personal freedom and minimizes the imposition of obligations on individuals.[147]

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138. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A1.4 (2003) (giving a base punishment level of twelve years for criminally negligent homicide and a base punishment level of eighteen years for reckless homicide).

139. *See* Wu & Kang, *supra* note 127, at 278-79 (identifying two domestic areas that are loosely analogous: the doctrines of the Responsible Corporate Officer and Accomplice Liability).

140. HUSAK, *supra* note 85, at 84.

141. *See id.* at 83-88.

142. SISTARE, *supra* note 86, at 45.

143. *See generally* HUSAK, *supra* note 85, at 83–97.

144. *See* SISTARE, *supra* note 86, at 56 ("For criminal omissions, the framework of expectations derives from created or legally recognized obligations ... [i]t is the framework of expectations, in part, which enables us to identify omissions as distinguished from non-events. The expectations help us to specify the circumstances constituting a failure of performance.").

145. *See id.* at 57. Civil law systems are generally more willing to create obligations, and are less reluctant to criminalize omissions. *Id.*

146. *See id.* 56–57.

147. *See* MOORE, *supra* note 87, at 278 (discussing liberty and the reluctance in the law of creating a criminally enforceable duty).

From a philosophical perspective, omissions—as a form of culpable conduct—do not implicitly offend either a utilitarian-based deterrence theory or a deontological retributive theory.[148] Imposing liability for a failure to act can create the same incentives and deterrent effect as for affirmative action.[149] Moreover, the moral approbation that is associated with affirmative action would seem to attach as readily—although perhaps not to the same extent[150]—to a failure to act provided there was a guilty mind.

Although there may be no self-evident cogent rationale for preferring commissions to omissions as a condition of criminal liability, a general discomfort with omissions seems intuitively correct.[151] In some sense, this intuitive appeal seems linked to society's culpability judgments regarding what kind of conduct should be considered wrongful.[152] However, intuition regarding the level of culpability does not necessarily imply that omissions are not a valid form of culpable conduct, only that commissions tend to be preferred.

> If it is true that the agent of a wrongful commission is always more culpable than the agent of a wrongful omission, this should be reflected in the grading of offenses and in allotment. Of course, it might also affect liability standards in derivative ways: we might choose to set a higher threshold for all criminal omissions. But a general disparity in agent culpability is not sufficient to establish the *prima facie* impropriety of liability for omissions. And it is certainly not sufficient to justify a principle of legislation restricting offenses of omission.[153]

If not *per se* an improper basis for liability, it seems reasonable and fair to create a duty and assign a positive obligation under the criminal law in the doctrine of command responsibility.[154] Military and civilian leaders are in a position of power and trust and accept these positions,[155] presumably aware of these attendant obligations. Therefore, it is not forced on the individual without their willing acceptance. However, the omission element cannot be examined separately from the mental element when assessing the justness of the command responsibility doctrine.[156]

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148. *See id.* at 278-80.

149. *See id.* at 278.

150. *See id.* (arguing that "while some failures to act are wrongful, they are not nearly as wrongful as their counterpart evil actions, so that the demand for punishment of retributive justice is less strong in the former cases than the latter.").

151. *See* SISTARE, *supra* note 86, at 57.

152. *See, e.g.*, HUSAK, *supra* note 85, at 83.

153. SISTARE, *supra* note 86, at 60.

154. Wu & Kang, *supra* note 127, at 290.

155. *Id.*

156. *See id.* at 278.

3. The Confluence of Omission and Negligence in Command Responsibility: A Problematic Theory of Criminal Liability

Although omissions or negligence are not independently objectionable, their combination in a criminal doctrine is troublesome. Individuals have a more tenuous link to their omissions, generally having far less control and exercising less independent choice than for commissions.[157] In the command responsibility context, the *actus reus* of omission may be combined with a minimum *mens rea* of negligence—that also lacks a strong volitional (choice) element.[158] This combination is problematic in that it assigns liability to a superior, with neither a strong element of fault nor independent choice manifested in some action.[159]

Negligence bases liability not on the subjective state of mind of the violator, but on an objective standard that the violator fails to meet.[160] It assigns liability in rare circumstances in which the absence of individualized responsibility seems acceptable and under circumstances and conditions that justify its imposition.[161] One such circumstance should be an overt volitional act that is not met by an *actus reus* of omission.[162] Without such an act, the command responsibility doctrine requires almost no evidence of individualized responsibility and therefore is incompatible with a theory of criminal justice that values the individual as the necessary unit of moral accountability.[163]

4. The Confluence of Omission and Recklessness (Willful Ignorance): A More Justifiable Theory of Liability

Although omissions can be a valid form of conduct, the minimum *mens rea* should be higher than negligence.[164] The issue thus becomes the appropriate level of

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157. *See* SISTARE, *supra* note 86, at 58-59.

158. *See* Wu & Kang, *supra* note 127, at 278-82.

159. *See id.* at 282-83.

> There are several justifications for . . . [a] stringent *mens rea* requirement. One powerful argument is that because the act requirement is so attenuated in this case (such that any action that aids or encourages the principal or even a mere omission will suffice) and because the chain of causation between the accomplice-superior and the result element is indirect, there is a particular need to be vigilant and demanding with respect to *mens rea*.

Id.

160. MODEL PENAL CODE AND COMMENTARIES § 2.02(d) (1985).

161. *See, e.g.*, HUSAK, *supra* note 85, at 83.

162. *See* Damaška, *supra* note 84, at 455 (drawing a distinction between the omission to prevent and the omission to punish and distinguishing the culpability involved).

163. *But see* FLETCHER, *supra* note 121, at 626–27 (examining negligent omissions and stating "there is nothing linguistically amiss in 'intentionally' or 'negligently' breaching a duty where the duty consists in acting a particular way, rather than in averting an impeding harm").

164. *See, e.g.*, Wu & Kang, *supra* note 127, at 283. There are practical deterrence based

mental state that can justify liability based on an omission.[165] This article asserts that there must be some individualization of fault before criminal liability is ever appropriate, and that this individualization must exist in the confluence of conduct and mental state.

Recklessness or willful ignorance may satisfy this requirement of a mental state that has some individualized awareness of fault. "A person acts recklessly" when he "consciously disregards a substantial and unjustifiable risk" under a specific set of circumstances.[166] Unlike mere negligence, recklessness requires a subjective analysis of a person's mental state under a set of circumstances.[167] Moreover, it involves a culpable affirmative choice to disregard a substantial risk.[168] Negligence only requires a failure to perceive a risk.[169] Willful ignorance is a species of recklessness or knowledge where an individual intentionally or consciously avoids knowing something incriminatory.[170] While arguable in the command responsibility context, recklessness and willful ignorance are more justifiable under a deontological retributive theory because these mental states contain some element of conscious wrongdoing under particularized circumstances.[171]

In sum, a respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate. In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet. In those instances where the doctrine requires a *mens rea* that rises above a level negligence, it is more justifiable.[172]

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reasons for requiring an elevated *mens rea*:

> A lower *mens rea* requirement could have a "chilling effect" on blameless and desirable conduct, because a more attenuated connection with subject mental blameworthiness makes the scope of the criminal law less predictable from each individual's point of view. In other words, deterrence is ineffective if agents cannot anticipate being held liable for the crime in question, and what is worse, deterrence may even result in substantial costs being imposed on ordinary activity.

Id.

165. *See* SISTARE, *supra* note 86, at 60.

> [I]f the law were to reflect comparative estimations of duty in standards of liability and principles of legislation, the purported inferiority of duties to act would not dictate general resistance to criminal omissions. It would only suggest that some forms of liability not be imposed for omissions and that some wrongful omissions not be criminal.

Id.

166. MODEL PENAL CODE AND COMMENTARIES § 2.02(c) (1985).

167. *Id.*

168. *See id.*

169. *Id.* at § 2.02(d).

170. *See id.* at § 2.02(2)(b)(i), (7)-(8).

171. MODEL PENAL CODE AND COMMENTARIES § 2.02 cmts. 2, 3.

172. Although somewhat outside the scope of this article, the severity of punishment

IV. AN EXPLANATORY ACCOUNT

The most recent declaration of the command responsibility doctrine in the ICC statute indicates that a negligence standard likely will persist under international law.[173] Such a standard in combination with an *actus reus* of omission is offensive to a deontological retributive theory of criminal law that values the individual. There are at least three explanations for the persistence of a negligence standard.

First, the recognition of a negligence standard may be due to the fact that in the international context, the retributive theory is not the dominant normative philosophy of law.[174] A number of commentators on international law emphasize the peculiar nature of international crimes and consider deterrence the correct approach or at least an equivalent objective of international law.[175] In addition, major international instruments, while listing multiple objectives for international law, generally fail to adopt a normative theory to guide law creation when different objectives come into conflict.[176] For example, Security Council Resolution 827 establishing the ICTY states that the purpose of the tribunal is to "put an end to [international crimes] and to take effective measures to bring to justice the persons who are responsible for them."[177] This statement indicates that the United Nations is focused on the objectives of deterrence and just punishment. However, it does not state that one objective is absolute. Similarly, the website of the International Criminal Court describes individual criminal accountability as "a cornerstone of international criminal law," and "[e]ffective deterrence [as] a primary objective of those working to establish the international criminal court" without any indication of which objective should be considered paramount.[178]

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involved should also be a consideration in assessing the justness of command responsibility. Reduced states of mind, while legitimate bases for punishment, require reduced sentences commensurate with the guilt of the individual. Although international tribunals are required to account for individual circumstances in their sentencing guidelines, they are not required to limit the penalty based on the accused's state of mind. For example, in *Prosecutor v. Musema*, Int'l Crim. Trib. for Rwanda, Case No. ICTR-96-13-A, ¶ 986 (2000) (sentencing), http://www.ictr.org/EGLISH/cases/musema/judgements/8.htm, the tribunal balanced mitigating and aggravating circumstances, but felt that "deterrence, to dissuade for ever others who may be tempted to commit atrocities" was the preeminent concern.

173. Kelt & von Hebel, *supra* note 73, at 21-22.

174. *See* Otto Triffterer, *The Preventative and the Repressive Function of the International Criminal Court*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 137, 141, 143-45 (Mauro Politi & Giuseppe Nesi eds., 2001).

175. *See, e.g., id.* at 137, 142.

176. *See* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 324 (1997).

177. S.C. Res. 827, U.N. SCOR, 48th Sess., at 1, U.N. Doc. S/RES/827 (1993), *available at* http://www.ohr.int/other-doc/un.res-bin/pdf/827e.pdf.

178. Overview of the Rome Statute of the International Court (1998-1999), *available at* http://www.un.org/law/icc/general/overview.htm.

If retribution is not the dominant theory, it must share developmental influence with other theories, and therefore, does not independently shape the creation of international legal principles.[179] Without a dominant theory, the creation of international law involves a dynamic of compromise in which the values and needs of the international community are advanced in a pragmatic way.[180] In both customary and treaty law creation, normative theories, political principles, and practical objectives are traded and balanced in a manner that maximizes the collective good under prevailing circumstances.[181] This dynamic was evident in the ICC negotiations on the Elements of Crimes.[182] As one commentator noted:

> Some delegates approached the Elements from the perspective of ensuring broad principles that would facilitate prosecution. Other delegates tended to approach the Elements from the perspective of the accused or safeguarding sovereignty. Both approaches were ultimately useful, as the resulting debate and dialogue were necessary in order to strike the right balance in the Elements.[183]

While such an approach may be "necessary," it could result in legal doctrines that compromise principles for practical results. This compromise may be permissible under a utilitarian approach that seeks to maximize the net social good.[184] However, it is not satisfactory under a principled theory such as retributivism that holds that punishment is only warranted if offenders deserve to be punished.[185]

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179. *See, e.g.*, SUNGA, *supra* note 176, at 325-26 (rejecting a retribution theory and stating that "international criminal law must serve broader purposes for the community at large, on a constructive and prospective basis, whether built on the foundations of utilitarianism, a 'social engineering approach,' the theories of Kelsen or Hart or one of the many other important jurisprudential bases that have gained ground in recent decades.").

180. *See, e.g.*, Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 543 (2003) (discussing prosecutorial discretion and noting that tribunals combine a retributive and deterrent methodology).

181. SUNGA, *supra* note 176, at 325-26.

182. Darryl Robinson & Herman von Hebel, *Reflections on the Elements of Crimes, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 220-21 (Roy S. Lee ed., 2001).

183. *Id.* at 221.

184. SUNGA, *supra* note 176, at 325-26.

185. *See* MOORE, *supra* note 87, at 28. The command responsibility doctrine aptly illustrates this dynamic of compromise and its unsatisfactory results. The jurisprudence surrounding the Additional Protocol to the Geneva Convention of 1949, *see* Additional Protocol, *supra* note 37, the International Criminal Court, *see* Rome Statute of the International Criminal Court, *supra* note 74, and the International Tribunals for Rwanda, Statute for the International Criminal Tribunal for Rwanda, *supra* note 67, and Yugoslavia, Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 53, provides evidence of the international community's effort to balance the practical objective of deterring gross violations of human rights with a more principled

A second explanation for the failure to observe the principle of individual fault is that the international community, while generally focused on moral principles and retributive theory, recognizes the justness of collective responsibility in some circumstances.[186] Generally, collective responsibility considers the group as the moral unit, not the individual.[187] Although concerned with blameworthiness, this theory does not regard individual moral responsibility as an absolute requirement of punishment.[188] Rather, it is merely the predominant characteristic of modern individualistic societies.[189] A society that recognizes a less individualistic ethic, with a focus on group or family, may find certain applications of collective responsibility palatable and uncontroversial.[190] Importantly, if the individual is not regarded as the absolute unit of moral accountability, then it may be acceptable—under certain conditions—for the international community to assign responsibility based on group membership.[191] If the international community recognizes the justness of collective moral responsibility, a respect for the individual is diminished. This theory is problematic, however because "[i]t is difficult to determine limits to collective responsibility."[192]

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concern for preserving some semblance of individualized fault as a basis for assigning criminal liability.

186. *See* Triffterer, *supra* note 174, at 137, 146-48.

187. *See* JOEL FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 233 (1970) (describing collective liability as "the vicarious liability of an organized group (either a loosely organized, impermanent collection or a corporate institution) for the actions of its constituent members.").

188. *Cf.* LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 76 (1987) (taking a "middle position" in which collective moral responsibility to groups of persons is not sufficient for the ascription of individual moral responsibility. "Other conditions, especially related to the personal blameworthiness of the individual members, would also have to be present for the contributing individuals to be held individually responsible for the harm in question.").

189. *See* FEINBERG *supra* note 187, at 240.

190. *See* Waley-Cohen, *supra* note 91, at 127 (discussing China and noting that the influence of traditional notions of criminal collective responsibility are still present in modern law due to the deeply ingrained concepts of family and community responsibility).

191. *See* FEINBERG *supra* note 187, at 240-41.

> [C]ollective criminal liability imposed on groups as a mandatory self-policing device is reasonable only when there is a very high degree of antecedent group solidarity and where efficient professional policing is unfeasible. Furthermore, justice requires that the system be part of the expected background of the group's way of life and that those held vicariously liable have some reasonable degree of *control* over those for whom they are made sureties. It is because these conditions are hardly ever satisfied in modern life, and not because individual liability is an eternal law of reason, that collective criminal responsibility is no longer an acceptable form of social organization.

Id.

192. J.R. LUCAS, RESPONSIBILITY 77 (1993).

A third explanation for the development of a command responsibility doctrine that fails to meet fundamental culpability principles is that individual accountability for international crimes is a relatively new genre of international law. While Nuremberg created the precedent for individual accountability, international law has yet to incorporate the type of intensive philosophical discussion regarding justness that should permeate such criminal law creation.[193] The tradition of positivism has remained strong, deriving law externally from the conduct and acceptance of states rather than from an implicit consideration of basic metaphysical principles.[194] As one commentator has noted:

> 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.[195]

While most national criminal systems may "subscribe to the general principle that people should be held accountable according to their own actions and their own mode of culpability," international law has neglected to adequately account for this maxim.[196]

V. A PRESCRIPTIVE SUGGESTION

Irrespective of which explanation is most compelling, the recent development of a permanent international criminal court and the emergence of aggressive universal jurisdiction for certain international crimes require that greater attention and discussion now be given to justifying law. The imposition of punishment on individuals requires that international law move beyond mere consent-based positivism toward a more reflective approach that incorporates some moral compass in law creation. Without a more reflective approach, a discord between principles and law could have a corrosive "impact on the public support for international criminal justice."[197]

This does not require a wholesale abandonment of positivism, or a rejection of the dynamic of compromise. These influences are too deeply entrenched in current conceptions of international law to be easily dismissed. Rather, international lawmakers should continuously concern themselves with advancing an understanding

193. *See* Damaška, *supra* note 84, at 463-65.
194. *See id.* at 495.
195. *Id.*
196. *Id.* at 464.
197. *Id.* at 470–71.

of a common philosophy of law even as the reality of international lawmaking recognizes the need for a certain degree of ideological flexibility. At a minimum, this requires that problematic philosophical issues begin to be identified and accurately described "rather than passed over in silence or masked by rhetorical legerdemain."[198] An identification of problematic philosophical issues will provide the necessary dialectic framework for rehabilitating international criminal law.

In the short term, this approach will only result in highlighting legal doctrines, such as command responsibility, that are both objectionable and desirable at the same time. However, the objectionable aspects should not diminish or discourage the long-term efforts of international lawmakers to create a coherent and principled system of international justice. By adopting a measured approach, lawmakers can create a legal system that will be more in line with the dictates of a deontological retributive theory of law.

198. Damaška, *supra* note 84, at 456.