

Michigan Law Review

Volume 109 | Issue 6

2011

Liberal Legal Norms Meet Collective Criminality

John D. Ciorciari

Gerald R. Ford School of Public Policy, University of Michigan

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), and the [Organizations Law Commons](#)

Recommended Citation

John D. Ciorciari, *Liberal Legal Norms Meet Collective Criminality*, 109 MICH. L. REV. 1109 (2011).

Available at: <https://repository.law.umich.edu/mlr/vol109/iss6/15>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LIBERAL LEGAL NORMS MEET COLLECTIVE CRIMINALITY

*John D. Ciorciari**

MAKING SENSE OF MASS ATROCITY. By *Mark Osiel*. Cambridge: Cambridge University Press. 2009. Pp. xviii, 257. £50.

INTRODUCTION

In early 2008, a Cambodian survivor confronted a Khmer Rouge leader for the first time at a U.N.-backed tribunal in Phnom Penh. Facing Pol Pot's infamous deputy, Nuon Chea, she recounted her parents' untimely deaths and her brutal imprisonment at age seven, when she was shackled beside her four-year-old brother. Nuon Chea has denied responsibility for these and other atrocities during the Khmer Rouge reign of terror in the late 1970s, but the victim asked plaintively, "If Nuon Chea claimed he was not responsible, who was then for the loss of my parents and other victims' loved ones?"¹

That plea drove to the heart of the challenge of accounting for mass atrocity. From the gas chambers at Auschwitz to the dust-swept plains of Darfur, survivors are left scouring for answers. What happened? How can the crimes be explained? Who should be blamed? What can help victims heal? How can future abuses be prevented? These questions follow any crime but pose particular problems after mass atrocities, which invariably involve numerous perpetrators acting through complex organizations.

International criminal law ("ICL") tends to focus on the same question asked by the Cambodian survivor above: who was ultimately most responsible? Focusing on the culpability of senior leaders has powerful appeal. It resonates with a natural human tendency to personify misdeeds and identify a primary locus for moral blame. It also serves political ends by putting a face on mass crimes, decapitating the old regime, and leaving room for reconciliation at lower levels. But what happens when smoking guns do not point clearly toward high-ranking officials? And how can the law address the fact that most atrocities are committed by lower-level functionaries in the field? It is seldom possible to put all—or even most—of the culprits of mass atrocities on trial. What legal doctrines and policy

* Assistant Professor, Gerald R. Ford School of Public Policy, University of Michigan. The author is grateful to Carrie Booth Walling and Monica Hakimi for their comments on previous drafts.

1. Ker Munthit, *Cambodian Genocide Victim Confronts Ex Khmer Rouge Leader*, THE IRRAWADDY, Feb. 9, 2008, available at http://www.irrawaddy.org/article.php?art_id=10233 (quoting civil party Theary Seng from a hearing of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia).

practices best help a society achieve the delicately intertwined goals of justice, peace, and reconciliation?

Mark Osiel² tackles these vexing questions in *Making Sense of Mass Atrocity*. Osiel is a seasoned and accomplished analyst of ICL. In this latest work, the fifth in a series of books dealing with responses to mass atrocity,³ he compels readers to reflect on how such crimes really happen, how the law currently addresses them, and how it should. He offers trenchant critiques of ICL and proposes significant doctrinal and policy reforms, focusing on how legal rules and practices can incentivize relevant actors to prevent or deal with such abuses. His book may rankle some of ICL's true believers, but it offers an important and constructive contribution to a field that can sometimes use a bit more introspection.

This Review begins by introducing the problem Osiel seeks to address—namely, the challenge of responding to collective atrocities. In Part II, it assesses his arguments on how to reform relevant legal doctrines. Part III examines his claims regarding the roles of amnesty and prosecution as national and international actors seek to promote diverse interests in retribution, deterrence, and reconciliation. Finally, Part IV evaluates his boldest proposal—to supplement existing practices by imposing collective civil sanctions on military officers in certain circumstances.

I. THE DILEMMA: INDIVIDUAL DEFENDANTS FOR COLLECTIVE WRONGS

At its core, *Making Sense of Mass Atrocity* is an effort to relieve tension between the basic tenets of legal liberalism and the grisly social reality of how mass crimes are committed. Modern ICL sprouted from the seeds of the Nuremberg and Tokyo tribunals and rests on a foundation of broadly “liberal” principles that emphasize individual rights and responsibilities. Its signal achievement has been to move beyond the law's traditional remedy of imposing collective civil penalties against states, “pierce the sovereign veil,” and hold individuals responsible for their crimes. There is much to be said for a focus on accountability. By challenging impunity, ICL helps develop and reinforce basic human rights norms. The threat of criminal prosecution gives would-be offenders reason to think twice before orchestrating mass abuses.⁴ Criminal trials also pro-

2. Professor of Law, Aliber Family Chair, University of Iowa College of Law.

3. Previous books include MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997); MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR* (1999); MARK J. OSIEL, *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR* (2001); and MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* (2009). Osiel has also published numerous law review articles and commentaries on related subjects.

4. The independent deterrent effect of international criminal justice is difficult to measure, and empirical studies are lacking. However, even most despots doubtlessly reflect before enacting brutal policies, giving ICL an opportunity to shape their cost-benefit calculi. See Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 *HUM. RTS. Q.* 624 (2009) [hereinafter Akhavan, *Disincentive to Peace?*];

vide at least some victims with a sense of justice and empowerment and may help facilitate personal healing as well.⁵

Prioritizing individual culpability can be problematic, however, if the pendulum swings too far. Leaders cannot commit mass atrocities alone. Osiel thus identifies a basic conundrum: "Criminal law sees a world of separate persons, whereas mass atrocity entails collective behavior" (p. x). He warns that "[w]ith its focus on discrete deeds and isolated intentions, legal analysis risks missing the collaborative character of genocidal massacre, the vast extent of unintended consequences, and the ways in which 'the whole' conflagration is often quite different from the sum of its parts" (p. 2).

Tension certainly does exist. As Mark Drumbl and others have noted, it is awkward to "shoehorn collective agency into the framework of individual guilt."⁶ Organizational behavior and systemic forces are essential to understanding past atrocities and preventing future ones, but criminal trials tend to downplay these dynamics. Prosecutors have incentives to treat complex collectives as bundles of discrete, autonomous actors rather than organic wholes. Focusing on structure rather than agency is dangerous when seeking convictions and assigning blame; it risks presenting defendants as fungible cogs in an impersonal machine. Genocidal killers could go free, and support for tribunals could quickly evaporate.

The fact that prosecutors can usually target only a fraction of suspects exacerbates the problem. They target senior figures when possible, but convicting those leaders is often difficult. Smoking-gun evidence rarely links them directly to crimes carried out by their subordinates. To avoid letting high-ranking criminals off the hook, prosecutors and judges have powerful incentives to devise new doctrines that stretch the boundaries of individual responsibility. In such circumstances, ICL risks reaching beyond the pale of the basic principle of culpability and breaching individual rights in an effort to defend them. Osiel argues that the law "seems to find itself impaled on the horns of this dilemma" (p. 3). Without "doctrinal ingenuities, criminal law might never fully reach mass atrocity's masterminds," he writes. "Yet, if liberal legality achieves this laudable goal only by compromising its first principles, then in the process it has surely lost its moral bearings, even sacrificed its soul" (p. 118).

Even successful prosecutions of leaders are only a partial response to widespread terror. Most low-level offenders escape judgment, and the threat or occurrence of trials does not ensure that they will lay down their arms, reconcile with erstwhile adversaries, and forego future abuses. Osiel rightly argues that a range of policy options deserves consideration in responding to

Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001). For a competing view, see Helena Cobban, *International Courts, FOREIGN POL'Y*, Mar.-April 2006, at 22, 26 (arguing that ICL has limited deterrent capability due to the impassioned or irrational nature of many mass human rights abusers).

5. See, e.g., JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 133, 155, 183 (1997); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 66-74, 88-89 (1998).

6. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 39 (2007).

collective crimes. He develops a number of doctrinal and policy reforms, taking an “economic vantage point” (p. 11) that prioritizes giving key actors incentives to prevent and punish gross human rights violations.

II. REFORMING LEGAL DOCTRINES

The first set of challenges is doctrinal. Fighting impunity requires holding leaders accountable. A leader may be held liable as a principal for perpetrating, planning, or ordering a crime or as an accessory for aiding and abetting.⁷ However, high-ranking criminals rarely pull the trigger; most physical acts of mass atrocity are committed by foot soldiers and functionaries. Moreover, leaders usually try to avoid leaving evidence of specific orders, concrete plans, or even clear chains of command. In such cases, prosecutors must look to other forms of responsibility. Since the late 1990s, the International Criminal Tribunal for the former Yugoslavia (“ICTY”)—and to a lesser extent, the International Criminal Tribunal for Rwanda (“ICTR”)—have refined or expanded legal doctrines to connect leaders to far-flung atrocities. They have relied primarily on the concepts of joint criminal enterprise (“JCE”) and superior responsibility.

JCE is based on the “common purpose doctrine” that emerged from the post-World War II trials of Nazi defendants engaged in organized murder. The ICTY Appeals Chamber set forth the three basic forms of the doctrine in the 1999 *Tadić* judgment.⁸ The first, “basic” form (“JCE-I”) resembles the doctrine of conspiracy. It applies when a defendant belongs to a group possessing a common criminal purpose and renders the defendant liable for intended crimes of the group, even if the defendant was not the physical perpetrator.⁹ The second, “systemic” form (“JCE-II”) is similar. It renders a defendant liable for crimes committed by other members of a concentration camp or similar facility if they shared a common criminal purpose and car-

7. These modes of liability are related to the notions of conspiracy and complicity. See Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7, U.N. Doc. S/RES/827 (May 25, 1993) (amended 1998 and 2000) (imposing responsibility on individuals who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime”). The statutes of other contemporary tribunals contain similar provisions. See Statute of the International Tribunal for Rwanda, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone (“SCSL”), art. 6, U.N. Doc. S/RES/1315 (Aug. 14, 2000); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (“ECCC”) for the prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29 (Act. No. NS/RKM/0801/12).

8. The *Tadić* judgment referred to these categories as variants of liability under the common purpose doctrine. The ICTY Appeals Chamber later adopted the term “joint criminal enterprise.” See *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶¶ 1 *et seq.* (Mar. 19, 2004).

9. *Prosecutor v. Tadić*, IT-94-1-A, Judgment, ¶¶ 196, 220 (July 15, 1999) [hereinafter *Tadić* Appeals Judgment]. The *Almelo Trial* was one precedent; three Germans intended to kill a British soldier and were convicted as co-perpetrators although they performed different roles. Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, Almelo, Holland, Nov. 24–26, 1945, 1 U.N. War Crimes Commission (“UNWCC”), Law Reports of Trials of War Criminals 35.

ried out complementary functions.¹⁰ The third, “extended” form (“JCE-III”) was the most groundbreaking and controversial. It allows a court to find a defendant guilty for a crime by another group member that “while outside of the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”¹¹ JCE-III is based on the notion that people who engage in exceptionally dangerous activities should bear the risk of foreseeable adverse consequences.

The doctrine of superior responsibility offers an alternative path to conviction. It grew out of the ancient principle of command responsibility in wartime. In its modern embodiment, it subjects both civilian and military leaders to criminal liability for a failure to punish or prevent crimes by subordinates when under a duty to do so.¹² The ICTY’s 1998 *Čelebići* judgment set forth the three core elements of the contemporary doctrine. The defendant must have possessed “effective control” over subordinates; knew or had reason to know of crimes they committed or would commit; and nevertheless failed to take appropriate remedial action.¹³

Osiel argues that under ICTY jurisprudence, it is “too easy” to convict high-ranking criminals under JCE and “too difficult” under superior responsibility (p. 24). He proposes “to steer the law safely between these twin perils” (p. 30) by curtailing JCE and broadening the bounds of superior responsibility. He recommends broadening the latter by infusing it with a concept of managerial control that is typically associated with the civil law doctrines of co-perpetration and indirect perpetration. These doctrines—which are expressly included in the Rome Statute of the International Criminal Court (“ICC”)—apply when an individual commits a crime “jointly with another” or “through another” person.¹⁴ They differ from JCE by focusing less on implied criminal agreement and more on the types of organizational behavior and association that should render group members responsible for one another’s offenses. Osiel regards this shift of focus as more consistent with liberal norms and more reflective of how collective atrocities occur.

10. Tadić Appeals Judgment, *supra* note 9, at ¶ 203. This followed a series of cases decided by British and American courts in Germany after the Second World War, including the *Dachau Concentration Camp* and *Belsen* cases. See, e.g., Trial of Martin Gottfried Weiss and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, Nov. 15–Dec. 13, 1945, 11 UNWCC, Law Reports of Trials of War Criminals 5; Trial of Josef Kramer and 44 others, British Military Court, Luneberg, Germany, Sept. 17–Nov. 17, 1945, 2 UNWCC, Law Reports of Trials of War Criminals 1.

11. For example, Tadić was part of an armed group that raided a Bosnian village as part of an ethnic cleansing campaign. Although evidence did not prove that he perpetrated killings, Tadić was convicted for the murder of five Muslims because he participated in a criminal enterprise in which such crimes were foreseeable. Tadić Appeals Judgment, *supra* note 9, at ¶¶ 204, 373.

12. See Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 38 (Nov. 16, 2005).

13. Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶ 346 (Nov. 16, 1998).

14. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute], arts. 25(3)(a), (d).

A. *Taming JCE*

Joint criminal enterprise quickly emerged as the ICTY prosecutors' preferred vehicle for linking mid-level or senior officials to diffuse and dispersed offenses in the field.¹⁵ However, to many critics, JCE threatens to violate the basic principle of criminal law that a defendant must have had culpable knowledge or intent to be convicted of an offense.¹⁶ The concept of an "enterprise" is vague,¹⁷ as are the notions of common criminal plans or the "natural and foreseeable consequences" that flow from it. This leaves defendants potentially liable for a vast range of crimes that they did not commit, intend, or even know about. Osiel is justifiably concerned about the doctrine's "elasticity" (p. 66) and "dangerously illiberal tendencies" (p. 92). As he notes, similar doctrines have been struck down in most legal systems.¹⁸ The ICTY has fueled these concerns by allowing JCE's reach to expand dramatically since *Tadić*. Defendants have been convicted for atrocities committed by far-away perpetrators who had no proven contact with the defendant and no common membership in a hierarchical organization.¹⁹ Osiel concludes that the ICTY's brand of JCE is "so broad a notion that it requires enormous self-restraint by prosecutors ever to be defensible in practice" (p. 73).

He also finds it problematic that JCE can apply similarly to enterprise members of all ranks. He faults the doctrine's "utter indifference to power when determining liability" (p. 78) and argues that the law cannot address the reality of collective crimes without focusing on power relations, organizational dynamics, and those who were most responsible. Osiel therefore

15. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 107 (2005). The ICTR has used the doctrine more sparingly, instead trying numerous defendants for conspiracy to commit genocide under the 1948 Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, 78 U.N.T.S. 277, art. 3 (Dec. 9, 1948).

16. See, e.g., Danner & Martinez, *supra* note 15, at 134–46; GIDEON BOAS ET AL., FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 106 (2007); JOHN LAUGHLAND, TRAVESTY: THE TRIAL OF SLOBODAN MILOŠEVIĆ AND THE CORRUPTION OF INTERNATIONAL JUSTICE 116–23 (2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 78–88 (2007).

17. International courts have provided little guidance. The U.S. Supreme Court has defined a criminal "enterprise" under the Racketeer Influenced and Corrupt Organizations ("RICO") Act merely to require "an ongoing organization, formal or informal," *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009), that exists "separate and apart from the pattern of activity in which it engages." *Id.* at 2249 (2009) (Stevens, J., dissenting) quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981) (internal quotation marks omitted).

18. Many U.S. states apply the controversial *Pinkerton* doctrine, which holds individuals responsible for foreseeable crimes by co-conspirators. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946). However, the Model Penal Code rejects this principle. See MODEL PENAL CODE § 2.06 (1962); Edward M. Wise, *RICO and its Analogues: Some Comparative Considerations*, 27 SYRACUSE J. INT'L L. & COM. 303, 312 (2000) (noting that no civil law system applies such liability).

19. See, e.g., *Prosecutor v. Krstić*, IT-98-33-T, Judgment, ¶¶ 610–45 (Aug. 2, 2001). For additional examples, see STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 144–45 & nn.20–21 (2009).

advocates narrowing JCE and applying it less often. He suggests that “it is possible to construe enterprise participation as a form of complicity” (p. 89), which “might not be an entirely bad idea” (p. 90). This would trim the scope of JCE, because complicity requires proving that the defendant knew about and contributed substantially to the crime. It would also reduce JCE’s appeal, because even high-level criminals would be convicted as accomplices, not principals.

The ICC appears to be headed in that direction. The Rome Statute does not refer to enterprises specifically but imposes liability when a defendant “contributes to the commission . . . of . . . a crime by a group of persons acting with a common purpose . . . [to further] the criminal activity or criminal purpose of the group.”²⁰ In the 2007 *Lubanga* case, the ICC Pre-Trial Chamber described this provision as “closely akin” to JCE but as a “residual form of accessory liability” that applies when a defendant’s conduct does not fit other established categories such as ordering, aiding, or abetting.²¹ Instead of applying JCE, the ICC applied the co-perpetration doctrine as a form of principal liability. However, it held that co-perpetration requires that the defendant’s participation be “essential” to the commission of the crime.²² This raises a major evidentiary hurdle and makes co-perpetration less appealing to prosecutors than JCE, and less useful as a mechanism for holding leaders accountable.

Decisions of hybrid tribunals reflect continued contestation about the proper scope of JCE. Like the ICTY, the Special Court for Sierra Leone has applied an expansive version of the doctrine.²³ By contrast, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) recently curtailed the doctrine’s application. In a stinging rebuke to the ICTY, it ruled that JCE-III was not a part of customary international law when the Khmers Rouges were in power and that the principle of *nullum crimen sine lege* (no crime without law) required excluding JCE-III from the proceedings.²⁴

20. Rome Statute, *supra* note 14, art. 25(3)(d).

21. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶¶ 335–37 (Jan. 29, 2007).

22. *Id.* ¶¶ 342–47.

23. See Jennifer Easterday, *Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone*, 3 BERKELEY J. INT’L L. PUBLICIST 36, 39–42 (2009).

24. *In re the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, Case No. 002/19–09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) (May 20, 2010) [hereinafter ECCC PTC decision]. The *Tadić* court relied on post-World War II cases and various domestic practices to argue that JCE-III was a part of customary international law. The ICTY Appeals Chamber cited the *Borkum Island* and *Essen Lynching* cases as precedents. *Tadić Appeals Judgment*, *supra* note 9, ¶¶ 205–12 (citing United States v. Goebell (“Borkum Island”), Case No. 12-489, Deputy Judge Advocate’s Office, 7708 War Crimes Group, European Command, Aug. 1, 1947, U.S. Nat’l Archives Microfilm Publications, and Trial of Erich Heyer and Six Others (“Essen Lynching”), British Mil. Ct. for the Trial of War Criminals, Essen, Germany, Dec. 18–19, 21–22, 1945, 1 UNWCC, Law Reports of Trials of War Criminals 88–91). However, the ECCC Pre-Trial Chamber (“PTC”) found these precedents unconvincing, because despite fact patterns germane to JCE-III, neither court issued specific findings on the issue of common criminal plans. The PTC also found that national

Osiel's basic point is correct—JCE should be applied more narrowly than it has been at the ICTY to preserve ICL's credibility and adherence to foundational liberal principles. However, it is important to disaggregate the doctrine. The extended mode is highly problematic and requires much more specific definitions of group membership and mens rea to merit future use, even as a form of accessory liability. JCE-I is comparatively safe and worth retaining as a form of principal liability. The systemic form of JCE lies in between. It deserves continued application, but only if courts impose clearer standards on what constitutes a repressive system and qualifies as a common criminal purpose giving rise to mens rea. If these conditions are met, JCE-II can be a useful tool in advancing accountability for institutionalized collective crimes.

B. *Expanding Superior Responsibility*

In addition to limiting JCE, Osiel suggests reducing reliance on it by broadening superior responsibility. Osiel argues that under current law, superior responsibility fails to capture enough culpable conduct and errs by treating leaders as passive participants in mass crimes. He also faults the ICTY for interpreting the doctrine too narrowly. For example, in the 2008 *Orić* case, the ICTY declined to convict a superior for failing to punish crimes committed by subordinates before the establishment of a superior–subordinate relationship.²⁵ In this and other cases, prosecutors have found the doctrine difficult to deploy effectively. Osiel recommends repairing the doctrine by easing the control requirement and effectively reducing the standard of mens rea.

1. *Easing the Control Requirement*

The ICTY has defined “effective control” to mean the material ability to prevent, stop, or punish offenses by subordinates.²⁶ In practice, the prosecutor has found it difficult to satisfy this requirement given the murky distinctions between de facto and de jure authority, the ebb and flow of a leader's influence across individual subordinates over time, and crisscrossing chains of command. To Osiel, this “largely explain[s] why superior responsibility has fallen into such disfavor at the ICTY” (p. 39). He argues that the doctrine is too rigid to respond to the realities of contemporary con-

legal treatment of enterprise liability was necessary and that no such law existed in Cambodia. Thus, the PTC concluded that JCE-III was not foreseeable to the Khmer Rouge defendants as of 1975–1979. See ECCC PTC decision, *supra*, at ¶¶ 79–87.

25. Prosecutor v. Orić, IT-03-68-A, Judgment (July 3, 2008). For a criticism of the decision, see Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-in-Review*, 7 NW. J. INT'L HUM. RTS. 170, 225–29 (2009).

26. Prosecutor v. Orić, IT-03-68-T, Judgment, ¶ 311 (June 30, 2006). Judges have looked to the defendant's authority to issue orders, the propensity of subordinates to follow those orders, and the superior's general influence over subordinates and ability to punish those who disobey orders. *E.g.*, *id.* at ¶ 312; see also RATNER ET AL., *supra* note 19, at 147.

flict—involving transnational networks and nonstate actors—and is “defeated by the absence of thorough subordination” (p. 45).

To rejuvenate the doctrine, Osiel recommends infusing it with Claus Roxin’s theory of organizational domination. Roxin argues that bureaucratic leaders commit offenses when they transmit illicit orders, even if they do not know who will commit the offense or in what manner.²⁷ Subordinates are fungible, “mere gear[s] in a giant machine.”²⁸ A leader is like an evil “watchmaker” who attaches a clock to a bomb, winds it up, and walks away, knowing with reasonable certainty that the device will detonate (p. 105). Osiel contends that in such circumstances, managerial control of an organization should satisfy the requirement of effective control for the purposes of superior responsibility.²⁹ Thus, he suggests focusing on organizational structures to capture leaders’ misconduct rather than divining shared criminal purpose, as JCE demands (pp. 106–07).

Roxin’s model of managerial control will not solve all of the evidentiary lacunae. It applies well to certain hierarchical organizations—the same types of collectives that are most susceptible to superior responsibility doctrine as it now stands. Determining the extent and duration of a defendant’s managerial control is much more difficult when *de jure* and *de facto* authorities diverge and unofficial and nonstate actors enter the fray.

2. Lowering the Bar for Criminal Intent

Another way to widen the scope of superior responsibility would be to relax the standard for *mens rea*. The ICTY and ICTR have steered away from a negligence standard, which would render a defendant liable when he should have known about crimes but failed to keep a watchful eye on subordinates.³⁰ Instead, they have insisted on a tougher constructive knowledge standard, requiring that the defendant received information putting him on notice of possible abuses, but failed to investigate them.³¹

27. CLAUS ROXIN, *AUTORÍA Y DOMINIO DEL HECHO EN DERECHO PENAL* § 24, at 270 (Joaquín Cuello Contreras & José Luis Serrano González de Murillo trans., 6th ed. 1998).

28. Claus Roxin, *Problemas de Autoría y Participación en la Criminalidad Organizada*, in *DELENCUENCIA ORGANIZADA* 194 (Juan Carlos Ferré & Enrique Anarte Borrillo, eds., 1999).

29. He also views managerial control as grounds for convicting the leader as a co-perpetrator or indirect perpetrator, but as noted above, early ICC jurisprudence suggests that would require proving that the superior’s contribution was essential to the crime. See *supra* note 22 and accompanying text.

30. Other courts have also generally disfavored negligence standards, which risk casting the net of culpability too widely. A U.S. tribunal controversially applied such a standard in the 1945 *Yamashita* case, holding a Japanese general liable for failing to attempt to discover and control widespread crimes by his subordinates. Trial of General Tomoyuki Yamashita, U.S. Military Commission, Manila, Philippines, Oct. 8–Dec. 7, 1945, 4 UNWCC, Law Reports of Trials of War Criminals 1, 35, *aff’d In re Yamashita*, 327 U.S. 1 (1946).

31. *E.g.*, Prosecutor v. Bagilishema, ICTR-95-1A-A, Judgment, ¶¶ 35–37, 42 (July 3, 2002) (requiring a showing that “the accused [superior] either ‘knew’ or ‘had reason to know’” of crimes committed by subordinates over whom he had effective control); Prosecutor v. Delalić, IT-96-21-A, Judgment, ¶¶ 226, 241 (Feb. 20, 2001) (interpreting “‘had reason to know’” such that “a superior

The Rome Statute of the ICC imposes a similar standard on civilians, who can only be held responsible if they “knew, or consciously disregarded information which clearly indicated” that abuses were taking place.³² It treats military commanders differently, rendering them liable if they “knew or, owing to the circumstances at the time, should have known” about offenses.³³ This is essentially a negligence standard. If interpreted loosely, it could veer toward strict liability for leaders deemed to have “effective control.”³⁴ Osiel does not advocate strict criminal liability, but importing Roxin’s model of managerial control does relieve pressure on prosecutors to establish the defendant’s constructive knowledge. If organizational leaders can be reasonably sure that crimes will be committed pursuant to their nefarious plans, they are on notice of likely offenses from the moment of the plan’s inception. “[T]he watchmaker knows that, in the ordinary course of events, his device will explode” (p. 108).

Osiel’s doctrinal proposals are grounded in a realistic vision of how some collective crimes doubtlessly transpire, and their appeal to prosecutors is clear. By focusing on organizational control, they evade some of the evidentiary challenges of proving specific superior–subordinate relationships and the defendant’s “reason to know” of offenses. However, if broadly construed, they can easily run afoul of the culpability principle. In addition to the challenge of discerning the scope of a defendant’s control, evidence of the specific contours of organizations’ criminal plans is apt to be sparse.

Osiel is aware of the hazard of expanding doctrines to compensate for evidentiary challenges but “pleads guilty, unabashedly” (p. 127) and offers a spirited defense. He contends that some “normative harshness” is warranted in dealing with “colossal wrongs.”³⁵ He argues that legal principles such as *nullum crimen sine lege* and the lenity rule must be weighed in relation to the law’s broader normative aims. He advocates a “character conception of individual culpability” (p. 131) that looks not only to the letter of the law but also to widely shared norms in assessing culpability. He is comfortable leaving blurry edges on the forms of responsibility that apply to high-level officials, who do not need to be told that mass abuses are unlawful and can exploit bright-line rules to evade responsibility.³⁶ He argues, “[W]hen a person who, presented with clear options of white and black, chooses to enter

will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates”).

32. Rome Statute, *supra* note 14, art. 28(b)(i).

33. *Id.* art. 28(a)(i).

34. The outcome will likely hinge on how the ICC interprets the language “the circumstances at the time.” See RATNER ET AL., *supra* note 19, at 148.

35. P. 129. Osiel borrows the phrase “normative harshness” from Darryl Robinson, who has used the term to criticize proposals such as Osiel’s for deviating from liberal principles. See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925, 944 (2008).

36. On the issue of notice, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 124, 158–71 (2008) (arguing that perpetrators of mass atrocities were on “sufficient notice of the foreseeability of ICL jurisprudential innovations” based on extant law and widely held universal norms).

so ominous a grey zone between the two, the law rightly deems him to act at his peril" (p. 140). This resembles the justification for JCE-III, but as noted above, Osiel contends that an expanded version of superior responsibility offers a safer and more accurate way to approach collective crimes.

A tug-of-war exists between liberal legal norms designed to protect defendants' rights (such as *mens rea*) and those designed to combat gross human rights violations. If ICL strays too far from basic individual rights, it loses credibility; if it fails to fight impunity, it loses relevance. The key is to strike the optimal dynamic balance. Osiel's doctrinal reforms are carefully crafted efforts to do so. To this reviewer, his importation of Roxin's theory is sensible, but only if it is narrowly construed. Courts should require clear evidence of control *and* specific plans to commit particular types of offenses to hold defendants liable as "watchmakers."³⁷ Otherwise, Osiel's model could easily suffer from excess elasticity, as enterprise liability does.

III. RECONCILING NATIONAL AND INTERNATIONAL APPROACHES

Reforming ICL doctrines can help make criminal trials more effective, but it does not resolve the question of who should stand trial in the wake of collective atrocities. Osiel examines differences in the approaches national and international authorities tend to take toward amnesty and prosecution and advocates prioritizing pragmatic, context-specific solutions.

A. Deciding Whom to Prosecute

Osiel argues that national and international prosecutors tend to have different priorities. Domestic prosecutors generally apply narrow doctrines, seek to pin responsibility on the "kingpins [of] mass atrocity," and downplay the collective nature of the crimes (pp. 147–48). This pleases their "executive masters," who seek above all to draw a line under the old regime, quell public passions, and establish "a new founding myth for the nation" (p. 155). Osiel believes this "scapegoating of sorts" can be justified as part of the "costs of reconciliation and relegitimation," insofar as prosecutors select defendants according to degrees of wrongdoing and set aside more "invidious considerations" (p. 152).

International prosecutors generally prefer to cast wider nets and apply more expansive doctrines like JCE, Osiel contends. This reflects their strong normative commitment to human rights as the "bearers and exegetes of this ascendant faith" (p. 184) and a prevailing view that serious suspected offenders should stand trial. It also results from concrete career incentives to

37. As Osiel notes, the ICC has issued some jurisprudence broadly in line with this reasoning. See *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶¶ 500–38 (Sept. 30, 2008) (laying out criteria under which a defendant can be convicted as a perpetrator based on organizational membership). Osiel suggests that if prosecutors establish that the defendant assumed effective control of a dangerous organization, the evidentiary burden could shift, requiring the defendant to show a loss of control before a subsequent crime was committed. P. 107. To this reviewer, that would be too perilous a step away from the presumption of innocence.

notch convictions on their belts. Osiel argues that international prosecutors generally prioritize retribution and deterrence “with reconciliation a distant third” (p. 170). Targeting lower-level suspects alongside chieftains is appealing, both because they are often easier to convict and because it is their faces that are most often seared in the memories of the ordinary victims who seek justice (pp. 165–66).

National and international priorities sometimes do diverge. Many transitional governments have downplayed accountability, and others have preferred limited, quick trials to decapitate the *ancien régime* and consolidate peace on desired terms. Examples include the 1979 People’s Revolutionary Tribunal in Cambodia, which convicted Pol Pot and Ieng Sary for genocide in absentia, and the trial of Francisco Macías Nguema and nine of his henchmen in Equatorial Guinea the same year. At the hybrid tribunal now operating in Cambodia, national and international co-prosecutors have wrangled over how many Khmer Rouge suspects should face justice. Prime Minister Hun Sen publicly insists that trying more than the five people now in custody would endanger national stability.

There are also important counterexamples, however, in which states have gone beyond trying a handful of big fish. In Greece, nearly 90 military junta members stood trial for abuses of the 1967–74 period. Hundreds of former communist officials in East Germany, thousands of Ethiopians associated with the Mengistu Haile-Mariam regime, and tens of thousands of Rwandans implicated in the 1994 killings have been subjected to various types of domestic criminal proceedings. The Argentinian government—which halted prosecutions and enacted amnesties and pardons after the 1985 “Trial of the Juntas” for fear of military revolt—invalidated the amnesty law in 2005 and is now trying hundreds of “Dirty War” suspects. The Iraqi Special Tribunal established to adjudicate crimes of Saddam Hussein’s Ba’athist regime has tried roughly 2 dozen people and remains active. Viewed in this context, the number of indictments issued by the ICTY (161), ICTR (92), ICC (14 to date), and U.N.-backed hybrid court for Sierra Leone (13) look much less exceptional.³⁸

When international and domestic priorities do conflict, how can they be reconciled? Osiel argues that it is “undesirable, or at least premature” to try to synchronize national and international prosecutorial practices (p. 179). Doctrinally, he sees value in national experimentation and warns that ICL should not “encroach too ambitiously on the legitimate preserves of national law, at least in democratic societies” (p. 176). With respect to personal jurisdiction, he defends the prerogative of democratic leaders to “privilege reconciliation over retribution in their policies of transitional justice” and “prosecute only the very worst offenders” when broader trials would un-

38. ICTR, *Report on the completion strategy of the International Criminal Tribunal for Rwanda*, at 4 n.7, U.N. Doc. S/2010/259 (May 25, 2010); Key Figures of ICTY Cases, ICTY, <http://www.icty.org/sid/24> (last visited October 5, 2010). The prosecutor for Sierra Leone notably declined to exercise jurisdiction over suspects under the age of eighteen. E.g., David M. Crane, *Prosecuting Children in Times of Conflict: the West African Experience*, HUM. RTS. BRIEF, Spring/Summer 2008, at 11, 14–15.

dermine stability (p. 179). International courts may “step back into the breach” when national prosecutors fall far short of accountability norms but should be “more attentive to national preoccupations.”³⁹ Overall, he prioritizes flexibility and finding a “practicable middle ground” that balances aims of deterrence, retribution, and reconciliation on a context-specific basis (p. 180).

Policymakers indeed face balancing acts in coping with collective crimes. The apparent trend in ICL is toward a norm requiring states to prosecute those deemed “most responsible” for atrocities, but to leave greater sovereign discretion with respect to lower-level subordinates. One argument for focusing on leaders is that prosecuting lower-level subordinates delivers diminishing marginal benefits of retribution, deterrence, and norm penetration, but still carries significant risks to reconciliation.⁴⁰ This claim has intuitive appeal, but strong counterarguments exist. Trying underlings may better advance retribution—because they are the physical abusers that victims saw in the flesh—and have more deterrent impact—because foot soldiers are less likely to risk prosecution than senior officials who commit abuses in the pursuit of much greater wealth and spoils. There is little evidence that trials have prompted relapses to violence that would not otherwise have occurred, and in certain circumstances, broader prosecutions may also facilitate reconciliation by preempting vigilante justice.

It is exceedingly difficult to test these propositions empirically, which helps explain why debates over transitional justice approaches have been so resistant to resolution. The risks and rewards of various prosecutorial strategies vary from case to case, and officials make policy judgments based on highly imperfect information. Some degree of selectivity in prosecution is usually imperative due to practical constraints.⁴¹ Even if time and money were no obstacles, the wisdom of trying all possible suspects is doubtful in a transitional society. How defendants are chosen is thus crucial to the legitimacy of the accountability process. When prosecutors choose fairly, trials can provide a sense of justice and contribute to a better shared understanding of the abuses of the past. Conversely, when prosecutors choose culprits to advance narrow political or ethnic vendettas, trials can degenerate into charades of victors’ justice and reinforce social divides. The danger of selective (in)justice is a perennial and legitimate concern in criminal trials

39. P. 180. The Rome Statute does allow the ICC to exercise jurisdiction when the relevant state or states are “unwilling or unable” to proceed. Rome Statute, *supra* note 14, arts. 12–15, 17. This is the “complementarity” principle. Osiel rightly argues that the ICC should exercise careful review so domestic prosecutors do not simply “dump” inconvenient or unpopular cases at its door. P. 182.

40. See Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT’L SEC., Winter 2003/2004, at 5, 20–24 (reviewing a number of brief case studies from the post-Cold War era). The ICTY has drawn particular criticism as a costly venture that indulged Western interests at the apparent expense of interethnic healing. See, e.g., Cobban, *supra* note 4.

41. The Rwandan case illustrates some of the practical limitations of a society that seeks credible justice for thousands of suspected offenders. See Christopher J. Le Mon, *Rwanda’s Troubled Gacaca Courts*, HUM. RTS. BRIEF, Winter 2007, at 16, 17.

following mass abuses.⁴² Timing also matters; prosecutions conducted before the dust settles pose special challenges to stability, whereas delaying trials too long can forfeit much of their impact.⁴³

International courts and lawyers have vital roles in helping to arrive at the best possible solutions in particular contexts. They can provide important checks and balances on state action by reviewing how national prosecutions are designed and conducted. They can also furnish essential technical support that makes trials more legitimate and effective.⁴⁴ When states refuse to act in accordance with widely shared norms, international lawyers should apply pressure. Too often, gross human rights violators enjoy impunity in the name of reconciliation as rival elites patch fences and continue to misgovern. In certain circumstances, the ICC should exercise jurisdiction where domestic leaders face legitimate domestic political constraints or refuse to hold the worst offenders accountable.

International pressure is not always unwelcome; it often provides political cover for domestic policymakers who seek accountability. Nevertheless, Osiel provides an important reminder of the need for sensitivity to local conditions. International criminal lawyers are right to push for accountability norms. To build a normative regime that remains credible over the medium term, they need to do so responsibly.

B. *Using Amnesty as a Carrot*

Prosecution is not the only policy option available in the wake of mass atrocities. Amnesty, with or without associated truth commissions, is also a path commonly taken. Osiel laments what he regards as a “near-complete monopolization” (p. 235) of the ICL literature by those favoring prosecution. He argues that amnesty agreements are useful, lawful arrows in the quiver of policy options available to societies emerging from mass atrocities. He sees prosecution less as a “normative duty as such” and more of a “bargaining chip” in negotiations to reconstitute a broken state (p. 235). Amnesty is the “carrot,” and prosecution the “stick” (pp. 221–22). Pragmatic amnesty deals “can facilitate democratic transition and help end civil wars” by incentivizing abusers to lay down their arms or part with power.⁴⁵ When these and other dividends are likely to outweigh the costs in foregone

42. This is perhaps the most common normative critique of ICL as an enterprise. See, e.g., Charles T. Call, *Is Transitional Justice Really Just?*, BROWN J. WORLD AFF., Fall 2004, at 101, 107–08.

43. See Laurel E. Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 218–19 (2009).

44. This is one of the principal justifications for the establishment of U.N.-backed tribunals in Cambodia, Sierra Leone, Timor-Leste, Kosovo, and Lebanon. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301–04 (2003).

45. P. 221. For an argument that strategic amnesty pacts tend to achieve more desirable outcomes than criminal prosecutions, see Snyder & Vinjamuri, *supra* note 40, at 17–44 (reviewing a number of brief case studies from the post-Cold War era).

justice, Osiel contends that governments will—and should—consider amnesty seriously.

Human rights advocates generally frown on deals that exempt gross human rights violators from accountability, but Osiel rejects the notion that amnesties are presumptively disfavored under international law. He fears that human rights lawyers and advocates have succumbed to “constructivism run amok” (p. 235), hoping that their ambitious interpretations of the duty to prosecute will become self-fulfilling prophecies. He asserts that amnesty “largely defines state practice—massively and pervasively, throughout the world” despite the fact that international lawyers “prefer to lavish scholarly attention on emergent tendencies to the contrary” (p. 233).

Amnesties are common indeed, especially since the mid-1990s.⁴⁶ More than seventy amnesty programs have been introduced in the past decade alone, often coupled with truth commissions or selected trials.⁴⁷ At least one amnesty program—adopted in South Africa alongside the Truth and Reconciliation Commission—has won considerable praise from human rights advocates.⁴⁸ It is therefore safe to conclude that customary international law does not impose a general duty to prosecute after periods of mass abuse. To the extent that a customary norm is emerging, it can be more fairly described as a requirement to prosecute the most serious offenders absent compelling domestic circumstances.⁴⁹

Many governments continue to regard amnesty deals as viable policy options, and international law is unlikely to eradicate the practice in the near term. Amnesty is not always the wrong policy choice. Dealing with perpetrators of mass crimes almost always looks simpler on paper than it does in the messy throes of a transitional environment. Policymakers must consider a range of objectives and weigh the powerful interest of justice against lives that could be saved if amnesty entices combatants to lay down their weapons and rejoin the fold. As Mark Freeman argues, amnesty deals are sometimes “necessary evils.”⁵⁰

Nevertheless, there are good reasons for international lawyers to lean against the practice and subject amnesty deals to scrutiny. The interests of governing elites who undertake cost-benefit calculations and make amnesty decisions often diverge from those of their citizens and the international

46. LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS 18–22 (2008); Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT’L J. TRANSITIONAL JUST. 208, 209–10 (2007) [hereinafter Mallinder, *Reconciled?*].

47. Amnesty Law Database, <http://www.law.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/AmnestyLawDatabase/> (last visited Oct. 3, 2010).

48. See, e.g., Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L AFF. 647, 648–51 (1999) (defending the amnesty component as a necessary measure bearing appropriate conditions).

49. RATNER ET AL., *supra* note 19, at 170–71; Mallinder, *Reconciled?*, *supra* note 46, at 213–14.

50. See MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE (2009); see also Max Pensky, *Amnesty on trial: impunity, accountability, and the norms of international law*, 1 ETHICS & GLOBAL POL. 1, 18 (2008).

community. Sweeping certain past abuses under the rug is sometimes a “necessary evil” to pursue peace and reconciliation, but it can also serve as a cynical tool to bury inconvenient facts and solidify elites’ positions of power.⁵¹ Too many such deals will leave international accountability norms in tatters, especially if they include those deemed most responsible for atrocities. If amnesty becomes an expected feature of peace accords, combatants may conclude that they have little to fear (and perhaps legal concessions to gain) from committing crimes.⁵²

It may be unrealistic to expect transitional leaders to take global norms seriously when their near-term domestic incentives point in the opposite direction. That is why international law should require them to do so and why state practice alone should not determine the legality of amnesties. Letting mass criminals off the hook should not be a step lightly taken. Scholars have proposed a variety of standards to impose, including democratic approval, an exhaustion of other reasonable options, minimum leniency, and strict conditions.⁵³ These features can make amnesties more legally acceptable and more effective in promoting aims such as truth-telling and reconciliation.

The Rome Statute is notably silent on the question of amnesty, but one obvious possibility is for that court to review proposed national amnesty deals in determining whether and under what conditions to honor them. An ICC review process could strengthen a government’s bargaining hand by signaling to the counterparty that international amnesty is in the offing if high standards are met. Those deemed most responsible for mass atrocities should be deemed ineligible absent truly exceptional and compelling circumstances.

IV. IMPOSING COLLECTIVE SANCTIONS

Regardless of the balance they strike between amnesty and prosecution, societies emerging from mass atrocity invariably face dilemmas on how to address the collective nature of offenses and the misdeeds of myriad functionaries and bystanders. Osiel offers a bold proposal: impose collective financial sanctions on groups of military officers found responsible for atrocities. Penalties would incentivize military officers to prevent abuse by their peers or subordinates, which is appropriate because they are the “lowest cost providers of insurance against mass atrocity” (p. 196). Osiel contends that strict pecuniary liability for officials in the responsible units

51. Ronald Slye refers to these as “amnesiac amnesties.” Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT’L L. 173, 240–41 (2002).

52. Payam Akhavan argues that amnesty deals can also signal weakness and encourage insurgents to regroup and attack again. This occurred in Sierra Leone after the 1999 Lomé Accords granted amnesty to rebel leader Foday Sankoh, who subsequently tried to overthrow the government. Akhavan, *Disincentive to Peace?*, *supra* note 4, at 635–36.

53. FREEMAN, *supra* note 50, at 110–79; Mallinder, *Reconciled?*, *supra* note 46, at 226–27; Slye, *supra* note 51, at 245–47.

would have a deterrent “multiplier effect” and could even provide restitution funds for victims (pp. 194–95).

Collective punishment should not be taken lightly—even if it amounts to civil fines rather than incarceration—but Osiel’s proposal is not quite as radical as it may first appear. Partnerships are held joint and severally liable for certain offenses; individuals can secure damages from municipalities; the International Court of Justice imposes collective civil liability on states; and the U.N. Security Council implements collective economic sanctions.⁵⁴ In the fight against gross human rights violations, collective civil remedies can be useful complements to individual criminal responsibility.⁵⁵ Osiel’s plan is simply for more targeted civil sanctions.

The greater problems with the plan may lie in implementation. Financial sanctions could conceivably deter crimes but would need to be quite costly to outweigh the powerful organizational incentives that motivate soldiers to commit atrocities during conflict. Just as many transitional governments shy away from putting officers on trial, many would be loath to levy costly sanctions against them. This is especially true in states where militaries exert heavy influence and where officers and troops are poorly paid but well-armed—precisely the states where atrocities most often occur. International pressure would likely be required, and enforcing sanctions on an unwilling government would be difficult. Where militaries threaten to close ranks, host states would generally prioritize reconciliation, and as Osiel emphasizes elsewhere, their assessments deserve some credence.

Financial sanctions would acknowledge the reality of collective participation but would not necessarily leave victims with a more accurate picture of how crimes transpired. If the prosecutorial narrative risks exaggerating individual roles, a collective civil remedy risks suggesting undifferentiated blame—at least within particular parts of the military. Civil penalties would also lack the retributive punch and sense of moral condemnation associated with trials. Any funds raised for victims would likely be modest; most mass atrocities occur in poor countries, where military personnel have scant on-the-book salaries. Financial payouts to victims could even backfire if recipients see meager restitution as a dismissal of their suffering. The modest benefits of collective sanctions have to be weighed against the cost of breaching the norm disfavoring collective punishment.

Despite these problems, Osiel’s proposal should not be dismissed out of hand. An ambitious version of the scheme is unlikely to take hold soon, and he sensibly focuses on how the concept could develop incrementally in democratic states. A narrowly tailored scheme may well be worth testing and expanding if it proves successful. In a field as challenging and important as ICL, some experimentation is warranted.

54. See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003); Note, *Collective Sanctions and Large Law Firm Discipline*, 118 HARV. L. REV. 2336, 2344–45 (2005).

55. In the *Bosnia Genocide Case*, the ICJ considered awarding reparations to Bosnia from Serbia in connection with the Srebrenica massacre but opted not to do so. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 163–67 (Feb. 26).

CONCLUSION

Neither lawyers nor policymakers have arrived at anything approaching a silver-bullet solution to the challenge of accounting for mass atrocities. ICL has developed considerably since the era of Nuremberg but still faces challenges in dealing with collective criminality. There is a natural tendency to stretch doctrines to hold high-level actors accountable, but that path is fraught with danger. Laws influence social behavior largely because they resonate with common conceptions of right and wrong. Osiel offers thoughtful suggestions to help lawyers and policymakers address impunity and prevent future abuses without straying too far from the law's liberal moorings.

He also contributes by highlighting the importance of incentives and the need for pragmatic tactics in the promotion of categorical imperatives. He does not endeavor to settle debates as much as steer them in positive directions, considering the tools available and the various trade-offs they entail. Many of his points are provocative and invite the reader to engage with him—as this Review has tried to convey—but disagreement is a healthy feature of societal responses to complex atrocities. A measure of dynamic tension generates creativity and provides the flexibility and shock absorption that are lacking in a more rigid, one-size-fits-all approach. Anyone interested in these debates will find *Making Sense of Mass Atrocity* a book well worth reading.