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ADVANCING FUNDAMENTAL PRINCIPLES THROUGH DOCTRINE AND PRACTICE: COMMENTS ON DARRYL ROBINSON, *JUSTICE IN EXTREME CASES*

*Alexander K.A. Greenawalt**

I am honored to comment on Darryl Robinson's terrific new book which makes an extraordinary contribution to the literature on international criminal law (ICL).¹ Already an admirer of Robinson's work, I learned a lot from reading his book and find his approach convincing. Broadly speaking, there is not much, if anything, on which I disagree with Robinson. I share his criticisms of international criminal tribunal reasoning.² I welcome the call for greater attention to deontic considerations.³ I agree on the importance of the fundamental principles that Robinson identifies, and I also agree that justifying these principles does not require consensus on moral foundations.⁴ At the same time, his analysis raises complex questions about the interpretation, application, and practical significance of these fundamental principles for a project focused on the reform of ICL. It is these questions that are the focus of my comments.

One of the great contributions of Robinson's book is the attention he devotes to justifying and defending fundamental principles that are often taken for granted or treated casually.⁵ Robinson makes a compelling case that international tribunal case law must take greater account of deontic considerations, and the jurisprudence would benefit from a careful reading of Robinson's work. A more difficult question concerns the practical implications for doctrinal substance. Three complications, in particular, come to mind. One concerns the relationship between published judicial reasoning and the resulting doctrinal decisions. Another concerns the contested interpretation and understanding of the fundamental principles. The third concerns the limitations of formal doctrine as a vehicle to vindicate fundamental principles. I elaborate upon these concerns through consideration of three modes of individual responsibility that have proven controversial in ICL: joint criminal enterprise (JCE), aiding and abetting, and command responsibility.

Robinson himself devotes substantial attention only to the third of these doctrines, but all three raise problems that benefit from the framework that Robinson provides. Hence, my purpose in discussing JCE and aiding and abetting alongside command responsibility is not primarily to debate Robinson's own conclusions

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1. DARRYL ROBINSON, *JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW* (2020).

2. *See, e.g., id.* at 15.

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

4. *See generally id.* at 85–118.

5. *See id.* at 22–23 (noting that ICL jurists have often treated fundamental principles as doctrinal rules without engaging in deontic reasoning).

about those topics but instead to consider the implications of his broader approach for some of the most contested questions of substantive ICL.

I. JCE

First announced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in the *Prosecutor v. Tadić* case, the doctrine of JCE holds responsible all members of a criminal enterprise for all crimes committed pursuant to the enterprise so long as the offenses in question were either part of the common plan or a reasonably foreseeable result of that plan.⁶ All JCE members are held responsible whether or not they had any role in the particular crime.⁷ It is enough that they share in the goals of the JCE, make some contribution to the common plan, and possess (according to the extended “JCE-III” mode of participation) at least a form of recklessness (*dolus eventualis*) toward the prohibited result.⁸ On this basis, the ICTY Appeals Chamber convicted Duško Tadić on five counts of murder committed during an action to ethnically cleanse a village. The Court found that Tadić had participated in the common plan to attack the village, but there was no finding that he had any involvement in the murders or that murder was part of the common plan.⁹

This approach to JCE ranks among the most debated aspects of the ICTY’s legacy. Although JCE is not the focus of Robinson’s book, he does give the doctrine brief analysis, summarizing common critiques and highlighting JCE as a departure from the fundamental principles he defends.¹⁰ JCE raises concerns for me as well, but the question of whether and how it violates fundamental principles is a complicated one. Consider some criticisms suggested by Robinson’s analysis.

One concern relates to legality. Robinson notes that “JCE was developed by Tribunal judges, and it is far broader than any of the modes of liability actually listed in the Tribunal Statutes.”¹¹ Given this apparent lack of statutory authorization, perhaps the ICTY should have refused to convict Tadić of murder no matter how strong the moral case for conviction might or might not have been. That is certainly a defensible argument, but it is also one that raises a deeper concern about the ICTY. Apart from specific provisions for superior responsibility and separate treatment of some discrete issues like official capacity and superior orders, the ICTY Statute dedicates only a few words to criminal responsibility. It states merely that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”¹² Even for basic

6. See Case No. IT-94-1-A, Appeal Judgment, ¶¶ 227–28 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (outlining the elements of JCE).

7. *Id.* ¶ 227.

8. *Id.* ¶¶ 204, 227–28.

9. *Id.* ¶¶ 230–32.

10. ROBINSON, *supra* note 1, at 249–52.

11. *Id.* at 34.

12. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, ¶ 1, Sep. 2009 [hereinafter ICTY Statute].

modes of liability like aiding and abetting or the most basic forms of commission, the Statute lacks guidance on critical questions like mens rea, levels of contribution, affirmative defenses, degrees of guilt, and so forth. A strict defender of the legality principle might therefore have objected that all ICTY charges should have resulted in acquittal given the statute's general failure to conform with minimum requirements of legality.

Another view, by contrast, dictates that legality values are more flexible. While greater specificity in the law may be preferable, many of the details of criminal responsibility are necessarily left to judicial elaboration. Under this view, JCE becomes more defensible: international law lays out basic rules of individual culpability and, as in many national legal systems, the case law elaborates on the details of how exactly one may commit a crime.¹³ Incidentally, this framework also resolves the apparent contradiction that Robinson highlights in the dual claim that the ICTY adhered to existing customary international law (CIL) while also making significant developments to the law.¹⁴ The most plausible account of CIL—at least with respect to ICL—is that international law often lays out basic rules and principles while entrusting much to judicial elaboration. In that sense, it may well be that the only way for international tribunals to follow CIL is through judicial development, although certainly I agree with Robinson that the tribunals have not always been forthright about how that dynamic works.

This observation highlights a second possible objection to JCE: that the Court derived the doctrine from poor reasoning, relying excessively on sources and teleological reasoning among other factors to the exclusion of deontic considerations. Robinson masterfully documents the fallacies of the tribunal case law, much of it betraying a sort of international-law exceptionalism that places too much weight on the special circumstances and goals of ICL and too little weight on core criminal law values.¹⁵ But it is also noteworthy that the final result of that process—the extended JCE doctrine—is almost a mirror of the *Pinkerton* approach developed by U.S. federal courts and several U.S. states according to which conspirators become responsible for reasonably foreseeable crimes committed by their co-conspirators.¹⁶ That correspondence begs the question of whether the doctrine is actually the result of the published reasoning, or whether the reasoning is

13. I have previously explored this dynamic in the context of aiding and abetting. See Alexander K.A. Greenawalt, *Foreign Assistance Complicity*, 54 COLUM. J. TRANSNAT'L L. 531, 563 (2016) (“[R]eliance on World War II-era precedents cannot serve as a substitute for normative analysis, especially regarding the limits of criminal responsibility.”). With respect to ICL more generally, see Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1064, 1071 (2011) (advancing account of ICL according to which ICL leaves many questions of criminal liability undetermined).

14. ROBINSON, *supra* note 1, at 38 (“[A]t the same time as the ICTY insisted that it scrupulously applies only rules that are ‘beyond any doubt customary international law,’ it also took credit for having ‘expanded the boundaries of international humanitarian and international criminal law.’”) (footnotes omitted).

15. See generally *id.* at 20–54 (exploring the “identity crisis” of ICL).

16. *Pinkerton v. United States*, 328 U.S. 640 (1946); see *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgment, ¶ 224 n.289 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (citing *Pinkerton* and other cases adopting this approach).

merely the Court's attempt to justify its preferred result by reference to the methodologies which it believes will most comport with the legality principle. In that event, is it the reasoning that matters most? Or is it the final result?

Robinson provides a partial answer to the question with a compelling argument for why "reasoning matters."¹⁷ He allows that "[a] judgment might employ problematic reasoning and still reach a defensible result," but warns that "replication of faulty structure of arguments will eventually produce faulty outcomes."¹⁸ "Our reasoning," he explains, "is our 'math,' and systemic distortions in our math will eventually throw off our calculations in significant ways."¹⁹ But my point about judicial reasoning does not assume the same causal relation between process and result. I am not concerned here with the case in which bad judicial reasoning happens to produce the right conclusion. Instead, my point is that the published judicial reasoning may not reflect the actual reasoning by which the judges reached their conclusions. If I am correct about that, then the judge-made doctrine demands separate consideration from the published reasoning even if one maintains that the reasoning should reflect greater transparency about the importance of normative reasons as opposed to source-based reasons.

A third objection goes to the substance of the JCE doctrine. A core critique of JCE is that it violates the fundamental principles of culpability and fair labeling by treating defendants like Tadić as guilty of crimes to which they did not contribute.²⁰ The concern is a serious one, but the question is also complicated by the fact that extended JCE-III liability does in fact capture a measure of culpability that would be lost without the doctrine. To illustrate, imagine that Duško Tadić had three fictional siblings—Danica, Dragan, and Dejana—all involved in JCEs of their own.

1. Danica Tadić participates in a JCE to ethnically cleanse a village during which she personally participates in the execution of five villagers.
2. Dragan Tadić participates in a JCE to ethnically cleanse a village. He does not participate in murder but knows that the execution of five villagers is part of the plan.
3. Duško Tadić (as actually found by the ICTY) participates in a JCE to ethnically cleanse a village. Five villagers are murdered. Tadić does not participate in the murders, and they are not part of the plan, but the deaths are a foreseeable result of the plan (for which Tadić had a culpable mental state of *dolus eventualis*, an analogue of recklessness).
4. Dejana Tadić participates in a JCE to ethnically cleanse a village. Murder is not part of the plan and no one is murdered.

17. ROBINSON, *supra* note 1, at 54.

18. *Id.*

19. *Id.*

20. *See id.* at 251 ("[With JCE] the accused need not perform any part of the actus reus of any crime. The accused's acts need only to contribute to a common design. Thus a minor contribution can trigger massive criminal liability.") (emphasis and footnote omitted); *see also id.* at 255 (arguing that the ICTY's "teleological enthusiasm" in developing JCE-III strained both the legality principle and other deontic constraints like culpability and fair labeling).

What is the problem with convicting Duško of murder as the ICTY did? One objection, invoking both the principles of culpability and fair labeling, is that doing so lumps him together with Dragan and Danica, who are more responsible for homicide than he is. That is true. But Duško is also more guilty than Dejana, who bears no responsibility for homicide whatsoever. If Duško is found not guilty of murder, then Dejana can rightly complain that she is being held just as responsible as Duško even though his actions were worse. Moreover, Dragan has the same complaint vis-à-vis Danica: he is more guilty of murder than Duško but less so than Danica. If the choice is a binary one of guilt versus innocence with respect to murder, then inevitably differently situated persons will be lumped together into the same category.

Perhaps, then, the problem is that we need more categories? Duško could be held responsible for a lesser form of homicide, such as manslaughter. I think that's a better solution than treating him as a murderer, but there are also other ways to take account of his relative culpability, for example through detailed factual findings that accurately reflect and assess culpability and through sentencing discretion. And even if manslaughter is the more "fair" label, there is a limit to how much labels can accomplish. The label alone can never capture all the gradations of culpability embodied by those to whom it applies. At what point do we say the fair labeling principle has been violated? And does fair labeling necessarily privilege the label offered by the category of offense over other types of labeling (such as the more detailed findings in the judgment itself)? As these questions reveal, the formal liability finding (i.e., "guilty of murder" pursuant to JCE-III) is only one component of how the Court says what it has to say about the nature and consequences of the accused's conduct.

Or maybe the problem, as Robinson suggests, is that the JCE doctrine treats Duško as a principal perpetrator of murder rather than as an accessory?²¹ But whether or not that distinction (which also plays a role in Robinson's consideration of command responsibility)²² is crucial is more a matter of legal culture and doctrine than of fundamental principles. In the United States, the principal/accessory distinction is typically not imbued with any deep moral significance. For instance, the U.S. Code collapses several categories of accessory liability into principal liability when it provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."²³ The collapsing of these categories does not mean, for example, that those who aid or abet are always as guilty as those who personally commit the offense. They may be more or less so. But such distinctions are left to sentencing rather than to formal labels. In other countries, by contrast, the principal/accessory distinction has great moral significance, to the point that

21. *See id.* at 252 (maintaining that problematic aspect of JCE doctrine is that it deems an accessory to have committed the crimes and to be equally guilty of those crimes regardless of the size of the part they played and that it imposes principal liability on people who do not meet the objective or subjective requirements that are usually necessary for principal liability).

22. *See infra* Part III.

23. 18 U.S.C. § 2(a) (2018).

conviction as an accessory rather than a principal yields a significant reduction in the maximum permitted sentence.²⁴ Predictably, these states also draw the line between principals and accessories in different ways. For instance, the German control theory—embraced by the International Criminal Court (ICC)—treats as principals persons who would be considered accessories under the traditional common law approach.²⁵ International criminal tribunals, for their part, have discretionary sentencing with no automatic reduction for accessories.²⁶ Hence, the principal/accessory distinction, in the formal sense, becomes purely one of fair labeling. Whether or not it is fair to call Tadić a principal perpetrator of murder depends upon what moral significance one attaches to that label. Is this really a matter of fundamental principles or merely a case of labels lost in translation?

Another critique—perhaps the most serious one—relates not to the conviction of Tadić himself but to the potentially sweeping scope of the doctrine used to convict him. For example, the JCE framework creates the possibility of treating minor participants in a vast JCE (say the ethnic cleansing of all of Bosnia) as mass murderers.²⁷ While the unusual circumstances typical of ICL cases may present this problem with special frequency, the basic problem already exists in the United States under the *Pinkerton* approach. For example, could a U.S.-based teenager who sells drugs to others in a particular neighborhood be held responsible for a vast array of crimes on the theory that he is a contributing member of a broad transnational conspiracy tracing all the way back to El Chapo in Mexico? In some ways, the problem is far worse in the United States than at the ICTY because conspiracy liability—the trigger for the *Pinkerton* doctrine—applies to a much broader set of offenses for which those convicted often receive longer sentences than those meted out to worse offenders by the comparatively lenient international tribunals.²⁸

24. See, e.g., Strafgesetzbuch [StGB] [Penal Code], §§ 27(2), 49(1), translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.) (mandating substantial mitigation of sentence for aiders as compared to principals).

25. See Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, ¶ 7 (Dec. 1, 2014) (“A co-perpetrator is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.”); see also Jens David Ohlin, Elies Van Sliedregt, & Thomas Weigend, *Assessing the Control-Theory*, 26 LEIDEN J. INT’L L. 725, 728 (“[T]he [control] theory expands the scope of perpetratorship to persons who are far removed from the scene of the crime and do not personally perform any of the acts required by the offence definition.”); *id.* at 726 (noting the origins of control theory in German criminal law theory).

26. Rome Statute of the International Criminal Court art. 77, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]; ICTY Statute, *supra* note 12, art. 24.

27. See ROBINSON, *supra* note 1, at 250–51 (“[T]he doctrine grew to apply atrocities across an entire region, or even to a ‘nationwide government-organized system,’ or a ‘vast criminal regime comprising thousands of participants,’ in which the persons actually committing crimes are ‘structurally or geographically remote from the accused.’ . . . The accused’s acts need only contribute to a common design. Thus a minor contribution can trigger massive criminal liability.”) (footnotes omitted).

28. See, e.g., 18 U.S.C. § 371 (2018) (establishing the crime of conspiracy when two or more people collude to commit any offense against the United States). On sentencing, see, for example, Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 127 (2018) (“The vast use of long-term sentences in the U.S. is an anomaly by

So applied, I agree that the JCE doctrine would violate fundamental principles of justice. But does that conclusion require rejection of JCE or merely a doctrinal reform? U.S. federal courts, for instance, have identified due process limits on the reach of *Pinkerton* liability to those whose contributions are too insignificant and attenuated.²⁹ This solution would appear to go a long way toward addressing concerns about overcriminalization, but it also highlights a more central point about the limits of criminal law doctrine because the hard work of determining whose contributions are sufficiently substantial now falls to case-by-case adjudication rather than a self-applying doctrinal label. As it happens, U.S. case law has thus far made little of this limiting possibility, with the result that prevention of injustice is often left to the morally imperfect vagaries of prosecutorial discretion and plea bargaining.³⁰

The importance of case-by-case adjudication to the application of general doctrine also leads me to question how much we can separate the doctrine from actual results. Is the fact that the JCE doctrine has the potential to create injustice enough to justify the conclusion that it violates fundamental principles, considering that Robinson does not allege actual injustice in any particular case? A counterargument proceeds as follows: a justice system's commitment to fundamental principles cannot be assessed by reference to formal culpability principles alone because the potential for unjust application in individual cases will always exist no matter how refined the doctrine is. Especially in the case of a judicially created doctrine like JCE, we must therefore wait to see how the case law actually confronts cases of potentially unjust application. Does the court then limit the doctrine or find some other way to avoid the unjust result? Only then can we comprehensively assess the system's commitment to fundamental principles.

II. AIDING AND ABETTING

My next example is aiding and abetting. As with JCE, the tribunal case law in this area exemplifies Robinson's concerns about insufficient deontic reasoning and potentially sweeping liability. Yet again, the ultimate implications for fundamental principles are less certain than might appear.

The key ICTY case is the *Prosecutor v. Furundžija* decision, in which the Trial Chamber identified the elements of aiding and abetting as they purportedly exist

international standards, and in line with the position of the United States broadly as a world leader in its use of incarceration.”) (footnote omitted). See Jens David Ohlin, *Proportional Sentences at the ICTY*, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 322, 324 (Bert Stewart et al. eds., 2011) (“[I]t still strikes some observers that the sentences handed down by the ICTY were surprisingly low, although perhaps in keeping with evolving standards of decency that reign in European penal systems.”) (footnote omitted).

29. See, e.g., Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 120–46 (2006) (surveying relevant cases).

30. See *id.* at 145 (noting that, as of 2000, only two federal court decisions had overturned a *Pinkerton* conviction on due process grounds); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 779 (10th ed. 2017) (noting commonplace application of *Pinkerton* liability to “minor players”).

under CIL.³¹ The case engages entirely in source-based reasoning with no deontic analysis, and even its consideration of sources leaves much to be desired. For one, the Court treats judge-made law from World War II as primary evidence of CIL without explaining how these sources satisfy the requisite standard of state practice and *opinio juris* or considering the risk that that case law may have been biased by its surrounding context of victor's justice, in which the Allied Powers sat in judgment of those on the war's losing side.³² Moreover, the Court glosses over glaring inconsistencies among the cases that undermine their ability to support a single CIL standard.

In the British *Zyklon B* case, for instance, the senior gassing technician at a firm that supplied Auschwitz's gas chambers was acquitted on the apparent ground that he lacked sufficient influence over the supply of gas³³—a fact that the *Furundžija* Court notes as support for its view that “the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal.”³⁴ But then we also read about the *Synagogue case* in which a “long-time militant of the Nazi party” was convicted based on being an “intermittent” approving spectator to the destruction of a synagogue “although he had not physically taken part in it, nor planned or ordered it.”³⁵ The *Furundžija* decision cites this case approvingly for the point that spectators may sometimes be accomplices, but it ignores the tension with the outcome in *Zyklon B*.³⁶ So much for making a significant difference. Finally, there is the *Rohde* case, in which a concentration camp inmate was convicted of involvement in the death by lethal injection of four British women prisoners despite the inmate's only role being his operation—under orders—of the concentration camp crematorium used to dispose of the dead bodies after the fact.³⁷ The *Furundžija* Court analogizes the inmate to a lookout without pausing over the massive difference in context between that of the *Rohde* inmate and a typical lookout—a contrast that speaks directly to the issue of who makes a “significant difference” and who does not.³⁸

31. Case No. IT-95-17/1-T, Judgment, ¶¶ 190–249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

32. See, e.g., *id.* ¶ 193 (noting that it is necessary to examine case law because World War II-era legal instruments did very little to define aiding and abetting); see also Greenawalt, *Foreign Assistance Complicity*, *supra* note 13, at 544–63 (exploring these issues, including relevance of victor's justice).

33. Case No. 9, *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 102 (U.N. War Crimes Commission ed., 1947).

34. Case No. IT-95-17/1-T, Judgment, ¶ 233.

35. *Id.* ¶ 205.

36. See *id.* ¶ 223 (“This clearly requires that the act of the accomplice has at least a substantial effect on the principal act In other words, mens rea alone is insufficient to ground a criminal conviction.”).

37. Case No. 31, *Trial of Werner Rohde and Eight Others*, in 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 54, 54–56 (U.N. War Crimes Commission ed., 1948).

38. See Case No. IT-95-17/1-T, Judgment, ¶ 204 (“The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge they will be warned of impending discovery in the lookout

But the Court's ultimate finding—that aiding and abetting entails the knowing provision of substantial assistance to a crime³⁹—charts a relatively conventional approach to accomplice liability. It corresponds, for example, with the International Law Commission's approach in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind⁴⁰ and also with the American Law Institute's (ALI) original proposal for its Model Penal Code before the organization substituted an ostensibly stricter purpose-based standard.⁴¹ It is an approach that the *Furundžija* Court could have justified by deontic reasoning, and perhaps the judgment actually was the result of such reasoning notwithstanding the Court's unconvincing appeal to settled CIL.⁴² As with JCE, it is no stretch to imagine that the Court covered its tracks with source-based analysis precisely in order to maintain the appearance of compliance with the legality principle. And once again, if the result is appropriate, how much should it matter that the published reasoning is unsatisfying?

As with JCE, the aiding and abetting case law also exemplifies the limits of formal doctrine in safeguarding fundamental principles. We may agree generally that a knowing substantial contribution to a crime should be punishable, but the real challenge lies in determining how to interpret and apply that standard in concrete cases. The abstract doctrine is susceptible to both narrow and broad applications, and my own view—which I have developed in greater detail elsewhere—is that the doctrine cannot displace the need for case-by-case assessment of blameworthiness by way of judgments that are not reducible to a doctrinal formula.⁴³

The international case law provides an instructive example in the debate over culpability for government officials accused of aiding and abetting crime by way of providing cross-border military assistance to non-state groups conducting mass atrocities. In *Prosecutor v. Perišić*, the ICTY Appeals Chamber invoked and applied a widely criticized “specific direction” requirement to acquit the accused—the former head of the Yugoslav military—on the ground that the assistance he provided

scenario, reassures the killers and facilitates their commission of the crime in some significant way.”).

39. *See id.* ¶ 249 (“In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence.”).

40. *See* International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/51/10(Supp.), ¶ 30, ¶ 50 art. 2(3)(d) (1996) (“An individual shall be responsible for a crime [listed in the Draft Code] if that individual . . . knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.”).

41. *See* MODEL PENAL CODE § 2.04(3)(b) (AM. LAW INST., Tentative Draft No. 1, 1953) (“A person is an accomplice of another person in commission of a crime if . . . acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission . . .”); *see also* MODEL PENAL CODE §§ 2.06(3)(a), 2.06 cmt. 6(c) at 315–16 (AM. LAW INST. 1962) (rejecting the knowledge-based approach to accomplice liability in favor of a purpose-based approach).

42. *See Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶¶ 236–41 (surveying international case law for support of its position on aiding and abetting).

43. *See generally* Greenawalt, *Foreign Assistance Complicity*, *supra* note 13.

to genocidal Bosnian Serb forces took the form of general assistance used both to commit atrocities and to engage in non-criminal combat actions.⁴⁴ Later ICTY cases rejected this requirement,⁴⁵ as did the Special Court for Sierra Leone when it convicted former Liberian President Charles Taylor on a similar theory of his having provided essential assistance to the murderous Revolutionary United Front (RUF).⁴⁶

Many people will find it easy to support conviction in cases like *Perišić* and *Prosecutor v. Taylor*, but other examples—the United States' provision of military assistance to some Syrian rebels and the various goods and services sold by multinational corporations to human-rights-abusing regimes—raise difficult line-drawing questions. I suspect that most people's intuitions about such cases will turn on a balance of factors that are not reducible to the simple formulation of knowing substantial assistance.⁴⁷ There is a difference, for example, between providing aid to an armed group that itself is engaged in a JCE to commit atrocities versus one that is not so engaged, but that remains unable to prevent some misuse of the assistance. It also matters what precautions, if any, the donor takes to prevent the criminal use of the aid. As a matter of interpretation, it is possible perhaps to reconcile these and other factors with the wording of the formal legal standards. It might be that these or other criteria inform whether or not particular assistance should be considered "substantial," or they might be central to the question of what it means to "assist" a crime in the legal sense as opposed to undertaking an action that merely, in some more remote way, has the side effect of making someone else's crime possible or easier to carry out. But whatever interpretive work we might do here does not change the fact that the formal doctrine plays only a partial role in safeguarding and advancing fundamental principles. At some point, the doctrinal formulas become silent and case-by-case moral judgment takes over.

The story of aiding and abetting, in sum, is similar to that of JCE. Unsatisfying source-based analysis produces a doctrinal standard that is familiar outside the context of ICL. In its bare terms, that standard is susceptible to sweeping interpretations, threatening commitment to core principles. But such concerns are premature because the formal doctrine is an inherently imperfect mechanism for advancing fundamental principles. Equally, if not more, important, is the interpretation and application of the doctrine in concrete cases.

III. COMMAND RESPONSIBILITY

I turn now to the doctrine that is the primary focus of Robinson's study, the international criminal standard for command responsibility. Robinson's discussion of command responsibility is illuminating, and his proposed reform of the doctrine

44. Case No. IT-04-81-A, Judgement, ¶¶ 71–73 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

45. See *Prosecutor v. Stanišić*, Case No. IT-03-69-A, Judgement, ¶¶ 103–08 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 9, 2015) (rejecting "specific direction" as an element of aiding and abetting); *Prosecutor v. Šainović*, Case No. IT-05-87-A, Judgement, ¶¶ 1649–51 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (same).

46. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, ¶¶ 436–47 (Sept. 26, 2013).

47. See Greenawalt, *Foreign Assistance Complicity*, *supra* note 13, at 593–97 (discussing factors that affect aiding and abetting blameworthiness).

through integration of a contribution requirement is sensible.⁴⁸ I agree—and Robinson’s thorough exploration leads me to agree even more—that the case law has been a muddle.⁴⁹ But, again, the question of whether and how the existing state of affairs conflicts with fundamental principles presents some complications that are worth exploring.

Robinson’s key criticism is that the command responsibility doctrine—as developed principally by the ICTY—violates the culpability principle: in defined situations, it permits the conviction of a commander for crimes committed by her subordinates even when the commander did not contribute at all to the perpetration of those crimes.⁵⁰ This possibility is starkest in cases where the commander’s responsibility rests solely on a post hoc failure to punish the subordinates absent evidence either that the commander should have prevented the crimes, or that the failure to punish them encouraged the perpetration of additional subsequent crimes.⁵¹ The point is not that criminal liability is per se inappropriate in such cases. As Robinson observes, if international law were to treat irresponsible command as a separate offense—as some states, in fact, do—then “the concerns about culpability would be resolved.”⁵² The problem, as Robinson elaborates, lies with treating the mere failure to punish a crime as a form of accessorial participation in that underlying crime. The result is a contradictory jurisprudence that “(i) recognizes the principle of personal culpability, pursuant to which a person must contribute to a crime to be party to it, and yet (ii) uses command responsibility to declare persons party to international crimes without a causal contribution.”⁵³

I agree with and am convinced by Robinson’s core observation about such cases. Given the opportunity to re-draft tribunal statutes, Robinson’s analysis provides a compelling case for reform. But the problem is that international judges do not have that luxury. Take, for instance, Article 7 of the Statute of the ICTY, stating that:

[t]he fact that any of the acts [prohibited by] 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.⁵⁴

The phrasing of this article is inartful to say the least—read literally, it seems to treat command responsibility as a possible affirmative defense rather than as a mode of

48. See ROBINSON, *supra* note 1, at 174–76 (defending contribution requirement to establish command responsibility).

49. See *id.* at 169 (“Tribunal judgments began to include muddled and self-contradictory statements about the nature of command responsibility.”).

50. See *id.* at 152 (stating that tribunal jurisprudence does not apply the contribution requirement to command responsibility).

51. See *id.* at 155–56 (discussing scenarios that present the possibility of command responsibility when commander did not contribute to the crime).

52. *Id.* at 164.

53. *Id.* at 143.

54. ICTY Statute, *supra* note 12, art. 7(3).

liability—but the implication is reasonably clear: liability can attach to a commander not merely for failing to prevent crimes but also for failing to punish crimes she learned about or should have learned about after the fact.⁵⁵ A judge enforcing that statute in a failure-to-punish case now has two basic choices for protecting fundamental principles. Option 1 is to safeguard the culpability principle and promote fair labeling by reading a contribution requirement into the statute. But this solution—favored by Robinson⁵⁶—then risks impunity for a group of serious offenders: namely, those who culpably fail to punish subordinate crimes but do not otherwise contribute to the crimes. These commanders are culpable both in the sense that they have helped the crime succeed—whether or not “accessory” is actually the right label—and in the sense that they are engaging in culpable risk-taking behavior. Just like drunk drivers engage in culpable risk creation even if no one is harmed, so too do commanders whose failure to punish creates a risk of future subordinate crimes even if no such crimes transpire.

Option 2 is to enforce the statute as written with no contribution requirement. The result is that the statute authorizes the punishment of a class of persons for whom punishment is morally justifiable, but the statute does so in the wrong way, treating them as participants in crimes to which they did not contribute. But the matter need not end there for reasons similar to those I have explored with JCE and aiding and abetting. A judge pursuing this second interpretive option is free to explain the ways in which the commander’s culpability is materially different from that of a typical accomplice and to take full account of that fact when imposing a sentence.⁵⁷

Option 2 is not a perfect solution. The best solution is clearer statutory language that appropriately distinguishes the different types of cases. At the same time, the availability of Option 2 calls into question both the necessity and the desirability of Option 1. Is Option 1 truly required to realize fundamental principles? Or is it an overly formalistic response that needlessly denies punishment authorized by the statute to persons who are morally deserving? For Robinson, the problem with Option 2 is that by effectively treating command responsibility as a separate offense, “it is an implausible departure from the applicable law of the Tribunals (and the ICC), and hence it is a change that should not be made by judicial fiat, but rather by lawmakers (legislators or treaty drafters), if it must be made.”⁵⁸ The point is well taken, but its implications are less clear for a case such as this one where the object of judicial innovation is not to expand liability but instead to restrain the statute by avoiding the violation of fundamental principles that would result from giving the text its most natural reading. The Option 1 alternative of adding a contribution requirement arguably reflects an even starker act of judicial fiat by completely eliminating—rather than merely recharacterizing—a form of liability that the statute imposes.

55. *Id.*

56. See ROBINSON, *supra* note 1, at 145 (proposing a contribution requirement for command responsibility).

57. *But see id.* at 252 (“However, adopting over broad doctrines with the sanguine reliance on prosecutorial or judicial discretion to avoid their excess is problematic, because it allows a ‘rule of officials’ rather than a ‘rule of law.’”).

58. *Id.* at 165.

Although Robinson is highly protective of the culpability principle in the failure to punish context, he is notably more relaxed about the more typical scenario in which a commander faces punishment for a culpable failure to prevent a subordinate's crime. Robinson devotes a separate chapter to justifying the punishment of commanders based on a negligent failure to prevent subordinate crimes.⁵⁹ The key distinction in this case is that such negligent failures will typically satisfy Robinson's concerns about contribution in that the commander's failure will have had the effect of facilitating the offense. Nevertheless, such cases raise very similar concerns to the failure-to-punish scenario in that they arguably involve punishing a commander for a more serious offense than the one they are responsible for committing. If command responsibility is truly in all cases a mode of participation in the underlying crime, then the commander will be guilty of murder on grounds of having negligently failed to prevent a subordinate from committing murder.

Among Robinson's important contributions on this topic, two points stand out. One observation is that criminally negligent commanders are not always less culpable than those who are reckless or those who know of their subordinates' crimes.⁶⁰ He argues, for example, that "[a] negligently ignorant commander, who cares so little about the danger to civilians that she does not bother with *even the first step* of monitoring, actually shows *greater* contempt than the commander who monitors and learns of a risk, but hopes it will not materialize."⁶¹ I agree, but such contrasts are not unique to command responsibility. A school bus driver who habitually transports young children while heavily intoxicated resulting in fatal consequences will be considered by many to be morally worse than the person who purposefully acts to end the life of a beloved parent in order to spare the parent the pain of a terminal disease. Such cases reinforce the point that there are limits to the formal doctrinal categories. But so long as criminal law maintains the general distinction between mental states based on their value in most cases, I do not see how command responsibility presents a unique exception. Robinson's example does not suggest that negligent commanders are generally more culpable than other blameworthy commanders. In addition to the commander who hopes a known risk will not materialize, there is also the commander who knows but does not care, or who remains passive in the hopes that the risk will materialize. Assuming, as I do, that these are the more typical cases, a better result would be to treat the negligent commander as guilty of a lesser offense such as negligent homicide, yet achieving that result within the confines of existing law would also require the same sort of judicial maneuvering that I explored with Option 2 in the failure-to-punish scenarios.⁶²

59. *Id.* at 194–223.

60. *Id.* at 198.

61. *Id.*

62. For instance, the Statute of the International Criminal Court speaks of a culpable commander being "criminally responsible for crimes within the jurisdiction of the Court committed by subordinates." See Rome Statute, *supra* note 26, art. 28(b). That language suggests that the commander is guilty of the particular crime committed by the subordinate and not some other crime. Moreover, negligent homicide does not appear on the list of offenses punishable by the Court.

Robinson's second point about negligence rests on a distinction between principals and accessories considering that the latter bear a "diminished level of blame."⁶³ He writes that "[c]ommand responsibility is a mode of *accessory* liability" and that "it is not problematic, or even unusual, that an accessory does not satisfy the *dolus specialis*, or 'special intent,' required for the principal's crime."⁶⁴ In this way, extended liability associated with command responsibility marks a contrast to the extended JCE-III doctrine which remains problematic because JCE-III is a form of principal culpability.⁶⁵ Certainly, this is one way to distinguish between principals and accomplices, and Robinson's observation about accomplices and mens rea finds support in the ICL case law which he cites.⁶⁶ But as I have already explained, it is hardly universal or necessary to imbue the principal/accessory distinction with this degree of moral significance. One might also look to the example of the influential Model Penal Code, which rejects the practice of convicting accomplices based on a lower mens rea than that required of principals.⁶⁷ The Code requires that an accomplice act with a purpose to promote or assist the commission of an offense and, further, that "[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."⁶⁸

My point here is not that the Model Penal Code's approach is preferable to Robinson's account of command responsibility. To the contrary, I have argued that there are different ways of achieving fundamental principles and that the formal liability labels are only one, incomplete part of the solution. For instance, even if one embraces Robinson's view about negligent commanders, not all command responsibility cases will involve the same diminished culpability, as some commanders will reflect far more culpability than others. Further work is then required to distinguish these different commanders whom the law treats as accessories. Rather than attach decisive significance to the principal/accomplice distinction, I would argue that the various issues related to both command responsibility and JCE-III involve similar problems and solutions and do not admit of clear-cut distinctions.

Moving beyond these questions related to causal contribution, the law of command responsibility provides yet one more example of the limits of formal doctrine in safeguarding fundamental principles. While Robinson's proposed reforms emphasize clear doctrinal lines with respect to mens rea and causal

Hence, any judicial innovation along the lines I am suggesting would most plausibly take place through judicial elaboration and characterization rather than changes to the formal charges.

63. ROBINSON, *supra* note 1, at 213.

64. *Id.* at 209.

65. *See id.* at 212 ("The extended form ('JCE-III') is rightly criticized for imposing principal liability without meeting the culpability requirements for principal liability. But command responsibility is accessory liability and thus does not require paradigmatic mens rea.").

66. *See id.* at 211 (citing multiple ICTY and ICTR cases to support his argument that accomplice mens rea need not meet the same requirements as that of the principal).

67. MODEL PENAL CODE § 2.06(4) (AM. LAW INST. 1985).

68. *Id.*

contribution, other—perhaps more difficult—questions surround the determination of what sorts of contributions count, and who should be seen as negligent. Consider, for example, the case of a head of state, who, acting in her capacity as commander-in-chief, makes a decision to deploy her country’s armed forces in an armed conflict. In the case of any sufficiently substantial conflict, she knows that, no matter what precautions she or anyone else takes, some of her subordinates will end up committing some war crimes at some point. These crimes could be prevented by refusing to engage in armed conflict in the first place, yet we do not conceptualize that decision alone—the decision to resort to war—as a culpable failure to prevent crimes. Doctrinally (and putting aside the questions of whether the use of armed force is otherwise lawful), the head of state’s decision presents no deviation from the standard of reasonable preventative measures expected of a commander. We also might say that the causal contribution to future crime is too attenuated to qualify as culpable contribution.

This example is an easy one, but others will present more difficult problems of line-drawing. It is for this reason, perhaps, that the ICTY’s *Čelebići* judgment, whose reasoning Robinson subjects to persuasive criticism,⁶⁹ declined to acknowledge command responsibility based on a commander’s general failure to put in place an adequate system of reporting.⁷⁰ It may help here to distinguish two different scenarios. One is the case of the isolated bad commander working within a good system. The doctrine of command responsibility seems tailor-made for these circumstances as the bad commander’s deviation from expected standards will be relatively easy to establish. But the more difficult case is that of the good commander, fighting perhaps for a good cause but within a bad or dysfunctional system. How much time is the commander required to spend in a perhaps fruitless attempt to fix the system rather than performing other functions? The risk is that a court will unfairly punish individuals for what are, in fact, collective failures. As with aiding and abetting, the doctrinal formulas provide guidance, but they must work alongside less determinate moral judgments.

IV. CONCLUSION

Darryl Robinson’s important and compelling book marks a significant contribution to the literature on ICL, and these brief remarks cannot do justice to the many insights provided by his rich and careful analysis. Robinson provides a roadmap for better reasoned judicial opinions alongside concrete proposals whose adoption would improve the law. My own modest critiques do not detract from that achievement but instead seek to highlight some complexities in the assessment of how fundamental principles are protected and advanced. I have argued that there are different doctrinal pathways for safeguarding core values, but also that formal doctrinal standards play an inherently limited, albeit important, role in this project.

69. See ROBINSON, *supra* note 1, at 200–05.

70. Case No. IT-96-21-A, Judgement, ¶ 226 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

