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Translating Guilt

Identifying Leadership Liability for Mass Atrocity Crimes

Cassandra Steer

Springer

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[1] From *The Psychology of Transference*, para 400.

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Contents

Abbreviations

BGH	*Bundesgerichtshof* (German Federal Court of Justice)
BiH	State Court of Bosnia Herzegovina
CJM	*Codigo de Justicia Militar* (Argentine Military Code of Justice)
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
ISIS	Islamic State of Iraq and al-Sham
JCE	Joint Criminal Enterprise
LRA	Lord's Resistance Army (Uganda)
MCP	Model Penal Code (United States of America)
OTP	Office of the Prosecutor
PTC	Pre Trial Chamber
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
StGB	*Strafgezetsbuch* (German criminal code)
STL	Special Tribunal for Lebanon
UN	United Nations
USA	United States of America
WCA	War Crimes Act 2000 (Canada)

Chapter 1
The Problem of Liability in International Criminal Law

> This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors.
>
> — Chief Prosecutor Robert Jackson's opening statement
> Nuremberg, November 21, 1945

Although mass atrocity does not always take the same form as it did during the Second World War, this book is concerned with the continuation of humankind's 'desperate effort' to apply the discipline of the law to leaders of mass atrocity crimes. In recent years this desperate effort has produced what can only be described as confusion at the various international tribunals as to how to deal with individual leadership liability for collective crimes of atrocity. How to categorise the individual liability of these leaders, and to what extent they are truly responsible, is a matter of continued debate. As an illustration, in June 2016, former vice-president of the Democratic Republic of Congo Jean-Pierre Bemba was sentenced by the International Criminal Court (ICC) to 18 years imprisonment, due to his command responsibility for failing to prevent or punish the forces under his command and control for war crimes and crimes against humanity.[1] In March 2014, Germain Katanga was convicted by the ICC for 'contributing' to war crimes by a majority of the judges, and yet three of them wrote lengthy separate, partially concurring judgments, in which they disagreed with each other on how the final judgment dealt with Katanga's exact level of responsibility.[2] In April 2012, Charles Taylor, former president of Liberia, was convicted for 'aiding and abetting' in various international crimes, and sentenced to 40 years by the Special Court for Sierra Leone.[3] In March of the same year, Thomas Lubanga was sentenced by the ICC to a mere 14 years for his role as a 'principal' in conscripting child soldiers

[1] Bemba Sentencing Judgment 2016.

[2] Katanga Trial Judgment 2014.

[3] Taylor Judgment 2012.

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in the Democratic Republic of Congo.[4] And back in 1998, the seminal case at the International Criminal Tribunal for Former Yugoslavia (ICTY) saw Dusko Tadić sentenced to 25 years imprisonment for his role as a 'principal' in a joint criminal enterprise.[5] While the facts of each case are different, still the disparate conclusions as to the grounds and form of individual liability to be applied, and the appropriate sentence, leave one questioning to what extent we can speak of a coherent body of international criminal law (ICL). This book will elucidate that the problem is one of translation.

Ever since the famous axiom spoken by Justice Jackson at the closing of the trial of the major war criminals at Nuremberg that 'crimes against international law are committed by men, not by abstract entities',[6] the starting point of ICL has been that individuals should be held liable for the acts committed through the collective. Leaders could no longer hide behind the collective notion of 'acts of State'. This major paradigmatic shift in international law meant that the individual was recognised as being a subject of international law for the first time, however the reasoning was based very much in concepts born out of public international law concepts, and not out of criminal law; this is one level of translation which has since proved problematic.

In order to capture as many participants as possible in the collective crimes committed within the Nazi regime, one form of liability was intended to apply to the leaders as well as all those involved further down the ranks, but in the final analysis there was no consensus as to what form of liability this should be. Since the 1990s and the explosion in international prosecutions for mass atrocity, international tribunals have had even greater problems: not all crimes of mass atrocity are committed within such an efficient and thoroughly documented system of bureaucracy as the Nazi regime, and the mixed legal background of judges, prosecutors and defence lawyers has led to seemingly unsolvable debates as to the proper approach.

These debates on modes of liability in ICL have become more and more complex over the last 20 years. The problem has become concentrated on the question whether to widen the net of liability and treat all those involved in mass atrocities equally liable—a unitary approach—or whether to differentiate between principals and assistants, and apply different modes of liability—a differentiated approach. There appears to be a policy trend to focus on 'those most responsible', however the question remains *who* is most responsible, and what form of liability should attach. In many situations currently under investigation at the ICC, for instance, suspects with authority over others have maintained a deliberate remoteness between themselves and the actual crimes committed, and even if they have exerted explicit authority, there are often disparate and complex hierarchies and groupings among physical perpetrators, leading to further uncertainty as to liability. Those at the top do not engage in the 'dirty work'; the question is whether they are liable for the fact that they have others do the dirty work for them.

---

[4] Lubanga Trial Judgment 2012.

[5] Tadić Appeals Judgment 1999.

[6] Nuremberg Judgment Closing Statement of the Prosecution 1945.

From pragmatic, moral and legal points of view, we must answer the question whether the intellectual authors of these crimes should be held responsible in the same way as those who drove the train full of victims being taken to concentration camps, or those who kidnapped, tortured or killed with their own hands. There is another level of translation evident here, namely from collective acts to individual liability. There is much disagreement as to whether there should be a normative distinction drawn between parties to crimes of mass atrocity, to what extent causation is relevant, and whether there is a danger of guilt by association. These disagreements can be drawn back to the differences between the predominant civil law and common law traditions.

Doctrinal questions of a criminal law nature require more attention than they have received thus far, such as whether liability is based on transferring *blame* from the collective to the individual, or rather based upon attribution of the *acts* of the many within a collective to the individual. Each of these approaches leads to conflicting answers to the question of responsibility: when attributing the acts of all to each individual in the collective, everyone within the collective could be seen to carry equal responsibility. On the other hand, when focusing on the question of individual blame for the collective result, the distribution of blame means some actors within the collective could be singled out as being more responsible than others, due to their particular role. The debates and lack of clarity as to which approach should prevail in ICL are a result of the differences in approach at the domestic level and, it will be argued throughout this book, the way in which these domestic notions are being translated to the international plane.

Due to the relative infancy of ICL and the fact that these crimes are committed in vastly different ways and by different means in each unique conflict situation, the makers of law within ICL are forced to be creative in their solutions. It is the complexity of this problem and the nature of the process of patchworking a new system together that form the focus of this book. There has not been a great deal of attention paid to theorizing the most appropriate system of liability in ICL,[7] instead the gap has been filled in the most efficient way possible, namely by drawing on domestic law from various jurisdictions, and translating this to the international context.

It is therefore necessary to consider the specific context of mass atrocity crimes, and to ask a functionalist comparative question[8]: not 'which domestic jurisdiction or legal tradition has the better modes of liability?', but rather 'which approach will reflect the collective nature of mass atrocity crimes and fulfill the aims of ICL in the best way possible?'

In this book, this enquiry is undertaken in three parts. Part I lays the foundations for being able to answer this functionalist question. It begins with the pragmatic, moral and legal considerations mentioned above, arguing a rationale for holding leaders criminally liable as "those most responsible" for systemic crimes of mass atrocity. It then looks at the way in which domestic criminal law notions of liability

[7] Fletcher 2011; Ohlin 2014; Vogel 2002; Robinson 2008; van der Wilt 2012.

[8] More will be said about the meaning of functionalism in Sect. 2.5.

act as sources of ICL. Given that the legal instruments such as treaties, statutes, resolutions and customary law have little to offer on these technical criminal law questions, decision makers have had little choice but to turn to domestic criminal law for inspiration, instruction and doctrinal development. The role that domestic law plays is more than merely interpretative guidance, or the ascertainment of general principles. Because the normative content of domestic criminal law is particular to the legal tradition, historical context and policy desires of the State in which it operates, it is difficult to speak of general principles or even customary law. Rather, the way in which domestic law notions are being borrowed from and drawn up into the international context can be seen as comparative law in action.

Part II of this book undertakes to demonstrate how a comparative law perspective on this very process of law development can shed light on why this takes place, how it takes place, and why there appears to be a clash of legal cultures emerging in case law and doctrine on the question of modes of liability. Part II enters a comparative study of modes of leadership liability in various domestic jurisdictions, and -more importantly- a consideration of the reasons that have played a part thus far in choices that have been made to translate certain notions from the domestic to the international context. Understanding this process can also aid in considering how we could be making this somewhat haphazard process more consistent, in order to come to more informed and deliberate choices. The assertions here are that decision-makers in the processes of ICL look to the jurisdictions with which they are most familiar, that there is insufficient attention paid to the policy factors which have led to the development of each domestic system of liability, and further that there is insufficient attention given to the question whether these policy factors are akin to those at the international level.

A comparative law perspective can offer a method to solve the clash of legal cultures that appears on the international plane, by offering the missing analysis needed to discover which system of liability is most appropriate to the specific context of ICL and why. By posing the question in this way, the assumption that one legal tradition should prevail as a matter of superiority can be avoided. This study offers arguments as to why there should in fact be a normative distinction drawn between participants in mass atrocity crimes, and on what grounds leaders should be held responsible for the crimes committed by their subordinates. A comparative analysis allows a more neutral formulation of a rationale of responsibility of leaders of system crimes, upon which the most appropriate modes of liability for mass atrocity can be formulated, regardless of the legal tradition from which they may stem.

The intention here is not to provide a detailed outline of all the modes of liability applicable to collective criminality in ICL. There are already many excellent extensive studies on this.[9] The intention is rather to look at the policy and doctrinal reasons for whether or not there should be a normative distinction drawn between parties to a crime, and how best to design a system of liability in ICL, in order to resolve the question of leadership liability for mass atrocity crimes. This focus means that in comparing the domestic and existing international modes of liability, the historical

[9] See for example Boas et al. 2007; Olásolo 2009; van Sliedregt 2012.

and policy context is given primary attention, and the specific context of mass atrocity is the axis around which such comparison takes place.

In Part III it will become apparent that in fact this book is not only about modes of liability. It is also about understanding ICL as a process of comparative law, and understanding comparative law both as a method and a methodology applicable to ICL. As a method, comparative law is the tool with which we can analyse the factual processes that have led to the development of various modes of liability on the domestic and international planes, and to untangle the debates on the terminology which hail from differing systems of liability. As a methodology, it provides a lens through which to understand the way in which ICL has developed to date, and a context within which law-makers and law-appliers can confidently make a selection from among the existing possible systems of liability, by identifying which one is most appropriate for the context of mass atrocity. If applied properly, such a methodology can justify the very act of making a selection as an inherent part of this process of ICL law development.

The argument to be made is not that there is a particular domestic approach that deserves to win out against the other, but rather that the process by which ICL develops has always been one of comparative law. In order to resolve the debates on modes of liability, use can be made of this process to better understand the factors at play and the goals which ICL aims to serve. The methodological requirements of comparative law can strengthen the justification of selecting which system fits the context of ICL best, and the subsequent choices of modes of liability. The conclusion drawn in the end is that it would appear that an objective approach, with a normatively differentiated system of liability, and more culpability for leaders of mass atrocity crimes, does just that.

The question has been posed by one scholar in a particularly poignant way: if you had to share the dinner table with one of them, who would you prefer to dine with; the mastermind or the executioner?[10] I will return to this question in the final chapter, however it gives nothing away to state here that the underlying assertion of this entire study is that there is something more understandable and more telling of the fallibility of the human spirit in the actions of an executioner who takes part in a collective where heinous acts are not only expected of him, but they have become the norm. And there is something more distasteful, more horrendous, more blameworthy about the 'armchair killer', the leader who is in a position to influence others such that they become her instruments, such that they become capable of atrocities which serve an ideology that the leader wishes served by her subordinates. When she is fully capable of intervening, of using her influence to minimise rather than maximise the atrocities acted out by others at her behest, there is something more disturbing about the evil expressed through her when she does the opposite, than the evil expressed through her subordinates. We are all capable of the kind of evil expressed by those subordinates under the right (or wrong) circumstances. One would hope not all of

[10] Gideon Yaffe, Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale University, posed this question during a presentation at Yale Law School. I am grateful to James Stewart for presenting the question to me during discussions at the University of British Columbia.

us are capable of the other kind of evil. This author would therefore choose to dine with the executioner, with the human being who may have done the unforgivable, but not the unthinkable.

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Part I
Laying the Foundations

Chapter 2
Leadership Liability for Collective Crimes

Contents

The truism that crimes of mass atrocity are by definition collective may be one of the greater banes of criminal law lawyers attempting to solve the problem of liability. The paradigmatic commitment to individual guilt that forms the very basis of ICL brings with it problems that are unique to the context of mass atrocity. In conflict situations the moral universe has shifted, and ordinary people, who would not normally commit acts of violence, become capable of heinous acts on a grand scale. Such crimes are characterised by the use of State (or State-like) apparatuses by government or military officials and superiors to mobilise masses towards grave and large scale violence, but the distance between these superiors and the bloody acts committed by the hands of others makes it difficult to untangle questions of responsibility. The greatest challenge is how to accurately reflect the collective nature of these crimes, and at the same time identify who is truly to blame for the emergence of such a situation, and for the individual crimes which take place as a result of it: the problem of collective guilt means that 'where all are guilty, nobody is.'[1]

With the Nuremberg trials, the move from state to individual responsibility for transgressing the laws of armed conflict and human rights was based on the notion that only by holding individuals responsible could these laws be upheld. This notion was in order to pierce the veil of the State entity behind which leaders could otherwise hide. It was also based on the notion of personal autonomy of the individual; only a person is capable of a moral wrong, not an abstract entity such as the State. But this also means that an individual can only be held liable to the extent that she is

[1] Arendt 1987, p. 43.

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responsible for the moral wrong.[2] And as a matter of logic, we can only be held responsible for that over which we have control, in the sense of moral agency.[3]

Many scholars have pointed out the difficulty of delineating this moral and legal responsibility in the context of mass atrocity, where the extraordinary has become the norm: there is an orthodoxy of hate, and violent, systemised crimes become acceptable among members of the collective.[4] Criminologists have contributed to understanding what one scholar terms *Makrokriminalität*:

> The individual crime is conditioned by a conflict in which the whole society is involved. Hence, it is embedded into certain developments and events at the macro level. In this respect, it is not deviant, but conform behaviour.[5]

In these situations, the moral climate has shifted, and it is often the case that if an individual were to refuse to take part in specific crimes, she would risk becoming the next victim, being seen as a threat to the ideology being enforced. This is known to have occurred under regimes such as Pol Pot in Cambodia, and the Junta in Argentina, where anyone considered to be a subversive was declared an enemy to be rooted out.[6] Thus, the moral autonomy of individual 'foot soldiers' is reduced. Perhaps they are not entirely exculpated for their evil deeds, but they cannot be said to be acting truly autonomously. Their identity becomes so caught up in the masses and in the violence perpetrated on others, that individuals have been known not only to commit horrendous acts against strangers, but even to denunciate friends, neighbours and family members as enemies in order to ensure their own survival.[7]

Sociological studies of mass atrocity demonstrate that violence only becomes systematic and widespread in this way if a central authority at the very least encourages it, and more often than not those at the height of power do more than this, explicitly mobilising subordinates to support their authority and ideology by extreme means.[8] Situational aspects to collective crimes include the imposition and utilization of ideologies such as nationalism, scapegoating, and utopianism;[9] obedience to authority under situations of authorization and routinisation of violence, and dehumanization of victims;[10] and de-individuation in large groups leading to conformity with group norms.[11]

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[2] Nino 1996, p. 136; Mégret 2013, p. 93.

[3] Duff 2007, p. 58.

[4] See for example Drumbl 2005, p. 541; Tallgren 2002, p. 573; Robinson 2012, p. 134.

[5] H. Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt*, (Surhkamp 1989) at 12, cited in Harrendorf 2014, p. 233.

[6] Sancinetti and Ferrante 1999, p. 23; Nino 1996, p. 58; Hinton 1998, pp. 95, 113; Tallgren 2002, p. 573.

[7] Arendt 1973, p. 397.

[8] Arendt 1973, p. 311; Semelin 2007, pp. 166–168.

[9] These are the attributes of ideologies as defined by A. Alvarez, 'Destructive Beliefs: Genocide and the Role of Ideology' in: Haverman and Smeulers 2008, 216; see also Harrendorf 2014, p. 235.

[10] H.C. Kelman and V.L. Hamilton, *Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility*, (Yale University Press 1989) at 16–20, cited in: Harrendorf 2014, p. 240.

[11] Harrendorf 2014, p. 243.

The question of moral responsibility therefore shifts up the hierarchy to the leaders, and it is argued here that the legal responsibility should shift in weight accordingly. At the same time, the challenge remains how to reflect the collective nature of the crimes, so that in prosecuting an individual for specific acts, the bigger picture doesn't disappear into notions of individual actions and individual blame. Each specific crime takes place as part of an organised, ideological context, as a means to a greater end. It is therefore necessary to identify modes of liability that can reflect the responsibility of leaders not only for specific crimes committed by subordinates, but for their functional role in the creation and abuse of a system that condones and even encourages atrocities to take place, while at the same time respecting the limits of individual liability according to the principle of culpability.

As a first step towards explaining this, the question of moral agency within the collective will be discussed here. This represents the first translation of guilt to be dealt with in this book: the translation from the collective to the individual and to the role of leaders in particular. There is an intuition that is expressed in the policies of international tribunals that the leaders are the 'most responsible', however the rationale behind this intuition does not receive much attention. It is therefore necessary to consider on what basis individuals are responsible within a collective, and who among the collective may be more responsible for the actions ensuing, and therefore be held to account.

2.1 Translating from the Collective to the Individual

There is an assumption made at the heart of ICL that requires more attention: that the collective guilt belonging to a nation or society for crimes of mass atrocity can in some way be translated to individual responsibility. There is an intuition that certain individuals are most responsible for the collective, and at the first international tribunal in Nuremberg the blame was presumptively placed on the leaders of the regime. While there may be a logic to this, it is necessary to clarify the rationale behind it, since we cannot assume that just because someone is in a leadership position, they automatically carry greater responsibility for the crimes committed.

Some criminology scholarship points to personality types that are predisposed to committing crimes of violence which, if combined with situational aspects described above such as a dominant ideology of nationalism or utopianism, routinisation of violence and dehumanization of victims, can lead to an escalation of the kinds of crimes committed.[12] This typology can help to understand the driving motive that certain individuals may have in taking part in collective crimes of atrocity, and particularly in understanding the role of the opportunist, the fanatic and the criminal mastermind who make use of the predisposition of certain other individuals to encourage mass

[12] Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in: Haverman and Smeulers 2008; see also Harrendorf 2014, p. 244.

group behaviour.[13] In this way, even those whose predisposition is minimal, or only triggered by external threat, can become parties to extraordinarily violent behaviour which has become normal due to the fact that so many others already take part. However this understanding does not help to isolate who is more or less responsible, and why.

The assumption that collective guilt can be translated to individual responsibility involves two conceptual shifts. Firstly, from the collective to the individual in terms of guilt, and secondly from the collective to the individual in terms of responsibility. In domestic criminal law, these two shifts occur in respect of collective crimes in different ways, depending on the legal tradition within which the system plays out. The first shift from the collective to the individual is common to most (western) domestic criminal systems because we deal with individual guilt, and not with collective guilt.[14] There must therefore be some way to link the individual suspects' actions and intentions to the crime committed by a group. How this is done is reflected in the second shift, from collective to individual responsibility, which differs depending on the emphasis placed upon either the subjective intention of the individual, or upon the objectively measured contribution to the commission of the crime.

2.2 Individual Versus Collective Guilt

With respect to the first shift from collective to individual guilt, what is happening in these interactions can perhaps better be understood in the light of what American criminal law theorist George Fletcher has described as the war between Liberals and Romantics.[15] Romanticism is associated with a strong identity with the collective, where war and militarism become a source of inspiration for taking part in an ideology worth dying for, and for accepting a role within a hierarchy and part of the fighting collective.[16] Liberalism, on the other hand, is associated with principles of voluntary choice and individual responsibility, which dominate ICL due to their roots in western criminal law systems.

When it comes to the notion of collective or individual guilt, romantics are expansionist, arguing for collective guilt, and liberals are reductionist, arguing for individual guilt.[17] The conflict between focusing on the collective or the individual is

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[13] Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in: Haverman and Smeulers 2008, p. 242.

[14] Mégret 2013, p. 86. An important exception is the notion of *qasāma* in many schools of Islamic law, whereby if a victim is found dead and there is no identifiable suspect, either the owner of the property or land on which the victim was found, or all the inhabitants of the quarter in which the victim is found can be liable to pay 'blood money' as a compensation to the victim's family members. This is predicated on the notion that the landowner or the community would be more likely to ensure security in their quarter of living if they know there is a risk they will be held liable in the event of a violent crime. See Peters 2005.

[15] Fletcher 2002.

[16] Fletcher 2002, p. 1501.

[17] Fletcher 2002, p. 1508.

a foundational feature of two different views of reality. For example, the collective notion of State responsibility is central in public international law, and we consider ICL to be a part of public international law, yet we struggle with the notion that entire bodies of people can be guilty for the crimes carried out by a few in the name of the collective. As former ICTY chief prosecutor Carla Del Ponte stated:

> all Serbs, all Muslims, and all Croats are not responsible for the crimes committed by a relatively small number of offenders … I do not intend to put the whole Serbian people on trial. On the contrary, I want to help Serbia turn the page and bring to justice those who, as individuals, are responsible.[18]

The key question is therefore whether the individual is the ultimate unit of action, or whether we, as individuals, are invariably implicated by the actions of the groups of which we are a part.[19] As already pointed out, in the context of mass atrocity the extraordinary becomes the norm, and violent, systemised crimes are accepted, condoned and perhaps even expected among members of the collective.[20] This deprives people of their second-order capacity to rein in their criminal impulses: the rational choice that an individual agent can make according to either moral impulses or impulses given by their physical surroundings.[21] If an individual chooses to follow the senses which would instruct violent crime over the moral principles which would counsel against it, under normal conditions in domestic criminal law, this would lead to full criminal liability. Guilt in this sense is personal. Yet when the surrounding norm has become one of violence, the ability to make this choice may be reduced. The romantic group identity takes over from the liberal individual identity. It has been suggested that a deindividuated state can actually be induced in people where the group becomes so large that there is increased anonymity and a diffusion of responsibility; the ability of an individual to evaluate the group norm decreases as the sense of self decreases.[22] As Hannah Arendt pointed out, the normality of atrocities in these circumstances is what is so terrifying, since the crimes are committed under circumstances that make it nigh impossible for the perpetrator to know that what is being done is wrong.[23]

In ICL, the liberalist construction of the individual as the central unit of action means that a number of selected individuals are to be blamed for systemic levels of violence.[24] However at the same time the basis upon which these individuals are selected is not always clear. The agents responsible for creating a climate of hate are not easy to identify; teachers, religious leaders, politicians, policies of the state, and bureaucrats enforcing a system of supportive laws are involved. Should ICL

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[18] Press Statement by Prosecutor Carla Del Ponte on the Occasion of her Visit to Belgrade, The Hague, 30 January 2001, P.I.S./558-E.

[19] Fletcher 2002, p. 1504.

[20] See Arendt 1973, p. 314; Drumbl 2005, p. 541; Tallgren 2002.

[21] Fletcher 2002, p. 1543.

[22] For an insightful and succinct discussion of the scholarship on this phenomenon, see Harrendorf 2014, p. 243.

[23] Arendt 1964, p. 253.

[24] Drumbl 2005, p. 568.

select all of these individuals as culpable for the crimes that ensue? Or only some of them? If the latter, which ones, and based upon what criteria? Fletcher argues that in these situations, the collective guilt could (and should) be used to mitigate individual guilt, rather than placing the full weight of the collective guilt on the shoulders of one individual.[25] In the example of Adolf Eichmann, put on trial for his role towards executing 'The Final Solution' in Nazi Germany, Fletcher would argue that the collective guilt of the nation of Germany should have mitigated Eichmann's individual guilt. This was Eichmann's own argument, that he felt he was 'being made to pay for the glass that others have broken.'[26]

Nevertheless, the preference for the reductionist, liberalist approach over the expansionist, romantic approach in applying the regime of ICL is evident, and while collective guilt in a moral sense may be seen to exist, collective responsibility in a legal sense is rejected outright. As stated by Antonio Cassese in his capacity as former President of the ICTY:

> If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, collective responsibility — a primitive and archaic concept — will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages.[27]

The problem remains, however, how to identify those individuals responsible within the collective for crimes committed by the collective. There is a danger of collapsing criminal liability for a single crime amounting to *an act* of genocide or a war crime, with responsibility *for* the genocide or grander scale of war crimes.[28] The other side of the coin is the tendency to use modes of liability which absorb all individuals into the collective, holding them liable for all crimes committed by the collective while avoiding the difficulty of proving who actually tortured or killed in specific cases.[29] The doctrine of Joint Criminal Enterprise (JCE) has, for example, been used to include convictions where an individual had acted in the sphere of politics, leading to a criminalisation of political behaviour and a blurring of the line between collective action and individual liability.[30]

The terms 'guilt' and 'liability' are therefore to be used with caution, since the translation of moral guilt and collective guilt to individual criminal liability is not a direct one.[31] This also points to the important relationship between guilt and agency, which will be discussed next.

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[25] Fletcher 2002, p. 1543.

[26] Osiel 2009, p. 20, citing Enrique Gimbernat Ordeig, Autor y Complíce en Derecho Penal (1966) at p. 187.

[27] Report of the President of the ICTY 1994, para 16.

[28] Mégret 2013, p. 109.

[29] Simpson 2007, p. 71.

[30] Haan 2005, p. 173.

[31] More attention will be paid to this in Sect. 5.3.6.3 where the definitions of terminology are clarified.

2.3 Individual Versus Collective Agency

Given the preference for individual guilt in the place of collective guilt in western criminal law and in ICL, there must be clear principles based upon which it can be determined when and to what extent an individual is responsible for crimes committed through a collective. Who is most to blame for the collective crimes? The key concept is that of agency. In domestic criminal law we consider group action to be of greater danger than individual action. We have specific crimes and often higher sentences for organised group actions and organised crimes. And we have modes of liability to deal with the problem of switching back and forth between expansionist and reductionist realities. In ICL, despite individualism at its core, we still believe that crimes of mass atrocity express the actions and the implicit guilt of entire groups of people, most typically of nations that are in conflict.[32] We therefore require a theory of agency that justifies shifting the responsibility for this group action to the individual as an agent within the collective.

Complicity itself, understood as participation in collective crime, and translated into different modes of liability, deals explicitly with this shift from individual to collective and back again. Criminal law theorist Christopher Kutz explains action in terms of generality, whereby the collective exists as an agent with its own intention, in the way we see corporations, a basketball team, or an orchestra.[33] At the same time Kutz opts for a reductionist approach, in that each individual's actions within the collective agency can be seen to be caused by the collective will. Individual members of a group intentionally do their part in promoting a joint outcome, or a joint activity.[34] A board member signs a paper on behalf of the corporation, a team member shoots a basket, a violinist plays her part of a symphony. Individuals act in this context with the intention that the group perform an act, and with the expectation that other members of the group will do their part.[35] But individual intentions and beliefs can still be ascribed to the individual, based on a functionalist approach, so that even if an individual might say 'the group made me do it', there is still some individual agency possible, since it is possible to interpret our actions as our own. This is especially relevant when we are not talking about an orchestra playing a symphony, but, for example, members of an air force collectively bombing a city, an action which involves weighing up the moral choices.

Kutz argues that participatory intention entails implication, in the sense that if an individual intentionally participates in a wrongful act, this would automatically entail individual responsibility for the collectively produced result.[36] He draws a descriptive distinction between participatory, inclusive accountability, based upon the relation between an individual's will and the resulting wrong or harm, which is a subjective approach, and direct, exclusive accountability, which is based more upon

[32] Fletcher 2002, p. 1512; Drumbl 2005, p. 567.

[33] Kutz 2000, pp. 68, 75.

[34] Kutz 2000, p. 69.

[35] Kutz 2000, p. 96.

[36] Kutz 2000, p. 146.

a causal relation to the individual's actions, and is therefore predicated on an objective approach. However Kutz maintains that normatively there can be no difference between these two forms of accountability and that both complicit participants and direct actors must be seen to be equally and jointly culpable for collective crimes.[37] The individual air force members must all be held culpable for the war crime of bombing a city. In this same way, any unintended consequences of the collective action that are foreseeable, including further or different criminal acts committed by other members of the collective, should be ascribed to the group and back again to all the rest of its individual members:

> [R]uined flowers are a foreseeable part of a project of picnicking, as a product of any group member's actions. Neither of us needed to expect that we would ruin flowers, but each ought ex post to acknowledge that it was a possible consequence of what we did together. And so it is reasonable to ascribe the mess to us, and to me inclusively.[38]

This approach would lead to the conclusion that there need be no normative distinction between participants in a crime. It is a subjective approach, focusing upon the intention of the individual within the collective, regardless of any difference between the role of, for example, the violinist and conductor of an orchestra. However there are arguments for making such a distinction when it comes to mass atrocity crimes in particular, and for opting for a more objective approach to the question of participation in collective actions.

2.4 Deliberative Structures and Those Most Responsible

Legal philosopher Jens Ohlin offers a further step in this analysis when he speaks of overlapping agents,[39] a notion which Kutz also discusses, but with different conclusions as to the distribution of responsibility. The problem with ascribing the collective will to a group, and speaking of group agency in the romantic sense, is that it interferes with the liberal notion of individual liability, which is central to the criminal law paradigm. Just as Kutz's theory shows, we are left with a continuous shift between group and individual, since the group intent is said to cause the individual action, which then gets attributed to the group, and finally in terms of criminal liability back to the individual again. Ohlin agrees with Fletcher that a full reduction of the group to the individual, in the liberalist ideal which Kutz follows, is an unsatisfactory conclusion.[40] However, where Fletcher would argue for mitigation of guilt and therefore of legal responsibility of the individual, Ohlin instead says that while a group can act with a certain collective rationality, the individual still retains individual agency, even though there is a submission of some individual reason to the group.[41] The

[37] Kutz 2000, pp. 147–154.
[38] Kutz 2000, p. 155.
[39] Ohlin 2007.
[40] Ohlin 2007, p. 173.
[41] Ohlin 2007, p. 181.