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Introduction

MASS ATROCITY HAS been an unfortunately persistent occurrence throughout human history; the phenomenon of holding individuals criminally responsible for its commission is, in contrast, a relatively recent development.[1] 'Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced'[2] – this ringing pronouncement by the International Military Tribunal at Nuremberg has become a talisman for international criminal lawyers ever since the historic trials conducted after World War II.[3] Banishment of the spectre of collective guilt has been sought with repeated incantations of the principle of individual responsibility in constitutive documents of international tribunals, judgments and scholarly writing.[4] The puzzle of the collective nevertheless endures: like an unloved

[1] On the development of collective and individual criminal responsibility in international law see, eg, A Levy, 'Criminal Responsibility of Individuals and International Law' (1945) 12 *University of Chicago Law Review* 313; TLH MacCormack, 'Selective Approach to Atrocity: War Crimes and the Development of International Criminal Law' (1996–1997) 60 *Albany Law Review* 681; E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, TMC Asser Press, 2003) 15–39; A Eser, 'Individual Criminal Responsibility' in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford, Oxford University Press, 2002) 767, 774–78.

[2] *France v Goering* (1946) 22 *International Military Tribunal* 411, 466.

[3] See, eg, AM Danner and JS Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 82, 85; G Simpson, 'Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law' in A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (Cambridge, Cambridge University Press, 2009) 69, 73 (noting the pervasiveness of this notion in international criminal law). It should be noted, though, that this affirmation coincides both with an argument that the responsibility may not lie exclusively with the individual but also with the State and, of late, with increasing demands for organisational responsibility for international crimes. See, eg, PM Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) 1085; A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899; M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909.

[4] See, eg, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/Conf 183/9*, 2187 UNTS 90 (*entered into force* 1 July 2002), Art 25(2); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International

catchy tune it lingers, lodging in the crevices of modes of responsibility fashioned by international criminal tribunals. How can individual responsibility adequately reflect the manner in which such a crime comes to pass, including the multifarious ways in which various persons contribute to it, ranging from the lowly soldier to the head of a government? Who should be considered the perpetrator of a crime such as genocide – an offence that necessarily involves participation by several hundreds of individuals? And what of our usual notions of responsibility that are manifested in the case of an everyday criminal act – if X stabs Y intending to kill Y then X is the murderer. If X was a jealous spouse who was told by Z that his wife Y was being unfaithful to him, and X murdered Y in a fit of passion, he would be the murderer and Z only the instigator. Is this also true of the ordinary civilian who harms, kills or tortures in a climate of conflict and chaos orchestrated by a few high-level policy makers? In other words, should the intellectual authors of a genocidal policy be held to account as the perpetrators of the crime, or should they be labelled instigators and aiders, and punished accordingly?

I. DISTINCTIVE FEATURES OF INTERNATIONAL CRIMES

The difficulty in identifying principles that can distinguish adequately between the various participants in mass atrocity and label their responsibility accurately stems from the peculiar nature of international crimes. The most telling of the characteristics is that an international crime, when contrasted with its domestic counterpart, is inherently collective in nature, for the perpetrator as well as the victim.[5] While the perpetrator of a crime

Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704/Add 1 (3 May 1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827, Art 7(1); Statute of the International Criminal Tribunal for Rwanda, SC Res 955 (8 November 1994), UN Doc S/RES/955, Art 6(1); Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, delivered to the Security Council, UN Doc S/25704 (3 May 1993), para 53; *Prosecutor v Tadić*, No IT-94-1-A, Appeals Chamber Judgment (15 July 1999), para 186; A Cassese, 'Reflections on International Criminal Justice' (1998) 61 *MLR* 1, 6; M Sassoli and LM Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case' (2000) 82 *International Review of the Red Cross* 733, 755. Some scholars have taken a more nuanced view of the relationship between guilt and responsibility, holding that collective guilt can be an appropriate response to collective wrongdoing and that its recognition does not necessarily justify collective responsibility: GP Fletcher, 'Collective Guilt and Collective Punishment' (2004) 5 *Theoretical Inquiries in Law* 163, 168–78. Others would not go so far as to advocate collective guilt, but instead favour collective sanctions as more suited to dealing with accountability for mass atrocity: M Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 576–77; M Drumbl, 'Pluralizing International Criminal Justice' (2005) 103 *Michigan Law Review* 1315.

[5] P Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 *Human Rights Quarterly* 737, 781; GP Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective

such as ethnic cleansing or waging aggressive war is individually culpable, he invariably commits this crime on behalf of, or in furtherance of, a collective criminal project, whether of a state or some other authority.[6] The hypothetical figure of the lone *génocidaire* rarely exists in practice: the perpetrator is part of, and acts within, a social structure that influences his conduct, in conjunction with other people.[7] Similarly, the victims of international crimes are mostly chosen not based on their individual characteristics, but because of their actual or perceived membership of a collective.[8] This is reflected in the provisions of the law as well as in practice. Genocide, for instance, is defined as performing certain acts such as killing or causing serious harm, 'with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[9] International crimes are also collective in the sense that they are committed with the consciousness on the part of the individual perpetrator that he is part of a common project. While it would be far-fetched to say that there is a 'corporate mens rea'[10] at work in all international crimes, what can hardly be disputed is that crimes such as crimes against humanity that are committed as a systematic and widespread attack against a civilian population cannot be understood solely in terms of the mental state of each perpetrator. Rather, one must address the social structures and group solidarity that renders them possible – whether that is based on fear of violence, ethnic hatred or religious intolerance.[11]

The second distinctive aspect of international crimes is that the individual crimes do not deviate from, but conform to, the prevailing social norm.[12] In this sense, they are indeed 'crimes of obedience', as coined by Kelman: they are acts carried out under explicit instructions from makers of official policy, or at least in an environment in which they are sponsored, expected or tolerated by them, and which are considered illegal or immoral by the larger community.[13] Drumbl uses the terminology of *jus*

Guilt' (2002) 111 *Yale Law Journal* 1499, 1531; LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573, 605.

[6] RD Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39, 56.

[7] Ibid.

[8] Drumbl, 'Collective Violence', above n 4, 571.

[9] Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277, Art 2.

[10] Sloane, above n 6, 58.

[11] MJ Osiel, *Making Sense of Mass Atrocity* (Cambridge, Cambridge University Press, 2009) 187–88.

[12] A Nollkaemper, 'Introduction' in Nollkaemper and van der Wilt (eds), above n 3, 1, 6; Fletcher, above n 5, 1541; I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561, 575.

[13] HC Kelman, 'The Policy Context of International Crimes' in Nollkaemper and van der Wilt (eds), above n 3, 26, 27.

cogens norms and basic conceptions of human decency when speaking of this larger community.[14] This is regardless of whether the crimes are also committed for personal motives or with zeal.[15] The perpetrator of an international crime acts within a moral and cultural universe where his actions correspond to the values of the group to which he belongs. He may conceive of himself as being in the right and working to prevent injustice, or even in self-defence.[16] The victims are transformed into the guilty parties, and the group dynamic is reinforced by a myth of ethnic, religious, racial or national superiority that is under threat from the victims.[17] Scholars and journalists who analyse genocide and ethnic cleansing have documented such experiences in cases such as Rwanda and Yugoslavia.[18] It is even claimed that in such a climate, it is paradoxically those who refuse to commit the crimes who deviate from the social norm. Criminal law, in these circumstances, appears to be something that can be adhered to only by exceptional individuals.[19]

George Fletcher offers a slightly different account of this dimension of international crimes in terms of the denial of the perpetrator's opportunity for self-correction. The moral climate of hate does not cause the crime to be committed; rather, it deprives people of their second order capacity for self-restraint (from criminal conduct). The perpetrator is subject to the world of the senses, but always has the capacity to choose the world of reason and let his conduct be governed by the moral law. However, the circumstances in which he operates can make this exercise of choosing the moral order far more demanding.[20] It is for this reason that the dramatically different background, which Carlos Nino terms 'radical evil',[21] in which international crimes are committed, as compared to isolated acts of murder or rape, must be paid serious attention to in any theory of responsibility for international crimes.

Lastly, a theory of modes of participation in international crimes has to be sensitive to the number and motivations of the participants in the crime. It must be able to accommodate the fact that these participants will be spatially and temporally dispersed, and that for this reason, unlike in domestic crimes, a theory of responsibility cannot afford to focus solely on the time and place where each individual offence (such as rape) con-

[14] Drumbl, 'Collective Violence', above n 4, 567.

[15] Kelman, above n 13, 27.

[16] See JE Alvarez, 'Crimes of State/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365, 396–97; MA Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda' (2000) 75 *New York University Law Review* 1221, 1243, 1245.

[17] Alvarez, above n 16, 396–97; Tallgren, above n 12, 574; Drumbl, 'Collective Violence', above n 4, 567–68.

[18] See, eg, on Rwanda, A Des Forges, *'Leave None to Tell the Story': Genocide in Rwanda* (New York, Human Rights Watch, 1999).

[19] Drumbl, 'Collective Violence', above n 4, 568; Tallgren, above n 12, 573.

[20] Fletcher, above n 5, 1541–43.

[21] C Santiago Nino, *Radical Evil on Trial* (New Haven, CT, Yale University Press, 1996) vii.

stituting the overall crime (war crime) occurred. It should also be cautious of simplifying the social, cultural and structural forces that make mass atrocity possible, and should resist the temptation to make all cases of mass violence fit into a preconceived mould. International crimes can take place in diverse organisational settings – they may be highly organised and rigidly hierarchical ones, or deliberately encourage arbitrariness and spontaneity.[22] The crimes may rely on anonymity and functional specialisation to facilitate their commission.[23] Conversely, they may thrive on proximity between the perpetrators and the victims, where neighbours, friends and family are motivated to kill and rape people with whom they previously had close ties, in a ritual cleansing affirming the division of religion, race or ethnicity.[24]

It is also important to keep in mind that the image of the participant as a soulless bureaucrat, who is merely 'doing his job' as part of the enterprise of mass atrocity,[25] presents only part of the truth about the reality of mass atrocity. This image is of significance, and has proved quite influential in the development of a theory of perpetration. As we shall discuss in chapter seven, Roxin's picture of the fungible intermediary as a human automaton clearly relies on this conception of the physical perpetrator in order to shift control onto the *Hintermann*. However, as academics have noted in their studies of the phenomenon of mass atrocity, more often than not, there is a 'communal engagement with violence'.[26] Atrocity cannot be perpetrated on such a widespread basis unless it is accompanied by the vigorous participation of a very large number of ordinary people.[27] Some studies even question whether crimes on such an epidemic scale can be committed by people simply acting under the instructions of authority figures, unless they have internalised the ideology behind the instructions and actually wish to assist in its operationalisation.[28] People can be motivated to commit such acts only when the ideology resonates with their own psychological dispositions.[29]

While the calculating bureaucrat and the crazed ideological killer perhaps represent two extremes of the kinds of actors in international crimes, most perpetrators will display some or a combination of various kinds of

[22] MJ Osiel, 'Constructing Subversion in Argentina's Dirty War' (2001) 75 *Representations* 119, 127.

[23] See Sloane, above n 6, 64. Against Osiel, above n 11, 99.

[24] AJ Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (Cambridge, Cambridge University Press, 2005) 32; Drumbl, 'Collective Violence', above n 4, 569–70.

[25] See Sloane, above n 6, 64.

[26] Fletcher and Weinstein, above n 5, 605.

[27] Drumbl, 'Collective Violence', above n 4, 569; LE Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice' (2005) 26 *Michigan Journal of International Law* 1013, 1026.

[28] Vetlesen, above n 24, 25–26.

[29] Ibid, 50.

motives.[30] Mann even classifies perpetrators according to their motives: ideological killers, bigoted killers, fearful killers, careerist killers, materialist killers, disciplined killers, comradely killers and bureaucratic killers.[31] In fact, no case of mass atrocity will involve only one type of perpetrator. This is true even in the case of atrocities committed by the Nazi regime, where it is now acknowledged that while the personnel in concentration camps were part of an oppressive organisational matrix, they still had considerable freedom to act and perpetrate violence as they wished without fear of retribution.[32] Commentators on mass conflict note that in quite a number of these scenarios, subordinates enjoy considerable autonomy in the interpretation and execution of the policy directives of leaders, and sometimes this control over the fate of their victims is appropriated rather than granted voluntarily.[33] For example, during Argentina's Dirty War (1976–1983), junior officers who acted at the lower levels exercised considerable discretion as to how to treat their victims after interrogation.[34]

These distinctive features of international crimes – their collective nature, conformity to the prevailing social norms and widespread participation in their commission by different levels of participants acting on different motives – must be kept in mind while attempting to construct a theory of responsibility for international crimes.

II. THE NEED FOR AN ACCOUNT OF MODES OF PARTICIPATION

One might argue that the categorisation of the various participants in mass atrocity into principals and accessories is not particularly necessary, or even useful. As long as we respect the concept of individual accountability and adhere to fundamental criminal law principles, the exact label we attach to the accused is irrelevant. After all, the offender is held accountable in either case and, in the absence of any mandatory mitigation of sentences for accessories, punished equally. Indeed, quite a few domestic criminal law systems consider the distinction between principals and accessories to be largely redundant.[35] I argue that a sophisticated

[30] On Rwanda, see Drumbl, above n 16, 1246–51.

[31] M Mann, *The Dark Side of Democracy: Explaining Ethnic Clensing* (Cambridge, Cambridge University Press, 2006) 27–29.

[32] Vetlesen, above n 24, 36 (quoting Sofsky).

[33] Osiel, above n 11, 22–23, 26.

[34] Ibid, 102.

[35] For instance, 'formal unitary systems', such as those in Denmark and Italy, do not recognise the distinction between principal and secondary responsibility, whereas 'functional unitary systems', like those of Austria and Poland, formally distinguish between the two but do not consider secondary responsibility to be derivative in nature: H Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford, Hart Publishing, 2010) 18–19, fnn 35–37. In the United States, the Model Penal Code and the majority of states have abandoned the traditional common law distinctions between principals and accessories: WR LaFave, *Criminal Law* (St Paul, MN, West Academic Publishing,

understanding of the status of the accused in relation to the offence committed is crucial for the ascription of responsibility. Statements of responsibility perform an expressive function: the censure of the conduct of the accused. However, this expression is not confined simply to evaluating whether the accused is innocent or guilty; it also assesses exactly what he is guilty of.[36] The rules of criminal responsibility would fulfil this essential communicative function only if they accurately expressed[37] the nature of the censure, its appropriate target and the conditions under which it is deserved.[38] A theory of attribution of responsibility for international crimes must therefore be capable of representing, as accurately as possible, both the nature of the crime in question and exactly how the accused is connected to its commission.[39]

This communicative function of criminal responsibility is perhaps even more important in international criminal trials than in domestic ones. Apart from the more standard aims of criminal justice[40] – retribution, deterrence, incapacitation and rehabilitation – proponents of trials for international crimes have come to view these as embracing increasingly more ambitious goals. The international criminal trial is touted as a venue for giving voice to victims of mass violence, expected to create a historical record of wrongdoing and even to contribute to the prevention of conflict.[41] There is also emphasis on the potential didactic function of the

2010) 706–08. English criminal law treats the principal and the accomplice identically for the purposes of punishment in that they are both guilty of the full offence, but the distinction between the two still has some limited significance. Most importantly, the status of an accomplice is in part contingent upon the existence of a principal who commits an offence, and there are some practical differences: strict liability offences require *mens rea* on the part of the accessory, there is also no vicarious liability for the act of an accomplice and the definitions of certain offences allow for the possibility of their commission (as a principal) only by a defined class of persons. See AP Simester and GR Sullivan, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford, Hart Publishing, 2010) 206.

[36] V Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2005) 80.

[37] Gardner holds that rules of responsibility, in the relevant sense, are ascriptive rather than normative. They are therefore directed towards making our judgements on whether and how we should count what people have done more accurate, rather than more desirable or valuable. See J Gardner, 'Criminal Law and the Uses of Theory: A Reply to Laing' (1994) 14 *OJLS* 217, 220.

[38] Tadros, above n 36, 3.

[39] For recent powerful counterarguments to this position, see JG Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 *Leiden Journal of International Law* 165, 211–13.

[40] See, eg, JN Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass, Harvard University Press, 1964) 158; LN Sadat, *The International Criminal Court and the Transformation of International Law* (Ardsley, NY, Transnational, 2002) 73–75; RJ Goldstone, 'Justice as a Tool for Peace-making: Truth Commissions and International Criminal Tribunals' (1996) 28 *NYU Journal of International Law & Politics* 485, 491; D Wippman, 'Atrocities, Deterrence and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473.

[41] 'Developments in International Law – International Criminal Law' (2001) 114 *Harvard Law Review* 1943, 1961; M Schrag, 'Lessons Learnt from ICTY Experience' (2004) 2 *Journal of International Criminal Justice* 427, 428; M Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 331.

process – creating a public sense of accountability for severe violations of human rights through exposure, stigmatisation, and internalisation of norms and values that respect human rights.[42] Champions of these trials assert that it is only through justice – establishing accountability for abuses, creating an accurate historical record and providing some relief for victims – that a conflict society can transition to a peaceful and stable one based on the rule of law.[43] Commentators disagree on whether these are all legitimate aims of the international criminal trial, whether they are capable of being operationalised and how they should be prioritised. However, if the truth- and history-telling and didactic functions of international criminal trials are to be realised, it is essential not only that they reflect, quite precisely, the position of the accused in the context of mass atrocity, but also that they situate him within the political and cultural climate that made this violence possible.

Indeed, it is precisely this motivation for accurately reflecting the accused's role in the commission of mass atrocity[44] that has led international criminal tribunals to develop two competing doctrines – Joint Criminal Enterprise (JCE) on the one hand and indirect perpetration and co-perpetration on the other – as modes of responsibility.[45] Joint Criminal Enterprise is largely a common law-influenced doctrine, with close analogues in the doctrine of joint enterprise in English law[46] and the *Pinkerton* conspiracy doctrine in US law.[47] It has been in vogue for much of the existence of the *ad hoc* criminal tribunals, especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal

[42] Akhavan, above n 5, 741–42, 746–51; Damaska, above n 41, 345–47.

[43] JE Méndez, 'In Defense of Transitional Justice' in AJ McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN, University of Notre Dame Press, 1997) 1, 7; RG Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2001) 28; JE Alvarez, 'Rush to Closure: Lessons of the Tadić Judgement' (1998) 96 *Michigan Law Review* 2031, 2031–32; AKA Greenawalt, 'Justice without Politics?: Prosecutorial Discretion and the International Criminal Court' (2007) 39 *NYU Journal of International Law & Politics* 583, 602.

[44] See, eg, C Kress, 'Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht' (2006) *Goltdammer's Archiv für Strafrecht* 304, 308; F Zorzi Giustiniani, 'The Responsibility of Accomplices in the Case Law of the *Ad Hoc* Tribunals' (2009) 20 *Criminal Law Forum* 417, 419; E van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* 1171, 1182, 1185.

[45] On the international tribunals' embrace of the differentiated model of participation, see, eg, S Wirth, 'Committing Liability in International Criminal Law' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden, Martinus Nijhoff Publishers, 2009) 329; G Werle and B Burghardt, 'Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?' (2011) 9 *Journal of International Criminal Justice* 85, 88; D Guifoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law (2011) 64 *Current Legal Problems* 255, 285.

[46] For a succinct account of the doctrine of joint enterprise in English law, see A Ashworth, *Principles of Criminal Law* (Oxford, Oxford University Press, 2009) 420–27; AP Simester, 'The Mental Element in Complicity' (2006) 122 *LQR* 578; Simester and Sullivan, above n 35, 233–44.

[47] See *Pinkerton v United States*, 328 US 640 (1946).

Tribunal for Rwanda (ICTR).[48] Co-perpetration and indirect perpetration are based on established forms of participation in German criminal law and are currently the favoured doctrines at the International Criminal Court (ICC).[49] Both doctrines have come under considerable criticism from academics and courts, for reasons ranging from the methodological to the substantive, including the uncomfortable truth that they lack a secure foundation in customary international law or even in general principles of law recognised by civilised nations.[50] The most recent jurisprudence of the ICC also demonstrates some ambivalence towards the acceptance of indirect perpetration and co-perpetration at the court.[51] Having never been on a firm footing to begin with, a coherent account of the basis for attribution of responsibility for international crimes seems more precarious than ever. If international criminal tribunals are to fulfil their goals of ending impunity for international crimes and establishing individual accountability, this is a task that they simply cannot afford to postpone any further.

III. STRUCTURE AND METHODOLOGY

In this study, I take up the challenge of constructing a theoretical framework for distinguishing between parties to an international crime, which yields modes of perpetration and accessorial responsibility that account

[48] For an excellent analysis of the prominence of JCE at the *ad hoc* tribunals, see generally G Boas, JL Bischoff and NL Reid, *International Criminal Law Practitioner Library Vol I: Forms of Responsibility in International Criminal Law* (Cambridge, Cambridge University Press, 2007) 8–141; WA Schabas, 'The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 *New England Law Review* 1015, 1030–33; N Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy' (2004) 2 *Journal of International Criminal Justice* 446.

[49] On the recent ascendance of the doctrines at the ICC and their background in German criminal law, see F Jessberger and J Geneuss, 'On the Application of a Theory of Indirect Perpetration in *Al Bashir*: German Doctrine at the Hague?' (2008) 6 *Journal of International Criminal Justice* 853, 857; HG van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility' (2009) 7 *Journal of International Criminal Justice* 307.

[50] On JCE, see, eg, Danner and Martinez, above n 3; JD Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 69; ME Badar, '"Just Convict Everyone!" – Joint Perpetration: From *Tadić* to *Stakić* and Back Again' (2006) 6 *International Criminal Law Review* 293. On indirect perpetration and co-perpetration, see Jessberger and Geneuss, above n 49, 868; *cf* G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 963–64 (stating that while perpetration by means is recognised in major legal systems, it had not been regulated by international criminal law instruments or courts prior to the Rome Statute).

[51] See *Prosecutor v Lubanga*, No ICC-01/04-01/06-2482, Judgment Pursuant to Art 74 of the Statute, Separate Opinion of Judge Adrian Fulford, Trial Chamber I (14 March, 2012); *Prosecutor v Mathieu Ngudjolo Chui*, No ICC-01/04-02/12, Judgment Pursuant to Art 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, Trial Chamber II (18 December 2012).

for the collective nature of these crimes. This new conception of responsibility reflects the doctrinal concerns at the core of debates on responsibility in highly theorised domestic criminal law systems, and is simultaneously attuned to the unique features of international crimes. I consider the theoretical foundations of the distinction between perpetrators and accessories in English and German criminal law, as prominent representatives of the common law and civil law traditions respectively. I assess the points of convergence and difference between these systems, and apply this analysis to the unique features of international crimes in order to develop an account of principal and secondary responsibility for international crimes. In this process, I develop a theoretical account of JCE liability which engages with domestic criminal law principles to assess whether it can be justified as a mode of principal or accomplice liability. I also take on the task of considering the doctrines of co-perpetration and indirect perpetration that have been put forward as alternatives to JCE, and examine whether these are true to the doctrinal bases of responsibility in domestic legal systems and to the nature of international crimes.

The argument developed in this study has the following structure. Part One of the book comprehensively reviews the development of forms of perpetration or principal responsibility in international criminal law. It analyses the development of the JCE doctrine at international tribunals, including its historical underpinnings, its initial formulation by the ICTY, and its subsequent explication by tribunals and academics. It then conducts a similar examination of the concepts of indirect and co-perpetration, beginning with their incorporation in the jurisprudence of the ICTY and their later adoption by the ICC. It identifies the main loopholes and contradictions in the construction of these theories, and presents factual scenarios for which these theories have either no answers or only problematic ones.

Part Two develops a concept of perpetration for international criminal law, drawing on domestic criminal law theory. It looks at the concept of a perpetrator in English and German criminal law, and uses the doctrinal insights gleaned from this analysis to assess whether JCE, indirect perpetration and co-perpetration are appropriate modes of perpetration responsibility for international crimes. It also proposes a new, modified version of the doctrine of *Organisationsherrschaft* as a more accurate characterisation of the role and function of high-level participants in mass atrocity.

Part Three of the book focuses on the concept of accomplice liability in German and English criminal law and doctrine. Based on this assessment, it addresses whether JCE II and JCE III can be justified as forms of secondary criminal responsibility, and whether there is any merit to retaining them as distinct modes of liability that capture the collective dimension of international crimes. It concludes that a more tightly circumscribed

version of JCE II may be retained in international criminal law. The status of JCE III is more precarious, given that domestic criminal law theory yields inconsistent results on its advisability. While JCE III may be justified independently using expressive and risk justifications rationales, it may be more prudent for international criminal law to abandon it as a mode of secondary responsibility.

A word on methodology is in order here: I choose to focus on English and German criminal law for my examination of responsibility for several reasons. First, in the field of domestic criminal laws, these legal systems constitute two of the most sophisticated and influential systems representing the common law and civil law worlds respectively. Secondly, existing modes of responsibility in international criminal law have borrowed heavily from these legal systems in their jurisprudence on modes of responsibility. Thirdly, my task is not to advocate the wholesale adoption of any doctrine that may be found in any particular legal system, but rather to restructure and combine divergent theoretical perspectives on perpetration responsibility in order to develop a suitable account of the criminal responsibility of senior and mid-level participants in mass atrocity. The attempt, therefore, is to engage fully with domestic criminal law principles and theory while simultaneously capturing the unique features of international crimes. In this sense, the legal systems serve as sources of ideas and concepts, and not as true sources of 'law'.

It is entirely possible that there are other legal systems and traditions that would also have something useful to teach us about the rationale for distinguishing between parties to a crime and how best to attribute criminal responsibility. I am wary, however, that any attempt to address all these systems, while being more inclusive, would also be more superficial, and less well suited to the aim of developing a normative structure for international crimes. The more judicious course of action is to begin by focusing on jurisdictions one can represent, fairly, and welcome a broadening of the debate as scholars from other traditions in turn contribute their insights to the task. A different approach would risk losing both depth and accuracy.