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Ranking Responsibility? Why We Should Differentiate Between Participants in Mass Atrocity Crimes

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1 Introduction

In March 2012, Thomas Lubanga was sentenced to 14 years prison in the International Criminal Court’s (ICC) first judgment, for his role as a perpetrator in the conscription of child soldiers.¹ In May of the same year, Charles Taylor, former president of Liberia, was convicted for ‘aiding and abetting’ in various international crimes, and sentenced for 40 years by the Special Tribunal for Sierra Leone (SCSL).² Back in 1997 a soldier, Dusko Tadić was sentenced to 20 years prison by the International Criminal Tribunal for former Yugoslavia (ICTY) for the war crime of the murder of five civilians found in a village where Tadić was known to have been involved in destruction of property, but where there was no direct evidence of his participation in the killings.³ The conviction was based on the fact there had been a tacit agreement to commit various international crimes, and these deaths were a foreseeable consequence of such acts. When we consider that, with the notable exception of Tadić, in all of the above cases the convicted individuals played some kind of leadership role, the difference in approach by each of the tribunals raises questions as to the significance of this leadership role.

Mass atrocity crimes are by definition collective crimes, and those involved in the commission of these crimes are often caught up in complex relationships of power, fueled by political, ethnic or racial divides. Allotting blame and determining individual criminal liability becomes difficult because the structures of power and influence are very diffuse, and the evidence required to link an individual to the crimes committed becomes difficult to prove. Political and military or quasi-military leaders create policies, initiate, incite, organize or at the very least condone the collective criminal activity that leads to mass atrocity, yet they rarely are physically present at the locus delicti, and almost never pull the trigger. But when we think of these types of crimes, and try to identify who we think is morally the most culpable for such atrocities, most of us would agree that these leaders are the intellectual architects and carry a special kind of moral responsibility apart from those who physically perpetrated the crimes. The

¹ Prosecutor v Thomas Lubanga Dyilo, ICC-01/01-01/06 (Lubanga Trial Judgment).
² The Prosecutor v Charles Ghankay Taylor, SCSL-03-01-T (Taylor Judgment).
³ The Prosecutor v Dusko Tadić, Appeals Judgment IT-94-1-A (Tadić).
challenge is to create a system that is capable of holding these leaders criminally responsible, despite their distance from the physical acts, while at the same time maintaining a sense of justice and consistency in the application of the system. Essentially we want the best of both worlds: to end impunity and put the orchestrators of mass atrocity behind bars, but to do so in the most just manner possible. The legitimacy of the international criminal justice project demands that both these requirements be fulfilled.

This problem of individual criminal liability for collective crimes is not unfamiliar in domestic criminal law, where jurisdictions have had to deal with gang violence, organised crime in mafia groups, and crimes committed by subordinates at the behest of leaders within bureaucratic structures. Domestic jurisdictions have come up with two main policy responses: one is to create as wide a net as possible within which all individuals who are in any way linked to the criminal plan are considered to be equally liable, thus eliminating the problem of evidence. The other approach is to draw a clear distinction between the leaders or orchestrators of such crimes, and those lower down the ranks of a hierarchical power structure, in order to allot a heavier moral blame on the leaders even when they did not physically execute the crimes. The evidence then focuses upon their role within such a power structure and tells a different normative story about the facts. International tribunals have taken both approaches, leading to a ‘clash of legal cultures’ and a great deal of uncertainty. The divergence in approaches may just be considered the ambling development of a new field of international law, however the specific context of any criminal law system is that it deals with individual liability and punishment. This means that there must be clarity for the defendants as to how they might be prosecuted and what laws are applicable, and that it must not be the arbitrary result of which tribunal happens to have jurisdiction, or which judges apply which system. Such arbitrariness would mean failing in the requirement of a just system.

In this chapter, firstly it will be argued that from an ethical perspective, the specific nature of international criminal law (ICL) requires not only individual guilt to be attributed for collective actions, but also that a distinction should be drawn between individuals involved in these collective crimes, according to the gravity of moral culpability.
Secondly, a comparative law perspective will demonstrate that the doctrinal differences between solutions to this problem in various domestic jurisdictions are rooted in the difference between a fundamentally subjective approach and a fundamentally objective approach. Although a clear line cannot be drawn between all common law jurisdictions and all civil law jurisdictions, these approaches could be said to be reflected in the common law and civil law traditions respectively. The emerging case law of international tribunals demonstrates differing preferences for one tradition or the other, and it will be argued that the present clash of legal cultures can be avoided if we consider the specific context of ICL as compared to collective crimes under domestic criminal laws. It should be pointed out that the focus here is upon the ambit of international courts, and not the prosecution of mass atrocity crimes by domestic tribunals under domestic law.

Finally, a conclusion will be drawn as to why it is appropriate to distinguish between participants in crimes of mass atrocity in a normative sense, because this better reflects the normative story that an trial tells about how such crimes occurred. This answers the desire to end impunity of the orchestrators of such acts, but at the same time it will be argued that is is possible to do this in a way that answers the requirement of a just system, by considering the modes of liability most appropriate to the specific context of crimes of mass atrocity.

2 The Moral Argument: What is the rationale behind distinguishing a hierarchy of participation in collective crimes?

Ever since the famous axiom spoken by Justice Jackson at the closing of the trial of the major war criminals at Nuremberg, the starting point of ICL has been that ‘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.’\textsuperscript{4} The decision that individuals could be held individually liable for the acts committed through the collective, and could no longer hide behind the collective notion of ‘acts of State’, represented a major paradigmatic shift in international law. The individual was recognised as being a subject of international law for the first time, but perhaps less obvious was the attribution that took place.

\textsuperscript{4} Closing statement of the Prosecution Judgment of the International Military Tribunal, 1946.
behind this thinking. Was it a question of transferring guilt from the collective to the individual? Or was it rather based upon attribution of the acts of many within a collective to the individual? Both approaches raise the further question of whether everyone within the collective could be seen to carry equal responsibility, or whether some actors within the collective could be singled out due to their particular role.

2.1 Individual and Collective Guilt

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 — which are by definition collective crimes, committed by a multitude of individuals acting within a system or culture of violence against a group of victims who also generally have a shared identity — can in some way be translated to individual responsibility. This involves two conceptual shifts. Firstly, from the collective to the individual, and secondly from the notion of guilt to the notion of legal 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 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.5 There must be some way therefore 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 guilt to legal responsibility, which differs depending on the emphasis placed upon either the subjective intention of the individual with respect to the collective crime, or upon the objectively measured contribution to the commission of the crime. These differences will be laid out in section 3.

With respect to the first shift from collective to individual, 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.6 Romanticism is

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5 An important exception is the notion of 
qasāma
 in many school of Islamic law, whereby if a victim is found dead and there is no identifiable suspect, 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 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (Cambridge University Press, 2005).

associated with 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. 7 Whereas liberalism 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 dinidivual guilt, romantics are expansionist and liberals are reductionist. 8 The conflict between focusing on the collective or the individual is 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. Is the individual the ultimate unit of action, or are we, as individuals, invariably implicated by the actions of the groups of which we are a part? 9

In the context of mass atrocity crimes the extraordinary becomes the norm: there is an orthodoxy of hate, and violent, systemised crimes become acceptable among members of the collective. 10 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. 11 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 criminal liability. 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. And yet 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. 12 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, but in any case teachers,

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11 Yale Law Journal 1499 .
7 Ibid., p. 1501.
8 Ibid., p. 1508.
9 Ibid., p. 1504.
11 Fletcher, `The Storrs Lectures', n Error! Bookmark not defined., 1543.
12 Drumbl, n Error! Bookmark not defined.
religious leaders, politicians, policies of the state, and a system of supportive laws are involved. Should ICL 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. 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.

The preference for the reductionist, liberalist approach over the expansionist, romantic approach in applying the regime of ICL is evident, but the fact that Jackson’s words and the paradigm shift of the Nuremberg trials have replaced collective guilt with individual guilt as the dominant international response to mass atrocity may still need to be justified, especially in light of observations by many scholars that individual criminal prosecutions are not always necessarily the best response. If our goals include reparation for the large scale violence and destruction suffered by entire communities, or reconciliation between conflicting groups, then the distribution of blame may be better shifted back to the collective, with a focus upon replacement of the norm of violence and attention to the deeper roots of the instability which led to that norm. Alternative mechanisms may sometimes be more appropriate, with attention to local, rather than so-called international values. As well there may be some cases in which the focus on collective guilt seems more appropriate as a measure of legal responsibility, such as corporate liability, since it goes to the root of the agency which causes the criminal activity.

This notion of the agency which causes the crime is of central importance when considering the relationship between the collective and the individual, and the question whether some individuals in a leadership capacity carry a heavier moral burden than other individuals.

2.2 Individual and Collective Agency

Fletcher, 'The Storrs Lectures', n Error! Bookmark not defined., 1543.
Drumbl, n Error! Bookmark not defined., 600.
See e.g. the chapter by Harmen van der Wilt in this volume, on Aansprakelijkheid van de Rechtspersoon.
With respect to the second conceptual shift described above, from guilt to legal responsibility, this question of agency deserves attention. 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. We therefore require a theory of agency that justifies shifting the responsibility for this group action to the individual as an agency within the collective.

Complicity itself, understood as participation in collective crime, and translated into different modes of liability, deals explicitly with this the 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. 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. 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. 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

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17 Fletcher, ‘The Storrs Lectures’, n Error! Bookmark not defined., 1512.
19 Ibid, 69.
20 Ibid, 96.
individual intentionally participates in a wrongful act, this would automatically entail individual responsibility for the collectively produced result. Kutz draws a descriptive distinction between participatory, inclusive accountability, based upon a teleological relation between an individual’s will and the resulting wrong or harm, and direct, exclusive accountability, which is based more upon a causal relation to the individual’s actions. However Kutz maintains that normatively there can be no difference between these two forms of accountability and that complicit and direct actors must be seen to be equally and jointly culpable for collective crimes. Kutz 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 picknicking, 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’. Kutz

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, as will be further argued in section 3, 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.

Legal philosopher Jens Ohlin offers a further step in this analysis when he speaks of overlapping agents, a notion which Kutz also discusses, but with different conclusions as to the distribution of responsibility. The problem with ascribing a collective will to a group, and speaking of group agency in the romantic sense, is that it interferes with the liberal notion of

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21 Ibid., 146.
22 Ibid., 147-154.
23 Ibid., 155.
individual liability, which is central to the criminal law paradigm. Just as Kutz’ 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.25 However, where Fletcher would therefore 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.26 The basketball team member submits some reason to the team, in that it is not simply her goal to score baskets individually, but also to do what is best for the team in order to win, even if she never shoots a single basket herself. The violinist plays his part of a symphony as an individual, for if he were to fail to play, or to play a different piece of music, it would be clear that he was not subsumed into the group. At the same time he has submitted some of his reason to the collective will of the orchestra to perform a certain symphony. In this way the group and the individual are overlapping agents.27

This means that while the group can still be said to be acting collectively, with a collective will, the individual can still be held responsible for his or her own actions, and possibly — though not always — for the actions of the group. The determining factor is the extent to which there was a possibility for the individual to be involved in the group deliberation, which led to the collective will. A person lower down in a hierarchy within a group would be less culpable, because they had not surrendered their individual reason to the group deliberative process, whereas those on equal footing with each other, or higher up within a group, can be held responsible for the collective will and action.28

This notion of overlapping agency helps to explain the problem of individual responsibility for complex collective crimes within the bureaucracy of the State or a State-like organisation of insurgents. The expansionist ideal would ascribe full liability to the collective,

25 Ibid., 173.
26 Ibid., 181.
27 Ibid., 185.
28 Ibid., 196-197.
meaning that individuals acting through the collective would be immune to scrutiny of their actions. This was precisely the reason that the Nuremberg trials shifted the paradigm of responsibility to the individuals who were blamed for committing crimes in the name of the State. On the other hand, the liberalist ideal would place full blame on the shoulders of individual members of the collective, which, in the case of their removal from the organization, would leave the same bureaucratic climate in place that allowed the crimes to take place, and would do nothing to ensure prevention of further criminal activity. The notion of overlapping agency would allow for clarification of the collective rationality, while at the same time, not all of the individual members are subsumed into the abstract of the collective. Those lower down in the organization can be said to fade more into the background, whereas those higher up have a different role in the deliberative structure of the collective, and therefore a higher degree of moral responsibility as individuals.\textsuperscript{29} The notion of overlapping agency helps to identify both the collective reason and the individual reasons that lead to the commission of collective crimes. This gives justification for both punishment of, for example, a corporation as a collective entity, as well for punishment of certain, but not all, individuals within the collective. As Ohlin points out, the more horizontal the participation of individuals in the deliberative process of the collective, the more justification there is to consider all of the members equally culpable,\textsuperscript{30} but where there is more of a discernible hierarchy, overlapping agency describes the dynamic of collective criminality in such a way that the focus is upon those who have more influence over the crimes.

When we apply this approach to discerning moral culpability to the question of modes of liability, it may help to instruct us how to select from the different models available based on domestic criminal law. There are reasons why there are differences between these models, which will be explained in the section below through a comparative study. But given the extraordinary nature of mass atrocity crimes, it takes something for a collective to start to accept them as normal behaviour — it takes some individuals with specific political aims and sufficient influence over others to convince them to give up their individual reason to the group and use violent means to fulfil these ends. The notion of overlapping agency, which allows us to distinguish a higher level of blameworthiness for those who exercise control or influence over

\textsuperscript{29} Ibid., 197.
\textsuperscript{30} Ibid.
the deliberative process in a collective, no matter how organised or diffuse that collective may be, is highly compelling as a guiding principle to help select a model for modes of liability appropriate to ICL. It should therefore be kept in mind while comparing the modes of liability in the following section.

3  The Comparative Argument: Does one system have a better approach than another?

The debate as to whether or not a distinction should exist between participating members in a collective crime centres on reasoning drawn from domestic legal traditions. Those who hail from criminal law jurisdictions in which a distinction is made, may have difficulty understanding why the leaders of systematic crimes would not be qualified as carrying a heavier degree of responsibility, whereas those who hail from jurisdictions in which no normative distinction is made see no point in drawing complex dogmatic lines, particularly if the sentencing does not reflect a greater degree of guilt. In the pluralistic field of ICL where this question is left to the judges in various tribunals, the search for an answer appears to give rise to a clash of legal cultures. This author has argued elsewhere that such areas of ICL are developed as a process of comparative law, whereby the lack of clear technical notions in the statutes of tribunals leaves individual participants to solve the problem, and they do so by applying the notions they are familiar with from their own domestic legal training. In this section it will be shown what these differences are and how this clash of legal cultures has manifested itself in the international tribunals. Unless there can be some more grounded reasoning given for a particular solution, it is merely a case of which legal culture wins out. This is an unsatisfactory method of finding the law. It will therefore be argued that the specific context of ICL justifies the normative distinction between participants in crimes of mass atrocity.

It should be emphasised that while the approaches outlined below reflect strong tendencies within the common law tradition and the civil law tradition, no clear line can be drawn between systems that fall into one tradition or the other. Although we tend to talk of

'common law' or 'civil law' systems, in fact it is misleading to try and categorise a jurisdiction according to one or the other, especially if the assumption is then made that all those jurisdictions identifiable as either 'common law' or 'civil law' will share the same substantive and procedural criminal laws and doctrines. In fact, contemporary comparative law no longer busies itself with categorisation along these lines, which is why the notion of a 'tradition' is preferred here to a 'system'. 32 A legal tradition is about the shared norms, values and approaches, which may change over time, rather than strict categorisation. 33 It will be demonstrated here that there is an important difference between a subjective approach and an objective approach to criminal liability, and that these two approaches can be recognised primarily in the common law tradition and civil law tradition respectively. However there are examples of jurisdictions which might identify more strongly with the civil law tradition which, contrary to other jurisdictions which share its tradition, may have a more subjective approach. France would be one example. 34 The important thing is to recognise the impact that an objective or subjective approach has on the way modes of liability are formed and whether or not a distinction is made between participants in a collective crime.

One other note of clarification is the terminology used here. One of the challenges in ICL is that there is always a process of linguistic translation taking place, which, when not done with attention to technical differences, can be misleading, especially when translating into English terminology which is not itself uniform across jurisdictions. While there appears to be agreement that the term ‘complicity’ means participation in collective criminality, and that ‘accomplices’ are the persons who act with complicity in a joint effort to commit a crime, confusion can arise when using the terms ‘accomplice’ or ‘accessory’ because we tend to read into these terms a particular technical meaning depending on our own domestic criminal law background. There may or may not be a normative distinction drawn between a principal and an accessory. The terms ‘accomplice’ and ‘accessory’ will therefore be avoided here. Instead the functional term


33 Glenn, Legal Traditions of the World, ibid., 25.

34 See for example Article 121-7 Code Penal, in which the term complice denotes anyone who participates in a crime without distinction. This resembles the Anglo-American use of the term 'accomplice', whereas the Spanish cómplice denotes secondary participants as distinct from principals, see for example articles 45 and 46 Código Penal in Argentina.
‘participant’ will be used to denote persons who are part of a collective crime, and wherever a normative distinction is made between participants, we will speak of principals and secondary participants.

3.1 A Subjective Approach Reflected in the Common Law Tradition

Although historically many jurisdictions that follow the common law tradition distinguished between principals and ‘accessories’ as secondary participants, today most of these jurisdictions have abandoned any normative distinction between participants in a collective crime. If you and I have an agreement to rob a bank, a joint intention to commit a joint action, then it does not matter in the end whether I am the only one to enter the bank armed with a weapon and demanding money, while you sit in a car outside ready to make the getaway and do not in actuality commit the act of ‘robbing the bank’; we are both equally liable and will be punished as such. Clearly, the emphasis is on our joint intention, on the subjective element of the crime, or in common law terminology, on the \textit{mens rea}. While the objective element, or the \textit{actus reus}, must also be fulfilled, determination of culpability is determined decisively by the subjective factor.

Despite the fact that all participants in a collective crime are considered equally culpable, the terms ‘principal’ and ‘accessory’ still appear in many English language jurisdictions. This stems from the old English common law, which serves as an important source to jurisdictions which have taken on the common law tradition. The terminology today echoes the distinctions that used to be made, whereby principals in the first and second degree were considered to bare more responsibility and thus a heftier punishment than accessories in the first and second degree.\textsuperscript{35} Principals in the first degree were the physical perpetrators who fulfilled all the elements of the crime. Principals in the second degree were those who were present at the \textit{locus delicti} but played a more supportive role, such as aiding or abetting. Both were punished as principals but the normative qualification served to illustrate a slight difference in culpability. Accessories were those who were not present at the execution of the crime and were therefore

considered to have played a less significant role, and thus were given a lighter punishment.\textsuperscript{36}

Over time these normative distinctions have disappeared. In the UK, the Accessories and Abettors Act of 1861 states that ‘whomsoever shall aid, abet, counsel or procure the commission of any indictable offence...shall be liable to be tried, convicted and indicted as a principal offender.’ \textsuperscript{37} The Act refers to accessories and abettors, collapsing what were originally two categories, namely principals in the first degree and the general category of accessories. While the choice to do away with the normative qualifications may have been one of policy, the conflation of all technical terms into one generic group means that continued use of these terms can be confusing. This can be compared with Australia, which inherited English law as a colony, but which has developed its own laws according to its federal structure. In the central sources, including both codification and much of the case law, the term ‘accessory’ is used to differentiate from a principal actor, and yet the Commonwealth Criminal Code denotes that an accessory ‘aids, abets, counsels or procures the commission of an offense by another person [and] is taken to have committed that offense and is punishable accordingly.’\textsuperscript{38} Similarly in the case law the terms ‘aiding, abetting, counselling or procuring’ have been determined to entail intentional assistance to a principal actor, yet in the end this is interpreted to mean ‘facilitating’ or ‘enabling’ another person — the physical perpetrator — to commit a crime, without distinction as to qualification nor sentencing.\textsuperscript{39}

In the US, where state and federal legislation all have done away with the old normative distinctions, accomplice liability is sometimes described as an ‘alternative’ way of committing a crime. This suggests that anyone participating in a collective crime is taken to have committed the crime, leaving no room for normative distinction between participants. Textbook definitions of accomplice liability include soliciting, requesting or commanding another actor to commit the

\textsuperscript{36} See ibid. Accessories in the first degree were those who provided support before the enactment of the crime, such as procurement, counseling or commanding. An accessory in the second degree was someone who supported the fulfillment of the crime after the fact, such as someone who ‘receives, relieves or comforts’ the principal actor or actors. So in the example above where I give you information about how to enter the bank and when, but I am not present when you go in to the bank armed and demanding money, you are a principal in the first degree and I am an accessory in the first degree.

\textsuperscript{37} Cited in Andrew J Ashworth, 'United Kingdom' in Kevin J Heller and Marcus D. Dubber (eds.) The Handbook of Comparative Criminal Law, (Stanford University Press, 2011), 539.

\textsuperscript{38} Section 11(2) Criminal Code (Commonwealth of Australia)

\textsuperscript{39} Giorgianni v The Queen 473 (High Court of Australia, 1985) (Giorgianni).
crime, or aiding the other person in planning or committing, all forms of assisting, and even ‘all persons concerned in the commission of a crime’. The one essential element in all of these definitions is the necessary intention to facilitate or promote the commission of the crime, similar to the Australian notion of ‘enabling’. The subjective approach is entirely determinative; because assistance is rendered intentionally, the accomplice is considered to be equally culpable as the physical perpetrator, regardless of the actual contribution to completion of the crime. One is led to think of Kutz’ description of a participatory, inclusive accountability.

This subjective approach manifests itself most clearly in the notion of conspiracy as a mode of liability, which has received a particular form in North America, where it was developed mostly as a response to mafia based crimes during the era of prohibition. Because it was difficult to prove who did what in these complex and secretive webs of organised crime, the best policy solution was to widen the net as far as possible by focusing in on the agreement between participants. This was particularly with respect to the desire to be able to capture the leaders, or family heads, who for example were almost never present at the scene of a murder, nor did they do anything physically with respect to the movement of illegal alcohol, and for whom it was difficult to prove in a court that they had given explicit orders for a specific crime to be committed. Instead, with the doctrine of conspiracy liability, all that needed to be proved was that there was an agreement between two or more people to commit a crime. This was constructed such that the mens rea could be inferred from the agreement, and that the ‘act’ of agreeing satisfied the requirement of the actus reus. While it could be said to be a stretch of the legal notion of an act, in terms of policy it certainly solved a great problem of linking the individual to collective criminality, and especially with respect to the more invisible leaders behind the scenes. The underlying assumption is that collective action poses a greater risk to society than individuals ever could. A conspirator is assumed to be less likely to withdraw from a commitment made to others in the group than if it were purely an individual plan to commit a crime, and group criminality also allows for a division of labour, enabling grander schemes and wider-scale criminality to take place.

The most important thing to understand about accomplice liability in American criminal law is that it is based on a theory of vicarious liability, a notion entirely predicated on a subjective approach. Accomplice liability is seen as a form of liability for another’s acts, or of indirect liability, rather than for one’s own participation in a crime. The theory of derivative liability does not hold the accomplice punishable for their own acts and contributions to the crime, but rather says that anyone who ‘knowingly, voluntarily and intentionally unites with the principal offender’ is legally accountable for the acts of that principal offender. A participant will be convicted not for ‘assisting’ in the crime, but for commission of the crime, and then not because they necessarily contributed to fulfilling the elements of the crime, but rather because their intention was to join the physical perpetrator and this intention renders them responsible for the crime committed by another.

Four general conclusions can be drawn here about the jurisdictions compared here. Firstly, there is an inherently subjective approach in determining an individual’s culpability: not the acts and contributions of an individual to a crime (the objective aspect, or actus reus), but rather their mental state (the subjective aspect, or mens rea) is the test of culpability. Indeed the principle of culpability is denoted by the required mental state as an element of a specific crime. Secondly, this subjective approach leads to a theoretical underpinning of participation in collective crimes, of vicarious liability. Because a subjective approach is based upon personal blameworthiness, there is no transference of blame for the collective’s actions, or for actions of another individual in the collective, but rather the acts are fictitiously attributed to all members of the group, as if they all committed the acts themselves. Thirdly, as a consequence of this theoretical underpinning of the relationship between the group and the individual, there is a unitary system, wherein there is no normative distinction between participants in the collective, and they are all punished as principals, regardless of whether the language of ‘accessory’ is still used in some jurisdictions. There is an inherently horizontal relationship constructed by the law between all participants. And finally, due to this equal culpability of all participants in a collective, there is only a single notion of direct perpetration. These conclusions can help shed

43 Model Penal Code §2.06 (1)
light on the ‘clash of legal cultures’ that occurs in ICL in the search for modes of liability, especially when compared with the characteristics of a more objective approach.

### 3.2 An Objective Approach Reflected in the Civil Law Tradition

The civil law tradition finds its historical roots in the Justinian Codex and the Roman-Franco tradition of codification, which has led to an ordered taxonomy of laws, differing from the Anglo-American common law tradition of seeking legal developments in the shifting common values of society. It therefore makes sense that the criminal codes found in jurisdictions with this tradition are more technical in nature. Law-makers are trained legislators who aim to ensure that new developments fit within the existing system, and law-appliers are also trained jurists; the role of a lay jury is limited in the civil law tradition.

What this means in terms of modes of liability is that there is room for a more complex taxonomy of participation than in the fluid case-law development we see in the common law tradition. Such a taxonomy often has a carefully construed doctrine underpinning it. Generally in jurisdictions with a civil law tradition we can recognise a normative distinction between participants, similar to those that existed in the old English common law. So in the example of you and I sharing a plan to rob a bank, it would depend upon the role played by each of us what kind of liability attaches. If I am the one who enters the bank, armed and demanding money, while you sit outside and wait in a getaway car, it’s possible that you would be considered a mere secondary participant, and it’s also possible you might receive a lower punishment to reflect this qualification. The details depend upon each jurisdiction, but the differentiated system differs from the common law unitary system. One other characteristic of importance is that the elements of a crime are not binary, unlike the common law terminology of *mens rea* and *actus reus*, but rather ternary: the subjective (intent) and objective (action) elements are supplemented by the notion of ‘blameworthiness’. Without blameworthiness there is no punishable crime.

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46 This notion is linked to excusing defenses such as necessity, duress, or insanity, all of which would serve to disculpate a defendant.
In Germany the preference for a carefully constructed taxonomy of participants in a collective crime are evident. There is a clear normative distinction between principals and secondary participants, and each participant is punished according to his or her own blameworthiness. Principals, or Täter, include not only the physical perpetrator, but also the Mitläufer, or co-perpetrator who acts jointly and with a shared intention with others; as well as the mittelbare Täter, or the actor who uses another person as an ‘innocent instrument’ to commit a crime. This last figure is the indirect perpetrator, whose control over the act, (in the German literature Tatherrschaft) renders a higher level of blame. One is led here to think of Ohlin’s notion of overlapping agency.

The secondary participant, or Teilnehmer, is qualified as being less blameworthy because the contribution to the crime, or the control over its execution, is less than that of the principal. Secondary participants include person who intentionally aids or assists a principal to commit the crime. The latter receives a lower sentence to reflect the lower level of blameworthiness.

By way of comparison, this notion of ‘control over the crime’ has been absorbed into many Latin American jurisdictions, for example Argentina, which is heavily based on the German system and its doctrines. In the Argentinean Code Penal, receiving the maximum penalty are those who execute the crime, those whose co-operation was so necessary that the crime could not have been committed without them, and those who instructed another person to:

47 §29 StGB: Jeder Beteiligte wird ohne Rücksicht auf die Schuld des anderen nach seiner Schuld bestraft
48 §25 (2) StGB: Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mitläufer) Another form distinguished not in the German penal code, but only in the literature, is the Nebentäter, or those who act jointly but coincidentally, such as gang violence which may not have been pre-planned. See M Bohlander, Principles of German Criminal Law, (Hart Publishing 2009), 160.
49 § 27 StGB: Als Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Tat, Hilfe geleistet hat.
50 An exception is the case of Aanstiftung (which could be translated as either soliciting or inciting), which is considered to be a secondary participant in terms of qualification, yet the person is punished on the same level as the principal. See Professor Dr. G. Jakobs, Mittelbare Täterschaft der Mitglieder des Nationalen Verteidigungsrat, Anmerkung, NSiZ 1995, 26.
commit the crime.\textsuperscript{52} This last person, the instigator, is given the maximum penalty alongside the other principals, but is considered to be a secondary participant. According to the literature, this distinction is based on the fact the instigator has no dominion or control over the execution of crime.\textsuperscript{53} As well as the instigator, the \textit{Codigo Penal} lists as secondary participants those who aided ‘in any other way’ — other than in such a way that their cooperation was essential — and those who provided assistance before or after the fact.\textsuperscript{54} Secondary participants other than the instigator receive a reduction on the sentence between $1/3$ and $1/2$ of the sentence applicable to the principal, which again is a reflection of the lower level of blameworthiness.

Clearly the objective test of material contribution to the commission of the crime, or control over the crime, is central to these approaches. While the requisite mental or subjective element must always be present, the level of which depends of course upon the definition of a crime, it is not this subjective element which is determinative of the level of blameworthiness. Instead it is either the actual contribution made by an accused, or the dominion an accused person exercised over the crime, which is the determining factor. In particular, the notion of indirect perpetration was developed as a construct to reflect the way in which some people higher up in a hierarchy make use of third parties lower down in the hierarchy to commit a crime. In the first place this covers cases where the physical perpetrator was, for whatever reason, an ‘innocent agent’, for example if they did not know what they were doing was wrongful, or did not know the full extent of the facts.\textsuperscript{55} The idea of being responsible for the commission of a crime which one did nothing towards committing in the physical sense is justified by the redistribution of blameworthiness from the physical perpetrator to the person manipulating or holding a position of greater responsibility.

In the second place, this notion was developed further to cover cases where the physical perpetrator is not at all innocent, for example the \textit{Mauerschützen} case, or the Berlin Wall shootings, where members of the National Defence Committee of former East Germany were prosecuted for the multiple murders of East German citizen who were either shot, or killed by

\textsuperscript{52} Article 45 \textit{Codigo Penal de Argentina}
\textsuperscript{53} Ferrante, n 51, 65.
\textsuperscript{54} Article 46 \textit{Codigo Penal de Argentina}
\textsuperscript{55} Compare the mode of liability already discussed in German criminal law known as \textit{mittelbare Täter}. This is translated into Argentinean law as \textit{autoría mediata}, and is recogniseable in Dutch criminal law as \textit{doen pleger}
mine explosions upon attempting to cross the internal East-West German border. The members of the Committee had not physically committed these murders, rather they had handed down an administrative decision in which the policy of ‘shoot to kill’ was determined. The problem was that the soldiers who were the physical perpetrators were fully culpable, with no defences available to them which would lead to their status shifting to that of ‘innocent agent’. Under the original application of the modes of liability available under German law, this would have rendered the members of the Committee as ‘merely’ secondary participants as instigators. This was considered an undesirable outcome, because of the normative story about the facts that it was hoped the trial could tell. The planners and orchestrators who handed down the policy were considered to be more blameworthy than secondary participants. This brings us back to the notion of overlapping agency; because the members of the Committee exercised power over the decision making within the collective, they can be considered more blameworthy than those who eventually executed the collective agreement. Considering the central role of blameworthiness in the civil law tradition, it becomes clear why it was undesirable that these influential members of the collective would be qualified as secondary participants, and how the notion of overlapping agency helps to underwrite the desired outcome.

The court in this case cited German theorist Claus Roxin, who had recognised the moral and legal difficulty in situations involving organisational power structures. It would be counter-intuitive to qualify a policy-maker in an organisation as a mere secondary participant if the physical perpetrator, though not innocent, only committed the crime because of the influence of the policy maker. Instead, Roxin coined the theory known as Organisationsherrshaft, or control over the organisation. By extending the notion of control over the crime to include control over the organised collective that facilitates the crime, Roxin solved the doctrinal dilemma posed. According to this theory, when a person high up in an organisation hierarchy makes use of the power structure and conditions of this organisation, acts in full knowledge of these circumstances, exploits the willingness of the subordinate physical actor to carry out the illegal act, and intends the fulfilment of these acts to be a result of his or her own actions, then this ‘actor behind the physical perpetrator’, or Hintermann, must be considered to be an indirect

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58 Claus Roxin, Täterschaft und Tatherrschaft (8th ed.) (De Gruyter Recht, Berlin, 2005).
perpetrator, because he or she has control over the act.\textsuperscript{59}

This theory has been made welcome use of many Latin American jurisdictions as they have prosecuted the members of regimes which had policies of violence, leading to mass atrocity crimes. Most notably in the case against the leaders of the \textit{Junta} military dictatorship in Argentina in the 1980s,\textsuperscript{60} and more recently in the Peruvian case against former President Fujimori,\textsuperscript{61} in both of which cases Roxin was cited directly.

Generally, four distinguishing characteristics can be identified in these jurisdictions. Firstly, a heavily leaning objective approach can be recognised. While a shared intention is always a prerequisite for holding individuals culpable for collective crimes, this is not the central point of departure. Instead the emphasis is more on the actual contribution to the fulfillment of the crime, including the notion of control over the crime. Secondly, this objective orientation leads to the conceptualisation of individual responsibility for collective crime as a distribution or attribution of blame for the crime, rather than a vicarious liability as if the co-perpetrator had committed the act themselves. The individual is blameworthy to the extent of his or her co-operation or contribution. Thirdly, this distribution of blameworthiness leads to a normative distinction between participants. In other words, there can be a vertical relationship between participants, with a higher level of blameworthiness attributed to those who contributed in an essential way or had control over the crime. This distinction can be reflected in the sentencing, but need not always be. Finally, this objective orientation allows room for the notion of an indirect perpetrator, whose physical contribution may have been nil, but whose control or dominion over the crime leads to the classification as a principal.

### 3.3 Trends in the International Tribunals

International tribunals have applied modes of responsibility to individuals involved in collective crimes of mass atrocity following models drawn from various domestic traditions,

\textsuperscript{59} Ibid., 549.
\textsuperscript{59} Sentencia del Juica a las Juntas, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires, December 9, 1985 (Junta Trial).
\textsuperscript{60} Fujimori Exp. No. AV 19-2001 (Fujimori).
with great disagreement as to which approach is correct. At the same time, this debate has lacked any sensitivity as to what the roots to the differences are and, perhaps more importantly, without any discussion of the context into which these approaches are being translated. In determining which model is most appropriate in ICL, however, it should not be a matter of competition between those forming the law or between legal cultures, but of seeking the solution that functions best in the specific context of ICL.

Looking back at the negotiations surrounding the design of the Nuremberg tribunal, the term ‘conspiracy’ was included in the Charter following the US proposal, since it had been argued this would be an effective way to link the members of the Nazi political and military regime to the thousands of mass atrocity crimes that had occurred, without needing direct evidence of their physical involvement; ascertaining an agreement was sufficient. Although it appeared in the indictments, none of the defendants was convicted of conspiracy and it was not even referred to in the judgments, mostly because there was discomfort on the part of European judges and jurists with this unfamiliar subjective approach and its far-reaching consequences.

With the development of the notion of command responsibility, a predominantly objective approach prevailed, most notably in the Tokyo Tribunal’s conviction of General Yamashita for the war crimes committed by his subordinates, due solely to his role as General. As the doctrine was developed and refined, the subjective element received more attention, since the elements were introduced that a commander must have had knowledge or at least should have known of the crimes being committed. However it could still be said that it is the objective approach that prevails, as it has become more important to prove the extent to which an accused commander is able to exercise control over the physical perpetrators who are his or her subordinates. At least with respect to crimes committed within a clear hierarchy of command,
then, the notion of control over the crime is recogniseable as a central element.67

A return to a more subjective approach can be recognised in later developments that appeared at the new ad-hoc tribunals in the 1990s, when the judiciaries were forced to solve the same problem of how to link an individual to a collective crime while it was difficult to prove exactly what had been enacted by whom, or to what extent there was any organisation in the commission of the crimes. In the seminal Tadić decision, mentioned in the introduction to this chapter, the court held Tadić responsible for killings as a crime against humanity, based upon the fact that there had been an agreement — a joint criminal enterprise — between him and others to terrorise a village and destroy property and ‘ethnically cleanse’ the area by scaring away the inhabitants.68 There had been no agreement to kill, and the court could not prove beyond reasonable doubt that Tadić himself had killed anyone, but the killings in question were considered ‘reasonably foreseeable’ in the course of events, and thus Tadić was held liable for these further crimes as if they were his own acts, based upon the original criminal agreement which he had entered into. The similarity with the common law notion of conspiracy and the subjective approach is evident, since the agreement is the axis upon Tadić’s liability for the acts of others turned. The Trial Chamber of the ICTY has admitted the similarity to conspiracy as a domestic law mode of liability.69

The language of Joint Criminal Enterprise (JCE) was taken to infer far-reaching liability for many accused individuals in the case law of the ICTY, which was mirrored in the case law of the ICTR as well. Due to the differences in domestic law approaches, there was controversy about this approach. Criticism about the subjective approach, the lack of distinction between participants, and the far-reaching liability for acts by other participants stemmed mainly from

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68 Tadić, n 3, para 175.
69 The Prosecutor v Radoslav Brdjanin and Momir Talić, Pre-Trial Decision IT-99-35-PT, para. 355.
On the other hand, common law trained lawyers favoured this approach because it allowed a flexible system of including many participants in a shared intention, and fulfilled the same role as conspiracy liability in the fight against organised crime domestically.

The International Criminal Court (ICC) has taken a decidedly different tack from the now well established case law of the ICTY. Even though a derivative form of JCE can be found in the Rome Statute, the ICC has instead favoured the notion of co-perpetration, based upon the contribution towards the fulfillment of the crime, and in the case of leaders within a structural hierarchy, indirect perpetration. Rather than focusing upon the shared intention or agreement, the explicit approach has been to apply the notion of control over the crime, and thereby to distinguish between participants in a collective crime. German theorist Claus Roxin’s theory has been cited explicitly in the relevant decisions. In the ICC’s first judgment, finding Thomas Lubanga guilty of conscripting child soldiers in the conflict in the Democratic Republic of Congo, the Trial Chamber affirmed that there is a normative distinction between the modes of liability in the Rome Statute, and elaborated upon the necessary subjective and objective elements for indirect perpetration.

This normative distinction between participants and the preference for ‘control over the crime’ as the theory according which the distinction is made has created a new controversy. Jurists trained in, or favouring, the civil law tradition have commonly favoured this approach in commentaries on the ICC decisions because it gives a clearer distinction between participants and a more concrete test for liability, arguably appropriate for applying to the leaders of system

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71 Article 25(3)(d) of the Rome Statute.

72 The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges ICC-01/04-01/07 (Katanga Confirmation of Charges) para. 492; The Prosecutor v Thomas Lubanga Dyilo, Decision on the Confirmation of Charges ICC-01/01-01/06-803 (Lubanga Confirmation of Charges) para. 340.

73 Lubanga Trial Judgment, n 1.
crimes who have been described as ‘armchair killers’.74 On the other hand, jurists trained in the
common law tradition have difficulty with departing from a subjective approach, have called it
contrived reasoning, and have criticised the explicit import of German doctrine because it is
selective and arbitrary.75

Notably, in his dissenting opinion, Judge Sir Adrian Fulford, the only common law
trained judge on the bench, asserted that there is no hierarchy to be discovered among the modes
of responsibility in the Rome Statute of the ICC, since a ‘plain text’ reading of article 25(3)
would suggest that there is no distinction between them and they could be applied mutually or
alternatively.76 He further goes on to say that it would only make sense to make such a
distinction if this were reflected in the sentencing, but since article 78 of the Rome Statute makes
no reference to the qualification according to a particular mode of liability, Judge Fulford
maintains that no such reflection can be shown.

Comparative criminal law expert Kai Ambos replied in his analysis of the case that this
ignores the explicit decision of the drafters to abandon a unitarian concept of perpetration, such
as the ad-hoc tribunals had, in favour of a differentiated system.77 Furthermore, for Ambos the
final result is not just about the sentencing, its about expressing blameworthiness for those
persons most responsible, and telling a normative story about what happened on the ground.78 It
should be pointed out that Ambos himself, though a comparativist, is trained in Germany, where
an objective approach prevails.

Once again the divide is evident between a typically subjective approach, grouping all

73 See Gerhard Werle and Boris Berghardt, ‘Indirect Perpetration: A Perfect Fit for International Prosecution of
Armchair Killers? Foreword’ (2011) 9 Journal of International Criminal Justice 85. See also commentaries by
Fletcher and Jens David Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’
(2005) 3 JICJ 539; George P Fletcher, ‘New Court, Old Dogmatiek’ (2011) 9 Journal of International Criminal
Justice 179; H. G. van Der Wilt, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’ (2009)
7(2) Journal of International Criminal Justice 307; H.G. van der Wilt, ‘Joint Criminal Enterprise and Functional
Perpetration’, n 70.
of International Law 165.
75 Judge Sir Adrian Fulford, dissenting opinion Lubanga Trial Judgment, n 1, paras 7 and 8.
77 Ibid.
participants together as equally liable for all acts committed within the collective, and a typically objective approach, creating a normative distinction between participants based on a test of the extent to which an actor has control over the crime. However the question as to which approach is more applicable in ICL, should not be answered with a preference for one domestic criminal law approach or another. In so far as Judge Fulford’s objection to the majority opinion in *Lubanga* was that it followed the German domestic model verbatim, his criticism has merit. It is unclear why one domestic system serves as the instructive source of ICL. Instead we should consider the specific context of mass atrocity crimes and whether ICL deserves to develop its own specific set of modes of liability.

3.4 Why ‘Control over the Act’ is Appropriate in ICL

The comparative discussion in this section demonstrates that different jurisdictions come to conclusions that are sometimes diametrically opposed, depending on the approach of the tradition that carries them. It is submitted that neither approach is superior to the other, but rather that these approaches have developed as a matter of policy response to the problem of collective criminality within differing legal traditions. However, in the process of searching for the most appropriate modes of liability as a matter of policy response in the context of mass atrocity crimes, translating these approaches to the international context may not be as simple as legal transplants between domestic systems. This is because, firstly, ICL is such a nascent system of law, which does not follow predominantly one or another legal tradition. There is therefore no *prima facie* reason to choose either an objective or a subjective approach. To date it would appear that the choice for a subjective approach at the ad-hoc tribunals, and for the objective ‘control over the crime’ approach at the ICC, has been highly influenced by the predominance of one tradition or the other among the participants in the legal processes, such as the indicting lawyers, the judges and academic commentators. But also secondly because system criminality in domestic law jurisdictions may function very differently from the system criminality in the context where violent crimes have become the norm. As one author has put it: ‘the international

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The criminal justice system is assumed to function following mechanisms of an idealized national system that cannot be localized anywhere.81

We must therefore consider the specific context of mass atrocity crimes, and ask ourselves a functionalist comparative question: 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 to a greater extent?’

From this functionalist perspective it would then be possible to develop a set of criteria for the most appropriate modes of liability. Firstly, in order to alleviate criticisms of being based arbitrarily or selectively upon certain domestic traditions, the approach underpinning the selection of modes of liability would have a sufficient doctrinal development that would place it firmly in the criminal law paradigm. Secondly, it would take into account the inherently collective nature of the crimes in question, but at the same time the causal link between the acts of the accused and the crimes in question would be sufficient, avoiding guilt by association. Thirdly, since both distribution of liability and punishment must be justified by some aim according to criminal law theory, it would serve the central aims of ICL. This criterion is quite difficult to clarify, since ICL is held up to serve a vast array of interests and purposes, from reconciliation and furthering peace, to fulfilling victims’ needs for redress, while at the same time ensuring a fair trial for the accused.82 Clearly not all the goals can be served at once, since some of these even come into conflict with each other at times. It would therefore be prudent to reduce these multiple goals to at least one central goal, along the lines of strengthening the public sense of accountability for mass atrocity crimes.83 Finally, it would also fulfill the need to uphold the due process rights of the accused, including the principal of legality, and certainty. Clarity and consistency throughout ICL as to how the modes of liability will function, how they will be interpreted and applied, is desirable from the point of view of the accused, but also from the point of view of the legitimacy of the international criminal justice project as a whole.

81 Tallgren, n 10, 556-7.
83 Damska, ibid.
The first criterion requires that when we look to domestic criminal law doctrines, it is done so with attention to as wide a range of jurisdictions as possible, and a justification of the selected jurisdictions for comparison. These are the basic rules of the game when undertaking comparative legal investigations. This requirement applies whether there is acknowledgment of the fact that a comparative investigation is taking place, or whether the comparison is couched in terms of ascertaining customary law. This same criterion requires a deeper consideration of the doctrine underpinning the modes of liability in the jurisdictions compared. To this extent the ICC could be said to have satisfied this requirement, since even though it was highly selective of the German model, there was at least a consideration of the subjective approach and other alternatives to the ‘control over the crime’ approach.

With respect to the second criterion, Fletcher and Ohlin argue compellingly that a more objective approach is appropriate when ‘all the parties act intentionally and maliciously, and there is therefore no basis for distributing responsibility on the basis of mens rea.’ The dominant or hegemonic party warrants more blame and punishment than the subservient party, particularly in a context where the collective norm has become one of violence. Some have argued that a unitary theory of participation, eradicating any normative distinction between participants based on their contribution or influence over the crime, is desirable precisely because the requisite mens rea for a complicit actor is the same whether they are a physical perpetrator or an indirect perpetrator. Once again, this demonstrates a preference for a subjective approach, which may function well in a domestic context, where criminal activity is deviant to the norm, but in a context of mass atrocity where the norm is the opposite, we must consider the different positions of participants carefully. Those acting as part of the collective as physical perpetrators certainly demonstrate the requisite mens rea, but perhaps their behaviour is less culpable, because it is to some extent understandable or even excusable. Perhaps we cannot expect an individual lower down in a hierarchy of violence to object or refuse to take part, since

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85 The ad-hoc tribunals have often asserted that JCE is grounded in customary law, while in fact undertaking a selective survey of jurisdictions. See Danner and Martinez, n 64; Vera Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Tribunal for the Former Yugoslavia’ (2005) 5 International Criminal Law Review 167; Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction,* (Oxford University Press, Oxford, 2008). This is equally objectionable as following a single domestic model verbatim, as the ICC appears to have done in the Lubanga judgment, see Judge Fulford’s dissent, Lubanga, n 1.
86 Fletcher and Ohlin, n 74.
87 Stewart, n 75.
to do so would most likely be to expose themselves to the atrocity being turned upon them. At the same time, mere reference to hierarchy is not enough. Applying the well developed doctrinal arguments for using ‘control over the crime’, or the overlapping agency theory, and the questions these doctrines raise about who was involved in the collective process of deliberation, leads to the conclusion that distinguishing between participants would be both appropriate and justified. A more subjective approach does not take the deliberative process into account, ignoring the dynamics integral to crimes of mass atrocity. Once again, the notion of overlapping agency helps to distinguish why this is so. The deliberative process is what leads to the formation of agreement among a collective to behave in a particular way. When that behaviour amounts to mass atrocity, it is not enough to lump everyone in the collective together. We tend to respond to such devastating situations with a sense of wanting to know who carries the blame (an objective approach), rather than whether we can attribute the acts fictitiously to all the participants involved (a subjective approach).

The third criterion of fulfilling the goals of ICL is a little more complex, however if we follow the intention of the drafters of the Rome Statute that the ICC must in any case contribute to ending impunity, then it seems uncontroversial to focus on a central goal of strengthening the public sense of accountability for mass atrocity. Historically this has proven to be difficult, especially when the policy has been to capture as many of those involved in the mass crimes as possible. For example at Nuremberg, the intention was to prosecute those at the top, letting a derived liability for those lower down in the echelons ‘trickle down’, allowing repeated use of evidence as they moved down the hierarchy of defendants. However it soon became clear what an impossible task this was. Instead only the leaders of the Nazi regime were prosecuted at Nuremberg, and some domestic military tribunals carried the work further, under Control Council Law No. 10. This same broad intention was the starting point under the mandate of the ICTY to hold ‘all persons who participate in the planning, preparation or execution of serious

89 Werle and Berghardt, n 74, 89.
90 Preamble, Rome Statute of the ICC
91 Woetzel, n 63.
violations of international humanitarian law in the former Yugoslavia’ individually responsible. Again this has proved to be an impossible task, and the policy of the prosecutor shifted over the years to focus on the leaders, even though the doctrine of JCE made no such distinction. The policy of tribunals such as the Extraordinary Criminal Chambers of Cambodia (ECCC) and the ICC has rather been to focus on ‘those most responsible’ for the systematic crimes at hand.

While it may be so that all those involved in such mass atrocity crimes carry guilt for their own actions, when we consider the conceptual shift described above, from guilt to responsibility, what ICL attempts to do is tell a story about the facts and who is responsible for those facts. By distinguishing normatively between participants in these crimes, the shift from individual guilt to individual responsibility can be done in a way appropriate to the grand and scale and horrific nature of crimes that take place only because a willingness has been created in the collective, under influence of certain members of the collective who exercise more control over the deliberative process.

With respect to the fourth criterion named above, that of taking into account the due process rights of the defendant, including the requirement of legality and certainty, opting for a coherent theory of differentiated modes of liability in ICL is also desirable. The unitary approach pursued by the ICTY has caused a great deal of controversy and dissent, due to the fact that JCE became more and more elastic, linking individuals to crimes who were far removed from the facts and from the possibility to influence the crimes, ignoring their actual position on any kind of collective. This leads to ‘guilt by association’, whereby an individual can never predict for which crimes he or she may be prosecuted, and cannot even exercise some kind of influence over the commission of crimes for which he or she may be held liable. Since the desired outcomes of a

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93 Although JCE has been applied at the ECCC, the policy has been to prosecute the top leaders within the Pol Pot regime. See Report of the U.N. Group of Experts for Cambodia, U.N. Doc. A/53/850, S/1999/231 (March 16, 1999), para 110, in which the recommendation was made that ‘the independent prosecutor appointed by the United Nations limit his or her investigations to those persons most responsible for the most serious violations of international human rights law’ (emphasis added).
94 See section 2.2 above.
system of prosecution for mass atrocity crimes are that it is not only effective, but also just, predictability and certainty are necessary aspects to take into consideration.

An approach focusing more on the objective role of a participant, or on the extent to which an individual has control over the deliberative process of the collective and over the execution of the crimes, in the sense of overlapping agency, is more appropriate to the special context of mass atrocity crimes. As Drumbl points out, these crimes on a grander scale are considered to be crimes against the international community of humanity as a whole, committed in the context of violence which is incomparable to even the worst gang, mafia or corporate group crimes in domestic law.\(^96\) It is therefore appropriate to look at these developing areas of ICL as *sui generis*, and the context of these crimes requires a specific set of modes of liability which are not merely taken from one domestic system or another. The reason that a normative distinction should be drawn between participants in these crimes is not because the civil law approach deserves to win out over the common law approach, but because the way in which these crimes are committed, the scale of individuals involved in the collective, and the effect that policy or other power dynamics within such a collective have, all demand it.

### 4 Conclusion: Why does it matter whether a distinction is drawn between leaders and other participants?

Mass atrocity crimes are special in nature not only because of the scale upon which victims, communities and societies are struck by them, but also because they occur in a context where the atrocity has become the norm. Whereas domestic crimes — even gang crimes or organised crime — are punished as deviant from the norm in society, as Drumbl, Fletcher and Tallgren point out, often individuals take part in the horrors of mass atrocity crimes precisely because many others around them do too. The violent behaviour has become the norm in the context of conflict. To expect them to act otherwise would be to expect them to rise above the norm and risk persecution themselves. While this doesn't take away from the wrongfulness of their acts, perhaps their culpability is lessened. The question therefore is who can be held responsible for acts within this culture of violence; is everyone equally culpable? Or are there

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\(^96\) Drumbl, n 10, 540.
specific structures of power which should be taken into account? In other words, how should we distinguish between Tadić, Taylor and Lubanga, given that their roles in the various complex collective deliberations were each quite different?

In answering this question, the modes of liability applied must not be arbitrarily selected from domestic models. Even if we are international lawyers, we still tend to look through the lens of the domestic training we have as our background. It is the job of international criminal lawyers to learn to widen this lens to one of the comparativist who is both self-aware of the internal perspective of the familiar domestic training, and sensitive to the fact that sometimes the best solution in the context of ICL may not fit with that internal perspective. Rather than casting a wide net and not making any distinction between participants in these collective crimes — an approach that is entirely valid in the context of domestic collective crimes — a different normative story needs to be told about the hierarchical relationships leading to the commission of mass atrocity crimes. When comparing domestic modes of liability, therefore, the lens should be focused upon the doctrinal approach underpinning them, and a translation of the most appropriate approach to the international context will lead the final choice of modes of liability. In this respect it has been argued here that the choice of the ICC to concentrate on the ‘control over the crime’ approach was a correct one, even if it can be criticised for blindly following the German model.

There is a risk that focusing on the leaders purely because of their role may lead to selectivity which is offensive to liberal notions that an individual should never be punished as an example, but only for his or her own wrongful deed. However the arguments made here have attempted to show that drawing a normative distinction between participants in mass atrocity crimes is not making a scapegoat of those in leadership roles purely due their position in the collective, but rather that there is sense in paying attention to the deliberative process within a collective and placing more blame on those who can influence the agency of the collective as a whole. In this way the shift from group agency to individual agency is made in accordance with the fact that ICL deals with /emphindividual criminal liability. At the same time, the shift from individual guilt to individual responsibility is made with more attention to the question who can

97 Fletcher, ‘Storrs Lectures’, n 6; Drumbl n 10; Stewart n 75; Tallgren n 10.
affect the actions of the group.

The argument here has been that as soon as the choice has been made to use the mechanism of criminal law, and therefore of individual criminal responsibility rather than collective responsibility, in the case of system criminality, where there are hierarchical relationships of power and differing levels of control over the collective, differentiated modes of liability are the most appropriate.