Translating Guilt: Identifying Leadership Liability for Mass Atrocity

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The truism that crimes of mass atrocity are by definition collective may be one of the greater banes of criminal law lawyers attempting to solve the problem of liability. Mass atrocities do not occur at the hands of one individual, but as part of a repressive system in which these crimes are at best condoned and at worst orchestrated. Nevertheless international criminal law deals with individual criminal responsibility, following the axiom of the Nuremburg trials 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.'[1] Collective crimes are familiar to all domestic criminal law systems, however the context in which mass atrocity takes place is different in some very important ways, and the problem of identifying those who are responsible for what has been achieved by the collective can be more complex. This study focuses on the question of leadership liability, and attempts to untangle the debates on modes of liability in international criminal law (ICL) that have become more and more complex over the last 20 years as international tribunals have sought to solve this question outside of the context of an established domestic criminal law system.

This book is presented in three parts. In **Part I: Laying the Foundations**, the theoretical and methodological background is given. In the introductory **Chapter 1** a brief explanation is given of the fact that at the international tribunals the problem of leadership liability has become concentrated on the question whether to widen the net of liability and treat all those involved in mass atrocities as equally liable, or whether to differentiate between them and apply different modes of liability. There appears to be a policy trend to focus on 'those most responsible', however the question remains *who* is most responsible, and what form of liability should attach. In many situations of mass violence, those with authority over

[1] Chief Prosecutor Robert Jackson's opening statement, Nuremburg, November 21, 1945.

others maintain a deliberate remoteness between themselves and the actual crimes committed. There are often disparate and complex hierarchies and groupings among physical perpetrators, leading to further uncertainty as to liability. Those at the top do not engage in the 'dirty work'; the question is whether they are liable for the fact that they have others do the dirty work for them.

The title of this study 'Translating Guilt' refers to the many layers of translation that take place in the search for the most appropriate modes of liability for mass atrocity. There is a translation from the collective to the individual, in terms of guilt and agency. There is a translation from the notion of collective criminality under circumstances of 'every day' deviant criminal behaviour, to the circumstances of mass atrocity, where deviation from moral behaviour becomes the norm. There is a translation of criminal law terminology from languages including German, French and Spanish to English, and even translation between English-language jurisdictions which have different understandings of terminology such as responsibility, liability, culpability, as well as the various forms of complicity expressed as modes of liability. And there is a translation from the domestic to the international.

In **Chapter 2, 'Putting the Leaders of Mass Atrocity on Trial'**, the central question posed is why the leaders should be held primarily liable for mass atrocity that occurs under their leadership. This represents the first layer of translation, from the collective guilt to individual guilt, and from collective agency to individual agency. It is argued that the liberal foundation of criminal law must be maintained, especially the principle of culpability; that an individual should only be punished for that which she has done, or participated in, and not for the actions of others for which she has no responsibility.

The paradigmatic commitment to individual guilt that forms the very basis of ICL brings with it problems that are unique to the context of mass atrocity. In conflict situations the moral universe has shifted, and ordinary people who would not normally commit acts of violence become capable of heinous acts on a grand scale. Sociological studies demonstrate that mass atrocities take place where certain elite members of society have managed to create regimes of hatred against a targeted group, and to legitimate their leadership by violent means. Often individuals commit mass atrocity under this leadership in conditions where hatred has been indoctrinated in various subtle or explicit ways, and where they have been asked to give up some of their decision-making agency to the collective, but also under threat of their own survival if they refuse to participate, such that both their rational and their moral agency is reduced. In these circumstances those higher up in the hierarchy maintain their agency and remain irreplaceable. The notion of overlapping agency is therefore asserted as a way of identifying which individuals within the collective can be said to be most responsible. The leaders have more deliberative capacity, more influence and control, and therefore more responsibility.

This is where the second layer of translation is important, from the notion of collective criminality under 'normal' circumstances, to the phenomenon of mass atrocity where deviation has become the norm. Individual criminal liability in

any liberal system is predicated on rational and moral agency: an individual is punishable for acting contrary to the law where he is blameworthy for having acted against the norm that dictated he should have done otherwise (or for omitting from doing something where he was expected to do so) and where had the choice and ability to have done otherwise. Where there are exculpatory reasons, he is not punishable. While it is not argued that an individual should be excused for committing acts such as kidnapping, torture, rape, or killing simply because everyone else around him was doing the same, at the same time in the context of mass atrocity the moral universe has been turned upside down. An ideology has been created under which it is expected that individuals will take part in the oppression of a designated group by extreme means, under which rational choice has been reduced, and the moral choice to refuse to take part may become extremely difficult, lest the dissenter become the next target.

This rationale for holding the leaders accountable as 'those most responsible' must then be translated into a system of liability, which is the third layer of translation dealt with in Chapter 2. In order to identify which system of liability is most appropriate for the context of mass atrocity, there are several tensions apparent in ICL. For example the demand for an effective system of ICL, the measure of which depends on which goals are to be served, stands in tension with the desire for a symbolic outcome in terms of delegitimising a violent regime, as well as ensuring the rule of law, and providing a historical record of the atrocities that took place.

Furthermore it is asserted that the requirements of justice and fairness should operate as tempering limits on the desire for an effective and symbolic outcome. In particular the principle of culpability means that modes of liability which extend to 'guilt by association' should be avoided. Collective criminality makes individual criminal liability complex, especially in the context of mass atrocity where it may be difficult to prove who did what to contribute to a specific crime. However the sole fact of intentionally taking part in group violence should not mean that every party in the group becomes responsible for every act committed within the collective.

It is asserted that an over-arching goal can be identified in order to manage the tensions between these numerous aspirations; that of strengthening the public sense of accountability for massive human rights breaches. This is compelling as an overarching goal, since it would satisfy the requirement of fairness and justice by ensuring *accountability* in the form of criminal liability and not just collective blame, as well as being measurable in terms of effectiveness by helping to focus on *who* should be held accountable. This serves as an important guiding principle in the design of liability as a whole.

One way to resolve the tensions between the aspirations of a system of international criminal justice and the requirements of a system of liability is to test them against the aims and functions of punishment. A brief discussion is undertaken of the main theories of punishment familiar to domestic criminal lawyers, such as retribution, prevention and norm expression, with a focus on which of them would apply best to the punishment of mass atrocity. Theories of punishment are

concerned with the moral and legal principles that can guide in the selection of a system of liability, and are therefore helpful in answering the question how to best reflect the collective nature of mass atrocity crimes while also identifying those who are most responsible within the collective.

There are difficulties of translating these theories of punishment from the domestic context, where those breaking the law can be assumed to be acting rationally and as morally independent agents (unless there is exculpatory evidence to the contrary), to the context of mass atrocity, where most individuals committing the crimes are acting under circumstances where both their rational and their moral agency is reduced, and the leaders have maintained more rational and deliberative capacity. After discussing these difficulties and the preferences demonstrated in the rhetoric of international tribunals and commentators, the conclusion is drawn that the aim of norm expression in fact ties together those of retribution and prevention. All three theories point to the effectiveness of focusing on identifying the leaders of mass atrocity as most responsible for the circumstances which lead to the commission of collective crimes.

The final question raised in Chapter 2 is whether, based on a centralised goal and the requirements of fairness and justice, it is possible to simply pick or choose from among domestic modes of liability and transplant them to the international context. The simple answer is yes; not only is it possible, but the process by which ICL is developed already does exactly this, and always has done.

Chapter 3, 'A Comparative Theory of International Criminal Law' develops a descriptive picture of the ways in which ICL are developed, with a particular focus on who the most influential players are as law-makers and what this means for a doctrine of sources. This comes back to the translation of modes of liability from the domestic to the international, which is the fourth layer of translation.

In making this translation there have often been assumptions made about the transferability of domestic notions. As a result confusions have arisen with respect to the terminology surrounding culpability, accomplice and accessory liability, and even the legal meaning of the term 'principal'. Since many domestic systems retain the terminology of 'principal' and 'accessory', without this necessarily denoting a normative differentiation nor a legal effect with respect to the conviction, the translation to the international context has often lacked a functional analysis, and a clear choice for one approach to liability. In the context of mass atrocity, the limits of culpability are important to keep in mind, and the effect of transplanting from one legal system to another must be given more attention.

A formalist or static approach to understanding law, which assumes that there is an answer to every legal problem to be discovered with enough applied reasoning, and which assumes that the doctrine of sources satisfies the question as to where such answers can be found, is insufficient to comprehend the processes at play. Rather a dynamic approach is asserted here, according to which the notions of 'subject' and 'object' of the law, and of formally endowed law-makers, are replaced with some more realist observations. The cast of participants involved in the processes that lead to law creation and application is much larger, and includes not

only States and international organisations, but also individual judges, prosecutors, defence lawyers and scholars, all of whom have a very influential role in ICL.

The role of these participants and the law that is developed by them are mapped throughout the comparative study in Part II by applying a series of mapping tools which are laid out in Chapter 3. These include observations of who the participants are; what their perspectives are, including the domestic legal traditions they bring with them as a lens through which they interpret international law in general and ICL in particular; the situations in which these participants interact, including not only in the international tribunals, but also in venues of diplomatic negotiations and in scholarly debates; the resources drawn upon by these participants in terms of asserting authority; the strategies applied when asserting any notion or rule as part of ICL; and the aggregate outcome, in terms of whether a particular assertion is accepted as law or not.

This dynamic approach to law-making in ICL describes law as a process of decision-making rather than as a body of rules. The process is by definition influenced by which participants have the most influence in various situations and settings, such that in ICL the judges, lawyers and scholars who are cited as authoritative can be said to be more influential as law-makers and law-appliers than are States. Much of the normative criminal law content of ICL is left up to these participants to develop, since the traditional formal sources such as treaties and customary law have little to offer. Because there is nowhere else to turn to, domestic criminal law models become the most important sources for developing ICL. This process of translation from the domestic to the international is described as a patchworking process, and can be seen as a form of comparative law in action. The participants have followed the same patterns observed by comparative scholars with respect to legal transplantations between domestic systems: where there are gaps in the law, participants borrow notions from jurisdictions which are the most accessible and the most authoritative. In ICL this has led to the selection by participants who are asserting a rule or a mode of liability as applicable from the jurisdictions which are most familiar to them, and to the greatest influence coming from the US and, more recently, German doctrine.

Another aspect of this understanding of law as process is that the content of the law as it develops is necessarily an expression of policy. Despite the fact that most lawyers tend to shy away from accepting law as policy, to deny it is to deny the law any social or political consequence. Even according to a more formalist understanding of the law, it cannot be denied that the law is never developed nor applied in a neutral manner. The dynamic understanding applied throughout this enquiry strives to make explicit and visible the policy-oriented aspects of the design and making of law. This allows both explicit scrutiny of the assertions made, and a systematic analysis on a more abstract level as to the content of the law. The law itself is thus described both as process and as policy, or as 'decision making by authorised decision makers when authority and power coincide.' The policy reasons for the development of various systems of liability in different domestic and international contexts are therefore important to take into account in coming to a full understanding of the development of liability in ICL.

Given that the development of ICL is so heavily dependent on domestic criminal law models, and this inevitable translation from the domestic to the international is conceived of as a patchworking process, a full comparative study is undertaken in this enquiry in order to identify the most appropriate modes of leadership liability. **Chapter 4, 'The Requirements of a Comparative Law Method'**, sets out the final foundational tools and requirements for such a comparative enquiry.

A comparative study can aid in the creation and identification of common norms, a common vocabulary, and a truly pluralist or hybrid system of ICL. Without such an approach the process becomes one of unilateral transplantation of dominant systems instead. Not only can a comparative perspective on ICL help to understand the processes, and analyse the concepts being debated at a deeper level, it can also aid in strengthening the very same processes by contributing some methodology that could bolster the predictability and coherence of the processes and the outcomes. International criminal lawyers and scholars must be comparativists in their work, and look beyond that which is familiar to them.

In order to avoid both bias and arbitrariness in the selection of jurisdictions and specific modes of liability for comparison, there must be a methodological rigour applied. The first requirement is a functionalist method, which aims to explain social norms and structures by the ends they serve; the law responds to social human needs, and therefore rules and institutions have the purpose of answering these needs. Similar problems will therefore have similar solutions, even though the form of the rules and institutions may differ. Thus, while modes of liability may have different forms and different names in each compared jurisdiction, they serve a similar purpose, namely the criminal responsibility of individuals for the commission of collective crimes. Rather than looking for modes of responsibility with a certain description or title, such as 'instigating' or 'complicity', instead the search is for modes of responsibility which fulfil a certain function, namely to what extent a person who has a leadership role within an organised group is culpable for the criminal acts committed by other (often lower ranking) members of that group. This is a functional rather than a technical question.

A functional approach therefore also takes into account the policy context within which the compared modes of liability have developed, and fits well with the dynamic conception of law as process and policy. Based on the functional method, and the concern for the contextualisation of systems of liability, a series of criteria are laid out against which selection of the most appropriate modes of liability in ICL can be tested:

i. Does the mode of responsibility reflect the collective nature of the crime?

ii. Does the mode of responsibility allow for identification of the person responsible within the group even when there is no clear hierarchical line?

iii. Could it operate in a different legal tradition (for instance where procedural rules play a more or less determinative role in the application of substantive law)?

iv. How has it been applied judicially, and what kinds of interpretation has been given to it in various social contexts?

v. Are these contexts akin to that of mass atrocity?

The second methodological requirement is to justify the selection of which jurisdictions will be compared in the search for a system of leadership liability applicable to ICL. Any comparative study is by definition selective in that only a restricted number of jurisdictions can be compared. In order to avoid bias (as far as this is possible) or arbitrariness, the selection of jurisdictions must be made explicit and justified. One of the criticisms often levelled at the interpretation of liability at the international tribunals is that the domestic jurisdictions which were cited as authoritative were overly selective and insufficiently representative of different legal traditions. With the patchworking process of ICL in mind, and the application of the functional approach, the criteria for selecting jurisdictions includes the following; domestic jurisdictions which have already been drawn upon by international tribunals; jurisdictions which can be instructive due to the higher level of development on the topic in question; jurisdictions which may be considered representative of certain traditions or trends. A final selection can be made based on language limitations and other limiting reasons.

Based on these criteria, Germany and Argentina have been selected as representative of the civil law tradition, and the USA and Canada have been selected as representative of the common law tradition.

Finally the third methodological requirement according to a functional approach is that of terminology; the points of comparison must be described with a lexicon and vocabulary that represents the function, and which are as neutral as possible. Attention is therefore paid to clarifying the terminology to be used throughout the rest of this enquiry.

In the first place, a distinction is drawn between unitary systems of liability, according to which the liability of every person involved in a crime is entirely independent of any other persons — a plurality of persons amounts to a plurality of offences — and differentiated systems, according to which a distinction is drawn between a principal and a person who is some way assists the principal, variously described as a participant, a secondary participant, an accessory or an accomplice, although the meaning of each of these terms may also differ. A further distinction is drawn between a 'descriptively differentiated' system, sometimes called a functionally unitary system, and a 'normatively differentiated system'. The former maintains the language of differentiation between a principal and an accomplice, but makes no legal or normative distinction. All parties are considered equally liable for a collectively committed offence, regardless of each individual's contribution. The latter makes a legal, normative distinction, and has different requirements for principal participation and accomplice participation. In a normatively differentiated system, an accomplice is considered to be morally less responsible for the final result than a principal, due to the fact that she 'merely' assisted the principle and did not fulfil the requirements of the crime herself.

The notion of accomplice liability is further defined. All those involved in a collective crime are to be referred to as parties to a crime, in order to avoid the confusion as to whether 'accomplice' denotes a normatively secondary form of liability or not. Party liability can be derivative, meaning that the liability of an accomplice is dependent upon the commission of a crime, and the wrongfulness of the act (i.e. it is not justifiable). In this sense, a party is an accessory, since the liability is accessory to, or derivative of, liability of the principle. However in a system where a vicarious theory of liability prevails, it would seem that accomplice liability is only 'accessory' in a very limited way; that is, the crime must have been completed, but the liability of each party is independent of the liability of any other party, and every party is considered to be equally liable as a principal. The term 'accessory' is therefore misleading in these systems.

Attention is also paid to terminology surrounding the literal translation of guilt. The notions of moral and rational agency are important in order to translate guilt as responsibility, as liability and as culpability, and to express these relationships as modes of liability. Guilt is necessarily personal and relational: a person is answerable *for* her own acts, and is answerable *to* someone for them. She is answerable when she is to blame, and she is to blame when she had the ability to weigh up her acts against their consequences both for the potential victim and for herself, and to make a choice. But this answerability, responsibility and capacity for guilt does not yet amount to liability. The relational aspect of guilt is that an individual is answerable for his criminal acts to the victim, but also to society. Criminal liability is the calling of society, represented by the State or by an international tribunal, to the individual to answer for his acts. He is criminally liable when he cannot offer an adequately exculpatory reason for the acts for which he is responsible.

Within the limits of exculpatory reasons, liability can be determined and expressed as different modes. The final distinction is between a system of liability that is either subjective or objective in nature. The subjective approach prevails in the common law tradition, where modes of liability express a functionally unitary system, such that there is no legal difference between a 'principal' and an 'accomplice', and all parties to a crime are considered equally liable. The objective approach prevails in the civil law tradition, where modes of liability express a normative differentiation, such that a principal is considered to carry more moral blame and therefore to be more culpable than an accomplice, who is culpable for assisting in the crime, but not for having committed the crime.

Following this, **Part II: A Comparative Study of Modes of Liability** undertakes to apply the theoretical and methodological tools laid out thus far, in order to come to a deeper and more sophisticated understanding of the development of different domestic systems of liability which have served as models in ICL, and the ways in which these models have been translated to the international plane.

In **Chapter 5, 'Subjectivity Reflected in the Common Law Tradition'**

the first stage of mapping begins by looking at the characteristics of the common law tradition and how these have influenced the development of a particular system of liability.

In this tradition, liability is predicated on a subjective approach, which focuses on the intention or agreement to take part in a criminal enterprise, and leads to a kind of vicarious attribution of the acts of all those in the collective to each individual. The acts of all become the acts of one. With this emphasis on intention there is no concern for distinguishing degrees of liability based on the extent of physical contribution to the act, and thus what results a binary understanding of liability; either a party is liable, due to a shared intention, or he is not. In a domestic context this may satisfy the desire to punish for collective crimes, by capturing all parties to a crime under one form of liability regardless of the difficulty of proving who did what. However in the context of mass atrocity it can easily overreach the limits of moral culpability, and can lead to the punishment of an individual for the crimes of an entire society.

Specific attention is paid to the notion of conspiracy, since this is particular to the common law tradition. In Canada, as in most other jurisdictions following the common law tradition, conspiracy is an inchoate crime, however in the US it has developed uniquely into a mode of liability. It requires only an agreement among parties, and one overt act towards completion of the crime, in order to convict every individual implicated in the agreement. This results in a very far-reaching extended mode of liability that requires little or no evidence of the actual role played by any individual suspect. Conspiracy has been rejected on the international plane both as an inchoate crime and as a mode of liability, yet is displays significant similarities with the mode of liability known as Joint Criminal Enterprise (JCE).

Noteworthy is the fact that a subjective approach has no inherent doctrinal limits, as displayed by the far-reaching notion of conspiratorial liability. Since the emphasis is on the intention or agreement, and not on the degree of contribution to the resulting crime, extended liability can include further crimes committed by other parties, even if these were not originally agreed upon or intended. In order to curb this extended liability, Canada has introduced constitutionally interpreted limits, based on the notion of 'fundamental principles of justice', namely that the morally innocent must be protected. It has been determined in the case law that when it comes to high stigma crimes such as murder and war crimes, a party cannot be held liable for a further crime committed by another party if that was not the original intention or agreement. The US has no such constitutional limits. If a subjective approach is to be applied in ICL, then such limits should be considered carefully, given the high stigma of mass atrocity crimes and the risk of guilt by association.

In **Chapter 6, 'Objectivity Reflected in the Civil Law Tradition'**, it becomes apparent that in the jurisdictions compared the translation from collective to individual guilt, and from collective to individual agency is predicated on an objective approach, whereby culpability is translated as blameworthiness for a wrongful act, and not (only) blame for intentional participation in a plan or agreement. Blameworthiness is measured in degrees, based on the test of causal

contribution. Rather than a vicarious theory of liability attributing all acts of the collective to each individual, instead the theory of liability is based on personal autonomy, and attribution of blame. Depending upon the extent to which an individual had sufficient control over the crime, the measure of blame is determined, resulting in a normatively differentiated system of liability. Principals are more blameworthy, and therefore carry higher degrees of responsibility, than accomplices who assisted the principal. 'Guilt by association' is thus avoided, and the translation from collective guilt to individual guilt rests upon a closer focus on individual agency.

In both Germany and Argentina, the latter having inherited much from the former's design of a criminal law system, the role of scholars has been particularly important in recent history in response to situations of atrocity and how to determine leadership liability. Because public opinion and subsequent policy demanded that the leaders were not held liable as mere accomplices, theories have been developed to accommodate the fact that the leaders exercised control and influence over the physical perpetrators. Principal liability was deemed to be determined by the notion of 'control over the crime', which could include both physical control and exercising control over another. In particular the theory of Claus Roxin gained much acceptance, that control over the crime could also include control exercised over a hierarchical organisation, or *Organisationsherrschaft*, such that the subordinates commit crimes on behalf of the leaders. Of importance is the fact that subordinates have little rational agency to exercise within hierarchical organisations, and are replaceable if they refuse to take part, whereas the leaders have deliberative capacity and control, and are integral rather than replaceable. This reflects the notion of deliberative capacity and overlapping agency asserted in Chapter 2.

Although Roxin's theory had received much support in Germany, it was first applied judicially in Argentina in response to the Dirty War of the 1970s. The leaders of the *Junta* violent regime that had taken over the State were held responsible as principals for thousands of kidnappings, tortures and deaths, due to their control over the hierarchical organisations within which the crimes were perpetrated by their subordinates. This has led to a general trend in many Latin American countries seeking to prosecute the leaders of similar regimes, whose courts have made direct reference to the Argentine case law and to Roxin's theory. Soon after, the German courts followed suit and convicted members of the (East German) National Defence Committee for having handed down a policy leading to multiple murders of East German citizens who were either shot or killed by mine explosions upon attempting to cross the Berlin Wall. There were political and moral pressures to punish those most responsible according to the full extent of their role. A qualification as a mere assistant in the crimes was unsatisfactory, and the notion of *Organisationsherrschaft* was judicially applied.

With respect to liability for crimes of mass atrocity on the international plane, these two systems of liability reflected in the common law and civil law traditions have been influential in different ways and at different times in different tribunals. In **Chapter 7, 'Shifting Trends in International Tribunals'** a historical map

is made which demonstrates this process of patchworking, forming a new body of ICL by piecing together different elements from the domestic systems of liability.

One major conclusion that can be drawn from this map is that the role of the participants in the process is determinative in the selection of which legal tradition and which correlative system of liability is asserted as being applicable in ICL. Where there has been a majority of judges, lawyers and scholars who are influenced by the common law tradition, a system of liability has prevailed which is functionally unitary and which is predicated on a subjective approach. This was the case in the design of the Nuremberg and Tokyo tribunals, and the notions of liability that were included in these Charters. Debates on the content of this approach became apparent among the judges, lawyers and scholars who were influenced by the civil law tradition, and in the end conspiracy and was rejected because it was not universal, and unrecognised by anyone other than the American lawyers as a mode of liability.

Some attention is also given to the Military Tribunals that were established under Control Council Law No. 10, specifically because they were domestic tribunals deciding new questions of ICL with exclusive reference to their own domestic law. The younger ad-hoc tribunals, which have increased in number since the 1990s, have often referred to the decisions of these tribunals as evidence of customary law, however it is argued this is an incorrect designation of their status. The Military Tribunals were applying domestic laws which differed from each other, and they were not doing so with any notion of *opino juris*. The laws they applied and the case law that emerged is almost exclusively representative of the common law tradition and cannot be said to represent international customary law. Rather it is evidence of the importance of domestic case law as a source of ICL.

At the International Criminal Tribunals for Yugoslavia and Rwanda (respectively the ICTY and ICTR) the statutes were modelled closely on the Nuremberg Charter and as such had a functionally unitary approach to liability. In an attempt to extend liability to include crimes committed by other members of a collective, the subjective approach prevailed, in particular with respect to JCE. In its most extended form as JCE III, liability for the unplanned but objectively foreseeable acts of other parties is shared by all according to the same vicarious attribution of all acts to all parties, which underpins a subjective approach. Noteworthy is the prevalence of common law trained lawyers and judges in asserting this subjective approach, and the dissent heard on the bench and in scholarly commentary that hailed for the most part from those trained in the civil law tradition.

Similarly, whereas command responsibility has developed over time from a kind of strict liability, towards a more restrictively defined crime of omission, it has also been interpreted to be based on an attribution of the *acts* of the subordinates to the commander, thus expressing a kind of vicarious liability.

Conversely, where participants who are influenced by the civil law tradition have had the leading role, such as at the International Criminal Court (ICC), there has been a preference for an objective approach to liability and for a normative differentiation between parties to a crime. This objective approach brings with it an attribution of responsibility, rather than imputation of another's acts; a theory

of derived, rather than vicarious liability. It is in this way that co-perpetration and indirect perpetration have been interpreted as principal modes of liability, differentiated from lesser, derivative modes of accessory liability.

At the ICC this objective approach and in particular the interpretation of indirect perpetration 'by means of an organisation' have been drawn directly from German, Spanish and Argentine case law and scholarship, with direct citation of Roxin's theory of *Organisationsherrschaft*, giving explicit preference to the civil law tradition. The dissenting minority voice has been that of participants who prefer the subjective approach, inevitably influenced by the common law lens. The scholarly debates have followed similar lines.

What becomes apparent is that neither approach is inherently superior, but that there is a need to focus on the specific context of mass atrocity in order to identify whether a subjective or an objective approach is more appropriate. Such a functionalist approach has been lacking thus far in the international tribunals, since the decisions have been heavily influenced by the domestic law background of the participants asserting one solution or another. This has led to a certain bias on the part of participants, scholars and authors of *amicus* briefs included, and an arbitrariness in terms of the outcome. The criticism of dissenting judges at the ICC may well be valid, that it is unjustified to simply draw on certain domestic laws and assert them as applicable international law. A defendant may never know what system of liability will apply, since it will depend on the tribunal before which he stands, on the background training of the indicting and defending lawyers, and of the judges on the bench.

Despite the arbitrariness of this patchworking process, it remains inevitable, and the question arises how to harness it such that a system of liability can emerge that reflects the specific nature of mass atrocity crimes, and serves the functions and goals of ICL described in Chapter 2. It is to this question that Part III turns.

Part III: What Can Be Learned From a Comparative Lens gives an overview analysis of the comparative study undertaken in Part II and applies the methodology and criteria laid out in Part I to provide an answer to the question of leadership liability for mass atrocity crimes.

In **Chapter 8, 'Analysing the Processes in Light of the Goals: Which Factors Have Led to the Development of Modes of Liability?'**, a synthesis is made of the chapters in Part II, in order to complete the maps presented there. The specific focus is on the policy and historical factors which have led to the development of different systems of liability, in order both to understand the context giving rise to different theories and approaches, and to help identify which approach would be most appropriate to the specific context of mass atrocity adjudicated by international tribunals.

Of great importance is the social and policy reasons for the prevalence of the subjective approach in the common law tradition and for the objective approach in the civil law tradition. The fact that a jury is typical in the former tradition is one important factor, since liability is decided as a factual matter by lay decision-

makers, who cannot be expected to internalise and consistently apply a complex taxonomy of liability. Thus it is more likely that a more simplified, functionally unitary system should emerge.

The approach to governmental authority is another factor, since in many countries following the common law tradition there is a more horizontal organisation of government and of decision-making in a criminal trial. This may be one explanation for the approach to liability that is also horizontal in nature: any hierarchy in a criminal organisation is irrelevant when it comes to criminal responsibility.

A judge's main concern in the common law tradition is to adjudicate a contest between two versions of the truth presented by the defence and prosecution, and to uphold equality of arms during the trial. The final outcome is thus fair if the procedure is fair, and the label that attaches to a convicted person as having committed the crime even she only assisted another in its commission is less relevant. A subjective approach, with the emphasis on the intention or agreement in the first place, serves this purpose well. In particular, in the first half of the twentieth century, the notion of conspiracy was developed to deal with mafia-type crimes, where it was difficult prove who did what, and to implicate the mafia bosses in the crimes if they had not physically contributed. By emphasising the agreement as the most important element, this problem was solved.

By comparison, in the civil law tradition, typically there are no juries, and judges are endowed with a more active, investigative role, trained as both factual and legal decision-makers. There is therefore more room for a more technical system of liability to emerge, with some guarantee that it will be applied consistently. Indeed, the civil law tradition preferences consistency and coherency of the system over individual resolution of a conflict, and a trial could be said to be more focused on policy implementation and on establishment of as accurate a picture as possible of the truth. Thus, the label that attaches to any individual's conviction for participation in a collective crime is of great importance: if an individual only assisted another in the commission of a crime, but did not himself fulfil the elements of the crime, then it would be incorrect to convict him for having committed that crime as a principal. Correct labelling and historical truth have a more important place in the civil law tradition.

As well, the mode of liability known as indirect perpetration through an organisation was developed specifically in response to situations of atrocity. Roxin was originally inspired by the case of Adolf Eichmann, convicted by the Israeli District Court for his role in the extermination of the Jews in the Second World War, because he found it unsatisfying that it could not be reasoned that Eichmann was a principal rather than an accessory, purely because he had not physically killed anyone. Roxin thus developed his theory of *Organisationsherrschaft*, which was subsequently applied by the Argentine and other Latin American courts, and later by German courts in response to the atrocities that took place under violent domestic regimes. It is a mode of liability aimed specifically at holding leaders liable as principals, normatively differentiated from a person who merely assists a crime and is therefore less morally culpable, even though these leaders have not 'pulled the trigger'. This is exactly the context of mass atrocity faced by international

tribunals, which differs greatly from the gang or mafia-type crimes to which a subjective approach has responded with a theory of equal, vicarious liability.

The two stages of mapping in Part II, that of domestic jurisdictions and of the international tribunals, show the processes by which ICL develops, and as such demonstrates the characterisation of law as both process and as policy.

Given that the role of judges and scholars has become of primary importance in the development and application of ICL norms, these participants need to pay more attention to the comparative work that is taking place when they look to familiar domestic law solutions. While an extensive enquiry such as the one at hand is not a luxury that judges can afford, nor that all scholars can spend time on, at the same time if these participants were to take more effort to make explicit the choices being made, and to justify why they are being made, then this would aid in the predictability and transparency of the process and of the outcomes. It would also aid in bolstering the legitimacy of the outcome: once again, if the judges in the majority at the ICC had justified the reasons they were looking to Roxin's theory and to the case law in Germany and Argentina for authority, drawing parallels to the context of mass atrocity in ICL, many of the reasons for dissent and continued debate would disappear.

Where participants have failed somewhat in the transplantation or patchworking of domestic models of liability to the context of international mass atrocity prosecutions is in the formulation of the question. By beginning the enquiry into collective criminality and leadership liability with the use of terminology such as 'principal', 'accomplice' and 'accessory' liability, a series of mistakes are made which lead to utter confusion and to debates that talk cross purpose. The comparative study in Part II demonstrates that these terms have different connotations and legal meanings in different systems. Thus to pose the question in terms of the search for the 'correct' form of complicity liability applied to certain individuals, is to obfuscate important factors of comparison and reduce the chances of a useful and meaningful answer.

One of the effects of the patchworking process which should be taken into account is the shift in emphasis on domestic law as a source of ICL. Once again a dynamic approach to understanding law can aid in this. A formalist understanding insists on the pedigree of sources; in the first place treaties, customary law, general principles, and only as a subsidiary source can case law and the opinions of scholars be taken into account. However the mapping in Part II has demonstrated that the reverse is true in ICL. Treaties have very little to offer because they tend to provide the institutional framework for ICL and the definition of crimes, but the technical, criminal law nature of questions such as liability and defences have been left up to the judges to decide. These judges have little if any customary law or general principles to turn to, since these questions differ from jurisdiction to jurisdiction, and these differences stand in the way of any general rules emerging, and since courts do not apply notions of liability because they consider it to be an international obligation to do so, but rather because it is a matter of domestic law design. Thus, domestic case law and the opinions of scholars who have become authoritative are the primary sources for ICL, making the patchworking process

truly inevitable.

If we embrace the observations made throughout the comparative part of this study, and accept the patchworking processes by which ICL has always been developed as inherent to the hybrid nature of this body of law, then there are possibilities to improve the processes and the strength of the outcomes. This can be achieved by applying the 'rules of the game' of comparative law methodology.

In **Chapter 9, 'In Defence of a Normatively Differentiated System'**, this methodology is applied and the argument is made that there are reasons why an objective approach, and the resulting normatively differentiated system of liability, are more appropriate for the specific context of ICL. Specific modes of leadership liability can then be identified within such a system, while avoiding the 'clash of legal cultures' that has thus far taken place among international criminal lawyers.

Firstly, as argued in Chapter 2, the requirements of fairness and justice must take priority in designing a system of liability, since the rights of the defendant to a fair trial are imperative, including the principles of legality and culpability. It was asserted in Chapter 2 that the principle of liability does not require the same strict application of *nullum crimen* with respect to modes of liability as it does with respect to the codification of the elements of crimes, due to the necessarily open nature of norms of liability. However the expectation that modes of liability will be clearly articulated and consistently applied still plays a role.

This is one of the reasons the objective approach should be favoured in ICL. The principle of legality, if properly construed, does not lead us to focus on the actor's intent, but rather on the question whether the actor's conduct meets the preannounced definition of a crime. An objectivist orientation is therefore more faithful to the principle of legality. By taking the actual contribution of an individual to the commission of a crime as the test of liability, rather than focusing on the agreement or intention to take part, there is a possibility of identifying those with more influence, who are therefore more blameworthy for the collective outcome. If a leader who has sufficient influence over the collective were to cease driving the collective towards committing crimes of mass atrocity, there is the possibility she could intervene and influence the collective to cease the acts, whereas if someone lower down the hierarchy ceases his participation, others can replace him and the atrocities continue. The objective approach offers tools for distribution of responsibility.

Furthermore the principle of culpability, which has been recognised as a part of ICL, requires that individual autonomy and rational agency should be respected when it comes to criminal liability, and that each individual should be held responsible for her own behaviour, but only to the extent that she could have been expected to do otherwise under the circumstances.

In the domestic contexts where the subjective approach has been favoured, it has helped to solve the problem of gang-type organised crimes and group violence, where it is otherwise difficult to link the leaders to the crimes. However in the context of mass atrocity, the subjective approach means that an individual who is lower down in the hierarchy, and who may have operated more on the periphery, is equally liable as the physical perpetrators and the leaders. The final convictions

for these high stigma crimes therefore do not express the facts accurately, and do not express the different levels of moral culpability properly ascribed to each individual, leading to unfair labelling. Conversely, the objective approach offers tools for delineating responsibility, and attaching an accurate label to a convicted individual for his actual contribution to the crime. The factual, historical recording of the facts is legally distinct, and thus fairer both to defendants and to the victims in terms of expressing the truth.

The narrative, didactic role played by international prosecutions, coupled with the preference for retribution and norm expression as the functions of punishment, all lead to the conclusion that it is more effective and more appropriate to identify leaders of mass atrocity and their responsible role in the crimes, and to delineate the responsibility of those on the periphery. An objective approach fulfils this better than a subjective one.

The functional criteria that were set out in Chapter 4 for identifying modes of leadership liability that would fulfil the requirements, aims and goals of ICL as an effective, symbolic and didactic system are then used to test the various asserted modes of liability in the international tribunals.

The first criterion is that the collective nature of mass atrocity crimes is reflected. It would appear that while a subjective approach may reflect the collectivity, it risks over-reaching the principle of culpability because of the way party liability works with respect to further, unplanned crimes and the weight of responsibility carried by all parties regardless of their actual contribution. In the context of mass atrocity, where the crimes are no longer societally deviant behaviour but rather expected behaviour, it is more difficult for an individual to voluntarily distance herself from the acts of others and thus there are no natural limits for a subjective approach to liability. This is one of the reasons that JCE has been criticised as amounting to guilt by association, and is also one of the reasons conspiracy has been rejected as applicable in ICL. It is not the case with modes of liability such as planning, instigating, ordering, nor the modes of liability necessarily predicated on an objective approach. Such an approach, and the correlative normatively differentiated system of liability, lead to better protection of the limits of culpability, and a more detailed reflection of the different roles in collective crimes.

With respect to the second criterion, whether the mode of responsibility allows for identification of the person responsible within the group even when there is no clear hierarchical line, it would seem that an approach such as JCE would be a satisfactory fit, as would the notions of co-perpetration and perpetration by means of another. The extension of this latter mode of liability to include 'perpetration by means of an organisation' does require a certain hierarchy of control, and thus would not be useful in situations where crimes are committed by diffuse groups, such as the ISIS.

The third criterion, whether the mode of liability could operate in a different legal tradition, is drawn from comparative law scholarship on legal transplants. The procedural advantages of conspiracy, upon which JCE is heavily modelled, play no role in ICL, for instance circumnavigating the hearsay rule, or the ability to intervene preemptively before an attempt at commission has begun. The normatively

differentiated modes of liability, and in particular the notion of perpetration by means of an organisation, do not depend on any procedural context, and can thus be easily transplanted.

With respect to the fourth and fifth criteria, the judicial application of a mode of liability in a domestic context, and whether this context is akin to that of mass atrocity, there should be particular attention paid to the fact that the conspiracy model of liability, upon which JCE is based, was developed in a domestic context quite different from the context of mass atrocity. Other modes of liability such as planning, ordering, soliciting, are more directly related to the context of International Humanitarian Law (IHL), and therefore have a closer identity to the specificity of IHL, and as such the judicial interpretations they have been given are instructive. However these modes of liability do not deontologically satisfy the desire to identify those most responsible according to the weight of their involvement, since they are generally considered to be forms of encouragement, or secondary modes of liability.

Where there are leaders whose role has been indefensible in the creation and enforcement of an ideology and the orchestration of atrocities, their role needs be identified as more blameworthy. This is where co-perpetration, indirect perpetration, and indirect perpetration by means of an organisation come into their own, most especially given the domestic contexts in which they were developed and applied. These are truly akin to the situations to which ICL is responding, which is a factor that deserves serious weight in the search for the most appropriate modes of liability.

In the concluding **Chapter 10**, the question that was posed in the beginning of this enquiry, is repeated: if you had to share the dinner table with one of them, who would you prefer to dine with, the mastermind or the executioner?[2] The underlying assertion of this entire study is that there is something more understandable and more telling of the fallibility of the human spirit in the actions of an executioner who takes part in a collective where heinous acts are not only expected of him, but they have become the norm. And there is something more distasteful, more horrendous, more blameworthy about the 'armchair killer', the leader who is in a position to influence others such that they become her instruments, such that they become capable of atrocities which serve an ideology that the leader wishes served by her subordinates. When she is fully capable of intervening, of using her influence to minimise rather than maximise the atrocities acted out by others at her behest, there is something more disturbing about the evil expressed through her when she does the opposite, than the evil expressed through the subordinates. We are all capable of the kind of evil expressed by those subordinates under the right (or wrong) circumstances. One would hope not all of us are capable of the other kind of evil. This author would therefore choose to dine with the executioner, with the human being who may have done the unforgivable, but not the unthinkable.

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

From the perspective of individual victims and their family members, one could imagine that sitting across the dinner table from the physical perpetrators would be more difficult, because of the proximity of the evil done at the hands of this actor. There is a desire to see the physical perpetrator punished in order to redress the harms done to them. However the claim that there should be a distinction between participants does not deny there is culpability on the part of these physical perpetrators; the wrongfulness of their acts is undeniable, and since they act with the requisite *mens rea*, or fault standards. It does not even deny that these individuals should be punished for their actions. However due to the contextual norm of violence under which they acted, and their reduced rational agency and reduced ability to act otherwise, there is no reason to hold these actors more responsible than the leaders who did not physically commit the atrocities, but who orchestrated them and ensured that others would take such actions. They are at least equally responsible. But there is most certainly a difference between the physical perpetrators and the leaders on the one hand, and those contributing on the periphery of these horrendous acts on the other. The latter are less morally blameworthy, and according to a theory of retribution, deserve to be labelled as such and punished to a lesser degree than the physical and intellectual authors of the crimes. An objective approach leads to a system of normative differentiation between principals and secondary parties, based on degrees of blameworthiness, leading to fair labelling and the desired norm expression.

Modes of liability are necessarily open norms, and have always been subject to judicial interpretation and clarification in the doctrine. Because ICL instruments have not provided enough detail to support such interpretation and clarification, individual participants whose role is that of law application, interpretation and appraisal have had to turn to domestic criminal law notions for help. The task of these participants now is to undertake this process with due attention to the policy considerations behind each model, as well as to the context of mass atrocity, and with justification of the selection of models being drawn upon. In doing so, the translation of guilt can become more consistent. The 'clash of legal cultures' that has been prevalent in the development of modes of liability to date can be minimised, and a more centralised model can emerge in ICL to hold the leaders accountable for their definitive role in humanity's worst expressions of collective evil.