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Excesses of Responsibility: The Limits of Law and the Possibilities of Politics

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The twentieth century saw the unprecedented individualization, legalization, and criminalization of responsibility in international relations. At the start of the century, if any agent was held responsible in the international sphere for harm resulting from conflict or war, it was the state, and states were held politically (rather than legally, for the most part) responsible for their acts by other states. By the end of the century individuals were held legally (often criminally) responsible for such harm, now defined as “war crimes” or “atrocities.”¹ Individuals were increasingly held responsible by international or hybrid tribunals set up under the auspices of the most powerful international institution in the post-1945 system, the UN Security Council, and with significant financial support from the world’s most powerful states, foremost being the United States. Only a few years into the twenty-first century, trials of individuals were under way at an independent International Criminal Court (ICC). Our first reaction when we see news reports of war or civil conflict is frequently to ask which individuals are responsible and how they are to be punished. The drive toward individual accountability can be seen in, for instance, the 2009 report by the Goldstone Commission into alleged war crimes committed in Gaza (which led to subsequent calls for the ICC to take up the

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case), the 2011 report by the Panel of Experts set up by the UN secretary-general to advise on accountability in Sri Lanka, and the swift referral of the situation in Libya to the ICC in February 2011.²

However, this shift of focus from collective-political to individual-criminal responsibility in international relations has not been without problems. While international criminal proceedings today against Radovan Karadžić, Charles Taylor, the alleged architects of the genocide in Cambodia, and so on seem to follow the twentieth-century trend toward holding individuals responsible for directly planning, commissioning, or executing international crimes, close examination of the trials tells a different story. The defendants are in fact being tried for inherently collective actions—that is, they are charged with being part of “joint criminal enterprises.” In addition, there is substantial interest in using existing (but until now rarely utilized) international law on state responsibility to hold states accountable for atrocities. For example, both Bosnia-Herzegovina and Croatia have sought to hold Serbia responsible for genocide at the International Court of Justice (ICJ). This signals that there are what I call “excesses of responsibility” involved in atrocity that legal practices of assigning individual criminal responsibility cannot capture. Attempts to do so via the doctrine of joint criminal enterprise, devised by the Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia (ICTY); the Articles of State Responsibility accepted by the UN General Assembly in 2001; and (though to a lesser extent) the long-standing doctrine of command responsibility are deeply problematic.

The current system of individualized, legalized responsibility is based on two principal assumptions, both of which I seek to challenge:

1. Responsibility for war crimes is principally a characteristic of individuals. In order to end impunity and prevent cycles of violence, these individuals (rather than the states or national, ethnic, or social groups to which they belong) should be held responsible for such crimes. The classic statement of this position, followed by all subsequent international war crimes proceedings, can be found in the International Military Tribunal at Nuremberg Judgment: “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.”³
2. Courts are the most appropriate institutions to adjudicate questions of responsibility and to hold those responsible for harm to account. Other approaches to atrocity (truth commissions, amnesties, and so on) are political in the worst sense—that is, they are tainted by partisanship and power, plus they cannot offer sufficiently robust protection of the innocent or punishment of the guilty. The rhetoric surrounding the establishment of the ICC bears out this preference for criminal prosecution: “In the prospect of an international criminal court lies the promise of universal justice. . . . Only then [when such a court is established] will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”⁴ With the establishment of the ICC “we are witnessing a

great victory for justice and for world order—a turn away from the rule of brute force, and towards the rule of law.”⁵

These assumptions have been widely accepted by those seeking to bring justice to people who have experienced the worst types of conflict.⁶ Counter to this view, I argue that responsibility for war crimes lies not with individual perpetrators alone but also in significant measure with collectives and with those individuals who did not commit crimes but did contribute to harm. I also contend that criminal trials are limited in their ability to respond to atrocity, and propose a reinvigoration of notions of political responsibility that are enforced through such institutions as responsibility and truth commissions, which assign political responsibility and seek to understand the role of collectives, as well as a wider range of individuals, in atrocity.

Justifications for war crimes trials that center on their function to ascribe individual responsibility (a function regarded as the bedrock of international criminal justice) lead to a third mistaken assumption:

3. War crimes trials find individuals guilty for acts that they have directly perpetrated (via carrying out specific offenses or instigating, planning, or organizing them), in keeping with the doctrine of individual responsibility. Press coverage of the trial of Karadžić at the ICTY, for instance, tends to portray him as being tried for the direct perpetration of crimes in the former Yugoslavia, or at least for masterminding them. In fact, the principal charges against him are on the

basis of his “joint criminal enterprise” liability for actions taken by other (mostly collective) actors.⁷ Similar misunderstandings can be seen in coverage of the trials of Slobodan Milošević and Charles Taylor.

The argument below proceeds in four parts. In the first section, I show why responsibility for war crimes cannot be parceled out neatly to the direct perpetrators of harm. The second and third sections show that when notions of collective responsibility do appear in judicial approaches to atrocity, they tend to do so in ways that obscure the actual contributions of actors to harm. The final section explains why we need to extend notions of responsibility beyond the law and to rejuvenate a concept of political responsibility more sensitive to the excesses of responsibility (both individual and collective) involved in atrocity. Philosophy and political theory offer a rich understanding of responsibility that is in danger of being lost through the increased reliance on courts to pronounce on issues of accountability.⁸ I suggest that there is a range of so-called accountability mechanisms, in particular forms of investigative or truth commissions, that are too often viewed as inferior to trials and are rarely used to hold actors to account, despite having great potential to do so. Using a broader range of accountability mechanisms *as* accountability mechanisms (that is, using these mechanisms primarily to hold actors to account and institute processes of atonement, rather than just to provide an account of past conflict) could substantially ameliorate the problems associated with using trials to process all forms of responsibility.

Excesses of Responsibility

It is a founding principle of international criminal law (ICL) that responsibility for war crimes rests with individuals.⁹ The principle is embedded in the statutes of all the international and hybrid criminal tribunals (hereafter “tribunals”) and of the ICC, as well as in countless indictments and judgments. It is seen as particularly valuable to hold individuals responsible for atrocity because doing so supposedly breaks cycles of violence by isolating guilt to a few key perpetrators rather than entire groups. As Antonio Cassese, first president of the ICTY, explains:

How can we prevent someone from instinctively hating a whole ethnic group, and thus leaving a spark of hatred to reignite the whole conflict if the particular member of that group who has allegedly wrought havoc upon him or her is not brought to book? Collective responsibility must be replaced by individual responsibility.¹⁰

The way that domestic societies and the international community attempt to achieve this individualized responsibility for atrocity is increasingly through international criminal law, with a steady and significant rise in prosecutions for human rights crimes observed since 1980.¹¹ But for all the benefits associated with a systematic international legal response to war crimes—which include a reduction in impunity and some (disputed) effects in deterring future crime—there are significant problems when courts attempt to adjudicate on individual responsibility for atrocities, as they struggle to parse out the contributions of numerous actors to crimes that are often inherently collective.¹² These problems, and the need to focus on relatively small numbers of perpetrators for reasons of court capacity, have led to a reliance by international courts on notions of collective agency and responsibility. This should in principle have brought about more accurate

allocations of responsibility, due to the collective nature of atrocity crimes, but in practice the requirement that courts maintain the vocabulary of individual responsibility has led to awkward and inadequate judgments. Some individuals are held responsible for more than there is good evidence for (in particular when they are found liable as members of joint criminal enterprises) and some escape judgment entirely.

Assigning responsibility for atrocity is extremely complicated given the layers of culpability involved. If I attack my Canadian neighbor in order to steal his car in peacetime, and in the process kill him, I am guilty of murder and deemed responsible for his death (though I may seek to mitigate my punishment by claiming diminished capacity, childhood abuse, and the like). But if I attack and kill my Canadian neighbor in order to steal his car in the context of a political program to cleanse the United States of Canadians, so that in part I am attacking him because he is Canadian and/or with the knowledge that I will probably get away with attacking him because he is Canadian, I am still entirely responsible for his death in a strict sense, but there are a wide range of other actors implicated, too: the political leaders who formulated the anti-Canadian policy; political functionaries who instituted the policy; groups within the community that fostered or allowed an atmosphere of hatred for Canadians to develop; groups or individuals who could have fought against these policies and the ethnic hatred they caused, or who could have protected my neighbor (including, where relevant, such organizations as the UN, international corporations, and nongovernmental organizations), but did nothing. Even when I appear to have acted alone to attack my neighbor, a significant number of other actors are involved, such that there is an excess of

responsibility that cannot be discharged by holding me solely responsible for murder. And to complicate matters further, many war crimes are committed not just by individuals acting in a context for which others hold responsibility but by collectives, such as gangs, mobs, or more formal organizations—for example, armed units. The appeals judgment in the first case before the ICTY describes the problem faced by international courts:

Most of the time [international] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act . . . the participation and contribution of the other members of the group is often vital in facilitating [it]. It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.¹³

There is much to query here about whether the moral gravity of participation is lessened, and particularly whether it is different, when an individual acts within a group. But the description of why war crimes perpetration is more complicated than many other criminal acts is compelling. The situation gets more complicated still when we acknowledge that, while acts of atrocity such as rape, mutilation, and murder are usually committed by rank-and-file members of armed groups, the people most responsible for creating, encouraging, and maintaining the overall contexts in which these atrocities took place are usually political leaders. We may want to hold the individual rapists responsible (ideally,

criminally liable) for their actions, but it is political leaders (Milošević, Taylor, Omar al-Bashir, and the like) who we are most interested in prosecuting, even if they never physically participated in particular acts of atrocity. And while little is said about them in ICL, the individuals and groups who foster or allow an atmosphere of hatred to develop and who stand by while atrocity is perpetrated should, it is argued, also bear some responsibility for acts that take place in their midst. Mark Drumbl expresses this well:

Violence becomes normalised when neighbours avert their gaze, draw the blinds, and excitedly move into a suddenly available apartment. This broad public participation, despite its catalytic role, is overlooked by criminal law, thereby perpetrating a myth and a deception. The myth is that a handful of people are responsible for endemic levels of violence. The deception . . . involves hiding the myriad political, economic, historical, and colonial factors that create conditions precedent for violence.¹⁴

There are, therefore, excesses of responsibility involved in all war crimes. Even if every direct perpetrator was caught and prosecuted, we would not be satisfied that all responsibility had been correctly allocated, because the architects of the atrocity, along with those who had stood by and allowed the violence to happen, could have escaped censure. Responsibility is not a zero sum game; in most situations of atrocity, no single perpetrator (or even small group of perpetrators) can be considered to be completely responsible. Instead, atrocity is characterized by “numerous people harm[ing] others with differing degrees of acquiescence and direction from a large bureaucratic class.”¹⁵

Individuals act within complex contexts to which many others contribute. The

foundational assumption of ICL—that responsibility for atrocity is principally a characteristic of individuals—is, therefore, deeply problematic.

Because tribunals have found this assumption impossible to maintain, they do not hold individuals accountable *as* individuals much of the time. In fact, the majority of defendants before the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chamber of the Courts of Cambodia have been, or are being, tried not for rapes, murders, or acts of torture or ethnic cleansing that they themselves carried out, but for crimes carried out by others.¹⁶ Courts have developed three principal doctrines for holding individuals accountable for the acts of others or for collective actions, and (though much more rarely) for holding collectives accountable for collective or individual actions:

1. Attributing criminal responsibility for the outcomes of individual actions of subordinates to commanders through the doctrine of “command responsibility,” for which the Japanese general Tomoyuki Yamashita was executed after World War II and under which U.S. Captain Ernest Medina was prosecuted (but controversially acquitted) following the My Lai massacre during the Vietnam War.
2. Attributing criminal responsibility for the outcomes of collective actions to individuals (usually people who hold official positions or political power) who were involved in the overall scheme of which atrocities were a part, but who

might not have intended the outcomes in question and might not have played any part in the direct perpetration of the crimes. This was seen first in the charges of conspiracy and membership of criminal organizations at Nuremberg, and the idea has been developed much further through the doctrine of joint criminal enterprise.

3. Attributing noncriminal responsibility for collective actions, such as genocide, to states, through the doctrine of state responsibility, as Bosnia-Herzegovina tried to do when asking the ICJ to rule on whether Serbia was responsible for genocide during the 1992–1995 war.

Criminal Liability via Command Responsibility and Joint Criminal Enterprise

Article 25 of the Rome Statute that established the ICC states that a person shall be responsible for a crime if she is involved in that crime at almost any level, regardless of whether other persons are responsible for the same crime. Under the statute, a person can be responsible for a crime committed with or through another person; a crime she attempted, ordered, solicited, induced, facilitated, directly and publicly incited (in respect of genocide); or in any other way intentionally contributed to (Article 25 (3)). She can also be responsible (whether or not she is a military commander) for acts committed by any subordinates who were or should have been under her effective command and control (Article 28), or if she contributes to a crime by a group acting with a common purpose (Article 25).

Command responsibility is long established in international law. Indeed, there is reference to military commanders being responsible for the behavior of their subordinates in Sun Tzu's *Art of War* from 500 BC.¹⁷ Reference to command responsibility appears in the 1907 Hague Conventions and the 1949 Geneva Conventions, and the doctrine was developed in important ways during the Yamashita trial at the Tokyo Tribunal in 1945. General Yamashita, the commanding officer of the Japanese army in the Philippines, was found guilty of having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities."¹⁸ The doctrine was codified into international law in the 1977 Additional Protocol I to the Geneva Conventions.

Jurisprudence is now settled that command responsibility applies not just to military commanders but also to political leaders and other civilian superiors in positions of de jure authority or de facto control over the direct perpetrator.¹⁹ This is a less controversial doctrine than joint criminal enterprise, as criminal liability requires both knowledge (in most circumstances) and culpable inaction on behalf of the commander: the commander must have known, or had reason to know, that the crime was about to be or had been committed, and must have failed to take necessary and reasonable measures to prevent the crime(s) or to punish the perpetrator(s).²⁰ Despite controversy over the expansive position tribunals have taken regarding what it means for commanders "to know or have reason to know" that their subordinates were about to or had committed a crime, and despite some misgivings about the appropriateness of ICL as a vehicle for holding negligent superiors to account (because to do so stigmatizes the commander in the same

way as the perpetrator), the doctrine of command responsibility is a broadly accepted means of allocating some of the excess of responsibility involved in atrocity.²¹

It is worth noting explicitly, however, how awkwardly this doctrine fits with the idea of individual criminal responsibility. No intent is required for command responsibility to be proven, and no direct evidence need link the alleged perpetrator to the crime. Instead, command responsibility “allows conviction and punishment based [not on the gathering of direct evidence but] on a philosophical construct” that assumes that “certain roles come with built-in accountability for the actions of others, whether or not the individual who holds the role was aware of these actions.”²² In addition, international prosecutors have found it hard to establish that those accused of bearing command responsibility for the actions of others actually did play the role assumed—that is, that they had the requisite control over their subordinates. This has left commentators concerned that prosecuting under the doctrine is too difficult, with Mark Osiel noting that as of 2008 only one person had been convicted by the ICTY solely on the basis of command responsibility.²³

The other doctrine devised by tribunals to make individuals criminally liable for the acts of others, joint criminal enterprise (JCE), is the subject of greater contestation. JCE is the mode of liability alleged in cases where a command hierarchy cannot be established, but there is nevertheless a desire to hold responsible as direct perpetrators certain individuals who did not carry out, aid, and abet, or otherwise directly perpetrate the atrocity in question. Charges of conspiracy and membership of criminal organizations were

available to the Nuremberg Tribunal to enable convictions of leaders who were not implicated in crimes, but the tribunal did not rely upon them. Defendants at Nuremberg were “found guilty on the basis of their willful and purposive criminal conduct” rather than imputed liability, with their own actions establishing their culpability beyond doubt.²⁴ Such an approach was rejected by the 1990s tribunals, leading to the development of the doctrine of JCE.

Under JCE, a defendant is found guilty of crimes committed by others as if they had themselves committed the crime, despite the fact that they may not have participated in, or even known about, the crime in question. The doctrine was invented during the Duško Tadić case, the first case heard by the ICTY. The Trial Chamber at the ICTY originally acquitted Tadić of a crime against humanity for the killing of five men in the Bosnian village of Jaskici, because although Tadić had been at the scene of the crime, there was no evidence that he had taken part in the murders. The Appeals Chamber overturned this judgment on the basis that Tadić had gone to Jaskici, along with the eventual murderers, with the intention of ethnically cleansing the village. Murder, the Appeals Chamber judged, was a “natural and foreseeable” consequence of effecting the common criminal plan for which Tadić and his men had traveled to Jaskici.²⁵ The court justified its decision to convict Tadić with the following statement:

All those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated . . . must be brought to justice. If this is so, it is fair to conclude that the Statute [of the ICTY] does not confine itself to providing for jurisdiction over those persons who plan, instigate,

order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute . . . does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable.²⁶

Various aspects of this statement deserve careful scrutiny: employing the ideological weight of the concept of atrocity to justify extending the statute substantially beyond its original wording; the assumption that anything not expressly excluded by the statute is therefore included; and the ascription of criminal liability rather than just responsibility. For the purposes of this discussion, the most important aspect of the judgment is the justification used for the development of JCE. The judgment states that the ICTY has jurisdiction over those persons directly connected to a crime, but also for everyone in a group that can be deemed to have a common criminal purpose. I argue below that JCE is less a necessary corrective to the doctrine of individual responsibility and more a catchall concept, which contradicts the normal requirements of criminal law that defendants have committed a crime (*actus reus*) with intention or at least knowledge of that crime (*mens rea*). Rather than making prosecution too hard, as the doctrine of command responsibility might be argued to do, JCE makes prosecution too easy. As one observer has pointed out, JCE seems to allow courts to “just convict everyone.”²⁷

There are three types of JCE: JCE I (Basic JCE), in which all participants in the common design possess the same intent to commit a crime and one or more of them actually perpetrates the crime; JCE II (Systemic JCE), in which the requisite *mens rea* comprises knowledge of the nature of a criminal system and intent to further the common design of ill-treatment; and JCE III (Extended JCE), which involves holding someone responsible as a principal (rather than an accessory) for crimes committed by other members of a group of which they were part. All the prosecution needs to show to establish liability under JCE III is: (a) the intention to take part in a JCE and to further the criminal purposes of that enterprise (for instance, the forcible expulsion of civilians from occupied territory); and (b) that the crimes committed by other members of the group (which were not the object of the JCE but were additional to it) were natural and foreseeable consequences (though not necessarily *foreseen* consequences) of the JCE.²⁸

JCE I deals effectively with small-scale group or mob violence carried out over a short time period in which all participants share the same intent (for instance, to gain information by torturing a group of civilians or to loot a town) and all contribute to carrying out the criminal plan. JCE II is for the most part a reliable way to hold responsible the commanders and functionaries who organize and run concentration camps—those who know of serious abuses and willingly participate in the functioning of the institution, but who may not themselves kill or abuse those imprisoned in the camps. In both cases, those convicted via JCE can be reasonably said to have known about, and often directly intended, the crimes in question, as well as taken some bureaucratic part in their perpetration.

However, it is JCE III that has been a “magic bullet” for prosecutors at the tribunals, as no evidence is required of the direct participation of the accused in any single crime.²⁹ Also, the group involved in the JCE III need not be organized in a military, political, or administrative structure; the common plan for commission of a crime under the statute does not need to have been previously formulated—it can “materialize extemporaneously”; and the accused does not need to have participated in furthering the criminal purpose of the group—she just needs to have *intended* to do so.³⁰ The common purpose of such groups has been expanded in recent trials to striking proportions. For instance, Radovan Karadžić has been indicted at the ICTY on the basis of his participation, from October 1991 until November 30, 1995, in a JCE that had as its objective the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb–claimed territory in Bosnia-Herzegovina through such crimes as genocide, persecution, extermination, murder, deportation, and inhumane acts (forcible transfer). The Office of the Prosecutor (OTP) has charged that Karadžić *either* shared the intent for the commission of the crimes with other members of the JCE *or* shared an objective, including at least the crimes of deportation and inhumane acts, but should be held responsible on the basis that it was *foreseeable* that the other crimes listed *might* be perpetrated by one or more members of the JCE. The (thousands of) members of the JCE are listed as eleven named individuals, plus: members of the Bosnian Serb leadership; members of the Bosnian Serb Democratic Party and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions; commanders, assistant commanders, senior officers,

and chiefs of units of the Serbian Ministry of Internal Affairs, the Yugoslav People's Army, the Yugoslav Army, the army of the Serbian Republic of Bosnia-Herzegovina, the Bosnian Serb Ministry of Internal Affairs, and the Bosnian Serb Territorial Defense at the republic, regional, municipal, and local level; and leaders of Serbian and Bosnian Serb paramilitary forces and volunteer units.³¹

To find Karadžić criminally liable equivalent to a principal perpetrator for all foreseeable crimes—including genocide—committed over a four-year period by the actors listed above seems off the mark insofar as it would not identify his actual contribution to these crimes, assuming there is one. Indeed, such indictments only fuel arguments that the ICTY is anti-Serbian, working to reinvigorate partisan support for the likes of Karadžić and Milošević.³² Overall, the doctrine of JCE has been expanded so far beyond the normal requirements of criminal liability (*mens rea*, *actus reus*, and the principle of *nullem crimen sine lege*, which forbids courts from finding defendants guilty of acts that were not crimes at the time they were committed) that it is almost unrecognizable as law. As such, it is liable to misapplication due to the complexity of the jurisprudence, as in the case of Augustine Gbao at the Special Court for Sierra Leone. Gbao was convicted, in the words of a dissenting judge, of crimes that “he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend.”³³ The Rome Statute seeks to rein in the jurisprudence of the tribunals, but its provisions for “co-perpetration” are yet to be concretized in trial decisions and could potentially be almost as expansive of those of JCE.³⁴ The reality of collective criminality sits uneasily alongside the doctrine of individual responsibility,

which sees responsibility not as shared but as residing within multiple separate individuals.

Legal Accountability via State Responsibility

The doctrines of command responsibility and joint criminal enterprise each administer excesses of responsibility by assigning multiple legal responsibilities for the same crime, but only, and with difficulty, to individual perpetrators. While the predominant assumption in the contemporary system is that responsibility is a property of individuals, there is also a route within international law to hold collectives, in the form of states, legally responsible (but not criminally liable) as collectives. Traditionally, there have been few ways in which states could be held responsible by actors other than their own populations. This has changed recently both with the development of the responsibility to protect doctrine (which does not yet have a secure international legal status) and with the completion of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the “Articles”). The Articles were adopted by the International Law Commission and commended to governments by the General Assembly in 2001, three years after the Rome Statute—establishing an ICC founded on individual responsibility—was agreed.³⁵

The Articles codify the conditions under which states can be held responsible for “internationally wrongful acts” (IWAs) by external agents, such as the International Court of Justice. An IWA can be a breach of treaty-based bilateral or multilateral

obligations, or a serious breach of an obligation arising under a peremptory norm of general international law (that is, a norm that is “accepted and recognized by the international community . . . as a norm from which no derogation is permitted”).³⁶ If found responsible for an IWA, the responsible state is under an obligation to make full reparation for the injury caused, which could include restitution (reestablishing the situation that existed before the wrongful act), compensation (for the damage caused by the act, including any financially assessable damage), and satisfaction (which may consist in an acknowledgment of the breach, an expression of regret, a formal apology, or another appropriate modality). Missing from the Articles is a conception of state criminality, as the International Law Commission tried but failed, in the face of significant pressure from states, to establish that states could have criminal intent.

This notion of state accountability sits awkwardly alongside the doctrine of individual responsibility, to say the least. Gerry Simpson argues that the Articles bear significant resemblance to the Versailles settlement of World War I, which the doctrine of individual responsibility was supposed to supersede.³⁷ There are provisions in the Articles to avoid states from being crippled by reparations, but nevertheless the impulses behind both the Articles and the Treaty of Versailles remain the same: to hold states responsible, as states, in a meaningful way. Given that the docket of the ICJ is busier than ever, there is reason to think that the doctrine of state responsibility will increase in salience in the future. But while it is undoubtedly progressive that the Articles recognize that agents other than individuals may bear responsibility for atrocity, their early application suggests they may not solve the problems of excess responsibility as described above.

Similar to joint criminal enterprise, the implications of state responsibility are mixed, and the effects of the Articles have been weak, as illustrated by the first case in which the ICJ applied the Articles in their final form. In 2007 the ICJ found Serbia guilty of failing to prevent the genocide of 8,000 Bosnian Muslims at Srebrenica in 1995 and failing to punish the alleged perpetrators or surrender them to the ICTY.³⁸ The judgment marked the first time that the court had ruled on state responsibility for genocide and, despite the scope offered by the Articles, the court issued a relatively irresolute ruling. Bosnia alleged that Serbia's support for the ethnic cleansing of Muslims from Bosnian territory amounted to genocide. The court ruled (13–2) that Serbia had not committed genocide but found (12–3) that Serbia had violated the obligation to prevent genocide, as derived from the Genocide Convention, insofar as it had continued to support the Bosnian Serb military and political leadership despite being aware that genocide could result from its actions. Much of the court's decision making turned on the issue of *intention*, in particular the extent to which the “special intent” required for genocide could be observed in the actions of Serbia and the Bosnian Serbs. It concluded that most of the crimes committed during the 1992–1995 war were “acts of genocide,” but not genocide per se, as it had not been proven that those planning and carrying out the acts (Srebrenica apart) had intended to destroy Bosnian Muslims as a group. Even where special intent was found in connection with Srebrenica, the ICJ ruled that Serbia was not responsible for genocide as, it was argued, while Belgrade had provided assistance and support to the direct perpetrators, those perpetrators were not under the “effective control” of Belgrade, nor was it proven that the aid and assistance offered by Belgrade to Republika Srpska

came at a time when Serbian authorities were clearly aware that genocide was about to take place or was under way.³⁹

These rulings proved highly controversial, offering, according to some observers, a “posthumous acquittal” to Slobodan Milošević on charges of genocide.⁴⁰ More broadly, they offered tacit support to moves to shield the Serbian state from responsibility and to see a limited number of individuals blamed for past war crimes, and did little to challenge the ideologies that underpinned Serbian policies in the 1990s.⁴¹ Rather than providing a valuable supplement to the doctrine of individual responsibility, they seemed to yield to it. They also offered little tangible justice to Bosnians. Bosnia had requested substantial reparations from Serbia, but the court decided that financial compensation for the failure to prevent genocide was not justified, and deemed the most appropriate form of satisfaction to be a declaration that Serbia had failed to comply with the obligation to prevent genocide. Boris Tadić, the president of Serbia, acknowledged the ruling of the court, and the Serbian Parliament passed a resolution in March 2010 condemning the Srebrenica massacre. However, the resolution did not acknowledge the massacre as genocide, did not admit Serbian complicity in it, and did not represent a significant majority view. The resolution passed by just two votes.

Although the ICJ ruling forced some level of accountability in Serbia, the response of, and to, the court was far inferior to the scale of the crimes. The court’s narrow ruling was not altogether surprising, given how reluctant the ICJ has been in the past to venture into the territory of politics or to render decisions that are likely to cause controversy, and

there is little sign that this will change.⁴² While more cases concerning state responsibility might be heard at the ICJ, the Articles are unlikely to be used by the court to build a robust regime of collective accountability. More generally, it is unclear how holding collective actors legally responsible can sit coherently alongside the individualized responsibility sought in international criminal law. In February 2006 courts in the Hague were simultaneously hearing cases in which Slobodan Milošević was being held individually responsible (as part of a JCE) for genocide in the former Yugoslavia, while Serbia was being held responsible as a state for the same crime.⁴³ Since then, Bosnian Serbs Ljubisa Beara and Vujadin Popovic have been found guilty of the genocide at Srebrenica (by way of JCE, though acting under the orders of Karadžić), and Karadžić is on trial for the same crime (via a JCE in which neither Beara nor Popovic are named).

From Legal to Political Responsibility

The argument in the previous sections has questioned common assumptions about international criminal law and outlined how, despite its being founded on the principle of individual responsibility, most criminal cases at the international level hold *individuals* legally responsible for *collective* criminality. However, most individuals and collectives who contribute to atrocity (those who stoke hatred, the bystanders, the collaborators, and so on) are outside the jurisdiction of courts. And when collectives are held legally responsible as collectives (for instance, at the ICJ), the results, so far at least, are underwhelming. In short, using courts as the sole vehicles by which to hold actors to

account leads both to confused principles and confused practices, which in turn leave excesses of responsibility unallocated.

The confusions arise, I contend, because of a second form of excess: an excess use of law, in particular courts and trials, as the means by which to adjudicate questions of responsibility.⁴⁴ There is little doubt that trials have some positive effects. Hunjoon Kim and Kathryn Sikkink, for example, find that “human rights prosecutions (including international criminal trials) have a strong and statistically significant impact on decreasing the level of repression.”⁴⁵ Trials for atrocity crimes are also argued to have important retributive and expressive functions.⁴⁶ Certainly, accountability of some kind is to be preferred to impunity of any kind. But the juridification of conflict and the focus of courts on a few prominent individuals both elides how those individuals were responsible for collective crimes and also threatens our ability to make sophisticated judgments about collaborators or bystanders. Those actors whose behavior is not easily characterized as innocent or criminally guilty, yet who are central to atrocity—that is, those who (alone or collectively) enabled or failed to prevent atrocity—are rarely prosecuted. These actors should be held to account alongside planners, instigators, and perpetrators both for reasons of justice and also to deter future violence:

If average citizens believed they might be much worse off if they followed the exhortations of conflict entrepreneurs, then fewer would follow, and some might even discredit these entrepreneurs early enough in the game to preclude them from gaining momentum . . . [yet] since passive acquiescence rarely—if ever—is

implicated in a system based exclusively on individualized criminal justice, it is unclear how this system can deter this fundamental prerequisite to mass atrocity.⁴⁷

International criminal and public law have important roles to play in bringing offenders to justice, but the trend toward charging individuals with participation in large-scale JCEs cannot compensate for the inability of courts to fully allocate responsibility for atrocity.⁴⁸ Furthermore, courts are not the optimal forums in which to determine the institutional and societal reforms required to prevent similar violence in the future. In order to hold to account a greater number of actors in the most appropriate ways, and thereby reduce excesses of responsibility, a broader conception of responsibility is required, one that reaches beyond criminal or legal responsibility and is able to process collective alongside individual accountability.

Perhaps the best-known advocate of distinguishing between criminal guilt and other forms of responsibility, and in particular elucidating a concept of political responsibility, is Karl Jaspers. After World War II, Jaspers called on Germans to recognize their responsibility in four ways: criminal guilt (guilt adjudicated through criminal law); political guilt (which requires the guilty to “bear the consequences of the deeds of the state whose power governs me and under whose order I live,” but does not involve individual blame or liability); moral guilt (guilt for the things I have done); and metaphysical guilt (which comes about because “there exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge”).⁴⁹ Iris

Marion Young draws similar distinctions based on the work of Hannah Arendt: “(1) those guilty of crimes; (2) those not guilty, but who bear responsibility because they participated in the society and provided the guilty agents with at least passive support that undergirds their power; (3) those who took action to distance themselves from the wrongs, either by forms of withdrawal or efforts at preventing some of them; (4) those who publicly opposed or resisted the wrongful actions.”⁵⁰ Young notes that the second and fourth of these definitions concern political responsibility (with the first and third describing legal and moral responsibility). She adds to Arendt’s (and, implicitly, Jaspers’s) conception a requirement that those who bear political responsibility, like those who bear guilt, do so because of actions they have or have not taken, alone or as members of groups, rather than because of their nationality or ethnicity.

Jaspers, Arendt, and Young recognized the need for a notion of political responsibility that is separate from and complementary to legal responsibility. The notion of political responsibility is particularly important here because the destruction of the polis is a known contributing factor to mass violence: “the deformations visited on the body politic, the low-level humiliations endured by those marked as different, the cruelties of a monstrous economic order and the sometimes subtle violations visited on language” create the conditions of possibility for atrocity.⁵¹ But what form of institution could determine such responsibility? There already exists in the field of transitional justice an array of accountability mechanisms, all of which have the potential to supplement courts in establishing the political responsibility of individuals and groups for past violence. However, these mechanisms are too often used to account for the past or to provide an

account, rather than to hold to account. This can be seen in the practices of, and discourse around, the most prominent accountability mechanism beside courts: nonjudicial commissions of enquiry, such as truth commissions.

The International Center for Transitional Justice states that “some 40 official truth commissions have been created to *provide an account* of past abuses”⁵² (italics added). Yet keeping a record of the past has not been the only rationale for establishing such commissions: the pioneering National Commission on the Disappeared (CONADEP) was set up in Argentina in 1983 to work alongside courts in achieving accountability, and the early Latin American truth commissions did have goals that included establishing accountability.⁵³ Since then, truth commissions have increasingly become decoupled from prosecution processes, and their role in adjudicating accountability has become minimal.⁵⁴ Amnesty International does not even mention accountability when setting out the goals of truth commissions: “truth commissions should 1) clarify as far as possible the facts about past human rights violations; 2) provide the evidence they gather to continuing and new investigations and criminal judicial proceedings; 3) formulate effective recommendations for providing full reparations to all the victims and their families.”⁵⁵ Similar arguments can be made for other nonjudicial mechanisms; for instance, the terms of reference for the UK Chilcot Inquiry over the Iraq conflict are: “to establish, as accurately as possible, what happened and to identify the lessons that can be learned” rather than to establish accountability.⁵⁶

It is perhaps not surprising, therefore, that many observers and practitioners exhibit a “prosecution preference,” with nonjudicial mechanisms seen as second-best. As Miriam Aukerman has argued: “While participants in [debates about transitional justice] disagree as to when trials are possible in practice, they generally share a basic assumption: prosecuting perpetrators of injustice is the optimal method for dealing with past atrocities.”⁵⁷ Yet if accountability is to be extended beyond those who are criminally guilty, or if accountability is to be sought at all in situations where criminal trials are for some reason not possible, other mechanisms are needed to adjudicate it. The most promising route is an enhanced form of truth commissions, labeled here responsibility and truth commissions (RTCs). Recent research bears this out: hybrid systems (that is, combinations of trials, amnesties, and commissions) have been shown to be more effective than any single mechanism in deterring human rights abuses, and truth commissions are judged to be most successful when they have the resources and support needed to establish accountability as well as truth (for instance, powers of subpoena and search and seizure, and to name perpetrators and make mandatory recommendations).⁵⁸ Such commissions should have the authority to hold to account not just individuals but groups: political, military, media, and private sector actors, international organizations, and any others who could be said to bear some significant responsibility for the enabling conditions of atrocity. Attempts have been made in past commissions to consider the responsibility of groups, but the focus tends to fall back onto individuals—with unfortunate results. Susie Linfield notes that, despite plans for the South African Truth and Reconciliation Commission to investigate institutional responsibility for apartheid:

By focusing on human-rights violations . . . the [Truth and Reconciliation Commission] neglected the more banal evils that sustained apartheid—the myriad ways in which everyday life itself was an insult to, indeed a negation of, human rights and human dignity. The hearings may, paradoxically, have thus enabled a majority of whites—who, after all, were not criminals or sadists themselves, merely beneficiaries of a criminal, sadistic system—to wall themselves off from responsibility.⁵⁹

RTCs should, therefore, resist the trend toward individualizing responsibility in favor of assessing accountability across diverse actors—something courts are unable to do. RTCs would adjudicate accountability in ways different from and complementary to courts, in particular by offering opportunities for reflection, atonement, and the repair of the polis. Young sees the outcome of political responsibility as consisting in “watching [our social] institutions, monitoring their effects to make sure they are not grossly harmful, and maintaining organized public space where such watching and monitoring can occur and citizens can speak publicly and support one another in their efforts to prevent suffering.”⁶⁰ These are goals appropriate to commissions, but not to courts.

Responsibility in RTCs would not be established beyond reasonable doubt (though it would be investigated thoroughly), nor would it be punished through imprisonment. Accountability would be achieved through the naming of offenders (under carefully defined conditions) to generate condemnation of their acts, and such measures (recommended by the commission for implementation by political bodies) as the removal of certain persons from office, the restructuring or destruction of public or private

institutions that facilitated atrocity, sanctions, reparations programs, and acts of atonement.⁶¹ Atonement, or the restoration of the moral worth of the individual or group via “a willed, purposive effort to travel the distance between the wrong committed and the parties, both perpetrator and victim, who have been affected, morally diminished, by it,” is not achieved through trials, which individualize guilt in the few and exonerate the many.⁶² Rather, it is achieved through public processes in which those who did not defend the polis must work to rebuild it, while those who stood by and watched atrocity, and those who privately opposed aggressive regimes but did not publically act, must reckon with themselves. Such processes of atonement as reparation, apology, memorialization and the transformation of legal and political systems, are rarely, if ever, mandated by courts, but they are appropriate as responses to actors who bear *political* accountability.

RTCs would not “solve” problems of responsibility on their own. Indeed, it should be recognized each time that accountability mechanisms are sought that no mechanism or combination of measures will ever put right the wrongs done through violence. RTCs would face the same challenges as truth commissions, often amplified because of their enhanced powers and mandates. Enforcement of RTC findings would be challenging in the face of recalcitrant regimes, political pressure may lead to some individuals and groups escaping censure, and many actors are likely to try and evade responsibility. The enforcement record of truth commissions is generally poor, and the willingness of international institutions to push national authorities toward implementation of commission findings seems to have weakened, despite the fact that such external pressure

seems to help commissions to focus on accountability as well as truth.⁶³ Compromises may have to be made between goals of accountability and of stability, and RTCs will have to make pragmatic as well as principled decisions about aspects of their functioning: whether to grant amnesty from criminal prosecution in return for testimony, how hard to press states and other powerful actors for information, whether to publish recommendations that could be incendiary, and so on.

Perhaps the most critical (and difficult) issue to be resolved is how RTCs could work alongside trials to provide a complementary system of accountability without either threatening the work of the other. There are important examples of truth commissions that have complemented judicial mechanisms: in Argentina and Chad, facts established by truth commissions were later used to build prosecutions, and the truth commission in Guatemala spurred efforts toward trials.⁶⁴ There is a need, however, for more work on the conditions under which the two can be most effective. The strong powers of subpoena and search and seizure that commissions would need may clash with courts' powers if investigating the same situations, and courts will likely want access to any self-incriminating or confidential evidence that commissions might hold. Research findings on the likely effects of the ICC on truth commissions are inconclusive at present, though significant steps have been made toward identifying frameworks for coordination (around confidential information sharing, conditional amnesties, and mitigation of sentence for participating in commissions) that could further the goals of each institution.⁶⁵

Despite these issues, RTCs would be an important (re)-addition to the contemporary architecture of accountability. The starting assumptions of the current system, that responsibility for atrocity is individual and can, for the most part, be captured under criminal law, have led to collective responsibility being assigned in ad hoc and often confused ways. They have also led to notions of political responsibility being sidelined in favor of legal responsibility. Recognizing that responsibility for atrocity is fundamentally collective as well as individual, and political as well as legal, necessitates innovative institutional responses. Tasking bodies other than courts to determine some significant aspects of the responsibility for war crimes would reduce excesses of responsibility, and lessen the reliance by courts on such doctrines as joint criminal enterprise to sanction those actors who are implicated politically but not, perhaps, criminally in atrocity.

Conclusion

The legalization and individualization of responsibility have brought some real benefits; they have challenged sovereign immunity and engendered a debate about what it is acceptable for states and statespeople to do to their citizens. But the current regime is inherently conflicted due to the excesses of responsibility involved in atrocity.

International criminal law cannot take adequate account of these excesses, as its purpose is to find individual guilt for inherently collective crimes. And when it appears that law can take account of excess—for instance, through such doctrines as joint criminal enterprise—it seems to do so only via compromising its fundamental principles. At the same time, an excessive reliance on law downplays the political dimensions of atrocity

and the culpability of a wide range of individual and collective actors in allowing political space to be closed down and oppression to begin.

In response to the inherent limits of law, I have suggested a rejuvenation of the idea of political responsibility, and a new approach to the kind of investigative or truth commissions that are often described as accountability mechanisms but rarely seem to function as such. I have argued that we should support not just trials as responses to atrocity but also mandate such mechanisms as responsibility and truth commissions to establish political responsibility. In doing so, they would require large numbers of culpable (but not necessarily legally guilty) actors to take responsibility for their actions and inactions, atone for harm they have contributed to, and rebuild their political space. Such a system would generate its own problems, and some excesses would undoubtedly remain. Nevertheless, using RTCs alongside trials would be superior to using international law alone to allocate responsibility as—through recognizing both individual and collective actors and both legal and political responsibility—these commissions would reduce excesses of responsibility and move societies closer to achieving justice after violence.

NOTES

¹ The term “war crimes,” which I use interchangeably with “atrocity” in the text, is commonly used to describe the four categories of crime prosecuted by the ICC: genocide, crimes against humanity, war crimes, and aggression. In fact, war crimes as defined in the Rome Statute are more limited and specific as offenses than the other crimes listed, and are consequently somewhat less problematic when it comes to ascribing individual responsibility for their perpetration, and the argument thus applies more fully to genocide, crimes against humanity, and aggression.

² See www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf and Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter show that international and domestic trials concerning serious human rights violations have “made a strong and steady increase from the handful of cases in the early 1970s” (*Transitional Justice in Balance* [Washington, D.C.: United States Institute of Peace Press, 2010], p. 99).

³ *France et al. v. Goering et al.* (1946), 22 IMT 203, p. 466.

⁴ Kofi Annan, “Statement of Secretary-General Kofi Annan to the International Bar Association in New York,” June 11, 1997.

⁵ Kofi Annan, “Address to the Preparatory Commission for the ICC in New York,” April 19, 2002; www.unis.unvienna.org/unis/pressrels/2002/13003.html.

⁶ Leslie Vinjamuri, “Deterrence, Democracy, and the Pursuit of International Justice,” *Ethics & International Affairs* 24, no. 2 (2010), p. 198.

⁷ See, e.g., Ian Traynor, “Radovan Karadzic Delivers ‘Dissident’ View of Bosnian War,” *Guardian*, March 1, 2010; www.guardian.co.uk/world/2010/mar/01/radovan-karadzic-dissident-bosnian-war; “Radovan Karadzic,” *New York Times*, March 1, 2010; www.nytimes.com/info/radovan-karadzic/?scp=1-spot&sq=karadzic&st=cse; and David Charter, “Radovan Karadzic Defends ‘Just and Holy’ War against Muslims,” *Times of London*, March 2, 2010; www.timesonline.co.uk/tol/news/world/europe/article7045059.ece.

⁸ I alternate “responsibility” and “accountability” to avoid excessive repetition. There are fine distinctions between the terms, but I use both here to indicate the processes by which those agents involved in particular outcomes are identified and made to answer for their contributory actions or inactions.

⁹ For more detailed discussion of the individualization and legalization of responsibility, see Kirsten Ainley, “Individual Agency and Responsibility for Atrocity,” in Renee Jeffery, ed., *Confronting Evil in International Relations* (Basingstoke, U.K.: Palgrave Macmillan, 2008), pp. 37–60; Gary J. Bass, *Stay the Hand of Vengeance* (Princeton, N.J.: Princeton University Press, 2000); Mark Drumbl, “Pluralizing International Criminal Justice,” *Michigan Law Review* 103 (2005), p. 128; George Fletcher, “The Storrs Lectures: Liberals and Romantics at War,” *Yale Law Journal* 111, pp. 1538–39; Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964); and Gerry Simpson, *Law, War & Crime* (Cambridge: Polity Press, 2007).

¹⁰ Address of Antonio Cassese, President of the ICTY, to the UN General Assembly, November 14, 1994.

¹¹ Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54 (2010), p. 949.

¹² Human Rights Watch, “Selling Justice Short,” July 7, 2009, makes a strong case for the benefits of postconflict justice mechanisms.

¹³ *Prosecutor v. Dusko Tadic*, ICTY (Appeals Chamber), judgment of July 15, 1999, para. 191. Domestic criminal jurisdictions, of course, also confront the complications of collective responsibility. Cases concerning corporate criminal liability are common in many domestic systems, and there has been a marked increase in corporate crime law (for instance, the 2007 U.K. Corporate Manslaughter and Corporate Homicide Act). Inspiration for the doctrine of JCE can be found not just in the criminal organizations

charge at Nuremberg but also in the 1970 Racketeer Influenced and Corrupt Organizations Act in the United States, which was designed to assist in prosecutions of members of the mafia and others involved in organized crime. There is a rich literature on corporate criminal liability in domestic systems; see, e.g., William Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago: University of Chicago Press, 2006); James Gobert and Ana-Maria Pascal, eds., *European Developments in Corporate Criminal Liability* (Abingdon, U.K.: Routledge, 2011); and Mark Pieth and Radha Ivory, eds., *Corporate Criminal Liability: Emergence, Convergence, and Risk* (New York: Springer, 2011).

¹⁴ Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), p. 172. There is considerable debate within the literature on conflict and atrocity as to whether violence in general—and atrocity in particular—can be explained at a purely individual (and, implicitly, rational) level. My argument here is that responsibility for this violence is collective, in part because of the mass nature of atrocity crimes. These crimes involve a large number of actors who play different roles in the larger group or system that inspires, encourages, and coordinates crimes. State structures are particularly important in facilitating atrocity to be committed at sufficient scale to qualify as a crime against humanity. See Virginia Held, “Group Responsibility for Ethnic Conflict,” *Journal of Ethics* 6 (2002), pp. 157–78; David J. Keen, *Complex Emergencies* (Cambridge: Polity Press, 2008); and Anthony F. Lang, “Crime and Punishment: Holding States Accountable,” *Ethics & International Affairs* 21, no. 2 (2007), pp. 239–57.

¹⁵ Nir Eisikovits, “Transitional Justice,” *Stanford Encyclopaedia of Philosophy* (2009); plato.stanford.edu/entries/justice-transitional/.

¹⁶ Shane Darcy, “Imputed Criminal Liability and the Goals of International Justice,” *Leiden Journal of International Law* 20 (2007), p. 380.

¹⁷ Noted in William H. Parks, “Command Responsibility for War Crimes,” *Military Law Review* 62 (1973), pp. 130–38.

¹⁸ Trial of General Tomoyuki Yamashita, US Military Commission, 1945, Case No. 21, IV Law Reports of Trials of War Criminals, pp. 3–4.

¹⁹ Bakone Justice Moloto, “Command Responsibility in International Criminal Tribunals,” *Berkeley Journal of International Law Publicist* 3, no. 1 (2009), pp. 12–25.

²⁰ *Ibid.* See also *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, July 29, 2004, para. 217, and *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, March 24, 2000.

²¹ Darcy, “Imputed Criminal Liability”; and John Laughland, “Conspiracy, Joint Criminal Enterprise, and Command Responsibility in International Criminal Law” (Lecture to the International Law Defence Conference, The Hague, November 14, 2009); www.heritagepirdefense.org/papers/John_laughland_Conspiracy_joint_criminal_enterprise_and_command_responsibility.pdf.

²² Eisikovits, “Transitional Justice,” p. 13.

²³ Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009), p. 48. Osiel argues for a significant extension of the doctrine of command, or superior, responsibility to encompass the control that superiors can exert through their position in organizations and informal networks as well as in formal chains of command (Osiel, *Making Sense of Mass Atrocity*, chap. 6).

²⁴ Darcy, “Imputed Criminal Liability,” p. 399.

²⁵ *Prosecutor v. Dusko Tadic*, para. 204.

²⁶ *Ibid.*, para. 190. See Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *Journal of International Criminal Justice* 5 (2007), pp. 109–33, for a rebuttal of the charge of judicial creativity in the Tadić appeal.

²⁷ John Laughland, *Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice* (London: Pluto Press, 2006), chap. 6.

²⁸ Definitions paraphrased from *Prosecutor v. Dusko Tadic*, para. 220.

²⁹ William Schabas, “*Mens Rea* and the ICTY,” *New England School of Law Journal* 37 (2002–03), p. 1032.

³⁰ Definitions paraphrased from *Prosecutor v. Dusko Tadic*, para. 227. See also Laughland, “Conspiracy,” fn. 17.

³¹ Karadžić case, 3rd Amended Indictment, February 27, 2009; www.icty.org/x/cases/karadzic/ind/en/090227.pdf. In addition to these charges, the OTP is also seeking to prove Karadžić’s criminal liability for planning, instigating, ordering, and/or aiding and abetting the crimes charged and to establish his command responsibility for the same crimes.

³² On Serbian views of the ICTY, see Kevin Sullivan and Peter Finn, “Karadžić Case Offers Court a Chance to Repair Its Image,” *Washington Post*, July 24, 2008; www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072300557.html.

³³ Opinion of Justice Shireen Avis Fisher, Judgment, *Sesay, Kallon and Gbao* (SCSL-04-15-1-1321), Appeals Chamber, October 26, 2009. See also Wayne Jordash and Penelope Van Tuyl, “Failure to Carry the Burden of Proof,” *Journal of International Criminal Justice* 8 (2010), pp. 591–613; and Jennifer Easterday, “Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone,” *Berkeley Journal of International Law Publicist* 3 (2009), pp. 36–46. In a rebuke to the ICTY, the ECCC has held that JCE III did not exist in customary international law in 1975 to 1979, so cannot be used to establish liability in the Khmer Rouge genocide trials.

³⁴ Co-perpetration is based on the idea that co-perpetrators share *control* over a crime, and requires both that each co-perpetrator played an *essential part* in the common plan (such that each had the power to “frustrate the commission of the crime by not performing their tasks”), and that each were *aware* that they had such control. Much will turn on the definitions of “essential,” “control,” and “awareness,” but at least some form of *mens rea* and *actus reus* requirements appear in the doctrine. *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, paras. 347, 332, 344 ii, and 345. See Jens David Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,” *Journal of International Criminal Justice* 5 (2007), pp. 69–90, for a critique of co-perpetration.

³⁵ UN General Assembly Resolution 56/83 (December 12, 2001).

³⁶ Vienna Convention on the Law of Treaties, 1969, art. 53, United Nations Treaty Series, vol. 1155, p. 331.

³⁷ Simpson, *Law, War & Crime*, chap. 3, documents the ongoing tensions between state, collective, and individual responsibility in international law.

³⁸ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)”; www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=4.

³⁹ The ICJ rejected the ICTY’s standard of “overall control” (used in the *Tadic* Appeal Decision) to characterize the relationship between Belgrade and the Bosnian Serb armed forces and militias, in favor of its own, more stringent, standard of “effective control” derived in its 1986 *Nicaragua* decision. See Dermot Groome, “Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?” *Fordham International Law Journal* 31 (2008), pp. 911–89; and Mark Gibney, “Genocide and State Responsibility,” *Human Rights Law Review* 7 (2007), pp. 760–73, for detailed analyses of the case.

⁴⁰ Ruth Wedgwood, “Bad Day for International Justice,” *New York Times*, March 8, 2007; www.nytimes.com/2007/03/08/opinion/08iht-edwedge.4844290.html?_r=1.

⁴¹ Jelena Subotic, “Expanding the Scope of Post-Conflict Justice,” *Journal of Peace Research* 48 (2011), p. 162.

⁴² The ICJ advisory opinion on Kosovo’s Declaration of Independence, delivered in July 2010, illustrated well the court’s reluctance to venture into difficult areas. It ruled that the declaration was not a violation of international law, but gave no indication as to whether Kosovo is now to be regarded as a state, or whether other states are in breach of international law by recognizing Kosovo’s independence.

⁴³ Simpson, *Law, War & Crime*, p. 66.

⁴⁴ Eric Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009), describes this kind of excess as “legalism” (the “view that law and institutions can keep order and solve policy disputes,” p. 21) or, at the international level, “global legalism” (“an excessive faith in the efficacy of international law,” p. xii).

⁴⁵ Kim & Sikkink, “Explaining the Deterrence Effect,” p. 951.

⁴⁶ Drumbl, *Atrocity, Punishment and International Law*, chap. 6, examines the retributive, deterrent, and expressive functions of international trials, but concludes that such trials fail to fulfill any of these functions adequately.

⁴⁷ Drumbl, “Pluralizing International Criminal Justice,” p. 128.

⁴⁸ Osiel, *Making Sense of Mass Atrocity*, is more optimistic about the possibilities of reforming international criminal law to better deal with collective responsibility; see footnote 23.

⁴⁹ Karl Jaspers, *The Question of German Guilt* (New York: Fordham University Press, 2000 [1947]), pp. 25–26.

⁵⁰ Iris Marion Young, “Guilt versus Responsibility: A Reading and Partial Critique of Hannah Arendt” (paper prepared for the American Political Science Association, Washington, D.C., September 2005); research.allacademic.com/meta/p_mla_apa_research_citation/0/3/9/9/9/p39990_index.html. It is worth noting that while actors external to the state, such as the UN, foreign states, multinational corporations operating in a state but headquartered elsewhere, and so on, don’t have an obvious place in Jaspers’s schema, they could be captured under Young’s second category.

⁵¹ Gerry Simpson, “War Crimes Trials, Solemnity and the Problem of Evil” (unpublished paper, 2010).

⁵² See ictj.org/our-work/transitional-justice-issues/truth-and-memory.

⁵³ Popkin and Roht-Arriaza found early truth commissions have four main goals: “to creat[e] an authoritative record of what happened; provid[e] a platform for the victims to tell their stories and obtain some form of redress; recommend . . . legislative, structural or other changes to avoid repetition of past abuses; and establish . . . who was responsible and provid[e] a measure of accountability for the perpetrators.” Margaret L. Popkin and Naomi Roht-Arriaza, “Truth as Justice: Investigatory Commissions in Latin America,” *Law & Social Inquiry* 20, no. 1 (1995), p. 80.

⁵⁴ No Peace without Justice, “Closing the Gap: The Role of Non-Judicial Mechanisms in Addressing Impunity,” 2010, chap. V.

⁵⁵ See www.amnesty.org/en/international-justice/issues/truth-commissions.

⁵⁶ Chilcot Terms of Reference, www.iraqinquiry.org.uk/about.aspx.

⁵⁷ Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime,” *Harvard Human Rights Journal* 15 (2002), p. 40. See also Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100 (1991), pp. 2537–48.

⁵⁸ Olsen, Payne, and Reiter, *Transitional Justice in Balance*; Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32 (2010), pp. 980–1007; and Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2011), pp. 285–86. International inquiries or international independent investigations may also be appropriate if the state involved is unwilling to establish robust domestic mechanisms, or in order to assess the accountability of external actors. Domestic mechanisms are the focus here because political responsibility is best established using more local political processes.

⁵⁹ Susie Linfield, “Trading Truth for Justice?: Reflections on South Africa’s Truth and Reconciliation Commission,” *Boston Review* (Summer 2000).

⁶⁰ Young, “Guilt versus Responsibility,” p. 16.

⁶¹ Osiel, *Making Sense of Mass Atrocity*, chap. 10, sets out an innovative proposal to impose collective financial sanctions on the officer corps of militaries, to incentivize militaries who are in positions in the future to prevent atrocity to do so.

⁶² M. A. L. Oshana, “Moral Taint,” *Metaphilosophy* 37 (2006), p. 370.

⁶³ Hayner, *Unspeakable Truths*, pp. 31, 193; Popkin and Roht-Arriaza, “Truth as Justice,” p. 114.

⁶⁴ Reed Brody, “Justice: The First Casualty of Truth?” *The Nation*, April 30, 2001.

⁶⁵ Alison Bisset, “Rethinking the Powers of Truth Commissions in Light of the ICC Statute,” *Journal of International Criminal Justice* 7 (2009), pp. 963–82; Declan Roche, “Truth Commission Amnesties and the International Criminal Court,” *British Journal of Criminology* 45 (2005), pp. 565–81; and Christopher D. Totten, “The International Criminal Court and Truth Commissions,” *Northwestern Journal of Human Rights* 7 (2009), pp. 1–33.