

SYSTEM CRIMINALITY AND INTERNATIONAL RESPONSIBILITY: BACK TO CANONICAL QUESTIONS

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INTRODUCTION

More than seventy years after the Nuremberg Trials and the Tokyo Trials, international criminal law today has certainly walked down many roads — International Criminal Tribunal for the former Yugoslavia [hereinafter *ICTY*], International Criminal Tribunal for Rwanda [hereinafter *ICTR*], International Criminal Court [hereinafter *ICC*], Special Court for Sierra Leone [hereinafter *SCSL*], Extraordinary Chambers in the Courts of Cambodia [hereinafter *ECCC*], Special Tribunal for Lebanon [hereinafter *STL*], as well as the worldwide embracement of international criminal law at national level and those domestic trails. Nevertheless, standing at the turning point with the seemingly insoluble debates over, *inter alia*, immunity, jurisdiction, complementarity, legitimacy in front of the once universally celebrated ICC, through the critiques regarding its situations/cases like Darfur, Afghanistan, Iraq, Rohingya, Bemba; today's international criminal law has obviously not gone far enough to triumph over its challenges. These challenges originate precisely from those canonical questions at its time of birth.¹

¹ By making this argument, the author acknowledges that she skips one significant point in the logic chain, which is, those canonical questions are prerequisite to solve other questions, or, at least, necessary to better understand the dilemma where stand other questions. For instance, figuring out the nature of international crimes and how international criminal law fits in international legal system is at best capable of solving the problem of immunity and jurisdiction, or at least helpful to better understand it. The former is also critical to answer the question of the legitimacy of the ICC and the rationale of its principle of complementarity, be it a realistic compromise or reasonable structure fluently fits in the regime. It is in that sense argues the

Those canonical questions were, and still are: What is the nature of international criminal law as of mixed blood of public international law and criminal law? How does international criminal law fit in the international legal system? Why are the crime of genocide, crimes against humanity, war crimes and the crime of aggression international crimes but not others? Is it necessary to secure criminal liability before an international criminal court/tribunal instead of a domestic one? Where does the legitimacy of the individual criminal liability come from? Is individual criminal liability sufficient as the remedy for mass atrocities? What is the correlation between the individual liability and the collective responsibility?

This Article tries to answer these questions in three parts. First, the international crimes are both conceptually and empirically system criminality. They are not great evil that accidentally breaks out in a temporally organized way, but are mass atrocities brought forward by hierarchical and bureaucratic groups in a strategically organized way. Driven by, *inter alia*, totalitarianism, fanaticism, and extremism, the individuals are deeply trapped and struggle within the system, under the upside-down moral environment where right becomes wrong and wrong becomes right. Through the process of dehumanization, individuals (in particular the followers) gradually lose their independent will and judgement and begin to regard the crimes as routine life under the collective will.

Second, considering the systematic nature of international crimes and the purpose of criminal punishment, there should be a dual regime for both state responsibility and individual criminal liability. For *mens rea*, international crimes are driven by both the liberal will of the individual and the collective will. In respect to *actus reus*, international crimes are committed both by individual perpetrators and also through the orders of hierarchical and bureaucratic groups. On the one hand, individuals (followers) can be utilized as tools for group policy, while on the other hand, organization can be used as machine for individual (leaders) desire. According to the justification of punishment (culpability) and purpose of punishment (retribution, deterrence, rehabilitation and incapacitation), neither individual nor group shall be used as scapegoat for the other. Fortunately, both the Rome Statute and

author that the dysfunction of international criminal law in response to the current critiques and challenges clearly exposes the lack of consensus, or at least, the lack of strong consensus, on those canonical questions. Of course, clear elaboration of this point would call for another article.

the Draft Articles on State Responsibility reserve the capacity to embrace the dual regime of responsibility.

Third, the collective nature of international crimes not only determines the allocation of state responsibility and individual liability, but also examines and justifies the modes of individual criminal liability. Historically, there was a fundamental mismatch between international crimes and the modes of individual liability. From conspiracy to joint criminal enterprise [hereinafter *JCE*], individualism and liberalism govern the understanding of international crimes, thus individual is the presumption, starting point, and destination. *JCE* treats all individuals equally, looks into the horizontal linking relations among individuals only, and leads to vicarious liability. On the contrary, control theory, from the perspective of collectivism, seeks the internal relationship vertically and can work together with *JCE* to rightfully balance between the dimensions of individualism and collectivism of international crimes. Furthermore, command responsibility substantiates the abstract collective entities by attributing the underlying wrongdoings to the commander who fails to function as a qualified “guarantor” and thus works as separate responsibility for omission. Lastly, both the international crimes and the collective entities vary in the level of collectivism and individualism. Accordingly, how to choose or combine the modes of liability shall be decided on a case-by-case basis.

Even if the readers do not find a completely creative and original thesis being proposed, the sheer consolidation and re-emphasis of what has already been there ever since the time of Hannah Arendt, since Judge B.V.A. Röling, and since George Fletcher, is significant. The author firmly believes that by re-answering the canonical questions that are probably fading in the library, strong consensus of the legitimacy, ends and means of international criminal law could be reached. And this is particularly vital when facing the current challenges to the shaking building of international criminal law. From our paths backward we shall find the right path forward.

I. THE COLLECTIVE NATURE OF INTERNATIONAL CRIMES

The fact that international criminal law is based on both public international law (which normally subjects states to its jurisdiction) and criminal law (which deems individual liability as its “second nature”²)

² See H. VAN DER WILT, *HET KWAAD IN FUNCTIE* (2011).

has historically triggered debates between international law lawyers and criminal law lawyers on the fundamental issues such as source, legality, elements of crimes, modes of liability.³ The reason behind that discordance is the *antinomy*⁴ between individualism from the side of criminal law and collectivism from the side of international law. Such *antinomy* has also shaped the development of philosophy, political theory and jurisprudence throughout history.⁵

Dating back to the Nuremberg Trials, it was notably established that, “[c]rimes 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.”⁶ The Nuremberg norm was then followed by, *inter alia*, the ICTY, the ICTR and the ICC.⁷ Nevertheless, it has often been omitted that Article VI of the Charter of the International Military Tribunal [hereinafter *IMT Charter*] starts with the requirement that the offenders shall act “in the interests of the European Axis countries.”⁸

Indeed, the creation of international criminal law means that individuals can no longer hide behind states and enjoy impunity for the most severe atrocities. However, that creation does not mean that collective factors play no role in international crimes as well as the corresponding responsibility. Notwithstanding the great sum of literature on collectivism in political theory,⁹ jurisprudence,¹⁰ and psychology,¹¹

³ See, e.g., George P. Fletcher & Jens D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 540 (2005).

⁴ *Antinomy* means the equally rational but contradictory results of applying two laws. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (John M. D. Meiklejohn trans., Barnes & Noble Publishing 2004) (1781). See also SADIQ J. AL-AZM, *THE ORIGINS OF KANT’S ARGUMENT IN THE ANTINOMIES* (1972); Michelle Grier, *The Logic of Illusion and the Antinomies*, in *A COMPANION TO KANT* 192–206 (Graham Bird ed., 2010).

⁵ See, e.g., ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (Transaction Publishers, 1997) (1930).

⁶ INTERNATIONAL MILITARY TRIBUNAL, *THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBURG GERMANY* 223 (1998).

⁷ E.g., Prosecutor’s opening statement in *Slobodan Milosevic* in ICTY: “The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted on the basis of his individual criminal responsibility. No state or organization is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crime of genocide.”

⁸ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, annex art. 6 (Aug. 8, 1945), 82 U.N.T.S. 279.

⁹ See, e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Harcourt Inc., 1973) (1951).

¹⁰ See, e.g., ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* (Transaction Publishers, 2nd prtg. 2002) (1942).

¹¹ See, e.g., GUSTAVE LE BON, *THE CROWDS: A STUDY OF THE POPULAR MIND* (Dover Publications, 2002) (1895).

individualism seems to have dominated international criminal law. Furthermore, collective responsibility is harshly criticized, such as in the situation of Iraq¹² and Serbia¹³, while individual liability is largely determined from an isolated perspective and extension of linking principle would be vigorously objected, such as JCE III¹⁴ and command responsibility.¹⁵ In addition, with the trials of certain numbers of low-level perpetrators, the ICTY claimed that collective plan or policy is neither the elements of the crime of genocide nor the element of crimes against humanity under customary international law.¹⁶ Fortunately, leading authors insist on the ideas of policy crimes,¹⁷ collective will,¹⁸ collective moral agency,¹⁹ and system criminality.²⁰ Among them, Schabas, for instance, believes that international crimes are, by nature, policy crimes for which state or organizational policy is needed.²¹

The concept of system criminality was most likely first proposed by the Dutch Judge B.V.A. Röling²² in the Tokyo Trials and then elaborated by scholars as “phenomenon that international crimes are often caused by collective entities in which the individual authors of

¹² See S.C. Res. 687 (April 3, 1991). In this Resolution Iraq was deprived of part of its territory and prohibited from acquiring certain types of weaponry. It probably reflects a returning to collective responsibility in Versailles.

¹³ In Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26) [hereinafter *Genocide case*] (ICJ held that Serbia violated the Genocide Convention by failing to prevent this genocide and by failing to facilitate the punishment of those responsible for it).

¹⁴ Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶ 404 (Int'l Crim. Trib. for the Former Yugoslavia April 3, 2007), <http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf>.

¹⁵ While the ICTY Appeals Chamber judgment in *Orić* limited superior's responsibility on the basis of rigid existence of superior-subordinate relationship at the time of the crime, the later Rome statute loosens that linking principle and extends the scope of superior responsibility. See Prosecutor v. Orić, Case No. IT-03-68-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008) <http://www.icty.org/x/cases/oric/acjug/en/080703.pdf>. See also Rome Statute of the International Criminal Court art. 28, July 17, 1998, UN Doc A/CONF.183/9 [hereinafter *Rome Statute*].

¹⁶ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Chamber Judgment, ¶ 98, n. 114 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

¹⁷ See William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008).

¹⁸ See George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

¹⁹ See TRACY ISAACS, *MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS* (2012).

²⁰ See SYSTEM CRIMINALITY IN INTERNATIONAL LAW (Andre Nollkaemper & Harmen van der Wilt ed., 2009).

²¹ See Schabas, *supra* note 17.

²² B.V.A. RÖLING, *THE LAW OF WAR AND THE NATIONAL JURISDICTION SINCE 1945* 355 (1960).

these acts are embedded.”²³ Generally, international crimes include the crime of aggression (or the crime against peace), the crime of genocide, crimes against humanity, war crimes,²⁴ and torture.²⁵ As for terrorism, since there is no international agreement on its definition and so far it is often debated before domestic courts using domestic law,²⁶ it will not be discussed in this Article.²⁷

A. THE CONCEPTUAL AND EMPIRICAL GROUND FOR SYSTEM CRIMINALITY

1. *The Crime of Aggression*

Among the international crimes, the crime of aggression (the crime against peace) might be characterized as the most collective one. Born in the IMT Charter, it was defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”²⁸ On the other hand, the prohibition of use of force is incorporated in the UN Charter: “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”²⁹

²³ Andre Nollkaemper, *Introduction*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 9 (Andre Nollkaemper & Harmen van der Wilt ed., 2009).

²⁴ These international crimes are generally acknowledged. *See, e.g.*, Rome Statute, *supra* note 15, arts 6–8; International Criminal Court Res. 6 (June 11, 2010).

²⁵ In ICTY, ICTR and ICC, torture is incorporated in crimes against humanity and war crimes. *See, e.g.*, Rome Statute, *supra* note 15, arts 7(1)(f) and 8(2)(a)(ii). However, Torture Convention indicates torture as an independent international crime. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. [hereinafter *Torture Convention*]. Cassese also supports torture as an independent crime. CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW 21 (3rd ed. 2013).

²⁶ *Id.* at 146 (Although terrorism is within the jurisdiction of the STL, which is the only international tribunal that deals with terrorism, still Lebanese domestic law applies due to lack of international reference).

²⁷ Due to the overlap between terrorism and war crimes as well as crimes against humanity, international terrorism might be properly incorporated in those two international crimes. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33(1), Aug. 12, 1949, 75 U.N.T.S. 287.

²⁸ Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6 (a), Aug. 8, 1945, 58 Stat. 1544, EAS No 472, 82 U.N.T.S. 280 [hereinafter *IMT Charter*].

²⁹ U.N. Charter art. 2 ¶ 4.

Nevertheless, the two norms are essentially different, not only due to the sovereign nature of the prohibition of use of force, which strictly put the obligation on states only,³⁰ but also because of the different level of force in the two norms, where Article 2(4) of the UN Charter apparently covers broader situations than that of aggression.³¹ Yet, as the only crime of *jus ad bellum*, the crime of aggression is largely affected by the strong political context surrounding the use of force. Having been long excluded from the ICTY, the ICTR and the ICC,³² the crime of aggression has often been discussed as a state's wrongful act rather than an individual crime both in the Security Council³³ and the International Court of Justice [hereinafter *ICJ*].³⁴

It is not hard to conclude the collective nature of the crime of aggression. According to the limited practice in the Nuremberg Trials and the Tokyo Trials, as well as the contemporary concept of the crime of aggression incorporated in the Rome Statute, the crime of aggression can only be achieved by states or at least state-like organizations. This strong collective nature triggers individual criminal liability only for high-level leaders rather than low-level perpetrators.³⁵

2. *War Crimes*

The law of war, or international humanitarian law, or *jus in bello*, is much older than international criminal law, perhaps much older than most of the fields in international law. For a long time, international law has been mainly, if not equivalent to, the law of war. Dating back to

³⁰ Due to the subject of U.N. Charter, the prohibition of use of force refers to sovereign states. Although Rome Statute *prima facie* adheres to this approach, there is strong tendency that *jus ad bellum* and aggression extend to non-state subjects. See, e.g., CASSESE, *supra* note 25, at 140.

³¹ Art. 2(4) of U.N. Charter also includes "threat of use of force," the threshold of which is rather low. As established in Nicaragua case, ICJ gave an example that "a signaled intention to use of force if certain events occur." See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua Case*]. See also IAN BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 361–64 (1963); MALCOLM SHAW, *INTERNATIONAL LAW* 1125 (6th ed. 2008); NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 260 (2007).

³² It was not until the 2010 did ICC member states decided upon the definition of the crime of aggression, and it was not until 2017 did ICC finally adopt the resolution on the crime of aggression.

³³ See S.C. Res. 573, UN SCOR, 40th Sess., 2615th mtg., UN Doc. S/RES/573 (Oct. 4, 1985). See also S.C. Res. 577, UN SCOR, 40th Sess., 2631st mtg., UN Doc. S/RES/577 (Dec. 6, 1985).

³⁴ See, e.g., *Nicaragua Case*, *supra* note 31; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

³⁵ See, e.g., CASSESE, *supra* note 25, at 141.

the time of Hugo Grotius, and even earlier, certain kinds of weapons were prohibited and civilians were protected.³⁶ After centuries of evolution, it is of little surprise that the notion of war crimes first challenged the traditional norm of state responsibility (as the main form of collective responsibility) in the 19th Century.³⁷

However, the transition to individual liability does not mean the denial of the collective nature of war crimes. As generally acknowledged as “serious violations of the rules of customary and treaty law (mainly the Geneva Convention) concerning international humanitarian law,”³⁸ war crimes are not only required to occur in international or non-international armed conflict,³⁹ but are also required to have *nexus* with the armed conflict.⁴⁰

The *nexus* does not sheerly rely on time or space, but requires a more substantial link to the hostilities. In the *Akayesu* judgment, the ICTR examined whether “the acts perpetrated by Akayesu . . . were committed in conjunction with the armed conflict.”⁴¹ In *Delalic et al.*, the ICTY Trial Chamber stated that “[t]here must be an obvious link between the criminal act and the armed conflict.”⁴² Similarly, the

³⁶ See, e.g., WAR CRIMES AND INTERNATIONAL CRIMINAL LAW 7–8 (Willem-Jan van der Wolf ed., 2010). HUGO GROTIIUS, THE RIGHTS OF WAR AND PEACE (Jean Barbeyrac & Richard Tuck eds., Liberty Fund, 2005)(1625).

³⁷ E.g., General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in FRANCIS LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE 245, 247–74 (1881). H.R. DOC. NO. 40-3 (1867). Hague Convention II with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, T.S. NO. 403. Hague Convention I Pacific Settlement of International Disputes, Jul. 29, 1899, T.S. NO. 392.

³⁸ SHAW, *supra* note 31, at 312.

³⁹ The extension of the scope of armed conflict is established both in common Art. 3 of Geneva Convention and in the famous *Tadić* case. Protocol Additional to the Geneva Conventions of 12 August 1949, art. 3, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Protocol II*]; Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

⁴⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶¶ 630-34, 638–44 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/appeals-chamber-judgements/en/010601.pdf>; Prosecutor v. Kayishema, Case No. ICTR-95-1, Appeals Judgment (Reasons), ¶¶ 185–89, 590–624 (Int’l Crim. Trib. for Rwanda June 1, 2001), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict95-1/appeals-chamber-judgements/en/010601.pdf>; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 259–62, 275 and 974 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-13/trial-judgements/en/000127.pdf>.

⁴¹ *Akayesu*, Case No. ICTR-96-4, ¶ 643.

⁴² Prosecutor v. Delalić et al., Judgment, Case No. IT-96-21-T, Trial Judgment, ¶ 193 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

Appeals Chamber of *Tadić* in the ICTY indicated that the test is “whether the offenses were closely related to the armed conflict as a whole.”⁴³ And in *Clément*, the ICTR held that “the term ‘nexus’ should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established *factually*.”⁴⁴

The ICC explicitly incorporates such nexus into its Elements of Crimes, requesting that the acts “took place in the context of and was associated with an . . . armed conflict.”⁴⁵ Such nexus has been interpreted as “the alleged crimes were closely related to the hostilities;”⁴⁶ and the hostilities “must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed.”⁴⁷

The requirement of a substantial *nexus* to armed conflict lies in the intense conflict between individualism and collectivism in *jus in bello*. From the perspective of individualism, *jus in bello* differentiates itself from ordinary international law by focusing on rights and obligations of individuals rather than that of states. *Jus in bello* largely decreases the evils of war, which is strongly based on collective inhumanity, by cherishing the hope not only in collective deterrence and constraints, but also in individual humanity. Consequently, the severe violation of *jus in bello* gave birth to individual liability. On the other hand, from the perspective of collectivism, the severe violation of *jus in bello* is definitely different from common crimes, comparing the killing of civilians in armed conflict and murder in ordinary context.

Raul Hilberg correctly points out the nature of the *nexus*: “it was infinitely more, and that more was the work of a farflung, sophisticated

⁴³ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 573 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

⁴⁴ Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 188 (Int’l Crim. Trib. for Rwanda May 21, 1999), http://www.worldcourts.com/icttr/eng/decisions/1999.05.21_Prosecutor_v_Kayishema_1.pdf.

⁴⁵ International Criminal Court, Elements of Crimes, 2011 [hereinafter *Elements of Crimes*], art. 8(2)(a)(i), War crime of willful killing, ¶ 4.

⁴⁶ Prosecutor v. Lubanga, ICC-01/04-01-06, Decision on the Confirmation of the Charges, ¶ 288 (Jan. 29, 2007), http://www.worldcourts.com/icc/eng/decisions/2007.01.29_Prosecutor_v_Lubanga1.pdf; Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Confirmation of the Charges, ¶ 380 (Sep. 30, 2008), http://www.worldcourts.com/icc/eng/decisions/2008.09.30_Prosecutor_v_Katanga.pdf.

⁴⁷ *Lubanga*, ICC-01/04-01-06, ¶ 287; *Katanga*, ICC-01/04-01/07, ¶ 380; Prosecutor v. Abu Garda, ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 90 (Feb. 8, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_00753.pdf.

bureaucracy.”⁴⁸ Similarly, Cassese, one of the pioneers of international criminal law, also concludes that the nexus requires pursuit of “the ultimate goals of the military campaign” or at least “consonant with the military campaign” and further excludes the behavior like stealing goods merely for individual interest during armed conflict.⁴⁹ Thus, to seek the delicate balance of collectivism and individualism, it is neither proper to escape from the notion of individual liability, nor is it just to deny the collective nature of the war crimes. For the same reason, Gerry foresightedly warns that “war crimes trials at best can appear as partial justice, at worst a form of scapegoating.”⁵⁰

3. Crimes Against Humanity

First used by the Allies to censure the mass killings of Armenians in the Ottoman Empire after WWI in 1915,⁵¹ the crimes against humanity grew “outside the treaty process that addresses a broad range of systematic atrocities.”⁵² Later incorporated into Article 6 of the IMT Charter, crimes against humanity were added out of the concern that part of the Nazis may not be punished under the traditional crime forums.⁵³ Crimes against humanity provisions might serve as “miscellaneous provisions” to ensure that no severe crimes shocking the humanity of all nations would go unpunished. Nexus to armed conflict, just like that in war crimes, was previously required in the Nuremberg Trials and the subsequent domestic trials.⁵⁴ Recently, the nexus tends to disappear in both international conventions and the international criminal tribunals,⁵⁵ but this does not change the nature of the crimes against humanity.

⁴⁸ RAUL HILBERG, *THE POLITICS OF MEMORY* 59 (2002).

⁴⁹ CASSESE, *supra* note 25, at 79.

⁵⁰ Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* 94 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

⁵¹ CASSESE, *supra* note 25, at 84.

⁵² STEVEN R. RATNER ET AL., *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 48 (3rd ed. 2009).

⁵³ In Tokyo Trial, 25 Japanese leaders were indicted for war crimes and crimes against humanity; however, only war crimes were addressed. Int’l Trib. for Far East, Judgment, Part C, Ch. IX, ¶¶ 113–44 (Nov. 1948).

⁵⁴ Most of the domestic post-WWII trials followed Nuremberg to incorporate the nexus requirement. RATNER, *supra* note 52, at 54.

⁵⁵ See, e.g., Note by the Secretary-General, UN GAOR, 22nd Sess., Annex, Agenda Item 60, at 1, 6–7, UN Doc. A/6813 (1967), at 3, 7. See also UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) [hereinafter *ICTY*].

The collective nature of the crimes against humanity is reflected in its definition. Article 7(1) of the Rome Statute requests “acts when committed as part of a widespread or systematic attack,” and Article 7(2)(a) explains “attack” as “pursuant to or in furtherance of a state or organizational policy to commit such attack.”⁵⁶ Few arguments posit that the “policy” requirement is equal to the “systematic” element and the “widespread” alone can be another approach to satisfy the crimes against humanity. However, it is neither consistent with contextual interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties [hereinafter *VCLT*], nor the judicial decisions.⁵⁷ Further, the *travaux préparatoires* of the Rome Statute suggests that “an attack must be instigated or directed by a Government or by any organization or group,”⁵⁸ which shall be taken into consideration when interpreting Article 7(2) according to Article 32 of the VCLT⁵⁹

In *Situation in the Republic of Côte d’Ivoire*, the ICC identified five “contextual elements” of crimes against humanity: “(i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack.”⁶⁰ In the *Tadić* case, the ICTY Trial Chamber emphasized “policy”, holding that the attacks under crimes against humanity are not composed of “isolated, random acts of individuals” and “cannot be the work of isolated individuals alone.”⁶¹

As concluded by Darryl Robinson, “the purpose of the policy element in the Rome Statute, in the *Tadić* decision, and in the ILC draft

Statute] art. 5, May 25, 1993, SC Res. 827; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006) [hereinafter *ICTR Statute*] art. 3, November 8, 1994, SC Res. 955; UN Security Council, Statute of the Special Court for Sierra Leone [hereinafter *SCSL Statute*] art. 1, January 16, 2002, UN Doc. S/2002/246; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) [hereinafter *ECCC Statute*] art. 5, as amended by NS/RKM/1004/006 (Oct. 27, 2004).

⁵⁶ Rome Statute, *supra* note 15, art. 7.

⁵⁷ See Darryl Robinson, *Crimes Against Humanity: A Better Policy on “Policy”*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, 705 (Carsten Stahn ed., 2014).

⁵⁸ *Draft Code of Crimes against the Peace and Security of Mankind*, [1996] 2 Y.B. Int’l L. Comm’n. 2.

⁵⁹ Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

⁶⁰ Situation in the Republic of Côte d’Ivoire, ICC-02/11, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, ¶ 29 (Nov. 15, 2011).

⁶¹ *Tadić*, *supra* note 43, ¶¶ 645, 655.

Code, was simply to exclude ‘ordinary’ crime.”⁶² The norm emphasizes the prerequisite to be an international crime rather than isolate crimes of murder, enslavement, torture, rape etc. Additionally, it is the collective evil that constitutes the deepest concern of all nations, which may lead to the collapse of humanity by its spiral-like impact.

4. *The Crime of Genocide*

Human history has witnessed numerous mass atrocities. Notoriously, genocide is one that occurred over and over again. With intent to “destroy, in whole or in part, a national, ethnic, racial or religious group,”⁶³ the crime of genocide is deemed as the most heinous international crime — “the crime of crimes.”⁶⁴ Though not expressly used in the Nuremberg Trials, the severe concern for genocide led the international community to the Genocide Convention, with the unanimous passage of Resolution 96 in the UN General Assembly.⁶⁵ Later, the ICTY dealt with several famous genocide cases and the ICTR dealt with dozens of them.⁶⁶

Unlike other international crimes, the collective nature of the crime of genocide has long focused on the “group nature of the victims” rather than the “group nature of the perpetrators.”⁶⁷ However, the collective nature has also been described as self-evident throughout history — genocide has always been committed by an organization group through policy.

The ICTY challenged the collectivism of the crime of genocide in the *Jelisić* case by arguing that “the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient [and] they did not discount the possibility of a lone individual seeking to destroy a group as such.”⁶⁸ The ICTY seems to have imagined a single individual’s genocide situation if the

⁶² See Robinson, *supra* note 57.

⁶³ Rome Statute, *supra* note 15 art. 6.

⁶⁴ Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Appeals Chamber Judgment, ¶ 53 (Int’l Crim. Trib. for Rwanda July 9, 2004), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-14/appeals-chamber-judgements/en/040709.pdf>; Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 699 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

⁶⁵ GA. Res. 96 (I) (Dec. 11, 1946).

⁶⁶ RATNER, *supra* note 52, at 27.

⁶⁷ See Robinson, *supra* note 57.

⁶⁸ Prosecutor v. Jelisić, Case No. IT-95-10-T, Trial Judgment, ¶ 100 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), <http://www.icty.org/x/cases/jelasic/tjug/en/jel-tj991214e.pdf>.

other elements like special intent are satisfied. This indication of the strong tendency of individualism once misled to a jurisdictional dilemma that the ICJ had nothing to do with the state's behavior concerning genocide since the collectivism of this crime was largely refused.⁶⁹ Fortunately, the ICJ in *Bosnia v. Serbia* confirmed the existence of state responsibility under the Genocide Convention and thus turned back to the collective nature of the crime of genocide.⁷⁰

Moreover, although the nature of collectiveness is not incorporated in the Rome Statute,⁷¹ several months after the decision of the *Jelisić* case, the Elements of Crimes was adopted and it explicitly requires "[t]he conduct[s] took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."⁷² The ICC Pretrial Chamber in *Bashir* followed the Elements of Crimes and concluded that "as the attacks and acts of violence committed by GoS against . . . were large in scale, systematic and followed a similar pattern . . . there are reasonable grounds to believe that the acts took place in the context of a manifest pattern of similar conduct directed against the target group."⁷³ The same approach was adopted by the ICJ in *Croatia v. Serbia*, where the Court examined the pattern of conduct, the scale, the context, and concluded that:

The Court considers that, of the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent, the most important are those that concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population.⁷⁴

⁶⁹ See, e.g., Paula Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide*, 18 EUR. J. INT'L L. 631 (2007); Claus Kreß, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT'L L. 619 (2007); Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J. INT'L CRIM. JUST. 905 (2007); Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. INT'L CRIM. JUST. 889 (2007).

⁷⁰ Genocide case, ¶ 471, *supra* note 13 (detailing court's vote on Serbia's state responsibility).

⁷¹ Rome Statute, *supra* note 15, art. 6.

⁷² Elements of Crimes, *supra* note 45, art. 6, Genocide. This sentence appears under each act that constitutes genocide.

⁷³ Prosecutor v. Bashir, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶ 16 (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04826.PDF.

⁷⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3 (Feb. 3), ¶ 413.

Lastly, the collective nature of the crime of genocide is reflected throughout both the reality and the theoretical rationale. Regarding reality, although individual genocide was imagined by the ICTY, there was no record for such situation throughout history.⁷⁵ Conversely, genocide was always committed by well-organized groups, especially governments through systematic plans. It is the idea of an accurate regime to carry out such a terrible crime that astonishes people most, such as the Nazi German and the Rwandan genocide context. That might be why some states favor state responsibility over individual liability for genocide.⁷⁶ Moreover, not only is the crime of genocide deemed as the most severe crime but also the only crime that incorporates conspiracy in the ICTY and the ICTR.⁷⁷ Based on the consistency of international crimes, there would be no reason to explain why other crimes are of collective nature but not the most severe one. Such interpretation would also contradict with the preamble, Article 1, as well as the object of the Rome Statute, which are deeply concerned with the associative atrocities that severely shock the humanity of all nations.

5. Torture

As a notion enjoying the identity of *jus cogens*,⁷⁸ incorporated in international human rights law,⁷⁹ international criminal law, domestic law, and a crime both as war crimes and crimes against humanity, torture might be the most complicated crime to locate in the international legal system. By using the name “discrete crime,” Antonio Cassese implies the grand scope, the chaos and the inconsistency in the notion of torture.⁸⁰ Unlike the other four crimes, torture was not expressly or implicitly mentioned in the Nuremberg Trials as an independent crime, and it was

⁷⁵ Simpson, *supra* note 50, at 71.

⁷⁶ Nollkaemper, *supra* note 23, at 12 (UK argues that Genocide Convention shall aim at states rather than individuals during the negotiations of the Convention, since it is beyond possibility to blame particular individuals for atrocities that the governments/states are responsibility for). *See also* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2d ed. 2000) (Denmark criticized that the accountability for genocide or aggression shall not be limited to individuals since they are acting on behalf of the state).

⁷⁷ VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 96 (1995).

⁷⁸ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 153 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/case/furundzija/4>; Sideman de Blake v. Republic of Argentina, 965 F.2d 699, 714–18 (9th Cir. 1992).

⁷⁹ *See* Torture Convention, *supra* note 25, at 1.

⁸⁰ CASSESE, *supra* note 25, at 132.

not until 1975 that torture became a separate crime to trigger individual liability. This was confirmed by the General Assembly Declaration on Protection from Torture.⁸¹ As of now, torture may still remain the most controversial and unsettled one among the five international crimes.

As *lex lata*, the UN Torture Convention expressly incorporates the “instrumental purpose” as well as “official involved,” which is concluded by Cassese as to distinguish “the phenomenon of torture from isolated sadism more properly the concern of domestic law.”⁸² Torture is not listed as a category of international crime in the Rome Statute, but is included both under Article 7(1)(f) as a crime against humanity of torture and Article 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 as a war crime of torture. Elements of Crimes requests, for a crime against humanity of torture, that “[t]he conduct was committed as part of a widespread or systematic . . .” and that “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”⁸³ As for a war crime of torture, Elements of Crimes requires a nexus to armed conflict and the awareness of such nexus.⁸⁴

Further, the collective nature lies deep in the rationale behind the implementation of torture as a policy. Herbert Kelman relates the circular reemergence of torture to the theory of statehood — the *antinomy* of powerfulness and vulnerability. He reveals that the more powerful the democracy, the more vulnerable the sovereignty is to lose control when confronting emergencies like security issue.⁸⁵ This thesis may explain why torture occurs disproportionately with the extent of development of states compared with other international crimes. And torture is even more likely to be committed by the side who represents justice under *jus ad bellum*.

Notably, Karl Schmitt states, “[s]overeignty is he who decides on the exception.”⁸⁶ The recourse to torture is precisely how a collective power decides who the exception and enemy are to maintain its power when confronting severe challenges.⁸⁷ Thus, the “instrumental purpose”

⁸¹ G.A. Res. 3452(XXX), at 91 (Dec. 9, 1975).

⁸² CASSESE, *supra* note 25, at 133.

⁸³ Elements of Crime, *supra* note 45, Article 7(1)(f), Elements 4 and 5.

⁸⁴ *Id.*, Article 8(2)(a)(ii)-1.

⁸⁵ Herbert C. Kelman, *The Policy Context of International Crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 94 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

⁸⁶ CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., University of Chicago Press, 1st ed. 2006) (1922).

⁸⁷ Kelman, *supra* note 85, at 32.

required by torture serves as a “policy” requirement and reveals the collective nature of the crime of torture, to which the perception of threat to the power of the whole system, usually state sovereignty, plays a central role to cause this kind of collective acts.⁸⁸

In conclusion, the five international crimes are conceptually and empirically systematic crimes that are committed by collective groups instead of isolated individuals. The next section will explore the philosophical ground for international crimes and will examine whether they are practically committed collectively, or essentially distinct from normal crimes as system criminality.

B. THE PHILOSOPHICAL GROUND FOR SYSTEM CRIMINALITY

Perhaps the previous section has already answered part of the canonical questions on a conceptual and empirical level: What characterizes the crime of aggression, war crimes, crimes against humanity, the crime of genocide and torture as international crimes? Why are serious transnational crimes such as human trafficking not international crimes? Why did international crimes break out altogether in certain context such as the Second World War [hereinafter *WWII*], Yugoslavia, Rwanda? Why were the suspects always charged with several international crimes simultaneously?

Nevertheless, one has to go deeper and explore the philosophical origin of international crimes by going back to the canon of Hanna Arendt.

1. *The Origin: Ordinary Atrocity by Extraordinarily Atrocious Men or Extraordinary Atrocity by Ordinary Men?*

If we go through the records of *Israel v. Eichmann*, we will find the record surprisingly similar to what has been portrayed in *The Reader* (of course, Eichmann is probably the prototype).⁸⁹ Instead of witnessing justice being done upon an extraordinarily atrocious man, we could only find a polite, well-educated normal man answering the questions with logic and calmness, and naturally gave his explanation for conducting the extraordinary atrocities as completion of routine tasks. Interestingly, the

⁸⁸ W. S. Heinz, *The Military, Torture and Human Rights: Experiences from Argentina, Brazil, Chile and Uruguay*, in *POLITICS OF PAIN: TORTURES AND THEIR MASTERS* (Ronald D. Crelinsten & Alex P. Schmid eds., 1993).

⁸⁹ CrimC (Jer) 40/61 *Israel v. Eichmann*, PM 5721(2) (1961) (Isr.).

concept of the “banality of evil” is incorporated in the records with no further explanation for several times.⁹⁰ Hanna Arendt gives her understanding that “[h]owever monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.”⁹¹

Why did this happen? In addition to the fact that international crimes always took place systematically, what else are international crimes different from the normal crimes?

Herbert Kelman divides crimes into two categories — one is “ordinary crimes committed in violation of the expectations and instructions of authority,” the other is “crimes of obedience that take place under explicit instructions from the authorities, or in an environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities.”⁹² The latter, according to Kelman and Hamilton, is still “considered illegal or immoral by the larger community.”⁹³

Hannah Arendt analyzes the issue from the perspective of collectivism fundamentally. Based on her political theory of *totalitarianism*, Arendt points out that ordinary crimes that occur in a normal political system are the exceptions to the rule, while those extraordinary atrocities occur in an “upside-down system” where “law becomes crime and crime becomes law” and the atrocities are no longer exceptions but are normal acts in the reversed system.⁹⁴ Under the strong dominant collectivism who “decides on the exception,”⁹⁵ tens of thousands of Eichmanns appear with no possibility to “know or to feel that he is doing wrong.”⁹⁶ For individual doers who are “absorbed in the group,” they “commit acts they would almost certainly never contemplate doing as individuals,” carried out killings and other

⁹⁰ David Luban, *Hannah Arendt as a Theorist of International Criminal Law*, 11 INT’L CRIM. L. REV. 621, 635 (2011).

⁹¹ Hannah Arendt, *Thinking and Moral Considerations*, in RESPONSIBILITY AND JUDGMENT 159 (Jerome Kohn ed., 2003).

⁹² Kelman, *supra* note 85, at 26–27.

⁹³ H.C. KELMAN & V.L. HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 46 (1989).

⁹⁴ ARENDT, *supra* note 9, at 291–92.

⁹⁵ SCHMITT, *supra* note 86, at 5.

⁹⁶ ARENDT, *supra* note 9, at 125–26.

atrocities “for granted routine,”⁹⁷ like 250,000 people a year on the Eastern Front in WWII.⁹⁸ Unfortunately, we reluctantly have to acknowledge that the leviathan of totalitarianism reappears again and again like Cambodia in 1970s, and Rwanda in 1994 after the seemingly extreme and rare cases of Nazi Germany or Militarism Japan.

This phenomenon can also be explained by “collective will” argued by George Fletcher, an American leading scholar. Fletcher similarly relies on “climate of moral degeneracy” produced by the “collective,”⁹⁹ and describes the idea that “collective will and the idea of the people as the folk or as an independent actor capable of great evil” as a “romantic approach.”¹⁰⁰ However, different from the idea which goes to the extreme that “there are no individuals in organizations,”¹⁰¹ Fletcher tries to find a balance between the liberal approach and the romantic approach. Under these circumstances, one certainly reserves his liberal mind and action even in a certain group, however it is simultaneously driven by the “collective will.” This does not mean a higher standard for *mens rea*, but that there would be certain circumstances where individual behaviors seem to have plausible excuses and collective actions exert destructive power.

2. Mechanism: What Makes Hundreds of Thousands of Eichmanns Throughout History?

Under what is described by Judge Röling as “prevailing climate in the system,”¹⁰² there are indeed certain procedures that trigger mass atrocities.¹⁰³

Kelman gives an interesting construction of the social process that facilitates mass atrocities.¹⁰⁴ The first step is “authorization,” which functions similarly to the “upside-down”¹⁰⁵ system in Arendt’s theory. Under such “authorization,” normal and exceptional are defined in a new

⁹⁷ Maurice Punch, *Why Corporations Kill and Get Away with It: The Failure of Law to Cope with Crime in Organizations*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 42 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

⁹⁸ HANNAH ARENDT, *EICHMANN IN JERUSALEM* 73 (Penguin Books, 2006).

⁹⁹ Fletcher, *supra* note 18, at 1541–42.

¹⁰⁰ GERRY J. SIMPSON, *LAW, WAR AND CRIME* (2007).

¹⁰¹ Punch, *supra* note 97, at 42.

¹⁰² RÖLING, *supra* note 22, at 138.

¹⁰³ I. Tallgren, *The Sense and Sensibility of International Criminal Law*, 13 EUR. J. INT’L L., 575 (2002).

¹⁰⁴ Kelman, *supra* note 85, at 36.

¹⁰⁵ ARENDT, *supra* note 9, at 291–92.

way and individual moral perception becomes absorbed in the “authorization” system. The second step is “routinization,” where mass atrocity is divided into normal daily tasks in a highly organized way. There is no space left for individuals to raise any moral questions, in a way that “individual autonomy may give way to group coherence.”¹⁰⁶ The hundreds of thousands of Eichmanns carry out their routine tasks with no personal decision-making process, but only with thinking of the “overall product to which these tasks contribute.”¹⁰⁷ For the preceding reason, Eichmann still considered his genocide job simply as a routine job even in the trial. The last step is “dehumanization” of the victims. Mass atrocity is often driven by extremism, whether it is political, racial or religious. Victims are treated in an abstract way, rather than in a humanized manner. The intoxicating perception of the concept of “enemy” or “exception” gradually takes control of the perpetrators. “Individualism is the first value to disappear,”¹⁰⁸ and perpetrators cannot relate to the victims on any moral terms under the collective symbolization.

Geroge Kateb’s theory on imagination, which is influenced by Heidegger and Arendt, from another perspective, complements Kelman’s proposed process. In Kateb’s eyes, at the heart of the mass atrocities is the phenomenon of hyper-active imagination of the leaders, who are in the position to design or redesign the reality as to create a political and social environment of moral blindness; and the in-active imagination of the followers who embrace the leaders’ redesigned reality and are reluctant to admit that others are as real as themselves.¹⁰⁹

Nevertheless, one might ask the following: what about Hitler, the one percent (but one critical percent) of leaders who stand on the top of the machine of Leviathan, designing or redesigning the reality, creating the morally blind environment and followed by hundreds of thousands of Eichmanns? The answer is quite simple. One who stands on the top of the sovereignty is the sovereignty itself. One who stands on the top of the system is the system itself. The collectivism in the leaders reaches the maximum level, and the way international criminal law attributes the crimes committed by the physical perpetrators to the leader is identical to the way international law attributes the wrongful act by those a state has authority or control over to a state.

¹⁰⁶ Nollkaemper, *supra* note 23, at 6.

¹⁰⁷ Kelman, *supra* note 85, at 36.

¹⁰⁸ HANNAH ARENDT, *ON VIOLENCE* 67 (Harvest Books, 1970).

¹⁰⁹ George Kateb, *The Adequacy of the Canon*, 30 *POL. THEORY* 482 (2002).

In conclusion, international crimes are not only practically collective crimes, but system criminality by nature that fundamentally distinguish themselves from normal crimes. Indeed, there is a vital distinction between Hitler and Eichmann, namely the leaders and the followers. But that distinction supports, rather than defeats, the collective nature of international crimes, and further plays a vital role in determining the responsibility and modes of criminal liability, which will be discussed in Part IV.

II. THE DUAL REGIME OF STATE RESPONSIBILITY AND INDIVIDUAL LIABILITY

The birth of international criminal law was accompanied by the individualization of international criminal liability. By positioning individual liability at the central stage, no person can hide behind the shield of the sovereign states or collective organizations to escape from his or her own liability. Antonio Cassese points out another rationale behind this regime that “a defendant ought not to be punished for acts perpetrated by other individuals.”¹¹⁰ Consequently collective responsibility is “no longer acceptable.”¹¹¹

However, as the most severe harm to the international community as a whole, mass atrocities are never individual perpetrators’ power against mass victims, but instead originate from collective system power, and can only be fundamentally prevented from the root of the collectivism. As Kelman correctly points out, the essential question is not “who is responsible” but “who is responsible for what.”¹¹² Either sheer individual liability or collective responsibility alone can serve as a scapegoat for the other.¹¹³ The answer becomes clear that the dual regime of international responsibility is necessary to accomplish the aim of remedy and prevention.

¹¹⁰ Simpson, *supra* note 50, at 87.

¹¹¹ CASSESE, *supra* note 25, at 137.

¹¹² Kelman, *supra* note 85, at 28.

¹¹³ *E.g.*, Simpson said that “war crimes trial at best can appear as partial justice, at worst a form of scapegoating.” Simpson, *supra* note 50, at 94.

A. THE THEORETICAL JUSTIFICATION FOR THE DUAL
RESPONSIBILITY REGIME

Before the theoretical analysis, let us imagine the situations below. If we take a single scene, where a Japanese soldier raped a little girl and then cruelly killed her, we have a strong feeling that this soldier should be held individually liable for his own conduct. If we expand the scene, where tens of thousands of women were being raped and competitions of killings were being held everywhere in Nanking, we might treat those inhumane acts as a whole and strongly feel obliged to find out who invaded the city and who led the Nanking massacre. If we adjust the scene so that we could find in Japan, the Emperor highly praised the killings in Nanking and civilians read about the killing competition in the newspaper for pleasure, then we might feel even more horrified and want to figure out who opened Pandora 's Box and created such an inhumane moral climate.

Indeed, when confronting international crimes, we need to think about them in a bigger picture: What is the purpose of punishment for criminology? Does individual criminal liability alone satisfy the purpose of punishment concerning those international crimes?

The Nineteenth Century witnessed a great development in criminology. Cesare Beccaria justifies his idea of “deterrence” as the purpose of punishment based on social contract reasoning,¹¹⁴ while Jeremy Bentham justifies punishment by the pursuit of the utilitarian goal of “the greatest happiness of the greatest number.”¹¹⁵ Largely based on the debate between contractualism and utilitarianism, modern criminology develops four general purposes of punishment — retribution, deterrence, rehabilitation and incapacitation.¹¹⁶ All of them shall be taken into consideration to examine punishment.¹¹⁷ Nevertheless, sometimes one attaches greater significance to certain purposes than others. For example, one of the biggest challenges in post-WWII trials is the matter of retroaction. And in response to the challenge of retroaction,

¹¹⁴ See CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 148–150 (Edward D. Ingraham trans., Philip H. Nicklin, 2nd American ed. 1819) (1764).

¹¹⁵ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 74 (Clarendon Press, 1907) (1789).

¹¹⁶ See GABRIEL HALLEVY, THE RIGHT TO BE PUNISHED: MODERN DOCTRINAL SENTENCING (2013).

¹¹⁷ JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 308–09 (2d ed. 2005).

John Rawls attaches great significance to the purpose of remedy for the tremendous harm that all human beings suffered.¹¹⁸

It is the author's position that in spite of retribution, other purposes of punishment can hardly be satisfied under the regime of individual criminal liability alone. In particular, individual liability has little to do with deterrence, rehabilitation and incapacitation when the Leviathan of totalitarianism, fanaticism, and extremism reappears time and time again.

International crimes are not only about systematic crimes, but also about systematic fanaticism and systematic unconsciousness. It is a special period during which the evil side of human nature erupts like a volcano under the strategic organization of certain bureaucracy. In WWII, those soldiers were driven by fanaticism and most of them later could hardly believe what they had done. Even the civilians, like Japanese women deemed it sacred to provide sexual service to Japanese soldiers and then died with glory of sacrifice for the great national ambition. The social contract is not ruined by the individuals, but is destroyed by a mass group of people organized in a hierarchical and bureaucratic way.

For ordinary crimes, it is appropriate to grant punishment to those who physically committed the crimes for the deterrence of their personal conduct. However, for international crimes, the deterrence shall be made precisely towards those who have the capacity to use certain system to accomplish their ambition of ruling. This is also the case for rehabilitation and incapacitation. This view might be a return back to the traditional rationale of public international law, that "individual responsibility is unlikely to do the job, since individuals who transgress fundamental norms of international law often are not acting on their own initiative or for their own cause."¹¹⁹

Nevertheless, what the author tries to argue here is not using the one regime to defeat the other. Just like that the classic liberal view of individual will and the romantic view of collective will co-exist in mass atrocities,¹²⁰ individual and collective responsibility are symbiotic,¹²¹ hence individual criminal liability and state responsibility shall co-exist to accomplish the remedy, as well as the prevention of international crimes all together.

¹¹⁸ See JOHN RAWLS, A THEORY OF JUSTICE 3 (Harvard University Press, rev. ed. 1999).

¹¹⁹ Nollkaemper, *supra* note 23, at 4.

¹²⁰ Fletcher, *supra* note 18.

¹²¹ Simpson, *supra* note 50, at 71.

B. THE FEASIBILITY OF THE DUAL RESPONSIBILITY REGIME

In *Bosnia v. Serbia*, the ICJ interpreted the Genocide Convention in a way to confirm that there is a “duality of responsibility”: On the one hand contracting parties are under the obligation to refrain themselves from engaging in any conducts of genocide and failing to do so will trigger state responsibility; on the other hand individuals will be held personally liable for the crime of genocide.¹²² In addition to the Nuremberg norm, which plays the dominant role, dual responsibility also exists in the international legal system, both in history and present.

1. History Review

It might be hard to imagine today that the early twentieth century experienced an extreme tendency of collectivism, namely the “criminal state.” Not long before the Nuremberg regime of individual liability, the Versailles settlement criminalized states who breached the fundamental norms in the international legal system rather than individual in a *de facto* way.¹²³ Article 281 of the Versailles Treaty affirmed Germany’s responsibility for the payment of reparations in the war.¹²⁴ This principle was followed by the 1945 Potsdam Declaration, Section IV of which also put the emphasis on reparations.¹²⁵ Similarly, Japan was obliged to enter negotiations of reparation with victim states like South Korea, Vietnam, and the Philippines.¹²⁶ Decades later, UN Compensation Commission again addressed Iraq’s state responsibility concerning its invasion of Kuwait.¹²⁷

In spite of responsibility for reparation, it is also common practice to require “guarantee of non repetition.” Dating back to the Potsdam Protocol in 1945, there were sentences to “prevent the revival or

¹²² Genocide Case, *supra* note 13, ¶ 173. See also Thomas M. Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?*, 6 WASH. U. GLOBAL STUD. L. REV. 567, 573.

¹²³ Simpson, *supra* note 50, at 78.

¹²⁴ C. Bloch & P. Renouvin, *Le Traité de Versailles et les réparations*, 8 II REVUE DE DROIT INTERNATIONAL 375 (1931).

¹²⁵ Jochen A. Frowein, *Potsdam Agreement on Germany*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1087, 1088 (1997).

¹²⁶ ANDREA GATTINI, LE RIPARAZIONI DI GUERRA NEL DIRITTO INTERNAZIONALE 254 (2003).

¹²⁷ See Elyse J. Garmise, *The Iraq Claims Process and the Ghosts of Versailles*, 67 N.Y.U. L. REV. 840, 869–870 (1992); Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT’L L. 161, 165 (2002).

reorganization of German militarism.”¹²⁸ Later in Security Council Resolution 687 in 1996, Iraq was deprived part of its territory and was prohibited from acquiring certain types of weaponry.¹²⁹ However, when this type of issue was brought before the ICJ, it was much harder to make the decision due to the strict consideration of causal link,¹³⁰ for instance, in the *Land and Maritime Border*¹³¹ and *Bosnia v. Serbia*.¹³²

2. Possible Reconciliation in Modern Regime

According to Hart’s theory, law rules can be divided into primary law rules and secondary law rules; the former refer to the rules solidifying basic right and duty, while the latter refer to the rules reconciling those basic rights and duties.¹³³ While drafting the Draft Articles on State Responsibility, the International Law Commission regarded such responsibility rules as secondary law rules.¹³⁴ Indeed, the modes of state responsibility vary when based on different primary law rules. Moreover, it is meaningless to argue whether state responsibility excludes or includes criminal responsibility, since it is clearly indicated in Article 1 that “every internationally wrongful act of a state entails the responsibility of that state.”¹³⁵

Similar to individual criminal liability that is well-established in international criminal law, state responsibility for the same mass atrocities are well-incorporated in the international legal system as well.

¹²⁸ Protocol of Proceedings of the Potsdam Conference (II)(A)(3)(i)(a) (Aug. 1, 1945).

¹²⁹ S.C. Res. 687, ¶¶ 2, 8 (April 3, 1991).

¹³⁰ ROSALYN HIGGINS, THE INTERNATIONAL COURT OF JUSTICE: SELECTED ISSUES OF STATE RESPONSIBILITY 280 (2009).

¹³¹ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), 2002 I.C.J. 303, ¶ 318 (Oct. 10).

¹³² Genocide case, *supra* note 13, ¶ 466.

¹³³ See HERBERT L.A. HART, THE CONCEPT OF LAW 81 (3rd ed. 2012).

¹³⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001) [hereinafter *Draft Articles on State Responsibility*], e.g. General Commentary (1):

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the *secondary rules of State responsibility*: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the *primary rules*, whose codification would involve restating most of substantive customary and conventional international law.

¹³⁵ *Id.* art. 1.

Aggression is prohibited as “use of force” in the UN Charter.¹³⁶ Atrocities in war and against humanity are regulated by the Geneva Convention.¹³⁷ Genocide and torture are elaborated in the Genocide Convention and the Torture Convention.¹³⁸ All those Conventions serve as primary international law rules which trigger state responsibility.

This idea of the reconciliation of the dual regime can also be found in Article 25(4) of the Rome Statute: “no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”¹³⁹ Moreover, the commentaries of the Draft Articles on State Responsibility support this idea explicitly.¹⁴⁰ Hence, the dual responsibility indeed exists in the international legal system.

III. THE MODES OF INDIVIDUAL CRIMINAL LIABILITY

The *antinomy* of collectivism and individualism not only results in the coexistence of state responsibility and individual criminal liability, but also shapes the justification of and determination on the modes of individual criminal liability.

It is the nature of criminal law to focus on personal fault, guilt and the subsequent liability.¹⁴¹ The basic idea lies in the belief that the individual is choosing freely to commit the offense and thus can only be held fully liable for the free choice of his own conduct.¹⁴² Therefore, when a crime is committed jointly, personal liability always becomes the first position while other derivative criminal liability based on certain linking principles is logically deduced from the primary liability.¹⁴³

However, once it is realized that international crimes are system criminality by nature and distinguish themselves from normal crimes

¹³⁶ UN Charter art. 2, ¶ 4.

¹³⁷ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287/ 1958 ATS No 21.

¹³⁸ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Torture Convention, *supra* note 25.

¹³⁹ Rome Statute, *supra* note 15, art. 25(4).

¹⁴⁰ See Draft Articles on State Responsibility, *supra* note 134 art. 58.

¹⁴¹ See, e.g., GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW (2010); Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 182 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

¹⁴² See, e.g., Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68 (1991); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431 (1989).

¹⁴³ GABRIEL HALLEVY, THE MATRIX OF DERIVATIVE CRIMINAL LIABILITY 20 (2012).

jointly committed by a group of people in a loosely and temporally organized way, we can no longer interpret the criminal liability in a merely isolated way and in a purely liberal approach. The precondition of the liberal theory of “free choice” is fundamentally challenged by Arendt’s “upside-down system”¹⁴⁴ of totalitarian background and Fletcher’s romantic theory of “collective will.”¹⁴⁵ So are the fundamental elements of criminal liability such as intent and culpability.¹⁴⁶ Correspondingly, new methods are necessary to reconcile the nature of international crimes and the modes of individual criminal liability.

International criminal courts and tribunals have long struggled to find modes of liability that meet both the fundamental principles of criminal law and the characteristics of international crimes. From conspiracy in the Nuremberg Trials,¹⁴⁷ to JCE in the ICTY,¹⁴⁸ the Rome Statute introduces co-perpetration on joint control and command responsibility,¹⁴⁹ and finally includes the highly hybrid mode of indirect co-perpetration.¹⁵⁰ Nevertheless, regardless of whether those different modes of liability are considered good or not, the consensus on the modes of individual criminal liability remains unreachable.

A. GENERAL RULE

As discussed above, the general deduction approach for ordinary crime based on “free choice” is from personal liability to derivative liability.¹⁵¹ However, under the “upside-down system,”¹⁵² this deduction approach shall be revisited correspondingly.

¹⁴⁴ Luban, *supra* note 90, at 639.

¹⁴⁵ Fletcher, *supra* note 18.

¹⁴⁶ Intent, foreseeability, culpability etc. might be the fundamental elements to consider when determining individual criminal liability. See, e.g., Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69 (2007).

¹⁴⁷ Conspiracy was used with respect to the crime against peace in Nuremberg Trial and was later deemed an inchoate crime with respect to the crime of genocide. E.g., Prosecutor v. Milošević et al, Case No. IT-99-37-AR72, Separate Opinion of Judge Hunt, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003).

¹⁴⁸ See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

¹⁴⁹ Rome Statute, *supra* note 15, art. 25, 28; van der Wilt, *supra* note 141, at 158.

¹⁵⁰ See, e.g., Prosecutor v. Katanga, ICC-01/04-01/07-3269, Decision on Confirmation of Charges (Sep. 30, 2008), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-43-ENG.pdf.

¹⁵¹ HALLEVY, *supra* note 143, at 20.

¹⁵² ARENDT, *supra* note 9, at 291–92.

The traditional rule of attribution refers only to the derivative deduction from individual to individual. However, in the context of international crimes, both the individual, based on the liberal view of free choice, and the group as a whole, based on the romantic idea of system criminality, are the symbiotic primary position of liability. Hence the rule of attribution shall not only be the linking principle among individuals, but also based on the relationship between individual and collective groups.¹⁵³ This doctrine is called *Zurechnungsprinzip Gesamttat*.¹⁵⁴

In other words, in the mixed system of *individualism* and *collectivism*, each individual has a duality of nature. On the one hand, an individual is to be held liable for his or her own committed or derivative crimes. On the other hand, crimes committed by a part of the collective group are to be attributed to individuals in certain high functional positions or to be mitigated for people in certain low functional positions due to lack of culpability.

1. *Collectivism as Justification for Attribution and Mitigation*

The fundamental mismatch between international crimes as system criminality and modes of individual criminal liability becomes much more obvious when calculating the culpability by measuring *mens rea* and *actus reus*. The disproportion of those concepts directly leads to the dilemma of seeking linking principles among individuals especially in a large-scale organized crime.¹⁵⁵ JCE tries to fill in the gap by using a horizontal link,¹⁵⁶ co-perpetration by joint control tries by using a vertical

¹⁵³ Kai Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "Most Responsible"*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* 157 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

¹⁵⁴ FRIEDRICH DENCKER, *KAUSALITÄT UND GESAMTTAT* 125, 152, 229, 253 (1996).

¹⁵⁵ See Jens D. Ohlin, *Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability*, 25 *LEIDEN J. INT'L L.* 771 (2012).

¹⁵⁶ E.g., *Tadić*, *supra* note 148, ¶ 191:

Most of the time these 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 (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commissions of the offence in question. 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.

link,¹⁵⁷ and indirect perpetration tries by combining the horizontal and vertical links.¹⁵⁸

As discussed in Part II of this Article, system criminality occurs in the background of an “upside-down” society, where the individual doers are “absorbed in the group,” “commit acts they would almost certainly never contemplate doing as individuals,” and carry out mass killings and other atrocities “for granted routine,”¹⁵⁹ for instance, 250,000 people a year on the Eastern Front during WWII.¹⁶⁰ Under this deep psychological impact,¹⁶¹ international crimes arise from a “conspicuous feature of modern bureaucracies” existing so as to “dissociate evil from human motives.”¹⁶² Thus, the mass atrocities are not accomplished by a simple aggregation of separate evils, but a complicated chemical reaction by a group of people acting collectively in an organized way. Each atrocity is not only linked to the physical or derivative individual, but also to the collective group as a whole.

Elaboration of *mens rea* in Article 25(d) of the Rome Statute might serve as a plausible ground to support the dual system in international crimes. That Article stipulates: “such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group . . . ; (ii) be made in the knowledge of the intention of the group to commit the crime.”¹⁶³ The linking principle in *mens rea* refers directly to the “purpose of the group,” and thus relates individual *mens rea* to collective will and the collective system as a whole.

Moreover, the ICTY’s analysis of JCE II in the *Kvočka* case also helps on this point. The ICTY indicated that “Kvočka continued participation in the Omarska camp, sent a message of approval to other participants in the camp’s operation, specifically guards in a subordinate position to him, and was a condonation of the abuses and deplorable

¹⁵⁷ E.g., Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 330-40 (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF; Prosecutor v. Bemba, ICC-01/05 -01/08, Decision on the Confirmation of Charges, ¶¶ 347-50 (June 15, 2009), https://www.icc-cpi.int/courtrecords/cr2009_04528.pdf; Prosecutor v. Banda, ICC-02/05-03/09, Decision on the Confirmation of Charges, ¶ 126 (March 7, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.03.07_Prosecutor_v_Banda.pdf.

¹⁵⁸ See, e.g., Katanga, *supra* note 150.

¹⁵⁹ Punch, *supra* note 97, at 42 and 55.

¹⁶⁰ ARENDT, *supra* note 98, at 73.

¹⁶¹ van der Wilt, *supra* note 141, at 166.

¹⁶² ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 41 (1st ed. 1989).

¹⁶³ Rome Statute, *supra* note 15, art. 25(d).

conditions there.”¹⁶⁴ Such legal reasoning can be properly understood in a way that Kvočka’s participation contributes to the collective group as a whole in both a psychological way and physical way.

Indeed, in this mixed system, collectivism is too abstract and needs to be substantiated to function in the individual criminal liability. Usually commanders (especially those positioned at the high level of the hierarchical organizations) are deemed to be the symbolized figure of the collective group.¹⁶⁵ Then the rules of attribution and mitigation apply based on the certain functional position an individual plays in a collective group on the dimension of collectivism. The attribution mode would be further discussed in superior responsibility later.

As for the issue of mitigation, collectivism side has long been ignored, and collective will and systematic function have not been separated from individual will and liability. It is not the whole story that individuals can use the collective group as a shield to avoid liability,¹⁶⁶ but international criminal trials “at best can appear as partial justice, at worst a form of scapegoating,”¹⁶⁷ disregarding the “sophisticated bureaucracy.”¹⁶⁸ Moreover, the mitigation rule is completely absent.¹⁶⁹ As a matter of fact, the collectivism side of international crimes largely lowers the personal culpability when one acts in a way substantially contributing to the collective group, and accordingly mitigation of the punishment might be justified.¹⁷⁰ Further, considering retribution, deterrence, rehabilitation and incapacitation as the purposes of punishment,¹⁷¹ mitigation can play an important role,¹⁷² and the collective group as a whole “may be better positioned to cause a change in behavior” by monitor and control.¹⁷³

¹⁶⁴ See Prosecutor v. Kvočka et al., Case No. IT-98-30/I-T, Trial Judgment, ¶ 405 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

¹⁶⁵ See, e.g., Ambos, *supra* note 153.

¹⁶⁶ This is why the Nuremberg notion was created. See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany.

¹⁶⁷ Simpson, *supra* note 50, at 94.

¹⁶⁸ HILBERG, *supra* note 48, at 59.

¹⁶⁹ Simpson, *supra* note 50, at 96.

¹⁷⁰ See Fletcher, *supra* note 18.

¹⁷¹ HALLEVY, *supra* note 116, at 15–54.

¹⁷² Nollkaemper, *supra* note 23, at 15.

¹⁷³ Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003).

2. *Before Determination: Different Level of Collectivism Concerning Different International Crimes*

Before discussing the modes of individual liability in details, one point requires clarity. Although the five main international crimes are system criminality, the level of collectivism is different for each crime.¹⁷⁴ Such difference plays an important role in attribution, mitigation, and choosing the appropriate modes of liability.¹⁷⁵

Among international crimes, the crime of aggression (the crime against peace) might be characterized as the most collective crime.¹⁷⁶ The strong, collective nature of the crime of aggression leads to individual liability only on high-level, if not the highest, leaders, rather than imposing criminal liability on low-level perpetrators.¹⁷⁷ Following the crime of aggression, the next one might be the crime of genocide. Although the ICTY imagined the situation of one-man genocide,¹⁷⁸ genocide remains not only the most severe crime committed by one group with the special intent to eliminate the whole group of other people, but also the only crime that incorporates conspiracy in the ICTY and the ICTR.¹⁷⁹

Crimes against humanity and war crimes may share the same level of collectivism. As generally acknowledged as “serious violations of the rules of customary and treaty law (mainly Geneva Convention) concerning international humanitarian law,”¹⁸⁰ not only are war crimes required to be located in the context of international or non-international armed conflict,¹⁸¹ but they are also required to be qualified upon the nexus with the armed conflict.¹⁸² The collective nature of crimes against humanity is reflected in its definition. Article 7(1) of the Rome Statute requests “acts when committed as part of a widespread or systematic attack,” and Article 7(2)(a) defines “attack” as “pursuant to or in

¹⁷⁴ See Jann Kleffner, *The Collective Accountability of Organized Armed Groups for System Crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 238–69 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

¹⁷⁵ Nollkaemper, *supra* note 23, at 15.

¹⁷⁶ For the origin of the crime against peace, see IMT Charter, *supra* note 28, art. 6 (a).

¹⁷⁷ CASSESE, *supra* note 25, at 141.

¹⁷⁸ Jelisić, *supra* note 68, ¶ 100.

¹⁷⁹ See MORRIS & SCHARF, *supra* note 77.

¹⁸⁰ SHAW, *supra* note 31, at 312.

¹⁸¹ The extension of the scope of armed conflict can be found in both common art. 3 of Protocol II and Tadić case.

¹⁸² Akayesu, *supra* note 40, ¶¶ 630–34; Kayishema, *supra* note 44, ¶¶ 185–89, 590–624; Musema, *supra* note 40, ¶¶ 259–62, 275, 974; Tadić, *supra* note 43, ¶ 573; Delalić, *supra* note 42, ¶ 193.

furtherance of a state or organizational policy to commit such attack.”¹⁸³ Both crimes are closely related to policy background, however they can be done either on a macro level or micro level.

Lastly, the level of collectivism of torture might be hard to discern. As the least severe crime, torture sounds much easier to be committed in a non-organized manner. However, the recourse to torture is exactly how a collective power decides who the exception and enemy are to maintain its power when confronting major challenges.¹⁸⁴ Thus, the “instrumental purpose” required by torture serves as a “policy” requirement and reveals the collective nature of the crime of torture. Furthermore, the perception of a threat to the system’s power (usually state sovereignty) plays a central role in causing these collective acts.¹⁸⁵ Considering that torture is practically incorporated in war crimes and crimes against humanity before the ICTY, the ICTR and the ICC,¹⁸⁶ the author presumes that the level of collectivism is similar for both types of crime.

In addition to the five international crimes varying in collectivism level, the entities carrying out the crimes also have different levels of collectivism. The organization’s nature may vary from the highly hierarchical bureaucracy of Nazi-Germany, to loosely organized groups in Somalia.¹⁸⁷ Correspondingly, different legal responses shall be paid to different kinds of organization.¹⁸⁸ The latest example is the ICC Appeals Chamber’s judgment in *Bemba*. The Appeals Chamber, when determining Bemba’s command responsibility for 2002-2003 Central African Republic Operation, attached great significance to the collective level of the operational entity:

The scope of the duty to take “all necessary and reasonable measures” is intrinsically connected to the extent of a commander’s material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.¹⁸⁹

¹⁸³ Rome Statute, *supra* note 15, art. 7.

¹⁸⁴ Kelman, *supra* note 85, at 32.

¹⁸⁵ See Heinz, *supra* note 88.

¹⁸⁶ See, e.g., Rome Statute, *supra* note 15, art. 7(1)(f), art. 8(2)(a)(ii).

¹⁸⁷ See Kleffner, *supra* note 174.

¹⁸⁸ Nollkaemper, *supra* note 23, at 18.

¹⁸⁹ Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ¶ 167 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf.

To conclude, both international crimes and the collective entities vary in the level of collectivism. When choosing the modes of liability, or applying the rule of attribution or mitigation, the different collective level of the crimes and the organizations shall be taken into consideration. Generally speaking, the more collective the crime and the group are, it would be more likely to attribute the wrongdoing to the superior, either by joint control approach or by command responsibility, and to mitigate the culpability of the individuals in a lower functional position. Correspondingly, the less collective the crime and the group are, it would be more appropriate to treat international crimes closer to ordinary crimes by applying liability mode like JCE, since it would be harder to link what is done by one to another, especially in a vertical way. It would also be hard to mitigate the individual culpability by considering collective entity.

B. JCE OR JOINT CONTROL? COLLECTIVISM AND INDIVIDUALISM IN
MODES OF LIABILITY

1. *JCE as Horizontal Linking Principle for Individualism*

Built on shared *mens rea* rather than shared *actus reus*,¹⁹⁰ and restrained by the element of significant contribution rather than membership,¹⁹¹ JCE makes itself stand out as a promising mode of liability to construct horizontal linking principles among individuals.

The *Tadić* case gives a brilliant start for JCE, where the court creatively provides three type of JCE: JCE I, co-perpetrators act on common design based on same criminal intention;¹⁹² JCE II, context of concentration or detention camp;¹⁹³ and JCE III, perpetrators based on common design commit a foreseeable risk of incorporating conduct beyond the scope of the common design.¹⁹⁴ While the first two types of JCE are widely accepted, JCE III is challenged as a strict liability. Several arguments are made to justify JCE III, and one of them

¹⁹⁰ CASSESE, *supra* note 25, at 163.

¹⁹¹ *E.g.*, Prosecutor v. Pavković et al, Case No. IT-05-87-A, Appeals Chamber Judgment, ¶ 1179 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (ICTY Appeals Chamber emphasized "significant contribution" over membership).

¹⁹² *Tadić*, *supra* note 148, ¶ 196.

¹⁹³ *Id.*, ¶ 202.

¹⁹⁴ *Id.*, ¶ 204.

emphasizes the causal link between the previous existence of the other JCE types to the additional crime in JCE III.¹⁹⁵

So far, JCE has been widely applied by the ICTY, the ICTR, the SCSL,¹⁹⁶ by national courts such as the War Crimes Chamber of the Court of Bosnia and Herzegovina,¹⁹⁷ and the East Timorese Special Panel for Serious Crimes.¹⁹⁸ JCE has also been recognized as a mode of liability by the STL¹⁹⁹ and the ECCC.²⁰⁰

Nevertheless, when coming to the ICC, it becomes unclear whether or not JCE is applicable; and if so, to what extent JCE shall apply. With no explicit reference in Article 25(3)(a) of the Rome Statute, JCE can be applied by interpreting “jointly with another person” in Article 25(3)(a).²⁰¹ However, the ICC may find it hard to accept JCE III, which is based on the acceptance of a foreseeable risk, since there is specific requirement for intent under the ICC regime.²⁰² Up till now, although the ICC decisions show an obvious preference to co-perpetration through joint-control, yet it remains possible for the ICC to apply JCE.²⁰³

What is the basic rationale of JCE? When first introducing JCE, the ICTY in the *Tadić* case indicates:

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 the commissions of the offence in question. It follows that the moral gravity of such

¹⁹⁵ CASSESE, *supra* note 25, at 170.

¹⁹⁶ See e.g., Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶¶ 72–5 (June 20, 2007).

¹⁹⁷ See e.g., Prosecutor’s Office of Bosnia and Herzegovina v. Milorad Trbic, Case No. X-KR-07/386, First Instance Verdict, affirmed, Second Instance Verdict, ¶¶ 203–14 (Oct. 16, 2009).

¹⁹⁸ See e.g., Prosecutor v. Cardoso, Case No. 04c/2001, Special Panel for the Trial of Serious Crimes in the District Court of Dili, East Timor, Judgment, ¶¶ 367–76 (April 5, 2003).

¹⁹⁹ See e.g., Prosecutor v. Ayyash et al., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176bis, ¶¶ 237–49 (May 30, 2013).

²⁰⁰ See, e.g., Prosecutor v. IENG et al., Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶¶ 57–8 (May 20, 2010).

²⁰¹ Prosecutor v. Lubanga, ICC-01/04-01/06, Separate Opinion of Judge Adrian Fulford, ¶¶ 15–6 (Mar. 14, 2012); Katanga, *supra* note 150, ¶¶ 520–26; Bemba, *supra* note 157, ¶¶ 347–50.

²⁰² Bemba, *supra* note 157, ¶ 369 (rejecting *dolus eventualis* and holding that to meet the requirement of intent “he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan”).

²⁰³ See e.g. Lubanga, *supra* note 201, ¶¶ 16–18 (reasoning that the control theory cannot be found in the Rome Statute and the theory resembles JCE in the way it is interpreted); See also CASSESE, *supra* note 25, at 175.

participation is often no less — or indeed no different — from that of those actually carrying out the acts in question.²⁰⁴

In brief, JCE is a horizontal linking principle to aggregate separate individual *mens rea* and *actus reus*. Completely based on the idea of individualism, JCE first presumes equally separate individual liability and then deduces derivative responsibility by ascertaining links among individuals. Nothing is given to the collective group as a whole, nor international crimes as system criminality. Hence, JCE has several fundamental flaws.

First, the essential presumption of JCE is that all members under the common design are *de facto* and *de jure* equivalent. Originated from complicity-conspiracy, JCE remains a mixed pedigree combining complicity with conspiracy.²⁰⁵ Criticized as a “just convict everyone” doctrine,²⁰⁶ JCE puts equal culpability for all members,²⁰⁷ based on its unitary spirit that everyone is causally responsible for the crime disregarding the level of participation.²⁰⁸

Second, for the preceding reason, the most evident limitation for JCE lies in its failure to justify the vertical relationship among individuals who commit international crimes in an organized way. Since the vertical relationship breaks out the basic spirit of JCE regarding equivalent common design, incongruities appear when JCE fails to fill in the linking gap in a large scale of co-perpetration in an organized way. JCE cannot find the explanation for attribution and culpability vertically in the way that it finds them horizontally in the *Kvočka* case.²⁰⁹

Third, the basic idea for JCE to link individuals aggregately and thus deduce vicarious responsibility fails to substantiate any abstract collectivism and fails to answer the core of the “policy” crimes.

²⁰⁴ Tadić, *supra* note 148, ¶ 191.

²⁰⁵ See, Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 139 (2005).

²⁰⁶ See Mohamed E. Badar, ‘Just Convict Everyone!’ — *Joint Perpetration: From Tadić to Stakić and Back Again*, 6 INT’L CRIM. L. REV. 293 (2006).

²⁰⁷ See, Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Judgment, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002) (“If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.”)

²⁰⁸ Jens D. Ohlin, *Co-Perpetration: German Dogmatik or German Invasion?*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS 3 (Carsten Stahn ed. 2013).

²⁰⁹ See Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 188 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

Analyzing from the perspective of isolated, separate individuals, not surprisingly, JCE finds all members in a common plan equally culpable.²¹⁰ Indeed, from the sheer perspective of criminal law, which focuses mainly on personal guilt and personal liability,²¹¹ JCE perfectly functions to extend criminal liability by horizontally linking separate individuals. However, from the perspective of international crimes as systematic crimes, JCE fails to reflect the interaction among members of the collective group in an organized way. Consequently, through JCE “international crimes cannot be properly understood.”²¹²

In conclusion, JCE is certainly more suitable for ordinary crimes, or at least crimes not committed in a highly organized way. Recalling the previous discussion with respect to the level of collectivism of international crimes and collective entities, JCE may not apply in a macro way to understand a large scale of well-organized mass atrocity. As for the less-organized crimes or the micro part of a large map, JCE still has an important role to play on the individualism dimension of international crimes.

2. *Co-Perpetration on Joint-Control*

Under the fundamental mismatch between JCE and the systematic nature, or at least highly organized feature of international crimes, a better linking principle is necessary. Such linking principle should be able to combine both the horizontal and vertical way, and fundamentally substantiate the abstract collective entities and subsequently draw the nature of international crimes. The strong expectation to combine the horizontal cooperation and vertical control gave birth to the control theory/co-perpetration on joint-control.²¹³

The escape from JCE first appeared in the *Gacumbitsi* case in the ICTR, where the Appeals Chamber held that the perpetrator committed genocide although he never physically participated in killing.²¹⁴ Present at the crime scene to supervise and direct the massacre, Gacumbitsi was deemed an active participant in separating the Tutsi refugees to be killed and constituted “as much an integral part of the genocide as were the

²¹⁰ Ohlin, *supra* note 146, at 76.

²¹¹ van der Wilt, *supra* note 141, at 160.

²¹² *Id.*

²¹³ Katanga, *supra* note 150, ¶¶ 491–93.

²¹⁴ Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeals Chamber Judgment, ¶ 60 (July 7, 2006), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-01-64/appeals-chamber-judgements/en/060707.pdf>.

killings which it enabled.”²¹⁵ According to Roxin’s control theory, Gacumbitsi should be defined as the individual who had control over the crimes, namely who decided whether the atrocity would occur.²¹⁶

Later in *Lubanga* case, the ICC interpreted Article 25(3)(a) of the Rome Statute by using Roxin’s theory.²¹⁷ Similar to JCE, there is no explicit reference to control theory, or co-perpetration on joint-control, or indirect co-perpetration in Article 25(3)(a), where an individual is stipulated as criminally responsible if he “commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”²¹⁸ The ICC in *Lubanga* explained that “principals to a crimes are not limited to those who physically carry out the objective elements of the offenses, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.”²¹⁹ In other words, such a defendant shall be convicted as a principal perpetrator in spite of his lack of *actus reus*, since he became an indirect perpetrator when using “other individuals as instruments to perform the killings.”²²⁰

Roxin further justifies his theory by using the mode of “*Organisationsherrschaft*”²²¹ which refers to perpetration through an organization by using an organized apparatus of power as an instrumentality of the crime.²²² The ICC pointed out that the organization shall be based on a hierarchical structure comprising sufficient fungible subordinates ensuring *automatic compliance* with the leader’s will.²²³ Accordingly, relying on subordinates as “mere gear in a giant machine,” the perpetrator-behind-the-perpetrator (which is called by Roxin as *Hintermann*)²²⁴ is able to master behind the scene and achieve his criminal aims.²²⁵

²¹⁵ *Id.*

²¹⁶ See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, Page (2000).

²¹⁷ Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 324 (Jan. 29, 2007).

²¹⁸ Rome Statute, *supra* note 15, art. 25(3)(a).

²¹⁹ Lubanga, *supra* note 217, ¶ 330.

²²⁰ FLETCHER, *supra* note 216, at 639.

²²¹ Thomas Weigend, *Perpetration through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT’L CRIM. JUST. 91, 97 (2011).

²²² CLAUS ROXIN, *TÄTERSCHAFT AND TÄTHERSSCHAFT* 193 (8th ed. 2006).

²²³ Katanga, *supra* note 150, ¶ 512.

²²⁴ ROXIN, *supra* note 222, at 244; Claus Roxin, *Dogmatic Structure of Criminal Liability in the General Part of the Draft Israel Penal Code*, 30 ISRAEL L. REV. 71, xx-xx (1996).

²²⁵ Katanga, *supra* note 150, ¶ 515.

Control theory/co-perpetration on joint-control differs from JCE fundamentally in the following three ways. First, control theory/co-perpetration on joint control never presumes the equivalent culpability and liability on individual perpetrators. On the contrary, the original idea behind this mode of liability is to find who is more to blame in mass atrocities committed in an organized way. That is also why this mode puts a significant amount of emphasis on seeking “the perpetrator who stands behind the perpetrators.”²²⁶ Admittedly, the distinction made to discern different levels of culpability and liability did appear before the ICTY in the age of JCE. For instance, the ICTY once accepted that JCE members can use non-members as “tools” to achieve the common purpose, which probably gave birth to the way of linking the crimes to a JCE member through superiors’ control over a hierarchical organization.²²⁷ This idea can be further dated back to Eichmann,²²⁸ Argentinean Generals,²²⁹ East German border killings,²³⁰ and Nuremberg cases.²³¹

Second, unlike JCE, control theory/co-perpetration on joint-control is born to deal with vertical linking principle rather than the horizontal one. Instead of focusing on the coordination between horizontal behaviors, control theory/co-perpetration on joint-control focuses more on the vertical structure of the collective entities and how the entities function from the top of the organization to the bottom of the organization. Under *Organisationsherrschaft* the immediate perpetrators are “interchangeable cogs in the machine of hierarchical power.”²³² Unlike JCE, which relies on shared common design, control theory/co-

²²⁶ Some of these principles were also developed in FRIEDRICH C. SCHROEDER, *DER TÄTER HINTER DEM TÄTER: EIN BEITRAG ZUR LEHRE VON DER MITTELBAREN* (1965).

²²⁷ Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶¶ 68–70 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://www.icty.org/x/cases/stakic/acjug/en/staj060322e.pdf>; Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Chamber Judgment, ¶¶ 239, 241, 262 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009), <http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>.

²²⁸ See Eichmann case, 36 I.L.R. 197 (Israel Sup. Ct. 1961).

²²⁹ Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal [National Chamber of Criminal and Correctional Appeals], 09/12/1985, Fallos (1985-309-I/II- 1601-2) (Argentina).

²³⁰ Bundesgerichtshof [BGH][Federal Court of Justice] July 26, 1994, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2703 (Ger.).

²³¹ United States v. Altstoetter, Case No. 11, Judgment, ¶ 985 (US Military Tribunal sitting at Nuremberg Dec. 4, 1947”) (“[C]onscious participation in a nationwide government-organized system of cruelty and injustice.”).

²³² Ambos, *supra* note 153, at 144.

perpetration on joint-control relies on the function of the organization through interchangeability and automatic execution.²³³

Third, the basic idea behind control theory/co-perpetration on joint-control no longer assumes individual liability first and then deduces vicarious responsibility by linking individuals through certain principles. The focus has transferred from individual to collective entities, which strikes the very nature of international crimes, namely system criminality. Moreover, this mode of liability substantiates the abstract entity by requesting the key element of exercising effective control.

Of course, the control theory/co-perpetration on joint-control certainly has some limits. One of them is that it focuses too much on vertical structure, that it works well when attributing responsibility at the leadership level in an organizational apparatus of hierarchical power,²³⁴ but works less efficiently when examining the horizontal coordinating factors. Moreover, it is sometimes hard to meet its precondition of “interchangeability” and “automatic execution.”²³⁵ In addition, it could be a dangerous tendency to ignore the liberal choice of the direct perpetrators by relying too much on *Organisationsherrschaft* and thus throw the individualism away.

In conclusion, based on the *antinomy* of collectivism and individualism of international crimes, and considering the different levels of collectivism of both international crimes and the collective entities, neither can JCE nor control theory/co-perpetration on joint-control completely take the place of the other. JCE provides the linking principle dealing with the horizontal part on the individualism dimension, while the control theory/co-perpetration on joint-control provides the linking principle dealing with the vertical structure on the collectivism dimension. Accordingly, they shall work together and apply flexibly under a case-by-case analysis taking into consideration the level of collectivism of both the international crimes and the collective entities.

²³³ *Id.* at 145.

²³⁴ See Hans Vest, *Humanitätsverbrechen — Herausforderung für das Individualstrafrecht*, 13 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 493 (2001).

²³⁵ Ambos, *supra* note 153, at 145.

C. DUAL SYSTEM? COMMAND RESPONSIBILITY AS A SEPARATE
RESPONSIBILITY FOR OMISSION OR COMPLEMENTARY MODE OF
LIABILITY?

Command responsibility does not refer to the accountability of commanders who positively led the mass atrocities (which has already been discussed in JCE and control theory). Instead, command responsibility refers to the liability of commanders for inaction and omissions.

Although highly controversial, command responsibility is not a new creature. As early as WWII,²³⁶ command responsibility was engaged in international law. It was established as a way to hold superiors liable for failure to prevent or punish crimes perpetrated by their subordinates.²³⁷ While discussed in *Karl Brand and others* (Doctors case), *List and others* (Hostages cases), *Wilhelm von Leeb and others* (High Command case) in Nuremberg and *Araki and others* in Tokyo, command responsibility was first fully elaborated by the ICTY in *Delalic et al.* (Čelebići camp).²³⁸

Further developed in the ICTY and the ICTR, command responsibility is finally incorporated in Article 28 of the Rome Statute, requiring an additional element of causation.²³⁹ It stipulates that crimes must result from the superior's failure to exercise control properly over his subordinates. This has been interpreted in a way that the superior's omissions must have "increased the risk of the commission of the crimes."²⁴⁰ Moreover, Article 28 of the Rome Statute largely overcomes the ambiguity of the wording of Article 7(3) of the ICTY Statute and explicitly indicates command responsibility as omission liability where a command is punished for his or her own failure to act, not for the crimes

²³⁶ Mineitciro Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. L. 95, 121 (1920).

²³⁷ CASSESE, *supra* note 25, at 182.

²³⁸ See, e.g., Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999); Matthew R. Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 159 (2000).

²³⁹ Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 77 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf> ("[C]ausality between a commander's failure to prevent subordinates crimes and the occurrence of these crimes . . . is more a question of fact to be established on a case by case basis, than a question of law in general.")

²⁴⁰ Bemba, *supra* note 157, ¶ 425.

of the subordinate.²⁴¹ According to the judicial decisions of international criminal courts and tribunals,²⁴² command responsibility requires *de jure* or *de facto* superior-subordination relationship,²⁴³ effective control,²⁴⁴ actual or constructive knowledge and failure to take necessary and reasonable measures.

What is the nature of command responsibility? Command responsibility characterizes itself as a separate responsibility of omission, as opposed to a complementary mode of liability. In *Delalic et al.*, the ICTY Trial Chamber provided a thorough explanation for command responsibility: “the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act.”²⁴⁵ Going through the Hague Conventions of 1907 as “the roots of the modern doctrine of command responsibility,” Charters and practice in the Nuremburg Trials and the Tokyo Trials, the post-WWII domestic trials, the Rome Statute and ILC’s draft work, the Trial Chamber concluded that “the principle of individual criminal

²⁴¹ ELIES VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* 189 (1st ed. 2003).

²⁴² E.g., *Delalic et al.*, *supra* note 42, ¶ 346; *Prosecutor v. Aleksovsi*, Case No. IT-95-14/1-T, Trial Judgment, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999), <http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf>; *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Trial Judgment, ¶ 311 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006), http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf; *Prosecutor v. Orić*, IT-03-68-T, Trial Judgment, ¶ 294 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Trial Judgment, ¶ 558 (Int’l Crim. Trib. for the Former Yugoslavia Sep. 27, 2007), <http://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf>; *Prosecutor v. Delić*, Case No. IT-04-83-T, Trial Judgment, ¶ 56 (Int’l Crim. Trib. for the Former Yugoslavia Sep. 15, 2008), <http://www.icty.org/x/cases/delic/tjug/en/080915.pdf>; *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Trial Judgment, ¶ 406 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008), http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf.

²⁴³ E.g., *Prosecutor v. Karera*, Case No. ICTR-01-74, Judgment and Sentence, ¶ 564 (Dec. 7, 2007), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-01-74/trial-judgements/en/071207.pdf>; *Orić*, *supra* note 242, ¶ 309.

²⁴⁴ E.g., *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-T, Trial Judgment, ¶ 378 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *Hadžihasanović*, *supra* note 242, ¶¶ 76–79; *Orić*, *supra* note 242, ¶ 311. See also Bantekas, *supra* note 238, at 580; Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 39 CORNELL INT’L L. J. 793, 795–96 (2005); Mark J. Osiel, *The Banality of the Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1774 (2005).

²⁴⁵ *Delalic*, *supra* note 42, ¶ 334.

responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.”²⁴⁶

In the *Halilović* case, the ICTY Trial Chamber pointed out: “for the acts of his subordinates” does not mean “that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.”²⁴⁷ The Trial Chamber went on saying:

The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.²⁴⁸

As a separate responsibility for omission, command responsibility depends on the different primary law rules it breaches compared with that of normal criminal liability. Unlike JCE or control theory, command responsibility does not come from the deduction through linking principle. Instead, it comes directly from the breach of the duties defined in Article 87 of the Additional Protocol I to the Geneva Conventions of 1977, namely the commander’s responsibility under *jus in bello*.²⁴⁹ Generally command responsibility is divided into two types, namely failure to prevent and failure to punish.²⁵⁰ Both types perfectly reflect the core of the command responsibility — responsibility of prevention of the occurrence of mass atrocities, either in a preventive way by hierarchical control and supervision, or in a deterrent way by punishing previous atrocities.

If the control theory is seeking a functional approach through the structure of the organization to find who is more culpable, then command responsibility goes one step further. Command responsibility finds a substantiated individual on behalf of the collective entity to be attributed to and imposes on him or her the responsibility to control and the

²⁴⁶ *Id.* ¶¶ 335–43.

²⁴⁷ Prosecutor v. Halilović, IT-01-48-T, Trial Judgment, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), <http://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf>.

²⁴⁸ *Id.*

²⁴⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 87, 8 June 1977, 1125 U.N.T.S. 3.

²⁵⁰ See, e.g., *Blaškić*, *supra* note 239, ¶¶ 76–77, the ICTY Appeals Chamber held that causation may not be an element of superior responsibility under ICTY Statute, since it could be impossible to link a failure to punish with the commission of the crime.

subsequent liability to be punished. In brief, command responsibility to a large extent serves as the representative of the collectivism dimension of international crimes and its substantiated result on individual criminal liability.

The preceding discussion demonstrates why some of us may find it familiar to read command responsibility. Indeed, it looks exactly the same as the states' omission responsibility of failure to act. A State can breach its duty by "knowingly us[ing] its territory to raise harm to others" or "omissions and failure to prevent harm," under which circumstance, private bodies' acts can be properly attributed to state through its underlying responsibility of control.²⁵¹ In the case of command responsibility, a commander is supposed to act as a "guarantor" of the entity to prevent the atrocities, and the subsequent atrocities due to the commander's omission and failure to act can be appropriately attributed to that commander. In this way, the commander is symbolized as the representative of the collective entity while the abstract entity is substantiated as the commander.²⁵² Such "guarantor" responsibility is a separate individual liability, which maximally magnifies the collectivism in individual criminal liability.

In sum, command responsibility is *not* a parallel mode of liability like JCE and control theory, *not* a kind of vicarious liability,²⁵³ *not* a mode of accessory liability,²⁵⁴ but an independent and separate omission responsibility directly created from a commander's obligation of prevention as a "guarantor" of the collective entity.

IV. CONCLUSION

Human history has seen too many inhumane mass atrocities. It is reasonable to presume that "there is nothing that people will not do to other people."²⁵⁵ However, mass atrocities are not simple aggregations of isolated individual evils. Driven by fanaticism and extremism, people are deeply absorbed in the collective entities with power of totalitarianism

²⁵¹ See *Draft Articles on State Responsibility*, *supra* note 134; See also *Corfu Channel case* (U.K. & N. Ir. v. Alb.), Merits, 1949 I.C.J. 4, ¶ xx (April 9).

²⁵² Ambos, *supra* note 153, at 149.

²⁵³ For the arguments on vicarious liability, see, e.g., SLIEDREGT, *supra* note 241, at 352; Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 628 (2007).

²⁵⁴ Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction*, 13 MELBOURNE J. INT'L L. 1, 1 (2012).

²⁵⁵ Punch, *supra* note 97, at 42.

and with the mechanism for dehumanization. At a micro level, both collective will and liberal will govern the choice of an individual. At a macro level, the moral environment of a society is turned upside down, and the more powerful the collective entities are, the more difficult it is for an individual to make liberal choices from the evil tasks that have become routine tasks. Confronting the mixed nature of individualism and collectivism, there is a fundamental mismatch between traditional criminal law focusing on individual guilt and accountability of international crimes as system criminality. Hence, there should be dual regime for both state responsibility and individual criminal liability.

The appropriate understanding of the *antinomy* between individualism and collectivism in international crimes also plays a vital role in justifying and determining the modes of individual criminal liability. JCE provides the horizontal linking principle on the individualism dimension, while the control theory/co-perpetration on joint-control provides the vertical linking principle on the collectivism dimension. The two of them shall work together and apply under a case-by-case analysis taking into account the level of collectivism of the international crimes and the collective entities. In addition, command responsibility as separate responsibility for omission substantiates the abstract collective entities and attributes the wrongdoings of its subordinates to the commander who plays the role as the “guarantor” of the collective entities for failure to act.