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### The End of 'Modes of Liability' for International Crimes

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# THE END OF “MODES OF LIABILITY” FOR INTERNATIONAL CRIMES

James G. Stewart\*

*Modes of liability, such as ordering, instigation, superior responsibility and joint criminal liability, are arguably the most discussed topics in modern international criminal justice. In recent years, a wide range of scholars have rebuked some of these modes of liability for compromising basic concepts in liberal notions of blame attribution, thereby reducing international defendants to mere instruments for the promotion of wider socio-political objectives. Critics attribute this willingness to depart from orthodox concepts of criminal responsibility to international forces, be they interpretative styles typical of human rights or aspirations associated with transitional justice. Strangely, however, complicity has avoided these criticisms entirely, even though it too fails the tests international criminal lawyers use as benchmarks in the deconstruction of other modes. Moreover, the source of complicity's departures from basic principles is not international as previously suggested—it stems from international criminal law's emulation of objectionable domestic criminal doctrine. If, instead of inheriting the dark sides of domestic criminal law, we apply international scholars' criticisms across all modes of liability, complicity (and all other modes of liability) disintegrates into a broader notion of perpetration. A unitary theory could also attach to all prosecutions for international crimes, both international and domestic, transcending the long-endured fixation on modes of liability within the discipline.*

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*“I have the most profound conviction that I am being made to pay here for the glass that others have broken.”*

Adolf Eichmann<sup>1</sup>

## I. INTRODUCTION

International criminal courts and tribunals use the term “modes of liability” to designate participants in a crime. Even though the label is conceptually misleading and of uncertain historical pedigree,<sup>2</sup> it has emerged as the preferred description of a whole series of doctrine, ranging from traditional notions of instigation to the more exotic concepts of superior responsibility and joint criminal enterprise. Understandably, the concepts attract tremendous judicial and scholarly treatment. After all, the contours of “modes of liability” determine whether Eichmann’s

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<sup>1</sup> Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocities*, 105 GERMAN CRIMINAL LAW COLUM. L. REV. 1751, 1764 (2005) (quoting from GERMAN CRIMINAL LAW ENRIQUE GIMBERNAT ORDEIG, AUTOR Y COMPLICE EN DERECHO PENAL [PERPETRATOR AND ACCOMPLICE IN CRIMINAL LAW] COLUM. L. REV. trans., 1996)).

<sup>2</sup> Importantly, the phrase “modes of liability” is conceptually misleading and of uncertain historical pedigree. It is legally misleading because these doctrines only attribute unlawfulness rather than “liability”. The better term is “modes of attribution,” since whether a defendant is “liable” once a particular unlawful act is attributed to her requires a further assessment of justifications and excuses. Admittedly, this nomenclature is premised on a preference for the normative theory of guilt GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 319, 329 (2007). In terms of origin, it is also unclear where international criminal justice acquired the term “modes of liability,” and why it gained such ascendancy in the discipline. Early international judgments used the more appropriate phrase “modes of participation”: Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (May 7, 1997) (referring to joint criminal enterprise as a “mode of participation”); Prosecutor v. Delić, Case No. IT-04-83-T, Judgment, ¶ 56 (Sep. 15, 2008) (referring to superior responsibility as a “mode of participation”); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 266 (Mar. 3, 2000) (discussing ordering, planning, instigating or otherwise aiding and abetting as “modes of participation”). This accords with the descriptor adopted in most domestic criminal systems. In German criminal law, the overarching concept is ‘Beteiligung’, which experts translate as ‘Participation’. See MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CRIMINAL LAW* 154 (2008); French criminal theory also refers to criminal participation, see Christine Lazerges, *La participation criminelle*, in RÉFLEXIONS SUR LE NOUVEAU CODE PÉNAL, 11 (1995); for historical antecedents, see also B. GETZ, *DE LA SOI-DISANT PARTICIPATION AU CRIME* (1876); in many Anglo-American jurisdictions, the tendency is to describe modes of liability as those rules that determine parties to crime. See WAYNE R. LAFAVE, *CRIMINAL LAW*, 5TH 701 (5th ed. 2010) (employing the term “Parties to Crime”); A. SIMESTER & G.R. SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* 195-246 (3rd ed. 2007) (discussing modes of participation).

punishment for the glass others broke is an illiberal instance of vicarious liability or justifiable blame for his contribution to atrocity. In what follows, I argue that complicity falls on the wrong side of these alternatives, and that consequently, it should collapse along with all other modes of liability into a single broad notion of perpetration. This, as we will soon see, promises to transcend a long-endured fixation on modes of liability within the discipline.

Since its modern revival, international criminal justice has devoted tremendous energy to the topic of modes of liability, precisely because international courts are committed to convicting Eichmann (and all the modern masterminds of atrocity like him) for the violence others have perpetrated.<sup>3</sup> To this end, international criminal courts have crafted a series of “modes of liability” that treat principal architects of atrocity as perpetrators (even though masterminds seldom pull the trigger, deploy the asphyxiants, throw the electrical switch or, to borrow from Eichmann, break the glass). These new “modes of liability” (such as superior responsibility, joint criminal enterprise, indirect perpetration and perpetration through an organization) are necessary, we are told, to accurately capture the role of the principal architects of atrocity.

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<sup>3</sup> A large number of international criminal courts expressly profess a commitment to only prosecuting those ‘who bear the greatest responsibility’ for crimes within their jurisdiction. See: Agreement between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), art. 1.1, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137 (“The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”); ICC Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, Sept. 2003, at 7 (“The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”); Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 4) as revised on 11 September 2009, Preamble (“WHEREAS the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”); For scholarly opinion endorsing this view, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003); For a more critical assessment, see Jose E Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365 (1999).

One especially evocative image drives the process. For many, the dilemma is that the application of everyday rules of criminal attribution lead to Hitler’s conviction as an accomplice for the Holocaust. The proposition is simply insupportable since it would “get the moral valences entirely wrong—almost backwards, in fact.”<sup>4</sup> To a large extent, this perception explains the motivation for adopting novel standards of blame attribution at the international level. But from the competing perspective, Eichmann’s last words before the gallows leave a lingering concern modes of liability that make someone responsible for the acts of others might be fundamentally unfair. Thus, the development of modes of liability in international criminal justice reflects a persistent tension between these two competing extremes: functional attempts at ensuring accountability of senior masterminds of mass violence versus the very real threat of illiberal excess.

Initially, international courts looked domestically for solutions to their moral quandary, borrowing the most permissive “modes of liability” from domestic criminal systems. Yet in the ensuing years, these “modes of liability” have generated a flood of criticism. Many scholars have rebuked international doctrines such as superior responsibility and joint criminal enterprise as “display[ing] a measure of insensitivity to an actor’s own personal culpability.”<sup>5</sup> The criticism has become so extensive that it may be fair to say that a majority of scholars view the modes of liability deployed to solve the Hitler-as-accomplice dilemma as closer to substantiating Eichmann’s appeal to unfairness than they are to offering a defensible account of criminal responsibility. This has led to a growing perception that international criminal courts of various descriptions “risk

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<sup>4</sup> MARK OSIEL, MAKING SENSE OF MASS ATROCITY 85 (2009). The only caveat is that Osiel’s comment assumes an objective theory of perpetration, whereby the perpetrator is the person who actually releases the gas into the concentration camps. As we will later see, the objective theory is theoretically discredited, but this does not undermine Osiel’s point that rank and file perpetrators are generally viewed as less culpable than their superiors in international criminal justice.

<sup>5</sup> Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. LAW 455, 456 (2001). Aside from Damaška’s excellent article, the critical literature is extensive. For some of the best exemplars, see in particular Héctor Olásolo, *Reflections on the International Criminal Court’s Jurisdictional Reach*, 16 CRIM. L. FORUM 279 (2005); 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 (2005); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925 (2008); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69 (2007).

using the accused as an object in a didactic exercise rather than respecting autonomy and fairness.”<sup>6</sup>

Strangely, however, complicity has escaped careful theoretical scrutiny in the scholarly revolt against international modes of liability.<sup>7</sup> This is peculiar since complicity, or accessorial liability as it is otherwise known, is of central relevance to the Hitler-as-accessory dilemma; is increasingly prominent in international discourse; and most importantly, also harbors a glaring conceptual anomaly—the doctrine holds the accomplice liable for the same crime as the perpetrator, even though the accomplice by definition did not personally carry out the offense.<sup>8</sup> To illustrate, someone convicted of aiding genocide by supplying the weapons is herself guilty of genocide, even though she never killed a soul. As John Gardner aptly puts it, “[a]s far as the conviction goes, it is as if she had pulled the trigger herself.”<sup>9</sup> Consequently, this fiction should raise the alarm that complicity too entails “a dramatic escalation of responsibility.”<sup>10</sup>

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<sup>6</sup> Robinson, *supra* note 5, at 931.

<sup>7</sup> There is a considerable and important literature dealing with the doctrine and policy of complicity in international criminal justice, but to my knowledge, none of it explores the objectionable peripheries of the doctrine. See, for example, Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339 (2000) (explaining three categories of policy implication derived from the application of complicity); LEIV LUNDE, MARK TAYLOR & ANNE HUSER, *COMMERCE OR CRIME? REGULATING ECONOMIES OF CONFLICT* (2003) (providing a helpful synthesis of the law of complicity in sixteen different jurisdictions); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008) (discussing ATCA cases that employ complicity); for a notable exception, see Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT’L CRIM. JUST. 977 (2007) (discussing the need for international criminal justice to craft a law of complicity specific for its purposes).

<sup>8</sup> The French Criminal Law is a good example of this paradox. Article 121-6 of the French Criminal Codes stipulates that “[s]era puni comme auteur le complice de l’infraction”. Simultaneously, leading experts define complicity as “un mode d’imputation dirigé contre une personne qui a aidé à la réalisation d’une situation infractionnelle sans pour autant accomplir elle-même aucun des actes visé par le texte d’incrimination.” JACQUES-HENRI ROBERT, *DROIT PÉNAL GÉNÉRAL* 343 (6e éd. refondue. ed. 2005).

<sup>9</sup> John Gardner, “*Aid, Abet, Counsel, Procure*”: *an English View of Complicity*, in *EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT*, 228 (Albin Eser, Barbara Huber, & Karin Cornils eds., 1998). Lord Steyn, of the then British House of Lords, also put the point succinctly in the Pinochet litigation when he cited “an elementary principle of law, shared by all civilised legal systems, that there is no distinction between the man who strikes, and a man who orders another to strike.” Lord Steyn in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, (1998) 3 W.L.R. 1456 (H.L.) at 54.

<sup>10</sup> Damaška, *supra* note 5, at 464.

As I will show, complicity too fails the tests scholars use as benchmarks in the deconstruction of other modes of liability. And yet these departures from defensible theory defy hypotheses authors have offered to explain the origins of harsh international doctrine. To date, critics have argued that these sorts of conceptual overreach are a byproduct of an uncomfortable amalgamation of the interpretative cultures that animate international criminal justice, namely interpretative styles typical of human rights and law of war; the effect of moral outrage on interpretative technique; or the broader political aspirations associated with transitional justice that are said to drive hermeneutics in international criminal adjudication.<sup>11</sup> An analysis of complicity, however, reveals that this explanation under-appreciates the role of domestic criminal justice in the development of objectionable international doctrine. In reality, complicity’s most objectionable characteristics are inherited from domestic exemplars that national scholars denounce as a conceptual “disgrace.”<sup>12</sup>

Let me qualify this criticism from the outset. I do not claim that domestic criminal law is of no value to international jurisdictions. International courts will inevitably take inspiration from domestic standards as practitioners with uniquely criminal law backgrounds (who are, I suspect, a majority in international criminal justice) draw on domestic concepts in the day-to-day operation of modern international criminal courts. This process is entirely unavoidable and by and large positive—how else could practitioners come to terms with the novelty of supranational criminal law except through their pre-established experience of criminal justice? And international criminal justice certainly has much to learn from this experience. And yet, much of the excellent criticism of

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<sup>11</sup> Danner and Martinez, *supra* note 5, at 78 (“International human rights law, domestic criminal law, and transitional justice. Each one, to varying degrees, informs the purposes and principles of international prosecution, and their interaction creates conflicts within international criminal law itself.”); Robinson, *supra* note 5, at 961 (“Interpretive, substantive, structural, and ideological assumptions of human rights and humanitarian law have been absorbed into ICL discourse, distorting methods of reasoning and undermining compliance with fundamental principles.”) In fairness to Darryl Robinson, his excellent piece also mentions that this may only be part of the problem and that domestic systems depart from basic principles too. Robinson, *supra* note 5, at 927-930; Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L. J. 1111 (2011) (observing doubts about tribunals commitments to core principles of justice “that many domestic legal systems take for granted”, and arguing that “[w]hile greater reliance on domestic law might not offer a complete solution, it may offer at least one positive step in ICL’s rediscovery of a criminal law that better aspires to ICL’s liberal aims.”)

<sup>12</sup> Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?* 5 OHIO ST. J. CRIM. L. 427, 427 (2008).



modes of liability has eagerly pointed out the dark sides of international doctrine as if domestic systems do not have equivalents, which has produced a skewed vision of the origins of objectionable international doctrine. As one prominent expert of domestic criminal law laments, departures from principle are so consistent in some national systems that criminal theory may well be "a lost cause."<sup>13</sup>

The shortcomings of complicity, however, lead to a wider set of reflections about modes of liability as a species. If accessorial liability fails the standards that scholars of international criminal justice erect to judge other international modes of liability, will there be any mode that survives the analytical deconstruction? Put differently, could it not be possible to put an end to the highly complicated, seriously inefficient and frequently harsh development of modes of liability in international criminal justice by adopting a unitary theory of perpetration that collapses all modes of liability into a single standard? On this account of blame attribution, only a causal contribution and the mental element required for the offence would be necessary; all those who contribute to international crimes would be deemed perpetrators, dispensing with all other forms of legal classification.

The theory is not just conceptually coherent, it is also well suited to the realities of modern international criminal justice. On the theoretical plane, many scholars of criminal law are beginning to advocate for the abandonment of complicity,<sup>14</sup> often because they perceive that a proper conception of perpetration renders complicity "superfluous."<sup>15</sup> These

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<sup>13</sup> Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L. Q. REV. 225 (2000).

<sup>14</sup> Michael S. Moore, *The Superfluity of Accomplice Liability*, in CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 280 (2009); Bob Sullivan, *Principals and Accomplices-A Necessary and Useful Division?*, in FOUNDATIONAL ISSUES IN THE PHILOSOPHY OF CRIMINAL LAW, 651 (Anthony Duff & Christopher Wong eds., 2007); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1996) (although Kadish does not advocate for the abolition of complicity, his position is closest to that I advance here); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 7-10 (1 ed. 2009) (arguing that insufficient concern is the baseline for all forms of criminal responsibility); DIETHELM KIENAPFEL, DER EINHEITSTÄTER IM STRAFRECHT (1971); THOMAS ROTSCH, "EINHEITSTÄTERSCHAFT" STATT TATHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE (2009).

<sup>15</sup> Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007). The description of complicity as superfluous is overly forgiving of the violations of theoretical principles complicity presently entails, but in fairness to Michael Moore, his analysis does not consider the mental element of aiding and abetting where the most conspicuous violations of culpability occur. Moreover, his assessment of the physical element does not deal with standards adopted in international

scholarly arguments find practical support in at least five modern domestic criminal systems from Italy to Brazil, which operate unitary systems of perpetration that abandon the sorts of “modes of liability” that have plagued modern international criminal justice.<sup>16</sup> Moreover, the unitary theory also has international precedence—the Nuremberg and Tokyo Tribunals initially dispensed with a distinction between direct perpetration and accomplice liability entirely.<sup>17</sup>

Surprisingly then, the unitary theory of perpetration has gone largely unnoticed in international criminal justice, even as scholars advocate for its adoption within a less mature system of European criminal law.<sup>18</sup> Putting aside the theoretical merits of the concept, an obvious pragmatic appeal lies in its ability to transcend the numerous inconsistencies between systems of blame attribution in each of the European systems it amalgamates. On this basis, one would imagine that the unitary theory should be all the more attractive internationally given the exponentially larger number of national systems globally, each of which contains disparate “modes of liability.” Regrettably, the intensity of the debate

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criminal justice, which deviate from basic principles elsewhere. Both these points are explored further below.

<sup>16</sup> The countries are Austria, Brazil, Denmark, Italy and Poland. For further information, see JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 121, 133 (2e ed. 2002); Kai Ambos, *Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections*, 12 MAASTRICHT J. EUR. & COMP. 173, 182-185 (2005) (setting out examples from various unitary jurisdictions).

<sup>17</sup> Although the Nuremberg and Tokyo Charters adopted differentiated doctrines of complicity, the majority of cases merely considered whether an accused was “concerned in,” “connected with,” “inculcated in” or “implicated in” international crimes. For an overview of these cases, see The United Nations War Crimes Commission, *Digest of the Laws and Cases, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, VOL XV* at 49-58. Like Hector Olásolo, I conclude that this amounts to a unitary theory of perpetration insofar as it fails to distinguish modes of participation. See OLÁSULO ET AL., *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 21 (2010).

<sup>18</sup> Johannes Keiler, *Towards a European Concept of Participation in Crime*, in *SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION* (André Klip ed., 2011); BETTINA WEIBER, *TÄTERSCHAFT IN EUROPA: EIN DISKUSSIONSVORSCHLAG FÜR EIN EUROPÄISCHES TÄTERMODELL AUF DER BASIS EINER RECHTSVERGLEICHENDEN UNTERSUCHUNG DER ... FRANKREICHS, ITALIENS UND ÖSTERREICHS* (1. Auflage. ed. 2011); WOLFGANG SCHÖBERL, *DIE EINHEITSTÄTERSCHAFT ALS EUROPÄISCHES MODELL: DIE STRAFRECHTLICHE BETEILIGUNGSREGELUNG IN ÖSTERREICH UND DEN NORDISCHEN LÄNDERN* (1 ed. 2006); Ambos, *supra* note 17, at 182-185; for rare exceptions to the rule that scholars do not consider the unitary theory of perpetration for international crimes, see OLÁSULO ET AL., *supra* note 19 at 14-20; E. VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* 61-65 (1st Edition. ed. 2003).

around international modes of liability has obscured a potential solution hiding in plain sight.

This Article exposes the theory. To begin, Part I introduces criticisms of superior responsibility and joint criminal enterprise in order to flesh out the key theoretical objections raised against each of these modes of liability. Through this process, I isolate conceptual principles that are later helpful in revealing the objectionable peripheries of complicity. In Part II, I undertake this exercise by first exploring the identity of complicity in international criminal justice, then by assessing the mental and physical elements required for accessorial liability in light of the criticisms of other modes of liability in the field. I conclude that complicity too falls well short of the standards used to criticize other “modes of liability,” but that this arises from the influence of objectionable domestic standards, not the undeniable pressures of international law or politics.

Having concluded that any defensible concept of complicity requires complicity and perpetration to share several common elements, Part III defends the unitary theory in abstract theoretical terms then assesses pragmatic arguments for applying the standard to international crimes particularly. I argue that whatever moral significance there might be between making a difference to a crime and “making a difference to the difference that principals make”,<sup>19</sup> this discrepancy can be adequately accounted for at the sentencing stage of a criminal trial. The deconstruction of complicity shows that, at the very least, we must bring it much closer to perpetration, but my argument is that the characteristics of international criminal justice militate in favor of allowing complicity to disintegrate entirely into a unified notion of perpetration in all domestic and international jurisdictions capable of prosecuting these offenses. What emerges then, is a preferable account of when we can hold Eichmann and his many analogues responsible for the glass others broke—without fallaciously escalating his guilt.

## II. FUNDAMENTAL PRINCIPLES IN THE CRITICISM OF MODES OF LIABILITY

It is instructive to briefly review the considerable literature criticizing other modes of liability in international criminal justice in order to isolate basic tenets of criminal responsibility. I here use the most objectionable elements of two modes of liability that are often admonished within international circles in order to identify a framework through which we might later interrogate complicity.

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<sup>19</sup> John Gardner, *Complicity and Causality*, 1 CRIM. L. AND PHIL. 127, 128 (2007).

A. *A Blameworthy Moral Choice: The Mental Element in JCE III*

Joint criminal enterprise (JCE) holds all those who agree to a common plan involving the perpetration of a crime responsible for other foreseeable offences that take place during the execution of the plan.<sup>20</sup> I here use scholarly discussion of the so-called “third” or extended variant of JCE to introduce fundamental principles about blameworthy moral choice in international criminal discourse, since so many scholars have openly deplored JCE III’s tendency to “overpower the restraining force of the criminal law tradition.”<sup>21</sup> While these criticisms appropriately expose basic principles applicable to mental elements in modes of liability, their idealized vision of the criminal tradition’s predominantly restraining character understates the sometimes major gaps between theory and practice in domestic systems and their effect on the development of unjustifiable international doctrine.

JCE has three strands. The first “basic” form occurs where “co-defendants, acting pursuant to a common design, possess the same criminal purpose.”<sup>22</sup> An example would be a plan formulated by three soldiers to torture a detainee, where each of the soldiers carries out a different role (holding the victim down, preventing others from entering the room and applying electrodes and controlling the current). This “basic” form of JCE holds each of the soldiers responsible for the war crime of torture, even though the men guarding the door and restraining the victim do not satisfy the elements of the crime—like Eichmann, they do not personally perform the crime. The second “systematic” form of joint criminal enterprise is a mere subset of the “basic” form, and therefore adds little of great salience for present purposes,<sup>23</sup> mostly

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<sup>20</sup> To find individual criminal responsibility pursuant to a joint criminal enterprise, the elements which must be established are: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute. For a particularly recent affirmation, see *Prosecutor v. Krajisnik*, Judgment, Case No. IT-00-39-A, ICTY Appeals Chamber, ¶ 156–157 (Mar. 17, 2009).

<sup>21</sup> Danner and Martinez, *supra* note 5, at 132.

<sup>22</sup> *Prosecutor v. Tadić*, *supra* note 2, at 196. Note that this language is not always consistent: see *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, ¶ 97 (Feb. 25, 2004) (finding that “[t]he first category is a ‘basic’ form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purposes, possess the same criminal intention.”).

<sup>23</sup> In JCE II, the common plan in JCE I is merely replaced by “an organized criminal system,” such as an extermination or concentration camp. There is, therefore, general consensus that this “systematic” category in JCE II is only a subset of the ‘basic’ form in JCE I. See for instance, *Prosecutor v. Tadić*, *supra* note 2, at 203 (“this category of cases... is really a variant of the first category”); *Prosecutor v. Kvočka et al.*, Case No.

because it also requires that the participants in the enterprise harbor the necessary intent to torture.

The third variant, however, descends into darker territory. Under JCE III, all participants in a joint criminal enterprise are responsible for crimes committed beyond those agreed, provided they are “a natural and foreseeable consequence of the common purpose.”<sup>24</sup> Thus, the soldier manning the door is also convicted of torturing the victim, even if he believed he was guarding the entry to prevent enemy soldiers entering and only foresaw that one of his confederates might commit torture while they were in the premises.<sup>25</sup> The great anomaly is not only that the lookout is punished for having perpetrated torture even though he did not personally hurt a fly; it is also that he is convicted based on mere foresight, a standard well below that defined in the offence for which he is punished. The key point is that JCE III tolerates a sharp cleavage between the definition of crimes and modes of liability used to convict defendants of them—the two categories overlap, but not perfectly.

From whence did the doctrine come? True, the famed *Tadić* Appeal Judgment declared JCE III part of customary international law, but this finding was a mere reiteration of national principles. To the extent that the court purported to draw on custom, it cited cases convened by British, Canadian, American Military Tribunals applying Control Council Law No. 10, as well as domestic courts within Italy, all of which originally applied national concepts of attribution.<sup>26</sup> And in any event, the ICTY explicitly affirmed that, “international criminal rules on common purpose [i.e. JCE] are substantially rooted in, and to a large extent reflect, a position taken by many States of the world in their national legal

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IT-98-30/1-A, Judgment, ¶ 82 (Feb. 28, 2005) (describing JCE II as “a variant of the first form”); Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008*, 20 CRIM. L. FORUM 353, 374 (2009) (concluding that JCEII can be viewed as an element of JCE I if interpreted narrowly).

<sup>24</sup> Prosecutor v. Kvočka et al., *supra* note 20, at 83.

<sup>25</sup> In fact, there is good authority for the idea that the standard is actually objective foreseeability, lowering the mental element required for JCEIII even further. See Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 109, 121 (2007) (arguing that most courts actually apply an objective standard of foreseeability for JCEIII).

<sup>26</sup> Prosecutor v. Tadić, *supra* note 2, at 204. For discussion, see Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT’L CRIM. L. REV. 167, 177 (2005). For other arguments that JCE is an outgrowth of the US concept of Pinkerton liability, see George P. Fletcher, *New Court, Old Dogmatik*, 9 J. OF INT’L CRIM. JUST. 187 (2011).

systems.”<sup>27</sup> Therefore, to the extent that international criminal courts and tribunals are applying controversial standards of attribution like JCEIII, it is largely because they have imitated national equivalents.

The critics, however, have shown JCE III no mercy, largely on the grounds that the incongruity between the mental element for the mode and that required for the crime leads to a violation of the principle of *culpability*.<sup>28</sup> Traditionally the offshoot of retributivism, culpability reflects a commitment to the idea that an individual’s punishment must be calibrated to her personal desert.<sup>29</sup> The immediate retort (that I heard many times from Anglo-American lawyers in practice) is that this focus on culpability is overly academic when national systems depart from the principle as a matter of course. If JCE III solves the Hitler-as-accomplice dilemma and furthers the noble aspirations of the international justice project,<sup>30</sup> why should international courts moderate their use of the doctrine when so many major Western jurisdictions apply an identical concept?

In simple terms, guilt matters. An individual cannot be instrumentally punished to pursue even noble policy goals. Although this notion dates at least to Kant, in the English-speaking tradition, H.L.A Hart famously reconciled it with utilitarian theories of punishment by pointing out a disparity between the objectives of the criminal system as a whole and the

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<sup>27</sup> Prosecutor v. Tadić, *supra* note 2, at 193. In support of this proposition, the Tribunal cited law from France, Italy, England and Wales, Canada, the United States, Australia and Zambia that also criminalize a version of JCE III, *id.* at 224.

<sup>28</sup> Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 174 (2007) (concluding that relative to other aspects of JCE, “the conflict of JCE III with the principle of culpability is more fundamental”); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 548 (2005) (arguing that “the doctrine [JCE] itself is substantively overbroad and transgresses basic principles of legality that limit punishment to personal culpability.”); Ohlin, *supra* note 5, at 85 (discussing the violation of culpability occasioned by punishing different degrees of contribution equally); Danner and Martinez, *supra* note 5, at 134 (arguing that JCE poses significant challenges to the culpability principle).

<sup>29</sup> In a sense, desert is synonymous with meritocracy. If an individual performs well in an exam, she deserves an excellent mark. If she kills her mother, she deserves punishment. For more on the positive and negative notions of desert, see JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55 (1974). See also PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED, HOW MUCH?* 135 (2008) (discussing vengeful, deontological and empirical concepts of desert).

<sup>30</sup> Mirjan Damaška, *What is the Point of International Criminal Justice?* 83 CHI.-KENT. L. REV. 329 (2008); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561 (2002).

principles to be employed in attributing blame in concrete cases.<sup>31</sup> He illustrates the distinction with a striking example—even if your rationale for punishment within the system generally is deterrence, it is clearly morally vulgar to punish family members of those who carried out criminal offenses, even if doing so has massive deterrent effects.<sup>32</sup> In a similar example of greater salience for international criminal justice, George Fletcher chillingly recalls that “[a]s the National Socialists well knew in controlling inmates in slave labour camps, occasionally hanging an innocent person effectively deters disobedience by other inmates.”<sup>33</sup> Quite clearly, punishment without culpability is anathema to liberal notions of criminal law, even if it does promote deterrence or other desirable outcomes.

Therefore, culpability is central to any theoretically justifiable account of criminal responsibility, from retributivism to restorative justice.<sup>34</sup> True, advocates of restorative criminal justice may calculate guilt slightly differently,<sup>35</sup> but they are still committed to the notion that “only the

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<sup>31</sup> According to Hart, “[w]hat is needed is the realization that different principles (each of which may in a sense be called a ‘justification’ [for punishment]) are relevant at different points in any morally acceptable account of punishment.” Furthermore, “it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offense.” See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 3, 9 (Rev. ed. 1984) (emphasis in original).

<sup>32</sup> *Id.* at 5-6.

<sup>33</sup> GEORGE FLETCHER, RETHINKING CRIMINAL LAW 415 (1978).

<sup>34</sup> For a helpful overview of the different intensities of retribution and their intersection with utilitarian justifications for criminal law, see Alexander and Ferzan, *supra* note 15, at 7-10 (discussing weak, moderate and strong conceptions of retributivism); for a summary of similar thinking in German criminal theory, see VOLKER KREY, 1 DEUTSCHES STRAFRECHT : ALLGEMEINER TEIL 118 (2002) (discussing dominant theories of punishment in German criminal law, none of which advocate extending liability beyond an individual’s desert).

<sup>35</sup> Since restorative fault emphasizes a defendant’s responsibility for rectifying harm he has caused, John Braithwaite has argued that assessments of fault should be moved from their current point of assessment at the time the crime is perpetrated, “to fault based on how restoratively the offender acts after the crime.” John Braithwaite, *Intention versus Reactive Fault*, in INTENTION IN LAW AND PHILOSOPHY 345 (Ngair Naffine, Rosemary J. Owens, & John Matthew Williams eds., 2001). Few courts have adopted restorative theories of punishment in cases involving international crimes, such that Braithwaite’s vision of culpability is less germane for present purposes. This leaves open the question whether, in preferencing some version of retributive punishment, international criminal lawyers may have “hitched themselves to a dead horse.” GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 137 (2007).

guilty should be punished.”<sup>36</sup> In fact, these philosophical commitments are so widely held that Mirjan Damaška plausibly claims that “if one were to catalog general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list.”<sup>37</sup> And yet, while this is true at the level of principle, it overlooks states’ sometimes prolific abdication from theoretical standards in practice and the genealogy of JCE in national law.

Unsurprisingly, international criminal courts mimic this schizophrenic relationship with culpability. When addressing the concept in abstract terms, they also adopt a formal rendition of the culpability principle, insisting that “the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated”.<sup>38</sup> The pledge is laudable but it also omits half the concept. An individual is culpable, not just because she participated in criminal acts or transactions, but also because she made a blameworthy moral choice to do so.<sup>39</sup> So already the tremendous incidence of strict liability crimes within Anglo-American jurisdictions reveals a great distance between Damaška’s understandable appeal to culpability and the practice of states that habitually disregard it.<sup>40</sup>

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<sup>36</sup> JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 168 (1993) (“We agree with the negative retributivists, for republican reasons, that indeed only the guilty ought to be punished.”).

<sup>37</sup> Damaška, *supra* note 5, at 470.

<sup>38</sup> Prosecutor v. Tadić, *supra* note 2, at 186; Prosecutor v. Brima et al., Case No. SCSL 04-16-A, Judgment, ¶ 15 (Feb. 22, 2008); Prosecutor v. Vasiljević, *supra* note 22, at 29. Strikingly, the better formulation was at Nuremberg: the Tribunal claimed that its reasoning was “in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.” 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 499 (1947).

<sup>39</sup> MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 403 (2010) (acknowledging the dual meanings of culpability, but emphasizing that responsibility entails a voluntary and unjustified act that proximately causes harm, coupled with the obligation that “one must have done so culpably”). Fletcher, *supra* note 27, at 461 (stipulating that the components of desert are wrongdoing and culpability). Note that culpability bears several meanings here. On the one hand, it is frequently used in a normative sense i.e. a person is culpable only if she is justifiably to blame for her conduct, as compared with the use of the term culpability in the US Model Penal Code to designate mental elements. For further discussion, see *id.*, at 398.

<sup>40</sup> It is difficult to reconcile the extent of strict liability in many Anglo-American national systems with the view frequently expressed in international criminal scholarship that national departures from culpability are highly exceptional. In a survey of 165 new offenses created within England and Wales in 2005, Andrew Ashworth shows that strict liability was sufficient in 40%, plus an additional 26% were strict liability but watered



How then is culpability to be measured? To begin, note that the content of requisite blameworthy choice varies from one international crime to the next. Indeed, the availability of different mental elements allows states, treaty-makers and sometimes judges to define crimes in such a way that each prohibits distinct moral transgressions. For some crimes, recklessness or negligence will suffice, whereas others are markedly more demanding in order to signal the particular moral magnitude of the violation. In the context of genocide, for instance, the requisite choice is not simply to kill individuals; it also involves carrying out these acts with a corresponding intention to “destroy, in whole or in part, a racial, ethnic, or religious group.”<sup>41</sup> For many, this added psychological disposition is the quintessence of the crime—it is the element that distinguishes garden-variety murder from what Raphael Lemkin described as “barbarous practices reminiscent of the darkest pages of history.”<sup>42</sup>

One would think then that convicting someone of genocide without this special intent emasculates the crime. And yet, international courts have found that a member of a JCE could be found to have committed genocide, even though he merely foresaw that his colleagues might carry out the crime.<sup>43</sup> For many scholars, this is theoretical heresy. David Nersessian, for example, describes JCE III as a form of “constructive liability,”<sup>44</sup> a term he uses in contrast to direct forms of liability, because “theories of constructive liability... allow conviction for the same offense

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down slightly by a proviso that the offense must be carried out “without reasonable excuse.” Andrew Ashworth, *Criminal Law, Human Rights and Preventative Justice*, in *REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW* (Bernadette McSherry, Alan Norrie, & Simon Bronitt eds., 2008). Strict liability is just the tip of the iceberg. For a wide range of violations of culpability in the United States, see Paul H. Robinson, *Imputed Criminal Liability*, 93 *YALE L.J.* 609, 617–618 (1983) (discussing Pinkerton liability, the felony-murder rule, vicarious liability of officials of organizations, RICO and others).

<sup>41</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. O 81-1 (1949), 78 U.N.T.S. 277, in Article II.

<sup>42</sup> RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 90 (2008).

<sup>43</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 6 (Mar. 19, 2004) (holding that even when the crime charged is genocide, “the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent”). For similar conclusions relating to other special intent crimes, see *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, ¶ 471 (Feb. 26, 2009) (convicting Šainović of persecution for the murder of Kosovo Albanians “even though falling outside of the object of the JCE, [the murders carried act to persecute were] reasonably foreseeable to Šainović.”).

<sup>44</sup> David L. Nersessian, *Whoops, I Committed Genocide - The Anomaly of Constructive Liability for Serious International Crimes*, 30 *FLETCHER F. WORLD AFF.* 81, 82 (2006).

even though the requisite conduct and mental state are absent.”<sup>45</sup> In articulating what makes these mechanisms objectionable, Nersessian draws on the principle of fair labeling.<sup>46</sup> The concept was originally developed by Andrew Ashworth to describe the need for specificity in the label of a particular offense, rather than lumping together vastly different categories of offending.<sup>47</sup> Even though this original purpose is less germane here, the underlying idea was that “[f]airness demands that offenders be labeled and punished in proportion to their wrongdoing.”<sup>48</sup> Otherwise, an accused is stigmatized by preconceptions associated with an offence that do not match his personal responsibility.

While I doubt that fair labeling (in the sense critics of international criminal justice use it) deserves an existence separate from culpability, it does alert us to an important insight—the label of a crime is a key element of punishment that must match an accused’s guilt, *regardless of the number of years in prison an accused is to serve*.<sup>49</sup> This reading reinforces that conviction for a particular crime requires fidelity to its identity, which predictably, is contained in the crime’s definition. The physical and mental elements in the paradigm of the offence thus define what it means to be responsible for violating that prescription. Accordingly, convicting an individual of genocide for merely foreseeing the crime over-punishes. It misapplies the criminal label genocide, which is reserved for more

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<sup>45</sup> *Id.* at 82. What this thoughtful criticism does not reveal is how aiding and abetting is also constructive, and that this point was instrumental in leading international courts to define JCE III similarly. *Prosecutor v. Brđanin*, *supra* note 43, at 5, 8 (“As a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach. Aiding and abetting, which requires knowledge on the part of the accused and substantial contribution with that knowledge, is but one example.”).

<sup>46</sup> *Id.* at 96-98.

<sup>47</sup> Andrew Ashworth, *The Elasticity of Mens Rea*, in *CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS*, 53-56 (Colin Tapper ed.) (referring to “representing labelling” as “the belief that the label applied to an offence ought fairly to represent the offender’s wrongdoing.” Ashworth’s prototypical illustration was the impropriety of merging the hitherto separate crimes of theft and obtaining by deception, which were thought to convey separate moral wrongs.); For further discussion, see also Glanville Williams, *Convictions and Fair Labelling*, 42 *CAMBRIDGE L.J.* 85 (1983); James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 *MODERN L. REV.* 217 (2008). To my mind, this principle does not enjoy a separate existence from culpability. This, because the label of a criminal conviction is a key component of a defendant’s punishment, and therefore must be reconciled with desert.

<sup>48</sup> Ashworth, *supra* note 47, at 53-56 (Referring to “representing labeling” as “the belief that the label applied to an offence ought fairly to represent the offender’s wrongdoing.”).

<sup>49</sup> James Chalmers and Fiona Leverick make this point well in describing the preferences of rape victims to have their assailants prosecuted for rape, even if this leads to lesser jail-terms. See Chalmers & Leverick, *supra* note 47, at 217.

blameworthy conduct, then mis-conveys a degree of responsibility that is not paired to the defendant’s desert.

As Darryl Robinson convincingly argues, this is an aberration: “the [defendant] still faces the stigma of a conviction for committing genocide, while having satisfied neither the actus reus nor the hitherto indispensable mens rea for genocide”.<sup>50</sup> The approach transgresses principles of culpability and fair labeling “by lumping together radically different levels of blameworthiness under one label.”<sup>51</sup> While I am less convinced that international influences explain this position (as distinct from a combination of the Hitler-as-accomplice dilemma and readily available domestic tools like JCE), we are likely to share deep misgivings about the national justifications for the doctrine—calculating culpability as “a package deal”<sup>52</sup> still escalates responsibility on policy grounds.

Jenny Martinez and Allison Marsten Danner also propose that “certain forms of joint criminal enterprise... that tolerate a reduced mens rea should not be used in cases involving specific intent crimes such as genocide and persecution.”<sup>53</sup> Here too, there is a concern that the distinctive features of these serious crimes are “weakened by the lowering of the mental state to recklessness or negligence, as would occur in a Category Three JCE”.<sup>54</sup> Although Martinez and Danner recommend closer attention to the principle of culpability in international criminal justice in

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<sup>50</sup> Robinson, *supra* note 5, at 941.

<sup>51</sup> *Id.*, at 941.

<sup>52</sup> Andrew Simester offers arguably the most famous defense of joint criminal liability at the national level. See A.P. Simester, *The Mental Element in Complicity*, 122 L.Q. REV. 578, 599 (2006) (“[b]y forming a joint enterprise, S signs up to its goal. In so doing, she accepts responsibility for the wrongs perpetrated in realising that goal, even though they be done by someone else. Her joining with P in a common purpose means that she is no longer fully in command of how the purpose is achieved. Given that P is an autonomous agent, S cannot control the precise manner in which P acts. Yet her commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realizing that purpose. Her responsibility for incidental offences is not unlimited: S cannot be said to accept the risk of wrongs by P that she does not foresee, or which depart radically from their shared enterprise, and joint enterprise liability rightly does not extend to such cases. Within these limitations, however, the execution of the common purpose—including its foreseen attendant risks—is a package deal. Just as risks attend the pursuit of the common purpose, an assumption of those risks flows from S’s subscription to that purpose.”); See also, George Fletcher’s helpful outline of the common justification for felony-murder. GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 193 (1998) (“The state justifiably threatens robbers who cause death with an additional punishment in order to make them, as it were, “careful“ robbers—they should do everything possible to minimize the risk of death. Imposing this additional burden on them is not considered unjust, for they, as robbers, have embarked on a forbidden course of endangering human life.”).

<sup>53</sup> Danner and Martinez, *supra* note 5, at 79.

<sup>54</sup> *Id.*, at 151.

order to bolster a fragile legitimacy, promote human rights and achieve transitional justice goals,<sup>55</sup> their critique also underscores more deontological concerns for fairness to the accused—using JCE III to circumvent special intent inappropriately amplifies moral responsibility beyond the contours of the crime.

A final set of scholars reach the same conclusion, albeit on slightly different grounds. Antonio Cassese, for instance, argues that JCEIII may not be employed in conjunction with special intent crimes for two very compelling reasons.<sup>56</sup> First, to do so would connote a “logical impossibility,”<sup>57</sup> since one may not be held responsible for committing a crime that requires special intent unless that individual is proved to have the requisite special intent.<sup>58</sup> Second, he convincingly argues that the “distance” between the subjective dispositions of the primary and secondary offenders must not be dramatic if they are both to be convicted of the same offense, otherwise personal culpability “would be torn to shreds.”<sup>59</sup>

Thus, to preserve analytical consistency, all modes of liability must require subjective standards that are the same as those announced in the definition of each particular crime. Otherwise, modes of liability warp responsibility as distinct from merely attributing wrongdoing in line with the moral weight of the crime in question.

### B. *The Fundamentals of Action: Failures to Punish in Superior Responsibility*

At the turn of the seventeenth century, the famed internationalist Hugo Grotius wrote, “we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime.”<sup>60</sup> The statement represented the beginnings of the

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<sup>55</sup> *Id.* at 146.

<sup>56</sup> Cassese, *supra* note 25, at 121.

<sup>57</sup> *Id.* at 121.

<sup>58</sup> *Id.* at 121.

<sup>59</sup> *Id.* at 121; Elies van Sliedregt also explains this difference based on a distinction between perpetration and participation. The former forbids escalation whereas the later tolerates this. Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT’L CRIM. JUST. 184 -207, 201 (2007). I later argue that if such a distinction makes little sense, since it is still inappropriate to convict someone of a crime they do not deserve, even if you have reduced the time they will spend in prison. See *infra* section IV.A.

<sup>60</sup> HUGO GROTIUS ET AL., HUGONIS GROTHII DE JURE BELLI AC PACIS LIBRI TRES: IN QUIBUS IUS NATURAE & GENTIUM, ITEM JURIS PUBLICI PRÆCIPUA EXPLICANTUR 523 (1925).

modern doctrine of superior responsibility, but again it was not until domestic courts prosecuted the Japanese General Yamashita after WWII,<sup>61</sup> that the doctrine began its meteoric rise to prominence within international criminal justice. The doctrine’s modern popularity has stemmed, in large part, from its promise as a solution to the Hitler-as-accessory dilemma. To this end, superior responsibility must function as a mechanism through which the superior is deemed liable “for the crimes of his subordinates.”<sup>62</sup> Accordingly, superior responsibility emerged as a “mode of liability” with domestic backing that promised to overcome the insurmountable deficiencies of complicity and accurately capture the true moral responsibility of the puppet masters in atrocity.

Once again, the origins of the concept were largely domestic. To conclude a meticulous study of WWII jurisprudence governing superior responsibility (which in turn served as a foundation for modern iterations), Kevin Heller observes that “[n]one of the [WWII] tribunals, however, identified the precise ‘law of war’—conventional or customary—that justified imposing criminal liability on a military commander who failed to properly supervise his subordinates, much less on a civilian superior. Instead, they simply cited *Yamashita*, decided by the U.S. Supreme Court in 1949, for the existence of the mode of participation.”<sup>63</sup> Much has transpired since, but this history undermines a thesis that broad modes of liability are necessarily hatched internationally. Quite the contrary, international courts enthusiastically embrace far-reaching doctrine once prominent domestic systems grant them their imprimatur.

Confusingly, there are several definitions of superior responsibility within international criminal law, but crudely speaking, a subordinate’s wrongdoing is attributed to the superior where she has effective control over the perpetrators of crimes and knew or had reason to know of their offenses, but failed to prevent or punish the perpetrators.<sup>64</sup> Only a decade

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<sup>61</sup> In Re: Yamashita 327 U.S. 1, 15 (1946). For a detailed history of the case, see RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (1982).

<sup>62</sup> Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 53 (Nov. 16, 2005); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT’L L. 251, 267 (2008) (completing a survey of previous practice by concluding that “there is overwhelming support for the mode of liability view.”).

<sup>63</sup> KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 262–263 (2011).

<sup>64</sup> For instance, Article 7(2) of the ICTY Statute states: “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the

ago, however, Mirjan Damaška alerted us that aspects of the old concept are inconsistent with first principles—convicting a superior of the same offence as his subordinate for merely *failing to punish* that subordinate violates the principle of culpability too,<sup>65</sup> in this instance, because “the opprobrium attaches to [the superior] for heinous conduct to which he has in no way contributed”.<sup>66</sup> Underlying Damaška’s complaint lies the supposition that culpability presupposes personal participation *in the wrongful conduct required for the crime of which the accused is convicted*.<sup>67</sup>

Let us embark on a brief exegesis to explore the significance of this idea. Wrongful action requires that a defendant’s actions “must reflect on him in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate.”<sup>68</sup> Murder requires actions that lead to death, rape requires insertion of a penis in a vagina, theft demands appropriation, and so forth. There can be no mix and match—an appropriation cannot be a murder and a killing cannot be theft. Thus, it is not acceptable that someone convicted of a crime did something morally reprehensible, if that action has no bearing on the content of the offense with which she is charged. These principles reflect basic liberal aspirations—in order to guard against the prospect of thought-crimes, guilt by association or punishment based on status, a *wrongful act* calibrated to the definition of the crime is widely regarded as “a primary candidate for a universal principle of criminal liability.”<sup>69</sup>

In traditional understandings, *wrongful acts* tend to divide into two camps. For one category of offences such as rape and fraud, conduct alone is sufficient since the action itself constitutes the criminal harm.<sup>70</sup> To

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perpetrators thereof.” (Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(2), Sept. 2008).

<sup>65</sup> Damaška, *supra* note 5, at 468.

<sup>66</sup> *Id.* at 468.

<sup>67</sup> *Id.* at 469.

<sup>68</sup> Victor Tadros, for instance, points out that it is not sufficient that the defendant has acted wrongly in some way; as a minimum his actions “must reflect on him *in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate*.” VICTOR TADROS, CRIMINAL RESPONSIBILITY 49 (2007) (emphasis in original).

<sup>69</sup> Fletcher, *supra* note 26, at 420.

<sup>70</sup> See Fletcher, *supra* note 26, at 61-62 (describing a basic cleavage in the criminal law, between crimes of harmful consequences and crimes of harmful actions). Fletcher’s taxonomy elsewhere refers to patterns of manifest criminality, harmful consequences and subjective criminality (Fletcher, *supra* note 26, at 388-390). The last of these labels describes inchoate offenses, and therefore is not directly relevant here; This tripartite taxonomy emulates German criminal theory (Krey, *supra* note 34, at 151-153, discussing Erfolgsdelikte (result-oriented crimes), schlichte Tätigkeitsdelikte (non-result oriented crimes); and Verletzungsdelikte/Gefährungsdelikte (crimes constituted by violation of

extrapolate into the international sphere, the war crime declaring that no quarter will be given merely requires the order not to take prisoners—it matters not whether injured or surrendering enemy soldiers are subsequently massacred in Lawrence of Arabia style, since the announcement itself suffices to commit the crime. In the second category of crimes, however, proof of harmful consequences is required. And for these harm-type crimes, “a causal connexion between some action of the accused and the specified harm must be shown in order to establish the *existence* of liability.”<sup>71</sup>

Two contrasting theories question this traditional thinking from opposing extremes, both of which are useful for understanding international criminal law’s philosophical stance on these issues. From one side, there are those who deny the conduct/harm division outright, arguing that causation is a quintessential element of responsibility across all criminal offences.<sup>72</sup> Rape is not restricted to the conduct of inserting one’s penis into a woman’s vagina without consent, but denotes “causing sexual penetration of the female.”<sup>73</sup> By analogy, the war crime of declaring no quarter is actually *causing bodily movements* in the throat,

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legal interests/mere endangerment of legal interests). The same distinction is true in both French and Spanish criminal law. See ALBIN ESER, *INDIVIDUAL CRIMINAL RESPONSIBILITY* 105 (2002) (describing a distinction between “delito de mera actividad” and “delito de resultado” in the former, and “infracción formelle” and “infracción materielle” in the latter.).

<sup>71</sup> H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 79 (2nd ed. 1985) (emphasis in original).

<sup>72</sup> The criticism of the traditionalist division between conduct and harm type offenses is best made in MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 101 (2009) (“The thesis is that all complex descriptions of actions share with ‘killing’ a built-in, second causal element: the bodily movement (that is caused by a volition) must itself cause some further, independent event to occur, like a death in the case of ‘killing’); But see John Gardner, *Moore on Complicity and Causation*, 156 U. PA L. REV. PENNUMBRA 432 (2008) (disagreeing that rape requires causation, because the offence demands “no result... other than the action in question having been performed”). My own sympathies lie with Moore. Consider this hypothetical: if a patient is given an anesthetic in her arm before an operation, and a doctor asks her to raise her arm, she tries but fails because the arm is anesthetized. If the doctor asks her to raise her anesthetized arm a second time, but this time the doctor physically raises the patient’s arm at precisely the same time she makes her second attempt, we are still not able to say that the patient lifted her arm, even though she intended to raise it at precisely the same time that it did. Volition must cause action, therefore causation is common to all forms of responsibility. For helpful discussion, including arguments that would disagree with my hypothetical, see R. A. Duff, *Acting, Trying, and Criminal Liability*, in *ACTION AND VALUE IN CRIMINAL LAW* 75-106, 83-85 (Stephen Shute, John Gardner, & Jeremy Horder eds., New ed. 1995).

<sup>73</sup> MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 16 (2009).

mouth and lips, which subsequently cause an announcement to one's troops that no prisoners will be taken in battle. On this account of the philosophy of action, one can never escape causal analyses, even for what are commonly known as conduct-type crimes. The distinction between conduct and harm therefore disintegrates, leaving causation as a universal ingredient in blame attribution.

Others reach the diametrically opposite conclusion by denying causation any legitimate role in determining responsibility. These arguments rely heavily on thinking about moral luck—if we are committed to punishing people for what they deserve, surely they should not benefit from their luck.<sup>74</sup> Why, after all, should a would-be murderer who shoots at her enemy be punished less, merely because the victim by chance dies of a heart attack seconds before the bullet hits?<sup>75</sup> If we are serious about culpability as the metric upon which to judge responsibility, we must eliminate these types of fortuitous scenarios from our calculus. To do this requires nothing short of abolishing harm as a touchstone for criminal responsibility, and as a result, eliminating causation from the criminal lexicon. In its place, criminal offenses would always be inchoate in structure, making attempt the paradigm for criminal responsibility.

As a reflection of the inherent deference to domestic orthodoxy, international courts and tribunals reject both extremes. To illustrate, in determining the liability of leaders within the infamous Radio télévision libre des mille collines (RTL) for instigating genocide, the Rwanda Tribunal distinguished instigation as a “mode of liability” from direct and public incitement to commit genocide, which operates as a separate inchoate crime. Like the conduct-type war crime of declaring no quarter, the crime of direct and public incitement to commit genocide “is completed as soon as the discourse in question is uttered or published”.<sup>76</sup> Whereas a showing of causation would be required to convict the radio owners for instigating genocide, for this inchoate crime a “causal

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<sup>74</sup> For the classic discussion of this in English-speaking literature, see Thomas Nagel, *Moral Luck*, Supp 50 PROCEEDINGS OF THE ARISTOTELEAN SOCIETY (1976); For more recent discussion, see Andrew Ashworth, *Taking the Consequences*, in ACTION AND VALUE IN CRIMINAL LAW 107 (Stephen Shute, John Gardner, & Jeremy Horder eds., 1995); Alexander and Ferzan, *supra* note 15, at 171-175.

<sup>75</sup> For an excellent overview of these arguments, see Alexander and Ferzan, *supra* note 15 at 171-196 (arguing that only culpability, not resulting harm, affects desert). For a response to these claims, which asserts the orthodox position that harm matters, see Moore, *supra* note 73, at 30 (arguing that we feel very differently about a drunk driver's responsibility for swerving and only missing a child crossing the street by an inch, than we do if the drunk driver actually hits and kills the child.).

<sup>76</sup> Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment, ¶ 723 (Nov. 28, 2007).



relationship is not requisite to a finding of incitement.”<sup>77</sup> So in contrast to the theory that causation represents the hidden structure of all criminal responsibility, international courts side with domestic example.

Likewise, arguments from moral luck have no real currency internationally—harm indisputably matters in international criminal justice. All range of international crimes, from deportation as a war crime to extermination as a crime against humanity, are defined in ways that make the actual occurrence of harm necessary for guilt. For the former, civilians must be expelled across a border; for the latter, members of a civilian population must perish.<sup>78</sup> In some instances, international courts explicitly reinforce the normative significance of harm by explicitly stating that international crimes are *not* inchoate and that liability is contingent upon proof that the intended harm materialized.<sup>79</sup> In sum, international criminal justice is highly deferential to domestic tradition, both in its practice of distinguishing harm-type and conduct-type offences along traditional lines and in considering harm a theoretical center-piece of criminal responsibility.

But why the mimicry? If we are truly committed to culpability as the guiding feature of blame attribution in international criminal justice, should we not have boldly dispensed with harm as the essence of international criminal responsibility, in favor of a system that better accounts for the problem of moral luck? Less ambitiously, is it not more

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<sup>77</sup> Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶ 1015 (Dec. 3, 2003); this aspect of the Trial Chamber’s reasoning was affirmed on appeal. See Prosecutor v. Nahimana et al., *supra* note 76, at 678; for a concise articulation of the difference between instigation as mode of liability and incitement as inchoate offence, see Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, Judgment, ¶ 512 (June 20, 2009) (“Instigation under Article 6 (1) is a mode of liability; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.”).

<sup>78</sup> “(1) The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population; (2) The conduct constituted, or took place as part of a mass killing of members of a civilian population.” Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* [hereinafter ICC Elements of Crimes], at 6; “The perpetrator deported or transferred one or more persons to another State or to another location.” *Id.*, at 17.

<sup>79</sup> Prosecutor v. Milutinović et al., *supra* note 43, at 92 (“liability for aiding and abetting under the Statute cannot be inchoate: the accused cannot be held responsible under Article 7(1) for aiding and abetting if a crime or underlying offence is never actually carried out with his assistance, encouragement, or moral support.”); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 378 (May 15, 2003) (“Article 6(1) does not criminalize inchoate offences”).

coherent to dispense with the traditional distinction between harm-type and conduct-type offences, to acknowledge that causation is common to both? That international criminal justice adopts neither of these positions again reflects the pull of domestic influence, not some nefarious utilitarian agenda derived from its international political status. The absence of any domestic practice adopting these theories has obviated the need for international criminal jurisdictions to choose between competing models, leaving them to contentedly follow established domestic doctrine regardless of whether it accords with principle.

This leads us back to superior responsibility, where international criminal justice’s traditionalism plays out most keenly. To begin, we must acknowledge that one might dispute whether superior responsibility is the ideal illustration of these philosophical principles in action insofar as it involves liability for an omission. There is broad dispute in criminal theory whether omissions *cause* anything. On the one hand, there are those who consider that an omission is “nothing at all,”<sup>80</sup> which gives rise to the conclusion that omissions cannot cause anything—“nothing comes of nothing, and nothing ever could.”<sup>81</sup> Conversely, social theories of causation posit that we ordinarily explain omissions as having causal power.<sup>82</sup> We have no problem, for instance, saying that “a lack of rain causes crops to fail.”<sup>83</sup> The debate need not delay us here though, since both judicial and scholarly discussions of superior responsibility assume a causal structure, and perhaps more pertinently, the question is largely peripheral to our central focus on accessorial liability.

How then do these foundational principles play out within superior responsibility? Intriguingly, misgivings about causation have prompted international courts to offer two corrections to the law governing failures to punish. The first is largely cosmetic—in response to the complaint that failures to punish convicted defendants of harm-type offenses without establishing causation, international criminal courts began adding language to the pertinent sections of their judgments professing that “an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.”<sup>84</sup> This language, however, has proved more of a smokescreen to ward off

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<sup>80</sup> Moore, *supra* note 73, at 55.

<sup>81</sup> *Id.*, See also, I; HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL*. 618 (1996) (also doubting that omissions are causal insofar as they lack “a real source of energy.”)

<sup>82</sup> GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 64 (1998).

<sup>83</sup> VICTOR TADROS, *supra* note 68, at 171-172 (2007).

<sup>84</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 171 (Sept. 17, 2003).

conceptual criticisms than a marked normative change,<sup>85</sup> but the important point is that the rhetoric became important to quell theoretical unease with the doctrine’s overreach, and that causation was the grounds for the discomfort.

In contrast, the second judicial correction was more radical. Several Trial Chambers convicted military commanders of a separate offence of “failing to take the necessary and reasonable measures to punish”,<sup>86</sup> then proceeded to hand down drastically reduced sentences commensurate with the commanders’ failure to act (as distinct from the harm associated with a crime such as torture, extermination or genocide).<sup>87</sup> This transformation of superior responsibility from a mode of liability to a separate lesser conduct-type crime was born of major theoretical misgivings—there is no logically plausible means of reconciling failures to punish with causation.<sup>88</sup> How, after all, can a commander *cause* a crime that is already complete by the time she is impelled to act? The solution then was to dispense with causation by transforming failures to punish into a form closer to attempt.

For the same reasons, the vast majority of academics agree that failures to punish must constitute a separate conduct-type offense, given the impossibility of the commander’s failure causing the subordinate’s crime.<sup>89</sup> With respect to a crime subordinates have already committed,

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<sup>85</sup> I view this language as largely cosmetic because it conceals the long history of holding the superior responsible “for the crimes of his subordinates,” and more significantly, belies the ongoing practice of using superior responsibility to convict military and civilian commanders of “rape,” “pillage” and “genocide” carried out by underlings. For instance, “The Accused Ljubomir Borovčanin is found GUILTY pursuant to Article 7(3) of the Statute, of the following counts: Count 4: Murder, as a crime against humanity.”; *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Judgment, ¶ 835, (June 10, 2010). Thus, it seem clear that the superior is still convicted of the crime his subordinates perpetrated. For a more detailed confirmation of this reasoning, see Robinson, *supra* note 5, at 951-952.

<sup>86</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgment, ¶ 620-628 (Mar. 15, 2006) (finding Amir Kubura, for instance, “GUILTY of failing to take the necessary and reasonable measures to punish the murder of Mladen Havarnek at the Slavonija Furniture Salon in Bugojno on 5 August 1993.” The judgment’s entire disposition followed this approach).

<sup>87</sup> *Id.* at 625, 627. (sentencing Enver Hadzihasanovic to 5 years imprisonment and Amir Kubura to 2.5 years for failing to prevent or punish war crimes).

<sup>88</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Judgment, ¶ 38 (Apr. 22, 2008); citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 77 (Jul. 29, 2004); *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 832 (Dec. 17, 2004).

<sup>89</sup> Thomas Weigend, *Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht*, 116 BEMERKUNGEN ZUR VORGESETZTENVERANTWORTLICHKEIT IM VÖLKERSTRAFRECHT 999, 1021 (2004); Bing Bing Jia, *The Doctrine of Command Responsibility Revisited*, 3 CHINESE J. INT’L L. 1 (2004), (“[b]ut it makes no sense to see

causality is “logically impossible” since later events cannot cause earlier ones.<sup>90</sup> And as far as future crimes go, giving failures to punish a separate existence where crimes have yet to occur would require an absurdity: “to initiate prosecution of a crime that has not yet been committed.”<sup>91</sup> On this basis, the problem of causation within failures to punish “has not and arguably cannot be resolved.”<sup>92</sup> In sum total, using failure to punish as a vehicle for convicting the superior of the same offence as the subordinate is “largely disproportionate.”<sup>93</sup>

Admittedly, a minority of scholars in international criminal justice do reach the opposite view, but strikingly, their disagreement consistently attempts to reconcile failures to punish with causation rather than simply denying that the concept is necessary.<sup>94</sup> Otto Triffterer, for example, argues that failures to punish are based on a double causal connection to the offense: the first flows from the superior’s initial omission to control the subordinates; the second derives from the failure to exercise a “second chance” to absolve himself by referring the matter to justice.<sup>95</sup> Many find

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failure to punish in the same light, which should be treated as an offence independent of subordinate crimes that raise the issue of command responsibility in the first place.”); Robinson, *supra* note 5, at 951 (“[e]ven if we agree that failure to punish crimes is worthy of criminalization, it is simply inaccurate to label such a failure as ‘genocide.’”); 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, 636 (2007), (“with regard to the failure to punish, where no real causal link subsists between the subsequent failure to act of the superior and the crime previously committed, the conviction of the superior for the same crime committed by the subordinates is difficult to justify.”); Elies van Sliedregt, *Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense*, 12 NEW CRIM. L. REV. 420, 431-432 (2009) (arguing that superior responsibility has different structures in different jurisdictions, but recommending the “splitting solution” involving treating failures to punish as a separate crime.).

<sup>90</sup> Weigend, *supra* note 89, at 1021.

<sup>91</sup> *Id.* at 1021.

<sup>92</sup> *Id.*; See opinion to similar effect *supra* note 83.

<sup>93</sup> Weigend, *supra* note 89, at 1021.

<sup>94</sup> Otto Triffterer, *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?*, 15 LEIDEN J. INT’L L., 203 (2002) (arguing that causation is embedded in the structure of superior responsibility); GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 42-43 (1<sup>st</sup> ed. 2009) (accepting that superior responsibility is a mode of liability, and rejecting the view that the doctrine of superior responsibility contains no requirement of causality).

<sup>95</sup> Triffterer, *supra* note 94, at 203. Use of the word “absolve” in the text is my own. I use this in anticipation of a criticism that Triffterer’s “second chance” is causally unnecessary if the failure to control is already adequate. With this modification, I believe his account is coherent causally, even if I harbor grave doubts whether the causal element could ever match the requisite subjective element of the subordinate’s crime *at the time of perpetration*.

this explanation unsatisfying,<sup>96</sup> but its attempt to justify the mode of liability view in causal terms surely highlights the significance causation plays in any robust theory of blame attribution, at least for harm-type offences.

Only one scholar begs to differ. In her excellent article, Amy Sepinwall makes the strongest case for treating the failure to punish as a mode of liability by pointing out how “failure to punish can be read as an expression of his support for his troops’ act.”<sup>97</sup> She argues that because the superior intends the failure, he aligns himself with the subordinate’s atrocity.<sup>98</sup> In so doing, the commander compounds his subordinates’ offense, such that “he ought to be held criminally liable for it.”<sup>99</sup> Although I have some sympathy for this explanation,<sup>100</sup> it unjustifiably snubs the philosophical rationale that makes causation central to theories of criminal responsibility everywhere. Without it, we abandon the project of creating an objective connection between an accusers action and the harm to which international criminal justice assigns moral weight in calculating responsibility, leaving little principled protection against thought-crimes, guilt by association, punishment based on status or other innovative doctrine that allow policy to supersede desert.

Thus, if international criminal justice is to become coherent not harsh, causation is an indispensable element for the perpetration of all harm-type offences. There is, however, one final twist in this plot. For secondary parties, the harm/conduct distinction disappears because the derivative nature of the secondary party’s liability creates a cause-like relationship.<sup>101</sup> The war crime of declaring no quarter is a conduct-type war crime (insofar as the consequences of the declaration are legally immaterial), but assessing whether a superior can be convicted of the crime for failing to punish a subordinate who made the announcement demands causation too. How else can we justify convicting the superior of

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<sup>96</sup> Weigend, *supra* note 89, at 1021; Meloni, *supra* note 89, at 630.

<sup>97</sup> Sepinwall, *supra* note 63, at 289.

<sup>98</sup> *Id.* at 292.

<sup>99</sup> *Id.* at 295.

<sup>100</sup> Her argument is, for instance, a wonderful explanation of why failures to punish must be criminalized in the face of fears of over-criminalization more broadly. See DOUGLAS N. HUSAK, *OVER CRIMINALIZATION* (2008). Nonetheless, my own view is that a separate conduct-based crime remains the appropriate form of liability, since the superior makes no difference to a completed atrocity.

<sup>101</sup> Sanford H Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985) (“the notion of derivativeness can be expressed as well in terms of the requirement of a result: just as causation doctrine requires that the prohibited result occur before there can be an issue of the actor having caused it, so in complicity doctrine there must be a violation of law by the principal before there can be an issue of the secondary party’s liability for it.”).

this particular war crime, other than by showing that his actions made a difference to someone else committing the offense? Thus, if the vast majority of scholars in international criminal justice assume valid foundations in their criticisms of superior responsibility, causality must be an element of all “modes of liability” within the discipline.

### III. THE CONCEPTUAL SHORTCOMINGS OF COMPLICITY

The previous section identified two benchmarks for testing the theoretical merit of modes of liability that emerge from scholarship in international criminal justice. First, there is a conceptual need for congruence between the mental element in the crime and that required for the mode of liability; and second, an accused’s acts must be causally connected to the harm contemplated in the crime of which she is ultimately convicted. Before we apply these same benchmarks to complicity, we must first interrogate the nature of accessorial liability in order to establish that a comparison across different modes of liability is methodologically defensible.

#### A. *The Nature of Complicity – Two Defining Features*

##### 1. Complicity as “Mode of Liability”

In his memorable treatise on accomplice liability, K.J.M Smith eloquently forewarned that “[s]urveying complicity’s hazy theoretical landscape can, depending on the commentator’s nerve, temperament, and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow gloom.”<sup>102</sup> My analysis sails much closer to the gloom than the relish, for there is much in the peripheries of complicity that is deeply unsatisfying. The question remains, however, to what extent complicity can be compared to other modes of liability, and if it is abandoned in favor of a unitary theory of perpetration, what features of complicity will a unitary theory have to accommodate? The first prerequisite is that complicity must act as a mode of liability too.

In domestic law, it traditionally does precisely this. In the Anglo-American tradition, for example, “the accomplice is guilty of the same

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<sup>102</sup> K. J. M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 4 (1991).

offense as the principle.”<sup>103</sup> The driver of the getaway car, in other words, is convicted of the same offense as her confederates who hold up the bank at gunpoint, even though the getaway driver does not personally steal a thing. Civil law countries follow this approach too, although the similarity is sometime overlooked in disparate approaches to sentencing. In Germany, for instance, aiders and abettors are sentenced to a maximum of three quarters of the penalty for the offense they facilitate whereas the sentence for instigators is taken from the same sentence range as principals.<sup>104</sup> If one wonders how the great diversity of complicitous acts could consistently square with such neat mathematical divisions,<sup>105</sup> the rule’s apparent rigidity should not cloud our vision of complicity’s overarching structure—regardless of how the accomplice’s sentence is to be calculated, these systems unequivocally hold the accessory liable for the rape, theft or murder that she assists in bringing to fruition.

Some national jurisdictions take the equivalence between perpetration and complicity one step further. In France and England, criminal legislation explicitly stipulates that the accomplice “shall be liable to be tried, indicted, and punished *as a principal offender*.”<sup>106</sup> In other words, not only is the label “robbery” common to the sanction visited on the robber and her getaway driver, both offenders warrant potentially equivalent punishment. In light of these principles, one shares George Fletcher’s bewilderment “why the French and Anglo-American systems ever recognized distinctions among perpetrators, joint perpetrators and accomplices.”<sup>107</sup> I return to this question in due course, but for now it is sufficient to observe that domestic jurisdictions have traditionally (but not invariably) viewed complicity of a mode of liability

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<sup>103</sup> Sullivan, *supra* note 15, at 154; Fletcher, *supra* note 34, at 649-650 (“Aiding another person to commit a crime renders one an accomplice, and being an accomplice is simply one way of ‘being guilty of an offence.’”).

<sup>104</sup> Strafgesetzbuch, § 26, 27 and 49. For a modern English translation, see MICHAEL BOHLANDER, *THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION* 43, 50 (2008).

<sup>105</sup> Is it not possible that some rogue aider is five sixths as culpable as the perpetrator? As Michael Moore has argued, “[o]ne could say that, on average, accomplices are less-substantial causers than are the principals they aid, and this is true enough. Yet this is only a rule of thumb, something that is true in the general run of causes.” Moore, *supra* note 17, at 423; And in fact, the intuition that the indirect nature of the accomplice’s acts render her less culpable is “surprisingly difficult to justify”. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 147 (2000) (discussing whether complicit actors are less culpable than direct actors). For further discussion, see Fletcher, *supra* note 34, at 654-657 (addressing the rationale for categorically mitigating the accessory’s punishment.).

<sup>106</sup> The Accessories and Abettors Act 1861 (24 & 25 Vict. c.98), s. 8 (emphasis added).

<sup>107</sup> Fletcher, *supra* note 33, at 651.

through which one becomes responsible for the perpetrator’s crime regardless of sentencing policy.

This history has notable modern exceptions. Contrary to earlier understandings that there is no crime of “being an accessory”,<sup>108</sup> some domestic jurisdictions have since passed an inchoate offense called *criminal facilitation*.<sup>109</sup> These new inchoate offenses, which generally co-exist alongside orthodox notions of complicity, are inspired by the view that accessorial liability need not function as a mode of liability.<sup>110</sup> Once again, moral luck provides one important rationale for the modern inchoate variations of complicity—why should the accomplice who sends a crowbar to assist a prison breakout be acquitted of the offence only because the inmate fortuitously manages to escape without it? In terms of desert, this is undoubtedly perplexing—“[w]hether the aid is actually rendered is fortuitous; the actor is equally culpable and his dangerousness is equally great if the perpetrator never receives the aid.”<sup>111</sup> In addition, some doubt that an accomplice can ever *cause* a perpetrator with capacity for autonomous choice to commit a crime,<sup>112</sup> offering a further basis for adding an inchoate version of complicity that excludes causal inquiries outright.

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<sup>108</sup> *Id.* at 582 (“the actor is punished for a violation of the same prohibitory norm that covers standard cases of perpetration. There is no crime of ... “being an accessory”).

<sup>109</sup> In England and Wales, sections 44, 45 and 46 of the Serious Crimes 2007 create three new inchoate crimes of intentionally encouraging or assisting an offence; Encouraging or Assisting an Offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed. For commentary, see ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, 458–461 (6 ed. 2009). In the United States, similar offenses are labeled criminal facilitation. For discussion, see Robert Weisberg, *Reappraising Complicity*, 4 *BUFF. CRIM. L. REV.* 217, 261-270 (2000).

<sup>110</sup> Christopher Kutz, *Causeless Complicity*, 1 *CRIM. L. & PHIL.* 239, 301 (2007) (arguing that causality should play no role in complicity, in part, in order to limit the role of moral luck in criminal law). For similar sorts of arguments, see Richard Buxton, *Complicity and the Law Commission*, *CRIM. L. REV.* 223 (1973) (“the way out of these and other difficulties would be to create a general offence of aiding or encouraging crime, committed by one who does acts which are known to be likely to be of assistance or encouragement to another in committing crime, whether or not that principal crime is in fact committed.”); Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 *CRIM. JUST. ETHICS* 25 (1996) (“harm principles should have little or nothing to do with the law of complicity.”); Michael Moore summarizes these arguments succinctly by claiming that “(on this view) accomplice liability is just inchoate liability in the special cases when the evil sought to be prevented by the law has occurred (even though the accomplice did not cause it to occur).” Moore, *supra* note 13, at 401. Note, however, that several of these authors would eliminate this special requirement that the harm occurred, making complicity resemble attempt even more closely than Moore suggests.

<sup>111</sup> Fletcher, *supra* note 26, at 679.

<sup>112</sup> Yeager, *supra* note 110, at 31.



Where does complicity in international criminal justice stand on these competing visions of accessorial liability? As one might expect, it unquestioningly rejects the modern avant-garde in favor of tradition. Without doubt, international courts do not treat complicity as a separate inchoate offense. A range of international courts, both historical and contemporary, have convicted accessories of *the same offense as the perpetrator* and done so while openly referring to aiding and abetting as a “mode of liability.”<sup>113</sup> As further and decisive evidence of this reality, the terms aiding and abetting, instigating, or any other of complicity’s numerous synonyms never feature in the dispositions of international criminal judgments in the overwhelming majority of instances.<sup>114</sup> In expressing condemnation of an accessory’s conduct, international courts merely report that the defendant is responsible for crime X; we are not told why.<sup>115</sup>

Indeed, there is much to commend this orthodox view of complicity. Under an inchoate version, the vendors of the chemical Zyklon B used as an asphyxiant in Auschwitz would be convicted of *criminal facilitation*—not murder, extermination or genocide.<sup>116</sup> This alternative may overcome evidential difficulties proving complicity, but it also gravely undervalues culpability to convict the vendors of the chemical used to gas in excess of four million people of *criminal facilitation*. Whatever one might think about the merit of creating a new inchoate version of complicity to complement the more traditional equivalent, when the crime (here genocide) does take place and the accomplice’s actions make an unequivocal contribution to the criminal

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<sup>113</sup> Fletcher, *supra* note 26, at 637 (defining accessorial liability as “all those who are held derivatively liable for another’s committing the offense.”).

<sup>114</sup> The typical international trial alleging complicity concludes abruptly by declaring: “The Accused RADOSLAV BRDANIN is found not guilty under Article 7(3) of the Statute but GUILTY pursuant to Article 7(1) of the following counts: Count 3 – Persecutions...” Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 1152 (Sep. 1, 2004); A comprehensive review of all convictions for aiding and abetting, instigation, planning and ordering reveals that international courts and tribunals follow this format in fifty-nine (59) other situations i.e. making no mention of the mode of liability within the disposition of the judgment. In only three (3) scenarios, international courts state something like: “The Chamber finds the Accused Haradin Bala GUILTY, pursuant to Article 7(1) of the Statute, of the following counts: Count 4 - Torture, a violation of the laws or customs of war, under Article 3 of the Statute, for having aided the torture of L12.” Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, ¶ 41 (Nov. 30, 2005). Thus in over 95% of cases, international court’s dispositions make no mention of complicity, even though it was the basis for conviction.

<sup>115</sup> *Id.*

<sup>116</sup> See UNITED NATIONS WAR CRIMES COMMISSION, Trial of Bruno Tesch and Two Others “The Zyklon B Case”, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93.

harm (here providing the means),<sup>117</sup> convicting the accomplice of an inchoate offense is at best like convicting an actual murderer of attempted murder.<sup>118</sup> If harm matters, mere facilitation is inadequate.

So, for better or worst, international criminal justice understands complicity in traditionalist form. In fact, such is the comfort with the unquestioning international dependence on pre-established traditional notions of complicity that there are few arguments that the doctrine might take inchoate form in international criminal justice. So somewhat strangely, the highly charged judicial and academic debate over whether failures to punish in superior responsibility should constitute a separate inchoate offense finds no parallel in the international law governing complicity, even though the issues are broadly analogous. The essential consequence of all this is therefore that causation must be an element of accomplice liability in order to honor the philosophical commitments international criminal law has inherited from below.

## 2. The Derivative Nature of Accessorial Liability

One further feature of complicity requires introduction as background too. The second defining feature of accessorial liability both internationally and domestically is that it is commonly known as a form of "derivative liability."<sup>119</sup> Even the most nefarious accessory, who does everything in her power to facilitate someone else's crime, is not complicit in anything if a perpetrator does not act wrongfully. If X sends a crowbar to her friend Y in prison in order for Y to use it to break out of prison, there is no crime if, unbeknownst to X, Y has independently broken out a week before the crowbar arrives at its destination. True, this again raises the perennial problem of moral luck (why should X benefit from Y's fortuitous earlier breakout), but the long history of complicity has almost

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<sup>117</sup> Assume for the sake of this argument that Bruno Tesch's company Tesch & Stabenow was the only available supplier of the means of exterminating such a large number of civilians, such that their contribution was an indispensable cause of the crime. In fact, as I detail below, this is not factually accurate, but my minor factual modification makes the normative point indisputable.

<sup>118</sup> Actually, convicting those who intentionally provide chemicals for a genocide that subsequently takes place is even more objectionable than convicting an actual murderer of attempted murder, because the label attempted murder at least communicates the gravity of the offense involved. Criminal facilitation communicates nothing of the sort, and to the extent that the label of the crime is a key element in the punishment inflicted on an accused, this significantly under-represents desert.

<sup>119</sup> Fletcher, *supra* note 26, at 637 (defining accessorial liability as "all those who are held derivatively liable for another's committing the offense.").

invariably defined complicity as contingent upon the wrongdoing of a perpetrator.

Historically, this dependence was so intense that the accomplice would escape prosecution if the principal perpetrator was never apprehended, prosecuted and convicted.<sup>120</sup> For instance, until the eighteenth century no accessory could be convicted if his principal had died, received pardon by clergy, or had not been convicted for any reason at all.<sup>121</sup> In England it was only in 1848 that it became possible to indict, try, convict and punish an accessory before the fact “in all respects as if he were a principal felon”,<sup>122</sup> regardless of whether the perpetrator was first brought to trial and convicted. Around the same time, Continental systems made a similar shift, which reduced the principal’s perpetration of the crime to a contested issue within the accessory’s trial. While these changes meant that the formal reliance on derivative liability within complicity was less strict, it remained a central feature of the doctrine.

The derivative nature of accomplice liability was later further diluted but again leaving the basic concept intact. In most national jurisdictions, an accomplice can now be held responsible where the principal perpetrator’s crime is excused, say when an accomplice assists someone insane to commit a crime. As a result, complicity is now viewed as entailing only a “limited or partially derivative character.”<sup>123</sup> Although the moral basis for this dilution is obvious, it also gives rise to downstream complications. How do we determine the responsibility of someone who gives you a gun intending that you kill Mr. W, but fortuitously, Mr. W attacks you first and you kill him with the gun in self-defense?<sup>124</sup> While cases of this sort involving culpable intentions on the accomplice’s part but justified actions on the perpetrator’s are complex, the complexity does not eclipse the overraching principle—the vast

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<sup>120</sup> Dubber, *supra* note 7, at 982 (showing how a putative accomplice would “[e]scape trial and punishment if the principal was never found, was never prosecuted, was acquitted, was convicted but had his conviction overturned or was pardoned.”).

<sup>121</sup> Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 695 (1929); Smith, *supra* note 102, at 20-23.

<sup>122</sup> Sayre, *supra* note 121, at 695.

<sup>123</sup> Hans-Ludwig Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 BYU L. REV. 611, 620 (highlighting how the notion of limitierte Akzessorietat was not developed in German criminal law until 1943).

<sup>124</sup> For even more complicated variants of my example, see Fletcher, *supra* note 27, at 667-669 (discussing inconsistent American case law on the issue of whether a confederate of a criminal who is justifiably shot by police while fleeing the crime-scene can be an accomplice in the death of his confederate.); Hans-Ludwig Schreiber, *supra* note 123, at 629-630 (discussing a scenario where the “accomplice” deliberately initiates a situation where you kill Mr. W in self defense.).

majority of domestic criminal systems still maintain that the accessory’s liability is contingent on the principle perpetrator’s wrongdoing.

Once again, international criminal courts follow domestic influence, here explicitly. In a leading case on point, the ICTR embraced the derivative nature of complicity by again relying on domestic examples, this time in the form of the French criminal law. As a reflection of a trend that international criminal tribunals repeat consistently, the tribunal acknowledged that this notion implies that “[t]he accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.”<sup>125</sup> In particular, it declared that “complicity is borrowed criminality (*criminalité d'emprunt*).”<sup>126</sup> In drawing on this notion of *criminalité d'emprunt*, the Tribunal did not register that the label is a relic of 18<sup>th</sup> century criminal reform, and that leading French academics in the modern era view it as “[u]ne expression vicieuse”.<sup>127</sup> Although the matter has no substantive importance for present purposes, the process of absorption marks an important theme—by borrowing domestic doctrine (not leading theory), international courts incorporate the historical idiosyncrasies of national criminal systems regardless of their compliance with foundational principles.

But is there a danger that complicity *borrow*s too much? In addressing this problem, scholars in domestic criminal theory are earnest to ward off allegations that derivative liability amounts to vicarious liability. The former is justifiable, the latter anathema to liberal notions of criminal justice. Sandy Kadish, for example, pleads that we (like Eichmann) should not misconstrue the two terms—vicarious liability is nothing more than punishment based on a relationship between the parties, whereas derivative liability requires action and blameworthy choice on the part of the secondary party, “mak[ing] it appropriate to blame him for what the primary actor does.”<sup>128</sup> But Kadish’s bright-line distinction begs the more nuanced question. How distant are vicarious and derivative liability really? In other words, what type of action and choice will suffice to blame the accomplice for “what the primary actor does,” especially when the accessory’s act and choice is not stipulated in the offense with which she will ultimately be convicted? With an understanding of complicity’s conceptual identity in international criminal justice, we now turn to this dilemma.

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<sup>125</sup> *Id.* at 528.

<sup>126</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 528 (Sep. 2, 1998)

<sup>127</sup> Robert, *supra* note 8, at 351; See also Philippe Salvage, *Le lien de causalité en matière de complicité*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 25, 41 (1981).

<sup>128</sup> Kadish, *supra* note 101, at 337.

### B. *The Mental Element for Complicity*

The mental element for accessorial liability is highly debated and inconsistently applied at both international and domestic levels. Most international criminal tribunals formally insist that “the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal”,<sup>129</sup> and justify the adoption of this standard as the embodiment of customary international law. Conversely, the Statute of the International Criminal Court demands that the accessory assist the perpetrator “[f]or the purpose of facilitating the commission of such a crime”.<sup>130</sup> The intensity of volition then, formally distinguishes complicity within competing international incarnations of the doctrine. And yet, this formalism conceals the reality that neither of these standards is that actually applied most often in practice, and more importantly, that no single static standard is theoretically defensible.

To begin, note the competing rationale for the purpose and knowledge standards. The purpose standard is said to promote autonomy by precluding criminal impediments to otherwise lawful activities that depend on social interaction, especially business. The knowledge standard, on the other hand, promotes social control and the prevention of crime by demanding that agents take interventionist action when aware that their actions are enabling offending.<sup>131</sup> In its most ambitious guise, the knowledge standard posits that the potential aider “might be an educative or moralizing force that causes the would-be offender to change his mind.”<sup>132</sup> Given the magnitude of international crimes, the knowledge standard would seem the more reasonable rationale for our purposes, and yet both accounts miss the mark.

At the level of doctrine, the famed purpose/knowledge dichotomy glosses over a complex literature arguing that the accomplice liability actually involves “two dimensional fault”,<sup>133</sup> which goes to the assistance provided, the perpetrator’s intentions, and/or the ultimate crime

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<sup>129</sup> Prosecutor v. Vasiljević, *supra* note 22, at 102; Prosecutor v. Fofana, Case No. SCSL 04-14-T, Judgment, ¶ 145 (Aug. 2, 2007); Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 501 (Dec 13, 2004).

<sup>130</sup> Rome Statute of the International Criminal Court, Art 25 (3)(c), 2187 U.N.T.S. 90, July 17, 1998.

<sup>131</sup> Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent*, 51 MISS. L.J. 155, 178 (1980).

<sup>132</sup> *Id.*

<sup>133</sup> Ashworth, *supra* note 109, at 415; This also reflects the state of the law in German criminal law, see Bohlander, *supra* note 2, at 168 (discussing “doppelter Anstifter- und Gehilfenvorsatz” twofold intent of the aider or abettor).

facilitated.<sup>134</sup> Later, I argue that it possible to transcend these intermediary steps by inquiring whether the accomplice satisfies the mental element of the crime itself. For present purposes though, it suffices to recognize that in international criminal justice, these types of technicalities are completely overshadowed by the intensity of the contest between the knowledge and purpose strands. Thus, when the US Supreme Court was asked to hear allegations that a company was complicit in crimes perpetrated within Apartheid South Africa, it faced a veritable deluge of argument for either side of the purpose/knowledge divide.<sup>135</sup>

The dichotomy, like many other international modes of liability, is inherited from international criminal law’s domestic forbearers. The International Criminal Court’s reliance on purpose was (perhaps unfaithfully) drawn from a similar standard in the American Law Institute’s Model Penal Code, which appears to require that an accomplice provide assistance with the purpose of facilitating the crime.<sup>136</sup> In contrast, other international criminal courts have drawn inspiration from the vast array of national systems and earlier international precedents, which merely require that an accomplice provide assistance to the perpetrator *knowing* that her actions facilitate the crime. Therefore, to the extent that

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<sup>134</sup> Smith, *supra* note 87, at 141-197 (reviewing English and American jurisprudence requiring that the accessory must intend his acts of assistance or encouragement and be aware of their ability to assist or encourage the principal offender, then exploring the complexities of these two variations); GLANVILLE LLEWELYN WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 394-396 (1953) (reviewing the multiple mental elements required for the accomplice); Eser, *supra* note 70 at 923-924 (discussing the “double intent” in complicity derived from German criminal law).

<sup>135</sup> For comprehensive analyses, see Keitner, *supra* note 7, at 86-96; Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT’L HUM. RTS. 304, 308-315 (2007).

<sup>136</sup> I say perhaps unfaithfully because the Model Penal Code also has a strange provision requiring that “[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result *that is sufficient for the commission of the offense.*” See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06, 296. The significance of this provision is opaque. See Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2178 (1987) (pointing out that there is some ambiguity arising from this provision about how to address the accomplice’s knowledge of circumstances. but arguing that the accomplice should be required to show the same mental element as that required for perpetration); In any event, even US Federal standards of complicity have varied wildly, involving knowledge, purpose, recklessness and a unitary theory. See Baruch Weiss, *What Were They Thinking: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 FORDHAM L. REV. 1341, 1486 (2001) (reviewing the relevant caselaw and advocating for the unitary theory, which he describes as a “derivative approach”).

complicity is a doctrine deeply divided in international criminal justice, the schism mirrors an identical disharmony between domestic traditions.

Remarkably, both sides of the dichotomy are misguided. As a matter of pure doctrine, recklessness is the mental element for complicity most frequently applied by international criminal courts. This is evident, for instance, from the habitual inclusion within most international criminal judgments, of the refrain that “[i]f he is aware that one of a number of crimes will *probably* be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and an abettor.”<sup>137</sup> Clearly, awareness of a *probability* is constitutive of culpable risk-taking, not knowledge. It goes without saying that the two concepts are far from synonymous. To paraphrase Glanville Williams, becoming an accessory by providing assistance “knowing that a crime is afoot” is quite different from helping “knowing that a crime may be afoot.”<sup>138</sup> Could it be that the purpose/knowledge debate has ignored the true application of complicity in international criminal justice?

Apparently so. To cite but one representative illustration,<sup>139</sup> one International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber first reiterated the widely cited proposition that complicity merely requires awareness that “one of a number of crimes would

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<sup>137</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998) (emphasis added); Prosecutor v. Blaškić, *supra* note 88, at 50; Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 255 (Nov. 2, 2001); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 63 (March 31, 2003); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 350 (Jan. 31, 2005); Other cases refer to accessorial liability for “foreseeable consequences” of one’s actions. See Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, *supra* note 138, at 262 (“The aider or abettor of persecution will . . . be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement.”); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 692 (May 7, 1997) (stating that the aider and abettor “will . . . be responsible for all that naturally results from the commission of the act in question.”).

<sup>138</sup> Glanville Williams, *Complicity, Purpose and the Draft Code - 2*, CRIM. L. REV. 98, 99 (1990).

<sup>139</sup> For a small selection of further examples, see Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 759 (Feb. 22, 2001) (convicting the accused Kovac for handing over and/or selling two women to other soldiers whom he knew would “most likely continue to rape and abuse them.”); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 602 (July 31, 2003) (convicting the accused Stakić for deliberately placing civilians in harms way “with the knowledge that, in all likelihood, the victims would come to grave harm and even death.”); Prosecutor v. Brima, Case No. SCSL 04-16-T, Judgment, ¶ 1786 (June 20, 2007) (convicting the accused Brima for killings because “was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.”).

probably be committed",<sup>140</sup> then proceeded to convict a politician named Radoslav Brđanin of the war crime of willful killing for issuing a decree that required the victims to disarm. The key mental element linking Brđanin to the willful killing (of victims and by perpetrators he did not know in anything except broad abstractions) was that he was aware that the disarmament decree "could only be implemented by use of force and fear".<sup>141</sup> But force and fear do not inevitably mean killing. Could his plan not be executed through beatings, torture, forced expulsion and intimidation instead? The only analytically plausible explanation is that the killings were probable but not certain. This, as we suspected, is recklessness.

So international criminal justice here tolerates a type of double-speak, claiming knowledge but applying recklessness. This disparity between theory and reality is surely alarming, but we should not lose sight of its origins. As we have seen, a range of theories hypothesize that these types of disparities between rhetoric and practice arise from importing interpretative styles typical of human rights and law of war into international criminal law; the effect of moral outrage on interpretative technique; or the broader political aspirations associated with transitional justice that are said to drive hermeneutics in international criminal adjudication.<sup>142</sup> And yet here, the double-speak has a quite different genesis. Domestic criminal law in a range of countries that officially adopt the knowledge standard not only allows a strikingly similar application of the rule<sup>143</sup>; some of their leading academics openly lament that this "introduces reckless knowledge as sufficient."<sup>144</sup> The origins, therefore, are entirely domestic.

Things only get worse on the conceptual level. On closer inspection, none of the three highly debated standards (purpose,

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<sup>140</sup> Prosecutor v. Brđanin, *supra* note 114, at 272.

<sup>141</sup> *Id.* at 473.

<sup>142</sup> See *supra* note 11.

<sup>143</sup> LaFave, *supra* note 2, at 725-727 (discussing the "natural and probable consequence" rule in various American jurisdictions, which is very similar to that adopted in international criminal justice); JACQUES-HENRI ROBERT, DROIT PÉNAL GÉNÉRAL 350 (6e éd. refondue. ed. 2005) (setting out how an accomplice's acts are unlawful if the crime actually committed injures the same *legal interest* as that the accomplice considered); Bohlander, *supra* note 2, at 167-173 (indicating that in German law, *dolus eventualis* will suffice for the accomplice's intent); Ashworth, *supra* note 110, at 415-420 (discussing English jurisprudence that makes it adequate that the accomplice knows of the "type" of crime the perpetrator will commit).

<sup>144</sup> Ashworth, *supra* note 109, at 419 (cogently pointing out that "the accomplice knows that one or more of a group of offences is virtually certain to be committed, which means that in relation to the one(s) actually committed, there was knowledge only of a risk that it would be committed - and that amounts to recklessness.").



knowledge, recklessness) is theoretically justifiable. Like other modes of liability in international criminal justice, all three violate the principle of culpability in certain circumstances because they all tolerate the imposition of a crime’s stigma in situations where the person convicted of the offense did not make the blameworthy choice necessary *to be found guilty of that particular offense*. Many point out the perversity of using JCE III to escalate blame for genocide in this manner, but what about instances where complicity has an identical effect?<sup>145</sup> With accessorial liability, individuals are also held responsible for genocide where they knew or were merely aware that genocide was one of a number of crimes that would “*probably* be committed.”<sup>146</sup> These scenarios, which are actually more common in practice, violate culpability too. Tellingly, these violations are explicitly based on examples drawn from a host of western systems.<sup>147</sup>

Why then are all these standards conceptually problematic? Let us consider the reckless standard of complicity first. On a positive note, recklessness is at least very candid about its function—it avoids complicity being rendered “a dead letter.”<sup>148</sup> The argument hinges on the

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<sup>145</sup> Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 497 (Dec. 13, 2004) (“...this standard (knowledge) does not extinguish the specific intent requirement of genocide. To convict an accused of aiding and abetting genocide based on the “knowledge” standard, the Prosecution must prove that those who physically carried out crimes acted with the specific intent to commit genocide.”).

<sup>146</sup> The most famous use of complicity to escalate responsibility occurred in the Krstić case, where the Appeals Chamber of the ICTY overturned the Trial Chamber’s conviction of General Krstić as a principal perpetrator in genocide, substituting a conviction for the same crime through complicity. This was necessary, according to the Appeals Chamber, because “[t]here was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent.” Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134 (Apr. 19, 2004). There are, however, many more cases that adopt the same position. For a small subset of such cases across various international criminal tribunals, see Prosecutor v. Krnojelac, *supra* note 84, at 52 (finding that for the crime against humanity of persecution that “the aider and abettor in persecution, an offense with a specific intent, must be aware... of the discriminatory intent of the perpetrators of that crime,” but “need not share the intent”). Prosecutor v. Fofana, *supra* note 129, at 145 (“In the case of specific intent offences, the aider and abettor must have knowledge that the principal offender possessed the specific intent required.”); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment, ¶ 2009 (Dec. 18, 2008) (“[i]n cases of specific intent crimes such as persecution or genocide, the aider and abettor must know of the principal perpetrator’s specific intent.”).

<sup>147</sup> See the discussion of French, German, Swiss, English, Canadian and Australian law within the Krstić Appeal Judgment, which ultimately carried the day in what would rapidly become the accepted position across all international criminal tribunals. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134 (Apr. 19, 2004).

<sup>148</sup> BRENT FISSE & COLIN HOWARD, HOWARD’S CRIMINAL LAW 332 (5th ed. 1990).

inability to know the future with certainty. Even if member X of a criminal gang provides her terrorist colleague Y with a nuclear warhead for a specific terrorist mission, X cannot know with certainty that a crime will transpire.<sup>149</sup> Short of knowing that water will flow downhill or that the sun will rise in the East, no one can know with certainty what the future will involve, and surely few human actions ever acquire a degree of predictability anywhere close to the direction of the Earth's rotation or laws of physics.<sup>150</sup> Thus, argue the recklessness advocates, we either deny that complicity exists for assistance in advance of the crime (because people can seldom *know* what others will do in the future) or we apply a standard closer to recklessness for accomplices who choose to undertake acts they know are inherently risky.<sup>151</sup>

The competing criticisms of recklessness are, however, equally compelling. For many, embracing reckless complicity would require us to continuously vet those with whom we have dealings so that we can ensure that our interactions do not lead to potentially wide-ranging criminal harm. This, according to many scholars, would have the unsavory consequence of creating "blank cheque responsibility",<sup>152</sup> where the aider becomes responsible for all foreseeable consequences of their daily public interactions, transforming the average citizen into an "unpaid auxiliary policeman".<sup>153</sup> Beyond unduly infringing upon liberty and individual autonomy, a reckless standard of complicity would offend liberal notions of punishment and inhibit social intercourse.<sup>154</sup> To return to Glanville

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Stephen Shute sees an ability to predict natural phenomena like the sun rising in the East as undermining the argument that "[i]n the strictest sense of the word one cannot 'know' that something will be the case in the future." Stephen Shute, *Knowledge and Belief in the Criminal Law*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 171, 186-187 (Stephen Shute & A. P. Simester eds., 2002); I am doubtful whether these examples do enough to account for Fisse's point about knowledge. Natural phenomena like the sun rising tomorrow are merely examples of future events we can predict with the highest degree of certainty, but these illustrations do not mean that awareness of a probability is automatically equivalent to knowledge. To my mind, G.R. Sullivan offers a more accurate explanation by accepting that we *can* know what the laws of physics will produce in the future, but that many cases involving decisions about what defendants knew of other people's future acts "afford graphic demonstrations of how statutory language is sometimes completely overridden." G.R. Sullivan, *Knowledge, Belief, and Culpability*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 207, 215 (Stephen Shute & A. P. Simester eds., 2002).

<sup>151</sup> Fisse and Howard, *supra* note 148, at 332.

<sup>152</sup> Smith, *supra* note 102, at 13.

<sup>153</sup> Williams, *supra* note 134, at 101.

<sup>154</sup> Kadish, *supra* note 101, at 353 ("A pall would be cast on ordinary activity if we had to fear criminal liability for what others might do simply because our actions made their

Williams, "[t]he law of complicity makes me my brother's keeper, but not to the extent of requiring me to enquire whether he is engaging (or proposing to engage) in iniquity, when my own conduct (apart from the law of complicity) is innocent."<sup>155</sup>

But is this *always* the case? Notice how neither side of this debate mentions desert, even though scholars of international criminal justice rightly hold the concept dear. To conform with desert and its analog culpability, recklessness should be appropriate as a standard of liability for the accomplice when it is adequate for the perpetrator. After all, recall that we earlier measured culpability by referencing elements of each particular crime. The argument conveniently dovetails with claims that using reckless as a standard for complicity *where recklessness suffices for the crime in question* would not imperil an individual's autonomy or chill normal social interchange any more than reckless perpetration already does.<sup>156</sup> Consequently, there is no generic difficulty to reckless complicity as such; it is really the application of recklessness across international crimes whose mental elements vary that is unduly harsh. At present, this is the dominant scenario in international criminal law.

The knowledge standard for complicity is just as objectionable, albeit for slightly different reasons. As we have seen, a primary objection to the knowledge standard is that it is an epistemological impossibility for the vast majority of human actions,<sup>157</sup> which probably explains why international criminal jurisdictions follow the many national systems that allow knowledge to surreptitiously dilute into recklessness. All the same,

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acts more probable.") As I set out in the next paragraph, Kadish does not himself agree with this argument.

<sup>155</sup> Williams, *supra* note 134, at 101. Apart from the responses to this line of argument I set out below, I also find Glanville William's argument that recklessness "requir[es] me to enquire" misleading. One either assists someone believing that there is a substantial probability that they will use your assistance to perpetrate a crime, or one declines to offer that assistance. In either scenario, the duty to enquire does not enter in, and the metaphor of unpaid auxiliary police is unsubstantiated. The position assimilates complicity with omission liability perfectly, when there are important differences between these two types of derivative liability. See Fletcher, *supra* note 34, at 676-677 (concluding a comparison between omission and complicity by highlighting the differences between the two, many of which undermine William's arguments).

<sup>156</sup> Kadish, *supra* note 14, at 387 ("It is not evident to me that subjecting actors in these circumstances to liability for a crime of recklessness need greatly imperil the security of otherwise lawful activities, certainly not any more than holding actors liable for recklessly 'causing' harms, which the law regularly does. People aren't all that unpredictable."); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 944-947 (2000) (defending reckless complicity against arguments of overreach). For the traditional response to these arguments, see Simester, *supra* note 46, at 588-560.

<sup>157</sup> See *supra* note 142.

the knowledge standard presents another special peculiarity—knowledge of what? The dilemma is that the offense itself does not help answer the question. After all, many international crimes make no mention of knowledge whatsoever.<sup>158</sup> So as soon as one utters the word knowledge, a whole series of deeply complicated, highly debated and ultimately inconsistent responses arise,<sup>159</sup> born of “uncertainty as to whether the law should be concerned with [the] mental state relating to [the accomplice’s] own acts of assistance or encouragement, to his awareness of the principal’s mental state, to the fault requirements for the substantive offense involved, or some combination of the above.”<sup>160</sup> Unfortunately, in certain contexts, this uncertainty has permeated into international criminal jurisdictions too.<sup>161</sup>

Complication, however, is not the knowledge standard’s worst fault. The greater concern is that knowledge also violates culpability since, in David and Goliath fashion, it too overpowers higher mental elements. As previously mentioned, knowledge usually suffices for conviction of international crimes requiring special intents,<sup>162</sup> allowing the weaker complicity standard to eviscerate the stronger character of the crime. Like genocide, other international offenses from pillage to torture are said to demand a specific purpose, for which knowledge should be perfectly inadequate.<sup>163</sup> For each of these crimes, the objective contribution to the

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<sup>158</sup> The offense need not mention knowledge at all. For a war crime like declaring no quarter be given, the basic requirement is only that the perpetrator declared or ordered that there shall be no survivors, and that the declaration or order “was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.” These elements make no mention of knowledge, leaving a great deal of ambiguity about what the accomplice needs to know in order to be convicted of the offense. This ambiguity also leads to terrible complexity. For example, see LAW COMMISSION, PARTICIPATING IN CRIME, Law Com No. 305 (2007) (UK) (detailing the tremendous complexity of the knowledge based system within England and Wales)

<sup>159</sup> Weisberg, *supra* note 109, at 233 (exploring different interpretations of these three elements); Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2174 (1987), (arguing that, because of these multiple points of inquiry, confusion has existed concerning the mens rea element of accomplice liability for years).

<sup>160</sup> LaFave, *supra* note 2, at 324.

<sup>161</sup> See the summary of inconsistent approaches, and the advent of the double intent in *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgment, ¶¶ 286-288 (June 30, 2006).

<sup>162</sup> See above, note 128.

<sup>163</sup> ICC Elements of Crimes, *supra* note 76, at 26 (pillaging requires that the perpetrator intended to deprive the owner of the property and to appropriate it *for private or personal use*.) I am compelled to add, I strongly disagree that this notion of private or personal use is workable or reflects customary international law. See JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 19-23 (2010); *id.*, at 14 (the war crime of torture requires the perpetrator to be aware of the factual circumstances

crime must be carried out for a concrete purpose (to destroy, extract information, or for personal or private use). Therefore, by merely requiring knowledge as a necessary mental state for conviction, the test harks back to the characteristics of other international modes of liability so many scholars denounce as excess.

Perhaps purpose is the solution for complicity then? Alas, the purpose standard only fares marginally better—it over-corrects then veers from the path of culpability too. True, in many of the jurisdictions that seemingly embrace purpose, the over-compensation is intentional. The drafters of the US Model Penal Code, for instance, concluded that the purpose standard was the preferable mental element for accessorial liability in order to offset the indirect nature of the accomplice’s contribution to the criminal harm.<sup>164</sup> While this approach is often celebrated as a laudable liberal adjustment to normal principles, we should reflect momentarily on its implications—by this doctrine an accomplice who acts in such a way that she not only satisfies the mental element of the crime but makes an essential contribution to its realization is absolved of liability. And yet, if we maintain principle, this too misapplies desert and mis-communicates responsibility.

For one reason, an accessory who assists a crime with intent, recklessness or negligence is not responsible, even though these mental elements are by far and away the most prevalent within the criminal law. Why is our faith in culpability so easily shaken here? If the mental element set out in the criminal offence really does define the degree of *culpability* associated with a crime (as many excellent critiques of other modes of liability in international criminal justice assert), then should it not also define the accomplice’s *desert* too?<sup>165</sup> Otherwise, our method of

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that established the protected status of the victim under the Geneva Conventions of 1949).

<sup>164</sup> Evidently, the point was the subject of heated discussion. See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06, 318-319 (noting that while the Chief Reporter for the Model Penal Code favored a standard broader than purpose, the Institute rejected the position after tense debate). See also, Simester, *supra* note 46, at 583 (arguing that the protection of potential victims and the preservation of liberties for potential defendants “demand more stringent mens rea standards for secondary liability than is needed to establish culpability.”).

<sup>165</sup> I.H. Dennis, *The Mental Element for Accessories*, in CRIMINAL LAW: ESSAYS IN HONOUR OF JC SMITH, 60 (Peter Smith ed., 1987) (criticizing the purpose standard as insensitive to retributive notions of desert); Sullivan, *supra* note 16, at 154-155 (arguing that in order for the accomplice to be convicted of the same offense as the perpetrator, retributive theory would require an equivalence of culpability.) For a competing perspective, see Simester, *supra* note 46, at 600 (arguing that “culpability is not enough... the better approach is to distinguish culpability from responsibility, and to focus on the latter.”).

identifying culpability is capable of manipulation based on arguments from policy, in ways we earlier rejected. If we adopt a more sound approach to culpability, then *purpose* is very frequently an unjustifiable over-compensation that, in the final analysis, leads to potentially serious under-punishment.

Coincidentally, a utilitarian concept of responsibility would support the same conclusion. For a utilitarian view of punishment, purpose is unattractive since deterrence (and therefore crime prevention) is maximized by punishing those who are aware of even the slightest risk of harm.<sup>166</sup> Admittedly here, there are more complicated questions about over-deterrence, which require a careful calibration of complicity standards with the desire for free social intercourse, especially in the realm of business.<sup>167</sup> Nonetheless, utilitarian concerns tend to militate against adoption of the highest conceivable notion of blameworthy moral choice (i.e., purpose) across the entire panoply of international crimes, since complicity can achieve greater deterrence for such tremendous harm by setting the mental element at levels much closer to that defined in a crime. If recklessness suffices for perpetration of an offense, demanding that the accomplice assist the crime with the *purpose* of bringing it about under-deters accomplices.

Moreover, empirical research suggests that in many instances members of the public believe that the accomplice is blameworthy even though they did not share the perpetrator's criminal purpose. The subjects of one survey reported "stark disagreement" with the "elevation thesis" (*viz.* the idea that the mental element in complicity should be elevated to purpose, that is, beyond that required within the paradigm of the crime itself).<sup>168</sup> Instead, respondents assigned punishments to accomplices "who are knowing or even only reckless with respect to the criminal outcome in instances in which the elevation view would assign no liability."<sup>169</sup> We

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<sup>166</sup> If, to paraphrase Ian Dennis, more reckless facilitators are deterred, perhaps fewer atrocities will transpire. Dennis, *supra* note 165, at 60.

<sup>167</sup> R. A. Duff, "Can I help you?" *Accessory Liability and the Intention to Assist*, 10 LEGAL STUD. 165 (1990); Glanville Williams, *supra* note 135, at 366–380; S. Bronitt, "Defending Giorgianni - Part Two: New Solutions for Old Problems in Complicity" (1993) 17 CRIM U 305. For myself, I doubt whether business deserves the privileged status it often receives in the theoretical discussions of this topic, given that it merely represents one facet of social interaction where influence is rampant. What, for instance, about families, literature, music and teachers?

<sup>168</sup> PAUL ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 103 (1996).

<sup>169</sup> *Id.* at 103. (concluding that "[f]rom the point of view of our respondents, the culpability requirement as to result should not be elevated to purposeful... instead, the offense should be graded according to the degree of culpability that the accomplice shows.").

might doubt the extent to which these findings could be extrapolated across an international community,<sup>170</sup> but the research does at least serve as further grounds for caution. Using purpose as the mental element for complicity may badly fail to match popular notions of responsibility, which would diminish international criminal justice's prospects of promoting reconciliation, transitional justice or other desired objectives. From both retributive and utilitarian perspectives then, purpose fails.

Where does this leave us? If the preceding analysis is correct, all static standards of complicity are indefensible. All fixed mental elements for accessorial liability (i.e., purpose, knowledge or recklessness) violate basic principles of blame attribution since in each, there will occasionally be a marked departure from culpability when the elements of the crime do not match those of the mode of liability. In these instances, complicity distorts an accused's degree of responsibility, either by amplifying culpability relative to the elements of the crime with which she is held responsible or artificially elevating culpability beyond its normal parameters to absolve her otherwise blameworthy conduct. In these situations, complicity will only conform with culpability out of chance couplings between mental elements within complicity and those required for crimes. Relative to desert, responsibility becomes arbitrary, replicating the very characteristics so many scholars deride in other international modes of liability.

The consequences are, needless to say, hard to overstate. First, these departures from fundamental principles of blame attribution are not nefarious creations of an illiberal international system; they are borrowed from domestic criminal systems that set bad examples. While JCE and superior responsibility's origins in domestic law are more easily concealed in only a portion of national jurisdictions, there can be little doubt that domestic criminal systems from the vast majority of the world adopt objectionable static mental elements for complicity. The oftentimes heated

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<sup>170</sup> Anthony Duff argues that there is a conceptual problem with punishing at the supranational level, to the extent that "[c]alling someone to answer, holding someone responsible, is a communicative endeavor which presupposes normative community; normative community requires at least a modicum of mutuality" Anthony Duff, *Can We Punish the Perpetrators of Atrocities?*, in *THE RELIGIOUS IN RESPONSES TO MASS ATROCITY* 93 (Thomas Brudholm & Thomas Cushman eds., 2009). Although these criticisms are important, they do tend to overlook the growing practice of national courts prosecuting their own nationals for international crimes within domestic courts, and the supranational principle of complementarity, which seeks to institutionalize that shift towards trials in national communities. Moreover, the enforcement of international criminal norms in regional international courts, which represent a more homogenous community, may improve the case for international criminal adjudication. See for instance, William W Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 *TEX. INT'L L.J.* 729 (2003).

debate between proponents of these various standards has only obfuscated the reality that none are theoretically defensible, and that the solution lies in transcending rather than deepening terms of the current debate. In this light, international criminal justice's major sin is not that it has allowed policy interests or interpretative styles from branches of international law to crowd out criminal standards; but more that it has showed its domestic antecedents too much reverence.

Thus, if international criminal justice is to acquire normative coherence, it must disassociate itself from objectionable domestic precedent. How would a defensible alternative look? Well, if the only defensible conception of accomplice liability is one where the mental element is the same as that required for perpetration, complicity ceases to retain any independent identity over and above perpetration, at least at the level of moral choice. And if complicity begins to dissolve into perpetration in this way, should modes of liability as a species not disappear along with it, for exactly the same reasons? In other words, if any static conception of a mental element within a mode of liability violates culpability relative to the mental elements in crimes (which vary from one crime to the next), should we not abolish modes of liability altogether in favor of a more capacious notion of perpetration? To a large extent, the answer to this question depends upon how complicity fares with respect to the second fundamental element of blame attribution. But, as we will soon see, the answer is no more positive.

### *C. The Physical Element of Complicity*

We have established not only that complicity functions as a mode of liability in international criminal justice, but that many international crimes also require harm as a pre-condition for responsibility. Given these characteristics, causation is conceptually necessary to bind accomplices to proscribed criminality if there is any chance of placating the critics of other international modes of liability, and more basically, of respecting the principle of culpability. In other words, having attributed complicity an ultra-orthodox status in international criminal law, we are left with a stark and seemingly intractable choice between only two options: we either accept that causation is an element of accessory liability, in which case it shares common features with perpetration; or we conclude that complicity is acausal in structure, in which case it violates principles of culpability in ways that scholars of international criminal justice rightly find reprehensible.



Surprisingly, international courts opt for the latter of these approaches. The accepted position before international courts and tribunals is that "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is *not* required."<sup>171</sup> Needless to say, this defies basic thinking in criminal theory. By this reasoning, international courts define complicity in such a way that it explicitly violates a principle international criminal lawyers view as cardinal; a principle they often employ to passionately censure the breadth of other modes of liability within the field; and a principle that theorists call foundational.

Thankfully, some action relative to the criminal harm is required of the accomplice in international criminal law. International courts and tribunals invariably stipulate that "the actus reus of aiding and abetting is that the support of the aider and abettor has a *substantial effect* upon the perpetration of the crime."<sup>172</sup> But alas, this merely adds new layers of ambiguity to already opaque waters. What could it possibly mean to have a substantial effect upon the perpetration of a crime *without* causing it?<sup>173</sup> The puzzle is how courts can simply do away with causation in favor of this *substantial effect* standard, when by all accepted wisdom, "there is no

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<sup>171</sup> Prosecutor v. Blaškić, *supra* note 88, at 48 (emphasis added); For a different rendering of the same idea, see Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 901 (July 20, 2009) ("There is no requirement of a causal relationship between the conduct of the aider or abettor and the commission of the crime."). The same standard has spread to other international criminal tribunals. Prosecutor v. Fofana, *supra* note 129, at 143 (same); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 33 (June 7, 2001) ("the assistance given by the accomplice need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.").

<sup>172</sup> Prosecutor v. Blaškić, *supra* note 88, at 48; Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgment, ¶ 187 (May 9, 2007) ("the Appeals Chamber reiterated that one of the requirements for the actus reus of aiding and abetting is that the support of the aider and abettor have a substantial effect upon the perpetration of the crime"); Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgment, ¶ 117 (Jan. 16, 2007) (a conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime."); Prosecutor v. Brima, *supra* note 32, at 775 ("The actus reus of 'aiding and abetting' requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of a crime.").

<sup>173</sup> The idea is reminiscent of a cartoon in the New Yorker magazine that depicts a meeting between three businesspeople, where one comments to another "we want to include you in this decision without letting you affect it." See *The Cartoon Bank*, (2011) <http://www.cartoonbank.com/2011/we-want-to-include-you-in-this-decision-without-letting-you-affect-it/invt/137184/>

way of contributing to any result, directly or indirectly, except causally.”<sup>174</sup>

The origins of this substantial effect test are obscure in international criminal law,<sup>175</sup> but we can speculate. Perhaps the position was tacitly influenced by English criminal theory, which has traditionally harbored a marked distaste for the view that an accomplice could *cause* the perpetrator’s crime. Following the seminal work of H.L.A. Hart and Tony Honoré on causation, the large majority of commentators within the English-speaking world have argued that the volitional actions required to convict the direct perpetrator preclude the claim that the accomplice too *caused* the harm.<sup>176</sup> The perpetrator made a decision; this interrupts all earlier causal influence, and acts as an intervening cause. On this account, the accomplice’s actions are no more the cause of a crime than the perpetrator’s genes, family history and socio-economic background, all of which undoubtedly provide influence, without overriding the perpetrator’s blameworthy moral choice.<sup>177</sup> Could this reasoning possibly explain the doctrinal ambiguity in the modern international criminal understanding of the relationships between causation and complicity?

It seems doubtful. While Hart and Honoré’s work has proved seminal, a competing line of authority has long recognized that in some instances, the perpetrator’s actions join rather than break causal chains

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<sup>174</sup> Gardner, *supra* note 72, at 443.

<sup>175</sup> The International Law Commission’s Draft Code of Crimes Against Peace and Security of Mankind adopted a definition of aiding and abetting that required the accomplice to assist “directly and substantially”, but the only justification for this was that this was “intended to limit the application of the Code to those individuals who had had a significant role in the commission of a crime”. International Law Commission. Summary of the 2437<sup>th</sup> Meeting, Consideration of the Draft Articles on Second Reading, 6 June 1996, para. 26. The two international judgments that initially endorsed the substantial effect standard relied on the ILC recommendation, together with a selection of WWII caselaw that made no direct mention of substantial effect. See *Prosecutor v. Tadić*, *supra* note 128, at 688-692); *Prosecutor v. Furundžija*, *supra* note 137, at 219-231. Accordingly, I conclude that the true criminological motivations for the substantial effect doctrine are mainly unarticulated.

<sup>176</sup> Hart and Honoré, *supra* note 71, at 41 (“A deliberate human act is therefore most often a barrier and a goal in tracing back causes in such inquiries: it is something through which we do not trace the cause of a later event and something to which we do trace the cause through intervening causes of other kinds.”); *Id.*, at 129 (“the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connection.”).

<sup>177</sup> Kadish, *supra* note 101, at 333 (arguing that otherwise, we do violence to notions of agency and the conception of a human action as freely chosen upon which we depend to convict the perpetrator).

created by an accomplice.<sup>178</sup> For example, if X pays a hit-man to assassinate his wife, arranges for the wife to be at a specific location at a time he discloses to the hit-man; provides the hit-man with the weapon necessary for the crime and subsequently disposes of his wife's dead body, there is little trouble in declaring that X caused his wife's death.<sup>179</sup> Was X the actual perpetrator (in the sense of breaking the glass)? Obviously not; the crime was committed by the hit-man. Nevertheless, we are by no means precluded from simultaneously holding the hit-man responsible for the killing, given that we have little difficulty saying that both X and the hit-man caused the wife's death.<sup>180</sup> So if Hart and Honoré's vision of perpetrators *always* acting as intervening causes was the inspiration for the international rule, the choice was poor.

Perhaps the motivation for abandoning causation in complicity stemmed from a different concern, namely that the crimes would have

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<sup>178</sup> Moore, *supra* note 72, at Part IV, The Legal Presupposition of There Being Intervening Causes (criticizing Hart and Honoré's views that voluntary actions are intervening causes). Feinberg, *supra* note 23 (arguing, contrary to Hart and Honoré, that "there is no conceptual barrier, at least none imposed by common sense, to our speaking of the causes of voluntary actions."); In particular, Feinberg's conceptual distinction between "causing a person to act" and "making him act" offers a strong critique of Hart and Honoré's thesis. *Id.* at 161, 165 (arguing that although a mother clearly played some (albeit extremely remote) causal role in her 30-year old son's crime by merely having given birth to the perpetrator, it would be "misleading in the extreme" to suggest that his mother thirty years earlier "made" him perpetrate the crime.) For further criticism of Hart and Honoré's thesis, see Smith, *supra* note 87, at 68-70 ("it is possible to construct counter-examples where actions, while voluntary within the meaning accorded by Hart and Honoré, are in 'common speech' reasonably describable as 'caused' by another.") For a similar position in German criminal theory, see GEORGE FREUND, in: Wolfgang Joecks, Klaus Miebach and Bernd von Heintschel-Heinegg (ed.), MUNCHENER KOMMENTAR ZUM STRAFGESETZBUCH BAND 1 1 §§ 1-51 StGB, 2003, Vor §§ 13 ff., marginal number 318; CLAUS ROXIN, Strafrecht. Allgemeiner Teil Band I: Grundlagen, Der Aufbau der Verbrechenslehre, 4th ed. 2006, § 11, marginal number 28, at p. 363.

<sup>179</sup> Moore, *supra* note 17, at 422-423; Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. PHIL. 289, 294 (2007). In fairness to Hart and Honoré, they viewed instigation as an exception to their general rule that voluntary action breaks causal chains, but as Joel Feinberg retorts "they put forward no more general principle to explain why the exceptions are exceptions." Feinberg, *supra* note 29, at 153.

<sup>180</sup> International criminal courts and tribunals confirm as much. For instance, in the media case where representatives of the Radio television libre des mille collines (RTL) were convicting of inciting genocide, the Rwanda Tribunal held that "[t]he nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication." Prosecutor v. Nahimana et al., *supra* note 76, at 952.

occurred whatever the accomplice did.<sup>181</sup> In many instances, complicity is over-determined insofar as the accomplice's assistance was readily substitutable for the assistance of someone waiting in the wings. To return to the Zyklon B example, if the Nazis had access to a long line of willing suppliers of chemical asphyxiants (or variants that had comparable effects), then it would be difficult to argue that the suppliers of Zyklon B really *caused* the unspeakable consequences their chemicals enabled. As one of the defendants claimed, had he not agreed to supply the chemicals to Auschwitz, "the S.S. would certainly have achieved their aims by other means."<sup>182</sup> Which judge, who knew anything about the stunning efficiency of the Nazi regime, could doubt the claim? So if causation means "but for" causation then, even if this firm did not furnish the S.S. with the means of exterminating humans, the horror of Auschwitz would still have unfolded almost identically. Thus, these particular vendors of Zyklon B did not really *cause* anything.

This position, however, presumes an ill-informed notion of causation. In the vast literature on the topic, over-determination features as a recurrent theme.<sup>183</sup> Throughout this extensive treatment, over-determined causes are consistently treated as a form of causal contribution, not grounds for adopting a substantial effect test in lieu of

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<sup>181</sup> There is some support for this thesis. Both of the first cases to address complicity in modern international criminal justice refer to the problem of over-determination within the context of discussions of the substantial effect doctrine. See (Prosecutor v. Tadić, *supra* note 128, at 688 (acknowledging that "in virtually every situation, the criminal act most probably would have occurred in the same way had not someone acted in the role that the accused in fact assumed"). Prosecutor v. Furundžija, *supra* note 137, at 224 (discussing a WWII case the defendant claimed that his conduct in no way contributed to the crimes because others would have taken his place). Nonetheless, this explanation is not entirely convincing, since the same judgment also acknowledged that "the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another." *Id.*

<sup>182</sup> UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 116, at 102; indeed, even if the S.S. were bent on using Zyklon B for the purposes, there were many other sources. Representatives of the firm I.G. Farben were also prosecuted for supplying large quantities of Zyklon-B that "was actually used in the mass extermination of inmates of concentration camps, including Auschwitz." UNITED NATIONS WAR CRIMES COMMISSION, Trial of Carl Krauch and Twenty-Two Others "The I.G. Farben Trial," 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 23-24 (1947).

<sup>183</sup> For an elegant philosophical discussion of the problem, which draws on examples of complicity, see Jonathan Glover, *It Makes No Difference Whether or Not I Do It*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1975) (discussing over-determination with reference to a scientist producing chemical and biological weapons); Kutz, *supra* note 105 (exploring the responsibility of pilots in the Dresden firebombing on the basis of over-determined causes); JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 57 (2008) (discussing over-determined causality in the context of complicity, although he does not use the term over-determination).

basic principles.<sup>184</sup> In line with this reasoning, a slew of commentators from different legal traditions consider that *sine qua non* causation must be assessed relative to events "as they took place",<sup>185</sup> in order to avoid allowing defendants like these to wash their hands of responsibility. So, by selling vast quantities of chemical gases to the S.S. for use in Auschwitz, Dr. Tesch and his colleagues made an important causal contribution to the mass killing *as it actually transpired*. After all, ignoring how things actually transpired would mean that no one could ever *cause* murder. Everyone eventually dies, so the serial killer merely modifies the time, place and manner of an inevitability. Clearly, the modifications matter.

In fact, if there is a deeper unspoken influence in this perplexing international account of complicity, it may herald from an unlikely domestic source. In a surprising parallel with international principles, German courts apply what is described as a *furtherance formula* ("Förderungsformel"), according to which, the aider and abettor need not have caused but must have actually furthered ("tatsächlich gefördert") the perpetrator's crime.<sup>186</sup> And yet, the vast majority of German academics strongly disagree with this approach on the predictable grounds that it unjustifiably discards causation.<sup>187</sup> In fact, they are only consoled by the impression that the *furtherance formula* probably differs little in practice from causality, especially when causation is calculated based on "the harm

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<sup>184</sup> Hart and Honoré, *supra* note 71, at 117-119 (discussing what they describe as additional causes, and the need for assessing *sine qua non* based on events that occurred "in this particular way"); Smith, *supra* note 102, at 84 ("the *sine qua non* condition is concerned with an event's exact occurrence, including time, place, extent and type of harm, and so on."); Tatjana Hörnle, *Commentary to "Complicity and Causality,"* 1 CRIM. L. PHIL. 143, 144 (2006) (using the example of a firing squad to show how the "subtraction method" of calculating causation leads to injustice, which might be overcome by focusing on events "as they happened."); For criticism that this approach misuses the term causation, see Yeager, *supra* note 110, at 29 (arguing that this approach "simultaneously uses a word [cause or causation] in a special or technical sense that need not confirm to our ordinary use of the word, while still trading on what we normally mean by it."). Likewise, for further criticisms, see Moore, *supra* note 15, at 406-407.

<sup>185</sup> *Id.*

<sup>186</sup> RGSt 58, 113 (114-115) (Entscheidungssammlung des Reichsgerichts in Strafsachen Vol. 58, p. 113, at pp. 114-115). See also, CLAUS ROXIN, *Strafrecht. Allgemeiner Teil Band II : Besondere Erscheinungsformen der Straftat*, 2003, § 26 marginal number 186, at p. 194.

<sup>187</sup> See, WOLFGANG JOECKS, in: Wolfgang Joecks, Klaus Miebach and Bernd von Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch. Band 1 §§ 1-51 StGB*, 2003, § 27, marginal numbers 23-37; STEPHAN A. OSNABRÜGGE, *Die Beihilfe und ihr Erfolg. Zur objektiven Beziehung zwischen Hilfeleistung und Haupttat* in § 27 StGB, 2002, at 159-160, 261; Roxin, *supra* note 178.

in its concrete appearance.”<sup>188</sup> The parallel is illuminating. Even if the influence of this German position on the international rule is unavoidably speculative, its incongruity with accepted theory should dampen our assurance that unprincipled international rules necessarily reveal the triumph of international agenda over the restraining force of the criminal law—departures from principle are ubiquitous.

If all this is sound, we are still left with the challenge of rescuing the international definition of complicity from the jaws of domestic incoherence. To achieve this, the standard international position requires inversion. If we remove the word “not” from the accepted judicial reasoning,<sup>189</sup> the legal position becomes that “proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime *is* required,” and having a *substantial effect* on a crime (in the sense of making a causal contribution to events as they transpired) *is* a form of causation. This quick (but admittedly major) fix protects complicity against the criticisms other modes of liability have correctly endured within the field by ensuring that causality plays a role in allocating blame to the accomplice. But it still leaves one further matter conspicuously unexplored: why must the accomplice’s effect be *substantial*?

At first blush, this requirement is just as bizarre as the others. On the prevailing account of causation, an action is either a cause of an event or it is not—why the extra element? Again, the pull of mainstream domestic notions of complicity probably explains the doctrinal position. In both Anglo-American and Continental traditions, concepts of proximity or normative attribution intervene to preclude responsibility, where the causal contribution is trivial, remote or unusual.<sup>190</sup> A member of the

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<sup>188</sup> Joecks, *supra* note 188, at marginal number 27; Roxin, *supra* note 178.

<sup>189</sup> To recall, the accepted position in international criminal justice is “proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required.” See *supra* note 166 and accompanying text.

<sup>190</sup> Fletcher, *supra* note 33, at 590 (“Because the causal link is limitless, some new concept must be devised to eliminate far-flung effects from the range of liability. Common lawyers speak about proximate cause”.); in German criminal theory, normative attribution (“objektive Zurechnung”) is considered an additional element of any *actus reus*, in order to restrict the broad effect of causality. CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL. GRUNDLAGEN, DER AUFBAU DER VERBRECHENSLEHRE 372 (2006); HEINZ KORIATH, KAUSALITÄT UND OBJEKTIVE ZURECHNUNG 15 (1 ed. 2007) (discussing the implications of normative attribution); MANFRED MAIWALD, KAUSALITÄT UND STRAFRECHT. STUDIEN ZUM VERHÄLTNISS VON NATURWISSENSCHAFT UND JURISPRUDENZ 4-5, 9 (1980); for a helpful English language summary, see Krey, *supra* note 28, at 59-101.

public who opens the door of a bank to let in a robber;<sup>191</sup> a restaurateur who serves a murderer dinner prior to a killing; or an onlooker who encourages the beating of a man who subsequently dies in an accident on the way to the hospital all make causal contributions to criminal harm, but these contributions are deemed too remote to warrant criminal punishment. The *substantial effect* doctrine precludes liability even though the assistance in each of these scenarios unequivocally contributed to crimes *as they transpired*.

Perhaps the incorporation of the substantial effect doctrine in international criminal law reveals the positive side of domestic influence, even if it is part and parcel of a dependence that sometimes has perverse consequences. In some instances, international criminal justice imitates bad domestic examples that transgress culpability; but othertimes, domestic influences serve commendable liberal purposes. If normative attribution does explain the need for a substantial effect it might fit into the latter category, even if the process of absorption into the international is not more conscious than that which produces international standards of blame attribution scholars rightly reject. In either case though, international political agenda and interpretative cultures from other branches of international law appear to play only back seat roles to the driving force of preconceptions derived from domestic criminal law.

In any event, once we return to the substance of complicity, our analysis indicates that it a defensible notion of complicity incorporates both causation and normative attribution (or its equivalent proximity). As soon as we recognize this, we are immediately drawn back into Gardner's "splendid paradox": if these elements are common to perpetrator and accomplice alike, why are accomplices not simply a subset of perpetrators?<sup>192</sup> As Michael Moore asks, "[a]ll substantially cause the harm, so why is one treated as an accomplice and the others treated as principals?"<sup>193</sup> To answer this, we must next investigate whether there is anything that necessitates a distinction between perpetrators and accomplices *at the stage of attribution*, and assuming a negative answer, whether complicity (like modes of liability in international criminal justice generally) occasions more departures from coherent philosophical principles, doctrinal uncertainties and hours of costly intellectual labor than it is worth.

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<sup>191</sup> I borrow the example from Joshua Dressler, although he uses it in a different context. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. J. 91, 133 (1985).

<sup>192</sup> Gardner, *supra* note 9, at 231. Gardner views the paradox as more apparent than real because causal relations come in stronger and weaker versions. *Id.*

<sup>193</sup> Moore, *supra* note 39, at 423.

#### IV. TOWARDS A UNITARY THEORY OF PERPETRATION FOR INTERNATIONAL CRIMES

Up until now, we have observed how causation and the moral choice contained in the definition of the crime are necessary conditions for allocating blame to the perpetrator *and the accomplice*. I now argue that these criteria are also sufficient. Although I do not endorse any particular incarnation of the unitary theory, the Austrian concept of perpetration offers helpful introductory flavor: “a punishable act is not simply committed by the person who is a direct author of it, but also by all other persons who cause another to execute it or who contribute in any other manner to its execution. Consequently, the distinction between perpetrators, instigators and accomplices is only of interest in order to permit the judge to individualize the sentence, he who plays a modest role being punished less than essential actors.”<sup>194</sup> In the discussion that follows, I first inquire whether there is anything of a normative nature that theoretically *precludes* this approach in the abstract, then offer a range of pragmatic reasons why a similar approach for international crimes may be preferable to the status quo.

##### A. *An Abstract Theoretical Defense*

International criminal justice’s response to the Hitler-as-accomplice dilemma has played out in three overlapping phases. Initially, superior responsibility emerged as the theoretical response, but its popularity was quickly surpassed by the rise of joint criminal enterprise as the new prosecutorial doctrine of choice. Even though both of these modes of liability were drawn from Anglo-American criminal traditions then incorporated into the corpus of international criminal law as “*sui generis*” forms of responsibility in international law,<sup>195</sup> they both over-extend basic

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<sup>194</sup> Article 12, Austrian Criminal Code, translated from the French version in Pradel, *supra* note 15, at 133. It is interesting to note that according to § 15 sec. 2 of the Austrian Penal Code, the attempt to facilitate an offense is not punishable. This reveals that the Austrian system still requires a distinction between instigators and aiders and cannot therefore be considered a pure unitary system. I am grateful to Thomas Weigend for the point.

<sup>195</sup> In my view, any time a court refers to a mode of attribution as “*sui generis*,” the latin acts as a mask for the departure from basic principles. The phrase is thus a telltale sign that the mode of liability cannot be philosophically justified. Prosecutor v. Halilović, *supra* note 52, at 78 (“The Trial Chamber further notes that the nature of command



principles of criminal responsibility. As this became increasingly apparent, these initial solutions for the problem were denounced as illiberal, sending decision-makers, practitioners and academics back to the drawing boards. Once again, they would look for domestic examples, this time drawing on the German doctrine used to separate perpetrators from accomplices as the next borrowed domestic solution. Arguably, this was another false step.

Early on in its existence, the International Criminal Court embraced the German “control over the crime” doctrine as a basis for differentiating perpetrators from accomplices.<sup>196</sup> On this understanding, Hitler was a perpetrator because he had hegemonic control over the atrocities in concentration camps, leaving the camp guards, bureaucratic administrators and vendors of Zyklon B as mere accomplices. Domestically, this “control over the crime” theory was viewed as a major advance on earlier objective and subjective notions of perpetration. The first of these viewed a perpetrator as someone who actually swung the machete, but this failed to account for the fact that a perpetrator could use an innocent agent to carry out a crime on her behalf. The second subjective theory focused uniquely on whether the actor takes the crime “to be his own,” but this calculation cannot be easily established, and allows a person who perpetrates the crime with their own hand to be described as an accomplice.<sup>197</sup>

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responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link”); Prosecutor v. Orić, *supra* note 152, at 293 (“the superior’s responsibility under 7(3) of the Statute can indeed be called a responsibility *sui generis*.”).

<sup>196</sup> The standard was initially adopted in Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 341 (June 15, 2009); See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 486 (Sep. 30, 2008) (finding that the criminal responsibility of a person “must be determined under the control over the crime approach to distinguishing between principals and accessories.”). The concept was also employed at the ICTY by one German judge, but the use of the doctrine was rejected on appeal. See Prosecutor v. Stakić, *supra* note 139, at 440; Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 62 (Mar. 22, 2006) (finding that “[t]his mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers.”).

<sup>197</sup> Fletcher, *supra* note 33, at 655 (pointing out that the subjective test was unworkable in practice because a trier of fact could not easily determine the attitude of the suspect at the time of the deed.); Schreiber, *supra* note 123, at 626 (detailing the criticism that the person swinging the machete could consider herself an accomplice, and thereby benefit from lower penalties afforded accessories). Ultimately, some consider that this could also lead to a situation where differences of opinion among assailants mean that there are no perpetrators of a crime at all. This would arise where all participants in a criminal offense

This initial influence quickly led to a major invocation of German doctrine, even when certain doctrines were highly disputed domestically. The international experiment with “control over the crime” was soon followed by the adoption of German theories of co-perpetration, hitherto rejected in international criminal justice. Likewise, indirect perpetration was spawned as a viable mechanism for accounting for the Hitler-as-accomplice dilemma, at least in certain circumstances where the perpetrator’s will was overcome by that of a mastermind at headquarters—in a command post, or behind a desk far from the bloodletting. To cap off the unconditional embrace of German criminal theory in international criminal practice, the ICC even adopted a more controversial German notion of functional perpetration through a bureaucracy,<sup>198</sup> even though one leading German theorist feared that this “may create more problems than it solves.”<sup>199</sup>

Could the same thing be said for modes of liability *in toto*? Aside from the wider concern that these types of uncritical domestic transplants replicate the failed methodologies of the first two solutions to the Hitler-as-accessory dilemma, it also conceals major philosophical assumptions. One is especially important. Is there any *necessary* distinction between perpetrators and accomplices? Perplexingly, the ICC treats the question as axiomatic; as if it is beyond all dispute. For instance, the decision that first adopts the doctrine into international criminal justice simply states that “the definitional criterion of the concept of co-perpetration is linked to *the distinguishing criterion* between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.”<sup>200</sup> We are told nothing more about why *the distinguishing criterion* is so conceptually inevitable, perhaps revealing a blindspot in the enthusiasm for law crafted in a particular domestic system.

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believed that they left the decision whether to commit the crime to others. For a full discussion, see Olásolo et al., *supra* note 17, at 30-33.

<sup>198</sup> See the discussion of Organisationsherrschaft (control over an organization), in Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, *supra* note 179, at 498-518.

<sup>199</sup> Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT’L CRIM. JUST. 91, 105 (2011) (“Since criminal liability for ordering or instigation is a sufficient basis for imposing severe sentences on responsible figures in the background of the actual crimes, adopting the notion of ‘perpetration through an organization’ may create more problems than it solves.”).

<sup>200</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 326 (June 15, 2009) (emphasis added). I add emphasis to the words *the distinguishing criterion* because the use of the singular, without further discussion, evidences an unquestioning allegiance to established dogma. This is precisely the parochial influence of the domestic that often influences international criminal doctrine too.

In reality, the division is far from conceptually inevitable. A number of other jurisdictions happily dispense with it (and its attendant technicalities) in favor of only the two elements used to dissect international modes of liability like JCE and superior responsibility. What matters on a unitary account of perpetration is that the assailant made a substantial causal contribution to a prohibited harm while harboring the mental element necessary to make him responsible for that crime. To be clear, I do not consider that the unitary theory of perpetration is the only defensible account of perpetration or that differentiated models are inherently harsh. Quite the contrary, my ambition here is simply to point out that a unitary theory is at least as conceptually coherent as its counterpart.

To start, notice that the real question is not whether there is a moral difference between perpetration and complicity, but if there is such a difference, whether it must feature at the initial stage of determining liability rather than later during the sentencing phase. There is no obvious structural impediment to taking accessories' generally relatively lesser culpability into account at the sentencing phase along with other factors that are important to culpability but extraneous to the label visited upon the accused. If a defendant's motive for the crime, co-operation during trial, or history of recidivism are factors that appropriately reflect on the sentence they *deserve*, what rationale exists for treating the defendant's "important criminal energy" differently?<sup>201</sup> Certainly, it is difficult to see why one would choose to maintain an overly complicated, ever-expanding and occasionally harsh set of "modes of liability" in international criminal justice, if a more streamlined system can also mitigate punishment as necessary.

To a large extent, this approach answers those who view perpetration and complicity as inherently distinct. For John Gardner, for instance, there is something innately privileged about being a perpetrator as compared with "mere" complicity,<sup>202</sup> such that "the attempt to

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<sup>201</sup> I refer to "important criminal energy" because it is the classic justification for a distinction between perpetrators and accomplices founding German criminal theory. The argument is that extensive participation shows important criminal energy, and that qualitatively significant contributions are more culpable. So in contrast to the principal and instigator, whose contributions drive the wrongdoing, the aider's contribution is of minor relative significance. CLAUS ROXIN, STRAFRECHT, ALLGEMEINER TEIL. BD. 2: BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT 231 (1. A. ed. 2003); See also WOLFGANG JOECKS, KLAUS MIEBACH & GÜNTHER M. SANDER, MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH. GESAMTWERK: MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH 3. §§ 185 - 262 STGB: BD. 3 (1 ed. 2003) § 27, marginal number 1.

<sup>202</sup> John Gardner argues that the distinction between principals and accessories is embedded in the structure of rational agency. There is, in his view, a moral split between

eliminate complicity from the moral landscape, in favor of a more capacious domain of principalship, fails.”<sup>203</sup> The distinction between principals and accessories, he argues, is embedded in the structure of rational agency—there is a moral split between what one must do *simpliciter*, and what one must do by way of contribution to what someone else does. While I tend to doubt the veracity of that claim,<sup>204</sup> observe how it does no work to maintain the segregated notion of complicity he defends—if there is such a distinction, it could figure at sentencing once the crime in question is coherently settled. Thus, the metaphysical distinction may well exist, but it has no obvious relevance for or against the unitary theory of perpetration.

Similarly, the derivative nature of complicity is also neutral as between differentiated and unitary models of perpetration.<sup>205</sup> George Fletcher, for instance, insists that “[p]erpetrators or principals are those who are directly liable for the violation of a norm; accessories are those who are derivatively liable.”<sup>206</sup> This is perfectly unobjectionable as far as definitions of a differentiated system go, but the definition does not purport to address (let alone justify) the partition of forms of attribution into a differentiated model. Clearly, we cannot escape our earlier analysis of derivative liability entirely—an individual’s responsibility for the glass others broke will always be at least partially derivative of at least one other person’s wrongdoing,<sup>207</sup> but nothing impedes treating the

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what one must do *simpliciter*, and what one must do by way of contribution to what someone else does. See Gardner, *supra* note 19, at 141.

<sup>203</sup> Gardner later acknowledges in response to critics that “the distinction between principals and accomplices might perhaps be excised from the law (e.g. for rule of law reasons), but... it cannot be excised from life.” Gardner, *supra* note 183, at 253. I am tempted to read this as a concession that a unitary theory of perpetration is legally justifiable provided moral distinctions are respected within the sentencing phase, but I no doubt read more into the comment than he might accept.

<sup>204</sup> I doubt this because the point seems entirely contingent on the construction of the particular offence in question. If, for example, an offence is defined as “causing rape,” then the criminal offence itself collapses the distinction between perpetrators and accomplices. Thus, if there is a distinction between perpetrators and accomplices, it is a byproduct of the drafting of criminal codes, not a innate property of principal perpetration or accessorial liability themselves. Curiously, the point is not entirely academic for international criminal justice—the war crime of “willfully causing great suffering or serious injury and cruel treatment” presumably furnishes a practical illustration. Conceptually, there is no difference between perpetrators and accomplices of this war crime, since treaty-makers have expunged any difference by employing causation in the crimes’ definition.

<sup>205</sup> For background to the derivative nature of complicity, see *supra* Part II.B above.

<sup>206</sup> Fletcher, *supra* note 27, at 636.

<sup>207</sup> For discussion of the partial derivative nature of accomplice liability, see *infra* section III.A.2.

considerable assistance Eichmann or others provide to direct perpetrators as one of very many means of *perpetrating* an international crime. Perpetrators *can also* be all those who contribute to a crime, whether directly or through another.

This brings us to grammatical arguments. For many, the literal construction of certain offenses uses terms that only a certain class of perpetrator can satisfy, creating a category of crimes often dubbed “non-proxyable.”<sup>208</sup> The classic illustrations on non-proxyable crimes include bigamy (which only married people can perpetrate) and being drunk and disorderly in a public place (which only drunk people can perpetrate), so the argument is that a sober or unmarried person who assists these offenses cannot *perpetrate* the crimes. If these examples seem too distant from international criminal justice, consider Pauline Nyiramasuhuko, the Rwandan Minister of Women’s Development, who was found guilty of rape for ordering militia under her influence to sexually violate Tutsi women by the thousands.<sup>209</sup> For many proponents of the “non-proxyable” problem, convicting Nyiramasuhuko as a perpetrator of rape intolerably pretends she has a capacity she does not—if rape is defined as requiring the insertion of a penis into a woman’s vagina, she cannot be a perpetrator.

Yet, I am not confident that this reasoning holds any real normative value. This because complicity replicates the problem it is employed to solve—Nyiramasuhuko is found guilty of rape as an accomplice too.<sup>210</sup> So if accessorial liability also fails to solve the non-proxyable problem, these sorts of crimes are of no value in delimiting principal from accessorial liability. True, re-casting complicity as the inchoate crime of *criminal facilitation* might solve the problem outright (because Nyiramasuhuko would not be labeled a rapist), but as I have highlighted earlier, this ignores the sometimes tremendous harm accomplices’ actions actually facilitate and discounts the fact that modern international criminal law unfalteringly treats complicity as a means of participating in the perpetrator’s crime, not as a separate inchoate offence. As such, we can only soothe our anxieties about the non-proxyable problem by understanding that it is inevitable in a system that views harm as morally significant.

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<sup>208</sup> Kadish, *supra* note 101, at 373; Smith, *supra* note 102 at 107-110; Moore, *supra* note 15, at 418-420; Gardner, *supra* note 19, at 127, 136.

<sup>209</sup> Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment, ¶ 6087-6088 (June 24, 2011).

<sup>210</sup> For proof of this in international criminal justice, see *supra* note 109 (showing that the dispositions of international courts and tribunals make no mention of complicity in over 95% of complicity cases that lead to conviction. Instead, they merely declare the name of the crime with which the accomplice is convicted.)

Indeed, the problem remains unresolved in ordering, instigating, JCE, superior responsibility, indirect perpetration, control over the act, co-perpetration and functional perpetration; in short, all modes of liability. With each of these doctrine, the perpetrator need *not* satisfy the physical element in a criminal code. So why give Nyiramasuhuko's anatomical status special significance over other physical elements in the definition of the crime? Doing so assumes an objective theory of perpetration: the assumption that the perpetrator is *only* the person who pulls the trigger, releases the gas, or, to borrow Eichmann's metaphor, breaks the glass. And yet, the objective theory of perpetration is entirely discredited elsewhere,<sup>211</sup> and the struggle for defensible solutions to the Hitler-as-accomplice dilemma in international criminal justice is a testament to its inadequacy in practice.

This, admittedly, involves tolerating a type of fiction (here, that Nyiramasuhuko inserted a penis in a woman's vagina, when she did not). This fiction could, of course, be quickly overcome by redefining rape (and other international crimes) in causal terms (i.e., as "causing rape"),<sup>212</sup> but even absent this kind of major legislative exercise, "what matters morally is significant causal contribution, not the kinds of limitations marked by the causative verbs of English."<sup>213</sup> To absolve Nyiramasuhuko of liability for the mass rape she caused based on a reference to physical attributes in the offense that she does not possess is to prefer fidelity to verbal semantics over substantive coherence. Like others, I believe that "normative rather than linguistic considerations would seem the more persuasive."<sup>214</sup> The overarching point, however, is that whatever real problems non-proxyable crimes present are equally true of unitary and differentiated models of perpetration alike, depriving this line of reasoning of any analytical purchase in debates between the two models.

Another frequent argument is that the unitary theory of perpetration violates the principle of legality by conferring judges with undue discretion in sentencing? For many, if statutory offences were meant to include even remote causal contributions, the legislature would

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<sup>211</sup> Fletcher, *supra* note 33, at 654-656 (highlighting reasons for the departure from the objective theory of perpetration); Hans-Ludwig Schreiber, *supra* note 123, at 614 (placing the objective theory of perpetration in historical context, and demonstrating the passage to a subjective theory, then the turn to "control over the act."); Dubber, *supra* note 7, at 983 (highlighting how the position in the US Model Penal Code resembles the objective theory, perhaps explaining why the non-proxyable problem remains so vital in English language theory).

<sup>212</sup> As mentioned earlier, the war crime of "willfully causing great suffering" already takes this form. See *supra* note 202.

<sup>213</sup> Moore, *supra* note 15, at 417.

<sup>214</sup> Kutz, *supra* note 105, at 303.

have to enact even greater sentencing ranges below usual minimums, conferring judges with extreme discretion in sentencing.<sup>215</sup> This renders law insufficiently certain. Worse, the breadth of this discretion would be all the more worrisome as judges would still have to make the types of intricate differentiations that are presently undertaken at the attribution level (i.e., distinguishing between aiding, co-perpetration, indirect perpetration, instigation, etc.) when calculating sentences, only these determinations would take place without conceptual guidelines and behind closed doors.<sup>216</sup> Consequently, a unitary system just brushes the problems under the carpet.

But these arguments are also unpersuasive. Although the point is obscured by the ICC’s assumption of the differentiated model, the truth is that in the many differentiated jurisdictions, judges reason inductively to force facts into legal categories they feel allow for an appropriate punishment.<sup>217</sup> Instigation is elevated to indirect perpetration; aiding is recast as co-perpetration. To illustrate, certain courts describe a case of acting as a lookout for a criminal perpetrator—everywhere the textbook example of aiding—as co-perpetration in order to allow for the full scope of punishment afforded a perpetrator.<sup>218</sup> In fact, this trend is so dominant in practice that “[i]t seems that no longer the dogmatic categorization determines the severity of the sentence imposed, but conversely that the severity of the sentence deemed desirable determines the categorization of the conduct in question.”<sup>219</sup> If this is true, fears of judicial discretion are

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<sup>215</sup> CLAUS ROXIN, in: Burkhard Jähnke/Heinrich W. Laufhütte/Walter Odersky (ed.), *Strafgesetzbuch. Leipziger Kommentar* :Erster Band, 11th ed. 2003, Vor § 25, marginal number 6. See also, HANS-HEINRICH JESCHECK and THOMAS WEIGEND, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5th ed. 1996, 646.

<sup>216</sup> *Id.*, marginal number 8.

<sup>217</sup> THOMAS ROTSCH, “EINHEITSTÄTERSCHAFT” STATT TATHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE 462 (1. Auflage. ed. 2009) (showing how considerations of culpability and sentencing prompt practitioners and theorists to choose somewhat arbitrarily between modes of attribution to apply.) Evidently, these practices have a long history. Schieber explains that during the Weimar Republic reform efforts were undertaken to relax strict insistence on the derivative nature of complicity so as “to constrain the scope of indirect perpetration and to relegate many of the cases that were thus being dealt with as a species of perpetration back to the category of complicity.” Hans-Ludwig Schreiber, *supra* note 123, at 620. This is also true in France, where the fact that complicity does not attach to the lowest form of crimes (called “contraventions”) leads the French Cour de Cassation to declare accomplices co-perpetrators to avoid their acquittal. For details, see BERNARD BOULOC, GASTON STEFANI & GEORGES LEVASSEUR, *DROIT PÉNAL GÉNÉRAL* 287-288 (19e édition ed. 2005). For further modern examples from the Netherlands and elsewhere, see Johannes Keiler, *supra* note 18, at 186-190.

<sup>218</sup> HR 23 oktober 1990, NJ 1991, 328, cited in Keiler, *supra* note 18, at 187.

<sup>219</sup> Keiler, *supra* note 18, at 190.

unavoidable for both theories, meaning that the argument from legal certainty does not lead inexorably to a differentiated system of perpetration.

Finally, arguments about the expressive capacity of a differentiated model do not appear to furnish it with great legitimacy. Under a differentiated scheme, a defendant’s responsibility is expressed through the combination of at least two essential components: (a) the mode of participation; and (b) the name of the crime with which she is convicted. To eliminate (a) returns us to the problem of fair labeling principle—the criticism is that grouping the people who shot helpless refugees with AK-47s and the businessman who supplied the weapons under a single banner of say murder unfairly groups disparate degrees of responsibility, which a fair system of representation ought to segregate by employing additional qualifiers.<sup>220</sup> This observation leads into often implicit normative differences between perpetration and participation,<sup>221</sup> and provides the impetus for the invention of notions like functional perpetration, that allow the doctrinal label to encapsulate an element of the collectivity through which the crime came about.<sup>222</sup>

There are, in my view, at least four problems with this account, each of which shows how a unitary theory is arguably more capable of fine-tuned expression than its counterpart. First, and least importantly, the argument for the expressive capabilities of a differentiated model ignores that international courts and tribunals do not mention the mode of liability within the disposition of their judgments in more than 95% percent of cases surveyed.<sup>223</sup> As we have seen, in the vast majority of instances, dispositions contained in international judgments merely list element (b),

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<sup>220</sup> See *infra* section II.A; Frédéric Mégret also elevates fair labeling to a principle of fairness in human rights. See Frédéric Mégret, *Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by The ICC With Special Emphasis on the General Part*, [http://law.huji.ac.il/upload/Evaluating\\_FM.pdf](http://law.huji.ac.il/upload/Evaluating_FM.pdf)

<sup>221</sup> van Sliedregt, *supra* note 59 (arguing that whether members of a JCE must comply with the full mens rea of genocide turns on whether they are perpetrators or participants); Cassese, *supra* note 25, at 26 (arguing that it is a logical impossibility for someone who does not have the necessary mens rea for genocide to “commit” the crime, but accepting that he or she may aid and abet the crime nonetheless). I am grateful to Thomas Weigend for confirming that the fact that JCE and Superior Responsibility purport to act as forms of “committing” a crime whereas complicity is a mere means of participation is the normative basis upon which the two concepts might diverge within a differentiated model.

<sup>222</sup> For one of the most thoughtful discussions, see Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* (Andre Nollkaemper & Harmen van der Wilt eds., 2009)

<sup>223</sup> See *supra* note 104.



the crime with which an accused is convicted.<sup>224</sup> That there is almost never mention of element (a) viz. the mode of liability within dispositions tends to suggest an unfortunate mismatch between abstract theorizing and practice—international criminal justice does not presently offer a vehicle for the expressive capacity the differentiated model demands.

Other difficulties are more difficult to overcome. Take, for instance, the miscommunication of responsibility inherent in labeling an accomplice a *genocidaire* when she does not have the requisite special intent. Some justify this disparity by pointing to a normative divide between “committing” a crime and other forms of “participation,”<sup>225</sup> although the rationale for the division invariably goes unannounced. In purely analytical terms though, one struggles to see a justification for the division when commission and participation both make an accused responsible for one and the same crime. As a matter of logic, the amalgamation of misaligned modes of liability and elements of crimes must corrupt one or both concepts, and branding an accomplice with a label he does not deserve still misrepresents responsibility, even if you have diminished the time she will serve in prison.

A differentiated model uses legal terms to express graduated degrees of blame, but there is also a danger that labels for modes of liability need not carry any great meaning for relevant audiences, further undermining the differentiated model’s expressive capacity. Arguably, describing someone as an “instigator” of genocide means something comprehensible to lay stakeholders in certain jurisdictions, but I have grave doubts whether murder through a combination of indirect and co-perpetration holds any comparable significance. The risk is that the meaning of increasingly abstract legal terms used to describe modes of liability seems esoteric to ordinary citizens, who no longer understand the terminology or its moral implications.<sup>226</sup> If this is true, a lack of comprehension among the public adds another layer of distortion to the condemnatory aspirations of international trials.

Contrary to usual expectations, the unitary theory may offer greater expressive capacity here. Under the unitary model, an accused could be convicted of genocide, denoting that she made a substantial contribution to the destruction of an ethnic group with the requisite intention to bring the crime about, then a judgment could append a single concise plain language explanation of her contribution i.e. GUILTY of genocide for supplying machetes to the Interahamwe. Structurally, one would immediately know that this conduct led to the crime described and

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<sup>224</sup> *Id.*

<sup>225</sup> See above note 208.

<sup>226</sup> Rotsch, *supra* note 14, at 468.

that the defendant adopted a subjective disposition necessary to constitute genocide—she really wanted the Tutsi exterminated. The differentiated alternative (i.e. GUILTY of (a) aiding and abetting (b) genocide) does not tell us nearly as much about the culpability of the accused, because the formalistic concept “aiding and abetting” varies so widely from jurisdiction to jurisdiction and, just as importantly, may spoil the identity of the crime.

This leads to a final related observation. To date, much of the debate around modes of liability in international criminal justice seems to have presumed that the crime and the mode of liability must do all the expressive work. But what prevents the judgment itself shouldering some of this load? For example, functional perpetration is necessary, we are told, to symbolically denounce the collective apparatus that enabled the individual crime.<sup>227</sup> And yet this begs the question why a court could not simply state whatever collective structures enabled the offence as part of its narrative. Without addressing this question, these often very insightful analyses of how traditional notions of perpetration do not adequately capture the reality of collective action that are so frequently part and parcel of atrocity risk overburdening “modes of liability,” when a plain language explanation within a judgment may suffice.

### B. *The Specificities of International Crimes*

If a unitary theory of perpetration is not theoretically foreclosed, we must inquire which of the two models is preferable for the particularities of international crimes. From the very beginning, the fact that an international system of blame attribution does not already exist is surely anomalous—for all the international interest in ending impunity, transitional justice and modes of liability, there is no treaty regime that defines modes of participation international crimes. With war crimes for instance, the Geneva Conventions themselves furnish “only keywords to designate a criminal act, nothing which can be called a definition”,<sup>228</sup> leaving a range of indispensable criminal concepts “under a cloud of

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<sup>227</sup> See van der Wilt, *supra* note 222. Harmen van der Wilt also argues that we should not underestimate the symbolic expressive value of JCE. While I agree with everything in this excellent article, I merely disagree with the final step where they seek to rely on a differentiated model of perpetration for expression.

<sup>228</sup> Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 392 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002).

obscurity.”<sup>229</sup> This is most certainly true of modes of participating in these crimes—while the Conventions require states to implement legislation allowing for the prosecution of those responsible for “committing or ordering to be committed”,<sup>230</sup> they deliberately stopped short of elaborating on the extent of these concepts.<sup>231</sup> Whatever might be said about the merit of this approach as a means of securing broad participation in the treaty regime, it has proved to be a thorn in the side of practitioners ever since.

Despite popular views to the contrary, the ICC Statute does not markedly change this situation. For one reason, some of the world’s leading countries are not party to the ICC Statute, meaning that recourse to customary international law remains inevitable in many instances where international crimes might be enforced. As a reflection of this, the ICC Statute formally safeguards the continued co-existence of customary international law outside the treaty regime,<sup>232</sup> allowing for a complex mosaic of blame standards that stem from all range of international legal sources to simultaneously co-habitat the discipline. Even states that have signed and ratified the Rome Treaty are not required to emulate modes of attribution as defined in the ICC statute within their domestic legal orders. As a consequence, international modes of liability are extremely difficult to identify.

The first problem with the scheme is methodological. While the ICC Statute brings a degree of clarity to cases arising within its four walls, many international trials still depend on custom as a source of law. The difficulty is, as Martii Koskiennemi famously argued, that custom is quite “useless” at generating definitive standards.<sup>233</sup> So even in a field like

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<sup>229</sup> G.I.A.D Draper, *The Modern Pattern of War Criminality*, in *WAR CRIMES IN INTERNATIONAL LAW*, 160 (Yoram Dinstein & Mala Tabory eds., 1996).

<sup>230</sup> See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146 3, Aug. 12, 1949, 75 U.N.T.S 287/1958 A.T.S No 21 (“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”).

<sup>231</sup> This is evident, for instance, from the statement of one negotiator at the time who observed that “[t]he Conference is not making international penal law”. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section B, at 116.

<sup>232</sup> Article 10 ICC Statute stipulates that “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

<sup>233</sup> Martti Koskiennemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1952 (1990). This, as Koskiennemi memorably argues, “because the interpretation of ‘state behavior’ or ‘state will’ is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way.” Koskiennemi’s principal point is that it is really our moral certainty that something

international human rights, where legal precision is comparatively less important, some of the leading exponents observe that “the human rights movement’s quest for additional sources finds its favorite candidate, customary international law, in the midst of a profound identity crisis.”<sup>234</sup> Despite this crisis, a differentiated system of blame attribution in international criminal justice depends on the very same candidate for defining the terms of serious criminal responsibility.

This leads to major practical difficulties. For instance, despite the prolific use of JCE III over the past debate, the Extraordinary Chambers in Cambodia recently disagreed with the original Tadić decision that had declared JCE III part of customary international law.<sup>235</sup> Whatever might be said about the relative strengths of either court’s reasoning, the content of customary modes of attribution is clearly unacceptably uncertain if different judicial bodies can reach diametrically opposed conclusions based on similar materials. While it is arguably not the business of international criminal justice to overcome the latent deficiencies with customary international law writ large, the absence of any restriction on the *number* of “modes of liability” enables types of scenario to continue unchecked. Put differently, a unitary theory of perpetration precludes the uncertainties of custom infiltrating the criminal process.

The wider concern is that such an ill-defined set of differentiated “modes of liability” violate the principle of legality. As we well know, the principle of legality has a rich but troubled history in international criminal law, from its identification as a merely principle of justice at Nuremberg to more definite modern accounts that sometimes do not restrain any better.<sup>236</sup> When the methodology for identifying customary standards is so vague, and there is no numerical cap on how many modes

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should be prohibited that is driving the analysis of custom, not some objectively ascertainable standard that might be obtained in a dispassionate positivist fashion.

<sup>234</sup> Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AYIL 82, 88 (1988); The attempts to justify concepts in human rights (and international criminal law) into the corpus of customary international law even though they are not easily reconciled with normal standards for identifying custom is, I suspect, an example of what David Kennedy calls “a combination of overly formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument.” See David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 120 (2002).

<sup>235</sup> Prosecutor v Ieng et al, Case No: 002-19-2007-ECCC/OCIJ (PTC38), para. 83 “For the foregoing reasons, the Pre-Trial Chamber does not find that the authorities relied upon in Tadic... constitute a sufficiently firm basis to conclude that JCEIII formed part of customary international law at the time relevant to Case 002.”

<sup>236</sup> For an excellent overview of this history together with modern manifestations of the problem, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

of liability might be “discovered” in customary international law, the danger is that international blame attribution seriously threatens legality.<sup>237</sup> As Beth Van Schaack points out, most common law jurisdictions prohibited the notion of common law crimes in the 19<sup>th</sup> century, precisely because the combination of judge-made law and serious criminal liability was perceived as compromising legality and its liberal underpinnings.<sup>238</sup> And yet modern international criminal justice not only permits the historical anachronism, it also places no limit on the *quantity* of modes of liability the methodology can generate.

This leads to a further set of problems. Even where the principle of legality is honored, international standards of blame attribution remain seriously fragmented. Complicity itself is an illustration. If we accept the differentiated system incorporated in the ICC together with the German mechanisms for dividing perpetrators and accomplices, we are still left with a mental standard for complicity in the ICC that is markedly higher than the equivalent in the vast majority of crimes within that court’s jurisdiction, with standards before other international courts that claim knowledge but contract to recklessness in practice (thus violating culpability in certain circumstances), and with all range of domestic variants of complicity across the spectrum of national courts capable of trying international crimes. If we are serious about international expressive accounts of international justice,<sup>239</sup> a real danger is that the meaning of international condemnation is lost in translation.

This draws us back into earlier discussion about the superior expressive capabilities of a unitary theory. In our previous theoretical discussion, we observed how a unitary theory allows a principled determination of criminal responsibility, then flexible opportunities to describe the nature of the contribution without legalese. If the expressive value of modes of are not fully comprehended within the national jurisdictions where they originated, they are likely to export very poorly to foreign cultures as part of the international adjudicatory process, given that victims, perpetrators and members of their communities are even less familiar with the significance of terms like “instigation,” “joint criminal

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<sup>237</sup> Mirjan Damaška, *supra* note 5, at 469.

<sup>238</sup> Van Schaack, *supra* note 236, at 191.

<sup>239</sup> Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 42–44 (2007) (arguing that expressive theories of punishment are likely to capture the nature of international sentencing better than other retributive or utilitarian conceptions); See also MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 173–179 (2007) (discussing the role of expressivism in international criminal punishment).

enterprise” or “indirect perpetration.”<sup>240</sup> In the words of Immi Tallgren, the disapproval communicated by international criminal justice “risks being unclear or having adverse connotations, depending on the background of the offender.” The same is true for victims and local communities.

Aside from concerns about the quality of the responsibility expressed, there are also the absence of substantive restraints on the scope of international modes of liability—the open-ended system of differentiated “modes of liability” does little to ensure that the standards courts apply accord with any conceptual foundations. This, as we have seen, is an acute problem when international courts draw so heavily on national doctrine that may or may not accord with basic principles in blame attribution, and when universal jurisdiction allows all range of courts to hear these cases. The open ended nature of modes of liability acts as an invitation for practitioners socialized in different systems to prioritize their own domestic schooling in criminal law, since that is what most senior practitioners bring to international prosecution. The differentiated system does not tell us which of the myriad variants international courts should adopt nor place conceptual restrictions on modes of liability of the type outlined here. In the face of this reality, a unitary theory of perpetration might better preserve (and advertise) culpability as the benchmark for international criminal responsibility, ending the various phases of international courts mimicking of domestic practice and shifting academic debates to issues of sentencing, where these discussions belong.

Equally importantly, the unitary theory would simplify a body of rules governing international modes of liability that has attained a degree of technicality that is in jeopardy of alienating those who matter most. From experience, very few practitioners of international criminal justice understand the full import of “modes of liability,” which they tend to allocate to experts trained in relevant national jurisdictions wherever possible. This tendency is exacerbated when leading texts describing prominent international modes of liability are not available in official United Nations languages, further reinforcing the professional dependence on experts socialized in only a small number of jurisdictions. It goes without saying that these issues are likely to inhibit the engaged participation of victims, perpetrators and affected communities, who are generally even less equipped to deal with technocratic jargon than the professionals who represent them. It would probably be easier to endure these struggles if they were conceptually unavoidable, but of course, they are not.

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<sup>240</sup> Tallgren, *supra* note 30, at 583.

A unitary theory might also mediate the dissonance between national and international concepts of blame attribution more meaningfully. At present, standards of blame attribution vary wildly from one jurisdiction to the next, producing a fragmented array of rules. Predictably, the dissimilarity in international versus domestic standards has and will continue to cause major practical problems. In one case tried within the Netherlands, for instance, a Dutch court invested considerable energy into determining whether it was required to apply international or domestic notions of complicity when prosecuting its own national for genocide.<sup>241</sup> From the reasoning in the decision, the question appeared determinative of the defendant’s responsibility for a crime no less than genocide—application of the national standard of complicity led to conviction; the international equivalent did not. Without common standards of blame attribution, serious criminal responsibility presently turns on largely arbitrary elections between two competing notions of blame attribution.

The system that is also highly inefficient. As is well known, the two ad hoc UN international tribunals alone are estimated to have claimed roughly 15 percent of the United Nations annual budget, which a projected cost of around \$25 million per case.<sup>242</sup> While it is nigh on impossible to quantify the portion of that figure attributable to the unsettled pluralistic nature of international modes of liability, there can be little doubt that radically limiting litigation over these concepts would free up considerable capacity, save donors resources and hasten trials.<sup>243</sup> Just a short glance at the number of appellate cases that involve complex (but conceptually unnecessary) questions about modes of liability confirm as

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<sup>241</sup> For an insightful discussion, see Harmen van der Wilt, *Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court*, 8 INT’L CRIM L. REV. 229, 244-245 (2008). This concern is apparent in the United States too, where courts asked to deliberate on Alien Tort Act cases must decipher whether they apply domestic or international standards of complicity, before they attempt to ascertain which of the competing standards represents customary international law. Keitner, *supra* note 7, at 73-79.

<sup>242</sup> UN SC, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary-General, UN Doc. S/2004/616 (2004); Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity* 99 NW. U. L. REV. 539 (2005) (calculating average cost of trials as \$25 million per case).

<sup>243</sup> Ralph Zacklin, *The Failings of Ad Hoc Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543 (2004) (“The delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the [ICCPR]”); One commentator described the ICTY’s proceedings as “as annoying and interminable as the Tour de France.” PIERRE HAZAN & JAMES THOMAS SNYDER, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 187 (2004) (citing Jacob Finci);

much. A more efficient system promotes rights to expeditious trial that are frequently in jeopardy internationally, and makes capital available that might minimize the selectivity of trials. As such, a more streamlined concept of perpetration promotes accountability.

Finally, to return to one of the central themes of this paper, a unified theory of perpetration is important from a purely functional perspective. Throughout, much of the debate about “modes of liability” has assumed a false duality between mastermind and physical perpetrator. In reality, there are also accomplices who make important (sometimes indispensable) contributions to the ways atrocities unfold. I have in mind corporations—the suppliers of weapons, the banks who finance military offensives, representatives of extractive industries who bankroll warlords—all play surprisingly important roles in sustaining modern bloodshed. Although these sorts of inputs have received little more than hortatory acknowledgement in modern international criminal justice, as soon as this veil is lifted, we will see that unified standards of blame attribution are essential to creating a level playing field capable of treating accomplices equally.

Without this, the system of international criminal law enables safe-havens, corporate races to the regulatory bottom to avoid liability, and perceptions that businesses in certain jurisdictions are at a competitive disadvantage vis-à-vis those elsewhere. In other areas, international law has some great experience in erecting universal standards in order to deal with these global realities—in treaties ranging from the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air to the United Nations Convention on Contracts for the International Sale of Goods, states have rationalized a single set of standards to address transnational practices. So while I am sensitive to the compelling arguments for pluralism in international criminal justice,<sup>244</sup> I can only assume that in international criminal justice too, the need to avoid overt injustice trumps the otherwise understandable desire for doctrinal heterogeneity between legal systems.

How then would this uniformity be achieved? A unitary theory of perpetration for international crimes cannot simply replace all standards of attribution everywhere—the prospect of revolutionizing global standards of attribution is politically unthinkable and culturally undesirable. Nonetheless, national courts prosecuting international crimes could use an international unitary standard of perpetration in domestic cases involving international crimes, leaving habitual modes of attribution to continue unaffected for everyday domestic crimes. As a matter of ironic

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<sup>244</sup> For strong arguments for heterogeneity between jurisdictions in international criminal justice, see Greenawalt, *supra* note 11; van der Wilt, *supra* note 242, at 244-245.



coincidence, this would emulate an extant scheme in German law, which applies a unitary theory of perpetration to a specific subset of administrative offences, even though it maintains its famous differentiated model for other crimes.<sup>245</sup> The only difference would be that this model would displace and annul customary international standards then apply uniformly throughout all courts capable of exercising jurisdiction over international crimes.

## V. CONCLUSION

In a recent article questioning the merit of a continued distinction between perpetration and complicity, one eminent expert in criminal theory asks, "how can there be such frequent disparities of responsibility and culpability between perpetrators and accomplices when both are equally guilty of the crime in question?"<sup>246</sup> The answer to the question in domestic criminal law lies in fragmented growth of criminal law in stages though different epochs, leaving a unified body of rules that need not coincide with rational principles.<sup>247</sup> In international criminal law, however, the answer lies in the fact that international courts have borrowed historically contingent doctrine from these domestic systems, even when they defy accepted principles international courts themselves nobly endorse as a matter of course. Modes of liability, and complicity in particular, typify this trend.

Ever since the modern revival of the international criminal project, "modes of liability" have arguably featured as the most debated topic. In response to an acute unease with treating Hitler as an accessory, international criminal courts and tribunals have adopted controversial domestic models that resolve the problem, but scholars have more recently exposed the objectionable nature of aspects of these doctrines, forcing international courts into a third phase characterized by a sweeping receptivity to German distinctions between perpetrators and accomplices. In each of these phases, we scholars have only focused on a limited set of

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<sup>245</sup> Bohlander, *supra* note 2, at 153 (discussing the use of of unitary theory of perpetration (Einheitstaterbegriff) for administrative offences (Ordnungswidrigkeiten). For further information about administrative offences, see Krey, *supra* note 34, at 21.

<sup>246</sup> Sullivan, *supra* note 14, at 156.

<sup>247</sup> ALAN NORRIE, CRIME, REASON, AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 8-9 (1993).

modes of liability, without considering the broader implications for international blame attribution writ large. Simultaneously, international influence, both legal and political, has emerged as the dominant explanation for the various departures from basic principles in blame attribution.

Complicity, however, also fails many of the standard tests employed to criticize modes of liability in international criminal justice, and in all likelihood, modes of liability as a species will suffer the same fate. As I suggest throughout, this troubling reality stems less from international influence and more from the natural infiltration of indefensible domestic doctrine into the international arena. Thus, while the common criticism is that international modes of liability have lost touch with "the restraining force of the criminal law tradition,"<sup>248</sup> this perspective overlooks the domestic criminal law's long history of internal inconsistency and the great influence of domestic principles internationally. So if experts sadly observe "a gap between liberal rhetoric (general principles) and practical reality (pervasive exception) within national criminal systems,"<sup>249</sup> we should be unsurprised to find that it resurfaces internationally.

This said, there may be scope for reversing this trend. In his seminal work on the grammar of criminal law, George Fletcher posits that international law, and international criminal law in particular, can come to play a vital role in the development of defensible domestic doctrine. He argues that "the task of theorists in the current century is to elaborate the general principles of criminal law that should be recognized not only in the International Criminal Court, but in all civilized nations."<sup>250</sup> If this framing is correct, a unitary theory of perpetration for international crimes could overcome the sometimes major shortcomings of modes of liability in international criminal law and act as a constructive influence on domestic practices. Until then, domestic criminal law will remain a vital and predominantly welcome point of reference for international courts and tribunals, but a mature international system also recognizes the darkness it stands to inherit from its domestic predecessors and opts for a different path.

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<sup>248</sup> Danner and Martinez, *supra* note 5, at 132.

<sup>249</sup> Simon Bronitt, *Toward a Universal Theory of Criminal Law: Rethinking the Comparative and International Project*, CRIM. J. ETHICS 53-66, 55 (2008).

<sup>250</sup> Fletcher, *supra* note 2, at 20.