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Ten Reasons for Adopting a Universal Concept of Participation in Atrocity

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TEN REASONS FOR ADOPTING A UNIVERSAL CONCEPT OF PARTICIPATION IN ATROCITY

*James G. Stewart**

The legal doctrine that assign blame for international crimes are numerous, unclear, ever-changing and often conceptually problematic. In this essay, I question the prudence of retaining the radical doctrinal heterogeneity that, in large part, produces this state of disarray. Instead of tolerating different standards of participation across customary international law, the ICC Statute and national systems of criminal law, I argue for a universal concept of participation that would apply whenever an international crime is charged, regardless of the jurisdiction hearing the case. Although I have argued elsewhere that a unitary theory of perpetration should serve this role, I here attempt to remain agnostic about the content of the universal system for which I advocate. In so doing, I isolate the question of universality from the theory of responsibility that would fill it, querying why so much energy is invested in generating treaties to harmonize definitions of international crimes, when no comparable initiative exists for the modes of participation these crimes couple with. I conclude this call for a universal notion of participation in atrocity by suggesting that the current disarray in this domain is more a challenge for academics and states than litigators and judges.

* Assistant Professor, University of British Columbia. My kind thanks to participants at the conference held at the Free University of Amsterdam on Harmonization and/or Pluralism in International Criminal Law for thoughtful comments on an earlier presentation of these ideas.

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I. INTRODUCTION

The legal mechanisms that link individual agency to atrocity are numerous, difficult to identify, perpetually changing, and not infrequently, conceptually questionable. From aiding and abetting to indirect co-perpetration, there is little settled understanding of how international crimes are attributed to a particular individual. In this Chapter, I argue that instead of continuing to embrace the radical doctrinal heterogeneity that, in large part, produces this disarray in modes of participation for international crimes, we should promulgate a universal set of standards that resolves these issues once and for all. We have treaties for international crimes like genocide, war crimes, and soon crimes against humanity,¹ but not for forms of participation in these crimes that very much colour what it means to be responsible for an international offence. Why the anomaly? In what follows, I propose that we overcome this great discrepancy by agreeing on a global set of standards governing blame attribution for international crimes wherever they are tried.

How would this universal concept work? With a global notion of participation in atrocity like I propose, all national and international trials would apply common standards of attribution where international crimes are charged, but revert to normal domestic rules for other offences. If a national court hears a formal allegation of genocide, international standards of participation would immediately apply. In what follows, I set out ten arguments that favor this universalist approach to participation over the troubled waters in which the discipline presently finds itself adrift. I start, then, by noting how the current struggles stem, in large part, from the interaction of three different sources of law: customary international law, principles enshrined in the ICC Statute and rules governing participation in national legal systems. My thesis is that the interrelation of the three layers of law governing participation ends up inhibiting rather than enabling justice, and I question whether litigation is the appropriate means of resolving these ambiguities.

Forms of participation for international crimes currently arise at three intervals. First, customary international law governs modes of participation in a large number of international tribunals. And yet, if common law systems did away with customary rules of criminal law, created by judges, many decades ago (because their imprecision violated basic human rights principles and core tenets of liberalism),² why are

¹ FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, (Leila Nadya Sadat ed., 2011).

² See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

international courts still doing differently? This question is particularly vexing when the vagaries of customary international law allow for radically divergent interpretations. Since the *Tadić* judgment, for example, the ICTY and numerous other international tribunals had tried and convicted a host of individuals under the third variant of joint criminal enterprise liability ('JCE').³ But decades later, a Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia finds that this mode of attribution was probably never an element of custom.⁴ A universal concept of participation would prevent this type of contradiction.

Second, the ICC Statute codifies a set of standards for criminal attribution within a treaty regime, but this creates as many problems as it solves. Many states are not parties to the ICC Statute (not, presumably, because of the Statute's provisions governing participation). Even within the terms of the statute itself, few agree on the interpretation to be given to standards of participation, except to concede that they are incoherent.⁵ Moreover, the Statute purports to leave customary international law intact at the same time that it marks a significant instantiation of state practice on these issues.⁶ Against this backdrop, judges and scholars dispute whether the open-textured nature of the Statute allows for the invocation of a wide variety of German modes of participation. The difficulty is that, as other judges push back against this invocation, standards of blame attribution become exceptionally difficult to identify with any degree of confidence. In what follows, I express some skepticism about the view that judges will settle on a defensible *Dogmatik* with time.

Third, national courts are increasingly assigned the lead role in prosecuting international crimes, as part of what Kathryn Sikkink

³ Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 227 (May 7, 1997) (referring to joint criminal enterprise as a "mode of participation").

⁴ Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), *Jeng Sary et al.*, Case File No. 002-19-2007-ECCC/OCIJ (PTC38), PTC, ECCC, 10 May 2010, para. 83 ('For the foregoing reasons, the Pre-Trial Chamber does not find that the authorities relied upon in *Tadić* ... constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002.').

⁵ See, for instance, [LJIL Article to be cited instead]: Jens David Ohlin et al, *Assessing the Control-Theory*, 26 LEIDEN. J. INT'L. L. 725, 744 (2013). ('Moreover, it is highly questionable whether Article 25(3) is based on a single coherent, normative theory of participation. Nothing in the drafting history of the ICC suggests that Article 25(3) was to constitute a self-contained system of criminal participation with a coherent doctrinal grounding.'). But cf. Chapter by G. Werle/B. Burghardt in this volume.

⁶ Art. 10 ICC Statute ('Nothing 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.').

memorably calls a ‘Justice Cascade.’⁷ While this deluge of national trials for international crimes is a very welcome (if long awaited) development, it adds to the normative ambiguity in modes of participation. Whether national courts should employ local modes of participation that are indigenous to the criminal law within the forum, or borrow international modes in keeping with the global character of the crime in question, is unclear. Even if judges do favor the international laws governing participation, they still face a daunting second-order question: which international law to apply? As we just witnessed at the two prior levels, the ICC Statute may clash with custom, and custom can generate conflicting interpretations. Regrettably, these dilemmas are not exceptional—they are hallmarks of a global legal disunity on issues of criminal participation that undermines the aspirations of international criminal justice as a project.

In what follows, I set out ten reasons for states to negotiate a universal notion of participation for international crimes based on a model academics agree on, which informs a new treaty as well as amendments to the ICC Statute. Alternatively, academics could lead a process that creates a model system of participation, similar to the *Corpus Juris* in Europe, the Model Penal Code in the United States or the UN Model Laws at an international level. My list of reasons substantiating this argument reads like a catalogue insofar as I resist the desire to group the factors favoring this universalization of participation, or categorize them by type. Similarly, I do not offer arguments against this universalist position, since excellent authors already offer thoughtful reasons why we should embrace and manage the exercising legal heterogeneity throughout the world, rather than giving in to the knee-jerk desire for uniformity.⁸ Instead, I list here a set of problems I believe militate in favor of universal uniformity instead of rampant doctrinal divergence, in the hope of broadening an existing discussion.

Finally, for the purposes of this paper, I attempt to remain agnostic about what the content of this universal notion of participation should be. In the interests of fully disclosure, I have elsewhere argued that a unitary theory of perpetration should serve this purpose,⁹ and I remain convinced that a variant of the unitary theory of perpetration is symbolically most appropriate, normatively preferable, and politically plausible as an option

⁷ KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (1 ed. 2011).

⁸ Paul Berman, *Global Legal Pluralism*, 80 S.CAL.L.REV. 1155 (2007); Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011).

⁹ James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 LEIDEN. J. INT’L. L. 165 (2012).

for the universal standard I suggest. Nonetheless, I do my best to extricate this preference from my argument in this Chapter as much as possible (even if I suspect I sometimes fail). I am convinced that the question of universality and content come apart, and that the former requires considerably more discussion, regardless of how universal forms of participation are configured. In that spirit, what arguments can be marshaled for universalizing the rules governing participation in international crimes instead of tolerating the extant doctrinal heterogeneity across the three levels I set out?

II. TEN REASONS FOR A UNIVERSAL CONCEPT OF PARTICIPATION IN ATROCITY

A. Ensuring a Level Playing Field

International crimes frequently cross territorial borders before, during, and after the execution of the offence. After orchestrating the calls to butchery in Rwanda, for instance, Jean-Bosco Barayagwiza fled to Cameroon. Terrorist organizations responsible for systematic attacks on civilians in various parts of the world co-ordinate and launch their operations from multiple sites, as do the military and intelligence personnel who conduct excessive counter-terrorist operations to interdict them. Foreign governments act as puppet masters for rebel groups' oftentimes brutal conduct, and companies incorporated in one country, operating out of another, whose officers come from different states again, flood foreign conflict zones with weaponry that enables atrocity. And yet, if standards of criminal responsibility differ from one jurisdiction to the next, we promote races to the regulatory bottom, thereby tolerating legal safe harbours that impede accountability in these sorts of scenarios.

This problem is not new to international law, and it is surprising that it has not featured in discussions of international criminal law more conspicuously until now. Addressing races to the bottom was, for example, a core motivation for the UN Convention Against Corruption.¹⁰ The fear was that, if anti-corruption were left to national legal systems alone, companies in jurisdictions like the United States that had muscular forms of anti-corruption legislation in place, would be prejudiced vis-à-vis foreign competitors. If that were not trouble enough, companies could

¹⁰ Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the Interests of Justice*, 50 CRIM. L.Q. 305–348, 193 (2005); Kevin E. Davis, *The Prospects for Anti-corruption Law: Optimists versus Skeptics*, 4 HAGUE J. ON THE RULE OF L. 319 (2012).

simply relocate to jurisdictions where chances of accountability were slight. International law governing corruption emerged as an attempt to establish a global baseline whose universalism precluded these evasive strategies. The question is, why is there no equivalent thinking in standards of criminal participation, at least for crimes that shock the proverbial conscience of mankind?

After all, moments do arise where criminal law is universalized to address globalized phenomena. Take the UN Security Council Resolution 1368 of 12 September 2001, that called on *all* states to ensure that ‘those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.’¹¹ Subsequently, the UN Security Council passed another resolution requiring all states to criminalize terrorist financing,¹² in a bid to ensure that criminal laws with a particular scope and effect were firmly in place globally to combat a transnational phenomenon. Of course, this quasi-legislative act was controversial in that it was probably beyond the Security Council’s remit,¹³ but it does highlight a stark disparity with international law governing modes of attribution for international crimes. Is it not peculiar that a terrible set of terrorist acts in a single country could generate this attempt to universalize certain criminal laws, when atrocities of all stripes spread throughout the world over a much longer period have escaped that project, even during a period of light-speed growth in the field?

Instead, universalist aspirations in international criminal law are only expressed in important campaigns for new treaties governing international crimes. The great efforts of Raphael Lemkin, culminated in the passage of the Genocide Convention, convinced as he was that new legislation would have an appreciable effect on ensuring that the sufferings of the Second World War would not be relived.¹⁴ Likewise, the post-war period also saw the codification of war crimes for the first time in treaty form, under the

¹¹ UNSC Resolution 1368 (2001), S/RES/1368, 12 September 2001.

¹² UNSC Resolution 1373 (2001), S/RES/1373, 28 September 2001, stating that the Security Council ‘*Decides* that all States shall:... (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts’.

¹³ See Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L LAW 175 (2005).

¹⁴ RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (Clark, N.J.: The Lawbook Exchange Ltd. 2nd ed. 2008) (2008). I accept that the Genocide convention also prohibited attempt and complicity, although the precise meaning of these terms is not announced in the treaty.

rubric of the grave breaches regime.¹⁵ When it came to addressing modes of attribution for these grave breaches, however, states proved strangely recalcitrant, offering “only keywords to designate a criminal act, nothing which can be called a definition.”¹⁶ Finally, we now witness convincing arguments for forging a treaty governing crimes against humanity, to unify at least three different understandings of these offenses within the discipline.¹⁷ While all these initiatives are praiseworthy, it is anomalous that they limit themselves to international *crimes*, when forms of participation colour the meaning of these offenses so thoroughly.

If we are motivated to create a universal system of international criminal justice that does not tolerate normative safe harbours, this anomaly requires correction.

B. Restraining Illiberal Excess

At times, the forms of participation that couple with international crimes risk converting a criminal trial into an illiberal instrument for social control. At an international level, this difficulty arises where international courts reach for permissive domestic doctrine so as to enmesh a broad range of big fish, for an even broader range of criminal harm. As I have argued elsewhere, JCE III fits this description well: an English doctrine initially imported into international criminal law through WWII jurisprudence, then corroborated in modern practice by the parallel existence of equivalent concepts in a range of predominantly Anglophone jurisdictions.¹⁸ As very numerous scholars have pointed out, however, JCE III tolerates a sharp cleavage between the definition of crimes and modes of liability used to convict defendants of them, which many take to violate the cardinal principle of culpability.¹⁹ A universal concept of

¹⁵ For a discussion of grave breaches and their confusing, overlapping relationship with other war crimes, see James G. Stewart, *The Future of the Grave Breaches Regime*, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 855 (2009).

¹⁶ 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).

¹⁷ FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 1.

¹⁸ Stewart, *supra* note 9 at 172–178.

¹⁹ 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.”); Danner and Martinez, *supra* note __, at 134 (arguing that JCE poses significant challenges to the culpability principle).

participation should act as a restraint against the adoption of doctrine like this.

Aside from these more mundane examples, the restraining force of a universal concept of participation could also prove very useful in states that find themselves in the throes of mass violence. Recall that, in truth, domestic criminal law is frequently part and parcel of the problem international criminal justice exists to address—it was criminal law that served as a vehicle for many of both Hitler and Stalin’s most terrifying excesses.²⁰ In other less extreme contexts, the history of criminal law is still one of extensive instrumentalization by a cadre of elites to further partial social and political agenda. Modes of participation in particular, are a key component of this darker underbelly of the national criminal justice systems international criminal lawyers too quickly defers to. For the reasons I mention, the principled, proportionate, and fair application of criminal law norms to the guilty may well be the exception not the rule globally. We are therefore unwise to uncritically bow to domestic doctrine, when the history beneath it is frequently badly stained.

Instead of leaving international crimes to couple with whatever forms of participation might be on offer, in either the domestic or international sphere, should we not construct standards of blame attribution that conform with basic ideas in liberal theory? As almost everyone agrees, this necessitates treating the principle of culpability as sacrosanct. To paraphrase an example from H.L.A. Hart, whatever we think the purpose of mounting international prosecutions might be,²¹ we surely cannot punish the mother of an offender in the hope that this will prevent atrocity – it may well do so, but the mother is not guilty.²² Punishment without guilt is anathema to a liberal conception of the institution. And yet, the painful truth is that many criminal jurisdictions have an ambivalent commitment to this principle of guilt, and as a matter of practice, much global criminal law dispenses with the constraint. By insisting more forcefully on culpability, a universal standard of participation could guard against trials for international crimes being tainted by these objectionable influences.

Put differently, for international criminal justice to safeguard its self-image as a solution to (not facilitator of) human rights violations, it must

²⁰ For a harrowing account of criminal law under Stalin and Hitler, see RICHARD VOGLER, *A WORLD VIEW OF CRIMINAL JUSTICE* (2005).

²¹ These purposes are often remain implicit and contradictory in practice. See Mirjan Damaska, *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. OF INT’L L* 561 (2002).

²² H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY : ESSAYS IN THE PHILOSOPHY OF LAW* 5–6 (Rev. ed. ed. 1984).

discontinue the habits of unconditionally surrendering issues of participation to whatever standard is at hand. This not only means that international criminal courts and tribunals should be slow to absorb national laws into the international sphere without careful normative scrutiny of their content, it also suggests that the international community should have much more to say about the content of rules governing participation when they couple with international crimes in domestic trials. If we care about international criminal law being instrumentalized for illiberal purposes, both these concerns require us to construct a set of standards that at least fence off the possibility of excess. At present, the radical doctrinal heterogeneity that characterizes modes of participation internationally falls well short of this protective posture.

C. Preventing Arbitrary Choices of Criminal Law

Where there are two or more standards of criminal attribution on offer, and no second-order rules that mandate priorities where conflict arises between them, judges make determinations of guilt or innocence based on choice of law. This may well epitomize private international law, but its application in a criminal context breeds arbitrariness a liberal system should endeavor to eliminate. Note, before we begin, how peculiar this choice of law is for received wisdom about criminal law in many systems. As Markus Dubber points out, in the United States, territoriality is still the primary manifestation of the power to punish, such that ‘choice of law questions cannot arise in American criminal cases, since no sovereign could assert another’s authority’.²³ In cases involving international crimes, however, the fact that public international law remains silent about the modes of attribution that must attach to international crimes, means that even in the United States, courts will be forced to make elections between standards of participation derived from different systems. Sometimes, these elections determine guilt.

Consider the issue presently on appeal before the DC Circuit, in the case concerning the criminal responsibility of an alleged member of al-Qaeda held at Guantánamo named Al Buhul.²⁴ Several years ago, the US

²³ Markus Dubber, *Comparative Criminal Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (OXFORD HANDBOOKS), 1290–1291 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

²⁴ For a helpful summary of the litigation, including relevant court documents, see the wiki established by Lawfare, <http://www.lawfareblog.com/wiki/military-commissions/ali-hamza-ahmad-suliman-al-bahlul/> (last accessed 13 August, 2013).

Military Commission for Guantanamo convicted Al Buhulul of material support to terrorism for, among other things, producing a horrendously violent movie inciting anti-American sentiment and glorifying violence. The problem is, the Military Commission's jurisdiction was limited to violations of the laws of war, international law determined the content of that body of law, and '[m]aterial support for terrorism was not a war crime under the law of war'.²⁵ But the US government has appealed on the grounds that this form of participating in a war crime was well grounded in 'the *American* common law of war',²⁶ i.e. national criminal law. Whatever might be said about the merit of the argument, it is plainly undesirable for guilt and innocence *for one and the same crime*, to turn on a seemingly open choice of law.

To avoid this conundrum, should we not transcend these difficulties by arriving at a universal system of criminal responsibility for international crimes? This would mean that in the Guantánamo case, for instance, we would obviate the need for litigation on the source of modes of attribution for international crimes, since the issue would be clear. We would already know what the scope of international responsibility was because we would have specified this for all international crimes, before all possible fora, ahead of time. This universal, exhaustive, and principled specification would allow the application of global standards in this case, protecting the defendant against overly zealous retributive sentiment (a natural danger inherent in all criminal justice during war). At the same time, this universal standard would also allow states to categorically reject allegations of manipulating international law to enable their excessive response to security threats. In both senses, a universal standard prevents arbitrary choices of law from having pernicious effects on the system.

D. Establishing Clear Standards

Ambiguity is a related by-product of radical doctrinal heterogeneity in modes of participation for international crimes. At present, the overlapping nature of modes of participation that stem from a whole host of jurisdictions creates a system whose contours remain constantly opaque. For instance, if one is to ask the fairly basic question, 'what is the law governing accomplice liability of arms vendors?', one should expect a straight answer if we are concerned that responsibility for international

²⁵ *Salim Ahmed Hamdan v. United States of America*, 696 F.3d 1238, 1248 (D.C. Cir. 2012).

²⁶ *Ibid.*, at 1252 (emphasis in original).

crimes should mean something reasonably stable across an international community. Unfortunately, the intense divergence between standards that *could* apply depending on context, preclude any meaningful answer that is not wholly contingent. If this raises the alarm that members of civil society throughout the world cannot actually ascertain what these criminal standards are, it produces an equal threat that these actors are themselves unable to comport with pre-established rules. The current system trades clarity for doctrinal diversity.

If one attempts to answer the relatively simple question across the three levels of law governing participation, this tradeoff becomes plain. Let us start with the ICC treaty. During the negotiation of the Rome Statute, states adopted the standard for complicity contained in the U.S. Model Penal Code (MPC), requiring that the accomplice must provide assistance with the ‘purpose’ of facilitating the crime in question. At first blush, this was a strange choice given that, to the best of my knowledge, only 3 of 195 national jurisdictions in the world adopt a standard for complicity that even mentions ‘purpose’.²⁷ The peculiarity increases when one acknowledges that ‘purpose’ does not mean anything like what most international criminal lawyers attribute to the concept—most believe that it exonerates indifferent assistance, requiring the accomplice to display a concrete volition towards the consummated crime, for example, by providing the weapon *wanting* civilians to be killed with it.²⁸ Closer inspection of the MPC reveals something very different.

The U.S. Model Penal Code (from whence all purpose standards for complicity originate) does not understand the term “purpose” in this manner. The MPC also states that

When 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*.²⁹

²⁷ Admittedly, I count all of the state jurisdictions in the United States as one, even though many of them mention “purpose”. Note, however, this this almost never means what international criminal lawyers assume. See further below.

²⁸ Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT’L HUM. RTS. 304 (2007); SARAH FINNIN, 38 ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLE 25(3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2012); Chimene I Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

²⁹ See ²⁹ See THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES PART I § 2.06(4) 296 (1985). (emphasis added).

As leading American scholars acknowledge, this means that the purpose requirement goes only to the provision of the assistance (the arms vendor wanted to sell the weapon), leaving the mental element in the crime with which the accomplice is charged to determine the culpability requisite for the attendant consequences.³⁰ Thus, if recklessness suffices for crimes against humanity, the arms vendor may be responsible if she is reckless about whether the weapon would enable that consequence. The difference is enormous, but unclear based on the interpretations this concept has received from international lawyers that purport to apply custom to date.

At the *ad hoc* tribunals, the mental element required for complicity is knowledge, but this standard frequently dilutes into recklessness in practice.³¹ Future events cannot be known with certainty, and because complicity by definition must involve assistance prior to future criminal activity by a principal, complicity invariably boils down to an awareness of risk. This, of course, is not peculiar to international tribunals, they borrowed this legal position from national courts that do similarly.³² If that slippage in the subjective realm is slightly disorienting, it pales in comparison to the addition of ‘specific direction’ as an element of the *actus reus* of aiding and abetting in international criminal law.³³ As I have argued elsewhere, this newly adopted standard is not only exceptionally difficult to imagine as an element of the *actus reus*, it has no meaningful support in customary international law, national practice, or criminal theory.³⁴ Thus, to the ambiguities of the ICC statute, add the vagaries of customary international law.

Now assume that an arms vendor is charged in a national court for complicity in the atrocities his commerce enabled. Would a national court hearing a case involving complicity in international crimes apply the standard of purpose as to the final criminal outcome (the apparent ICC standard), purpose as to the assistance plus whatever mental element is required for the crime (the correct interpretation of the MPC standard), knowledge as in virtual certainty (the formal customary requirement) or just a substantial probability (the standard most frequently applied in practice)? Or, would it again be justified in applying national criminal

³⁰ The negotiating history of the MPC, leading American scholars, and 47 out of 50 state jurisdictions in the United States support this interpretation of “purpose.” I explore this interpretation in a forthcoming article entitled see James G. Stewart, *The Competitive Advantage of Corporate Responsibility for International Crimes: Justice After Kiobel*, J. of INT’L CRIM. L (forthcoming).

³¹ Stewart, *supra* note 9 at 192–194.

³² *Id.* at 192–193.

³³ See Prosecutor v. Perišić, Case No. IT-04-81-A, Judgement, (Feb. 28, 2013).

³⁴ For a complete list of my writings against “specific direction,” links to them and a summary of each, see <http://www.law.ubc.ca/faculty/stewart/direction.html>.

notions like *dolus eventualis*, which are lower again? In the physical realm, will these courts require some form of causal linkage between the accomplice's actions and the completed offence, and if so, how will they address the bizarre 'specific direction' requirement that is alien to their own national law and that governing complicity everywhere else?

Suddenly, the simple question seems anything but. If we care about clarity in the system, should there not be some attempt at resolving these sorts of ambiguities once and for all, in one foul swoop, for all jurisdictions that might try international crimes? Perhaps Anne-Marie Slaughter is right that judicial globalization will deliver this shared understanding in good time,³⁵ but that seems speculative in this field, where competing doctrine, judicial socializations, and political affiliations are likely to run against this current. What, too, of the rights of the accused along the way? (Not to mention the acquittals of those arms vendors who are morally very blameworthy on a defensible concept of complicity). For these and all the other reasons I set out here, academics should generate a doctrinal position that is both clear and universal.

E. Neutral Standards Elected Not Imposed

In a way, the ICC Statute is a testament to the political horse-trading that produces criminal codes that leave all participants slightly exasperated with the compromise they are forced to live with. Be that as it may, political power has proved the strongest determinant of normative content in modes of attribution. By no small coincidence, the differentiated system of attribution presently in force internationally mirrors that in place in all of the largest Western economic and military powers. The problem is, in a global project that aspires to universality, the dominance of French, English, American, and German criminal law in international criminal law can symbolize a continuation of the imperialist histories of coercion that left much of the world with criminal law that was imposed not freely chosen.

Consider colonialism. Criminal law was consistently at the vanguard of colonialism, both overt and implicit. By a process that commenced with an Indian Penal Code, for example, the British impregnated much of the territory it had forcibly acquired in the European rush to empire with legal principles that were drafted in London then applied with astonishing insensitivity to local conditions. I first attended a university in a city called

³⁵ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

Dunedin, in New Zealand. That city boasts the steepest paved street in the world, which is a product of colonial town planners literally dropping the map of the Scottish capital Edinburgh in a new antipodean geography: the names of streets and their proportions to one another are identical, even when they go straight up a cliff face. The transposition of criminal law to the colonies followed a similar logic, meaning that much criminal law doctrine remains the relic of an incomplete process of decolonization (where it was attempted at all). Needless to say, this may produce a real degree of social alienation from extant criminal law.

In other places, like Japan, the country itself adopted a European model of criminal law rather than having it physically imposed. Nonetheless, the variation was one of degree not type. In the case of Japan, it reluctantly decided to adopt the German criminal code when would-be colonizing powers forced it to elect between colonialism of a more traditional sort, and amending the internal system of government to make way for capitalist expansion from the ‘civilized’ world. As Antony Anghie points out in chilling detail, international law was entirely onboard with the gunboat diplomacy that facilitated this agenda, by erecting ‘standards of civilization’ that predicated international recognition (and therefore an ability to ward off colonial imposition), on having internally enacted the changes physical colonization would achieve.³⁶ Predictably, this lose-lose option produces criminal standards that that can well leave a bad taste in a local population’s mouth.

The question is, should international criminal law unquestioningly draw on modes of participation produced by these ugly histories? If we are concerned about local values, the answer will often be no. Scholars of comparative law show that many states will seek to avoid adopting legal standards that still touch sore historical wounds—to venture from criminal law momentarily, some argue that Canadian constitutional law is more influential as a model for imitation globally than that in the United States, not just because of the idiosyncrasies of the very particular American constitutional form, but also because ‘Canada has the virtue of not being the United States’.³⁷ For instance, when it comes to taking legal advice on constitutional reform, Vietnam avoids both the United States and France with some vehemence, drawing instead on Danish advice.³⁸ If international criminal law continues to adopt standards from dominant

³⁶ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 72–91 (2007).

³⁷ FREDERICK F. SCHAUER, *THE POLITICS AND INCENTIVES OF LEGAL TRANSPLANTATION* 256–257 (2000).

³⁸ *Ibid.*, at 260.

western powers, is it again imposing alien rules, without sensitivity to historical wounds?

Certainly, one does not have to travel far to unearth uncomfortable continuities between international criminal law, colonialism, and the domestic criminal law that was imposed throughout that dark process. We could point to the spirited dissent of the Indian Judge at the Tokyo Tribunal to flesh out these embarrassing points of continuity, or to the testimony of Göring at Nuremberg, who responded to questions about the German policy of *Lebensraum* (living space for the German people) that lead to intervention in Russia and beyond, by saying ‘I fully understand that the four signatory powers [to the Nuremberg Charter] who call three quarters of the world their own explain the idea differently.’³⁹ Surely, to distance this discipline from this terrible history and do our best to appease modern allegations that international criminal law is neo-colonial in structure, we should rethink international modes of participation along more neutral lines. That analytical process might clear the ground for criminal standards that embody truly universal values, instead of treating existing criminal doctrine throughout the world as necessarily reflective of cultural diversity worth celebrating.

F. Abandoning Custom as a Source of Law Governing Criminal Participation

We are all familiar with the label ‘victor’s justice’ and its origins at Nuremberg,⁴⁰ where Allies tried only the vanquished (despite no end of Allied offending) and staged some quite remarkable legal acrobatics in order to establish individual criminal responsibility at an international level. The Hague Regulations of 1907 made no mention of war crimes; the Kellogg–Briand Pact prohibited aggression but individual criminal responsibility was again conspicuously absent, and crimes against humanity were not enshrined in any treaties, let alone ones that bound the parties to those particular proceedings. Consequently, Allied courts

³⁹ GERRY SIMPSON, *LAW, WAR AND CRIME : WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* 99 (2007).

⁴⁰ For modern discussions, see M. Koskenniemi, ‘*Between Impunity and Show Trials*’, in 6 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW* 1-35 (J.A. Frowein and R. Wolfrum eds., 2002); A. GARAPON, *DES CRIMES QU’ON NE PEUT NI PUNIR NI PARDONER* (Paris: Odile Jacob, 2002), chapitre 2; G.J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 8-20 (Princeton: Princeton University Press, 2000); G. SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* 16-17 (New Hampshire: Polity Press, 2007).

bravely set about forging a new set of norms governing individual criminal responsibility, on the unashamedly open basis that the prohibition against retroactive criminal law was only a ‘principle of justice’ to be weighed against others.⁴¹

The United Nations Security Council did not want to be tarred with this brush. When it resolved to establish the ICTY, the UN Secretary General appealed to customary international law, precisely in order to differentiate this second phase of international trials from the “victor’s justice” dispensed at Nuremberg. As such, the ICTY would need to establish the existence of each and every aspect of the law they applied in customary international law, to avoid the spectacle of inventing crimes *après coup* or accusations that the Security Council had assumed legislative capacity. This newfound commitment to the principle of legality (frequently honoured in the breach),⁴² created a headache for practitioners, scholars, and participants who attempted to comply. When a defendant raised the morally innocuous question about whether the war crime of deportation required expulsion across a national border or not, lawyers would painstakingly paw over ICRC studies, military manuals and state legislation, in an attempt to divine conformity with a standard for custom that resists concrete meaning.⁴³ Should a universal notion of participation in atrocity not discontinue this practice?

Observe, for instance, the anomaly of customary international criminal law more broadly. In public international law, custom is more than slightly mercurial. As Martti Koskiennemi famously argued, custom is quite “useless” at generating definitive standards.⁴⁴ So, if recourse to custom creates problems of credibility in other areas of international law,⁴⁵ it is especially problematic in a criminal law context when the principle of legality, liberal notions of punishment, and international human rights are all jeopardized. Unsurprisingly, few other systems of criminal justice allow such a vague source of law to create criminal

⁴¹ Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 462 (1948).

⁴² Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

⁴³ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, 91–98 (Mar 22, 2006).

⁴⁴ Martti Koskiennemi, *Review – 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.”

⁴⁵ For criticism of the over-use of custom in international human rights law, see Bruno Simma & Philip Alston, *Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. YBIL 82, 88 (1988).

responsibility? True, common law traditionally allowed judge-made crimes of various types, but that historical tradition was uniformly discontinued across the Commonwealth some decades ago. As Beth van Schaack explains, this shift grew out of a gradual recognition that custom and criminal responsibility are antithetical.⁴⁶ Why does international criminal law plan on doing differently?

The consequences are significant. To recall the example we began with, the famed *Tadić* judgment incorporated a third variety of joint criminal enterprise, which allowed all participants in a joint criminal enterprise to be held responsible for crimes committed beyond those agreed, provided they were ‘a natural and foreseeable consequence of the common purpose’.⁴⁷ Thus, a soldier who participates as a driver in a joint attempt to capture and torture a high-level enemy is responsible for murder when the prisoner is beaten to death, even though he never struck a single blow himself and only foresaw that one of his confederates might commit the crime.⁴⁸ As I mentioned, the Cambodian Tribunal later declared that JCE III was never part of customary international law,⁴⁹ meaning that various individuals languishing in prison were probably held responsible based on a contentious reading of custom. Quelle horreur!

A universal set of standards defining international criminal responsibility with some precision in a separate treaty or UN Model Law would preclude a repeat of the type of radical disaccord that resulted in the context of JCE III (to name only one example), obviate the need to consistently interrogate the content of state practice, and reinforce the ability of international criminal justice to exemplify liberal notions of punishment, symbolically if not in reality. At least with respect to forms of responsibility, this move away from custom would also transcend the need for the ICC Statute to preserve the parallel development of customary international law.⁵⁰ If standards of responsibility are settled, coherent, and universal, ongoing developments in custom would just replicate the worst features of the system as it presently stands. On all counts, a system without customary international law is preferable.

⁴⁶ Van Schaack, *supra* note 2. PAGE NR?

⁴⁷ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, para. 204.

⁴⁸ In fact, there is good authority for the idea that the standard is actually objective foreseeability, lowering the mental element required for JCE III even further.

⁴⁹ I accept, of course, that this ruling only purported to pertain to the earlier period when the Khmer Rouge’s crimes were perpetrated, but the fact that both courts drew heavily on WWII caselaw, that the Cambodia decision explicitly disagrees with interpretations offered in *Tadić*, and that relatively little happened between 1975 and 1993 suggests that the two are probably in direct conflict.

⁵⁰ See *infra*, note 6.

G. Overcoming Western Technocratic Legalese

In the past years, the ICC has embraced German criminal theory as a tool to interpret its own statute. Initially, the ICC adopted ‘control over the crime’ as a means of distinguishing perpetrators from accomplices. This was then followed by the adoption of German theories of co-perpetration, indirect co-perpetration, and even perpetration through a bureaucracy. There is much excellent scholarship written on each of these theories that offers insightful explanations of these concepts; how they are necessary, normatively justifiable, and map onto the realities of international crimes in Africa and beyond. A major difficulty, however, transcends the normative coherence of the scheme itself. Is all this immense complexity comprehensible to those affected by the trial, most notably, the defendant? Here, I confess grave concerns that the technocratic vernacular might be alienating, and that adopting a different set of standards may have more universal appeal.

At least since Durkheim, punishment has sought to express moral opprobrium in ways that are constitutive of a moral community. In the English-speaking world, this expressive theory of punishment was popularized by Joel Feinberg, who argued that

punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.⁵¹

At an international level too, this idea of punishment as communication has caught on,⁵² largely as a product of its (apparent) ability to tolerate the great selectivity of international trials. But, if expressivism is to play any role in accounting for the curious phenomenon of international punishment, the message it conveys must surely be intelligible.

At present, I fear that it is not. While German criminal theory is often exceptionally insightful, categorically precise and analytically rigorous, I wonder how well it expresses condemnation internationally. When onetime President of Côte d'Ivoire, Laurent Gbagbo, was indicted by the ICC, the BBC article reporting the news had to place the term ‘indirect co-

⁵¹ JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1974).

⁵² 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 (2007); MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173–180 (2007); Bill Wringer, *War Crimes and Expressive Theories of Punishment: Communication or Denunciation?*, 16 *RES PUBLICA* 119 (2010).

perpetration' in inverted commas like this, in order to mark the technocratic legalese it had no expectation its readers would understand.⁵³ I have no reason to suspect that the accused, the victims, Ivoirians, or anyone else without a solid training in German criminal law will understand the label any better. In fact, I suspect that, like me, many senior practitioners within this discipline also struggle with the concept, marking an important divide between the strength of the rule in the body of the donor system, and its functionality once transplanted into the international.⁵⁴

These misgivings are also making themselves known in formal pronouncements of international courts themselves. In a very interesting separate opinion in the *Ngudjolo Chui* judgment before the ICC, Judge Christine van den Wyngaert expresses her doubts about the cultural appropriateness of German terminological distinctions for global blame attribution:

I doubt whether anyone (inside or outside the [Democratic Republic of the Congo]) could have known, prior to the Pre-Trial Chamber's first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of "indirect co-perpetration", much less that it rests upon the "control over the crime" doctrine.⁵⁵

A global concept of criminal participation that had genuinely universalist pretensions would overcome this technicality, ensuring that the important communicative aspirations of punishment are not consistently lost in translation. Indeed, given the recent history of colonialism, the racial backgrounds of indictees presently on trial before the ICC, and longstanding criticisms about this from the African Union and TWAIL scholars, should we not attempt to minimize Western technocratic legalese? To anticipate arguments of those who will feel this history most keenly, the challenge is to resist normative systems that (again) seem

⁵³ Ivory ex-leader charges revealed in John James, *Ivory Coast: Gbagbo faces murder and rape charges*, BBC NEWS, November 30, 2011, available at <http://www.bbc.co.uk/news/world-africa-15960254> (last visited Dec 4, 2012).

⁵⁴ My apologies to Máximo Langer for labouring the transplant metaphor he convincingly discredits. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

⁵⁵ The Prosecutor v. Mathieu Ngudjolo Chui, No.: ICC-01/04-02/12-XX[insert individual nr], Judgment, (18 December 2012). Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, para. 20.

culturally alien, morally superior, and largely insensitive to the needs of affected societies.

H. A Didactic Function for Western States Too

In keeping with the colonial history just mentioned, the passage of law to the ‘uncivilized’ was often accompanied by a one-sided didactic attitude. Aside from acting as a particularly sharp tool for ensuring peace, order and security on terms favorable to colonial masters, the criminal law was also a mechanism for educating ‘savages’ in the Judeo-Christian tradition.⁵⁶ Apart from colonial imperialism, other western states have also exported their criminal laws to the periphery. The United States, for instance, has also become a prominent exporter of criminal procedure (and the institution of corporate criminal liability).⁵⁷ Likewise, Markus Dubber uses a clever parallel to draw in the criminal law tradition that recently infiltrated international criminal law when he jests that: ‘the Sun never sets on German criminal theory’.⁵⁸ The criminal law everywhere is very heavily influenced by European history.

The danger is that these legal transplants give off an unjustifiable impression that law manufactured in the donor states is beyond reproach. On closer inspection, western systems are almost never conceptually pristine, and frequently, they could also benefit from the good example a universal concept of participation could provide. For instance, if we can agree that culpability is the touchstone of criminal responsibility, which is as close as one can get to a universally accepted principle in criminal law theory, then we quickly realize that even dominant Western systems depart from this principle habitually. In England and Wales, strict liability is widespread (and growing),⁵⁹ murder does not even require an intention

⁵⁶ Makau Mutua asks these questions of human rights, but his criticism frequently draws on international criminal law and the history of western atrocities. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 202 (2001).

⁵⁷ Elisabetta Grande, *Comparative Criminal Justice*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 191–209 (Mauro Bussani & Ugo Mattei eds., 2012) (“the US system, ... while being the major exporter of categories and concepts in substantive civil law, does not perform the same role in substantive criminal law”).

⁵⁸ Dubber, *supra* note 23 at 1298.

⁵⁹ 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 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

to kill,⁶⁰ and joint criminal enterprise is good law.⁶¹ In the United States, Pinkerton liability, felony-murder, and the natural and probable consequences rule in complicity cases, all do similarly.⁶² Should international criminal law not set a standard that exposes these excesses to correct for their corrosive influence?

The gap between theory and practice in Germany is undoubtedly less intense, but it is also unmistakable. To filter out causal contributions that are minor, remote, unusual or that involve third party interventions, for example, all German academics agree that a concept called objective attribution (*objektive Zurechnung*) is necessary;⁶³ but German courts do not apply it in practice.⁶⁴ On issues of complicity, too, many crimes under German law require a causal link between action and prohibited consequence, but courts reduce the accomplice's contribution to 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.⁶⁵ As one might expect, the vast majority of German academics strongly disagree with this approach on the grounds that it unjustifiably discards causation.⁶⁶ In short, no system of criminal law achieves perfection.

So why do I labour these shortcomings, when all of these systems have so much to offer international criminal justice? My point is only that international criminal responsibility should have a didactic function that is universal in reach, instead of replicating a civilizing agenda that has historically been very one-sided. After all, some of the leading criminal

AND THE FUTURES OF CRIMINAL LAW (Bernadette McSherry, Alan Norrie, & Simon Bronitt eds., 2008).

⁶⁰ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 244 (6th ed. 2009) (“[In English criminal law there are now two alternative fault requirements for murder: an intent to kill, or an intent to cause grievous bodily harm.”]).

⁶¹ For a justification of JCE in English criminal law, see Andrew Simester, *The Mental Element in Complicity*, 122 L. Q. REV. 578, 599 (2006).

⁶² Paul H Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617–618 (1983).

⁶³ H. KORIATH, *KAUSALITÄT UND OBJEKTIVE ZURECHNUNG* 15 (1st ed., Baden-Baden: Nomos, 2007), (discussing the implications of normative attribution); M. MAIWALD *KAUSALITÄT UND STRAFRECHT. STUDIEN ZUM VERHÄLTNIS VON NATURWISSENSCHAFT UND JURISPRUDENZ* 4-5, 9 (Munich: Grundlegend, 1980).

⁶⁴ CLAUDIUS ROXIN, *STRAFRECHT. ALLGEMEINER TEIL I: GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE: BAND I* 351 (4., vollst. neu bearb. A. ed. 2005).

⁶⁵ RGSt 58, 113 (114-115) (Entscheidungssammlung des Reichsgerichts in Strafsachen Vol. 58, p. 113, at pp. 114-115). See also, CLAUDIUS ROXIN, *STRAFRECHT. ALLGEMEINER TEIL BAND II: BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT*, 2003, § 26 marginal number 186, at p. 194.

⁶⁶ 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.

theorists of our time support tasking international criminal law with this heavy burden. According to George Fletcher, ‘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’.⁶⁷ A universal system of participation in international crimes could go some way to achieving these lofty educative goals for developing and developed countries alike.

I. *Enabling Practice*

The current doctrinal heterogeneity in modes of participation is no friend to practitioners. To recall, practitioners are required to have some appreciation of forms of attribution at three competing levels: (a) customary international law; (b) the ICC Statute; and (c) national legal systems. Some would also add a fourth, namely (d) criminal law theory, in that one cannot assume that any of these sources are necessarily conceptually defensible. This expectation is onerous, especially when some of the key national concepts are incorporated into international criminal law from countries whose languages are not official to the courts in question, and when most practitioners come to the discipline with experience in domestic criminal practice or international law rather than comparative criminal law or theory. I here sketch some of the possible distortions this reality produces and the ways a universal standard might account for them.

First, modes of participation are presently very difficult for practitioners to identify. The past decade of litigation has produced moving goalposts, making it extremely difficult to litigate cases. Now JCE best captures the realities of responsibility during atrocity, but suddenly JCE III’s very existence is put in question. Is indirect perpetration the superior mechanism for describing the responsibility of superiors? What exactly does this mean? In order to differentiate between co-perpetrators and accomplices, we must recognize that co-perpetrators make essential contributions whereas accomplices do not, but atrocity is frequently overdetermined, so perhaps we water the ‘essential contribution’ standard down somewhat.⁶⁸ Complicity might criminalize too much in our imperfect world, so best append an element like ‘specific direction’, no matter whether it accords with custom, precedent or orthodox theory.⁶⁹ The

⁶⁷ GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 20 (2007).

⁶⁸ James G. Stewart, *Overdetermined Atrocities*, 10 J. INT’L CRIM. JUST. 1189 (2012).

⁶⁹ See *infra*, note 34.

chameleon-like status of these forms of participation is extremely difficult to work with.

Second, the current diversity of modes of participation promotes experimentation. International institutions tend to be populated by many highly intelligent people, young and old, who are eager to 'solve' the dilemma of international criminal attribution once and for all. This well-intentioned desire often falls victim to competing national perspectives on criminal law, overly romanticized visions of these domestic legal systems, and the influence of individuals capable of speaking languages that allow them to span discourses at the three (sometimes four) levels I mention. As part of this process, one assumes that modes of attribution can be 'tweaked' upwards here and downwards there to create the optimal solution. The problem is, without any unified vision of how this should take place or a shared commitment to foundational issues in criminal law theory, these 'tweaks' create an unending cascade of change. Needless to say, it is hard to litigate cases of enormous factual complexity, based on legal standards that are in a constant state of flux.

Relatedly, the obvious danger is that those who are called to decide these issues are unable to inform themselves of the underlying principles to their own satisfaction. Which exceedingly busy judge has the time necessary to study comparative criminal theory? This understandable difficulty risks precluding genuine dialogue among colleagues and, thereby, the emergence of shared understandings on issues of great importance. Expertise in modes of attribution requires knowledge of issues at three (and probably four) levels as mentioned above, specific linguistic skills, an ability to follow developments across numerous fields and a general openness to conceptual issues. Therefore, modes of participation risk being dismissed as too complicated or overly academic for practitioners. Why debate indirect co-perpetration if you neither understand the concept fully nor grasp its necessity? Thus, practitioners understandably fall back on the law they know from home and a 'do-the-basics-right' attitude.

Unsurprisingly, this fall back position can produce important internal factionalisms between different national camps, which are detrimental to the working experience of those involved and unproductive for the overall delivery of justice. Admittedly, the intense culture of denial about the inevitable psychic impact of atrocity on practitioners (especially the natural correlation with anger) might be the more important causal influence of this antipathy, but I still believe that a universal notion of participation would help resolve these internal tensions considerably. A universal concept of participation could answer many of these legal questions up front, establishing a common structure with some greater

degree of certainty while simultaneously minimizing opportunities for conflict. Perhaps, it might even help develop a mature sense of autonomy and an independent criminological self-understanding particular to the discipline.

Accordingly, universalization of participation in atrocity would enable justice, rather than deferring to the radical heterogeneity of legal doctrine that presently govern participation in international crimes at international and national levels. As I have shown, the content of these forms of participation international criminal law unquestioningly couples with is frequently more the product of historical chance than underlying cultural values worth venerating. Without doubt, a universal concept of participation would not prevent legal disputes about participation, overcome the different socialization of practitioners on these issues, or foreclose the value of national criminal law in thinking about these questions, but it would improve the day-to-day realities of practice considerably. At present, practitioners are unduly bogged down by a set of basic legal questions that are unlikely to be resolved through litigation in the near term, necessitating a quite different approach.

J. Cost Savings

International criminal justice is expensive. 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 over the past decades, with an estimated cost of around \$25 million per case.⁷⁰ Admittedly, it is exceptionally difficult to quantify the portion of that figure attributable to the unsettled heterogeneous nature of international modes of attribution. Still, limiting litigation over these concepts would certainly free up considerable capacity, save donors resources, and hasten the trials some have colorfully described as being ‘as annoying and interminable as the Tour de France’.⁷¹ Just a short glance at the number of appellate cases that involve complex questions about modes of participation confirm as much. Here, I detail two such examples that a

⁷⁰ UNSC, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, *Report of the Secretary-General*, U.N. Doc. S/2004/616 (August 23, 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).

⁷¹ 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);

single universal concept of participation would improve upon, if not eliminate.

On 29 November 2002, Dragoljub Ojdanić filed a motion before an ICTY Trial Chamber challenging the Tribunal's jurisdiction to try him using JCE as a mode of attribution, a notion the statute did not explicitly mandate.⁷² This challenge to jurisdiction delayed his trial during the time necessary to consider the motion, and produced the usual set of memoranda in a system characterized by an exceptionally high rate of written submissions: the Prosecution responded a fortnight later and the defendant filed a written reply early in the New Year, after the Christmas break. On 13 February 2003 the Trial Chamber rendered its decision dismissing the challenge to jurisdiction, upon which Ojdanić quite appropriately exercised his right of appeal. The appeal initiated a second round of written briefing, before a bench of the Appeals Chamber met in late March 2003 to confirm that the appeal indeed related to jurisdiction. Six months later, the Appeals Chamber rendered its final decision – JCE was indeed a part of the ICTY's jurisdiction.

It is hard to know how much time, resources, and human capital were invested in each step of this procedure (not to mention the costs associated with delaying the trial). Nevertheless, this anecdote again raises questions about the propriety of leaving modes of attribution to the vagaries of customary international law. Would it not be better to be clearer about the content of criminal responsibility well in advance, such that the very existence of a key concept in blame attribution cannot reasonably be called into question at an interlocutory phase? To be clear, I am not opposed to challenges to jurisdiction *per se* (they serve an important function in some contexts), but it is the height of inefficiency to be litigating the existence of a basic form of participation that should be defined within a court's statute. A universal theory of participation would not preclude challenges to jurisdiction, but it would minimize the need for modern courts to spend so much precious time and resources on very basic issues.

These costly inefficiencies are not limited to the *ad hoc* tribunals. The current debate at the ICC around 'control over the crime' as a mechanism for differentiating perpetrators from accomplices is a case in point too. To recall, up until the first trial judgment of the ICC in *Lubanga*, all pre-trial chambers had interpreted Article 25(3)(a) as requiring control over the crime, a concept borrowed from the German theorist Claus Roxin. Within

⁷² All this procedural history is set out in the Appeals Chamber's final decision. See *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 1-4 (21 May 2003).

the *Lubanga* trial judgment, Judge Fulford penned a lengthy dissent disagreeing with the invocation of this theory, since the Statute made no explicit reference to it. Although a differently constituted Chamber acquitted Mathieu Ngudjolo Chui without broaching the subject, Judge Van den Wyngaert offered a concurring opinion that joined in the skepticism.⁷³ Of course, I do not doubt that these questions are normatively significant, but I do wonder whether litigation is the most cost effective manner of attempting to resolve them.

If precious resources required for defence, prosecution, and judiciary to persistently circle around these questions were saved, they might open up greater possibilities for a whole range of programs that improve institutional responses to mass violence. This includes greater possibilities for victim compensation, better media outreach to affected communities, superior investigative capacities, more structural assistance to the defence, and so forth. If cost savings need not necessarily be spent within the institution itself, they could also allow for greater use of truth and reconciliation commissions or other transitional justice processes at the national level. Perhaps, the funds might even be invested in projects that alleviate structural causes of atrocity, like dysfunctional judicial apparatuses, endemic poverty, and natural resource predation. The point is, we should not forget that the absence of clarity on these core issues of responsibility comes at a price.

III. CONCLUSION

In this paper, I offer ten rationales for adopting a single universal notion of participation in international crimes. This universal concept would travel with international crimes, such that anytime an international crime was charged, we would know what modes of attribution apply. All national and international courts would employ this form of participation when hearing cases involving international crimes, thereby circumscribing what responsibility for atrocity means globally. I have attempted to leave to one side what the content of this universal notion of participation should be, in the hope of showing that the structural problems within the system as presently constituted are more the responsibility of academics and states than judges or litigators. I hope to have at least raised the question whether we academics are not better placed to resolve some of these core issues among ourselves, then advise states accordingly? If one feels skeptical about the ability of scholars to reach consensus on issues of this sort than translate this consensus into practice, recall that in 1902, a

⁷³ See *infra*, note 55.

congregation of the *Union Internationale de Droit Penal* (UIDP) held in St. Petersburg agreed on a particular theory of blame attribution.⁷⁴ Professor Franz von Liszt, one of the organization's founders, was such an ardent supporter of the theory that he argued it should feature as a central part of 'the unification of criminal codes', and the 'universalization of criminal law'.⁷⁵ Given that the UIDP boasted over twelve hundred members from over thirty countries at the time, this history is encouraging. Moreover, after the endorsement, a number of the UIDP's members lobbied successfully for the amendment of their own domestic criminal codes.⁷⁶ I believe academics in international criminal law should attempt something similar.

⁷⁴ BULLETIN DE L'UNION INTERNATIONALE DE DROIT PÉNAL Vol 11 137 (1904). The Congress endorsed the unitary theory of perpetration, but in keeping with my agnosticism here, I am more interested in the fact of agreement than the content.

⁷⁵ LEON RADZINOWICZ, THE ROOTS OF THE INTERNATIONAL ASSOCIATION OF CRIMINAL LAW AND THEIR SIGNIFICANCE: A TRIBUTE AND A RE-ASSESSMENT ON THE CENTENARY OF THE IKV 24 (1991).

⁷⁶ The countries are Denmark, Norway, Austria, Italy and Brazil. I discuss this history in a forthcoming work. See James G Stewart and Asad Kiyani, *Pluralism by Unification: Towards a Single Concept of Participation in International Crimes* (forthcoming)