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# Accountability for System Criminality

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André Nollkaemper argues that individual criminal culpability fails to reflect the structural nature of mass atrocity.[1] He encourages attempts by international criminal law to recognize collective action, for example through vicarious modes of liability, but ultimately notes that even expansive liability doctrines yield only a partial print of justice. Hence, international criminal law experiences an agency gap. Nollkaemper then argues that state responsibility, and other forms of collective responsibility, may better capture system criminality and related crimes of obedience.[2] That said, whereas international criminal law suffers from an agency gap, collective forms of responsibility suffer from an institutional gap. At present, there is no effective way to actually enforce collective responsibility, in particular beyond the state as juridical subject. Nollkaemper encourages the United Nations Security Council to step into the breach.[3] Ultimately, he posits that the relationship between individual criminal culpability and collective civil responsibility should become more synergistic.[4]

I agree with nearly all of Nollkaemper's assumptions, conclusions, and arguments. International criminal law conceptually situates itself upon a fiction, namely that wide-scale atrocity is the crime of individuals.[5] Such it may be, but it

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1. André Nollkaemper, *The Systemic Effects of State Responsibility for International Crimes*, 8 SANTA CLARA J. INT. L. 313, 314 (2010).
2. *Id.* at 336, 352.
3. *Id.* at 347-52.
4. *Id.* at 352.
5. This paradigm effectively emerged at Nuremberg, where the International Military Tribunal (IMT) intoned that the crimes in question were not the crimes of abstract entities, but the crimes of men and, what is more, that "*only* by punishing individuals who commit such crimes can the provisions of international law be enforced." 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (Nuremberg, 1947)

also is much more. The sum is larger than the parts. Atrocity is the product of groups, of acquiescent bystanders, of collective action, of colonial histories, of blood diamonds and coltran, and of the passivity of powerful foreign governments and international organizations.[6] Yet the criminal law pins blame only on those few who are most evidently, most notoriously, or most immediately responsible. International criminal law thereby offers a simple, reductionist lens that flattens the complex etiology of atrocity. This flattened approach may soothe our sensibilities. It may assuage our fears. It does not embarrass too much or too many. Nevertheless, it remains a fiction.

Alternately, the collective and systemic nature of atrocity might push us beyond the criminal law to consider what collective and systemic forms of justice would look like. In *Atrocity, Punishment, and International Law*, I argued that international criminal law would benefit from a horizontal expansion that welcomes other forms of law and regulation so that post-conflict justice can become much more than merely criminal prosecutions and sequestered incarceration.[7] Justice should implicate much more than the courtroom and the jailhouse, both of which currently benefit from iconic status as the reflexive (or, in Nollkaemper's words, "dominant") accountability response to mass atrocity.[8]

To varying degrees, wide-scale atrocity is a collective project nearly everywhere that it occurs.[9] Most particularly in cases of genocide and those crimes

(emphasis added). The IMT judges initially meant to respond to defendants' claims that they bore no responsibility for crimes committed by the Nazi state. In other words, the IMT underscored that these crimes were those of individuals in an attempt to avoid the situation where the responsibility of an abstract collective precludes the identification of individual guilt. That said, in the many years since Nuremberg, this sentence has come to stand for a much more independent proposition, namely that it is only by prosecuting individuals that justice can be served, thereby obscuring the responsibility of collectives. In my opinion, the challenge is to view both individual and collective responsibility as mutually complementary to the justice narrative, not mutually exclusive such that the instantiation of the former comes at the cost of the suborning of the latter.

6. Nollkaemper, *supra* note 1, at 320 (stating that "[p]erhaps the most important mechanism by which collectivities contribute to international crimes is through their influence on the normative climate").
7. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).
8. Nollkaemper, *supra* note 1, at 313.
9. *See, e.g.*, Steve Heder, *Reassessing The Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability In Comparative Perspective*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 377 (Ramji and Van Schaack eds., 2005) (discussing Cambodia); *See also* DRUMBL, *supra* note 7, ch. 2 (discussing Rwanda, Nazi Germany, Serbia, and Timor-Leste).

against humanity that are motivated by discriminatory animus, individual killers are not really deviant. Nor are they transgressive, delinquent, or pathological. Rather, these killers may simply be conforming to social norms that dominate in the place and time where they undertake their work—they may well believe themselves engaged in purifying their spaces of the 'other,' of 'taking out the garbage,' of 'expunging the vermin,' of 'trimming the tall trees,' and of 'pulling out the bad weeds.' Theirs is often a terrible but normalized social project, a bureaucratic enterprise, a day of service to the collective.

Accordingly, I believe international criminal justice needs to engage actively with collective responsibility and, in this vein, I applaud Nollkaemper's work. My sense is that in recent years collective responsibility—despite the admonitions of some that it is primitive or primeval[10]—seems to have made a small yet perceptible renaissance in the dialogic space of international criminal justice.

In the paper, Nollkaemper focuses his discussion on the international level. At this level, he locates institutional gaps in the enforcement of collective responsibility.[11]

I will leave for another day an assessment of Nollkaemper's encouraging of the United Nations Security Council to play a more involved role in the institutional enforcement of collective responsibility. Obvious critiques to Nollkaemper's proposition are: (1) that the Security Council will be paralyzed by politics; (2) that empowering the Security Council to pursue justice along collective lines may come at the price of its shying away from the International Criminal Court (*e.g.* by not referring situations or by deferring referrals under article 16 of the Rome Statute)[12]; and (3) that the Security Council may not be able to proceed in a principled, predictable, or consistent manner—these characteristics generally being regarded as central to the legitimacy of any accountability enterprise.

I propose moving the conversation off the international plane. International institutions are not the only show in town. After all, the bulk of the accountability business occurs at the national level. National institutions could robustly instantiate institutional and methodological diversity in the accountability narrative. International criminal lawyers might therefore carefully consider outreach to collective forms of responsibility within the context of national and local institutions.

10. Nollkaemper, *supra* note 1, at 323.
11. *See id.* at 344-45.
12. Rome Statute of the International Criminal Court art. 16, July 17, 1998, 2187 U.N.T.S. 91.

A variety of national initiatives already contemplate what could be described as collective forms of responsibility. Some of these are juridical in nature. Examples include the Alien Tort Claims Act in the United States, which permits civil damages in tort for violations of the laws of nations.[13] Claims have gone forward, amid considerable controversy, against corporations (a collective actor that, at present, is not a formal subject of international law).[14] The Anvil Mining Company, an Australian-Canadian corporation, has been the subject of investigation in Australia for alleged involvement in serious human rights abuses in the Democratic Republic of the Congo. Lawsuits brought in U.S. courts by Holocaust survivors and other victims of atrocity in World War II have prompted Germany, along with other states and other collective entities such as banks and insurance companies, to undertake massive restitutionary settlements.[15] In total, Michael Bazyler estimates these settlements as involving $ US 8 billion.[16] Even museums have restituted art found in their collections that had been stolen by the Nazis. Moreover, it is entirely plausible that national juridical organs could ascribe group liability to militias, organizations, non-state actors, rebel groups, ministries, departments, and corporations. Traditional forms of dispute resolution, for example in the African context, may serve reintegrative functions for groups of offenders, such as child soldiers.[17]

What is more, collective manifestations of responsibility need not only be articulated in judicial or quasi-judicial settings. Truth commissions can locate and ascribe collective and system responsibility. Public inquiries can expose the conduct of organizations in times of atrocity without even needing to identify culpable individuals. Nollkaemper laments the lack of accountability for detainee abuses occurring under the watch of the Bush Administration.[18] A truth commission or public inquiry, which is currently under somewhat anemic public discussion in the United States, could uproot the sources of the abuses in a manner that transcends the military courts-marshal that have thus far clumsily targeted

13. Alien Tort Statute, 28 U.S.C. § 1350 (2004).
14. *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).
15. *See* HOLOCAUST RESTITUTION, PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 103 (Michael J. Bazyler & Roger P. Alford eds., 2006).
16. *Id.*
17. The International Criminal Court has no jurisdiction over children (which it defines as persons below the age of 18 at the time of the alleged wrongdoing). *See* Rome Statute of the International Criminal Court, *supra* note 12, art. 26.
18. *See* Nollkaemper, *supra* note 1, at 317, 319 (owing to the system criminality of the conduct).

only lower-level offenders.[19] Other forms of justice, including memorialization, lustration, commemoration, and reparations also can proceed at the level of collectivities, thereby closing the accountability gap. As David Gray argues, perhaps states ought to reconsider categorically forgiving odious debt that weighs down successor regimes insofar as such forgiveness might compromise "transitional imperatives of truth and justice" that relate to both recipient states as well as transnational corporate investors.[20]

Moreover, thought should be given to how the architecture of international criminal law might stimulate methodological diversity at the national and local levels. As I have argued elsewhere, it is my belief that at present the institutions of international criminal law, predicated on primacy or complementarity, encourage mimicry among national justice initiatives, instead of diversity, thereby simply dissuading experimentation at the national level with mechanisms that diverge from the predicate of atomized individual conduct that underpins the Nuremberg paradigm and which Nollkaemper laments as offering only a distorted picture of justice.[21]

In sum, the institutional gap potentially could be filled by national or local institutions.

Nollkaemper does not examine why, exactly, individual criminal culpability has achieved iconic status. One narrative of international criminal law is that the field has emerged through the heroic efforts of committed lawyers and activists who have pushed back against powerful and embedded state interests. Certainly, there is some truth to this narrative. However, the overall etymology of the field is far more nuanced. International criminal law, which has benefitted from a flurry of institution-building, would not exist *but for* the support of states. Collective entities such as states, international organizations, non-state actors, groups, and corporations may benefit from the crimped narratives that international criminal law produces. International criminal law makes it possible for states, and populations, to point their fingers at a handful of notorious offenders and leaders and say, "Aha! It's your fault that mass atrocity occurred." And then to add: "That's it—when you are prosecuted, and punished, we move on, close up shop, and thereby attain closure. Justice has been served."

19. *See, e.g.*, Dahlia Lithwick, *Truth or Consequences?*, SLATE, Nov. 26, 2008, *http://www.slate.com/id/2205566/*.
20. David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS. 137, 137 (2007).
21. DRUMBL, *supra* note 7, ch.5.

The ICC encourages self-referrals in which illiberal governments may consolidate their own power by externalizing terrible violence by rebel groups upon the ICC which thereby becomes hamstrung in its ability to investigate human rights abuses by the referring governments. In this sense, the ICC can become co-opted by states. Uganda has neatly managed the ICC to (justifiably) discredit the LRA rebels while (unjustifiably) cloaking its own practices in Acholiland. Moreover, the risk of co-optation, which arises from the dependence of international criminal tribunals on the cooperation of concerned states, is not limited to the ICC. Rwanda has effectively managed the ICTR such that its judicial narrative is limited only to the genocidal abuses of the former Hutu government.[22]

The truths emerging from the atrocity trial are largely convenient truths. They do not create structural disquiet. The rules of evidence admit only that which implicates the individual defendant. Consequently, the viability of collective responsibility frameworks necessarily involves dissipating, overcoming, or wrestling the fears of states as to the narratives that will result. The viability of collective responsibility schemes also depends on candidly assessing the argument that preserving the humanity of aggressor collectivities by denying collective responsibility is a pivotal element in facilitating transitions toward peace. Sometimes denial serves valuable purposes.

One of Nollkaemper's suggested reforms—that the culpability mechanisms of international criminal law expand to better welcome vicarious liability doctrines[23]—is hotly debatable. Nollkaemper effectively suggests that international criminal law should cover more kinds of conduct. However, international criminal law is predicated on individual culpability proven beyond a reasonable doubt. Vicarious liability principles compromise this inherent assumption, thereby injecting some incoherence into the discipline. An alternate approach would entail cabining international criminal law and, instead, expanding collective

22. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION (Cambridge University Press 2008).
23. Examples might include joint criminal enterprise, command responsibility, aiding and abetting; and also injecting greater elasticity into juridical understandings of "committing," "instigating," "ordering," and both "direct" and "indirect co-perpetration." *See, e.g.*, Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeals Chamber Judgment (March 12, 2008) (expanding the legal definition of committing genocide and applying that extended definition to crimes against humanity); Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Trial Chamber Judgment (February 27, 2009) (noting that "committing" is not limited to direct and physical perpetration). I quibble with Nollkaemper's conclusion that article 25 of the Rome Statute recognizes joint criminal enterprise.

responsibility doctrines. Despite rhetorical pronouncements of "duality" by the International Court of Justice (ICJ) with regard to the overlapping nature of state responsibility and individual penal responsibility,[24] in practice this duality looks much more like subalternity. Specifically, in the overlapping jurisdiction over genocide at Srebrenica, the work of the ICJ has become subordinated to that of the ICTY. Goldstone and Hamilton argue that the ICJ's approach to fact-finding in the *Bosnia v. Serbia* litigation, in which the ICJ was extremely dependent on findings (and even refusals to make findings) of genocide by ICTY judges and prosecutors in charging documents, exceeded appropriate levels of deference.[25] I would add that the express political gamble by Serbia to supply redacted evidence to the ICTY (at the time to shield itself from concurrent state responsibility at the ICJ), and its success in undertaking this gamble, demonstrate that the duality between criminal and state responsibility operates in name only. Until the iconography of the criminal trial as the first-best best practice for accountability in the wake of terrible atrocity is debunked the power dynamics will not really change. The ICJ and ICTY co-exist in some sort of duality, but one that apparently requires bargains (as in the context of the evidence issue) that compromise the overall justice narrative to the detriment of collective civil responsibility and in favor of individual criminal responsibility. Furthermore, the status of transitional justice mechanisms at the national level is circumscribed not only by the lionized status of the atrocity trial, but also by the powerful transplant effects of primacy and complementarity doctrines. These doctrines replicate the internationalized status of liberal trials and correctional preferences within national jurisdictions to the detriment, I argue, of collective assignations of responsibility.

Despite these lamentations, it will not be possible for proponents of collective forms of responsibility to see their ideas gain traction in the absence of compelling arguments as to why responsibility should be assigned collectively. Achieving this traction requires much more than simply saying trials do little. After all, little is better than nothing. Unless collective forms of accountability can do more, why bother pursuing them? A burden of proof question arises. Nollkaemper might give us more in this regard.

24. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 67 (Feb. 26), *available at* http://www.icjcij.org/docket/index.php? pl=3&k=f4&case=91&code=bhy&p3=4.
25. Richard J. Goldstone & Rebecca J. Hamilton, *Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, 21 LEIDEN J. INT'L L. 95, 106 (2008).

To be sure, it is difficult to give more right now. Collective responsibility schematics have not seen much action in the fight against impunity. The ground has been occupied by the atrocity trial. And the atrocity trial is not ready to cede its ground, or whittle away its vaunted status. Still, proponents of collective responsibility must think hard, at least in theory, about what collective sanctions could bring to the justice table.

According to international criminal jurisprudence, the purposes of criminal punishment include retribution, deterrence, rehabilitation, truth-telling, incapacitation, expressivism, and reconciliation. Among these, deterrence and rehabilitation are mentioned most frequently. I have argued elsewhere that criminal prosecution and incarceration go only a small way to attain these goals, which is disappointing in light of the rhetoric of international criminal lawyers as to the deterrent and retributive value of the international atrocity trial.[26] I believe that among all goals, trials do the best at attaining expressive values, which I identify as simultaneously constructing the value of law and authenticating a historical narrative.

But the question arises: would collective sanctions fare better on any of these fronts? I believe they might. Certainly, they offer a more accurate picture of the polycentric provenance of atrocity, of its diffuse origins, and of the role of the many (in particular benefitting bystanders). In this sense, by implicating more individuals in the accountability narrative, collective sanctions might better attain overall retributive purposes. That said, collective sanctions may be inequitable insofar as crudely collective assignations of responsibility might implicate individuals regardless of what they actually did, how much they suffered, or how bravely they resisted. In response, it is not inexorable that the responsible group be designed crudely. We can consider careful and hybrid forms of drawing the group; and even structures where individual members might rebut a presumption of inclusion. I also have argued that collective sanctions might serve deterrent purposes by impeding the normalization of hate among the general population, in particular benefitting bystanders (without whom, I argue, there would be no possibility of truly *mass* atrocity). At present, insofar as criminal responsibility only reaches a handful of individuals, the general population has no incentive but to play along as the conflict entrepreneur consolidates his power base and normalizes the criminal state or association. If benefitting bystanders could face

26. DRUMBL, *supra* note 7, ch.6.

liability for the crimes ultimately committed by conflict entrepreneurs and zealous killers in their collective names, then perhaps they would have an incentive to snuff out these actors before the society becomes habituated into killing. Accordingly, the "breeding ground" for atrocity may diminish.[27]

I also argue that collective forms of responsibility carry significant expressive and denunciatory value. Although Nollkaemper turns to Darcy's work to state that the practice of international reparation is such that its effect on ordinary citizens is negligible, I do not accept this conclusion.[28] Tell that to the citizens of Iraq during times of economic sanction—a clear case-study of the Security Council taking collective responsibility measures, which obviously bears upon Nollkaemper's recommendation for the Security Council to play a more active institutional role. Tell that to Germans following Versailles—more than anything else, it is that treaty which has turned collective sanction into a *bête noire*. Serbia vigorously sought to insulate itself from the ICJ litigation. Serbia was more concerned with the prospect of a state responsibility award against it than the individual criminal responsibility of a small subset of formerly popular leaders. The weight of an entire society being attributed the crimes committed in its collective name is burdensome. Whereas individual criminal punishment bestows collective innocence on anyone not charged, collective responsibility provides no such out, except in situations where individuals have an opportunity to rebut the presumption of responsibility by demonstrating what, exactly, they did to resist atrocity committed in their collective names. To this end, in designing collective responsibility schemes proponents need to pay great attention to effect and vocabulary. Collective responsibility is not tantamount to collective punishment or collective guilt, both of which, it is widely argued, are prohibited by customary international law.

In sum, up and until those concerned with the inadequacy of criminal trials can demonstrate why collective forms of sanction add something to the justice metric, it will be difficult to unseat the primacy of the criminal trial given its relative practical convenience and allure in the public imagination, not to mention the path-dependency that has coalesced in its favor. To this end, calls to close the institutional gap in favor of more rigorous enforcement of collective responsibility—whether at the international, national, or local levels—must make a

27. Nollkaemper, *supra* note 1, at 352.
28. *Id.* at 324.

case why collective responsibility attains pertinent goals and avoids pernicious harms.