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## Introduction

# Accountability for Collective Wrongdoing

*Tracy Isaacs*

The contributions to this volume address a range of questions that arise when we start to consider legitimate ways to respond to collective wrongdoing and collective guilt. The chapters that follow cover an array of topics, from the effectiveness of international courts and tribunals, especially atrocity trials, in achieving postconflict justice to home state responsibility for the conduct of transnational corporations. Many of the contributors engage either directly or indirectly with questions of collective punishment and what justified means, if any, there are to punish collectives. Although the notion of collective responsibility is not the central focus of debate in this volume, the authors attend extensively to what collective responsibility consists in and how it distributes, particularly but not exclusively, in the context of justified forms of collective punishment. The issue of distribution raises questions about the nature of membership and the responsibilities, obligations, and even risks to which membership in a collective such as a state or nation gives rise, particularly if that collective is engaged in wrongdoing.

The chapters address the issues from the multiple disciplinary perspectives of law, political science, and philosophy. The volume is divided into two parts. Part I focuses on collective accountability in international law. Part II focuses on distributing accountability. In truth, many of the chapters fit well into both sections, but those in Part I engage more directly with the international legal structures – such as international criminal tribunals, the International Court of Justice (ICJ), and the International Criminal Court (ICC) – and some of the challenges and limitations that those entities have in addressing collective justice.

In this introduction, I take up two tasks. First, I provide a basic historical and scholarly context for the topics that arise in the chapters that follow. Second, using these contexts as a starting point, I draw attention

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to three main themes that arise throughout the chapters: (1) the limits of individual criminal trials for addressing atrocity; (2) issues about responsibility, punishment, distribution, and group membership; and (3) collective punishment and alternatives.

#### HISTORICAL CONTEXT

In the aftermath of World War II, two major events occurred that had a profound influence on contemporary thinking about accountability for collective wrongdoing. The first of these events was the establishment of International Military Tribunals to address war crimes committed in World War II. The most famous of these, the Nuremberg Tribunal, was established in 1945 to try high-ranking Nazis accused of war crimes. The Tokyo Tribunal (1946) prosecuted Japanese war criminals. The second event is a more scholarly turn – namely, the publication of Karl Jasper's *The Question of German Guilt* (1947).<sup>1</sup> In the series of lectures that produced this text, Jaspers confronts the question of the guilt of German citizens for the Nazi atrocities of World War II, most notably the Holocaust. Jasper's book stands as a classic text in the large body of scholarship on collective responsibility generated in the latter half of the twentieth century up to the present.

Nuremberg introduced the idea of individual legal guilt and punishment for political crimes. This approach found its way into the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1947).<sup>2</sup> Between 1949 and 1954, the International Law Commission (ILC) drafted several statutes for an international criminal court, but none was adopted.<sup>3</sup> No agreement could be reached concerning the definition of aggression, and then the Cold War put a stop to further efforts for the next three decades.<sup>4</sup> The possibility of an international criminal court was revisited beginning in 1989, when Trinidad and

<sup>1</sup> Karl Jaspers, *The Question of German Guilt*, trans. E. B. Ashton (Dial Press, 1947) from the German *Die Schuldfrage* (1946).

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide. Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: January 12, 1951.

<sup>3</sup> "Chronology of the International Criminal Court," n.d. Available at <http://www.icc-cpi.int/Menus/ICC/Home>.

<sup>4</sup> Joanna Harrington, Michael Milde, and Richard Vernon, "Introduction," *Bringing Power to Justice? The Prospects of the International Criminal Court*, ed. Joanna Harrington, Michael Milde, and Richard Vernon (Montreal: McGill-Queen's University Press, 2006), p. 5.

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Tobago asked the United Nations to expand the jurisdiction of international law to include drug trafficking. Although this expansion did not happen, it prompted the UN General Assembly to mandate the ILC to renew its efforts to develop a draft statute for an international criminal court.<sup>5</sup>

During the period leading up to the establishment of the ICC in 2002, the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>6</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>7</sup> were established by a UN Security Council resolution in 1993 and 1995, respectively, to address ethnic cleansing during the war in the former Yugoslavia and genocide in Rwanda. As at Nuremberg, these tribunals tried individuals, not states. The approach to addressing international crime by trying and prosecuting individuals continues in the ICC in The Hague. The ICC Statute was adopted in 1998 at the United Nations Conference of Plenipotentiaries in Rome. The Statute came into force on July 1, 2002, after receiving the requisite sixty ratifications.<sup>8</sup>

Mark Drumbl has described the approach of the legal prosecution and punishment of individuals for international crimes as following the model of the *liberal criminal trial*.<sup>9</sup> He has also subjected it to great scrutiny and criticism, as have other contributors to this volume. In the second part of this Introduction, I identify some of the key concerns that the authors raise regarding the effectiveness of this approach to international criminal justice. First, I turn briefly to the scholarly context out of which these discussions arise.

The scholarly conversation about collective responsibility that followed Jaspers's examination of German guilt has had as much influence on the subject matter and direction of discussion in this volume as the developments in international criminal law just outlined. Jaspers's lectures raise philosophical questions about the reach, extension, and mechanisms of collective guilt. He draws important distinctions between four types of guilt: criminal guilt, political guilt, moral guilt, and metaphysical guilt.<sup>10</sup>

<sup>5</sup> Ibid.

<sup>6</sup> "About the ICTY," the United Nations International Criminal Tribunal for the Former Yugoslavia, n.d. Available at <http://www.icty.org/sections/AbouttheICTY>.

<sup>7</sup> For an extensive and informative website about the International Criminal Tribunal for Rwanda, see the United Nations International Criminal Tribunal for Rwanda. Available at <http://www.icttr.org/>.

<sup>8</sup> "Chronology of the International Criminal Court."

<sup>9</sup> See Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press), as well as Drumbl's contribution to this volume.

<sup>10</sup> Jaspers, *The Question of German Guilt*, p. 31.

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His philosophical analysis of the way in which the German people – not just those who participated but the people as a group and as a nation – might bear some guilt for the war crimes of their government and military, generated a scholarly discussion that still takes place today among philosophers, legal scholars, and political scientists. Jaspers points out that “the restriction of the Nuremberg trial to criminals serves to exonerate the German people. Not, however, so as to free them of all guilt – on the contrary. The nature of our real guilt only appears the more clearly.”<sup>11</sup> In Jasper’s taxonomy of guilt, the sense in which all Germans are guilty is the political sense, in so far as “[w]e were German nationals at the time when the crimes were committed by the regime which called itself German, which claimed to be Germany and seemed to have the right to do so, since the power of the state was in its hands and until 1943 it found no dangerous opposition.”<sup>12</sup> In 1963, Hannah Arendt’s *Eichmann in Jerusalem: A Report on the Banality of Evil*, a detailed account of Eichmann’s trial for crimes against the Jewish people, crimes against humanity, and war crimes, introduced the idea that evil is not the exclusive property of sociopaths.<sup>13</sup> On the contrary, she argues, Eichmann’s testimony demonstrates the workaday commitment of a man whose main objective was to discharge the duties of his job as efficiently as possible.

In the decades between the end of World War II and the present, the point of focus has understandably moved away from the specific historical example of the German people in World War II to more general questions about the nature of collective agency and responsibility, including collective intention and collective action. There has been lively debate about the possibility and nature of collective responsibility.<sup>14</sup> Further, although some of the “applied” discussion addresses responsibility for war and war crimes,<sup>15</sup> much of the work has focused on corporate responsibility. Among the most frequently cited works in both the applied and theoretical literature is Peter French’s article, “The Corporation as a Moral Person.”<sup>16</sup> In it, French argues that corporate structures and

<sup>11</sup> Ibid., p. 61.<sup>12</sup> Ibid., p. 61.<sup>13</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).<sup>14</sup> See, for example, Stacey Hoffman and Larry May, eds., *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD: Rowman and Littlefield, 1991).<sup>15</sup> Richard Wasserstrom, “The Relevance of Nuremberg,” *Philosophy and Public Affairs* 1, no. 1 (Autumn 1971): 22–46.<sup>16</sup> Peter French, “The Corporation as a Moral Person,” *American Philosophical Quarterly* 16, no. 4 (July 1979): 207–15.

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decision-making mechanisms are the basis for intentional corporate action and support the idea that collectivities with sufficient organizational structure fulfill the conditions for moral personhood. When they satisfy the relevant criteria, they may justifiably be held collectively responsible for their actions in a way that is independent of the responsibility of any individual member.

As influential as French's argument has been, the concept of collective responsibility has many detractors. Some object on the grounds that collective entities do not have the requisite qualities for moral agency and that we do better to focus on the moral responsibilities of individual members, whose agency is less contested.<sup>17</sup> The most frequently cited reason against collective responsibility, voiced even before French argued for the corporation as a moral person, is that it holds some people responsible for the actions of others, a state of affairs that smacks of injustice.<sup>18</sup> In response, a number of authors have emphasized that if an attribution of moral responsibility is truly collective, then no individual member of the collective is necessarily implicated.<sup>19</sup> As Jaspers notes, there are a number of ways a person may be guilty, and without an exploration of what collective responsibility is and how it might hold some individuals responsible for the actions of others, the objection underdescribes its complex target. For example, Larry May picks up on Jaspers's notion of metaphysical guilt to explore the means through which membership in a guilty collective might subject a person to *moral taint*, a condition that does not always involve responsibility but, as the word "taint" suggests, also does not leave a person morally spotless.<sup>20</sup>

The concern about moral responsibility implicating or condemning innocent individuals is most urgent when we extend the discussion to the realm of punishment. When we begin to consider collective liability for international crimes, the impact of the actions of some on the lives of

<sup>17</sup> Seumas Miller, *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001); Christopher Kutz, *Complicity* (Cambridge: Cambridge University Press, 1999).

<sup>18</sup> See H. D. Lewis, "Collective Responsibility," in *Collective Responsibility*, ed. Stacey Hoffman and Larry May, op. cit., pp. 17–33, and more recently, Jan Narveson, "Collective Responsibility," *The Journal of Ethics* 6, no. 2 (2002): 179–98.

<sup>19</sup> Peter French, "The Corporation as a Moral Person," op. cit.; Tracy Isaacs, "Collective Intention and Collective Moral Responsibility," *Midwest Studies in Philosophy (Shared Intentions and Collective Responsibility)* XXX (2006): 59–73; Toni Erskine, this volume, Chapter 10.

<sup>20</sup> Larry May, "Metaphysical Guilt and Moral Taint," in *Collective Responsibility*, eds. Stacey Hoffman and Larry May, op. cit., pp. 239–54.

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others is no longer an abstract concept but a concrete reality. If collective sanctions befall a nation's citizens because of the war crimes of some subset of them, innocent individuals suffer the consequences of others' transgressions. In the wake of the atrocities committed in the former Yugoslavia and Rwanda, recent scholarly work has engaged closely with the prosecution and punishment of criminals in international tribunals and courts, examining the merits, shortcomings, and justice of trying and punishing individuals for collective crimes.<sup>21</sup>

The contributors to this volume advance the discussion about collective punishment in significant ways, taking a careful look at the possibilities for and justice of collective forms of punishment that address wrongdoing at the level of collective entities such as states. In what follows, I articulate the contribution that this volume makes to three themes in particular. First, a number of authors question the emphasis on individual accountability that has emerged as the dominant approach to the prosecution of international crime since Nuremberg and argue that a broader base of responsibility, including the responsibility of states, would more effectively achieve the goals of justice. Second, a host of moral challenges ensue when we consider collective sanctions and the way in which their impact distributes among potentially innocent members of collectives. Here, the discussion addresses not only distribution but also the nature of membership and the extent to which it implicates. Third, the authors examine and propose possibilities for collective punishment as well as alternatives to it. These contributions help us gain practical and theoretical purchase on the problems and debates outlined throughout the volume.

#### THE "LIBERAL CRIMINAL TRIAL" APPROACH TO PROSECUTING ATROCITY: CHALLENGES AND LIMITS

Despite mass crimes such as genocide generating interest in collective responsibility, the brief historical overview in the previous section demonstrates that from Nuremberg to the contemporary ICC, the purpose of international criminal trials has been to prosecute individuals.<sup>22</sup> Apart from being extremely resource-intensive, this approach to atrocity

<sup>21</sup> Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); Mark Drumbl, *Atrocity, Punishment, and International Law*, op. cit.

<sup>22</sup> Drumbl, *Ibid.*

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arguably falls short in a number of ways that are taken up in this collection by Drumbl, Lang, and Luban.

In “Collective Responsibility and Postconflict Justice,” Drumbl argues that the international criminal courts are ineffective at achieving justice because the liberal criminal trial model is limiting and inconclusive, precisely because it fails to attend to collective responsibility in exactly the sorts of cases in which collective responsibility is most appropriate. Atrocity, maintains Drumbl, is the product of collective violence. Individual participation is “deeply conformist” and simply would not occur outside of the collective undertaking. Thus, maintains Drumbl, the prosecution of individuals through the mechanisms of the ICC simply does not do justice to the nature of the atrocities committed. If, instead of pursuing individual criminal prosecutions and traditional legal punishment such as incarceration, emphasis were placed on collective responsibility, justice might be sought through different mechanisms of accountability. These results could be more satisfying. The prosecution of individual criminals at high-profile atrocity trials not only fails to address the collective nature of the violence committed but is also enormously resource intensive and leaves as an open question whether convicted perpetrators can ever receive their just deserts, given the nature of the crimes.

In “State Criminality and the Ambition of International Criminal Law,” David Luban argues that one of the primary reasons international criminal law focuses on individuals is because of its “fetishization” of the state. This tendency to fetishize states means that officially recognizing a category of state criminality would be heretical. Luban cites the notion of head-of-state immunity as part of the evidence for this claim; until recently, heads of state have enjoyed immunity because they personified the state. International tribunals, however, do not recognize head-of-state immunity; but neither do they prosecute states. Instead, notes Luban, in attributing international crimes to individuals, these tribunals reduce atrocity to “mere crime.” This focus sidesteps an important fact: states can be the worst criminals. Moreover, those individuals who do stand trial are not ordinary criminals, even if their brand of evil is of the banal variety. Drumbl points out that war criminals reintegrate well into society and are extremely unlikely to reoffend. Luban maintains that their particular criminality requires not individual evil, but the context of a criminal state. Again, the individual criminal trial does not adequately address this feature of the transgressions in question.

In “Punishing Genocide: A Critical Reading of the International Court of Justice,” Anthony Lang suggests that international crimes such as

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genocide have a “dual criminal nature” in so far as they are crimes of individuals and of states. At present, the recent international tribunals and the ICC are equipped to handle the individual criminal nature of these crimes. The International Court of Justice addresses complaints against states but does not prosecute them as criminals. Thus, the current international legal order cannot sufficiently address state criminality. An explicit statement of the possibility of states being held responsible for the crime of genocide comes from the ICJ in its consideration of the responsibility of Serbia for genocide in Bosnia and Herzegovina. Although the ICJ judgment does not find Serbia responsible for genocide in Bosnia and Herzegovina, it explicitly asserts that states can be held responsible for genocide.

What solutions do we find for the shortcomings of prosecuting individuals for extraordinary crimes such as genocide, war crimes, and crimes against humanity? The authors in this volume make a number of suggestions.

In response to the unsatisfying and limited nature of atrocity trials that follow the liberal criminal trial model, Drumbl suggests that an approach he calls “cosmopolitan pluralism” would more effectively integrate multiple sites of justice at the local, national, and international levels instead of favoring the high-profile international trial. In addition to reclaiming the significance of local and national judicial bodies, this approach would allow for extralegal accountability mechanisms with the primary goals of reconciliation and repair. Such mechanisms might include truth commissions, public inquiries, reparative funds, the politics of commemoration, redistributing wealth, and fostering constitutional guarantees that structurally curb the concentration of power. Such an approach would maintain the integrity and functioning of indigenous institutions of justice instead of forcing them to “judicialize” by conforming to the liberal model if they are to have respect and funding.

As we have seen, Drumbl sees this point as a reason for expanding beyond criminal trials into the broader category of collective responsibility. In so doing, the mass participation and broad complicity does not drift out of sight. Luban urges that state criminality be added to legal doctrine. This latter solution leads to additional questions, which he recognizes must be addressed if his proposal is to have teeth. First, some will question whether a state, being an artificial person, can commit a crime. Luban gestures toward the legal model of agency as one means of addressing this challenge. He notes further that there are promising directions for ascribing acts of humans to states articulated in the International



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Law Commission's 2001 "Draft Articles on Responsibility of States for Internationally Wrongful Acts." Corporate criminality provides a legal model of how extending the application of the Draft Article from civil to criminal law might work.

Lang urges a restructuring of the international legal order to capture the duality of international crimes. He maintains that in order to recognize the state and individual dimensions of the crime of genocide, a new relationship between the ICJ and the ICC must be established. The ICJ statement in the Bosnia and Herzegovina genocide case helps to support the argument that, by viewing states as corporate agents, the ICJ might work in a more integrated fashion with the ICC to address the dual nature of international crime.

So far, the main criticism of current judicial means of addressing atrocity we have seen is that the emphasis on the prosecution of individuals inadequately captures the collective element of such crimes. Intermediate between the accountability of states and the accountability of individuals lies the potential accountability of regimes, or of groups of individuals in authoritative positions, who jointly engage in atrocious acts.<sup>23</sup> Michael Scharf's chapter, "Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of 'Grotian Moment,'" addresses a concept that offers to fill this intermediate space, thus introducing a collective element of criminality into what would ordinarily be individual criminal trials: the concept of "joint criminal enterprise." Scharf's chapter discusses and defends the proposed use of this category in proceedings of the tribunal before which, at the time of writing, some alleged perpetrators of Cambodian atrocities face prosecution. Scharf makes the case that the concept of joint criminal enterprise is supported by precedents dating back to the prosecution of war crimes in World War II. The originating precedents do not, indeed, concern regimes; they concern groups of combatants whose actions resulted in war crimes (the murder of prisoners) in circumstances in which it was impossible to isolate individual culpability – to stand guard while a comrade pulls the trigger is not to commit murder, but it is to be complicit in a murderous "enterprise." However, the relevance of the idea to the case of regimes is clear. Regimes do not pull triggers, but they collectively create circumstances in which triggers get to be murderously pulled, and so should attract accountability. If the idea of "joint criminal enterprise" can be sustained, then we would have

<sup>23</sup> See Luban's and Vernon's chapters in this volume (Chapters 2 and 11, respectively) for a discussion of the distinction between a state and a regime.

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something important to contribute to solving the problem of individual criminal prosecution for atrocity: we could show that criminal prosecution can extend its reach significantly beyond strict individual culpability. Its potential, in so far as it extends the reach of accountability, is that it may capture just those degrees of culpability that attach to members of a regime whose actions are jointly necessary for atrocity, although none of them individually commits atrocious acts.

The chapters discussed thus far suggest that some revisions to the individual crime and punishment approach of the “liberal criminal trial” are in order. All of the suggestions point in the direction of a model that takes collective responsibility, and in some cases even collective criminality, more seriously. The idea of putting more emphasis on collective responsibility brings us squarely up against skeptical worries about the impact attributions of collective responsibility might have on innocents. The next section takes up this worry, which is primarily about the distribution of responsibility and punishment among members of guilty collectives.

#### RESPONSIBILITY, PUNISHMENT, DISTRIBUTION, AND MEMBERSHIP

Much of the skepticism directed against collective responsibility turns on the concern that it unjustly distributes punishments to innocents. A number of authors take a close look at the possibilities for collective punishment, and in so doing, they examine questions of distribution and justice. These issues relate closely to the way collective responsibility (not just collective punishment) might distribute, which in turn presses us to clarify our understanding of membership and its implications. Finally, as we have seen in Drumbl’s cosmopolitan pluralism and shall see in other chapters as well, punishment is not the only response to collective responsibility. There could be other ways of holding collectives accountable, and these warrant our attention as well.

In “The Distributive Effect of Collective Punishment” (Chapter 8), Avia Pasternak examines the impact collective punishment might have on group members by drawing attention to three bases for distribution: proportional, equal, and random. Recognizing that it is almost inevitable that collective punishment will pose burdens on individuals simply by virtue of their group’s wrongdoing, she argues that the way the burden is distributed ought to be taken into account when assessing the legitimacy of collective punishment. Her discussion begins with the example of the proposed academic boycott of Israeli universities, advocated by a number