System Criminality in International Law: Conclusions and Outlook

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Conclusions and outlook

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The chapters in this book emanated from a shared discomfort amongst contributing authors about a mismatch between the current fashionable focus on individual (criminal) responsibility, exemplified by the mushroom of international criminal tribunals, on the one hand, and the dominant role of larger collective entities in situations of system criminality, on the other. The book has sought to reflect on ways to better address the forms and manifestations of system criminality.

In this final chapter, we will recapitulate the dynamics of system criminality as these have been analysed in this book (section I) and summarize the power and limitations of the various forms of international responsibility in regard to system criminality (section II). We then will reflect on two cross-cutting themes: the relationship between the separate forms of international responsibility (section III) and the objectives that we may realistically ascribe to international responsibility in situations of system criminality (section IV). We conclude with some final observations (section V).

I. The dynamics of system criminality

The search for a more adequate framework of responsibility in regard to situations of system criminality requires an understanding of the dynamics of system criminality as these have been analysed in this book (section I) and summarize the power and limitations of the various forms of international responsibility in regard to system criminality (section II). We then will reflect on two cross-cutting themes: the relationship between the separate forms of international responsibility (section III) and the objectives that we may realistically ascribe to international responsibility in situations of system criminality (section IV). We conclude with some final observations (section V).

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widens the scope by showing that the same mechanisms apply for lawful organizations which engage in more colloquial forms of criminality. Starting with the conceptual tools of criminology – methods, means and opportunity – both scholars explain how individuals may get involved in criminal acts through processes of authorization, neutralization, rationalization and dehumanization. They do not suggest that individual culpability is completely irrelevant, but rather point out that holding (only) individuals responsible creates a scattered picture and will never suffice to capture the essence of system criminality. After all, within an organization individuals appear to be capable of committing crimes which they would not even consider when acting alone and they would certainly not be able physically to accomplish on their own.

Would collective responsibility be a better option? Gattini and Simpson describe how the international community has constantly vacillated between collective (in particular state) responsibility and individual responsibility, each feeding on the apparent shortcomings of the other. Simpson even qualifies the quest for accountability for international crimes as a 'perpetual bargain' between the individualist and the collective approach. The initial emphasis on 'blaming the collective' after World War I lost much of its momentum in view of the dismal political consequences and the idea that a whole people should not suffer for the misdeeds of a selected number of criminals. Indeed, the concept of individual responsibility, propagated at Nuremberg, mainly served to cleanse the German people from collective guilt. On the other hand, even at that time this preference for the individualist approach was partially mere appearance. Gattini correctly points out how the Nuremberg Tribunal adhered to the collective dimension by introducing concepts like 'membership of a criminal organization' and 'conspiracy'.

These four chapters then confirm the working hypothesis of this book that the collective dimension of international crimes should not be ignored. The individual cannot be easily severed from the organization or state in whose service he or she commits the crimes. Individual responsibility, which relies, as Simpson argues, on the fiction of detachability (between the individual and the state) does not dovetail with...
mass criminality. Crimes against humanity, genocide and aggression, but to some extent also war crimes and torture, require collective action and the availability of massive resources which can usually only be provided by the state or by other collective entities. This is illustrated by the recognition by the Prosecutor of the ICC that the international crimes in the Darfur conflict were determined by substantial state involvement. Against this backdrop, the resurgent quest for collective forms of responsibility is imperative.

II. Forms of international responsibility

The contributions to this book have examined the strengths and weaknesses of various forms of international responsibility in regard to system criminality. These fall in essentially two categories. While a number of options remain within the realm of individual (criminal) responsibility, but discuss the possibility to give the collective aspect of responsibility more weight and attention, a second category concerns responsibility of a collectivity as such.

Ambos discusses superior responsibility as a possible avenue for dealing with problems of system criminality. Strongly embedded in international humanitarian law, the concept conveys the idea that legal and moral standards in situations of armed conflict will only be observed if soldiers are subject to responsible command. Military commanders can be held accountable if they fail to prevent or repress violations of international humanitarian law by their subordinates. The asset of this legal construction is that it recognizes that military structures and organizations may be conducive to system criminality and that not only those who physically commit the crimes, but also those in the higher echelons who have the power and authority to prevent those crimes should be held responsible. However, the drawback of the concept in relation to system criminality is that it usually fails to identify the intellectual godfathers and architects of mass crimes. Military commanders incur criminal responsibility for negligent behaviour and their fault is considered, especially in recent case law, as a separate crime of omission.

In search of alternative concepts which might more adequately reflect the essential role of the genocidal masterminds, Ambos examines the pivotal concept of Organisationsherrschaft. This concept refers to pivotal politicians or bureaucrats who, by virtue of their control over an organization, employ the organization for the purpose of mass criminality. This concept is related to 'functional perpetration', as described and analyzed by Van der Wilt, serves useful purposes in depicting the criminal responsibility of the men at the top.

An alternative form of individual responsibility that is pertinent to attempts to deal with situations of system criminality is the joint criminal enterprise doctrine (JCE). This combines elements of time honoured concepts like conspiracy, complicity and participation in a criminal organization. While the concept does reach beyond the level of the individual and can connect to collectivities in which individuals participated, both Van der Wilt and Van Sledregt express their concern over the rather broad and uncritical application of the doctrine in recent case law of the ICTY. The problem with the doctrine is that it serves as a cloak, covering and uniting participants acting at different organizational levels, without much heed being paid to the actual contributions of these participants and their mutual synergy. In their enthusiastic reception of JCE, prosecutors and courts may easily lose sight of the legal pedigree and predecessors from which the doctrine has emerged.

The quest for appropriate concepts of criminal law which might capture the collective dimension of system criminality remains a difficult one indeed. The choice for a particular concept of collective responsibility seems often to be inspired by political considerations. In a perceptive essay, Mark Osiel argues that the ICTY’s preference for JCE might be influenced by the Prosecutor’s desire to achieve the conviction of as many suspects as possible, whereas domestic jurisdictions, in their quest for national reconciliation, rather opt for singling out particular culprits on the basis of superior responsibility.

Whereas the previous chapters focus on criminal justice’s attempts to widen the scope of punishable participants by calibrating forms of collective responsibility, the contributions of Eser and Jørgensen explore the possibilities of holding the organization as such criminally responsible. Jørgensen recalls the attempts of the Prosecutor in Nuremberg to use the criminality of organizations to widen the net for the prosecution of their individual members. Eser focuses on corporate criminal liability as such. These approaches would arguably better square with observations made

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in previous chapters that organizations may be crimogenic. Although some legal systems still adhere to the maxim *societas delinquere non potest*, there is a growing inclination to accept corporate responsibility in *criminalibus*. However, this has not been reflected in modern international law. Lack of universal acceptance of corporate criminal responsibility was the prime reason for restricting the International Criminal Court’s jurisdiction to natural persons.

After discussing these criminal law responses, the book moved to consider non-criminal forms of collective responsibility. Kleffner discusses the responsibility of non-state actors, in particular organized armed groups. He demonstrates that in this area a significant gap exists in the law of international responsibility. Whereas organized armed groups in many situations may have been factually responsible for international crimes and their role may be described in terms of system criminality, the law of international responsibility is undeveloped. Although in theory elements of the concepts and principles of the law of state responsibility may be applied to responsibility of such groups, and in the area of reparation interesting developments have taken place, generally states seem to have little interest or ambition to develop the law in that direction, relying more on (collective) sanctions and force to redress situations of system criminality. This underscores the diversity of legal responses that are required in response of system criminality, some of which are located squarely in the field of international responsibility, some of which are far removed from that domain, and yet others, as in the case of organized armed groups, have a *sui generis* nature that display some features of an accountability regime, yet in vastly different terms from individual or state responsibility.

The two chapters on state responsibility for system criminality, by Scobbie and Zimmermann/Teichmann, were written against the background of the fact that in positive international law the state as such cannot incur criminal responsibility for mass atrocities. The prospects for changing this situation appear slim. Criminal responsibility of states would require a different institutional organization of the international community with a centralized power. In the absence of this structure, holding states criminally responsible would trespass on the concept of sovereignty and would militate against the idea of inter-state equality.

Starting from the premise that the state’s obligation to abstain from system criminality applies *erga omnes*, both chapters examine whether

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6 Compare Art. 25(1) ICC Statute.
III. Relationship between system criminality and individual responsibility

The question that remains to be considered is the mutual relationship between the different responses to system criminality, in particular between forms of individual responsibility on the one hand and collective responsibility on the other.

Criminal lawyers have a natural proclivity to be suspicious of collective guilt. Their conceptual tool box consists of the twin concepts of actus reus and mens rea, which puts them on the track of inquiring who is exactly responsible for what. The aspiration to identify the culprits as precisely as possible, and to mete out punishment commensurate to the contribution and the amount of guilt, is one of the most attractive features of criminal law.

On the other hand, it may be said that the very nature of system criminality obliterates the piecemeal approach of criminal law. Criminal law is not capable of capturing the complex mechanisms and relations of organizations which engage in mass crimes. At the end of the day, one is left with a distorted and fragmentized picture of reality which does not comport with historical truth and in which the blame rests on a few individuals who, understandably, resent their being sacrificed as scapegoats. Collective responsibility is an important step towards acknowledgment that responsibility in case of system criminality should focus on higher levels. It epitomizes a more holistic approach which recognizes the responsibility of the wider periphery of bystanders who, though not directly involved, create the breeding ground for mass atrocity.

While the alternatives of individual and collective responsibility may be presented in mutually exclusive terms, and in practice more often than not trade-offs are made, as illustrated by the mass atrocities in Srebrenica when the international community opted for individual over collective responsibility, we believe that they are better conceived as being complementary.

The major challenge is to combine both approaches within an integrated analytical framework in which the disadvantages of one approach are offset by the advantages of the other and vice versa. This requires an analysis and assessment of responsibility at different levels, to which the individual chapters in the book have much contributed.

Starting from the largest forms of systems, the principles of state responsibility provide a useful tool for capturing the collective dimension of system criminality. The drawback of ‘collective guilt’ is mitigated by the fact that the current regime focuses on moral condemnation and does not provide for ‘punitive damages’, and by the fact that collective responsibility is not necessarily distributive, in the sense that the contribution and guilt of the participants to the collective can be easily measured. However, in light of the conclusions of Chapters 12 and 13, much work needs to be done to strengthen the implementation of the law of responsibility in regard to situations of system criminality, in particular of the principles contained in Articles 41 and 54 of the Articles on International Responsibility.

At a lower level, separate organizations which engage in system criminality may incur criminal or civil responsibility. Army battalions, organized armed groups, terrorist groups and even business corporations might qualify for this purpose. For the time being, such corporate solutions can only be tested by domestic jurisdictions, in view of the previously mentioned restriction of the ICC’s jurisdiction to natural persons. One of the clearest recommendations which emerges from this study is that this restrictive provision in the Rome Statute requires serious reconsideration, and that the possibilities to seek non-criminal responsibility of such entities, for instance in domestic courts by seeking to drain financial resources, should be encouraged.

Finally, individuals who are, either personally or in cooperation with others, most responsible for mass criminality should face justice in criminal procedures. The available concepts connoting collective responsibility, like superior responsibility, I.C.E., Organisationsherrschaft and functional perpetration should be further developed and refined to this purpose.

Individual and collective responsibilities thus do not exclude each other. On the one hand, for the reasons set out in Chapters 1–3, individual responsibility is unlikely to reach the level of the system, perhaps except in cases where international crimes are committed or induced by a limited number of persons who constitute the leadership of a small group. It is to be recognized, however, that while individual responsibility may not remove the need for legal responses targeted at system level,

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8 See also A. Nollkaemper, ‘Introduction’, this volume, Chapter 1, p. 20.
10 In the same vein, Oder, ibid. at 1842–8, who recommends the financial drainage of such organizations for being highly effective, while less stigmatizing.
it may have legal and practical consequences at that level, for instance by punishing leaders18 or by draining resources controlled by individual members of a group.19

On the other hand, the emphasis that we have put on the need for collective responsibility by no means removes the legitimate basis for individual responsibility. It is true that the structural dimensions of behaviour, and the related loss of subjective freedom,16 may cast doubt on the fundamental premise of (international) criminal law: that the individual is endowed with free will and the independent capacity to choose his conformity with norms that result from collective processes.20 It may have profound consequences for our assessment of individual atrocities. Rather than viewing them as necessarily evil, one may also view them as acts that, for the actor, conform to what is right. In the words of Habermas: ‘evil is thus the obverse side of the good.’21 However, there is no ground for excusing legal excuses for individual behaviour, and individual responsibility, on this basis. It may often be possible to identify degrees of freedom (to resist) that have not been exercised.22 Indeed, positive law does not accept that systemic causes entirely preclude individual responsibility,23 though it may be reflected in the level of punishment of individuals.24

We thus would be inclined to favour a synthesis of both individual and collective responsibility. After all, the regimes of state responsibility and individual (criminal) responsibility are to a large extent each others mirror image and therefore complementary. It stands to reason that these different levels of analysis and decision-making should be integrated by mutual references and benefits in the realm of procedure evidence, legal concepts etc.25

In view of the relatively limited contribution that the implementation of the law of international responsibility in itself may make in situations of systemic criminality, further complementarity should be sought between the law of international responsibility and the potential contribution of responses by the political organs of the United Nations as well as regional organizations. Such responses need not be isolated from the law of international responsibility, but may contribute to its application and enforcement, for instance because of the fact that the General Assembly and Security Council are capable of delivering


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22 to inform you that tomorrow we will be killed with our families: stories from Rwanda (Pluto, New York 1998).


24 See W. Friedmann, Legal Theory (Columbia University Press, New York, 1967), pp. 65–7, and see also Art. 51 of the ICC Article on State Responsibility. This conclusion appears to be in line with the theory of Hannah Arendt, despite her emphasis on the effect of bureaucracies on human freedom: see analysis in Vetlesen (n. 14) 86.

25 It may be argued that the reference for sentencing purposes attached by the ICTY in Prosecutor v Krukl, IT-98-33-T, Judgment (April 2, 2001) para. 724, to the role of individuals who hierarchically are higher placed than the author of the act, may be extended to the role of the state for which that author acted. See generally, on the possible influence of collective action on individual sentencing, M.A. Drumbl, ‘Collective violence and individual punishment: the criminality of mass atrocity’ (2005) 99 Northwestern University Law Review 567 et seq.

judgments on criminal behaviour by states, followed by individual or collective countermeasures. Though it is common to separate such responses from the law of responsibility, the line between assertions of responsibility and political response in international institutions may be a thin one. Also responses of political organs such as the Security Council may well be premised on alleged breaches of international law. Also in this respect, we suggest that a comprehensive view should be adopted that views the different methods not as alternatives, but as methods that all may have to be deployed to stop such crimes being committed.

IV. Objectives of international responsibility in regard of system criminality

An assessment of the power of the law of international responsibility in respect of system criminality ultimately depends on one’s assessment of the aims that may be ascribed to this body of law. Depending, then, on the context and on the interests of the actors involved, the law of international responsibility may serve a variety of purposes. We need to take into account that we cannot talk in the abstract of objectives and aims of international responsibility in response to system criminality. The question always has to be answered who it is that defines such objectives. Who defines what, for instance, in the case of Darfur should be the aims of international responsibility (for all practical purposes: the responsibility that the ICC seeks to effectuate).

22 N. White, ‘Responses of political organs to crimes by states’, this volume, Chapter 14.
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Retribution? Deterrence? Compensation? Incapacitation of the regime? Or all such things? Although the crimes involved in system criminality as defined in this book are crimes in which the international community has an interest, the question is who defines the objectives of the international community. Indeed, in many of the situations in recent years to which the label of system criminality seems proper, particular (groups of) states that, allegedly acting on behalf of the international community, have pursued a political agenda and have set different aims.

For some of these objectives, in situations of system criminality the possible contribution of international responsibility seems marginal at best. This holds in particular for termination. In many cases involving system criminality, international organisations and states seek: ‘an immediate response to the breach of public order, terminating the breach and containing the destructive effects of the act.’ Although termination is a well-established objective of the law of international responsibility and it seems proper to use this as a benchmark for evaluating the law and its application, the law of international responsibility may not be the first choice on the menu if this is the objective. Alvarez notes that the first lesson of Rwanda is that ‘international efforts to prevent the continuation of genocidal acts and other acts of violence must precede attempts at criminal accountability’. Indeed, there seems to be little evidence that in any of the cases involving system criminality in the past decades, international responsibility (whether in the form of individual responsibility, responsibility of states or responsibility of other collective actors) played a significant role in terminating the criminal acts. In respect of this objective, there is little doubt that, apart from unilateral force, responses by the Security Council are potentially the most effective means to combat situations of system criminality.

The deterrent power, in terms of general prevention, of international responsibility in relationship to system criminality seems equally limited. Though it has been said, also in regard to international crimes, that responsibility may have a deterrent effect, the methodological problems are substantial (we may never know exactly how effective and real its preventative effect will be) and the assumptions underlying such
deterrence are shaky, both for future individual perpetrators and for collectivities. It seems, for example, doubtful that, say, a determination of state responsibility of Serbia in 1995 would have made a difference for current policies of Sudan in Darfur. While in theory compensation may contribute to prevention, it seems doubtful that compensation by a collectivity (say a state) provides incentives for individual officeholders, as potential wrongdoers.

Both in regard to termination and prevention, it needs to be recognized that while the causal mechanisms identified in the introduction and discussed in detail in Chapters 2 and 3 may and should inform the responses through the law of international responsibility, for a large part they will be immune from the effect of the law of international responsibility.

In respect of other objectives, however, the law of international responsibility may have more relevance in respect of system criminality. This holds in particular for retribution, prevention of recurrence, reconciliation and compensation. The capability of various forms of international responsibility to contribute to these aims in situations of system criminality underscores that individual and collective responsibility are complementary and that each can contribute to different aims.

Perhaps first and foremost, the law of responsibility can be used as a form of retribution. As is well known, retribution in criminal law emanates from the moral imperative that criminal offenders should be punished because they deserve it, irrespective of the question whether punishment serves any other social aim. The Preamble of the Rome Statute, in affirming that the most serious crimes of concern to the international community as a whole must not go unpunished, pledges allegiance to retributive theory. This seems an objective that primarily can be served through the law of individual responsibility. However, the question whether collective accountability (for instance, the responsibility of Serbia as determined by the ICTY in the Genocide Case) could have retributive effects and as such complement individual punishment has been unexplored and would warrant further empirical research.

The law of international responsibility also may be used to prevent the recurrence of the crimes and to stop the actor who engaged in the criminal act from repeating them. This is a recognized objective of the law of international responsibility. Though prevention of course also is an objective of the law of individual responsibility, the law of collective responsibility may be more powerful. Prosecuting and detaining high-level leaders responsible for system criminality may help to prevent recurrence in situations where the commission of crimes by a state means that a people has fallen prey to a small criminal leadership. But in more complex forms of system criminality that may not be enough. Though state responsibility is not easily used to incapacitate a regime, the law might be relevant here as it provides for the obligation of states not to recognize and to cooperate to prevent bringing an end to situations that have resulted from system criminality. Beyond this, the options at the disposal of the Security Council may contribute to this aim.

Finally, also in regard to the aim to compensate victims of situations of system criminality individual and collective responsibility have their own role. Compensation, of course, is a recognized objective of the law of state responsibility and now has also found its way into the Statute of the International Criminal Court. However, both forms of international responsibility have quite distinct potential for offering compensation. Compensation as remedy for state responsibility is not compensation of individual persons/victims as such, and states may spend their recovery on other purposes. Compensation as part of individual responsibility, though it remains to be developed, will benefit individual victims rather than collective entities. Again, recognizing

30 See Article 30 of the Articles on State Responsibility.
31 The preamble of the ICC Statute states that it seeks to ‘to contribute to the prevention of such crimes’. The emphasis in international criminal law seems to be on general prevention, although case law of the ICTY incidentally refers to special deterrence as well; compare Judgment of the Appeals Chamber, Prosecutor v. Krstić and Čerkez, IT-95-14-A (17 December 2004) para. 1076: ‘both individual (i.e. specific) and general deterrence serve as important goals of sentencing.’
32 Tomuschat (n. 11) 250.
33 L. Scobie, ‘Assumptions and presuppositions: state responsibility for system crimes’, this volume, Chapter 12 and A. Zimmermann and M. Teichmann, ‘State responsibility for international crimes’, this volume, Chapter 13
34 In. White, ‘Responses of political organs to crimes by states’, this volume, Chapter 14.
35 Article 36 of the Articles on State Responsibility.
36 Article 79 ICC Statute. 37 Article 75 ICC Statute.
the own distinct role of various forms of responsibility as well as their complementary nature is key.42

V. Final remarks

The final conclusions of the book can be briefly summarized. International responsibility will offer only a relatively modest role to the problems of system criminality. The social processes that facilitate and contribute to system criminality require a combination of political and legal responses, of which international responsibility is only a minor part. The nature, power and interaction between such responses need to be further explored.

The available concepts of individual responsibility connoting collective responsibility, like superior responsibility, Organisationsherrschaft and functional perpetration should be further developed and refined to this purpose, without losing connection with the fundamental principles of individual responsibility.

The restrictive provisions in the Rome Statute on criminal responsibility of organizations requires reconsideration. Moreover, the possibilities to seek non-criminal responsibility of such entities, including organized armed groups, for instance in domestic courts by seeking to drain financial resources, should be explored and the law in this area should be developed.

The implementation of the principle of state responsibility in relation to system criminality needs to be strengthened, in connection with the activities of political organs of international organizations, which thereby could strengthen their role in the enforcement of community values. Beyond the rethinking of individual modes of responsibility in relation to system criminality, more work needs to be done on the possible and actual interactions between the different forms of responsibility. The questions are in part of an empirical nature. What forms of responsibility have or have not 'worked' in relationship to system criminality (in respect of such aims as termination, prevention, retribution and compensation)? Under what conditions and in what circumstances can they supplement each other? Is one form of responsibility able to compensate for the absence of others? There remain also fundamental normative and legal questions unexplored. What are the procedural and normative interactions between various forms of international responsibility? But these interactions cannot properly be understood before the separate forms of international responsibility in relation to system criminality are understood. It is hoped that this book offers a contribution to such understanding.

42 T. Franck, 'Individual criminal liability and collective civil responsibility: do they reinforce or contradict one another' (2007) 6 Washington University Global Studies Law Review 973 (noting that: 'genocide is a hydra-headed monster. It warrants a multifaceted response. The heralded advent of individual liability should not cloud our understanding of the continued importance of state responsibility').