

# **International Criminal Justice Series**

## **Volume 9**

### **Series editors**

Gerhard Werle, Berlin, Germany  
Lovell Fernandez, Bellville, South Africa  
Moritz Vormbaum, Berlin, Germany

## **Series Information**

The *International Criminal Justice Series* aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

## **Editorial Office**

Prof. Dr. Gerhard Werle  
Humboldt-Universität zu Berlin  
Faculty of Law  
Unter den Linden 6,  
10099 Berlin, Germany  
[gerhard.werle@rewi.hu-berlin.de](mailto:gerhard.werle@rewi.hu-berlin.de)  
[moritz.vormbaum@rewi.hu-berlin.de](mailto:moritz.vormbaum@rewi.hu-berlin.de)

More information about this series at <http://www.springer.com/series/13470>

Cassandra Steer

# Translating Guilt

Identifying Leadership Liability for Mass  
Atrocity Crimes



ASSER PRESS



Springer

Cassandra Steer  
Faculty of Law  
McGill University  
Montreal, QC  
Canada

ISSN 2352-6718                   ISSN 2352-6726 (electronic)  
International Criminal Justice Series  
ISBN 978-94-6265-170-8       ISBN 978-94-6265-171-5 (eBook)  
DOI 10.1007/978-94-6265-171-5

Library of Congress Control Number: 2016958989

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2017

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This Springer imprint is published by Springer Nature  
The registered company is Springer Science+Business Media B.V.  
The registered company address is: Van Godewijkstraat 30, 3311 GX Dordrecht, The Netherlands

*For my parents (all of them). This labour of love is thanks to your endless encouragement to seek out the world and ask the hardest questions.*

# Acknowledgements

Above my desk I have a quote from Carl Jung, to which I refer often: ‘The goal is important only as an idea. The essential thing is the opus which leads to the goal: *that is the goal of a lifetime*’.<sup>1</sup> For their contribution to this opus I am grateful to a number of people.

My mentor, Prof. Harmen van der Wilt, whose guidance was like a lighthouse, regardless of whether the skies were clear or dark and stormy. Steady, even, always truthful, ever inspiring, and truly focused. Thank you for your commitment, your insights, and for your generosity with your time.

I was supported a great deal in the comparative research I undertook in various countries by a number of generous people. In Germany at the Institut für Kriminalwissenschaften of the Georg August Universität in Göttingen I was welcomed and supported by Alexander Heinze, and am grateful also to Prof. Kai Ambos for his guidance. In the US at Cornell Law School Jens Ohlin provided hours of investigative debate and inspiring exchange of thoughts. I am indebted to him for his philosophical contributions and his all-round support. In Argentina at the Universidad Torcuato Di Tella in Buenos Aires I was welcomed by a warm community of intellectuals, and was supported in particular by Alejandro Chehtman, Hernán Gullco and Marcello Ferrante. I appreciate all their patience with my stumbling Spanish, and their extremely useful guidance on Argentine law. In Canada I was made to feel especially welcome in what I can only describe as an academic family at McGill Faculty of Law in Montreal. There Frédéric Mégret and Nandini Ramanujam took wonderful care of me as a guest of the Centre of Human Rights and Legal Pluralism. I am also grateful to the Hon. Patrick Healy, for his time, advice and candid views. And finally at the University of British Columbia in Vancouver I was treated to rich and conceptually essential debates with James Stewart, to whom I am grateful for his time, and his willingness to help me improve on my arguments in opposition to his.

---

<sup>1</sup> From *The Psychology of Transference*, para 400.

I am also grateful to the Fulbright Association of the Netherlands and to the University of British Columbia for the Mobility Research Award.

In this opus there has been a veritable team of wise and supportive people:

To the men of Cabero Stediki, Rory Kilmartin and Benjamin Dives, I am honoured to be the recipient of such a sophisticated listening and unbending support, and just as honoured to contribute to each of you as we ensure each other's success in our respective life goals.

To Alain Youell, I am blessed to have your wisdom and guidance in raising the level of growth and awareness in each of life's challenges to one of beauty and importance.

To my touchstone Bex Hronek, I am so blessed to have you by my side, and to know there is no question we cannot ask each other. To Jakob Hronek, I am grateful for your final touch of originality to this book.

To Kees Drabbe, I am indebted to you for the commitment with which you translated summaries, and for yours and Netty's omnipresent support.

To Kathryn Greenman, thank you for your ever insightful and incredibly constructive critique.

To the women of Stepping Out, the women's network at the Universiteit van Amsterdam Faculty of Law, thank you for being such an amazing network of inspiring, elegant, intelligent and powerful lawyers, academics, colleagues and friends.

To my parents and brothers, thank you for your endless belief in me, for your encouragement for me to follow my path on the other side of the world, even when this meant missing important moments in your lives. This book is dedicated to you, my family. My success is your success.

And finally to my fiancé, Sébastien, thank you for your patience, for always standing beside me, always encouraging me, and for tolerating the love affair I was having in the creation of this book, which took me away from you so many times.

# Contents

<b>1</b>	<b>The Problem of Liability in International Criminal Law .....</b>	<b>1</b>
	References .....	6
	Cases .....	6
 <b>Part I Laying the Foundations</b>		
<b>2</b>	<b>Leadership Liability for Collective Crimes .....</b>	<b>9</b>
2.1	Translating from the Collective to the Individual .....	11
2.2	Individual Versus Collective Guilt .....	12
2.3	Individual Versus Collective Agency .....	15
2.4	Deliberative Structures and Those Most Responsible .....	16
2.5	Why the Leaders?.....	18
	References .....	20
<b>3</b>	<b>Putting the Leaders of Mass Atrocity on Trial .....</b>	<b>21</b>
3.1	Efficacy and Symbolism: The Aspirations of International Criminal Law .....	22
3.1.1	Competing Paradigms: Accountability as a Central Goal .....	22
3.1.2	Symbolism: History Writing and Truth-Telling.....	26
3.1.3	Leadership Liability as a Prosecutorial Policy.....	30
3.2	Fairness and Justice: The Requirements of International Criminal Law .....	34
3.2.1	Fairness and the Principle of Legality .....	35
3.2.2	Fairness and the Principle of Culpability.....	38
3.2.3	Justice for Victims and for Defendants .....	40
3.2.4	Justice and Procedural Versus Substantive Truth.....	42
3.3	Designing a System of Liability in International Criminal Law .....	44
	References .....	46
	Cases .....	49

<b>4 A Comparative Theory of International Criminal Law .....</b>	<b>51</b>
4.1 International Criminal Law as Translation: From the Domestic to the International .....	53
4.1.1 Comparative Law as a Tool of Analysis.....	56
4.1.2 Legal Traditions .....	58
4.1.3 Legal Transplants .....	60
4.1.4 Legal Patchworking .....	63
4.2 International Criminal Law as Process .....	64
4.2.1 Participants as Law-Makers .....	66
4.3 International Criminal Law as Policy.....	69
4.3.1 International Law as Policy .....	69
4.3.2 Participants as Policy-Makers and Law-Apppliers .....	71
4.3.3 The Policy Choice of Modes of Liability.....	73
4.4 The Problem of Ambiguity .....	74
4.5 A Comparative Law Approach to Resolving the Search for Modes of Leadership Liability .....	77
References.....	78
Cases .....	81
<b>5 Applying the Tools.....</b>	<b>83</b>
5.1 Functionalism.....	84
5.2 Selection of Jurisdictions .....	87
5.3 Terminology: The Problems of Translation .....	90
5.3.1 Unitary and Differentiated Systems.....	91
5.3.2 Complicity .....	95
5.3.3 Accessory Liability .....	96
5.3.4 Parties to a Crime .....	98
5.3.5 Guilt .....	99
5.3.6 Subjectivity and Objectivity as Approaches to Liability .....	104
References .....	108
Cases .....	110

## Part II Leadership Liability Through a Comparative Lens

<b>6 Subjectivity Reflected in the Common Law Tradition.....</b>	<b>113</b>
6.1 The Common Law Tradition: A Context .....	114
6.2 The Old Common Law Modes of Liability .....	119
6.3 United States of America—Liability for the Acts of Others .....	122
6.3.1 Subjectivity.....	123
6.3.2 Vicarious or Derivative Liability for Parties to a Crime.....	125
6.3.3 <i>Mens Rea</i> and <i>Actus reus</i> Requirements for Accomplice Liability .....	128
6.3.4 Extended Liability: Further Crimes Committed by Others .....	130

6.3.5	Conspiracy: The Common Law Solution to Group Crimes.....	132
6.3.6	Summary .....	145
6.4	Canada—Moral Blameworthiness and the Importance of Stigma .....	147
6.4.1	‘Principles of Fundamental Justice’ and the Formation of Criminal Liability .....	148
6.4.2	Moral Innocence.....	150
6.4.3	Standards of Fault for Party Liability.....	150
6.4.4	Basic Party Liability.....	154
6.4.5	Constructive Extended Liability.....	158
6.4.6	Conspiracy: The Limited Common Law Solution to Group Crimes.....	163
6.4.7	Application of Canadian Modes of Liability to the War Crimes Act .....	166
6.4.8	Summary .....	171
6.5	Legal Culture and Policy Choices in the Common Law Tradition.....	174
6.5.1	Subjectivity.....	174
6.5.2	Vicarious Liability.....	178
6.5.3	The Relationship Between the Character of Criminal Trials and a System of Liability .....	179
	References.....	180
	Cases .....	182
7	<b>Objectivity Reflected in the Civil Law Tradition.....</b>	185
7.1	The Civil Law Tradition: A Context.....	186
7.2	A Normative Theory of Culpability.....	191
7.3	Germany: Responsibility for Control over the Act and Control over an Organisation .....	192
7.3.1	The Importance of Doctrine.....	194
7.3.2	Culpability as Blameworthiness.....	196
7.3.3	The German System of Modes of Liability .....	198
7.3.4	Objectivity and Control over the Crime.....	201
7.3.5	Roxin’s Theory of <i>Organisationsherrschaft</i> .....	205
7.3.6	Summary .....	212
7.4	Argentina: The German Theory Applied to Leaders of Organised Mass Atrocity .....	213
7.4.1	Legal Transplants in Argentine Law .....	214
7.4.2	Objectivity and Control over the Crime.....	216
7.4.3	Modes of Individual Criminal Liability .....	219
7.4.4	<i>Autoría Mediata</i> : Indirect Perpetration .....	221
7.4.5	The ‘Dirty War’ and the Criminal Responsibility of Its Leaders .....	224
7.4.6	<i>Autoría Mediata</i> in Subsequent Case Law .....	233

7.4.7	The Impact of Argentine Case Law in the Latin American Region .....	235
7.4.8	Summary .....	237
7.5	Legal Culture and Policy Choices in the Civil Law Tradition .....	238
7.5.1	The Relationship Between the Character of Criminal Trials and a System of Liability .....	239
7.5.2	Objectivity: Derivative Liability and Control over the Crime .....	241
7.5.3	Normative Differentiation Between Parties .....	242
7.5.4	Indirect Perpetration and Collective Atrocity .....	242
	References .....	243
	Cases .....	246
<b>8</b>	<b>Shifting Trends in International Tribunals .....</b>	<b>249</b>
8.1	Which Tradition? The Context of ICL .....	251
8.2	Conspiracy-Complicity: Prevalence of the Subjective Approach .....	253
8.2.1	The International Military Tribunal at Nuremberg .....	254
8.2.2	The Tokyo International Military Tribunal .....	259
8.2.3	Military Trials Under Control Council Law No. 10 .....	260
8.2.4	After the Second World War Trials: Rejection of Conspiracy .....	261
8.3	Command and Superior Responsibility: Leadership Liability as Omission .....	263
8.3.1	Command Responsibility .....	265
8.3.2	Superior Responsibility .....	268
8.4	Planning, Instigating and Ordering: Forms of Encouragement .....	269
8.4.1	Planning .....	270
8.4.2	Instigating/Soliciting/Inducing .....	271
8.4.3	Ordering .....	272
8.5	Aiding and Abetting: Hidden Controversies .....	274
8.5.1	Complicity and Aiding and Abetting .....	275
8.5.2	Aiding and Abetting as a Catch-All for Leadership Liability .....	277
8.5.3	Manipulation of the Law-Making Process .....	278
8.6	Joint Criminal Enterprise: Extended and Constructive Liability .....	280
8.6.1	The Inception of a New Mode of Liability .....	281
8.6.2	The Question of Sources for JCE .....	283
8.6.3	The Reification of JCE .....	286
8.6.4	Rejection of JCE at the ICC .....	292
8.7	Co-perpetration: Towards an Objective Approach .....	293
8.7.1	Co-perpetration at the Ad-Hoc Tribunals .....	294
8.7.2	Co-perpetration at the ICC: Control over the Crime .....	297

8.7.3	Balancing the Subjective and Objective Elements of ‘Control over the Crime’ .....	299
8.8	Indirect Perpetration/Perpetration by Means: A Normative Differentiation .....	301
8.8.1	A New Mode of Liability on the International Plane....	301
8.8.2	Perpetration by Means of an Organisation.....	302
8.8.3	Towards a Reification of Perpetration by Means of an Organisation .....	306
8.9	Indirect Co-perpetration by Means of an Organisation: Extended Liability .....	309
8.10	The Question of Differentiation Between Parties to a Crime .....	313
8.10.1	Functional Unitarity at the Ad-Hoc Tribunals .....	313
8.10.2	Normative Differentiation at the ICC.....	315
8.11	Legal Culture and Policy Choices in the International Tribunals.....	317
8.11.1	The Relationship Between the Character of International Criminal Trials and a System of Liability .....	318
8.11.2	Policy Shifts.....	319
8.11.3	The Influence of Participants on the Shifts Between Subjectivity and Objectivity .....	321
8.11.4	Vicarious or Derivative Liability? .....	323
	References .....	324
	Cases .....	329

### Part III Patchworking a Solution to Leadership Liability

9	Applying a Comparative Theory: Beyond Legal Transplants, Toward Legal Patchworking .....	337
9.1	Observing the Patchworking Process.....	338
9.2	Strengthening the Patchworking Process.....	340
9.3	Reversing the Traditional Doctrine of Sources: How the Subsidiary Sources Have Become Primary .....	343
9.3.1	The Rome Statute as an Internally Referencing Source.....	344
9.3.2	Treaties as Primary Sources?.....	345
9.3.3	The Limits of Custom and Principles of International Law .....	345
9.3.4	The Relationship Between General Principles and Domestic Law .....	348
9.3.5	The Role of Judicial Decisions .....	349
9.3.6	Scholars as Participants and Doctrine as a Source.....	350
9.3.7	A Different Hierarchy of Sources .....	351
9.4	Are Modes of Liability in International Criminal Law <i>Sui Generis?</i> .....	353

References .....	355
Cases .....	357
<b>10 Translating the Guilt of Leaders of Mass Atrocity .....</b>	<b>359</b>
10.1 Layers of Translation .....	360
10.2 In Defense of a Normatively Differentiated System of Liability .....	363
10.2.1 Liability and the Goals of International Criminal Law .....	364
10.2.2 Objectivity as a Doctrinal Choice: A Better Fit for the Context of ICL .....	368
10.2.3 A Normative Theory of Culpability .....	371
10.2.4 Deliberative Structure as a Basis for Distributing Liability .....	374
10.3 Sentencing or Qualification: Should Modes of Liability Do the Work of Differentiation? .....	377
10.4 Fair Labelling .....	380
10.5 Who Would You Rather Dine With? The Mastermind or the Executioner .....	383
References .....	385
Cases .....	388
<b>Appendix A: Full Texts of Articles on Liability .....</b>	<b>389</b>
<b>Index .....</b>	<b>397</b>

# Abbreviations

BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BiH	State Court of Bosnia Herzegovina
CJM	<i>Codigo de Justicia Militar</i> (Argentine Military Code of Justice)
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
ISIS	Islamic State of Iraq and al-Sham
JCE	Joint Criminal Enterprise
LRA	Lord's Resistance Army (Uganda)
MCP	Model Penal Code (United States of America)
OTP	Office of the Prosecutor
PTC	Pre Trial Chamber
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
StGB	<i>Strafgezetsbuch</i> (German criminal code)
STL	Special Tribunal for Lebanon
UN	United Nations
USA	United States of America
WCA	War Crimes Act 2000 (Canada)