

# Chapter 2

## Leadership Liability for Collective Crimes

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The truism that crimes of mass atrocity are by definition collective may be one of the greater banes of criminal law lawyers attempting to solve the problem of liability. The paradigmatic commitment to individual guilt that forms the very basis of ICL brings with it problems that are unique to the context of mass atrocity. In conflict situations the moral universe has shifted, and ordinary people, who would not normally commit acts of violence, become capable of heinous acts on a grand scale. Such crimes are characterised by the use of State (or State-like) apparatuses by government or military officials and superiors to mobilise masses towards grave and large scale violence, but the distance between these superiors and the bloody acts committed by the hands of others makes it difficult to untangle questions of responsibility. The greatest challenge is how to accurately reflect the collective nature of these crimes, and at the same time identify who is truly to blame for the emergence of such a situation, and for the individual crimes which take place as a result of it: the problem of collective guilt means that ‘where all are guilty, nobody is.’<sup>1</sup>

With the Nuremberg trials, the move from state to individual responsibility for transgressing the laws of armed conflict and human rights was based on the notion that only by holding individuals responsible could these laws be upheld. This notion was in order to pierce the veil of the State entity behind which leaders could otherwise hide. It was also based on the notion of personal autonomy of the individual; only a person is capable of a moral wrong, not an abstract entity such as the State. But this also means that an individual can only be held liable to the extent that she is

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<sup>1</sup> Arendt 1987, p. 43.

responsible for the moral wrong.<sup>2</sup> And as a matter of logic, we can only be held responsible for that over which we have control, in the sense of moral agency.<sup>3</sup>

Many scholars have pointed out the difficulty of delineating this moral and legal responsibility in the context of mass atrocity, where the extraordinary has become the norm: there is an orthodoxy of hate, and violent, systemised crimes become acceptable among members of the collective.<sup>4</sup> Criminologists have contributed to understanding what one scholar terms *Makrokriminalität*:

The individual crime is conditioned by a conflict in which the whole society is involved. Hence, it is embedded into certain developments and events at the macro level. In this respect, it is not deviant, but conform behaviour.<sup>5</sup>

In these situations, the moral climate has shifted, and it is often the case that if an individual were to refuse to take part in specific crimes, she would risk becoming the next victim, being seen as a threat to the ideology being enforced. This is known to have occurred under regimes such as Pol Pot in Cambodia, and the Junta in Argentina, where anyone considered to be a subversive was declared an enemy to be rooted out.<sup>6</sup> Thus, the moral autonomy of individual ‘foot soldiers’ is reduced. Perhaps they are not entirely exculpated for their evil deeds, but they cannot be said to be acting truly autonomously. Their identity becomes so caught up in the masses and in the violence perpetrated on others, that individuals have been known not only to commit horrendous acts against strangers, but even to denunciate friends, neighbours and family members as enemies in order to ensure their own survival.<sup>7</sup>

Sociological studies of mass atrocity demonstrate that violence only becomes systematic and widespread in this way if a central authority at the very least encourages it, and more often than not those at the height of power do more than this, explicitly mobilising subordinates to support their authority and ideology by extreme means.<sup>8</sup> Situational aspects to collective crimes include the imposition and utilization of ideologies such as nationalism, scapegoating, and utopianism;<sup>9</sup> obedience to authority under situations of authorization and routinisation of violence, and dehumanization of victims;<sup>10</sup> and de-individuation in large groups leading to conformity with group norms.<sup>11</sup>

<sup>2</sup> Nino 1996, p. 136; Mégret 2013, p. 93.

<sup>3</sup> Duff 2007, p. 58.

<sup>4</sup> See for example Drumbl 2005, p. 541; Tallgren 2002, p. 573; Robinson 2012, p. 134.

<sup>5</sup> H. Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt*, (Surhkamp 1989) at 12, cited in Harrendorf 2014, p. 233.

<sup>6</sup> Sancinetti and Ferrante 1999, p. 23; Nino 1996, p. 58; Hinton 1998, pp. 95, 113; Tallgren 2002, p. 573.

<sup>7</sup> Arendt 1973, p. 397.

<sup>8</sup> Arendt 1973, p. 311; Semelin 2007, pp. 166–168.

<sup>9</sup> These are the attributes of ideologies as defined by A. Alvarez, ‘Destructive Beliefs: Genocide and the Role of Ideology’ in: Haverman and Smeulers 2008, 216; see also Harrendorf 2014, p. 235.

<sup>10</sup> H.C. Kelman and V.L. Hamilton, *Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility*, (Yale University Press 1989) at 16–20, cited in: Harrendorf 2014, p. 240.

<sup>11</sup> Harrendorf 2014, p. 243.

The question of moral responsibility therefore shifts up the hierarchy to the leaders, and it is argued here that the legal responsibility should shift in weight accordingly. At the same time, the challenge remains how to reflect the collective nature of the crimes, so that in prosecuting an individual for specific acts, the bigger picture doesn't disappear into notions of individual actions and individual blame. Each specific crime takes place as part of an organised, ideological context, as a means to a greater end. It is therefore necessary to identify modes of liability that can reflect the responsibility of leaders not only for specific crimes committed by subordinates, but for their functional role in the creation and abuse of a system that condones and even encourages atrocities to take place, while at the same time respecting the limits of individual liability according to the principle of culpability.

As a first step towards explaining this, the question of moral agency within the collective will be discussed here. This represents the first translation of guilt to be dealt with in this book: the translation from the collective to the individual and to the role of leaders in particular. There is an intuition that is expressed in the policies of international tribunals that the leaders are the 'most responsible', however the rationale behind this intuition does not receive much attention. It is therefore necessary to consider on what basis individuals are responsible within a collective, and who among the collective may be more responsible for the actions ensuing, and therefore be held to account.

## 2.1 Translating from the Collective to the Individual

There is an assumption made at the heart of ICL that requires more attention: that the collective guilt belonging to a nation or society for crimes of mass atrocity can in some way be translated to individual responsibility. There is an intuition that certain individuals are most responsible for the collective, and at the first international tribunal in Nuremberg the blame was presumptively placed on the leaders of the regime. While there may be a logic to this, it is necessary to clarify the rationale behind it, since we cannot assume that just because someone is in a leadership position, they automatically carry greater responsibility for the crimes committed.

Some criminology scholarship points to personality types that are predisposed to committing crimes of violence which, if combined with situational aspects described above such as a dominant ideology of nationalism or utopianism, routinisation of violence and dehumanization of victims, can lead to an escalation of the kinds of crimes committed.<sup>12</sup> This typology can help to understand the driving motive that certain individuals may have in taking part in collective crimes of atrocity, and particularly in understanding the role of the opportunist, the fanatic and the criminal mastermind who make use of the predisposition of certain other individuals to encourage mass

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<sup>12</sup> Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in: Haverman and Smeulers 2008; see also Harrendorf 2014, p. 244.

group behaviour.<sup>13</sup> In this way, even those whose predisposition is minimal, or only triggered by external threat, can become parties to extraordinarily violent behaviour which has become normal due to the fact that so many others already take part. However this understanding does not help to isolate who is more or less responsible, and why.

The assumption that collective guilt can be translated to individual responsibility involves two conceptual shifts. Firstly, from the collective to the individual in terms of guilt, and secondly from the collective to the individual in terms of responsibility. In domestic criminal law, these two shifts occur in respect of collective crimes in different ways, depending on the legal tradition within which the system plays out. The first shift from the collective to the individual is common to most (western) domestic criminal systems because we deal with individual guilt, and not with collective guilt.<sup>14</sup> There must therefore be some way to link the individual suspects' actions and intentions to the crime committed by a group. How this is done is reflected in the second shift, from collective to individual responsibility, which differs depending on the emphasis placed upon either the subjective intention of the individual, or upon the objectively measured contribution to the commission of the crime.

## 2.2 Individual Versus Collective Guilt

With respect to the first shift from collective to individual guilt, what is happening in these interactions can perhaps better be understood in the light of what American criminal law theorist George Fletcher has described as the war between Liberals and Romantics.<sup>15</sup> Romanticism is associated with a strong identity with the collective, where war and militarism become a source of inspiration for taking part in an ideology worth dying for, and for accepting a role within a hierarchy and part of the fighting collective.<sup>16</sup> Liberalism, on the other hand, is associated with principles of voluntary choice and individual responsibility, which dominate ICL due to their roots in western criminal law systems.

When it comes to the notion of collective or individual guilt, romantics are expansionist, arguing for collective guilt, and liberals are reductionist, arguing for individual guilt.<sup>17</sup> The conflict between focusing on the collective or the individual is

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<sup>13</sup> Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in: Haverman and Smeulers 2008, p. 242.

<sup>14</sup> Mégret 2013, p. 86. An important exception is the notion of *qasāma* in many schools of Islamic law, whereby if a victim is found dead and there is no identifiable suspect, either the owner of the property or land on which the victim was found, or all the inhabitants of the quarter in which the victim is found can be liable to pay 'blood money' as a compensation to the victim's family members. This is predicated on the notion that the landowner or the community would be more likely to ensure security in their quarter of living if they know there is a risk they will be held liable in the event of a violent crime. See Peters 2005.

<sup>15</sup> Fletcher 2002.

<sup>16</sup> Fletcher 2002, p. 1501.

<sup>17</sup> Fletcher 2002, p. 1508.

a foundational feature of two different views of reality. For example, the collective notion of State responsibility is central in public international law, and we consider ICL to be a part of public international law, yet we struggle with the notion that entire bodies of people can be guilty for the crimes carried out by a few in the name of the collective. As former ICTY chief prosecutor Carla Del Ponte stated:

all Serbs, all Muslims, and all Croats are not responsible for the crimes committed by a relatively small number of offenders ... I do not intend to put the whole Serbian people on trial. On the contrary, I want to help Serbia turn the page and bring to justice those who, as individuals, are responsible.<sup>18</sup>

The key question is therefore whether the individual is the ultimate unit of action, or whether we, as individuals, are invariably implicated by the actions of the groups of which we are a part.<sup>19</sup> As already pointed out, in the context of mass atrocity the extraordinary becomes the norm, and violent, systemised crimes are accepted, condoned and perhaps even expected among members of the collective.<sup>20</sup> This deprives people of their second-order capacity to rein in their criminal impulses: the rational choice that an individual agent can make according to either moral impulses or impulses given by their physical surroundings.<sup>21</sup> If an individual chooses to follow the senses which would instruct violent crime over the moral principles which would counsel against it, under normal conditions in domestic criminal law, this would lead to full criminal liability. Guilt in this sense is personal. Yet when the surrounding norm has become one of violence, the ability to make this choice may be reduced. The romantic group identity takes over from the liberal individual identity. It has been suggested that a deindividuated state can actually be induced in people where the group becomes so large that there is increased anonymity and a diffusion of responsibility; the ability of an individual to evaluate the group norm decreases as the sense of self decreases.<sup>22</sup> As Hannah Arendt pointed out, the normality of atrocities in these circumstances is what is so terrifying, since the crimes are committed under circumstances that make it nigh impossible for the perpetrator to know that what is being done is wrong.<sup>23</sup>

In ICL, the liberalist construction of the individual as the central unit of action means that a number of selected individuals are to be blamed for systemic levels of violence.<sup>24</sup> However at the same time the basis upon which these individuals are selected is not always clear. The agents responsible for creating a climate of hate are not easy to identify; teachers, religious leaders, politicians, policies of the state, and bureaucrats enforcing a system of supportive laws are involved. Should ICL

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<sup>18</sup> Press Statement by Prosecutor Carla Del Ponte on the Occasion of her Visit to Belgrade, The Hague, 30 January 2001, P.I.S./558-E.

<sup>19</sup> Fletcher 2002, p. 1504.

<sup>20</sup> See Arendt 1973, p. 314; Drumbl 2005, p. 541; Tallgren 2002.

<sup>21</sup> Fletcher 2002, p. 1543.

<sup>22</sup> For an insightful and succinct discussion of the scholarship on this phenomenon, see Harrendorf 2014, p. 243.

<sup>23</sup> Arendt 1964, p. 253.

<sup>24</sup> Drumbl 2005, p. 568.

select all of these individuals as culpable for the crimes that ensue? Or only some of them? If the latter, which ones, and based upon what criteria? Fletcher argues that in these situations, the collective guilt could (and should) be used to mitigate individual guilt, rather than placing the full weight of the collective guilt on the shoulders of one individual.<sup>25</sup> In the example of Adolf Eichmann, put on trial for his role towards executing ‘The Final Solution’ in Nazi Germany, Fletcher would argue that the collective guilt of the nation of Germany should have mitigated Eichmann’s individual guilt. This was Eichmann’s own argument, that he felt he was ‘being made to pay for the glass that others have broken.’<sup>26</sup>

Nevertheless, the preference for the reductionist, liberalist approach over the expansionist, romantic approach in applying the regime of ICL is evident, and while collective guilt in a moral sense may be seen to exist, collective responsibility in a legal sense is rejected outright. As stated by Antonio Cassese in his capacity as former President of the ICTY:

If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, collective responsibility — a primitive and archaic concept — will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages.<sup>27</sup>

The problem remains, however, how to identify those individuals responsible within the collective for crimes committed by the collective. There is a danger of collapsing criminal liability for a single crime amounting to *an act* of genocide or a war crime, with responsibility *for* the genocide or grander scale of war crimes.<sup>28</sup> The other side of the coin is the tendency to use modes of liability which absorb all individuals into the collective, holding them liable for all crimes committed by the collective while avoiding the difficulty of proving who actually tortured or killed in specific cases.<sup>29</sup> The doctrine of Joint Criminal Enterprise (JCE) has, for example, been used to include convictions where an individual had acted in the sphere of politics, leading to a criminalisation of political behaviour and a blurring of the line between collective action and individual liability.<sup>30</sup>

The terms ‘guilt’ and ‘liability’ are therefore to be used with caution, since the translation of moral guilt and collective guilt to individual criminal liability is not a direct one.<sup>31</sup> This also points to the important relationship between guilt and agency, which will be discussed next.

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<sup>25</sup> Fletcher 2002, p. 1543.

<sup>26</sup> Osiel 2009, p. 20, citing Enrique Gimbernat Ordeig, *Autor y Cómplice en Derecho Penal* (1966) at p. 187.

<sup>27</sup> Report of the President of the ICTY 1994, para 16.

<sup>28</sup> Mégret 2013, p. 109.

<sup>29</sup> Simpson 2007, p. 71.

<sup>30</sup> Haan 2005, p. 173.

<sup>31</sup> More attention will be paid to this in Sect. 5.3.6.3 where the definitions of terminology are clarified.

## 2.3 Individual Versus Collective Agency

Given the preference for individual guilt in the place of collective guilt in western criminal law and in ICL, there must be clear principles based upon which it can be determined when and to what extent an individual is responsible for crimes committed through a collective. Who is most to blame for the collective crimes? The key concept is that of agency. In domestic criminal law we consider group action to be of greater danger than individual action. We have specific crimes and often higher sentences for organised group actions and organised crimes. And we have modes of liability to deal with the problem of switching back and forth between expansionist and reductionist realities. In ICL, despite individualism at its core, we still believe that crimes of mass atrocity express the actions and the implicit guilt of entire groups of people, most typically of nations that are in conflict.<sup>32</sup> We therefore require a theory of agency that justifies shifting the responsibility for this group action to the individual as an agent within the collective.

Complicity itself, understood as participation in collective crime, and translated into different modes of liability, deals explicitly with this shift from individual to collective and back again. Criminal law theorist Christopher Kutz explains action in terms of generality, whereby the collective exists as an agent with its own intention, in the way we see corporations, a basketball team, or an orchestra.<sup>33</sup> At the same time Kutz opts for a reductionist approach, in that each individual's actions within the collective agency can be seen to be caused by the collective will. Individual members of a group intentionally do their part in promoting a joint outcome, or a joint activity.<sup>34</sup> A board member signs a paper on behalf of the corporation, a team member shoots a basket, a violinist plays her part of a symphony. Individuals act in this context with the intention that the group perform an act, and with the expectation that other members of the group will do their part.<sup>35</sup> But individual intentions and beliefs can still be ascribed to the individual, based on a functionalist approach, so that even if an individual might say 'the group made me do it', there is still some individual agency possible, since it is possible to interpret our actions as our own. This is especially relevant when we are not talking about an orchestra playing a symphony, but, for example, members of an air force collectively bombing a city, an action which involves weighing up the moral choices.

Kutz argues that participatory intention entails implication, in the sense that if an individual intentionally participates in a wrongful act, this would automatically entail individual responsibility for the collectively produced result.<sup>36</sup> He draws a descriptive distinction between participatory, inclusive accountability, based upon the relation between an individual's will and the resulting wrong or harm, which is a subjective approach, and direct, exclusive accountability, which is based more upon

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<sup>32</sup> Fletcher 2002, p. 1512; Drumbl 2005, p. 567.

<sup>33</sup> Kutz 2000, pp. 68, 75.

<sup>34</sup> Kutz 2000, p. 69.

<sup>35</sup> Kutz 2000, p. 96.

<sup>36</sup> Kutz 2000, p. 146.

a causal relation to the individual's actions, and is therefore predicated on an objective approach. However Kutz maintains that normatively there can be no difference between these two forms of accountability and that both complicit participants and direct actors must be seen to be equally and jointly culpable for collective crimes.<sup>37</sup> The individual air force members must all be held culpable for the war crime of bombing a city. In this same way, any unintended consequences of the collective action that are foreseeable, including further or different criminal acts committed by other members of the collective, should be ascribed to the group and back again to all the rest of its individual members:

[R]uined flowers are a foreseeable part of a project of picnicking, as a product of any group member's actions. Neither of us needed to expect that we would ruin flowers, but each ought ex post to acknowledge that it was a possible consequence of what we did together. And so it is reasonable to ascribe the mess to us, and to me inclusively.<sup>38</sup>

This approach would lead to the conclusion that there need be no normative distinction between participants in a crime. It is a subjective approach, focusing upon the intention of the individual within the collective, regardless of any difference between the role of, for example, the violinist and conductor of an orchestra. However there are arguments for making such a distinction when it comes to mass atrocity crimes in particular, and for opting for a more objective approach to the question of participation in collective actions.

## 2.4 Deliberative Structures and Those Most Responsible

Legal philosopher Jens Ohlin offers a further step in this analysis when he speaks of overlapping agents,<sup>39</sup> a notion which Kutz also discusses, but with different conclusions as to the distribution of responsibility. The problem with ascribing the collective will to a group, and speaking of group agency in the romantic sense, is that it interferes with the liberal notion of individual liability, which is central to the criminal law paradigm. Just as Kutz's theory shows, we are left with a continuous shift between group and individual, since the group intent is said to cause the individual action, which then gets attributed to the group, and finally in terms of criminal liability back to the individual again. Ohlin agrees with Fletcher that a full reduction of the group to the individual, in the liberalist ideal which Kutz follows, is an unsatisfactory conclusion.<sup>40</sup> However, where Fletcher would argue for mitigation of guilt and therefore of legal responsibility of the individual, Ohlin instead says that while a group can act with a certain collective rationality, the individual still retains individual agency, even though there is a submission of some individual reason to the group.<sup>41</sup> The

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<sup>37</sup> Kutz 2000, pp. 147–154.

<sup>38</sup> Kutz 2000, p. 155.

<sup>39</sup> Ohlin 2007.

<sup>40</sup> Ohlin 2007, p. 173.

<sup>41</sup> Ohlin 2007, p. 181.



basketball team member submits some reason to the team, in that it is not simply her goal to score baskets individually, but also to do what is best for the team in order to win, even if she never shoots a single basket herself. The violinist plays his part of a symphony as an individual, for if he were to fail to play, or to play a different piece of music, it would be clear that he was not subsumed into the group. At the same time he has submitted some of his reason to the collective will of the orchestra to perform a certain symphony.

In this way the group and the individual are overlapping agents.<sup>42</sup> This means that while the group can still be said to be acting collectively, with a collective will, the individual can still be held responsible for his or her own actions, and possibly—though not always—for the actions of the group. The determining factor is the extent to which there was a possibility for the individual to be involved in the group deliberation, which led to the collective will. A person lower down in a hierarchy within a group would be less culpable, because they had surrendered their individual reason to the group deliberative process, whereas those on equal footing with each other, or higher up within a group, can be held responsible for the collective will and action.<sup>43</sup> The conductor of an orchestra is more responsible for the final performance of the symphony than each of the individual musicians, even though their collective participation is necessary. Those individuals who exercise more individual agency in the deliberative process of the collective are able to exercise more control over the actions taken by the collective, since they have more control over what is done, how it is done and why it is done. With greater agency and control comes more responsibility.

This notion of overlapping agency helps to explain the problem of individual responsibility for complex collective crimes within the bureaucracy of the State or a State-like organisation of insurgents. The romantic, expansionist ideal would ascribe full liability to the collective, meaning that individuals acting through the collective would be immune to scrutiny of their actions. Avoiding such immunity was precisely the reason why the Nuremberg trials shifted the paradigm of responsibility to the individuals who were blamed for committing crimes in the name of the State. On the other hand, the liberalist ideal would place full blame on the shoulders of individual members of the collective, which would risk scapegoating and, in the case of their removal from the organisation, would leave the same bureaucratic climate in place that allowed the crimes to take place, and would do nothing to ensure prevention of further criminal activity. A point must therefore be sought in between these two ideals, where the collective nature of the crimes is accurately reflected, while at the same time individual responsibility within the collective can be identified.

The problem remains of how to identify which individual members should shoulder this blame. The notion of overlapping agency allows for clarification of the collective rationality, and at the same time not all of the individual members are subsumed into the abstract of the collective. Those lower down in the organisation can be said to play a less determinative role, since they exercise less agency over the

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<sup>42</sup> Ohlin 2007, p. 185.

<sup>43</sup> Ohlin 2007, pp. 196–7.

decision-making, and since their refusal to take part would do little to change the collective actions. If one person refuses, another willing individual could take their place. Those higher up have a different role in the deliberative structure of the collective, since they exercise more control, and they are less easily replaced by others. Should a leader interfere with the collective will, this could change the course of the atrocities taking place, thus when their interference leads to the commission of crimes, they have a higher degree of moral responsibility as individuals.<sup>44</sup>

The notion of overlapping agency helps to identify both the collective reason and the individual reasons that lead to the commission of collective crimes. This gives justification for punishment of certain, but not all, individuals within the collective. As Ohlin points out, the more horizontal the participation of individuals in the deliberative process of the collective, the more justification there is to consider all of the members equally culpable,<sup>45</sup> but where there is more of a discernible hierarchy, overlapping agency describes the dynamic of collective criminality in such a way that the focus is upon those who have more influence over the crimes.

## 2.5 Why the Leaders?

The complexities of crimes of mass atrocity are difficult to capture in prosecutions, and yet there is a commitment to continue to build a system of ICL that can accurately reflect not only the collective nature of these crimes, but also the individual liability of certain individuals within that collective. The question posed in this chapter has been how to identify those within the collective who carry the most blame for the atrocities that have taken place; who are those ‘most responsible’, to be held to account? The extraordinary nature of mass atrocity comes about because a collective has begun to accept these actions as normal behaviour—but it takes some individuals with specific political aims and sufficient influence over others to convince them to give up their individual reason to the group and use violent means to fulfil these ends.

Given that criminal liability is based upon moral agency, in that we can only be held responsible for that over which we have control, the answer must be that those who have the most freedom of agency and exercise the most control over the collective must be most responsible. This is especially so since responsibility is intrinsically linked with moral agency; we can be held responsible only for that in relation to which we have some effective agency, some form of control.<sup>46</sup> Although thoughts and intentions are an aspect of this agency, and must be taken into account in determining criminal liability, they are not in themselves sufficient. Criminal liability requires first and foremost responsibility in this sense of agency and control.<sup>47</sup> As criminal law theorist Antony Duff has put it:

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<sup>44</sup> Ohlin 2007, p. 197.

<sup>45</sup> Ohlin 2007.

<sup>46</sup> Duff 2007, p. 58.

<sup>47</sup> Duff 2007, p. 37.

We are criminally responsible as moral agents, since we are responsible for our failures to respond appropriately to the moral reasons with which criminal law is concerned: culpable responsibility for moral wrongdoing is responsibility as a moral agent.<sup>48</sup>

In selecting a model for modes of liability most appropriate to ICL, it is still important to maintain some way of reflecting the collective nature of these crimes. The translation to individual criminal liability may threaten to subsume the collective context if blame is placed on the shoulders of those who took part in the masses, without identifying those who are most responsible for affecting the moral universe in which the collective will is enacted. The challenge is identifying the difference between influential leaders and those individuals lower down the hierarchy who may have reduced agency when it comes to the decisions that lead to crimes being committed, and who sometimes find their own survival dependent on their participation. In seeking a system of liability most appropriate for the context of ICL, these deliberative structures should be taken into account.

Given the specific character of mass atrocity crimes as system crimes, the notion of overlapping agency offers a way to distinguish between individuals involved in these collectives, by identifying a higher level of blameworthiness for those who exercise control or influence over the deliberative process in a collective. ‘Those most responsible’ are therefore those with the most influence and control. The notion of overlapping agency provides a tool for disentangling the collectivity of mass atrocity while helping to delineate criminal liability.

Overlapping agency also reflects the sociological analysis of totalitarianism according to Hannah Arendt, whereby leaders make use of propaganda to fuel ideologies beyond limited political belief, such that something even more powerful than a mob mentality arises; a mass mentality begins to take over within which moral standards have shifted drastically, and any act that ensures the survival of the perpetrator at the cost of victims’ livelihood or lives becomes both acceptable and expected.<sup>49</sup>

It would therefore seem there are moral grounds for identifying the leaders within a hierarchy as ‘those most responsible’ in the translation from the collective to the individual. These are general, justifying grounds for singling out the leaders of mass atrocity, providing the rationale for the intuition that has played consistently throughout attempts to prosecute crimes of mass atrocity. But it is also necessary to consider how to best reflect these grounds in terms of criminal liability. What system of liability will best reflect the reality of collectively committed atrocities and the role of leaders therein? One of the questions faced by the International Military Tribunal (IMT) at Nuremberg is still unsettled today, namely whether there should be a selection made, either pragmatic or normative, as to who specifically to prosecute and under what mode of liability. This has to do with a policy choice, and a prosecutorial strategy to ensure a system as effective as possible, to which the next chapter will turn attention.

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<sup>48</sup> Duff 2007, p. 47.

<sup>49</sup> Arendt 1973, p. 307.

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