

**ALL TOGETHER ALONE: ON MORAL RESPONSIBILITY FOR  
COLLECTIVE WRONGDOING**

By

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**Declaration**

This dissertation contains no material accepted for any other degree(s) at any other institution(s).  
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Stearns Broadhead

## **Abstract**

This doctoral dissertation offers a solution to a problem that appears perhaps most perspicuously in law. The problem can be formulated as a question: Who is morally responsible for collective wrongdoing such as genocide? There are three prominent ways (sometimes in combination) in which this query has been approached by theorists focused on the topic of responsibility for collective wrongdoing. First, it has been addressed as a question about the subjects of moral responsibility (e.g., individuals or groups). Second, it has been treated as a question about the objects of responsibility (e.g., dateable events or character). Third, it has been regarded as a question about the conditions under which it is appropriate to hold a subject morally responsible for collective wrongdoing. This dissertation largely eschews the first two approaches. It takes as its starting point the view that individuals can be morally responsible for past events and outcomes. As is shown, these include collective wrongdoing, which is a harmful event or outcome produced by multiple agents who together concertedly act (or omit) to bring it about. This dissertation argues that only when an individual intentionally participates as a group member with others in collective wrongdoing can she be morally responsible for it as such.

Part one of this dissertation begins by examining conceptions of crime, wrongdoing, and legal responsibility for them. It then identifies the central problem about responsibility for collective wrongdoing as it appears in the conventional definition of genocide. Part two of this dissertation opens by offering an account of collective wrongdoing, and more generally collective intentional action. It then argues about the conditions under which it is appropriate to hold an individual morally responsible for collective wrongdoing. In addition to this, it advances an argument in favor of a specific means of allocating responsibility to agents on the basis of their distinct roles in bringing about a collectively-produced wrong. This dissertation provides a solution to a problem that continues to prompt debate in moral philosophy. In so doing, it advances ongoing discussions about moral responsibility and the topic of collective wrongdoing. Furthermore, in light of the way that this dissertation approaches its central query in connection with law, the solution it provides is one that can be readily applied to that practice as well.

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## *General Introduction*

### **1. Preliminaries**

Sometimes a problem is clear. Sometimes there is clearly a problem, but it is not entirely clear what it is. Still sometimes there is clearly a problem, but it is not at all clear what to do about it. Moral responsibility and collective wrongdoing respectively offer more than their fair share of problems over which many continue to puzzle. However, there is one problem (albeit with multiple aspects) combining both of these topics that has really left me to wonder. It is a problem about ascribing moral responsibility for collective wrongdoing, and this dissertation endeavors to solve it.

To see the rough contours of the problem, consider a quotation from Seumas Miller which captures one of its aspects. The subject of the passage is genocide, a specific instance of collective wrongdoing, and who can be morally responsible for it:

Naturally, each [perpetrating] member is individually responsible for his or her individual act of murder, or for assisting in the murder of a given person, or for planning an attack, or for whatever contributory action he or she performed. But how do we escape the conclusion that no one is morally responsible for the genocide as such?<sup>1</sup>

What I find puzzling about the above is that the conclusion—'therefore, no individual is morally responsible for genocide as such'—is claimed to follow from the premise—each individual is morally responsible for her own actions. The conclusion appears to be no less perplexing when generalized to cover not just genocide, but any case from a family of cases that includes (but is not limited to) crimes against humanity, concerted harms against the

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<sup>1</sup> *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001), 248.

environment, and so forth: ‘therefore, no individual is morally responsible for collective wrongdoing as such.’

Showing *that* and how the above conclusion does not follow is only one of the major tasks of this dissertation. The problem generally pertains to conditions of moral responsibility and when an agent can be judged morally responsible in light of them. The solution to the first aspect of the puzzle depends in part on identifying that for which moral agents can be morally responsible. By detailing these conditions and providing arguments in their defense, this dissertation offers the escape route that Seumas Miller, among others, seems at pains to find.<sup>2</sup>

It is at least noteworthy that the above conclusion has held various theorists under its intuitive sway. Unlike an event, action, or outcome produced by a lone individual, collective wrongdoing (typically) necessitates the coordinated efforts of a plurality of individuals. If an individual is only responsible for her actions and the outcomes produced by those actions, and if she could not, by herself, effectuate a collective wrongdoing or wrong, then (as the argument goes) it seems she cannot be responsible for either of these.

As I describe in the subsequent section and also later in this dissertation, this first shade of the problem has prompted much discussion in philosophy, with especially heated debates about moral agency and the moral responsibility of groups as such. Although some of this talk has been fruitful, it seems to me that not all of it has been. If we accept that individuals can be morally responsible for collective wrongdoing as such, which is first to accept that individuals

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<sup>2</sup> A short selection of others: Marcus Hedahl, “The Collective Fallacy: The Possibility of Irreducibly Collective Action Without Corresponding Collective Moral Responsibility,” *Philosophy of the Social Sciences* 43, no. 3 (September 2013): 283–300.; Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford: Oxford University Press, 2011);. Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009);. Gregory Mellema, “On Being Fully Morally Responsible,” *American Philosophical Quarterly* 21, no. 2 (1984): 189–93; Sanford Levison, “Responding to Crimes of War,” *Philosophy & Public Affairs* 2, no. 3 (1973): 244–73.

can be morally responsible, then the next facet of the problem to puzzle over is about which individuals, in particular, can be morally responsible and on what grounds.

This second aspect is perhaps more elusive. It pertains to the scope or object (not degree) of an agent's moral responsibility. My solution amplifies and in a sense deepens the conditions of moral responsibility (the same conditions that underwrite the answer to the first feature of the problem). It does so by distinguishing *when*, with respect to even complex examples such as collective wrongdoing, some individuals are not simply eligible for blame as moral agents, and further not simply qualified for blame because of their actions, but deserving of blame for collective wrongdoing as such because of their principal role in it.<sup>3</sup> One can share blame for (culpable) wrongdoing by participating with others in collective wrongdoing. This is in distinction to, for example, an agent's blameworthiness for contributing to the wrongdoing of others.

Now, the above provides an initial impression of the problem that this dissertation will address. Perhaps there remains a question about why such a problem about ascribing moral responsibility for collective wrongdoing should be of concern at all. It is true that the topic is a live one in philosophy and law, and that this alone provides a reason to engage with it. That is, there is a fairly long-standing and still active literature with which to interact and to which a project on the topic can contribute. My answer as to why is not reducible to this, even though the literature will be advanced by this work.

Some of the most pitiable chapters of human history have arisen from the sorts of concerted, collective wrongdoing about which this dissertation is interested. Explicating and

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<sup>3</sup> Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), 57; Michael J. Zimmerman, "Sharing Responsibility," *American Philosophical Quarterly* 22, no. 2 (1985): 120.

arguing about the conditions of moral responsibility can guide moral judgment-making, which occurs in daily-life and (arguably) in law. Without clarity about such judgments—who they refer to, what their object is, and when they are appropriate—we potentially risk causing further harm in making them at all. My account avoids that risk and so stakes a position that might help others come to terms.

## 2. Specifics

Providing a defensible account that answers the question ‘who is morally responsible for collective wrongdoing?’ is the main concern of this work. Here I will discuss in greater detail substantive features of this account. Throughout certain assumptions are made and what follows is an effort to acknowledge them explicitly.

Here is one such assumption: people can be morally responsible. More specifically, moral responsibility is possible because relevant conditions of free will and control can exist.<sup>4</sup> Moral responsibility is the blameworthiness or praiseworthiness of moral agents. Whether an agent is morally responsible depends on facts about her (e.g., her capacity to deliberate and act on reasons) and her relationship to certain harmful or favorable events or states (e.g., having caused or omitted an action or having been under an obligation).

I take it that (necessarily) “an agent is morally responsible for some event or state if and only if that agent deserves to be the object of a response such as censure in respect of that event or state.”<sup>5</sup> Moral responsibility itself can be approached in different ways and with one of a variety of senses in mind. My focus is on an individual person’s responsibility for some past

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<sup>4</sup> Michael J. Zimmerman, *An Essay on Moral Responsibility* (Totowa: Rowman & Littlefield, 1988), 5.

<sup>5</sup> Michael J. Zimmerman, “Responsibility, Reaction, and Value,” *Journal of Ethics* 14 (2010): 111.

event. Call it retrospective personal responsibility. Further, blame is the type of response that I focus on and not, for example, forms of praise.

About blame, I mean various forms of negative outward expression (censorious treatment) that are directed at an individual because of a judgment of her worthiness of such a response. An individual may be judged blameworthy and on this basis negative treatment may apply; however, even if such treatment may apply because an individual is judged blameworthy, other considerations may weigh against subjecting her to that sort of experience.<sup>6</sup>

In daily life something like the assumption that people can be morally responsible is common. Although I do not weigh in on why that may be so, by making this assumption I am, in fact, signaling that many features of a long-standing debate about free-will and determinism will be set aside. While this dissertation has some investment in this debate it never directly treats it.

Here is another assumption: it is possible to detail conditions for holding persons morally responsible because they can be morally responsible in the first place (but I am not going to assume that anyone ever is morally responsible).<sup>7</sup> This is a crucial assumption because the answers I provide stipulate various conditions of moral responsibility.

Especially in light of this latter assumption, the aim of this dissertation can be restated. It provides an account of when to hold an individual person morally responsible for collective wrongdoing. That is, it offers conditions for moral responsibility ascribable to an agent for what she has done and this includes when what she did was culpably act with others.

Notice that the question I propose to answer differs from my formulation of the dissertation's topic. The former being 'who is morally responsible for collective wrongdoing?'

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<sup>6</sup> Cf. Zimmerman, *An Essay on Moral Responsibility*, chap. 5.

<sup>7</sup> Ibid., 5 & 47. The citation is connected in particular to the parenthetical statement, which I included in the sentence because, as Zimmerman points out, to do otherwise would potentially presuppose a "particular solution to the free will-determinism controversy."

The latter roughly being ‘when are individuals morally responsible for collective wrongdoing?’ There is also an intervening question; namely, ‘for what is moral responsibility to be ascribed?’

Any apparent discrepancy is dispelled by showing that these different pronouns capture the distinct aspects of the problems discussed in the first section. My chief question is purposely phrased as ‘who’ and the subsequent formulation as ‘when’ in order to reflect the distinctiveness and the priority of conditions to be addressed. To answer ‘who?’ is to identify the requisite capacity of agents to be responsible, which here represents a precondition for judgments about retrospective personal responsibility.

To answer ‘when?’ requires the fulfillment of the capacity condition and also a determination about ‘for what’ or the object of responsibility (i.e., collective wrongdoing). To dispel any hint of confusion, I will rephrase ‘when’ by using ‘who’ and also include the as-yet unexamined ‘for what’: Who, among those eligible and qualifying candidates (both in terms of capacity to be responsible and in terms of having abrogated a moral rule), deserve to be blamed for collective wrongdoing?

The assumptions in place can be taken to cover these issues. Nevertheless, the senses of the question bear repeating to indicate more precisely the distinctiveness of the conditions that will be the foci of this project. There is another reason to spend time on the query: a certain philosophical controversy seems to demand it. This is an ontological debate about whether the eligible subjects of moral responsibility (i.e., who is a moral agent) are only individual persons or whether they can be entire groups as well.<sup>8</sup>

Notice that apart from a couple of brief mentions, this work neither registers arguments in favor of, nor devotes time to refuting claims about groups as such or their moral responsibility.

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<sup>8</sup> There are yet other possible candidates—animals, complex machines, and so forth. I ignore them without otherwise denying or affirming them as potentially eligible.

In this regard, it never countenances arguments about whether or not acts imputed to collective agents not reducible to their individual personal members collective agents like states or corporations are, as Georg Henrik von Wright puts it, “‘logical constructions,’ i.e. could be defined (conceptually explicated) in terms of acts of some personal agents.”<sup>9</sup>

This work focuses on individual persons as moral agents. By adopting this starting point, in conjunction with the assumptions about moral responsibility generally, I investigate other problems that arise out of attempts to assign moral responsibility. The problems of specific interest appear most graphically in those cases where multiple agents do wrong together. Such instances often reveal uncertainties about the grounds for and apportionment of blame.

About those cases, collective wrongdoing is a harmful event or state produced (through performance or omission) by multiple agents who concertedly brought that event or state about. Collective crime is an event or state that violates a rule of criminal law produced (through performance or omission) by multiple agents who concertedly brought that law-violating event or state about. Agents who abrogate a moral rule (do wrong) are sometimes responsible in law for that abrogation (or vice versa), but certain legal rules are necessary for the violation to be counted as a legal violation.

In light of the preceding, a crucial terminological distinction should be borne in mind. When words such as ‘crime,’ ‘wrongdoing,’ and ‘intention’ are modified by the word ‘collective’ or ‘collectively,’ the so-qualified term(s) are meant to express that, for example, wrongdoing involves more than one individual.<sup>10</sup> This sense of collective refers to individuals

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<sup>9</sup> *Norm and Action*, The Gifford Lectures (Templeton Press, 1958), (Online resource available at <http://www.giffordlectures.org/Browse.asp?PubID=TPNORM&Volume=0&Issue=0&TOC=True>).

<sup>10</sup> Ibid.

together, or a collection of individual agents.<sup>11</sup> Here is an example: “The three workers lifted the table together.” Each worker lifted the table, then, and in so doing they all did it together.

The above contrasts with a sense of collective used to qualify distinct entities or groups as such (even if individuals are involved in them). That is, a collective agent such as a corporation, state, or some other organic group that is super-individual.<sup>12</sup> An example: “The Social Security Administration (SSA) sent me a check this morning.” While reference to the SSA is metonymic, it conceptualizes an organization as being distinct from any particular person. It is not an individual that is the subject, but rather the organization as a whole.

Notice that throughout I have used the verb ‘involve’ to indicate when, for example, wrongdoing might be describable as collective. In this sense, ‘to involve’ is a placeholder. It is meant to stand in for other action verbs that could better detail what an agent or multiple agents did in specific cases. It is only after evaluation of what one did and why one did it that ‘being involved’ could lead to judgments of moral responsibility. This is to iterate that an agent’s blameworthiness is not to be located in action alone, but in its conjunction with certain mental attitudes in performance or omission (e.g., the decision to do wrong).

All of the above helps set the stage for my thesis statement. It is this: individuals who intentionally participate as group members in collective wrongdoing can be ascribed moral responsibility for it. This will almost certainly appear obscure (or worse anemic) at this stage. Again, its clarification, argument and defense will occupy the following. Furthermore, conditions for allocating moral responsibility (most notably in the sense of sharing responsibility) will also be addressed.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.



Finally, it is worth restating that this work is concerned with questions of morality. It happens that some of these questions and the puzzles they instantiate appear in stark form in the law. Even in analyzing legal principles, rules, and so forth no attempt is made to advocate for or justify specific forms of legal treatment to be applied to an individual. Great caution is needed in that pursuit, and the following does not draw up guidelines or function as a guidebook for it.

### **3. Contributions**

In the above sections I have alluded to and cited various authors whose works focus on the same or similar topics that this dissertation does. There are two main conversations that this dissertation takes part in and to which it contributes. The first is unsurprisingly about moral responsibility and collective wrongdoing. The second is about rules that guide pronouncements of legal guilt.

With respect to the first especially, some of the theorists considered below include Christopher Kutz, Robert Goodin, Larry May, Joel Feinberg, John Gardner, and Michael J. Zimmerman. Arguably with the exception of May, none of these thinkers or their respective oeuvres focuses exclusively on collective wrongdoing and moral responsibility. Nonetheless, each has contributed to the philosophical literature.

Having listed some of the thinkers, however, I wish not to announce that my arguments always conform with or parallel arguments made by each of them. In some cases they do and in some cases the opposite would be closer to the truth. I wish rather to provide a general picture of the philosophical literature with which this project is engaged. It is, for the most part, moral philosophy applied to matters of concern to law.

The preceding is not a clumsy way of saying legal philosophy. With the exceptions of Feinberg and Gardner, who are often counted as legal philosophers, none of the others comfortably fit into that field. For that matter, with the arguable exception perhaps of Zimmerman, none of them would be slotted into moral philosophy.

The preceding is simply to say that I treat the topic largely from a vantage point of moral philosophy. Again, the current state of the topic in philosophy is sometimes pinned by arguments about agency and collective responsibility; however, starting with Christopher Kutz's work especially, some of the most recent work on collective action and moral responsibility has sidestepped such entanglements in order to provide fresh answers to a mature literature on individual moral responsibility for collective wrongdoing.

Some of these answers (as with mine) recognize that, even if the conversations about group agency and responsibility are not always fruitful for some purposes, they have at least helped to show that problems about determining individual moral responsibility in complex and challenging cases of collective crime and wrongdoing *still* exist. In part, they still exist because sensitivity to the features and specialty of collective action were (at least apparently) missing from some of the earliest philosophical writings on the topic.<sup>13</sup>

Notice also that many of the earliest discussions of this topic arose in the aftermath of World War Two, and were especially concerned with the drafting of Nuremberg Military Tribunal and the drafting of its Charter.<sup>14</sup> This is one of the main reasons that law gets dragged into this conversation at all; namely, the problems have been framed as questions about responsibility for the crimes prosecuted in connection with the Holocaust in particular. This

<sup>13</sup> This is a claim often laid against H.D. Lewis, "Collective Responsibility," *Philosophy* 23, no. 84 (1948): 3–18.

<sup>14</sup> E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser, 2003); and, Pamela J. Stephens, "Collective Criminality and Individual Responsibility: The Constraints of Interpretation," *Fordham International Law Journal* 37 (2014): 502.

interest has remained both in moral philosophy and comparative law, albeit with sometimes different emphasis, aims, and conceptual backgrounds.

This dissertation offers arguments about the appropriate conditions of individual moral responsibility for collective wrongdoing that not only are based on the most recent philosophical literature on the topic, but also contribute to this literature by explicating, counter-arguing, and sometimes defending views within it. To the extent that this most recent literature manifests and positions itself in relation to earlier contributions, my dissertation also explicates, defends, and sometimes argues against them.

In contrast to the above, but bearing in mind that the distinction is sometimes quite weak, this dissertation also considers legal literature on the topic of collective crime and wrongdoing. However, those writings that dwell on matter of legal procedure do not fit into this project. There are, however, recent substantive treatments of collective crime in comparative law that are addressed. Such writings include attempts to craft coherent theories of perpetration that account for the collective nature of crimes such as genocide and crimes against humanity.<sup>15</sup>

Although this dissertation does not itself aim to build a legal theory, any effort in that direction can at least pay heed to the problems that my account identifies.<sup>16</sup> I think that a stronger claim is defensible; namely, any such theory should be able to sustain and incorporate the solutions my account provides. Even so, I will not posit that stronger claim because to do so would enlarge this project's scope beyond the primarily moral questions it addresses.

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<sup>15</sup> Stephens, *ibid.*; Neha Jain, "Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration," *The American Journal of Comparative Law* 61 (2013): 831–71; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

<sup>16</sup> There are two points to note. First, by 'pay heed' I mean to recognize that questions of morality attend matters of legal policy and the conceptualization of (to the extent that there is a coherent doctrine) collective crime and wrongdoing. Second, and this is why I call the former claim a weak thesis in relation to debate about substantive issues of collective crime, many theories explicitly grapple with the problems this dissertation identifies.

In light of the above, this dissertation's argument contributes to the development of models of (co-) principal and secondary liability for collective crime. It can also contribute to efforts to locate a fair set of principles of liability for Joint Criminal Enterprise Doctrine (JCE). These possibilities roughly represent the current (disparate) state of the law. Again, any theory of this sort that integrates my conclusions will have at least one weighty moral reason working to its favor.<sup>17</sup>

#### 4. Synopsis

The structure of the dissertation is as follows. Part One, titled "Background and Conceptual Framework", constitutes the theoretical backbone of this work. As the title suggests, this part of the dissertation operates at a level of relative generality. It delimits the scope and develops the conceptual framework of the dissertation through definition, conceptualization, and analysis of those issues which operate as a backdrop to main thesis and arguments. Nevertheless, it is precisely at this level of the analysis that the dilemma motivating the rest of this work becomes apparent.

The first chapter, "Crime, Wrongdoing, and the Individual", offers an answer to the question 'what is crime?' In so doing, it starts by explicating the legalistic conception of crime, but does not limit itself to exposition only. The chapter analyzes that which is normatively required for determining the criminality of an act: constitutive elements of crimes (i.e., the special part of the criminal law), as well as guiding and regulating principles of the criminal law (i.e., the general part of the criminal law). What emerges is a comprehensive view of crimes and criminal law which serves to ground and normatively delimit considerations regarding the

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<sup>17</sup> Stephens, 502.

specific crime of genocide. Furthermore, it is a view that indicates the sort of protective principles that ostensibly should underlie forms of negative treatment for agents.

Chapter two, titled “The Conventional Definition of Genocide as a Problematic Groundwork”, is a critical analysis of the legal definition of genocide. Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide serves as starting point for consideration. Through investigation and analysis, problems and interpretative difficulties related to the basic structure, various elements, and liability conditions of the crime of genocide are revealed. This chapter lays the foundation for the central dilemma and its solution offered in part two of the dissertation.

Part Two, “Arguing about Individual Moral Responsibility for Collective Wrongdoing”, reframes analysis in the first part of this work and develops an account of the appropriate grounds of responsibility ascriptions for collective wrongdoing. The view of criminal responsibility from the first two chapters proves problematic for cases where multiple agents act in order to achieve a collective wrong. Genocide is taken to be a prototypal instance of such collective wrongdoing, where ignoring the collective features of the crime can result in an inadequate view of individual responsibility for it. The aim of this part of the dissertation is to offer an argument about individual moral responsibility for collective wrongdoing that is sensitive to the collective dimensions of the latter.

Chapter three, “Collective Intentional Action”, conceptualizes collective intentional action by accounting for those specific features which make the action or actions of more than one individual identifiably collective. This step is crucial because if we are to gauge individual responsibility for collective wrongdoing, it is first necessary to understand what collective wrongdoing is. Conceptualization pinpoints conditions that establish when and why individual

actions are to be considered collective intentional ones, and, subsequently when such actions constitute collective wrongdoing. On these bases, the moral evaluation of individuals can proceed.

Chapter four, “Assigning Moral Responsibility for Collective Wrongdoing”, puts forward an account of individual moral responsibility for collective wrongdoing. Building on the conception of collective intentional action from before, the chapter advances a view of responsibility which takes into consideration both individual actions, as well as the collective contexts in which they are performed and through which they are rationalized. The chapter argues that given the fulfillment of certain conditions individuals who intentionally participate as group members in collective wrongdoing share responsibility for it. The chapter details conditions and grounds for assigning blame to these agents (i.e., group members). It further clarifies grounds for judgments of responsibility which might also attach to agents who stand in different relations to the collective wrongdoing (i.e., secondary agents).

Finally, the “General Conclusion” offers an opportunity to look back on some of the main points and to review the principal conclusions of this work. Possible implications of the thesis for evaluating individual responsibility in law are pointed out as well.

## **PART ONE: BACKGROUND AND CONCEPTUAL FRAMEWORK**





## *Chapter 1. Crime, Wrongdoing, and the Individual*

### **Introduction**

The major aim of this chapter is to offer a conceptual analysis that brings into relief the meaning of crime. Other definitions and concepts such as wrongdoing and individual moral responsibility will be considered below and roughly clarified by such analysis. In later chapters, these other topics will be examined with greater refinement and in comparison with legal principles and practices examined here.

At first blush, the definition of crime seems readily accessible. Offering a definitive answer to the question 'what is crime?' is apparently as easy as turning to the penal code of a given country or jurisdiction. It might be even easier still. Just reading in the morning news about an armed robbery, or spotting someone in the corner market who nicks a sweet, the meaning of crime can be defined ostensively. As if to say, 'look there, there is the meaning of crime.'

Maybe the question 'what is crime?' seems simple because of how settled and obvious the meaning of crime appears to be within political communities. The same uncomplicated and perhaps unexamined analysis does not accompany the legalistic definition of crime, even if it might formalize aspects of the above intuitions. Roughly, the legalistic account holds that crime is intentional conduct that violates the criminal law of a state. This approximates the meaning of the term crime that will be employed in subsequent chapters of this dissertation, but the following will clarify and deepen this rough depiction.

There are a variety of challenges that have been leveled against the legalistic definition of crime. It can be noted at the outset that only some of the claims against it will be considered. The two main problems to be highlighted concern the applicability of the legalistic definition

given its commitment to a particular conception of criminal law. As explained below, applicability refers to two discrete matters: (1) the certainty of legal rules and their use in determinations about crime; (2) the emphasis (as a necessary condition) on states within the legalistic definition.

Even if criminology can provide analytic and normative insights for political philosophy generally and this work specifically, what follows is not a text that fits into that field of study. One distinction being that none of the three interrelated divisions of criminology detailed by Edwin Sutherland and Donald Cressey—sociology of law, social psychology of criminal behavior, sociology of penal institutions—are dealt with below using contemporary criminological methodologies, or with an emphasis on sociological concerns as such.<sup>18</sup> This chapter responds to a specific question by providing an answer rooted in criminal law as well as legal and political philosophy. Analysis reflects this.

This work is arranged in the following way. Part one outlines the legalistic definition of crime. Analysis is primarily devoted to two parallel formulations that answer the question 'what is crime?' One comes from Glanville Williams while the other is from Paul Tappan. The aim of part one is to explicate the constitutive terms of the legalistic definition as presented by Williams and Tappan. Part two deepens the preceding depiction of crime by considering four characteristics of criminal law—politicality, legality, generality, and penal sanctions. These provide an ideal regulative framework for the determination of crime and a consistent application of criminal law. In addition to the straightforward presentation of these characteristics, part two indicates where and how the two challenges mentioned above can lead to serious questions about the applicability of the legalistic definition itself. Part three concludes this chapter.

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<sup>18</sup> Edwin Sutherland and Donald Cressey, *Criminology*, 10th ed. (New York: Lippincott, 1978).

## 1. Defining Elements

In the introduction, I preliminarily identified crime as intentional conduct that violates the criminal law of a state. This can be refined in accordance with two formulations that in many respects parallel and amplify each other. The first from Glanville Williams states: “A crime must be defined by reference to the legal consequences of the act. . . . A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc.) known to follow those proceedings.”<sup>19</sup> The second, from Paul Tappan, goes further in its specifying conditions but remains whetted to a similar procedural conception: “Crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor.”<sup>20</sup>

Both of these formulations can be seen as factual definitions of crime, as opposed to substantivist ones.<sup>21</sup> As such, factual definitions describe crime by reference to the actions described in law as criminal. Unlike substantivist definitions, factual ones do not in the first place emphasize or ask about the reasons that could justify calling an act criminal, or what the “criteria should be for making a given behavior a crime in the future.”<sup>22</sup> One problem that seems immediately apparent with factual definitions of crime is that of circularity, a fallacy of

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<sup>19</sup> Glanville Williams, “The Definition of Crime,” *Current Legal Problems* 8, no. 107 (1955): 123.

<sup>20</sup> Paul W. Tappan, “Who Is the Criminal?,” *American Sociological Review* 12, no. 1 (1947): 100.

<sup>21</sup> Jean-Paul Brodeur and Geneviève Ouellet, “What Is Crime? A Secular Answer,” in *What Is a Crime? Defining Criminal Conduct in Contemporary Society*, ed. Law Commission of Canada (Toronto: UBC Press, 2004), 1–33. A paradigm example of a substantivist account in the relevant sense is Raffaele Garafolo’s natural definition of crime (from *Criminology*. Boston: Little Brown and Co., 1914). His definition is one that attempts to isolate a substantive core of crime without reference to institutions of law, but rather to what he regards as inherent characteristics of some behaviors. These paradigms are also developed in Mario Bunge, “A Systemic Perspective on Crime,” in *The Explanation of Crime: Context Mechanisms, and Development*, ed. Per-Olof Wikstrom and Robert J. Sampson (Cambridge: Cambridge University Press, 2006), 8–30.

<sup>22</sup> Brodeur and Ouellet, 2.

definition. This, however, does not hold in the particular—strictly speaking, neither Williams nor Tappan include the term being defined in the definition—nor does it apply to (at least well-formed and properly elucidated) factual definitions generally.

Reference to law enables the meaning of crime to be ascertained, but criminal law and crime are not synonymous. Criminal law includes principles by means of which, among other things, an act is determined to be a crime—the general part. It does not only include statements and conditions such as 'actions of sort *y* are to be treated as criminal'—the special part.<sup>23</sup> The following avoids circularity by examining the general part with an eye towards how it manifests (however differentially) in politics. It does not examine the penal code of country *D*, then identify those acts called crimes in it, and finally conclude that on this basis the meaning of crime is (or necessarily can be) definitively exacted.<sup>24</sup> Principles are both the primary foci of consideration and also the more general normative reference points for defining crime.<sup>25</sup>

The legalistic account distinguishes between principles and rules, where rules are based on principles. Further, it is one that takes legal procedure as central to describing a given act as a crime. Whether such procedure must conform to specific standards—a particular theory of justice or otherwise—seems not to be specified by either of the above definitions. However, Tappan's definition especially highlights the importance of the mental disposition and control

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<sup>23</sup> For a discussion of general versus special parts of criminal law, cf. Jerome Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1960), 14–26.

<sup>24</sup> G. Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton: Melbourne University Press, 1988), 9–10.

<sup>25</sup> Following Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 7–8: Principles “apply to normative concepts or statements that may or may not have hardened into rules of law . . . they may play a role in the determination of specific cases.” ‘Rules’ denotes rules of law, such as those listed in penal code, which are “binding on relevant actors and may be enforced through the use of government coercion.” These can be further divided following H. L. A. Hart into primary rules—first-order rules controlling all of our conduct—and secondary rules—second-order rules that determine when and to which acts a first-order criminal definition might apply (*The Concept of Law*, 2nd ed. Oxford: Oxford University Press, 1994, 79–99).

capacity of the agent in acting. These are locatable in the intent of an agent, as well as the absence of justifying or excusing conditions for acting.

These features reveal that even if the legal procedure by which action is decided to be criminal is not necessarily bound by specified standards of justice, for example, the procedure includes principles and mechanisms by which intentional action and control can be factored. This analytic point shows that Tappan's definition entails certain requirements for a legal procedure to decide whether the act of an agent can be called crime. Williams is not mute on this matter either, but his formulation relies on the words "criminal proceedings" to convey what Tappan more fully explicates.

Let me be even blunter about the above. The definitions from Williams and Tappan advance certain requirements for criminal law. Among them is that criminal intent (*mens rea*) as well as control must be accounted for when assessing whether an act is a crime. Such elements underwrite and guide the legal process—its officials and institutions. Legal procedure, then, is more robust than a simple enumeration or laundry list of acts that constitute crimes.

Even if the legalistic definition of crime focuses on matters of law in a descriptive way, this does not mean that matters of law generally and legal procedures specifically are without normative (prescriptive) significance. The opposite can be argued. As Alf Ross writes, law is that system of norms that “serves as a scheme of interpretation for a corresponding set of social actions in such a way that it becomes possible for us to comprehend this set of actions.”<sup>26</sup>

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<sup>26</sup> Alf Ross, “The Idea of Valid Law,” in *Law in Philosophical Perspective: Selected Readings*, ed. Joel Feinberg and Hyman Gross (Belmont: Wadsworth, 1977), 40.

Both Tappan and Williams advance a basic but important feature of crime; namely, that crimes are acts (prohibited by law) or, using synonymous terminology, conduct.<sup>27</sup> An act that is prohibited is understood in connection with a mental component (*mens rea*), what I above called criminal intent.<sup>28</sup> George P. Fletcher clarifies in what relationship proscribed acts stand to *mens rea*: “*actus reus* stands for the wrongful act, and *mens rea* for the criteria of attribution.”<sup>29</sup> In other words: there can be no criminal liability without culpable (or blameworthy) wrongdoing.”<sup>30</sup> As Fletcher points out, there must be some degree of deliberateness or control in choosing to act coupled with the act itself, as long as the act is proscribed by law. These two concurrent elements are necessary conditions for an attribution of criminal liability.<sup>31</sup>

Wrongful acts, it can be noted, are not always strictly positive acts (i.e., performances). Counter-examples include ‘state of affairs’ cases, where an agent might not perform an act as such but rather be ‘in charge of’ or ‘in possession of’ something which is prohibited.<sup>32</sup> There are also omissions. As Jerome Hall notes, omissions as a general rule do not carry criminal liability, but they can if certain duties obtain in a given instance.<sup>33</sup> This is to indicate in passing the complexity that attends to the phenomena known as acts (*actus reus*) in criminal law, but that at a minimum they are understood to be voluntary.

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<sup>27</sup> That is, prohibited acts and criminal conduct are used synonymously. However, when acts that are not legally prohibited are discussed, it should be clear that acts and criminal conduct are not synonymous.

<sup>28</sup> George P. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), 84.

<sup>29</sup> Strict liability is one counter-example of intentional action as a necessary element of criminal liability. Strict liability is “liability to punitive sanctions despite the lack of *mens rea*” (Hall, 325). While strict liability is often noted for its invocation in minor offenses (e.g., speeding on a highway, where regardless of intent one is still liable to penal sanction), there are instances such as manslaughter convictions where negligence, the objective test of reasonableness, and capacity to conform are applied in ways that deviate from the *mens rea* requirement presented in the text. Hall provides arguments against certain applications of strict liability, as does Glanville Williams, “Mens Rea and Negligence,” *The Modern Law Review* 16, no. 2 (1954): 231–32. This is also considered by Susan Estrich, *Getting Away with Murder: How Politics Is Destroying the Criminal Justice System* (Cambridge: Harvard University Press, 1998).

<sup>30</sup> Fletcher, *Basic Concepts*, 84.

<sup>31</sup> Ibid.

<sup>32</sup> J.C. Smith and Brian Hogan, *Criminal Law*, 7th ed. (Virginia: Lexis Law Publishing, 1992), 325–6.

<sup>33</sup> Hall, 190–201; John Herring, *Criminal Law*, 3rd ed. (New York: Palgrave Macmillan, 2002), 40–4.

Similar complexity also accompanies the meaning of *mens rea*, which is a measure of the deliberateness of choice in acting, and is divided into four basic categories—purpose, knowledge, recklessness, and negligence.<sup>34</sup> The point in mentioning these fine-grain distinctions is not only that both Williams and Tappan have in mind very specific conceptualizations, but also to distinguish my account, which outlines a baseline set of conditions for defining crime, from the whole criminal law.

As mentioned, the coupling of *actus reus* and *mens rea* is necessary for a determination or attribution of criminal liability, which at its most basic is liability to punishment.<sup>35</sup> In accordance with Williams and Tappan respectively, an agent's performance (or omission) of an act that violates a law (classed as a felony or misdemeanor), with the defined requisite mental element, and without justifying or excusing conditions, means that he or she is open to punishment for legal rule-breaking. This chain of events depicts the rough contours of what it means for an act to be a crime. I say rough because there is mention made to the source of sanctions—the state. This aspect will be considered in more detail later.

We might step back and consider this chain. All elements are necessary, but it is not clear if the description is sufficient. It seems that the description accurately reflects what Tappan and Williams call crime. Still, some primary notion seems to be missing. Here, we can inquire about the place of wrongfulness in acting. Do the definitions omit this oft-cited feature of crime? The answer is no, even though the term does not directly appear.

The legalistic account conceptualizes crime as wrongful conduct (i.e., wrongfulness) because it violates a rule. On this description, wrongfulness is “the logical dissonance between

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<sup>34</sup> Estrich, 11.

<sup>35</sup> Nicola Lacey, “Does Criminal Liability Require an Act?,” in *Philosophy and the Criminal Law: Principle and Critique*, ed. R. A. Duff (Cambridge: Cambridge University Press, 1998), n. 131.

behavior and the rules of criminal law.”<sup>36</sup> As George Fletcher says, when this dissonance occurs “the act is categorically wrongful”<sup>37</sup> Wrongfulness is conduct that contravenes a rule. At its most general, such a rule expresses a prohibition against the indefensible setback of interests (i.e., harm) to some party.<sup>38</sup>

Criminal law specifies which interests are protected from harm through specific rules and conditions applying to these. It is in this sense that wrongful conduct is a crime. Notice that it is not the violation of just any rule, but one that comes from a state.<sup>39</sup> This is in contrast to uncoded violations of moral principles and rules. It is also not just any kind of action because it must be voluntary, without excuse or justification (where justifications negate wrongdoing and excuses mitigate it). It is also not just any conduct in the sense that the requisite mental element (*mens rea*)—the deliberateness of choice or intent—must be present.

Noting these elements is not simply restating the chain of events depicted above. What these elements reinforce is the very notion of legal procedure underpinning the meaning of crime: the necessity of principles and mechanisms by which acts can be determined to be crimes. The idea is that there is a correspondence between certain acts and crime, but this relationship is simultaneously complicated and clarified by these intervening elements. Determining whether an act performed is a crime is a legal process, and this supplies the meaning of crime. This is not

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<sup>36</sup> Fletcher, *Basic Concepts*, 78.

<sup>37</sup> *Ibid.*

<sup>38</sup> Harm, then, is not just any setback of interests; it is an indefensible one (unjustifiable and inexcusable). Further, the interests must be of a certain sort. Jules Coleman calls them ‘legitimate interests,’ whereas John Kleinig calls them ‘welfare interests.’ In both cases, harmful action deprives an agent of a normal state or set of holdings (e.g., rights). This is a short comment on a complex and rich topic, and it is helpful to recount Joel Feinberg’s words: “Only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harm in the appropriate sense” in Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984), 33; Jules Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992), 329–31; John Kleinig, “Crime and the Concept of Harm,” *American Philosophical Quarterly* 15, no. 1 (1978): 27–36.

<sup>39</sup> This is a point that Fletcher considers, but also one treat by C. L. Ten, “Crime and Immorality,” *The Modern Law Review* 32, no. 6 (1969): 648–63.



to say that the legal process is wholly perspicuous, free from difficulties, or always efficient—there is potential for penumbræ of uncertainty. Attributing wrongful (harmful) conduct to an agent is holding her accountable or punishable for it.<sup>40</sup> This is the point at which the agent's (causal) role in the chain of events is definitively established. Another way of saying this: it is when the presumption of innocence transforms into the pronouncement of legal guilt.

One component of such judgments of guilt is that the conduct was prohibited and that an agent performed it according to requisite conditions. Another part, which further signals the attribution of guilt to an agent, is punishment. Williams stated that “a crime must be defined by reference to the legal consequences of the act,” and Tappan specifies the consequences of guilt as penal sanction. Legal punishment, and more noticeably its justification, is a complex matter. What it means in relation to crime is that it follows from the violation of a legal rule. Whether the infliction of punishment as privation is justified because it is a good thing, or whether it is to be meted out because of its good consequences goes too far with respect to the definition of crime.<sup>41</sup>

Nicola Lacey is correct in noting what A.M. Quinton saw as the fundamentally responsive (retributive) element in the notion of punishment when defined as “the state’s imposition of unpleasant consequences on an offender for her offense.”<sup>42</sup> Saying what Tappan does about penal sanctions does not imply that the legalistic definition necessitates or smuggles in a decidedly retributivist conception of punishment—that is, as long as punishment is defined appropriately. Lacey's definition (at least according to her) seems to avoid this problem of assuming retributivism:

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<sup>40</sup> Fletcher, *Basic Concepts*, 78.

<sup>41</sup> Nicola Lacey, *State Punishment: Political Principles and Community Values* (New York: Routledge, 1994), 7; A. M. Quinton, “On Punishment,” *Analysis* 14, no. 6 (1954): 141.

<sup>42</sup> Lacey, *State Punishment*, 7.

Punishment is (1) the principled infliction by a state-constituted institution, (2) of what are generally regarded as unpleasant consequences; (3) on individuals or groups publicly adjudicated to have breached the law, (4) as a response to that breach of the law, or with the motive of enforcing the law, and not intended solely as a means of compensation.<sup>43</sup>

The applicability of this conception to the legalistic definition of crime is justified in that there is no specification of potential justifications of punishment within either Williams or Tappan; there is no presumption that certain normative standards outweigh others in invoking negative sanctions. This is a crucial point because distinctions between justificatory theories of punishment rely on just these sorts of standards as arguments for their preferability.<sup>44</sup> The legalistic definition does not affirm or reject the condition of compensation for attributing guilt, for example, which is a necessary one for retributive theories. There is a connection between crime and punishment in the legal definition. However, this does not mean that the legalistic account implicitly or explicitly supports a particular justification of punishment and its attendant normative standards.

As has been discussed in the above part, the legalistic account defines crime according to factual and procedural elements of the law. It is the legal process of law that details and ultimately attributes to acts the significance of crime. This is a complex process in that it not only entails the fulfillment of specific conditions, but also the presence of principles and mechanisms to adduce whether these conditions have been met. Part of this process, which is also definitive of crime, is the leveling of punishment. Punishment follows from the attribution

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<sup>43</sup> Ibid., 7–8.

<sup>44</sup> C. L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987).

of wrongdoing. This does not mean that the legalistic definition claims that it annuls the wrongdoing or is best on whole. Those are different arguments.

## 2. Four Characteristics of Criminal Law

According to the legalistic definition, a crime is established by criminal law. As we saw, this depends on the legal process. This process is a complex one. Crime as wrongful conduct requires a set of rules that proscribe certain acts, and these rules make use of and reference to higher or primary principles. Criminal law lists specific forms of human conduct that are prohibited by a political authority and are enforced through punishment.<sup>45</sup> It is not always apparent that, for example, prohibited acts have occurred, or that the intention in performing them was the sort that makes them count as wrongful, or even that the rules are certain on these matters. These indicate deep problems in criminal law.

In this part, I will consider four characteristics of criminal law that underpin the legalistic definition of crime in order to deepen and clarify those principles (here called characteristics). The four characteristics—politicality, legality, generality, and penal sanction—provide an ideal regulative framework.<sup>46</sup> Taken together, they also distinguish it from other rules regarding conduct, whether coming from civic organizations, families, or other like bonds.

In the following, criminal law is not considered as it might be in reality: how it might in fact discriminate, neglect, or be vague. Still, mapping out criminal law in its ideal form does not mean that these considerations are rendered moot. One way that the shortcomings of law in practice are made evident is by detailing what law is in an ideal form. In addition to describing

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<sup>45</sup> Sutherland and Cressey, 4.

<sup>46</sup> These characteristics are adapted from Sutherland and Cressey, *ibid.*

the framework of criminal law on which the legalistic definition depends, this part develops an analysis of the two challenges that were noted in the introduction to this chapter. This will also constitute the main part of the subsequent chapter.

## 2.1. Politicality

The first characteristic of criminal law is politicality. This connects the attribution of crime to the state and certain international judicial institutions vested with relevant authority.<sup>47</sup> Only violations of rules created by states or other like institutions can be called crimes.<sup>48</sup> F.N. Hinsley says of this unique capacity:

At the beginning, at any rate, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: ‘and no final and absolute authority exists elsewhere.’<sup>49</sup>

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<sup>47</sup> The clause beginning ‘and certain . . .’ belies a developing and disputed matter. First, international institutions such as the International Criminal Court, ad hoc tribunals for Rwanda and Former Yugoslavia, as well as supra-national judicial bodies such as European Court of Human Rights, arose (i.e., were ‘vested with relevant authority’) through convention, treaty, or more generally the consensual acts of contracting states. Politicality in this respect can be seen as a characteristic primarily of nation-states if, about international judicial bodies, all that is meant is that they originate from state acts of the preceding sorts. Second and more controversially, the question of whether or how much a domestic criminal law analogy can be made is still (by degrees) to be determined. The continued development of international criminal law (ICL) will show what definitions and concepts of domestic law will ultimately be retained and applied (if any). There are some distinguishing traits of ICL and international crimes to note: crimes are committed by multiple perpetrators (collective nature); an individual often participates in such crimes in conformity with the prevailing norms of society (motivational explanation); the principle of complementarity helps determine whether or not a case is to be handled by an international or domestic body. The important assumption in this chapter is that defining the concept of crime relies on background principles and elements common to both domestic and international systems. The issue of greatest importance to this dissertation is who (here even in light of such legal-system distinctions) can be held morally responsible for complex collective action. This does not depend on legal definition, even if through such definition the problem is made clearer. Immi Tallgren, “The Sensibility and Sense of International Criminal Law,” *European Journal of International Law* 13, no. 3 (2002): 561–95.; and, Robert D. Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law” *Stanford Journal of International Law*, no. 43 (2007): 39–94.

<sup>48</sup> This is also referred to as ultimacy by Alexander Kent A. Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987).

<sup>49</sup> F.N. Hinsley as quoted in Stephen Krasner, *Sovereignty* (Princeton: Princeton University Press, 1999), 11.

This conception of politicality has a long intellectual history. Transformations in its conceptualization continue, which in large part relates to the absoluteness of the sovereign's power (whether monarch or otherwise) as noted by Hinsley. This concerns not only possible revision of state decisions and enactments, but also (constitutional) limits to the state so that its coercive power is checked and individual liberties are protected.

Hinsley's quotation broadly illustrates Hobbesian and Bodinian conceptions of domestic sovereignty, but John Locke (as only one later example) also distinguished the purview of political authority—its unique capacity to penalize and bring about punishment both in defense of and in the realm of public good.<sup>50</sup> Locke, for example, holds that sins as such are not punishable because “they are not prejudicial to other men's [*sic*] rights.” Further, the fallibility of human beings leads to sincere disagreements that cannot be decided by others (e.g., states) but are better tolerated. Finally, Locke also posits that outward force cannot save from sin, only “inward persuasion of the mind can.”<sup>51</sup> The notion of domestic sovereignty or politicality is one which locates the use and power to use penal sanctions within the exclusive domain of the state.

Jeremy Bentham was also clear about this first characteristic. For him too, decisions about whether an act constitutes a crime do not fall within the purview of the state alone.<sup>52</sup> Bentham held that the type of sanction—political—that attaches to crime makes its only feasible source the state. Here, we can compare a violation of religious rules, which are sins, with crimes, which are political. As Michael Gottfredson and Travis Hirshi say, for Bentham “the

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<sup>50</sup> John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003), 101: “Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defense of the commonwealth from foreign injury; and all this only for the public good.”

<sup>51</sup> *Ibid.*, 203.

<sup>52</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 2000), 27–8: “If at the hands of a particular person or set of persons in the community, who under names correspondent to that of judge, are chosen for the particular purpose of dispensing it, according to the will of the sovereign or supreme ruling power in the state, it may be said to issue from the political sanction.”

[respective] sanctioning system determines whether the behavior is criminal or noncriminal, moral or immoral, but this is merely a matter of description or system reference."<sup>53</sup> What is most important here about Bentham's position, is that crimes are regarded as such precisely because they fall within the exclusive domain of a state, which attaches a political sanction to acts it proscribes.

This first characteristic of criminal law coincides with a feature of the definition of crime noted in part one. There, as here, the qualification that the law be the law of a state indicates that violations of rules descending from other sources do not count as crimes. This is the specific relationship between this characteristic of criminal law and the definition of crime from above, but there is a more general point to be noted about criminal law. It stands supreme above various rules associated with and constitutive of other non-state organizations and institutions. Of course, reference to particularities within polities can be made; it is generally understood that constitutions instantiate the highest law of the land, providing primary rules as well as secondary rules by which the interpretation and fulfillment of primary rules can be achieved. In spite of important, but nevertheless more peculiar features, the law of the state remains central to the ideal framework of criminal law and the definition of crime presented so far.

## 2.2. Legality

The second characteristic—legality—pertains firstly to a requirement for specificity in criminal law. Conduct that makes one liable to criminal proceedings needs to be specified in law. In the absence of proscription, conduct is to be regarded as permitted and unpunishable. If an act is

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<sup>53</sup> Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (Palo Alto: Stanford University Press, 1990), 9. As an aside, Gottfredson and Hirschi isolated a central problem facing criminologists, and this problem has a common root with the matter of politicality and concomitant sanctions, hence their book's much quoted first sentence: "Criminologists often complain that they do not control their own dependent variable, that the definition of crime is decided by political-legal acts rather than by scientific procedures."

performed with requisite mental element, it harms some party and so on, but is not clearly prohibited by criminal law, then no crime will have occurred.

This characteristic advances a requirement for prospectivity in criminal law, a requirement and value that limits “unforeseeable retroactive expansion of criminal liability by judicial decision, as well as prohibits retroactive crime creation and statutory penalty increases.”<sup>54</sup> In this sense, there are not (or more properly *should* not be) open-ended provisions that allow for prosecution of all acts; strict definitions are required. This characteristic in its strong form is captured by the phrase: *nullum crimen sine lege* (nothing is criminal except by law [existing at the time of the act]).<sup>55</sup> While the gist of this phrase is captured above, it can be considered in greater detail.

*Nullum crimen sine lege* is regarded as a judicial and legislative requirement for the construal and construction of criminal laws.<sup>56</sup> It is a requirement, however, that admits of variation in application and in what, as a matter of practice, it demands. Here, the broad contours of the principle will be treated. The judicial requirement hinges on certain habits and prerequisites of interpreting law: literal interpretation, strict interpretation, liberal (as in broader) interpretation, and analogical interpretation. These represent different approaches to the judicial application of law to particular facts.

How to decide the meaning of laws, and by what interpretative criterion or criteria this should ensue, is at the root of this principle. At a minimum, it calls for precision. If abstracted from the problems that attend to interpretation in any given case, a core notion can be located: judicial determinations should conform to law; otherwise, they could amount to pronouncements

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<sup>54</sup> Gallant, 13.

<sup>55</sup> Hall, 34.

<sup>56</sup> *Ibid.*, 37.

and punishment by an individual (judge). In such instances, legal process and procedure would not assure reasonably consistent and reliable adjudication of criminal charges.<sup>57</sup>

The other aspect of the principle mentioned above is that of legislation itself and the requirement that it be specific. Not only does this affect judicial interpretation and adjudication, but also the role and activities of legislatures. This, as Jerome Hall notes, is most acutely felt in those countries where supreme or constitutional courts can invalidate legislative acts on constitutional grounds.<sup>58</sup>

A simplified way of describing this is that judgments about the constitutionality of legislation represent one aspect of the relationship between the judicial and legislative branches—checks and balances of power subsumed under the more general concept and practice of separation of powers. Whether particular statutory law provides for a perspicuous interpretation is not dependent on the judicial process alone: reducing vagueness and ambiguity is part and parcel of legislative activity. By this, it should be understood that unclear expression of law can lead to the misconstrual and misapplication, among other consequences.

As a matter of prospective and specific rules, legality is linked to rule of law. It also underlies the definitions of crime that were treated in part one. To the connection with rule of law, there are distinctions within the principle of legality between necessary institutions, values, and specificity on one hand, and personal, unprincipled, and uncoded practices on the other. In part one, I remarked that there was not a directly explicated relationship between the legalistic definition and demands of justice. I also remarked that in spite of this, the legal process entails

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<sup>57</sup> Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (New York: Oxford University Press, 1996), 18.

<sup>58</sup> Hall, 41.



requirements that do not substitute for a theory of justice, but do outline requirements of fairness that could be included in such a theory. The principle of legality is such a requirement.

### 2.3. Generality

The third characteristic, generality, stipulates that the law should be applied “without respect to persons.”<sup>59</sup> In this sense, law is to be applied in a regular way to its subjects. It is not to favor or disfavor persons to whom it addresses because of such things as social status or race. Enforcement and adjudication of criminal law is to conform to this characteristic as well. That a wealthy person is wealthy should not deter or prejudice law enforcement agents from fulfilling their duties, just as it should not if a suspect is indigent. This carries forward to adjudication; namely, the indigent should be provided with legal counsel, for example.<sup>60</sup> The particular rules regarding the protections necessary to achieve this characteristic vary, but the principle is clear in its prescription: law applies to all uniformly.

This characteristic advances a basic due process requirement in treatment before the law. The characteristic of legality works together with generality in order to provide safeguards against abuses (retroactive enforcement, prosecution on the basis of status characteristics, etc.). While criminal law should be specific and prospective in its prohibitions, it “should not particularize the subjects to whom they apply.”<sup>61</sup>

This characteristic calls for uniform application of specified criminal laws. This is not a straightforward matter. Although like cases are to be treated alike, there remain questions about whether and to what extent generality is appropriate. If we return to the fictive cases of the wealthy and the indigent, it seems that there might be reason to apply the law generally, but there

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<sup>59</sup> Sutherland and Cressey, 6.

<sup>60</sup>For an example of this type of scenario see *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>61</sup> Walker, 25.

also might be reason to consider the ways in which punishments of certain sorts are more appropriate or just because of particularities of circumstances. Without arguing for a specific conception of equity in the law, it is to be noted that recurrent problems of justice appear with the characteristic of generality as well.<sup>62</sup>

As a characteristic of criminal law, generality or uniformity in application at least supposes that there is not to be preference or distinction made on the basis of non-conduct related traits of agents. This provides for basic due process protections, and is not dissociated with substantive values. The characteristic of legality pertains to specificity and prospectivity of terms, but generality refers to the scope of application. The two can be seen as interlocking in that they both aim to limit abuse as well as guide action. In this respect, the action-guiding effects of criminal law necessitate that its proscriptions are (or at least can be) known in advance, and are regarded as applicable to all (its subjects). Generality is also a feature of rule of law in that it holds accountable all subjects uniformly, regardless of status differences or morally arbitrary characteristics of agents. It maintains criminal law's focus on wrongful conduct.

## 2.4. Penal Sanction

Characteristic four, that of penal sanction, points to a unique capacity of the criminal justice system to dispense measures of punishment not typically found in other organs of state.<sup>63</sup> The use of punishment correlates with the commission of a crime. Unlike a lynch mob that decides in the throes of passion and delusion to persecute a victim, the legal process applies punishment in accordance with law, and is to do so uniformly. This reveals a connection with politicality,

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<sup>62</sup> Equity (*epieikeia*), according to Aristotle is “just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.” Aristotle, *Nicomachean Ethics*, ed. Lesley Brown, trans. W. D. Ross (Oxford: Oxford University Press, 2009), 101137b 26–32.

<sup>63</sup> The qualification 'typically' is used to indicate that there are, for example, specialized military tribunals and procedures capable of sanctioning; however, these do not apply generally to all subjects of a state.

and a definitive feature of the state; namely, its unique hold on the authoritative use of coercion. If taken in the context of other characteristics, and in conformity with rule of law, the penal sanctions of a state are to proceed under conditions of specificity, prospective law making, and generality.

In part one, punishment was considered in brief. The definition there will continue to be used in this part. Here, the conditions of punishment (i.e., what makes punishment what it is) can be further analyzed. Following Hall, we can state the six conditions of punishment as such: (1) privative; (2) coercive; (3) 'authorized,' or inflicted in the name of the state; (4) it presupposes rules, their violation, a determination of this in the form of a judgment; (5) it is inflicted upon an agent who has committed a harm; (6) its extent and type is related to the commission of the harm.<sup>64</sup>

Punishment is privative in that (through coercive means) it replaces a normal state of holding rights and liberties within a polity with a diminished or, in some cases of incapacitation, extremely limited holding of rights and liberties.<sup>65</sup> The presupposition of rules indicates the presence of a legal process, which is bound by rules and by extension the characteristics of politicality, legality, and generality. The punishment is inflicted because of an agent's harmful actions. We can again note the deep debate about punishment's harm, function, and whether it can be justified.

The condition of extent and type is not unrelated to the controversy about function and justification. Formally, the extent and type condition refers to the correlation between wrongful

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<sup>64</sup> Hall, 309–10.

<sup>65</sup> The distinction of rights and liberties is based on Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (New Haven: Yale University Press, 1923). The definition of privative is in keeping with John Kleinig, "Crime and the Concept of Harm" where he writes: "A privative term is one whose opposite is logically primary. It is defined as the absence of those qualities which are constitutive of its opposite. . . . Underlying privative notion is some conception of normalcy."

conduct and subsequent punishment for it. The substantive debates vary with views about punishment's function—corrective, retributive, etc.—and its justification—that it can have a rehabilitative effect, that it is best on whole, that it annuls the crime, etc. The characteristic of penal sanction indicates a unique aspect of criminal law. Here, it is a necessary (if highly contested) element for criminal law's fulfillment and application. It interlocks with the other characteristics treated above.

### **3. Conclusion**

The legalistic definition answers the question 'what is crime?' by reference to factual and procedural features of criminal law. These features include the elements of crime, as specified in the special part of criminal law, as well as principles that not only guide the crafting of law, but also abet its implementation. To draw upon Tappan's formulation again, “crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor.”

While the above formalizes some commonsense intuitions, it ultimately goes further by situating crime in its full legal context. As I illustrated, the terms of the definition are apprehended not by investigating the penal code of a given country, even if that is instructive. The principles of criminal law are requisite for a determination of crime. The legal process both instantiates and is instantiated by them. Now that the definition and its associated ideal regulative framework have been detailed, I will in the next chapter discuss the legal prohibition against genocide, which instantiates features of the above definition of crime.

Showing how the legal rule against genocide conforms to these principles can further crystallize the nature of the general to special part relationship already discussed. More

important to this work as a whole, however, is that the rule against genocide reveals the chief problem identified at the outset. Notice about this latter point that the legal prohibition is not posited to be at odds with general principles of law, and thus noteworthy for that reason. Rather, it is presented as an example of a putatively well-crafted rule that (even so) contains a conception of individual accountability common to law that has proven problematic.

## *Chapter 2. The Conventional Definition of Genocide as a Problematic Groundwork*

### **Introduction**

Anyone interested in finding an answer to the question ‘what is genocide?’ will not be left wanting for responses. The variety of definitions and concomitant approaches to the query underscore not only an abiding concern with the subject matter and its grim history, but also the perceived deficiencies of the prohibition as formulated in international law.<sup>66</sup> The following eschews alternative accounts, and instead critically analyzes the legal definition of genocide. In so doing, it details the material and mental conditions that can lead to an individual’s punishment for the commission of the crime of genocide. This critical analysis will build on conclusions from chapter one, whose main focus was the meaning of crime and the legal principles underlying it.

A chief aim of this chapter is to identify how the first aspect of the problem (or an approximation of it) introduced at the outset of this dissertation appears and is treated in law. Recall that the first aspect of the puzzle pertained to whether individuals can be morally responsible for collective wrongdoing. Analysis of this legal definition can help bring into relief the problematic features not just of genocide, but also collective crime and collective wrongdoing generally. As will become apparent, there are other possible problems that could be addressed and are open to further analysis as well as argument. It is, however, to the relationship an individual can bear to collective wrongdoing that this dissertation will ultimately turn its attention. Notice that isolating the problem in this way helps to reveal what makes it problematic in the first place.

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<sup>66</sup> For an account of alternatives see Scott Straus, “Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide,” *Journal of Genocide Research* 3, no. 3 (2001): 349–75.

Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention or the Convention) sits at the center of analysis. This instrument was adopted by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951. Even a cursory reading of article II reveals that at least some of its terms call for clarification. Those of particular concern below include the definition of groups generally, the identification of the four protected groups, as well as the meaning of genocidal intent. Interpretative solutions to these come from four main sources besides the Convention: (1) case law—most notably judgments from the International Criminal Tribunals for Rwanda (ICTR) and for the Former Yugoslavia (ICTY); (2) the International Criminal Court Statute (ICC Statute or Rome Statute) and its Elements of Crimes; (3) the *travaux préparatoires* of the Convention; and, (4) legal scholarship on the subject of genocide.

Before setting off, I want to outline the chapter's organization. Section one presents the basic structure of the crime of genocide, and also the goals of its legal prohibition. Section two concentrates on the material element (*actus reus*) of genocide. Here, much emphasis is placed on two of the difficulties noted above; namely, the notion of the group, and how to identify the four protected groups. In addition, the conduct prohibited by the Convention is detailed. Section three focuses on the mental element (*mens rea*) of the crime. This section handles each term from the Convention's formulation separately in order to better assess the concept of specific intent. In addition, the section considers the meaning of article 30 from the ICC Statute. Part four concludes this work.

## 1. Definition, Structure, Main Problem, and Goals

### 1.1. Definition of the Crime

Article II of the Convention provides the authoritative formulation of the crime of genocide. It is also the original one in international law.<sup>67</sup> It was later reproduced verbatim in the statutes of the International Criminal Court at article 6, the International Criminal Tribunal for Rwanda (ICTR) at article 2(2), as well as the International Criminal Tribunal for the Former Yugoslavia (ICTY) at article 4(2). In addition, the prohibition is a part of general customary international law and recognized as part of *jus cogens*.<sup>68</sup> Article II reads as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

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<sup>67</sup> As stated in the Report of International Law Commission, 48th Session, UN Doc. A/51/10 (1996): “The definition of genocide contained in article II of the Convention . . . is widely accepted and generally recognized as the authoritative definition of the crime”; Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser, 2005), 190; and, Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, article 6; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), article 2(2); and, Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), article 4(2).

<sup>68</sup> Gideon Boas, James L. Bischoff, and Natalie Reid, *Elements of Crimes under International Law*, vol. 2, International Criminal Law Practitioner Library Series (New York: Cambridge University Press, 2008), 143 and 150. A brief reminder: (1) International customary law binds all states “except for those that have consistently and openly objected to the formation of a rule from its inception”; (2) *jus cogens* are peremptory norms of international law; no derogation from them is allowed. They “generally comprise fundamental human rights and rules of international humanitarian law, as well as the prohibition of the use of unlawful armed force.” Ilias Bantekas and Susan Nash, *International Criminal Law* (London: Cavendish, 2003), 3.



## 1.2. Structure of the Crime: Seat of the Problem

A standard distinction between the mental (*mens rea*) and material elements (*actus reus*) of the crime of genocide appears in the above definition.<sup>69</sup> An abbreviated depiction of the meaning of these elements is that “*actus reus* stands for the wrongful act, and *mens rea* for the criteria of attribution.”<sup>70</sup> Both of these are necessary for ascriptions of criminal liability.<sup>71</sup> They describe not only what a perpetrator did or caused, but also his or her criminal intent or fault in doing or causing them.<sup>72</sup> Notice that article II defines conditions under which a principal offender may be held criminally liable for genocide.<sup>73</sup>

A concise restatement of the definition can help to elucidate the preceding: the enumerated acts are punishable as genocide when performed with the intent to destroy in whole or in part a protected group. This captures the basic structure of the crime of genocide, as it underscores the coupling of specific kinds of conduct with a specific form of intent. However, an important point should be made at the outset. Article II does not require that prohibited conduct be part of an overall campaign of organized violence, or adhere to a policy of such.<sup>74</sup> This absence is noteworthy because genocide, such as in Rwanda in 1994 and in the Former Yugoslavia in the 1990s, seems practically to necessitate such a plan or organization for its fulfillment. In this respect at least, the substantive formulation goes against not just an intuition

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<sup>69</sup> Report of ILC, 48<sup>th</sup> Session, UN Doc. A/51/10 (1996), 44, para.4.

<sup>70</sup> Fletcher, *Basic Concepts*, 84.

<sup>71</sup> They are parts of a three-pronged test under international law: (1) Whether the suspect fulfilled the material elements of the crime; (2) committing conduct with “intent and knowledge” (i.e. the mental element); (3) whether excluding circumstances (excuses and justifications) were present (Gerhard Werle, *Principles of International Criminal Law*. The Hague: TMC Asser, 2005, 95). In this work, I assume that no excluding conditions are present, but I neither detail nor address them.

<sup>72</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2009), 84.

<sup>73</sup> William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 176; Article III of the Convention criminalizes other types of contribution (e.g. complicity and conspiracy); this work focuses only on the crime of genocide and the constitutive conditions of guilt of the principal offender for it.

<sup>74</sup> Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008), 140–1.

that genocide requires collective activity (except in less probable ‘lone-gunman’ scenarios), but also the history of genocidal events.

In the assessment of Antonio Cassese, the coordinated efforts of many persons to achieve a genocidal outcome remain important matters of fact.<sup>75</sup> However, they are not provided for or required as evidence for the prosecution and punishment of an individual for the crime of genocide.<sup>76</sup> In this sense, a person who kills or tortures members of a protected group with genocidal intent, but without a context of organized violence, could potentially meet the requirements of the legal prohibition.<sup>77</sup> Still, prohibited acts such as imposing measures intended to prevent births within a protected group are effectively inconceivable without coordination and planning.<sup>78</sup> As discussed at greater length in Section 3, contexts of systematic and organized violence do figure into assessments of individual guilt.<sup>79</sup>

The structure of the crime dictates that conduct, even where specified as having a group as its object, always occurs through attacks on individual members.<sup>80</sup> Genocide depersonalizes the victim.<sup>81</sup> In this sense, it is not because of a victim’s individuality that he or she is assailed, but rather because he or she is a member of a group selected for destruction. The commentator Nehemiah Robinson captures this idea well when he writes that “groups consist of individuals,

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<sup>75</sup> Ibid.

<sup>76</sup> The absence of this in the definition of genocide contrasts with the prohibition of crimes against humanity, where ‘the context of widespread and systematic attack against any civilian population’ explicitly features in the material element. Cf. ICC Statute, article 7(1).

<sup>77</sup> Commentators such as Claus Kress hold that “the [genocidal] intent must be *realistic* and must thus be understood to require *more than a vain hope*.” This would limit the possible instances and plausibility of many lone perpetrator hypothetical scenarios. (“The Crime of Genocide under International Law,” *International Criminal Law Review* 6, no. 4 [2006]: 472).

<sup>78</sup> Cassese, 140; the other acts that require such planning are the deliberate infliction of conditions of life calculated to bring about group destruction, and forcible transfer of children from one group to another.

<sup>79</sup> Note that the ICC Elements of Crime, ICC-ASP/1/3, articles 6(a)-(e) each includes the separate paragraph: “the conduct took place in the context of a manifest pattern of similar conduct” (i.e. a context of collective activity based around and aimed at the fulfillment of a genocidal plan or policy).

<sup>80</sup> Werle, *Principles*, 199.

<sup>81</sup> Cassese, *ICL*, 137.

and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not *per se* but only as members of the group to which they belong.”<sup>82</sup> One illustrative way of framing the preceding is in terms of proximate and ultimate purposes: the individual group member’s demise (proximate purpose) facilitates the group’s destruction (ultimate purpose). As will become apparent, this point proves relevant to considerations of both the material and mental elements of the crime.

### 1.3. Goals

Having sketched the basic structure of the crime as it appears in article II, a question about the goals of criminalization arises. The Convention explicitly details two of its own. It aims to oblige signatories to prevent and punish genocide, and it also seeks to facilitate international (judicial) co-operation for genocide’s prevention and suppression.<sup>83</sup> In the first major decision about genocide by an international tribunal, the Trial Chamber of the ICTR declared in its judgment of *Prosecutor v. Akayesu* that “the crime of genocide exists to protect certain groups from extermination or attempted extermination.”<sup>84</sup> The court’s articulation of this specific goal not only reflects the text of the definition itself, but also the views of both Raphael Lemkin, who coined the term genocide, and the Convention’s drafters.<sup>85</sup> Although a distinction can be drawn between the Convention’s avowed goal and the more specific one of safeguarding the four

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<sup>82</sup> Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960), 58.

<sup>83</sup> Cassese, *ICL*, 128; and, as declared in the Preamble to the Genocide Convention: “in order to liberate mankind from such an odious scourge [genocide], international co-operation is required.”

<sup>84</sup> *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, case no. IT-96-4-T, Trial Chamber Judgment (September 1998), §469.

<sup>85</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 2nd ed. (Clark: Lawbook Exchange, 2008), 79 & 91; Sixth Committee Session, UN Doc. A/C.6/SR.83, Eighty-Third Meeting (1 October 1948) in Hiram Abtahi and Philippa Webb, eds., *The Genocide Convention: The Travaux Préparatoires*, vol. 1 (Leiden: Martinus Nijhoff, 2008), 1505; United Nations General Assembly Resolution 96(I), UN Doc. A/96 (I) (11 December 1946).

groups, the respective goals cannot be taken as discontinuous.

## 2. Material Elements or *actus reus*

The material element of genocide includes the acts detailed in article II: killing; causing serious bodily or mental harm; inflicting conditions calculated to bring about physical destruction; imposing measures to prevent births; forcibly transferring children to another group. The list is set forth as exhaustive; however, conviction for the crime of genocide does not simply mean that a perpetrator performed one of them.<sup>86</sup> To qualify as genocide, prohibited conduct must have a national, ethnic, racial, or religious group as its object. Of course, this is in addition to the fulfillment of the other detailed conditions. The intent to destroy a protected group falls under the mental requirement, but because they are the objects of prohibited conduct groups fit within the material element of the crime as well.

### 2.1. Protected Groups

Defining groups proves essential for determinations about whether enumerated acts qualify as genocide. This poses problems in that the Convention does not provide a robust, substantive account either of groups generally, or those it specifically designates for protection. In addition, there exist no internationally agreed upon definitions of the groups' attributes.<sup>87</sup> The task at hand, then, consists of identifying the characteristics that constitute the group generally, and then identifying the traits of each respective group.<sup>88</sup> This will result in the clarification of the meaning of the terms.

Deliberations about the final text of the Convention indicate that the general notion of

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<sup>86</sup> Robinson, 57 & 64.

<sup>87</sup> Kress, "The Crime of Genocide," 475.

<sup>88</sup> Cassese, *ICL*, 138. He calls them "the major problems concerning the objective element of genocide."

groups is based on a common definitional trait: stability.<sup>89</sup> This characteristic emerges from the non-voluntary and inalienable nature of group membership, which is generally determined by birth and comes with no simple exit out.<sup>90</sup> However, the Convention's specification of four groups indicates that not all groups displaying stability may qualify for protection, but rather only those explicitly designated.<sup>91</sup> In this sense, the drafters sought to protect exclusively what they regarded as stable groups. As becomes more apparent in light of classificatory accounts of the four groups' defining traits, this designation of stability or permanence remains a crucial feature for assessing the object of prohibited acts.

Three prominent approaches have been differentially applied by courts in order to determine whether the target of prohibited conduct is to be regarded as a protected group. They are the objective, subjective, and mixed accounts. The first of these, the objective approach, follows from the general idea that designated groups are stable, permanent, and as such display externally fixed characteristics. In this respect, it defines the classes of groups according to "some alleged objective features each group exhibits."<sup>92</sup>

According to such fixed criteria set out by the Trial Chamber of the ICTR in *Prosecutor v. Akayesu*, a multitude of persons constitutes a national group on the basis of their legal bond of common citizenship or national origin.<sup>93</sup> An ethnic group consists of persons sharing common language or culture.<sup>94</sup> A racial group shares hereditary physical characteristics.<sup>95</sup> Finally, a

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<sup>89</sup> Sixth Committee Session, UN Doc. A/C. 6/SR.64, Sixty-Fourth Meeting (1 October 1948) in Abtahi and Webb, *Travaux Préparatoires*, 1:1309. Unless otherwise indicated, all UN documents comprising the *travaux préparatoires* come from this cited volume, and cited page numbers reflect its pagination.

<sup>90</sup> Sixth Committee Session, UN Doc. A/C. 6/SR.64, 1309.

<sup>91</sup> Notice on this point that the controversial exclusion of political groups from the Convention was advanced on the grounds that they lacked the relevant stability and permanence. A good general starting point for considering this is George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: Penn University Press, 1994).

<sup>92</sup> Cassese, *ICL*, 138.

<sup>93</sup> *Prosecutor v. Akayesu*, §512.

<sup>94</sup> *Prosecutor v. Akayesu*, §513.

religious group is a set of persons who have the same religion, denomination, or mode of worship.<sup>96</sup> This approach most faithfully adheres to the views of the Convention's drafters, but its reliance on what have been called outmoded standards has contributed to the adoption of other approaches by courts.<sup>97</sup>

The subjective account does not identify the respective groups according to fixed external characteristics, but rather with what Gerhard Werle calls "social ascription processes."<sup>98</sup> These include designations made by perpetrators about whether their victims were group members, as well as the self-perceptions of putative members themselves. This subjective construct of groups, then, assesses whether persons were treated as though they belonged to a group, or if they viewed themselves as belonging to such a group.<sup>99</sup> The subjective account faces its own challenges. At least in its pure form, this approach has been claimed to "circumvent the drafters' decision to confine protection to *certain* groups," and convert "the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive."<sup>100</sup>

As evidenced by case law and legal scholarship, there is a growing tendency towards the classification of groups according to a mixed standard. In this sense, both objective traits and subjective ascriptions are used to identify the four groups. This development is not entirely new, since some of the earliest judgments of the ICTR adopted this sort of perspective.<sup>101</sup> As

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<sup>95</sup> *Prosecutor v. Akayesu*, §514.

<sup>96</sup> *Prosecutor v. Akayesu*, §515.

<sup>97</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004), para. 494: "This terminology is criticized for referring to notions such as 'race', which are now universally regarded as outmoded or even fallacious. Nevertheless, the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects [thus, some objective criteria are necessary]"

<sup>98</sup> Werle, 195.

<sup>99</sup> Cassese, *ICL*, 139.

<sup>100</sup> Kress, "The Crime of Genocide," 474.

<sup>101</sup> As noted by Werle, judgments adhering to this type of combined standard include: *Prosecutor v. Musema*, (27

described by the Report of the International Commission of Inquiry on Darfur (hereinafter Darfur Report), the mixed account allows for a classification of the four groups in which “the subjective test may usefully supplement and develop, or at least elaborate upon, the standard laid down in the 1948 Convention and the corresponding rules on genocide.”<sup>102</sup>

The admixture of criteria addresses limitations and challenges arising from classifications based either on exclusively objective or exclusively subjective standards. As the Darfur Report indicates, social ascription processes can supplement objective analysis. By virtue of the Convention’s specification of the four protected groups, even if wanting in substantive depth, as well as the underlying conception of groups as stable entities, the subjective construct cannot legally supplant the objective approach.<sup>103</sup> This does not, however, exclude the possibility of considering additional complex social factors in order to arrive at a more nuanced definition of the four protected groups.

## 2.2. Prohibited Acts

The acts prohibited by article II are detailed below in accordance with the text itself, and the definitions provided by the Trial Chamber in the *Akayesu* judgment. This court’s descriptions have informed and guided subsequent rulings, and as such provide a useful definitional standard.<sup>104</sup> The interpretative difficulties apparent when exacting the meaning of groups do not appear when defining the acts themselves. However, determining whether certain conduct matches article II’s proscriptions ultimately depends on the case by case analysis of facts by

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January 2000); *Prosecutor v. Bagilishema* (7 June 2001); *Prosecutor v. Semanza* (15 May 2003).

<sup>102</sup> Report of the International Commission of Inquiry on Darfur, para. 500.

<sup>103</sup> Kress, “The Crime of Genocide under International Law,” 475; and, Claus Kress, “The International Court of Justice and the Elements of the Crime of Genocide,” *European Journal of International Law* 18, no. 4 (2007): 623.

<sup>104</sup> Boas, et al., *Elements of Crimes*, 177; cf. *Prosecutor v. Krstić*, International Criminal Tribunal for the Former Yugoslavia, case no. IT-98-33-T, Trial Chamber Judgment, (2 August 2001), §§508-13.

courts. This does not preclude setting out the court-provided definitions of the sorts of acts that conform to article II's list.<sup>105</sup> In a more schematic form than above, the following presents these more general statements about the acts proscribed.

#### **(A) Killing members of the group**

This is often conceived of as the ultimate genocidal act.<sup>106</sup> As defined by the Trial Chamber in *Prosecutor v. Akayesu* killing “is homicide committed with the intent to cause death.”<sup>107</sup> The ICTY Trial Chamber in its *Prosecutor v. Jelisić* judgment summarizes the three legal ingredients of the act in this way: “the victim is dead, as a result of an act of the accused, committed with the intention to cause death.”<sup>108</sup>

#### **(B) Causing serious bodily or mental harm to members of the group**

The *Akayesu* Judgment declared that “causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.”<sup>109</sup> This has remained an abiding standard applied in subsequent cases about genocide.<sup>110</sup> As detailed in the Trial Chamber of the ICTY's *Krstić* decision, while the harm need not be permanent and irremediable, it must go “beyond temporary unhappiness, embarrassment or humiliation . . . [and] results in grave and long-term disadvantage to a person's ability to lead a normal and

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<sup>105</sup> Robinson, 64.

<sup>106</sup> Robert Gellately and Ben Kiernan, “The Study of Mass Murder and Genocide,” in *The Specter of Genocide: Mass Murder in Historical Perspective*, ed. Robert Gellately and Ben Kiernan (Oxford: Cambridge University Press, 2003), 15–16..

<sup>107</sup> *Prosecutor v. Akayesu*, §501.

<sup>108</sup> *Prosecutor v. Jelisić*, International Criminal Tribunal for the Former Yugoslavia, case no. IT-95-10-T, Trial Chamber Judgment (14 December 1999), para.35. Note that the ICC Elements of Crimes, ICC-ASP/1/3, article 6(a) declares necessary conditions: “(1) The perpetrator killed one or more persons; (2) Such person or persons belonged to a particular national, ethnical, racial or religious group; (3) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; (4) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”

<sup>109</sup> *Prosecutor v. Akayesu*, §502.

<sup>110</sup> Cassese, ICL, 133.



constructive life.”<sup>111</sup> Acts indicative of this degree of harm include inhuman treatment, torture, rape, and deportation.

**(C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**

In the *Akayesu* judgment, the Trial Chamber offered an interpretation of acts conforming to this description as “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”<sup>112</sup> The specification of ‘deliberately’ reinforces the point that perpetrator’s conduct is consciously used as a means for a protected group’s physical destruction. Examples of such conduct have been offered by courts. The ICTR Trial Chamber wrote in the *Prosecutor v. Kayishema* that proscribed acts of this sort can include “the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.”<sup>113</sup>

**(D) Imposing measures intended to prevent births within the group**

Acts inhibiting a protected group’s reproductive capacities would fall within the ambit of this paragraph. While the text indicates that measures are intended, this specification does not attach additional or independent mental requirements. As described in the judgment of *Prosecutor v. Akayesu*, such measures “should be construed as sexual mutilation, the practice of sterilization,

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<sup>111</sup> *Prosecutor v. Krstić*, §513.

<sup>112</sup> *Prosecutor v. Akayesu*, §505.

<sup>113</sup> Quoted in Schabas, *Genocide in International Law*, 190–1.

forced birth control, separation of the sexes and prohibition of marriages.<sup>114</sup>

### **(E) Forcibly transferring children of the group to another group**

One interpretation of both the seriousness and the reason for this paragraph's inclusion in the Convention comes from the International Law Commission, which stated that "the forcible transfer of children would have particularly serious consequences for the future viability of a group as such."<sup>115</sup> This act requires that the person or persons forcibly transferred were part of a protected group; they were children (i.e. under eighteen years old); and, the transfer itself was from one group to another group.<sup>116</sup>

### **3. Mental Elements or *mens rea***

The primary clause from article II of the Convention describing the *mens rea* of genocide bears repeating: "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." This delimits the scope of the requirement as that of special intent (*dolus specialis*). The more recent codification of mental elements—intent and knowledge—provided by the ICC Statute applies in conjunction with the special or specific intent standard. The task at hand not only necessitates presenting the requirements set forth in the ICC Statute, but also special intent and the terms 'destroy' and 'in part.' Also, the term 'as such' will be briefly reconsidered. By exacting the meaning of these terms, the standard of *mens rea* becomes apparent. In keeping with a distinction set out early on, this lays bare the criteria of attribution or fault for the perpetrator's conduct.

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<sup>114</sup> *Prosecutor v. Akayesu*, §507.

<sup>115</sup> International Law Commission, *ibid.* 46.

<sup>116</sup> ICC Elements of Crimes, article 6(e).

### 3.1. ICC Statute – Intent and Knowledge

Genocide is among the four crimes over which the ICC has jurisdiction. As such, the Statute's definition of the required mental elements of crimes applies not only to genocide, but also crimes against humanity, war crimes, and (eventually) crimes of aggression. Although the Convention's definition of genocide appears word for word in the ICC Statute, the codification of the mental element at article 30 helps to elaborate the earlier instrument's conception of genocidal intent. This complements the specific intent requirement, and explicates the requisite intent for underlying conduct.

The two components of article 30's requirement are intent and knowledge. As the Statute declares, a person has intent when “(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” The Statute defines knowledge as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.” As is evident, both intent and knowledge are required for international crimes; furthermore, article 30 allows for the application of more specified *mens rea* requirements to the respective crimes covered by the ICC Statute.<sup>117</sup>

With respect to genocide, committing prohibited acts requires a feature additional to both the general criminal intent to engage in conduct and cause its consequences, as well the knowledge of such consequences and circumstances. Even if acting with knowledge of a broader plan of systematic violence, an individual's commission of an enumerated act must be performed

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<sup>117</sup> Werle, 95, 103 & 106.

with the specific intent to destroy a protected group.<sup>118</sup> While knowledge and intent as detailed in article 30 of the ICC Statute clearly have relevance to determinations about a perpetrator's mindset, the differentiating aspect of the *mens rea* requirement for genocide is its specific intent component.

### 3.2. Specific Intent

The ICTR Trial Chamber wrote in the *Akayesu* judgment: "Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."<sup>119</sup> Put another way, to be convicted of genocide a perpetrator must act against victims on the basis of their group membership, and have the purpose to destroy the group itself.<sup>120</sup> To see what makes specific intention distinct, consider again that an individual's intention to kill a victim with knowledge that his or her act will result in such a consequence (general criminal intent) does not by itself meet the *mens rea* requirement for genocide. The additional, distinguishing component is that in committing the act a perpetrator does so with the purpose to destroy the protected group, of which the individual or multiple victims are members.

In light of the above, the three basic components of genocide's intent requirement as identified by William Schabas become clearer. First, there is the intent to destroy the group. Second, this intent is for the group to be destroyed in whole or in part. Finally, the group a perpetrator intends to destroy in whole or in part must be one of the four designated by the

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<sup>118</sup> Ibid., 207; William Schabas notes that "case law has tended to emphasize intent rather than knowledge, probably because the word 'intent' actually appears in the definition of the crime" (*Genocide in International Law*, 242).

<sup>119</sup> *Prosecutor v Akayesu*, §498.

<sup>120</sup> Report of International Law Commission (ILC), 48<sup>th</sup> Session, UN Doc. A/51/10 (1996), 44; Alexander Kent A. Greenawalt, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation," *Columbia Law Review* 99, no. 8 (1999): 2264; Schabas, *Genocide in International Law*, 257; Robinson, 58 & 60; and, Hans Vest, "A Structure-Based Concept of Genocidal Intent," *Journal of International Criminal Justice* 5, no. 4 (2007): 783.

Convention.<sup>121</sup> This depiction amplifies the specificity and strength of the requirement: all three aspects are present in the mind of the perpetrator.

Section one of this work noted the problematic lack of explicit reference to a genocidal plan or policy in the definition of genocide. The context and circumstances of organized and systematic violence nevertheless can establish genocidal intent. The difficulty of determining whether a perpetrator acted with specific intent to destroy a group underpins the importance of contextual factors.<sup>122</sup> As the Trial Chamber in the *Akayesu* decision wrote, “it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.” Evidence of specific intent, then, could appear not only in the form of perpetrators’ confession, but from the surrounding context of violence.

### 3.2.1. ‘Destroy’

As the Trial Chamber Judgment of *Prosecutor v. Krstić* states, “international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.”<sup>123</sup> Remember that ‘destroy’ is a feature of the *mens rea* of genocide (i.e. with intent to destroy a protected group). As should be clear from the above analysis, demonstrating specific intent requires (as a necessary condition) proof of the perpetrator’s intention for destruction of the group in this relevant sense.

Despite more expansive notions of genocidal destruction in earlier draft versions, the Convention’s drafters eventually included only physically and biologically destructive conduct in

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<sup>121</sup> Schabas, *Genocide in International Law*, 270. 270.

<sup>122</sup> *Prosecutor v. Akayesu*, §523.

<sup>123</sup> *Prosecutor v. Krstić*, §580.

the definition.<sup>124</sup> Physical destruction refers to the material eradication of a group and its members. Biological destruction is annihilation through restriction of reproductive capabilities. In this, it can be a less immediate form of destruction. These respective qualifiers can be related to the material acts themselves. Whereas killing, causing serious bodily or mental harm, and inflicting conditions of life calculated to bring about physical destruction fit most clearly into the first type, the imposition of measures intended to prevent births and the forcible transfer of children fall into the category of biological destruction.

Although the prohibited acts of genocide reflect the two sorts of destruction, this should not be taken to mean that in killing a group member, for example, a perpetrator necessarily intends the group's eradication. The material element of genocide proscribes acts of physical and biological destruction; however, to be convicted of genocide a perpetrator's purpose must be the destruction of a protected group. As discussed above, underlying conduct performed with general criminal intent may be prosecuted, but genocide requires that an individual not only cause harm against a group member, but that he or she does so in order to destroy the group. The preceding summarizes the meaning of specific intent, but perhaps more importantly it underscores the essential role that destruction plays in it.

### 3.2.2. 'In part'

The words 'in part' qualify the specific intent for the physical or biological destruction of the group. Claus Kress writes that these "words make it plain that the intention need not be 'the complete annihilation of a group from every corner of the globe.'"<sup>125</sup> Even with this condition

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<sup>124</sup>Draft Convention on the Crime of Genocide, Secretariat Draft, E/447(28 March 1947), article 1 (3)(a-e) included cultural destruction in addition to biological and physical sorts; this exclusive focus also departs from the conception of genocide that Raphael Lemkin advanced, which included cultural, economic, and other forms of destruction.

<sup>125</sup> Kress, "The Crime of Genocide," 489.

established, the scope of the destructive intent is not immediately apparent.<sup>126</sup> The most consistently applied and accepted standard is that of substantiality.<sup>127</sup> It construes ‘in part’ as a substantial portion of the protected group (i.e. ‘with intent to destroy in whole or in *substantial* part’). This qualification of substantiality indicates an additional delineative component of genocidal intent.

Two primary interpretations of the term substantial have been applied. They are the quantitative and qualitative approaches. In accordance with the ICTY Trial Chamber in the *Jelisić* judgment, either of these standards may be used.<sup>128</sup> The quantitative perspective describes substantial as a large number of group members.<sup>129</sup> Although courts have been generally unwilling to set such limits, this approach necessitates a minimum numerical threshold in order to delineate between a substantial and an insufficient amount of victims.<sup>130</sup> The qualitative approach builds on the notion that certain group members are of greater significance for the continued existence of the group. On this interpretation, the loss of group elites could suffice to meet the threshold of ‘in part’ because of their (putative) importance to the group.<sup>131</sup> It is, then, the member’s qualitative impact on the group that results in satisfying the standard.

### 3.2.3. ‘As such’

This term was outlined in the preceding, but the meaning of ‘as such’ bears repeating as it pertains to the object of destructive intent—the group. Here, we can recall Robinson’s words:

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<sup>126</sup> Larry May, *Genocide: A Normative Account* (Cambridge: Cambridge University Press, 2010), chap. 6.

<sup>127</sup> Kress, “The Crime of Genocide,” 490.

<sup>128</sup> *Prosecutor v. Jelisić*, para. 82.

<sup>129</sup> *Ibid.*; Robinson, 63: “The intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial.”

<sup>130</sup> Kress, “The Crime of Genocide,” 490.

<sup>131</sup> Schabas, *Genocide in International Law*, 275.

“individuals are important not *per se* but only as members of the group to which they belong.”<sup>132</sup>

In this regard, ‘as such’ refers to the specific intent to destroy the protected group. Although it will be persons within a group that are the victims of genocide, it is the destruction of the group not the member’s individuality that constitutes the definitive component of this crime.<sup>133</sup>

#### 4. Conclusion

Here, we might step back and consider again what results from having detailed all of these features of genocide. First and most evidently, the standard distinction between material and mental elements provided a framework for identifying both the meaning and intricacies of each required component of the legal prohibition. In this, both the acts and intent that constitute conditions of criminal liability for genocide were defined. Elaboration of these elements in accordance with case law, international instruments, and legal scholarship provided substantive insights into the meaning and interpretation of the crime’s constituent terms. Three issues were given special attention because of their complexity and also lack of definitional clarification in article II. They were the general notion of groups, the related matter of identifying the four protected ones, and the meaning of genocidal intent.

In light of the identification of the elements of the crime, it is possible to offer a more expansive, annotated restatement of its definition: genocide is the intentional physical or biological destruction, by means of prohibited conduct, of an entire or substantial part of a national, ethnic, racial, or religious group as such. The perpetrator of the crime, then, must have not only committed one of the proscribed destructive acts against a member of a protected group,

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<sup>132</sup> Robinson, 65.

<sup>133</sup> Werle, 208.



but done so with the purpose of destroying the entire or a substantial part of the group. This captures the meaning of the crime and underscores the conditions of liability.

Whether this definition is the most appropriate is a distinct issue that was not registered above besides a brief mention of political considerations that attended the drafting of the Convention. What is of primary interest to this work, a matter also identified in the preceding, is how to relate an individual's responsibility for her actions to a collective wrong or crime.

This latter problem will be the focus of the following chapters. The first part's framework delimited certain background concepts, which will be utilized and contrasted in the next part. Importantly, the central dilemma to be addressed has as of yet only been shown to exist: no solution to it or conceptualization of all of its problematic aspects has been tendered. Having picked out one source of the legal conundrum about individual responsibility for wrongdoing involving multiple agents, it is now time to turn to other considerations that make reference to it not as a uniquely legal issue but as a moral one.



**PART TWO: ARGUING ABOUT INDIVIDUAL MORAL RESPONSIBILITY FOR  
COLLECTIVE WRONGDOING**



### *Chapter 3. Collective Intentional Action*

#### **Introduction**

This chapter re-examines and recasts concepts and definitions from the preceding part in order to develop an argument about the appropriate grounds for holding individuals morally responsible for collective wrongdoing. This shift towards argument supplies a reason to clarify further the relevance of part one of this dissertation to what follows; the central problems pursued in this chapter and the next (i.e., part two of this dissertation); and, the assumptions made along the way.

The previous chapter showed that individuals who perform or, in certain instances, omit genocidal acts with the requisite mental state and without excuse or justification can be criminally liable for their faulty actions. In line with both the first chapter and the previous one, when adjudication conforms to protective principles such as legality and generality, then resultant pronouncements of guilt for prohibited activities are justified. Formulating this in such a categorical way shunts to the side many issues. As this chapter targets a specific problem, on the sideline is where many such issues will remain.

A feature of the definition of genocide generates the dilemma at the core of what follows. Remember that the legal rule does not explicitly pay heed to how, in all but exceptional cases, an individual acts with others to realize (or even believe it possible to realize) group destruction.<sup>134</sup> This absence allows for the rather improbable view that the perpetrator of genocide is a solitary individual aiming to destroy a protected group without links to a collective goal or policy.<sup>135</sup> As

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<sup>134</sup> See Chapter 2 of this work, esp. §1.2.

<sup>135</sup> Kress, "The Crime of Genocide," 472.

such, it renders a prototypical collective crime—conceptualized for now as one in which many individuals are involved in its commission—into a purely individual one.

Something crucial about the nature of such wrongdoing, as well as responsibility for it seems to be overlooked by omitting this collective dimension. Consider a reformulation in order to locate more precisely what the problem might be: if an individual's actions are assessed in isolation from an outcome she acted with others to produce, then an account of what she has done, if it excludes such information, would in principle constrain ascriptions of responsibility just to her performance or omission of proscribed acts. This ostensibly leaves open the matter of responsibility for the wrong as such, be it genocide or otherwise.<sup>136</sup> The dilemma is that since an individual alone could not produce an end like group destruction, then blaming her personally for it would be at least intuitively inappropriate.

There might be an impulse to say that this dilemma is easily ironed out, and that the definition of genocide need only be slightly reworded to avoid any appearance of a limitation. It strikes me, however, that any such attempt would realistically need an answer to the very problem or question it aims to frame away in the first place. It would be an answer to a query about genocide specifically, but also about like cases of wrongdoing realized by a plurality of agents. To wit, who is morally responsible for collective wrongdoing?

If this is the question, and if it is applicable not just to the paradigmatic cases of genocide but to any sort of bad outcome produced by the actions of multiple agents, both of which I take to be the case, it is not entirely clear what sort of answer is to be given. Any lack of clarity seems to stem from three primary but related senses that can be given to the query. They are the

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<sup>136</sup> See “General Introduction” of this work esp. §1 and §2. My wording of this closely tracks that of Miller, 248.

subject of responsibility; the object of responsibility; and, the responsibility relation.<sup>137</sup> This taxonomy will be used to help identify my starting point, and each item will be explicated for this purpose.

For some the question is uniquely about the subject of responsibility ('who can be responsible?'). In this sense, it asks whether it is individual human persons, groups as such, or some other entities that are to be blamed or perhaps praised. Against the backdrop of collective crime and wrongdoing, a particular dispute about agency has often dominated debate.<sup>138</sup> It can be represented as positions for and against the claim that a collective has an ontological status distinct from that of its individual constituent members, and if it does whether collective moral responsibility can be ascribed on that account.<sup>139</sup>

Interestingly, the opposing viewpoints can be read as arguments about the underlying metaphysics of the famous dictum from the Nuremberg Trials, paraphrased here, that collective crimes are committed by individuals and not abstract entities.<sup>140</sup> Without denying the complexity of this sense of the question, the following limits itself to considering the 'for what' (object) and 'when' (responsibility relation) of retrospective personal responsibility. That is, when it can be shown that an individual was (retrospectively) at fault for her (personal)

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<sup>137</sup> I take this terminology from Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010), 36–43. The taxonomy, includes 'subject of responsibility' ('who is responsible'); 'objects of responsibility' (*what* or '*for what* can d be responsible'); and, the 'responsibility relation' or, as chapter one calls it, 'criteria of attribution' ('*when* can d be responsible for y', or '*under what conditions* is d responsible for y').

<sup>138</sup> Cf. Larry May and Stacey Hoffman, eds., *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage: Rowman & Littlefield, 1991); and, Peter A. French, ed., *Individual and Collective Responsibility: Massacre at My Lai* (Cambridge: Schenkman, 1972).

<sup>139</sup> The classic account is Peter A. French, "The Corporation as a Moral Person," *American Philosophical Quarterly* 16, no. 3 (1979): 207–15; the best account to my mind is Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

<sup>140</sup> The original is found in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, 22 vols. (Avalon Law Project, 1945), (Online Resource) [http://avalon.law.yale.edu/subject\\_menus/imt.asp#proc](http://avalon.law.yale.edu/subject_menus/imt.asp#proc). It reads: "crimes against international law are committed by men, not by abstract legal entities." Cf. Slidregt, 31.

performance or omission of some action and the outcome produced by it in collective contexts. As such, the focus is individual responsibility.<sup>141</sup>

Notice that in taking individuals as the starting point of analysis, my account examines how (by assuming that) collective wrongdoing fits into the framework of individual responsibility. That is, how to untangle and solve aspects of the above dilemma by relying on individualistic precepts. My account in this respect stays close to the current state of the topic as it is in law (i.e., personal responsibility for collective undertakings). It investigates from a moral perspective quandaries that appear in perhaps their starkest form in law. This approach does not aim to divorce law from morality, but rather examine specific problems of substantive morality that crop up in the legal context.

With the general subject of responsibility so decided, focus shifts to the other senses of the query. It is at least noteworthy that having such a subject does not in itself solve questions about the responsibility of particular individuals in given cases. Here it can also be made explicit that the object of responsibility generally has been fixed: moral evaluation limits itself to individuals' doings (i.e., responsibility for datable events). My approach, then, does not examine or regard the character of an agent, putatively evil or otherwise, as the relevant marker or basis for holding an individual morally responsible.<sup>142</sup>

Even with both of these foci announced, there are still no definite answers to the following. First, 'what about collective wrongdoing could possibly prompt a dilemma about individuals being responsible *for* something other than what they do?' Second, and this depends

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<sup>141</sup> While conditions of individual moral agency were presented in chapter one of this work, they can be briefly repeated: an individual subject must be rational, free, and unmistaken at that point in time under consideration.

<sup>142</sup>For some fairly recent contributions on evil, character, and genocide cf. Bill Wringe, "Collective Action and the Peculiar Evil of Genocide," *Metaphilosophy* 34, no. 3–4 (2006): 376–92; Eve Garrard and Geoffrey Scarre, eds., *Moral Philosophy and the Holocaust* (Aldershot: Ashgate, 2003); Todd Calder, "The Apparent Banality of Evil: The Relationship between Evil Acts and Evil Character," *Journal of Social Philosophy* 34, no. 3 (2003): 364–76.



on the answer to the first, ‘in the context of collective wrongdoing *when* is a particular agent from the general subject-set responsible for it?’

This chapter explicates an account of collective intentional action that shows what makes the wrongdoing of a plurality of agents identifiably collective. That is, it offers conceptualization of a class of cases in which individuals act not just aggregatively but in complex and coordinated ways. This provides conditions for identifying when the actions of two or more agents belong in the category of collective intentional action. These conditions will serve as the basis for moral evaluation of individual action in the context of collective wrongdoing.

Rather than attempt to generalize features of collective intentional action from the crime of genocide (paradigmatic as it may be), this chapter describes general conditions that apply to that crime and to other cases of wrongdoing with coordinated, collective dimensions. In this sense it does not generalize from a particular case, but rather constructs a general framework into which actions with specific features can be slotted. The characterization of those features that serve to establish an event as a collective intentional action is at issue in this chapter.

Now, describing the features of collective intentional action also confirms that there is something unique about collective wrongdoing. Further, it is by ascertaining its uniqueness that any dilemma about whether individuals *can* be responsible for collective wrongdoing as such is dispelled. The next chapter takes that up directly, but notice that the solutions provided there, which argue about when (and how much) to blame an agent, depend in part on this chapter’s prior identification of that for which in particular (what) the agent is to be blamed.

It is time to briefly turn to the responsibility relation sense of the starting dilemma—since an individual alone cannot realistically accomplish a wrong like genocide, personal responsibility

might be inappropriate. This could be read simply as saying ‘in the context of collective wrongdoing it is extremely difficult to determine *when* to blame an agent.’ Given that multiple agents are involved, it is ostensibly that much more technically challenging to establish when an individual is responsible. If this is the only sense to be given to the dilemma, then I find it unproblematic to grant the point.

It is truly hard to discern that over which an agent had control as a principal author. In cases of collective wrongdoing, talk of co-principals, or as I call them group members, becomes relevant.<sup>143</sup> This shade of the dilemma indicates that difficulties are largely associable with the demarcation of standards for responsibility assignation and their applicability to specific cases. This further impinges on matters of allocation (i.e. when standards do apply, *how* moral responsibility is to be distributed).

The next chapter argues and defends an account with the guiding claim that an individual can be held morally responsible for collective wrongdoing when she intentionally participates as a group member in a concerted effort to realize it. Additionally, it conceptualizes secondary agents—who aid in group members’ wrongdoing—in order to make sense of other ways in which individuals relate to wrongdoing. Put in common parlance, the argument asserts when and how to draw lines of responsibility by distinguishing requisite causal and mental conditions. In so doing, it also advances a claim about sharing responsibility for collective wrongdoing.

With this part of the dissertation sketched, along with its relation to the preceding part and the assumptions made, here is a brief outline of this chapter. Section one develops further

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<sup>143</sup> As indicated in the next paragraph, this topic is treated in the next chapter. For clarity and publicity’s sake, the meaning principal and co-principal, and the grounds for attributing responsibility to them is as follows: “The actions of the ‘principal’ or ‘co-principals’ are constitutive, wholly or partially, of the principal wrongdoing. That is to say, they are part and parcel of the principal wrongdoing that is constituted by the combination of actions performed by all co-principals” in Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013), 33.

the ways in which genocide is describable as an example of collective wrongdoing or crime. To transition from criminal law to moral argument and to lay out a unified conception of action, section two explicates intention and girds this with a paradigmatic account of intentional action. The third section provides an account of collective intentional action, and maps out how individuals act in collectively intentional ways and thusly how the outcome of such efforts can be seen as collectively-produced. The fourth section addresses the appropriate standard by which an individual's action can be counted as participation. A brief conclusion closes out this chapter.

## 1. Collective Dimensions of Genocide

So far genocide has been characterized as an example of collective wrongdoing or, in keeping with the first chapter of this work, an example of collective crime. While this seems appropriate (perhaps intuitively unimpeachable), it is possible to show more precisely three senses in which it is descriptively accurate. Notice at the outset, however, that only the final sense below will be considered in subsequent sections with respect to collective intentional action.

The first and most apparent way in which genocide can be described as collective is that certain stable, identity groups are the subjects of protections in the 1948 United Nations Convention as well as the International Criminal Court Statute—national, ethnical, racial and religious groups.<sup>144</sup> Again bear in mind Nehemiah Robinson's commentary about the composition of these groups: "[they] consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important

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<sup>144</sup> This point was restated in the *Akayesu* judgment when the Trial Chamber wrote: "the crime of genocide exists to protect certain groups from extermination or attempted extermination." *Prosecutor v. Akayesu*, ICTR-96.4.T (September 1998), §469. For a critical analysis of this choice and the purposes of protection cf. Chandran Kukathas, "Genocide and Group Rights" (presented at the Ethics in Africa, Cape Town, South Africa: Unpublished Lecture, 2006).

not *per se* but only as members of the group to which they belong.”<sup>145</sup> Call this the protected group of genocide, and the first way in which genocide can be conceived as collective.

The second sense of collective as it relates to genocide is that the protected groups described above represent a substantive feature of the perpetrator’s destructive intent in acting. That is, the specific intent to destroy in part or whole has one of the enumerated groups as its object. Proving specific intent is one requirement for legal liability for the crime of genocide.<sup>146</sup> The above sense and this one are close in meaning but nevertheless analytically distinguishable, as the latter refers to required intentional content, or more generally a mental state of the perpetrator in committing proscribed acts. Notice in further contrast that specific intent does not consist of a protected group *per se*, but of a protected group’s total or partial destruction. This second sense can be referred to as the subjective element of group destruction.

The third sense of collective is that the individual perpetrator of genocide acts in relation to the broader goals, plans, or context of collective and systematic violence. In this respect, the individual’s intentional connection to genocide is mediated by broader collective objectives which, depending on circumstances, differentially impact and influence his or her acts. The mediation does not, however, supplant individual intent and replace it with that of a collective’s; rather, in the words of Claus Kress, “an individual perpetrator’s genocidal intent requires a genocidal campaign as an implicit point of reference.”<sup>147</sup> In this way, the subjective element of group destruction is enabled and conditioned by the organization and action of other perpetrators.

What Kress refers to, then, amounts to a condition of possibility for an individual to be held liable inasmuch as the subjective element when accompanied by criminal conduct must be

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<sup>145</sup> *Commentary*, 58.

<sup>146</sup> Schabas, *Genocide in International Law*, 2:176.

<sup>147</sup> Kress, “International Court of Justice,” 622.

realistically accomplishable.<sup>148</sup> As some legal and moral philosophical treatments of the topic have shown, it has been posited that absent a genocidal plan or campaign involving multiple agents, an individual's decision to destroy a social group (or a decision to achieve another non-individually accomplishable goal) would, in all but the most extraordinary circumstances, prove unfeasible to implement.<sup>149</sup> This sense can be called the collective point of reference.

Crucial to this third sense is its attention to individual perpetrators who (in order to have more than a vain hope) act in relation to the broader collective goal or context. In law, an individual's proscribed conduct remains the locus of liability. Notice that the absence of this collective dimension of genocide in its legal definition gave rise to the problem identified in the preceding chapter. In this respect, the law defines the crime as if a lone individual acts to affect this wide-ranging destructive end.<sup>150</sup>

Having identified three collective dimensions of genocide, which confirm that the descriptors collective crime and collective wrongdoing are fitting, the next sections will elaborate on the modes of involvement and relevant mental attitudes that constitute my account of collective intentional action. This account pertains more directly to the third sense. Again,

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<sup>148</sup> Notice first that the concern here is not whether the individual completed acts or performed inchoate ones, but rather about the *mens rea* requirement that would make their performance punishable (article II of the Convention specifies completed acts, while article III of the same instrument proscribes, among other acts, attempts). Next, notice that 'realistically accomplishable' construes the group's genocidal plan as necessary for satisfying an individual belief condition, where "having an intention to A requires believing that one (probably) will A." As Alfred R. Mele further explains: "The proposal is designed to capture, among other things, the confidence in one's success that intending allegedly involves. A less demanding claim is that having an intention to A requires that one lack the belief that one (probably) will not A" ("Intention," in *A Companion to the Philosophy of Action*, ed. Timothy O'Connor and Constantine Sandis (New York: Blackwell, 2010), 108–9.)

<sup>149</sup> Claus Roxin, "Crimes as Part of Organized Power Structures," *Journal of International Criminal Justice* 9 (2011): 196–203; Kress, "International Court of Justice," 622; Greenawalt, "Rethinking Genocidal Intent" 2288; Vest, 783; Linda Radzik, "Collective Responsibility and Duties to Respond," *Social Theory and Practice* 27, no. 3 (2001): 456; Lepora and Goodin, chap. 1.

<sup>150</sup> William Schabas, "Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide," *Leiden Journal of International Law* 18, no. 4 (2005): 871–85.

this action-theoretic account underpins my answer to this dissertation's chief question about moral responsibility.

## 2. Intention, Acting, and Intentional Action

It might be useful to revisit the definition of intention treated in the preceding chapters. Further, it is possible to set this in a more general paradigm of intentional action that, in connection with act-type descriptions, will be used to illustrate how individual intentional action can be recast in terms of the collective goal to which it aims to contribute.

Intent and its species have to this point been situated in the context of criminal law. Analysis has shown how and under what conditions an individual can be legally liable for a prohibited action. To this end, and also because of the definitional constraints of genocide, special emphasis has fallen on the performance of acts that require particular states of mind (generally identified as *mens rea*) in order for them to be treated as criminal.

The first sense of intention is that of intentionally acting or, in H.L.A. Hart's words, "intentionally doing something."<sup>151</sup> This is the performance of outward bodily movements with the intention to perform them.<sup>152</sup> In the commission of *dolus generalis* offenses, intentionally acting can suffice for conviction if conduct is prohibited and performed without excuse or justification.<sup>153</sup>

Most apparent in this first sense of intention, but nevertheless undergirding the second one too, is something perhaps more fundamental; namely, the capacity to intentionally act or

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<sup>151</sup> Fletcher, *Basic Concepts*, 84; ICC Statute, article 30; H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 117.

<sup>152</sup> Hart, *Punishment and Responsibility*, 118; R. A. Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990), 38.

<sup>153</sup> Fletcher, *Basic Concepts*, 84.

deliberate is a condition of being able to be a liable or responsible agent.<sup>154</sup> That is, being capable of recognizing, deliberating about, and being guided by reasons for action that are purportedly authoritative underpins criminal liability and responsibility.<sup>155</sup>

The second sense of intention, which is also employed in connection with genocide, is the intent to bring about a result or “doing something with the further intention.”<sup>156</sup> This is a sense of intending a present act as means or preparation towards a certain or specific result.<sup>157</sup> The analysis of genocide above illustrated how intentionally performing acts such as killing is prohibited and fit the first sense of intention.

There is yet a further intention requirement in liability for genocide (*dolus specialis*), that of intending the destruction of a protected group in whole or in part. This means for the second sense that an individual acts intentionally in the commission of forbidden conduct (implying that an agent can form intentions), and does so with the further intent for a result that “extends beyond the *actus reus* of the offense.”<sup>158</sup>

The above can be fitted into a more general paradigm of intentional action that does not necessitate special reference to or further accommodation of criminal law. Again, criminal law has so far provided a framework for detailing conditions necessary to ascribe liability for crime, and more specifically for the crime of genocide. Intentions represent criteria of attribution when an act proscribed by positive law is performed on the basis of them; genocide requires proof of a two-part subjective element.<sup>159</sup>

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<sup>154</sup> Ibid.

<sup>155</sup> R.A. Duff, “Who Is Responsible, for What, to Whom?,” *Ohio State Journal of Criminal Law* 2 (2005): 445.

<sup>156</sup> ICC Statute, article 30; Hart, *Punishment and Responsibility*, 118.

<sup>157</sup> Duff, *Intention, Agency, and Criminal Liability*, 38.

<sup>158</sup> Ibid., 40; Vest, 783.

<sup>159</sup> Fletcher, *Basic Concepts*, 81.

The definition of the crimes of interest here entail that prohibited conduct is performed with a guilty mind of a requisite sort, and only when they are proven to have been committed in conjunction with such a mental state can they lead to conviction and sanction. In other words, to have merely caused or done something is not enough to be convicted for it; there must also be a fault or subjective element.<sup>160</sup>

By offering a more general account of intentional action which, like the senses of intent already analyzed, describes an act in terms of the intended goal of the individual in acting, it will allow for the evaluation of a wider range of participation than just that proscribed by law. This is not to say that extended forms of participation necessarily amount to genocidal or even criminal acts. With respect to ascriptions of liability and imputations of fault—that is, responsibility ascriptions—it is not always the case that one’s moral responsibility can be transposed into legal liability.<sup>161</sup>

It is helpful to bear in mind that a primary difference between legal and moral responsibility is the “range of objects for which one is responsible in each respective domain and in the enforceability of the associated obligations.”<sup>162</sup> Having available such a general conception of intentional action provides a means of evaluating and connecting an individual’s act to collective intentional goals, even in the absence of positive legal obligations.

Following Donald Davidson, then, intentional action is “both causally and teleologically explained by an agent’s goals . . . [which are] embedded in networks of intentions, desires, and instrumental beliefs.”<sup>163</sup> That is, the goal or reason that an agent intends in acting serves to

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<sup>160</sup> Feinberg, *Doing and Deserving*, 140.

<sup>161</sup> *Ibid.*, 129.

<sup>162</sup> Isaacs, 14; G. J. Warnock, *The Object of Morality* (London: Methuen, 1971), 56–9.

<sup>163</sup> This is synthesis of Davidson’s view is from Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), 72; Donald Davidson, *Essays on Actions and Events* (Oxford: Clarendon Press, 1980), chap. 3 & 5; cf. Duff’s thorough analysis of intentional action and criminal law. His work



explain what she has done in terms of its cause and logic. An act can be ascribed to her as an agent so long as she could have at least deliberated about doing it.<sup>164</sup> (This is not to say that this sort of deliberation is always necessary for an act to be intentional). If an agent intends *to* X, where X is an action or a result of an action, but produces Y instead, she can be said to be a cause of Y, but not of having intentionally acted *to* produce it.<sup>165</sup>

Such a teleological account makes sense of how intentional action—a well-worn but still elucidative example is that of flipping a light switch—can be described in terms of the intended goal of doing that thing. In this respect, it is a fundamentally descriptive and explanatory account of agents’ practical reasoning and motivation, and not in the first place an account or consideration of agents’ responsibility.<sup>166</sup> These points can become clearer by introducing an example.

Let’s say that Roberta flips a light switch on a wall in a room. In so doing, she wakes her friend sleeping in the room, the room’s light comes on, the cockroaches in the room flee under the floorboards, and so forth. These different consequences can be used to re-describe Roberta’s act of flipping on the light switch. This kind of expansion and contraction of action descriptions is what Joel Feinberg called the “accordion effect,” and which Davidson himself relied on in order to convey the notion of act-type description.<sup>167</sup>

If Roberta intended to illuminate the room, then the following could be said about her action: ‘she lit the room.’ The primitive or *simpliciter* act of flipping the light switch is

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reveals that Davidson’s treatment of act-types and intention offers not only one possible paradigm of intentional action in law, but intentional action generally (i.e., the definition of the function and operation of agent causality). (*Intention, Agency, and Criminal Liability*, esp. 55–63.)

<sup>164</sup> Davidson, 50.

<sup>165</sup> *Ibid.*, 47.

<sup>166</sup> Alfred R. Mele and Steven Sverdlik, “Intention, Intentional Action, and Moral Responsibility,” *Philosophical Studies* 82, no. 3 (1996): 272.

<sup>167</sup> Feinberg, *Doing and Deserving*, 134.

teleologically and causally explained by her intended goal of illuminating the room. In this respect, and in the words of Christopher Kutz, “as long as what the agent does satisfies a goal non-accidentally, an intentional action is performed, and the action is intentional under a description appropriately related to (or identical) to a statement of the agent’s goal.”<sup>168</sup> The flipping of the switch might have caused other effects such as cockroaches fleeing, but the description of Roberta’s intentional action (in terms of its goal) is that of lighting the room.

The outcome of an action does not in itself “reveal in what respect an act is intentional.”<sup>169</sup> It might have been that Roberta intended to wake her sleeping friend, and following the teleological account the appropriate description of her action would reflect or be identical with this (i.e., ‘Roberta woke her friend’). From the multiplicity of possible descriptions of an act, the intentional goal characterizes the act as attributable to the agent who intentionally performed it.<sup>170</sup> Act description of this sort is especially useful in the analysis of circumstances where multiple agents act; namely, an individual’s action may be re-described in terms of collective features or collective goals in light of an intention to contribute to a group’s efforts.

Consider anew Roberta’s situation: she enters the room, flips the light switch, wakes her friend, but this time she illuminates the room because this is the signal for her car-thieving comrades in the street to flee because a police car is approaching. In this scenario, and in accordance with a teleological explanation outlined, Roberta’s act can at least sustain the description that ‘she aided in stealing cars,’ and perhaps there are grounds for the more controversial ‘she stole cars,’ as opposed to just ‘she lit the room.’

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<sup>168</sup> Kutz, *Complicity*, 73.

<sup>169</sup> Davidson, 54.

<sup>170</sup> Ibid., 48; Kutz, *Complicity*, 73.

The teleological view allows for the depiction of the relationship between individuals and the contexts in which they act by reference to the description of (individual) intention in acting. Furthermore, while a criminal law conceptualization of intention anchors a fault element of legal liability for crime, the more general paradigm of intentional action enfolds this formulation whilst also allowing for consideration of other aspects of intention, action, and their evaluation. With respect to collective contexts, explication of individual intentional action in this teleological and causal way can permit a view of collective action that locates a group's action in the intended goals of individuals acting together; however, it is necessary to identify when and under what conditions it is possible to call this collective intentional action.

As will be treated in the next section, merely acting intentionally in the presence of other agents does not equal acting in a collectively intentional way. The final description of Roberta's act dimly alluded to this claim, as there were implied elements of collective organization and sharing of her intended goal. Still, the conditions underlying acting together in a robust and intentionally interdependent sense need clarification.

### 3. Collective Intentional Action

Claus Kress bemoans the International Court of Justice's (ICJ) missed opportunity to define and integrate collective intent more conclusively into the international law on genocide in its judgment of the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>171</sup> The facts of the case and the position of the court

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<sup>171</sup> Kress, "The International Court of Justice," 622; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, case no. 91, International Court of Justice, Judgment (26 Feb 2007).

would have lent themselves well to an explicit legal formulation of collective intent.<sup>172</sup> However, the ICJ's reluctance or failure might merely confirm what Larry May has pointed out elsewhere: "the term 'collective intent' in international law is not well understood."<sup>173</sup> We would do well to recognize that collective intent is not uniformly defined (or for that matter understood) in contexts besides international law either.

Following May, collective intent in this account is most broadly formulated as "the intent of a group of people to act in a certain way."<sup>174</sup> This can be represented as 'A<sup>n</sup> intend to Z,' where agents A<sup>(1, 2 . . . n)</sup> intentionally participate as members in a collective towards a (shared) goal.<sup>175</sup> Notice first that this definition conforms to the above teleological account of individual intentional action: collective intent is the sharing or overlapping of private intentions by multiple agents to do something together as group members. Collective intentional action is the intentional participation (i.e., action) of multiple agents towards a common goal.

The above does not require a view of collectives as already-existing or non-voluntary social entities, even if existing social relations and commonalities might become salient for initiation, organization, and participation as group members. The core trait of collectives is a common or shared goal of individuals to (at least) participate or act together as members of the collective.

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<sup>172</sup> Kress, "International Court of Justice," 622; Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?," *European Journal of International Law* 18, no. 4 (2007): 631–48; Antonio Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford: Oxford University Press, 2008), chap. 19.

<sup>173</sup> *Genocide: A Normative Account*, 115; for the various uses of collective or shared intent and their application in international trials under the joint criminal enterprise doctrine see Gideon Boas, James L. Bischoff, and Natalie Reid, *Forms of Responsibility in International Criminal Law*, vol. 1, International Criminal Law Practitioner Library Series (New York: Cambridge University Press, 2008), chap. 2.

<sup>174</sup> May, *Genocide: A Normative Account*, 124.

<sup>175</sup> This is adapted from Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford: Oxford University Press, 2007), esp. 17. It is also reliant on the formulation of 'participatory intention' in Kutz, *Complicity*, 69, 74–89, & 107–112. My approach itself closely follows May, *Genocide: A Normative Account*, chap. 7.

In line with the preceding, intentional participation marks off the relevant boundaries of collectives as well as membership therein. Description of intention as collective is a result of its relational structure—held by multiple agents—as well as its content—an intention to participate as a member in a collective. It is, then, a structural and substantive intentional relation between agents that underlies their collective action. As such, these features allow analysis of collective intentional action as it arises from collectives not only of varying sizes, but also degrees of structuration, formality, and stability—for example, from highly-organized corporate bodies to more loosely-structured collectives arising in response to specific circumstances, or in pursuit of particular if ephemeral goals.

Uniform analysis of this sort does not discount differences between collectives, but rather isolates the grounds for description of collective intentional action from other common descriptors employed to identify the collectives themselves. Such analysis of action as collectively intentional can proceed only if there are overlapping intentions of agents to participate as members of the group.

Participation as a member for the collective does not require always knowing the group's goal perfectly. Although intentional contribution can occur where a goal is known as a complete quantity ("I aim to achieve with others our goal of stopping pickpockets in this neighborhood"), it may also occur when not all details are completely known ("I intend to play my part in support of my group").<sup>176</sup> In both versions, the aim to participate as a member of a collective represents the substantive core of individual intent in pursuit of or contribution to collective action.

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<sup>176</sup> Raimo Tuomela, 17.

The individual's intentional action represents a part-contribution to a project, where the project is (at least) known to be collective.<sup>177</sup> If a given individual does not function in a leadership or executive capacity, then that individual's knowledge of a group's overall goal or ultimate aim would most probably be constrained.<sup>178</sup> This does not alter the fact that an individual's intentional conduct is (so long as it is) conceived of and performed as a contribution to the collective.

The preceding indicates a perspectival difference that can be seen to arise between individuals who plan and organize a goal, for example, and those who merely act in support of it as group members without the entirety of the project or end being conceived by them. Just as an individual who goads others to act towards a goal may participate as a member, so too can an individual who aids without every detail being available. This again illustrates that collective intentional action can consist of, but only sometimes depends on, hierarchically organized individuals. It also helps to draw out the possible variety of contribution itself.

Take an example of two riders on a tandem bicycle where the mechanics of the apparatus distributes the task of pedaling to both of them, but steering only to the rider seated in front. That the individual in the front directs the bike *and* pedals, while the one in the back simply pedals, does not alter their intentional action of riding the bike together or collectively. The individual in the back is no less riding the bike because she lacks an equivalent ability to steer towards some further destination; she is riding the bike because she intentionally acts to do so with another despite not being able to steer to a particular spot. In this respect, the intentional

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<sup>177</sup> Pekka Mäkelä, "Collective Agents and Moral Responsibility," *Journal of Social Philosophy* 38, no. 3 (2007): 464.

<sup>178</sup> May, *Genocide: A Normative Account*, 120.

actions of individuals are rationalized by their participation in a collective act, rather than their proportional effects on its outcome.<sup>179</sup>

Contributing to a group's effort establishes a connection between individuals who view themselves as members inasmuch as they intentionally participate. This condition precludes instances of involuntary, non-voluntary, or coerced contributions as being regarded as participatory in this collectively intentional sense.<sup>180</sup> In addition, it points to an epistemic criterion that underlies the intention to participate; namely, collective intention depends on individuals' variable knowledge of other individuals who are also disposed to act collectively (i.e., as members of a collective).<sup>181</sup>

Notice that the preceding point differs from that of knowledge of a goal or plan. Collective intentional action (at least typically) requires an interdependence of knowledge of individuals when acting; however, whether such knowledge of others acting obtains will ultimately depend to a great extent on case-by-case analyses.<sup>182</sup> Furthermore, while knowledge of others' intentions as well as a collective goal might enter into considerations about agent responsibility (i.e., if an individual knew that her act would enable or allow others to do something), it does not follow from simply knowing that one intentionally participated as a group member.<sup>183</sup>

By setting forth this definition of collective intent, a key claim is that individuals who share the intention to participate (knowing fully or inchoately about the precise goal, but nevertheless acting as group members) are collectively intentionally acting. That is, acting

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<sup>179</sup> Kutz, *Complicity*, 87.

<sup>180</sup> May, *Genocide: A Normative Account*, 118.

<sup>181</sup> Sara Rachel Chant and Zachary Ernst, "Epistemic Conditions for Collective Action," *Mind* 117, no. 467 (2008): 550; see Mele *supra* note 11.

<sup>182</sup> *Ibid.*, 555 & 568.

<sup>183</sup> Mele and Sverdlik, "Intention, Intentional Action, and Moral Responsibility," 269–72. This point follows from the preceding analysis of intentions and intentional action; it is also briefly revisited below in § 4.2.

together as a group, or in the case of genocide, acting as a collective perpetrator. It is necessary to note again that while the above account of collective intent and collective intentional action allows for generalization across diverse cases, in connection with genocide they require further conceptual specification and supplementation in order to appropriately apply to the crime.

The next section offers a set of scenarios. The aim is to provide an elucidative (i.e., not complete) taxonomy of cases that differentially conform to the above definition of collective intent and conditions of collective intentional action. While family resemblances and differences are drawn out in the respective cases, it is important to stress that the examples are geared towards general clarification of the account, and not the delimitation of the only possible cases of collective intentional action.

Although it is the final scenario (and aspects of the third) that I take to be sufficient to underpin collective intentional action, each provides a conception that at least attempts to show when and how individuals intentionally acting are doing so in a collective way. Bear in mind that emphasis is placed first on what collective intent is, such that action can be said to be collectively performed, and then in light of such conclusions the consequences for genocide are assessed.

#### **4. When Intentional Action is Collective in the Relevant Sense: Four Scenarios**

First, suppose that a medical researcher from Indonesia is working towards the development of a deadly virus Z to kill millions of human beings. Then suppose that a medical researcher from Norway at the same time has also set upon crafting the same deadly virus Z to kill millions of human beings. Finally, suppose that there is yet another researcher in Mali who is also working on virus Z for the same purpose. The three researchers, then, each act intentionally towards the



achievement of an equivalent goal. Add to this scenario the fact that none of them is aware of or responsive to the efforts of the others.

Second, suppose that three researchers—one from Indonesia, one from Norway, and one from Mali—are invited (with a handsome compensation package) to conduct their respective research at the same organization called Nomed. Each researcher would be able to pursue her private project without contributing to the work of the others. As in the above scenario, there is the same or equivalent goal of each researcher—to develop the deadly virus Z—but now the researchers pursue their aims knowing of the others' goals. Suppose further that this makes them responsive to the others' work. Such responsiveness manifests differentially according to the researcher: one decides that surreptitiously gaining as much information about the others' work will strengthen her own project's prospects; one offers to review the others' research but decides against sharing her findings; one wants to work with the others but believes that near total isolation will prevent any future disputes about authorship and intellectual property.

Third, suppose that three researchers—from Indonesia, Norway, and Mali respectively—all work at Nomed where they conduct research and attempt to devise the deadly virus Z to kill millions of human beings. Nomed permits the researchers to work together as a group, but does not require it. As such, the researchers from Norway and Mali decide to combine their efforts in order to produce a deadly virus jointly. The researcher from Indonesia decides against joining the others and works on her own, even though she knows that she cannot produce a virus by herself. There is a condition that Nomed sets out before providing funding to the researchers: once every two months each researcher (even if they had all joined together) would review the work of the others in order to determine whether the efforts of the others would provide solutions to their own (potentially private) virus development. If after the mandatory review one or some

of the researchers believe that the work of the others could contribute to the production of the virus, then that work could be incorporated into their projects so long as appropriate attribution to the original researcher was made.

Finally, suppose that three researchers—again, one from Indonesia, one from Norway, and one from Mali—convene their research together as a team. They may or may not be in the same place, but regardless they all have decided to pool their skills and have devised a plan for the development of virus Z. For the purpose of filling in the narrative, their plan is complex and ambitious. It includes a division of labor such that while all team members aim towards the development of the deadly virus, each of them contributes differentially to its achievement. As the saying goes, to each according to her skill, and each is competent in an area that the other is not. So, while the researcher from Indonesia knows how to increase the virus's rate of replication once introduced into a host, the researcher from Norway knows how to increase the success of the virus's penetration of cells better than either of the other two researchers. They contribute to the fulfillment of their collective project in a robust way—they share a common goal that they act towards the achievement of, and by virtue of the plan have knowledge of and are responsive to each other.

#### 4.1

Let's assess each scenario on its own, considering not only the distinct meanings of collective intent, but also what it might mean to say that on the basis of the respective depictions agents are acting together. The first scenario looks to provide the most meager version of collective intent in that it is simply the aggregation of individual intentions.<sup>184</sup> As such, it is difficult to locate what is collective in it, or why describing it as collective intent matters. It better represents

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<sup>184</sup> May, *Genocide: A Normative Account*, 118.

something like a coincidence of parallel intents, or again an aggregate of agents acting with the parallel intention to do something: all of the researchers coincidentally intend to produce Z.<sup>185</sup> If this account were to ground collective intentional action, then the collective subject or group would consist of those individuals associable by their parallel intents without respect to or limitation by other conditions. The simple problem is that coincidental intentions are ordinary private intentions of the sort discussed in the above section, but without collective content or structure that could relate them to other individuals who also happen to have them.<sup>186</sup>

It is premature to treat at any length at this stage of analysis, but this scenario could be taken to entail the more radical implication that fault or credit can be ascribed to the researchers as a collective just in virtue of their parallel aims and unrelated acts. Consider that each researcher intends to Y in order to Z. In itself this does not mean that all researchers intentionally act towards Z in such a way that they might be categorized as Y-ing to achieve a collective Z, where Y is at least intentionally participating as a member.

If it is the researcher from Indonesia who eventually develops the deadly virus, then it would nevertheless seem that blame for its production would apply to the other researchers despite their apparent lack of relation. At least provisionally, assignment of collective fault for individuals' disparate actions performed with coincidental intent would not only provide insufficient grounds for collective intentional action, but they would also seem to allow for the violation of the principle of the separateness of persons.<sup>187</sup>

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<sup>185</sup> Margaret Gilbert, "Modelling Collective Belief," *Synthese* 73, no. 1 (1987): 187–8; Isaacs, 27.

<sup>186</sup> Gilbert, 187–8.

<sup>187</sup> Feinberg, *Doing and Deserving*, 235.

Some theorists and courts regard this first view of collective intent to be the operative sort in genocide, even if it does not result in collective liability ascriptions or collective guilt.<sup>188</sup> Again, if it is collective intent it is only an attenuated conception of it. Although such individual intentional acts to produce Z can be aggregated into a collection of intentional actions, it is insufficient to establish a non-coincidental sense of the collective intent of those acting either in the context of genocide or more generally.<sup>189</sup>

The mere paralleling of intent in this sort of case does not lend itself to anything besides the adjudication of an individual for acting with the intention of group destruction (i.e., in line with adjudication of individuals acting alone on the basis of the subjective element of group destruction). At best, this sort of combinatory assessment is superfluous to the prosecution of an individual perpetrator. Notice further that if individuals act alone, yet with coincidentally parallel intents, there perhaps should not be appeal to collective intent or group criminal behavior based on the threat of unjust or wrongful attribution. Still, if the apparent nature of genocide and its history in case law is any indicator, it is unlikely either for there to be a truly lone perpetrator, or multiple perpetrators with equivalent but unrelated (realistic) intentions of this sort.<sup>190</sup>

## 4.2

The second scenario looks more promising with respect to collective intentional action if only because each researcher knows of the others' goals to develop the deadly virus Z. Furthermore, each researcher is differentially responsive to the efforts of the others. Despite its more complex epistemological and actional structure, the example ultimately does not provide grounds for identifying the intent of the researchers' to be collective or shared. The analysis of collective

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<sup>188</sup> May, *Genocide: A Normative Account*, 118.

<sup>189</sup> Kutz, *Complicity*, 76.

<sup>190</sup> May, *Genocide: A Normative Account*, 118.

intent as an aggregate of parallel intents from the first scenario holds in this one:  $A^n$  intentionally Xs to achieve Z, where Z is a private goal and the researchers' intentions are without collective structure or content.<sup>191</sup>

The inclusion of knowledge and variable responsiveness to others does not in this respect alter the non-participatory character of the researchers' intentions or reasons in acting. Important to participation is agreement to a common project, whether it is formally established or arises from pro-group agent activity without prior arrangement (i.e. an individual intentionally participating in a group).<sup>192</sup> Such a common undertaking is lacking in the example. Although it might be possible to lump together or relate the researchers to each other on the basis of various attributes—because they are researchers or because they each seek the deadly virus Z—this does not suffice to connect or constitute the type of collective intent at the core of collective intentional action.

Here we can revisit and clarify the relationship between knowledge and collective intentional action. In the second scenario knowledge is assumed to be common knowledge—each researcher knows that the others are working towards the development of the virus, *and* they all know that the others know this.<sup>193</sup> That is, the knowledge they respectively possess is that each acts towards a parallel goal, not that they work together as group members towards a common goal or for the group. In this sense, each intends to produce Z, but Z is substantively private and coincidentally held.<sup>194</sup>

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<sup>191</sup> Gilbert, 188.

<sup>192</sup> Kutz, *Complicity*, 91; May, *Genocide: A Normative Account*, 120.

<sup>193</sup> Chant and Ernst, "Epistemic Conditions," 553. As Chant and Ernst point out, this follows the formulation of common knowledge attributed to David Lewis, *Convention: A Philosophical Study* (Cambridge: Harvard University Press, 1969): "a proposition  $p$  is common knowledge if and only if: (everyone knows that)<sup>n</sup>  $p$ ; for all values of  $n$ ."

<sup>194</sup> Tuomela, 117.

It is nevertheless taken to be necessary to have knowledge of others sharing the intention to participate as group members (i.e., to act together as a group, if not to act together in complete knowledge of a goal) in order to have collective intentional action. In order to join in, participate as, and be group members, individuals must decide to be a part of it (e.g., to partake in the broader plan whether by devising it, attempting to achieve, and so forth). The distinction of importance here is between knowing as a necessary but not sufficient condition for collective intentional action, and knowing in conjunction with (pro-group) participation as a member. This does not deny that knowledge of a collective plan or circumstances (not to mention their simple existence) alters the significance of one's action in a given context.<sup>195</sup>

Remember Roberta. The relationship between the action she performed and its teleological description depended on factors such as whether she intended to illuminate the room, wake her sleeping friend, or signal to her thieving comrades. However, if she flipped the switch knowing that her friend would wake, but intending to illuminate the room, then the result of the action would have (non-accidentally) produced a deleterious effect. The same applies to her flipping the switch if she knew that the car thieves would flee, even if she had intended to illuminate the room.

Knowledge of circumstances that increase the probability of certain consequences resulting from an action can function as ground for attribution of responsibility, even if knowledge does not explain how individuals—the researchers, Roberta, and so on—join in a collective activity.<sup>196</sup> That is, some degree of knowledge (that other are acting towards a common goal) is typically necessary to act as a member, but knowledge (to whatever degree) is

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<sup>195</sup> Isaacs, 100–1.

<sup>196</sup> In criminal law contexts such internal but non-intentional grounds of imputation include negligence, recklessness, and so on. These technical divisions, with concomitant particularities and specifications according to respective legal systems, can be cast in non-legal terms as improper care in effort, or instances of defective skill, and so forth. Feinberg, *Doing and Deserving*, 126; and, Mele and Sverdlik, 269.

not sufficient to establish the voluntary and intentional relationship between individuals acting as group members.<sup>197</sup> In the final analysis, participating as a group member requires intentionally acting as a group member ‘for the group.’

The second scenario was crafted such that no pro-group intentional action was taken by any of the researchers. Even so, the greater complexity of the example does not alter the meaning or type of collective intent present in it. That is, it is merely a coincidence of parallel intents belying no greater relationship between researchers besides that of private coincidental intents as well as common knowledge.

With respect to genocide, the analysis from the previous scenario holds here as well: if collective intent consists of the parallel intents of individuals acting towards private ends as non-group members, even knowing that others act with such purposes, then calling this collective looks at best uninformative. Proposing it as a ground of collective fault or guilt would, at least on its face, stand to violate principles and premises such as the individual difference principle and the separateness of persons; this is in addition to the absence of provisions in positive law about such collectivization.

### 4.3

Begin with the fact pattern detailed in the third scenario: (1) a group of individuals—the researchers from Norway and Mali—act together in a way that rather unproblematically conforms to conditions of collective intentional action; (2) a third individual—the researcher from Indonesia—knows of this group and its parallel goal; (3) the group of two knows of the other researcher and her parallel but not jointly pursued goal; (4) a condition that stipulates the possibility of any or all researchers knowingly contributing to the efforts of others.

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<sup>197</sup> May, *Genocide: A Normative Account*, 126.

As to the fourth detail, it is possible that a different ordering of the overall scenario would result in a relevantly distinct outcome. For example, if all researchers decided to work separately, then any subsequent incorporation of others' work would not contribute to a collective project, but rather to the project of another lone researcher. This is quite similar to the circumstances from the second scenario. Still, this scenario is framed such that if the grouped researchers use the work of the researcher from Indonesia, it would contribute to their collective undertaking. Conversely, if the researcher from Indonesia utilizes the group's results in her efforts, then (given the arrangement of facts) the group would be contributing to her development of a vaccine.

Now, the juiciest bit of this scenario seems to be whether the two researchers working together are doing so in a collectively intentional way. Although that issue is of central importance generally, assume for now that they *are* collective intentionally acting. There is certainly more to say about the matter, and the final scenario allows for its more complete exploration. However, the immediate issue to be addressed, which depends on the assumption of collective intentional action, is what to say about the action of the third researcher who knows of the (at least potential) contributory impact of her work if the group integrates her efforts into their project.

As in the second scenario, this one takes it to be that there is common knowledge of other agents and their goals. Since every researcher either knows that she could contribute to a collective project, or has such contribution as her intended aim, this scenario poses a distinct relationship between individual and collective conduct. Without a doubt this issue is an iteration of the primary problem—when are individuals acting in a collective intentional manner—but



again, the assumption is that that there is a group composed of individuals acting together on the basis of their collective intentions not parallel ones.

Let's say that the researcher from Indonesia does come up with a method for the virus's replication that the group otherwise would have not. After reviewing the researcher's work, the group decides that the only way to complete their project successfully is by utilizing this technique. If the analysis from the other scenarios holds here, and the theory proposed about collective intentional action is applied in this case, then even if the researcher from Indonesia knew for certain that her technique would be used by the group (i.e., knew that they would need her method in order to complete their collective project), she would not be acting as a member of the group. The reason is that she had not intended to participate in the collective as a group member. As before, then, she merely had a parallel intention to produce vaccine Z for the same disease as the others. In this respect, the only collective intent to be considered sufficient to analyze action as collective intentional would be that of the Norwegian and Malian researchers. The researcher from Indonesia simply, if knowingly, contributed to their project and its outcome (whatever that may be).

Consider the possibilities if instead of the group of two using the work of the third researcher, the scenario was switched around such that the researcher from Indonesia recognized that the only way her version of the deadly virus Z could be successful is if she incorporated their work into her own. This again would seem to produce equal results with respect to collective intent; it would only apply to the researchers who intend to participate as group members. Further, the only collective intentional action would be that produced by the group of two.

Here we might remember two closely linked points from the preceding that diminish the possible discomfort felt in this conclusion. First, the scenario required that the inclusion of

others' work must be attributed. This would help to prevent misrepresentation of authorship (i.e., the researcher from Indonesia might be the author, but only through the noted assistance of others). Second, the group of two might not have intended to participate in the other researcher's project, but they can still bear responsibility for it, as she could for her contributions to their project. The first of these identifies a procedure for registering blame to those who contributed. The second identifies how non-intentional contribution does not undermine considerations of responsibility, even if it excludes those aspects of ascription exclusively dependent on the intention to X.<sup>198</sup>

In the abstract, these variants of the main scenario represent the sort of paradigmatic structure of genocide as a collective wrong that Claus Kress among others identifies as relevant and sufficient for the ascription of legal liability for the crime (so long as accompanied by prohibited conduct).<sup>199</sup> The crime of genocide hinges on not just isolated actions of individuals, but their proscribed efforts performed in knowledge of a collective undertaking directed towards the achievement of group destruction.<sup>200</sup> Kress's conception of the relevant feature of fault for collective wrongdoing such as genocide does not appear to me to be incorrect, but rather incomplete. This is a point that I treat at greater length in the next chapter.

What is important to bear in mind here is that the scenario depicts the features of collective intentional action that have also mattered in law and to legal theorists. What is generally at issue here is not whether genocide as a crime is appropriately conceived, but rather whether the conception collective wrongdoing, of which genocide is one example, fits with the

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<sup>198</sup> Mele and Sverdlik, 268.

<sup>199</sup> Kress, "The Crime of Genocide," 497.

<sup>200</sup> Ibid.. Kress's account closely follows the proposed interpretation by Greenawalt, "Rethinking Genocidal Intent," 2288: "In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."

sense of moral responsibility of import (i.e., personal retrospective moral responsibility). It seems clear to me that, at least as far as this third example goes, the question of who can be morally responsible for the deadly virus Z (so long as we agree that the production itself can make one worthy of blame) turns on specifics of the case. Such specifics include whether (as a non-moral matter) one, two, or all researchers bring the virus into the world and why they do so.

An agent's relationship to the production of virus Z is a specific issue as well. If the researcher from Indonesia succeeded where the others as a group failed, then the scope of her deservingness of blame (since she in fact produced virus Z) might be that of a principal author of it. Notice an important point that reappears: an individual who intentionally acts knowing of its consequences (in this case to a collectively-produced outcome), but who does not intend to participate in that undertaking as a group member, can still be held morally responsible. What that individual is responsible for, I argue in the next chapter, depends on the reasons for which she acted and what she caused in so doing.<sup>201</sup>

This third scenario and its variants helped to re-identify features of collective intent, collective intentional action, and the relevance of internal but non-intentional states (i.e., knowledge) of individuals acting in relation to collective action. The primary thrust of analysis focused on individuals intentionally acting with knowledge of a collective intentional action, but not in order to directly affect it as an end. Again, such knowing, if unintended action can be grounds for the attribution of fault.<sup>202</sup> This describes the case of the researcher from Indonesia. The attribution of fault on grounds of knowledge does not describe intentional participation in a

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<sup>201</sup> In the case of genocide, bear in mind that the underlying prohibited conduct (*actus reus*) of the crime is otherwise illegal, but whether it is prosecutable as genocide depends not only on the correct interpretation or conceptualization of the mental element, but also whether an individual acted at least in relation to them. This is distinct from a circumstance in which the act performed does not otherwise constitute a violation. Cf. Werle, *Principles*

<sup>202</sup> Fletcher, 190–1.

collective action.<sup>203</sup> This follows not only from the general theory of collective intentional action, but also the functional and descriptive analysis of intentions and intentional action itself.

#### 4.4

Even though the fourth scenario looks to conform well to my characterization of collective intentional action, and thereby bears the hallmarks of an action of the collective intentional sort, it is nevertheless necessary to identify what makes this so, and what impact this could have on considerations about genocide. These action-theoretic considerations are distinguishable from matters of responsibility, even if the latter have not been entirely disregarded.

Inasmuch as theorizing collective intentional action allows for the exploration of those objects for which responsibility can be attributed, the two can be said to be distinct.<sup>204</sup> The task now is to investigate whether and why the three researchers, who in this case decided to combine their efforts in order to produce a deadly virus to kill millions of human beings, can be said to engage in intentional action in the relevantly collective sense.

The collective intent feature of the above account is met by the researchers in that they enact a joint project to develop deadly virus Z together (i.e., overlapping participatory intentions). In this case, but not as a prerequisite of collective intentional action generally, they devise and craft a plan such that the goal is known in its entirety and they act together to achieve it.<sup>205</sup> They are guided by a common reason to Z.

The feature of knowledge, which proves to be layered and complex across the diversity of cases, operates as a means of determining that the other researchers are disposed to act, and

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<sup>203</sup> Feinberg, *Doing and Deserving*, 139–40.

<sup>204</sup> Mele and Sverdlik, 268

<sup>205</sup> Mäkelä, 463.

that they share an aim in acting.<sup>206</sup> These combined features confer intentional collective coherence to the scenario, which was lacking in other examples of coincidental parallel intents held by multiple agents. The core attribute identified in the above account of collective intentional action—intention to participate as a group member—is present in this case.

The preceding can be cast in slightly different terms: collective intentional action depends on the overlapping of intents of people to act in a certain way, but this overlap is describable as collective intent only when individuals' part-contributions are intended as such.<sup>207</sup> The current scenario includes factors such as a plan, a stated division of the work, and the agreement to act towards the same goal. These underscore the scenario's amenability to analysis as collectively intentional; however, they are ultimately conceived as contingencies arising within the given case.

As posited above, matters like group size, degree of knowledge, and publicity of goals can variably harmonize or disharmonize the actions and intentions of individuals. Conformity to the conditions of collective intentional action, then, does not plausibly necessitate the uniform appearance of all such contingent features.<sup>208</sup> Although such differences highlight a reason why generalization from particular instances of collective intentional action is often times very difficult, the core trait of multiple individuals intentionally acting as group members is taken to be the constant.

This relational feature of individuals acting together grounds the claim that what they produce is not the product of any one individual, but all of them by virtue of their intended conjunction. This makes sense of the terms 'group membership' and 'group member' as used in

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<sup>206</sup> Chant and Ernst, 565.

<sup>207</sup> Kutz, *Complicity*, 82.

<sup>208</sup> May, *Genocide: A Normative Account*, 120.

this work. They are not here indicative of a fixed sociological category, but rather grounds for a distinction that arises because of an individual's choice to participate with others towards a common goal. It also shows that while certain outcomes necessitate the conjunction of individual actions, and further that certain outcomes are appropriately called collective wrongdoing when individuals intentionally act to produce certain violations, nothing about the cases presented here or others similarly structured should lead to the conclusion that the individuals differentially involved in them cannot be morally responsible for them.

In contrast to the other scenarios (again, excluding the group acting in the third case) this one instantiates the criteria of collective intentional action. The next issue to be addressed, then, is what this might mean for genocide. I would suggest that if legal liability for genocide is conceived in terms of the varying roles of agents (e.g., some who directly cause certain proscribed harms and others who contribute to these direct harms), then the order of operations should not simply start with the view that some agents are *more* culpable than others. Rather, the first order of business is to explicate what it is that agents can be responsible for, and then devise a means for judging them to be responsible. This claim is the chief focus of the next chapter. Finally, this approach has concerned itself with moral responsibility such that legal liability might also be clarified by it.

On a slightly different note, what might be said about this scenario and the connection with genocide is that often, but conceivably not always, those who play primary roles as group members are aided by others who contribute to their wrongdoing. In this respect, this fourth scenario might best instantiate collective wrongdoing (a form of collective intentional action), but still be an aberration because cases in which a multitude of agents act together are typically more differentiated with respect to the roles played by various agents.

## Conclusion

The preceding has bridged two specific problems that, while related, are not always brought together in such a direct way; namely, a problematic feature of the definition of genocide and collective intentional action.

The first step of analysis was to identify in what ways it is descriptively accurate to depict genocide as collective wrongdoing. In the second section, analysis recast the meaning of intention and intentional action. This was offered in preparation for an interpretation of collective intentional action. Intention was considered in connection with of criminal law. It was then treated in light of a view which, while being able to accommodate criminal law definitions, provided a teleological paradigm of intention and intentional action. Offering this more general account of intentional action allowed for the evaluation of a wider range of participation than just that proscribed by law. It also indicated the core relationship of individuals to collectives; namely, intending a goal for a group or as a group member. This latter point served as the basis for the subsequent section.

The third section provided this work's conception of collective intentional action. As such, it aimed to provide a means of understanding the complex relationships between individuals who act together to achieve a common goal. This account sought to clarify not just how multiple agents can be said to produce an outcome, but when this outcome can be described as a collective one.

The fourth section and its multiple subparts further characterized this paradigm of intentional action and the account of collective intentional action. It did so by detailing a family of cases (respectively treated in each scenario) that differentially conformed to the conditions

and features of the preceding accounts. Additionally, it reassessed the plausible interpretation of the problematic feature of genocide in light of these.

The chapter provides action-theoretic grounds for the claim that only when individuals intend to participate as group members, can it be said that they act together in a collectively intentional way. This is taken to hold for outcomes produced by multiple agents (in accordance with noted conditions), and certain cases of genocide specifically. By working out an account of collective intentional action and connecting it to genocide, it is possible to review practices of responsibility both generally and with respect to the crime. With an account of how and when individuals act together, analysis can proceed to appraise an individual's conduct linked with others and a resultant state of affairs. In this respect, the responsibility of an individual can be considered in connection not just with her acts in isolation, necessary as they are, but also her acts and reasons as they might relate to collective wrongdoing.



## Chapter 4. Assigning Moral Responsibility for Collective Wrongdoing

### Introduction

It may seem repetitious and too commonsensical to note that many important consequences occur when people act together. Appraising the actions of individuals in isolation from collectively-produced outcomes sometimes mistakes if not denies the reasons those individuals had in deliberating and acting with others. The following chapter develops at greater length the relationship between moral responsibility and collective intentional action such that both the reasons and actions of individuals are identified as grounds for assigning blame in cases of collective wrongdoing. In this respect, it offers solutions to problems of appraisal that arise when multiple agents act in concert.

The central claim of this chapter is as follows: in cases of collective intentional action that violate a moral principle (i.e., collective wrongdoing), individuals can be held morally responsibility for the violation just in virtue of their intentional participation as group members in it.<sup>209</sup> In line with the account of collective intentional action on which it is based, this primary assertion prioritizes individual intentional action whilst maintaining its necessary connection to collective undertakings that rationalize it. That is, moral responsibility is described in and clarified by an individual's relationship to a collective outcome: the object of responsibility is collective intentional action that breaches a moral principle and the subject of blame is any individual who acts as a participant.

Keeping with the perspective adopted in the previous chapter, but in distinction to initial considerations of crime and genocide, the following does not attempt to exact or extrapolate

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<sup>209</sup> This claim is adapted both Kutz, *Complicity*, 69; Larry May, *Genocide: A Normative Account*, 127; and, Larry May, *Crimes Against Humanity: A Normative Account* (New York: Cambridge University Press, 2005), 157.

conditions of legal liability for participation in collective intentional action. Analysis of the prohibition against genocide underscored a notable limitation; namely, the legal rule is formulated as if a lone individual acts to achieve the entire genocidal outcome in isolation from other agents. This position was rejected because it fails to account for the interdependence of individuals to resultant collective wrongs such as genocide. It further disassociates the actions of an individual from a collective outcome in which she participated with others, and through which her actions' broader moral significance can be discerned.

As will be shown, judgments of responsibility depend on the moral import of the instance of collective intentional action itself, as well as on the causal efficacy of an individual's intentional participation in it. The central claim above posits the relationship between collective actions and agents' blameworthiness for their part in them: intentional pro-group participation in collective intentional action serves as a key condition for moral responsibility. An individual is morally responsible for an action or outcome if it is appropriate or justified to blame or praise her for its realization. To say that an individual is morally responsible for intentionally participating as a group member in collective wrongdoing is to say that she deserves to be judged as blameworthy for the collective wrong.<sup>210</sup> Whether that agent deserves certain forms of treatment is to be assessed on a case-by-case basis.<sup>211</sup>

That an individual can be judged because of her intentional participation as a group member does not in itself serve as a conclusive argument for how to allocate responsibility. Remember that the previous chapter distinguished an order of operations which first called for the identification of how and when individuals act together collectively, and then in light of this

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<sup>210</sup> Zimmerman, *An Essay on Moral Responsibility*, 3–4 & 152.

<sup>211</sup> I take it that, as pointed out by Zimmerman, *An Essay on Moral Responsibility*, 162: “Desert is always a *prima facie* matter. To say that someone morally deserves a certain treatment is in part to say that there is a moral consideration in favor of his being so treated”; Feinberg, *Doing and Deserving*, 60.

account how responsibility could be related to collective intentional activity. Here, it is necessary to identify what can make an individual blameworthy (i.e. relate moral responsibility to collective intentional action), and then address matters related to assignation and allocation.

On my account, acting together in a collectively intentional way arises from a complex conjunction of individuals' intentions and actions and not a collective agent as such.<sup>212</sup> This sets a conceptual limit to talk of collective responsibility: multiple individuals can share responsibility for a collective wrong if they intentionally participate as group members (i.e., as co-principals) in its production. Saying this does not escape thorny problems of determining the most appropriate means of distributing responsibility in any given case, nor of how to respond to individuals who contribute to group members' wrongdoing but do not themselves directly produce the wrong (i.e., secondary agents). Fine-grained case-by-case analysis is ultimately how judgments about apportionment must proceed. The following provides principled guidelines for such endeavors.

Before setting off into analysis and argument, I want to outline how the chapter is organized. Section one focuses on the central claim and argues that moral responsibility for collective wrongdoing depends on intentional participation as a group member. Section two and its subsections build on this and provide an account of shared responsibility. To this end, intentional participation and the fault in it are more precisely identified and formulated in terms of shared responsibility that group members can bear for collective wrongdoing. Having argued for an account of moral responsibility for collective wrongdoing and shown when it can be shared by multiple agents, section three addresses the paradigm of secondary agents. The section not only handles issues of responsibility as they relate to secondary agents, it also helps to parry

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<sup>212</sup> von Wright, *Norm and Action*. He calls these "impersonal collective agents."

potential complications to the standard of intentional participation itself. A short conclusion ends this work.

## 1. Moral Responsibility for Collective Wrongdoing

In cases of collective intentional action that violate a moral principle, an individual can be held morally responsible in virtue of her intentional participation as a group member. This does not entail that all participating individuals will always be morally responsible. Rather, it is a *prima facie* ground for an individual's moral responsibility for collective wrongdoing, since blame can be avoided if an agent could not have reasonably known the aims of the others with whom she acted. Any other alleviating conditions that could also ground defensible excuses or justifications must not be present.<sup>213</sup>

The conditions of moral responsibility for collective wrongdoing can be presented in short form: (1) an individual capable of being held responsible (i.e., an agent) acted in a causally efficacious way; (2) other agents acted; (3) the agent acted with knowledge of others acting; (4) the agent's aim in acting was at least to participate as a group member in the realization of a goal that other acting agents sought; (5) the agent could have reasonably known the collective goal that her participation was intended to help realize.<sup>214</sup>

I wish to begin by clarifying more precisely the meaning of collective wrongdoing. Collective intentional action constitutes collective wrongdoing if in a given case of multiple agents acting (1) the definitional requirements of collective intentional action itself are met; (2)

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<sup>213</sup> Matthew Braham and Martin Van Hees, "An Anatomy of Moral Responsibility," *Mind* 121, no. 483 (2012): 606.

<sup>214</sup> Although the issue is briefly treated at the end of this section, an agent's omissions are also under consideration. For stylistic clarity, I do not always (when otherwise appropriate) append to the words 'act,' 'acting,' and 'action' the words 'and omit,' 'and omitting,' or 'and omissions'. Nevertheless, when an agent fails to act in a context of collective wrongdoing she may be held responsible for it. When multiple agents who could act together omit doing so, then this would be group omission. As long as the other conditions described in this section obtain in such instances, then such omissions would qualify as intentional participation in collective wrongdoing.

the results of the action or the action that produces the results breaches a moral principle.<sup>215</sup> The formal presentation of collective intentional action is as follows: When agents  $A^n$  intend to Z, where agents  $A^{(1, 2 \dots n)}$  intentionally act in pursuit of a (common) goal then they collectively intentionally act. Adapted to include just the subset of cases called collective wrongdoing the preceding becomes: When agents  $A^n$  intend to Z, where agents  $A^{(1, 2 \dots n)}$  intentionally act in pursuit of a (common) goal that violates a moral principle then they collectively intentionally act towards a wrong.

The distinction between the full range of cases identifiable as collective intentional actions and that subset of violative collective intentional actions comes down to the content of the goal pursued. A familiar character in a new setting: Roberta and her two friends decide to put her car in neutral and push it down a hill so that it crashes into a house at the bottom.<sup>216</sup> They all intend to participate and they all intend to cause damage to the house. They act together on the basis of the shared intention to achieve that harmful goal, and the substance of the intention—in this example to cause harm—delimits their collective intentional action as wrongdoing.

Collective wrongdoing is just that species of collective intentional action aimed at a moral violation. The distinction itself allows for a clearer view of an important point: not all violative action or resultant harm that involves multiple agents qualifies as collective wrongdoing. For example, the aggregated impact of agents acting in parallel without shared intentions does not conform to my account of collective intentional action. From this it follows

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<sup>215</sup> Steven Sverdlik, "Collective Responsibility," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 51, no. 1 (1987): 64.

<sup>216</sup> This is adapted from Zimmerman, "Sharing Responsibility," esp. 116. As will be seen by any reader of Michael J. Zimmerman, this chapter is deeply indebted to his work. Further, the conception of principal wrongdoing is indebted to Lepora and Goodin, *On Complicity and Compromise*.

that such coincidental individual action is not describable as collective wrongdoing, even if it results in harm or when the action of each individual agent constitutes a wrong.

The importance of the preceding derives from the fact that when individuals act together in certain ways with certain plans (i.e., collectively intentionally) they can be appraised for doing just that. Given that consideration is restricted to collective wrongdoing, evaluation focuses on both the moral and collective dimensions of individual participation. In this respect, blame can attach to an individual's action *not simply* because it caused harm or was itself wrong, but because it was intentionally performed as part of or in pursuit of collective wrongdoing.<sup>217</sup>

Here the now familiar teleological explanation of intentional action provides general insight into when and why it is appropriate to blame an individual for participation as a group member. Think of a case in which an individual, call her Eva, does something like drop an object on the ground. Perhaps she aimed at dropping it to dispose of it. Her intention or reason for dropping an object was to get rid of it. It was no accident. However, Eva might have dropped it for another reason. Suppose that local authorities had passed a harsh law against littering that she objected to, and she signaled her discontent with the rule by purposely dropping the object onto the ground.

On one description Eva got rid of an object and under another she showed her discontent with a law. These descriptions reflect not just the act, but the aim the agent had in acting as well. In this respect, intentional action does not merely characterize bodily movements, but the agent's intention in acting.<sup>218</sup> Eva's action may be describable in terms that include collective content if, for example, she tosses an object into the burning flames in order to partake in the ruin of the parliament set aflame by other dissenters. In a case such as this, which assumes conformity with

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<sup>217</sup> Björn Petersson, "Co-Responsibility and Causal Involvement," *Philosophia* 41, no. 3 (2013): 851.

<sup>218</sup> Cane, 114.

conditions of collective intentional action, and can be classified further as collective wrongdoing, the description of Eva's act includes her intention to act with others to produce a wrong.

Eva's action takes on moral significance because she intends it as part of collective wrongdoing. To achieve a result with others prompts her to act, and her intentional participation towards it warrants "descriptions of her action that invoke collective content."<sup>219</sup> While the grounds for assignation of moral responsibility arise in virtue of agential attribution (i.e., that an action is attributed to an agent), the description of the goal the agent had in acting sits at the heart, even if not exclusively, of considerations about what response is merited in light of such conduct and its results.<sup>220</sup>

The preceding provides a foothold into why and how multiple agents can share responsibility for wrongdoing, even though each agent is responsible for her own actions.<sup>221</sup> Eva acts on the shared intention to produce with others the ruination of the parliament building; it is precisely because she acts for such reasons that her relationship to the collective wrongdoing can be established. What an agent is evaluated for, that for which she can be blamed, depends on her individual intentional action aimed with others at the realization of a wrong.

Blame in such cases requires not only that the agent was capable of deliberating and responding to reasons, but also that other capable agents were able to do so. Acting together further necessitates that the agents knew about each other, or at least believed the others to be acting. When these conditions obtain, grounds exist for assigning moral responsibility to individuals involved in collective wrongdoing. Notice on this point that the wrongdoing is that

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<sup>219</sup> Isaacs, 102.

<sup>220</sup> Mele and Sverdlik, 272.

<sup>221</sup> Sverdlik, 66.

of individuals in a specific sort of relationship, and that moral responsibility attaches to them for their respective intentional participation.

This underscores the relational character of collective wrongdoing. In this sense, it highlights how and when wrongdoing is not just that of one individual, but of all those who act by virtue of the (intended) conjunction of their participation. Individuals differentially know of, but together participate in collective wrongdoing, and such participation is marked by the very act of joining with others. This opens a path to revealing the relevance of intentional participation as a group member, and further the defeasible link between intentional participation and moral responsibility.

The central claim posits the threshold of moral significance in collective wrongdoing as intentional participation as a group member. As explicated at greater length in the next section, intentional participation is fundamentally and perhaps firstly a matter of joining and acting with others. A collective in the relevant sense here is constituted only by those agents who together engage in a common undertaking.

In cases where many individuals act together, sometimes (if not often) intentional participation amounts to pro-group contributions without the individual acting towards a common end conceived as a complete quantity. Inasmuch as individuals participate in support of the group, and their acts can be reasonably described as such, this does not undermine the primary claim regarding intentional participation.

In the parliament-burning example, Eva aimed to participate in the realization of a particular ruinous end shared by others. The means-to-end connection between participation and the production of wrong was clear. This partly reflects the structure of the group described—



people coming together around the achievement of a certain goal.<sup>222</sup> Sometimes goal-oriented groups are organized (e.g., dissenters acting against a litter law) and sometimes they are disorganized (e.g., looters wreaking havoc randomly), sometimes they consist of few people (e.g., two people riding a tandem bicycle) and sometimes many (e.g., hundreds of rioters).

There are yet other types of collectives such as corporate entities. Here too, size, division of labor, and so forth vary among respective organizations.<sup>223</sup> What allows for uniform treatment of these various types of collectives is that in the case of all individuals intentionally join with others to achieve some end. That is, they intentionally participate as group members towards some (differentially known) common plan or goal. This is the minimal if defeasible link to moral responsibility for collective wrongdoing.

In clear examples of moral responsibility for actions, an agent not only intentionally acts but aims to act as a means or an end.<sup>224</sup> However, moral responsibility can be ascribed in cases where the strongest teleological links break down. An example would be when an individual intentionally acts without intending to produce results that follow from it. These cases do not undermine moral responsibility, but shift emphasis to other factors that could be relevant to moral evaluation. Fault in unintended doing can be assessed by means of another standard (e.g., knowledge).

Consider a case where Walter aims his gun at a paper target fifty yards from him, squeezes the trigger, and hits his friend Xavier instead, then his action can be described as ‘Walter shot Xavier.’ Walter might well be morally if not legally responsible for the result if he could have known that such an outcome would result. Given his reasons in acting, however, and

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<sup>222</sup> McKenna, 117.

<sup>223</sup> Cane, 146.

<sup>224</sup> Mele and Sverdlik, 275.

accepting the definition of murder as the willful killing of a human being, the action cannot bear this formulation ‘Walter murdered Xavier.’

Walter’s case is distinct from the one in which Eva acts with others to burn down the parliament building. Most evidently, conditions of collective intentional action do not obtain in the shooting scenario. This would render evaluation of Walter’s blameworthiness for collective wrongdoing impertinent because, among other things, his action lacks relevant intentional relation to those of others. The scene nevertheless highlights how doing something can elicit different responses depending on whether an individual knew, purposely acted, or had a capacity to know but was excused or justified in so doing.

The above variations do not exhaust all possible and relevant states of an individual’s mind when doing something. First, they highlight the defeasible link between responsibility and (faulty) action. Walter’s not knowing that Xavier could have been hit by the shot might suffice to void claims of his moral or legal responsibility.<sup>225</sup> Next, and think back for a moment, Eva might not be morally responsible for her trash-tossing *as a* part-contribution to the unfolding collective wrong if she could not have reasonably known to what she was contributing. The plausibility of her claim against knowledge would perhaps best be tested against what a reasonable person in a like circumstance could have known.<sup>226</sup>

A point brought out is that the link between group membership and moral responsibility can vary depending on the nature of the group. That is, intentional participation as a group member might not be blameworthy if group membership is alienated from collective wrongdoing in such a way that no similarly situated person could have reasonably known about it. In some collective contexts, the standard of foreseeability will be appropriate. However, such defenses

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<sup>225</sup> Feinberg, *Doing and Deserving*, 125.

<sup>226</sup> May, *Genocide: A Normative Account*, 125; Hart, *Punishment and Responsibility*, 140–5.

can sometimes appear inapplicable precisely because membership will entail knowledge. This describes Eva's circumstance: she intentionally participated in order to burn the parliament with others—knowledge of the goal was inherent in this.

Note here that what functions as a defense in favor of Walter might implicate in other circumstances. When an individual fails to abstain from acting in a context of collective wrongdoing whose plan or goal is reasonably knowable, then the very fact that an individual acts in light of such knowledge could (upon further examination) ground the claim that she intentionally participated in it. This would also apply to omissions, when not acting furthers wrongdoing. Of course, this only briefly highlights how knowledge as well as omissions can play a role in circumstances of collective wrongdoing and moral responsibility for them.

There is still more to be said about moral responsibility for collective wrongdoing. The preceding has developed my core argument and its associated conditions of moral appraisability. Agents involved in collective wrongdoing should be held responsible for their actions; however, their shared reasons in acting mark off a territory of consideration that directs attention to sharing responsibility for the outcomes that their participation helped to realize. The collective undertaking is shaped and constituted by multiple agents who engage in some project together. Evaluations of moral responsibility should factor this collective wrongdoing into the assessment of individuals.

## **2. Allocation: Shared Responsibility and the Paradigm of Group Membership**

This section and its subparts directly address how and why group members (i.e., those who intentionally participate) can share responsibility for collective wrongdoing. The term 'shared responsibility' might bring to mind something mysterious. It should not. In accordance with the

central thesis, sharing responsibility means the following: two or more individuals are fully morally responsible for an outcome if their intentional participation as group members helped to realize it.<sup>227</sup> With respect to collective wrongdoing, no individual can be regarded as solely to blame for its realization as it comes about through the collective intentional efforts of multiple agents.

Undiminished blame, which follows from sharing responsibility, attaches to group members because they, at least, intend their actions as part of a common undertaking that violates a moral principle. As a preliminary, bear in mind that if attributions of moral responsibility are to communicate censure for what a given individual is at fault for, then it matters greatly that the identification of fault be accurate enough to pick out differences between individuals who intentionally participate as group members and those who (not *merely* mind you) aid or assist them. In this respect, accomplices might be as blameworthy as group members, but they are not responsible for the same things that group members are.

The value in identifying and classifying group membership is tied to the deservedness of an agent of a particular judgment of moral blame—that she shares or is co-responsible with others similarly situated in attitude and action for collective wrongdoing. This sort of sensitivity to agents' reasons for acting helps to delimit their worthiness of blame, as do their respective roles in realizing a wrong. As will be shown, judgments of blame ought to be calibrated to reflect that for which an individual is responsible (i.e., what she does and why she does it). However, distinguishing between objects of responsibility in this way is separable from questions about blame. In cases of collective wrongdoing, this includes those features of

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<sup>227</sup> Zimmerman, "Sharing Responsibility," 115.

intentional action that qualify an individual as a group member and can make her blameworthy as a co-principal for the collectively-produced wrong.

### **2.1. Participation: Two Cases Compared**

Begin by examining two cases with the aim of making better sense of what group membership means and why shared responsibility is an appropriate means of apportioning responsibility for group members.

**Case 1.** (P1) A is an agent capable of being held responsible

(P2) A shoots B without justification or excuse in order to kill B

(P3) B dies because she was shot by A

Therefore

(P4) A is alone fully morally responsible for murdering B

**Case 2.** (P1) C and D are both agents capable of being held responsible

(P2) C and D know of each other and act together in a collective intentional way

(P3) C and D shoot E without justification or excuse in order to kill E

(P4) E dies because she was shot by C and D

Therefore

(P5) C and D are both fully morally responsible for murdering E<sup>228</sup>

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<sup>228</sup> Ibid., 116.

Case 1 depicts individual action, while the second portrays collective action. With respect to the latter, it is taken to be an example wherein cooperation and shared intentions to realize a plan are assumed to obtain. As such, it instantiates collective intentional action. In case 1, full moral responsibility is assigned to agent A, and in case 2 full moral responsibility is assigned to agents C and D. Here, it can be shown that the specialty of case 2—that C and D act together to bring about the violative outcome—does not itself undermine attributing moral responsibility to both agents fully.

Consider that whereas B's murder came about through A's willful action, E's murder is a result of C and D's willful actions. Such distinctiveness does not, however, provide grounds for diminishing the full responsibility of C and D for E's murder. The case identifies a circumstance in which C AND D murdered E—they did it with each other as co-principals or group members (i.e., members of a group of individuals who act on the shared aim of murdering E). In this respect, and in conformity with the preceding section, evaluation focuses on group members' (causal) roles and intentions, which link their respective actions to the collective wrongdoing.

The blame borne by C and D is a function of them being responsible agents who produced an outcome, which holds for A as well. Unlike A, however, they did it together. Of cases of the second sort, as long as all conditions—capacity to be responsible and so on—are kept constant, then judgments of the following sort can be made about their agents: *Each and every* individual acting with others towards an outcome can be fully morally responsible for it because, just as in acting alone to X, each individual is directly responsible for and at fault for X even if and even though it was produced with others.

## 2.2. Participation: Group Members

In keeping with the above, the blameworthiness of an agent is based on what she did with respect to a given action and its outcome.<sup>229</sup> Intentional participation in collective wrongdoing is blameworthy because it (partially) realizes a collective undertaking that violates a moral principle. Formulated in terms of an agent, an individual is blameworthy because she affiliated as a group member and acted with others in order to realize a wrong. The paradigm of shared responsibility for collective wrongdoing itself is marked by agents' mutual embarkation towards a wrong, and their coordination through shared intention to effect it.<sup>230</sup>

Reviewing these features of the account brings to a head the reason why the intentional participation as a group member can and should guide judgments about blame for agents of collective wrongdoing. The label group member refers to individuals who are distinctive because they jointly undertake wrongdoing.<sup>231</sup> The deliberate choice of individuals to realize a wrong together distinguishes them from others who might be responsible for contributing to collective wrongdoing, but not participating in it as group members.

In this respect, the actions of group members are constitutive of the collective wrongdoing (i.e., they do it themselves), and the reasons for which they act (i.e., on shared intention to or common purpose) link their individual acts with the collective outcome.<sup>232</sup> The conjunction of an actional component and the intentional relationship between individuals coordinates their respective efforts towards the collective outcome, as well as towards one another as fellow participants in it.

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<sup>229</sup> Zimmerman, *An Essay on Moral Responsibility*, 38.

<sup>230</sup> A.P. Simester, "The Mental Element in Complicity," *Law Quarterly Review* 122 (2006): 598.

<sup>231</sup> Ibid.

<sup>232</sup> Sanford Kadish, "Complicity, Cause and Blame," *California Law Review* 73 (1985): 337.

The language of group membership, then, distinguishes C and D not just as causally responsible for E's death, but also as morally responsible for it. The two agents share responsibility because each individual's act constituted part of the wrong—both C AND D *murder* E—and each individual intentionally participated as a group member to realize the wrong. With respect to blame, it is the constitutive causative role of an individual in collective wrongdoing that triggers evaluation of whether an individual is at fault as a group member in the first place (i.e., for having done X in service of a common goal).

Notice that in cases 1 and 2 the responsibility borne by each shooter (A, C, D) is for murdering victim B and victim E respectively. As an earlier example of Walter and Xavier illustrated, a shooter might have had some other purpose or mental attitude in firing a weapon, but the attitude in case 2 is that of purposeful killing. Simply put: C and D did not just shoot; they shot to kill; therefore, they murdered E.

Although causative role in an outcome is an entailment of participation in collective intentional action, so too is the criterion of attribution (*mens*) that delimits the action not only as that of agents A<sup>(1, 2 . . . n)</sup>, but that for which they can be blamed or at fault.<sup>233</sup> This underscores a point consistent throughout; namely, agents do not coincidentally pursue courses of action in order to achieve an overlapping goal. They intentionally participate in a collective intentional action to accomplish some violative X.

It bears repeating that an agent can be worthy of moral blame for acting on wrongful intentions with or without other agents who share them.<sup>234</sup> The cases of interest here are those in which multiple agents do act with others. Furthermore, they are cases in which respective individuals act and cooperate towards a common project, and who intend to do their respective

<sup>233</sup> Michael T. Molan et al., *Bloy and Parry's Principles of Criminal Law*, 4th ed. (London: Cavendish, 2000), 111.

<sup>234</sup> Lepora and Goodin, 66..



parts in it to realize a (common) goal. This does not suppose that each individual intends that she accomplish the whole wrong on her own, or that it could be accomplishable without others.<sup>235</sup>

### 2.3. Participation: Types

Case 2 represents a paradigm of collective intentional action whereby the collective efforts of individuals enable for their equal moral evaluation. Agents C and D are both fully responsible for an outcome. However, the example itself (C and D murdering E in the way they did) illustrates only one variety of collective wrongdoing: multiple agents are engaged in *identical* forms of action (each shoot) and share the intention to X (murder E). Using the descriptor of Chiara Lepora and Robert Goodin for this type of collective wrong, E's murder is a result of "full joint wrongdoing."<sup>236</sup>

The example is hypothetical, and perhaps many of those that involve identical forms of wrongdoing would be. The specialty of full joint wrongdoing should not otherwise distract from the more general conditions of shared responsibility underlying it. Although not all instances of collective wrongdoing will necessarily involve individuals engaged in precisely the same actions, sharing responsibility for the wrongdoing depends on individuals who intend their actions with others to achieve a certain violative goal.

When it is both true that an individual intends her action as part of that sequence of actions that constitute a wrong, and that the other conditions identified in the preceding section

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<sup>235</sup> Cf. Chapter 3 of this work esp. §1 for a discussion of belief as it relates to collective wrongdoing in the case of genocide. To repeat the words of Alfred Mele, op. cit. at Chapter 3: "having an intention to A requires believing that one (probably) will A. . . . The proposal is designed to capture, among other things, the confidence in one's success that intending allegedly involves."

<sup>236</sup> Lepora and Goodin, 37.

are met, then her action is describable as intentional participation<sup>237</sup>. Rather than identical action, this is the standard at which shared responsibility obtains. It implies that individuals share the intention in acting to achieve some common X. When individuals pursue a wrong together and their acts constitute it, then equal moral blame can and sometimes should follow.

The above rephrases the central thesis of the previous section, and it is also a corollary of a prior conclusion about the nature of groups. Namely, groups—be they goal-oriented, corporate entities, or otherwise—may differ, but the collective action and its outcome are the invariable objects of evaluation so long as the five conditions of moral responsibility for collective wrongdoing are met and absent excuse or justification from the agent. The particular form of an individual's participation in realizing a collective wrongdoing need not be identical with others intentionally participating as group members, but it must be causally relevant and it must be performed in service of the shared intention to achieve the wrong.

This more general ground of shared responsibility, wherein conditions of acting in causally relevant ways and towards common goal obtain, allows for the inclusion of types other than just that of full joint wrongdoing. Reconsider an example that highlighted this point: Eva tossing a bit of trash into the flames of the parliament-building in order to burn it down with others. Her action might have been preceded by others who identically also tossed trash, but maybe some college students dumped a couch onto the fire, and some fellow traveler might have started the whole thing by hurling a Molotov cocktail through a plate glass window on the building.

This extended case of Eva and others helps to elucidate the distinction at work; namely, that causality is not the whole story even if it is a central part of it. As was shown before, other

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<sup>237</sup> Ibid., 34.

factors are vital in judgments of blame. Among these, intentions, reasons for action, beliefs, and knowledge help elucidate why agents do what they do. Sensitivity to such factors in conjunction with the actions themselves highlights the link between the college students, Eva, and the fire-starter. The variability of modes of participation that qualify as fully blameworthy depends quite apparently on the circumstances of agreement to and implementation of the collective intentional action.

Again, full joint wrongdoing is a type of cooperative activity (i.e., collective intentional action) of individuals who directly act to achieve some wrong. Other examples can include conspiracy, collusion, and more generally cooperation to act concertedly.<sup>238</sup> About individuals engaged in a collective undertaking—Eva, the college students, or the cocktail thrower—the responsibility they bear as group members is not vicarious. Rather, it is personal responsibility for their part in wrongdoing that was collectively-produced: in acting to achieve some collective wrong as group members, their role in collective wrongdoing is (respectively and partially) constitutive of it.

Without the identification of individuals' reasons in acting, individuals could still be regarded as causes of an outcome. Saying this is similar to saying that “the hurricane destroyed the town,” or that “this straw together with all of the others in the pile broke the camel’s back.” The establishment of causal contribution turns on a fact about what happened and what an individual did.<sup>239</sup> Ascribing blame for collective wrongdoing depends on an intentional relationship that makes the reason for acting (the shared intention to) not just part and parcel of why an agent does something, but what it is that she does.

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<sup>238</sup> Ibid., 38–40.

<sup>239</sup> Feinberg, *Doing and Deserving*, 130–5.

Notice that consequences of various agents' actions might be the same, and yet blame takes into account the reasons they respectively had in producing them. When an individual intentionally acts with others to bring about X, this reason serves to mark off an ascriptive domain of group membership. From this, evaluating whether an individual is co-responsible can further progress. In such instances, progress consists of evaluating whether other conditions of moral responsibility obtain, and whether excuses or justifications weigh against ascribing responsibility.

It is the distinctiveness of group membership that makes shared responsibility for collective wrongdoing an appropriate allocation. The combination of mental and actional elements constitutive of group membership (i.e., what makes the appellation meaningful) signals that the response merited for group members is that which attaches to them as co-principals. Although a group member need not have performed exactly the same acts as other group members, the above argued that she needs to have intentionally participated in collective wrongdoing. The domain of group membership is that of agents who by virtue of their acts and intentions directly realize a collective outcome that violates a moral principle.

### **3. Allocation: Responsibility and the Paradigm of Secondary Agents**

The preceding identified the moral responsibility of those individuals—group members—who together directly affect collective wrongdoing. That is, it picked out those features that make an individual a candidate for moral responsibility for the collective wrongdoing (i.e., intentional participation as a group member) and showed how responsibility, and *a fortiori* blame, can be apportioned in light of them. Distinguishing group members and the responsibility they bear for their intentional actions aimed at some common X does not imply that others associated with but

not directly engaged in the wrongdoing are necessarily less blameworthy than group members. It does, however, direct questions about responsibility towards contributions *to* rather than participation *in* collective wrongdoing. This section outlines a conceptualization of the role and responsibility of secondary agents, and uses this to differentiate them from group members.

### **3.1. Contributions: Secondary Agents**

The analysis of group members provides a way of categorizing individuals in accordance with what they do and the intentions with which they do them. It claims that certain individuals can be responsible for collective wrongs and can be blamed for it as such. As argued, wrongdoing brought about by multiple agents, as opposed to just one, does not undermine evaluating each as fully responsible for the outcome so long as all conditions are met. Each group member is blameworthy because of what she did and her fault in doing it. As a causally efficacious member of that set of agents acting towards a goal, potential attributions of blame are focused on the individual.

Some if not many instances of collective wrongdoing will involve individuals who do not act, strictly speaking, as group members. Again, group members can be conspirators, full joint wrongdoers, or participate in yet other ways. The principal distinction set out in the preceding section comes down to (direct) causal relevance and intention in acting (i.e., together with all other conditions set forth). In cases that include not just group members directly acting without excuse or justification to achieve a violative goal, there are complications associated with how to conceptualize the wrong and potential responsibility of non-group members. They are those who

supported or aided group members but did not play the equivalently primary part in bringing about the wrong.<sup>240</sup>

Such supportive individuals are sometimes called secondary agents, accomplices, or accessories. For clarity's sake, I stick with the term secondary agents. Secondary agents are those individuals "whose actions do not constitute the principal wrongdoing but are part of a causal chain leading to it."<sup>241</sup> Note the difference between secondary agents and group members: secondary agents act in relation to or through group members in their wrongdoing, but do not act to realize the wrong themselves. They do something other than act with others to bring about a violation; they support group members and their assistance plays a part (to varying degrees) in group members' realization of collective wrongdoing.

This can raise an estimably troubling question about the moral responsibility of secondary agents who do not directly cause the collective wrong.<sup>242</sup> The trouble can be framed in the following way. In circumstances where many people act, it might be that one (you, me, a victim) wishes to blame a large swath of people who seem to be associated with the wrongdoing. If blame is to be registered because of something other than faulty action then this would need to be justified.<sup>243</sup> No such attempt to widen the scope of what has been termed moral responsibility's object—wrongdoing—has been or will be attempted here.

Perhaps it is evident that this does not make it any easier to square the sometimes multitudes involved in wrongdoing with the potentially smaller set of individuals (group

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<sup>240</sup> Molan et al., 303.

<sup>241</sup> Lepora and Goodin, 33. This definition will become clearer below, but notice that the assistance that secondary agents offer is *to* group members who are doing wrong. Their contributions do not represent the same types of actions as principal agents, but in some cases would be variably essential for the achievement of group members' common goals.

<sup>242</sup> Fletcher, *Basic Concepts*, 189; and, George P. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000), 582.

<sup>243</sup> For an account where affiliation through non-voluntary or identity membership grounds such responses cf. Cassie Striblen, "Guilt, Shame, and Shared Responsibility," *Journal of Social Philosophy* 38, no. 3 (2007): 469–85.

members) who can be blamed for its production. There are, however, secondary agents who do not devise and implement collective wrongdoing in the constitutive way that group members do, but can still be held responsible for their contributory actions. Again, this is a *prima facie* case that will ultimately depend on the absence of alleviating conditions in a given instance. What is sought, then, are principled ways to guide such particular ascriptions of blame.

Here a basic distinction at work can be pointed out; namely, group members are responsible for participating in collective wrongdoing while secondary agents are responsible for contributing to others realizing it. As individuals who directly realize wrongdoing, group members do something distinct (i.e., their actions partially constitute the collective wrongdoing) from others who aid in achieving their goals. Still, the substantive features of ‘contributing to’ need definition in order to show when they count as contributions to another’s violations, and ascribing moral responsibility for them is appropriate.<sup>244</sup> They are: (1) an individual capable of being held responsible (i.e., an agent) acted; (2) group members were engaged in collective wrongdoing; (3) the (secondary) agent causally aided group members in their wrongdoing; (4) the (secondary) agent knew, could have, or should have known her actions would contribute to group members’ wrongdoing.<sup>245</sup>

### 3.2. Contributions: Cause and Essentiality

To see why the above features are appropriate start by considering a third case in which M and P murder R. Suppose that agents M and P are capable of being responsible and act together with the intention to murder R. No other agent joins them in the undertaking of murder. Because

<sup>244</sup> John Gardner, “Complicity and Causality,” *Criminal Law and Philosophy* 1, no. 2 (2007): 132.

<sup>245</sup> There is certainly debate about whether causal contribution is necessary. I assume causal contribution to be necessary, and here follow among others Goodin and Lepora, *ibid*; Petersson, *ibid*; and, John Gardner, *ibid*. It is also worth noting that my position regarding cause sets my account (and the others mentioned in the preceding sentence) at odds with Christopher Kutz’s account both as appearing in his book *Complicity*, *ibid.*, and his article “Causeless Complicity,” *Criminal Law and Philosophy* 1 (2007): 289–305.

they murder R together—here assumed to meet the criteria of collective wrongdoing—shared responsibility is an appropriate allocation. Now, add to the case another agent capable of being responsible named Q. Q does not murder R, but rather provides M and P with the weapons they use to murder R.

In the format of the previous cases:

**Case 3.** (P1) M and P are both agents capable of being held responsible

(P2) M and P know of each other and act together in a collective intentional way

(P3) M and P shoot R without justification or excuse in order to kill R

(P4) Q supplies the weapons to M and P that they use to shoot R

(P5) R dies because she was shot by M and P

Therefore

(P6) M and P are both fully morally responsible for murdering R

As can be seen, the conclusion pertains to M and P. It is necessary to identify what might be morally relevant about Q supplying weapons in this instance before concluding anything about her responsibility (if any) for R's murder. It must be shown that there are grounds for linking the wrongdoing of M and P with the action of Q. It might be that supplying weapons is *mala in se*, which I assume is not true. Even if providing weapons is not wrong in itself, it might be that there was something about Q's provision that was otherwise faulty. Still, what needs to be established is more specific if it is to show that Q is responsible for aiding M and P in their wrongdoing.



As the story has gone so far, M and P are morally responsible for the collective outcome because they intended their actions to achieve that outcome together. The tie that binds them to the murder of R is that they jointly acted to kill R, and that their actions are describable in terms of the common goal they intentionally embarked upon. The first step of establishing the moral relevance of Q—a secondary agent by definition—furnishing M and P is whether she causally affected or supported them in their wrongdoing. Although in retrospect causal contribution admits of no degrees (Q’s action either did or did not play a part), this condition is modal in the sense that Q’s act may be more or less essential to the group members’ wrongdoing.

One extreme of essentiality is the (contested) view that an individual who is truly inessential to another’s outcome cannot be responsible for it.<sup>246</sup> Imagine that M and P, after having murdered R with weapons supplied by Q, go buy bullets because they’re out of ammunition. The gun shop owner comes into contact with M and P and supplies them with bullets, but having done so after the fact of the crime says nothing about the owner having contributed to the murder of R. The example admits of no link between the wrongdoing of M and P and the gun shop owner, as the owner is inessential either directly or indirectly to the realization of R’s murder.

The matter of essentiality manifests differently in case 3. Q’s act could make a (potential) difference to M and P murdering R. Q was in a position to contribute to a chain of events that made R’s murder possible. Still, her role is not perspicuous. Presenting causal

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<sup>246</sup> In stipulating a causal role for secondary agents, I do not examine objections of the following sort: “Yet what of a parent who is responsible for what her underage child has done?” While individuals might in some instances and jurisdictions be held vicariously responsible for others’ actions to which they did not contribute, blame could still be apportioned to the actual doer (child) while the responsibility to repair could be demanded of another party (parent). Still, I take most cases of this sort to be similar to blaming an individual of one skin color for what another with the same skin color *does* just in virtue of *that* common unchosen trait. Writ large, such attempts to blame err in their conceptualization of that for which one can and should be blamed, and that for which they could be feasibly treated in a certain way. Cf. Feinberg, *Doing and Deserving*, esp. chap. 4; and, chapter 1 of this work.

contribution in terms of essentiality allows for the gradation of the role secondary agents play. For example, if M and P could not murder R without Q supplying weapons (assuming all other circumstances of the case), then what she did would be essential to their wrongdoing.

It might be difficult to believe that Q, a lowly arms supplier after all, would have such a definitely essential role. Perhaps she did not. Maybe shooting R was the backup plan of M and P. Their goal was murder and they decided that out of the possible ways of achieving that, first would be stabbing with knives they already had, second would be shooting with guns they would obtain, and third would be with their own bare hands. This plan would make Q supplying weapons prospectively less essential to the goal, even if it turned out to be more essential to the wrongdoing in the end.

Consider another take: maybe Q was one of dozens of arms suppliers that M and P could have procured their weapons from, and as such the issue at hand is not whether M and P needed weapons that only Q had, but rather that M and P needed weapons and Q, but not just Q, had them in stock. It would seem that Q's assistance in this regard was inessential inasmuch as she was replaceable. Perhaps had M and P chosen another arms supplier, then Q would not be in this jam in the first place. Q might have a defense for supplying weapons to M and P as well as any other customers: 'The market is brimming with competition, and if you hold me to account, why not my competitors as well, because after all if I hadn't supplied them with weapons someone else would have? I made no overall difference.'<sup>247</sup>

If Q is correct that her supplying weapons does not impact the total supply of weapons, or does only what would otherwise have occurred through another supplier, then maybe her claim is not so flimsy. She added nothing. In line with a point made above—moral responsibility still

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<sup>247</sup> Gardner, 138.

attaches to an individual for what she has done even in cases of unintended doing<sup>248</sup>—Q’s responsibility for what she has done, however, depends on the truth value of Q’s claim being true. Even though what she did is (supposedly) discernible from M and P’s actions, her actions still need to be assessed in terms of whether (as a non-moral matter) they made a difference.<sup>249</sup> Further, if in supplying weapons she was relevantly in the know about M and P’s plans. What needs to be shown next is how this second substantive feature of contributing to—knowledge—makes it possible to say that Q bears moral responsibility for her contribution to others’ (primary) wrongdoing.

### 3.3. Contributions: Knowledge

A relevant point about Q’s attempt to justify what she did she is that she tries to do so by appealing to what others do irrespective of the particular circumstances that confronted her. From the beginning it was said that what is of concern here is not whether Q’s action is wrong in itself, even if that does matter, but rather when Q’s action can be said to contribute to M and P’s goal such that she can be responsible as a secondary agent for it. In line with the first two substantive features announced, secondary agents can be responsible in this way by virtue of the (variable) essentiality of their difference-making *and* when they knew, or could have and should have known that their acts would contribute to the group members’ plan.

The second of these can be put in the interrogative: Could or should Q have known that by supplying weapons she would aid M and P? This formulation helps to underscore what was also said above; namely, the case is to be made whether (even if definitely causally essential) the link between an individual’s action and moral responsibility is defeasible or not. If Q knew or if

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<sup>248</sup> Cf. §1 of this chapter; and, Mele and Sverdlik, 275.

<sup>249</sup> Petersson, 859.

she could have and should have known that by supplying arms to M and P she would (causally) contribute to their goal, then she would have to answer for what she did as a secondary agent. Blame for her doings appends when no other alleviating conditions are present and other substantive features are met.

About those other features it can again be stated that being a secondary agent depends on a capacity to be held responsible in any case (i.e., being an agent capable of deliberating about and acting on reasons). Having acted as a responsible agent also requires having done so voluntarily—not by accident, under duress, or otherwise. Notice that these conditions keep attention focused on what an individual does and why she does it in order to pick out why *she* was at fault for its performance or omission. Even so, and this is an understatement, it is not simple to identify the circumstances under which and when an individual can be said to have known (could or should) that by X-ing she would contribute causally to another's goal.

While the role of mental conditions has been discussed generally, this specific requirement can be considered at greater length. Secondary agents do something different from group members and in that have a different role in collective wrongdoing. They support, induce, incentivize through collaboration, consorting, or some other activity that makes them complicit in another's wrongdoing. They do not, however, act together to do wrong as group members—a difference that further distinguishes why group members can be co-responsible for collective wrongdoing, whereas those complicit in their wrongdoing would not be. Again, emphasis falls both on acting and an individual's disposition in so doing.

Something less robust is needed in the case of contributing to another's wrongdoing: within a range of subjects, the goal that group members have is among those things that an agent

could have possibly known (i.e., it has a value greater than zero).<sup>250</sup> Further, if the possibility of an agent knowing of group members' goal is more than zero (can), then it is one of those subjects about which she should have availed herself (ought). This feature too admits of degrees. In the absence of any possibility of becoming aware of group members' goals, holding that an agent 'should have known' is inapplicable. However, if there was a sliver of a chance that an agent could have known, then moral evaluation of her contributions to their goal can feasibly proceed.

Setting aside heroics and inhuman feats of sleuthing, then, Q might not have been able to know without superior but still viable efforts that M and P sought to murder R. Such an effort could have been made, and appraising her action as a contribution could feasibly advance. Q plies a trade that sometimes serves legitimate interests, but can also be abused with disastrous effects. Such potential for abuse can render what are considerable efforts in other contexts, standard operating procedure in this one. Nevertheless, if Q could not have known that M and P had murder with her weapons on their mind, than to regard her as *complicit* in their wrongdoing would be to mistake her part for something worthy of moral censure.

In the above respect, she might still be morally responsible, but to call it blameworthiness for complicity would be to miss the minimum threshold of knowledge that must obtain for that charge to stick. The result might come into existence without you. As a secondary agent, we can stipulate that you will not be doing principal wrong yourself, even if your essentiality in helping group members realize it will vary (i.e., you might be more or less essential but you will not be participating in the relevant sense). If you could have and should have known about the primary agents' goal or goals, then assisting them certainly sets you in a different relationship to it. That

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<sup>250</sup>Lepora and Goodin, 84.

is, in light of your awareness and through your freedom to contribute, you are in a position to add to the achievement of the violative goal.

Now, even when about achieving that goal you wish to say, like Q selling arms in an oversupplied market, that my contribution made no overall difference, you can still be held to account. Q would need to explain—provide justification or excuse—why in a case where she knew or could have and should have known that R’s murder would result, she nevertheless supplied arms to them. She would need to justify or excuse why she believed the reasons for acting in such (potentially) additive ways to be weightier than what she knew or could have known about the circumstances confronting her. In absence of justification or excuse, she would be blamed for her assistance of others engaged in collective wrongdoing.

Such analysis of both the actional and mental features of secondary agents is in keeping with the preceding grounds for assigning moral responsibility. What is particular, however, is the way in which the faulty action of secondary agents arises in light of a distinct relationship to a wrong (founded precisely on the action and mental grounds detailed). When they had knowledge of or could have and should have known about group members’ violative goals, the responsibility of secondary agents derives from them contributing to another’s wrongdoing. Again, this does not make them prospectively less blameworthy for their own actions, but shifts the basis of ascription from (co-) principal wrongdoing, to a mode that is fundamentally assistive rather than constitutive.

By way of further differentiation, consider that the above rejects the view that secondary agents are equivalently blameworthy *for* collective wrongdoing as group members are. It rejects in morals the legal maxim and accompanying doctrine that *qui facit per alium facit per se*, or ‘he

who acts through another acts through himself.’<sup>251</sup> While this is unsurprising given that this chapter has presented a means by which responsibility for wrongdoing produced by multiple agents can be conceived in ways that emphasize individual wrongdoing, the formal equivalence of (co-) principals and secondary agents is nevertheless a view that holds sway for some.<sup>252</sup>

By focusing on the substantive features of contributions and showing when an agent can bear responsibility for them, the difference between co-principals and secondary agents can be seen to be that of cause and mental attitude. In the case of group members, they cause collective wrongdoing as such or constitutively. In the case of secondary agents, they causally contribute to others who realize collective wrongdoing. This difference is at the heart of such a tailored view, where how much an individual should be blamed is a function of what she does unjustifiably and inexcusably. For group members who cause collective wrongs, they can share blame for it. For secondary agents who help, blame attaches to them for their contributions to others bringing it about.

## Conclusion

We might do well to return to the beginning. When people act together their reasons for acting help to uncover their common goals. In turn their goals help to explain their actions and can serve as grounds for assigning blame. The above has argued that moral responsibility for collective wrongdoing as such is a matter of the blameworthiness of those who have acted as group members with others to realize that violative goal. That is, group members directly brought about a collective wrong.

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<sup>251</sup> Fletcher, *Basic Concepts*, 190.

<sup>252</sup> *Ibid.*, 190–7.

The appropriateness of claiming that group members share responsibility arises from their causally relevant actions and the reasons they had in accomplishing them, either by commission or omission. Secondary agents are no different in the sense that they too are blamed for the wrongs they commit or omit; however, what they do is causally contribute to group members' wrongdoing, not produce it themselves. This gives license to blaming them for something distinct, and to blaming them in (potentially) non-equivalent ways because of their contributions' distinctiveness.

We can reach even further back to the previous chapter. There, solutions to problems about how to characterize and identify collective intentional action were provided, and the grounds for conceptualizing moral responsibility for collective wrongdoing were outlined. This chapter has tied matters of responsibility to collective intentional action, and offered a principled way of distinguishing between types of wrongdoing such that responsibility ascriptions reflect that which an individual has done.

Notice the conceptual limit to collective responsibility proposed: more than one person can be responsible for an outcome. By contrast, if one means by collective responsibility something else—something more expansive or not tied to an individual's intentional actions—then I would follow Steven Sverdlik when he notes that it would be unfair to hold a person responsible for a result that her intentional action played no part in realizing.<sup>253</sup> This does not deny the difficulty in locating fault when multiple or sometimes many people act together, but it also does *not* append fault to agents because they share a social identity or are associated with wrongdoers in some other non-actional, non-faulty way.

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<sup>253</sup> Sverdlik, 68.



Maybe it is clearer in disturbing cases such as genocide, but even without such extreme examples the aim of locating a principled means of allocating moral responsibility for collective wrongdoing is still plain: to blame agents for doing wrong, and being secure that responsibility is ascribed to just those agents who have done wrong. Sometimes the wrong done is killing and sometimes it is not. When a wrong can be attributed to an agent for what she has done, then the reproving response which follows ought not itself produce another wrong. This account guards against that.

## *General Conclusion*

I will conclude by recapitulating the central argument and distinctions of this work. I will also identify again how this dissertation advances the current discussion of moral responsibility for collective wrongdoing. I will end this conclusion and dissertation with a brief synopsis of the parts and chapters of the project.

### **1.**

The preceding chapters set upon a multi-faceted problem about responsibility that appears prominently in law and has in a similar form bedeviled moral philosophy. In locating the problem first in law, and then considering it apart from legal rules and institutions, this work came to address dilemmas about responsibility for collective wrongdoing from a moral philosophical point-of-view. The challenge of setting appropriate conditions for holding individuals morally responsible for collective wrongdoing was brought into relief by this dissertation's initial examination of the underlying principles and specific rules for legal liability for collective crimes such as genocide. Furthermore, a rough conception of a fair and just framework for meting out censorious treatment was laid out as well.

The central question—who is morally responsible for collective wrongdoing?—was assessed in connection with three senses that have appeared prominently in the philosophical literature on moral responsibility. The first was formulated as ‘who are the subjects of moral responsibility?’ The second was ‘for what can those subjects be responsible?’ The third was ‘when can those subjects be held responsible?’ (i.e., under what conditions is it appropriate to blame an individual for collective wrongdoing?).

This dissertation was primarily, but not exclusively concerned with the third sense from the preceding set. It was answered by arguing that individuals who intentionally participate as group members in collective wrongdoing can be ascribed moral responsibility for it. That is, the thesis posited that culpable wrongdoing for the purpose of achieving a violative goal with others similarly disposed in acting is the complex condition for an agent's moral responsibility for the collective outcome as such.

This position and intermediary claims were built atop assumptions about the first and second aspects of the central question. This dissertation was concerned only with individuals as subjects of responsibility ascriptions, and as such only briefly entertained disputes about other possible candidates. Similarly, the object of responsibility, sometimes also called the scope of responsibility, was taken to be dateable events. Certainly these respective topics have proven to be contentious in the philosophical literature, but rather than delve into or deny debates about alternative conceptions of the subjects and objects of responsibility, this dissertation trained its focus on a distinct problem about individual moral responsibility.

The challenge posed by the central problem was addressed by showing (a) that an account of individual moral responsibility can apply even to cases of complex coordinated actions of multiple agents (i.e., collective intentional action); and, (b) such an account can (and this account did) specify conditions that make an individual an appropriate candidate for moral responsibility ascriptions. In this respect, one accomplishment of this dissertation was to show that conditions for individual retrospective moral responsibility can be applied to a certain class of cases that has proven to be problematic; namely, cases of collective wrongdoing.

Notice about this dissertation's thesis that an agent's blameworthiness depends on certain properties that she displays; namely, her mental attitude in acting and her causal efficacy in

producing certain outcomes. It should be borne in mind that nowhere was it claimed that an agent is any less or more deserving of blame for what did because it was done with others. The preceding account drew attention to distinctions between defeasible conditions for blaming agents for collective wrongdoing when those agents choose to act with others towards certain common goals.

The above underscores a claim made throughout; namely, whether an individual acted and why she did is a basis for judgments about whether and for what she can be blamed. This is not to deny that sometimes attributions of responsibility are made on the basis of different or even unchosen properties of an agent. It is, however, to underscore that the account of personal retrospective moral responsibility from this dissertation was *not* led or otherwise conditioned by such considerations. There are a variety of accounts of moral responsibility, and various accounts of the appropriate bases of desert, but the preceding was only interested in moral responsibility ascribed on the basis of agents' actions and their reasons for actions.

As announced from the outset, this dissertation did not explore particular forms of blame that an agent might deserve because she has displayed certain properties or fulfilled certain conditions. This account identified conditions of moral responsibility and offered principled guidelines for the evaluation of an agent, but in so doing it did not offer guidance about which *specific* forms of treatment an individual should be subjected because of her blameworthiness. Given that this pursuit sought general conditions, and did not seek a definite conclusion for *a* particular case (e.g., an answer to a query about a given instance of collective wrongdoing), substantive debate about the (most) acceptable types of treatment proved to be too broad a topic for this project to handle.

It bears repeating that the operative view throughout was that any deleterious treatment an agent may deserve concerns what she (nondefeasibly) did and why she did it. Whether ‘all things considered’ some treatment ought to be meted out to that agent is a further step to be assessed on a case-by-case basis. The ideal regulative framework discussed in the first chapter, and the specificity and prospectivity of the legal rule against genocide, might shine a light on the sort of protective principles ostensibly required for certain forms of punishment.

There was another distinction of note. It was between my account of the conditions for moral responsibility and any other account that would posit that an agent should be blamed *more* because of a judgment about her perceived importance to various outcomes. If there was an operative sense of importance in this account, then it was that of the causal efficacy of an individual’s actions in producing an outcome. Saying this, however, does not conflate causal responsibility with moral responsibility, because again (and even though individuals may be held strictly liable or vicariously liable on other accounts) causality is here posited as a necessary but not sufficient condition of moral responsibility for collective wrongdoing as such. The criteria of attribution of moral responsibility (i.e., the responsibility relationship) included what and why an agent chooses to perform or omit certain actions.

In everyday speech, individuals are sometimes called ring-leaders. Often times, but not always, this descriptor and others like it are meant to indicate the importance of an agent to an outcome. If by importance it is meant that those individuals who appear to be at the ostensible top of the pyramid are guiltier than those who appear to be at its bottom, then this account did not cover such intended meanings or theories that might gird them. By contrast, if what is meant by importance is that whereas some persons are necessary to an outcome and others are essential in assisting those necessary to it, then the preceding can offer guidance about how to distinguish

amongst those various agents and how to grade their moral responsibility. Of course, whether the term importance or spatial metaphors like top or bottom are helpful in these types of pursuits is yet a different matter.

The above point helps to draw out another feature of this dissertation's account of moral responsibility. Namely, allocation of moral responsibility proceeded in accordance with the causal properties of an agent's actions. Again, these were taken in conjunction with other conditions such as agent's attitude when acting. With respect to this latter feature of fault, my account in part relied on Christopher Kutz's conception of 'participatory intentions.' This was used for the characterization of collective intentional action, and was later tied to when an agent involved in such undertakings may meet (or fail to meet) conditions of moral responsibility for it.

There are two additional distinctions to bear in mind about my account. First, my account addressed group members (i.e., primary agents), for whom the direct causal relationship and their mental attitudes to wrongs distinguishes them from other agents who may also be morally blameworthy. Second, although my major thesis covered only group members, the final chapter offered conditions for assigning moral responsibility to secondary agents that arise in light of their contributions to group members' collective wrongdoing.

About the first distinction, my thesis was crafted not to apply to *all* agents who might be worthy of blame. Any given case of putative wrongdoing requires a precise determination about that for which an agent may be blamed (i.e., a specific if defeasible charge of violating a moral principle). For such determinations, a means of differentiating the actions and attitudes of respective agents is (presumably) required. The initial set of principled guidelines for such delimitation that I offered were with respect to the limits of assigning blame for collective

wrongdoing as such (i.e., when group members are blameworthy). These guidelines were only later supplemented by additional conditions applicable to secondary agents.

With regard to that initial set of guidelines, it was argued that group members do something distinct from other agents; why they do it was also argued to be distinct; and, what they bear responsibility for can be recognized in those respects as distinctive. That for which an individual can be blamed depends on such facts, and these feed distinctions such as an individual as a group member intentionally participating, or as a secondary agent contributing to a group member's wrongdoing. Arriving at determinate answers about a particular agent in a particular case is what ultimately enables judgments of responsibility to proceed. On my account, these judgments reflect the variations in individuals' actions and choices.

About the second distinction from above, by distinguishing primary from secondary agents, this dissertation offered a further theoretical wrinkle to the conceptualization and discussion of moral responsibility for collective wrongdoing. However, it should be remembered that it does not follow from group members acting together to achieve a wrong that there will invariably be secondary agents who aided them. Further, it clearly does not follow that if there is a group of primary wrongdoers that all non-group members must also necessarily be held morally responsible.

My theorization about secondary agents and the conditions for their moral responsibility is separable from the thesis itself. Saying this here is meant to highlight again the lines of demarcation set by my account, as well as the distinguishability of evaluating the moral responsibility of secondary agents. Such evaluations included a number of conditions. Perhaps most notably (i.e., *sine qua non*) that there must be group members, and that secondary agents aid them in their principal wrongdoing. Even in light of the necessity of group member

wrongdoing for the possibility of secondary wrongdoing, my argument about secondary agent responsibility is separable from my major thesis.

At the beginning of this conclusion, I noted that this dissertation set upon a multi-faceted problem. The facets that I focused attention on were associable with various approaches and problems that arise in connection with the appropriate conditions for blaming an individual for past events. That this is also a problem in law should be pointed out again, for this too is one of its layers. The legal principles and rules that were considered in part one of this work helped to clarify some of the dimensions of the problem. However, the arguments I have made have not been directly aimed at uncovering or correcting any possible deficiencies in law.

In saying the above, though, I have not claimed that my account's solutions are inaccessible or unavailable to law. I have claimed the opposite to be the case. Whatever pressures may attend to the crafting of international conventions or that may arise in the course of legal proceedings, a clear view of why agents should face such judgments seems to be at least a fair prerequisite. Without having dipped into the deep waters of yet other debates (e.g., the best conception of the relationship between law and morality), this account offered a solution to a moral problem. It is a solution that helps to answer a similarly structured dilemma that has appeared in legal rules such as that against genocide.

The answer was addressed to concerns about who, specifically, in cases where multiple agents act together can be morally responsible for collective wrongdoing. In this respect, its integration into law would give a weighty moral reason to prefer, for example, certain standards to be used when evaluating some prohibited activities and yet other standards for similar activities. For this and other reasons, I will restate that my account ultimately shows that even if



in cases of collective wrongdoing individuals act together, moral responsibility so considered appends to individuals alone.

## 2.

To remind you of where you have been, and so you may more handily confirm the consistency of what has preceded, I offer a short recounting of the chapters of this work. Chapter one answered the question "what is crime?" It explicated the legalistic conception of crime, and addressed normative requirements for determining the criminality of an act: constitutive elements of crimes (i.e., the special part of the criminal law), as well as guiding and regulating principles of the criminal law (i.e., the general part of the criminal law). What emerged was a comprehensive view of crimes and criminal law that grounded and delimited the subsequent chapter's analysis of the crime of genocide.

Chapter two critically analyzed the legal definition of genocide. Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide served as starting point for consideration. Through investigation and analysis, problems and interpretative difficulties related to the basic structure, various elements, and liability conditions of the crime of genocide were revealed. Most importantly, perhaps, this chapter laid the foundation for the central dilemma and its solution offered in part two of the dissertation.

Chapter three conceptualized collective intentional action by accounting for those specific features that make the action or actions of more than one individual identifiably collective. This step showed how, if we are to gauge and grade individual responsibility for collective wrongdoing, it is first necessary to understand what collective wrongdoing is. Conceptualization pinpointed conditions that establish when and why individual actions are to be

considered collective intentional ones, and, subsequently when such actions constitute collective wrongdoing. On these bases, the moral evaluation of individuals proceeded.

Chapter four put forward an account of individual moral responsibility for collective wrongdoing. By building on the conception of collective intentional action, the chapter advanced a view of responsibility that took into consideration individual actions, the collective contexts in which they are performed, and how they can be rationalized by such collective undertakings. The chapter argued that given the fulfillment of certain conditions, individuals who intentionally participate as group members in collective wrongdoing share responsibility for it. The chapter further detailed conditions and grounds for assigning blame to these agents (i.e., group members or primary agents). It also clarified grounds for judgments of responsibility that could attach to agents who stand in different relations to the collective wrongdoing (i.e., secondary agents).

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