# THE TOPIC OF THE ISSUE

## The Banality of Good-- Aligning Incentives Against Mass Atrocity

Mark Osiel

This reflection emerged from the personal experience of attending a bunch of conferences on transitional justice in several so-called "post-conflict" societies, places like Serbia and Colombia.

Anyone doing this for long soon notices the nearly total disconnect between the discourse of local participants, and that of we globe-trotting consultants.

The locals focus on historically specific grievances about who did what horrible thing to whom -- sometimes a very long time ago.

We internationalists encourage the locals to view their national experience in a somewhat broader framework, comparing and contrasting it to other countries recently facing similar predicaments, and from whose legal responses… lessons can be learned.

One aspect of this disagreement is that, in prosecuting former rulers and their subordinates, we internationalists tend to favor legal doctrines that broaden the reach of criminal law far beyond what national prosecutors, beholden to domestic power holders, can afford to endorse.

The talk is an effort to make sense of that disagreement, to sociologize it.

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There is a recurring set of questions in mass atrocity prosecutions:

How should the law allocate responsibility between those with different roles in the division of labor?

What is the relative importance of their contributions, and how may the answer to that question best be rendered into legal form?

Which such renderings most risk exaggerating a defendant=s culpability?

Or, does our preoccupation with individual culpability simply prevent us from recognizing the truly collective nature of mass atrocity, foreclosing the collective sanctions that may offer the most efficient response?

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The key challenges criminal justice confronts in coping with mass atrocity trace to a single dilemma.

Law and evidence permit liability far beyond the few individuals who can practically be prosecuted.

Even these few, however, can often be convicted only through theories of indirect liability blaming them for wrongs beyond their complete control or contemplation.

The law is thus at once too timid and too ambitious, sapping its legitimacy.

In the Hague, prosecutors strive to enlarge and empower their emergent professional field of Ainternational criminal law,@ within which their interest lies in maximizing convictions of multiple defendants, even of middle and lower echelon.

This leads them to accuse defendants of Aparticipation in a joint criminal enterprise.@

But, that doctrine's very amplitude suggests the blameworthiness of far more people than courts in transitional democracies could realistically prosecute, without risking serious turmoil.

The national prosecutor in a newly democratic state has incentives to placate executives wishing to minimize prosecution of all but high-ranking past leadership, in the interest of social reconciliation and

regime consolidation.

National prosecutors thus tend to employ the law of Asuperior responsibility,@ since it greatly limits those susceptible to punishment.

So, the very features of superior responsibility that make this doctrine appealing to national prosecutors make it unappealing to international ones;

The converse is true of enterprise participation.

International prosecutors thus have incentives to "overcharge," national prosecutors to "undercharge."

The upshot is that national and international courts are employing different legal methods to characterize offenders similarly situated, reaching disparate results, imperiling international law=s coherence.

The problem diminishes, at least, once we understand superior responsibility only to require a superior's control over pertinent aspects of the organization that brings about the wrongful act, regardless of the particular subordinates performing it.

This interpretation, endorsed in recent European jurisprudence, eliminates the current high risk of acquittal.

It thus reduces incentives to rely excessively on enterprise participation, which is irreducibly imprecise and dangerously illiberal.

This project analyzes at once the incentives of perpetrators, prosecutors, and powerful bystanders.

It project proposes an integral "economic" model of, and solution to, the dilemma I just mentioned.

My approach does not appeal to humanitarian or other disinterested motives, but argues that if we get the incentives right, the law can elicit "good" behavior from the most banal of motives.

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National prosecutors generally seek to prosecute only a few top henchmen.

The Argentine case, on which I've written a lot, is perhaps the clearest case.

These prosecutors want to teach that responsibility for mass atrocity was not widely shared.

This lesson facilitates transition to the new regime, legitimating its leadership in the process.

This approach is morally credible, for it taps into the public's intuition that whoever A controls@ the course of events is more blameworthy than followers, however wrongful the follower's acts from the law=s perspective.

The doctrine thereby helps consolidate democratic transitions by deferring trial of smaller fish until initial amnesties may be overturned without risking civil strife.

Selectivity in prosecution is essential to transitional goals because, as a practical matter, trying individuals for their discrete wrongs is no different from blaming whole groups for collective harms once trials start to number in the hundreds or thousands, which they easily could in many countries, from South African and East Germany in the 90s, to Colombia and Iraq today.

Blaming whole groups is just what criminal prosecution of individuals was supposed to stop, to prevent.

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Among close observers, a consensus is emerging that national prosecutors are right, that prosecution should focus exclusively on top leaders, for simple charges, easily evidenced, trials that can be completed within a couple years.

This is the only way to harmonize legal process with predictable political cycles.

Fallen dictators will never be as despised as when first dislodged, when the country's woes seem wholly attributable to them.

Democratic successors will never be as popular as when first elected, before time gives them ample opportunity to display their frailties.

Hence, for instance, the recent shift in strategy for prosecuting Saddam Hussein: a quick trial based on a small subset of his wrongs – a single village, in fact -- for which solid documentary and witness evidence readily exist, rather than a broader indictment, telling a larger story about a fuller extent of his oppressive rule throughout the country, over decades.

But till now, international prosecutors have focused more than national peers on convicting small fry.

Convicting the big fish, consistent with demanding int'l standards, is much more difficult, owing both to frequent gaps in available evidence and unresolved doctrinal complexities of the sort this paper examines.

International prosecutors also realize that they can make crucial legal advances with more modest defendants, on many procedural issues, as well as on defenses of superiors' orders and duress.

Establishing rape as a means of committing genocide (and as a crime against humanity) could most easily achieved through small fry prosecutions, and int'l prosecutors considered this a particularly important goal – even though rape was already clearly established as a war crime.

The scope and solidity of the new professional field of practice advances through all such cases, of small fry no less than big fish.

Incentives of int'l prosecutors to decline cases against small fry are therefore slight.

The need to facilitate regime transition by limiting liability beneath top ranks is simply not a significant factor in int'l prosecutorial decisions about resource allocation.

National prosecutors cannot indulge expansionary such aspirations for their professional domain.

They're more deferential to executive masters because their human capital is Afirm-specific,@ not readily marketable in the private sector.

It's also invested in a civil service with a weak recent history of professional autonomy.

International prosecutors, by contrast, enjoy human capital that's much less firm-specific, which makes them less deferential, even to signs of discomfort from powers in the Security Council, apparently.

These lawyers enter the field only after considerable distinction within national legal systems to which they may readily return.

Public service in such estimable bodies as the ICTY also enhances their social capital, which make them readily marketable to other leading international bodies.

They want the field to grow in breadth and complexity, in part – at least -- because this increases the value of their professional experience within it -- and their resulting expertise.

In the attention I devote to individual incentives, though, I don't want to suggest that lawyers in human rights and humanitarian law are motivated primarily by venal concerns.

Such lawyers sincerely imagine themselves, ourselves, as representing the conscience of mankind, however pretentious that sounds.

But as Pierre Bourdieu observes: "The propriety of good intentions does not necessarily exclude an interest in the profits associated with fighting the 'good fight.'"

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It's often difficult to tell why the ICTY uses one doctrine in a given case rather than the other.

The choice between the two can much affect a defendant=s treatment, in two ways.

He is more likely to be convicted if charged as a participant in a joint criminal enterprise than as an irresponsible superior, due to the onerous evidentiary burdens the second doctrine imposes.

In the corridors of the ICTY Prosecutor, in fact, the acronym "JCE" – for joint criminal enterprise – even jokingly stands for "just convict everyone."

A longer sentence is also likely to result from conviction as a co-participant than as an irresponsible superior.

This is because enterprise participation allows prosecutors to blame the defendant for all wrongs committed by every participant in the putative Aenterprise,@ as long as these acts were reasonably foreseeable.

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Superior responsibility.

It arises when a commander culpably fails to prevent or later prosecute subordinates who violate humanitarian law.

Though the doctrine has a considerable history and is well accepted by military officers, it's fallen into disuse at the ICTY.

This is because the Court has interpreted superior responsiblity to demand that prosecutors prove the defendant's "control" over specifics of which subordinate did what to which victim.

But 'control= over subordinates can be highly fluid.

It may ebb and flow over time, between one location and another, depending on many factors, including the way combat with adversaries disrupts lines of authority and communication.

Also, chains of command often prove more complex than the organization chart depicts, because a subordinate may answer to one superior on certain matters, to another on different issues.

Requiring causation means that prosecutors must show that "but for" the superior=s misconduct, his subordinates would not have committed their criminal acts.

This proves very difficult in many cases, due to the fungibility of operatives in a large organization, even at very high levels.

If this superior officer had not misbehaved, then very often someone else would have done so, in his place, or simply further down the chain of command, producing the same criminal conduct from inferiors.

Also, the doctrine is defeated where there isn't quite thorough subordination, only intimate collaboration and mutual reliance among parties to atrocity.

I mention, for instance, the relation between the IRA and Sinn Fein, and between certain Islamic madrassas and Al Quada groups.

Even when one organization does thoroughly control another, such control is often easily concealed in ways that make superior responsibility law unavailable.

The relationship can simply be structured through what economists call a Aquasi-firm@ or "inter-firm."

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Enterprise Participation

According to the ICC Statute, a defendant is liable in this way if he "in any way…contributes to …commission of… a crime by a group of persons acting with a common purpose. Such contribution shall be… made with the aim of furthering the criminal activity or criminal purpose of the group…or in the knowledge of the group's intention to commit the crime."

Participation takes three forms.

The first involves shared intent to bring about a certain offense, manifested in an agreement with others.

This is essentially conspiracy by another name, except that it not a separate offence, but rather a method of committing offenses.

The second form of enterprise participation concerns so-called "organized systems of repression and ill-treatment@ -- specifically, detention or concentration camps.

The final type of participation involves criminal acts beyond the Acommon design,@ but Aa natural and foreseeable consequence of effecting it."

This is essentially the common law=s Pinkerton conspiracy rule.

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Both legal approaches – superior responsibility and enterprise participation -- makes implicit sociological assumptions about how mass atrocity happens.

The rules we use in particular trials surely ought to reflect empirical differences in the way mass atrocity occurs, not differences in prosecutorial incentives between various courtrooms.

Because we're lawyers, we immediately demand to know which legal precedents let us cope quickly with the new challenges of mass atrocity.

If we weren't lawyers, however, we would step back and first ask:

What kind of influence do participants in mass atrocity actually exercise over one another, through what organizational devices and interactional dynamics?

Wouldn't scholars studying mass atrocity, in history and the social sciences, probably have something to say about these questions?

How might the law stand to learn from their answers, conceptualizing its response accordingly?

As good lawyers, however, this is not how we have proceeded, of course.

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Some episodes of mass atrocity better fit one doctrine; other episodes, the other.

In the Milosevic trial, for instance, superior responsibility works best for the Kosovo indictment, since there's no question about his formal authority over the Serbian forces there.

But enterprise participation works better for the Bosnia and Croatian indictments, where Milosevic's power over events had little formal, legal basis.

In short, superior responsibility makes most sense where power passes mostly through an official chain of command, military and civilian from top to bottom.

The doctrine stresses the formal, hierarchical structure of military organizations and the reasons why a superior can usually expect his orders to be obeyed.

Enterprise participation, in contrast, makes more sense where the malevolent influence travels horizontally, through informal networks, and where power to wreak havoc is widely dispersed.

Much cross-border criminal activity – from drug smuggling to Islamist terror, after all -- operates through just such networks.

So its prosecutors will increasingly gravitate toward the int'l law of enterprise participation.

Take, for instance, when South American military regimes (in the notorious plan Condor) cooperated in killing off one another's dissident refugees.

Prosecutors could define the criminal 'enterprise' accordingly, encompassing just those military and police officials involved across borders -- people linked by no chain of command.

Enterprise participation also appeals to int'l prosecutors for its reach to civilian bosses and paramilitaries over whom no command or control may be exercised.

The person with most power in a social network is often a "broker" between organizations whose members want little direct contact.

Such brokers are central to mass atrocity.

They provide the essential node, for instance, linking regular army units and the irregular militias who usually perpetrate the worst violence.

Using informal networks enables rulers to deny responsibility for resulting atrocities -- with some plausibility, at least, enough to create reasonable doubt.

Hence, for instance, the central role of "Arkan," the 's service the "Tiger"□Serbian gangster, in putting at Miloševi hooligans, a group otherwise wishing no contact with law-enforcement authorities.

The Yugoslav Army could then secure the perimeters of a Bosnian town, while these irregulars terrorized its denizens: a mutually convenient division of labor.

Enterprise participation also allows prosecutors to view those engaged in criminal conduct, jointly and voluntarily, as evidencing a variety of relationships other than domination-subordination – if no less pernicious.

Mass atrocity is often the result, after all, of a mutual connivance, in which no perpetrator really, thoroughly controls any other.

Superior responsibility also compelled consideration of how its original application, to military officers, required reconsideration and complex alteration when extended to civilian leaders, like those of the Bosnian Serbs or Rwandan media executives.

With enterprise participation, however, civilians are treated no differently from military officers, in that identical criteria are employed in defining each as participants.

Also attractive to int'l prosecutors is that enterprise participation does not demand very much in the way of any actual, working Arelationship,@ among members, as ordinary language understands the term.

Ties may be…weak -- agreements…tacit.

The notion of a "common purpose" is appealing as well.

In any effective enterprise, there's generally a climate of shared commitment to its purposes, a feeling of spontaneity in serving them.

This effaces the difference between leaders and led.

There's an élan, a sense of Aone for all and all for one.@

Successful leaders strive to "coordinate," not to control.

Still distinguishable, of course, are those with greater and lesser influence over events and fellow participants.

But one can now draw such distinctions at the punishment stage of the proceeding, not in determining liability, as required by the law superior responsibility.

This is now easier to do, because the Tribunal has developed a set of relevant factors, including length of time the defendant was involved, his proximity to policy-making, the indispensability of his contributions, the heinousness of his motives, and his degree of knowledge about the larger enterprise to which his actions contributed.

But the notion of a "common purpose" sometimes threatens to become a fiction – and not necessarily a fair or helpful one.

Social science shows that members of modern organizations often do not uniformly share its avowed objectives, employ it instead for purposes of their own, at odds with official ones.

To view their sundry activities as reflecting a single, shared purpose is miss the most salient features in the social life of organizations -- all that's comic, and tragic about them.

Even the term Adivision of labor@ oversimplifies here.

It exaggerates the detailed planning and centralized, self-conscious coordination actually evident in most

episodes of mass atrocity, even the Holocaust.

At their own initiative, many people simply join the bandwagon, in whatever way they choose, often emboldened by ephemeral frenzy to, say, torch the dwelling of a Bosniak neighbor, or rape his daughter.

Authorization from above just provides a convenient pretext for indulging violent proclivities toward… personal vendetta, or greed for neighbors' property, and simple…sadism.

It's hard to say here there's really a "common purpose," given this variation in motives.

Regime elites may see ethnic cleansing as means to genocide.

But it's unlikely Arkan's hooligans did so – hence hard to say they all form a single enterprise, with a common purpose.

Here, we have neither a bureaucracy nor a network united by common purpose, exactly, but something more like…"crowd behavior," a concept sociologists of mass movement spent an entire century trying to run away from.

Where such spontaneity from below is actively encouraged by state authorities from above, but exceeds their control, it's hard to say whether command responsibility or enterprise participation is the better way to go.

Neither model, neither ideal-type, fits the facts very closely here.

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Even acting in perfectly good conscience, prosecutors simply do not now have any clear criteria for defining the enterprise, its purpose and membership, its scope in time and space.

The notion operates as a kind of legal fiction, for none of its supposed members would have thought to define themselves in this way, in just this particular manner.

Whether the specific 'dots' thus connected are too few or too many is a function – one's almost tempted to say "figment" – of the prosecutorial imagination.

Perhaps such a fictional device is defensible in this situation.

But it is unclear why we're prepared to rely so heavily on fiction here, while not at all in regard to superior responsibility.

There, after all, we might just as readily presume effective control to exist B call it Aconstructive control,@ if you like B wherever de jure authority exists.

Courts have not done so, however.

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On first introduction, superior responsibility clearly seems the more formalistic of the two doctrines, enterprise participation the more sociologically "realist."

After all, superior responsibility dwells on de jure competencies, official job descriptions within bureaucratic hierarchies, while enterprise participation claims to mold itself to the actual contours of criminal activity, to its social configuration.

The opposite may be closer to the truth, however.

De facto power – in all its sociological messiness -- quickly becomes central to superior responsibility in international courts, whereas prosecutors there are free to define "the criminal enterprise" in ways tied only very loosely to any observable patterns of interaction and influence among putative participants.

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It may be useful to rethink, and relax, the control requirement of superior responsibility in light of Claus Roxin=s influential analysis of Adolf Eichmann's trial, an analysis used by courts in Argentina, Spain, and Germany.

The superior=s control over an Aorganizational apparatus of hierarchical power," as Roxin calls it, enables him to utilize the subordinate as Aa mere gear in a giant machine.@

The inferior=s compliance with illegal orders flows neither from coercion nor deception.

Roxin=s key insight, then, is that the more powerful party Abehind the scenes@ may commit the offense through the organizational resources at his disposal, including the culpable inferior.

This approach, too, has problems though, as the paper indicates.

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Critics contend that criminal law's problems in coping with mass atrocity trace to the individualism of something called "liberal legality."

But Western law routinely sanctions people for harmful actions they themselves have not engaged in, as members of collectivities whose other members have done so.

The many forms of collective sanction our law employs prove that it is simply not so uncompromisingly committed to an individualist liberalism as we sometimes assume

Could collective sanctions against an entire officer corps (or pertinent subdivision) effectively deter and fairly redress mass atrocities brought about by a small subset of its members?

Yes, to some extent, at least.

In its organizational structure and professional culture, as I show, a military elite is well suited both to monitor prospective wrongdoers and to redistribute costs, initially inflicted upon it as a whole, to individual members actually culpable.

The basic idea is simply that when a high-level officer is convicted of mass atrocity, fellow officers of the same or higher rank within his relevant unit would collectively suffer monetary sanctions.

If silence by peers makes it initially impossible to distinguish culpable officers, then all corps members (above a certain rank) would bear the costs of collective sanctions pro rata, unless and until they broke silence and identified those to be prosecuted.

Military commanders might be viewed here as least-cost providers of insurance against atrocity.

They are better placed to prevent such wrong than anyone else, after all.

This line of analysis may offer the best rationale for the law of enterprise participation: the officer corps itself (or subdivision) is credibly conceived as a joint criminal enterprise through which the crimes are perpetrated, by the acts of some members and the omissions of others.

Well-positioned bystanders are prominent in social scientific accounts of mass atrocity.

But they occupy no place in current legal analyses, for the criminal law has never presumed to reach them.

As long as this is true, they will have little incentive to restrain more violent comrades in arms, over whom they might exercise influence through professional ties.

With this incentives approach, one hopes that what's lost in optimism about human nature (about inculcating moral norms) will be gained in humanitarian impact…and social understanding.

This approach does not violate the culpability principle, in that officers would knowingly consent to Astrict@ pecuniary responsibility in accepting any position to which it might attach.

They understand that directing large groups of men with guns is an inherently dangerous activity.

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In conclusion, despite their frequent denunciation, it's not the intellectual foundations of criminal law -- in the moral theory and social ontology of liberalism – that keep it from confronting colossal conflagrations like mass atrocity.

The problem's nothing so "deep."

It's really been just a failure of our professional imagination to look closely, empirically, at what's going on in such episodes and to rethink our legal categories accordingly.

Thank you.