COMPARATIVE CRIMINAL LAW, INTERNATIONAL CRIMINAL JUSTICE, THEORY OF CRIMINAL LAW

AN OPEN INVITATION TO FURTHER DEBATE (INSTEAD OF AN AMICUS BRIEF)

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In organizing this mini-symposium, I sought to engage expert reactions to my paper from a range of legal systems that have not featured in debates about forms of attribution in ICL. When international courts and tribunals construct(ed) these forms of attribution, they initially drew heavily on Anglo-American jurisdictions, adopting concepts like superior responsibility and joint criminal enterprise from them. Then, judges at the ICC announced a major swing towards notions of criminal responsibility derived from German criminal law, including co-perpetration, theories of control to distinguish perpetration from complicity, indirect co-perpetration and even perpetration through an organization to treat those doing the bloodletting and their masterminds as perpetrators. Throughout this process, nobody appears to have asked experts in systems that adopt a unitary theory of perpetration, which dispenses with all these doctrines, to reflect on the law within their own countries and its potential as a solution to recurrent problems with blame attribution in ICL. This silence has been quite strange, especially when the Nuremberg Tribunal applied a unitary theory of perpetration and several modern ICL judges have argued that the current complexity is unnecessary.

This mini-symposium has broken new ground in this regard, in ways that I hope sets the scene for further scholarly research and debate. I was especially grateful that a range of criminal law theorists from each of the countries I write about in the paper agreed to criticize the paper, and that some very prominent practitioners joined the fray to offer their reflections too. As is evident from this blog's

manifesto, I deliberately seek to create dialogue between theorists and practitioners, so I am thrilled that this discussion has involved members of both groups. Some of the feedback I received was striking—during the course of this online symposium, a senior prosecutor at one international court and a defense counsel for a well-known defendant at another emailed me saying they wholeheartedly agree with the need for a unitary theory. The latter even suggested that I file an amicus brief calling on one particular tribunal to revert to the unitary theory of perpetration adopted at Nuremberg. I politely declined, but decided to open up this final post to whomever wanted to share an opinion one way or the other, provided that it respected the strictures of the blog's manifesto.

Instead of defending the unitary theory of perpetration or either of the article's I've written about it (see here and here) in this post, I use this opportunity to set the scene for an open online discussion at the base of this post by reiterating what a unitary theory is and by summarizing the excellent posts that appeared in this symposium.

To begin, let me again highlight the three main variations of the unitary theory of perpetration to avoid commentators speaking past one another. The unitary theory of perpetration comes in three principal varieties, although some might contest whether the third species really fits within the genus. The first, known as a pure unitary theory, treats a causal contribution to a crime coupled with the requisite blameworthy moral choice announced in the criminal offence charges as necessary and sufficient elements of responsibility (excuses and justifications aside). On this view, the various forms of participation that exist in current ICL (aiding and abetting, JCE, co-perpetration etc.) are stripped of their autonomous existence and folded into a more capacious single notion of attribution. So, instead of attempting to manufacture fine-tuned rules that define JCE, aiding or any other form of participation in such and such a manner, a unitary theory of perpetration places them all in a big pot, then boils them all down to their shared normative essence. Through this distillation, blame attribution involves deciding whether accused X is responsible for crime Y based on settled core principles that pay no regard to the *form* participation takes, leaving their moral significance to be assessed post hoc by judges at the sentencing phase of a trial.

The second variant provides more detail without compromising the unitary theory's core commitments. Known as a functional unitary

theory, this iteration provides more guidance while insisting that causation and the mental elements announced within the criminal offense charged are necessary and sufficient bases for establishing wrongdoing across all forms of participation. To ensure that would-be criminals are sufficiently forewarned of their exposure to criminal law penalties, a number of states adopt this variant of a unitary concept—the general part of a criminal code or legislation articulates the different forms of causal connections that might apply within a unitary framework. In this sense, responsibility might involve carrying out the offence personally, instructing others to do so, providing necessary assistance, or furnishing assistance that is readily available elsewhere. Each of these forms of causation is announced within the law so as to inform the public of how they might attract criminal responsibility, but the underlying objective and subjective elements beneath these descriptions remain the same.

Third, some argue that subjecting accomplices to the same range of punishment as perpetrators also constitutes a weak type of unitary theory. In Germany (and the many jurisdictions that follow its example), aiders and abettors are sentenced to a maximum of three quarters of the penalty for the offense they facilitate, whereas the sentence for instigators is taken from the same sentencing range as principals. To a large extent, this discrepancy in maximum sentence drives the need for differentiating between perpetrators and accomplices, even if, as Markus Dubber has observed, "[r]emarkably little effort is spent on justifying this differentiation".[1] Nonetheless, this differentiated approach, whose purpose is partly to determine the applicable range of sentencing, generates a tendency to look upon systems that formally equate sentencing ranges for perpetrators and accomplices as soft iterations of the unitary theory. France and England, for instance, do just this. For my purposes, though, I do not consider this an example of the unitary theory because it places no restriction on the substantive elements of forms of attribution, whereas truly unitary theories do.

With the stage set, I next situate the various expert responses to this mini-symposium, grouping them into those who also advocated for a unitary theory in ICL, those who were more ambivalent about whether their national experience served as much of a template for ICL, and one who was positively unconvinced.

In the first of these categories, Judge Baragwanath's excellent post reminded us that there are actually many jurisdictions that fit within variants two and three, even if they might not describe themselves as unitary theories of perpetration. My own country of origin, New Zealand, begins the provision governing parties to offences by stipulating that "[e]very one is a party to and guilty of an offence who," before articulating different forms of participating in a consummated offence. Judge Baragwanath's post is so useful because it not only highlights that New Zealand's criminal law is, in important aspects, unitary, but it also shows how a series of cases in England, Australia and Hong Kong have been struggling with whether to tie mental elements in forms of participation to those in the offense announced in ways that mimic the unitary theory. Despite backsliding in some courts, there is a discernable modern trend in this direction. His post reminds me that the States of New York and California have an even more intense unitary theory of perpetration. In any event, in describing "modes of liability" as "unnecessary," Judge Baragwanath argues that "international criminal procedure, already complex and expensive, adds to those problems by forcing itself to leap over self-created non-existent hurdles."

Filippo de Minicis' post is similarly minded. Filippo is a presently Legal Officer in the Office of the Co-Investigating Judges in the Extraordinary Chambers in the Courts of Cambodia, but he was originally trained in Italian criminal law, which as I show in the article, also discarded a differentiated system of blame attribution in favor of a unitary alternative almost a century ago. Filippo argues that when looking at standards of attribution before ad hoc international criminal tribunals (i.e. in customary international law), there is "little difference in the required actus reus," and "a sufficient homogeneity on the mens rea side." Filippo concludes after a decade working with these standards that a unitary theory is both viable and preferable, but he is also circumspect about whether any theory is perfect and, as was the case with New Zealand, shows how Italy's commitment to the unitary theory is not absolute since Italy too appends a type of common purpose doctrine that approximates to JCE. Reality, it turns out, is complicated. Despite this, Filippo joins Judge Baragwanath as an advocate for the adoption of the unitary theory in ICL.

Other commentators are more ambivalent. Professor Carlos Eduardo A. Japiassú, for instance, highlights how Brazil's unitary

theory has slowly changed over time, shifting from a pure version to a functional one (which he calls "mixed"). While Professor Japiassú also speaks of a certain legal conservativism in Brazil, which I take to imply a lack of desire to shift back to a differentiated system that employs different substantive tests for different stand-alone forms of participation, he ends by concluding that "it remains unclear whether a pure rendition of this theory or a mixed variant like that now applicable in Brazilian Penal Law is a good alternative for International Criminal Law or International Criminal Courts." Similarly, Professors Iryna Marchuk and Jørn Jacobsen discuss important scholarly criticism of the unitary theory in Denmark and Norway respectively as well as partial retreats from it in recent doctrine, before also questioning their system's value as an exemplar for ICL.

Finally, in the third category, Judge Albin Eser's masterful critique exemplifies disagreement with the unitary theory. In many respects, his is a brilliantly concise defense of the structure of blame attribution currently in place in ICL and a deft rebuttal of the arguments in the paper. The series of questions he poses are skillfully listed as issues he would need to be convinced of to accept that a unitary theory is optimal. These start with the argument that different forms of participation actually better track real life, move to the idea that a unitary theory cannot justify why they are addressed at sentencing along, then shows how unitary theorist essentially overlook that these questions will arise at sentencing anyhow. Then, he argues that "the only practical advantage the unitary theory so far seems to offer is a procedural one," but he sees no procedural advantage here either. Ultimately, he concludes by correctly pointing out that even if we do have a differentiated system of blame attribution in ICL because powerful western states forced it on others, this says nothing about the theory's conceptual integrity. A unitary theorist would, of course, contest each of these steps, but Eser's brilliant critique is a wonderful counterpoint.

So, instead of labouring my own perspective any further here, I make space for other scholars, experts and practitioners to weigh in on these debates, which strikes me as a better idea than filing an amicus brief. I have therefore opened this post to comments, and anyone can post their views directly. In order to help ICL practitioners share their views (I recall many hours debating these questions with colleagues in war crimes tribunals), I'd like to offer a procedure through which you can legitimately (I hope) bypass the need for

institutional approval to publish. If your institution is agreeable, I will post thoughts and reflections from practitioners anonymously. I would not normally do this through the post, so if want to remain anonymous, please send me your comments by email at stewart@law.ubc.ca. Your email message to me should include your title and the institution you work for, but I undertake to keep this information entirely confidential, posting only your thoughts and reactions on this topic. For the rest of you, the post is open.

[1] Markus D. Dubber, 'Criminalizing Complicity: A Comparative Analysis', (2007) 5 *Journal Int Criminal Justice* 984 ff.