Criminal Responsibility in International Law

Liability Shaped By Policy Goals and Moral Outrage

1. INTRODUCTION

The principle of individual criminal responsibility in national law consists of basically two elements: (i) personal fault, for (ii) one’s own conduct.1 These elements can be termed the ‘parameters of culpability’. Since international criminal law has adopted this national principle of individual responsibility, these parameters underlie the international concept of individual criminal responsibility as well and are, therefore, the starting point of any research into that concept.2

Whilst individual criminal responsibility can be regarded an emancipation from collective responsibility, this does not mean that collective responsibility has become obsolete and irrelevant to modern criminal law. Liability theories such as accomplice liability, vicarious responsibility, strict liability, (membership of a) criminal organisation, and the doctrine of common purpose can all be regarded as concepts of

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2 See also ICTY, Prosecutor v. Tadić, Judgement, Case No IT-94-1-A, 15 July 1999 (Tadić Appeals Judgement) para. 186: ‘The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa)’. 
individual criminal responsibility with collective traits. Because of their centrality to international criminal law and their proximity to collective responsibility, this paper will focus on two of these theories, accomplice liability and the doctrine of common purpose, also referred to as joint criminal enterprise.

Because of the nature of international crimes, criminal responsibility in international law comes with a certain ‘flavour’. Genocide, crimes against humanity, and war crimes almost by definition imply collective criminality often carried out within a system. This type of ‘system-criminality’ generates ‘system-responsibility’ which, by bringing in collective elements, puts pressure on the principle of individual criminal responsibility. The question then arises whether this same pressure exists in national criminal law and whether the concept of criminal responsibility in international criminal law deviates from criminal responsibility in national criminal law?

In the second part of this paper an overview is given of the concept of criminal responsibility in international law. After having explored its national pedigree (§ 2.1) an analysis of joint criminal enterprise follows (§ 2.2.3), an expansive liability mode that, especially when put in a historical context, demonstrates the particular challenges the international criminal justice model faces in dealing with systemic criminality. Comparison with national equivalents of joint criminal enterprise (§ 2.3) will assist in answering the above-raised question whether criminal responsibility in international law differs from criminal responsibility in municipal law. In the third part, the underlying purposes (§ 3.1) and ambitions (§ 3.2) of international criminal law are made visible. This exercise serves to explicate the instrumental nature of international criminal justice, which (partly) accounts for expanding the limits of criminal responsibility in international law. In the fourth part of this paper the concept of moral responsibility is discussed. Regard for moral responsibility when attributing criminal responsibility may assist in achieving certain policy goals such as national reconciliation. At the same time, awareness of the interplay and distinction of moral and legal responsibility (§ 4.1) may limit the risk of an irrational broadening of individual responsibility to collective responsibility. The concept of moral collective responsibility is enquired into (§ 4.2) to see how, and to what extent, collective elements should penetrate the concept of individual legal responsibility in international law. In the fifth and last part of this paper, collective responsibility is described and categorised in legal terms (§ 5.1). An analysis of system-responsibility within the framework of moral and legal responsibility enables an appropriate assessment of individual criminal responsibility in international law (§ 5.2).