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# The Strangely Familiar History of the Unitary Theory of Perpetration

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# THE STRANGELY FAMILIAR HISTORY OF THE UNITARY THEORY OF PERPETRATION

*James G. Stewart*\*

*forthcoming, Essays in Honor of Mirjan Damaška*

## ABSTRACT

*A unitary theory of perpetration is one that does not espouse different legal standards for different forms of participating in crime. In this Article, I pay homage to Professor Damaška's influence on my work and career by reiterating my earlier arguments for a unitary theory of perpetration in international criminal law. Whereas my earlier work defended the unitary theory in abstract terms then for international criminal law in particular, this Article looks to the history of the unitary theory in five national systems that have abandoned differentiated systems like that currently in force internationally in favor of a unitary variant. Curiously, as things transpire, the reasons Norway, Denmark, Italy, Austria and Brazil dispensed with the types of differentiated system currently in force in international criminal law are strangely familiar to those working in international criminal justice today. The eerie sense of déjà vu that arises from reading these histories suggests that, potentially, the unitary theory may have real potential as a way through many of the key points of conceptual impasse that presently characterize this aspect of the field. In this respect, the Article seeks to contribute an historical perspective to a burgeoning dialogue about forms of blame attribution internationally by again questioning whether the great struggle with "modes of liability" is worth continuing.*

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## I. INTRODUCTION

International criminal courts and tribunals use the term “modes of liability” to designate forms of participation in atrocity such as instigation, aiding and abetting, joint criminal enterprise (“JCE”) and command responsibility.<sup>1</sup> In 2001, Mirjan Damaška authored a sublime critique of one of these modes of liability in an article entitled *The Shadow Side of Command Responsibility*.<sup>2</sup> Intellectually, the article was somewhat daunting for me as a then aspiring academic; it drew on a staggering breadth of learning in the history of criminal law, the theory of criminal responsibility and comparative law. Substantively, the article also planted a seed for my own subsequent work—at one point in this wonderful piece, Damaška argued that to the extent command responsibility was not objectionable, it merely collapsed into garden-variety omission liability.<sup>3</sup> This argument sparked my own thinking about the extent to which forms of liability as a species could be folded into a single unified set of normative principles. Why stop at just command responsibility? Several years later, this intuition led me to the unitary theory of perpetration that I revisit here. Stylistically, Damaška’s exceptionally eloquent prose awakened a realization that legal scholarship could be warmly critical, involve a spirited commitment to justice, draw heavily on the imagination and act as a vehicle for one’s own attempt at aesthetic excellence. I hope that my very inferior attempt at emulation here reveals something of his influence.

At present, “modes of liability” are numerous in international criminal law (“ICL”), ranging from traditional notions of instigation and aiding and abetting to more exotic concepts like Joint Criminal Enterprise (“JCE”) as well as the object of Damaška’s original critique, command responsibility. To my mind, the difficulties Damaška so eloquently pointed to in his earlier work encompass most species in the genus. Viewed as an ensemble, modes of liability appear to be sometimes harsh,

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<sup>1</sup> As I have pointed out in earlier work, the phrase “modes of liability” is slightly conceptually misleading and of uncertain historical pedigree. See James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 LEIDEN. J. INT’L. L. 165–219, 166 (2012).

<sup>2</sup> Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455–496 (2001).

<sup>3</sup> *Id.* at 462. (“When superiors are aware of the impending delinquency of their subordinates and do nothing to stop them, their omission shades into conventional complicity - aiding by omission - and has therefore hardly any independent purchase.”).

occasionally too lenient, frequently very difficult to understand, the source of important inefficiency, and as a combined consequence of all the foregoing, in a state of seemingly continuous flux. In what follows, I reiterate my suggestion that “modes of liability” should be abandoned in ICL, arguing again for a single functional unitary theory of perpetration wherever international crimes are invoked.<sup>4</sup> On this theory, whenever an international crime is charged in any forum, national or international, a causal contribution combined with the mental element(s) required by the crime charged would be necessary and sufficient to establish participation in the international crime.<sup>5</sup>

As things transpire, my project is not new. In 1902, the world’s leading criminal law theorists formally endorsed the unitary theory of perpetration at a distinguished congress of the Union Internationale de Droit Pénal (“UIDP”) in St Petersburg, precisely because it promised to overcome many of the same sorts of problems that modern ICL now struggles with.<sup>6</sup> The UIDP, or Internationalen kriminalistischen Vereinigung (“IKV”) as it was also known, represented the who’s-who of world criminal law theorists, at a time when passion for criminal science was arguably at its zenith. As a consequence of its then intellectual prestige, the UIDP’s endorsement of the unitary theory had a marked impact in practice—at least five countries abolished the differentiated system previously in force within their jurisdictions in favor of the unitary theory on the strength of this intellectual leadership. For reasons I come to

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<sup>4</sup> My previous article, entitled *The End of ‘Modes of Liability’ for International Crimes*, argued that a unitary theory of perpetration follows from the criticisms of individual “modes of liability” of international criminal law, accounts for conceptual shortcomings of complicity in ICL, is theoretically defensible, and offers a set of pragmatic advantages in ICL in particular. See Stewart, *supra* note 2. I did not commit to a pure, functional, or sentence-based variant of the unitary theory in this earlier work. On this distinction, see James G. Stewart, *Complicity*, in OXFORD CRIMINAL LAW HANDBOOK (Markus Dubber & Tatjana Hörnle eds., 2014). Upon reflection, I am minded to think that a functional unitary theory is preferable to a pure system, since this functional variant announces the various forms of causation, like instigating and aiding for example, while still employing stable substantive elements for all forms of participation. I am grateful to Kai Ambos for suggesting that I clarify this point.

<sup>5</sup> For a conceptual overview of different theories of complicity from a comparative perspective, including three variations of the unitary theory, see James G. Stewart, *Complicity*, in OXFORD CRIMINAL LAW HANDBOOK (Markus Dubber & Tatjana Hörnle eds., 2014).

<sup>6</sup> *Bulletin de l’Union Internationale de Droit Pénal* 137 (1904) (“Quant à la question de la complicité, la loi devra abandonner toute distinction doctrinaire entre ceux qui on participé au meme crime et se borner à indiquer les modes de participation qu’elle considérera comme tells”). Abandoning formal distinctions between participants but still announcing forms of participations as a guide to the public makes this theory a functional unitary theory. I also think that a functional unitary theory would be preferable in ICL.

momentarily, five is a far greater number than it seems at first blush. In this article, I argue that ICL should imitate this shift, not just within international courts, but also in national systems when international crimes are charged.

Ironically, the UIDP also shared this universalizing ambition—according to Professor Franz von Liszt, one of the group’s intellectual forefathers, the significant advance in criminal science that produced the unitary theory of perpetration should feature as a central part of “the unification of criminal codes,” and the “universalization of criminal law.”<sup>7</sup> In this Article, I take von Liszt’s project seriously, at least for trials involving international crimes. At least one leading modern scholar also shares these sentiments. Referring to the “universal structure of criminal law” as an “antidote” to the sorts of positivist arguments that reify domestic criminal doctrine, George Fletcher writes that “resolutions on the surface of the law should not obscure the unity that underlies apparently diverse legal cultures.”<sup>8</sup> Consequently, “the task of theorists in the current century is to elaborate the general principles of criminal law that should be recognized not only in the International Criminal Court, but in all civilized nations.”<sup>9</sup>

Instead of revisiting my earlier work defending the unitary theory in abstract terms,<sup>10</sup> this article interrogates why the UIDP then various national legal systems abandoned differentiated forms of blame attribution in favor of the unitary theory. As things transpire, the problems that led these national systems to a *volte-face* on the topic of blame attribution are strikingly similar to those the ICL is currently wrestling with. Consequently, the histories that follow should act as a caution against a faith that judge-made law will ultimately produce a settled defensible consensus about forms of attribution in ICL or, in other words, that a *dogmatik* will eventually emerge with time. In a number of the national systems I discuss below this never came to pass, to the point that leading criminal law theorists of the day ultimately advocated for transcending the

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<sup>7</sup> LEON RADZINOWICZ, THE ROOTS OF THE INTERNATIONAL ASSOCIATION OF CRIMINAL LAW AND THEIR SIGNIFICANCE: A TRIBUTE AND A RE-ASSESSMENT ON THE CENTENARY OF THE IKV 24 (1991).

<sup>8</sup> GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 5 (1998).

<sup>9</sup> GEORGE FLETCHER, THE GRAMMAR OF CRIMINAL LAW 20 (2007).

<sup>10</sup> For a discussion linked to international criminal law particular, see Stewart, *supra* note 2. More generally, see THOMAS ROTSCH, “EINHEITSTÄTERSCHAFT” STATT TÄTHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE (1. Auflage. ed. 2009); Johannes Keiler, *Towards a European Concept of Participation in Crime*, in SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION, 157 – 317 (André Klip ed., 2011).

very structure that subsumed the doctrine. I again suggest that ICL should consider following this alternative route.

I divide the article into five separate parts, each of which singles out a particular rationale for each of the five different states cited for departing from the differentiated system of blame attribution in favor of a unitary alternative. The historical narrative proceeds in chronological order, starting with the initial promulgation of a unitary theory of perpetration in Norway and culminating with the Austrian law adopted most recently. Although I have isolated one rationale for the unitary theory per country, I do not mean to imply that these were the only motivations for the normative shift in each context; there were actually a large number of reasons for abandoning the differentiated system of blame attribution in each jurisdiction. Nevertheless, by highlighting five states' rationales for the juridical change and mapping these rationales onto protracted debates about blame attribution in modern ICL, I hope to shed new light on the ways in which contemporary struggles on the topic at the international level are contingent on the differentiated structure. In each of the national systems I review, scholars were grappling with the very same problems that haunt modern ICL now, before they reached for a transcendent solution.

Several disclaimers are necessary at the outset. In what follows, I traverse an unreasonably wide terrain. I have not visited any archive in compiling these histories and my materials are, for the most part, from secondary sources. I have also had to engage the research assistance of native language speakers in each of the countries I write about, so the likelihood that I have misunderstood or distorted original theorists in certain instances is unavoidably high. In addition, I have not highlighted differences between pure, functional and sentence-based unitary systems in the various jurisdictions I discuss,<sup>11</sup> thereby failing to illuminate the sometimes marked discrepancies between them.<sup>12</sup> Similarly, my project is

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<sup>11</sup> I have explained the differences between these three variants of the unitary theory elsewhere, questioning whether the sentence-based account is properly classified as unitary at all. For an overview, see Stewart, *supra* note 5, at 539-540.

<sup>12</sup> Art. 12, Austrian Criminal Code adopts a functional unitary theory by announcing different forms of participation like perpetrators, instigators and accomplices, but it maintains uniform substantive elements for these various forms, thus justifying its inclusion within the unitary theory family. See JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 194 (2e ed. 2002). Norway, on the other hand, has no provision governing substantive rules of participation at all, relegating these issues to the special part of the criminal code. For discussion, see JOHANNES ANDENAES, *THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY* 274-277 (1965). Coincidentally, this approach accords with Douglas Husak's conceptual preference for complicity. Douglas Husak, *Abetting a Crime*, 33 *LAW AND PHILOSOPHY* 41-73 (2014). In Denmark, to offer one final variation, it appears that causation is not required for any form of participation. See Jørn Vestergaard, *Criminal*

entirely historical, which overlooks contemporary perceptions of the unitary theory of perpetration's function in these various systems. Several friends, for instance, have pointed out that in at least one of my examples, the enthusiasm for the unitary theory at the point of codification many decades ago is almost certainly a thing of the past. Because my project is mostly historical, I must defer to others on these questions.<sup>13</sup> Finally, I have not engaged with the thoughtful criticisms of the unitary theory of perpetration that are beginning to emerge in ICL,<sup>14</sup> hoping that my opinionated argument below will make a further contribution to a lively but respectful scholarly debate to be staged elsewhere. In this vein, I very much hope that what follows instigates a range of in-country experts to correct, critique and elaborate upon my brief accounts.

## II. INTELLECTUAL DISSATISFACTION IN NORWAY

In 1828, the German Professor of criminal law, Christoph Karl Stübel, wrote a highly influential book on criminal legislation.<sup>15</sup> In it, he explored the implications of then new thinking about causation for the concept of complicity. According to the then newly popular theory of counterfactual dependence (known as *Äquivalenztheorie* in the native German), all conditions are considered causal that could not be left out of

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*Participation in Danish Law - Uniformity Unlimited?* in CRIMINAL LAW THEORY IN TRANSITION: FINISH AND COMPARATIVE PERSPECTIVES 475–490 (Raimo Lahti & Kimmo Nuotio eds., 1992). Here again, Anglo-American theorists would concur. Alexander, Morse and Ferzan offer a conceptual defense of a normative scheme precisely like the Danish—one that does not formally distinguish between various forms of participation and removes causation for all aspects of the criminal law. See LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

<sup>13</sup> For an extensive review of this sort, see BETTINA WEIBER, TÄTERSCHAFT IN EUROPA: EIN DISKUSSIONSVORSCHLAG FÜR EIN EUROPÄISCHES TÄTERMODELL AUF DER BASIS EINER RECHTSVERGLEICHENDEN UNTERSUCHUNG DER BETEILIGUNGSSYSTEME DEUTSCHLANDS, ENGLANDS, FRANKREICHS, ITALIENS UND ÖSTERREICHS (1. Auflage. ed. 2011).

<sup>14</sup> Gerhard Werle and Boris Burghardt, *Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute*, in PLURALISM IN INTERNATIONAL CRIMINAL JUSTICE (Elies van Sliedregt and Boris Burghardt eds.), pp. 301-319 (criticizing my defense of the unitary theory of perpetration). See also, CASSANDRA STEER, TRANSLATING GUILT: IDENTIFYING LEADERSHIP LIABILITY FOR MASS ATROCITY (T.M.C Asser Press, 2015) (same).

<sup>15</sup> CHRISTOPH CARL STÜBEL, UEBER DIE THEILNAHME MEHRERER PERSONEN AN EINEM VERBRECHEN: EIN BEITRAG ZUR CRIMINALGESETZGEBUNG UND ZUR BERICHTIGUNG DER IN DEN CRIMINALGERICHTEN GELTENDEN GRUNDSÄTZE (1828).



consideration without the result not occurring.<sup>16</sup> By implication, all conditions are conceptually equivalent not temporally sequenced, meaning that both the person who supplies the weapon and the murderer who uses it make equal causal contributions to a consummated crime according to the prevailing test, regardless of their contribution's temporal distance from it. Stübel was not the first to contemplate the equivalence of causal contributions but he was original in one respect—he doubted whether formal causal equality necessarily resulted in the same sentence for perpetrators and accomplices.<sup>17</sup> Thus, the journey to the unitary theory began. If causation unified perpetrators and accomplices alike at the level of attribution, any need for differentiated sentencing could be achieved after responsibility for the consummated crime was attributed.

After Stübel, a number of other prominent European theorists developed and refined the potentiality of a unitary theory,<sup>18</sup> but it is highly unlikely that their intellectual labors would have born fruit in practice without the catalytic effect of the UIDP. Founded in 1888 by three prominent European criminal law theorists,<sup>19</sup> the UIDP or IKV as it also described itself in its second working language, brought together the leading scholars of the time. The professional association soon became exceptionally popular internationally—by 1905 it boasted a membership of one thousand two hundred participants from thirty countries.<sup>20</sup> Although the organization served as a platform for discussions about a range of topics, complicity was high on the group's agenda for a number of years: its members were preoccupied with “[t]he influence of the new concepts in the field of criminal law on ways of defining...complicity.”<sup>21</sup> Ultimately, this interest led them to abandon the doctrine as an autonomous concept in line with the insights developed by Stübel and his many successors. As I have argued elsewhere, I am of the opinion that ICL should do similarly.

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<sup>16</sup> For discussion of Äquivalenztheorie, see Claus Roxin, *Strafrecht Allgemeiner Teil*, 4. Aufl. (München: Beck, 2006), vol. 1, p. 352, § 11 Rn 7. For English-language equivalents, see VOLKER KREY, *GERMAN CRIMINAL LAW GENERAL PART 47–57* (2002) (providing a helpful English language overview of causation in German criminal theory); H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 431–464 (discussing dominant German theories of causation) (2 ed. 1985).

<sup>17</sup> ROTSCH, *supra* note 9, at 35.

<sup>18</sup> *Id.* at 34–76. (discussing twenty-six other authors in the Germanophone tradition who addressed the unitary theory of perpetration. This, of course, does not summarize the contributions of others in various jurisdictions, especially Scandinavia and Austria).

<sup>19</sup> The three included Franz von Liszt, its founder, Adolphe Prins and Gerard Anton van Hamel.

<sup>20</sup> RADZINOWICZ, *supra* note 6, at 2.

<sup>21</sup> *Id.* at 11.

Norway was the first to abandon a differentiated system of attribution like that presently applicable in ICL in favor of the unitary theory of perpetration. The Norwegians made this shift, in part, because their leading academic minds viewed the unitary theory of perpetration as conceptually superior. In 1875, for instance, the Norwegian Professor Bernhard Getz published his thesis “Report on the So-Called Complicity in Crimes,” in which he dismissed as invalid all distinctions between parties to crimes, arguing that they should be subsumed within a more extensive singular notion of perpetration.<sup>22</sup> The core of his thesis, which should have strong resonance for all familiar with the contemporary conundra with forms of participation in modern ICL, was that “I am aware of the line that legislation and theory draws between the perpetrator on one side, and the accomplice on the other, but the line between the two lacks a solid foundation.”<sup>23</sup> In particular, Getz observed that:

*“I don’t know how a perpetrator is unlike an accomplice and hence I have entitled this paper ‘The So-Called Participation in Crime.’ It seems to me that the accomplice fulfills all the necessary requirements to be perceived as a perpetrator and that every perception of the concept perpetration that excludes the accomplice leads to unreasonable results, which no one is willing to clarify.”<sup>24</sup>*

Repeatedly referring to the concept of complicity in differentiated systems as “amputated” from the body of blame attribution, Getz argued that the sorts of debates about the separation of perpetration from complicity that now captivate modern ICL arise from the fact that “this concept has been torn out from its natural context.”<sup>25</sup> Reintegration, therefore, was a more conceptually attractive means of overcoming what was ultimately for Getz, a false dilemma.

Getz raised a number of arguments to substantiate both his intellectual dissatisfaction with the differentiated system and the transcendent solution he preferred. With respect to the accomplice’s objective contribution, he argued, drawing on the then groundbreaking view of the equivalence of causes, that “[e]very action is objectively speaking in the same relationship with the crime, every action leads to the

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<sup>22</sup> BERNHARD GETZ, OM DEN SAAKALDTE DELAGTIGHET I FORBRYDELSER: EN STRAFFERETLIG UNDERSØKELSE 2 (Christiana, 1875). My kind thanks to Jon Erik Lundgaard for his assistance with translations from the original Norwegian.

<sup>23</sup> *Id.*, at 2

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

crime.”<sup>26</sup> Consequently, “[o]ne must ask: Has the person contributed to the crime or not? If he has, he is a perpetrator and consequently equally to blame.”<sup>27</sup> In the subjective realm, Getz was earnest to point out how motives are normally irrelevant to criminal liability, so appending additional subjective elements in an attempt to differentiate perpetrators from accomplices (i.e. did the actor view the crime as her own) was not only a departure from normal thinking, it amounted to “an unconditional mistake.”<sup>28</sup> Concluding his study colorfully, Getz reaffirmed that “every proposition to prove the specific distinction between the accomplice and the perpetrator has flashed before our eyes and must be deemed inadequate.”<sup>29</sup>

ICL’s plight to solve the riddle Getz found to be without convincing solution has played out in various different ways. Initially, the ICC seemed to treat the plurality of “modes of liability” in the ICC Statute as axiomatic—as if it is made necessary by the very metaphysics of blame attribution. For instance, the ICC’s first decision incorporating the German notion of “control over the crime” as a criterion for delimiting perpetration from complicity simply states that “the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.”<sup>30</sup> The Chamber did not indicate how the Statute made *the* distinguishing criterion conceptually inevitable. In fact, the use of the definite article to imply an inexorable division between perpetration and complicity is at odds with the scholarly work of Bernhard Getz and others, who had argued that this type of assumption was conceptually invalid.<sup>31</sup> Moreover, to assume the contrary is not only insensitive to the theory Getz helped popularize, it is also slightly out of step with the history of ICL.

Although the Nuremberg and Tokyo Charters explicitly enumerated different forms of attribution,<sup>32</sup> the Nuremberg Tribunal itself merely

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<sup>26</sup> *Id.*, at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, at 52.

<sup>29</sup> *Id.*, at 59.

<sup>30</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 326 (June 15, 2009) (emphasis added).

<sup>31</sup> ROTSCHE, *supra* note 9, at 17.

<sup>32</sup> Art. 6(3) of the Nuremberg Charter reads: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, 82 U.N.T.S. 284, *reprinted in* 39 AM. J. INT’L L. 257 (Supp. 1945).

considered whether an accused was “concerned in,” “connected with,” “inculcated in” or “implicated in” international crimes.<sup>33</sup> As many leading commentators now accept, this approach entailed a unitary theory of perpetration that was functionally equivalent to the concept the UIDP and Getz had called for,<sup>34</sup> namely, a system of blame attribution that declined to disaggregate modes of participation into formal legal concepts like aiding and abetting, superior responsibility or JCE, instead holding the substantive elements of blame attribution constant across the various roles different actors might play. Thus, the Nuremberg Tribunal dispensed with “the distinguishing criterion” a majority at the ICC would later assume to be structurally inescapable. Although the judges at Nuremberg made no explicit reference to Getz or the unitary theory, their approach does point to a similar intellectual dissatisfaction at some of the earliest stages of modern ICL.

The same intellectual dissatisfaction is evident today, albeit among a minority of prominent international judges. Like other aspects of ICL, the differentiated system of blame attribution and the difficult normative dilemmas that accompany it are “haunted by the presence of dissenting counter-narratives.”<sup>35</sup> ICC Judge van den Wyngaert, for instance, has argued that “[v]ery often the acts and conduct of political and military leaders will simply not fit the mould of principal liability. To try to characterise them as principals at any cost will thus often be problematic from a legal and conceptual point of view. However, once the rigid division between [perpetration and complicity] is abandoned, there is no

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<sup>33</sup> For an overview of these cases, see THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, VOL. XV, 49–58 (1947).

<sup>34</sup> KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART 105 (2013) (“the IMT and IMTFE Statutes merely require a causal contribution to a certain criminal result, thereby opting for a unitarian concept of perpetration (Einheitstäterschaft). As will be seen below, the jurisprudence adopted this fairly unsophisticated approach.”); OLÁSOLO ET AL., THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 21 (2010) (“the IMT and IMTFE embraced a unitary model which did not distinguish between the perpetration of a crime... and participation in a crime committed by a third person”); and ALBIN ESER, INDIVIDUAL CRIMINAL RESPONSIBILITY 781 (2002) (“for supranational courts and codes, this somehow ‘holistic’ model of perpetratorship [the unitary theory of perpetration] seemed attractive enough to be followed by the Nuremberg and Tokyo Tribunals”).

<sup>35</sup> GERRY SIMPSON, LAW, WAR AND CRIME : WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 92 (2007). Simpson eloquently points out the “discordant notes” dissenting judges have often sounded in the history of ICL. To use his metaphor, these dissents on forms of attribution are discordant with respect to the majority of academic opinion on the topic by they turn out to be harmonic with Bernhard Getz’s unitary theory of perpetration.

reason to qualify them as principals in order to attribute the level of blame which they deserve.”<sup>36</sup> Similarly, ICC Judge Fulford has argued against “the perceived necessity to establish a clear dividing line between the various forms of liability... to distinguish between the liability of ‘accessories’... and that of ‘principals.’”<sup>37</sup> Admittedly, Getz took these sorts of ideas a step further by advocating for substantive consistency in standards of attribution, to the point that the importance of differentiating between them disintegrated. Still, the harmony between aspects of his theory and these dissenting opinions is an important part of what makes the history of the unitary theory so eerie now.

The familiarity of the unitary theory’s history for modern ICL also plays out in theory, where recent scholarship by leading theorists proves that intellectual history can also repeat. In a recent set of articles, for instance, one of the leading contemporary theorists of criminal law in the English-speaking world, Michael Moore, has surmised that complicity is conceptually “superfluous.”<sup>38</sup> He argues that “there is no unique desert basis for accomplice liability. Aiding another to cause some bad result is not an independent desert basis. It is a mere stand-in for one of the four general bases on which we are rightly blamed.”<sup>39</sup> Like the judges at Nuremberg and the ICC, this argumentation does not draw on the UIDP, Getz or the unitary tradition they helped initiate, but the underlying intellectual dissatisfaction with the autonomous concept of complicity mirrors Getz’s discontent a century prior, in ways that create a strange sense of *déjà vu*. Some of Moore’s language is even reminiscent of Getz—in concluding his brilliant study of the same topic more than a hundred years later, Moore opined that “[w]hat we have seen should be sufficient to sink the good ship *Complicity*, not rearrange its furnishings.”<sup>40</sup>

In Norway, this sinking came about at the behest of Getz himself together with the scholarly imprimatur of the UIDP. Professor Getz was a prominent member of the association, which helped the dissemination of

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<sup>36</sup> See Ngudjolo Trial Judgement, Case no.: ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert, (Dec. 18, 2012) ¶ 29.

<sup>37</sup> Prosecutor v Thomas Lubanga Dyilo, Case No.: ICC-01/04-01/06 Judgement pursuant to Article 74 of the Statute, (Mar. 14, 2012), Separate Opinion of Judge Adrian Fulford, ¶ 6.

<sup>38</sup> Michael S Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007); See also Michael S. Moore, *The Superfluity of Accomplice Liability*, in CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 280–323 (2009); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009).

<sup>39</sup> *Causing, Aiding, and the Superfluity of Accomplice Liability*, *supra* n 38, at 395.

<sup>40</sup> Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, *supra* note 36, at 449.

this thesis. His work quickly caught the attention of prominent criminal theorists, in an age when the law professor was the “hero figure” of legal globalization.<sup>41</sup> Unsurprisingly, this influence increased by some order of magnitude after he was asked to draft the Norwegian criminal code. According to one modern Norwegian scholar, Getz’s Code “won international recognition and, in its time, was considered the most modern penal code in Europe.”<sup>42</sup> Of course, its treatment of complicity surprised no one—the Norwegian Code of 1902 contained a pure unitary theory of perpetration, which remains in force to this day.<sup>43</sup> So in sharp contradistinction to the origins of global criminal doctrine I address in the context of Brazil below, the unitary theory was developed initially from conceptual first principles that still resonate with ICL judges and theorists today, then it was adopted by a selection of national legal systems like Norway with some important degree of “indigeneity.”<sup>44</sup> Certainly, there is still a great deal to be said for and against the unitary theory in ICL, but it is noteworthy how intellectual dissatisfaction was a key motivating factor in Norway’s turn away from a differentiated system, and how that dissatisfaction lives on in ICL today.

### III. UNDUE PRACTICAL DIFFICULTIES IN DENMARK

As was the case in Norway before its shift to a unitary system (and in ICL presently), the Danish Criminal Code of 1866 embraced a differentiated system of criminal responsibility. But following in Norway’s stead, Denmark parted ways with the differentiated model once presented with the perceived advance in criminal science the unitary theory entailed. To this day, “[i]n Danish literature on criminal law, the [unitary theory of perpetration] is considered to be by far superior to other legal models.”<sup>45</sup> In the Danish history, a leading Professor of Criminal Law named Carl Torp emerged as the chief protagonist for this doctrinal

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<sup>41</sup> Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 638 (2002) (“The hero figure of the first globalization was the law professor (author of codes and statutory modifications of codes, as well as of treaties)”).

<sup>42</sup> ANDENAES, *supra* note 11, at 20.

<sup>43</sup> *Id.* at 277. (“Whether the defendant is guilty as a principal or a cooperator is merely a factor to be considered in meting out punishment, and there is no judicial interest in drawing a sharp line between the two.”).

<sup>44</sup> I borrow the term from Schauer, who points to a frequent desire for reactionary law reform after periods of foreign dominance to create a “transformed republic... whose chief characteristic is its ‘indigeneity.’” FREDERICK F. SCHAUER, *THE POLITICS AND INCENTIVES OF LEGAL TRANSPLANTATION* (2000).

<sup>45</sup> Vestergaard, *supra* note 11, at 489.

realignment, although by that time, the impetus of the UIDP's endorsement in 1902 and the Norwegian example led by Getz undoubtedly reduced the intellectual leadership required of him. While Torp rehearsed a familiar set of conceptual arguments against the differentiated system in advocating for its dismantling in Denmark,<sup>46</sup> he also seized upon a range of practical observations about difficulties with its operation. In one instance, for example, he argued:

*“Presumably it is now recognized from all sides, that the current Criminal Code in relation to an accessory in a crime sets out a series of rather artificial and mutual artificial delimiting Concepts that only moderately correspond to life's natural Conditions and cause unnecessary difficulties in applying the law.”*<sup>47</sup>

Based on some years experience at the coalface, I am of the opinion that a wide variety of “modes of liability” in ICL have also become artificial, only moderately correspond to real life, and are unnecessary difficult to apply. To illustrate, I here focus on just one mode of liability, indirect co-perpetration, which appears to exemplify all three of the shortcomings Torp observed of the differentiated model operative in Denmark at the time.

Indirect co-perpetration has emerged as the next major trend in ICL's experimentation with standards of blame attribution.<sup>48</sup> The concept

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<sup>46</sup> CARL TORP, DEN DANSKE STRAFFERETS ALMINDELIGE DEL (1905) (“Presumably the participant's Act may be just as necessary a preliminary Condition as the perpetrator's crime offence ... It all must come to the recognition that every preliminary Condition in relation to a specific Circumstance is equally necessary and therefore in theory of equal Importance, so that it is impossible to single out one or more Conditions as relevant in contrast to the remaining Conditions.”) I am grateful to Anja Amdi Harild for the translation.

<sup>47</sup> Betænkning afgiven af Straffelovskommissionen af 9. November 1917 (“Report from the Penal Code Commission of November 9, 1917”) In the explanatory notes to the draft Offence Code, the Commission states “it cannot be recognized that there is a sharp essential difference between Perpetrators and Accessories”. See Danish Criminal Code Report of 1923, Explanatory Statements to the Draft Criminal Code, column 73.

<sup>48</sup> Strikingly, indirect co-perpetration is charged in most cases before the ICC presently, confirming that it represents the next trend in international blame attributions. The following is a non-exhaustive sample of cases involving indirect co-perpetration at the ICC. Prosecutor v. Bemba, Case No.: ICC-01/05-01/08-15, Warrant of Arrest, (Jun. 10, 2008), ¶ 21; Prosecutor v. Katanga and Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, ¶ 492 [hereafter “Katanga Confirmation Decision”]; Prosecutor v. Al Bashir, Warrant of Arrest, ICC-02/05-01/09-1, 4 March 2009, at 7; Prosecutor v. Kenyatta et al., Decision on the Confirmation of Charges, Case No.: ICC-01/09-02/11-382-Red, (Jan. 23, 2012), ¶ 300 [hereafter “Kenyatta

is an amalgam of two distinct “modes of liability.” The co-perpetration element, initially rejected at ad hoc tribunals, was recently included within the ICC Statute as a species of perpetration. The second component, indirect perpetration, is analogous to the Anglo-American concept of innocent agency, whereby an individual becomes responsible for a criminal offense by employing an innocent actor (such as a child) as an instrument through which he brings about the crime. By fudging the fact that African foot soldiers are *not* actually innocent agents, then marrying this slightly fictitious rendering of indirect perpetration to co-perpetration, the ICC has adopted a notion of “diagonal responsibility” to hold one African warlord responsible as a perpetrator for the crimes committed by rank and file soldiers in a separate armed group the warlord co-operated with. In my opinion, this approach dovetails with all of Torp’s practical criticisms of the differentiated system that was once in place within Denmark.

First, indirect co-perpetration is highly artificial. For some of the modern advocates of the unitary theory of participation, the very moment differentialists dilute indirect perpetration (a.k.a “innocent” agency) to the point where the actual foot-soldier doing the bloodletting need no longer be innocent, they do irreparable harm to their entire analytical scheme. As Thomas Rotsch has argued, once there is a fully responsible principal perpetrator (i.e. a foot-soldier who enjoys full moral capacity), there should be no leeway for applying the doctrine of indirect perpetration to the soldier’s superior if differentiation is to be taken seriously.<sup>49</sup> The very idea of a “perpetrator behind a perpetrator” demonstrates inductive reasoning in defiance of the rationale for *ex ante* differentiation in the first place. Once this idea is entertained, intuitions about culpability and sentencing are generating exceptional concepts that run counter to

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Confirmation Decision”]; Prosecutor v Ruto et al, Case No.: ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), ¶¶ 290-292 [hereafter “Ruto Confirmation Decision”]; Prosecutor v Bosco Ntaganda, Case No.: ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, (Jun. 8, 2014), ¶ 97 [hereafter “Ntaganda Confirmation Decision”]; Prosecutor v Laurent Gbagbo, Decision on the Confirmation of Charges Against Laurent Gbagbo, Case No.: ICC-02/11-01/11, (Jun. 12, 2014), ¶ 226 [hereafter “Laurent Gbagbo Confirmation Decision”] Part of my enthusiasm for the unitary theory of perpetration derives from my skepticism about the way in which modes of attribution seem to move in fads internationally, from superior responsibility, to JCE, and now to indirect co-perpetration and its various component parts. It is peculiar that blame attribution moves in fads internationally.

<sup>49</sup> ROTSCH, *supra* note 9, at 461–462.



foundational assumptions about differentiation.<sup>50</sup> If differentiation has to rely on a fiction to prop itself up, perhaps the concept should fall?

Second, indirect co-perpetration also vindicates Torp's concern that differentiated systems like that operative in modern ICL "only moderately correspond to real life." As I have pointed out elsewhere,<sup>51</sup> the risk in making a concept as complex as indirect co-perpetration a mainstay of blame attribution in ICL is that the meaning of increasingly abstract legal terms seems esoteric to defendants, victims and ordinary citizens, who no longer understand the terminology or its moral import.<sup>52</sup> To illustrate, when the ICC indicted former President Laurent Gbagbo as an indirect co-perpetrator, the BBC placed the mode of participation in parentheses to mark the technocratic legalese it had no expectation its readers would understand.<sup>53</sup> Contrariwise, if Gbagbo is responsible for the international crimes he is reproached for, it seems infinitely more likely that his making a substantial causal contribution to the crimes together with the necessary blameworthy moral choice will better "correspond to real life," in ways that Torp foresaw. Moreover, discarding the label "indirect co-perpetration" could minimize the distancing effect of culturally-specific legal terminology.

Third, Torp's misgiving that differentiated systems "cause unnecessary difficulties in applying the law" also seems apparent from the short history of indirect co-perpetration in ICL. In the interests of brevity, I here summarize a set of milestones in that history that, in my opinion, reveal precisely the type of over-complication I imagine Torp had in mind. The ICC has insisted that the combination of co-perpetration and indirect perpetration "allows the Court to assess the blameworthiness of 'senior leaders' adequately."<sup>54</sup> However, at least one judge has objected that by

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<sup>50</sup> *Id.* at 461–462. Rotsch's broader point is that as a result of these dynamics, different forms of participation do not adequately mirror distinct degrees of culpability, traditional doctrines on modes of participation are manipulated in order to achieve fair outcomes, and ultimately, distinguishing between different modes of participation is already unnecessary.

<sup>51</sup> Stewart, *supra* note 2, at 212.

<sup>52</sup> *Id.* at 212.

<sup>53</sup> John James, *Ivory Coast: Gbagbo faces murder and rape charges*, 30 November 2011, <http://www.bbc.com/news/world-africa-15960254> ("Former Ivory Coast President Laurent Gbagbo is facing four charges of crimes against humanity, the International Criminal Court (ICC) has said. He is accused of being an 'indirect co-perpetrator' of murder, rape, persecution and other inhuman acts.")

<sup>54</sup> Prosecutor v Germain Katanga et al, Decision on the Confirmation of Charges, Case No.: ICC-01/04-01/07-717, (Sept. 30, 2008), ¶ 492.

this method, the Court has invented a “totally new mode of liability.”<sup>55</sup> The unitary theory of perpetration that so inspired Torp and his diverse contemporaries within the UIDP would not allow for even the suggestion of totally new modes of liability like this since the unitary theory is, by definition, singular. Similarly, the ICC has adopted Claus Roxin’s theory of organizational perpetration as a part of the co-perpetration component of indirect co-perpetration,<sup>56</sup> even though one leading German theorist feared that this “may create more problems than it solves.”<sup>57</sup> Then, after the initial appearance of indirect co-perpetration at the ICC, subsequent Chambers added another complicated mental element,<sup>58</sup> before having to determine whether *dolus eventualis* was a sufficient basis for establishing indirect co-perpetration.<sup>59</sup> Presently, depending on which interpretation one follows, the test for indirect co-perpetration involves five objective elements and four subjective, all of which are linguistically complex.<sup>60</sup>

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<sup>55</sup> Prosecutor v Mathieu Ngudjolo Chui, Judgment Pursuant to article 74 of the Statute, Case No.: ICC-01/04-02/12, (Dec 18, 2012), Concurring Opinion of Judge Van den Wyngaert, ICC-01/04-02/12-4, ¶¶ 60-61.

<sup>56</sup> See Katanga Confirmation Decision, *supra* note 48, ¶ 498; Ruto Confirmation Decision, *supra* note 48, ¶ 313; Ntaganda Confirmation Decision, *supra* note 48, ¶ 104. Laurent Gbagbo Confirmation Decision, *supra* note 48, ¶ 234.

<sup>57</sup> Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT’L CRIM. JUST. 91, 105 (2011) (“Since criminal liability for ordering or instigation is a sufficient basis for imposing severe sentences on responsible figures in the background of the actual crimes, adopting the notion of ‘perpetration through an organization’ may create more problems than it solves.”). I am inclined to extend this reasoning to all modes of liability, but even if there is a principled basis for denying the criticism that reach, it is still telling that a figure of Weigend’s authority would question the merit of employing a German concept whose use is so widespread at the ICC now.

<sup>58</sup> Although the Lubanga Confirmation of Charges Decision had not required this element, the Katanga Confirmation of Charges Decision added that “the suspects must be aware of the character of their organisations, their authority within the organisation and the factual circumstances enabling near-automatic compliance with their orders.” Compare Prosecutor v Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, Case No.: ICC-01/04-01/06 (Jan. 29, 2007), ¶ 326 [hereafter “Lubanga Confirmation Decision”] with Katanga Confirmation Decision, *supra* note 48, ¶ 534.

<sup>59</sup> In the Katanga and Kenyatta Confirmation Decisions, Pre-Trial Chambers I and II made no mention of whether *dolus eventualis* would suffice for indirect co-perpetration. Subsequently, Pre-Trial Chamber III explicitly excluded it in the Bemba and Ruto Confirmation Decisions. Compare Katanga Confirmation Decision, *supra* note 48, ¶ 531 and Kenyatta Confirmation Decision, *supra* note 48, ¶ 410 with Ruto Confirmation of Charges Decision, *supra* note 48, ¶ 333-336.

<sup>60</sup> For an excellent summary of this and other ICC case law on forms of participation, see WOMEN’S INITIATIVES FOR GENDER JUSTICE, *MODES OF LIABILITY: A REVIEW OF THE INTERNATIONAL CRIMINAL COURT’S CURRENT JURISPRUDENCE AND PRACTICE* 60–61 (2013), <http://iccwomen.org/documents/Modes-of-Liability.pdf> (setting out the elements of indirect-perpetration across two pages).

Most significantly, I suspect that Torp would find all these difficulties to be of no conceptual importance,<sup>61</sup> and therefore categorize them as “unnecessary.”

There is much for ICL to learn from this very brief history. After almost two decades of negotiations Torp led in Denmark, the Danish parliament adopted a unitary theory of perpetration. Like Getz, Torp was also the author of the criminal code that contained the system of blame attribution he saw as preferable in a national context that did not have to synthesize multiple legal traditions from throughout the world. So by a process that was not entirely original but still infinitely freer than that which brought about differentiated systems of blame attribution in most systems of criminal justice (see Brazil below), the Danish adopted a unitary theory of perpetration with the backing of global criminal law theorists and the good example of a Nordic cousin. Moreover, despite the power and influence of the largest European states that adopt a different system, and the rise of international criminal justice that defers to these powerful systems, Denmark has stuck with a unitary theory of perpetration to this day.<sup>62</sup> Strikingly, the practical reasons for its shift to the unitary theory are now mirrored internationally, except that the need for coherence is far greater for a global brand of criminal attribution.

#### IV. A MULTIPLICITY OF COMPETING SOLUTIONS IN ITALY

Italy adopted a variant of the unitary theory of perpetration in 1930, in a process that again saw the UIDP and leading local scholars (as distinct from colonializing masters, market pressures or reactionary assertions of autonomy) play a leading role. In 1889, the Criminal Code of the Kingdom of Italy, known as the Zanardelli Code after its author, formally propagated a differentiated model of attribution replete with the usual catalogue of “modes of liability.” In 1919, however, an influential member of the Italian positivist school of criminology named Enrico Ferri was chosen as President of the Criminal Reform Commission, which

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<sup>61</sup> In this respect, while I view Shachar Eldar’s excellent article on indirect co-perpetration as the most sophisticated conceptual account of the topic I have read, the very thoughtful piece does not articulate why a substantial causal contribution plus the mental element of the crime charged should not suffice for indirect perpetration, in which case we could dispense with this complicated architecture. Conversely, if these two elements are not sufficient, the question may become whether indirect co-perpetration is in danger of illiberal excess. See Shachar Eldar, *Indirect Co-Perpetration*, 8 CRIMINAL LAW AND PHILOSOPHY 605–617 (2014).

<sup>62</sup> Vestergaard, *supra* note 12 (discussing the parameters and merits of the unitary theory in modern Danish law).

began a process of rationalizing these forms of participation. It was not until the then Minister of Justice, Alfredo Rocco, tabled his “Report on the Final Draft of the 1930 Code,”<sup>63</sup> however, that this process of rationalization reached its apogee—Italians abandoned modes of participation in favor of a unitary theory of perpetration like that endorsed by the UIDP. Once again, aspects of this history reveal points of strange commonality with modern ICL.

Besides the conceptual motivations others had voiced, the Italians also saw real practical advantages in this new rationalization of diverse standards of blame attribution, reasoning that a unitary theory would provide a definitive solution to the multiplicity of competing theories about the distinction between perpetration and complicity, which never congealed into a stable shared understanding. In this respect, the important point, which dovetails with the experience of international courts and tribunals since their modern revival, is that the shift to a unitary theory became important in Italy when attempts at distinguishing perpetrators from accomplices created enormous legal uncertainty. Numerous creative solutions proliferated without ever proving terribly convincing.<sup>64</sup> As Sergio Seminara shows, at the time the old Zanardelli Code was in force in Italy, there were a wide range of doctrine on offer claiming to separate perpetrators from accessories, but none were able to point to convincing criteria, such that the problem remained without stable solution from start to finish.<sup>65</sup> In the words of Alfredo Rocco himself, “it is precisely for practical needs that doctrine and law have struggled to find a secure criteria to distinguish, in case of participation in a crime, principals from accessories.”<sup>66</sup>

This history is somewhat sobering. If international criminal lawyers assume that a consistent international *dogmatik* will inevitably emerge from the ashes of numerous failed experiments, in some instances, history suggests otherwise.

Already, attempts to differentiate perpetration from complicity in ICL are displaying many of the qualities that led Italians to walk away from the entire project. The Italian concern that no satisfying point of differentiation ever emerged in Italy despite no shortage of competing

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<sup>63</sup> Alfredo Rocco, *Progetto definitivo di un nuovo codice penale con la relazione del Guardasigilli On. Parte I. Relazione sul Libro I del Progetto, LAVORI PREPARATORI DEL CODICE PENALE E DEL CODICE DI PROCEDURA PENALE*, Vol. V, 165 (1929).

<sup>64</sup> SERGIO SEMINARA, *TECNICHE NORMATIVE E CONCORSO DI PERSONE NEL REATO* 31–42 (1987) (listing a number of doctrines which, at the time the old Zanadelli Code was in force, were not able to point out straight criteria for distinguishing between principals and accessories.).

<sup>65</sup> *Id.* at 31–42.

<sup>66</sup> Rocco, *supra* note 63, at 166.

theories has proved prescient for ICL now. Famously, the ICC's adoption of "control over the crime" to do this work met with powerful dissenting opinions by two prominent judges, both of whom disputed the need for the test at all.<sup>67</sup> Likewise, in the academy, the very best scholars have disputed objective, subjective and mixed theories of differentiation with great insight and rigor but without discernible agreement between them,<sup>68</sup> in ways their Italian predecessors experienced and would probably have anticipated in ICL anew. In fact, some of the very best scholars have ultimately concluded that "it is highly questionable whether [the ICC rules governing blame attribution are] based on a single coherent, normative theory of participation."<sup>69</sup> The Italians, on the other hand, did embrace a single coherent, normative theory that stands to transcend the difficulties ICL is (also) now negotiating. Again, the similarities with ICL's present are eerie.

Instead of retracing the various theories proffered to differentiate perpetration from complicity, I pause to offer a qualified defense of the Rocco Code in which the Italian rendition of the unitary theory first appeared. Some will object that this code is an example of illiberal criminal law in the service of totalitarianism. Rocco was a self-proclaimed fascist, who unashamedly described the legislation he crafted for Mussolini's autocratic regime as "a political code."<sup>70</sup> Consequently, much of the comparative literature still describes the Rocco Code as "the Fascist Code."<sup>71</sup> As a result of this unholy historical association, the unitary theory of perpetration is often unfairly dismissed out of hand—one

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<sup>67</sup> See statements by ICC Judges Van den Wyngaert and Fulford *supra* notes 36 and 37.

<sup>68</sup> For a set of excellent but contrasting perspectives on the dividing line between perpetration and complicity, see Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHI. J. INT'L L. 159–200 (2011); Jens David Ohlin, Elies Van Sliedregt & Thomas Weigend, *Assessing the Control-Theory*, 26 LEIDEN J. INT'L L. 725–746 (2013); Jens David Ohlin, *Searching for the Hinterman In Praise of Subjective Theories of Imputation*, 12 J INT CRIMINAL JUSTICE 325–343 (2014); Carl-Friedrich Stuckenberg, *Problems of "Subjective Imputation" in Domestic and International Criminal Law*, 12 J INT CRIMINAL JUSTICE 311–323 (2014); Alicia Gil Gil & Elena Maculan, *Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga case to the Katanga judgment*, 28 LEIDEN J. INT'L L. 349–371 (2015); Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 91–111 (2011); KAI AMBOS, *TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART* 102–180 (2013).

<sup>69</sup> Ohlin, Van Sliedregt, and Weigend, *supra* note 68, at 744.

<sup>70</sup> MARC ANCEL, *SOCIAL DEFENCE: A MODERN APPROACH TO CRIMINAL PROBLEMS* 65 (1966).

<sup>71</sup> RICHARD VOGLER, *A WORLD VIEW OF CRIMINAL JUSTICE* 64 (2005); ANCEL, *supra* note 67, at 65.

Argentine theorist argues that “due to the connection between the unitary theory and these ideas [Fascism and Nazism] today nobody argues them.”<sup>72</sup> That reasoning, however, is likely a *non sequitur*, deploying a kind of guilt by association to discredit a concept that does not deserve the reputational sleight.

In truth, the Rocco Code was not all bad—it also ushered in a range of liberal changes,<sup>73</sup> then survived several decades of reform by multiple democratic governments in Italy that were “avowedly anti-fascist.”<sup>74</sup> This, at the same time that certain provisions, especially that governing perpetration, were voluntarily “transplanted” into adjacent criminal systems, most notably in Brazil (see below).<sup>75</sup> From a wider vantage point, too, the almost invariable irony of episodes of mass violence is that they can also contain isolated pockets of liberal development. Some of the most important “discoveries” in German criminal science, for instance, were first unearthed and applied during the Nazi reign of terror.<sup>76</sup> Thus, as a general rule, pointing to the fascist origins of the Rocco code is not necessarily an indictment of all of the concepts that appear in that code. Some, for instance, may have amounted to important normative developments that have escaped the gaze of theorists of blame attribution in modern ICL.

In the case of the unitary theory in particular, the allegations from illiberal authoritarianism are clearly specious. As a matter of history, the concept’s origins pre and post-date WWII, as Getz, Torp, von Liszt and

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<sup>72</sup> EDGARDO ALBERTO DONNA, *TEORIA DEL DELITO Y DE LA PENA* 75 (2003) (arguing that “due to the connection between the unitary theory and these ideas [Fascism and Nazism] today nobody argues them. Because of its obvious danger and its incompatibility with the Rule of Law.”); See also, MIGUEL DÍAZ Y GARCÍA CONLLEDO, *ESTUDIOS DE FILOSOFÍA DEL DERECHO PENAL* 75 (2006) (criticizing the unitary theory for similar reasons).

<sup>73</sup> Giuliano Vassalli, *The Background of Current Italian Penal Law Reform*, in *STUDIES IN COMPARATIVE CRIMINAL LAW* 51–64, 59 (Edward M. Wise & Gerhard O. W. Mueller eds., 1975) (“The Rocco Code raised the age of criminal capacity (i.e., the age at which punishments may be imposed in cases of recognizable maturity) from nine to fourteen years. It expressly authorized detentive punishment aimed solely at the child’s moral reeducation and it permitted judicial pardon of the first offense attributable to minors up to eighteen years in cases where a detentive punishment not exceeding one year would otherwise be imposed.”).

<sup>74</sup> *Id.*, at 52–54. (explaining why the Italian government never enacted a different code after the fall of Mussolini). For a brief English-language overview of the changes since the Rocco Code, see ASTOLFO DI AMATO, *CRIMINAL LAW IN ITALY* 43–46 (2011).

<sup>75</sup> See Part IV below.

<sup>76</sup> See, for instance, Markus D. Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 *GERMAN L. J.* 1049–1071, 1061–1066 (2005) (Discussing the significance of Hans Welzel’s theory of finalism in the realm of action, which emerged in 1939 and 1940, as “easily the most influential recent theory of German criminal law”.)

the UIDP show. Substantively, the theory also holds comparative advantages in the subjective realm—by maintaining parity in the mental elements required for perpetrators and accomplices, the unitary theory avoids “modes of liability” acting as a prism that distorts responsibility, instead of assigning it in line with the culpability announced in the crime (with which both perpetrator and accomplice will be convicted). A doctrine like JCEIII has proved highly controversial in international criminal law, precisely because it tolerates major cleavages between the mental element announced in the mode of liability (foreseeability) and that contained in many crimes with which the mode couples (genocide, for instance, requires a specific purpose). By solving this problem in a defendant’s favor, the unitary theory promotes *greater* liberalism, vindicating the UIDP’s enthusiasm for what they perceived as a genuine advance in criminal science. In short, Italian fascism is no blemish on the unitary theory’s liberal credentials.

Consequently, if ICL is committed to liberal principles of blame attribution, it might also choose to transcend the dilemmas it currently faces through recourse (back) to the unitary theory of perpetration applied at Nuremberg, or even better, towards a more self-conscious variant that is crafted by academics in keeping with the origins of the unitary theory nationally. After all, the Italian experience is instructive in at least one important respect: it suggests that if left unchecked, the very thoughtful disagreement that presently exists among leading judges and scholars about the dividing line between perpetration and complicity in ICL may not come to any widely-shared conclusion, or to say the same thing differently, may continue in perpetuity without ever reaching consensus in theory or practice. This prospect of disagreement *ad infinitum* should be unsettling to criminal lawyers concerned about the right to a trial based on pre-established, stable legal principles rather than a process that involves a multiplicity of goal posts that are constantly in motion. At the very least, a unitary theory like the one adopted in Italy in 1930 warrants far great scholarly engagement as a plausible solution to debates that could well turn out to be intractable.

## V. AUTONOMOUS CHOICE IN BRAZIL

Until the year 1822, Brazil was a juridical dependency of Portugal. In the year 1822, what we now know as Brazil proclaimed its independence.<sup>77</sup> The first Penal Code of Brazil was promulgated in 1830,

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<sup>77</sup> Celso Campilongo, *History and Sources of Brazilian Law*, in INTRODUCTION TO BRAZILIAN LAW 1–14, 2–3 (Fabiano Deffenti ed., 2011).

and for better or worse, it maintained the differentiated system of blame attribution that was in place under the authority of its erstwhile colonial masters, who had in turn borrowed it from the French Penal Code of 1810 and the Spanish Penal Code of 1822.<sup>78</sup> The differentiated system of blame attribution continued in the Brazilian Penal Code of 1890, but in 1940, Brazilian legislators too would make the transition to a unitary theory of perpetration on the strength of the UIDP's influence and the example set by pioneering European nations. Article 25 of the Brazilian Penal Code of 1940 states that "Whoever, in any way, concurs for the crime is under the penalties attributed to it." There is some debate as to the origins of the provision—the received wisdom is that it was borrowed from the Italian Rocco Code.<sup>79</sup> Costa e Silva, however, argues that the Norwegian Penal Code of 1902 inspired the position, since the Norwegian influence was evident in Brazil within ordinances prior to that date.<sup>80</sup> Whatever the dominant source of inspiration, ICL can learn something significant from the manner in which the unitary theory was adopted in Brazil—it was openly elected not imposed.

To those familiar with debates about "modes of liability" in modern ICL, the Brazilian refusal to differentiate between forms of attribution will appear bizarre, uninformed, or fringe, but in fact the abundance of differentiated systems of blame attribution throughout the many systems of criminal law globally that informs these perceptions largely has forced imposition through colonialism to thank. With the partial exception of Italy, the European states that had adopted a unitary theory like that employed at Nuremberg and Tokyo were never colonial powers. Hence, when Brazil came to adopt the unitary theory of perpetration, it did so far more willingly. England, France, Spain and Germany, by contrast, all adopted the differentiated system now ascendant in ICL, then disseminated this system to the four corners of the global as part of European colonial rule. As I have argued elsewhere together with Asad Kiyani, the implications for our appreciation of diversity in criminal doctrine globally are appreciable—criminal doctrine is not a safe

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<sup>78</sup> NILO BATISTA, *CONCURSO DE AGENTES: UMA INVESTIGAÇÃO SOBRE OS PROBLEMAS DA AUTORIA E DA PARTICIPAÇÃO NO DIREITO PENAL BRASILEIRO* 5 (Liber Juris: 1979). On the history of the 1830 criminal code, see Tobias Barretto, *Do Mandato Criminal*, in *ESTUDOS DE DIREITO*, 223-227 (Rio. 1822).

<sup>79</sup> Batista, *supra* note 78, at 12.

<sup>80</sup> See ANTONIO JOSÉ DA COSTA E SILVA & LUIZ FERNANDO DA COSTA E SILVA, *COMENTÁRIOS AO CÓDIGO PENAL BRASILEIRO* 154 (1967). Batista, however, retorts that there is no concrete evidence that such code had exercised any kind of influence in Brazil. *Id.*



guarantor of a diversity in underlying social and cultural values.<sup>81</sup> The Brazilian relationship to the unitary theory is, however, an exception to this trend, which ICL may wish to replicate for symbolic as well as functional reasons.

The truth is that ICL frequently absorbs laws that are colonial artifacts, including standards of blame attribution. In the *Bagasora* Trial Judgment, for instance, an ICTR Trial Chamber cited to the Indian Penal Code (IPC) of 1860 as the embodiment of Pakistani criminal law in a survey of global criminal law.<sup>82</sup> In fact, the British used the IPC as a template for most all their colonial territories: it was implemented verbatim in countries as diverse as Uganda, Singapore and Australia, without calibration to local circumstances.<sup>83</sup> Similarly, by decree dated January 7th, 1886, the Belgian King Leopold promulgated the first Code Pénal du Congo. The code involved “vocabulary, formulation, and structure that was directly borrowed from Belgian criminal law legislation”.<sup>84</sup> Independence in 1960 just continued this trend,<sup>85</sup> such that the leading modern textbook on Congolese criminal law—authored by the

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<sup>81</sup> See James G. Stewart and Asad Kiyani, *The Ahistoricism of Legal Pluralism in International Criminal Law*, forthcoming.

<sup>82</sup> Prosecutor v. Bagosora et al., Case No. ICTR-98-41-A, Appeals Judgement, ¶ 729, n.1680 (Dec. 14, 2011). See also, Prosecutor v. Kunarac et al, Case No. IT-96-23-T& IT-96-23/1-T, Judgement, ¶ 454 n.1160 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (drawing on Pakistani criminal law, and many other national definitions, to interpret the scope of rape).

<sup>83</sup> Uganda received the Indian Penal Code (IPC) and Criminal Procedure Code in 1897 and 1902 respectively. See Henry Francis Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876 – 1935* (1974) 18 J. Afr. L. 6, 6 – 7. For discussion of the IPC’s transmission to Singapore, see BARRY WRIGHT, STANLEY YEO & WING-CHEONG CHAN, CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM 2 (2013). Evidently, the imposition of the IPC was delayed a generation in Australia because European settlers balked at the prospect of adopting criminal law standards that were originally crafted for Indians. See Barry Wright, *Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples* (2007) 26 U. Queensland L. J. 39, 46 – 47.

<sup>84</sup> Marie-Benedicte Dembour, *La peine durant la colonisation belge*, in LA PEINE - PUNISHMENT, 67 (De Boeck Université 1991) (1989) Dembour is also of the opinion that at the time of writing, this remained true: “[e]ncore aujourd’hui, le système pénal zaïrois reste fortement imprégné des principes que le colonisateur belge a introduits...”

<sup>85</sup> In discussing the history of criminal law in the DRC, Rubbens argues that “[w]ith the change to Republican status, the criminal law has scarcely changed.” Antoine Rubbens, *The Congo Democratic Republic*, in AFRICAN PENAL SYSTEMS 14, 16 (1969). Although Rubbens was writing in 1969, only a matter of years after independence, more recent studies conclude similarly. Dembour, for instance, is also of the opinion that “[e]ncore aujourd’hui, le système pénal zaïrois reste fortement imprégné des principes que le colonisateur belge a introduits...” Dembour, *supra* note 84, at 69.

Dean of the School of Law at the Université de Kinshasa—still draws a direct line between the current criminal code and Belgian decrees of 20 January 1940 and 7 January 1886.<sup>86</sup>

To cite one final example from a national system that was not formally colonized, the Japanese adopted German notions of (differentiated) blame attribution at the turn of the 19<sup>th</sup> Century to ward off full-blown colonial occupation.<sup>87</sup> Gunboat diplomacy by Western states compelled the Japanese to “elect” a European model of criminal justice, such that they would do internally what colonialism would have achieved otherwise.<sup>88</sup> As Anthony Anghie has explained, the litmus test for the type of international recognition that would forestall formal colonial rule, known as standards of civilization, demanded that states like Japan create “idealized European standards in both their external and, more significantly, internal relations.”<sup>89</sup> To comply with this exigency, Japan initially adopted the French Napoleonic Penal Code (1880) and the Code of Criminal Instruction (1880),<sup>90</sup> but after only a very brief period in effect, the French-based code came to be perceived as overly liberal, and incapable of legitimating the structure and values of the imperial regime.<sup>91</sup> In looking for European alternatives, the Japanese found German law more advanced and German society more comparable.<sup>92</sup> Consequently, when one turns to Japanese modes of attribution now, they reveal a

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<sup>86</sup> NYABIRUNGU MWENE SONGA, *TRAITÉ DE DROIT PÉNAL GÉNÉRAL CONGOLAIS* 49 (2001) (“La loi pénale trouve son siège principal au code pénal. Celui-ci, qui est aujourd’hui porté par le décret du 30 janvier 1940, a eu un début de formulation dans un texte législatif du 7 janvier 1886”).

<sup>87</sup> See SHIGEMITSU DANDO, *THE CRIMINAL LAW OF JAPAN: THE GENERAL PART* 34-35 (B.J. George trans. 1997). See also, Sally Engle Merry, *Colonial and Postcolonial Law*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 569, 570 (Austin Sarat, ed., 2004).

<sup>88</sup> Ram Prakash Anand, *Family of “Civilized” States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 *J HIST. INT’L L.* 1, 9–14 (2005). MICHAEL R. AUSLIN, *NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY* 1–8 (2006).

<sup>89</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 84 (2007).

<sup>90</sup> Wilhelm Röhl, *Generalities*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, 24 (Wilhelm Röhl, ed., 2004).

<sup>91</sup> Karl-Friedrich Lenz, *Penal Law*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, *supra* note 90, at 609–10. See also SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 9 (2011).

<sup>92</sup> The German code appeared especially relevant to the Japanese context: Germany was a relatively new nation, trying to create a federation out of a monarchical system of government while reconciling historical and customary practice with statutory law. Ronald Frank, *Civil Code*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, *supra* note 90, at 183.

differentiated system quite alien to Anglo-American audiences, which mirrors German criminal law and theory more or less precisely.<sup>93</sup>

Through all these processes, not the legislative autonomy apparent in Brazil, the differentiated system of blame attribution became most prevalent throughout the world. By the same dynamic, it also permeated international law. Asad Kiyani and I have spent long hours plotting the history of criminal law doctrine at each major interval in the development of supranational ICL institutions.<sup>94</sup> I will reiterate just one telling anecdote here to show how modes of attribution at the international level are infused with the same influences that propagated the differentiated model throughout much of the world. As Kiyani and I show, in elevating Joint Criminal Enterprise (“JCE”) into ICL, the *Tadić* decision cited a very limited set of state practice from “England and Wales, Canada, the United States, Australia and Zambia.”<sup>95</sup> Regrettably, drawing on just English-speaking systems effectively double-counted the influence of law generated through British colonialism: once in the metropole then several times again within former colonies the parent system had constructed in its own image.

Ironically, the same dangers are evident within judicial opposition to aspects of JCE. A decision of the Extraordinary Criminal Chambers of Cambodia (ECCC) rejecting one component of *Tadić*’s rendering of JCE pointed to the absence of this aspect of the concept in Cambodian criminal law.<sup>96</sup> Yet, as authority for this more restrictive reading of JCE, the ECCC cited a French text on the Cambodian *Projet de Nouveau Code Pénal*, which explained Cambodian modes of attribution in terms that reflected

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<sup>93</sup> To cite but a few illustrations, Japanese criminal law adopts a German tripartite structure, differentiating the paradigm of the crime from justifications and excuses, whereas Anglo-American systems amalgamates the latter two of these categories. Dando, *supra* note 87, at 3–4. Following their German inspiration, Japanese criminal law also includes *dolus eventualis* as the lowest sub-category of intention, in contrast with Anglo-American criminal law, whose closest equivalent is a stand-alone mental element called recklessness. For the Japanese treatment of *dolus eventualis* as intention, see *ibid*, at 154–55. Normally, recklessness is not assimilated to intention in English-speaking systems as occurs in Germany, and by mimicry now, Japan. Finally, Japanese criminal also rejects the objective theory of perpetration in favor of quintessentially German accounts of the dividing line between perpetration and complicity—while Anglo-American criminal law (unconvincingly) always treats the person doing the killing as the perpetrator, both Japanese and German criminal law do not. Compare Dando, *supra* note 87, at 217-219, with MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 156-166 (2008).

<sup>94</sup> See *The Ahistoricism of Legal Pluralism in International Criminal Law*, *supra* note 81.

<sup>95</sup> Prosecutor v. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), ¶ 224.

<sup>96</sup> See Prosecutor v Kaing Guek Eav (Duch Case), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case No: 002/19-09-2007-ECCC/OCIJ (PTC38), (May 20, 2010), ¶ 41.

French law *par excellence*.<sup>97</sup> This parallelism was largely unsurprising since French criminal law was introduced into Cambodia as early as 1929 as part of colonial control over “French Indochina,” and French law remains the dominant legal influence in Cambodia to this day.<sup>98</sup> The net effect, given that this anecdote is in step with a global trend, is that the existence and shape of international “modes of liability” is often a product of (competing) colonial legacies rather than a volitional adoption of criminal law standards among affected populations. Through these ignoble processes, then, the differentiated system of blame attribution has gained ascendancy globally.

By contrast, the Brazilian choice to adopt the unitary theory of perpetration appears to epitomize a far greater degree of autonomy, without the layers of coercion that are woven through the history of the differentiated system.

## VI. AVOIDING THE RECHARACTERIZATION PROBLEM IN AUSTRIA

In 1975, the Austrian legislature adopted a unitary theory of perpetration too, chiefly due to the seminal work of Austrian criminal theorist Diethelm Kienapfel.<sup>99</sup> Like its forbearers elsewhere, the prior Austrian Criminal Code of 1852 contained differentiated “modes of liability.” At the same time, the earlier Austrian system adopted the conceptually bizarre practice of assigning equal punishments to all participants within the confines of a general part that differentiated between different forms of participation, as is now the case in England, France, and the ICC.<sup>100</sup> The peculiarity, to draw again on George Fletcher, is that this back-end equivalence arguably renders the front-end division redundant.<sup>101</sup> When the Austrian Commission of Criminal Law was

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<sup>97</sup> *Id.*

<sup>98</sup> Phann Vanrath, *The Basics of Substantial Cambodian Criminal Law*, in INTRODUCTION TO CAMBODIAN LAW 198, 201 (Hor Peng, Kong Phallack, & Jörg Menzel, eds., 2010) (noting as well that French criminal law was in force in Cambodia since 1929 and that the 2009 code was drafted jointly by Cambodian officials and French experts).

<sup>99</sup> DIETHELM KIENAPFEL, DER EINHEITSTÄTER IM STRAFRECHT (1971).

<sup>100</sup> WEIBER, *supra* note 12, at 126. For further discussions of this history, see WOLFGANG SCHÖBERL, DIE EINHEITSTÄTERSCHAFT ALS EUROPÄISCHES MODELL: DIE STRAFRECHTLICHE BETEILIGUNGSREGELUNG IN ÖSTERREICH UND DEN NORDISCHEN LÄNDERN 50–56 (1 ed. 2006); ROTSCH, *supra* note 9, at 177–187.

<sup>101</sup> GEORGE FLETCHER, RETHINKING CRIMINAL LAW 651 (1978) (in discussing the French and English statutes differentiating perpetrators from accomplices then assigning them the same maximum penalties, Fletcher asks “why the French and Anglo-American systems ever recognized distinctions among perpetrators, joint perpetrators and accomplices.”).

established soon after WWII to rethink the earlier code, doing away with this normative oddity was high among their priorities. Strangely, however, the same oddity is retained in the ICC Statute—the ICC sets out a differentiated system of blame attribution without formally requiring a reduction in an accomplice’s sentence, and thus far, the ICC’s various Chambers have opined that complicity need not warrant a reduction of any sort.<sup>102</sup>

I seize, however, upon a different point of commonality between modern ICL and Austria pre-unitary theory. One of the key factors in the unitary theory’s favor, which carried great weight in the Austrian decision to abandon “modes of liability” was that the new unitary theory precluded the possibility of appealing against the stipulation of a “mode of liability” if the classification changed late in a trial.<sup>103</sup> Since all forms of participation were substantively identical, there would be no prejudice to the defendant if the form of perpetration was wrongly determined at the outset.<sup>104</sup> By chance, this coincides perfectly with the Regulation 55 conundrum the ICC now faces, which has caused a great deal of consternation in judicial and extra-judicial writing. I pause, then, to introduce the current dynamics of the Regulation 55 debate internationally, showing once again how curiously, history sometimes repeats.

Regulation 55 of the ICC Rules of Procedure and Evidence provides that a “Chamber may change the legal characterization of facts to accord with the crimes [...] or to accord with the form of participation of the accused [...] without exceeding the facts and circumstances described in the charges and any amendments to the charges.”<sup>105</sup> The rule has proved controversial in practice, with respect to the ability to legally recharacterize crimes as well as forms of participation. As regards the former, an ICC Pre-Trial Chamber invoked Regulation 55 to recharacterize an armed conflict in the DRC as international rather than

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<sup>102</sup> The Katanga Sentencing Decision states that “[a]s stated by the Chamber in its Judgment, article 25 [of the ICC Statute] merely identifies and lists various forms of illegal conduct and, in that respect, the proposed distinction between the liability of a perpetration of a crime and that of an accessory to a crime does not in any way amount to a hierarchy of blameworthiness, let alone prescribe, even by implication, a scale of punishments.” See *Prosecutor v Germain Katanga*, Case No.: ICC-01/04-01/07, *Decision on Sentence Pursuant to Article 76 of the Statute*, 23 May 2014, ¶ 61. I am grateful to Barbora Holá for her very helpful advice about this issue.

<sup>103</sup> WEIBER, *supra* note 12, at 143.

<sup>104</sup> *Id.* at 143.

<sup>105</sup> Regulations of the Court, Adopted by the judges of the Court on 26 May 2004, Official Documents of the ICC, ICC-BD/01-01-04.

non-international.<sup>106</sup> The test's larger controversies, however, have come in cases involving the recharacterization of forms of participation, sometimes well after in-court proceedings have come to a close,<sup>107</sup> thereby emulating the very problem Austrians sought to resolve through recourse to a unitary theory of perpetration.

On 21 September 2012, after the prosecution case had closed and the Court was over a month into the Defense case, an ICC Trial Chamber gave notice pursuant to Regulation 55 that it could choose to modify the legal characterization of the facts that had emerged in one-time DRC Vice-President Jean-Pierre Bemba's trial. Instead of requiring Bemba's "knowledge" of his subordinates' crimes for the purposes of superior responsibility, the Court intimated that "should have known" would suffice.<sup>108</sup> Then, far more controversially, six months after both the prosecution and defense cases had ended, a Trial Chamber notified the parties that it intended to consider Congolese warlord Germain Katanga's liability as an entirely lesser form of participation, not co-perpetration as he was charged with.<sup>109</sup> One of the judges in the case rebuked the decision severely in dissent, arguing that it went "well beyond any reasonable application of the provision and fundamentally encroaches upon the accused's right to a fair trial."<sup>110</sup> With one notable exception, academic studies of the topic have mirrored the judicial disquiet,<sup>111</sup> but few have

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<sup>106</sup> Lubanga Confirmation Decision, *supra* note 58, ¶ 156. By chance, I also think the difference between international and non-international armed conflict should be abandoned, especially for the purposes of war crimes in ICL. See James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313–350 (2003).

<sup>107</sup> Susana SáCouto and Katherine Cleary have written an excellent report summarizing the cases to date and considering their implications for rights of the accused. See SUSANA SÁCOUTO & KATHERINE CLEARY, REGULATION 55 AND THE RIGHTS OF THE ACCUSED AT THE INTERNATIONAL CRIMINAL COURT (2013), <https://www.wcl.american.edu/warcrimes/icc/documents/Report17.pdf> (last visited Oct 23, 2015).

<sup>108</sup> The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Giving Notice to the Parties and Participant that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of The Regulations of The Court, Case No.: ICC-01/05-01/08-2324, (Sept. 21, 2012), ¶ 5.

<sup>109</sup> The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, ICC-01/04-01/07-3319-tENG/FRA, ¶ 6 (notifying the parties that "Katanga's mode of participation could be considered from a different perspective from that underlying the Confirmation Decision.")

<sup>110</sup> Prosecutor v. Katanga, Case No.: ICC-01/04-01/07-3436, Dissenting Opinion of Judge Christine Van den Wyngaert, Mar 17, 2014, ¶ 1.

<sup>111</sup> Carsten Stahn has offered the leading justification of Regulation 55. See Carsten Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 CRIM. L. FORUM 1–31 (2005). For other excellent

recognized that some jurisdictions have resolved the larger part of the problem structurally.

For instance, in an excellent article criticizing the recharacterization of modes of participation at the ICC, Kevin Jon Heller opines that Regulation 55's shortcomings are manifest: "the defence will now have to rebut each and every possible form of complicity during trial, because it cannot be sure which one(s) the Trial Chamber will ultimately deem to be the proper legal characterization of the facts."<sup>112</sup> Notice, however, that this problem mostly recedes into obscurity once standards of responsibility are condensed into a single form. In other words, the factor that makes recharacterization simultaneously desirable and problematic for forms of participation is that it is possible to talk about "each and every possible form of complicity" (or perpetration) at all. If this troublesome doctrinal pluralism is acknowledged and withdrawn, modes of participation would not have different substantive contours. As such, the parties would be left to contest whether the accused made a substantial causal contribution to a crime with the requisite mental element announced in it, and most significantly, these elements could never shift. As the Austrians foresaw, the need to recharacterize forms of participation at least would be almost entirely obviated.

Once again, the UIDP played a vital role in paving the way for Austria to escape these types of problems, even though the doctrinal shift from differentiated to unitary took place over seventy years after the UIDP's famous endorsement of the theory. Interestingly, the Austrian legal change of heart seemed less a stubborn insistence on autonomy from the highly influential German neighbor, and more the product of a sustained philosophical commitment over that long duration. While German criminal theory engulfed systems of criminal justice that were far more distant in language, geography and culture (like Japan and now the International Criminal Court), Austrian academics kept the unitary theory alive through continual debate. One leading Austrian commentator concludes that "it was their constant publications on unitary perpetration theories that reached the result that (German) ideas of accessory participation (i.e. derivative perpetration of accomplices) could never

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commentary, see Margaux Reynauld, *The "Fair Fight" Against Impunity: A Proposal on the Modalities for Implementation of Regulation 55*, , <http://ssrn.com/abstract=2334803>; SÁCOUTO AND CLEARY, *supra* note 105. Dov Jacobs, *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?*, in *THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES* 205–222 (William A. Schabas, Yvonne McDermott, & Niamh Hayes eds., 2013).

<sup>112</sup> Kevin Jon Heller, *'A Stick to Hit the Accused With': The Legal Recharacterization of Facts under Regulation 55*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 981, 1002 (Carsten Stahn ed., 2015).

really become domestic in Austria.”<sup>113</sup> In my humble view, they should not have become international either. Nonetheless, that international courts and tribunals have adopted a differentiated system does not mean ICL has crossed the Rubicon; each of the national systems I discuss here replaced differentiated systems of blame attribution with unitary alternatives, even when the former appeared to be firmly entrenched within the respective legal cultures.

## VII. CONCLUSION

For someone familiar with modes of participation in contemporary ICL, reading the history of the unitary theory of perpetration will probably produce a strange sense of *déjà vu*. So many of the problems that bedevil this aspect of modern ICL were confronted and overcome when a set of European nations followed the advice of the UIDP, then the largest international congregation of criminal law theorists globally, by dismantling their differentiated system of blame attribution in favor of a unitary alternative. In this article, I have sought to pay homage to Professor Mirjan Damaška’s catalytic effect on my professional life and scholarly agenda by again suggesting that ICL should undertake a similar turn, such that responsibility for international crimes would mean something clear, stable, and conceptually defensible throughout the many jurisdictions capable of trying these offenses. There is, no doubt, much critical scholarly work still to be done to test the buoyancy of this vessel, but as I hope the foregoing has shown, our understandable affinity for the differentiated model presently in force is mostly a byproduct of our socialization in systems of criminal law from powerful Western states. If I have exceeded myself, this piece will have challenged these sorts of received wisdoms for others half as well as Damaška’s masterpiece once did for me.

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<sup>113</sup> SCHÖBERL, *supra* note 98, at 31.