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# The One or the Many

Jens David Ohlin

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**Abstract** The following Review Essay, inspired by Tracy Isaacs' new book, *Moral Responsibility in Collective Contexts*, connects the philosophical literature on group agency with recent trends in international criminal law. Part I of the Essay sketches out the relevant philosophical positions, including collectivist and individualist accounts of group agency. Particular attention is paid to Kornhauser and Sager's development of the doctrinal paradox, Philip Pettit's deployment of the paradox towards a general argument for group rationality, and Michael Bratman's account of shared or joint intentions. Part II then analyzes, with cautious support, Isaacs' two-level solution, which entails both individual and collective moral responsibility. Under this view, collective moral agency is a real phenomenon, though the existence of the collective neither obviates nor eliminates the moral responsibility of the individuals from which it is composed. My own evaluation of the proposed solution concentrates on Davidson's Principle of Charity and whether behavior interpretation requires viewing such agents in particular ways so as to maximize rationality. By analogy to the distinctive rationality of long-term plans, where the rationality of an individual act can only be understood relative to its place in the rationally justified long-term plan of a single individual, I also consider the rationality of individual acts whose rationality can only be understood relative to the group endeavors of which they are a part. Finally, Part III traces some implications of the two-level solution for legal doctrine, in particular the role of collective organizations in the recent jurisprudence of the International Criminal Court. For example, I note that the ICC has recently become more and more focused on the role played by goal-oriented collectives, especially with regard to the plan or policy requirement for crimes against humanity and, in the context of modes of liability, indirect liability for crimes committed through an organization (*Organisationsherrschaft*).

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## Introduction

Consider the following conversation during a Christmas snowstorm.

Four-year-old: What does the snowbank use snow for?

Father: The snowbank doesn't *use* snow. The snowbank just *is* snow

Four-year-old: (Silence)

This is a problem of identity and constitution (Wiggins 2001). On the one hand, the snowbank is made up of individual snowflakes. But if the snowflakes are real, then the snowbank is, in a sense, a mere conglomerate of real things, and not itself real. If both the snowbank and its individual snowflakes are real, then we have two things existing in the same place.

The problem gets worse. In a situation that philosophers often describe as the Problem of the Many, the snowbank has indeterminate contours, because its exact edge is uncertain (Unger 1980; Geach 1980). Where does the snowbank end and the snow on the rest of the lawn begin? There being no principled way to make this determination, there appears to be a large number of competing aggregates that could be called the snowbank. If all of them are real, we not only have one snowbank and many snowflakes in the same spot, but also many snow banks with equal claim to existence (Unger 1980: 413). A crowded state of affairs, indeed.

## Doctrine, Discourse, and Dilemmas

In 1993, Lewis Kornhauser and Larry Sager published *The One and the Many: Adjudication in Collegial Courts*. The essay, whose title invoked Aristotle's and Plato's discussion of individuals and kinds, actually dealt with a separate albeit related phenomenon. When appellate courts (composed of multiple judges) decide how to resolve a particular case, they are confronted with a meta-decision over how to resolve competing views among the various judges that form the appellate court (Kornhauser and Sager 1993). They can either vote on the ultimate outcome of the case, or they can vote on each legal issue and then combine the results, a dilemma that they called the doctrinal paradox (Kornhauser and Sager 1993: 3). According to Kornhauser and Sager, both decision procedures were potentially valid, and a decision between them should be based on, *inter alia*, hierarchical and internal management considerations.<sup>1</sup>

Kornhauser's and Sager's doctrinal paradox proved highly inspiring to Philip Pettit, who has argued in a series of articles and books, both individually and with Christian List, that the paradox is likely to emerge in many instances of collective enterprises, not just appellate courts, that are tasked with deciding a meta-procedure for resolving disagreements at the level of outcomes or the level of individual premises (Pettit 2002: 443; Pettit and List 2005: 377; Pettit and List 2011). Pettit and List refer to this as the *discursive*

<sup>1</sup> Kornhauser and Sager 1993, at 42 (noting that paradoxical cases impair supervisory role that appellate courts enjoy over trial courts).

dilemma, a nomenclature that reflects the generalized nature of the problem in all collective enterprises that could collectivize their deliberations (Pettit 2002: 452; List 2006: 362). This collective deliberation, for Pettit and List, is reason enough to ascribe collective agency to the group and ultimately, a group mind (Pettit and List 2011: 52).

The Pettit and List reformulation of the Kornhauser and Sager dilemma was a crucially important intervention in the philosophical literature on collective agency, a literature that oscillates between collectivists who argue in favor of the possibility of collective agency, and individualists who are generally skeptical of group agency.<sup>2</sup> Individualists are either skeptical that such enterprises have anything approaching a “group mind” or they argue that all claims regarding collective agency can be reduced to claims about individual agency, thus making the resort to collectivism superfluous or a mere *façon de parler*.<sup>3</sup> However, if Pettit and List are correct in their analysis, the deliberative process of at least some collective enterprises cannot be reduced to accounts of individual agency because doing so will fail to accord with the outcome of the decision-making process. Under a thoroughgoing individualist analysis, one would expect each member of the collective to reach an ultimate conclusion and then cast his or her vote accordingly. But if the group has deliberated in common, making group decisions with regard to each individual premise, the result will be an outcome that may not have been preferred by each individual in the group. The only way of making sense of this behavior is to posit the existence of a common mind, or in the alternative, ascribe irrationality to the individuals belonging to the group (Pettit 2002: 456–57).<sup>4</sup>

Or does it? Although it is clear that the Pettit and List argument provides evidence of a form of collective rationality, does this necessarily entail the positing of a collective entity? Does the existence of communal rationality ipso facto suggest that one’s interlocutor is operating with a group agent? Some skeptics suggest that without phenomenological unity (e.g. a common brain with unified mental states), any discussion of group minds is loose talk, nothing more. This broad skepticism can be put aside for a moment, especially since scholars frequently talk of legislative intent with little to no concern about phenomenological unity among members of Parliament (Ekins 2012). The more meaningful skepticism has nothing to do with a lack of phenomenological unity. Simply put, common rationality can be accounted for if we assume that *individuals* are engaged in collective rationality. Although collective rationality is required by a common enterprise among individuals, Ockham’s razor counsels caution before we increase our ontological furniture by positing the existence of collective *entities* that exercise this collective rationality. Indeed, if collective rationality entails the existence of a collective agent, then individual agents can never cooperate with each other to engage in collective rationality. The minute they do so, they disappear. Perhaps the smarter course of action is to stop short of attributing agency to the collective enterprise.

This intermediate solution—recognizing the distinctive intentional structure of collective enterprises without calling them collective entities—might bring one closer to individualist accounts offered by Bratman and fellow travelers (Bratman 1999: 93–129). Individual accounts, such as those favored by Bratman, do not require the positing of a

<sup>2</sup> In addition to Pettit and List, other members of the collectivist camp include Peter French, Margaret Gilbert, and Larry May. For a good description of the two camps, see (Miller and Makela 2005).

<sup>3</sup> For a discussion on this point, consider Thomas H. Smith, “Book Review: Group Agency”, *Mind* 121 (2012): pp. 501, 503.

<sup>4</sup> The issue of rational unity among collective agents was originally explored by Carol Rovane (1998: 144–145).

common mind. Bratman argues that the hallmark of Joint Cooperative Activities are joint or shared intentions, which is an individual intention to jointly carry out a specific project with one or more other individuals (Bratman 1999: 131). Implicit in this notion is the existence of a plan—an idea of how the project will be carried out and how the labor will be divided, i.e. co-ordination. Bratman calls this the “meshing” of sub-plans (Bratman 1999: 124). This coordination in the formulation and execution of the plan is part and parcel with the formulation of the joint intention to carry out a shared project (Bratman 1999: 125). In the end, though, the account is mostly individualist because the collective behavior is understood relative to intentions housed at the individual level—albeit intentions that make necessary reference to the actions and intentions of the other co-participants in the project. But it is, in the end, a reductive analysis—one that assumes that group actions are best understood in terms of the intentions of its component members, albeit intentions that make reference to the collective enterprise. But there is no positing of a common mind here.

What is at stake in this debate? On the one hand, it might appear to be an overly metaphysical debate, one that runs afoul of Richard Rorty’s famous injunction that if a question makes no difference to inquiry, it should make no difference to philosophy (Rorty 1998). Is our moral, ethical, legal, or medical analysis any different depending on the resolution of the entity vs. no-entity question? Indeed, it is. As the following analysis will suggest, a two-level analysis helps explain how collective agents are formed and dissolved, and how individuals within these collectives retain enough autonomy to continue acting as individuals in other areas of their lives. Also, a two-level analysis helps mediate the realities of collective action in the modern (and increasingly dark) world with the demands of individual culpability imposed by a liberal institution of criminal justice. Some consequences for international criminal justice will be traced in Part III of this Essay. Before that exercise in applied theory can be accomplished, Tracy Isaacs’ two-level analysis will be explained and analyzed in more abstract terms in the “[Rationality and The Two-Level Solution](#)” section.

## **Rationality and The Two-Level Solution**

Enter now Isaacs, who has authored a new book on collective agency titled *Moral Responsibility in Collective Contexts* (Isaacs 2012). In the literature on collective agency, most authors have staked out positions that can either be described as individualist or collectivist, arguing for or against the possibility of group agents, but Isaacs’ contribution to the debate is to offer a hybrid account, a two-level analysis that admits the possibility of group-level agency, and the necessity of judgments about group-level behavior, but also permits judgments about the agency of the individual members of the collective (Isaacs 2012: 97–129). The Isaacs project is to have her cake and eat it too, as it were, and mediate between the excesses of the collectivist and individualist projects. The question is whether this two-step process is indeed possible and advisable. A critical examination follows.

Isaacs is rightfully suspicious of the extremities of the two positions. She concludes that the existence of a group agent does not obviate the existence of its individual components; the one and the many can co-exist at the same time (Isaacs 2012: 98). In order to explain this result, she comes very close to endorsing and adopting Kutz’ notion of a “participatory intention,” where individuals have an individual intention to participate in a collective endeavor, a result that provides a justification for ascriptions of collective responsibility to each member of the collective on the basis of the participatory intention (Isaacs 2012: 99).

The justificatory pull of the participatory intention is so strong for Kutz that the desire to participate in the collective endeavor is sufficient to ground individual moral responsibility for the collective result even in the absence of a causal contribution to the overall endeavor. Kutz' rationale for dispensing with causation as a necessary condition of individual responsibility stems from his anxiety over paradoxes of aggregated agency (Kutz 2000). A very large number of individuals can participate in a common project whereby each makes a *de minimis* contribution to bring about a collective result; since each contribution is *de minimis*, each escapes responsibility for the whole. While some collectivists might take the paradox as evidence of the need to ascribe collective agency, Kutz sticks to his individualist guns but uses the paradox as a reason to reject causation as a necessary condition for individual responsibility. The participatory intention, freely chosen, is enough to hold the individual responsible for the acts of the whole.

Isaacs is sympathetic to the Kutz line of argument, but is less cavalier about causation as a necessary element of responsibility (Isaacs 2012: 118–119). Isaacs' two-level account does not come into full focus until she considers, like Kutz, the implications of the individualist and collectivist accounts for moral responsibility. Since fundamentally collective acts, like genocide, are only possible with deep collaboration among its members, a purely individualist account fails to explain the group-level dynamics among the individual members. Genocide is a case in point—it isn't just the aggregate of many individuals committing isolated acts of murder. If this were the case, one could describe the Rwandan genocide as 800,000 cases of individual murder—a description that not only fails to account for the profound moral tragedy of the event, but more importantly fails to account for the decision-making process of the individuals involved.<sup>5</sup> The perpetrators were not just engaged in conscious parallelism, each simply aware but indifferent to the contributing acts of the other co-perpetrators. Rather, each perpetrator viewed his contribution as consistent with a collective project to achieve a genocidal result—a result that each perpetrator both accepted and desired. To describe such acts without the language of collective agency is to avoid the distinctive intentional structure of its members that gave them a normative reason to participate in the project (Isaacs 2012: 123). Without mutual collaboration, the Rwandan genocide would never have occurred.

The virtue of a two-level analysis, of course, is that it escapes the old exculpatory dilemma of collective agency (Morris 2003). If individual agency disappears in the service of collective agency, the individual can no longer be held morally—or legally—responsible for his or her actions. Since collectives are made up entirely of individuals, each part uses the existence of the other to neutralize his or her liability—an absurd result. Because there is more criminality, not less, no one can be put on trial. Versions of this argument also appear in the work of moral individualists such as Jeff McMahan (McMahan 2008: 4).

A two-level account explains where this skeptical challenge goes wrong. Group-level responsibility, though very real, does not provide exculpatory or mitigating force to individual responsibility. Indeed, this must necessarily be the case because a two-level analysis must explain how collective agents come into and out of existence, with individuals freely choosing to join and exit such endeavors. So each individual is still responsible for his or her own actions; the responsibility of the group is simply added as a second level of responsibility. The individuals are responsible; the group is also responsible. But is this *too* much responsibility?

<sup>5</sup> Consider the case of John Demjanjuk, whose long legal saga in the US and Israel finally ended with his extradition to Germany where he was prosecuted for complicity in 28,060 murders, based on evidence that he was a camp guard at the Sobibor death camp.

Isaacs distinguishes between formal organizations and “goal-oriented collective agents” (Isaacs 2012: 31). The former have a codified decision-making procedure that mediates between the goals or interests of the organization, the manner in which those goals and interests will be pursued (including both deliberation and execution), and a division of labor among its members. In contrast, the latter have individuals who simply “coalesce around action toward the achievement of a particular goal that the members jointly embrace and aspire to” (Isaacs 2012: 98) but without a formal structure to bring that goal into fruition. Although applying this distinction to particular fact patterns may be controversial, I take it that the distinction roughly accords with the distinction between corporations and conspiracies. The two are different and, by Isaacs account, deserve a different analysis of their intentional structures. While this is no doubt true, the question is whether this is a difference in degree or in kind.

The key difference, according to Isaacs, is that organizations confer collective authority on their leaders or those in a position of authority (Isaacs 2012: 27–31). This delegation of authority provides a normative reason for ascribing vicarious responsibility for the actions of the organization to its leaders. In contrast, goal-oriented collectives do not confer responsibility on their leaders, and therefore its members cannot be responsible for the actions of the collective; they can only be responsible for their own *individual* contributions to the collective effort. However, this individualized analysis has its limitations; it is not possible to give a fully reductive account of the collective’s actions in purely individualistic terms. Their “contributions [need] to be understood in the context of the collective action of which they are parts” (Isaacs 2012: 99).

What is this collective context? For Isaacs, the collective context establishes the very particular moral wrong involved in a collective crime. Borrowing Davidson’s notion of an act-description and Williams’ notion of “thick moral terms,” Isaacs concludes (Isaacs 2012: 101) that only a non-reductive collective description will provide the thick moral term that explains why a collective crime such as a genocide is so heinous.<sup>6</sup> Although reducing it to 800,000 cases of individual murder might be coherent, it reduces the event to moral terms that just aren’t thick enough. But it is unclear if a reductive analysis would really forego the thick moral terms, because a reductive analysis would not necessarily require transforming a crime of genocide into individual cases of garden-variety murder. Rather, it would simply require that every reference to a group—whether the protected group or the perpetrators—should be understood as mere shorthand for an unwieldy class of individuals that is too numerous to describe in individualistic terms.<sup>7</sup> And moreover, in theory any reference to genocidal intent and collective intentions could be described in those individual terms as well, providing aggregative individualistic terms to understand the relationship between the individuals (what one would otherwise describe as the “collective context”).

Does this mean that the reductive program has won the day? I think not, although if the reductive program can be shown to be deficient, it is not by reference only to the notion of thick moral terms, as Isaacs’ ably does. Rather, the fragility of the reductive program can be conclusively demonstrated by placing rationality at center stage, and in particular, concentrating on the rationality of *plans*. I will explain.

<sup>6</sup> Isaacs’ conclusion in this passage relies heavily on the work of Davidson 1980 and Williams 1985.

<sup>7</sup> But see Smith 2012, p. 507 (“Grant, for argument’s sake, that, were there group agents, truths about their attitudes would not admit of easy paraphrase into truths about their members’ attitudes. It does not follow that our actual everyday and social scientific attributions of attitudes to groups are not thus paraphrasable”).

In order to understand the distinctive rational relationship between individuals engaged in a cooperative endeavor, one must first understand, by analogy, the distinctive rational relationship between a single individual's actions at two points in time. Consider first the Toxin Puzzle, first described by Gregory Kavka (Kavka 1983: 33). In this thought experiment, an eccentric billionaire has given the subject a vial of toxin that will make him ill but will not kill him. The billionaire will pay him one million dollars if tonight the subject intends to drink the toxin. The subject need not drink the toxin; he merely needs to *intend* to do so.

Now here's the famous paradox. If the subject "intends" to drink the toxin, and receives the money, then he'll have no reason to follow through and actually drink the toxin (Kavka 1983: 34). That's because the benefits will have already accrued to him and what remains is merely an action (drinking the toxin) that will make his life go worse for him. So self-interested rationality demands that the subject not follow through and drink the toxin. Unfortunately, that rational realization dooms the subject's chances of getting the million dollars. Because he has no rational reason to follow through and drink the toxin, he can't intend to do so. The billionaire, knowing that you cannot rationally intend to drink the toxin, will not give you the money.

The urgency of the paradox stems from the fact that the subject's failure to satisfy the billionaire's condition makes his life worse off. It would be better if he could get the million dollars. Strange that a theory of self-interested rationality should generate an outcome where rationality demands that a self-interested actor make his life go worse off. This is a form of self-defeating rationality, which does not make sense.<sup>8</sup>

The solution to the Toxin paradox is to understand the distinction between the rationality of plans and atomic decisions at singular moments in time. In fact, the subject can meet the billionaire's demands, but only because he has formulated a rational *plan*. The plan calls for him to intend to drink the poison and then follow through and drink the poison and collect the million dollars. The reason why it is rational for him to follow through, even after receiving the money, is because that action is part of a rationally defensible plan that makes his life go better for him (Gauthier 1994: 695).

At issue here is two completely different theories of rationality. Under one theory, an individual action is rational if and only if it constitutes the agents best response at that moment in time. In contrast, under the second theory, an individual action is rational if and only if it is part of a long-term plan that produces the best outcome for the agent.<sup>9</sup> In this case, the best outcome for the agent is to intend to drink the poison and then follow through with his intention because following through is an essential component of a rationally defensible plan. This version of rationality escapes the paradox because it reveals the absurdity of the naïve theory of rationality: it sanctions self-defeating actions that cause an agent to work against his own best interests.<sup>10</sup> Any theory of rationality that produces such results must be wrong, and it is. So under the correct vision, rationality is a long-term phenomenon that emerges in the formulation of strategic long term plans; agents then make decisions in accordance with those plans, and it is rational for them to engage in actions that are in accordance with plans that constitute their best response.

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<sup>8</sup> Views on the resolution of this paradox are by no means universal and consistent. Compare Gauthier 1994, p. 690 with Parfit 201, p. 81. For a good description of this debate, see Levy 2009, p. 267.

<sup>9</sup> For a similar formulation, see Finkelstein 2008, p. 83.

<sup>10</sup> See, e.g., Gauthier 1996, pp. 217, 220 ("rational commitment to a plan may require counter-preferential choice").



Now here's the insight that is most relevant for the current discussion. The same insight about rationality over time applies to rationality *across* persons. Just as the rationality of a single act should be judged by its accordance with a rationally defensible plan, so too the rationality of a collaborator's action should be judged, not in isolation, but in accordance with the collective plan that spans across individuals.

The warrant for this analogy is that for purposes of planning, the axes of time and inter-personal cooperation are both significant. And that's because both are important aspects of planning; the first is essential for individual plans, while both are essential for collective plans. It is literally impossible for an individual to formulate and execute a plan without engaging in long-term deliberation that anchors together acts at different points in time in furtherance of a single, long-term objective; that is the very essence of planning. Similarly, it is impossible for a group to formulate and execute a collective plan without weaving individual actions together through a common plan that unites all members in a collective endeavor.

The key point here is that without this move—either across time or across individuals—behavior that is truly rational will come across as irrational. In the Toxin Puzzle, drinking the toxin appears irrational, and hence forming the intention appears impossible as well. In the collective context, the individual's actions, taken in isolation, might be perceived as irrational, yet when viewed in its collective context, the individual's action is one part of a rationally defensible collective plan.

What dictates the choice between these two theories of rationality? When faced with the Toxin Puzzle, why not view the individual as acting irrationally? Or when considering the collective context, why not interpret the individual acting in isolation, even if this fails to capture the rationality of the individual's participation in a collective plan? The answer to this question is that Davidson's Principle of Charity demands that when engaging in behavior interpretation of agents and faced with ambiguous evidence, we naturally presume more rationality rather than less, *ceteris paribus*.<sup>11</sup> So when interpreting the agent faced with the Toxin Puzzle, we assume that the agent is acting more rationally rather than less rationally, so that the individual act should be understood relative to its place within the rationally justified plan. Similarly, the individual acting in the collective context should be interpreted as acting in accordance with a rationally justified collective plan rather than acting irrationally in accordance with an individual plan.

Can this argument be extended and provide a warrant for attributing entity-status to the putative collective agent (Rovane 1998)? In other words, does the Principle of Charity provide a reason to view an aggregate of individuals as a collective agent, when doing so makes sense of their behavior as rational? It might, although two questions remain. First, what is the exact difference between viewing the group as a collective agent versus an aggregate of individuals participating in a collective endeavor in accordance with a collective plan? Second, assuming that the collective agent is accorded entity status, what becomes of the individuals involved? Do the many disappear into the one?

Isaacs is clearly committed to the reality of collective agents and the persistence of the individual agents who constitute the collective—that is the essence of the two-level position. However, aside from the moral necessity of this position (in order to express the thick moral terms that describe the collective conduct), Isaacs is cautious about the exact relationship between the one and the many. It seems clear that it is essential for the individual agents to persist because that explains why individuals can freely—and

<sup>11</sup> See Davidson 1973, p. 19 (“Charity is forced on us;—whether we like it or not, if we want to understand others, we must count them right in most matters.”); Davidson 2001, pp. 134–135.

rationally—make a decision to join the collective endeavor, and also why individuals can freely—and rationally—make a decision to exit or even frustrate the collective endeavor. This process of entering and exiting a collective endeavor is a necessary process of them coming into being, and also a necessary process of their changing composition (which happens frequently). If the many disappear into the one, then individuals would never reevaluate their participation in collective endeavors and exit them. This clearly happens, though, and the model ought to account for this phenomenon.

The only solution, which is arguably implicit in Isaacs' argument, is to view the collective agent and the individuals who compose it as overlapping agents who decide to participate in a common endeavor but who retain independent status—and some independent rationality—from which they might continue to evaluate the rationality of their individual participation in the collective endeavor.<sup>12</sup>

This then opens up a potential asymmetry between rational plans over time and rational plans across collaborators. In the former, once we recognize the existence of the long-term plan, the rationality of the individual act cannot be demonstrated in isolation—it can only be demonstrated in virtue of its place within the rationally defensible plan. When looked at in isolation, the individual act is irrational. In contrast, when we consider rational plans across collaborators, the individual has a bona fide choice in how he or she views her own decision. If the individual agent thinks of herself as a single individual, she must rationally defend her action relative to her own individual plan. However, if the individual agent thinks of herself as participating in a collective endeavor, she can rationally defend her action relative to the *collective* plan, and in so doing engage in rational agency. But a shadow of the individual plan must always remain because it is on that basis that the individual agent must decide to remain committed to the collective endeavor or decide to quit the collaboration and forge an independent path away from her previous collaborators.

Having sketched out some of the details of what a two-level analysis would look like in philosophical terms, this Essay turns in Part III to rendering a two-level analysis into legal doctrine, with particular focus on international criminal law. Although Isaacs concentrates on moral responsibility, as opposed to legal responsibility, I will argue here that a two-level analysis would represent a welcome development for the doctrines of vicarious responsibility applied by the ad hoc tribunals and the ICC. In particular, recent legal doctrines applied by the ICC have foregrounded the importance of organizations in international criminal justice, even while at the same time international judges and courts have insisted on the doctrine of individual culpability. Squaring these two core ideas—crimes committed by organizations but legal responsibility only for individuals—will now be the task of the “[Organizations and Their Crimes](#)” section.

## Organizations and Their Crimes

Organizational liability dates back to Nuremberg, when the principal architects of the Allied legal strategy—mostly military lawyers working in the US War Department—described World War II as a massive Nazi conspiracy.<sup>13</sup> Indeed, the temporal and geographical scope of the conspiracy was unparalleled—it stretched across Europe and into Nazi expansion in North Africa and Russia, and it stretched across time going back to the

<sup>12</sup> On overlapping agents (though not using this term), see Rovane 2004, p. 181.

<sup>13</sup> See International Military Tribunal at Nuremberg, Indictment, in TRIAL OF THE MAJOR WAR CRIMINALS 1 (Nuremberg, 1947): pp. 29–41.

end of World War I and the humiliating terms of the Treaty of Versailles.<sup>14</sup> The doctrine of conspiracy was controversial at the time and French jurists on the IMT chafed at its inclusion in the indictment. In the end, a compromise was reached and conspiracy charges were upheld for crimes against peace (aggression) but rejected for all war crimes and crimes against humanity. The compromise was justified on the ground that aggression was already a collective crime (because it required state action in violation of basic principles of *jus ad bellum*) so that the conspiracy element could not add a collective dimension to a crime that was already inherently collective.<sup>15</sup>

The US War Department also spearheaded a plan to have the IMT declare certain Nazi entities as criminal organizations, including the SS, the Gestapo, and the Nazi High Command (Bush 2009: 1145–1146). Although the IMT did indeed find that these entities constituted criminal organizations, the Court never made full use of this legal finding. The whole point of the legal strategy was to justify the conviction of hundreds or thousands of mid-level and lower-rung members of these organizations; their mass trials could be limited to determining their membership in these organizations—a relatively easy empirical question given the Nazi penchant for scrupulous record-keeping—and they could be imprisoned *en masse* (Bush 2009). However, this legal effort was largely abandoned and the status of the SS and Gestapo as criminal organizations had mostly symbolic resonance as a way of expressing the manner in which the Nazis pursued their crimes through the machinery of the German *Reich*.<sup>16</sup>

The modern era of international criminal justice—dating from the mid-1990s with the creation of the ICTY and ICTR—has ostensibly turned its back on these Nuremberg precedents, regarding them with suspicion and even embarrassment. Conspiracy was absent as a substantive crime in the ICTY and ICTR statutes and retained only as a mode of liability for genocide—an exception that can be explained by the 1948 Genocide Convention’s positive obligation to prosecute conspiracy to commit genocide, which was copied verbatim and inserted in the ICTY and ICTR statutes by UN drafters.<sup>17</sup> But by the time the ICC’s Rome Statute was drafted in 1998, conspiracy as a mode of liability was entirely excised from its framework, even for the crime of genocide. And the crime of membership in a criminal organization was never seriously considered at all, a function of the growing and laudable prominence of the principle of individual culpability. The idea that the ICTY might declare a militia to be a criminal organization and mass-convict its members was an absurd idea that was never even considered. In any event, the ad hoc tribunals were limited to prosecuting high-level architects, with local courts in Rwanda and the former Yugoslavia being reserved for mid-level and street-level perpetrators. So there was simply no need for either the ICTY or ICTR to develop legal doctrines for mass incarceration.

However, although many international criminal lawyers claim to focus exclusively on individuals and individual responsibility, by virtue of their fidelity to the principle of individual culpability, an underlying obsession with organizations is everywhere. This includes, *inter alia*, the following legal doctrines: Joint Criminal Enterprise, *Organisationsherrschaft* (perpetration through an organized apparatus of power), and the

<sup>14</sup> *United States et al. v. Goering* (International Military Tribunal at Nuremberg), reprinted in *International Military Trials: Nazi Conspiracy and Aggression*, at 16.

<sup>15</sup> See Fletcher 2006.

<sup>16</sup> This was in part due to the IMT’s early pronouncements that the crime of criminal membership should be limited to organizations whose criminality was common knowledge. Bush 2009, p. 1147.

<sup>17</sup> Fletcher, *Amicus Brief*, p. 12.

organizational plan or policy requirement in crimes against humanity. I shall briefly describe each doctrine.

Joint Criminal Enterprise (JCE) was first announced by the ICTY Appeals Chamber in *Tadic*, which argued that higher-level defendants could be convicted for participating in a joint enterprise to carry out international crimes.<sup>18</sup> Drawing on some obscure British and Italian military commission precedents from the World War II era, the ICTY Appeals Chamber argued that the doctrine was necessary and appropriate in order to adequately hold higher-level perpetrators responsible for the very collective crimes that the Security Council had asked the ICTY to investigate and prosecute.<sup>19</sup> The doctrine was controversial for several reasons, including that the ICTY Statute made no mention of JCE, a problem that the ICTY Appeals Chamber solved by inferring that JCE was one type of criminal “commission” in the Statute’s terms.<sup>20</sup> Similarly, the doctrine was controversial because (at least initially) it held defendants responsible regardless of the level of their contribution, and also because it held defendants legally responsible for the acts of the JCE even when those wayward acts fell outside the scope of the criminal plan—a doctrinal innovation that closely tracked the common law *Pinkerton* doctrine.<sup>21</sup> Finally, and most importantly, the ICTY Appeals Chamber held that all members of the JCE were equally culpable for the group crimes, regardless of their level of participation, though relative differences in culpability might be distinguished during sentencing.<sup>22</sup> This latter consequence of the doctrine—equal culpability based on agreeing to the collective plan—meant that in applying the JCE doctrine in future cases, the most pressing legal finding made by the Trial Chamber would be whether a JCE—the common enterprise—existed. Once that finding was made, it was all but over for the defendant, except in very rare instances.<sup>23</sup>

A second example of the primacy of criminal organizations is the German doctrine of *Organisationsherrschaft* currently being applied by the ICC. Originally developed by the German criminal law scholar Claus Roxin in response to the Eichmann trial, the doctrine has roots in Roxin’s Control Theory of Perpetration (Roxin 1963: 193). *Organisationsherrschaft* allows the conviction of a mastermind (*Hintermann*) who uses an organization to perpetrate an international crime—a version of indirect perpetration but where the physical perpetrators belong to an organization. Like JCE, much hinges on whether the ICC judges find that an organization exists: according to the doctrine, the organization must be hierarchical, it must carry out the orders of its leaders as a matter of course, and its members

<sup>18</sup> See *Prosecutor v. Duško Tadić*, Case No IT- 94-1-A, Judgment, ICTY Appeals Chamber (July 15, 1999).

<sup>19</sup> See, e.g., *United States of America v. Kurt Goebell et al, (Borkum Island)*, Case No 12–489 (1946), microformed on 1–6 Records of United States Army War Crimes Trials, M1103 Rolls 1–7 (National Archives Microfilm Publications 1980), cited in *Tadić*, IT-94-1-A ¶ 210 (cited in note 1). See also *Trial of Erich Heyer and Six others (“The Essen Lynching Case”)*, British Military Court for the Trial of War Criminals, Essen, 18th–19th and 21st–22d December, 1945, 1 Law Reports of Trials of War Criminals 88, 91 (UNWCC 1947).

<sup>20</sup> See *Prosecutor v. Milan Milutinovic, Nikola Šainovic and Dragoljub Ojdanic*, Decision on Dragoljub Odjanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT-99-37-AR72, ¶ 20, ICTY Appeals Chamber (May 23, 2003) (“The Appeals Chamber therefore regards joint criminal enterprise as a form of ‘commission’ pursuant to Article 7(1) of the Statute.”).

<sup>21</sup> *Tadic* at ¶ 224.

<sup>22</sup> *Tadic* at ¶ 191.

<sup>23</sup> Indeed, the ICTY Appeals Chamber went so far as to conclude that a defendant could be convicted for the crimes of the JCE even if the defendant was not a member of the JCE. See *Prosecutor v Radoslav Brđanin*, Case No IT-99-36-A, ¶ 418, Judgment, ICTY Appeals Chamber (Apr 3, 2007).

must be essentially fungible.<sup>24</sup> However, unlike JCE, which lumps all perpetrators together, *Organisationsherrschaft* distinguishes the leader who controls the organization (or leaders who jointly control the organization) as perpetrators, while all others are deemed mere accessories or accomplices.<sup>25</sup> In recent indictments before the ICC, prosecutors have argued that such organizations were used to carry out post-election violence in Kenya that constituted crimes against humanity.<sup>26</sup>

As a third example, consider the doctrinal requirement that crimes against humanity must be pursued through a state or organizational plan or policy—a requirement that dates back to the Nuremberg era when the Gestapo and the SS were credited with providing an essential bureaucratic mechanism to transform private criminality into international wrongdoing by wielding the unprecedented power of the state.<sup>27</sup> In the Kenya cases, the ICC charges relied on the very same organizations that underpinned the *Organisationsherrschaft* mode of liability to meet the crime against humanity state or organizational plan or policy requirement. However, in its modern instantiation, this requirement is no longer tethered to state or sub-state entities as it was in Nuremberg. The Kenyan organizations deployed to commit the crimes against humanity included the Mungiki (a local criminal organization in Kenya) and the “Network” an unnamed ad hoc collection of perpetrators. Neither were sub-state entities like the Gestapo or the SS.<sup>28</sup>

In all three of these examples, the existence of a criminal organization plays the central role in the legal doctrines at the modern international tribunals. Though these doctrines have replaced conspiracy and the crime of membership in a criminal organization, the collective nature of these organizations are essential to carrying out international crimes—and the current doctrine reflects this reality. However, courts have continually struggled with how to understand an individual defendant’s personal culpability in the wake of organizational criminality.

This is where the two-level analysis comes in. Although it is not often expressed in these terms, the modern international tribunals are struggling with operationalizing this very insight: that collective organizations commit international crimes, but this fact neither eviscerates nor mitigates the responsibility of the individuals that compose these organizations. Both the one and the many are ultimately responsible for their actions, although translating this philosophical insight into legal doctrine is notoriously difficult.

In the first instance, it is unclear what it means to hold criminal organizations responsible *at the organizational level* for their collective criminality. Corporations are the easy case. Despite the old epithet—no body to kick and no soul to damn—corporations can be criminally prosecuted, civilly fined, even dissolved if necessary.<sup>29</sup> But criminal conspiracies, JCEs, and hierarchical organizations fitting Roxin’s description are more difficult to assess. Can they be held directly responsible?

The problem, of course, harks back to Isaac’s distinction between what she calls formal “organizations” and informal goal-directed collectives (23–28). Insofar as formal

<sup>24</sup> See, e.g., *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Confirmation of Charges, ICC-01/09-02/11, P.T.Ch. II (23 Jan. 2012).

<sup>25</sup> Not every scholar agrees that these distinctions are morally or legally crucial. On this point, consider Stewart 2012.

<sup>26</sup> See also *Prosecutor v. Ruto, Kosgey, and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11, P.T.Ch. II (23 Jan. 2012).

<sup>27</sup> For a history of this doctrine, see Schabas 2008, p. 953.

<sup>28</sup> See *Prosecutor v. Kenyatta* at para. 103, and *Prosecutor v. Ruto*, at para. 32.

<sup>29</sup> The saying is attributed to Edward, First Baron Thurlow, 1731–1806, cited in Coffee 1981, p. 386.

organizations like corporations are *de jure* entities, with a relatively transparent decision-procedure, they can be considered to be full-blown legal subjects. Indeed, the same philosophical reality that makes such organizations legal persons for contract law can make them legal persons for purposes of the criminal law. This is relatively uncontroversial, *Citizens United* notwithstanding.<sup>30</sup>

In contrast, international crimes are usually perpetrated by informal goal-directed collectives, and the ICC at least appears interested in building its doctrine around not just formal state-like organizations (as in the Nuremberg era) but also the more ad hoc conspiracy-like organizations that form the joint enterprises that make up the current prosecutorial strategy. But how are such de facto organizations, traditionally unrecognized by the law, to be called to account for their behavior?

So is a two-tier solution possible and or advisable in a legal system? It is not clear what it would look like. The collective is responsible and so is the individual; would operationalizing this insight require a return to the Nuremberg scheme? Does it mean determining that the organization is itself responsible and returning to membership offences? Or would it require something like Kutz' preferred result, where each individual is vicariously responsible for the actions of the whole if they have a participatory intention? In past work I have argued that individuals are vicariously responsible for the actions of their collectives if they have a joint intention to carry out an international crime—a standard that requires the meshing of sub-plans (Ohlin 2011: 721). In contrast, Isaacs argues that in cases of goal-directed collectives, its members should only be responsible for their individual contributions (Isaacs 2012: 121). To resolve the anxiety that this makes no one responsible for the entirety of the conduct, Isaacs responds that this gap is filled by the collective liability (Isaacs 2012: 128). But what does this actually mean? What does it mean to say that the collective will be held responsible, either for tightly held collectives carrying out discrete tasks, or loosely knit collectives, such as a nation or a people, that carry out a widely dispersed initiative?

The answer, of course, is that collective responsibility is easier to impose in theory than in reality. Direct responsibility for such collective entities must be confined to moral responsibility alone, without a legal corollary. In political terms, reparations can be imposed under international law requiring one state to compensate another. In criminal terms, though, the closest one can come is exactly what the modern tribunals are currently doing—make a legal finding that such informal goal-directed collectives exist and then use those collectives as the centerpiece of a legal doctrine used to prosecute its members. But perhaps the tribunals should not pretend that this is any more individualistic than the collective responsibility imposed at Nuremberg with the doctrines of conspiracy and criminal membership; both are deeply collectivist. The most one can hope for is that courts build into their doctrines a convincing two-level analysis that separates out the most culpable members from the less culpable individuals. As Isaacs teaches us, such organizations are not black boxes without an internal structure (28); rather, each has unique deliberation and execution procedures that carve up authority—and ultimately responsibility—in different ways.

Strangely, the ICC has demonstrated remarkably little interest in dealing with organizations that jointly perpetrate crimes. With the rejection of conspiracy after Nuremberg and the recent demise of JCE in favor of the Control Theory at the ICC, the current trend is towards ignoring organizations that perpetrate international crimes. True, *Organisationsherrschaft* deals with organizations, but only in the sense of an individual perpetrator who *uses* (along the vertical axis) an organization or an organized apparatus of power to

<sup>30</sup> 558 US 310 (2010).

commit international crimes. That is a far cry from a doctrine that deals with an organization that jointly *perpetrates* crimes along a horizontal axis. What the doctrine ought to do, in other words, is consider situations where a tightly knit organization—say a junta—commits an international crime. If such a doctrine were constructed, it could navigate the thorniest legal and moral dilemmas: what to do with dissenters who willingly join the group but who either expressly dissent from a particular goal-directed activity, or are held vicariously responsible when other members of the collective stray from the agreed plan. A two-level analysis in international criminal law would recognize both the centrality of these criminal organizations yet also remain faithful to the principle that a conviction ought to be based on the individual culpability of its members for contributing to that collective crime. In other words, it ought to recapture the essential truths of the conspiracy doctrine without falling victim to its worse excesses.

## Conclusion

In closing, we should return to the Principle of Charity. If interpretation gives us a *choice* between seeing the one or the many, charity arguably *demand*s that we select whichever maximizes rationality. In that vein, it is important to remember that interpretation involves more than just value-neutral descriptions of behavior; it also involves value-laden assessments—the nuts and bolts of inter-personal ethical relations (or what Isaacs and Williams call thick moral terms). These interactions demand that we have the capacity to both interpret and evaluate groups for the enactment of their criminal plans. But as ethical agents and legal actors we also need the tools to assess *individuals* for their participation in these collective plans. Once we understand that an individual's *reason* for contributing to a collective plan resides in the individual's personal commitment to the collective plan that might be rationally justified at the group level, then and only then can we cast judgment on him. What is crucial here is our capacity to praise or blame their decision to leave (or conversely their failure to leave) joint endeavors with criminal outcomes. Indeed, it is precisely because of our need to praise and blame individuals for these contributions that we need to realize both the reality of group agency and its indebtedness to the building blocks of individual agency.

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