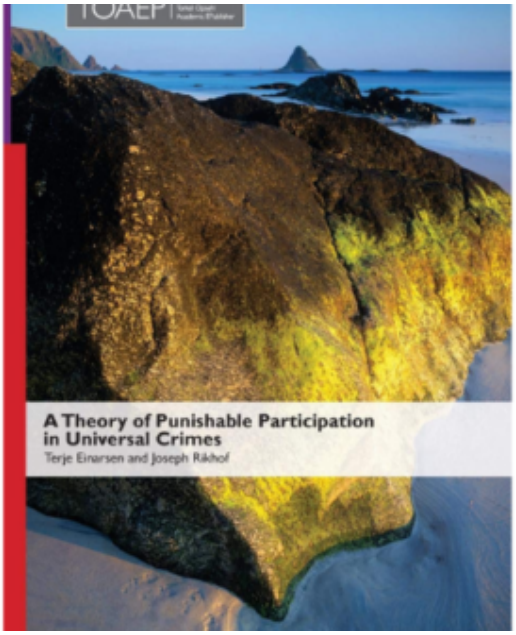




Books: Question and Answer Session with Terje Einarsen and Joseph Rikhof About Their New Book Entitled “A Theory of Punishable Participation in Universal Crimes”

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A Theory of Punishable Participation in Universal Crimes, Terje Einarsen and Joseph Rikhof, Torkel Opsahl Academic EPublisher, Brussels (2018**) http://www.toaep.org/ps-pdf/37-einarsen-rikhof**

The Editorial Board of the Philippe Kirsch Institute Global Justice Journal asked the authors some questions about their new book:

- Question: before discussing the contents of the book, could we first ask you about when and why the two of you decided to collaborate on this book?

We first discussed the idea of collaborating on the book while working on our respective monographs on universal crimes in international law (Einarsen) and exclusion in refugee law (Rikhof). We decided to move forward with a common project in 2013 and we drafted a comprehensive outline and the first chapter in 2014. We had a meeting in Bergen at a conference in International Criminal Law (ICL) and, on a memorable boat trip along the coast, we discussed for example why participation (membership)

in an organization used to commit mass crimes was no longer in use as a basis for responsibility. The main reason for our joint enterprise was not only that we shared a common interest in liability issues, but also that we seemed to have some similar ideas we wanted to explore in a book. In addition, we had complementary experience and skills that could perhaps be useful in a common project. Although theory and practice may not always match, we have indeed cooperated very well through the whole project.

- Question: The title appears to refer to the notion of complicity in crimes which transcend national jurisdictions. A lot has been written about legal concepts related to complicity in the last ten years. Why did you think another book on this subject matter was necessary or useful?

It is true that complicity in such crimes was central to our project. It is also true that several important new works on complicity have been published, and on other modes of liability as well. Some really good works on modes of liability existed before we got started. However, we think that our book may complement these other works and provide some new perspectives and insights, both in the theoretical and empirical elements of liability and in the overall analysis. Regarding the title, we decided to use the word “participation” instead of “complicity” in international crimes because we wanted to include all concepts and forms of criminal liability for persons taking part in international (universal) crimes and all kinds of participants regardless of their role and position in relation to the criminal acts and regardless of whether the participants were classified as principals or accomplices or by other terms at the operational levels of ICL, transnational criminal law and domestic criminal law.

We developed our approach within a theoretical and analytical framework, or matrix. It encompasses derivative criminal liability, while adhering to certain fundamental principles, including fair attribution of liability, that may transcend the division of domestic and international criminal law and specific national traditions. The notion of “derivative” liability is important to our work, but we use this concept differently from other authors who have used this term in ICL (see e.g. pages 113-114). In our conception, a person’s liability for a crime is neither derived from the criminal act as such, for instance the offence of murder, nor from the act of another person. Instead, we argue that liability for a person’s crime should be derived from a norm expressing the *basic type of liability* underlying a relevant crime description (the abstract crime norm). Criminal law liability forms and subcategories, and ultimately liability for a person committing or taking some other part in the crime, are derived from this basic type of liability. For example, commission (including omission) liability, inchoate liability and accomplice liability and their various subcategories are derived from the basic form of liability for the relevant crime (for instance, liability for crimes against humanity). Although this integrated approach may seem rather theoretical, it is, in fact, quite a realistic view and fully in line with e.g. Article 25 of the Rome Statute. While Articles 6 to 8 *bis* formulate the crime description norms, Article 25(3) formulate derivative forms of liability at the operational level for different kinds of participation in the relevant crimes. This theoretical and analytical framework, however, does not mean that all forms of participation necessarily results in the same level of gravity. And it does not mean that legislative and jurisprudential issues of criminal liability cannot be solved in different ways at the operational levels of

criminal law in compliance with our theory.

- Question: What aspects or chapters of your book do you think make a unique contribution to the academic work in this area of international law?

Most books discussing complicity in international (or universal) crimes approach it primarily from the perspective of the jurisprudence of the international tribunals and the International Criminal Court. Our book has a chapter on that approach, but we felt that we should enrich that perspective by broadening the horizon of our analysis to other sources of criminal law and theory. For instance, in recent years, domestic courts have given their views on notions of complicity in their jurisprudence and we have included that jurisprudence in our book; one chapter deals with such jurisprudence decided in countries which have put perpetrators on trial based on extra-territorial jurisdiction (i.e. where the crimes were committed outside the country undertaking such prosecutions) while another chapter discusses the caselaw of countries which conducted such trials for crimes committed in their own countries. Another added dimension to the book is the chapter in which we discuss the academic literature in this area of international law and canvas and explain a number of themes, such as comparative law versus autonomous approaches, unitary versus differentiated approaches with respect to personal liability and whether the legality principle extends to modes of liability. Last, we have included a chapter which addresses international trials from a historical and sociological perspective by examining the type of charges laid and the sentences meted out by all the international criminal institutions since the Second World War. We identified nearly 400 persons charged with participation in international crimes under many different liability concepts and grouped them into four overarching sociological categories and 20 sociological sub-categories ranging from several groups of high-level participants in main power structures involved in international crimes, to groups of mid-level and low-level participants in main power structures, to groups of participants in power support structures to the main structures. This led to some quite interesting observations, such as the connection between the level of functionaries and the sentences they received as well as the fact that the forms of liability used did not always correspond to the level these functionaries occupied in a particular hierarchy.

- Question: Your book can be roughly divided into a theoretical and an empirical portion. What is the main theoretical theme in the book? Can you explain what you mean by a scientific theory in the book and what it may imply with respect to other approaches to legal theory?

In the introduction (on page 2) we ask “Is ICL with respect to personal criminal liability actually premised on a sufficiently clear and transparent general scientific theory”? What we had in mind by this was partly an acknowledgment made by other more well-known authors – we mention in particular Van Sliedregt, Ambos and Fletcher in our introduction but there are others as well – that some kind of comprehensive liability theory is urgently needed but is currently lacking. ICL has been a focal point for criminal lawyers globally, especially during the last 25 years. Familiar principles of criminal law are being elaborated in extreme cases, where the liability of hundreds or thousands of persons connected to powerful institutions or organizations participate in criminal enterprises. We thought that this was

interesting and fertile ground for analyzing important criminal law principles on attribution of liability.

By using the term “scientific theory”, we wanted to signal from the start that a general theory – a model – for personal liability issues might be developed now. The model we have proposed in the book consists of principles, norms and analytical concepts for criminal liability at four different levels. Briefly, the first level is the supra-principle of free choice, while the second level consists of four fundamental principles: the principle of legality, the principle of conduct, the principle of culpability, and the principle of fair attribution of liability. The fourth (practical) level of the theory includes the analysis of operational criminal law systems: this is where the modes of liability and a variety of liability concepts are being implemented in practice within the several subsystems at the international and domestic levels. For instance, we regard the Rome Statute and the ICC as constituting one such subsystem within ICL. The most interesting theoretical part of the theory as a whole, we think, is the third theoretical level, comprising secondary principles concerned with fair attribution and labeling of liability, including the derivative principles. In the book, we identify 12 different subcategories of liability, four within the category of inchoate liability, four within the category of commission liability, and four within the category of accomplice liability. We also discuss the category of juridical entity participation in crime and the liability under international law of corporations. Based on the empirical findings, we identify some further subcategories of liability within this scheme, including joint criminal enterprise (JCE) and its further derivative forms (JCE 1, 2 and 3). This provides us with tools for organizing the different legal issues and for assessing the developments within ICL and for predicting possible further development in the future.

We have been asked whether this approach was meant to distinguish our theory of liability, as meant only to assist practitioners, for example, from more academic critical theories of law. This is not an easy question. First, the “critical legal studies” movement is itself complex. But the short answer is no: we had no such specific intention. Upon closer inspection, we think our general theory is open-ended enough to take into account the social context and different ideas of justice leaving room for theoretical critique, as well as for different policy choices to be made within the practical world of operational criminal law systems prosecuting universal crimes. It does not, by any means, rule out critique of operational criminal law, e.g. the on the ground that the current framing of liability overall or with respect to certain modes of liability may serve the interests of powerful actors in society. No doubt, criminal law and legal institutions can be misused as a means of oppression, and innocent persons might be charged with international crimes as well, even on purpose. While direct abuse has not been much of a serious issue at the international tribunals, this may well happen in domestic trials in some jurisdictions. On the other hand, by leaving out certain forms of liability at the operational level, which in principle are supported by our general theory, it is also possible to critique the operational system on that ground. The absence of juridical entity liability for powerful corporate players in current operational ICL could be a case in point.

It is furthermore important to underline that our theory is not meant to determine the outcome of concrete criminal law cases, although it might serve to invalidate criminal law proceedings and

outcomes which are clearly not in conformity with the fundamental principles of criminal law and human rights. The theory is meant to shed light on the scope and possibilities of lawful attribution of criminal liability within ICL, and inspire possible future developments that are likely, within criminal law systems designed to respect the rule of law, human rights and the fundamental principles of criminal law. It may provide a basis for evaluating best practices, and thus, it may assist legislators and drafters of new international court statutes as well as practitioners of ICL.

The general theory, we think, if adhered to, would support the autonomy of well-intentioned criminal law systems designed to follow certain fundamental principles. At the same time, it explains the possibility of common and “best” approaches to the various liability issues relating in particular to international crimes. In that sense, the general theory provides a “universal framework” by means of a scientific theory that still leaves room for other specific liability concepts and practices within the several subsystems of criminal law, both at the international and domestic levels. Overall, it outlines more consistent practices and use of liability concepts that respect the fundamental principles of criminal law a where the knowledge of the lawful scope of personal liability is gradually recognized and determined in fair trials.

- Question: How do think the empirical portion validates the theoretical theme? Were there any surprises when you tried to match up the data set out in the book with the conceptual premises set out in the beginning of the book?

The theoretical theme was in part designed to provide an explanation for the various types of liability which can be justified from a conceptual perspective. Our initial thought was that since we used a fairly broad stroke approach, most, if not all, forms of liability found in the existing jurisprudence would quite easily fit within our conceptual approach. While this was for the most part true for the international jurisprudence (with the possible interesting exception of membership in an organization involved in universal crimes) the picture which emerged from the domestic jurisprudence was more varied, in that a fair amount of experimentation has taken place at that level, including the use of some novel forms of punishable participation, which were close and sometimes crossed the line of the theoretical boundaries we developed.

- Question: What are your goals for the use of the book by readers and what would demonstrate to you that the book was a success?

While the book is in part a theoretical expose of international criminal law, by including data from various angles including a broad range of domestic jurisprudence, we have given the book a pragmatic slant. As such, we hope that this combined theoretical-empirical background will appeal to both academics and practitioners as well as policy makers. For practitioners, we hope that the book will give them a broader and more comparative canvas with which they can pursue their cases with the confidence that their approach is not only supported at the international level but also used by colleagues in other countries. Some of that comparative analysis, and the use of foreign as well international jurisprudence, is already taking place in domestic trials, but we hope that the book will

assist in that effort and that it will also further expand such co-operation. With respect to academics, we hope that the important discussions and thinking about forms of liability, which are still going on, will benefit from this book. We hope this will be true with respect to discussion of the general theory as such, while hoping that the chapter on academic literature will allow these discussions to be more focused and productive, which in turn, will assist judges at both the domestic and international level as well as policy makers who might be involved in setting up new international mechanisms.

- Question: is there a particular reason why you decided to go with this specific publisher?

We like the TOAEP publisher specifically for two reasons in addition to the fact that is has an excellent staff and editor. The first reason is that the book is available both as a hard cover version as well as e-book and that the e-book version is freely available on-line here; this will allow for the broadest distribution possible. Secondly, it is of great assistance to any researcher or practitioner that nearly all references in our book have additionally been provided by TOAEP with permanently available weblinks (so-called PURLs) and linked to the Legal Tools of the ICC. This is especially useful for the caselaw as it saves a great deal of time in finding those references. The whole book is also made available in the Legal Tools system.

- Question: Do you think that your respective backgrounds would make the book more useful to readers? Related to this, which type of readers do you think would be interested in your book?

We think that our backgrounds are useful for the readers of the book. First of all, both of us have worked in academia (we are at the moment law professors in Canada and Norway) and both directly in the field of law as practitioners, Terje as a judge and lawyer in Norway and Joseph as a legal advisor for the Canadian government. Secondly, and this became quite apparent during the writing of the book, the fact that one of us had a predominantly civil law background and the other a common law background, was very useful in that at least one of us had an innate understanding of some unique aspects of certain notions of liability in these legal cultures, which have also influenced the international jurisprudence. For instance, inchoate offences are used more often in common law while the notion of co-perpetration is more of a civil law notion. Understanding the peculiarities of these two legal systems and educating each other in them has strengthened the quality of the analysis in the book and will hopefully serve this conceptual bridge for others working in this field as well.

- Question: How has the book been received so far?

We understand from the publisher that based on twitter traffic and sales, the book has been well received. As well, both our law faculties have announced the book on their website while we have received several offers for book reviews and blog discussions.

- Question: Do you expect to collaborate on more projects in the future?

Yes, we both hope to do so, and we do have some plans as well. However, we may need some time to recover fully from this effort and take care of some other projects put on hold for a while. Having

said that, we are currently the co-supervisors of a PhD student at Bergen University who is doing research in ICL and related areas.

- Question: Have there been any developments since the publication of the book which touch on the themes you explored in it?

Yes, there have been. Since July 2018, which was the cut-off date for descriptions of jurisprudence and literature in the book, there have been several concrete developments which potentially would have been interesting to take into account, although further discussion of those cannot be undertaken here. Briefly, we refer to the following:

- In July 2018, a new article about extended liability was published, namely by Coman Kenny, entitled “Jurisprudence Continues to Evolve: The ECCC’s Revision of Common Purpose Liability” in the *Journal of International Criminal Justice*, Volume 16, Issue 3, pages 623–644;
- On September 25, 2018, a German Court sentenced Ibrahim A. to life in prison after having been found guilty of torture and killing persons protected under international law as well as murder, extortion, kidnapping, and the commission of war crimes under the German International Criminal Code;
- On November 16, 2018 Nuon Chea and Khieu Samphan were found by the ECCC to be guilty of genocide of Vietnamese in Cambodia between 1975 and 1979;
- On November 17, 2018, CAR ex-militia leader Alfred Yekatom was transferred to the ICC;
- On December 12, 2018, Anti-Balaka leader Patrice-Edouard Ngaïssona was arrested in the Central African Republic for crimes against humanity and war crimes pursuant to an ICC warrant and transferred to the ICC on January 23, 2019; their cases were joined on February 19, 2019;
- 0n December 20, 2018, the Bundesgerichthof in Germany overturned on appeal the war crimes allegations, but not the terrorism charges, against Ignace Murwanashyaka, the leader of the FDLR rebel group in the Democratic Republic of the Congo, and his aide Straton Musoni and ordered a retrial; their original trial had started on May 5, 2011 and they were convicted on September 28, 2015 and sentenced to 13 and eight years respectively for war crimes and being a ring leader of a terrorist organization;
- on February 19, 2019, a Swedish court convicted a man who fought against the Islamic State group in Iraq of war crimes for posting macabre pictures and videos on Facebook; the Orebro District Court sentenced 38-year-old Kurda Bahaalddin H Saeed H Saeed, who had arrived in Sweden as an asylum seeker with his wife and children, to 15 months in jail.

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About the Authors

Joseph RikhofGlobally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada's Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

Terje EinarsenTerje Einarsen is Professor of Law at the University of Bergen, and Senior Research Associate at the University of London. He is member of the Norwegian Bar Association, with permission to appear before the Supreme Court. He is currently chair of the domestic section of International Commission of Jurists (ICJ-Norway). Einarsen has been a judge at the Court of Appeals and Head of the Human Rights Committee of the Norwegian Judges' Association. He is founder of the Universal Crimes Project.