

## BOOK REVIEW

Terje Einarsen and Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes* (2018), Torkel Opsahl Academic EPublisher, 756 pp, ISBN 9788283481273  
doi:[10.1017/S0922156519000608](https://doi.org/10.1017/S0922156519000608)

In *A Theory of Punishable Participation in Universal Crimes*, Terje Einarsen and Joseph Rikhof unpack concepts of liability for individual contributions to universal crimes. Universal crimes – namely genocide, crimes against humanity, war crimes, and acts of aggression – tend to occur when a state or another powerful organization (a non-state actor, for example) collectivizes and channels the involvement of many people to commit the crime. The people who execute the acts are rarely ever the people who coordinate them. This disjuncture renders participation difficult to define and punish – individual acts may elide conventional legal intelligibility. Consequently, only a few individuals typically ever face prosecution for mass atrocities notwithstanding the involvement of what may be many thousands of individuals in the violence. An overview of the current legal theories of liability reveals that current approaches are inconsistent and imprecise. Therefore, Einarsen and Rikhof sought to develop a more comprehensive theory of personal criminal liability that would strengthen the ability of practitioners and policy makers to understand, explain, and predict the outcomes of the legal issues involved. This approach, moreover, would also better reflect the dynamics of the perpetration of atrocity.

This project is the second in an ambitious four-part series entitled ‘Rethinking the Essentials of International Criminal Law and Transitional Justice’.

*A Theory of Punishable Participation in Universal Crimes* develops a sophisticated quadruple level framework. The first level is the supra-principle of free choice. The second level consists of the fundamental principles of legality, conduct, culpability, and fair attribution of personal liability. The third level consists of secondary principles of personal liability which divide participation into three classes: inchoate liability, commission liability, and accomplice liability; each class is then further subdivided into four more specific categories. Finally, the fourth level, the specific rules on operational criminal law, is a practical level where modes of liability and concepts are being implemented in practice. At the core of Einarsen and Rikhof’s theoretical model is a scheme of derivation of personal criminal liability. Accordingly, each participant’s own contribution to the crime is the focus of the liability assessment, not another person’s acts or the crime itself.

After laying out their theory, the authors addressed punishable participation in universal crimes from an empirical and historical perspective by examining the work of the International Law Commission, the views of scholars, and the jurisprudence of international tribunals. The authors identified nearly 400 individuals charged with participation in international crimes under various liability concepts and grouped them into four overarching sociological categories ranging from high and low-level participants in main power structures to participants in power support structures to the

main structures. Not surprisingly, the judicial institutions examined by the authors brought to trial and convicted the people most responsible – the high and mid-level participants – for the crime in question. Additionally, Einarsen and Rikhof found a general trend of establishing criminal responsibility for individuals involved in relevant crimes and expanding circles of forms of participation. However, differences of opinion arose with regard to forms of participation between various institutions and academic scholars. It is for this reason, and the pursuit of overall streamlining, that Einarsen and Rikhof seek to develop an overarching theory of liability.

Einarsen and Rikhof then discuss the jurisprudence of domestic courts in countries that have invoked extraterritoriality, nationality, and territoriality for the purpose of asserting jurisdiction over universal crimes. This highly rigorous study showed that domestic courts were able to identify and successfully prosecute individuals liable for their participation in universal crimes. Einarsen and Rikhof also noted that domestic jurisprudence was more varied and novel than international jurisprudence. For example, the Netherlands utilizes two unique concepts when applying liability for conspiracy. First, Dutch practice incorporates the risk of harm through *dolus eventualis*, or conditional intent, meaning that a person accepts a reasonable chance that certain consequences or circumstances will occur. Second, the Dutch definition of substantial contribution of an offense only requires that the accused promote an offense or make it easier to commit. Both concepts were demonstrated in the *Van Kouwenhoven* case where an international businessman was convicted for aiding and abetting war crimes by providing weapons and ammunition to the Liberian armed forces under Charles Taylor. The court concluded that Van Kouwenhoven knowingly exposed himself to the substantial chance that the weapons and ammunition would be used by others to commit war crimes and crimes against humanity. Notably, this included liability for crimes in which the weapons were used directly (by shooting civilians) and indirectly (where the presence of weapons was used to commit crimes such as rape or pillage). Similarly, Germany applies a unique definition of aiding and abetting by permitting liability for an offense on the basis of providing moral assistance. Moral assistance can be technical, by imparting knowledge that results in improved prospects for a successful execution of the act, or psychological, by influencing the volition of the principal actor by reinforcing his or her decision to commit the crime.

Overall, the authors found that all forms of liability developed so far in the international jurisprudence fall within the framework of their general theory. They believe their theory provides an operational and theoretical matrix of personal liability within international criminal law that will help predict future observations of legal developments in statutes and judicial decisions concerned with possible criminal liability for alleged punishable participation in universal crimes.

Einarsen and Rikhof's study is highly refined, doctrinally exact, and wonderfully detailed. By rooting the content of international law within domestic practice, these authors revive the importance of general principles of law as a source of public international law. At the same time, the authors recognize the *sui generis* nature of much of atrocity crime – the sprawling stains of connivance and collective violence. This book will be of great assistance to practitioners, students, and policymakers alike. It will also assist lawyers and jurists engaged in the regulation of domestic crimes that have group-based catalysts, as well of course in the conceptualization of transnational crimes that may not (yet) have entered the corpus of international criminal law. The authors, moreover, demonstrate extraordinary diligence in updating their research in terms of new jurisprudence beyond the cut-off date they have invoked of July 2018. For example, in discussion of the book published in a question and answer series, they identified seven subsequent cases rendered by multiple institutions that address the legal questions that concern them.<sup>1</sup>

To be sure, the quality of the volume, while unimpeachable, is predicated on the assumption that the prosecution of international crimes can meaningfully fulfil deterrent, retributive, and

<sup>1</sup>See [www.kirschinstitute.ca/books-question-answer-session-terje-einarsen-joseph-rikhof-new-book-entitled-theory-punishable-participation-universal-crimes/](http://www.kirschinstitute.ca/books-question-answer-session-terje-einarsen-joseph-rikhof-new-book-entitled-theory-punishable-participation-universal-crimes/).

expressive goals. Much has been written about the actual attainability of these penological aspirations in the context of atrocity crime.<sup>2</sup> The quality of the volume also hinges on whether, even if aspirationally effective, in a logistical sense it is possible for many post-conflict societies to actually initiate these very complicated criminal cases in the wake of mass atrocity.

In sum, Einarsen and Rikhof have dug wide and deep and have contributed mightily to one of the major questions that vexes the prosecution of atrocity crimes, that is, how to connect a diverse array of responsible individuals to the underlying acts and to the subjacent crime base. In addition, their choice to place their impressive work with a publisher whose goal is to make ideas and content freely accessible to all, including persons pursuing justice in post conflict contexts where resources are often so fragile, is to be deeply commended.

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<sup>2</sup>See, e.g., H. Jo and B. Simmons, 'Can the International Criminal Court Deter Atrocity?', (Summer 2016) 70 *International Organization* 443–75; M. A. Drumbl, *Atrocity, Punishment and International Law* (2007); M. Osiel, *Making Sense of Mass Atrocity* (2009).

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