

Criminal Enterprise

Individuals, organisations and
criminal responsibility

WILLAN
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Christopher Harding

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Preface

I would sit there late in the evening turning it over in my mind. Maybe Herbert Hart did have a point: human beings were cursed, as part of their natural condition, with a need to interpret each other's behaviour, and this was a crucial need. We cannot live without engaging in the 'moral' activity of judging each other, of finding some 'right' and 'wrong'. But it is not just a functional necessity for social survival. We also enjoy this activity, and do so to the extent of often loving villains more than saints. There is a widespread fascination with bad behaviour, and crime – as the graphic manifestation of bad behaviour – is one of the most enduring preoccupations of literature, drama, art, everyday gossip, media presentations, not to mention academic discourse. And I thought about, for instance, how I would be really high remembering that moment, towards the end of *Godfather 1*, when Michael Corleone calmly states: 'Today, I have settled all outstanding Family business' and proceeds with his impressive list of assassinations. So let's be honest and admit that we engage in the business of casting judgment on criminals, not only because we feel that it is morally necessary, but also because we are fascinated by the whole business. And that fact must colour the activity of casting judgment.

Contribution to a research seminar discussion, 2003

This project has its origins in a now long-standing interest in and reflection on the subject of criminal responsibility. From my earliest reading of Hart's essays, I was struck by the enduring puzzle

presented by this topic, which poses some of the fundamental questions relating to human identity and the distinctive features of human nature. To determine the extent and the way in which we should be accountable for our actions is an essential part of the process of understanding ourselves and the whole history and development of humankind. But my more recent reflection took a particular turn. It is a commonplace observation that modern society is characterised by the number and sophistication of its organisations, so that human activity increasingly takes place within organisational structures and is subject to the influence of organisations. We are no longer, as human individuals, acting very often in splendid isolation. What bearing should this have on the issue of human responsibility? Are organisations in some way supplanting individuals as responsible actors? Does organisational activity moderate the normative role of its human components? These seemed to be relevant and important questions, but infrequently posed by jurists beyond a few topical contexts, such as the issue of responsibility for major industrial or transport 'disasters'. But also the individual-organisation question struck me as particularly interesting since it contains a great enigma. Organisations are necessarily composed of individuals, so do they possess any separate identity, and does it make sense to talk about individuals and organisations, rather than individuals outside organisations and individuals within organisations? This ontological debate is central to the whole subject, but is notoriously slippery in that neither philosophical nor sociological enquiry have provided any clear answers. This makes the subject all the more challenging but also fascinating for the lawyer and the criminologist.

My approach to the subject, as I started to work it out and present my pitch, encountered some frankly sceptical reactions. Nobody would doubt the significance of these questions, but my interdisciplinary ambition and my proposed focus did not convince some specialist epistemic groups. In particular, the idea that such a discussion could take business cartels, human rights violators, and Mafia and terrorist groups, and forge a convincing theory of responsibility from such a diverse and eclectic collection, encountered a fair amount of incredulity. I suspect that my idea that companies, governments and organised crime groups may sometimes have much in common offended against more purist analysis, as did my apparent selectivity ('So, why not also churches, trade unions, and all the other types of corporate person the world has seen?'). In fact, my choice was based partly on topicality, but also on an intuition that legally significant and revealing patterns would emerge across my chosen spectrum.

And I believe that, in the outcome, the gamble (if that is what it was) has proven justified.

Interested readers may particularly look forward to any conclusion from this study on the grand ontological question of whether organisations really do exist as separate entities. As I discuss at some length, that debate was lively over one hundred years ago, and remains so today. All I am prepared to say at this stage is, teasingly, that I think that it depends on what one is willing to believe. Much of what is being discussed in this subject is, after all, interpretation of social fact. But even if it is, in the end, a matter of interpretation, it is a hugely important business of interpretation, since so much policy and law depends on how it is made. There will probably always be those who steadfastly maintain that the company, the State, or whatever organisation, is a fiction, 'what the rules say it is', or no 'ding an sich'. Equally, there will probably always be those who steadfastly maintain that there is something real out there, other than the human parts, and more than the sum of those parts. I think that personally I am willing to see things the latter way, but I recognise that to do so is an act of interpretation, preference and 'view of the world'. But *my* preferred view is not the important point. Rather, what is important is to make some effort to understand why some prefer it one way, and some the other, and to recognise how and why this process of interpretation has led to inconsistency across the whole spectrum, and that is the issue which needs to be addressed and which this book seeks to address. My project therefore has been to explain different legal outcomes and to search for a consistent and coherent argument on the allocation of criminal responsibility in the context of individuals and organisations. I suggest a model for this purpose. It is for the reader to judge how convincing this suggested model may be.

I have tested some parts of the argument in this work in a number of ways. In particular, a draft of Chapter 7 was presented as a paper ('Human or Corporate?') at the Australia and New Zealand Society of Criminology Annual Conference in Wellington in February 2005, and a draft of Chapter 6 was presented at a meeting of the Law and Political Philosophy Discussion Group in Aberystwyth in November 2005 ('Revisiting H.L.A. Hart'). A version of what has become Chapter 8 has appeared as 'Human Action or State Action? Locating the Site of Supranational Criminality', in Roelof Haveman and Olaoluwa Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, 2006), and some of the material used in Chapter 9 was also used in 'The Offence of Belonging: Capturing Participation

in *Organised Crime*, which appeared in 2005 *Criminal Law Review*. Some of the argument relating to the *Rainbow Warrior* incident has been used and developed further in 'Vingt Ans Après: Rainbow Warrior, Legal Ordering and Legal Complexity' in 2006 *Singapore Yearbook of International Law*. I have appreciated the critical comments of audiences and readers of this work. More specifically I should also express my appreciation of those friends and colleagues who have helped me in my search for 'critical edge' during this period and on these questions, and for that purpose would like to single out Mitch Robinson, Alun Gibbs, Uta Kohl, Naomi Salmon, Chin Lim, Mick John-Hopkins and Katerina Novotna. I am naturally also appreciative of the willingness of Willan Publishing to take on the project for publication. Finally, I am also grateful for the award of a period of 12 months' research leave from the University of Wales, Aberystwyth, during which time I was able to develop some of my ideas and carry out a good part of the research for this book.

A word on the layout of the book might be helpful at this point. Since this study draws upon some apparently disparate sources, and much of it is based on challenging metaphysical and conceptual discussion, I have sought to guide readers by providing for each main chapter a kind of abstract. These abstracts are intended not only to provide a summary of argument, but also to set the argument in context, with some reference to other research and literature, while also emphasising salient, novel and tricky points of argument. The abstracts may be read collectively as a kind of 'rough guide' to the work and I would recommend their perusal first of all to any potential readers who may be tempted but still unsure about taking on the whole book. The book is divided into parts. After an introduction to the subject and the main problem, Part I (Chapters 2 to 5) provides the theoretical basis of the discussion; Part II (Chapters 6 to 8) draws argument from three principal or paradigmatic sites of individual-organisation interactivity; and Part III (Chapters 9 and 10) extrapolates models of criminal responsibility, by focussing on the autonomous criminal organisation and the joint criminal enterprise, leaving my concluding remarks to a very brief endnote.

In the final stages of writing the book I was visiting Potsdam in Germany, and walked to Cecilienhof, that quirky reproduction of an English country house where the Potsdam Agreement was negotiated and signed in 1945 by Stalin, Churchill and Truman (to be exact, Truman replaced the deceased Roosevelt who had attended the earlier Yalta meeting, and during the Potsdam Conference Attlee later replaced Churchill who had during that time lost a general

election). That most famous event in the building's history prompted a reflection on the theme of this book. How should we interpret the Potsdam Agreement? As the act of three human individuals – powerful political leaders, but nonetheless individual human actors? Or as the act of three of the most powerful victor governments at the close of a global conflict (Churchill had smugly described the meeting as that of a very exclusive club with an entrance fee of at least five million soldiers or their equivalent). Or as the act of a joint (criminal?) enterprise or political cartel, intent on dismembering Germany, sharing global power, and so producing that sad historical condition we look back upon as the 'Cold War'? These options of interpretation are the subject-matter of the following pages.

Aberystwyth, May 2007

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Chapter I

Introduction: searching for the responsible criminal actor

First of all, let us acknowledge the 'individual–organisation dilemma': the problem of how to evaluate the activity of organisations given that they are composed of individuals. Can organisations then be regarded as autonomous actors, capable of moral and legal agency? On the other hand, it should also be asked how an organisational context should be taken into account in assessing the conduct of human individuals acting within such a context. In addressing these fundamental questions, the study here adopts a method which combines a development of theory and the testing of argument in three main paradigmatic sites of human and organisational interactivity of contemporary significance. The main theoretical elements comprise organisations as a social phenomenon, the criteria of agency for purposes of assigning a normative (moral and legal) role, the legal routes between the identification of agency and the allocation of responsibility, and responsibility as a device within normative ordering. The choice of the three paradigmatic contexts (the business cartel, the delinquent governmental actor and the criminal organisation) may be explained and illustrated through three narratives of individual and organisational activity, in tales of delinquency perpetrated respectively by a transnational corporation, war criminals and a terrorist arm of government.

I Individuals, organisations and criminal responsibility

In a contemporary world within which a range of organisational, non-human actors play a significant and sometimes dominating

role, there are an increasing number of important and challenging questions relating to the evaluation of organisational and individual behaviour. Self-evidently such organisations are made up of human individuals and many of their dealings are with human as well as other organisational actors. But how should we understand the relationship between these organisations and individuals, and more specifically how should we attribute responsibility for the actions of these various organisational and human actors? To what extent is it meaningful and useful to hold States, intergovernmental organisations, companies, political factions, crime gangs or other non-human entities responsible for certain conduct, either instead of human individuals or in some way together with individuals? Is it possible to say that in some areas of activity organisations have replaced individuals as the real agents of action? Or, on the other hand, is it impossible to escape from a reduction of all organisational activity to its individual component parts? These are important questions because of the pervasive presence of several kinds of organisation in contemporary global society, and because this complexity of social structure inevitably affects ethical and legal processes through which we allocate responsibility for conduct viewed as problematical and causing harm to others. In short, who should we regard as the responsible moral, legal and (in relation to some kinds of conduct) criminal actors in contemporary society?

A few moments' reflection across a spectrum of activities will demonstrate the relevance and significance of these questions, even confining attention to the legal sphere rather than the broader ethical and political context. Who should be held responsible for severe human rights violations: governments and States, or individual politicians, soldiers or police officers? Who should be held responsible for the damage arising from industrial or transport disasters, or for the economic harm arising from financial delinquency, or for the long-term damage arising from environmental degradation – companies, or the individuals working for those companies? Who should be held responsible for the suffering caused by the activities of terrorist organisations, organised crime groups or extreme political or religious factions – those organisations or their individual members? In each of these examples, the kind of conduct and the resulting level of harm are usually considered to justify the extreme legal response embodied in the use of criminal responsibility and its associated sanctions. In this way, issues of agency – of identifying the relevant actor – and of criminal responsibility are brought together. The task is that of searching for and identifying the responsible criminal actor, and as

such it is a task of philosophical enquiry and broader jurisprudence as well as of criminal law and criminal justice.

These are not wholly new questions and it has already been practically necessary to provide some legal solutions in relation to such issues of responsibility. A study of this kind is necessarily therefore to some extent a critical evaluation of what has been done so far in the way of allocating legal responsibility. But it may be argued that much of the legal development to date in this area has a piecemeal character, based on responses to the dilemma of agency and responsibility in particular contexts. In this way, we have arrived at a certain idea of, for instance, the war criminal in one context, corporate liability for 'disasters' in another context, or company fines and personal prison sentences for price fixing in yet another context. Are these approaches and solutions consistent, in the light of the fact that they are all ways of dealing with the relation between individual and organisational responsibility? Should we be looking for and expecting consistency in this respect, and is it feasible to discuss matters in terms of a general theory of individual and organisational responsibility? A primary objective of this study is to consider a range of such situations which raise these questions in a sharp and paradigmatic form so as to test the value of a general theory, regarding what it may offer in terms of both an understanding of delinquent and criminal behaviour and of practical solutions in the distribution of legal responsibility.

Although the focus of this discussion is the issue of legal and more specifically criminal responsibility, it will be necessary in disciplinary terms to cast the net more widely than legal or even jurisprudential discussion. At the root of these questions lies the fundamental issue of our understanding of human behaviour and how society works. It is necessary to ask why and how human beings have increasingly arranged their lives around organisational structures, and then consider the impact of these structures on individual human autonomy and behaviour. These underlying questions and their discussion are inevitably first of all philosophical, and then sociological. The philosophical problem is one of identity and ontology, probing the existence and co-existence of human and non-human actors. The sociological aspect is more empirical – what do we know and understand about the functioning of different types of organisation, of the role of individuals within such organisations, and of the impact of organisations on human life? But both types of enquiry are necessarily prior to any specifically juristic analysis of legal responsibility, criminal law and criminal sanctions.

There are three major questions that form the backbone of the ensuing discussion and it may be helpful to summarise these questions here so as to provide a first signpost for the way ahead:

- May an organisation meaningfully be regarded as an independent actor for purposes of allocating moral and legal responsibility, and more particularly criminal liability? This is the question of *the ontology of organisations*.
- Assuming that the answer to the first question is positive, where and how should the line be drawn between organisational and individual responsibility, generally or in particular contexts; and in a society in which complex organisations dominate many areas of life, how much remains of individual human responsibility? This is the question of *the allocation of responsibility*.
- In what ways should the criminal liability of individuals, when acting within an organisational context, be affected by their role within such organisations? This is the question of *organisational impact*.

2 Mapping out the discussion

One of the challenges in writing this kind of work resides in the need to integrate theory with more empirical observation. Moreover, some of the theory is complex and is drawn from a number of sources and different disciplines – not only law and jurisprudence, but also philosophy and social science. There is also a danger with this kind of subject, once it becomes familiar, of slipping into the language of shorthand abstractions and to talk frequently about, for example, agency and actors, corporations and non-human entities, personality and identity, responsibility and accountability, while having in mind more explicitly and materially companies and chief executive officers, presidents and generals, or terrorists and assassins. Consideration for the reader eventually suggested that the argument would be more accessible if fact were put before theory, even though the theoretical structure is crucial to the subject. The discussion therefore opens, in the later part of this chapter, with a more descriptive and empirical account of the contemporary terrain of individual and organisational actors, before proceeding to a critical exploration of the theoretical framework and then a more detailed examination of selected paradigmatic cases. But in taking this approach, it is probably still

helpful to provide the reader here at the outset with some continuing idea of the main argument which is being tested in the book, and some sense of the theoretical basis of that argument.

3 Main lines of theory

(a) Stating the problem: the role of the individual and the organisation in contemporary life

This opening part of the discussion is intended to provide a picture of contemporary society whose activities involve organisations as much as individuals. In some respects this is to report on what is well-known. We can quickly identify significant organisational forms in most walks of life. Governance and public affairs are conducted through well-established types of organisation, from the State in a key position, and then moving upwards (for instance, intergovernmental organisations (IGOs)) or downwards (for instance, government departments or units of local government). Commercial and economic life is dominated by the organisational form often referred to as the company or the firm. Civil society is increasingly expressing itself through a range of non-governmental organisations (NGOs) carrying out a variety of representative roles. The educational and cultural world is structured around a spectrum of institutions, including the like of universities, research institutions and those managing collections or sites of cultural significance. Also the realm of more shadowy delinquent and criminal activity has a significant organised dimension, manifested in terrorist and organised crime groups and delinquent political and military factions.

But this area of general knowledge requires some explanation as well as description. Chapter 2 explores the significance of the range of organisational actors in contemporary life and considers the role of individuals within such organisational structures. One of the main puzzles within the subject arises from a certain identity of human individuals and their organisations, since the latter are of course formed by and constituted through the membership of human individuals. This overlapping of identities – after all, we are talking about *organisations of humans* even if theoretically we may like to characterise such entities as *non-human actors* – requires some exploration. Much of the later theoretical argument addresses this phenomenon of interaction between human person and organisational structure, and should be informed therefore by some prior idea of