Banality of Evil Meets Unity of Purpose: Criminological Similarities between Italian Mafia Groups and International Crimes

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This paper analyses the parallels between international extraordinary crimes and ordinary group crimes such as organised crime, using mafia-like associations in Italy. The first half of the work establishes criminological similarities between the two types of crimes. The second chapter explores how these characteristics have led to notable shortfalls in international criminal law, as well as the reforms proposed by scholars in the field to remedy them. The final chapter turns to the successes of Italian antimafia, achieved through a combination of direct legal measures and indirect social policies. While much of the shortfall in international criminal law is due to being a relatively new field largely imprinted on legalistic criminal systems used on a national scale, it would benefit from a dialogue with national systems designed to fight organised crime in light of their similar criminological challenges.
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| Cass.        | Corte di Cassazione  
(Cassation Court, the Italian Supreme Court) |
| Corte Cost.  | Corte Costituzionale  
(Italian Constitutional Court) |
| CP           | Codice Penale (Italian Criminal Code) |
| CPT          | European Committee for the Prevention of Torture  
and Inhuman or Degrading Treatment or Punishment |
| DDA          | Direzione Distrettuale Antimafia  
(District-level Anti-Mafia Directorate) |
| DIA          | Direzione Investigativa Antimafia  
(Anti-Mafia Investigative Agency) |
| DNA          | Direzione Nazionale Antimafia  
(National Anti-Mafia Directorate) |
| DRC          | Democratic Republic of Congo |
| ECHR         | European Convention on Human Rights |
| ECtHR        | European Court of Human Rights |
| ICC          | International Criminal Court |
| ICL          | International Criminal Law |
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the Former Yugoslavia
IMT International Military Tribunal
JCE Joint Criminal Enterprise
PON Programma Operativo Nazionale
(Operative National Programme)
Sent. Sentence
UN United Nations
UNSC United Nations Security Council
WWII World War II
Introduction

In international criminal law (ICL), extensive academic debate surrounds the role of individual criminal responsibility in the adjudication of collective crimes. The ‘most serious crimes of international concern’, including crimes against humanity, genocide, and war crimes, are paradoxically prosecuted using methods designed for ordinary crimes.\(^1\) The present Article draws a parallel between international crimes and organised crime in Italy, positing that their common traits raise similar challenges for the institutions tasked with adjudicating them based on individual responsibility.

As there continues to be ambiguity on the precise legal definition of ‘organised crime’, it is essential to frame what is meant by the concept here.\(^2\) Mindful of the distinctions between various forms of ‘organised crime’, the present Article uses the term in reference to mafia-type criminal syndicates in Italy. These organisations are defined by their operation through violence and intimidation, producing a general condition of acquiescence and silence—*omertà*—within wider society.\(^3\) Their organisational complexity, including an articulated hierarchy and code of norms,


distinguishes them from other group criminal phenomena. While various mafia-type organisations in Italy originate from different territories and operate under unique hierarchies and institutional frameworks, they share the same aim—controlling and governing territory and the accumulation of financial resources for their members’ benefit—and the same methods—the use of ruthless violence and intimidation. These common traits are codified in Article 416-bis of the Italian Criminal Code, criminalising membership to such organisations.

In both international and mafia crimes, the group that physically perpetrates crimes is limited and would be unable to assert itself without the tacit complicity and passivity of a large portion of society. Much like in mafia organisations, groups that commit international crimes do so by using their resources and solidarity arising from the creation of a subculture within the group, with its own hierarchies, norms, and values. This subculture is a specific feature of such crimes, where perpetrators act in accordance to the group values rather than those of wider society, making it difficult to frame their actions as deviant. The first Section of this Article

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5 Catino (n 3) 87–88.
will analyse these communal features, which challenge the paradigm of individual responsibility used in their respective adjudication processes.

Both mafia organisations and groups that perpetrate international crimes are the result of a fundamental breakdown in society, defined as a destruction of the social fabric through multiple processes.\(^8\) While this is more sudden and violent in the case of international crimes, it is wrought in both cases by historically weak governments that have failed to foster a shared social identity in the state or to implement lasting mechanisms of social control.\(^9\) The origins of the mafia, for example, can be traced to the breakdown of social order in Sicily in the 19th century, following Italian unification. The resulting widespread distrust of, and contempt for, national institutions of policing and criminal justice in the region paved the way for mafia members (mafiosi) to present themselves as ‘sellers of protection’.\(^10\)

Neglecting the governance dimensions of these groups—their ideological influence and their development of a subculture that governs its members’ thoughts, behaviour, and worldviews—stunts adjudication and policing efforts. These dimensions will be evaluated in the second and third Sections of this Article in relation to each criminal phenomenon in their respective arenas. As these groups are rooted in essentially

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\(^8\) ibid.


\(^10\) Schneider and Schneider (n 4) 363.
broken communities, the collective processes that created, abetted, and supported violence must be addressed for meaningful community reconstruction to occur and for the prevention of future crime. An institutional response to these crimes, therefore, must necessarily entail processes that go beyond the administration of justice and involve elements of democracy, economic transformation, and reconciliation.

Legal responses to collective crimes are best analysed in view of the established aims of each system of justice. While ICL lacks positive law detailing sentencing guidelines, rationales such as retribution, deterrence, and expressivism are mentioned across all foundational documents of international tribunals. Trials, however, fail to capture fundamental elements of extraordinary crimes, such as bystanders’ (in)action, thus hindering broader social reconciliation initiatives. While trials have an undoubtedly important role to play in ICL, their limitations in addressing prominent social issues in the wake of atrocities must be acknowledged.

Article 27 of the Italian Constitution is the only positive guidance on sentencing rationales, requiring penalties to be rehabilitative. Nevertheless, the jurisprudence of the Italian

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11 Fletcher and Weinstein (n 9) 625.
12 ibid 635.
15 Art 27 Cost.
Constitutional Court has highlighted the importance of the other rationales, stating that goals such as deterrence and prevention can underpin penalties since such goals are essential to the protection of citizens.\textsuperscript{16} Requiring the consideration of simultaneous aims, the court has refused to establish a ‘static hierarchy’\textsuperscript{17} of rationales, leaving it to individual judges to weigh which rationale should take precedence in a specific case, provided that none is excluded and the decision is compatible with the proportionality principle expressed in article 27 of the Constitution.\textsuperscript{18} In scholarship, there is a consensus that rationales underpinning sentencing transcend criminal law, which must be accompanied by social practice to ensure the achievement of its aims.\textsuperscript{19}

I. Parallels between Organised Crime and ICL

The collective nature of international crime brings to light the issues with individual criminal responsibility in ICL due to the complexity of the causes of and solutions to mass violence, the inapplicability of deviance theory, and the position of bystanders—engendering ‘thorny questions of responsibility and punishment’.\textsuperscript{20} Although organised crime takes place on

\textsuperscript{16} Constituzionale 12/1966; Constituzionale 264/1974.
\textsuperscript{17} Constituzionale 282/X, para 1291.
\textsuperscript{18} ibid.
\textsuperscript{20} Mark A Drumbl, Atrocity, Punishment, and International Criminal Law (n 14) 4.
an entirely different scale than mass violence, the present chapter will highlight the parallels between the two modes of criminality, finding that the collective element of international crimes is equally salient in organised crime.

Collective Nature of the Crime and Deviance Theory

The Rome Statute requirement of acts to be ‘widespread or systematic’ to qualify as crimes against humanity captures the collective scale of international crimes. The widespread nature of mass atrocity, indeed, entails a ‘communal engagement with mass violence’, with robust participation by numerous ordinary citizens. The collective scale of violence raises issues in framing these crimes solely in terms of the mental state of individual perpetrators, who—while individually culpable for their acts—commit crimes on behalf of a ‘collective criminal project’. In order to formulate comprehensive responses, the social structures and group solidarity that enable violence on such a scale must, therefore, be addressed.

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Social group norms provide a rationale for international crimes: their breadth is such that, in the time and place where atrocity is committed, it becomes nothing more than banal.\textsuperscript{25} As atrocity gains scale, it thus becomes more difficult to qualify participation in violence as deviant. This reality is in stark contrast with ordinary criminology adopted by ICL, which derives culpability ‘from the extent of the perpetrator’s voluntary and independent participation’ in the crime, in deviance from accepted social norms.\textsuperscript{26}

Perpetrators of international crimes generally subscribe to a mythology of ethnic, racial, or national superiority or infallibility.\textsuperscript{27} Therefore, perpetrators act within a social and cultural universe where their actions are morally justified by the values of the group to which they belong.\textsuperscript{28} So while participation in mass violence may transgress \textit{jus cogens} norms, it conforms to social norms ‘much closer to home’.\textsuperscript{29}

The effect of groups on individuals’ actions has been the subject of a rich literature in psychology. As early as 1895, Le Bon postulated that crowds behave differently than


\textsuperscript{26} Druml, \textit{Atrocity, Punishment, and International Criminal Law} (n 14) 30.


\textsuperscript{29} Druml, \textit{Atrocity, Punishment, and International Criminal Law} (n 14) 8.
individuals, in light of the anonymity, contagion, and suggestibility contributing to impunity and an absence of responsibility.\textsuperscript{30} This seminal work prompted several studies questioning the extent to which individuals have control over their actions in the context of collective events. These studies demonstrated that, in hierarchical situations, individuals could be drained of their personal responsibility—abandoning their own ideas of morality—and become agents of authority figures, making those who resist collective assimilation deviant.\textsuperscript{31} In these circumstances, people with a weakened sense of individual autonomy and independence will commit the gravest crimes, challenging the assumption of individual autonomy underpinning the adjudication of international crimes.\textsuperscript{32} This interpretation is reflected in ICL literature, where many scholars have referred to international crimes as ‘crimes of obedience’, carried out under explicit instructions from figures of authority in an environment that may tolerate or actively sponsor them, while being considered illegal by a


\textsuperscript{32} Fletcher and Weinstein (n 9) 605; Druml, \textit{Atrocity, Punishment, and International Criminal Law} (n 14) 29.
larger community. Nevertheless, recognition of the challenges posed to individual responsibility in literature—highlighting the necessity of a communal response to match the collective nature of atrocity and facilitate reconciliation—is not matched by practical action in ICL, where criminal trials limited to assessing the guilt of a few remain the preferred course of action.

Although participation in organised crime does not take place on the same scale as international crimes, it can be conceptualised as a ‘way of life’, requiring conformity to codes and norms in a specific community, and in opposition to wider society. Therefore, organised crime has created its own mythology and system of values by which members of the group abide faithfully—a phenomenon known as ‘criminal obedience’. Referred to as the ‘mafia paradigm’, far from


34 Fletcher and Weinstein (n 9) 612.


36 Gioacchino Lavanco and Franco di Maria ‘Psicologia del Cambiamento e Crisi nel Sistema Mafioso’ in Di Maria F (ed), La Polis Mafiosa: Comunità e Crimine Organizzato (Franco Angeli 2005) 103.

37 Often referred to as ‘sentire mafioso’, the literal translation being ‘mafia-like feeling’.
simply justifying the use of ruthless violence, it consists of a prism of interpretation and analysis of everyday life, including norms such as omertà, a strict hierarchy, a code of conduct, and rituals of admission. A central tenet of such a code is the concept of honour and, alongside it, the ideal figure of the ‘man of honour’—a member who faithfully adheres to the ‘mafia paradigm’—with which all mafiosi identify, thereby creating cohesion within the group. The importance of the group’s normative order is also communicated through rituals of initiation—involving religious elements and an oath of lifelong loyalty. These mark the beginning of a process of re-socialisation and redefinition of allegiances—transforming the neophyte into a ‘man of honour’. The new member thus enters in a pseudo-religious communion with the other


members, becoming ‘the same thing’—an expression used by mafiosi in reference to fellow ‘men of honour’.

This complex organisational structure distinguishes the mafia from other forms of group crimes that originated at the same time. Criminals such as bandits and gangsters can be deemed outlaws: they are alien to any relation with wider society that would legitimise them. Mafiosi, on the other hand, have created an alternative framework, and act in reference to local norms and codes that they have reshaped.

The creation of its own subculture and mythology—together with predominant socio-economic conditions in Southern Italy—ensured a seemingly continuous stream of new recruits for the mafia and guaranteed its survival throughout Italian history.

On an individual level, these collective organisational aspects, fundamental characteristics of mafia crimes, influence individuals’ behaviours. The mafia fits Goffman’s definition of a ‘total institution’, whereby its distorted cultural code subjects the individual to a psychological and cultural dependency on the group.

Through symbolism, organised crime exerts an absolute and unconditional claim upon the individual that has an impact beyond the normative level,

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43 Pezzino (n 38) 438.

44 Ciconte, ‘Le Mafie’ (n 38).

reaching ‘deeper cognitive and emotional levels’.\textsuperscript{46} The processes of tribal identification according to the rigid and authoritarian ‘mafia paradigm’ suppresses individual personality and critical spirit, guaranteeing absolute obedience.\textsuperscript{47} This process inevitably entails a weakening of the self in comparison to the ideal of the omnipotent family, which becomes the prism through which individual members relate to wider society.\textsuperscript{48} The infantilising nature of this process perpetuates the necessity of protection, flattening individual differentiation and positioning the group as the foundation of the individual’s identity.\textsuperscript{49} Similarly to international crimes, the individual thus becomes a willing instrument, able to commit brutal crimes without remorse.\textsuperscript{50} Therefore, organised crime poses the same challenge to the paradigm of deviance and individual responsibility, also involving individuals with a weaker sense of individual autonomy committing the most serious crimes.

\textsuperscript{46} Paoli (n 42) 274; See also Abner Cohen, \textit{Two-Dimensional Man: An Essay on the Anthropology of Power and Symbolism in Complex Society} (University of California Press 1974).
\textsuperscript{48} Fiore (n 39) 222–24.
\textsuperscript{49} Pomilla and Glyka (n 47) 63.
\textsuperscript{50} Alessandra Dino, \textit{Mutazioni: etnografia del mondo di Cosa nostra} (La Zisa 2002) 78; Attilio Scaglione, \textit{Reti mafiose: Cosa nostra e camorra: organizzatori criminali a confronto} (Franco Angeli 2011) 66.
The Role of Bystanders

Mass violence is not simply enabled by those who join the group of perpetrators; it is the product of the passive acquiescence of bystanders.\textsuperscript{51} This ‘deep complicity cascade’ is often ignored in trials—where categorical decisions of individual guilt often debunk popular calls for accountability—at the expenses of the development of effective methods to promote accountability for mass atrocity.\textsuperscript{52} Consequently, bystanders may identify as victims rather than acknowledge complicity in the events. Addressing bystanders’ complicity through alternative means is, therefore, crucial for the success of any social reconciliation project.\textsuperscript{53}

In devising a method to include bystanders in the post-conflict debate on collective responsibility, an understanding of their behaviour must be established. The present Article will use Staub’s definition of bystanders as ‘witnesses who are in a position to know what is happening and take action’.\textsuperscript{54} Bolstered by the inaction of others, bystander inaction becomes more prevalent as mass violence evolves.\textsuperscript{55}

\textsuperscript{51} Steven J Bartlett, \textit{The Pathology of Man: A Study of Human Evil} (Charles C Thomas 2005) 177.
\textsuperscript{53} Fletcher and Weinstein (n 9) 614–15.
\textsuperscript{55} Bibb Latané and John Darley, \textit{The Unresponsive Bystander: Why Doesn’t He Help?} (Prentice-Hall 1970) 42.
‘cultural tilt’ against the victimised group, which allows them to go along as if everything was normal, marks their change from passive spectators to complicit agents.\textsuperscript{56} The passivity of bystanders also affects the actions of perpetrators, emboldening them in their belief that their actions are at least acceptable, if not morally and legally right.\textsuperscript{57}

The roots of this behaviour may also transcend the conflict, resulting from cultural factors, including overly strong respect for authority, a belief of cultural superiority, and a history of aggressiveness.\textsuperscript{58} Addressing bystander passivity and its consequences, therefore, requires tackling social and cultural aspects that go well beyond the remit of criminal trials. The use of individual accountability inevitably leaves bystanders outside the legal definition of international crimes, despite their key role in the evolution of violence.\textsuperscript{59}

Similarly, activities of mafia groups are enabled by the passivity of wider society.\textsuperscript{60} Bystanders’ passivity under the form of \textit{omertà} is implicit in the definition of mafia itself. \textit{Omertà} can refer to two distinct behaviours resulting in silence and refusal to collaborate with the state. Historically, the term referred to the choice of silence made by \textit{mafiosi} in order to defend their organisation and communicate a rejection of the

\begin{itemize}
\item \textsuperscript{56} Staub, \textit{Overcoming Evil} (n 54) 196.
\item \textsuperscript{57} ibid, 197.
\item \textsuperscript{58} Ervin Staub, \textit{The Psychology of Good and Evil: Why Children, Adults, and Groups Help and Harm Others} (CUP 2010) 296–98.
\item \textsuperscript{59} Laurel E Fletcher (n 22) 1016.
\item \textsuperscript{60} Schneider and Schneider (n 4) 356.
\end{itemize}
legitimacy of the state and its institutions.\footnote{Laura Simeone, \textit{I Reati Associativi} (Maggioli 2015) 117.} Codified in art. 416-bis of the Italian Criminal Code, the refusal to collaborate must be dictated entirely by intimidation and subjection to the criminal organisation.\footnote{ibid; Corte di Cassazione, ‘Sezione 6, 10 Giugno 1989’ [1990] \textit{Rivista Italiana di Diritto e Procedura Penale} 1182.}

While the experience of intimidation may exclusively determine part of bystanders’ passivity, \textit{omertà} can largely be attributed to the historical roots of mafia culture in local culture.\footnote{Franco Di Maria and others, \textit{Il Sentire Mafioso: Percezione e Valutazione di Eventi Criminologici nella Preadolescenza} (Giuffrè 1989) vii.} Indeed, the ‘mafia paradigm’ is inevitably tied to historical concepts of Sicilian identity and family, and can as such be adopted by those who do not belong to the group.\footnote{Pomilla and Glyka (n 47) 54, 56.} This connection illustrates the power of mafioso subculture, which keeps its ties with wider society, having borrowed elements from the larger culture and reworked them into distinctive forms.\footnote{Downes and Rock (n 35) 145.} Regardless of the source of \textit{omertà}, bystanders’ passivity in mafia settings requires a holistic approach, tackling both the fear and the cultural seduction of the ‘mafia paradigm’ that determine bystander acquiescence.\footnote{Staub, \textit{Overcoming Evil} (n 54) 197.}
II. ICL and Individual Responsibility

The qualities of collective crimes exposed in the first chapter raise many challenges for their adjudication in liberal systems based on individual autonomy and responsibility. Designed to prosecute ordinary criminals under municipal criminal law, such a system is ill-suited to the complexities of extraordinary criminality. This in turn leads to tensions and shortcomings in relation to the stated goals of ICL, which will be explored in the first Section of this chapter. The second Section will focus on the solutions devised to face such challenges within tribunals. The final Section will offer an overview of the proposed horizontal and vertical reforms to ICL.

Shortfalls of Individual Responsibility and the Objectives of ICL

While ICL lacks positive law on the guiding principles of sentencing, jurisprudence and the resolutions establishing each international tribunal provide a relatively clear hierarchy of aims, which sees deterrence and retribution – inherited from national criminal law – as the main principles and expressivism and reconciliation as secondary.\(^6^7\) As the central ambitions of ICL belong to national systems, trials may fall

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short of these goals in light of the inability of legalistic system to address systemic elements of violence.\textsuperscript{68}

Retributive justice conceptualises punishment as a means to redress the moral balance affected by the perpetrator’s crime. As such, it requires that the offender be subject to a punishment proportionate to the gravity of the crime committed.\textsuperscript{69} In the current ICL system, where a prison term is the only measure of severity, this principle should be reflected in international tribunals meting out the longest sentences, as they tend to prosecute leaders.\textsuperscript{70} However, sentences by international tribunals are not generally more severe than those handed down for ordinary crimes in national jurisdictions.\textsuperscript{71} The impossibility of fulfilling the retributive aim of justice has been recognised by international tribunals themselves: in light of international human rights standards, the sentences could never reflect the atrocity committed by perpetrators of international crimes.\textsuperscript{72} The impossibility of matching extraordinary crimes with a proportional punishment “shatters and oversteps” a system based on retribution, as the atrocity is such that no sentence, irrespective

\textsuperscript{68} Mark Drumbl, ‘Collective Responsibility and Postconflict Justice’ in T Isaacs and R Vernon (eds.), \textit{Accountability for Collective Wrongdoing} (CUP 2011) 28.

\textsuperscript{69} ibid 30.


\textsuperscript{71} Jens David Ohlin ‘Applying the Death Penalty to Crimes of Genocide’ (2005) 99 \textit{American Journal of International Law} 767, 775.

\textsuperscript{72} 	extit{Prosecutor v Babić} IT-03-72-S, ICTY Trial Chamber, 29 June 2004, ¶44.
of severity, can rectify the wrongs carried out by perpetrators.\textsuperscript{73} This inherent unattainability in the retributivist pursuit has led some scholars to advocate for ICL to abandon retribution as its predominant aim.\textsuperscript{74}

Since Nuremberg, the consequentialist idea that punishment of an individual offender will deter others from imitating the criminal conduct has gained traction as a predominant aim of ICL, having been cited as a main rationale in the Security Council resolutions establishing the ICTY and ICTR.\textsuperscript{75} While the effectiveness of deterrence is difficult to assess, atrocities have continued to take place in states where international tribunals have been established, such as revenge killings in the former Yugoslavia and Rwanda, although it is not possible to tell whether the tribunals mitigated residual violence in the aftermath of mass atrocity.\textsuperscript{76} Nevertheless, there are several elements clearly hindering the deterrent effect, such as the


\textsuperscript{75} Jan Klabbers, ‘Just Revenge? The Deterrence Argument in International Criminal Law’ (2001) XII \textit{Finnish Yearbook of International Law} 249, 251; Drumbl, \textit{Atrocity, Punishment, and International Criminal Law}, (n 14), 16; Nemitz (n 74) 91.

limited number of prosecutions by international tribunals.\textsuperscript{77} More fundamentally, deterrence is based on the criminological profile of offenders in national contexts, which assumes that individuals act rationally through cost-benefit analyses when engaging in criminal activity. While it is arguable whether this applies to most criminals, it is certainly not the case for perpetrators of mass atrocity, who often do not see the fault in their crimes insofar as they align with the values of their group.\textsuperscript{78} This has been the case for Rwanda, where most defendants interviewed by Drumbl either stated they saw nothing wrong in their actions over the summer of 1994 or narrated the events as war, as opposed to genocide.\textsuperscript{79} The deterrent effect of international tribunals is further undermined by their failure to include passive acquiescence of bystanders, a fundamental prerequisite of mass violence.\textsuperscript{80}

International trials appear somewhat more successful at achieving expressivist aims. Expressivism maintains that trials and punishments should affirm the value of law, strengthen solidarity, and incubate public moral consensus about the past.\textsuperscript{81} While punishment is undoubtedly valuable as an educational and symbolic tool, stigmatising extraordinary perpetrators and teaching present and future generations the

\textsuperscript{77} Mark Drumbl, ‘Collective Responsibility and Postconflict Justice’ (n 68) 33.
\textsuperscript{78} Harmon and Gaynor (n 70) 695.
\textsuperscript{80} Mark Drumbl, ‘Collective Responsibility and Postconflict Justice’ (n 68) 34.
\textsuperscript{81} ibid 9
repudiation of violence, this effect can be hindered by the selectivity of prosecutions and instruments, such as plea bargains, which distort the retributive link between the crime and the penalty. The educational potential of ICL may be reduced by its distance from local processes and expectations, as externalised as it is from affected communities. The explanatory value of trials is further limited by their focus on individual culpability as opposed to the system involved in atrocity as a whole. To fulfill expressivist aims, it is essential that trials expand the scope of responsibility in order to accurately express the nature of the crime and the link between the accused and the offence.

The punitive system of ICL, rooted in individual guilt, is questionably presumed to promote peace and reconciliation in societies following mass atrocity. This claim is not only present in the UNSC resolutions establishing the ICTY and ICTR, but also advertised on the ICTY’s website, despite a lack of evidence to support the assertion. Reconciliation, in this case,

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83 Mark Drumbl, ‘Collective Responsibility and Postconflict Justice’ (n 68) 35.
is used in a broader sense and encompasses peace, social repair, healing, and individual rehabilitation. Despite their potential to elucidate the truth about past events, trials tend to create an ‘us versus them’ dynamic.\textsuperscript{87} Rehabilitation, explicitly mentioned in the Orić judgment, seems to be premised on a misconception of perpetrators of mass atrocity.\textsuperscript{88} As noted by Waller, “the most outstanding characteristic of perpetrators of extraordinary evil is their normality, not their abnormality”\textsuperscript{89} they are not maladjusted individuals and easily adapt to living unobtrusively in new contexts with no evidence of recidivism, as shown by Nazis fleeing Germany post-WWII.\textsuperscript{90} Moreover, as in the case of Rwandan detainees, international trials may not engender the necessary introspective reflection and shame for perpetrators to repudiate their past acts. Until these psychological transformations occur in individuals, encouraged by political institutions that develop a sense of shared identity and citizenship, meaningful peace and healing in post-conflict societies may remain elusive.\textsuperscript{91}

\textsuperscript{87} Mark Drumbl, ‘Restorative Justice and Collective Responsibility (…)’ (n 84) 11.
\textsuperscript{88} Prosecutor v Orić, Case No. IT-03-68-T, ICTY Trial Chamber, 30 June 2006, ¶721.
\textsuperscript{89} James Waller, \textit{Becoming Evil: How Ordinary People Commit Genocide and Mass Killing} (OUP 2007) 87.
\textsuperscript{90} ICTY detainees have also been noted for their ‘good social skills’ in comparison to domestic prisoners: Harmon and Gaynor (n 70) 693-694.
\textsuperscript{91} Mark Drumbl, ‘Restorative Justice and Collective Responsibility (…)’ (n 84) 17.
Legal Reforms of ICL

Trials in their current form, therefore, mostly fail to meet not only the penological objectives imported from municipal criminal law, but also the ones dictated by the unique nature of post-atrocity societies. As the collective nature of international crimes sits uneasily with the framework of individual agency, ICL jurisprudence and scholars have devised several concepts attempting to remedy the shortcomings of this model.

The ICTY – in its first case – devised a novel liability theory to account for the collective element of international crimes: Joint Criminal Enterprise (hereinafter JCE). Under this mode of liability, defendants can be found responsible under three types of conspiracy: where all members intended to commit the crime but the action was executed by a single individuals; where each member is participant in a common design, despite the lack of knowledge of the specific action taken by a single member; where members have agreed to commit a crime and therefore all become liable for the unplanned acts of other participants, so long as these were foreseeable. As this type of liability is not included in the ICTY statute, this judicial

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interpretation of Art. 7(1) has inevitably led to some controversies - especially concerning its compliance with the principle of legality - at the time of its formulation.\textsuperscript{94} JCE, however, has evolved over time, as shown by the inclusion of co-perpetration under art. 25 of the Rome Statute, becoming a widely used mode of liability to prosecute the intellectual authors of atrocities.\textsuperscript{95} Nevertheless, some scholars point to certain problematic aspects of the theory which have persisted. Under JCE, the same culpability attaches to participants that had intent to commit the crime and those who only had knowledge of its commission, or foresaw it.\textsuperscript{96} The imposition of equal culpability on all members of the JCE shows disregard for the internal structure of the group, a crucial element for the proper allocation of criminal blame.\textsuperscript{97} Moreover, the evidentiary requirement of an agreement among participants makes it inappropriate to prosecute those structurally remote from the commission of crimes, limiting its scope in

\textsuperscript{94} Prosecutor v Blaškić, Case No. IT-95-14-A, ICTY Appeals Chamber, 29 July 2004, ¶¶ 41, 42, 62, 166; Machteld Boot, Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Intersentia 2002), 288-302


\textsuperscript{96} Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (n 93) 80.

\textsuperscript{97} ibid 88.
addressing the full extent of the collective aspect of extraordinary crimes.\textsuperscript{98}

While independent criminological developments in ICL – such as JCE, command responsibility and co-perpetration – suggest a potential for ICL to develop its own criminology\textsuperscript{99}, they fail to address a crucial element: the actions of bystanders. In light of their role, being able to hold bystanders responsible would assist in achieving expressivist goals as well as facilitating reconciliation and preventing future violence, while fulfilling retributive aspirations.\textsuperscript{100} For this purpose, some scholars have advocated the use of the duty to rescue present predominantly in civil law tradition.\textsuperscript{101} Presently, the role of bystanders is not sufficiently clear to be defined as aiding or abetting, despite their actions as ‘approving spectators’ having the same effect on perpetrators.\textsuperscript{102} The effectiveness of this obligation is put into question in light of its presence in the domestic law of both Rwanda and the DRC, where it was not sufficient to stop mass

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\textsuperscript{98} Prosecutor v Brdjanin, IT-99-36-T, ICTY Trial Chamber, 1 September 2014, ¶347.
\textsuperscript{100} Laurel Fletcher (n 22) 1016.
\textsuperscript{102} Laurel Fletcher (n 22) 1074; Jessie Ingle ‘Aiding and Abetting by Omission Before the International Criminal Tribunals’ (2016) 14(4) Journal of International Criminal Justice 747, 752.
violence.\textsuperscript{103} However, the ICTR, in \textit{Rutaganira}, has argued for a modified duty to rescue to apply in ICL, where the gravity of the crime would justify removing the caveat exempting bystanders from action where their or a third party’s life or safety would be in danger.\textsuperscript{104} Nevertheless, in this case, the defendant’s position of authority determined the causal link between his inaction and the crime, therefore warranting liability for his omission.\textsuperscript{105} \textit{Rutaganira} demonstrates that, while proponents of the duty claim that it would be owed to the whole of society by any individual, evidentiary restrictions imply that the encouraging effect of someone’s inaction on perpetrators can only be demonstrated when the person is in a position of authority with respect to the perpetrator.\textsuperscript{106} This, in turn, would make the duty to rescue almost indistinguishable from command liability. Moreover, this proposition is plagued with the same issue of culpability as JCE: it seeks to impose the same degree of culpability to individuals whose actions do not have the same effect on the crime.\textsuperscript{107}

While the enacted and proposed innovations of ICL display potential for the development of an independent criminology, they do not challenge the rationales of punishment

\textsuperscript{103} \textit{Article 66bis}, Code Pénal, Democratic Republic of Congo; \textit{Article 256}, Code Pénal, Rwanda.

\textsuperscript{104} \textit{Prosecutor v Rutaganira} (ICTR-95-IC-T, 14 March 2005, para 5, 31, 65.

\textsuperscript{105} ibid 82.

\textsuperscript{106} Laurel Fletcher (n 22), 1061; \textit{Prosecutor v Akayesu} ICTR-96-4-T, ICTR Trial Chamber, 2 September 1998, ¶693.

mechanically transferred from domestic criminology. This highlights the need for a reform of international criminal justice taking into account the complexities and multi-layered actors of mass atrocity, which remain unaddressed in a system based solely on incarceration.\(^{108}\) Indeed, denying such complexities and responding in a simplistic manner to atrocity inhibits the development of effective methods to hold extraordinary perpetrators and their enablers accountable, hindering social reconstruction.\(^{109}\)

**Vertical and Horizontal Reforms**

One of the reasons for the failure of the dominant legalistic system to achieve the goals of ICL is the assumption that everyone who contributed to mass atrocity is deserving of equal culpability. As discussed in the previous section, this approach does not reflect the reality of a criminal enterprise, let alone the one of a whole society. While the collective behaviour of bystanders is crucial in allowing atrocities to happen, their culpability may not be such to warrant criminalisation. Procedural reforms confined to tribunals are therefore unlikely to succeed in addressing their conduct.\(^{110}\)

The question of how to address broad levels of complicity first presented itself in 19050s Germany. In relation to this issue, Jaspers categorically rejected attaching criminal liability to bystanders, theorising that there are two additional levels of

\(^{108}\) Drumbl, ‘Collective Violence and Individual Punishment’ (n 99) 576.

\(^{109}\) ibid 568; Fletcher and Weinstein (n 9), 605.

\(^{110}\) Laurel Fletcher (n 22) 1037.
guilt: moral and metaphysical.\textsuperscript{111} Moral and metaphysical guilt respectively attach to those who conveniently looked away, or actively gained from atrocities and those who failed to prevent the commission of crimes.\textsuperscript{112} While trials do not involve moral and metaphysical guilt, the declaration of criminal guilt of some should not be interpreted as a collective claim of innocence, and ways to address these levels of culpability in wake of atrocity must be devised.\textsuperscript{113}

As moral and metaphysical culpability do not warrant the use of incarceration, they leave greater discretionary power in determining sanctions, with a wide range of proposals in scholarship.\textsuperscript{114} Fletcher and Weinstein advocate for a holistic approach taking into account the social roots of violence to promote meaningful social repair, and encompassing criminal trials as well as state-level interventions, truth commissions, and community-based responses.\textsuperscript{115}

Amongst scholars advocating for a horizontal reform of ICL to integrate extralegal approaches, Drumbl proposes collective

\textsuperscript{111} Karl Jaspers, \textit{The Question of German Guilt} (Fordham University Press 2000 [1947]), 31-32.
\textsuperscript{115} Fletcher and Weinstein (n 9) 618-635
economic sanctions, in the form of trade restrictions, embargoes, and travel restrictions to underwrite collective responsibility.\textsuperscript{116} While these mechanisms may not reach ideologues and extremists, they may reach those who passively allow conflict to occur, encouraging members of the perpetrators’ social group to police each other, identifying and monitoring conflict entrepreneurs – therefore fostering deterrence.\textsuperscript{117} Nevertheless, their application within national communities may be impractical, and their stigmatising effect may lead to resentment and entrenchment of the group identities at the root of the conflict, instead of attenuating them to achieve meaningful reconciliation.\textsuperscript{118} On an individual level, Drumbl proposes ‘reintegrative shaming’, where perpetrators confront their actions in the affected community.\textsuperscript{119} Contrary to guilt ordered by an externally-imposed judgment, shame flows from the internal acknowledgment that what one did was blameworthy, thus potentially fostering personal and communal conditions for social repair.\textsuperscript{120} Community-based methods, contrary to the isolation resulting from trials, may therefore be better suited to promote expressivist aims, in the

\textsuperscript{116} Drumbl, ‘Collective Violence and Individual Punishment’ (n 99) 573.
\textsuperscript{117} Drumbl, ‘Collective Responsibility and Postconflict Justice’ (n 68) 38, 41.
\textsuperscript{118} Harvey Weinstein and Eric Stover, My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (CUP 2004) 10-20; Drumbl, ‘Collective Responsibility in Postconflict Justice’ (n 68) 43.
\textsuperscript{119} Drumbl, ‘Restorative Justice and Collective Responsibility’ (n 84) 11.
\textsuperscript{120} ibid 10-13.
form of open deliberations about the past, therefore breaking broad levels of social complicity, which can otherwise mask itself behind not being touched by the law in trials. 121 While not all communities and conflicts may be suited for this method of accountability, reintegrative shaming undoubtedly reaches segments of society and communitarian aims unaddressed by international trials.

Overall, a growing number of scholars are arguing for a shift in the objectives of ICL towards restorative aims, which focus on victims and include truth-telling, repudiation of past wrongs, institutional reform, and restitution amongst its aims. 122 As the implementation of reparative justice mechanisms does not presuppose criminal liability and individual responsibility, the focus of any penalty is on its beneficial value for victims, as opposed to the suffering of perpetrators. 123 This form of justice allows individuals to recognise that their actions are at the base of reparative sanctions, while also acknowledging the elements encroaching on their individual agency, therefore avoiding many of the issues related to the attribution of individual responsibility for group actions in trials. 124 As opposed to receiving a sentence, in this framework, perpetrators take responsibility by self-examining, acknowledging and attempting to rectify the harms caused, recognising that one’s participation in group wrongdoings has implications for the individual despite the

121 ibid 11-15
123 ibid 194.
124 ibid 196, 209.
influence of factors beyond his control. These considerations help justice move away from criminal law, with sanctions including community service and civil liability.

A move towards an increasingly restorative outlook on post-conflict justice also involves vertical reforms to ICL, taking a multi-level approach to include a role for national jurisdictions to address reparations to victims through tort and restitution. These areas of law could implicate involved masses and allow for a more nuanced measurement of degrees of responsibility than a categorical verdict on criminal liability. Using tort and restitution could thus provide ICL with a more textured understanding of the roles played in mass violence by actors overlooked in international criminal trial. Tort and restitution could integrate restorative justice within a dominantly retributive framework, allowing ICL to capture a broader spectrum of guilt and remedies.

In conclusion, the current retributive framework of ICL, mechanically imported from municipal criminal law, not only mostly fails to meet its own goals, but also lacks the flexibility to address the issues that arise in post-atrocity settings. While certain reforms, such as JCE, have assisted international tribunals in addressing group criminality, they are still inscribed within a system based on individual autonomy, thus failing to reach bystanders. Despite widespread recognition in

\[\text{125 ibid 209.}\]
\[\text{126 Drumbl. ` Collective Responsibility and Postconflict Justice` (n 68) 25.}\]
\[\text{127 ibid 39}\]
\[\text{128 ibid.}\]
ICL scholarship of the need for different forms of reckoning, trials have become the benchmark against which these efforts are evaluated.\footnote{Fletcher and Weinstein (n 9) 582.} As no single mechanism can simultaneously satisfy all the aims of post-conflict justice, vertical and horizontal reforms of ICL are necessary in order to achieve meaningful accountability. The latter section of this chapter has presented several alternative and complementary methods of accountability. Although their suitability will need to be carefully analysed prior to any implementation, their evaluation in the abstract is an impossible task – the main determinant of their success is their responsiveness to the situation on the ground.\footnote{Weinstein and Stover (n 118) 326.} In a relatively young field, where an active scholarship is involved in proposing new mechanisms of accountability, this gives hope for future developments.

III. Antimafia in Italy

implemented by the justice system.\textsuperscript{132} Indirect policies entail efforts to address the underlying social conditions supporting organised crime, including anti-racket measures, the reutilisation of confiscated assets, and initiatives aimed at spreading a culture of legality.\textsuperscript{133} The following chapter will evaluate the individual measures and their complementary work to create a multi-dimensional successful contrast to organised crime.

\textit{Direct Policies}

The turning point of the antimafia struggle has been the enactment of special legislation reflective of the unique challenges posed by organised crime. In 1982, the Rognoni-La Torre Law criminalised membership to mafia-type organisations, introducing article 416-\textit{bis} in the Italian Criminal Code.\textsuperscript{134} This article displays a multi-layered understanding of the sociological aspects of mafia crime, including in the definition elements of the sub-culture such as the notion of subjugation and the code of silence.\textsuperscript{135} While art. 416-\textit{bis} has been determinant of the state’s strategy against the mafia – with 9,000 investigations and 3,000 indictments for

\\[\textit{\begin{tabular}{l}
133 ibid; Schneider and Schneider (n 4) 353.
135 Trifuoggi (n 131) 834.
\end{tabular}}\]
suspected mafia connections between 1993 and 1999 only in Palermo’s Tribunal – its definition needs constant judicial updating, especially in application to mafia actions lacking a territorial dimension in Northern Italy.\textsuperscript{136} Complementing special legislation, specific antimafia institutions were established in the 1990s. Assisting the judiciary, 26 special prosecutor units at the district level (DDAs), coordinated by the National Antimafia Directorate (DNA), allowed selected prosecutors to develop expertise on the characteristics of local environment and its criminal phenomena.\textsuperscript{137} On the investigative front, the DIA, staffed with 1,500 units proportionately from each Italian police force, conducts investigations exclusively on mafia associations, providing coordination for the intelligence activities of the different police bodies.\textsuperscript{138} The existence of specialist regional and national \textit{ad hoc} institutions is the result of the focus on the social dimension of organised crime and their unique geographical manifestations, allowing constant revisitations


\textsuperscript{138} ibid 871.
of the legal definition of mafia to match the group’s evolution.  

The introduction of new legislation has been accompanied by procedural adjustments, such as those permitting mafia trials with a large number of defendants (aptly named ‘maxi-trials’). This has allowed the most notable mafia trial to take place in 1986, with 707 defendants, breaking for the first time the shroud of impunity surrounding mafiosi. The large number of defendants allowed justice to transcend individual responsibility and symbolically put the whole organisation on trial, as well as showing that important results against organised crime could be achieved while respecting the rule of law. On a practical level, these trials make the most effective use of evidence while ensuring secrecy. Evidentiary rules were also modified, allowing the use of video links for witnesses as well as defendants’ attendance, and making de relato evidence – i.e. declarations which the witness alleges to have heard by people who are missing, dead, or unwilling to

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141 Tribunale di Palermo (n 42), 713.
142 Paoli, ‘The Pentiti’s Contribution to the Conceptualization of the Mafia Phenomenon’ (n 42) 265; Balsamo (n 136) 105.
143 La Spina (n 140) 646.
confirm - acceptable provided they have been cross-confirmed by other witnesses.\textsuperscript{144}

Evidentiary amendments were related to the increasing role played by former ‘men of honour’ collaborating with justice (\textit{pentiti}), whose confessions enabled the 1986 maxi-trial.\textsuperscript{145} In 1991, a formal policy regime for collaborators and witnesses providing evidence against the mafia was established, granting \textit{pentiti} sentencing and penitentiary benefits, as well as providing innocent witnesses with state protection, financial assistance and the possibility of changing residence and identity, coordinated by a central agency.\textsuperscript{146} This policy saw the number of \textit{pentiti} increase significantly, reaching 1,177 by June 1996.\textsuperscript{147} For the state, the increase in \textit{pentiti} is a victory that transcends criminal justice: it proves that the totalising mafia paradigm can be challenged by the individual and wider society. From the individual point of view, in fact, the decision to collaborate is often the result of a process of

\textsuperscript{144} ibid.
\textsuperscript{145} Paoli, ‘The Pentiti’s Contribution to the Conceptualization of the Mafia Phenomenon’ (n 42) 265.
\textsuperscript{146} Laws n. 82/1991 and n. 203/1991; Paoli, ‘Mafia and Organised Crime in Italy: The Unacknowledged Successes of Law Enforcement’ (n 132) 871.
\textsuperscript{147} Ministero dell’Interno, \textit{Relazione sui Programmi di Protezione, sulla Loro Efficacia e sulle Modalità Generali di Applicazione per Coloro che Collaborano alla Giustizia - I semestre 1996} (Senato della Repubblica 1996), doc. XCI n. 1, XIII Legislature.
disillusion and affective disinvestment from a world that betrayed its idealised image.\textsuperscript{148}

These policies have significantly raised the costs associated with participating in a mafia association. \textit{Mafiosi} are now more likely to be arrested and charged, and receive severe sentences upon conviction. Defendants found guilty of crimes under Art. 416-\textit{bis} cannot benefit from any alternative to incarceration, and can be subject to a special regime under Article 41-\textit{bis} of the Prison Administration Act.\textsuperscript{149} Introduced in 1992 as a temporary measure and confirmed in 2002 as a permanent one, Art. 41-\textit{bis} – known as ‘hard prison’ – provides for the suspension of certain penitentiary rules in order to avoid continued contact of prominent figures with their respective criminal organisations.\textsuperscript{150} The balance between the needs of security and public order on one hand, and the fundamental rights of detainees on the other, involves the restriction of family visits to once a month, under surveillance and through a glass partition, the exclusion from prisoners representation, and group socialisation limited to five selected individuals.\textsuperscript{151} In light of the significant limitations it imposes, the regime is subject to regular biennial reviews by the Ministry of Justice, following an assessment of the capacity of the individual detainee to entertain relations with the criminal


\textsuperscript{149} La Spina (n 140) 648.

\textsuperscript{150} ibid; Law 297/2002.

organisation. Nevertheless, the recent deaths of the two most famous mafia bosses, Riina and Provenzano – who were not relieved of the Art. 41-bis regime despite having been respectively in a coma for five days and held unable to participate to his trial in light of his ‘chronic and irreversible mental decline’ – raises questions on these assessments.

These examples reveal a strongly retributive aspect of the 41-bis regime which is hard to reconcile with the rehabilitative aim of penalty stated in the Italian Constitution. Unsurprisingly, the regime has been the subject of numerous reviews by the Committee for the Prevention of Torture and several ECtHR cases. Although not finding against the regime as a whole, the Strasbourg court has often found violations of the detainees’ rights under articles 6 and 8 of the ECHR, highlighting that, although the regime is justifiable by

152 ibid 282.
154 CPT, Report to the Italian Government on the Visit to Italy Carried Out by the CPT from 8 to 21 April 2016, Council of Europe, CPT/Inf (2017) 23, 30.
safety concerns, it is liable to violate detainees rights through its application.\footnote{Bagarella v Italy, App no. 15625/04 (ECtHR, 7 July 2008) §29; Labita v Italy [2000] ECHR 160 §175-185; Enea v Italy [2009] ECHR 1239; Asciutto v Italy, App No. 35795/02 (Grand Chamber, 27 November 2017).}

In order to tackle the ‘grey area’ of complicity and omertà between the mafia, politicians and professionals, Italian judges have resorted to a combined reading of art. 416-bis and art. 110 – criminalising conspiracy – of the Criminal Code, thus creating the offence of ‘external participation in mafia affairs’.\footnote{Sergi, From Mafia to Organised Crime (n 139), 85-6.} This mode of liability aims to hold accountable the white collar workers who abuse their privileged positions, political or otherwise, to engage in a trafficking of favours which ultimately supports the criminal association’s activity.\footnote{ibid 86.} Confirmed by the Italian Supreme Court in 1994,\footnote{Cass. 16/1994 Demitry.} this method has allowed the uncovering of significant sections of the ‘grey area’. Most famously, it has led to the trial of former PM Giulio Andreotti and Marcello Dell’Utri, Berlusconi’s former right-hand man, both found guilty of external participation. On a more capillary level, administrative law allows for the dissolution, suspension and dismissal of local provincial or regional authorities where there is evidence of a connection between local administrators and mafiosi.\footnote{Act n. 22/1991.} These methods allow to reach the deep...
complicity, especially with politics, which defines mafia associations, thus targeting one of their main sources of power.

In a similar vein, Italian criminal law contains provisions for the seizure of mafiosi’s assets, which can be punitive and preventive and can extend the whole defendant’s estate, potentially reach his heirs.\textsuperscript{160} These patrimonial measures have been the most effective tools of the antimafia struggle, both in terms of practical effects, and in their symbolism. In a single maxi-trial in Reggio Calabria, the court confiscated properties worth almost €80 million,\textsuperscript{161} and the DIA claims to have expropriated assets worth almost €2 billion from Sicilian groups alone since its inception.\textsuperscript{162} While the accuracy of these figures may be questioned, the effect of patrimonial measures can be inferred by qualitative observations. During the second half of the 1990s, many mafia clans in Sicily and Calabria stopped paying monthly salaries to the families of convicted ‘men of honour’ due to the financial strain of confiscations, thus renouncing to a fundamental practice in mafia groups and amplifying the effect of the state’s repression.\textsuperscript{163} On a symbolic level, the expropriation of assets thus takes away the most treasured sources of mafia power: money and social

\begin{footnotesize}
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\item Law n. 356/1992; Law n. 159/2011
\item Commissione Parlamentare d’Inchiesta sul Fenomeno della Mafia e sulle Altre Associazioni Simili, Relazione sullo Stato della Lotta alla Criminalità Organizzata in Calabria, Doc. 42, XXIII Legislature (Camera dei Deputati 2000) 51.
\item DIA, Rilevazioni Statistiche \textltt{<http://direzioneinvestigativaantimafia.interno.gov.it/page/rilevazioni_statistiche.html}> accessed 10 September 2018.
\item Paoli, ‘Mafia and Organised Crime in Italy’ (n 132) 862-3.
\end{itemize}
\end{footnotesize}
prestige, hitting the criminal organisation where it hurts the most.\textsuperscript{164}

Overall, the criminalisation of mafia groups in Italy did not just aim at the individual members, but successfully involved the liability of systemic external participation and the group’s multi-dimensional structures of power.\textsuperscript{165} The legislation also acts on a symbolic level, undermining both the financial and political power of crime syndicates. Nevertheless, a repressive response alone leaves intact the mafia networks ensuring its constant reproduction.\textsuperscript{166} Therefore, antimafia must involve a social level, to address the behaviours and norms which allow criminal groups to flourish.

\textit{Indirect Policies}

To complement the repressive action weakening the mafia, social forces engage in constructive action to weaken the association’s external support.\textsuperscript{167} Indirect antimafia policies are implemented by a variety of actors, with different levels of institutionalisation. Together, they form a movement which

\begin{footnotesize}
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\item \textsuperscript{164} Sergi, ‘The Italian Anti-Mafia System Between Practice and Symbolism’ (n 137) 7.
\item \textsuperscript{165} Sergi, \textit{From Mafia to Organised Crime} (n 139) 94.
\item \textsuperscript{166} Vittorio Martone, ‘I Confini del Capitale Sociale tra Mafia e Antimafia: Riutilizzo dei Beni Confiscati e Riconversione dell’Economia Locale nel Feudo dei Casalesi’ (2015) 3 \textit{Polis} 335, 357.
\item \textsuperscript{167} ibid 338.
\end{itemize}
\end{footnotesize}
achieves a capillary presence throughout the national territory.\textsuperscript{168}

According to Falcone, the pervasive nature of mafia reflects a need for the state.\textsuperscript{169} The criminal organisation fills the power vacuums left by institutions with its own set of values and beliefs and, as such, it can be conceivably conceptualised as an alternative source of power existing alongside the state and undermining its institutions.\textsuperscript{170} This evokes the need not only for institutional reform, but also for an antimafia movement reaching deeper to contrast the spread of mafia culture. In fact, the most dangerous aspect of the infiltration of mafia in the social fabric is the normalisation of the mafia paradigm at a cognitive level, through daily experiences re-socialising citizens into subjects of mafia culture.\textsuperscript{171} Understanding the cultural penetration of mafia groups has prompted the development of educational efforts. Since the 1990s, schools in Palermo have participated in programmes taking aim at mafia’s subculture of vigilante justice and omertà: fostering discussions on the value of citizens’ rights against the practice of clientelism, and attitudes such as taking offense, demanding respect, and vindicating wrongs on one’s own.\textsuperscript{172} Other educational programmes, such as the ‘adoption’ of monuments by schools, involving students in the care and

\begin{itemize}
\item \textsuperscript{168} ibid 343.
\item \textsuperscript{169} Giovanni Falcone, \textit{Cose di Cosa Nostra}, (Rizzoli 1991) 71.
\item \textsuperscript{170} Trifuoggi (n 131) 835; Williams (n 136) 405.
\item \textsuperscript{172} Schneider and Schneider (n 4) 360.
\end{itemize}
history of their city, are highly symbolic acts of defiance against the destructive power of mafia corruption.173 At an institutional level, the EU-funded ‘Programma Operativo Nazionale’ (PON), with an endowment of €1,120 million, successfully promoted economic and social development, through its application in initiatives concerning the effective control of territory, the protection of cultural and environmental resources, and the spread legality culture.174

What allowed indirect antimafia policies to be effective is the development of their own networks and norms in opposition to the mafia paradigm, fostering widespread disapproval for the logics of collusion which distinguish mafia culture.175 Cooperatives and NGOs repurposing confiscated assets play a key role in promoting a culture of trust and cooperation, and creating social infrastructures to rival the mafia.176 As the confiscation of assets would be frustrated if they were simply to be resold, legislation was enacted in 1991 allowing the allocation of confiscated assets for social purposes, through the coordination of a national agency.177 In light of the strong territorial hold of the mafia and the prominent role played by wealth in communicating the group’s power, reclaiming of mafia estates and their repurposing as lawful spaces, by local cooperatives as well national organisations such as Libera,

173 ibid 361.
175 Martone (n 166) 360.
176 ibid 338.
undoubtedly carries a strong symbolic value for the resistance to mafia by civil society. The reappropriation of mafia assets also displays the complementarity and dependency of top-down and bottom-up approaches in antimafia: the grassroots activities of local and national organisations are enabled by effective repressive action of the state.\(^{178}\)

Another display of such complementarity is found in anti-racket activity. Racketeering, through the extortion of an informal tax called *pizzo*, is one of the rent-seeking mechanisms through which the mafia seeks to control society’s substratum.\(^{179}\) In 1991, following the murder of an entrepreneur vocally resisting the *pizzo*, the state passed anti-racket legislation, establishing a fund to compensate resisting entrepreneurs and the creation of an *ad hoc* commissioner for coordinating actions against usury.\(^{180}\) Through the involvement of NGOs in the grantees selection process, between 1999 and 2005, financial support was provided in 1,092 cases of extortion and usury, distributing over €91 million.\(^{181}\) The commitment by the state to opposing rackets was matched by a plethora of local social movements, most famously *Addiopizzo* (‘Farewell *pizzo*’), a grassroots movement which now counts 1,011 entrepreneurs and 13,199 consumers as members, and which offers a process of certification for

\(^{178}\) Trifuoggi (n 131) 840.
\(^{179}\) Williams (n 136) 404.
\(^{180}\) Act n. 172/1992; Act n. 44/1999; Paoli, ‘Mafia and Organised Crime in Italy’ (n 132) 874
businesses who do not pay the *pizzo*, as well as advice, support in reporting mafia activity, participation in trials, and educational programmes in schools.\textsuperscript{182} One of their first actions consisted in the distribution of stickers stating: “A whole society who pays the *pizzo* is a society without dignity”.\textsuperscript{183} This is emblematic of grassroots resistance to the mafia, as it proposes an alternative reading of a concept that the mafia has borrowed and distorted to make it a centrepiece of its subculture - the idea of honour, respect, and dignity - therefore positing an opposed set of ideas, norms, and behaviours to which citizens can adhere.

Despite these efforts, racketeering remains widespread, with 50\% of businesses still paying *pizzo* in most Southern towns in 2001.\textsuperscript{184} This highlights the importance of programmes promoting socio-economic advancement to fill the vacuums left by the victories of antimafia. In the 1990s, with educational programmes implemented in schools across Palermo, 40\% of children in neighbourhoods considered at risk of criminal activity dropped out of school, with residents lamenting ‘too much legality’.\textsuperscript{185} From their perspective, the mafia was a provider of employment, which the successes of antimafia


\textsuperscript{183} ibid 121.

\textsuperscript{184} Svimez, *Rapporto 2001 sull’Economia del Mezzogiorno* (Mulino 2001) 909

\textsuperscript{185} Schneider and Schneider (n 4) 361.
were taking away without any replacement.\textsuperscript{186} Similarly, in Naples, the successes of law enforcement have been evidenced by the increase in shootouts happening in broad daylight: as law enforcement weakened the most powerful criminal clans, various smaller groups fought for control of the territory.\textsuperscript{187} Economic conditions tend to be significantly worse where mafia is rooted. For the most part of the past 30 years, unemployment in Southern Italy as gravitated around 18\%, with a substantially higher youth unemployment reaching 71\% in the Reggio Calabria province in 1999.\textsuperscript{188} Such conditions increase the attractiveness of a career in organised crime, providing criminal groups with a virtually infinite reserve of manpower.\textsuperscript{1} Therefore, a truly successful antimafia policy cannot be carried out while excluding socio-economic factors which account for the spread of criminal organisations. Until the state does not propose substantial alternatives to mafia employment, it will not be able to fully eradicate the criminal phenomenon.

\textsuperscript{186} \textit{ibid.}
\textsuperscript{187} Paoli, ‘Mafia and Organised Crime in Italy’ (n 132) 867.
\textsuperscript{188} \textit{ibid} 877
IV. Conclusion

For more than forty years there has been an unwritten law in Italy that corrupt politicians didn’t go to jail, mafiosi didn’t talk and you couldn’t have a government without Giulio Andreotti. Now we have a government without Andreotti, corrupt politicians are going to jail and mafiosi are talking.189

Despite their differences in scale, mafia and international crimes share criminological traits that affect their legal and social responses/contrast activity. As both form a group sub-culture, promoting a mythology to which members subscribe to justify their actions, they raise challenges for framing such acts through the prism of deviance theory. Moreover, the weakening of individual autonomy that takes place upon adherence to these groups presents a further challenge for their adjudication through the paradigm of individual responsibility. Contrary to ordinary criminology, which bases individual liability on the extent of the perpetrator’s willful participation in the crime, these grave crimes are committed by individuals with a weakened sense of autonomy and independence. Another defining characteristics of these crimes is that they both involve a high level of social complicity. The role of bystanders, however, is beyond the remit of traditional criminal justice systems.

The international criminal justice system has mechanically imported its procedures and goals from Western legalistic

systems. The unsuitability of this model is evident when looking at the adjudication of international crimes. Discrepancies in sentencing, the selective nature of prosecutions and the impossibility of imposing a sentence proportionate to the most barbaric acts hinder the achievement of retributive and deterrent aims. Expressivism is also limited by the inability of trials to carry a complex narrative and implicate those who passively acquiesced to the crimes. Despite their ability to uncover the truth about specific past atrocities, the adversarial means through which this is achieved at trials may hinder reconciliation and social repair. While some reforms to assist in the criminal adjudication of groups have been formulated, the vertical and horizontal reforms necessary to gain a full picture of past atrocity and address the future are still lacking. Literature, however, abounds with proposals to address the moral and metaphysical guilt of different actors whose actions may not warrant criminal liability, including the incorporation of national systems addressing tort and restitutionary claims, the use of shaming and the adoption of restorative group sanctions.

While the rigid parameter of ICL and its imported objectives fail to address pressing social aspects of international crime, Italian antimafia has successfully created a synergy between legal and socio-cultural policies to tackle organised crime. Assisted by its approach to penalty as ‘multi-functional’, the Italian system has coupled strongly repressive action by the state with a plethora of social initiatives in a ‘double-track’ antimafia system, consisting of direct and indirect policies. The enactment of special legislation, known as the ‘Antimafia
Code’, and institutions has allowed to develop a specialised judiciary, and to use resources efficiently. This is further enhanced by procedural and evidentiary amendments, facilitating collaboration by former members and allowing trials with numerous defendants, thus creating the opportunity to transcend the constraints of individual responsibility and address the criminal organisation as a whole. The imposition of long sentences and a harsh penitentiary regime has also significantly raised the cost of being a mafioso, as they carry severe restrictions of social contact, cutting out individuals from their social milieu where they enjoy significant levels of prestige. The most effective direct measure, however, is found in the policy of both preventive and punitive patrimonial measures. These allow the state to confiscate the assets of mafiosi - thus undermining one of their main sources of power: wealth. This policy is rendered even more effective by the national mechanism allowing for the repurposing of these assets into socially useful businesses, often by grassroots organisations with a clear antimafia message. These organisations contribute to a variety of efforts, both local and national, to create a ‘culture of legality’ which can contrast the mafia paradigm in many regions of Southern Italy. Nevertheless, antimafia efforts are greatly hindered by the lack of significant socio-economic advancement opportunities in mafia-prone regions, making a career in organised crime very attractive to local youth. Without national policies tackling this element, antimafia policies, regardless of how effective, will never result in the total elimination of the group.
Far from suggesting a potentially disastrous and highly impractical automatic transfer of antimafia policies to the international arena, this Article hopes to demonstrate that the fact that both mafia and international crime have groups and social dimensions that need to be addressed can create a dialogue between the national and international spheres of criminal law, as opposed to the mechanical transfer of concepts from ordinary systems to ICL that has occurred until now. The antimafia experience is a testament to the importance of the development of a specialised criminology and a comprehensive response including socio-cultural element. While international tribunals may not be able to tackle these social aspects, they should encourage the development of alternative mechanisms of accountability in light of the very obvious failures of trials. The young age of ICL, compared to antimafia efforts in Italy, and its dramatic development in the past two decades suggest that establishing policies that aim to produce a more comprehensive response to collective crimes is not only a dream but a potential reality.
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