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Coping with International Atrocities through Criminal Law

A Study into the Typical Features of International Criminality and
the Reflection of these Traits in International Criminal Law





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Cover picture: Jenny Wiik

Åbo Akademi University Press
Tavastgatan 13, FI-20500 Åbo, Finland
Tel. +358 (0)2 215 3478
E-mail: forlaget@abo.fi

Sales and distribution:
Åbo Akademi University Library
Domkyrkogatan 2–4, FI-20500 Åbo, Finland
Tel. +358 (0)2 -215 4190
E-mail: publikationer@abo.fi

COPING WITH INTERNATIONAL ATROCITIES THROUGH
CRIMINAL LAW



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Åbo Akademis förlag | Åbo Akademi University Press
Åbo, Finland, 2013

CIP Cataloguing in Publication

Heikkilä, Mikaela.

Coping with international atrocities through criminal law : a study into the typical features of international criminality and the reflection of these traits in international criminal law / Mikaela Heikkilä. - Åbo : Åbo Akademi University Press, 2013.

Diss.: Åbo Akademi University.

ISBN 978-951-765-702-0

ISBN 978-951-765-702-0

ISBN 978-951-765-703-7 (digital)

Painosalama Oy

Åbo 2013

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ABBREVIATIONS

AC	Appeals Chamber
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
CH	Chambers
CCL	Control Council Law No. 10
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (a.k.a. European Convention on Human Rights)
ECtHR	European Court of Human Rights
GC	Grand Chamber
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention Relative to the Treatment of Prisoners of War
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
JCE	Joint criminal enterprise
PL	Plenary
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
SAC	Specially Appointed Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UN	United Nations

ACKNOWLEDGEMENTS

The writing of this doctoral thesis has been a process that has taken many years. During these years, many people have crossed my path without whom this thesis would not have been possible. To begin with, I would like to thank my first supervisor, Professor Martin Scheinin, who encouraged me to write a doctoral dissertation and who gave me a significant leeway in choosing a topic that genuinely interested me. My second supervisor, Professor Elina Pirjatanniemi, has with her broad expertise in both criminal and international law been an ideal supervisor for me. I am really thankful for all the interesting discussions about legal methods, criminal law and life in general that have helped me develop as an academic. I would also like to express my gratitude to my two eminent pre-reviewers, Professor Kimmo Nuotio and Professor Thomas Weigend, who despite their busy schedules found time to read and comment my long manuscript.

This doctoral thesis would not have been possible without the funding it has received from the Graduate School Law in a Changing Society (*Oikeus muuttuvassa yhteiskunnassa*, OMY)/the Graduate School Law in a Changing World (*Oikeus muuttuvassa maailmassa*, OMM), the Kone Foundation, and the Åbo Akademi University.

I would also like to thank my colleagues and friends at the Institute for Human Rights/ Department of Law who have made the work on the doctoral thesis such a pleasant endeavour. A special thank I would like to direct to our information specialist and librarian Harriet Nyback-Alanen who has always made sure that I have had access to the needed literature. I would also want to express my gratitude to the members of the “method group”, who triggered my interest in legal philosophy, and the members of the LARM research group, who opened up my eyes for the value of interdisciplinary academic research.

Last but not least I would like to thank my family – and especially, my mother Carita, my partner Jean, and my children Judit and Otto – for their love and support. Thank you! This thesis is dedicated to you!

1. INTRODUCTION¹

1.1. The History of Impunity for International Atrocities and the Development of International Criminal Law

Certain acts, such as murder and rape, are universally recognized as deviant and criminal. These acts are hence inherently criminal or *mala in se*.² In armed conflicts such acts are, however, frequently committed and met with impunity. The reason for this is that the deliberate infliction of harm is not socially evaluated in the same way in times of peace and in times of war. What in peacetime is perceived as crimes can be regarded as military actions or as “politics” in armed conflicts. An alternative moral order is thus in force during armed conflicts, which allows “many things that are strictly prohibited under all criminal codes.”³ Armed conflicts give rise to both situations of war and institutions of war (such as, prisoner-of-war camps), which “change the normal moral situation”.⁴

All, however, is not fair in love and war, at least legally speaking. The law of armed conflict or international humanitarian law has developed during centuries and it has established limits for fighting in armed conflicts.⁵ As such, it is also criminal to rape in armed conflicts and to murder non-combatants. The law of armed conflicts has, however, often been plagued by significant enforcement problems. During armed conflicts, the conditions are rarely conducive for war crime trials. After the conflicts, trials are often hampered by political settlements containing promises of amnesties or simply the wish to move on and leave the armed conflict behind. Post-conflict societies also often have numerous infrastructural and economic problems to handle. In these difficult circumstances, the finding of individual guilt may be of secondary importance for the authorities. In the rare cases where there have been war crime trials, the defendants have often represented the losing party to the conflict. Many historical examples of war crimes trials therefore have an element of victor’s justice in them.

Armed conflicts are, however, not the only context in which inherently criminal acts frequently are met with impunity. In totalitarian or authoritarian States, it is common that dissidents and/or members of minority groups face serious violence that goes unpunished. In these contexts, the impunity is often due to the State involvement in the criminality. Also after the abusive regime has fallen, attempts to address abuses are often conspicuous by their absence or modest in comparison to the magnitude of

¹ This study aims at covering legal developments up to mid-December 2012, when the thesis was submitted to the preliminary review. A few occasional references to articles/books and case law from 2013 have, however, been added.

² In Black’s Law Dictionary, a *mala in se* or *malum in se* crime is defined as a crime that is inherently immoral, such as murder, arson, and rape. Another type of crimes is crimes *malum prohibitum*, which are crimes because they are prohibited by statute, although the acts themselves are not necessarily immoral. *Black’s Law Dictionary*, 9th ed. (2009).

³ G. P. Fletcher, ‘The Law of War and Its Pathologies’, 38 *Columbia Human Rights Law Review* (2007), at 522.

⁴ L. May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), 11.

⁵ On the development of the law of armed conflict, see e.g., L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), 15-53.

the crimes committed.⁶ This impunity appears to have the same underlying reasons as impunity after armed conflicts: amnesties, lacking political will and scarce resources.

The difficulty faced by domestic criminal justice systems to – effectively and fairly – address crimes committing as part of armed conflicts and totalitarian regimes is the background of international criminal law. In this regard, the idea of international individual criminal responsibility was for the first time seriously raised after World War I: The *Treaty of Peace between the Allied and Associated Powers and Germany* signed at Versailles suggested that the former German emperor and persons accused of having committed acts in violence of the laws and customs of war should be prosecuted.⁷ This attempt to establish international individual responsibility, however, ended in a failure.⁸ The first successful multinational criminal trials instead took place after World War II. In Europe, the *International Military Tribunal at Nuremberg* (Nuremberg Tribunal) prosecuted leading Nazis for war crimes, crimes against humanity and crimes against peace.⁹ In Asia, the *International Military Tribunal for the Far East* (Tokyo Tribunal) was established to prosecute the major war criminals in the Far East.¹⁰ Together these tribunals established that “individuals have international duties which transcend the national obligations of obedience imposed by the individual state” and that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹¹ The tribunals hence confirmed the existence of individual criminal responsibility for certain crimes directly based on public international law. Both tribunals had powers to prosecute individuals for war crimes, crimes against humanity and crimes against peace.

The widespread and shocking Nazi criminality had also other consequences for the development of public international law. In the late 1940s, international human rights law started to develop and many important conventions were adopted. Central international instruments dating back to that time period are, for example, the 1948 *Universal Declaration of Human Rights* (UDHR),¹² the 1948 *Convention on the Prevention*

⁶ E.g., C. S. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), 118-127.

⁷ The *Treaty of Peace between the Allied and Associated Powers and Germany* signed at Versailles, 28 June 1919, Articles 227-230.

⁸ See further, e.g., T. Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, 100 *American Journal of International Law* (2006), at 554-559, and W. A. Schabas, *Genocide in International Law – The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009) 21-26.

⁹ *Göring et al.*, Judgment, IMT, 1 October 1946 (also referred to as the ‘Nuremberg Judgement’). See further e.g., D. A. Blumenthal & T. L. H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008) and G. Ginsburgs & V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990). Regarding the Nuremberg Tribunal, it has been noted that the tribunal rather was *multinational* than international, as it was established by the four victorious allies. *Bulletin of the International Criminal Tribunal for the Former Yugoslavia*, No. 5/6 (1996), at 4. As such, the first truly international criminal tribunal is the *International Criminal Tribunal for the Former Yugoslavia* (ICTY).

¹⁰ B. V. A. Röling & C. F. Rüter (eds.), *The Tokyo Judgment* (Amsterdam: University Press Amsterdam, 1977).

¹¹ *Göring et al.*, Judgment, IMT, 1 October 1946, at 223.

¹² UN Doc. G. A. Res. 217 (III) A of 10 December 1948.

and Punishment of the Crime of Genocide (Genocide Convention)¹³ and the four 1949 Geneva Conventions.¹⁴ Furthermore, within the United Nations (UN), the International Law Commission (ILC) was given the task to study the desirability and possibility to establish a permanent international criminal court.¹⁵ The period of fruitful international cooperation was, however, short. The hostile political atmosphere of the Cold War led to the discontinuation of many projects and negotiations. For example, the international criminal court project was disrupted as the establishment of a court “whose goals included the punishment of aggressive warfare was seen in the context of the cold war as a threat to national sovereignty.”¹⁶ Some important conventions, however, saw the light of day during the Cold War. For example, the 1966 *International Covenant on Civil and Political Rights* (ICCPR),¹⁷ the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention),¹⁸ and the two 1977 additional protocols to the 1949 Geneva Conventions.¹⁹ The Cold War period was characterized by widespread impunity for crimes committed during armed conflicts and by abusive regimes.

When the Cold War period ended in the late 1980s/early 1990s, the international community’s approach to international crimes changed rapidly and drastically. Only weeks after the fall of the Berlin Wall in 1989, the UN General Assembly revived the attempts to establish a permanent international criminal court.²⁰ The central turning-point against impunity, however, took place in May 1993, when the UN Security Council surprised many by creating an *ad hoc* tribunal to prosecute and punish persons responsible for serious violations of international humanitarian law committed in the Balkan Conflict, that is, the *International Criminal Tribunal for the Former Yugoslavia* (ICTY).²¹ The fact that such a tribunal was established has been explained, besides by the new post-Cold War political environment, with the widespread media coverage

¹³ UN Doc. G. A. Res. 260 (III) A of 9 December 1948.

¹⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC I), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC II), *Geneva Convention Relative to the Treatment of Prisoners of War* (GC III), and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (GC IV).

¹⁵ UN Doc. G. A. Res. 260 (III) B of 9 December 1948. See also UN Docs. A/2136(SUPP) and A/2645(SUPP). M. P. Scharf, *Balkan Justice – The Story behind the First International War Crimes Trial since Nuremberg* (Durham: Carolina Academic Press, 1997), 14-15, and V. Morris & M. P. Scharf, *The International Criminal Tribunal for Rwanda, Volume 1* (Irvington-on-Hudson: Transnational Publishers, 1998), 17-29.

¹⁶ Scharf 1997, at 15. The main reason for the interruption of the project was the international community’s inability to define aggression. B. B. Ferencz, ‘An International Criminal Code and Court: Where They Stand and Where They’re Going’, 30 *Columbia Journal of Transnational Law* (1992), at 377.

¹⁷ UN Doc. G. A. Res. 2200 (XXI) A of 16 December 1966.

¹⁸ UN Doc. A/RES/39/46 of 10 December 1984.

¹⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (AP I), and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (AP II).

²⁰ W. A. Schabas, ‘International Criminal Court: The Secret of Its Success’, 12 *Criminal Law Forum* (2001), at 415. See also Scharf 1997, at 15-17.

²¹ UN Doc. S/RES/827 (1993). References to the Statute of the ICTY will hereinafter be made in the form “Article X, ICTY Statute”.

that focused on the atrocities and the failure of the international community to restore peace.²² One year later, the UN Security Council created a similar tribunal to prosecute crimes committed in the Rwandan Civil War, namely the *International Criminal Tribunal for Rwanda* (ICTR).²³ The strong enthusiasm over international criminal law in the 1990s was, however, most clearly reflected in the negotiation and adoption of the *Statute of the International Criminal Court* (ICC) that in 1998 was adopted in Rome.²⁴ In July 2002, the Statute entered into force unusually quickly after having received the required sixty ratifications. Today, the ICC Statute has 122 State Parties.²⁵ Nowadays, international criminal law is also enforced by so-called hybrid or internationalized criminal tribunals, and increasingly by domestic courts.²⁶

1.2. The Goals of the Study

The development of international criminal law has entailed that the period of almost complete impunity for crimes that take place in armed conflicts and abusive States is over. The international community has recognized certain crimes as crimes under customary international law and it has established international and internationalized criminal tribunals to prosecute them. This need to establish *special* crimes and *special* institutions raises the question to what extent rapes and murders that have a connection to armed conflicts or totalitarian regimes are different from rapes and murders committed in peacetime. A central aim of this study is to elaborate on this *special nature of international crimes*, and indirectly on the difference between international crimes and “ordinary” national crimes. The concept of international crimes here refers to war crimes, crimes against humanity and genocide. Occasional references will be made to the crime of aggression (crime against peace) and terrorism, but these crimes are not investigated in detail here due to the controversies that have surrounded their international

²² V. Morris & M. P. Scharf, *An Insider's Guide to the International Criminal Court for the Former Yugoslavia, Volume 1* (Irvington-on-Hudson: Transnational Publishers, 1995), 17. On the establishment on ICTY, see e.g., M. C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson: Transnational Publishers, 1996) 202-205, and Scharf 1997, at xv and 51-63.

²³ UN Doc. S/RES/955 (1994). References to the Statute of the Rwanda Tribunal will hereinafter be made in the form “Article X, ICTR Statute”. On the establishment of the ICTR, see Morris & Scharf 1998, at 62-72.

²⁴ UN Doc. A/CONF.183/9. References to the Statute of the International Criminal Court will hereinafter be made in the form “Article X, ICC Statute”.

²⁵ <http://www.icc-cpi.int> (> Assembly of States Parties > States Parties) (last visited 2 September 2013).

²⁶ The most significant hybrid/internationalized courts are the *Special Court for Sierra Leone* (SCSL), the *Extraordinary Chambers in the Courts of Cambodia* (ECCC) and the *Special Tribunal for Lebanon* (STL). In common these hybrid/internationalized tribunals have that they combine domestic and international elements (e.g., judges and applicable law). See further e.g., L. A. Dickinson, ‘The Promise of Hybrid Courts’, 97 *American Journal of International Law* (2003), at 295 ff. and *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo and Cambodia*, C. P. R. Romano, A. Nollkaemper, & J. K. Kleffner (eds.) (Oxford: Oxford University Press, 2004). See also W. A. Schabas, ‘The Special Tribunal for Lebanon: Is a ‘Tribunal of an International Character’ Equivalent to an ‘International Criminal Court’?’, 21 *Leiden Journal of International Law* (2008), at 513-528.

criminality.²⁷ The concept of ordinary crimes, on the other hand, refers to crimes that lack a connection to extraordinary social circumstances and which have been criminalized in (presumably) all legal systems in the world.²⁸ This crime group most notably includes the crimes of murder, rape, and assault.²⁹ The concepts of international criminality and ordinary criminality refer to criminality consisting of international crimes respectively ordinary crimes.

It should be noted that the concept of “international criminality” in this study is used to refer both to certain crimes and to a certain social phenomenon. Neubacher has discussed the relationship between a social phenomenon and its criminalization, and argues in line with the so-called labelling theory that both the identification of the social problem and the criminalization are *definitional processes*. The content of concepts thus essentially depends on how they have been identified and defined, in contrast to some internal nature of the phenomenon.³⁰ Neubacher, however, seems to imply that first a social problem is identified and second a legal label is given.³¹ The present author, however, believes that the process is circular, that is, that also the legal label affects how the social problem is perceived and what is seen to be part of the social problem. To completely disconnect the social problem of international criminality from the legal definitions of international crimes appears to be impossible, and is not attempted here. As noted, the present author essentially defines the concept of international criminality by referring to the legal definition of the international crimes. This is, however, not to say that the content of the concept of international criminality is identical throughout the study. When the present author discusses international criminality as a social phenomenon, the content of the concept is also *determined by academic scholars* who do not necessarily strictly follow legal definitions.³² In the sections of the study where the legal approach to international

²⁷ In June 2010, the Assembly of State Parties of the ICC, however, adopted a resolution containing a definition of the crime of aggression. ICC Doc. RC/Res.6. For the ICC to be able to exercise jurisdiction over the crime, a further decision by States Parties is, however, necessary and the Statute amendment also has to be ratified by a number of States Parties. In connection to terrorism, on the other hand, the establishment of the STL has fortified the idea of the international criminality of terrorism even though the STL Statute refers to the Lebanese Criminal Code with regard to applicable criminal law. UN Doc. S/RES/1757 (2007).

²⁸ In German scholarship, a similar difference has been made between *Makrokriminalität* (macro-criminality) on the one hand and *Alltagskriminalität* (everyday criminality) on the other. See e.g., H. Jäger, *Makrokriminalität – Studien zur Kriminologie kollektiver Gewalt* (Frankfurt am Main: Suhrkamp, 1989), 11, and C. Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* (Münster: LIT Verlag, 2003), 240.

²⁹ The concept of “ordinary crimes” is problematic in that there are many different types of crimes that can be found in most domestic legal systems. As such this narrow definition of the concept conceals the fact that domestic legal systems address many different types of crimes with varying typical features. The concept is, however, frequently used in international criminal law in this meaning.

³⁰ F. Neubacher, *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit – Politische Ideen- und Dogmengeschichte, kriminalwissenschaftliche Legitimation, strafrechtliche Perspektiven* (Tübingen: Mohr Siebeck, 2005), 8.

³¹ Neubacher 2005, at 8.

³² Some social scientists have explicitly challenged the legal definitions of concepts (such as genocide) and given them alternative, but often related, meanings. See e.g., E. Markusen & D. Mirkovic, ‘Understanding Genocidal Killing in the Former Yugoslavia: Preliminary Observations’, in C. Summers & E. Markusen (eds.), *Collective Violence – Harmful Behavior in Groups and Governments* (Lanham: Rowman & Littlefield Publishers Inc., 1999), at 40.

criminality is discussed, the concepts are defined by the “legislators” and appliers of the law, that is, essentially by States and international criminal tribunals.

The present author believes that an investigation into the differences between international and ordinary crimes is important in that criminal law – a coercive instrument primarily developed to tackle ordinary crimes – is used to deal with international crimes. Another goal of the study is therefore to *illuminate how the typical characteristics of international crimes have affected the content and functioning of international criminal law*. An assumption made is that the special nature of international criminality at times makes it difficult for international criminal law to adhere to established criminal law doctrines and principles. Already here, it should be noted that the goal of the study is not to tackle the more general question of whether criminal law is a suitable instrument to address international criminality³³ or whether international crimes should be dealt with by alternative mechanisms, such as truth commissions. These are important questions, but to compare the different response mechanisms to international atrocities is not possible within the scope of this study. The goal here is therefore more limited, that is, to analyze the criminal law that *de facto* has been adopted and which *de facto* is applied to address international criminality.

Finally, the study aims at pointing out that international criminal law is not merely *reflecting* what is central in international criminality, but that at the same time the law is *conveying a certain image of the criminality*, which affects general sentiments.³⁴ In this regard, Garland has noted that “penalty communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters.”³⁵ The choices made in the criminalization and adjudication of the crimes are thus of significance, as they create a certain framework of meaning. The international community has chosen to emphasize certain characteristics of international criminality and to disregard others, and this affects perceptions about the criminality.

1.3. The Structure of the Study

This study has been organized into three parts, which have been divided into chapters and subsections. In Part I, the typical features of international criminality are investigated. More specifically, Chapter 2 establishes the phenomenology of international criminality by elaborating on international crimes as a historical and sociological phenomenon. International crimes often occur in certain contexts and take a particular form. In

³³ E.g., Drumbl has criticized the use of the same type of criminal law to ordinary domestic criminals and the perpetrators of mass atrocities. M. A. Drumbl, ‘A Hard Look at the Soft Theory of International Criminal Law’, in L. N. Sadat & M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008), at 7. Drumbl has also observed that many scholars within international criminal law implicitly support the use of international criminal law and hence follow the dominant “metanarrative of international criminal law.” M. A. Drumbl, ‘Pluralizing International Criminal Justice’, 103 *Michigan Law Review* (2005), at 1297.

³⁴ Cf. Garland who has noted that penal practices are shaped by changing forms of mentality and sensibility, but that at the same time the penal institutions change the general culture. D. Garland, *Punishment and Modern Society – A Study in Social Theory* (Oxford: Clarendon Press, 1990), 249-250.

³⁵ Garland 1990, at 252.

Chapter 3, the investigation is continued by turning the focus towards criminology and what this branch of science has to offer to the understanding of international crimes. In criminology, a central goal is often to increase the understanding of the causes behind the criminality.³⁶ Already here, it can, however, be noted that criminology as an academic discipline has traditionally not given much attention to international crimes. Only a few major studies have been conducted that have a strong relevance for understanding international criminality. In this study, attention has, however, not only been given to studies that explicitly have elaborated on international criminality (or “supranational criminology” as the branch of criminology sometimes is called today).³⁷ General criminological literature has also been used to some extent. While Chapter 2 on phenomenology emphasizes the uniqueness or special features of international criminality, Chapter 3 on criminology, on the contrary, suggests that there are certain similarities between international and ordinary criminality.

In Part II of the study, the “instrument” addressing the criminality is studied. Questions of relevance in this part are, for example, what it means that international atrocities are addressed with criminal law, and to what extent international criminal law is comparable to ordinary domestic criminal law. In Chapter 4, the attention is on the general characteristics of criminal law, whereas Chapter 5 focuses on international criminal law. In relation to international criminal law, it has been put forward that it is a hybrid branch of law, which simultaneously derives its origin from and continuously draws upon: (a) international humanitarian law; (b) international human rights law; and (c) national criminal law.³⁸ It is essential to understand the complex nature of international criminal law before turning the attention towards the content of the law.

Part III is the main part of the study, in which the existing international criminal law is analyzed. The study focuses on the international criminal law that today is applied by the UN *ad hoc* tribunals (ICTY and ICTR) and the ICC. More concretely, the study looks at the law regulating international crimes (Chapter 6), the law affecting attribution of responsibility (Chapter 7), the law on factors excluding criminal responsibility (Chapter 8), and the law regulating sentencing (Chapter 9). All these chapters start with a section on the *lex lata*, that is, an identification of the existing law. The *lex lata* sections are followed by analysis sections, in which the applicable law is considered from a phenomenological and/or criminological perspective. The goal of Chapters 6–9 is to illuminate the legal choices made in international criminal law.

The study ends with a concluding chapter in which the findings that have been made during the process are summarized. The concluding chapter also contains a more general discussion about the picture of the criminality that the *lex lata* conveys.

1.4. Some Words about the Methodology

As the previous sections indicate, the study is not a traditional legal study in international criminal law, which primary aim is to identify the existing law by analyzing the historical

³⁶ E.g., J. Sarnecki, *Introduktion till kriminologi*, 2nd ed. (Lund: Studentlitteratur, 2009), 51.

³⁷ See, e.g., the network on supranational criminology (<http://www.supranationalcriminology.org>, last visited 14 March 2013).

³⁸ A. Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 6.

development of norms from past to present with reference to legal sources. The “conventional style of academic research in law”³⁹ (or “legal dogmatics” as this type of research often is called) has many excellent representatives in international criminal law, and as regards most aspects of international criminal law there are already numerous publications that aim at establishing the “correct” interpretation and identification of the law.⁴⁰ The study is neither a representative of another common approach in legal research, viz. a more philosophical approach, where the question of what *justifies* various norms and approaches is central. In connection to domestic criminal law, piles of books have been written on how the deliberate infliction of pain that criminal law entails can be justified, and this approach has spread to international criminal law.⁴¹ Finally, the study is not a critical legal study, which primary goal would be to deconstruct the law and to establish hidden power structures. So how should the chosen approach be characterized?

The author would call the approach chosen an *interdisciplinary approach with a legal base*, as the primary aim of the study is to attain a better understanding of the law by complementing traditional legal analysis with insights from other branches of science.⁴² Interdisciplinary studies are often conducted in research teams, where representatives of different research traditions look at the same subject from their own perspective. Such projects obviously have the benefit that the various scholars perfectly master their own research tradition. The drawback, however, is that they rarely result in texts that genuinely would be interdisciplinary. Lawyers continue to conduct traditional legal analysis, sociologists traditional sociological studies, etc. The spill-over of knowledge from one branch of science to another is hence often poor. In this study, the author has herself tried to use several different types of material, however, so that the emphasis is on legal research material (that is, most notably, international legal instruments, case law, and legal scholarship). However, in Chapters 2–3 much non-legal material is used, which requires some methodological comments.

To begin with, it should be noted that in these chapters the author has not tried to establish genuinely new facts about international criminality, but to make use of the existing research. To obtain fresh historical knowledge would require studies into archives etc. which is beyond the scope of this study. Likewise, to make new

³⁹ I. Tallgren, *A Study of the ‘International Criminal Justice System’ – What Everybody Knows?* (Helsinki: Faculty of Law, University of Helsinki, 2001), 13.

⁴⁰ In this connection, it should be noted that K. J. Heller has a book project he refers to as the “genealogy of international criminal law”, in which he aims at systematically conducting a “historical-theoretical study of the process of international criminalization.” K. J. Heller, ‘New Book Project: A Genealogy of International Criminal Law’, *Opinio Juris* [blog], 22 May 2012.

⁴¹ Many such studies indicate that the use of international criminal law to address international criminality is not unproblematic. See further e.g., M. Koskeniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United Nations Law* (2002), at 1-35, and M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’, 99 *Northwestern University Law Review* (2005), at 568 (‘Although I accept that mass atrocity is manifestly illegal, I argue that its collective nature problematizes concepts such as bystander innocence, public responsibility, victim reintegration, reconciliation, recidivism, and the moral legitimacy of pronouncements of wrongdoing by international tribunals when the international community itself is perceived as having failed to prevent [...] the wrongdoing.’)

⁴² Cf. J. Gardner, ‘In Defence of *Offences and Defences*’, 4 *Jerusalem Review of Legal Studies* (2012), at 112 (‘For the perspective I took, as I saw it, was already the criminal lawyer’s perspective on the criminal law, merely taken up to a higher altitude at which only the larger features of the landscape can be discerned.’)

criminological insights generally requires empirical research, which also lies outside the scope of this study. In relation to the chapter on the phenomenology of international crimes, the present author has therefore chosen to rely on books and articles by scholars who have conducted historical or sociological research on international criminality or who through their professional experience (for example, as judges) have gained insights into the nature of the criminality. As regards the criminological chapter, very little empirical research has been conducted in connection to international crimes. In respect to criminology, the author has therefore relied on basic textbooks in criminology to establish a framework, and complemented this with more specific articles and books on supranational criminology.⁴³

Regarding Chapters 6-9, it is important to note that the research project focuses on the “rhetoric of judging at the level of law”,⁴⁴ that is, what the legal instruments and case law say about the content of the law. Hence, the study does not consider the question of how the law *de facto* is applied by the judges in concrete cases (referred to as the casuistry of the international criminal law by Cupido).⁴⁵ Furthermore, as much research has already been conducted in which the *lex lata* is identified, the focus in Chapters 6–9 is on *analyzing* the law. A central consideration is which typical features of international criminality are reflected in the law and which are not. Important to acknowledge are namely also the *silences of the law*. In this regard, the author concurs with Charlesworth who has held that: “All systems of knowledge depend on deeming certain issues as irrelevant or of little significance” and that “the silences of [...], the] law may be as important as its positive rules and rhetorical structures.”⁴⁶ By identifying the *emphases* and *silences* of international criminal law, the thesis hence aims at providing new angles on the *lex lata* of international criminal law. The division of the analysis into chapters on crime definitions, attribution, defences and sentencing also aims at highlighting *at what stage* and *how* different types of factors are considered.

In summary, the interdisciplinary approach is what distinguishes this study from most other studies. Special attention is given to historical and criminological viewpoints, and to the nature of criminal law. The underlying idea is that using literature from many different academic fields will make the *legal* analysis of the international criminal law more nuanced, as the external perspectives can throw light on weaknesses in the legal way of thinking. The author strongly believes that discussions regarding the same topic in different academic fields should be brought together.

1.5. Relationship to Already Conducted Research

The present author has not come across another study on international criminal law, in which exactly the same methodology would have been used. There is, however, some

⁴³ E.g., A. Smeulers and F. Grünfeld, *International Crimes and Other Gross Human Rights Violations – A Multi- and Interdisciplinary Textbook* (Leiden: Martinus Nijhoff Publishers, 2011).

⁴⁴ K. J. Heller, ‘Cupido on the Rhetoric of the Policy Requirement’, *Opinio Juris* [blog], 4 July 2012.

⁴⁵ See further ‘Casuistry of the International Criminal Law’, <http://www.rechten.vu.nl/en/research/research-institutes-and-centres/acic/research/ongoing-projects/casuistry-of-international-criminal-law.asp> (last visited 15 March 2013).

⁴⁶ H. Charlesworth, ‘Feminist Methods in International Law’, 93 *American Journal of International Law* (1999), at 381.

interdisciplinary legal research on international criminal law, which the author finds especially inspirational and which she therefore wants to explicitly mention as examples of already conducted research. For example, a doctoral study with a title suggesting a very similar theme has been conducted by Christina Möller in Germany.⁴⁷ The way in which Möller in practice approaches the research subject, however, clearly diverges from the way in which the present author aims at proceeding. Möller's dissertation, for example, begins with a detailed survey of numerous historical examples of international crimes beginning from the religious crusades.⁴⁸ The author does not find it necessary to personally try to establish what has happened in different armed conflicts. Instead, the author uses conclusions made by historians (and legal scholars such as Möller). The historical survey of Möller is followed by a part that is called criminological and legal policy considerations. This is the most relevant part of Möller's thesis for this study, and references will be made to Möller's findings.⁴⁹ The remaining part of Möller's study is devoted to discussing how international criminal law can be legitimized, for example, the role of general prevention in international criminal law.⁵⁰ As was noted in connection to the goals of the study, the question of how international criminal law can be legitimized has been defined as something that lies outside the scope of this study.

A further interesting study has been committed by Frank Neubacher, who after an investigation into the criminology of international criminality (or more correctly, primarily the criminological labelling theory) discusses the birth and legitimation of international criminal law as well as its significance from a criminal policy perspective.⁵¹ The main question for Neubacher is the power relationship between politics and law, or to put it another way, between State interests and the protection of the human rights to life and physical integrity through criminal law.⁵²

Thirdly, in Finland, Immi Tallgren has at the University of Helsinki defended a doctoral thesis containing articles that to some extent touch upon the same topic as this study.⁵³ A central question in that thesis was, however, whether international criminal law can be justified with the same arguments as domestic criminal law.⁵⁴ In her study, Tallgren also questioned the idea of a universal basis of international criminal law,⁵⁵ and discussed the relationship between individual and collective responsibility.⁵⁶

⁴⁷ Möller 2003. The title *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* can be translated into "International Criminal Law and the International Criminal Court – Criminological, Punishment Theory and Legal Politics Viewpoints".

⁴⁸ Möller 2003, at 17-226.

⁴⁹ Möller 2003, at 227-412.

⁵⁰ Möller 2003, at 413-624.

⁵¹ Neubacher 2005.

⁵² Neubacher 2005, at 1-2 and 9-10.

⁵³ The title of the thesis was "A Study of the 'International Criminal Justice System' – What Everybody Knows?".

⁵⁴ Tallgren 2001, at 4-5.

⁵⁵ Tallgren 2001, at 7-8.

⁵⁶ I. Tallgren, 'La Grande Illusion', 15 *Canadian Journal of Law and Jurisprudence* (2002), at 304 ff.

Besides the theses mentioned above, the author has also found the research of Alex Alvarez,⁵⁷ Jose E. Alvarez,⁵⁸ Mark A. Drumbl,⁵⁹ George P. Fletcher,⁶⁰ Herbert Jäger⁶¹ and Mark Osiel⁶² to be of great inspiration, as these authors have not merely focused on studying international criminal law from the typical legal perspective. Also some edited books with an interdisciplinary approach should explicitly be mentioned: *System Criminality in International Law* (2009)⁶³ and *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (2010).⁶⁴

Most scholars who have focused on the question of what type of criminality international criminality is, have connected that question to the question of whether it is justified to use criminal law to address international criminality. As noted above, the author finds this to be an important question, which, however, is outside the scope of the study. The starting-point of this study is instead that international criminal law *de facto* exists and on a daily basis is used to prosecute individuals. The goal here is to identify the structures and choices made in the existing law and to point out some problems courts face when dealing with international crimes due to the special nature of the criminality. In essence, the present study and the above mentioned research are therefore complementary.

⁵⁷ E.g., A. Alvarez, *Governments, Citizens, and Genocide: A Comparative and Interdisciplinary Approach* (Bloomington, Indiana: Indiana University Press, 2001).

⁵⁸ E.g., J. E. Alvarez, 'Rush to Closure: Lessons from the *Tadić* Judgment', 96 *Michigan Law Review* (1998), at 2031 ff.

⁵⁹ E.g., M. A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

⁶⁰ E.g., G. P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International, Volume One: Foundations* (Oxford: Oxford University Press, 2007).

⁶¹ E.g., Jäger 1989.

⁶² E.g., M. J. Osiel, *Obeying Orders* (New Brunswick: Transaction Publishers, 1999), and M. Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009).

⁶³ A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009).

⁶⁴ A. Smeulders (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010).

PART I:

THE SOCIAL PROBLEM THAT
INTERNATIONAL CRIMINAL
LAW AIMS AT ADDRESSING

2. THE PHENOMENOLOGY OF INTERNATIONAL CRIMINALITY

2.1. Introduction

Numerous books have been written on armed conflicts and abusive regimes during which terrible atrocities have been committed. Most of these books are, however, non-theoretical in character. Alvarez has, for example, regarding the existing literature on genocide noted that:

The literature that is available on genocide tends to be fragmentary and incomplete, resulting in fragmentary and incomplete knowledge of the causes and correlates of genocide. Research on genocide has often tended to be autobiographical, journalistic [...] or purely historical [...]. While this body of work is often extremely descriptive and powerful, it is typically atheoretical and lacks a comparative viewpoint that allows for the identification of consistent elements among different examples of genocide.⁶⁵

When reading the various historical accounts of international atrocities, it, however, becomes evident that the crimes often have a certain pattern or common traits.⁶⁶ These traits are now increasingly recognized, and it today possible to find articles and books in which some typical features of international criminality are singled out. But how have these typical features of international criminality, which are largely independent of the time and place of the atrocities,⁶⁷ been identified? It appears that most scholars deduce the typical features from comparative studies of various historical atrocities,⁶⁸ or from personal professional experience in dealing with international crimes.⁶⁹ A difference in this regard can be made between discovering facts through *planned empirical studies* and discovering them through *general observation*. It appears that the typical features of international criminality often have been identified through general observation. As regards the question of what the typical features of international criminality are, not all scholars stress exactly the same features, but the divergence is not significant. It is, for example, often emphasized that international criminality is collective criminality and that State involvement in the criminality is common. These and other similar

⁶⁵ Alvarez 2001(a), at 14.

⁶⁶ The question of the *uniqueness* of certain atrocities, or to put it another way, the question to what extent different atrocities can be compared, has been debated especially with respect to the Holocaust. See e.g., Möller 2003, at 232-237, and M. J. Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', 144 *University of Pennsylvania Law Review* (1995), at 549-553.

⁶⁷ Some features of the criminality can, however, change over time. Modern armed conflicts, e.g., differ from more ancient ones as regards the used weaponry and in the involvement of civilians in the conflicts.

⁶⁸ E.g., Möller 2003.

⁶⁹ Goldstone has, e.g., put forward that: "Since 1991 I have been at the cutting edge of investigations into mass violence – in South Africa, the former Yugoslavia, and Rwanda. What has struck me again and again are the similarities in the manner in which perpetrators, victims, and bystanders react to massive human rights abuses." R. J. Goldstone, 'Foreword', in M. Minow, *Between Vengeance and Forgiveness – Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), at ix. In the case law of the international criminal tribunals, it is also possible to find comments about the nature of the criminality. See e.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 191.

often mentioned characteristics will now be examined one by one. In this part of the study, the international crimes will thus be studied as a *social phenomena* and the focus will be on *the context in which individuals commit their crimes*. The individual reasons for participation in atrocities and the question of how the social phenomenon of international criminality is created are topics that are addressed in Chapter 3 of this study.

2.2. Crimes Committed in Armed Conflicts and during Totalitarian Regimes

Is it “genocide or civil war?” the editor asks. But this is the wrong question. For it is often war [...] *and* genocide. Genocide virtually always occurs within a context of war, and sometimes triggers war or the renewal of war.⁷⁰

International crimes generally occur in societies where social mechanisms that restrict the use of violence have been put aside, that is, in situations of *social breakdown*.⁷¹ Armed conflicts usually represent such breakdown situations. In international criminal law, armed conflicts have been defined as situations where there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups.⁷² Armed conflicts are thus explicitly defined by the *abnormal use of violence*.

It has been argued that *jus in bello* or the law of armed conflict represents an alternative legal order, which its own internal logic and tradition.⁷³ Fletcher has in this regard noted that: “In the alternative legal order of war, the participants are entitled to do many things that are strictly prohibited under all criminal codes. They are allowed to hurt people – indeed, to kill them – and, less egregiously, to destroy property that is related to the war effort.”⁷⁴ In a similar vein, it has been found that armed conflicts are social activity which involves the mobilization and organization of individuals for the purpose of inflicting physical violence.⁷⁵ Killing and hurting the enemy is thus not only allowed in armed conflicts, but often socially expected.⁷⁶ It appears that the alternative

⁷⁰ H. Fein, ‘Civil Wars and Genocide: Paths and Circles’, 1 *Human Rights Review* (2000), at 49. The question of whether genocide should be distinguished from warfare has been debated. There is, however, a consensus that armed conflicts tend to create conditions conducive for genocide. E. Markusen, ‘Genocide and Warfare’, in C. B. Strozier & M. Flynn (eds.), *Genocide, War, and Human Survival* (Lanham, Maryland: Rowman & Littlefield Publishers, 1996), at 76-78, and Markusen & Mirkovic 1999, at 43-46.

⁷¹ L. E. Fletcher & H. M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, 24 *Human Rights Quarterly* (2002), at 617-620.

⁷² Article 8, ICC Statute, and *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 70.

⁷³ G. P. Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’, *Yale Law Journal* (2002), at 1516 and 1518.

⁷⁴ Fletcher 2007(b), at 522. See also M. Kaldor, *New and Old Wars – Organized Violence in a Global Era* (Cambridge: Polity Press, 2001), 17.

⁷⁵ Kaldor 2001, at 13 (referring to Clausewitz).

⁷⁶ H. Dumont, ‘La puissance des mots: des maux que l’on doit qualifier de criminels ou le difficile passage d’une logique de guerre à une logique de droit pénal’, *Cahiers de défense sociale* (2005), at 47.

moral and legal order of war can *affect people's ability to appreciate what constitutes legal respectively criminal behaviour*.⁷⁷

In wars, myths of maleness flourish and soldiers may want to prove to themselves and others that they are fearless and merciless.⁷⁸ In armed conflicts, the violence also has a tendency to become more brutal over time, as “each side escalates its wrongdoing in retaliation for the enemy’s wrong, real or imagined.”⁷⁹ Bauman has in this vein noted that killings in armed conflicts are not always entrusted to experts or delegated to special units, but can be committed by numerous killers in the daylight and in full vision.⁸⁰ In all societies engaged in armed conflicts the brutalization does not go that far, but the social toleration of violence, however, appears to grow in all societies engaged in armed conflicts.⁸¹

More generally, it may be argued that armed conflicts increase *conditions conducive for criminality*. In armed conflicts, a lot of property is destroyed, many individuals are killed, wounded and displaced, unemployment is often high, etc. These typical features of armed conflicts entail that many individuals during armed conflict experience both *concrete loss* in the form of, for example, killed relatives and friends, and *loss of mastery and control over their own life*.⁸² The changed life conditions may make individuals behave in new ways and individuals who have not earlier committed crimes may start to do so. Armed conflicts hence increase both petty crimes and serious crimes.⁸³ Nikolić-Ristanović notes that: “[a]ll available data for the First and Second World Wars shows that the crime rate increases during and after war.”⁸⁴ War zones have therefore been called “criminogenic social environments par excellence”.⁸⁵

⁷⁷ Cf. R. Jamieson, ‘Towards a Criminology of War in Europe’, in V. Ruggiero, N. South & I. Taylor (eds.), *The New European Criminology – Crime and Social Order in Europe* (London: Routledge, 1998), at 493.

⁷⁸ See further Smeulers & Grünfeld 2011, at 49.

⁷⁹ Osiel 1995, at 558.

⁸⁰ Z. Bauman, ‘Wars of the Globalization Era’, 4 *European Journal of Social Theory* (2001), at 24-25.

⁸¹ An exception to this may be societies engaged in “non-traditional” wars, such as the American war against terrorism. The word “non-traditional” is here used to indicate armed conflicts that are so to say long distance and which do not significantly affect the everyday life of most citizens in a country involved in the armed conflict. Cf. S. Sheppard, ‘Passion and Nation: War, Crime, and Guilt in the Individual and the Collective’, 78 *Notre Dame Law Review* (2003), at 753. Cf. the related discussion on the brutalization effect of the death penalty, viz. that it is possible that the execution of death penalties “sets an example of killing to avenge grievances, an example that some private individuals then follow.” J. M. Shepherd, ‘Deterrence versus Brutalization: Capital Punishment’s Differing Impacts among States’, 104 *Michigan Law Review* (2005), at 206.

⁸² Cf. Fletcher & Weinstein 2002, at 623.

⁸³ Smeulers & Grünfeld 2011, at 60. With reference to the research of Kalyvas, they also note that in armed conflicts “the distinction between political violence and ordinary crimes becomes blurred”, that is, individuals opportunistically take advantage of the conditions of war. *Ibid.*, at 61.

⁸⁴ V. Nikolić-Ristanović, ‘War and Crime in the Former Yugoslavia’, in V. Ruggiero, N. South & I. Taylor (eds.), *The New European Criminology – Crime and Social Order in Europe* (London: Routledge, 1998), at 463.

⁸⁵ P. Roberts & N. McMillan, ‘For Criminology in International Criminal Justice’, 1 *Journal of International Criminal Justice* (2003), at 324. See also O. S. Liwerant, ‘Mass Murder – Discussing Criminological Perspectives’, 5 *Journal of International Criminal Justice* (2007), at 919 (referring to Kellens).

Most international crimes are thus committed in armed conflicts, but there exists another typical context for international criminality.⁸⁶ This context is the context of *totalitarian* societies, or to put it another way, States that do not recognize any limits to their authority.⁸⁷ Many totalitarian States are, however, involved in some sort of armed conflicts, so the two typical contexts for international criminality are by no means exclusive. In fact, a non-democratic regime significantly appears to increase the risk for inter-State wars, violence between the regime and an opposing group (for example, internal armed conflict) and the use of violence against own citizens.⁸⁸

The connection between non-democratic regimes and international criminality has been studied most famously by Rummel who has put forward that whereas democracy fosters conciliation and compromise and entails checks and balances of the use of power, a non-democratic regime often rules through coercion and force.⁸⁹ According to Rummel, the operating framework of totalitarian States is often “repression, control, spies, concentration camps, torture, executions” and the “dynamic of obedience is fear.”⁹⁰ Totalitarian States thus primarily use *coercive power* (that is, the use of threats of pain, negative deprivation or some other negative outcome) to make other do as they want, whereas *bargaining power* plays a central role in democratic regimes.⁹¹ In the same way as armed conflicts, totalitarian regimes therefore increase the amount of violence in society. Most international crimes are thus committed in societies that are characterized by “criminal normality”⁹² or “maelstroms of violence”.

Typical for international atrocities is also that they occur *at a time of change*, for example, “during a period of colonization, at the end of colonization, when a regime falls, after a military coup d’état or at the rise of a despotic ruler or dictator.”⁹³ As noted above, social breakdown is often an important precondition for international crimes.

⁸⁶ Jäger identifies even more typical contexts and talks in this regard of “collective exceptional circumstances” (*kollektiven Ausnahmeständen*). As such exceptional circumstances he mentions wars, genocides, mass murders, totalitarian regimes, State suppression, minority persecutions, cultural and religious conflicts, guerrilla wars, revolutions, counter-revolutions, and acute political mass situations. H. Jäger, ‘Gedanken zur Kriminologie kollektiver Verbrechen’, 63 *Monatsschrift für Kriminologie und Strafrechtsreform* (1980), at 359.

⁸⁷ R. Conquest, *Reflections on a Ravaged Century* (New York: W. W. Norton & Company, 2000) 74. Braithwaite has, in this regard, noted that totalitarian states are structurally humiliating and criminogenic. J. Braithwaite, ‘Poverty, Power, and White-Collar Crime – Sutherland and the Paradoxes of Criminological Theory’, in K. Schlegel & D. Weisburd (eds.), *White-Collar Crime Reconsidered* (Boston: Northeastern University Press, 1992), at 96.

⁸⁸ R. J. Rummel, *Power Kills: Democracy as a Method of Nonviolence* (New Brunswick: Transaction Publishers, 1997), 44, 85 and 91. Rummel has observed that when a State has been involved in an international or non-international armed conflict and has suffered loss, the likelihood of violence against own citizens increases. *Ibid.*, at 93.

⁸⁹ Rummel 1997, at 6 and 101.

⁹⁰ Rummel 1997, at 8.

⁹¹ Rummel 1997, at 118-120. Rummel makes a difference between: (1) coercive power; (2) authoritative power, viz. power derived from sources such as tradition, custom and religion, and (3) bargaining power, viz. relations based on exchange. Based on what type of power the society principally is ruled with, he categorizes societies into totalitarian, authoritarian and democratic. He notes that whereas authoritarian societies are not totalitarian, the use of coercion in these societies is generally greater than in democracies. *Ibid.*, at 118-119 and 204-205.

⁹² Cf. Koskenniemi 2002, at 12.

⁹³ Smeulers & Grünfeld 2011, at 171 (regarding genocide).

2.3. Deadly Regimes: The Unusual Role of the State

Systematic persecution arises as wider social and political identities are radicalized, and the state gradually withdraws its protection from the intended victims of violence.⁹⁴

Another usual feature of international criminality is the atypical relationship between the State and the criminality. In peaceful democratic societies, the State is usually actively engaged in the suppression of criminal behaviour and it does what it can to punish those guilty of crimes. In connection to international crimes, the State, is, on the contrary, often involved in the criminality or at least condones it. It is not unusual that war crimes, crimes against humanity and genocide are committed by police officers, prison guards and members of the armed forces who normally act as the guardians of the law and who often are perceived as the only legitimate users of force in society.⁹⁵ International crimes are thus often crimes by persons who are supposed to make, defend and/or enforce the law. This public official participation opens up the possibility to commit crimes that cannot be committed in ordinarily functioning societies. Very large-scale mass atrocities, such as nationwide genocides, in fact, only appear to be possible when the State is a “criminal State”.⁹⁶ Due to the special relationship between the criminality and the State, international criminality is sometimes referred to as system criminality,⁹⁷ as governmental criminality,⁹⁸ as sanctioned massacres,⁹⁹ or as State-enhanced criminality.¹⁰⁰

⁹⁴ H. M. Hintjens, ‘When Identity Becomes a Knife – Reflecting on the Genocide in Rwanda’, 1 *Ethnicities* (2001), at 45-46.

⁹⁵ Alvarez 2001(a), at 73-74. Also from the point of view of the individual participant this is significant. Alvarez observes that many “perpetrators [of genocide] participate, not because of individual inclination or desire, but in their professional roles and as part of their professional responsibilities.” A. Alvarez, *Genocidal Crimes* (London: Routledge, 2010), 4.

⁹⁶ Luban defines a criminal State as a State that “turns the world upside down and makes the monstrous the centerpiece of civic obligation.” D. Luban, ‘State Criminality and the Ambition of International Criminal Law’, in T. Isaacs & R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011), at 63. In criminal states, deviance and normality, exceptions and rules, and criminality and lawfulness can hence be inverted. *Ibid.*, at 62 (referring to Arendt).

⁹⁷ E.g., K. Marxen, ‘Beteiligung an schwerem systematischen Unrecht’, in K. Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse? Band III: Makrodelinquenz* (Baden-Baden: Nomos Verlagsgesellschaft, 1998), at 227-228, and A. Nollkaemper, ‘Introduction’, in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 17-18 (Nollkaemper, however, argues that also other types of collective entities than States may be involved in system criminality). Lampe has held that States engaged in criminality are a sub-type of systems of wrong (*Unrechtssysteme*). E.-J. Lampe, ‘Systemunrecht und Unrechtssysteme’, 106 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1994), at 700.

⁹⁸ E.g., Friedrichs refers to State crime or governmental crime. He defines State crime as crimes committed on behalf of a State, and governmental crime as crimes committed within a governmental context on any level. E.g., D. O. Friedrichs, ‘Governmental Crime, Hitler and White Collar Crime: A Problematic Relationship’, *Caribbean Journal of Criminology and Social Psychology* (1996), at 47-48, and D. O. Friedrichs, ‘State Crime or Governmental Crime: Making Sense of the Conceptual Confusion’, in J. I. Ross (ed.), *Controlling State Crime*, 2nd ed. (New Brunswick: Transaction Publishers, 2000), at 53-54.

⁹⁹ H. C. Kelman, ‘Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers’, 29 *Journal of Social Issues* (1973), at 29 and 38.

¹⁰⁰ W. Naucke, *Die strafjuristische Privilegierung staatsverstärkter Kriminalität* (Frankfurt am Main: Vittorio Klostermann, 1996), 20.

When State officials are involved in the commission of crimes this generally adds to the dangerousness of the criminality. State authorities namely have certain *powers*, which distinguish them from most non-State actors. Power can be defined as the ability to concentrate force and to suppress or neutralize dissent.¹⁰¹ A State, for example, generally has a well equipped army and access to various public records. A State also has unique possibilities to constrain criticism and prevent the diffusion of knowledge,¹⁰² that is, *ideological power*.¹⁰³ *Censorship and propaganda* are often in extensive use in totalitarian regimes and in armed conflicts.¹⁰⁴ In situations of abuse of power, the victims of crime are furthermore usually in an especially exposed position. In most international crimes, there is thus an atypical victim-perpetrator relationship, which is characterized by the special vulnerability of the victims and the exceptionally unchecked powers of the perpetrators.¹⁰⁵

State participation in the criminality is also problematic from the point of view that it is traditionally States that define what is criminal and what is not, and most individuals adhere to authorities and want to be law-abiding. State officials thus generally have *authority*, that is, power that individuals and groups accept as *legitimate*.¹⁰⁶ When domestic authorities or domestic laws prescribe internationally criminal behaviour, an individual may be faced with a domestic duty to obey and an international duty to disobey. Some scholars have therefore spoken of “crimes legalized by the State” or “crimes of obedience”.¹⁰⁷ In fact, some scholars find the whole idea of international or global crimes peculiar, in that it is usually the State which is the highest authority in criminal law. A common conception is expressed by Bauman who argues that: “There is no moral-ethical limit which the state cannot transcend if it wishes to do so, because there is no moral-ethical power higher than the state.”¹⁰⁸

The fact that individuals want to adhere to authorities entails that individuals do not necessarily have to be *forced* to obey through, for example, threats of sanctions, but may themselves “choose” to act as the authorities want them to act.¹⁰⁹ State involvement

¹⁰¹ Alvarez 2001(a), at 14-15.

¹⁰² Nino 1996, at x.

¹⁰³ Turk has differentiated between different types of power, and he defines ideological power as control of definitions of and access to knowledge, beliefs and values. A. T. Turk, ‘Law as a Weapon in Social Conflict’, 23 *Social Problems* (1976), at 280. Gill has noted that ideological power is a central means to establish authority. G. Gill, *The Nature and Development of the Modern State* (New York: Palgrave Macmillan, 2003), 26.

¹⁰⁴ E.g., Markusen 1996, at 78 and Möller 2003, at 252.

¹⁰⁵ Möller 2003, at 260. Cf. Charny who has developed an own “generic” definition of genocide and in that included the “essential defenselessness and helplessness of the victims” as an element. I. W. Charny, ‘The Prospects for a Nongenocidal World: Reflections on Why There Can Still Be Hope’, in C. Summers & E. Markusen (eds.), *Collective Violence – Harmful Behavior in Groups and Governments* (Lanham: Rowman & Littlefield Publishers, Inc., 1999), at 215.

¹⁰⁶ A. Alvarez, ‘Justifying Genocide: The Role of Professionals in Legitimizing Mass Killings’, 6 *Idea* (2001).

¹⁰⁷ E.g., H. C. Kelman & V. L. Hamilton, *Crimes of Obedience – Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989), 46 (crimes of obedience) and H. Arendt, *Eichmann in Jerusalem – A Report on the Banality of Evil* (New York: Penguin Books, 1994 [1963]), 136 (crimes legalized by the State).

¹⁰⁸ Z. Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989), 86.

¹⁰⁹ Katz criticizes the people in his home village who argued that they as “little people” could not stop the Nazi State for underestimating their own power and hence downplaying their autonomy to decide how to act. F. E. Katz, *Ordinary People and Extraordinary Evil: A Report on the Beguilings of Evil* (Albany: State University of New York Press, 1993), 42-43.

in or acceptance of the criminality namely has a significant *legitimizing effect*. Jäger has in connection to torture noted that there is a “legality bonus” in State action, which discharges individuals morally.¹¹⁰

Finally, State involvement in or acceptance of the criminality is problematic in that it is usually public officials who are responsible for the investigation and prosecution of crimes. When public officials are involved in the criminality there are no national authorities willing to secure evidence and to prosecute the crimes. And in the rare cases where international officers have a mandate to investigate and prosecute the crimes, State unwillingness to cooperate with these investigators can make the prosecution of crimes extremely difficult. Bassiouni has, for example, in relation to the ICC investigations in Sudan observed that the hostility of the government of Sudan, Darfur’s remote location, the continued unrest in the region and lacking resources make the investigations “near mission impossible.”¹¹¹ Criminal trials require *access to evidence* and uncooperative State officials can entail *de facto* impunity for the crimes.¹¹²

Even though many international crimes are committed by actors who have a State-connection, it, should, however, be noted that today non-State actors often participate in armed conflicts, and that also such actors can commit international crimes. For example, in the Balkan Conflict, a UN commission of experts counted eighty-three paramilitary groups besides the six regular armies,¹¹³ and ICTY has brought charges against members of some of these paramilitary groups.¹¹⁴ Before the ICC, many cases have been brought against members of rebel groups, such as the Lord’s Resistance Army in Uganda. This ICC prosecutorial strategy has been criticized,¹¹⁵ but it has also been noted that some ICC situations have concerned States that at least to some extent can be characterized as “failed States” and where rebel groups have gained considerable powers and have been able to commit large-scale atrocities.¹¹⁶ The classical assumption that non-State actors are in an asymmetrical power relationship to State actors does hence not always hold true.

¹¹⁰ H. Jäger, ‘Strafrechtsschutz für Menschenrechte? Zur Durchsetzbarkeit des Folterverbots’, *Mittelweg* 36 (1992), August/September, at 76.

¹¹¹ M. C. Bassiouni, ‘The ICC – Quo Vadis?’, 4 *Journal of International Criminal Justice* (2006), at 425-426.

¹¹² The prosecution of crimes committed by State officials has also been hampered by immunities granted to State agents and the idea that States should not get involved in the internal affairs of other States. See further e.g., Cassese 2008, at 302-314.

¹¹³ UN Doc. S/1994/674/Add.2 (Vol. I), Annex III, at 4, and Annex III.A, at 11-12.

¹¹⁴ E.g., Milan Lukić, who was the leader of the White Eagles, a group of local Bosnian Serb paramilitaries.

¹¹⁵ It has been observed that the ICC’s need to have good working relationships with States is problematic in that it may push the Court to focus on non-State actors. E.g., Schabas has put forward that: “The attention to non-state actors is closely related to the concept of ‘self-referral’, which has the practical consequence of establishing a degree of complicity between the Office of the Prosecutor and the referring state.” W. A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, 6 *Journal of International Criminal Justice* (2008), at 751.

¹¹⁶ M. Osiel, ‘Ascribing Individual Liability within a Bureacracy of Murder’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), at 122. In the ICRC ‘The People on War Report’ it was, in fact, put forward that one major explanation to the breakdown of norms and conventions in armed conflicts is “uncertain State authority that has left many areas of conflict”, that is, the fact that the lack of a central authority may result in “a society without apparent restraints”. Greenberg Research Inc., *The People on War Report – ICRC Worldwide Consultation on the Rules of War* (Geneva: ICRC, 2000) 28.

Technical advances (such as the development of weapons of mass destruction) may in the future increase the possibility of non-State actors to commit mass atrocities.

2.4. Collective Crimes and Collective Action

War is by its nature a collective enterprise. Organized groups engage in armed conflict with each other. [...] War always requires coordinated action, a chain of command, a sense of organization and, above all, a consciousness on the part of the individuals engaged in military action that they are acting as part of the collective effort.¹¹⁷

A further typical feature of international criminality is that it generally represents *collective criminality*. Regarding some atrocities, the collective nature of the criminality has indeed been striking. It is, for example, estimated that around 75,000-150,000 persons participated in the Rwandan genocide in 1994.¹¹⁸ The Holocaust, on the other hand, has been found to have had between 100,000 and 500,000 hands-on killers and millions of other types of participants.¹¹⁹ *Mass* killings, *mass* rapes, *mass* deportations etc. cannot generally be committed without numerous perpetrators and accomplices.

The typical large-scale participation in international crimes has entailed that they often are perceived as *collective happenings*, which is reflected in the way they are named and discussed in the public. We, for example, talk about the *Rwandan* genocide and the *Srebrenica* massacre, that is, geographical place names are often used to identify the atrocities.¹²⁰ Sometimes the atrocities are, however, instead named after the victim group (for example, the *Armenian* genocide).¹²¹ As will be discussed in greater detail further on in the study, international criminal law is, however, not directly interested in these collective happenings or *macro-crimes*. Rather, the law focuses on the acts of individual offenders, that is, on the *micro-crimes* collectively making up the macro-crimes. The legal relationship between the macro- and micro-levels is, however, a complex one.¹²² The individualistic perspective of international criminal law has been criticized for concealing the structural causes behind the criminality or the “broad institutional logic through which the actions by individuals create social effects.”¹²³ At the same time, a

¹¹⁷ Fletcher 2002(b), at 1514-1515.

¹¹⁸ J. Waller, *Becoming Evil – How Ordinary People Commit Genocide and Mass Killing* (Oxford: Oxford University Press, 2002), 14 (referring to Smith). Much higher estimates of the number of perpetrators have also been presented. Möller has called the problems caused by the high number of perpetrators (e.g., the impossibility to prosecute everyone) the *quantitative problem* of collective criminality. With the *qualitative problem* of collective criminality she, on the other hand, refers to the question of whether criminal law is a suitable means to address individual acts within collective criminality. Möller 2003, at 298 and 315.

¹¹⁹ D. J. Goldhagen, *Hitler’s Willing Executioners – Ordinary Germans and the Holocaust* (New York: Vintage Books, 1997), 166-167.

¹²⁰ H. Jäger, ‘Makroverbrechen als Gegenstand des Völkerstrafrechts – Kriminalpolitisch-kriminologische Aspekte’, in G. Hankel & G. Stuby (eds.) *Strafgerichte gegen Menschheitsverbrechen – Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg: Hamburger Edition, 1995), at 329.

¹²¹ Möller 2003, at 244-245.

¹²² Cf. “While national criminal investigations normally focus on a perpetrator, known or unknown, of a crime, ICTY and ICTR investigations focus on atrocities in geographic and functional areas.” UN Doc. S/2000/597, at 47 (para. 126).

¹²³ Koskeniemi 2002, at 13-14.

strong focus on the macro-crimes can hide the role played by individuals in creating and implementing the collective action.¹²⁴ The focus of the law in this regard *affects the picture of the criminality that is conveyed*.

From a criminal law perspective, the collective nature of international criminality often makes the fair attribution of responsibility demanding. The responsibility of individuals in international crimes is namely often difficult to establish due to the fact that these crimes consist of numerous and connected individual acts that are synchronized into a “non-transparent macro-crime”.¹²⁵ International criminality is furthermore generally also collective from another perspective. Many international crimes are committed in armed conflicts and in connection to ethnic rivalries, which are characterized by *collective thinking*. Fletcher has in this regard noted that for many people in matters of war “the individual culprits are beside the point” and that “war is waged against a collective, typically a nation-state”.¹²⁶ As an example, he mentions the Pearl Harbor attack and notes that: “No one cared about the individual Japanese pilots who returned safely from the attack [...]. They were not criminals but rather agents of an enemy power.”¹²⁷ Fletcher even argues that war creates “alternative identities” and that a “person who goes to war ceases, in part, to be an individual and becomes a soldier in a chain of command.”¹²⁸ Likewise Oko has found that in strongly ethnized societies everything is looked upon through a lens of ethnicity, which makes the ethnicity of the perpetrator more important than his/her individual actions.¹²⁹ This collective dimension of international criminality has been found to be difficult to combine with the individualistic approach of criminal law. For example Fletcher has argued that:

One of the mysteries in the relationship of war and crime is the way in which war crimes break the collective spell of military action. We can make sense of the claim that in the course of hostilities the individual soldier merges with the collective military unit. But is it possible, then, that the individual reemerges from the collective and becomes individually liable for a war crime? If he kills a soldier, he is part of the collective; if he intentionally kills a civilian, he is on his own – but not entirely on his own.¹³⁰

2.5. Different Types of Collectives¹³¹

International crimes are thus often collective crimes. But to *what kinds of collectives* do the perpetrators generally belong? Some of the typical collectives have already been

¹²⁴ Möller has therefore argued that it is wrong to think that an individual perspective only leads to concealment of the complex reality, as an individual perspective casts light on the internal structure of the collective happening or the particles of the mosaic. Möller 2003, at 329 (see also 348).

¹²⁵ Möller 2003, at 245 (in German *intransparente Gesamtkörper des Makroverbrechens*).

¹²⁶ Fletcher 2007(b), at 521.

¹²⁷ Fletcher 2007(b), at 521.

¹²⁸ Fletcher 2007(a), at 334.

¹²⁹ O. Oko, ‘The Challenges of International Criminal Prosecutions in Africa’, 31 *Fordham International Law Journal* (2008), at 377-378.

¹³⁰ Fletcher 2007(b), at 538.

¹³¹ The term collective is here used to denote “any aggregate of two or more individuals”. Cf. D. R. Forsyth, *Group Dynamics*, 5th ed. (Belmont, CA: Wadsworth, Cengage Learning, 2010), 13.

mentioned in this study: international criminality often has a State-connection, which means that typical collectives include State agencies, such as the government, the police force, and the national army. These large collectives often have sub-groups to which it also may be possible to connect an individual. For example, State armies often have corps, divisions, brigades, regiments, platoons, patrols, squads, etc.¹³² An individual offender may also have connections to collectives, which are not part of the State machinery, such as a guerrilla or paramilitary group, a terrorist organization or network or a private military firm.¹³³ Also such collectives often have sub-groups. Also other types of collectives may be connected to international criminality. Engelhart has, for example, noted that business corporations can be involved in international crimes.¹³⁴ Möller, on her part, has pointed out that during the religious crusades numerous atrocities were committed by the Church.¹³⁵ Furthermore, it is generally possible to divide the international criminals into collectives based on identity characteristics or “categories”, such as nationality, ethnicity and religion.¹³⁶ People who participate in international crimes therefore belong to many different types of collectives.

In social sciences, it is common to distinguish between collectives with regard to their size and internal structure. A possible distinction is, for example, that between groups, networks and crowds. In this regard, a *group* can be defined as a collective where two or more individuals are connected to each other by social relationships.¹³⁷ Because the individuals in the group interact and influence each other, the group develops dynamic processes that separate a group from a random collection of individuals.¹³⁸ A random group of individuals who act together, on the other hand, is often called a *crowd*.

¹³² Castano, Leidner and Slawuta have argued that it is “usually small-to-average-sized groups of individuals who commit violations” of international humanitarian law. E. Castano, B. Leidner & P. Slawuta, ‘Social Identification Processes, Group Dynamics and the Behaviour of Combatants’, 90 *International Review of the Red Cross* (2008), at 260. As such, the group membership in these smaller collectives must also be taken into account when considering the phenomenology of international crimes.

¹³³ Regarding the “units” that nowadays often participate in armed conflicts, Kaldor has differentiated between: (1) regular armed forces; (2) paramilitary groups; (3) self-defense units; (4) foreign mercenaries; and (5) regular foreign troops generally under international auspices. Kaldor 2001, at 92. The question to what extent acts by terrorists should and can be regarded as international crimes (rather as acts of terrorism) is, however, a contested one. See further e.g., W. A. Schabas, ‘Is Terrorism a Crime against Humanity?’, in H. Langholtz, B. Kondoch & A. Wells (eds.), *International Peacekeeping: The Yearbook of International Peace Operations* (Leiden: Martinus Nijhoff Publishers, 2004), at 255-261.

¹³⁴ M. Engelhart, ‘International Criminal Responsibility of Corporations’, in C. Burchard, O. Triffterer & J. Vogel (eds.), *The Review Conference and the Future of the International Criminal Court* (Alphen aan den Rijn: Kluwer Law International, 2010), at 176-177.

¹³⁵ Möller 2003, at 282.

¹³⁶ Forsyth refers to “categories” when he talks of groups that consist of individuals who “are similar to one another in some way, such as gender, ethnicity, religion, or nationality”. Forsyth 2010, at 14.

¹³⁷ Cf. Forsyth 2010, at 2-3.

¹³⁸ E.g., Forsyth 2010, at 18. Stainton Rogers has, on her part, differentiated between different types of groups depending on how permanent they are and to which degree individuals are committed to them. More specifically, she distinguishes between incidental groups, membership groups and identity reference groups (such as, ethnicity and religious communities). W. Stainton Rogers, *Social Psychology: Experimental and Critical Approaches* (Maidenhead: Open University Press, 2003), 264. Crowds and incidental groups have in common that in those individuals are “brought together for a relatively short period of time [...] with minimal involvement in and commitment to each other”. Cf. *Ibid.*, at 264.

Crowd-action is characterized by contagion, that is, the spread of behaviours from one crowd-member to another.¹³⁹ Finally, *networks* are characteristically structured as interconnected but decentralized nodes/cells, which learn from each other and support each other when it serves them to do so.¹⁴⁰ In networks, some individuals know each other very well (for example, individuals within a cell), but generally speaking networks are characterized by anonymity and the fact that it is the goals/values that direct the action rather than common decision-making.¹⁴¹ Different scholars, however, give the above defined terms somewhat different meanings. Significant for this study is the realization that *international criminal law faces very different types of collectives*. In the Rwandan genocide, it is, for example, possible to identify everything from crowd behaviour (individual committing crimes *in parallel*) to small-group behaviour (people committing crimes *in cooperation*).¹⁴²

In relation to collectives that engage in international criminality, the role played by the *bureaucratic organization model* has furthermore often been noted. Osiel has, in fact, used the term “administrative massacres” to refer to international criminality.¹⁴³ The bureaucratic organization model is often connected to the modern State, but also other collectives may have such traits. Bureaucracies are characterized by a well-defined division of tasks and a strict hierarchy with superiors and subordinates.¹⁴⁴ Bureaucratic organizations are hence *vertical* collectives with certain individuals in high-level positions and others in low-level positions. From the point of view of this study, the difference between *vertical* collectives and *horizontal* collectives is central.¹⁴⁵ Armed groups namely often have a strongly hierarchical structure. The verticality of such collectives is often enhanced by a *militarist organizational culture*, which emphasizes the obligation to follow orders.

¹³⁹ Social movements have similarities with crowds, but in contrast to crowds social movements often have a longer duration. Over time, the structure of social movements often changes from a more crowd-like to a more organization like. Forsyth 2010, at 503 and 513.

¹⁴⁰ Networks are characterized by their dynamic structure and the fact that their structure is not traditionally hierarchical, but rather based on their common values/goals. E.g., M. Castells, *The Rise of the Network Society*, 2nd ed. (Oxford: Blackwell Publishers, 2000), 501, and C. J. Borgen, ‘A Tale of Two Networks: Terrorism, Transnational Law, and Network Theory’, 33 *Oklahoma City University Law Review* (2008), at 413-414.

¹⁴¹ Borgen has noted that: “Decentralization means that nodes do not generally wait for orders but are entrepreneurial in finding targets of opportunity and organizing the resources needed for a particular action.” Borgen 2008, at 413-414.

¹⁴² Cf. A. Eser & F. Rettenmaier, ‘Criminality of Organizations: Lessons from Domestic Law – A Comparative Perspective’, in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 224.

¹⁴³ Osiel defines the term “administrative massacre as “large-scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war – civil or international, real or imagined.” Osiel 1995, at 468.

¹⁴⁴ See further e.g., M. Weber, *Economy and Society, Volume 3* (New York: Bedminster Press, 1968) 956-1005, and L. A. Scaff, ‘Bureaucracy’, *Blackwell Encyclopedia of Sociology* (2007).

¹⁴⁵ It should be noted that the division of collectives into vertical respectively horizontal ones does not mean that both types of elements cannot coexist. E.g., vertical organizations generally also have horizontal elements, viz. individuals in the same hierarchical status. Likewise, horizontal organizations often have individuals who are perceived as “leaders” or as otherwise influential persons.

As noted above, there has, however, been a certain change in the types of actors and collectives that take part in international atrocities and not all collectives participating in the crimes are bureaucratic. Some of these “new” collectives have what, in fact, could be called post-bureaucratic traits.¹⁴⁶ In post-bureaucratic organizations, the hierarchical power structures have been replaced by loose clusters of ever-changing, ever-connecting, ever-disconnecting networks.¹⁴⁷ In these collectives, *influence* is more important than traditional hierarchical *power* and the organization does not necessarily have a clear centre.¹⁴⁸ The post-bureaucratic organizations therefore have a more *horizontal* structure. For criminal law, this trend towards more horizontal and network-like organizations is not unproblematic. In traditional vertical organizations, it can generally be assumed that individuals in certain positions have certain powers, but in horizontal network-type organizations the role played by various members is often very obscure for outsiders.

In relation to international criminality, it should furthermore be noted that the *coexistence of various vertical and horizontal collectives* can make an inquiry into the relationship between two or more collectives necessary. It is thus not only individual collectives that have a vertical-horizontal dimension, but also the relationship between collectives may have it. To give a concrete example, in the *Stakić* case before the ICTY (which concerned the responsibility for a campaign of persecution in the Prijedor region) the legal significance of horizontal connections between different vertical structures of power became topical. Three organized structures of power co-existed in the region, viz. the civil administration, the civilian police and the military, and the campaign of persecution required the joint action of all three organized structures of power. Stakić controlled the civilian administration, but the individuals committing the various physical acts of persecution were members of the police or the military. The challenging legal question was therefore whether Stakić could be held responsible for the acts of individuals who did not belong to the vertical structure of power he was controlling.¹⁴⁹ International criminal law does thus not only have to address the question of relationships between individuals in collectives, but also the question of relationships between collectives.

¹⁴⁶ Cf. M. Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, 105 *Columbia Law Review*, at 1834, and Kaldor 2001, at 8 and 95. The same trend has been identified in connection to terrorism, as some modern terrorist organizations (e.g., al-Qaeda) have a network structure.

¹⁴⁷ R. Lippens, ‘Rethinking Organizational Crime and Organizational Criminology’, 35 *Crime, Law & Social Change* (2001), at 324. Grey and Garsten, on their part, find that the “principal features of post-bureaucracy include the reduction of formal levels of hierarchy, an emphasis on flexibility rather than rule-following and the creation of a more permeable boundary between the inside and outside organizations”. C. Grey & C. Garsten, ‘Trust, Control and Post-Bureaucracy’, 22 *Organization Studies* (2001), at 230.

¹⁴⁸ C. Heckscher, ‘Defining the Post-Bureaucratic Type’, in C. Heckscher & A. Donnellon (eds.), *The Post-Bureaucratic Organization: New Perspectives on Organizational Change* (Thousand Oaks: Sage Publications, 1994), at 25, and Lippens 2001, at 320-323. There are namely other types of power than hierarchical, that is, e.g., ideological, economic, and political power. E.g., M. Mann, *The Sources of Social Power, Volume II* (Cambridge: Cambridge University Press, 1993), 7-10, and Gill 2003, at 24. The sources of power are numerous and include, among other things, expertise, money and charisma.

¹⁴⁹ H. Olásolo & A. Pérez Cepeda, ‘The Notion of Control of the Crime and Its Application by the ICTY in the Stakić Case’, 4 *International Criminal Law Review* (2004), at 508-510. How ICTY resolved this will be considered in Chapter 7.

As regards different types of collectives, two additional categorizations should be mentioned, namely the differentiation between: (a) legitimate and illegitimate collectives; and (b) collectives where the membership is chosen and collectives to which one is born. Regarding the legitimate-illegitimate distinction, it can be observed that many international crimes are committed by members of legitimate organizations, such as armies and police forces. In fact, many international crimes could be defined as “white-collar crimes”, that is, as crimes committed by persons of respectability and high social status in the course of their occupation.¹⁵⁰ As noted already earlier, State authorities are generally not only perceived as legitimate, but their participation in the criminality has a special legitimizing effect on the whole criminal behaviour. Not all international crimes are, however, committed by members of collectives that have a legitimate image. For example in the Balkan conflict, many atrocities were committed by members of paramilitary groups that already during the conflict had a bad or questionable reputation.¹⁵¹ Some of these entities were even established for the very purpose of committing crimes.¹⁵² Criminologically, the question of legitimate and illegitimate collectives is interesting in that the image of the crime-committing entity may affect the willingness of different types of people to engage in the criminality. From a criminal law perspective, on the other hand, the existence of illegitimate or “criminal” collectives has raised the question of whether membership in certain types of collectives *per se* should be punishable.

As regards the difference between collectives where membership is chosen and collectives where membership is automatic or compulsory, this distinction has in international criminal law primarily been debated in relation to the question of what collectives are protected by international criminalizations. It has, most notably, been asked whether the international criminalization of genocide only protects stable groups in which membership is automatic.¹⁵³ Likewise, it has been questioned whether the concept of “gender” in connection to persecution should be equated with the stable biological sex or whether the concept rather should be construed broader to include, for example, sexual orientation which some regard as chosen.¹⁵⁴ The differentiation between stable and chosen groups is, however, problematic in that it sometimes is difficult to establish whether a certain group-belonging *de facto* is chosen or not.¹⁵⁵ A more satisfactory term in this regard is “identity-reference groups”, which indicate that there exist collectives to which people belong long-term and which acts as a “reference frame for a person to know ‘who’ they are”.¹⁵⁶ Identity-reference groups are central in connection to international crimes in that such group belonging often affects to what

¹⁵⁰ E. H. Sutherland, *White Collar Crime: The Uncut Version* (New Haven: Yale University Press, 1983 [1949]), 7.

¹⁵¹ E.g., Kaldor has observed that some of the paramilitary groups appear to have been established more or less only to commit atrocities. Kaldor 2001, at 93.

¹⁵² Eser & Rettenmaier 2009, at 225.

¹⁵³ See further e.g., Schabas 2009, at 151-153.

¹⁵⁴ See further e.g., V. Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime against Humanity of Gender-Based Persecution’, 17 *Duke Journal of Comparative & International Law* (2006), at 49 ff.

¹⁵⁵ It may also be asked why the question of whether a particular group belonging is chosen or not should be legally relevant.

¹⁵⁶ Stainton Rogers 2003, at 264 (bold omitted).

camp one belongs in a particular conflict, and sometimes also whether one becomes a victim or a perpetrator. Many armed conflicts can today be characterized as “conflicts of identity”,¹⁵⁷ which indicates the centrality of these types of collectives for international criminality.

2.6. Individuals with Different Relationships to the Criminality

In order to fully understand genocide [...], it is necessary to appreciate that the killing sites where the murders are carried out only represent the end point of a long sequence of steps involving many institutions, agencies, and actors. Genocide is a process, not just an event.¹⁵⁸

In relation to international crimes, it is commonplace to find perpetrators playing very different roles in the crimes. A distinction that is often made is that between those individuals who physically execute the crimes (for example, kill) and the non-physical participants in the crimes.¹⁵⁹ The first category of criminals is sometimes called “hands-on criminals” and the second type “criminals behind the desk”. Often the different roles played by the perpetrators are related to the *hierarchical position* they have in the collective. This is reflected in terms such as “high-level, mid-level, and low-level perpetrators”, “leaders and foot soldiers” and “the masterminds behind the crime and the followers”.¹⁶⁰ It is, for example, usually only low- and mid-level actors who hands-on participate in the crimes.¹⁶¹ High-level actors instead more often participate in the crimes through other types of “physical” acts (for example, by establishing certain organizations or by adopting policies) or by acts of speech and expression (for example, by ordering the commission of crimes).¹⁶² Due to the fact that high-level and low-level actors often play different roles in the crimes, it is in scholarly writings possible to find categorizations that proceed from the hierarchical position of the actors. For example, Kelman makes a difference between *crimes of obedience* and *crimes of authority*.¹⁶³ It should, however, be noted that the question of whether a person is a superior or not partly is context-bound.

¹⁵⁷ Another common term is “ethnic conflicts”. See further e.g., P. Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’, 20 *Human Rights Quarterly* (1998), at 752, and Kaldor 2001, at 77.

¹⁵⁸ Alvarez 2001(a), at 88.

¹⁵⁹ In relation to the Rwandan genocide, Prunier, e.g., makes the difference between organizers, intellectual inspirators and killers. G. Prunier, *The Rwanda Crises – History of a Genocide* (London: Hurst & Company, 1995/1997), 239.

¹⁶⁰ Drumbl makes a combination of the hierarchical and physical-non-physical distinctions, and categorizes the perpetrators into: (1) the conflict entrepreneurs; (2) the leaders who remain subject to authority and are ordered into ordering others; and (3) the actual killers “most of whom are ordinary folks”. Drumbl 2007, at 25.

¹⁶¹ Sometimes, however, high-level actors also participate in the physical causing of harm. Del Ponte has, e.g., noted that in the Rwandan genocide also high-level actors committed hand-on crimes. C. Del Ponte, ‘Investigation and Prosecution of Large-Scale Crimes at the International Level – The Experience of the ICTY’, 4 *Journal of International Criminal Justice* (2006), at 548.

¹⁶² S. Wallerstein, ‘Criminalising Remote Harm and the Case of Anti-Democratic Activity’, 28 *Cardozo Law Review* (2007), at 2718-2719.

¹⁶³ H. C. Kelman, ‘The Policy Context of Torture: A Social-Psychological Analysis’, 87 *International Review of the Red Cross* (2005), at 126. See also Kelman & Hamilton 1989, at 51.

An individual can be the chief of a prison and superior in relationship to the prison guards, at the same time as he/she is a low-level actor when compared to the political leaders.¹⁶⁴ Except for the very highest leaders and the most low-level foot soldiers, most participants in international crimes therefore have both individuals in more superior positions above them and individuals in inferior position below them. For international criminal law, the hierarchical division of labour often entails a need to be able to *prove a connection* between the participants in the crime, that is, the way in which the crime has been accomplished collectively. In relation to high-level actors, the challenge often lies in connecting them with the physical acts of violence. In connection to low-level actors, the difficulty, on the other hand, often is to establish that they have shared or supported the criminal goals promulgated by the leaders.

In relation to international criminality, it is also common to find categorizations of the participants in the crimes based on their *personality type*. Some leaders are, for example, portrayed as *ideologically obsessed and charismatic*.¹⁶⁵ Adolf Hitler, Slobodan Milosević and Osama Bin Laden are often seen as examples of this type of actor. At the mid- and/or low-levels, on the other hand, it is typical to distinguish between the *bureaucrats* who “just do their jobs” without considering the content of the job, the *sadists* who seem to enjoy committing serious violent crimes, and the *individuals who have been coerced to take part* in the crimes.¹⁶⁶ These stereotypes are obviously simplifications of reality. Not all leaders are ideologically obsessed, not all subordinates sadists etc.¹⁶⁷ Many participants in international crimes are, in fact, what could be characterized as “ordinary people”.¹⁶⁸ Already here, it may furthermore be pointed out that research indicates that the number of persons who by reason of duress participate in mass atrocities is

¹⁶⁴ Cf. in some cases, the ICTY has commented upon the significance of the accused person taken into consideration the overall context. See e.g., the discussion regarding Tadić’s importance in the overall campaign in the Opština Prijedor. *Tadić*, Judgement (sentencing), TC, ICTY, 14 July 1997, para. 60.

¹⁶⁵ Cf. Smeulers & Grünfeld 2011, at 320-321.

¹⁶⁶ On the various stereotypes, see e.g., Möller 2003, at 344.

¹⁶⁷ That not all leaders are of the same personality type or play the same role in international atrocities is emphasized by the work of some psychologists/psychiatrists who investigated the leading Nazis prosecuted by the Nuremberg Tribunal. E.g., Kelley divided the Nazi prisoners into the policy makers, the salesmen, the gunmen, the rabble rousers and the businessmen. D. M. Kelley, *22 Cells in Nuremberg: A Psychiatrist Examines the Nazi Criminals* (New York: Greenberg Publishers, 1947). Gilbert, on the other hand, distinguished between, *inter alia*, the revolutionists, the diplomats, and the militarists. G. M. Gilbert, *The Psychology of Dictatorship: Based on an Examination of the Leaders of Nazi Germany* (New York: Ronald Press, 1950).

¹⁶⁸ See e.g., C. R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperPerennial, 1998), and Waller 2002. Mann argues that it is possible to distinguish between participants in Nazism depending on their normality/peculiarity and their motives. More specifically, he notes the distinctions between two different types of *peculiar people* taking part in the crimes (“ideological killers” and “disturbed killers”) and four different types of *ordinary people* (“bigoted killers” reflecting the prejudices of their time, “fearful/compliant killers”, “bureaucratic killers” and “materialist killers”). Mann himself is sceptic towards applying this kind of typologies, as he notes that all participants in Nazism “were [...] implicated together in a radicalizing collective project.” At the same time, his study of 1,581 participants in the Nazi atrocities indicates that many of the leading Nazis were “long-term Nazis” who had been pre-war extremists and who had a “career” in violence. As such, his study suggests that many Nazis who were prosecuted for their wartime atrocities were “real Nazis” rather than “ordinary men”. M. Mann, ‘Were the Perpetrators of Genocide “Ordinary Men” or “Real Nazis”? Results from Fifteen Hundred Biographies’, *14 Holocaust and Genocide Studies* (2000), at 331-333 and 358-359.

not great.¹⁶⁹ It seems that authority in many cases is enough to persuade individuals to participate in mass atrocities. Many participants in international crimes therefore seem to lie somewhere between the eager sadists and the coerced individuals. From the point of view of the phenomenology of international crimes, the attempts to categorize the participants into various personality types, however, emphasize one important point: it is not only one type of individuals who participate in international crimes. Rather, in international criminality, very different types of personalities often cooperate to produce the harmful outcomes.

Finally, it should be noted that in relation to international criminality, there are not just different types of *participants* in the crimes, but more generally individuals with different types of *relationships* to the criminality. Fletcher and Weinstein have, for example, noted that international crimes besides participants often have: (a) *community members* who directly or indirectly profit from the crimes or who limit their “participation” to taunting or throwing stones; and (b) *bystanders* who do nothing to stop the criminal behaviour of others.¹⁷⁰ Likewise Drumbl has observed that “some of the major conditions precedent to mass violence are bystander acquiescence and passive complicity – the violence is perpetrated in the name of an organic community for the overall benefit of the community.”¹⁷¹ Most international crimes are thus stories with few heroes,¹⁷² many participants, numerous victims and a large number of bystanders. This is especially true for genocides and certain crimes against humanity (such as large-scale campaigns of ethnic cleansing) which by their nature are such that everybody in the society must be aware of them. For criminal law, the large number of individuals who passively supports the criminality (and who essentially make the criminality of others possible) raises the question of a “morally defensible line between legally culpable and inculpable parties.”¹⁷³

2.7. Political and Ideological Crimes?

In many of them a rebel tells the amputee that his or her injury is a “message” to Kabbah, but the message appears to be senseless, never explaining why the war is being fought.¹⁷⁴

In connection to international crimes it is, furthermore, common to point out the ideological or political reasons behind the criminality. Armed conflicts often have a political background (such as the wish to gain political control over a certain

¹⁶⁹ E.g., Browning 1998, at 192, and Goldhagen 1997, at 379-381.

¹⁷⁰ Fletcher & Weinstein 2002, at 579-580 and 604. Also Drumbl observes that many bystanders benefit in a materialistic way from the crimes of others, that is, e.g., get promotions at work. Drumbl 2007, at 25.

¹⁷¹ M. Drumbl, ‘Remarks of Mark Drumbl’, in S. R. Ratner & J. L. Bischoff (eds.) *International War Crimes Trials: Making a Difference?* (Austin, Texas: The University of Texas at Austin School of Law, 2004), at 31.

¹⁷² Importantly, there are, however, some “heroes”, who refuse to participate in the criminality and who instead choose to try to save potential victims.

¹⁷³ M. J. Osiel, ‘Why Prosecute? Critics of Punishment for Mass Atrocity’, 22 *Human Rights Quarterly* (2000), at 119. Osiel in this context talks of “quasi-accomplices”. *Ibid.*, at 126.

¹⁷⁴ A. D. Haines, ‘Accountability in Sierra Leone: The Role of the Special Court’, in J. E. Stromseth (ed.) *Accountability for Atrocities – National and International Responses* (Ardsley, New York: Transnational Publishers, 2003), at 185.

geographical area)¹⁷⁵ and regimes have ideologies (such as communism). Sometimes, it is even asserted that international crimes are committed with a desire “to do good”, that is, to “create a better world”.¹⁷⁶ Smeulers and Grünfeld have therefore held that international crimes have a “political meaning and purpose” and that they are “usually [...] perpetrated during a political struggle in order to gain and maintain political power.”¹⁷⁷ Alvarez even argues that genocide “cannot take place without the appropriate ideological support” and that genocide therefore always is “a means to an end.”¹⁷⁸ He mentions nationalism, past victimization, dehumanization, scapegoating, absolutist worldview and utopianism as examples of dangerous “ideological themes”.¹⁷⁹

Even if political/ideological jargon is typical in connection to international criminality, it is, however, not evident that what is said publicly reflects the true reasons behind the criminality. One reason for the scepticism towards the idea that participants in international crimes generally would be motivated by politics or ideology is that “[i]deologies are rarely coherent, nor are ideologues consistent.”¹⁸⁰ Furthermore, criminological studies indicate that crimes that appear to be political or ideological can have many different types of underlying motives. It is thus possible to commit a racist crime without being motivated by a racist ideology.¹⁸¹ In this regard, for example, the idea that the Rwandan genocide was committed with racist motivations has been challenged.¹⁸² Also Goldhagen’s claim that it was a particular form of racially based hatred against the Jews (so-called racial eliminationist anti-Semitism) that was the root cause of the Holocaust has been widely criticized in academia.¹⁸³ Many are, in fact, most sceptical to the idea that politics or ideologies *criminologically* would explain international atrocities. This viewpoint is supported by the fact that many participants in international crimes do not exhibit political or ideological radicalism. Sometimes this is plainly evident, as when members of private military firms (engaging in armed conflicts out of purely economical reasons) commit atrocities. Sometimes the macro crime committed by the collective has also been clearly non-ideological in nature.

¹⁷⁵ Kaldor has argued that whereas armed conflicts before had geo-political or ideological goals, armed conflicts today often are about “identity politics”. She defines identity politics as the claim to power on the basis of a particular identity – be it national, clan, religious or linguistic. Kaldor stresses that the goals of identity politics are political goals. Kaldor 2001, at 6, 69, 76-86 and 110.

¹⁷⁶ See e.g., Koskenniemi 2002, at 8 (referring to Todorov and Besançon).

¹⁷⁷ Smeulers & Grünfeld 2011, at 20.

¹⁷⁸ Alvarez 2010, at 57.

¹⁷⁹ Alvarez 2010, at 61-73.

¹⁸⁰ Waller 2002, at 120.

¹⁸¹ See e.g., Möller who asks whether the international crimes are hate crimes, and in this connection notes that it cannot be excluded that individual acts are committed without motives of hate. Möller 2003, at 288.

¹⁸² Hintjens 2001, at 45-46.

¹⁸³ Goldhagen 1997, at 417-418 and 479. On Goldhagen’s thesis and the criticism against it, see e.g., A. Alvarez, ‘Adjusting to Genocide – The Techniques of Neutralization and the Holocaust’, 21 *Social Science History* (1997), at 147-149, A. Brannigan, ‘Criminology and the Holocaust: Xenophobia, Evolution, and Genocide’, 44 *Crime & Delinquency* (1998), at 268-270, Drumbl 2007, at 28-29, and R. Kamber, ‘Goldhagen and Sartre on Eliminationist Anti-Semitism: False Beliefs and Moral Culpability’, 13 *Holocaust and Genocide Studies* (1999), at 252-271. In relation to genocides and many crimes against humanity, where a certain population group is targeted for ethnic or similar reasons, it is also sometimes suggested that the crimes are crimes of “passion” which arise from “primordial tribal hatred.” Akhavan 1998(b), at 752. Akhavan is critical towards such claims.

There have, for example, been “utilitarian genocides” during the age of imperialism where “colonizers exterminate[d] indigenous people because they want[ed] the land and/or resources for material gain.”¹⁸⁴

Even though individual participants in international crimes are not necessarily motivated by politics or ideology, it should, however, be observed that research has clearly indicated that *political or ideological indoctrination* may lower the threshold to engage in international criminality, and that such indoctrination frequently is present in connection to international criminality. The “greater good” that the criminality is supposed to further can thus act as a factor that justifies/excuses the criminal behaviour in the mind of the participant, even though it is not, as such, *the* factor that makes the individual act. It is furthermore today generally accepted that the commission of atrocities generally requires the *dehumanization* of the victims.¹⁸⁵ In this regard, Hintjens has noted that it is the “human capacity to extend and limit compassion that gives radical ideology its fatal power.”¹⁸⁶ Leaders wanting their subordinates to commit international crimes must therefore ensure that their subordinates lose their sympathy for the victims. Often this is achieved through propaganda, indoctrination and/or hate speech. Political and ideological polarisation of society is hence often deliberately and artificially created.¹⁸⁷ Akhavan has, in this regard, argued for the need to understand “the non-ethnicity of ethnic conflict.”¹⁸⁸

Furthermore, while it can be questioned to what extent individual perpetrators have been motivated by politics or ideology, it is, however, evident that most international crimes have something that can be called an *element of bias* and/or *politics*. The victims are often chosen due to the fact that they belong to a certain population category. Drumbl has in this vein argued that: “At the very core of the extraordinariness of atrocity crimes is conduct [...] that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target on discriminatory grounds.”¹⁸⁹ Furthermore, political and ideological goals are often pursued through the crimes. International crimes can, for example, be committed to compel individuals from a certain population group to leave a particular geographical area. International criminality can therefore often be characterized as *instrumental violence*.¹⁹⁰

Due to the political or ideological element in the international criminality, it is sometimes asserted that trials regarding international crimes are “political trials”, that is, trials that are held only due to the fact that an individual has belonged to the “wrong”

¹⁸⁴ Smeulers & Grünfeld 2011, at 170.

¹⁸⁵ E.g., Alvarez 1997, at 166, Alvarez 2001(a), at 125-128, Möller 2003, at 273-274, and M. Minow, ‘Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? An Essay for Kenneth Karst’, 47 *UCLA Law Review* (2000), at 1256.

¹⁸⁶ Hintjens 2001, at 27.

¹⁸⁷ E.g., Akhavan 1998(b), at 752, and Dumont 2005, at 38.

¹⁸⁸ Akhavan 1998(b), at 752.

¹⁸⁹ Drumbl 2007, at 4.

¹⁹⁰ Cf. Zwi, Garfield and Loretta who define collective violence as “the instrumental use of violence by people who identify themselves as members of a group [...] against another group or set of individuals, in order to achieve political, economic or social objectives.” A. B. Zwi, R. Garfield & A. Loretta, ‘Collective Violence’, in E. G. Krug *et al.* (eds.), *World Report on Violence and Health* (Geneva: World Health Organization, 2002), at 215.

side of the conflict.¹⁹¹ Most notably these kinds of arguments are due to the fact that not all individuals who have committed international crimes are prosecuted.¹⁹² Also the fact that violence that normally is unlawful is lawful during armed conflicts may explain why individuals sometimes consider serious criminality as a question of politics. There is also a further reason why international trials sometimes are called political: The crime elements of most international crimes require that the judges in the trials consider the context, in which the crimes are committed. For example, the war crime of grave breaches can only be committed in international armed conflicts, which obliges the adjudicator to establish the existence of such a conflict, and the relationship between the individual's conduct and the conflict in question. Indirectly, this may entail that the judges are forced to decide whose version of what happened during a certain time period they consider to be "the truth". It has therefore been put forward that in relation to international criminality, the traditional legal distinction between the individual behaviour (which is the object of the criminal trial) and the context (which is not the object of the trial) is not maintained.¹⁹³

2.8. Consequences of the Criminality: Mass Victimization and Violations of Collective Interests

International criminality is generally not "incidental and episodic", but rather "conscious, deliberate, extending over time and highly damaging."¹⁹⁴ It often results in *mass victimization*. As an example one may mention the recent conflicts in the Democratic Republic of Congo, where thousands girls and women have been raped. Or the civil war in Sierra Leone, where thousands have been mutilated through amputations of limbs. These kinds of large-scale atrocities generally require numerous hands-on criminals. At the same time, the criminality of a single high-level actor may be connected to the suffering of millions of victims.¹⁹⁵ For the victims of international crimes, the mass

¹⁹¹ The answer to the question of whether trials concerning international crimes often are political trials is partly dependent on how one defines the concept of a "political trial". Sometimes the concepts of a "political trial" and a "show trial" are used to denote the same thing. Peterson, however, argues that whereas show trials are characterized by: (1) a largely predetermined outcome; and (2) a focus on the audience outside the courtroom ("the show"), the outcome of political trials is not necessarily predetermined. J. Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', 48 *Harvard International Law Journal* (2007), at 260 and 269.

¹⁹² The problem of selective prosecutions will be considered further in Chapter 5.

¹⁹³ Koskenniemi 2002, at 16-17 (including a reference to Leben). The contextual elements of international crimes will be considered further in Chapter 6.

¹⁹⁴ Cf. M. Punch, 'Why Corporations Kill and Get Away with It: The Failure of Law to Cope with Crime in Organizations', in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 50.

¹⁹⁵ In relation to one of the leading Nazis – Hermann Göring – Arendt therefore argued that the hanging of him was certainly essential but totally inadequate, because his culpability overstepped and shattered any and all legal systems. H. Arendt (letter dated 17 August 1946) in L. Kohler & H. Saner (eds.), *Hannah Arendt Karl Jaspers Correspondence 1926-1969* (New York: Harcourt Brace Jovanovich Publishers, 1992), at 54. Also other scholars have questioned the criminal law's ability to find punishments that match the suffering of the victims of mass atrocities. Koskenniemi 2002, at 2-3. As has been noted before, the question of whether criminal law as such should be used is beyond the scope of this study. Significant for this study is instead that the mass victimization entails special challenges for international criminal law both procedurally (e.g., victim participation in the proceedings) and substantially (e.g., to find a proportionate sentence).

victimization often entails that their victimization does not receive the merited legal attention. Criminal justice systems namely rarely have sufficient resources to address all crimes committed.

The victimization caused by international criminality is furthermore generally characterized by its *severity*. It has been noted that armed conflicts “produce coercive circumstances, which include fear, psychological oppression, imprisonment or detention, occupation, generalized terror, abuse of power, duress and deprivation of psychological and physical support and comfort”.¹⁹⁶ The crimes *target the most important legal interests or goods* (such, as life, health and freedom) and the attacks are often *cruel and destructive*.¹⁹⁷ *Repeated victimization* is common as well as *many-layered victimization* (that is, besides being attacked themselves, it is common that victims have experienced loss of relatives and friends, been forced to leave their home, etc).¹⁹⁸ Victims of international crimes are therefore often severely traumatized, if they at all have survived the attacks against them.

From a victimological perspective, it may be noted that international crimes often have a lot of so-called *ideal victims*, that is, individuals who most readily are given the complete and legitimate status of being victims.¹⁹⁹ An ideal victims has, according to Christie, at least five typical attributes: (1) the victim is weak; (2) the victim was carrying out a respectable project; (3) the victim was where she could not possibly be blamed for being; (4) the offender was “big and bad”; and (5) the offender was unknown and in no personal relationship to the victim.²⁰⁰ In genocides, for example, many members of the group are targeted even though they do not rebel or offer any threat.²⁰¹ War crimes are regrettably often committed against civilians or prisoners of war who do not pose a military threat. This is, of course, largely due to the crime definitions, as many acts of violence against combatants do not constitute war crimes.²⁰² The point remains, however, that many international crimes are committed against individuals who cannot readily be blamed for their own victimization.

¹⁹⁶ D. K. Piragoff, ‘Procedural Justice Related to Crimes of Sexual Violence’, in H. Fischer, C. Kreß & S. R. Lüder (eds.), *International and National Prosecution of Crimes under International Law – Current Developments* (Berlin: Berlin Verlag, 2001), at 386. Triffterer has noted that victims of international crimes are quite often more at the disposal or mercy of their perpetrators than victims of ordinary crime. According to him, everyone can more or less effectively protect himself/herself against “micro-criminality”, such as theft. O. Triffterer, ‘The Preventive and the Repressive Function of the International Criminal Court’, in M. Politi & G. Nesi (eds.), *The Rome Statute of the International Criminal Court – A Challenge to Impunity* (Aldershot: Ashgate/Dartmouth, 2001), at 161.

¹⁹⁷ Möller 2003, at 238.

¹⁹⁸ V. Folnegovic-Smalc, ‘Psychiatric Aspects of the Rapes in the War against the Republics of Croatia and Bosnia-Herzegovina’, in A. Stiglmeier (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Nebraska: University of Nebraska Press, 1994), at 177 (regarding rape victims).

¹⁹⁹ N. Christie, ‘The Ideal Victim’, in E. A. Fattah (ed.), *From Crime Policy to Victim Policy – Reorienting the Justice System* (London: MacMillan, 1986), at 18.

²⁰⁰ Christie 1986, at 19.

²⁰¹ Fein 2000, at 51.

²⁰² In this regard, it is interesting to note that May has asked whether the distinction between combatants and non-combatants in international humanitarian law rather should be between those guilty and those innocent. May 2007, at 104. See further Section 6.3.5.1.

In domestic legal systems, it is common to categorize crimes depending on what *interests* or *legal goods* (for instance, right to privacy, right to life) they violate.²⁰³ This reflects the fact that criminalizations are adopted for a reason and that they hence have a social function.²⁰⁴ Sometimes it is evident what interest a criminalization protects, but the rationale underlying a criminalization can also be debated. The rationale may also change over time. For example, while rape earlier often was seen as a violation of property (the husband's/father's property) or as a violation against family honour, it is today usually seen as an act that threatens the victim's individual honour, as an act of violence against the victim, or as an act violating the victim's sexual integrity. In most cases, the *holder of the legally protected interest* is an individual person, but criminal law also protects certain supra-individual interests.²⁰⁵ When considering the harm caused by international crimes, it becomes evident that the crimes violate many different types of interests belonging to both individuals and collective entities. To begin with, the crimes obviously have *individual victims*, and depending on the underlying offence is question²⁰⁶ the crimes violate the life, sexual integrity etc. rights of these individuals. International crimes, however, also violate interests that go beyond individuals, or to put it another way, the harm caused is "greater than the sum of the individual wrongs composing it."²⁰⁷ For example, as the victims often are chosen due to their group belonging,²⁰⁸ the criminality can be said to violate the *group interests* of that group. Often targeted groups are ethnic, national and religious groups. Also other social groups may be targeted, such as gender or political groups. Typical for international criminality is therefore that it

²⁰³ On criminal law and the protection of legal goods, see further e.g., C. Lernestedt, *Kriminalisering – Problem och principer* (Uppsala: Iustus förlag, 2003), 127-180, K. Nuotio, 'On the Significance of Criminal Justice for a Europe 'United in Diversity'', in K. Nuotio (ed.), *Europe in Search of "Meaning and Purpose"* (Helsinki: Faculty of Law, University of Helsinki, 2004), at 181-184, and K. Nuotio, 'Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach', in R. A. Duff et al. (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010), at 238-261. It should be noted that a difference has been made between, on the one hand, the *legal interests* the crime violates (e.g., life interests) and the *object* that is violated through the crime (e.g., the life of a particular victim). See further Lernestedt 2003, at 128-130. The legal good discussion has been popular in e.g., Germany and the Nordic countries. In some other countries, one can find the related discussions about the harm principle and the requirement that criminal law should be used to protect public interests.

²⁰⁴ S. Melander, *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset* (Helsinki: Suomalainen lakimiesyhdistys, 2008) 327 and 334. Note Jareborg who criticizes the idea that the *primary* aim of criminal law is to solve social problems. This being said, criminal law, however, has a social task. N. Jareborg, 'What Kind of Criminal Law Do We Want?', in A. Snare (ed.) *Beware of Punishment – On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag A/S, 1995), at 23-24. See also P. O. Träskman, 'The Dragon's Egg – Drugs-Related Crime Control', in A. Snare (ed.) *Beware of Punishment – On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag A/S, 1995), at 159.

²⁰⁵ Melander argues that the focus of criminal law is on protecting individual interests, which have a connection to individual human/fundamental rights. Melander 2008, at 342.

²⁰⁶ The criminalization technique used in connection with international crimes will be considered further in Chapter 6.

²⁰⁷ Osiel 2000, at 129. See also e.g., A. Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', 87 *Virginia Law Review* (2001), at 484-489.

²⁰⁸ See further e.g., Möller 2003, at 351 and 353. Bassiouni argues that collective victims emerge in situations where individual victims are targeted because they belong to a certain group or collective. M. C. Bassiouni, 'The Protection of 'Collective Victims' in International Law', in M. C. Bassiouni (ed.), *International Protection of Victims* (Toulouse: Érès, 1988), at 183.

affects the life of many, if not most, members of the targeted community.²⁰⁹ In relation to international criminality, it is also common to point out that the crimes have been internationally criminalized due to the fact that they violate *international interests*. More specifically, it has been suggested that international crimes can threaten international peace and security and shock the conscience of humanity.²¹⁰ The question of what the *primary* rationale of international criminalizations is (or for the protection of what legal goods international criminalizations have been adopted) is beyond the scope of this study.²¹¹ Here, the central thing to note is rather the *plenitude of harm caused*.

2.9. Concluding Remarks

An investigation into the phenomenology of international criminality reveals that the criminality has certain typical characteristics that often distinguish the criminality from ordinary domestic criminality. The criminality is often large-scale collective criminality causing severe mass victimization. State involvement in or toleration of the criminality is usual and the victims of the crimes are often victimized due to their group belonging. Many of the participants in mass atrocities are ordinary citizens who have a strong bond to society, that is, persons who cannot be characterized as “deviants” in criminological terms or as “disturbed” in psychological terms.

²⁰⁹ Osiel 1995, at 475.

²¹⁰ M. C. Bassiouni, ‘International Crimes: The *Ratione Materiae* of International Criminal Law’, in M. C. Bassiouni (ed.), *International Criminal Law, Volume I*, 3rd ed. (Leiden: Martinus Nijhoff Publishers, 2008), at 133. Hiéramente is, however, critical to the idea of distinct legal goods that would separate international crimes from ordinary domestic crimes. He finds that if the category of international crimes is used at all, formalistic criteria (e.g., that the crimes have an international law background) must be used to separate them from ordinary crimes, as he finds the suggested substantive criteria (e.g., that they threaten international peace and security) unsubstantiated. M. Hiéramente, ‘The Myth of “International Crimes”: Dialectics and International Criminal Law’, 3 *Goettingen Journal of International Law* (2011), at 556-557 and 569-573. Cf. also Nuotio who argues that “[c]ollective goods cannot warrant protection through the criminal law if they are too general and diffuse”. He mentions the preservation of law and order as an example of a too general interest. Nuotio 2010, at 261.

²¹¹ Attempts to do this have, however, been made by others. E.g., Bassiouni has put forward that international crimes, *inter alia*, affect a significant international interest, constitute an egregious conduct deemed offensive to the commonly shared values of the world community or involve more than one State. M. C. Bassiouni, ‘The Penal Characteristics of Conventional International Criminal Law’, 15 *Case Western Reserve Journal of International Law* (1983), at 28-29, and M. C. Bassiouni, ‘The Sources and Content of International Criminal Law: A Theoretical Framework’, in M. C. Bassiouni (ed.), *International Criminal Law, Volume I, Crimes*, 2nd ed. (Ardsey: Transnational Publishers, 1999), at 33. Cassese, on his part, has argued that international crimes protect values considered important by the whole international community and that there is a universal interest in repressing them. Cassese 2008, at 11. Due to the way in which international criminalizations are brought about (see further Chapter 5, the process rarely results in documentary evidence clearly revealing the legislator’s will) these attempts, however, often consist of: (a) discussions of what – from a more philosophical perspective – would constitute a rational basis for a criminalization; or (b) rather speculative attempts to interpret the political processes that have resulted in a criminalization. To identify the underlying reasons is hence difficult. The question is also whether these identified characteristics should be characterized as *post facto* explanations to the criminalizations or rather as principles that establish the *proper range and scope of international criminal law*. Fletcher has argued that there should be more precise constitutional principles to determine the proper range and scope of international criminal law. G. P. Fletcher, ‘Parochical Versus Universal Criminal Law’, 3 *Journal of International Criminal Justice* (2005), at 27.

These characteristics of international criminality constitute typical *dimensions of the social problem* that international criminal law purports to address, and a central question in this study is how the *social problem* that international criminality represents has been translated into a *criminal law question*. What dimensions of the social problem have been taken into consideration in the law? How has the fact that international criminal law is criminal law affected the legal addressing of the social problem? It is hence the *legal framing of the social problem* that is of special interest in this study. Already here, it may be noted that international criminality is such a *multidimensional phenomenon* that many different legal solutions are possible. It is, for instance, possible for the criminal law to stress the abuse of power or the collective aspect of the criminality. The emphases of the law can also change over time, and these changes may at least partly be due to changes in the social phenomena addressed through the law. The increased capacity of non-State actors to commit international atrocities and the emergence of new types of armed conflicts are examples of significant societal changes in connection to international criminality. Before the adopted legal solutions will be considered, the investigation into the nature of international criminality is, however, continued by turning the attention towards criminology.

3. CRIMINOLOGY AND INTERNATIONAL CRIMES

3.1. Explaining Crime and Criminality

Criminology is the branch of science that focuses on the causes of crime. It tries to explain: (1) *criminality*, that is, the propensity of individuals and entities to commit crime; (2) *crime*, that is, the occurrence of an event involving law-breaking, and (3) *criminalization*, that is, the process of certain activities being defined as criminal.²¹² The existing criminological theories investigating law-breaking have been classified in numerous different ways. An often mentioned distinction is that between macro and micro theories, that is, theories that try to explain differences in the location and proportion of criminal behaviour in various groups and societies (*macro theories*) and theories focusing on differences among individuals in committing and refraining from criminal acts (*micro theories*).²¹³ It is also common to distinguish between rational actor theories, positivist theories, social process theories, conflict theories, and critical theories. The content of these theories will be elaborated below, as will their significance, if any, for understanding international criminality. It should also be noted that there is a difference between theories on what *causes* crime and theories that merely try to explain how criminality *is possible*.

Criminology as a branch of science has traditionally given scant attention to international crimes.²¹⁴ Instead, political, legal, historical, and psychological explanations have been offered to these crimes.²¹⁵ A reason for this can be that in criminology *empirical research methods* are common and to investigate international crimes empirically poses special challenges.²¹⁶ Another explanation may be criminology's traditional focus on garden-variety type of criminality.

A controversial question in this regard is to what extent theories developed to explain ordinary criminality also can be used to explain international criminality. In this

²¹² See D. O. Friedrichs, 'The Crime of the Century? The Case for the Holocaust', 34 *Crime, Law and Social Change* (2000), at 26. Criminology is also often described as the field of science studying law-making, law-breaking and reactions towards law-breaking. E. H. Sutherland, *Principles of Criminology*, 4th ed. (Chicago: J. B. Lippincott, 1947 [1939]), 1.

²¹³ R. L. Akers, *Criminological Theories – Introduction, Evaluation, and Application*, 3rd ed. (Los Angeles: Roxbury Publishing Company, 2000) 4. In relation to international criminality, Simpson makes a similar distinction between *structural* analysis (focusing on processes, social behaviour, institutions, hierarchies etc.) and analysis focusing on *agency*. G. Simpson, 'Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law', in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 94.

²¹⁴ E.g., Alvarez 1997, at 141, S. Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past', 20 *Law and Social Inquiry* (1995), at 10, L. E. Day & M. Vandiver, 'Criminology and Genocide Studies: Notes on What Might Have Been and What Still Could Be', 34 *Crime, Law and Social Change* (2000), at 43-44, Friedrichs 1996(b), at 44-45, Jamieson 1998, at 480, and W. S. Laufer, 'The Forgotten Criminology of Genocide', in W. S. Laufer & F. Adler (eds.), *The Criminology of Criminal Law* (New Brunswick: Transaction Publishers, 1999), at 72-73.

²¹⁵ Alvarez 1997, at 141.

²¹⁶ E.g., Friedrichs 1996(b), at 45, and G. S. Yacoubian, 'The (In)significance of Genocidal Behavior to the Discipline of Criminology', 34 *Crime, Law and Social Change* (2000), at 14.

connection, some scholars have stressed the unique nature of international criminality. For example, Tallgren has held that:

[The] criminality that international criminal law is addressing is, typically, not a result of social or economic marginalization, which is how we tend to view the major bulk of crimes dealt with in national systems, such as youth delinquency, urban violent crime or drug criminality. That seems to hold true even though parts of the vast field falling under international criminal law, such as the use of child soldiers or trafficking in human beings for the sex industry, do resemble or originate from comparable circumstances. Contrary to most national criminality which is understood to constitute social deviation, acts addressed as international crimes can, in some circumstances, be constituted in term of conforming to a norm. As a result, the refusal to commit such acts could be considered as socially deviating behaviour.²¹⁷

Likewise, for example, Drumbl has called perpetrators of mass atrocities “qualitatively different” from perpetrators of ordinary crimes.²¹⁸ To completely dismiss the significance of existing criminological research for internationality criminality, however, seems premature, even though ordinary criminality and international criminality differ as regards the “typical perpetrators.”²¹⁹ To begin with, not all ordinary criminality is the result of economic and social marginalization (for example, so-called white-collar criminality) nor constitute deviation (for example, shop-lifting). Furthermore, and most importantly, criminology

²¹⁷ I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, 13 *European Journal of International Law* (2002), at 575. Some scholars even find that the “non-deviant character” of many participants in international criminality makes it problematic to at all address international criminality with criminal law. E.g., Drumbl has put forward that “atrocities crimes are group crimes characterized more by collective obedience than by individual transgression” and that a discourse shift is therefore needed from juridicalised determinations of individual criminal culpability to collective forms of responsibility. M. A. Drumbl, ‘Collective Responsibility and Postconflict Justice’, in T. Isaacs & R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011), at 24 and 28. As was noted in the introductory chapter, the question to what extent alternative ways to address atrocities (e.g., restorative justice measures) would be more suitable is beyond the scope of this study.

²¹⁸ E.g., Drumbl 2005(b), at 1310. See also e.g., M. A. Drumbl, ‘Sclerosis – Retributive Justice and the Rwandan Genocide’, 2 *Punishment and Society* (2000), at 298, M. A. Drumbl, ‘Toward a Criminology of International Crime’, 19 *Ohio State Journal on Dispute Resolution* (2003), at 268, Drumbl 2005(a), at 549-550, and Drumbl 2007, at 8-9. Likewise e.g., Jäger 1992, at 75 (regarding torture), and Liwerant who has put forward that the “‘mass killer figure’ neither corresponds with the images of the serial killer nor with the criminal man.” Liwerant 2007, at 920.

²¹⁹ Also e.g. Haveman and Smeulers have found that in relation to international criminality, the most important question is not why individuals show deviant behaviour, but why individuals obey and conform. R. Haveman & A. Smeulers, ‘Criminology in a State of Denial – Towards a Criminology of International Crimes: Supranational Criminology’, in A. Smeulers & R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), at 9.

does not only investigate “deviance” or “deviants,”²²⁰ but more generally human behaviour in connection to criminality. Finally, when assessing what present criminology has to offer international criminal law, it should be emphasized that criminology has not succeeded in explaining any type of criminality exhaustively. This does not mean that the criminological research is of no value. Criminology has succeeded in identifying many factors that have a strong or weak explanatory power in relation to crimes in general or certain types of crimes in particular. Due to the complex nature of international crimes, it is also unlikely that these crimes could be explained with one theory. Instead, numerous theories may in combination shed some light on how these crimes come about.

The present author therefore believes that studies on everyday human behaviour may be useful when trying to understand extraordinary evil.²²¹ The relevance of the different criminological theories in relation to international crimes is, however, very difficult to test scientifically. What the author has done is to try to compare the degree to which the various criminological theories convey the same picture of the criminality as the phenomenology of the crimes does. In recent years, the criminological interest in international criminality has grown, and the insights from this growing “supranational criminology”²²² – or the more specific “criminology of genocide” and “criminology of war”²²³ – will naturally also be considered.²²⁴

²²⁰ The concept of deviance is problematic, as it is strongly dependant on the chosen group of reference or context. E.g., D. Matza, *Becoming Deviant* (Englewoods Cliffs: Prentice-Hall Inc., 1969), 11. In relation to international criminality, it can, e.g., be questioned whether the reference context should be the local society or the international community. Neubacher has in this vein argued that calling international criminals deviant only makes sense with reference to some standard at a superior level (e.g., international law and universal norms). F. Neubacher, ‘How Can It Happen That Horrendous State Crimes Are Perpetrated? – An Overview of Criminological Theories’, 4 *Journal of International Criminal Justice* (2006), at 789. (Cf. in relation to ordinary criminality it can be likewise questioned whether the reference context should be a certain suburb or the whole State.) Furthermore, if deviance is defined as something that strays from the existing social *morality*, the difficult question arises whether the perpetrators of international crimes really believed that they were acting morally correct. Ellis has noted that there a philosophical tradition from Socrates onwards that denies the possibility that people knew what they did was wrong, but did it anyway. Ellis, however, notes that there are also those who disagree with this assumption (e.g., Peter French). A. Ellis, ‘Introduction’, in A. Jokić (ed.), *War Crimes and Collective Wrongdoing – A Reader* (Malden, Massachusetts: Blackwell Publishers, 2001), at 4. The fact that there are numerous people that do something should not alone be seen as a proof that the behaviour is thought to be morally correct or ethical. Furthermore, it should be noted that Matza has argued that deviance should not only be viewed as “being different”, but also as an “actional activity”. He notes that to become deviant is to embark on a course that justifies, invites or warrants intervention and correction. Matza 1969, at 155 (referring to Lemert). If one takes this view, the fact that there exists international criminal law alone makes international criminals deviant.

²²¹ See hereby Katz 1993, at 3-4.

²²² See e.g., the book *Supranational Criminology: Towards a Criminology of International Crimes*, A. Smeulers & R. Haveman (eds.), (Antwerp: Intersentia, 2008).

²²³ D. O. Friedrichs, ‘Towards a Criminology of International Crimes: Producing a Conceptual and Contextual Framework’, in A. Smeulers & R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), at 36-37.

²²⁴ Also psychological research will to some extent be considered here. Psychology investigating why individuals participate in international crimes is sometimes referred to as the “psychology of evil”. D. R. Mandel, ‘Instigators of Genocide – Examining Hitler from a Social-Psychological Perspective’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 260.

It is important to recognize that the goal of this chapter is not to provide an exhaustive explanation of international criminality, but rather to shed some more light on the social phenomenon. The criminological theories are, however, not only relevant for this study in that they increase the understanding of international criminality. Although supranational criminology is a new branch of criminology, it has namely already clearly affected public sentiments about the criminality (for example, who primarily should be blamed for the crimes).

This Chapter is organized so that the various criminological schools of thought are discussed one by one followed by a general discussion about supranational criminology.

3.2. Criminals as Rational Actors

3.2.1. Introduction

The victims of hurricanes [...] are different from victims of genocide. The former are struck down by impersonal and essentially random forces of nature [...]. The victims of genocide, on the other hand, are struck down by other human beings who rationally and cold-bloodedly go about the job of targeting and eliminating specific groups within society. [...] In other words, genocide is conceived and carried out by human beings, and therefore it is certainly not inevitable.²²⁵

The idea that criminals are rational actors, who commit crimes in the rational exercise of free will,²²⁶ is central to those arguing that criminal law and penalties can deter individuals from committing crimes.²²⁷ In *classical criminology*, represented first and foremost by Cesare Beccaria and Jeremy Bentham, “people are more or less free to choose crime as one of a range of behavioral options [...] [and the] relative attractiveness of any choice is affected by the costs associated with criminal action.”²²⁸ Later on, the rationality of human action has been stressed by the *rational choice perspective* of Ronald V. Clarke and Derek Cornish and *routines activity theory* of Marcus Felson and Lawrence Cohen, amongst others. In the rational choice perspective emphasis has been put on “adaptive choice, strategic analyses, decision making, and bounded or limited rationality.”²²⁹ The routines activity theory, on its part, asserts that crimes occur when there are motivated offenders, suitable targets/victims and a lack of capable guardians.²³⁰ The common denominator of

²²⁵ Alvarez 2001(a), at 131.

²²⁶ Note, however, Morse who argues that criminal law does not demand free will, but rather intentional action and other similar criteria which are not incompatible with determinism in the same way as the idea of the free will. S. J. Morse, ‘Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience’, 9 *Minnesota Journal of Law, Science & Technology* (2008), at 2.

²²⁷ On modern deterrence thinking, see e.g., T. L. Meares, N. Katyal & D. M. Kahan, ‘Updating the Study of Punishment’, 56 *Stanford Law Review* (2004), at 1172-1182.

²²⁸ W. Einstadter & S. Henry, *Criminological Theory – An Analysis of Its Underlying Assumptions* (Fort Worth: Harcourt Brace College Publishers, 1995), 44.

²²⁹ D. B. Cornish & R. V. Clarke, ‘Preface’, in D. B. Cornish & R. V. Clarke (eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (New York: Springer, 1986), at vi.

²³⁰ L. E. Cohen & M. Felson, ‘Social Change and Crime Rate Trends: A Routine Activity Approach’, 44 *American Sociological Review* (1979), at 588-608.

all rationality theories is that they stress the significance of *incentives and disincentives* to commit crime, and the fact that humans are affected by such external factors due to their rationality. Theories stressing rationality can also be called *instrumentalist* as they explain crimes with human interests and intentions.²³¹

3.2.2. Are International Criminals Rational Actors?

The idea that individuals participating in international crimes would act rationally or be rational seems offensive to many people. International crimes are therefore sometimes depicted as “acts of madness” or as behaviour brought about by emotions or passions. Some authors have also argued that traditional disincentives to commit crime (for example, criminalizations and punishments) do not function in connection to international criminality. For example, Tallgren has put forward that:

What is most relevant here, however, is the extent to which the motives that the possible offender has to commit a crime affect the likelihood of any threat of punishment having a preventive effect. It could be typical of crimes falling under the jurisdiction of the ICC that the offender is not acting individually in a similar sense as the offender committing a ‘normal’ murder or robbery. Instead, the offender is likely to belong to a collective, sharing group values, possible the same nationalistic ideology. In such a situation, the offender may be less likely to break the group values than the criminal norms.²³²

It may indeed be so that the threat of punishment in relation to international crimes has a lesser preventive effect than normally. This is, however, not to say that those who commit crimes act irrationally or that the crimes as such would be irrational. As Tallgren notes above, the context in which the crimes usually are committed is abnormal, and rationality is context-bound. Of special interest here is Bauman’s theory of the rationality of evil.²³³ In his study of the Holocaust, Bauman concludes that:

At no point of its long and tortuous execution did the Holocaust come in conflict with the principle of rationality. [...] On the contrary, *it arose out of a genuinely rational concern, and it was generated by bureaucracy true to its form and purpose.*²³⁴

²³¹ D. O. Friedrichs, ‘Criminological, Sociolegal, and Jurisprudential Dimensions of the Holocaust: A Pedagogical Approach’, in *Proceedings of the Fourth Biennial Conference on Christianity and the Holocaust: “The 50th Anniversary of the Nuremberg War Crimes Trials: Their Effectiveness and Legacy”*, Held at Princeton Marriott Forrester Village, Princeton, New Jersey, April 14-15, 1996 (Lawrenceville, NJ: Rider University, 1996), at 259. Friedrichs contrasts instrumentalist interpretations with structuralist interpretations, in which international crimes are explained with socio-historical forces. *Ibid.*

²³² Tallgren 2002(b), at 572-573. See also e.g., M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 50. An opposite view is, however, presented by Osiel who argues that while conventional violent offenders are unlikely to be deterred, “military officers are much more rational actors, trained to think in terms of the comparative cost of alternative methods for goal attainment.” Osiel 2005(a), at 1845-1846.

²³³ Bauman has observed that whereas Arendt’s thesis is the banality of evil, his thesis is the rationality of evil. Z. Bauman in H. Welzer, ‘On the Rationality of Evil: An Interview with Zygmunt Bauman’, *Thesis Eleven* (2002), No 70, at 107.

²³⁴ Bauman 1989, at 17.

Contemporary mass murder is distinguished by a virtual absence of all spontaneity on the one hand, and the prominence of rational, carefully calculated design on the other. [...] *Modern genocide is genocide with a purpose*. Getting rid of the adversary is not an end in itself. It is a means to an end: a necessity that stems from the ultimate objective, a step that one has to take if one wants ever to reach the end of the road. *The end itself is a grand vision of a better, and radically different, society.*²³⁵

In short, Bauman thus argues that crimes such as the Holocaust are the product of modern society and that cruelty is more social (situational) than character-based (dispositional).²³⁶ This resonates with criminological theories that see social environment as shaping human behaviour.

From the perspective of criminological theories that stress human rationality, Bauman's distinction between the rationality of the actor and the rationality of the action is central. According to Bauman, the rationality of the action, that is, rationality measured by the objective consequences for the actor, does not have to resonate with the rationality of the actor, which is a psychological phenomenon.²³⁷ According to him, reason is "a good guide for individual behaviour only on such occasions as the two rationalities resonate".²³⁸ In certain contexts, it may be impossible for rational people to evaluate correctly what would be rational action. As a concrete example, one may mention the participation of Jews in the extermination of Jews during the Nazi era. That irrational behaviour can be the result of a rational mind is also argued by Post and Panis, who (somewhat confusingly) put forward that their analysis demonstrates that Saddam was a rational calculator who, however, often miscalculated.²³⁹ What these studies suggest is hence that international criminals often are rational from a criminal law perspective.²⁴⁰ In contrast to, for example, a mental disease, the abnormal social context does not take away the rationality of the actor, even though the context may strongly affect the exercise of the rationality. That international criminality can be rational from this perspective is stressed by the fact that international criminality can be very carefully planned and executed, and hence deliberate.

When wanting to understand how rational people can make decisions that from the outside appear to be completely irrational, it is also important to recognize that "the decision" to commit an international crime is not necessarily one "big decision" but may consist of numerous smaller everyday decisions which eventually result in a situation where the individual is confronted with the final decision to "step over to the other side" and become involved in international criminality. In this regard, Katz has noted that:

²³⁵ Bauman 1989, at 90-91. Bauman's idea seems to have some touching-points with the more general idea that the difference between good and evil is not simple. Matza has noted that the relationship between good and evil *phenomena* is complicated and that relations between good and evil in *sequence* can be surprising. In other words, bad things can result from highly treasured aspects of social life, and good can be born of what was conventionally deemed evil. Matza 1969, at 69.

²³⁶ See further e.g., Browning 1998, at 167, and Laufer 1999, at 78-79.

²³⁷ Bauman 1989, at 149.

²³⁸ Bauman 1989, at 149.

²³⁹ J. M. Post & L. K. Panis, "Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milošević and Saddam Hussein," 38 *Cornell International Law Journal* (2005), at 829.

²⁴⁰ Morse 2008, at 6. Morse also observes that the law demands the possession of the general capacity, not its actual exercise. *Ibid.*, at 7.

“The route to evil often takes the form of a sequence of seemingly small, innocuous incremental steps, in each of which one tries to solve a problem within one’s immediate situation.”²⁴¹ In this process towards evil-doing, the individual’s morality follows rather than leads.²⁴² The small steps towards evil-doing may be very rational when judged by themselves, also from an external perspective. The outcome of the process, on the other hand, can appear very irrational. The difficulty many people have in understanding how ordinary people can commit grave atrocities may be due to this inability to see that the decision to commit the crime may be preceded by many other decisions that pave the way for the crucial decision. Interestingly, also for the perpetrators, it may take long time to realize that a decision to become involved in an international crime has been made. Katz has observed that much of the evil go unrecognized because so much of everyday life remains unchanged.²⁴³ The decision to commit an international atrocity does thus not necessarily turn the world of the perpetrator upside down, at least immediately.

3.2.3. Typical Contexts of International Crimes and the Prevalence of Motivated Offenders, Suitable Targets and the Lack of Capable Guardians

In criminology, the routines activity theory has put forward that crimes are more likely to occur when there are motivated offenders, suitable targets/victims and a lack of capable guardians.²⁴⁴ This prompts the question of whether these types of crime-conducive circumstances often exist in connection to international criminality. In this regard, it is interesting that Holocaust studies have sought to explain the Holocaust by first looking at the behaviour of the perpetrators, then by studying the behaviour of the victims and finally by looking at the role played by the bystanders.²⁴⁵

Smeulers and Grünfeld note that: ‘Periods of collective violence usually lead to a social re-stratification of society and this means new opportunities for people. Profiteers and careerists take advantage of the situation.’²⁴⁶ To find people willing to participate in international crimes is unfortunately rarely difficult. Profession self-interest (for example, advancement, honours) and personal self-interest (for example, fulfilment of narcissistic needs) are examples of factors that can motivate individuals to participate in international crimes.²⁴⁷ For example, when analyzing the leading Nazis at the Nuremberg prison, Gilbert found that some of them could be characterized as political opportunists who mainly were interested in achieving fame and fortune.²⁴⁸ Arendt also famously found

²⁴¹ Katz 1993, at 13.

²⁴² J. M. Darley, ‘Social Organization for the Production of Evil’, 3 *Psychological Inquiry* (1992), at 208. When individuals engage in behaviour that violates their normal standards, according to the theory of *cognitive dissonance*, they will be motivated to change their attitudes and beliefs to reduce the discrepancy between their behaviour and their cognitions. Behaviour can thus according to this theory change thoughts. L. S. Newman, ‘What Is a “Social-Psychological” Account of Perpetrator Behavior? The Person Versus the Situation in Goldhagen’s *Hitler’s Willing Executioners*’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 53-54.

²⁴³ Katz 1993, at 33.

²⁴⁴ Cohen & Felson 1979, at 588-608.

²⁴⁵ H. Fein, *Genocide – A Sociological Perspective* (London: Sage Publications, 1993), 58-59.

²⁴⁶ Smeulers & Grünfeld 2011, at 321.

²⁴⁷ Waller 2002, at 191-196.

²⁴⁸ Gilbert 1950, at 288-289.

that Eichmann was “banal”, as the only personal defects he displayed was opportunism and thoughtlessness.²⁴⁹ In some cases it is not, at least primarily, the individual who benefits from the crime, but the collective engaged in it. For example, Haines has regarding the armed conflict in Sierra Leone put forward that: “What *is* clear is that the RUF [=Revolutionary United Front] and the government of Sierra Leone were not at war with each other over ethnic, racial or religious differences. [...] Many have concluded that the civil war in Sierra Leone was actually a struggle over mining concession for diamonds.”²⁵⁰ Likewise, for example, the killings of Native peoples in South America have been characterized as economically motivated.²⁵¹ Besides personal/economic gain, the desire to obey orders, peer pressure and other social processes that will be discussed later on in this chapter may create motivated offenders.

As regards suitable targets, it is generally recognized that international criminality often is characterized by an abnormal perpetrator-victim relationship in which the *victims are in an especially exposed position*. Armed conflicts and persecutory campaigns mean that individuals often are driven away from their homes and have to live in refugee camps and detention centres where they are especially vulnerable to attacks by potential abusers. In situations where armed groups attack civilians, unarmed civilians have little possibilities to defend themselves against the attackers.²⁵²

Finally, armed conflicts and totalitarian regimes are also characterized by the lack of capable guardians. Most international crimes are committed in situations where the State does not act as a guardian in its normal way. Many authors have also noted that the bystanders to mass atrocities play a significant role. Staub, for example, has held that the passivity of the bystanders allows the perpetrators to see their acting as acceptable or even right.²⁵³ It is, however, generally recognized that bystanders or “strangers” rarely act as guardians in relation to ordinary domestic criminality.²⁵⁴ The abnormal withdrawal of State protection and the normal indifference of bystanders thus entail that most international crimes are committed in situations of complete lack of capable guardians. From the perspective of the routines activity theory, it may be concluded that the conditions of armed conflicts appear to be very conducive for criminality.

In summary, the rational actor theories suggest that international criminality is rational, rather than irrational and primordial. This being said, the rationality theories may in relation to international criminality overstate the human capabilities to regulate

²⁴⁹ Arendt 1994 [1963], at 287-288. See also Osiel 2000, at 129-131.

²⁵⁰ Haines 2003, at 186.

²⁵¹ See further Alvarez 2001(a), at 101. It should also be noted that in some cases, the bystanders are not only bystanders, but also beneficiaries to the crimes. In fact, it has been argued that the high number of benefiting bystanders is an explanatory factor to the social support and longstanding survival of certain criminal policies. Osiel 2005(a), at 1805.

²⁵² E.g., Markusen 1996, at 81.

²⁵³ E. Staub, ‘The Psychology of Bystanders, Perpetrators, and Heroic Helpers’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 12 and 27.

²⁵⁴ The traditional bystander reactions of denial, avoidance, passivity and/or indifference have been explained with the phenomena of diffusion of responsibility (= if there are many watching, people ask why it should be they who intervene), the inability to identify with the victim and the inability to conceive of effective intervention. S. Cohen, ‘Human Rights and Crimes of the State: The Culture of Denial’, 26 *Australian and New Zealand Journal of Criminology* (1993), at 104 and 106.

their behaviour. An inherent deficit in the rationality theories is namely that they downplay the significance of the environment and social processes for human action. They also largely disregard individual differences as regards ability to regulate behaviour.

3.3. Kinds of People Theories and Theories on the Human Disposition to Hostility towards Others

3.3.1. Generally on Biological/Psychological Theories

This tendency to explain observed behavior by reference to internal dispositional factors while ignoring or minimizing the impact of situational variables has been termed the fundamental attribution error (FAE) by my colleague Lee Ross (1977). [...] Dispositional analyses are a central operating feature of cultures that are based on individualistic rather than collectivist values [...]. Thus, it is individuals who are lauded with praise and fame and wealth for achievement and are honored for their uniqueness, but it is also individuals who are blamed for the ills of society. Our legal [...] systems all are founded on principles of individualism.²⁵⁵

Biological and psychological criminological theories, which explain criminality with the biological or psychological characteristics of the criminals, have been nicknamed “kinds of people” theories.²⁵⁶ In early times, these theories were largely deterministic, and theorists representing this school saw the biological or psychological traits of individuals as factors *forcing* individuals into criminality. Nowadays, biological and psychological criminologists are often more cautious and only see the personal characteristics as factors that can increase the likelihood of offending. This development is in line with the idea that is a false dichotomy that has been created between pitting the person against the situation in explaining human behaviour.²⁵⁷

It is not only the nature of the causal relationship that has been modified over the years. Also the biological traits that have been found to have a connection to offending have undergone a major change. In the 19th century, abnormalities in the physical appearance were searched for and it was sometimes argued that criminals were biologically inferior (“atavists”). For example, Franz J. Gall studied bumps on craniums and Cesare Lombrose head size, arm length, etc. Today, no one would seriously suggest that criminals have these kinds of physical traits in common. The focus in biological criminology is instead nowadays on factors such as hormones, nutrition, genes, IQ and neurotransmitters. Psychological theories, on the other hand, can roughly be divided into psychoanalytic theories and personality theories. In psychoanalytic theories, the explanations for offending are searched in disturbances in individuals’ emotional development. Personality theories, on their part, argue that certain personality traits (for example, impulsiveness and aggressiveness) increase the risk of offending.

²⁵⁵ P. G. Zimbardo, ‘A Situationist Perspective on the Psychology of Evil – Understanding How Good People Are Transformed into Perpetrators’, in A. G. Miller (ed.), *Social Psychology of Good and Evil* (New York: Guilford Press, 2004), at 24-25.

²⁵⁶ Cf. A. K. Cohen, *Deviance and Control* (Englewood Cliffs: Prentice-Hall, 1966), 42.

²⁵⁷ Newman 2002, at 50.

3.3.2. Post-World War II Studies and Criminal Personalities

After World War II, the idea of the “mad Nazis” was for a while generally accepted.²⁵⁸ Especially, after an initial autopsy of the deceased defendant Robert Ley revealed a brain abnormality, some thought that the madness of the Nazis was proven.²⁵⁹ The psychological condition of the leading Nazis, was, however, soon given more thorough scientific attention. Interestingly, some psychiatrists and psychologists worked at the Nuremberg prison, and hence had the possibility to interview and observe the former Nazi leaders during a longer period of time. The psychological team included Douglas M. Kelley and Gustave Gilbert, who also made some psychological tests on the prisoners (including IQ tests and the Rorschach test).²⁶⁰ The results of the Nuremberg prison studies have been contradictory.²⁶¹ Kelley’s conclusion was that Nazism could not be explained with madness or special personalities. He noted that the Nazi leaders only had in common three characteristics with many other people: overweening ambition, low ethical standards and a strongly developed nationalism.²⁶² Gilbert, on the other hand, divided the leading Nazis into different personality types, including ideological fanatics, political opportunists (who could be divided into aggressive psychopaths and passive, suggestible conformists), militaristic personalities and schizoid personalities. He noted that the different types of personalities reacted/adapted differently to the prevailing social environment.²⁶³ For Gilbert, Hitler, for example, was a paranoid psychopath. He also noted that Hitler had had an alcoholic and harsh father, and concluded that: “But it is certain that somewhere in the darker recesses of Hitler’s libido there lay smoldering ashes of violent, unresolved Oedipal conflicts [...]. Thus, [...] we can now see how Hitler resolved his libidinal anxieties, his feelings of inferiority, and his ambivalent ego-identifications through absolutely rigid, paranoid obsessions and aggressions.”²⁶⁴ More generally, Gilbert explained the Holocaust with the “complex interaction of individual personalities, group interests, critical events, and broader social forces”.²⁶⁵

²⁵⁸ See further Waller 2002, at 55-71. Browning has observed that: “In the first decade after the Holocaust, attempts at understanding the perpetrators focused for the most part on the questions of individual psychological makeup, on the other hand, and a specifically German iniquity, on the other.” C. R. Browning, ‘Introduction’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 3.

²⁵⁹ Waller 2002, at 58.

²⁶⁰ Kelley 1947, at viii.

²⁶¹ See further e.g., Waller 2002, at 58-71.

²⁶² Kelley 1947, at 239.

²⁶³ Gilbert 1950, at 203-204, 219 and 285 (see also 118-119, 154 and 266).

²⁶⁴ Gilbert 1950, at 18-21, 64 and 283. Also regarding other international criminals has the unhappiness of the childhood been noted. E.g., apparently Slobodan Milosevic’s parents and favourite uncle committed suicide, and Saddam Hussein’s father and brother died near Hussein’s birth, leaving Hussein’s mother too depressed to take care of Hussein when he was an infant. See e.g., Post and Panis 2005, at 824 and 826, and M. P. Scharf & W. A. Schabas, *Slobodan Milosevic – A Companion* (New York: Continuum, 2002), 5. See also Smith, who discusses the possible connection between harsh child-rearing practices and aggressive cultures in relation to the Rwanda genocide. D. N. Smith, ‘The Psychocultural Roots of Genocide: Legitimacy and Crisis in Rwanda’, *53 American Psychologist* (1998), at 751.

²⁶⁵ Gilbert 1950, at 265.

Also other psychological studies were conducted in the wake of World War II. For example, a book with the title *The Authoritarian Personality* was published by Theodor W. Adorno and his research colleagues in 1950. After studying a group of individuals who possessed anti-Semitic attitudes, they came to the conclusion that some individuals have a prejudiced personality and are very submissive and obedient to those in power. The development of this authoritarian personality was largely explained with strict parenting.²⁶⁶ The research results and methodology of this study have been put into question.²⁶⁷ The methodological flaws connected to the authoritarian personality research partly explain why research focusing on the psychological makeup of the international criminals appears to be more or less non-existent today.²⁶⁸ Instead, some researchers focus on parts of a personality, such as cognitive style. It has, for example, been noted that authoritarians have a tendency to black-or-white thinking and display intolerance to ambiguity.²⁶⁹ This makes the authoritarians more prone to, for example, erroneous stereotyping. Suedfeld and Schaller, however, emphasize that an authoritarian cognitive style does not automatically lead to oppressive attitudes.²⁷⁰ It has also been suggested that people react differently to drastic social changes, that is, that individuals have “hidden” behavioural traits that only become visible due to the new life circumstances.²⁷¹

Today, it is generally held that biological and psychological theories that focus on individual abnormalities are at odds with crimes characterized by collective wrongdoing.²⁷² For example, Webel and Stigliano argue that: “Stalin may have been ‘paranoid’, but the genocidal actions of thousands of bureaucrats, police, tortures and prison guards could not be explained solely in terms of his mental/brain ‘disease.’”²⁷³ It has hence been put forward that mass crimes, such as the Holocaust, negate the idea that evil crimes are only committed by evil people.²⁷⁴ The concept of evil people is very pejorative and should as such be rejected, but it seems clear that the Holocaust affirms that the mass atrocities cannot be explained with personality theories alone. Most international crimes are thus

²⁶⁶ T. W. Adorno *et al.*, *The Authoritarian Personality* (New York: Harper & Row, 1950), 971.

²⁶⁷ E.g., P. Suedfeld & M. Schaller, ‘Authoritarianism and the Holocaust – Some Cognitive and Affective Implications’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 69, and Waller 2002, at 80-81.

²⁶⁸ Friedrichs has noted that there has been a relatively greater emphasis on personality factors in explaining governmental crime than in explaining white collar crime. Friedrichs 1996(b), at 49.

²⁶⁹ Suedfeld & Schaller 2002, at 74.

²⁷⁰ Suedfeld & Schaller 2002, at 75 (see also 86).

²⁷¹ J. M. Steiner, ‘The Role Margin as the Site for Moral and Social Intelligence: The Case of Germany and National Socialism’, 34 *Crime, Law & Social Change* (2000), at 69.

²⁷² E.g., Alvarez 2001(a), at 7, and C. Webel & T. Stigliano, ‘Are We ‘Beyond Good and Evil’? Radical Psychological Materialism and the ‘Cure’ for Evil’, 14 *Theory & Psychology* (2004), at 95.

²⁷³ Webel & Stigliano 2004, at 95.

²⁷⁴ R. H. Burke, *An Introduction to Criminological Theory* (Cullompton: Willan Publishing, 2001), 75. Aschheim notes how the idea of “evil” after the September 11 terrorist attacks has again become topical, and he asks whether “Osama Bin Laden and al-Qaeda and the new ‘axis of evil’ (Iraq, Iran and North Korea) [will] usurp the more home-grown twentieth-century forms of the Gulag and the death camps.” S. E. Aschheim, ‘Imaging the Absolute: Mapping Western Conceptions of Evil’, in H. Dubiel & G. Motzkin (eds.), *The Lesser Evil: Moral Approaches to Genocide Practices* (London: Routledge, 2004), at 80.

committed by persons who are biologically and psychologically normal.²⁷⁵ This does not, however, mean that perpetrators cannot have particular biological or psychological traits that *partly* explain their individual offending (such as impulsiveness and aggressiveness).²⁷⁶ As noted above, international crimes often have different types of participants and it does not seem impossible to *hypothesize* that some individuals participating in the crimes as hands-on criminals *may* be characterized by similar biological/psychological traits as individuals committing ordinary violent crimes. International and ordinary domestic crimes, for example, have in common that they often are committed by young, male persons.²⁷⁷ Alcohol and drug abuse is further common among certain sub-groups of international criminals,²⁷⁸ as it is in connection to certain ordinary crimes. Biological or psychological explanations may thus shed some light on why certain types of people participate in collective crimes. In connection to individual offenders, the question of whether they have suffered from insanity or diminished mental capacity may also be relevant.²⁷⁹ The personality trait theories can, however, not explain the crimes as a social phenomenon or the criminal behaviour of masses.

3.3.3. Human Nature Theories

Due to the scientific problems associated with personality theories, the focus of biological/psychological theories is today usually on *human nature*, rather than on individual abnormalities, with regard to international crimes.²⁸⁰ For example, Brannigan, with reference to amongst others Matt Ridley's thoughts, argues that:

Whereas Lombroso's Darwinism was reductionistic, the new evolutionary psychology presupposes a theory of action, that is, human decision making is based on choices, moral conflicts, and dilemmas – not mechanical causation or reflex action. However, the “appetites” are not socially constructed [...]. But how does this illuminate the question of genocide? There is persuasive evidence that the human species exhibits

²⁷⁵ E.g., D. Frey & H. Rez, 'Population and Perpetrators – Preconditions for the Holocaust from a Control-Theoretical Perspective', in L. S. Newman & R. Erber (eds.), *Understanding Genocide: The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 208, Katz 1993, at 35, and Waller 2002, at 18. Charny has, however, argued that it from the point of view of the legitimacy of psychology is problematic if participation in mass atrocities is not characterized as abnormal. More specifically he finds that even though mass atrocities often are committed by “everyday human beings”, the behaviour as such should be characterized as pathological or disturbed. I. W. Charny, 'Genocide and Mass Destruction: Doing Harm to Others as a Missing Dimension in Psychopathology', 49 *Psychiatry* (1986), at 144 and 148.

²⁷⁶ Similarly Waller 2002, at 123. See also Steiner who has argued that individuals differ with respect to their “social and moral intelligence,” which affects how they adapt to social changes and, e.g., behave in totalitarian societies. Steiner 2000, at 62, 64 and 67.

²⁷⁷ Cf. J. Young, 'Merton with Energy, Katz with Structure: The Sociology of Vindictiveness and the Criminology of Transgression', 7 *Theoretical Criminology* (2003), at 392.

²⁷⁸ E.g., Alvarez 2001(a), at 13 and 24, and Greenberg Research Inc. 2000, at 35-36.

²⁷⁹ See e.g., M. Soyka, 'Psychiatrische Begutachtung von Angeklagten für das “United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia” (ICTY)', 70 *Fortschritte der Neurologie – Psychiatrie* (2002), at 84-87.

²⁸⁰ Also in philosophy and theology has the question of whether human beings have a natural inclination to be good and/or bad been much debated. On this discussion, see further e.g., Waller 2002, at 136-138.

xenophobia and, like chimpanzees, practices murderous competition and out-group exclusion. [...] The coalitionist or “tribal” instinct is at the core of human nature. We cooperate to compete. But the dark side of this sociability is group prejudice and an intolerance for out-groups.²⁸¹

In summary, the evolution of sociability, altruism, and the instincts for coalitions goes hand in hand with hostility to outsiders. [...] [T]his does not mean there is a gene for genocide. But genocide thrives through a combination of cultural animosities, forces that are proximal, and our instinctual legacy of groupishness, forces that are distal.²⁸²

Likewise, Waller regards evolutionary psychology as relevant and believes that there are three innate, evolution-produced tendencies of human nature that can partly explain the human capacity for extraordinary evil, namely ethnocentrism, xenophobia, and the desire for social dominance.²⁸³ Here, it should, however, be noted that a human disposition to be suspicious towards people belonging to another group does not necessarily mean that the outcome *must* be racism or genocides. Inter-group resentment may take many different forms. Bauman, for example, distinguishes between heterophobia, constant enmity and racism. He finds *heterophobia* to be a “manifestation of a still wider phenomenon of anxiety aroused by the feeling that one has no control over the situation” which can be found more or less everywhere, whereas *constant enmity* is a “more specific antagonism generated by the human practices of identity-seeking and boundary-drawing.” Racism, on the other hand, is something that is “in the service of the construction of an artificial social order” and which is characterized by a declaration that “a certain category of people endemically and hopelessly resistant to control and immune to all efforts at amelioration” with the consequence that they should be removed or destroyed.²⁸⁴ In other words, the fact that people may have a disposition to, for example, ethnocentrism does not mean that bias crimes, such as genocide, come from “inside”. Evolutionary psychology, however, explains why propaganda and ethnic agitation can be so effective.

Another viewpoint having as its starting-point human nature is that by Staub who stresses basic human needs. Staub argues that needs for security and for control over one’s life are examples basic human needs, that when frustrated may lead to one group in society turning against another.²⁸⁵ Difficult life conditions are therefore, according to him, often the *starting-point* for mass atrocities.²⁸⁶ He also notes that finding scapegoats and ideologies are typical destructive reactions to difficult life conditions threatening basic needs.²⁸⁷

²⁸¹ Brannigan 1998, at 270-271. See also Waller 2002, at 145-168 on evolutionary psychology.

²⁸² Brannigan 1998, at 272 (containing a reference to Gould).

²⁸³ Waller 2002, at 153. He defines *ethnocentrism* as the inclination to focus on one’s own group as the right one and *xenophobia* as the tendency to fear outsiders or strangers. *Ibid.*, at 154-155. See also J. E. Waller, ‘The Ordinarity of Extraordinary Evil: The Making of Perpetrators of Collective Violence’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), at 23-25.

²⁸⁴ Bauman 1989, at 64-65 (italics omitted).

²⁸⁵ Staub 2002, at 13.

²⁸⁶ Staub 2002, at 13. Staub, however, notes that sometimes mass killings instead start from self-interests, such as land interests. E. Staub, ‘Predicting Collective Violence: The Psychological and Cultural Roots of Turning against Others’, in C. Summers & E. Markusen (eds.), *Collective Violence – Harmful Behavior in Groups and Governments* (Lanham: Rowman & Littlefield Publishers, Inc., 1999), at 199.

²⁸⁷ Staub 2002, at 18-19.

Theories focusing on human nature/needs have been found to have a little explanatory power in connection to international crimes in that the theories do not explain why international crimes occur in certain societies, but not in all. As such, most find that these theories must be complemented with other theories that explain how the typical human features become relevant for offending.

In summary, the relationship between biological/psychological factors and offending is very indirect.²⁸⁸ Waller has, in this regard, emphasized that one should not mistake *enablement* for *causation*.²⁸⁹

3.4. Social Pathology: Sociological Theories and International Crimes

3.4.1. Introduction

What kind of people are able to hack women and children to death while ignoring their pleas and agony? [...] More disturbingly, might we ourselves be capable of such deeds?²⁹⁰

Sociological theories can be defined as theories that argue that the social environment shapes human behaviour. The theories have a positivist element in that they regard behaviour as determined by factors beyond the individual's control.²⁹¹ The most famous theories of this kind are the social disorganization theory, the anomie/strain theories and the subculture theories.

The *social disorganization theory* is also known as the Chicago school of human ecology. The most known representatives of this school were Clifford R. Shaw and Henry McKay, who in the 1930s divided Chicago into different "concentric circles" and noted that certain areas have higher crime rates than others. Most notably, they observed that criminality was high in so-called zones in transition. A central idea in the theory, which largely is borrowed from Émile Durkheim, is that rapid social change leads to a breakdown of social rules and norms, that is, to so-called anomie.²⁹²

In contrast to the human ecology theory, which aims at explaining why more crimes are committed in certain geographical areas, strain and subculture theorists study the social structure of whole societies.²⁹³ In Robert K. Merton's *anomie theory* criminality is explained by the strain or pressure that the impossibility to reach culturally valued things by legitimate means causes.²⁹⁴ Criminality is hence seen as an adaptation to a social pressure to be successful. Robert Agnew has developed Merton's theory by, among other things, identifying other types of stress than the impossibility to reach the "American

²⁸⁸ Cf. attempts to explain rape with male biology, and the fact that rape rates vary considerably from society to society.

²⁸⁹ Waller 2002, at 163.

²⁹⁰ Alvarez 2001(a), at 110.

²⁹¹ G. B. Vold, T. J. Bernard & J. B. Snipes, *Theoretical Criminology*, 5th ed. (Oxford: Oxford University Press, 2002), 9.

²⁹² C. R. Shaw & H. D. McKay, *Juvenile Delinquency and Urban Areas*, rev. ed. (Chicago: The University of Chicago Press, 1969 [1942]).

²⁹³ Einstadter & Henry 1995, at 145.

²⁹⁴ R. K. Merton, 'Social Structure and Anomie', 3 *American Sociological Review* (1938), at 672-682.

dream” which produce criminality. He notes that individuals do not only “seek certain goals, they also try to avoid painful or aversive situations.”²⁹⁵ Finally, Richard A. Cloward and Lloyd E. Ohlin have put forward a *differential opportunity theory*. The central idea in their theory is that there may be differentials in access to success-goals in both legitimate and illegitimate opportunity structures.²⁹⁶ In certain areas delinquent subcultures arise and criminal behaviour becomes an available option.²⁹⁷

In Albert K. Cohen’s *delinquent subculture theory*, the idea that all people share the same social goals is put in question. Cohen on his part argues that the impossibility of all individuals to reach the dominant goals leads to the emergence of subcultures with reachable goals. This can according to Cohen explain so-called purposeless crime, such as vandalizing.²⁹⁸ In the same way as Cohen, Walter Miller has stressed that certain groups in society have their own culture. In his theory of the focal concerns of lower-class culture, Miller argues that representatives of the lower-class value highly qualities, such as toughness and smartness.²⁹⁹

3.4.2. Social Pathology and International Crimes

Many international crimes are committed in abnormal social circumstances, such as armed conflicts and totalitarian regimes. Some authors have emphasized this fact, and have stressed the relationship between the structure of the society and the criminality. A famous representative of the sociological way of thinking is R. J. Rummel who has argued that mass killing by government is less likely in democracies.³⁰⁰ According to him, an explanation to this is that in democracies there are checks and balances on the use of power and that in democratic cultures compromises, negotiation and tolerance are promoted.³⁰¹ A crucial problem in non-democratic societies is, according to Rummel, the concentration of power. In this context, he notes that: “*Power kills; absolute Power kills absolutely.*”³⁰² He also argues that in non-democratic societies, the society is often converted into a hierarchical, task-oriented organization, where the members are divided into those who command and those who obey.³⁰³ In these types of societies the use of violence is much more likely.

A different perspective on how social structure affects the possibilities of grave atrocities is presented by Bauman. His central thesis is the link between the modernity and the Holocaust. The modern civilization was for Bauman a necessary,

²⁹⁵ R. Agnew, ‘A Revised Strain Theory of Delinquency’, 64 *Social Forces* (1985), at 154. Agnew has also in later research emphasized the effect of personality traits on reactions to strain. E.g., R. Agnew, T. Brezina, J. P. Wright & F. T. Cullen, ‘Strain, Personality Traits, and Delinquency: Extending General Strain Theory’, 40 *Criminology* (2002), at 43-71.

²⁹⁶ R. A. Cloward & L. E. Ohlin, *Delinquency and Opportunity – A Theory of Delinquent Gangs* (Illinois: The Free Press of Glencoe, 1960) 150-151.

²⁹⁷ Cloward & Ohlin 1960, at 28 and 153.

²⁹⁸ A. K. Cohen, *Delinquent Boys: The Culture of the Gang* (Glencoe, Illinois: The Free Press, 1955) 65-67.

²⁹⁹ W. B. Miller, ‘Lower Class Subculture as a Generating Milieu of Gang Delinquency’, 14 *Journal of Social Issues* (1958), at 5-19.

³⁰⁰ Rummel 1997, at 3 and 6.

³⁰¹ Rummel 1997, at 6, 8, and 101.

³⁰² Rummel 1997, at 9.

³⁰³ Rummel 1997, at 7 and 200.

albeit not sufficient, condition for the Holocaust.³⁰⁴ Modern societies can create a moral indifference through mechanisms, such as authorization, routinization, and dehumanization. In a similar way as a higher living standard makes ordinary property crimes more likely, a modern lifestyle makes genocide more likely. Alvarez has, in this regard, pointed out that Norbert Elias' argument that the civilizing process has made violence in modern societies less prevalent is challenged by the high level of violence in modern armed conflicts and genocides.³⁰⁵

It is also usual to stress the lack of norms or anomie prevailing in societies engaged in armed conflicts, and the effect this has on human behaviour.³⁰⁶ More specifically, it has been argued that social conditions that frustrate basic psychological needs make violence more likely.³⁰⁷ In armed conflicts, it is not only international crimes that are committed, but also numerous ordinary crimes.³⁰⁸ The over-criminalization of societies engaged in armed conflicts, has not only been explained with anomie theories. Also very concrete features in these societies, such as the availability of weapons, have been noted to partly explain increases in crime.³⁰⁹

It has also been put forward that in armed conflicts and dictatorships there emerge *cultures of cruelty*, that is, types of subcultures that diverge from "normal cultures" in that they reward individuals for acts of cruelty.³¹⁰ In this vein, Waller notes that: "Perpetrators create, and are created by, a culture of cruelty that helps them initiate, sustain, and cope with their extraordinary evil."³¹¹ In cultures of violence, socially construed symbols and messages thus help participants to accommodate themselves

³⁰⁴ Bauman 1989, at 13. For interpretations of Bauman's thinking, see e.g., Browning 1998, at 167, N. Christie, *Crime Control as Industry – Towards Gulags, Western Style*, 3rd ed. (London: Routledge, 2000), at 179-181, and D. Hirsh, *Law against Genocide: Cosmopolitan Trials* (London: The GlassHouse Press, 2003), at xvi and 24-31. Significantly, Bauman does not describe the German society as abnormal, but as modern. Christie divides the explanations given to the Holocaust extermination camps into three ways, i.e., the first wave explaining the camps with abnormal minds, the second wave explaining the camps with a deviant social system, and the third wave explaining the camps with the prevailing type of social organization. Christie 2000, at 177-178.

³⁰⁵ Alvarez 2001(a), at 32-33.

³⁰⁶ "Durkheim (1992) and Sorokin (1944) both insist that war (and revolution) inevitably usher in a state of social disorganization and normlessness. [...] It could be argued, however, that some wars [...] may usher in a state of hyper-discipline [...]" Jamieson 1998, at 482. See also Alvarez, who discusses anomie in connection to genocide. Alvarez 2010, at 38-39.

³⁰⁷ E. Staub, 'Notes on Cultures of Violence, Cultures of Caring and Peace, and the Fulfillment of Basic Human Needs,' 24 *Political Psychology* (2003), at 1. Likewise, Steiner has noted that societies where broad segments of the population are discontent are more susceptible to charismatic demagogues. This may result in persecutions, genocide, etc. Steiner 2000, at 66.

³⁰⁸ See further Section 2.2.

³⁰⁹ Nikolić-Ristanović 1998, at 475-476.

³¹⁰ E.g., Katz 1993, at 31, 86 and 89, and Waller 2002, at 203. The idea of subcultures is connected to the idea of various organizational cultures. Shover and Hochstetler note that the concept of "organizational culture" is over 50 years old. It has been mainly used to explain differences between organizations in financial performance, but also to explain organizational crime. A shortcoming in organizational culture research is, however, according to Shover and Hochstetler the failure to explore the effects of hierarchy and agency as constraints on culture. N. Shover & A. Hochstetler, 'Cultural Explanation and Organizational Crime,' 37 *Crime, Law and Social Change* (2002), at 4-6.

³¹¹ Waller 2002, at 203.

to, for example, killing.³¹² In these cultures characteristics such as braveness and toughness can be highly evaluated and a decision not to participate in the criminal activity can be questioned. It has also been suggested that the “normal” culture in armed conflicts becomes twisted and certain aspects of the culture become emphasized. Rapes in armed conflicts have, for example, been characterized as “culturally rooted contempt for women that is lived out in times of crisis.”³¹³ Even more generally, it has been suggested that in certain nations or societies there exists certain cultures, which at least partly explain mass atrocities.³¹⁴ The Holocaust has, for example, been explained through the exceptionalism of German history and the German traditions of militarism, authoritarianism, and anti-Semitism.³¹⁵ Other authors have differentiated between cultures that emphasize individual interests and cultures that emphasize collective interests, and have argued that there is a link between individually based democratic values and reduced risk of inter-group violence.³¹⁶ More generally, Staub has argued that a cultural devaluation of a group, respect for authority, a monolithic culture, certain cultural self-concepts (for example, a belief in cultural superiority), unhealed wounds due to past victimization and a history of aggressiveness often characterize societies where mass atrocities are committed.³¹⁷

In summary, of the criminological theories, the sociological theories are those that most readily recognize the criminogenic effect of abnormal societies. A problematic question for these theories is, however, why the environment does not affect all people in the same way. The theories also view humans as very passive. In contrast to the sociological theories, social process theories recognize that people do not only react to situations, but also influence them.³¹⁸

³¹² Alvarez 1997, at 151.

³¹³ R. Seifert, ‘War and Rape: A Preliminary Analysis,’ in A. Stiglmyer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994), at 65. MacKinnon has in a similar vein argued that: “The rapes in the Serbian war of aggression against Bosnia-Herzegovina and Croatia are to everyday rape what the Holocaust was to everyday anti-Semitism: both like it and not like it at all, both continuous with it and a whole new departure, a unique atrocity yet also a pinnacle moment in something that goes on all the time.” C. A. MacKinnon, ‘Turning Rape into Pornography: Postmodern Genocide,’ in A. Stiglmyer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994), at 74.

³¹⁴ See Waller 2002, at 36-49. Staub argues that there are different types of “cultures of violence”. The culture of violence that prevails in the United States, e.g., entails a high level of interpersonal violence. The risk of genocide, on the other hand, is, according to Staub, insignificant in the United States. Staub 2003, at 6.

³¹⁵ See e.g., Goldhagen 1997, at 479-480.

³¹⁶ D. Oyserman & A. Lauffer, ‘Examining the Implications of Cultural Frames on Social Movements and Group Action,’ in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 162-163.

³¹⁷ Staub 2002, at 15-18.

³¹⁸ The theories, however, diverge in how active a role they think individuals have in shaping their own lives. According to Einstadter and Henry learning, neutralization and control theories see individuals as rather passive actors, whereas the labelling theory views humans as active agents. Einstadter & Henry 1995, at 197.

3.5. Social Process Theories on Criminality

3.5.1. Introduction

*[W]e can demystify evil. No alien powers are at work in evil, merely human beings responding to the context in which they find themselves and making decisions on their own.*³¹⁹

Social process theories are characterized by their focus on the socio-psychological processes that develop over time in the course of social interaction.³²⁰ The theories can be divided into: (1) learning theories, (2) neutralization theories; (3) control theories; and (4) labelling theories.³²¹ In learning theories, attention is paid to the relationship between normal learning and criminal behaviour. An early representative of the learning school in criminology was Gabriel Tarde who put forward the so-called *laws of imitation*.³²² The most famous and influential theories are, however, Edwin Sutherland's *differential association theory* and Ronald Akers' *social learning theory*. Sutherland's differential association theory (1939/1947) argues that criminal behaviour is learned behaviour and that the principal part of learning occurs within inmate personal groups. The learned matters include techniques for committing crimes, motives, rationalizations and attitudes. Crimes are, according to this theory, committed when the association with criminal tendencies becomes stronger than the association with non-criminal tendencies.³²³ In Akers' social learning theory the focus is placed on the mechanisms of learning, and the theory differentiates between differential association, definitions, differential reinforcement and imitation.³²⁴ Akers has himself defined the concepts as follows:

Differential association refers to the process whereby one is exposed to normative definitions favorable or unfavorable to illegal or law-abiding behavior. [...] Definitions are one's own attitudes or meanings that one attaches to given behavior. [...] Some of the definitions favorable to deviance are so intensely held that they almost "require" one to violate the law. For instance, the radical ideologies of revolutionary groups provide strong motivation for terrorist acts [...]. Differential reinforcement refers to the balance of anticipated or actual rewards and punishments that follow or are consequences of behavior. [...] Imitation refers to the engagement in behavior after the observation of similar behavior in others.³²⁵

³¹⁹ Katz 1993, at 126.

³²⁰ Einstadter & Henry 1995, at 175.

³²¹ Einstadter & Henry 1995, at 176-177 and 197.

³²² G. Tarde, *Les lois de l'imitation : étude sociologique* (Paris : Alcan et Réunion, 1911).

³²³ Sutherland 1947 [1939], at 6-7. Tindale *et al.* have noted that according to the dynamic social impact theory, the impact that others have on a person's attitudes, beliefs, preferences, and so on is determined by the strength (e.g., status, expertise), immediacy (closeness in terms of physical or social distance), and number of influence sources. R. S. Tindale, C. Munier, M. Wasserman & C. M. Smith, 'Group Processes and the Holocaust', in L. S. Newman & R. Erber (eds.), *Understanding Genocide - The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 151.

³²⁴ The theory was first put forward in an article co-written with Robert L. Burgess. R. L. Burgess & R. L. Akers, 'A Differential Association-Reinforcement Theory of Criminal Behavior', 14 *Social Problems* (1966), at 128-147.

³²⁵ Akers 2000, at 76-79.

The neutralization theory, on the other hand, has as its starting-point that people are socialized into non-criminal, conventional behaviour, that is, that also criminal individuals share the dominant value system of society. The theory therefore focuses on the learning of so-called techniques of neutralization that allow people to commit crimes without moral qualms.³²⁶ The concept of neutralization is clarified by Alvarez, who notes that techniques of neutralization are not rationalizations as: “Rationalizations are attempts to ease one’s conscience after the fact, whereas these techniques, used *prior* to the behavior, make it possible to engage in otherwise unacceptable activities.”³²⁷ The idea of neutralization techniques is often connected to Gresham M. Sykes and David Matza. They identified five techniques of neutralization that allow individuals to engage in criminal behaviour: denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners and appeal to higher loyalties.³²⁸

A completely different view on the socialization process is presented by the control theories or social bonding theories. In these theories, the central question is why individuals do *not* commit crimes. In the 1950s/1960s, Alber J. Reiss and F. Ivan Nye introduced the difference between internal control (socialization) and external control (rewards/punishments), and Walter Reckless a theory of inner and outer containment, and pushes and pulls towards delinquency.³²⁹ The most famous control theory is, however, that by Travis Hirschi, in which the main argument is that individuals with a weak bond to society commit crimes and four different types of bonds to society are identified (that is, attachment to parents, peers and school, commitment to conventional lines of action, involvement in conventional activities and belief in common values).³³⁰ In the 1990s, Hirschi and Gottfredson put forward the idea that the main factor explaining criminality is bad self-control.³³¹

Finally, according to social interactionism “an individual’s identity and self-concept, cognitive processes, values, and attitudes are seen as existing only in the context of society acting, reacting, and changing in social interaction with others.”³³² In criminology, the labelling theory has seized upon this standpoint, and views stigmatizing labels, such as “a criminal”, as an independent variable that causes criminality. Individuals who are

³²⁶ Einstadter & Henry 1995, at 178.

³²⁷ Alvarez 1997, at 153. Newman notes that the recontextualization of behaviour can reduce dissonance, that is, the discrepancy between one’s behaviour, and attitudes and beliefs. Newman 2002, at 56.

³²⁸ G. M. Sykes & D. Matza, ‘Techniques of Neutralization: A Theory of Delinquency’, 22 *American Sociological Review* (1957), at 667-669. Maruna and Copes note the connection between the neutralization techniques and Freudian ego psychology, that is, the idea of defence mechanisms that defend the integrity of the ego when internal and external events occur that violate the preferred view of the self (e.g., denial and projection). S. Maruna & H. Copes, ‘What Have We Learned from Five Decades of Neutralization Research?’, 32 *Crime and Justice* (2005), at 236.

³²⁹ See further e.g., A. J. Reiss, ‘Delinquency as the Failure of Personal and Social Controls’, 16 *American Sociological Review* (1951), at 196-207, F. I. Nye, *Family Relationships and Delinquent Behavior* (New York: John Wiley & Sons, 1958), and F. E. Hagan, *Introduction to Criminology: Theories, Methods, and Criminal Behaviour*, 7th ed. (Thousand Oaks: Sage, 2011), 164 (referring to Reckless).

³³⁰ T. Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969).

³³¹ T. Hirschi & M. Gottfredson, ‘Rethinking the Juvenile Justice System’, 39 *Crime & Delinquency* (1993), at 263.

³³² Akers 2000, at 122 (referring to Ritzer).

labelled as criminals are hence likely to develop a criminal self-identity and may become more criminal than they were before the labelling.³³³

3.5.2. Social Process Theories and International Criminality

The idea of armed conflicts as “schools of crime”, in which criminal behaviour is learnt, has a clear connection to learning theories in criminology.³³⁴ It has also been put forward that aggression at least partly is a learned behaviour and that armies function as institutions where individuals learn the techniques and justifications for using violence.³³⁵ More often international crimes are, however, addressed through the neutralization theories. An author who has explicitly used Sykes and Matza’s neutralization theory to the Holocaust is Alvarez.³³⁶ More concretely, he suggests that most of the neutralization techniques identified by Sykes and Matza can be used to explain the Holocaust and puts himself forward a further, sixth neutralization technique, viz. denial of humanity.³³⁷ Regarding the neutralization technique of denial of responsibility, Alvarez notes that the use of this technique “is evident in the argument of many perpetrators that they were only following orders.”³³⁸ Denial of injury, on the other hand, could according to Alvarez be achieved through the use of sterile and technical language (for example, calling killing treatment)³³⁹ and denial of victims by claiming that the victims themselves could be blamed for their victimization (for example, claiming that the attacks were self-defence).³⁴⁰ The denial of victims is often the result of so-called *othering*, that is, a process in which enemies artificially are created.³⁴¹ The technique of condemning of the condemners was not so much resorted to as, Alvarez notes, there was not much external condemnation at the time.³⁴² Finally, appeal to higher loyalties was achieved by “portraying the Jews as a serious threat to the German people” as this “made it possible for the perpetrators who helped bring about the Final Solution to assert they were doing so for their people and their country.”³⁴³

³³³ Akers 2000, at 123.

³³⁴ Jamieson 1998, at 484-485 (referring to authors having this view), and Nikolić-Ristanović 1998, at 475-476.

³³⁵ Smeulers & Grünfeld 2011, at 205 (referring to Bandura and Berkowitz) and 268-282.

³³⁶ Alvarez 1997, at 139 ff., and Alvarez 2001(a), at 112 ff. Cohen has regarding the application of the neutralization theory to international atrocities noted that: “For Sykes and Matza’s point was precisely that delinquents are *not* “political” in the sense implied by the subcultural theory [...]. But exactly the same techniques appear in the manifestly political discourse of human rights violations”. Cohen 1993, at 107.

³³⁷ Alvarez 1997, at 166.

³³⁸ Alvarez 1997, at 158-159. See also Alvarez 2001(a), at 115-117.

³³⁹ Alvarez 1997, at 160-162. See also Alvarez 2001(a), at 117-120.

³⁴⁰ Alvarez 1997, at 162. See also Alvarez 2001(a), at 120-123.

³⁴¹ “[A] process of othering [...] involves the two components of a feeling of economic injustice (relative deprivation of some sort) and feelings of ontological insecurity. Thus, in order to create a ‘good enemy’ we must be able to convince ourselves that: (1) they are the cause of a large part of our problems; (2) they are intrinsically different from us—inherently evil, intrinsically wicked, etc. [...] It goes without saying that such a process of essentialization occurs not only domestically [...], but also in terms of the dramatization of evil between, say, the First World and its terrorists.” Young 2003, at 400.

³⁴² Alvarez 1997, at 164-165. See also Alvarez 2001(a), at 123-124.

³⁴³ Alvarez 1997, at 165. See also Alvarez 2001(a), at 124-125.

The sixth neutralization technique Alvarez identifies is denial of humanity, and he notes that dehumanization both preceded and accompanied killings.³⁴⁴ Alvarez is not alone in arguing that dehumanization has a great explanatory power in relation to mass atrocities. For example, Staub argues that devaluing and scapegoating of others is common in ethnic and group conflicts.³⁴⁵

Alvarez is not the only one who has found the neutralization theory to be useful when trying to understand how international criminality can occur. Also, for example, Herbert Jäger has analyzed international criminality with reference to the various neutralization techniques.³⁴⁶ Furthermore, there are many other theories on international criminality that identify similar processes as the neutralization theory. For example, Herbert C. Kelman and V. Lee Hamilton identify three elements typical for what they call crimes of obedience, viz. (1) authorization, (2) routinization; and (3) dehumanization.³⁴⁷ Psychologist Albert Bandura has in his research identified practices through which harmful conduct is cognitively restructured so that it becomes possible for people who are socialized into human behaviour. He notes that through moral justification reprehensible conduct is made personally acceptable “by portraying it as serving socially worthy or moral purposes.”³⁴⁸ Furthermore, Bandura argues that euphemistic labelling is used to “make harmful conduct respectable and to reduce personal responsibility for it.”³⁴⁹ Finally, exonerating comparisons, often based on flawed information on the adversary’s behaviour, make the own behaviour seem acceptable.³⁵⁰ According to Bandura, the reconstruction of the conduct so that it does not appear as immoral is, however, only one element in a larger disengagement process making atrocities possible. Displacement and diffusion of responsibility, disregard or distortion of consequences, and dehumanization of the victims are, according to him, other central processes.³⁵¹ Also Möller has noted that political or military goals, collective interests, etc., that is, higher supra-individual goals, often are used to justify action both before and after it, that a desensibilization (*Desensibilisierungsprozess*) or “blunting” process (*Abstumpfungprozess*) often precedes international criminality and that the creation of a special distant offender-victim relationship often is a precondition for the criminality.³⁵² Somewhat similar to neutralization thinking is also the *doubling theory* of Robert Jay Lifton, which argues that individuals in the “service of social madness” develop a second

³⁴⁴ Alvarez 1997, at 166. See also Alvarez 2001(a), at 125-128.

³⁴⁵ Staub 1999, at 196.

³⁴⁶ Jäger 1989, at 187 ff.

³⁴⁷ Kelman & Hamilton 1989, at 16-19, and Kelman 2005, at 131.

³⁴⁸ A. Bandura, ‘Moral Disengagement in the Perpetration of Inhumanities’, 3 *Personality and Social Psychology Review* (1999), at 194.

³⁴⁹ Bandura 1999, at 195.

³⁵⁰ Bandura 1999, at 195-196.

³⁵¹ Bandura 1999, at 194 and 196 ff. With *displacement of responsibility* Bandura refers to arguments made that the behaviour was dictated by the authorities. *Diffusion of responsibility*, on the other hand, can occur due to division of labour, collective action, etc. *Ibid.*, at 196 and 198. See also A. Bandura, B. Underwood & M. E. Fromson, ‘Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims’, 9 *Journal of Research in Personality* (1975), at 253-269.

³⁵² See further Möller 2003, at 267-271.

self which allows them to remain sane, that is, that a type of psychological dissociation takes place.³⁵³

The ideas of the control theories have not really been used to analyze crimes of international concern. A reason for this is probably that some underlying presumptions of the theories (such as that a strong bond to society means that a person is less likely to offend) do not correspond well with the reality of international crimes. Some scholars have, however, investigated the question of why certain individuals have *not* participated in international criminality. For example, Fogelman, who has conducted an interview research on the rescuers of Jews during the Holocaust. With reference to Lifton's different self theory, she argues that the rescuers developed a different self which made it possible for them to continue to counteract the Nazi regime.³⁵⁴ She also notices that the rescuers often had a childhood characterized by love, nurturance, and tolerance for different people.³⁵⁵

Finally, the labelling theory is also a theory that has seldom been used to analyze international criminality.³⁵⁶ A reason for this may be that international criminals are often not viewed as criminals by their environment. The international criminals do hence not necessarily have a criminal self-image,³⁵⁷ and the idea that the criminal label would lead to more criminal behaviour does not seem to fit.

3.5.3. Processes Often Present in International Criminality

Organizations such as those involved in the Nazi death camps have not one but two outputs. They produce not only death, but individuals who become autonomously capable of and committed to producing other deaths.³⁵⁸

In many social process theories on international crimes, distancing, bureaucratization, routinization, brutalization and dehumanization are mentioned. Many scholars regard these processes as those that have the greatest explanatory power in connection to international criminality and they will therefore be considered in greater detail here.

³⁵³ R. J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986) 418-419. See also R. J. Lifton & E. Markusen, *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat* (New York: Basic Books, 1990), at 193 ff. Lifton's idea of a "doubled personality" has, however, not convinced all. See e.g., Darley 1992, at 209. See also Alvarez 1997, at 147, and Waller 2002, at 113-120. A distinction may be made between divided self-conceptions (e.g., Lifton) and unitary self-conceptions. According to unitary self theories the self is altered due to social forces, whereas divided-self theories assert that an alternative self can be created due to social forces. Waller has noted that according to "contemporary social psychology [...] people tend toward integration (i.e., unitary self)." J. E. Waller, 'Perpetrators of the Holocaust: Divided and Unitary Self Conceptions of Evildoing', 10 *Holocaust and Genocide Studies* (1996), at 11, 14 and 16.

³⁵⁴ E. Fogelman, 'Victims, Perpetrators, Bystanders, and Rescuers in the Face of Genocide and Its Aftermath', in C. B. Strozier & M. Flynn (eds.), *Genocide, War, and Human Survival* (Lanham, Maryland: Rowman & Littlefield Publishers, 1996), at 88-90.

³⁵⁵ Fogelman 1996, at 95.

³⁵⁶ Neubacher has, however, used the labelling theory to discuss the international criminalization process. Neubacher 2005, at 176 ff.

³⁵⁷ Cf. Alvarez 2001(a), at 105.

³⁵⁸ Darley 1992, at 216.

Distancing has been defined as the psychological and/or physical separation of participants and victims in, for example, genocides.³⁵⁹ The effect of distancing can be achieved in many different ways. For example, the victims may be dehumanized (*psychological distancing*) or made impersonal through the use of long-distance weapons (*physical distancing*).³⁶⁰ The psychological rationale behind distancing is that it is easier to harm others, when those victimized are unknown, depersonalized or dehumanized. In relation to this Bauman has argued that: “The increase in the [...] distance between the act and its consequences achieves more than the suspension of moral inhibitions; it quashes the moral significance of the act and thereby pre-empts all conflict between personal standard of moral decency and immorality of the social consequences of the act.”³⁶¹ Bureaucratization, routinization and dehumanization are all processes that can result in distancing.

The role of *bureaucratization* in connection to international criminality has been considered especially in relation to the Holocaust.³⁶² Bureaucracies are often pictured as “world[s] of operations without consequences, information without knowledge” and it has been held that in bureaucracies people become “mindless perpetrators doing what they are ordered to do and expected to do without being personally involved, committed, or aware of the terrifying destruction they are executing.”³⁶³ In bureaucracies, the division of labour makes it easy to overlook the horrors that the bureaucracy as a whole produces. Scholars, however, diverge in the extent to which they see international criminals as “innocent cogs” in bureaucratic machineries. For some, the bureaucratic nature of the criminality can almost exclude meaningful criminal responsibility. Arendt has, for example, famously noted the problem of punishing persons who do not appear to have intent to do wrong.³⁶⁴ For others, the ignorance of the bureaucrats is rather seen as a sign of conscious choice to disregard the reality.³⁶⁵ For those believing that individuals maintain a possibility to affect their behaviour in bureaucracies, the idea that bureaucratic organizations have two “components” is of special significance. In the following passage, Katz describes these components and analyzes Arendt’s description of Auschwitz:

One component is *a system of control*, which coexists with the other component, *a system of autonomy*. Traditional descriptions of bureaucracies concentrated on controls. [...] In such a system of control there are explicit rules for guiding the

³⁵⁹ Alvarez 2001(a), at 15.

³⁶⁰ Cf. Alvarez 2001(a), at 15 (referring to Grossman).

³⁶¹ Bauman 1989, at 25. Bauman finds that the most interesting aspect of Milgram’s study is the finding of “the inverse ratio of readiness to cruelty and proximity to its victim”, that is, that it is more difficult to harm people that one touches. *Ibid.*, at 154-155 (italics omitted).

³⁶² E.g., Bauman 1989, at 17, and R. L. Rubenstein, *Förintelsens lag* (Stockholm: Alba, 1980) 29-42.

³⁶³ Waller 2002, at 96 (interpreting Arendt).

³⁶⁴ Arendt 1994 [1963], at 276. Smeulers and Werner, however, argue that Arendt despite her thesis of the banality of evil did not regard the lack of criminal intent as a defence or an excuse. As a proof of this they refer to works of Arendt where she opposes attempts to attribute guilt to collectives. A. Smeulers & W. Werner, ‘The Banality of Evil on Trial’, in C. Stahn & L. van den Herik (eds.), *Future Perspectives on International Justice* (The Hague: T.M.C. Asser Press, 2010), at 31.

³⁶⁵ See also Cohen, who questions the argument put forward by some that they were just doing their job from a temporal perspective: “Memory is a social product [...] When you say that you were “just doing your duty” or were “only a cog in the machine” or that “others have done much worse,” was this “true” at the time, or fabricated in the light of later political history?”. Cohen 1995, at 45.

behavior of the bureaucracy's officials in response to problems that might arise; the career of officials is geared to carrying out these rules; success in a bureaucratic career depends on how well the bureaucrat performs tasks, as judged by those higher in the bureaucratic hierarchy; there is clear separation between the official's work and personal life; and within the bureaucratic organization, there are clearly defined objectives for the organization and clearly stipulated steps for reaching the objectives.³⁶⁶

But toward the middle of her statement Arendt mentioned that there was activity at Auschwitz that deviated from the official controls. Much of the life at Auschwitz seemed to be entirely arbitrary and capricious. [...] What she caught a glimpse of was a system of autonomy that can exist within bureaucracies. Such systems of autonomy derive from the fact that the bureaucracy's rules and regulations usually have a great deal of room for interpretation by the individual who makes decisions during day-to-day work activities.³⁶⁷

Katz's point is important, but it should also be noted that a difference should be made between: (a) the alternatives an individual *in reality* has; and (b) the alternatives an individual *believes* to have. In bureaucratic organizations also knowledge can be divided, which means that a person may believe that she has no discretion even though she in fact has some.³⁶⁸

The bureaucratization thesis has furthermore been criticized for disregarding the non-bureaucratic participation of hands-on criminals³⁶⁹ or "the spontaneous initiative at lower echelons".³⁷⁰ The hands-on criminals generally see the destructive consequences of their actions, which entails that bureaucratization does not distance them from the harm caused. In this regard, Kelman and Hamilton have noted that: "Normalization of atrocities is more difficult to the extent that there are constant reminders of the true meaning of the enterprise."³⁷¹ For the hands-on criminals, the process of *routinization* therefore appears to have a greater explanatory power than the process of bureaucratization. Kelman and Hamilton describe routinization as a process that first and foremost explains why individuals continue with their criminal activity. They argue that:

Routinization fulfills two functions. First, it reduces the necessity of making decisions, thus minimizing the occasions in which moral questions may arise. Second, it makes it easier to avoid the implications of the action, since the actor focuses on the details of the job rather than on its meaning.³⁷²

In practice, routinization entails that the commission of atrocities becomes something normal. Often routinized people see themselves as people "just doing their job". For people caught in routinization, the idea that they are "professionals" is often crucial.³⁷³

³⁶⁶ Katz 1993, at 79.

³⁶⁷ Katz 1993, at 80.

³⁶⁸ D. Luban, A. Strudler & D. Wasserman, 'Moral Responsibility in the Age of Bureaucracy', 90 *Michigan Law Review* (1992), at 2355.

³⁶⁹ Browning 1998, at 162.

³⁷⁰ Osiel 2010, at 112.

³⁷¹ Kelman & Hamilton 1989, at 18.

³⁷² Kelman & Hamilton 1989, at 18.

³⁷³ Kelman 2005, at 132.

Another process that has been found to affect hands-on criminals is the process of *brutalization*.³⁷⁴ Each act of violence makes further acts of violence easier to commit.³⁷⁵ Staub has observed that: “Mass killing or genocide is usually the outcome of an evolution that starts with discrimination and limited acts of harm-doing. Harming people changes the perpetrators (and the whole society) and prepares them for more harmful acts.”³⁷⁶ The process of brutalization can therefore be characterized as a *re-socialization* in beliefs, values, and standards of conduct.³⁷⁷ A brutalized person uses violence “more often and more easily” and the use of violence is often characterized by its excessive nature.³⁷⁸ In this vein, it has been suggested that sadism sometimes is the consequence of participation in atrocities rather than a personality trait.³⁷⁹

Finally, most large-scale atrocities have been preceded by a process of *dehumanization* of the victim group. In dehumanization, the victims are deprived of two significant characteristics, namely *identity*, that is, the standing as distinctive individuals, and *community*, that is, membership in the collective of individuals who care for each other.³⁸⁰ More concretely, dehumanization often entails the assignment of derogatory labels or negative stereotyping. Often, members of the victim groups are referred to in terms of animals, diseases or monsters. Through an “ideology of antagonism” the victims can thus be presented as posing a danger to the existence of oneself.³⁸¹ Dehumanization is usually the result of organized propaganda, in which history can be falsified.³⁸² The goal of dehumanization is the “social death” of the victims.³⁸³

In relation to distancing, the role of *denial* has also sometimes been put forward. Denial is often seen as an unconscious psychological defence mechanism for coping with guilt and other disturbing realities.³⁸⁴ According to the denial paradox, a person in denial can simultaneously both know and not know the true state of affairs.³⁸⁵ Knowledge can also be affected by *cognitive bias*, that is, the selection of information to fit existing perceptual frames.³⁸⁶

³⁷⁴ On brutalization, see e.g., Newman 2002, at 55.

³⁷⁵ T. Ward, ‘State Crime in the Heart of Darkness’, 45 *British Journal of Criminology* (2005), at 441.

³⁷⁶ Staub 2002, at 22. See also Staub 1999, at 196.

³⁷⁷ Staub 2002, at 24.

³⁷⁸ Smeulers & Grünfeld 2011, at 62.

³⁷⁹ Kelman 1973, at 35-36.

³⁸⁰ Kelman & Hamilton 1989, at 19. In a similar vein, Fein has argued that the exclusion of the victim from the universe of obligation is a necessary but not sufficient condition for genocide. Fein 1993, at 36. According to her, this exclusion need not entail dehumanization. *Ibid.*

³⁸¹ Staub 1999, at 197.

³⁸² Waller points out that linguistic dehumanization is often connected to an abuse of victims (e.g., starvation, not letting the victims take care of their hygiene) which “proves” their dehuman nature. Waller 2002, at 247-248.

³⁸³ Waller 2002, at 237-238.

³⁸⁴ Cohen 1993, at 105.

³⁸⁵ Cohen 1993, at 105.

³⁸⁶ Cohen 1993, at 105.

3.5.4. Authorization and Obedience to Authority

Another popular way to explain how “ordinary people” become involved in international atrocities is to stress the role played by *authorization*. Authorization can be defined as legitimate authorities explicitly ordering, implicitly encouraging, tacitly approving or at least permitting criminal behaviour.³⁸⁷ According to the authorization thesis, people have a natural inclination to obey authorities. Milgram’s research at the University of Yale in the beginning of the 1960s is often cited in this context.³⁸⁸ In his experiments, test persons were asked to administer (in real life fake) electric shocks to a person and in the experiment exhibited a strong tendency to obey authorities. After the experiment, Milgram noted that:

After witnessing hundreds of ordinary people submit to the authority in our experiments, I must conclude that Arendt’s conception of the *banality of evil* comes closer to the truth than one might dare imagine. The ordinary person who shocked the victim did so out of a sense of obligation – a conception of his duties as a subject – and not from any peculiar aggressive tendencies.³⁸⁹

The positive side of the human inclination to adhere to authorities is that it makes it easier for people live in collectives. The negative side, on the other hand, is that people start to feel non-responsible for their doings and that the authorization appears to remove the urge to make choices and judgments.³⁹⁰ Authorization also legitimates criminal behaviour *ex post facto*.³⁹¹

The degree to which individuals orientate towards authorities seems to be a question of both socialization (culture) and personality.³⁹² Waller has also observed that certain religious belief systems make people react passively to authority orders, as the belief systems make people assume that they cannot redefine situations through their own actions.³⁹³ Also the “monopoly” of the authority affects the influence of the authority over individuals. In this context, Bauman has argued that “pluralism is the best preventive medicine against morally normal people engaging in morally abnormal actions.”³⁹⁴

3.5.5. Group Dynamics and the Idea of Conformism

Obedience to authorities appears to have a significant explanatory power in connection to low- and mid-level actor behaviour in *vertical* collectives. There are, however, also other

³⁸⁷ Kelman & Hamilton 1989, at 16.

³⁸⁸ S. Milgram, *Obedience to Authority: An Experimental View* (London: Tavistock, 1974). See also e.g., T. Blass, ‘Perpetrator Behavior as Destructive Obedience: An Evaluation of Stanley Milgram’s Perspective, the Most Influential Social-Psychological Approach to the Holocaust’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide: The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 105, Smeulers & Grünfeld 2011, at 212-232, and Waller 2002, at 102-111. Blass has, however, noted that Milgram’s research is first and foremost *situational* as it emphasizes the significance of the *external pressure* exerted by authorities. Blass 2002, at 95.

³⁸⁹ Milgram 1974, at 6.

³⁹⁰ Kelman & Hamilton 1989, at 16.

³⁹¹ H. Jäger, ‘Zur Kriminalisierung von Politik durch ein Völkerkriminalrecht’, 2 *Mittelweg* 36 (1993), at 69.

³⁹² Waller 2002, at 180-182.

³⁹³ Waller 2002, at 180.

³⁹⁴ Bauman 1989, at 165 (italics omitted).

types of collectives and horizontal relationship within vertical collectives.³⁹⁵ Interestingly, therefore, rather few scholars have emphasized the role of non-vertical group processes in respect to international criminality. Exceptions to this are, for example, Browning who in his analysis of the Reserve Battalion 101 has emphasized the role played by *peers* and the idea of *conformism*,³⁹⁶ and Alvarez, who has noted the relevance of conformism in connection to genocides.³⁹⁷ Also Smeulers and Grünfeld have in their book devoted a whole chapter to conformism, group behaviour and collective identities.³⁹⁸

Social groups have a tendency to require that their members conform to the group's values and actions. Members of a group should thus behave in a manner "appropriate" for the group.³⁹⁹ Conformism is, however, not only the result of an *external* pressure to conform. Peer pressure and conformism may make people do things they think are wrong (and not do things they think are right) *if they believe* that their feelings, beliefs or preferences discrepant from their group's feelings, beliefs or preferences.⁴⁰⁰ In this regard, research indicates that individuals have a need to "fuse oneself with some larger entity", especially in situations of chaos or crisis,⁴⁰¹ probably in order to enhance self-esteem and to reduce uncertainty.⁴⁰² The adaptation to the group norms may be realized in different ways, for example, through compliance, identification or internalization.⁴⁰³

Group dynamics may thus alter the *behaviour* of individuals. It has, however, also been argued that such dynamics may change individual *thoughts* and *feelings*. It has, for example, been noted that: "Often we believe certain things to be true simply because most, if not all, of the people around us believe and/or assert them to be true."⁴⁰⁴ It has also been observed that opinions and behaviours often become more extreme as a result of group interaction.⁴⁰⁵ In connection to international criminality, collective thinking often becomes especially pronounced.⁴⁰⁶ There is an *élan* or sense of "one for all and all for one" which allows leaders to "coordinate" the collective action, instead of extorting the compliance of the members of the group.⁴⁰⁷

³⁹⁵ More or less all groups, however, have some type of a leader, and in this regard it is noteworthy that studies on group processes have not always given much attention to the question of leadership in non-vertical collectives. Hogg has – more generally – observed that as "[l]eadership is a core feature of social groups [...] it seems odd that leadership is often not a core feature of the study of group processes and group processes are not often a core feature of the study of leadership." M. A. Hogg, 'Social Psychology of Leadership', in A. W. Kruglanski (ed.), *Social Psychology: Handbook of Basic Principles*, 2nd ed. (New York: Guilford Press, 2007), at 725 (referring to Chemers).

³⁹⁶ Browning 1998, at 184.

³⁹⁷ Alvarez 2010, at 51.

³⁹⁸ Smeulers & Grünfeld 2011, at 243-266.

³⁹⁹ Cf. the idea of *socialization*, that is, the idea of people learning what is appropriate behaviour and behaving accordingly.

⁴⁰⁰ Newman 2002, at 48.

⁴⁰¹ Hintjens 2001, at 38 (referring to Fromm, Yurick and Kristeva).

⁴⁰² Tindale *et al.* 2002, at 145.

⁴⁰³ Smeulers & Grünfeld 2011, at 247.

⁴⁰⁴ Tindale *et al.* 2002, at 149.

⁴⁰⁵ Waller 2002, at 35.

⁴⁰⁶ See further e.g., Fletcher 2002(b), at 1525.

⁴⁰⁷ M. J. Osiel, 'Modes of Participation in Mass Atrocity', 38 *Cornell International Law Journal* (2005), at 797.

It has also been put forward that *deindividualization* may have a connection to aggressive behaviour, that is, that individuals as anonymous members of a crowd (or, for example, with their faces concealed) are more prone to behave aggressively.⁴⁰⁸ Deindividuation may hence diffuse the responsibility and facilitate “the transformation from an individual to a collective identity.”⁴⁰⁹ As social beings, humans like to be members of groups and they are attracted to mass movements.⁴¹⁰

3.5.6. Concluding Remarks

In summary, among criminologists, social process theories are those that have been found to have the greatest explanatory power in connection to international crimes. Certain of these theories have also become influential outside criminology. International criminal law scholars, for example, often refer to Milgram’s theory on obedience to authority when discussing how the criminal responsibility should be distributed between superiors and subordinates. What is significant in connection to the social process theories is that they often have been used to explain the criminal behaviour of mid- and low-level actors. Very little attention has in supranational criminology been given to the criminality of high-level actors.

3.6. Critical Criminological Theories

In critical criminology, the starting-point is that crime is the *outcome of conflict and domination*.⁴¹¹ A number of critical criminologists have, in contrast to mainstream criminologists, focused on the crimes of the powerful and have argued that “working-class crime is insignificant when compared to the ‘crimes of the powerful’ that largely go unpunished.”⁴¹² The critical element in these theories often consists of questioning the official definitions of crime and the existing social order.⁴¹³ Critical criminology has many sub-theories, such as conflict theory, radical criminology, feminist criminology, Marxist criminology, left realism, anarchist criminology and so-called new criminology.⁴¹⁴

Interestingly, however, even though critical criminologists have focused on the crime of the powerful, they have not traditionally given international criminality much attention. There are, however, a few important exceptions: Susan Brownmiller, Catharine

⁴⁰⁸ Smeulers & Grünfeld 2011, at 207 (referring to *inter alia* Zimbardo) and 263.

⁴⁰⁹ Smeulers & Grünfeld 2011, at 208.

⁴¹⁰ Smeulers & Grünfeld 2011, at 256-257 and 261.

⁴¹¹ Einstadter & Henry 1995, at 227. The term critical criminology is, however, used in somewhat different meanings by various authors. Burke, for instance, uses it to refer to left realism and left idealism, the latter of which is a criminological theory closely founded on the victimized actor model. Burke 2001, at 173.

⁴¹² Burke 2001, at 177.

⁴¹³ Einstadter & Henry 1995, at 227.

⁴¹⁴ Einstadter & Henry 1995, at 228, 259 and 277. Simplifying, conflict theorists stress different group interests and conflicts, Marxist and radical theories economic conflict and capitalism, new criminology capitalism and the labelling of criminals, anarchist theorists the abolition of systems of domination, and left realism the harm of ordinary crimes. E.g., Burke 2001, at 147 and 154, and Einstadter & Henry 1995, at 228-234.

A. MacKinnon, Austin Turk, and Jock Young. The feminist authors (Brownmiller, MacKinnon) have first and foremost concentrated on the traditional impunity for sexual violence against women in armed conflicts.⁴¹⁵ The other critical criminologists have, on the other hand, often focused on human rights violations by States, and have sometimes argued for the criminalization of such violations.⁴¹⁶ Lately also conflict thinking has been advanced in connection to international criminality. The genocidal violence in Darfur has, for example, been found to be the result of the “competition between patriarchal and hierarchically organized racial and ethnic groups”⁴¹⁷

It has been noticed that some individuals who participate in international crimes are, in fact, the absolute antithesis of “criminals” as conventionally conceived. Their social class, status and respectability may be completely different from that of “normal” offenders. In this respect, international criminals are similar to so-called white-collar criminals. The concept of white-collar criminals was coined by Edwin Sutherland in the late 1930s. He used this concept to refer to crimes committed by persons of respectability and high social status in the course of their occupation.⁴¹⁸ Even though Sutherland conducted his research during the Nazi epoch, he himself did not discuss genocide as a form of white collar criminality.⁴¹⁹ Rather, he used the concept when elaborating on economic criminality. Only lately, has the idea of Hitler as the “greatest white-collar criminal” been put forward.⁴²⁰ According to Braithwaite, international criminality and economic criminality namely have certain common features: the motivating force of greed, special opportunities to commit crimes, and the offender’s perceived right to humiliate his/her victims (the social structure of humiliation).⁴²¹

The significance of the concept of white-collar crime lies primarily in that it forces one to pay attention to *the role of social power in shaping opportunities* for and responses to criminal behaviour.⁴²² In this regard, it is interesting that Shapiro has criticized the traditional white-collar crime research for focusing on offender characteristics and for disregarding offence characteristics. As an alternative, she wants to define white-collar

⁴¹⁵ E.g., S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975), and MacKinnon 1994(b).

⁴¹⁶ Einstadter & Henry 1995, at 246. See also e.g., W. J. Chambliss, ‘State-Organized Crime – The American Society of Criminology, 1988 Presidential Address’, 27 *Criminology* (1989), at 183–208, Cohen 1993, at 97–115, and H. Schwendinger & J. Schwendinger, ‘Defenders of Order or Guardians of Human Rights’, 5 *Issues in Criminology* (1970), at 123–157.

⁴¹⁷ J. Hagan & W. Raymond-Richmond & P. Parker, ‘The Criminology of Genocide: The Death and Rape of Darfur’, 43 *Criminology* (2005), at 531 and 553 [NB. The article is not persuasive regarding the content of international criminal law].

⁴¹⁸ E. H. Sutherland, ‘White-Collar Criminality’, 5 *American Sociological Review* (1940), at 1–12, and Sutherland 1983 [1949], at 7. See also D. Weisburd, E. Waring & E. F. Chayet, *White-Collar Crime and Criminal Careers* (Cambridge: Cambridge University Press, 2001) 8.

⁴¹⁹ Friedrichs 2000(a), at 25.

⁴²⁰ Braithwaite 1992, at 100. This comparison between genocidaires and “price-fixing executives” has, however, been criticized by Friedrichs, who thinks that this classification trivializes the crimes of those participating in genocides. Friedrichs 1996(b), at 47 (see also at 59).

⁴²¹ Braithwaite 1992, at 81.

⁴²² K. Schlegel & D. Eitle, ‘Back to the Future: A Reminder of the Importance of Sutherland in Thinking about White-Collar Crime’, in W. S. Laufer & F. Adler (eds.), *The Criminology of Criminal Law* (New Brunswick: Transaction Publishers, 1999), at 364.

crime as violations of trust.⁴²³ She notes that social class, status, etc. are related to the distribution of positions of trust, which provide opportunities for abuse, but that social standing should not be equated with social role.⁴²⁴ While Shapiro obviously has a point, it should be noted that much research indicates that *actor characteristics* often influence how a person is treated by the criminal justice system. The concept white-collar criminality is thus important in that it emphasizes that there may be different types of criminals (or to put it another way, criminals who do not correspond with the *cliché* idea of criminals) and that, for example, conventional criminal law ideas, such as that a significant difference should be made between first-time offenders and recidivists, are problematic to apply to high-level economic and international criminals. Crimes requiring a position of trust are difficult, if not impossible, to commit after one has received a criminal record, and economic and political leaders therefore rarely have a (relevant) criminal record.

3.7. Concluding Remarks

As the present author sees it, more or less all criminological theories that have been used to consider ordinary criminality can to some extent be applied to international criminality, even though some theories appear more suitable than other. That the same types of theories can be used to address both types of criminality is not surprising. Both types of crimes are committed by human beings and human behaviour is influenced by certain factors. Vaughan has in this line argued that while crimes take “place in a variety of socially organized settings” it is always possible to identify certain *elements of social organization* (such as, division of labour and hierarchies) as well as certain *common processes* (such as power, competition, conflict, cooperation, domination, subordination, culture, and socialization).⁴²⁵ “Unique” crimes, such as the Holocaust, can therefore be regarded as extreme cases of familiar social phenomena.⁴²⁶ That ordinary and international criminality have features in common is thus natural, but at the same time frightening. As observed by Osiel: “Some side of us [...] wants such acts to remain unintelligible, incomprehensible.”⁴²⁷

Criminology has not during its years of existence been able to solve the “mystery” of ordinary criminality. Rather the various criminological theories coexist, however, so that some theories have lost in popularity and influence (most notably, determinist

⁴²³ S. P. Shapiro, ‘Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime’, 55 *American Sociological Review* (1990), at 347. Schlegel and Eitle have, however, noted that in a way all forms of crime can be considered as violations of trust, and they therefore argue that Shapiro’s notion does not bring much conceptual clarity. Schlegel & Eitle 1999, at 380-381.

⁴²⁴ Shapiro 1990, at 358. Podgor notes that the white-collar criminality initially was a sociological concept that was used to designate crimes committed by persons coming from a certain social class (offender-based approach). She notes that the concept today partially has become a legal one, and that it increasingly is used to denote a certain type of crimes (offence-based approach). Unlike Shapiro, Podgor, however, seems to favour an offender-based approach. E. S. Podgor, ‘The Challenge of White Collar Sentencing’, 97 *Journal of Criminal Law and Criminology* (2007), at 734-735 and 737-738.

⁴²⁵ D. Vaughan, ‘Criminology and the Sociology of Organizations: Analogy, Comparative Social Organization, and General Theory’, 37 *Crime, Law & Social Change* (2002), at 120.

⁴²⁶ Cf. Bauman 1989, at 2.

⁴²⁷ Osiel 2000, at 144.

biological, psychological, and sociological theories). Most criminologists today agree that human behaviour is affected both by situational (external) and dispositional (internal) factors. Furthermore, many today support multi-theoretical approaches. Criminologists, however, often disagree on the significance given to the various factors and theories.

Also in connection to international criminality, the need to have a multi-theoretical approach has been stressed. Friedrichs has regarding the Holocaust observed that an integrated theory appears to be needed to explain it, but that it seems impossible to find a truly testable theory and that at best one can hope to achieve is “a rough approximation of the relative “weight” of a broad range of factors [...]”⁴²⁸ This being said, many supranational criminologists, however, give sociological and social process theories considerable weight. The absolute dominance of these theories has, however, recently been put in question by some scholars who find that the subjectivity of the perpetrators often is overlooked in supranational criminology. Foster, for example, notes that whereas Hannah Arendt’s account of Eichmann as a bureaucrat and “system-man” is quoted by more or less all scholars (because it suits the prevailing understanding about the nature of international criminality), David Cesarini’s description of Eichmann as “a forceful and strong person with considerable energy and zeal” has been given significantly less attention.⁴²⁹

All in all, the present author finds that criminology stresses the *common features* of ordinary and international criminality. This being said, the phenomenology of international criminality entails that certain social processes become especially significant in connection to those crimes. The collective nature of the criminality, for example, emphasizes the role played by phenomena such as peer pressure and crowd behaviour. Likewise, the frequent State involvement in the criminality makes criminological research on the human inclination to obey authorities relevant. The context of individual action cannot hence be disregarded in connection to international criminality.

Socio-psychological explanations of international criminality may be found to have a “relatively exonerating position towards perpetrators”.⁴³⁰ Scholars, however, disagree as to the degree to which the context affects individuals and how the context of action should be considered in the law. Some scholars emphasize the role played by pathological societies very strongly. For example, Tallgren has claimed that the refusal to commit international crimes sometimes is socially deviating behaviour, which requires “exceptional individuals”.⁴³¹ With such a viewpoint, it is often difficult to approve the use of criminal law in connection to international criminality. Other scholars are less deterministic, even though they acknowledge that the pathological societies provide individuals with more opportunities to commit crime and pressure to do so. The latter

⁴²⁸ Friedrichs 2000(a), at 34.

⁴²⁹ D. Foster, ‘Rethinking the Subjectivity of Perpetrators of Political Violence’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), at 48 and 52.

⁴³⁰ A. G. Miller, A. M. Buddie and J. Kretschmar, ‘Explaining the Holocaust – Does Social Psychology Exonerate the Perpetrators?’, in L. S. Newman & R. Erber (eds.), *Understanding Genocide – The Social Psychology of the Holocaust* (Oxford: Oxford University Press, 2002), at 320.

⁴³¹ Tallgren 2002(b), at 573 and 575.

standpoint is obviously more compatible with the criminal law idea of individual responsibility.⁴³²

The goal of the criminological inquiry in this study has primarily been to gain more information about the social problem international criminal law addresses. From this perspective, it is also significant to note areas where very little criminological research has been conducted. In supranational criminology, much attention has been devoted to the question of why “ordinary people” or the masses participate in the criminality. The focus has hence essentially been on explaining the participation of mid- and low-level actors.⁴³³ Why the leaders (or “instigators”) engage in the criminality has, on the other hand, been given very little attention, especially during the last decades.⁴³⁴ After World War II, the leading Nazis were psychologically examined, but due to the methods used, this research is not given much weight today. The present author feels that this imbalance in research is problematic. In many accounts of international criminality, an image is depicted of rational and manipulative leaders who intentionally create an abnormal social context and who maliciously lurk “ordinary people” to participate in the criminality. Jäger in this regard talks about the *influential stereotype* of the “remote-controlled” and without individual motivation acting low-level participant.⁴³⁵

The prevailing research makes it justified to primarily blame the leaders for the criminality and to largely excuse the masses for their participation. The present author, however, believes that criminology does not as such support that high-level actors should take *all* blame. Milgram’s research does persuasively point out that people in positions of authority often are obeyed. But to what extent do peers affect each other? And, what drives the leaders to commit crimes? Does the behaviour of subordinates affect the behaviour of superiors? It is thus important to recognize that even though criminology provides insights into the nature of international criminality, it is not evident that supranational criminology yet has identified all relevant relationships and processes, or given them the right weight. When certain features of the criminality are stressed, it is possible that others at the same time are concealed.

⁴³² Norrie discusses the thinking of Arendt and Jaspers and notes two alternatives in the questioning of the possibility of legitimate criminal justice in these situations. On the one hand, it can be argued that individuals are not really to blame because of their circumstances, that is, that there has been a loss of a subjective moral grip on the individual. On the other hand, it can be argued that the law has objectively lost its moral claim to validity, as justice requires a common framework within which the judge and the judged coexist. A. Norrie, ‘Justice on the Slaughter-Bench: The Problem of War Guilt in Arendt and Jaspers’, 11 *New Criminal Law Review* (2008), at 193 and 196.

⁴³³ Friedrichs has observed that: “We need to understand more fully differences in the psychodynamics of instigators as opposed to hands-on perpetrators. Those who formulate the instigating orders in cases of genocide might not be capable of implementing these orders; and those who implement the orders might not be capable of instigating them.” Friedrichs 2000(a), at 27. Friedrichs argument challenges questions such as “why do people commit genocide?”, as genocides may have many different types of participants to whom different answers apply. Criminology has for sure considered the difference between physical and non-physical participants, but not so much the participation of the top-level participants.

⁴³⁴ This is also noted by Mandel, who points out that the instigator-perpetrator distinction is not identical to the leader-follower distinction. He notes that not all high-level actors in Nazi Germany were instigators. Mandel 2002, at 261-262.

⁴³⁵ Jäger 1995, at 333 (‘das Stereotyp des funktionalisierten, ohne Eigenmotivation mitwirkenden Täters’).

As regards the relationship between the social problem and the criminal law, it has been noted that the insights that sciences such as criminology has produced about human behaviour scantily has affected criminal law. For example, Jeffrey has argued that criminal law and criminology always have been “in conflict” and that criminologists have been frustrated with the fact that their research has not influenced the lawyers and politicians who decide about criminal law.⁴³⁶ Denno, on her part, has held that type of information social sciences produce rarely is relevant for criminal law. According to her, the causation social science is interested in is namely different than the one criminal law is interested in.⁴³⁷

While it is true that criminological research rarely is quoted in criminal law contexts, it is, however, untrue that the social problems (including the causes of crime) would be irrelevant for criminal law. In fact, as noted also by Osiel, “the moral complexity present in much wrongdoing” is something that the criminal law seeks to acknowledge and accommodate through, for example, doctrines on *mens rea* and justifications and excuses.⁴³⁸ Criminal law is always adopted as a response to a true or perceived social problem. For legitimacy reasons, the criminal law must therefore to *some extent* reflect reality.

As the present author sees it, criminal law is not *indifferent* to the social reality it tries to address, but rather *selective*. This can be explained with the fact that criminal law is not just an objective reflection of the empirical reality, but an interpretation of it which has been affected by social moral evaluations about what is relevant for responsibility and what is not. Criminal law thus contains certain built-in evaluations of relevance and irrelevance, which entails that when a certain social problem is translated into a criminal law question certain aspects of the social phenomena are taken into consideration and others are overlooked. In this transformation, it is often aspects of the criminality that are incompatible with the rationale of criminal law that are “lost in translation.”

This translation of the social problem of international criminality into a criminal law question is the object of Chapters 6–9 in this study. Before the international criminal law as such will be analyzed, some words must be said about the *instrument* with which international criminality is addressed. More specifically, the next part of the study tries to identify the basic features of criminal law in general and international criminal law in particular.

⁴³⁶ C. R. Jeffrey, ‘Criminology and Criminal Law: Science versus Policy and the Interaction of Science and Law’, W.S. Laufer & F. Adler (eds.), *The Criminology of Criminal Law* (New Brunswick: Transaction Publishers, 1999), at 5-7.

⁴³⁷ D. W. Denno, ‘Human Biology and Criminal Responsibility: Free Will or Free Ride?’, 137 *University of Pennsylvania Law Review* (1988), at 649.

⁴³⁸ Osiel 1995, at 487.

PART II:

THE INSTRUMENT

4. THE BASIC FEATURES OF CRIMINAL LAW

4.1. Introduction

Punishment is not wholly explicable in terms of its purposes because no social artefact can be explained in this way. Like [...] table manners, punishment has an instrumental purpose, but also a cultural style and an historical tradition, and a dependence upon 'institutional, technical and discursive conditions'.⁴³⁹

The existence of criminal law is today, and has for a long time been, regarded as a self-evident. All nations in the world have criminal law. The role played by and the nature of criminal law have, however, changed over time. Nowadays, criminal law is one of the main ways to deal with behaviour deemed unacceptable by society, at least in the Western parts of the world. The recent expansion of the use of criminal law can be explained with the easiness with which criminal law can be adopted combined with the prevailing conception that adopting criminal law means "doing something" to address a social problem. In other times and cultures, alternatives to criminal law, such as civil law, restorative justice or administrative measures, have been more popular.⁴⁴⁰

Even though there is criminal law in all nations, its content and scope varies from country to country. In some countries, there also co-exist several criminal law systems with their own specific features.⁴⁴¹ For example, in the United States, the states have criminal laws of their own that co-exist with federal laws. The various systems are, however, often grouped into certain traditions or families to make comparisons more feasible. Criteria used to divide legal systems into legal families include the system's historical background and development, characteristic mode of thought, distinctive institutions, use of legal sources, and ideology.⁴⁴² The common law (Anglo-American) tradition, the civil law (continental law) tradition, the religious law tradition and the socialist law tradition are often regarded as the major contemporary legal traditions.⁴⁴³ Even though there are significant differences between how different criminal law systems and traditions approach the social problem of crime, it is, however, argued here that all

⁴³⁹ Garland 1990, at 19 (quoting P. Q. Hirst).

⁴⁴⁰ Society can naturally also choose not to react at all to certain deviant or antisocial behaviour.

⁴⁴¹ See e.g., R. David & J. E. C. Brierley, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law* (London: Stevens & Sons, 1985), 17-18. Merryman defines a legal system as "an operating set of legal institutions, procedures, and rules". J. H. Merryman, *The Civil Law Tradition – An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1969), 1.

⁴⁴² K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 3rd ed. (Oxford: Oxford University Press, 1998), 68. Cf. de Cruz regarding the concepts of legal system, parental legal system, and legal tradition. P. de Cruz, *Comparative Law in a Changing World*, 2nd ed. (London: Cavendish Publishing, 1999) 3-5, 33 and 101.

⁴⁴³ E.g., P. L. Reichel, *Comparative Criminal Justice Systems – A Topical Approach*, 3rd ed. (Upper Saddle River, New Jersey: Prentice Hall, 2002), 81. See also David and Brierley who do not enumerate the religious law tradition. David & Brierley 1985, at 22. There also exists indigenous legal systems, but these are usually not grouped, as they do not share a common legal tradition. Reichel 2002, at 81.

the various criminal law systems have certain common characteristics. In other words, calling a social conflict a “crime” implies a certain way of managing it.⁴⁴⁴ In this vein, Fletcher has argued that: “It is true that every country has a criminal code, but these codes should be understood as local answers to the universal questions that constitute the foundation of criminal law.”⁴⁴⁵

The rise of the nation State and the ideals of the Enlightenment together gave rise to what today often is called modern criminal law.⁴⁴⁶ During the Enlightenment, the conception of justice changed and the heavily discretionary decision-making processes, which previously had dominated, were increasingly seen as unjust and replaced by processes stressing values such as uniformity, proportionality, equality in law, and the strict application of rules.⁴⁴⁷ The modern criminal law we have today is thus to a high degree a *historical product*.⁴⁴⁸ In relation to the significance of the Enlightenment period for the development of criminal law, Norrie has noted that: “modern criminal law was formed in a particular historical epoch and derived its characteristic ‘shape’ from the fundamental features of the social relations of that epoch. Its principles, therefore, are historic and relative rather than natural and general.”⁴⁴⁹ Also after the Enlightenment period, criminal law has continued to adapt to prevailing circumstances, even though the law has not since experienced a similar fundamental change.

In this chapter, some basic features of modern criminal law will be identified and elaborated upon. As international criminality is addressed with criminal law, it is important to recognize what is feasible within the paradigm of criminal law.⁴⁵⁰

4.2. Criminal Law Puts the State in Charge

Ashworth has argued that one of the key procedural elements that distinguish criminal from civil proceedings is that criminal proceedings are generally initiated by a *public*

⁴⁴⁴ H. Steinert, ‘Ideology with Human Victims’ – The Institution of ‘Crime and Punishment’ between Social Control and Social Exclusion: Historical and Theoretical Issues’, in V. Ruggiero, N. South & I. Taylor (eds.), *The New European Criminology – Crime and Social Order in Europe* (London: Routledge, 1998), at 407 (referring to Christie). Cf. Nuotio who talks about the basic concepts of criminal law. K. Nuotio, *Teko, vaara, seuraus – Rikosvastuun filosofisista, kriminaalipoliittisista ja lainopillisista perusteista* (Helsinki: Suomalainen lakimiesyhdistys, 1998), 38.

⁴⁴⁵ G. P. Fletcher, *Basic Concepts of Criminal Law* (Cary, NC: Oxford University Press, 1998), 5.

⁴⁴⁶ Cesare Beccaria (1738-1794) is often mentioned as the father of modern criminal law. E.g., A. Norrie, *Crime, Reason and History – A Critical Introduction to Criminal Law*, 2nd ed. (London: Butterworths, 2001), 17.

⁴⁴⁷ Garland 1990, at 206 (with reference to Beattie’s study concerning England).

⁴⁴⁸ Tuori has pointed out that viewing law as a historical product does not mean that one has to adopt evolutionary theoretical assumptions. Rather, it can merely signify that one acknowledges the interaction between law and the society that surrounds it. He has also pointed out that whereas the law on its surface may change quickly, the deeper layers of the law (viz. the legal culture and the deep structure of the law) change more slowly. K. Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002), 3-6, 155, and 184.

⁴⁴⁹ Norrie 2001, at 8.

⁴⁵⁰ Ohlin has noted that a difference can be made between criminal law theory (ideal criminal law identified through philosophical inquiry) and principles that are common in many domestic criminal law systems. J. Ohlin, ‘Where to Find Liberal Principles of Criminal Law’, *Lieber Code* [blog], 10 April 2013. The two are, however, connected, and both affect sentiments about how criminal law should be structured.

official.⁴⁵¹ More generally, it has been argued that criminal law forms a system of various levels of action, each connected with its own public authorities.⁴⁵² Criminalization decisions are usually made by members of democratically elected bodies, crimes are generally investigated by police officials or other public officials (such as coroners), conviction and sentencing decisions are made by State or municipal courts, and the execution of punishments is administered by various administrative authorities. The “criminal model” thus puts the State in charge.⁴⁵³ This heavy involvement of various public officials in the administration of criminal law reflects that criminal law is *law*, that is, part of the regulatory system of a State. Criminal law is thus *not* characterized by “privatization” or, to put it another way, of elements, such as negotiation, flexibility and self-regulation.⁴⁵⁴ In legal systems where a difference is made between civil law (essentially regulating the relationship between citizens) and public law (regulating the relationship between citizens and authorities, or the relationship between authorities), criminal law is thus traditionally categorized as public law.⁴⁵⁵

The active involvement of State officials in the administration of criminal law obviously requires the existence of such officials.⁴⁵⁶ The development of modern criminal justice systems is therefore connected to the emergence of the modern State with characteristics such as a central government adopting centralized legislation and a bureaucratic mode of administration.⁴⁵⁷ This change from traditional feudal societies to modern ones was not only characterized by a different mode of administration, but also of a new view on the role of the State and the authorities.⁴⁵⁸ The State essentially *monopolized the use of force* on its territory and became the unit responsible for security

⁴⁵¹ A. Ashworth, ‘Is the Criminal Law a Lost Cause?’, 116 *The Law Quarterly Review* (2000), at 230. See also *Benham v. United Kingdom*, Judgment, GC, ECtHR, 10 June 1996, para. 56.

⁴⁵² Jareborg 1995(b), at 18.

⁴⁵³ S. E. Marshall & R. A. Duff, ‘Criminalization and Sharing Wrongs’, *Canadian Journal of Law and Jurisprudence* (1998), at 15. See further also D. Robinson, ‘International Criminal Law as Justice’, 11 *Journal of International Criminal Justice* (2013), at 705-706.

⁴⁵⁴ M. Delmas-Marty, ‘International Criminalisation of Economic Activities: Variable Geography and Geometry’, in *Flores juris et legum – festschrift till Nils Jareborg* (Uppsala: Iustus förlag, 2002), at 170.

⁴⁵⁵ E.g., D. Frände, *Allmän straffrätt* (Helsinki: Juridiska fakulteten, Helsingfors universitet, 2004), 4 (regarding Finland), and N. Jareborg, *Straffrättens gärningslära* (Stockholm: Nordstedts Juridik/Fritzes, 1995), 36 (regarding Sweden).

⁴⁵⁶ See e.g., C. Emsley, *Crime, Police, and Penal Policy – European Experiences 1750-1940* (Oxford: Oxford University Press, 2007), 270, and D. Garland, ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’, 36 *The British Journal of Criminology* (1996), at 448-449.

⁴⁵⁷ E.g., Mann has argued State modernization encompasses four processes of growth, viz. (1) in State size; (2) in the scope of its functions; (3) in administrative bureaucratization; and (4) in political representation. Mann 1993, at 358.

⁴⁵⁸ Jareborg has held there has existed different types of *crime ideologies*, and argue that whereas crimes in early times were regarded as acts of disobedience to a person in a position of power (*primitive ideology*), they are today often seen as acts against the prevailing legal order (*collectivist ideology*) or as acts against certain values or interests (*radical ideology*). According to Jareborg, the collectivist ideology characterizes modern criminal law. N. Jareborg, *Scraps of Penal Theory* (Uppsala: Iustus Förlag, 2002), 75-80. See also R. A. Duff, ‘Conceptions of Crime’, in *Flores juris et legum – festschrift till Nils Jareborg* (Uppsala: Iustus förlag, 2002), at 183-195.

and order.⁴⁵⁹ Crime prevention and control hence became State tasks and criminal law turned into a central State instrument to protect collective and individual interests against certain types of interferences.

That the State plays a central role in criminal law is also reflected in the fact that the question of what kinds of wrongs criminal law should deal with often is answered with “wrongs that are of public concern.” This distinction between wrongs that are of public concern and wrongs that only are of private or individual concern is, however, not easy to draw in practice.⁴⁶⁰ Marshall and Duff, for example, emphasize that this distinction is not the same as the distinction between collective and individual wrongs, and that the level of seriousness of the wrong does not by itself explain why certain wrongs are public wrongs.⁴⁶¹ Instead, they argue that the difference lies in the “character of the seriousness.”⁴⁶² The requirement of “higher interests” that go beyond purely individual or collective interests is thus characteristic for criminal law. The idea that the crimes are not only violations of individual interests that can or should be revenged is connected to the idea that punishment presupposes a neutral authority, or to put it another way, an authority that represents the public.⁴⁶³

It thus lies in the nature of criminal law that the State and its public officials are heavily involved in the production and management of the law. It is due to this extensive State involvement that the fact that the perpetrators are public officials is both a practical problem and a moral problem for criminal law. Cohen has in this vein argued that “there are good moral reasons why any grading of seriousness should take this into account – in particular, the fact that the very agent responsible for upholding law, is actually responsible for the crime.”⁴⁶⁴

4.3. Criminal Law Is a Social Artefact

Society produces its own idea of *evil* as it condemns *sin* and punishes *crime*.⁴⁶⁵

That criminal law generally is adopted by legislative bodies, such as democratically elected parliaments, stresses another feature of criminal law, namely that criminal law is something adopted and created. Christie has in this regard put forward that: “Acts are not, they *become*. So also with crime. Crime does not exist. Crime is created. First there

⁴⁵⁹ Max Weber famously defines the State as the entity having the monopoly of the legitimate use of force at a particular area. M. Weber, *Gesammelte Politische Schriften* (München: Drei Masten Verlag, 1921) 397 [in the essay “Politik als Beruf”]. Garland has, however, identified a countertrend, and argues that the high crime rates in certain modern societies have challenged the idea that States *alone* can provide security, law and order within their territories, and that citizens for that reason are expected to protect their property against thefts, etc. Garland 1996, at 448.

⁴⁶⁰ Marshall & Duff 1998, at 7.

⁴⁶¹ Marshall & Duff 1998, at 7-8.

⁴⁶² Marshall & Duff 1998, at 8.

⁴⁶³ Fletcher 1998, at 35.

⁴⁶⁴ Cohen 1993, at 101.

⁴⁶⁵ P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002), 63.

are acts. Then follows a long process of giving meaning to these acts.⁴⁶⁶ A decision to criminalize is thus essentially a *political* decision, which generally is preceded by *moral* argumentation.⁴⁶⁷ To some extent the criminalization process is, however, constrained by *law*⁴⁶⁸ and, for example, *practical factors*, such as budget considerations. Garland has therefore regarding processes of criminalization noted that:

Broad ideological ambitions may run up against immediate financial constraints, political expediency may conflict with established sensibilities, the perceived requirements of security may differ from those of morality, the professional interests of one group may be in tension with those of another, and the pursuit of any one value will generally involve the violation of several others.⁴⁶⁹

Criminal law can therefore be called a “cultural artefact” which embodies and expresses the cultural forms of society.⁴⁷⁰ If then a criminalization decision is a political decision affected by numerous different types of factors, what can then be said about the function or objective of criminal law and the criminal justice system surrounding it? Is the *primary* aim of criminal law the prevention of certain harms, to censure unwanted behaviour, to protect particular legal goods or something else? Jareborg has in this regard distinguished between ethical motivations (for example, to make the living conditions for people living in societies tolerable or to censure unwanted behaviour), political motivations (the protection of society and its institutions) and socio-psychological motivations (to prevent private revenges).⁴⁷¹ One may also question whether the goal of criminal law is to deter crime, prevent crimes, provide retribution, rehabilitate offenders etc.⁴⁷² Different answers to what the primary objective should be have been presented, but the above mentioned functions are usually in some way included in the argumentation. Some scholars also find that it is impossible to identify “the” goal of criminal law, that is, they find that one instead should focus on identifying more limited goals, such as the goal of criminalizations, the goal of conviction/sentencing and the goal of enforcement of sentences.⁴⁷³ It is also widely questioned whether criminal law in reality fulfils the missions given to it, and especially the goal of general prevention. No modern State

⁴⁶⁶ N. Christie, ‘Between Civility and State’, in V. Ruggiero, N. South & I. Taylor (eds.), *The New European Criminology – Crime and Social Order in Europe* (London: Routledge, 1998), at 121.

⁴⁶⁷ See e.g., N. Jareborg, *Straffrättens ansvarslära* (Uppsala: Iustus förlag, 1994), 308. Cohen speaks of the “constructionist triangle”: (1) the actual incidence; (2) the public perception of the seriousness of the crime problem; and (3) the rhetorical manipulation of the crime problem and public anxiety in media and political discourse. S. Cohen, ‘Crime and Politics: Spot the Difference’, *47 British Journal of Sociology* (1996), at 8.

⁴⁶⁸ E.g., human rights law prohibiting retroactive criminalization.

⁴⁶⁹ Garland 1990, at 285.

⁴⁷⁰ Garland 1990, at 193 (regarding punishment). Garland notes that the causality runs in both ways, i.e., culture affects what is punishable and punishments form culture. *Ibid.*

⁴⁷¹ Jareborg 1994, at 328.

⁴⁷² Ashworth has, e.g., noted that a difference lies between him and John Braithwaite in that Braithwaite stresses the preventive effect of criminal law whereas he sees censure as the main function of criminal law. Ashworth 2000, at 249-250.

⁴⁷³ At least in the Nordic countries, it is often argued that a difference should be made between the primary goals of criminalizations (general prevention), the goals of the conviction/sentencing stage (retribution) and the goals of execution of punishments (individual prevention).

has, however, dared to abolish its criminal justice system as a whole.⁴⁷⁴ Criminal law is therefore the *normal way* to respond to certain unwanted behaviour today, even though the legal systems in the world differ in how much and what kind of criminal law they use.

Generally accepted criminalization criteria are that: (a) a legitimate interest is violated or threatened; (b) that a person is culpable to the violation/threat; and (c) that the protection of the interest demands a criminalization, that is, criminal law should only be used “as a last resort or for the most reprehensible types of wrongdoing.”⁴⁷⁵ These principled criminalization criteria do not, however, alone determine which deeds are criminalized and how. The fact that criminal law is something created therefore also raises the question of *who* creates the law, or more specifically, *whose interests* does the law protect. As noted above, in most countries, criminal statutes and codes are adopted by democratically elected bodies, such as the parliament, and political considerations therefore affect criminalization decisions. Furthermore, in criminology, it has become popular to speak about *moral entrepreneurs* (for example, mass media, interest groups) who influence the legislators.⁴⁷⁶ “*Moral panics*” have also been found to affect criminalization decisions.⁴⁷⁷ Cohen has explained the term of moral panics by noting that: “Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media.”⁴⁷⁸ Moral panics may arise, for example, as a result of shocking incidents (such as the 11 September 2001 terrorist attacks) or as a result of media attention given to a particular societal phenomenon. The political decision-making preceding criminalizations and the phenomena of moral entrepreneurs/panics emphasize that the content of criminal law is not only determined by “objective” criminalization criteria, such as the societal harmfulness of the behaviour.

In this regard, critical criminologists have stressed the role played by societal conflict and domination in criminalization processes.⁴⁷⁹ They have more specifically pointed out that criminal law traditionally has focused on the criminality of the working class and deviants, whereas the crimes of the powerful largely have gone unrecognized and unpunished.⁴⁸⁰ From the point of view of this study the following argument made by Norrie is interesting: due to the fact that criminal law primarily is used to deal with the “criminal classes” of society and hence street or garden-variety criminality, it has been

⁴⁷⁴ Jareborg 1994, at 328.

⁴⁷⁵ Jareborg 1995(b), at 22. See further Section 4.4.2.

⁴⁷⁶ The concept of *moral entrepreneurs* is often connected to Howard Becker. H. S. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press of Glencoe, 1963).

⁴⁷⁷ The concept of *moral panics* is often connected to Jock Young and Stanley Cohen. See further J. Young, ‘The Role of the Police as Amplifiers of Deviancy, Negotiators of Reality and Translators of Fantasy: Some Consequences of Our Present System of Drug Control as Seen in Notting Hill’, in S. Cohen (ed.), *Images of Deviance* (Harmondsworth: Penguin Books, 1971), at 37, and S. Cohen, *Folk Devils & Moral Panics – The Creation of the Mods and Rockers* (Oxford: Basil Blackwell, 1972/1980).

⁴⁷⁸ Cohen 1972/1980, at 9. In Young’s definition of moral panics, the societal reaction to a phenomenon is always “grossly disproportionate to the event or the activities of the individuals concerned”. J. Young, ‘Moral Panic: Its Origins in Resistance, Resentment and the Translation of Fantasy into Reality’, 49 *British Journal of Criminology* (2009), at 13.

⁴⁷⁹ Einstadter & Henry 1995, at 227.

⁴⁸⁰ See further Burke 2001, at 173 and 177.

formed in a way that suits that criminality. The flip-side is hence that criminal law has not really been designed to deal with “respectable criminals”, such as corporate leaders, State officials or “ordinary people”.⁴⁸¹ As criminal law today increasingly is used the address criminality that cannot be categorized as street criminality (for example, environmental, economic *and* international criminality) the need to revise some established criminal law doctrines has arisen.

4.4. Criminal Law Is Connected to Pain Infliction

4.4.1. Criminal Law and Pain Infliction

The most central characteristic of criminal law is, however, probably the fact that criminal law is connected to the threat of intentional pain infliction or *punishment*. Criminal law is, in fact, called penal law in many languages.⁴⁸² Many punishments entail interferences with basic human rights. The right to freedom of movement is, for example, affected by imprisonment sentences and the right to life by death penalties. In addition to the pain that the punishment itself entails, criminal law is furthermore characterized by its *censuring* nature. It is generally more stigmatizing to be punished in a criminal law procedure than to receive a civil sanction. The line between criminal punishment and civil/administrative sanctions is, however, not drawn similarly in all legal systems. Due to this, for example, the European Court of Human Rights (ECtHR) has had to decide whether certain domestic proceedings fall under Article 6 of the European Convention of Human Rights (ECHR) and a person hence is “charged with a criminal offence” even though certain sanctions have been classified as a civil or administrative in domestic law. In those determinations, the degree of severity of the penalty has been a central criterion.⁴⁸³ Criminal law is thus essentially about inflicting pain and not about forgiveness or mercy.

The close connection between criminal law and pain infliction has entailed a vivid discussion on how the practice of pain infliction can be *legitimized*. With respect to legitimizing criminal law, a difference is often made between retributive and utilitarian thinking.⁴⁸⁴ In retributive thinking, the connection between wrongdoing and punishment is emphasized.⁴⁸⁵ In utilitarian thinking, on the other hand, the focus is on

⁴⁸¹ Norrie 2001, at 82.

⁴⁸² Fletcher, however, notes that in some legal systems it is not only punitive sanctions, but e.g., treatment, that is included in the “penal law”. Fletcher 2007(a), at 69-73.

⁴⁸³ See e.g., *Benham v. United Kingdom*, Judgment, GC, ECtHR, 10 June 1996, para. 56, *Engel and Others v. The Netherlands*, Judgment, PL, ECtHR, 8 June 1976, para. 82, and *Ravnsborg v. Sweden*, Judgment, CH, ECtHR, 23 March 1994, para. 35.

⁴⁸⁴ Norrie has argued that there is a connection between the emergence of the liberal ideal of criminal justice with its emphasis on individual responsibility and the development of modern theories of punishment. A. W. Norrie, *Law, Ideology and Punishment – Retrieval and Critique of the Liberal Ideal of Criminal Justice* (Dordrecht: Kluwer Academic Publishers, 1991), 15.

⁴⁸⁵ Fletcher, on his parts, argues that punishment may be imposed: (1) for a criminal act (act-based criminal law); (2) due to guilt (guilt-based criminal law); or (3) on an offender as a person (actor-based criminal law). Fletcher 2007(a), at 27-37.

what the punishment should bring about, that is, for example, deterrence, prevention and incapacitation. From the point of view of this study, the more interesting question is, however, what the pain infliction feature has entailed for the *content* of criminal law.

The fact that punishment entails intentional pain infliction has led to various safeguards against arbitrary exercise of public power. As noted above, today discretionary and non-uniform decision-making in criminal law matters is generally regarded as “scandalous and unjust.”⁴⁸⁶ The various safeguards are often called the principles of *rule of law*. Whereas the extensively used concept of “rule of law” has been given different definitions in different contexts, in the criminal law context it is, however, often connected with principles or values such as consistency as between laws, possibility of compliance, congruence between declared rule and official response, non-retroactivity, clarity, relative stability, publicity, and generality.⁴⁸⁷ In a similar vein, Jareborg has argued that a criminal law policy which follows the values of a *Rechtsstaat* is characterized by both certain *principles for criminalization* (a crime presupposes that a legitimate interest has been violated or threatened, criminal responsibility presupposes culpability, criminalizations must be general, that is, not directed towards specific individuals, the crime definitions must be understandable, etc.), certain *procedural safeguards* (the existence of independent courts, the placing of the burden of proof on the prosecutor, the requirement of proof beyond a reasonable doubt, etc.) and certain *sentencing principles* (proportionality between crime and punishment and parity between punishments for equally reprehensible crimes).⁴⁸⁸ Some of these principles identified by Jareborg will now be considered in greater detail.

4.4.2. The Pain Infliction and Its Consequences for Substantive Criminal Law

Jareborg has thus argued that the fact that criminal law is connected to pain infliction entails that the law to be rational should protect certain essential values or interests.⁴⁸⁹ There is some disagreement on what interests criminal law should protect, but those that are protected through criminal law, however, often include fundamental rights and freedoms of individuals (for example, life, physical integrity, psychological integrity, property and sexual integrity), public security and the security of the State.⁴⁹⁰ Jareborg has, in this regard, however, noted that it is not enough that there is an interest worth protecting. The question of how deserving certain behaviour is of punishment is namely not only related to what interests are violated but how direct the relationship is between the act/omission and the interest violation (for example, the difference between to kill

⁴⁸⁶ Garland 1990, at 205-206 (with reference to Beattie’s study concerning England).

⁴⁸⁷ N. Lacey, *State Punishment – Political Principles and Community Values* (London/New York: Routledge, 1988), 149.

⁴⁸⁸ Jareborg 1995(b), at 22-23.

⁴⁸⁹ Jareborg 1994, at 328.

⁴⁹⁰ Cohen has noted that what some authors call legally protected interests, is very close to what is understood by human rights. Cohen 1993, at 101. Jareborg has in relation to this noted that there seems to be a much greater universal agreement on what it, e.g., means to hurt another person than what a good life is. Jareborg 1994, at 290. Garland, on his part, points out that even though there is an agreement that murder shall be criminal, there are great variations in the exact understanding of most concepts (e.g., is abortion murder?). Garland 1990, at 57.

intentionally and to put somebody's life in danger).⁴⁹¹ The principle that not all interests worth of protecting should be protected through criminal law is also reflected in the principle of criminal law as *ultima ratio*, which establishes that criminal law should only be used when no other suitable means exist.⁴⁹² Criminal law is thus not something that can solve all social problems.⁴⁹³

The fact that criminal law is connected to pain infliction is also reflected in the principle of *nullum crimen, nulla poena sine praevia lege poenali*, that is, no crime, no punishment without previous penal law. This legality principle has been a central criminal law principle in many legal systems since the Enlightenment period. In France, for example, the 1789 *Declaration of the Rights of Man and Citizen* asserted it. In Germany, the influential legal scholar von Feuerbach gave the principle its famous Latin maxim in the early 19th century. Today, it is also codified in many human rights instruments.⁴⁹⁴ In many legal systems, the legality principle is understood to require that criminal law: (1) should be statutory law (*lex scripta*); (2) that criminal law should not be too open and vague (*lex certa*); (3) that criminal law should not be retroactively applied to the detriment of the accused person; and (4) that analogy should not be accepted in criminal law contexts. The criminal law should thus be foreseeable and fair in order to make it possible for individuals to plan their lives so that they can avoid the coercive intervention of the criminal law.⁴⁹⁵ As will be considered to some extent in the next chapter, due to the fact that international criminal law accepts customary international law, the principle of *nullum crimen sine lege* has been interpreted rather liberally in international criminal law. It is, however, clearly established that “the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission” is not acceptable.⁴⁹⁶

4.4.3. The Pain Infliction and Its Consequences for Procedural Criminal Law

For many, criminal law is characterized by the procedural law that is connected to it.⁴⁹⁷ Due to the connection between crime and punishment, most legal systems provide

⁴⁹¹ Jareborg 1994, at 330 and 332.

⁴⁹² See e.g., Fletcher 2007(a), at 157 and 262, and N. Jareborg, ‘Criminalization as Last Resort (*Ultima Ratio*)’, 2 *Ohio State Journal of Criminal Law* (2005), at 524 ff. Cf. Ashworth who has argued that criminal law should only be used in cases of “serious wrongdoing”. A. Ashworth, ‘Conceptions of Overcriminalization’, 5 *Ohio State Journal of Criminal Law* (2008), at 408.

⁴⁹³ Jareborg makes a difference between a defensive criminal law policy, which follows the values of a *Rechtsstaat*, and an offensive approach, where criminal law primarily is seen as a means to solve social problems. Jareborg argues that criminal law should be designed in accordance with the defensive model. Jareborg 1995(b), at 21-28 and 33.

⁴⁹⁴ E.g., Article 11(2), UDHR, Article 15, ICCPR, and Article 7, ECHR.

⁴⁹⁵ Lacey 1988, at 149.

⁴⁹⁶ *Delalić et al.*, Judgment, TC, ICTY, 16 November 1998, para. 313. See also e.g., *Delalić et al.*, Judgment, AC, ICTY, 20 February 2001, paras 179-180, and *Göring et al.*, Judgment, IMT, 1 October 1946, at 219.

⁴⁹⁷ See e.g., Ashworth 2000, at 230. This is so, even though also the procedural systems of the world vary. See e.g., V. Tochilovsky, ‘Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia’, in H. Fischer, C. Kreß & S. R. Lüder (eds.), *International and National Prosecution of Crimes under International Law* (Berlin: Arno Spitz GmbH, 2001), at 627-644.

greater procedural protections in criminal trials than in civil or administrative hearings.⁴⁹⁸ Individuals accused of crimes thus have the right to certain *fair trial rights*. These rights have today been codified in many human rights instruments and include the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the right to be presumed innocent until proved guilty according to law, the right to have adequate time and facilities for the preparation of one's defence, the right to be tried without undue delay, and the right not to be compelled to testify against oneself or to confess guilt.⁴⁹⁹

As this study focuses on substantive criminal law, it is the consequences of the fair trial rights on the *law of evidence* that is of special interest here. It is generally recognized that defendants in criminal law cases have the right to the "benefit of doubt." A criminal law conviction therefore requires that an individual is found guilty *beyond reasonable doubt*. This among other things entails that a "not guilty" outcome in a criminal proceedings does not have to correspond with "not guilty in reality." Criminal trials produce a *procedural truth* which, among other things, is affected by the evidence presented at trial. This is especially evident in certain legal systems, where the accepted evidence is strictly defined and the trials are rather a battle between the prosecutor and the defence team than an "objective" inquiry into the truth.

It should also be recognized that the possible outcome in many criminal justice systems is "guilty" and "not guilty".⁵⁰⁰ Zehr has in relation to this observed that: "Legally the question of guilt is an either-or question. Degrees of severity of the offense may vary, but in the end there are no degrees of guilt. One is guilty or not guilty."⁵⁰¹ The guilty-not guilty dichotomy has been found especially problematic in relation to international criminality as it is often large-scale bystander support that makes the criminality possible. This raises the question of how non-criminal bystanders should be distinguished from criminally responsible aiders and abettors.

In criminal law limitations must hence be made between legally relevant and irrelevant facts. This may entail that the complexities of the real world become overlooked.

4.5. Criminal Law Focuses on Individual Human Behaviour

4.5.1. The "Juridical Individual"

That criminal law focuses on *individual behaviour* is a further characteristic of modern criminal law. The origin of the focus on individual behaviour has also been traced back to the Enlightenment period. In the 17th–18th centuries, the idea that the basic units of society were *discrete and autonomous individuals* namely gained ground.⁵⁰² Before that, the ultimate units of society and also, for example, responsibility had been the clan, the

⁴⁹⁸ Fletcher 1998, at 26.

⁴⁹⁹ See further e.g., Article 10, UDHR, Article 14, ICCPR, and Article 6, ECHR.

⁵⁰⁰ In Scottish criminal law, the outcome "not proven" is, however also possible. 'Scots Law – Criminal Courts and Procedure' available at <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure> (last visited 3 May 2012).

⁵⁰¹ H. Zehr, *Changing Lenses* (Scottsdale: Herald Press, 1995), 67.

⁵⁰² See e.g., E. H. Wolgast, *The Grammar of Justice* (Ithaca: Cornell University Press) 1-27.

kinship group or the family.⁵⁰³ The individuality that Enlightenment brought about was, however, not individuality as the term often is understood today. In the individuality of Enlightenment, the focus was not namely on the innumerable *differences* between various persons, but on a certain characteristic *common* to most people, that is, essentially the ability to reason and calculate.⁵⁰⁴ Abstractions such as the “economic man” date back to the Enlightenment period. In line with this, Norrie has argued that modern criminal law is based upon an ideological representation of human life through the idea of the *abstract legal individual* or “juridical individual.”⁵⁰⁵ This juridical individual is, according to Norrie, characterized by *psychological individualism*, which signifies that the contexts in which individuals operate as much as possible are excluded from the realm of criminal law.⁵⁰⁶ The consequence of this is that the social and political conflicts existing in societies largely are overlooked by criminal law.⁵⁰⁷ The individual focus of criminal law has also had consequences on how collective action and collective units are perceived. Fletcher has pointed out that the law focuses on “individuals in their transactions with each other” and that “even when addressing complex systems of interaction” they are treated “as though they were single agents.” “Collective entities, their actions, their responsibility, and their guilt” are therefore, according to Fletcher, “ideas that run afoul of the methodological commitments of the legal mind.”⁵⁰⁸ This being said, for example, corporate criminal responsibility is today accepted in a number of domestic jurisdictions.⁵⁰⁹ To some extent, modern criminal law has therefore been forced to look beyond the juridical individual.

⁵⁰³ J. Feinberg, *Doing & Deserving – Essays in the Theory of Responsibility* (Princeton, New Jersey: Princeton University Press, 1970), 235.

⁵⁰⁴ Norrie 2001, at 21.

⁵⁰⁵ Norrie 2001, at 231.

⁵⁰⁶ Norrie 2001, at 223. See also Zehr 1995, at 70-73. It is sometimes argued that criminal law reflects the “folk psychological theory”, which explains behaviour in terms of desires, beliefs and intentions. This approach has been supported by Morse, who argues that “[d]iscovering a cause for behavior, whether it is biological, psychological or social, does not mean that the agent is not responsible” since “[a]ll behavior has causes”. That something (e.g., a personality trait or the environment) makes criminal behaviour more *predictable* is thus not, according to him, *per se* a reason to exclude responsibility. Only when a cause, such as deprivation, severely diminishes an individual’s capacity for rationality does Morse think that the cause should excuse the individual. More himself categorizes himself as a *compatibilist*, who does not regard free will thinking (libertarianism) and determinism to be mutually exclusive. S. J. Morse, ‘Criminal Responsibility and the Disappearing Person’, 28 *Cardozo Law Review* (2007), at 2551-2554 and 2569. See also S. J. Morse, ‘Rationality and Responsibility’, 74 *Southern California Law Review* (2000), at 256 and 263.

⁵⁰⁷ Norrie 2001, at 223. Second, there is the component of *political individualism*, which entails a strengthening of the status of individuals in relation to the State. For Norrie, the juridical individual thus has a dualistic character, as “judged against the actualities of human life, it functions to repress individuals; measured against the strength of state power, it can act to defend them.” *Ibid.*, at 224.

⁵⁰⁸ Fletcher 2002(b), at 1511.

⁵⁰⁹ On corporate criminal liability, see e.g., H. Jaatinen, *Oikeushenkilön rangaistusvastuu* (Helsinki: Lakimiesliiton kustannus, 2000), Norrie 2001, at 92 ff., and B. Swart *et al.*, ‘International Trends towards Establishing Some Form of Punishment for Corporations’, 6 *Journal of International Criminal Justice* (2008), at 947 ff. Jaatinen has observed that the traditional conception of a crime has been developed with a human offender in mind and that it therefore is impossible to apply it without modifications to corporations. Jaatinen 2000, at 16. Also Swart considers to what extent corporations may act and be morally culpable, that is, how corporations may fulfil the requirements for criminal responsibility. Swart in Swart *et al.* 2008, at 950-951.

The “juridical individual” is like much other modern criminal law thinking an outcome of the reaction against the highly discretionary criminal law that preceded modern criminal law. The merit of the “juridical individual” is its connection to *equality* thinking. All human beings have certain things in common and the focus should be placed on these common characteristics and not on individual life circumstances. In real life, however, there exists inequality and life circumstances, which means that juridical individual thinking also entails that reality is simplified and morally significant differences can be overlooked. Criminal law is, however, not generally interested in finding out how *average people* act or think. The law rather makes *normative assessments*. For example, when it is considered what a “reasonable man” would have done, it is evaluated what “is *right* for persons to think, feel and behave— or, at the very least, ways in which it is *not wrong* for them to do so.”⁵¹⁰

The modern criminal law is, however, not throughout based on the idea of the abstract legal individual. Garland has observed that the Enlightenment ideals stressing formal justice later on have been challenged by another justice conception, which requires that consideration is given to individual situations and interests.⁵¹¹ In Garlands opinion, many of the problems and dilemmas criminal law faces today (for example, how to reconcile the need to individualize sentences and the principle of equality) are the result of *contradictory conceptions of justice* which exist side by side within modern culture.⁵¹²

4.5.2. The Requirement of Individual Culpability

For criminal responsibility to become topical there must be a *wrongdoer*, a criminal agent, that is, “someone who does the wrong and can be held responsible for it.”⁵¹³ As noted, based on the traditional criminal law way of thinking it is thus essentially only individuals who can act and be guilty from a criminal law perspective. Natural events are of no interest to criminal law.⁵¹⁴ Nor are the acts of persons who are unable to form valid intentions, that is, the insane or children under a certain age. In criminal law, the agent is thus usually a natural person possessing certain intellectual capacities, or to put it another way, a certain mental maturity. Criminal law is thus based on the idea of *rational* human beings who can make *choices* regarding behaviour and action.⁵¹⁵ In this context, Fletcher has argued that:

Legal systems vary in the extent to which they show respect for offenders and suspected offenders as subjects rather than objects. One primary mode of expressing this respect is found in the rule that punishment is imposed only for human actions, that is, for the crimes committed by human beings when they act as subjects. The

⁵¹⁰ P. Westen, ‘Individualizing the Reasonable Person in Criminal Law’, 2 *Criminal Law and Philosophy* (2008), at 138.

⁵¹¹ Garland 1990, at 206.

⁵¹² Garland 1990, at 206-207.

⁵¹³ Marshall & Duff 1998, at 14.

⁵¹⁴ See e.g., Fletcher 1998, at 60, and S. H. Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’, 73 *California Law Review* (1985), at 330.

⁵¹⁵ E.g., Osiel argues that criminal law embodies *liberal* assumptions of human nature, that is, that individuals have moral autonomy and rational capacity. Osiel 1995, at 469.

requirement is called the “act requirement,” and it is as close to a universal requirement of criminal justice that exists.⁵¹⁶

For criminal responsibility to arise, it is, however, rarely enough that a person with certain faculties has caused harm (*strict responsibility*). What is furthermore needed is often called culpability or a “guilty mind” (or to use the Latin term *mens rea*). The principle of culpability (*nulla poena sine culpa*) is often mentioned as one of the fundamentals of modern criminal law.⁵¹⁷ This viewpoint is reflected, among other things, in the case law of the ECtHR, where culpability requirements have been found characteristic for criminal proceedings and hence criminal law.⁵¹⁸ Legal systems, however, vary somewhat in how they define the requirement of culpability.⁵¹⁹ In common law jurisdictions, it is common to speak of *mens rea* and to denote with this either *intention* to commit the crime or *recklessness* as to whether a crime will occur as a result of one’s actions.⁵²⁰ An act can be said to be intentional when it is done with the aim of carrying out the act.⁵²¹ Recklessness, on the other hand, is characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious disregard for or indifference to that risk.⁵²² Whereas intent and recklessness is generally regarded as enough for establishing criminal fault, criminal responsibility for *negligence* is more exceptional.⁵²³ Negligence

⁵¹⁶ Fletcher 1998, at 43-44.

⁵¹⁷ Jareborg 2005, at 522.

⁵¹⁸ See further Ashworth 2000, at 230. It should, however, be noted that the ECtHR has not ruled out strict criminal liability completely. See e.g., *Salabiaku v. France*, Judgment, CH, ECtHR, 7 October 1988, para. 27.

⁵¹⁹ It should be noted that concepts of *mens rea* and culpability can be used in two different meanings. On the one hand, the concepts can be given a *descriptive function* and in these situations *mens rea* or culpability signifies that the defendant acted with the mental state required by the law (e.g., acted with intent). On the other hand, the concepts can be used in a *normative (or evaluative) sense* and then they imply that the individual actor meets the criteria for being blamed for the action (that is, in the normative understanding, it is impossible to argue that someone is culpable if the person has, e.g., been excused). While the descriptive use has been regular in common law jurisdictions, civil law jurisdictions generally give the concept a normative understanding. See e.g., G. P. Fletcher, ‘Criminal Theory in the Twentieth Century’, *2 Theoretical Inquiries in Law* (2001), at 273-274, and Fletcher 2007(a), at 288. Likewise, Jescheck has differentiated between culpability as “the requirement of *mens rea*” and culpability as a “court’s conviction that the defendant is personally reproachable for the crime”. H.-H. Jescheck, ‘The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’, *2 Journal of International Criminal Justice* (2004), at 44.

⁵²⁰ Norrie 2001, at 35, and *Black’s Law Dictionary*, 9th ed. (2009) (‘mens rea’). See also e.g., H. L. A. Hart, *Punishment and Responsibility – Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 114-115 and 117.

⁵²¹ *Black’s Law Dictionary*, 9th ed. (2009) (‘intentional’).

⁵²² *Black’s Law Dictionary*, 9th ed. (2009) (‘reckless’).

⁵²³ E.g., A. Ashworth, ‘Further Notes on Coherence in Criminal Justice’, in *Flores juris et legum – festskrift till Nils Jareborg* (Uppsala: Iustus förlag, 2002), at 19, and Ashworth 2008, at 411. Finkelstein observes that the idea that negligence is an unsuitable base for criminal responsibility was most famously articulated by J.W.C. Turner (1936), whereas H.L.A. Hart (1968) has defended criminal negligence (not as a state of mind, but as an failure to live up to an objective standard of conduct). C. Finkelstein, ‘Responsibility for Unintended Consequences’, *2 Ohio State Journal of Criminal Law* (2005), at 579-580. Hart himself, however, notes that he does not advocate punishing negligence, but merely wants to show that it is not a form of strict liability. Hart 1968, at 157.

denotes the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.⁵²⁴ Often the criminal responsibility for negligence demands that the deviance from the reasonable standard has been significant, that is, for example, that the negligence can be characterized as *gross negligence*. The distinction between intent, recklessness and negligence stresses that culpability is not merely something that is used to distinguish criminal behaviour from non-criminal behaviour, but to grade blameworthiness.

In civil law jurisdictions, a difference is often made between *dolus* and *culpa*, so that *dolus* approximately stands for intent and *culpa* for negligence.⁵²⁵ Also in civil law jurisdictions, “[d]olus crime is [...] the archetype, but the trend is to criminalize negligent behaviour increasingly.”⁵²⁶ This is the case especially for gross negligence.⁵²⁷ Furthermore, in civil law jurisdictions, it is common to differentiate between different types of *dolus* to make the categorization more nuanced. A common distinction is that between *dolus determinatus* (or direct intention, the goal of the perpetrator has been to achieve the outcome of the crime), *dolus directus* (or almost certain knowledge, the objective of the perpetrator has not been to achieve a certain outcome, but he/she must have known that the outcome will be the one that has been realized) and *dolus eventualis* (the objective of the person has not been to achieve the realized outcome, but he/she knows that a certain outcome is possible and remains indifferent or accepting to this possibility).⁵²⁸ In comparative contexts, it is especially the relationship between common law “recklessness” and civil law “*dolus eventualis*” that has been debated. Some legal scholars equate these

⁵²⁴ *Black's Law Dictionary*, 9th ed. (2009) ('negligence').

⁵²⁵ In civil law jurisdictions, it is common to distinguish between: (a) the requirement that the offence elements are fulfilled; (b) the requirement that the act/omission has been wrongful; and (c) the requirement of personal guilt. The question of whether the offender has acted with intention is today often considered as a question of whether the offence elements are fulfilled (and not as a question of personal guilt). See e.g., G. Taylor, 'Concepts of Intention in German Criminal Law', 24 *Oxford Journal of Legal Studies* (2004), at 120. In this regard, also the distinction between act-oriented culpa (or fault) and actor-oriented culpa (or guilt) should be noted. E.g., N. Jareborg, *Essays in Criminal Law* (Uppsala: Iustus förlag, 1988), at 29, and Jareborg 1994, at 36-37. A similar distinction is that between the questions: (a) whether the offender generally speaking should have acted otherwise (Finnish *teon huolimattomuus*); and (b) whether the actor can be blamed for the way he/she acted (Finnish *tekijän huolimattomuus*). V. Hahto, *Tuottamus vahingonkorvausoikeudessa* (Helsinki: WSOY, 2008) 13. Others, however, see intention as a question of whether there has been personal guilt. S. Melander, *Rikosoikeus 2010-luvulla* (Helsinki: Helsingin yliopiston oikeustieteellinen tiedekunta, 2010) 90. Due to international criminal law's orientation towards the common law's *mens rea* thinking, intent is considered here in connection to the question of culpability.

⁵²⁶ Jareborg 2002, at 45. Hörnle has noted that in German law there are more crimes that can be committed negligently than in American and English law (common law jurisdictions). T. Hörnle, 'Social Expectations in the Criminal Law: The 'Reasonable Person' in a Comparative Perspective', 11 *New Criminal Law Review* (2008), at 6.

⁵²⁷ E.g., in Finland, a difference is made between gross negligence (*törkeä tuottamus*) and negligence (*tuottamus*) and both forms of responsibility demand that the criminal code explicitly stipulates that negligence can be the basis for criminal responsibility. Criminal Code of Finland, Chapter 3, Sections 5 and 7. Most provisions in the criminal code providing for negligence responsibility demand gross negligence. See further e.g., A.-M. Nuutila, *Rikosoikeudellinen huolimattomuus* (Helsinki: Lakimiesliiton kustannus, 1996), 581, 590-591, and 612.

⁵²⁸ See e.g., K. Nuotio & M. Majanen, *Rikosoikeuden poluilla* (Helsinki: Helsingin yliopisto, 2003), at 51-53, and Taylor 2004, at 106. Generally on intent in criminal law, see further e.g., J. Matikkala, *Tahallisuudesta rikosoikeudessa* (Helsinki: Suomalainen lakimiesyhdistys, 2005).

concepts,⁵²⁹ whereas others point to differences. For example, Fletcher has argued that whereas *dolus eventualis* refers to a negative attitude towards causing harm (a certain attitude), the common law recklessness only requires the conscious running of an unjustified risk (certain knowledge).⁵³⁰ Duff has, however, argued that recklessness can be viewed both as a *choice* (a conscious and unjustified risk-taking) and as an *attitude* (an indifference to the consequences of one's action).⁵³¹

In all criminal justice systems, the *intent* is thus central even though the systems define the concept somewhat differently. In certain legal systems, a difference is, for example, not made between intent and recklessness, which can cause confusion in comparative contexts. This divergence in understanding of what constitutes intent is partly due to the fact that the concept can be used in different meanings both in everyday speech and in legal parlance. Duff has, for example, held that there are two strands of judicial thought about the legal meaning of this concept. The first one analyses intention in terms of *desire and foresight*. An agent intends both those consequences which he wants to come about and those which he foresees as being to some appropriate degree likely or probable. The second strand explains intention in terms of what the agent *decides to do*.⁵³² This difference in use is reflected in the distinction between *intention in relation to the consequence* and *intention in relation to the conduct*. It is also reflected in the distinction between *intending* a result and bringing about the result *intentionally*. For example, Duff has argued that:

The paradigm distinguishes an action's intended effects, which an agent acts in order to bring about, from its foreseen side-effects, which she expects and might want, but does not act in order to bring about. [...] Philosophers as well as jurists sometimes include expected side-effects within the scope of intention. [...] I do not intend [...] the expected side-effects of my action; but I might be said to bring them about intentionally.⁵³³

Criminal law generally demands intention in relation to the conduct and consequences, but certain crimes also demand that an act or omission is committed with a certain further outcome in mind. These crimes are often called *specific intent crimes*.⁵³⁴ Specific intent should be distinguished from motives that refer to "the reason [...], the] consequences are desirable to the actor".⁵³⁵ It is generally held that the motives are irrelevant in criminal law when guilt determinations are made.

⁵²⁹ E.g., Cassese 2008, at 58 and 66.

⁵³⁰ Fletcher 2007(a), at 317. Taylor has, however, emphasized that *dolus eventualis* has both a cognitive element and a requirement of a particular attitude. Taylor 2004, at 109-110.

⁵³¹ R. A. Duff, *Intention, Agency & Criminal Liability – Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990), 140 ff.

⁵³² For Duff neither of these definitions is, however, of great clarity. Duff 1990, at 18.

⁵³³ Duff 1990, at 74-76 (see also at 36-37). He also makes a difference between: (1) intended effects (i.e., reason for action); (2) expected side-effects which provide reason against action; and (3) expected side-effects, which provide no reason either for or against the action. He notes that the first two are brought about intentionally. Category 3 side-effects are "effects which the agent does not act with the intention of bringing about, but which are properly ascribed to her as their responsible agent." *Ibid.*, at 79.

⁵³⁴ See e.g., Duff 1990, at 38, and Hart 1968, at 117-118, 120-121 and 125.

⁵³⁵ M. T. Rosenberg, 'The Continued Relevance of the Irrelevance-of-Motive Maxim', 57 *Duke Law Journal* (2008), at 1146. E.g., a person may intentionally kill another person (general intent) with the intent to participate in the destruction of a particular societal group (specific intent) with the underlying desire to gain personal advantages (motive). See further Section 6.3.5.2.

Besides intent, a guilty mind also prerequisites a certain cognitive element, namely *knowledge*. Knowledge can be defined as awareness that a circumstance exists or a consequence will occur in the ordinary course of events.⁵³⁶ Cassese has observed that while knowledge in many common law jurisdictions clearly is distinguished from the volatile aspect of the *mens rea*, it in many civil law jurisdictions is part of the *dolus* or *culpa*.⁵³⁷

Lacey has observed that the focus on intention, recklessness, foresight, knowledge etc. represents a *capacity-based viewpoint on responsibility*, which is characteristic for modern criminal law.⁵³⁸ At the same time, other conceptions of responsibility (continue to) co-exist and influence the formation of the law, namely *character principles of responsibility* and *outcome responsibility*.⁵³⁹ In the same way as Garland, Lacey has therefore questioned the assumption of some criminal law theorists that criminal law today is based on *one* coherent principle of responsibility.⁵⁴⁰ This being said, capacity-based conceptions of responsibility dominate in the criminal law today.

4.5.3. Acts and Omissions that Are Connected to the Causing of Harm

It has been observed that the primary interest of criminal law is the *harmful consequences* of human action.⁵⁴¹ It has therefore been suggested that only individual behaviour that causes *harm* or another relevant change in the external world should be criminalized. That an individual through his/her acts or omissions causes harm or at least substantially contributed to its occurrence, that is, *causation* or *contributory fault*, is thus generally a prerequisite for criminal responsibility.⁵⁴² In rare cases, it is accepted in criminal law that the contributory fault of one person is ascribed to another person (vicarious liability).⁵⁴³

⁵³⁶ Article 30(3), ICC Statute. Clark notes that the reference to circumstances “was a crucial one, and caused much debate later in the process of drafting the Elements.” R. S. Clark, “The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences”, 12 *Criminal Law Forum* (2001), at 306.

⁵³⁷ Cassese 2008, at 61-62.

⁵³⁸ N. Lacey, ‘Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice’, 1 *Criminal Law and Philosophy* (2007), at 236 and 246. The human capacities of cognition and volition hence today lie as the foundation of criminal law. *Ibid.*, at 236.

⁵³⁹ Lacey distinguishes between two types of character principles: (1) the overall-character principle arguing that the “defendant’s conduct is evidence of a wrongful, bad, disapproved character trait”; and (2) the more cautious form of character responsibility restricting the evaluation of the specific conduct which forms the basis of the present allegation. Lacey 2007, at 238-239. In outcome responsibility, “being the cause of a particular outcome may under certain circumstances ground an attribution of responsibility”. *Ibid.*, at 239.

⁵⁴⁰ Lacey 2007, at 240 and 246.

⁵⁴¹ E.g., Fletcher 1998, at 60. Fletcher notes that the production of certain harms per definition requires human action (e.g., rape). In other cases, the harm can be caused both by human action and natural events (e.g., death of a human being). In these cases, it must first be settled whether the harm was caused by human action or a natural event, before the question of individual responsibility at all becomes topical. *Ibid.*, at 60-61.

⁵⁴² E.g., Feinberg 1970, at 222, and Norrie 2001, at 134. The question of what criteria of causation should be applied in criminal law (or in a particular criminal law decision-making situation) is a complicated one and the alternatives are many. See further e.g., P. K. Ryu, ‘Causation in Criminal Law’, 106 *University of Pennsylvania Law Review* (1958), at 786 ff.

⁵⁴³ Feinberg 1970, at 227.

In these rare cases, there is usually a special relationship between the person in fault and the person held liable, for example, a superior-subordinate relationship that is deemed to justify the extended liability.⁵⁴⁴ The main rule is, however, that criminal responsibility requires both *personal fault* (causation or participation) and *personal guilt* (guilty mind). According to modern criminal law, criminal responsibility for the acts and thoughts of others is thus generally found unacceptable as well as collective criminal responsibility.⁵⁴⁵ In practice, it may, however, be difficult to draw the line between acceptable and unacceptable responsibility for the acts of others in situations where many people act together.⁵⁴⁶

Criminal responsibility thus generally presupposes that harm has been caused and individual fault in relation to that harm. To a certain degree, it is, however, accepted that behaviour that only entails an increased risk of harm can lead to criminal responsibility (so-called endangerment offences) and, in fact, these types of criminalizations have become more common.⁵⁴⁷ Significantly, criminal responsibility, however, always requires *blameworthy behaviour*. Personal characteristics or dispositions, social status or position or mere thoughts are hence today generally held as factors that cannot function as the base for criminal responsibility.⁵⁴⁸ A central element in crime definitions is therefore the description of the unlawful deed or conduct. In common law jurisdictions, this is often called the *actus reus* part of the crime definition.⁵⁴⁹ In civil law jurisdictions, on the other hand, it is generally held that criminal responsibility presupposes that all offence elements as they have been defined in a criminal statute are satisfied (German *Tatbestandsmäßigkeit*). The aim of *actus reus* element is to limit the criminal legislation by requiring a specification of the conduct that will incur responsibility.

In most cases, the *actus reus* is a particular act, but it may also consist of an omission. The reason why criminal law is more focused on acts than omissions⁵⁵⁰ has by Norrie been explained by the liberal worldview on which criminal law is based and in which duties to act mainly are established by contractual obligations.⁵⁵¹ Some

⁵⁴⁴ Feinberg has noted that: “In short, liability can transfer, but not agency, causation, or fault [...], and certainly not guilt.” Feinberg 1970, at 233.

⁵⁴⁵ See e.g., Cassese 2008, at 33, and *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 186. The prohibition against collective punishments has explicitly been endorsed in international humanitarian law. See e.g., Article 87, GC III, Article 33, GC IV, Article 75, AP I, and Article 4, AP II. See also Human Rights Committee, General Comment No. 29, para. 11 (UN Doc. CCPR/C/21/Rev.1/Add.11).

⁵⁴⁶ This question will be considered further in Chapter 7.

⁵⁴⁷ See e.g., H. Takala, ‘On Risks and Criminal Law’, in A. Snare (ed.), *Beware of Punishment – On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag A/S, 1995), at 52-53. According to Nuotio, the increased focus on activities that have a high risk on causing harm has entailed that criminal law has started to pay more attention to organizational wrongdoing, where the focus is not so much on the causal relationship between happenings, but rather on who bears the responsibility based on the distribution of responsibility in the organization. K. Nuotio, ‘Yhteiskunnallistuva rikosoikeus’, *Lakimies* (1998), at 593.

⁵⁴⁸ E.g., B. M. Baker, ‘Theorizing about Responsibility and Criminal Liability’, 11 *Law and Philosophy* (1992), at 408-409 (discussing the Anglo-American act doctrine), and Wallerstein 2007, at 2700.

⁵⁴⁹ *Actus reus* is a Latin term that denotes “guilty act” or “deed of crime”. Black’s Law Dictionary defines *actus reus* as the wrongful deed that comprises the physical components of a crime. *Black’s Law Dictionary*, 9th ed. (2009) (‘actus reus’).

⁵⁵⁰ In certain legal systems (e.g., Anglo-American criminal law), omission responsibility is exceptional. Norrie 2001, at 120.

⁵⁵¹ Norrie 2001, at 124-125.

legal scholars have, however, found that omission responsibility should be extended as “[t]here are certain duties of citizenship which extend beyond those responsibilities that one has voluntarily undertaken [...] that comes from living in a community with others.”⁵⁵² The broadening of omission responsibility is, however, complicated by the difficulty to draw the line between situations where there is a duty to act and situations where there is not, and the fact that “[t]he law of acts secures liability for a particular group of individuals, while the law of omissions ensures that the boundaries of liability will not become extended to cover other groups who are not constructed as criminal by the dominant ideology.”⁵⁵³ The latter explanation for the fact that there is reluctance to broaden omission responsibility is particularly interesting for international criminal law, as many international crimes are characterized by extensive bystander passivity. It should be noted that whereas criminal law traditionally often has focused on isolated deeds, it has become more usual to consider chains of events instead. In practice, this may entail that act-omission distinction is difficult to maintain, as such chains may consist of both acts and omissions.⁵⁵⁴

That criminal responsibility requires *blameworthy* behaviour furthermore entails that the behaviour must be attributable to the person in question. More specifically, it is often pointed out that the criminalized behaviour should be carried out *voluntarily*.⁵⁵⁵ In reality, the question of whether an action or an omission has been voluntary or not is often one of degree. An act carried out under a death threat is more voluntary than as something done as a result of a spasm, but it is not fully voluntary.⁵⁵⁶ In this regard, a difference has been made between *involuntary behaviour*, which involves incapacity or inability to control conduct in accordance with choices, and *non-voluntary behaviour*, which involves being unable to choose freely because of constraints.⁵⁵⁷ In criminal law, a difference is sometimes made between a *capacities* viewpoint on voluntariness in criminal law, where the central question is whether the individual has certain faculties, abilities, etc. which makes it possible for him/her to conform to the law.⁵⁵⁸ Criminal law voluntariness can, according to this perspective, be negated by factors such as lack of muscular control, impaired mental capacity, lack of skills and knowledge and constraints on choice imposed by circumstances.⁵⁵⁹ An alternative to the capacities viewpoint is the

⁵⁵² Norrie 2001, at 128 (partly referring to e.g., Ashworth).

⁵⁵³ Norrie 2001, at 133. On omission responsibility, see also e.g., A. Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford: Oxford University Press, 2006), at 109-113.

⁵⁵⁴ In certain situations, a *per se* non-criminal act may affect evaluations of later omissions. Nuotio mentions as an example a teacher taking children to a pool area to swim, where the teacher first actively acts and creates a situation (a situation of increased risk) and where an omission later on may take place. Nuotio 1998(a), at 286-287 and 289.

⁵⁵⁵ Norrie 2001, at 110.

⁵⁵⁶ See further e.g., Feinberg 1970, at 149, Fletcher 2007(a), at 286, and H. L. A. Hart & A. M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959) 38-39. Note also the difference between (voluntary) action and mere bodily movements. Feinberg 1970, at 150, and Fletcher 2007(a), at 286.

⁵⁵⁷ Baker 1992, at 420 (referring to Sistare). See also Ashworth 2006, at 224. Ashworth has observed that involuntariness or automatism is primarily a denial of authorship. *Ibid.*, at 98.

⁵⁵⁸ Baker 1992, at 403, and C. T. Sistare, ‘Models of Responsibility in Criminal Theory: Comment on Baker’, *7 Law and Philosophy* (1989), at 311.

⁵⁵⁹ Baker 1992, at 417-418.

cognitivist viewpoint, where the idea of a conscious choice is central.⁵⁶⁰ While it is clear is that criminal responsibility does not arise in situations of involuntary behaviour, the legal systems in the world, however, differ somewhat in how they approach non-voluntary behaviour. In all criminal law systems, it is given legal significance that a person, for example, acts in self-defence or in duress, but how it is done varies.

4.5.4. Degrees of Guilt

Criminal law thus has numerous in-built requirements about factors that must be present for criminal responsibility to arise. These factors include a guilty mind, behaviour having a causal link to a harm, etc. These requirements are, however, not only relevant for the determination of whether there is criminal guilt or not. They are also relevant for evaluations of the blameworthiness of the behaviour or the *degree of guilt*. Fletcher has in this regard observed that:

The striking assumption of modernity is that some people are more guilty than others. Their relative degrees of guilt depend on two factors: first, how much they contribute or how close they come to causing physical harm, and second, their internal knowledge of the action and its risks. The principal who controls the actions leading to harm is more guilty than the accessory who merely aids in execution of the plan. Those who take risks intentionally are worse than those who do so inadvertently. These assumptions about relative guilt are built into the modern way of thinking about crime and punishment.⁵⁶¹

Criminal law has thus codified certain societal perceptions of what kinds of mental states and behaviour are more blameworthy than others. From the point of view of international criminal law this is interesting. Modern criminal law is namely largely based on blameworthiness evaluations done in connection to ordinary criminality. The special features of international criminal law, however, raise the question of whether certain established assumptions should be reconsidered. It can, for example, be asked whether the idea that the hands-on criminal generally is one of the most blameworthy participants in the crime should be abandoned.

4.6. Concluding Remarks on the “Essence” of Criminal Law

The aim of this chapter has been to introduce the instrument used to deal with international criminality, that is, to give a *description* of what criminal law is. To give

⁵⁶⁰ Baker 1992, at 418 (and 403), and Sistare 1989, at 311. A similar distinction seems to be the one between behaviour that the actor could have avoided and behaviour that could not have been avoided. Fletcher refers to Jaspers and observes that: “Moral guilt may coincide with criminal guilt, but it need not do so. [...] Jaspers would say that those who act under duress or personal necessity [...] are still morally guilty if they could have avoided the act.” Jasper also identifies political and metaphysical guilt. “Both political and metaphysical guilt are beyond the moral category of the avoidable. They attach even in cases of living under dictatorships where it is not humanly possible to avoid the inhuman actions of those in charge. Political guilt is borne by each person in a political community merely by virtue of being there and being governed.” Fletcher 2002(b), at 1530-1531.

⁵⁶¹ Fletcher 2002(b), at 1564-1565.

a representative description is obviously difficult due to the differences between the various criminal justice systems of the world. Despite the differences, there is, however, something that can be called “modern criminal law” with certain typical features. Modern criminal law is, first and foremost, characterized by it being created as a *reaction* to the highly discretionary criminal law that existed before, and as such modern criminal law emphasizes the equality of people and values such as consistency and equal treatment. This is the central strength of modern criminal law, which, however, at the same time has entailed that criminal law at times overlooks aspects of reality. Zehr has observed that: “Social, moral, and personal factors are relevant only insofar as they are legally defined as relevant” and that “questions of social justice are rarely relevant.”⁵⁶² Likewise Norrie has criticized the criminal law conceptions of voluntariness and causation for being based on a simplified conception on the relationship between individual agency and societal structures, in which the social character of the lives of individuals to a high degree is overlooked.⁵⁶³ Modern criminal law thus essentially focuses on *individuals* as *rational actors*, and not as features formed by their history and surrounding. As such, criminal law has a tendency to emphasize the significance of individuals in producing outcomes. This feature of criminal law has been found to be especially problematic in relation to international criminality, as both the phenomenology and criminology of international criminality stresses the role of situational factors in connection to individual offending. Criminal law is also strongly characterized by it being connected to intentional pain infliction by public authorities. Requirements of culpability, causation and harm are therefore typical for criminal law.

In relation to criminal law, critical criminologists have pointed out that criminal law at least traditionally only has been used to deal with the “criminal classes” or ordinary criminality, and that harmful behaviour by the elites or non-deviant people are not generally considered as criminal. It should, however, be noted that it is not only international criminality which by its nature differs from the garden-variety criminality, which criminal law so-to-say primarily addresses. As noted, in many domestic criminal justice systems, the last decades have been characterized by the expansion of the use of criminal law. This development has had consequences not only on the *amount* of criminal legislation, but on its *content*. Criminal law is increasingly used to address phenomena such as corporate misbehaviour and environmental harm, where the criminals are not traditional street criminals. Many legal systems today recognize corporate criminal responsibility. Also otherwise criminal law has gained new characteristics. The law does not anymore only focus on the intentional causation of harm, but increasingly considers negligent behaviour and risk behaviour. This being said, many of these “new” developments continue to be “legal irritants” that challenge established perceptions of “good criminal law”.

New types of criminal law that attracts discussion is, however, not merely created as a response to new societal phenomena that demand new legal solutions, but may rather be the result of legislative processes in which thorough consideration has not been given to the basic dogmas of criminal law. Ashworth, in this regard, argues that: “Legislatures frequently create and reenact offenses without proper consideration of the extent of

⁵⁶² Zehr 1995, at 81.

⁵⁶³ Norrie 2001, at 140 (regarding causation).

their conformity with general principles or of the justification for departures.”⁵⁶⁴ He, for example, finds it problematic that it is not anymore self-evident that without a guilty mind there can be no criminal liability.⁵⁶⁵ A difficult question is therefore to what extent a certain deviation from the basic tenets of criminal law constitutes a violation of the tenet or rather a move away from it. When finding a deviation from an established principle one must therefore consider to what extent the deviation, in fact, is justified and as such could be considered as a new path in criminal law.

So, if the central principles of modern criminal law are not necessarily absolute or unchangeable, what is the point in trying to identify them? One function of the basic tenets is to function as an instrument in *normative assessments* of criminal law. Particular criminal law provisions/case law can be found to live up or fall short of the principles, goals and values of “good criminal law”.⁵⁶⁶ There thus exists some sort of “ideal criminal law” against which concrete criminal law can be assessed. In international criminal law, for example, certain doctrines have attracted considerable criticism from criminal law scholars and the identification of the basic principles of criminal law thus helps one to understand why.⁵⁶⁷ For this thesis, the identification of the basic principles of criminal law is also important in that the principles have affected the legal choices made in certain questions. Furthermore, the tenets have a value in themselves, even though they are not necessarily unchangeable. Nuotio has pointed out that one function of these basic tenets of criminal law is to *slow down* the process in which the criminal law is changed and in this way protect the criminal law from becoming an abused instrument for solving all societal problems.⁵⁶⁸ New paths in criminal law must hence be justified well.

⁵⁶⁴ A. Ashworth, ‘Towards a Theory of Criminal Legislation’, 1 *Criminal Law Forum* (1989), at 41. In fact, he finds that “almost all jurisdictions are experiencing a constant stream of criminal legislation that tramples clumsily, needlessly, or unfairly on general principles of criminal law.” *Ibid.*, at 60.

⁵⁶⁵ Ashworth 2000, at 228.

⁵⁶⁶ Cf. R. A. Duff, ‘Theorizing Criminal Law: A 25th Anniversary Essay’, 25 *Oxford Journal of Legal Studies* (2005), at 354-355.

⁵⁶⁷ E.g., the joint criminal responsibility doctrine. See further Chapter 7. One may, of course, ask to what extent it is necessary for *international* criminal law to adhere to the fundamentals of *municipal* criminal law. It is, e.g., possible to argue that international context sometimes requires *sui generis* solutions. Cf. M. Damaška, ‘The Shadow Side of Command Responsibility’, 49 *American Journal of Comparative Law* (2001), at 456-457, and 471. As the goal of many fundamentals is to protect individuals against abuse of power, it is not unproblematic to disregard them in the international context either.

⁵⁶⁸ Nuotio 1998(a), at 20. The basic principles of criminal law are thus persevered by criminal law scholars, judges, etc. but also by, e.g., human rights law.

5. THE SPECIAL FEATURES OF INTERNATIONAL CRIMINAL LAW

5.1. Unusual Sources of Criminal Law

5.1.1. A Short Recapitulation of the History of International Criminal Law

Traditionally, public international law has been a branch of law regulating State behaviour and protecting State interests. In the late 1940s, the multinational prosecution of the leading war criminals of World War II and the emergence of human rights law, however, brought new elements into the law. The question of *individual* obligations and *individual* rights then became topical. International criminal law is the branch of public international law, which addresses individual obligations.

Historically, the development of international criminal law has been strongly connected to the establishment and existence of multinational or international criminal tribunals.⁵⁶⁹ After World War II, two such tribunals were established to prosecute the some leading war criminals, that is, the Nuremberg and Tokyo tribunals. In the immediate post-war period, there were also some other war crime trials, such as the trials held before the United States Military Tribunals in Nuremberg based on Control Council Law No. 10 (CCL).⁵⁷⁰

In its judgment, the Nuremberg Tribunal put forward that: “The [Tribunal’s] Charter is not an arbitrary exercise of power [...] but in the view of the Tribunal, [...] it is the expression of international law existing at the time of its creation [...]”⁵⁷¹ It has, however, frequently been noted that of the crimes within the jurisdiction of the post-World War II tribunals only war crimes was somewhat established. Crimes against humanity and crimes against peace were not settled crimes and as such the punishment for these crimes was controversial.⁵⁷² In the mid-1940s, it was not only the international

⁵⁶⁹ The Nuremberg Tribunal has, *inter alia*, been called multinational, a “joint national court” (Jescheck) and a “four-power tribunal” (Jackson). W. Jackson in ‘Panel I. Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial’, 12 *New York Law School Journal of Human Rights* (1995), at 495, and Jescheck 2004, at 39. Whereas the Nuremberg and Tokyo tribunals often are characterized as multinational, the ICTY, ICTR and ICC are international tribunals. E.g., ICTY in its Bulletin notes that whereas the Nuremberg Tribunal was a “military court, established by the four victorious Allies as a part of a political settlement,” ICTY is a “non-military court, established by the Security Council under Chapter VII of the UN Charter.” *Bulletin of the International Criminal Tribunal for the Former Yugoslavia*, No. 5/6 (1996), at 4.

⁵⁷⁰ See further *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volumes I-XV.

⁵⁷¹ *Göring et al.*, Judgment, IMT, 1 October 1946, at 218.

⁵⁷² See e.g., Jescheck 2004, at 41-42, 48 and 50, Meron 2006, at 564-565 (see, however, an opposite view at 567) and R. Wolfé in ‘Panel I. Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial’, 12 *New York Law School Journal of Human Rights* (1995), at 485-490. The Nuremberg Tribunal, however, also found that the “law of the Charter is decisive, and binding upon the Tribunal” and that Allied occupying countries had an “undoubted right” to legislate for the occupied territories. *Göring et al.*, Judgment, IMT, 1 October 1946, at 218. In practice, it has therefore been argued that the tribunal in connection to crimes against peace and crimes against humanity essentially had to rely on its *ex post facto* adopted charter or the “binding occupation law.” Jescheck 2004, at 41.

crimes that were not firmly established, but also the principle of international individual criminal responsibility. The Nuremberg Tribunal, however, famously stipulated that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁵⁷³ This statement has been found to announce “the end of the classic doctrine whereby only states possess legal personality in international law.”⁵⁷⁴ Taken into consideration the alternatives put forward to the criminal prosecutions (such as, summary executions of the leading war criminals) the prosecutions have, however, in retrospective often been regarded as a civilized means to address the atrocities committed during World War II. The way in which especially the Nuremberg Tribunal tried to take into consideration the retroactivity concerns (for example, by interpreting the crime against humanity narrowly) as well as the fair trial rights of the accused (such as, the presumption of innocence) has also enhanced its historical legitimacy. After the post-World War II trials, the UN General Assembly affirmed the principles of international law recognized in the Charter of the Nuremberg Tribunal and in its judgment.⁵⁷⁵ Also human rights instruments adopted after World War II have acknowledged the existence of international criminal law.⁵⁷⁶

In the 1940s, international criminal law thus significantly developed through war crime tribunals. In the same time period, the law, however, also evolved through the adoption of international treaties. Most importantly, the Genocide Convention was adopted in 1948 and the four Geneva Conventions in 1949. During the rest of the Cold War, international criminal law, however, hardly developed at all. Attempts to adopt international criminal law instruments frequently failed⁵⁷⁷ and prosecutions of international crimes were rare.

The next phase of fast development of international criminal law started in the mid-1990s, when the UN Security Council through resolutions adopted under Chapter VII of the UN Charter established ICTY (1993) and the ICTR (1994). These tribunals were, in the same way as the post-World War II tribunals, created *after the crimes already had been committed*. When, for example, the ICTY was established the UN Secretary-General who was responsible for the preparation of a draft statute therefore emphasized the need to limit the subject-matter jurisdiction of the tribunal to violations of international humanitarian law that beyond any doubt entail individual criminal responsibility based on customary law.⁵⁷⁸ Through their case law, the *ad hoc* tribunals have made international criminal law much more settled and specific. In 1998, the most significant instrument of international criminal law was adopted viz. the Rome Statute of the ICC, which is

⁵⁷³ *Görling et al.*, Judgment, IMT, 1 October 1946, at 223.

⁵⁷⁴ Jescheck 2004, at 43.

⁵⁷⁵ UN Doc. G.A. Res. 95 (I) of 11 December 1946.

⁵⁷⁶ E.g., Article 15, ICCPR stipulates that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed” and that nothing in the article “shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

⁵⁷⁷ AP I and AP II, and the Torture Convention are, however, examples of conventions that were adopted during the Cold War period.

⁵⁷⁸ UN Doc. S/25704, 3 May 1993, paras 33-34.

the only international criminal court statute that has been adopted *before* the crimes have been committed. In the 21st century, the international criminal tribunals have been followed by so-called hybrid courts that have both international and national “elements”, such judges and applicable law. Such hybrid tribunals are for example the SCSL and the ECCC.

Now in the 2010s, after an intense phase of development, international criminal law is (again) experiencing a period where its future direction is debated and its legitimacy is questioned.⁵⁷⁹ This being said, and as noted by Schabas, “it is probably misplaced to contemplate a total collapse [of international criminal justice] analogous to what occurred in the 1920s and the 1950s”, as it has “become too important a feature of the international system.”⁵⁸⁰

5.1.2. The Legal Sources of International Criminal Law

5.1.2.1. Introduction

In Article 38(1) of the *Statute of the International Court of Justice* (ICJ) three primary sources of international law are enumerated: international conventions, international custom and general principles of law recognized by civilized nations. Furthermore, two subsidiary sources are mentioned: judicial decisions and the teachings of the most highly qualified publicists of the various nations. As international criminal law is part of public international law, the international sources of law are also *a priori* the sources of international criminal law.⁵⁸¹ This being said, the use of legal sources in international criminal law has not always followed the model suggested by general public international law. To begin with, the Article 21 of the ICC Statute contains a special provision on applicable law, which guides the functioning of that court. Also the *ad hoc* tribunals have, however, at times also approached the sources of law differently.⁵⁸² The international criminal tribunals’ uneasy relationship with the international legal sources may be explained with the fact that the tribunals have to apply the legal sources in a *criminal law context*. In criminal law, specificity, clarity and legal certainty are important values.

In domestic legal systems, criminal law is usually created by special law-making bodies, such as parliaments, which adopt the law in the form of written criminal statutes or codes. In these law-making processes, the goal is explicitly to create criminal law. In international law, there are no equivalent international legislators. The main actors in international law are States and multilateral treaty-making processes can only by extensive analogy be compared to domestic legislative processes. In many of the treaty negotiations that have resulted in treaties that are relevant for international criminal law,

⁵⁷⁹ See further e.g., D. Luban, ‘After the Honeymoon – Reflections on the Current State of International Criminal Justice’, 11 *Journal of International Criminal Justice* (2013), at 505-515, D. Robinson, ‘A Cosmopolitan Liberal Account of International Criminal Law’, 26 *Leiden Journal of International Law* (2013), at 127-153, and W. A. Schabas, ‘The Banality of International Justice’, 11 *Journal of International Criminal Justice* (2013), at 545-551.

⁵⁸⁰ Schabas 2013(a), at 551.

⁵⁸¹ E.g., R. Cryer, H. Friman, D. Robinson & E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 9.

⁵⁸² A. Zahar & G. Sluiter, *International Criminal Law – A Critical Introduction* (Oxford: Oxford University Press, 2008), 79 (especially regarding procedural law).

the goal has not explicitly been to create criminal law. The treaties therefore often contain sweeping and loose compromise rules which are functional in an inter-State context, but problematic in a criminal law context.⁵⁸³ The process through which *customary international law* is created is even further away from the usual way in which criminal law in domestic legal systems is adopted.

5.1.2.2. Treaty Law and Other Written Sources of Law

In international criminal law, there is one legal source that on the surface reminds of domestic statutory criminal law, namely the *statutes of the international criminal tribunals*. Especially, the statutes of ICTY and ICTR, however, are very different types of written legal instruments. To begin with, the statutes are UN Security Council resolutions, that is, instruments adopted by a political organ in processes which cannot be characterized as legislative. Secondly, and most importantly, the statutes have been adopted *after* most of the crimes have been committed, that is, *ex post facto*. It has therefore been held that the statutes “are not themselves *law*”, but rather “pointers to a law existing in some form in the rarefied sphere of international law at the time of the alleged offences.”⁵⁸⁴ This view is also reflected in the report by the UN Secretary-General, which preceded the adoption of the ICTY and which contained its draft statute. In that report, the Secretary-General put forward that “the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”⁵⁸⁵ The ICTY has also in its case law stressed the customary law basis of its authority to punish.⁵⁸⁶

The way in which the *ad hoc* tribunals have been created may give the impression that treaty law is completely insignificant in relation to those tribunals, but this is not quite the case. To begin with, the statutes of the tribunals have sometimes been characterized as treaty law, as the UN Security Council resolutions find their binding force in Article 25 of the UN Charter, which is a treaty.⁵⁸⁷ Secondly, the tribunals have often referred to

⁵⁸³ Cassese 2008, at 9.

⁵⁸⁴ Zahar & Sluiter 2008, at 80.

⁵⁸⁵ UN Doc. S/25704, 3 May 1993, para. 34.

⁵⁸⁶ See e.g., *Milutinović et al.*, Decision (JCE), AC, ICTY, 21 May 2003, para. 9, *Hadžihasanović et al.*, Decision (command responsibility), AC, ICTY, 16 July 2003, para. 44, *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 141, and *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 83. See also T. Meron, ‘Revival of Customary Humanitarian Law’, 99 *American Journal of International Law* (2005), at 821. See, however, the *Tadić* Appeal Judgement, where the Appeals Chamber puts forward that “it is open to the Security Council [...] to adopt definitions of crimes in the Statute which deviate from customary international law.” *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 296. Sluiter, however, correctly observes that this pronouncement is problematic in that the principle of legality demands that the criminal responsibility of individuals is not broadened retroactively. G. Sluiter, “Chapeau Elements” of Crimes against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals’, in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (New York: Cambridge University Press, 2011), at 110. It is substantive criminal law that is guided by the principle of *nullum crimen sine lege*. With respect to procedural law, there is no similar requirement of pre-adopted law, which gives the statutes a more central role in the procedural sphere. Cf. Zahar & Sluiter 2008, at 79. Regarding customary international law in the procedural sphere, see also *Blaškić*, Judgement (Croatia), AC, ICTY, 29 October 1997, para. 64.

⁵⁸⁷ *Cryer et al.* 2010, at 9. See also Cassese 2008, at 15-16.

treaties as evidence of customary law.⁵⁸⁸ The case law of the tribunals therefore contain many references to international treaties, such as the 1948 Genocide Convention and the 1949 Geneva Conventions. Thirdly, and most controversially, the tribunals have also found that treaties can establish international criminality in cases when the country in which the crimes have taken place has ratified the treaty. For example, in the *Kordić and Čerkez* case, the ICTY Appeals Chamber established that: “The maxim of *nullum crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention whether it is part of customary international law.”⁵⁸⁹ The ICTR has similarly in some cases pointed out that Rwanda in 1994 had ratified all central international humanitarian law treaties including AP II, and that the instruments for that reason were in force in the territory of Rwanda and formed part of Rwandan law.⁵⁹⁰ When making these references, the tribunals have generally not considered whether there has been domestic implementing legislation.⁵⁹¹ This is intriguing as most international treaties only establish State obligations (international illegality) and not individual obligations (international criminality).⁵⁹² It appears that the *ad hoc* tribunals increasingly have recognized that this is problematic from a legality perspective. For example, the ICTY Appeals Chamber in the *Galić* case stressed that treaties usually only “provide for the prohibition of a certain conduct” not for its criminalization, and that treaty law prohibition therefore often has to be complemented with a customary international law criminalization.⁵⁹³

⁵⁸⁸ See further e.g., W. A. Schabas, *The UN International Criminal Tribunals – The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 99.

⁵⁸⁹ *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 44.

⁵⁹⁰ E.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 617, and *Rutaganda*, Judgement, TC, ICTR, 6 December 1999, paras 86-89. In a report written after the finalization of the ICTR Statute, the UN Secretary-General indicates that customary international law plays a less central role in relation to the ICTR. He notes that: “In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions.” UN Doc. S/1995/134, para. 12. See also *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 170, and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 978.

⁵⁹¹ See e.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, paras 44-46.

⁵⁹² G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 9. Bantekas has characterized this as a “dynamic and evolutionary interpretation” of international treaties. I. Bantekas, ‘Reflections on Some Sources and Methods of International Criminal and Humanitarian Law’, 6 *International Criminal Law Review* (2006), at 121-123. See also T. Meron, ‘Is International Law Moving towards Criminalization?’, 9 *European Journal of International Law* (1998), at 23-24, and Zahar & Sluiter 2008, at 87. More cautious towards basing international individual criminal responsibility on treaties are e.g., Meron 2006, at 576, and A. Pellet, ‘Applicable Law’, in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford: Oxford University Press, 2002), at 1067-1070.

⁵⁹³ *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 83.

While the role of treaty law is somewhat unclear before the *ad hoc* tribunals, treaty law clearly plays a central role in connection to the ICC. The ICC Statute, which is the primary source of law for that court,⁵⁹⁴ is a multilateral treaty. Werle has, for example, noted that: “Until the ICC Statute entered into force, international treaties were of lesser importance for international criminal law. Today, the ICC Statute, a multinational international treaty, is the main source of international criminal law.”⁵⁹⁵ The ICC Statute departs from the statutes of the *ad hoc* tribunals in that it has been adopted *before* the crimes have been committed. The ICC Statute also reminds of domestic criminal statutes in that the goal of the drafting process explicitly was to create an instrument that would function as the basis for criminal prosecutions.⁵⁹⁶ It should be noted that in the *Lubanga* case, a Pre-Trial Chamber of the ICC found that the Statute represents pre-existing written criminal norms, which entails that the legality principle is not violated when someone is prosecuted based on the Statute regardless of what the customary law on the question is.⁵⁹⁷

Most interestingly, the ICC Statute furthermore contains a provision on applicable law. Article 21 of the ICC Statute establishes that:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions. [...]

This provision has been found to “modify” the international sources of law to suit criminal law better.⁵⁹⁸ Before the ICC, its internal written sources of law have supremacy, namely the

⁵⁹⁴ Article 21, ICC Statute.

⁵⁹⁵ G. Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague: T. M. C. Asser Press, 2009), 50 (para. 139).

⁵⁹⁶ Cf. Meron 2006, at 567.

⁵⁹⁷ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, para. 303. See, however, B. Broomhall, ‘Article 22 – *Nullum Crimen Sine Lege*’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 719-720.

⁵⁹⁸ M. McAuliffe deGuzman, ‘Article 21 – Applicable Law’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 702. On Article 21, ICC Statute, see also e.g., W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), 381-400.

statute, the elements of crimes, and the rules of procedure and evidence.⁵⁹⁹ The fact that the ICC and the *ad hoc* tribunals apply different legal sources (or give them different weight) gives rise to a significant risk of *fragmentation*, that is, that the international criminal law applied by the courts varies. Some have, however, downplayed this risk by noting that the ICC Statute largely is declaratory of customary international law,⁶⁰⁰ and that the Statute also has affected the content of customary law through its negotiation and ratification processes.⁶⁰¹ The initial case of the ICC (especially regarding commission liability), however, indicates that international criminal law for sure to some degree is fragmented.⁶⁰²

5.1.2.3. International Customary Law

In most domestic legal systems, non-statutory criminal law is not anymore accepted. In international criminal law, customary law, however, still plays a central role.⁶⁰³ This is the case especially in connection to the *ad hoc* tribunals, which have been established *ex post facto* and which apply the general sources of public international law. As the *ad hoc* tribunals generally presume that their statutes reflect customary international law,⁶⁰⁴ the tribunals have primarily looked into customary international law to clarify the statutes and to fill gaps. Due to the openness of many of the statute provisions, the *ad hoc* tribunals have, however, in practice often relied on customary international law. For the ICC, customary international law or “the principles and rules of international

⁵⁹⁹ Bitti distinguishes between the “internal sources of law” and the “external sources of law” in the ICC Statute. G. Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’, in C. Stahn & G. Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 288 and 293. The ICC Elements of Crimes, which “shall assist the Court in the interpretation and application” of the crime definitions shall be consistent with the Statute. Article 9, ICC Statute. Triffterer has pointed out that there appears to be some inconsistencies (e.g., regarding Article 8(2)(b)(xii)), and asks what should be done in that the Assembly of State Parties does not have a legislative power in connection to substantive criminal law. O. Triffterer, ‘Can the “Elements of Crimes” Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?’, in C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 384.

⁶⁰⁰ Meron 2006, at 567.

⁶⁰¹ Hunt has observed that even though the aim of the ICC Statute and Elements of Crimes negotiations generally has been to develop international criminal law, specific provisions also entail a “straightjacket” impeding legal developments. D. Hunt, ‘The International Criminal Court – High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges,’ 2 *Journal of International Criminal Justice* (2004), at 59.

⁶⁰² See further e.g., Sections 7.2.4 and 7.2.5.

⁶⁰³ Degan has suggested that written sources of law due to the need for legal certainty should be given preference over customary law in international criminal law. V.-D. Degan, ‘On the Sources of International Criminal Law’, 4 *Chinese Journal of International Law* (2005), at 51. The *ad hoc* tribunals have, however, constantly stressed the acceptability of customary law as a source of international criminal law.

⁶⁰⁴ The tribunals have, however, increasingly started to ascertain the customary basis of the statute provisions. E.g., *Milutinović et al.* Decision (JCE), AC, ICTY, 21 May 2003, para. 9, *Hadžihasanović et al.*, Decision (command responsibility), AC, ICTY, 16 July 2003, para. 44, *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 141, and *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 83. See, however, Schabas, who questions whether the judges have powers to exercise judicial review of the Security Council, that is, whether the Security Council correctly has identified the content of customary international law. Schabas 2006(b), at 84. Also the SCSL has found that it is “bound to apply customary international law.” *Taylor*, Judgement, TC, SCSL, 18 May 2012, para. 398.

law, including the established principles of the international law of armed conflict”⁶⁰⁵ is a secondary source of law which only shall be applied “where appropriate.”

In Article 38(1) of the ICJ Statute, international customary law is defined as “international custom, as evidence of a general practice accepted as law.” It is generally recognized that the crystallization of norms under customary international law requires both State practice and *opinio juris*, that is, “a general recognition that a rule of law or legal obligation is involved.”⁶⁰⁶ It is well-known that identification of customary international law is a difficult endeavour. There are, for instance, many different opinions on what constitute relevant State practice and evidence of *opinio juris*, and, for example, how conflicting practice should be reconciled. A debated question is also the relationship between State practice and *opinio juris*, that is, whether the focus should be on what States actually do or on what they say that is the right way to act.⁶⁰⁷

Schabas has found that the *ad hoc* tribunals in their search for customary norms often have relied on extensively ratified treaties.⁶⁰⁸ He, however, notes that this is not unproblematic in that “treaties do not always codify customary international law”, but may exceed or fall short of it.⁶⁰⁹ Furthermore, the treaties constituting statutes of international criminal tribunals (such as the ICC Statute and the Nuremberg Charter) may contain provisions that are jurisdictional (aimed at limiting the tribunals’ jurisdiction) rather than substantive.⁶¹⁰ The *ad hoc* tribunals have, however, not only looked into treaty law when trying to identify customary law. Cassese, for example, has stressed the role played by case law as evidence of customary international law.⁶¹¹ Also, for example, soft law instruments, such as ILC documents, have been consulted when trying to identify prevailing *lex lata*.⁶¹²

The fact that there are so many different ways to create State practice and to express *opinio juris*, as well as, the possibility to emphasize either State practice or *opinio juris* in practice entails that the identification of customary international law is a process where the line between law identification and law creation easily can become blurred. In relation to customary criminal law, it is often difficult to establish *exactly when* a certain act or omission has been internationally criminalized. Not surprisingly, some scholars have criticized the tribunals for the way in which they have approached customary international

⁶⁰⁵ E.g., Pellet 2002, at 1070-1071. See, however, McAuliffe deGuzman 2008, at 706-707.

⁶⁰⁶ *North Sea Continental Shelf Cases*, Judgment, ICJ, 20 February 1969, para. 74.

⁶⁰⁷ On customary international law, see further e.g., A. E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *American Journal of International Law* (2001), at 757-791.

⁶⁰⁸ Schabas 2006(b), at 98-100. See also B. B. Jia, ‘The Relations between Treaties and Custom’, 9 *Chinese Journal of International Law* (2010), at 103-105.

⁶⁰⁹ Schabas 2006(b), at 100.

⁶¹⁰ Cf. The discussion whether the armed conflict nexus requirement in the crimes against humanity definition in the Nuremberg Tribunal’s Charter was jurisdictional or substantive. M. E. Badar, ‘From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity’, 5 *San Diego International Law Journal* (2004), at 91-92.

⁶¹¹ Cassese 2008, at 17-20. See also Zahar & Sluiter 2008, at 97-98. On the use of national case law in the identification of customary international law, see also Bantekas 2006, at 131-132, and A. Nollkaemper, ‘Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY’, in G. Boas & W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers, 2003), at 281-286.

⁶¹² See e.g., *Furundžija*, Judgment, TC, ICTY, 10 December 1998, para. 227, and *Kunarac et al.*, Judgment, TC, ICTY, 22 February 2001, para. 537.

law and found the practice of the tribunals to be unsystematic and law-making.⁶¹³ It is beyond the scope of this study to in detail discuss the tribunals' identification of the customary law.⁶¹⁴ Central for this study is the *outcome* of the tribunals' investigations into customary law, which will be discussed in the following chapters, as well as the *relative indeterminacy* characteristic for international criminal law.

5.1.2.4. General Principles of Law Recognized by Civilized Nations

The third primary source of international law identified in the ICJ Statute is "general principles of law recognized by civilized nations." These general principles can be defined as rules "laid down in the legislation of most countries of the world."⁶¹⁵ In the case law of ICTY,⁶¹⁶ and in the Statute of the ICC,⁶¹⁷ general principles of law have been found to be a subsidiary source of law that only should be applied when the written sources of law or customary international law does not regulate a question. Due to the still rudimentary nature of international criminal law, the *ad hoc* tribunals have, however, at times referred to domestic legislation, and it has been noted that despite being a subsidiary source, general principles of law has not been an insignificant source of law.⁶¹⁸ The *ad hoc* tribunals have, for instance, turned to general principles of law when establishing the meaning of the term "rape."⁶¹⁹ In the same way as the identification of customary international law largely is dependent on the methodology used, also the outcome of surveys into general principles of law can be affected by methodology. The identification processes by the international criminal tribunals have sometimes been criticized for being limited and unrepresentative.⁶²⁰

⁶¹³ E.g., Bantekas has argued that ICTY sometimes has disregarded the *usus* element of custom in favour of *opinio juris*, that is, largely disregarded the behaviour of armies on the battlefields. I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester: Manchester University Press, 2002), 15. See also e.g., Zahar & Sluiter 2008, at 92-105, and Sluiter 2011, at 111.

⁶¹⁴ On customary international criminal law and the principle of legality, see e.g., N. Arajärvi, 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality', 15 *Tilburg Law Review* (2011), at 163-182, and M. Heikkilä, 'Ajatuksia laillisuusperiaatteen merkityksestä universaalitoimivaltatapauksissa: Bazaramba-tapaus ja Suomen kansainvälinen rikosoikeus', *Lakimies* (2011), at 919-924.

⁶¹⁵ A. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law – The Kolk and Kislyiy v. Estonia Case before the ECHR', 4 *Journal of International Criminal Justice* (2006), at 415.

⁶¹⁶ *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 591. See also W. A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge: Cambridge University Press, 2007), 195.

⁶¹⁷ Article 21, ICC Statute.

⁶¹⁸ See further F. O. Raimondo, 'General Principles of Law as Applied by International Criminal Courts and Tribunals', 6 *The Law and Practice of International Courts and Tribunals* (2007), at 394-396, and F. O. Raimondo, 'General Principles of Law, Judicial Creativity, and the Development of International Criminal Law', in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), at 45-59.

⁶¹⁹ E.g., *Furundžija*, Judgement, TC, ICTY, 10 December 1998, paras 177-178, and *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, paras 439 ff. For references to this source of law in international criminal law, see also e.g., *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, paras 26 and 40, *Erdemović*, Judgement (joint sep. op. of Judge McDonald and Judge Vohrah), AC, ICTY, 7 October 1997, paras 40 and 56-72, *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 583, and *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 225.

⁶²⁰ E.g., Nollkaemper 2003, at 289 and 295, and Raimondo 2007, at 402-403. See also V. Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 314-315.

5.1.2.5. Judicial Decisions

Article 38(1) of the ICJ Statute identifies *judicial decisions* as a *subsidiary means* for the determination of rules of law.⁶²¹ In the case law of the ICTY and ICTR, references to both domestic and international case law have, however, been frequent and the legal weight attached to case law is often significant. Especially, the legal weight attached to post-World War II case law has been substantial.⁶²² Often the case law has been referred to as sign of the existence of a norm under customary international law.⁶²³ The international criminal tribunals have also often made reference to their own case law and each other's case law. In international criminal law, judicial decisions are therefore not an insignificant subsidiary source of law. The heavy reliance of case law can be explained with the urge to ensure *legal certainty* in a criminal law context. The openness of many treaty provisions and customary international law norms furthermore explains the central role played by case law. Jurisprudence is namely often the source of law where one can find more specific definitions of concepts, principles, etc.⁶²⁴

The extent to which a Trial Chamber is required to follow earlier decisions made by itself, another Trial Chamber or the Appeals Chamber, is not regulated in the statutes or rules of the currently functioning *ad hoc* tribunals.⁶²⁵ In the case law of the *ad hoc*

⁶²¹ It has, however, been observed the interests of certainty and stability have made also the International Court of Justice follow its own case law. E.g., Nollkaemper 2003, at 291.

⁶²² Cf. Fletcher, whose opinion is that the post-World War II case law has been given an undeserved central role. Fletcher 2007(a), at 90.

⁶²³ In the *Kupreškić et al.* case, the Trial Chamber noted that: "Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. [...] precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law." *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 540. Nollkaemper has, however, argued that in certain cases the references to domestic case law (especially some domestic post-World War II case law) has been such that it can be argued that the case law rather has been regarded as independent authorities than as evidence of customary international law or general principles of law. Nollkaemper 2003, at 290-295. Also Judge Shahabuddeen has held that one should recognize the role played by case law ("judicial creativity") in international criminal law. He calls it a "pretence" that the decisions of the *ad hoc* tribunals always would be based on customary international law. M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), at 186 (see also 190 and 203).

⁶²⁴ S. Darcy, 'Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law', in N. Quéniévet & S. Shah-Davis (eds.), *International Law and Armed Conflict – Challenges in the 21st Century* (The Hague: T. M. C. Asser Press, 2010), at 320.

⁶²⁵ Based on the statutes, the *ad hoc* tribunals have both Trial Chambers and an Appeals Chamber. Article 11, ICTY Statute, and Article 10, ICTR Statute. The ICC shall consist of an Appeals Division, a Trial Division and a Pre-Trial Division. The judicial functions of the Court shall be carried out in each division by Chambers. Articles 34 and 39, ICC Statute.

tribunals, the precedential value of its Appeals Chamber decisions has, however, been recognized.⁶²⁶ In the *Aleksovski* Appeal Judgement, the ICTY argued that:

The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. [...] Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been “wrongly decided, usually because the judge or judges were ill-informed about the applicable law.” [...] The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers [...]. The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.⁶²⁷

In the *Semanza* case, the ICTR Appeals Chamber adopted “the findings of ICTY Appeals Chamber in the *Aleksovski* case” and recalled “that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.”⁶²⁸ In the practice of the tribunals, it is common that the tribunals refer to, quote, concur with and/or endorse decisions by other trial chambers or by other international criminal tribunals, that is, even though the tribunals are not formally bound by the decisions.⁶²⁹ In 2004, Cassese for example, noted that international criminal law had become so settled that the *ad hoc* tribunals could “confine themselves to citing their previous cases” and “concentrate on

⁶²⁶ Tracol notes that the principle of judicial precedent is weak before the *ad hoc* tribunals in that it is established by case law only. X. Tracol, ‘The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals’, 17 *Leiden Journal of International Law* (2004), at 67-68. Shahabuddeen has challenged the idea that international tribunals are *bound* by previous decisions, even though he recognizes that the tribunals may choose a *practice* to follow previous decisions. M. Shahabuddeen, ‘Consistency in Holdings by International Tribunals’, in N. Ando, E. McWhinney & R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda, Volume 1* (The Hague: Kluwer Law International 2002), at 633-650. See also *Semanza*, Decision (sep. op. of Judge Shahabuddeen), AC, ICTR, 31 May 2000, and *Milošević*, Decision (admissibility of evidence, part. diss. op. of Judge Shahabuddeen), AC, ICTY, 30 September 2002, para. 38.

⁶²⁷ *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, paras 107-108 and 113-114. See also e.g., *Galić*, Decision (acquittal), TC, ICTY, 3 October 2002, para. 10, and *Milošević*, Decision (preliminary motions), TC, ICTY, 8 November 2001, para. 4.

⁶²⁸ *Semanza*, Decision, AC, ICTR, 31 May 2000, para. 92.

⁶²⁹ E.g., Tracol 2004, at 99. See also M. A. Drumbl & K. S. Gallant, ‘Appeals in the *Ad Hoc* International Criminal Tribunals: Structure, Procedure, and Recent Cases’, 3 *Journal of Appellate Practice and Process* (2001), at 633-634. It should be noted that Article 20(3) of the SCSL Statute establishes that: “The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.” See also e.g., *Kallon*, Decision (protective measures), TC, SCSL, 23 May 2003, para. 12, *Gbao*, Decision (protective measures), TC, SCSL, 10 October 2003, para. 31, and *Norman et al.*, Decision (indictment), AC, SCSL, 16 May 2005, para. 46.

establishing the facts”, instead of discussing the applicable law at great length.⁶³⁰ Some scholars have, however, questioned the frequent referring to case law in international criminal law. For example, Fletcher has called the ICTY practice for “case law positivism”, which he defines as an excessive reliance on case law which indicates that the tribunals regard case law as a sufficient authority to settle legal questions.⁶³¹

As regards the ICC, the Rome Statute regulates that the Court *may* apply principles and rules of law as interpreted in its previous decisions.⁶³² The ICC Statute thus gives a lot of discretion to the ICC regarding the use of its own case law.⁶³³ Bitti has observed that the early practice of the ICC has been to refer to its own case law, but not to give special weight to Appeals Chamber case law.⁶³⁴ The ICC approach thus seems to be more amenable to instability than the approach chosen by the *ad hoc* tribunals, which gives appeals chamber case law more weight. The question of what significance the ICC can and should give the *ad hoc* tribunals’ case law has also raised debate, as the ICC Statute does not explicitly mention international case law as a source of applicable law.⁶³⁵ Nerlich has, however, argued that the ICC can look into *ad hoc* tribunal case law to find guidance on the content of, for example, “the principles and rules of international law.”⁶³⁶ He, however, finds that the decisions of the *ad hoc* tribunals clearly cannot be considered as an autonomous source of law for the ICC, as the judges of the *ad hoc* tribunals do not have the power to legislate.⁶³⁷

5.1.2.6. Subsidiary Means: Teachings of the Most Highly Qualified Publicists

The ICJ Statute furthermore mentions the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. While it is possible to find some references to academic writing in the *ad hoc* tribunals case law, it has been argued that such references have been rare.⁶³⁸ The ICC Statute does not at all mention the teachings of the most highly qualified publicists as a

⁶³⁰ A. Cassese, ‘Black Letter Lawyering v. Constructive Interpretation – The *Vasiljević* Case’, 2 *Journal of International Criminal Justice* (2004), at 265.

⁶³¹ Fletcher 2007(a), at 89-90.

⁶³² Article 21(2), ICC Statute.

⁶³³ Pellet notes that: “In fact, this provision reflects a compromise between, on the one hand, the partisans of the rule of *stare decisis* in accordance with the common law-approach, and, on the other hand, those supporting the civil-law concept that precedent has no compulsory effect. Yet the balance clearly leans in favour of the latter since the Court *may* follow the principles laid down in its previous decisions, but it is not *bound* to.” Pellet 2002, at 1066. Staker observes that Article 21 seems to put ICC case law “at the bottom of the hierarchy, although this would seem an unlikely result”, and that the initial ICC case law has not yet completely settled the matter. C. Staker, ‘Interpretative Methodologies and the Use of Precedent in Cases before International Criminal Courts’, in K. A. A. Khan *et al.* (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010), at 188.

⁶³⁴ Bitti 2009, at 292-293.

⁶³⁵ See e.g., Bitti 2009, at 296.

⁶³⁶ Nerlich 2009, at 313.

⁶³⁷ Nerlich 2009, at 316. See also *Lubanga*, Judgment, TC, ICC, 14 March 2012, para. 603 (‘decisions of other international courts and tribunals are not part of the directly applicable law under Article 21’.)

⁶³⁸ Schabas 2006(b), at 112. Fletcher argues that more attention should be given to scholarly work and less to case law. Fletcher 2007(a), at 90.

possible source of law. Also ICC case law, however, contains footnotes with references to the writings of legal scholars.⁶³⁹

5.1.2.7. Interpretation of Written Sources of Law

Whereas the *identification* of a norm generally is the problematic question in relation to non-written legal sources, *interpretation* is often the challenging question in connection with written legal sources.⁶⁴⁰ The fact that criminal law is connected to intentional infliction of pain has in many domestic legal systems entailed that special rules of interpretation are applicable in criminal law. The requirement that criminal statutes shall be strictly or narrowly constructed is, for example, an important principle in many domestic legal systems. In international criminal law, the fact that the *sources of law* are the international ones and the *subject-matter* is criminal law has raised the question of what interpretative principles should be applied, that is, those usually used in connection to international law or those used in connection to criminal law or a combination of both.

In international law, the interpretation of treaties is first and foremost regulated by the 1969 *Vienna Convention on the Law of Treaties* which is generally found to reflect customary international law and which provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its objective and purpose” (Article 31). It has been argued that this provision manifests four separate but simultaneously applicable interpretation principles, namely the principles of textuality, contextuality, teleology and good faith.⁶⁴¹ In *textual or literal interpretation* the focus is placed on the terms (words) chosen by the drafters, and an ordinary or everyday meaning is to be given to the terms, if it is not explicitly established that the parties intended to give them a special meaning.⁶⁴² The *contextuality principle*, on its part, requires that attention is given to the surrounding or framework of the term interpreted.⁶⁴³ Relevant surrounding is, for example, the whole text of the treaty (including the preamble and annexes) and to

⁶³⁹ See e.g., the references to Roxin’s work in *Katanga & Ngudjolo*, Decision (confirmation of charges), PTC, ICC, 30 September 2008, at 162 and 167-168.

⁶⁴⁰ Indirectly interpretation may, however, also be relevant in relation to non-written legal sources, as the written legal sources may function as evidence of a customary norm. Furthermore, in international criminal law, the distinction between interpretation and identification is blurred by the fact that when interpreting the content of the statutes of the *ad hoc* tribunals, the identification of customary international law is often relevant. See in this regard e.g., Powderly’s article on interpretation, which on numerous pages discusses the identification of customary international law. J. Powderly, ‘Judicial Interpretation at the *Ad Hoc* Tribunals: Method from Chaos?’, in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), at 26-32.

⁶⁴¹ E.g., *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 98. Note, however, Aust who argues that: “Article 31 is entitled ‘General rule of interpretation’. The singular noun emphasises that the article contains only one rule [...]” A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007), 234.

⁶⁴² Aust notes that: “It is important to give a term its *ordinary meaning* since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended.” Aust 2007, at 235.

⁶⁴³ The Vienna Convention in Article 31 refers to the context and other factors that shall be taken into account together with the context.

the treaty attached instruments. Giving attention to the surrounding has often been understood to mean that the interpretation must be such that the outcome does not make the treaty unsystematic or contradictory. Thirdly, the principle of *teleological or effective interpretation* requires that a term be interpreted taking into account the object and purpose of the treaty.⁶⁴⁴ Finally, the *good faith* principle has been understood to require the interpreters to seek an interpretation that is not absurd or unreasonable.⁶⁴⁵ In addition to these four simultaneously applicable main interpretation principles, the Vienna Convention also recognizes *supplementary means of interpretation*, including the preparatory work of the treaty and the circumstances of its conclusion. The convention establishes that recourse may be had to such supplementary means of interpretation in order to confirm the meaning resulting from the application of the main interpretation principles or to determine the meaning when the interpretation according to the main interpretation principles leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Article 32).

As noted regarding the legal sources of international criminal law, the ICTY and ICTR have been established through UN Security Council resolutions. Despite this, the tribunals have from time to time explicitly referred to the Vienna Convention and to the principles of interpretation enumerated in the convention.⁶⁴⁶ The references to the Vienna Convention have been justified with the argument that the statutes are instruments derived from the UN Charter, which is a treaty.⁶⁴⁷ It has also been put forward that recourse to the convention can be made as it, in essence, only manifests principles of interpretation generally accepted in domestic jurisdictions.⁶⁴⁸ As regards interpretative principles set

⁶⁴⁴ Linderfalk – like some other authors – differentiates between the concepts of object and purpose, which according to him signify a forward-looking explanation (a goal), and the concept of motive, which according to him is backward-looking (a historical fact that explains the birth of the provision or instrument). Article 31 in the Vienna Convention is according to him only concerned with the forward-looking object and purpose. U. Linderfalk, *Om tolkning av traktater* (Lund: Lunds universitet, 2001), 230-231.

⁶⁴⁵ Aust 2007, at 234.

⁶⁴⁶ See e.g., *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 98, *Bagosora et al.*, Decision (admissibility of appeal), AC, ICTR, 8 June 1998, para. 28, *Bagosora et al.*, Decision (protective measures), TC, ICTR, 5 December 2001, para. 2, *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1161, *Erdemović*, Judgement (joint sep. op. of Judge McDonald and Judge Vohrah), AC, ICTY, 7 October 1997, para. 3, *Kanyabashi*, Decision (jurisdiction, diss. op. of Judge Shahabuddeen), AC, ICTR, 3 June 1999, at 21, *Kanyabashi*, Decision (jurisdiction, joint sep. and conc. op. of Judge Wang Tieya and Judge Rafael Nieto-Navia), AC, ICTR, 3 June 1999, para. 10, *Kanyabashi*, Decision (jurisdiction, joint and sep. op. of Judge McDonald and Judge Vohrah), AC, ICTR, 3 June 1999, paras 15 and 28, *Kordić & Čerkez*, Decision (evidence), AC, ICTY, 18 September 2000, para. 22, fn 39, *Milošević*, Decision (preliminary motions), TC, ICTY, 8 November 2001, para. 47, and *Tadić*, Decision (protective measures), TC, ICTY, 10 August 1995, para. 18.

⁶⁴⁷ *Kanyabashi*, Decision (jurisdiction, joint sep. and conc. op. of Judge Wang Tieya and Judge Rafael Nieto-Navia), AC, ICTR, 3 June 1999, para. 11. In the case law, it has also been suggested that the interpretation principles to be found in the Vienna Convention also can be used when interpreting the rules of the tribunals, which are instruments adopted by the Judges. E.g., *Kanyabashi*, Decision (jurisdiction, joint and sep. op. of Judge McDonald and Judge Vohrah), AC, ICTR, 3 June 1999, para. 16.

⁶⁴⁸ *Kanyabashi*, Decision (jurisdiction, diss. op. of Judge Shahabuddeen), AC, ICTR, 3 June 1999, at 21-22, and *Kanyabashi*, Decision (jurisdiction, joint sep. and conc. op. of Judge Wang Tieya and Judge Rafael Nieto-Navia), AC, ICTR, 3 June 1999, para. 11.

down in the Vienna Convention, it should be noted that the *object and purpose* of the ICTY, and hence the tribunal's statute, has been identified as threefold: (1) to do justice; (2) to deter further crimes; and (3) to contribute to the restoration and maintenance of peace.⁶⁴⁹ (Two Judges of the ICTR's Appeals Chamber, on the other hand, have put forward that: "The overreaching object and purpose of the Statute is ensuring a fair and expeditious trial for the accused."⁶⁵⁰) In relation to individual provisions references have also been made to the object and purpose of, for example, treaties constituting the background to the individual treaties. For example, ICTY has held that the purpose of GC IV is to ensure the protection of civilians to the maximum extent possible.⁶⁵¹ The *context* of the statute, on the other hand, has been considered to include the report of the UN Secretary-General containing the draft statute of the ICTY, which was *approved* by the Security Council when adopting the statute.⁶⁵² It should, however, be noted that this report can be viewed both as a to the statute annexed instrument (context), and as a *travail préparatoire* (supplementary means of interpretation). The emphasis put on the report in the case law, however, indicates that the report clearly is regarded as more than just a supplementary means of interpretation. The opinions expressed by the members of the Security Council when voting on the adoption of the statute have, on the contrary, been given little significance when interpretations have been made. These opinions have thus mainly been regarded as possible supplementary means of interpretation.⁶⁵³ In relation to the ICTR, the report of the Secretary-General was presented after the statute already had been adopted.⁶⁵⁴ The *ad hoc* tribunals have also referred to the *travaux préparatoires* of international treaties, such as the 1948 Genocide Convention.⁶⁵⁵ Schabas has observed that *travaux préparatoires* that consist of lengthy debates in international organs often

⁶⁴⁹ *Tadić*, Decision (protective measures), TC, ICTY, 10 August 1995, para. 18. On the Internet pages of the ICTY, a further objective is identified, viz. to render justice to the victims of crime. See further 'Achievements' [ICTY] <http://www.icty.org/sid/324> (last visited 29 August 2012).

⁶⁵⁰ *Kanyabashi*, Decision (jurisdiction, joint and sep. op. of Judge McDonald and Judge Vohrah), AC, ICTR, 3 June 1999, para. 16.

⁶⁵¹ *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 146. See also *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 168.

⁶⁵² "It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council [...], while the Statute was "adopt[ed]" [...]. By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute." *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 295. See also e.g., *Tadić*, Decision (protective measures), TC, ICTY, 10 August 1995, para. 18, and *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 169. Schabas has argued that this understanding of the context diverges from the one contemplated in the Vienna Convention. W. A. Schabas, 'Interpreting the Statutes of the *Ad Hoc* Tribunals', L. C. Vohrah *et al.* (eds.) *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), at 858-859.

⁶⁵³ *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 300 and 303. See, however, *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 169.

⁶⁵⁴ UN Doc. S/1995/134.

⁶⁵⁵ E.g., *Musema*, Judgement, TC, ICTR, 27 January 2000, para. 162.

are problematic as legal sources in that they generally provide support to “practically any interpretation.”⁶⁵⁶

Finally, it should be noted that the judges of the *ad hoc* tribunals have not only made use of the interpretation principles of the Vienna Convention. Sometimes, the judges have used *domestic* interpretation principles. For example, the principles of strict construction of criminal law and *in dubio pro reo* have occasionally been applied.⁶⁵⁷ In the case law, it has also been suggested that the “geographical origin” of a legal concept may be taken into consideration when interpreting it.⁶⁵⁸ Finally, the judges have sometimes invoked more “international” interpretative principles, such as the interpretation most consistent with international customary law or with international human rights law.⁶⁵⁹

As the ICC Statute is a treaty, the Vienna Convention is clearly applicable to that statute.⁶⁶⁰ The Statute, however, also contains some articles which regulate interpretation. Article 22(2) establishes that the *definition of a crime* shall be strictly construed and shall not be extended by analogy and that in case of ambiguity the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.⁶⁶¹ Article 21(3), on its part, stipulates that the application and interpretation of law must be consistent with internationally recognized human rights and be without any adverse distinction founded

⁶⁵⁶ Schabas 2003(a), at 868. Regarding the ICC Statute, Cassese has observed that there “hardly exist preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference.” A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999), at 145.

⁶⁵⁷ See e.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 319 and 501, *Bagilishema*, Judgement, TC, ICTR, 7 June 2001, para. 57, *Delalić et al.*, Judgement, TC, ICTR, 16 November 1998, paras 408-413, *Kayishema & Ruzindana*, Judgement, TC, ICTR, 21 May 1999, para. 103, and *Tadić*, Decision (evidence), AC, ICTY, 15 October 1998, para. 73. As regards the use of “domestic Vienna Convention equivalents”, see e.g., the *Čelebići* case in which reference was made to the literal, golden and mischief rules of interpretation. *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, paras 158-171.

⁶⁵⁸ See e.g., *Delalić et al.*, Decision (evidence), TC, ICTY, 1 May 1997, para. 16. Note, however, the view expressed by the Appeals Chamber in the *Blaškić* case: “The Appeals Chamber holds that domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings.” *Blaškić*, Judgement, AC, ICTY, 29 October 1997, para. 23.

⁶⁵⁹ See further L. Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’, 21 *European Journal of International Law* (2010), at 548.

⁶⁶⁰ Here, it should be noted that it in connection to human rights law treaties has been asked to what extent it is problematic that the Vienna Convention “contains many hidden assumptions that are not justified in respect of human rights treaties”, e.g., that the treaties regulate the relationship between States. Human rights treaties could be regarded as a special regime to which, e.g., different rules apply regarding reservations. M. Scheinin, ‘Impact on the Law of Treaties’, in M. T. Kamminga & M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009), at 27. In a similar vein, it may be asked to what extent conventions establishing (or codifying) individual criminal responsibility constitute a special regime, which special feature require special consideration. In this regard, it is significant that international criminal tribunals have regularly referred to general principles of law in the field of criminal law.

⁶⁶¹ Broomhall has pointed out that Article 22(2) refers to definition of crimes and that the applicability of the principle of strict construction to other parts of the Statute (such as defences) is not settled in the Statute. Broomhall 2008, at 720.

on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

5.1.2.8. Conclusions

While criminal law in most domestic legal systems is created through written criminal statutes, international criminal law is criminal law with legal sources that are different. The written legal sources of international criminal law have at least traditionally been rudimentary and vague. Customary law continues to play a central role in international criminal law. In practice, this entails that international criminal law is plagued by an *indeterminacy* unfamiliar to domestic criminal law.⁶⁶² Due to the openness of international criminal law and various interpretational means open to the judges, it is not surprising that the judges of the international criminal tribunals sometimes have been accused of creating law instead of just interpreting or applying it. For example, Robinson has criticized the judges for expanding the definitions of crimes through victim-focused teleological reasoning.⁶⁶³

For the present study, the nature of international criminal law is relevant from two different perspectives. First, *it is not always simple to establish what the lex lata of international criminal law is*. Second, as one goal of the study is to see how different typical features of international criminality are reflected in the law, it is important to recognize that the international *criminalization process often has a feature of arbitrariness*. Similar phenomena may be treated differently in law due to purely political considerations.⁶⁶⁴ The creation of international criminal law has been highly periodic and connected to specific atrocities or wars that have shocked the international community. In the heat of a moral panic, legal solutions may be quickly adopted, but the drawback is that they are not necessarily well thought out. This is especially problematic in that when particular legal solutions become established in international criminal law, they are often difficult to change afterwards. In domestic criminal law, it is generally easy to establish new statutory law that replaces old legislation. In international criminal law, on the other hand, customary law often continues to coexist in parallel with new treaty law and new treaties are not necessarily ratified by the same States as the old ones. As such, international criminal law is by its nature both volatile (subject to sudden changes) and conservative (difficult to change).

5.2. International Criminal Law is Criminal Law that Is Enforced in an Unusual Way

5.2.1. The Availability of Evidence and Substantive Criminal Law

The frequent State involvement in international criminality has led to widespread impunity for international crimes. This has, *inter alia*, resulted in international enforcement mechanisms. More interesting for this study is, however, the idea that

⁶⁶² Cassese 2008, at 4-5.

⁶⁶³ D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008), at 933-946.

⁶⁶⁴ E.g., war crimes in international and internal armed conflicts. This will be considered further in Chapter 6.

the State reluctance to investigate and prosecute the crimes could have an effect on substantive international criminal law.

Former ICTY Prosecutor Del Pointe has noted that international criminal tribunals do not have the advantage of contemporaneous investigative tools, such as police intelligence information, surveillance, telephone intercepts or undercover operations, and that in many cases official records have been destroyed and documents have disappeared.⁶⁶⁵ This has affected the evidence used in the trials (for example, it has led to a focus on witness evidence). From a substantive criminal law perspective one may, in this regard, ask whether there also has been a push towards substantive criminal law that *de facto* can be proven through the evidence often available in international criminal trials. One could, for instance, speculate to what extent the common difficulty to establish superior orders has affected the development of the doctrine of superior responsibility. Evident is, at least, that lack of available evidence affects prosecutorial choices and judicial decisions in international criminal law.⁶⁶⁶

5.2.2. Selective Prosecutions

When ordinary domestic crimes are committed, the public officials usually investigate and prosecute *all* persons involved in the crimes. In certain legal systems, the prosecution of all culpable parties may even be mandated by law.⁶⁶⁷ The requirement that all crimes should be investigated and prosecuted is generally justified with the principle of equality, that is, that like cases should be handled in the same way.⁶⁶⁸ This being said, the domestic prosecutor may, depending on the law in the country in question, in certain cases decide not to prosecute.⁶⁶⁹

In international criminal law, the situation is completely different. Due to limited resources and policy considerations, the international criminal tribunals are only expected to investigate and prosecute a handful of the individuals who are suspected of having committed crimes. The strategy of the international prosecutors has generally been to focus on the leadership stratum of perpetrators (“big fish”). This strategy is often justified with the argument that it is the leaders who make the crimes possible and that the convictions of leaders give more victims vindication.⁶⁷⁰ Wald has also observed that the big fish strategy “eradicates the unease caused when courts bring the full force of international law down on some [low- or mid-level] defendants but fail to try their

⁶⁶⁵ Del Ponte 2006, at 546.

⁶⁶⁶ E.g., Meron 2006, at 560. Likewise plea agreements may affect for what an individual *de facto* is convicted. It is thus not always only the factual circumstances which dictate for what an individual is convicted. On guilty pleas in international criminal law, see further e.g., Mettraux 2005, at 316.

⁶⁶⁷ Del Ponte 2006, at 541 (e.g., Italy).

⁶⁶⁸ Nino has argued that the retributivist idea of consistent treatment of offenders partly explain why international crimes historically have not been prosecuted in domestic legal systems, that is, he finds that the lack of prosecutions can be explained with the impossibility to prosecute all culprits. Nino 1996, at 185.

⁶⁶⁹ In Finland, the prosecutors may, e.g., choose not to prosecute crimes for which the maximum penalty is a fine, when the crime judged as a whole is petty. See further *Criminal Procedure Act*, Chapter 1, Sections 6-7.

⁶⁷⁰ Meron 2006, at 563.

more blameworthy superiors.⁶⁷¹ Prosecutorial decisions have also been affected by other considerations, such as availability of defendants and evidence and (probably) the aspiration to prosecute different types of cases/crimes.

In essence, international criminal law has tried to solve the conflict between the need to limit the number of cases at the international level with the principle of equality with the so-called *principle of complementarity*. According to this principle, the international crime cases are distributed between the international and national level so that the international investigations and prosecutions should only be seen as complements to national proceedings. The international criminal tribunals vary in whether they (ICTY and ICTR) or the domestic courts (ICC) have primacy over the cases. In practice, however, national prosecutions of international crimes are unfortunately rare. This means that international criminal law still is plagued by selective prosecution.⁶⁷²

For international criminal law, the selectivity is first and foremost an equality or legitimacy problem. From the point of view of this study, the more interesting question is, however, *what consequences the selectivity has had on the image of the criminality that the international criminal law conveys and on the content of the law*. In scholarly writings, it has, for example, been noted that focus on leaders has consequences on the narrative of international criminal law. Osiel has, for example, put forward that the Nuremberg Tribunal's focus on the major war criminals and the Nazi aggression (and not the Holocaust) entailed that the tribunal missed both the macro picture (viz. the story of mass collaboration) and the micro perspective (viz. the story of the victims).⁶⁷³ He has also pointed out that: "trials of lower echelons permit exploration of vital historical and moral issues that big fish prosecutions cannot: They reveal how bureaucratic routine and casual indifference enable even the humblest functionaries to cause enormous suffering, permitting barbarity to become widespread."⁶⁷⁴ Prosecutorial strategies in which important aspects of the criminality are concealed may hence send problematic signals. They may, for example, exaggerate the blameworthiness of the leaders and downplay the role played by the followers.⁶⁷⁵ For the audience, this may entail that the case law becomes "politically unpersuasive."⁶⁷⁶

Regarding implications for substantive criminal law, one should note the following: Firstly, for international criminal law to become a *coherent system* the prosecution of different types of cases is essential. For example, a central criminal law principle is that

⁶⁷¹ P. M. Wald, 'Foreword: War Tales and War Trials', 106 *Michigan Law Review* (2008), at 915.

⁶⁷² On the use of prosecutorial discretion within international criminal law, see e.g., R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004), 175 ff., and Schabas 2008(c), at 731-761.

⁶⁷³ M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997), 100-103.

⁶⁷⁴ Osiel 2005(a), at 1817 (referring to Alvarez).

⁶⁷⁵ Osiel 2005(a), at 1764. "Prosecutors choose defendants and construct their legal arguments accordingly, with a self-conscious view toward conveying a certain message about how the country came to suffer such an apocalypse." *Ibid.*, at 1806. "The law's reach is thus at once too timid and too ambitious, both overinclusive and underinclusive vis-à-vis the actual distribution of moral responsibility." *Ibid.*, at 1764.

⁶⁷⁶ Osiel 1997, at 164.

the sentence shall reflect the blameworthiness of the offender's behaviour and to settle distinctions in comparative guilt both high-level and low-level actor cases are needed.⁶⁷⁷ Secondly, due to the fact that certain types of factual circumstances only are typical in particular types of cases,⁶⁷⁸ the selectivity may entail that there is *no or very little case law on particular questions*. For example, as duress generally is something that low-level actors are likely to meet, the international case law focusing on more high-level and eager actors rarely has dealt with duress. Thirdly, Schabas has argued that ICTY's initial focus on low-level actors to some extent has *distorted its case law*. He, for example, finds that the cases against the "thugs and hooligans" (Tadić, Kunarac and Jelisić) have brought about a problematic approach to the requirement of a policy behind crimes against humanity.⁶⁷⁹ It is, in fact, an intriguing question to what extent the cases chosen for prosecution can affect the content of the law.

5.3. Concluding Remarks

It has been argued that international criminal law is *criminal law with some special features*, such as unusual legal sources and an uncommon selectivity as regards enforcement. In comparison to most domestic criminal law, international criminal law is both imprecise and unsettled. How international criminal law "as an instrument" addresses international criminality will be considered next.

⁶⁷⁷ Coherence problems may also occur if connected cases are tried in *individual trials* instead of in *joint trials* with multiple accused. Sloane has, e.g., argued that Ruzindana likely received a 25-year sentence rather than life imprisonment because ICTR tried him jointly with Kayishema, who was a former prefect. R. D. Sloane, 'Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda', 5 *Journal of International Criminal Justice* (2007), at 728. Due to the collective nature of international crimes, the question of joint v. individual trials often raises, and individual cases may be connected to each other in factual terms.

⁶⁷⁸ Wald has observed that the big fish strategy has had as an unintended consequence the concentration of indictments and trials on the legal theories dealing with individuals remote from the scenes of the crimes and the physical acts constituting the underlying offences to the crimes. Wald 2008, at 916-917.

⁶⁷⁹ W. A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes', 23 *Leiden Journal of International Law* (2010), at 853. See also Schabas 2009, at 244-245, and W. A. Schabas, 'State Policy as an Element of International Crimes', 98 *The Journal of Criminal Law & Criminology* (2008), at 953 ff.

PART III:

THE LEGAL SOLUTIONS

6. THE INTERNATIONAL CRIMES

6.1. A Short Historical Expose

War crimes or “violations of the laws and customs of armed conflict” is the international core crime⁶⁸⁰ with the longest history. It is possible to find examples of criminalized behaviour during armed conflicts that date far back in time as well as evidence on occasional prosecutions of individuals who violated the norms. The development of *international* criminal responsibility, however, essentially began in the early 20th century, when suggestions of multi-national war crimes prosecutions were put forward after World War I.⁶⁸¹ The first time individuals *de facto* were internationally prosecuted for war crimes was, however, after World War II.⁶⁸² In these post-World War II trials, the understanding of what acts could be characterized as internationally prosecutable war crimes reflected the prevailing international law. In the early 1940s, international law was a branch of law that focused on regulating inter-State affairs and what happened within a country was not of international concern. For war crimes, this entailed that a war crime could only be committed in inter-State (international) armed conflicts and against individuals of another nationality.

For international law, World War II entailed a turning-point in that the law from the mid-1940s increasingly started to concern itself with things that happen within national borders.⁶⁸³ Most notably, human rights law began to develop during that time period. In international criminal law, World War II also started a development which has been characterized as the “international criminalization of internal atrocities.”⁶⁸⁴ The Nuremberg Charter namely contained the crime *crimes against humanity*, which essentially was included to allow prosecutions of atrocities committed by the Nazis against their own citizens.⁶⁸⁵ It has been argued that the adoption of this crime category constituted retroactive creation of criminal law and that the drafters of the charter attempted to “blur” this issue by including a war nexus requirement, that is, by defining crimes against humanity as a crime connected to the waging or initiation

⁶⁸⁰ The concept of international core crimes hence here refers to war crimes, crimes against humanity and genocide.

⁶⁸¹ See further e.g., Meron 2006, at 553-559, and Schabas 2006(b), at 226-227.

⁶⁸² On the post-World War II prosecutions on war crimes, see further e.g., N. F. Chistiakov, ‘The Question of War Crimes at the Nuremberg Trial’, in G. Ginsburgs & V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), at 155-166, I. A. Reshetov, ‘International Law and Crimes against the Laws and Customs of War’, in G. Ginsburgs & V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), at 167-176, and Y. Totani, ‘The Case against the Accused’, in Y. Tanaka, T. McCormack & G. Simpson (eds.), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2011), at 152-154.

⁶⁸³ See further e.g., A. Rosas, ‘Suvereenisuuden kuolema’, in P. Lämsineva & V.-P. Viljanen (eds.), *Juhlajulkaisu Antero Jyränki 1933 – 9/8 – 1993* (Turku: Turun yliopisto, 1993), at 173.

⁶⁸⁴ Meron 2006, at 568.

⁶⁸⁵ Article 6(c), Nuremberg Charter. See also Article 5(c), Tokyo Charter, Article II (c), Control Council Law No. 10, and Meron 2006, at 564.

of war.⁶⁸⁶ The war nexus was hence considered necessary to allow the interference with State sovereignty.⁶⁸⁷ In 1948, the UN General Assembly adopted the Genocide Convention. One aim of the convention was to clearly spell out the international illegality and criminality of *genocides*, such as the Holocaust. Schabas has, however, also argued that adoption of the convention can be seen as a reaction to the Nuremberg Tribunal's failure to recognize "the reach of international criminal law into peacetime atrocities."⁶⁸⁸

The law applied by the ICTY and ICTR is largely based on the international criminal law that emerged or crystallized in the 1940s. One may, however, identify two significant developments in the *ad hoc* tribunals' statutes and case law. Firstly, there has been a trend towards increasingly recognizing that crimes of international concern do not have to have an inter-State dimension, but may be intra-State. This trend is reflected in the fact that crimes against humanity do not require a war nexus of any kind, and, most notably, in the recognition that war crimes can also be committed in internal armed conflicts.⁶⁸⁹ Secondly, there has been a trend towards construing the crimes so that the crimes have become more distinguishable from each other. In this regard, whereas crimes against humanity historically emerged from the humanitarian principles contained in the laws and customs of war, the crime today is not anymore linked to *jus in bello* or war crimes.⁶⁹⁰ Also genocide, which historically often has been viewed as a type of crimes against humanity, has in the case law of the tribunals been clearly distinguished from crimes against humanity. The fact that the modern *ad hoc* tribunals' understanding of

⁶⁸⁶ Crimes against humanity were thus connected to war crimes and crimes against peace. M. J. Kelly & T. L. H. McCormack, 'Contributions of the Nuremberg Trial to the Subsequent Development of International Law', in D. A. Blumenthal & T. L. H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), at 107-108. In the Nuremberg Charter (Article 6) crimes against humanity was defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*; or persecutions on political, racial or religious grounds in execution of or *in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated" (emphasis added). See also e.g., M. C. Bassiouni, *Crimes against Humanity – Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), 33-34, and R. S. Clark, 'Crimes against Humanity at Nuremberg', in G. Ginsburgs & V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), at 177-199.

⁶⁸⁷ G. Boas, J. L. Bischoff & N. L. Reid, *International Criminal Law Practitioner Library, Volume II, Elements of Crimes under International Law* (Cambridge: Cambridge University Press, 2008), 24.

⁶⁸⁸ W. A. Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris', 40 *Case Western Reserve Journal of International Law* (2007-2008), at 36. The same point is also made by King in H. T. King, B. B. Ferencz and W. R. Harris, 'Origins of the Genocide Convention', 40 *Case Western Reserve Journal of International Law* (2007-2008), at 13-14.

⁶⁸⁹ *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, paras 137 and 141. See also e.g., Schabas 2006(b), at 231-236.

⁶⁹⁰ P. Akhavan, 'Reconciling Crimes against Humanity with the Laws of War – Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence', 6 *Journal of International Criminal Justice* (2008), at 25-26, and K. Ambos & S. Wirth, 'The Current Law of Crimes against Humanity – An Analysis of UNTAET Regulation 15/2000', 13 *Criminal Law Forum* (2002), at 24. Most notably, crimes against humanity do not have to have an armed conflict nexus, which has entailed that crimes against humanity have been divorced from war crimes. *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 141. It is unclear exactly when the nexus requirement disappeared. See further e.g., Cassese 2006, fn 5, and Schabas 2006(b), at 187-189.

the international crimes, and especially crimes against humanity, departs from the post-World War II tribunals' is interesting in that during the Cold War period international criminal law did not really develop. The case law of the *ad hoc* tribunals has therefore been very progressive, some would even say law-making.⁶⁹¹

When the ICC Statute was negotiated in 1998, the statutes of the *ad hoc* tribunals already existed and some case law by these tribunals. In the ICC negotiations, the development of international criminal law suggested by the *ad hoc* tribunals was largely accepted and codified. On some points, the ICC Statute, however, differs from the law applied by the *ad hoc* tribunals (or customary international law).⁶⁹²

This chapter will begin with the identification of the current crime elements of war crimes, crimes against humanity and genocide. To the extent there is a significant difference in the customary international criminal law and the ICC Statute this will be mentioned. As much has already been written on the crimes as such, this analysis will be short. The focus in this chapter will instead be placed on looking at the elements from the point of view of the phenomenology of the crimes. It is argued that the crimes clearly reflect many typical features of the criminality. At the same time, however, the uncertainty surrounding some crime elements has been significant. This can largely be explained with the legal sources of international criminal law. The present author, however, also believes that some uncertainty is due to disagreement on what the legally relevant features of international criminality should be.

6.2. The Elements of the Crimes

6.2.1. Different Types of Crime Elements

In the ICC Statute, a difference is made between the material and mental elements of the crimes over which the court has jurisdiction. Article 30 of the Statute stipulates that, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the *material elements* are committed with intent and knowledge.⁶⁹³ In a commentary to the Statute, Piragoff and Robinson have noted that the term "material elements" refers to the crime definitions in the Statute and hence to the "conduct or action described in the definition, any consequences that may be specified in addition to the conduct, and any factual circumstances that qualify the definition."⁶⁹⁴

⁶⁹¹ E.g., A. Marston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', 59 *Vanderbilt Law Review* (2006), at 1 ff., Robinson 2008, at 927, and Zahar & Sluiter 2008, at 105.

⁶⁹² See further e.g., L. N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute', 49 *DePaul Law Review* (2000), at 909 ff., and Schabas 2010(a), at 269-272.

⁶⁹³ The question of the general mental state requirements for criminal responsibility for international crimes will not be considered in this study. See further e.g., M. E. Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective', 19 *Criminal Law Forum* (2008), at 473 ff.

⁶⁹⁴ D. K. Piragoff & D. Robinson, 'Article 30 – Mental Element', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 851-852.

Regarding the crime definitions in the statutes of the ICC and the *ad hoc* tribunals, it should, however, be noted that the crime definitions sometimes contain both objective/material and subjective/mental elements. As regards the mental elements, some establish particular mental requirements whereas others only reaffirm the generally demanded intent and knowledge. For example, the crime definition of genocide requires *genocidal intent* which is a special mental element, whereas the reference to *wilful* killing in relation to the war crime of grave breaches generally merely is seen as a reaffirmation of the general requirement of intent.⁶⁹⁵

In the crime definitions, the material elements generally consist of *conduct* (act) elements and/or *consequence* (result/harm) elements. In this respect, the international crimes are similar to most ordinary domestic crimes, where it common to require both a certain conduct and a certain end-result.⁶⁹⁶ The international crime definitions, however, also often contain *contextual or circumstantial* elements,⁶⁹⁷ which are unusual in domestic criminal law.

6.2.2. War Crimes

6.2.2.1. Material Elements

War crime is (as noted above) the international core crime with the longest history, and as such the controversial question is not whether the crime is internationally criminalized or not, but rather which all acts can constitute war crimes. The crime has been defined differently in the statutes of all modern international criminal tribunals.⁶⁹⁸ The uncertainty about the scope of the international criminalization of war crimes is connected to the legal sources: Much of the law of armed conflicts is customary law or treaty law which does not contain explicit criminalizations. The only specific characterisations of certain acts as criminal (before the ICC Statute) can be found in the 1949 Geneva Conventions and in the 1977 AP I, which contain so-called grave

⁶⁹⁵ See e.g., K. Dörmann, '(a) Grave Breaches', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 306.

⁶⁹⁶ It should, however, here be noted that there are today increasingly crimes that have a different "style". Ashworth, e.g., notes that some criminalizations aim at conduct which in itself causes no harm and that, *inter alia*, the creation of risks is increasingly criminalized. A. Ashworth, 'Criminal Justice and Civilization', in A. Snare (ed.), *Beware of Punishment: On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag A/S, 1995), at 13. Cassese has in relation to international criminal law noted that also this branch of law criminalizes conduct creating an unacceptable risk of harm. E.g., it is possible to find criminalizations of early stages of commission or preparation. Cassese 2008, at 10.

⁶⁹⁷ In the ICC Elements of Crimes, it is pointed out that the elements have been structured according to the following principles: "As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order; – When required, a particular mental element is listed after the affected conduct, consequence or circumstance; – Contextual circumstances are listed last." ICC Doc. ICC-ASP/1/3 (Part II-B).

⁶⁹⁸ Articles 2 and 3, ICTY Statute, Article 4, ICTR Statute, and Article 8, ICC Statute.

breach provisions.⁶⁹⁹ The content of the other types of war crimes have to a large degree been settled by customary law. War crimes committed *during* armed conflicts should be distinguished from the crime of aggression (simplifying, the crime of *starting* an armed conflict).⁷⁰⁰

Generally speaking, war crimes can be defined as acts criminalized in *jus in bello* (*underlying offences*) which are committed during an armed conflict and which are associated with the conflict (*nexus with armed conflict*).⁷⁰¹ The main characteristics of war crimes are thus: (a) the fact that the illegality of certain behaviour is regulated in a special legal order, viz., the law of armed conflict, and (b) the environment or context to which the criminal acts are connected.⁷⁰² Certain types of war crimes have additional elements that must be proven, for example, that the crimes are committed against protected property or persons (grave breaches)⁷⁰³ or that the crimes are committed against persons no longer taking active part in hostilities (violations of common Article 3 in the 1949 Geneva Conventions).⁷⁰⁴ It has been observed that these types of *victim requirements* can be necessary in the context of armed conflicts in that certain acts are not criminal when committed against combatants or others taking active part in the hostilities.⁷⁰⁵

As regards the underlying offences of war crimes, they are numerous and it is not meaningful to consider them all here separately.⁷⁰⁶ They contain both acts which criminalization aims at protecting those not taking active part in the hostilities (for example, intentionally directing attacks against civilians) and acts which criminalization aims at humanizing the fighting in general (for example, criminalization of the use of poisonous gases). Certain of the prohibited acts are such that they clearly demand the existence of an armed conflict and are directly connected to regulating the fighting (for example, criminalization of declaring that no quarter will be given), whereas other war crimes constitute acts that also are prohibited in peacetime. Of the underlying offences that also are prohibited in peacetime, some constitute ordinary domestic crimes (for

⁶⁹⁹ Article 50, GC I, Article 51, GC II, Article 130, GC III, Article 147, GC IV, and Article 85, AP I. Grave breaches are a special type of war crimes. Grave breaches can only be committed in international armed conflicts and against so-called protected persons or property. *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, paras 80-84. See also e.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 80, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 170. On grave breaches generally, see e.g. H. Fischer, 'Grave Breaches of the 1949 Geneva Conventions', in G. Kirk McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Volume I* (The Hague: Kluwer Law International, 2000), at 67-93.

⁷⁰⁰ In connection to war crimes, the prevailing legal assumption is therefore that fighting in the armed conflict *per se* is legal. It should be noted that civilian direct participation in hostilities has not in itself been defined as a war crime in international criminal law. See further D. J. R. Frakt, 'Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War', 46 *Valparaiso University Law Review* (2012), at 732-733.

⁷⁰¹ E.g., *Tadić* Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 70, and *Kunarac et al.*, Judgement, TC, ICTY, 22 February 2001, para. 402.

⁷⁰² E.g., *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 58, and *Rutaganda*, Judgement, AC, ICTR, 26 May 2003, paras 569-570.

⁷⁰³ *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 81. See also e.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 80, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 170.

⁷⁰⁴ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 420.

⁷⁰⁵ Cryer *et al.* 2010, at 287.

⁷⁰⁶ See e.g., Article 8, ICC Statute.

example, rape), whereas others are international crimes or crimes with an international pedigree (for example, torture or terroristic acts such as the taking of hostages).⁷⁰⁷ It has been pointed out that the list of criminalized acts is not always logical in that, for instance, the list of prohibited weapons is not necessarily connected to the inhumanity of the weapons, but rather to whether States have agreed to prohibit the use of particular weapons.⁷⁰⁸ Another illogicality of the war crime definition has been found to be that there are more war crimes (underlying offences) that can be committed in *international* armed conflicts.

As regards the requirement of an armed conflict, the ICTY Appeals Chamber in the *Tadić* case established that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁷⁰⁹ This test, which has been reaffirmed in numerous later cases, in essence, requires that an investigation is made into the *intensity* of the conflict and the *organization of the parties* in the conflict.⁷¹⁰ Neither the ICC Statute nor the Elements of Crimes define what an armed conflict stands for. In the *Lubanga* judgement, the definition put forward in the *Tadić* case was, however, quoted with approval.⁷¹¹ Certain types of war crimes (most notably grave breaches) demand that the armed conflict is international.⁷¹² Armed conflicts have by ICTY been deemed to be international when the conflict takes place between two or more States, when an another State intervenes in non-international armed conflict through its troops, or when some of the participants in the internal armed conflict act on behalf of

⁷⁰⁷ Cf. the fact that the underlying offences in relation to terrorism and war crimes often are similar (e.g., murder, the taking of hostages). M. P. Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', 36 *Case Western Reserve Journal of International Law* (2004), at 359 ff.

⁷⁰⁸ Cf. May who asks why the principle of discrimination prohibits the use of poison, but allows the use of most bombs. May 2007, at 122 (see also at 120). In relation to the adoption process of the ICC Statute, Tallgren has observed that: "For the days ahead, the Conference will be striving for the completion of the six pages of definitions of war crimes. [...] The choice is, among others, between chemical weapons, biological weapons, land mines, blinding lasers, various types of bullets, and nuclear weapons. Hardly any state is without a weak point: a producer here, a buyer there, a non-ratified treaty on the left, a 'specific geopolitical aspect' on the right. [...] The preparation, negotiation and acceptance of the ICC Statute start to resemble the very crimes the Statute defines: the same large-scale activity, wealth of planning, secret deals, remarkable masses involved, wide-ranging effects and international concern." I. Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', 12 *Leiden Journal of International Law* (1999), at 695-697.

⁷⁰⁹ *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 70.

⁷¹⁰ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 562. See also e.g., *Mrkšić et al.*, Judgement, TC, ICTY, 27 September 2007, para. 407.

⁷¹¹ *Lubanga*, Judgement, TC, ICC, 14 March 2012, para. 533. Furthermore, in connection to armed conflicts not of an international character, the ICC Statute establishes that this concept refers to "protracted armed conflict between governmental authorities and organized armed groups or between such groups". "[S]ituations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" have explicitly been defined outside the concept. Article 8(2)(f), ICC Statute. See also *Lubanga*, Judgement, TC, ICC, 14 March 2012, paras 537-538. On the initial ICC case law, see further e.g., R. Cryer, 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision', 7 *Journal of International Criminal Justice* (2009), at 285-286.

⁷¹² *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, paras 80-84. See also e.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 80, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 170.

another State.⁷¹³ The ICC *Lubanga* Trial Chamber also accepted this finding.⁷¹⁴ The ICC Elements of Crime, furthermore, establish that the term “international armed conflict” encompasses military occupation.⁷¹⁵ The *Bemba* Pre-Trial Chamber defined armed conflict not of an international character as “outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a State territory”.⁷¹⁶ The Pre-Trial Chamber also noted that the hostilities may take place between government authorities and organized dissident armed groups, or between organized armed groups.⁷¹⁷ An organized armed group must be able “to plan and carry out military operations for a prolonged period of time”.⁷¹⁸

Secondly, the underlying offence must be “closely related to the hostilities”⁷¹⁹, that is, a link must be established between the accused person’s acts and the armed conflict. In the *Kunarac et al.* case, the ICTY Appeals Chamber specified this nexus requirement by finding that the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s *ability* to commit it, his *decision* to commit it, the *manner* in which it was committed or the *purpose* for which it was committed.⁷²⁰ The Appeals Chamber furthermore identified as factors indicating a nexus the fact that the perpetrator is a combatant, the fact that the victim is a non-combatant, the fact that the victim is a member of the opposing party, the fact that the act may be said to serve the ultimate goal of a military campaign and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁷²¹

From the point of view of this study, it is also interesting to note what kinds of elements are *not included* in the crime definitions. Fenrick, for example, has stressed that plan, policy and scale are not elements of war crimes.⁷²² There are no requirements of a pattern of conduct and a single independent act can constitute a war crime. In this regard, the context element of war crimes is different from the context element of crimes against humanity, which function is to exclude random violence. It should, however, be noted that the ICC Statute contains a so-called jurisdictional threshold, which function is to exclude isolated acts of violence from the Court’s jurisdiction. The Statute namely stipulates that the Court shall have jurisdiction over war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such

⁷¹³ *Tadić* Judgement, AC, ICTY, 15 July 1999, para. 84. See also *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, paras 208-211.

⁷¹⁴ *Lubanga*, Judgement, TC, ICC, 14 March 2012, para. 541. See also *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 220-223.

⁷¹⁵ ICC Doc. ICC-ASP/1/3 (Part II-B), fn 34.

⁷¹⁶ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 231.

⁷¹⁷ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 231.

⁷¹⁸ E.g., *Mbarushimana*, Decision (confirmation of charges), PTC, ICC, 16 December 2011, para. 103.

⁷¹⁹ *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 70.

⁷²⁰ *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 58.

⁷²¹ *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 59.

⁷²² W. J. Fenrick, ‘B. Analysis and Interpretation of Elements’ [Article 8, War Crimes], in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, O. Triffterer (ed.) (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 181. See also Bassiouni & Manikas 1996, at 514 (regarding state policy).

crimes.⁷²³ In its case law, the ICC has, however, held that the term “in particular” “makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court.”⁷²⁴ Also a single act can therefore amount to a war crime within the ICC context.⁷²⁵ (The single violation must, however, presumably constitute a *serious* violation of international humanitarian law.)⁷²⁶ Secondly, it is noteworthy that the crime elements of war crimes do not contain crime elements that restrict the group of possible perpetrators to, for example, State representatives or soldiers. In the *Akayesu* Appeal Judgement, the ICTR noted that while the perpetrators of war crimes in most cases are commanders, combatants and other members of the armed forces due to the nexus requirement of war crimes, a special relationship with one party to the conflict is not a precondition for the applicability of the tribunal’s war crime provision.⁷²⁷ In relation to war crimes that only can be committed in international armed conflicts State involvement in the conflict is required, but there is no requirement that the individual perpetrators have a State affiliation.

6.2.2.2. Mental Elements

The international war crime definitions do not explicitly provide for special mental elements that would apply to all war crimes.⁷²⁸ In case law, it has, however, been asked what the required mental state is in relation to the contextual crime element, that is, the armed conflict. It appears clear that the accused person must not have made the correct *legal evaluation* of the existence of an armed conflict or, for example, its international nature. Instead, the person must only be aware of the *factual circumstances* that determine the existence of the conflict and its nature. In the *Kordić and Čerkez* case, the ICTY Appeals Chamber namely laid down that:

The *nullum crimen sine lege* principle does not require that an accused knew the specific *legal* definition of each element of a crime he committed. It suffices that he was aware of the *factual* circumstances, e.g. that a foreign state was involved in the armed conflict. It is thus not required that Kordić could make a correct legal evaluation as to the international character of the armed conflict.⁷²⁹

Likewise, in the *Naletilić and Martinović* Appeal Judgement, the Appeals Chamber put forward that: “The perpetrator only needs to be aware of factual circumstances on which the judge finally determines the existence of the armed conflict and the international (or internal) character thereof.”⁷³⁰ In the Elements of Crimes of the ICC, it is suggested that:

⁷²³ Article 8(1), ICC Statute. On the background of this provision, see e.g., Boas, Bischoff & Reid 2008, at 293-294.

⁷²⁴ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 211.

⁷²⁵ *Mbarushimana*, Decision (confirmation of charges), PTC, ICC, 16 December 2011, para. 94.

⁷²⁶ Cf. *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 94.

⁷²⁷ *Akayesu*, Judgement, AC, ICTR, 1 June 2001, para. 444. See also Boas, Bischoff & Reid 2008, at 242.

⁷²⁸ Some of the underlying offences, however, have special mental elements. E.g., the underlying offence “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” require the specific intent to spread terror among the civilian population. *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 104.

⁷²⁹ *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 311.

⁷³⁰ *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, para. 119.

“there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international. [...] There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”⁷³¹

6.2.3. Crimes against Humanity

6.2.3.1. Material Elements

Crimes against humanity entered the international criminal law scene as a crime connected to war crimes and crimes against peace, but has during the last decades developed into a crime that is clearly distinguishable from these two crimes. The crime elements of crimes against humanity were for a long time unsettled. This is reflected in the fact that the crime has been defined differently in the statutes of all modern international criminal tribunals.⁷³² The case law of the *ad hoc* tribunals and the ICC Statute have, however, entailed that the crime elements today have become solidified. Crimes against humanity nowadays refer to certain inhumane acts (underlying offences) committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The list of possible underlying offences varies somewhat from one tribunal to another, but includes serious inhumane acts such as murder, torture, and rape. It is the attack that must be widespread or systematic according to the crime definition, and not the underlying offences.⁷³³ Some underlying offences are, however, such that they imply a pattern of conduct (most notably extermination, persecution, and *apartheid*).⁷³⁴ To be

⁷³¹ ICC Doc. ICC-ASP/1/3 (Part II-B). Decœur finds it problematic that the ICC follows a different approach than the *ad hoc* tribunals, that is, that a person only must be aware of the facts determining the existence of a conflict and not of facts establishing its nature. More specifically he argues that: “the *mens rea* should encompass the nature of the conflict and, as a result, the plea of mistake should be an admissible defence before the ICC.” H. Decœur, ‘Avoiding Strict Liability in Mixed Conflicts: A Subjectivist Approach to the Contextual Element of War Crimes’, 13 *International Criminal Law Review* (2013), at 482-484. See also E. La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008) 113-114.

⁷³² Article 5, ICTY Statute, Article 3, ICTR Statute, and Article 7, ICC Statute.

⁷³³ E.g., *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, para. 94.

⁷³⁴ Of these, *extermination* refers to the killing or intentional infliction of conditions of life calculated to bring about the destruction of part of a population, *persecution* to the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity, and *apartheid* to the commission of inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. See Article 7, ICC Statute, and ICC Doc. ICC-ASP/1/3 (Part II-B). Boot and Hall note that the purpose of the distinction between groups and collectivities is not evident. M. Boot & C. K. Hall, ‘Persecution’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 217. In the *ad hoc* tribunals’ jurisprudence, extermination has been defined as acts or omissions which contribute directly or indirectly to the killing of a large number of individuals with the intent to kill or to subject the individuals to deadly life conditions. See e.g., *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, paras 800-801. Persecution, on the other hand, has been defined as “an act or omission which: (a) discriminates in fact and denies a fundamental human right laid down in international law; and (b) is carried out with the intention to discriminate on political, racial, or religious grounds.” *Gotovina et al.*, Judgement, TC, ICTY, 15 April 2011, para. 1802. See also e.g., *Krnjelac*, Judgement, TC, ICTY, 15 March 2002, para. 431.

committed, these kinds of “pattern underlying offences” generally demand extensive cooperation between individuals.

In crimes against humanity, the underlying offence must thus be committed in a particular *context*. This context element has two sub-components: (1) the underlying offence must be part of a *widespread or systematic attack*; and (2) the attack must be *directed against any civilian population*. The requirement that the act must be part of a widespread or⁷³⁵ systematic attack is often called the nexus element of crimes against humanity. The aim of this requirement is to exclude isolated and random acts from the scope of the crime. The words “widespread,” “systematic” and “attack” have all been interpreted in case law. Widespread has been understood in different ways, but essentially the term refers to the number of victims and the large-scale nature of the attack.⁷³⁶ Likewise, the adjective “systematic” has been given alternative definitions, but it connotes that there has been a pattern or a methodological plan or that the attack can be called organized.⁷³⁷ Finally, “attack” has been understood to refer to a *course of conduct* involving the *multiple* commissions of prohibited acts.⁷³⁸ In an attack, there has to be a certain connection or link between the various isolated acts. The fact that numerous violent crimes are committed in a certain geographic area is thus not in itself equivalent to an attack.

Secondly, the attack must be *directed against any civilian population*. This requirement emphasizes the humanitarian origin of the criminalization of crimes against humanity. It is not only enemy civilians that are protected, but *any* civilian population. In relation to crimes against humanity, the nationality or affiliation of the victim is thus irrelevant.⁷³⁹ In the *Martić* Appeal Judgement, ICTY put down that the concept of “civilian” in context to crimes against humanity should be given the same meaning as in international humanitarian law in general.⁷⁴⁰ The Appeals Chamber hence referred to Article 50(1) of AP I, which defines civilians as persons

⁷³⁵ At one point, it was unclear whether the requirement was a widespread OR systematic attack, or a widespread AND systematic attack. Today, it is, however, clearly established that the test is disjunctive. E.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 248.

⁷³⁶ E.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 580, *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 648, *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 206, and *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 428. Regarding the ICC, see e.g., *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, para. 95, and *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 83.

⁷³⁷ E.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 580, *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 648, *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 203, and *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 429. Regarding the ICC, see e.g., *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, para. 96.

⁷³⁸ E.g., *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 415-416, and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, paras 916-918.

⁷³⁹ Cryer *et al.* 2010, at 241.

⁷⁴⁰ In some earlier case law, it was suggested that the term “civilian” in the context of crimes against humanity should be given a broader meaning. See e.g., *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 637 ff. See also O. Swaak-Goldman, ‘Crimes against Humanity’, in G. Kirk McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts, Volume I* (The Hague: Kluwer Law International, 2000), at 153-155.

not belonging to the armed forces.⁷⁴¹ The Appeals Chamber, however, stressed that it is the population that must be civilian, not necessarily the individual victims. Persons *hors de combat* may hence be the individual victims of crimes against humanity.⁷⁴² It has also been established that it is enough that the population is *predominantly* civilian, that is, the presence of certain non-civilians in their midst does not change the character of the population.⁷⁴³ The rationale behind the *population* requirement has also been found to exclude isolated/random acts from the scope of crimes against humanity.⁷⁴⁴ In the *Tadić* case, the Trial Chamber, for example, pointed out that the population element is intended to imply crimes of a collective nature.⁷⁴⁵ The requirement does not, however, mean that the entire population of a given State or territory must be victimized.⁷⁴⁶ The requirement that the attack be “directed against” has been interpreted to mean that the civilian population must be the primary (and not incidental) target of the attack.⁷⁴⁷

In the ICC Statute, an additional crime element can be found as the Statute demands that the course of conduct is *pursuant to or in furtherance of a State or organizational policy* to commit such attack.⁷⁴⁸ The ICC Elements of Crimes put forward that: “It is understood that policy to commit such attack requires that the State or organization actively promote or encourage such an attack against a civilian population.”⁷⁴⁹ Such a policy element has also been suggested before the *ad hoc* tribunals, but it has been rejected by them. In *Kunarac et al.* case, the ICTY Appeals Chamber found that “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.”⁷⁵⁰

A difficult legal question is what the ICC policy element exactly stands for. The concept of a policy can be given a *maximalist interpretation* making the requirement equivalent to the requirement of an agreement or plan to commit a systematic attack. This, however,

⁷⁴¹ *Martić*, Judgement, AC, ICTY, 8 October 2008, paras 291-302. See also J. Dungal, ‘Defining Victims of Crimes against Humanity: *Martić* and the International Criminal Court’, 22 *Leiden Journal of International Law* (2009), at 727-752.

⁷⁴² *Martić*, Judgement, AC, ICTY, 8 October 2008, paras 303-314. A pre-trial chamber of the ICC has, however, held that when assessing whether an attack has been directed against a civilian population, it will take ‘into account the information relevant to the status of victims, their ethnic or political affiliation as well as the methods used during the attacks.’ *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, para. 108.

⁷⁴³ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 638.

⁷⁴⁴ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 648.

⁷⁴⁵ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 644.

⁷⁴⁶ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 644.

⁷⁴⁷ E.g., *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 421, and *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 92.

⁷⁴⁸ Article 7(2)(a), ICC Statute.

⁷⁴⁹ ICC-ASP/1/3 (Part II-B). In footnote 6, it is furthermore established that: “A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”

⁷⁵⁰ *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 98. Likewise e.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, paras 120 and 126, *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 84, and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 922.

did not appear to be the intention of the drafters of the ICC Statute.⁷⁵¹ On the other hand, in a *minimalist interpretation* the policy requirement only excludes clearly random acts, that is, is equivalent to the requirement of an attack.⁷⁵² Finally, the policy element can be viewed as an element which *function is to exclude from the scope of the crime certain types of criminality*, for example, the criminality of serial killers, motorcycle gangs and small terrorist groups, which according to Schabas can successfully be addressed by domestic legal systems.⁷⁵³ Robinson, on his part, has held that there are four possible approaches to the policy element and hence the “essence” of crimes against humanity, of which the two last ones appear to be available to the ICC due to the ICC Statute:

(1) that there is no policy element (advanced by Guénaél Mettraux and others and adopted in [the *ad hoc*] Tribunal jurisprudence), (2) that there must be a State policy (advanced by Cherif Bassiouni and others), (3) the theory requiring ‘state-like’ organizations and (4) broader theories encompassing organizations with ‘capacity’ to direct CAH [= crimes against humanity].⁷⁵⁴

So far, the ICC policy element has only been interpreted in a few decisions, originating from pre-trial chambers. In the *Kenya* authorization of investigation decision, the Pre-Trial Chamber found that the requirement was fulfilled as “a number of attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force.”⁷⁵⁵ In that decision, the pre-trial chamber also held that in the case of a State policy the policy does not necessarily need to have been conceived at the highest level of the State machinery (that is, a “policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy”) and – the majority of the Pre-Trial Chamber – that in connection to organizational policy, “the formal nature of a group and the level of its organization should not be the defining criterion” but instead its “capability to perform acts which infringe on basic human values.”⁷⁵⁶ In other pre-trial decisions, it has been held that the policy requirement “implies that the attack follows a regular pattern” and that the policy may be “made by a group of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack.”⁷⁵⁷ So far, the majority of the ICC Pre-Trial Judges have

⁷⁵¹ E.g., D. Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference,’ 93 *American Journal of International Law* (1999), at 50-51.

⁷⁵² E.g., R. Dixon & C. K. Hall, ‘1. Chapeau [crimes against humanity];’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 179-180.

⁷⁵³ Schabas 2008(e), at 960 and 972-974.

⁷⁵⁴ D. Robinson, ‘Essence of Crimes against Humanity Raised by Challenges at ICC,’ *EJIL Talk!* [blog], 27 September 2011.

⁷⁵⁵ *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, para. 117.

⁷⁵⁶ *Situation in the Republic of Kenya*, Decision (investigation), PTC, ICC, 31 March 2010, paras 89-90. These opinions were quoted with approval in *Situation in the Republic of Côte d’Ivoire*, Decision (investigation), PTC, ICC, 3 October 2011, paras 45-46. Judge Kaul dissented to the *Kenya* decision and wanted to give the concepts a more narrow reading. *Situation in the Republic of Kenya*, Decision (investigation, diss. op. of Judge Kaul), PTC, ICC, 31 March 2010.

⁷⁵⁷ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 81. See also *Katanga & Ngudjolo*, Decision (confirmation of charges), PTC, ICC, 30 September 2008, para. 396.

hence adopted the “capacities approach” to the policy element, rather than the “State-like entity approach” advanced in minority.⁷⁵⁸ The initial case law has received both rather positive⁷⁵⁹ and very negative evaluations.⁷⁶⁰ The final ICC stand on the policy element remains to be seen.

In the same way as in relation to war crimes, it should also be noted what does *not* constitute crime elements of crimes against humanity. To begin with, it is today clearly established that there does not have to be a nexus to an armed conflict.⁷⁶¹ As noted above, the *ad hoc* tribunals have furthermore held that an underlying policy is not a requirement for the crime. Finally, the ICTR Appeals Chamber has established the existence of “substantial resources” is not necessary⁷⁶² and neither is the toleration of the acts by the State.⁷⁶³

6.2.3.2. Mental Elements

In relation to the mental element of crimes against humanity especially two questions have attracted discussion: (1) what is the required mental element for the context element of the crime; and (2) whether crime against humanity requires a discriminatory intent or motive. In relation to the context element, it is today settled that the perpetrator must have *knowledge* of the broader context (that is, the attack against the civilian population) in which he/she participates through his/her underlying offence.⁷⁶⁴ He/she must hence be aware that “his acts fit into [...] a pattern”⁷⁶⁵ or, to say it another way, of the “broader context in which his actions occur”.⁷⁶⁶ The perpetrator need, however, not share the overall purpose or goal of the attack.⁷⁶⁷

⁷⁵⁸ Robinson 2011 [blog].

⁷⁵⁹ Cupido finds that the initial ICC case law indicates that the inclusion of the policy element in the ICC Statute has not resulted in a more prominent role for the policy element. The reason for this is according to her that the “value of and need for an autonomous policy element are concordantly related to the interpretation and application of the widespread or systematic attack-requirement”. The existence of a policy has in the ICTY case law been central when assessing the systematic character of an attack. M. Cupido, ‘The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate’, 22 *Criminal Law Forum* (2011), at 275 ff. See also G. Mettraux, ‘The Definition of Crimes against Humanity and the Question of a ‘Policy’ Element’, in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (New York: Cambridge University Press, 2011), at 153.

⁷⁶⁰ E.g., Kress has found that the “customary definition of crimes against humanity includes the requirement of a policy by a state or a state-like organization” and that the ICC Statute should be construed accordingly. C. Kress, ‘On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision’, 23 *Leiden Journal of International Law* (2010), at 871.

⁷⁶¹ E.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 249 and 251. See further Schabas, who notes that the *Eichmann* case was the first trial in which a conviction was entered for crimes against humanity without a formal link to armed conflict. W. Schabas, ‘The Contribution of the Eichmann Trial to International Law’, 26 *Leiden Journal of International Law* (2013), at 676-680.

⁷⁶² *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 922.

⁷⁶³ *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 84.

⁷⁶⁴ Article 7, ICC Statute, and e.g., *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 556, *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 248, and *Kayishema & Ruzindana*, Judgement, TC, ICTR, 21 May 1999, paras 133-134.

⁷⁶⁵ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 248.

⁷⁶⁶ *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 656. See also e.g., *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 556.

⁷⁶⁷ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 272.

As regards the discriminatory intent, the ICTR Statute stipulates that the underlying offences must be committed on national, political, ethnic, racial or religious grounds.⁷⁶⁸ In the *Akayesu* Appeal Judgement, the Appeals Chamber, however, found that “in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack) [...] the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds”, and that “[i]n the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law [...]”.⁷⁶⁹ The prevailing view is therefore today that crimes against humanity do not generally demand discriminatory intent. Only in connection to persecution does such a requirement exist.⁷⁷⁰ Crimes against humanity can thus generally be committed for “purely personal motives”.⁷⁷¹

6.2.4. Genocide

6.2.4.1. Material Elements

Genocide departs from war crimes and crimes against humanity in that the definition of the crime has not varied or changed over time.⁷⁷² This is due to the 1948 Genocide Convention that contains a definition of the crime, which has been embraced by later statute drafters.⁷⁷³ Through the case law of the *ad hoc* tribunals, the crime elements of genocide have, however, been interpreted and clarified. In the *Akayesu* case, the ICTR, for example, stressed that genocide has three central elements: (1) one of the listed prohibited acts (underlying offences) has been committed; (2) that the prohibited act has been committed against a national, ethnical, racial or religious group; and (3) that the prohibited act has been committed with the specific intent to destroy in whole or in part the group as such.⁷⁷⁴ At time being, there is only initial ICC case law on genocide.

The genocide definition enumerates five possible underlying offences to genocide. Genocide can be committed by killing members of the group, by causing serious bodily or mental harm to members of the group, by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, by imposing measures intended to prevent births within the group and by forcibly transferring children of the group to another group. The prohibited acts make it clear that what is

⁷⁶⁸ Article 3, ICTR Statute.

⁷⁶⁹ *Akayesu*, Judgement, AC, ICTR, 1 June 2001, para. 464. See also e.g., Boas, Bischoff & Reid 2008, at 33-35, and Schabas 2006(b), at 196-197 and 219.

⁷⁷⁰ E.g., *Akayesu*, Judgement, AC, ICTR, 1 June 2001, para. 464, *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 131, and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 985.

⁷⁷¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 272.

⁷⁷² Article 4, ICTY Statute, Article 2, ICTR Statute, and Article 6, ICC Statute.

⁷⁷³ Article II, Genocide Convention, and UN Doc. G. A. Res. 260 (III) A, 9 December 1948. The term “genocide” has been ascribed to the Polish lawyer Raphael Lemkin, who in the 1940s combined the Greek word *genos* (family/tribe/race) with the Latin word *cide* (killing). After the Holocaust, the term quickly began to receive legal significance. In 1946, the UN General Assembly unanimously adopted resolution 96 (I), in which genocide is characterized an international crime. UN Doc. G.A. Res. 96 (I), 11 December 1946.

⁷⁷⁴ *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 499.

prohibited is the *physical destruction* of the group, and not, for example, the destruction of the language and culture of the group (“cultural genocide”).⁷⁷⁵

The preparatory work of the [Genocide] Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.⁷⁷⁶

Cryer *et al.* argue that this approach “avoids the difficulties of fitting a group such as the Tutsis precisely into one of the listed categories, but ensures that it comes within the area of protection that was intended by the negotiators, while also respecting the negotiators’ intent that the list be a closed one.”⁷⁷⁷

Even though the crime elements of genocide have remained unchanged in the various court statutes, it is noteworthy that an additional crime element has been introduced in the ICC Elements of Crime. The Elements namely require that the underlying offence takes place in the context of a manifest pattern of similar conduct directed against that group or that it could itself effect such destruction.⁷⁷⁸ The Elements of Crimes thus foresee that there has been a *genocidal campaign* to which individual crimes of genocide can be related.⁷⁷⁹ This has been called the contextual element or the quasi-contextual element of genocide.⁷⁸⁰ As the ICC Statute demands that the Elements of Crimes are consistent with the Statute (and as the Elements are not binding for the judges),⁷⁸¹ it remains to be seen how the ICC will approach its non-statutory contextual element. In a pre-trial decision in the *Al-Bashir* case, the majority of the Pre-Trial Chamber held that the contextual element is fulfilled only when “the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.”⁷⁸² Kreß finds this initial case law rather convincing in that it does not require a contextual element proper, but a sort of requirement that the genocidal intent is realistic. He, however, finds that the

⁷⁷⁵ E.g., A. Cassese, ‘Genocide’, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 336. The question of whether forcible transfer of population, which is not really physical or biological destruction, can constitute genocide has, however, been the subject of conflicting case law at the ICTY. See e.g., *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, paras 665-666, and *Brđanin*, Judgement, TC, ICTY, 1 September 2004, paras 693-694. See also W. A. Schabas, ‘Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide’, 27 *Cardozo Law Review* (2006), at 1708.

⁷⁷⁶ *Krštić*, Judgement, TC, ICTY, 2 August 2001, para. 556.

⁷⁷⁷ Cryer *et al.* 2010, at 211. The *Akayesu* approach is, however, preferred by Kreß, who argues that that approach follows the internationally recognized rule of interpretation that each word used in a legal text carries its distinct legal meaning. C. Kreß, ‘The Crime of Genocide under International Law’, 6 *International Criminal Law Review* (2006), at 475-476.

⁷⁷⁸ ICC Doc. ICC-ASP/1/3(Part II-B).

⁷⁷⁹ Cf. however, Cryer who argues that a genocidal policy is not required, but merely a pattern of similar conduct, which is a pattern of the *underlying offences*. Cryer 2009(a), at 291.

⁷⁸⁰ E.g., Cryer *et al.* 2010, at 218, and C. Kreß, ‘The International Court of Justice and the Elements of the Crime of Genocide’, 18 *European Journal of International Law* (2007), at 622.

⁷⁸¹ Article 9, ICC Statute.

⁷⁸² *Al Bashir*, Decision (warrant of arrest), PTC, ICC, 4 March 2009, para. 124.

requirement of a “concrete threat” set by the majority is too high.⁷⁸³ The dissenting judge in the Al-Bashir pre-trial decision, Judge Ušacka, declined to consider the contextual element at the initial procedural stage, but implied that it could be considered as not supported by the statute.⁷⁸⁴

The applicability of the contextual element has also been suggested before the *ad hoc* tribunals.⁷⁸⁵ In the *Krštić* Appeal Judgement, the ICTY, however, found that context elements such as widespread or systematic attack on a civilian population or manifest pattern of similar conduct are *not* part of the customary international law criminalization of genocide.⁷⁸⁶ In principle, ICTY has therefore foreseen the possibility of genocides with very few victims. Noteworthy is, however, that both the ICTY and the ICTR have often considered whether a genocidal context has existed as a background factor when trying to establish the existence of individual genocidal intent.⁷⁸⁷

With regard to other factors *not* considered as crimes elements of genocide, it should be noted that it in the drafting process of the Genocide Convention was considered to what extent it was necessary that the crime was committed “with the complicity of the Government”.⁷⁸⁸ This requirement did not make it to the convention, but the question of whether there should be a (State) plan or policy to commit genocide has continued to be contentious. For example, in 1996, the ILC seemed to assume that there had to be such a plan/policy before individuals could be held responsible for the crime.⁷⁸⁹ The *ad hoc* tribunals have, however, held that there is no requirement of a State or organizational

⁷⁸³ C. Kreß, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case’, 7 *Journal of International Criminal Justice* (2009), at 297-306. Likewise Kirsch has held that there must be an endeavour or plan that is capable of destroying the group as individual intent only gains relevance in criminal law if the individual believes that he/she possesses the means to achieve the goal. He, however, finds that “the occurrence of a nationwide genocidal campaign is not a necessary element of the crime”. S. Kirsch, ‘The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct’, 42 *Creighton Law Review* (2009), at 352, 354 and 358.

⁷⁸⁴ *Al Bashir*, Decision (warrant of arrest, sep. and partly diss. op. of Judge Ušacka), PTC, ICC, 4 March 2009, para. 20 (‘I consider that this element is met in the instant case, regardless of whether or not it should be applied. Accordingly, I would decline to settle the question of whether or not the contextual element is consistent with the statutory definition of genocide at the present stage, as it need not be addressed here.’)

⁷⁸⁵ *Krštić*, Judgement, TC, ICTY, 2 August 2001, para. 682.

⁷⁸⁶ *Krštić*, Judgement, AC, ICTY, 19 April 2004, paras 223-224. See also e.g., *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, paras 828-829.

⁷⁸⁷ Bonafè has divided the *ad hoc* tribunals’ genocide cases into: (1) cases where neither a genocidal context or a genocidal intent has been found (e.g., the *Stakić* and *Brđanin* cases); (2) cases in which a genocidal context has been identified but individual genocidal intent has not been proven (e.g., the *Krštić* and *Blagojević* cases); and (3) cases in which both a genocidal context and genocidal intent has been established (e.g., many ICTR cases). B. I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Leiden: Martinus Nijhoff Publishers, 2009), 132-133.

⁷⁸⁸ UN Doc. E/AC.25/SR.4, 15 April 1948, at 3-6.

⁷⁸⁹ UN Doc. A/51/10 (SUPP), at 89-90. Individuals would, according to the ILC, be connected to the genocide through their knowledge of the plan/policy. ILC argued that the crime definition “requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail” of the plan/policy. *Ibid.*, at 90.

policy to commit genocide.⁷⁹⁰ This being said, it has, however, been found that “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation”⁷⁹¹ and that “the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.”⁷⁹²

6.2.4.2. Mental Elements

In genocide cases, both intent to commit the underlying offence and a special genocidal intent must be proven. In connection to intent and underlying offences, it has in case law been put forward that it is the perpetrator’s belief that an individual victim belongs to a protected group that is central (subjective approach), even though tangible evidence of group existence and belonging also seem to be required to ensure that the perpetrator’s identification of members is not completely fictitious (objective approach).⁷⁹³

The specific intent (*dolus specialis*) of genocide is that the underlying offence must be committed *with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*. The intention must hence extend beyond the *actus reus* of the underlying offence. This is generally considered to be “the” characteristic feature of genocide, which significantly enhances its gravity.⁷⁹⁴ The specific intent has been interpreted to demand that the perpetrator seeks or aims at destruction of the group through his/her genocidal acts (purpose-based interpretation of the specific intent). It is thus not enough that the perpetrator commits the underlying offences with the *knowledge* that this leads to the destruction of a group or that it is *foreseeable* that the acts will have as a consequence destruction of a group (knowledge-based interpretation of the specific intent).⁷⁹⁵

The word “destroy” in the specific intent definition has been interpreted to refer to the *physical or biological* destruction of the group.⁷⁹⁶ The case law of the *ad hoc* tribunals indicates that a group can be physically destroyed in two different ways. First, the physical destruction can manifest itself in an attempt to exterminate a very large number of the members of the group (*quantitative approach*). Second, the destruction may be

⁷⁹⁰ E.g., *Jelisić*, Judgement, TC, ICTY, 14 December 1999, para. 100, and *Jelisić*, Judgement, AC, ICTY, 5 July 2001, para. 48. See also *Nchamihigo*, Judgement, AC, ICTR, 18 March 2010, para. 363 (“The Appeals Chamber recalls that proof of the existence of a “high level genocidal plan” is not required in order to convict an accused of genocide or for the mode of liability of instigation to commit genocide. Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber in considering as unnecessary proof of a nexus between the Appellant’s crimes and a national campaign.”)

⁷⁹¹ *Kayishema & Ruzindana*, Judgement, TC, ICTR, 21 May 1999, para. 94.

⁷⁹² *Kayishema & Ruzindana*, Judgement, TC, ICTR, 21 May 1999, para. 276.

⁷⁹³ E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 25. See also e.g., Cryer *et al.* 2010, at 211-213, Kreß 2006, at 474, L. May, ‘Identifying Groups in Genocide Cases’, in L. May & Z. Hoskins (eds.), *International Criminal Law and Philosophy* (Cambridge: Cambridge University Press, 2010), at 91-107, and Schabas 2006(a), at 1713-1714.

⁷⁹⁴ See e.g., *Sikirica et al.*, Judgement (acquittal), TC, ICTY, 3 September 2001, para. 89, and Schabas 2006(a), at 1716.

⁷⁹⁵ Some, however, feel that a knowledge-based approach to genocidal intent would be more appropriate. See e.g., A. K. A. Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, 99 *Columbia Law Review* (1999), at 2288.

⁷⁹⁶ E.g., *Krštić*, Judgement, AC, ICTY, 19 April 2004, para. 25.

achieved by destroying a key segment of the group, such as all fertile women (*qualitative or selective approach*).⁷⁹⁷

For genocide responsibility, the perpetrator must furthermore intend to destroy the protected group *as such*. This requirement shows that genocides primarily are crimes committed against groups, not individuals.⁷⁹⁸

Finally, the requirement of “in whole or in part” has been important to clarify, as the content given to this requirement strongly influences the ambit of the genocide criminalization. This requirement has been interpreted especially by the ICTY in relation to the Srebrenica massacre. In the *Krštić* Appeal Judgement, the ICTY put forward that:

The intent requirement of genocide [...] is [...] satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial [...]

The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. [...] The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.⁷⁹⁹

Also other cases have indicated that when the intention is to destroy a group in part, this part must be substantial or considerable.⁸⁰⁰

Regarding the ICC's quasi-contextual element, no explicit requirement of individual knowledge of the context is demanded by the Elements of Crimes. The Elements instead put forward that: “Notwithstanding the normal requirement for a mental element

⁷⁹⁷ *Jelisić*, Judgement, TC, ICTY, 14 December 1999, para. 82. See also Nersessian 2003, at 317.

⁷⁹⁸ In the *Niyitegeka* Appeal Judgement, the ICTR clarified that: “The term “as such” has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term “as such” clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting “as such” to mean that the proscribed acts were committed against the victims *because* of their membership in the protected group, but not *solely* because of such membership.” *Niyitegeka*, Judgement, AC, ICTR, 9 July 2004, para. 53.

⁷⁹⁹ *Krštić*, Judgement, AC, ICTY, 19 April 2004, paras 12-13. See also *Al Bashir*, Decision (warrant of arrest), PTC, ICC, 4 March 2009, para. 146.

⁸⁰⁰ See e.g., *Kayishema & Ruzindana*, Judgement, TC, ICTR, 21 May 1999, para. 97 (considerable), and *Jelisić*, Judgement, TC, ICTY, 14 December 1999, para. 82 (substantial).

provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.”⁸⁰¹ The mental state requirement in relation to this crime element is not yet settled.

6.3. Analysis of the International Core Crime Criminalizations

6.3.1. Criminalization Technique: *Chapeaus* and Underlying Offences

War crimes, crimes against humanity and genocide all have in common that they are *generic crimes*. The crimes namely “encompass a broad array of specific acts” (underlying offences or prohibited acts), but are “defined in terms of, and limited by, general elements” (*chapeau* elements).⁸⁰² For a conviction for a generic crime, both the elements of the *chapeau* and one of the underlying offences must be proven. The opposite of generic offences are specific offences. The crime definitions of these crimes only contain specific enumerated acts, that is, underlying offences.⁸⁰³ It is often submitted that it is the *chapeau* elements which distinguish international crimes from ordinary domestic crimes and which *transform* the underlying offences into crimes of international concern. The underlying offence of torture is, however, as such an international crime and some of the underlying offences do not have domestic equivalents.

The labelling of a crime as an international crime has both practical consequences and an expressive function. Firstly, the scope of the State obligation to cooperate in legal matters and the applicable jurisdictional rules are often dependent on whether the crime is an international crime or merely a domestic crime. Secondly, the general elements of the international crimes may have consequences for sentencing and the crime’s stigmatizing effect. It can namely be argued that through the *chapeau* element, the underlying offence becomes a *more dangerous version* of itself.⁸⁰⁴ Another function of the *chapeau* elements is to distinguish the various international crimes from each other. In international criminal law, it is possible to distinguish between two types of *chapeau* elements. War crimes and crimes against humanity have *chapeaus* that require a certain context or environment for the individual action, whereas genocide requires a specific intent for the individual action.

⁸⁰¹ ICC Doc. ICC-ASP/1/3(Part II-B). On the negotiations on this formulation, see V. Oosterveld, ‘The Context of Genocide’, in R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transaction Publishers, 2001), at 48-49. Werle and Jessberger find that the element is a jurisdictional requirement for the ICC only, which is not subject to the requirement of individual knowledge. G. Werle & F. Jessberger, “‘Unless Otherwise Provided’: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law”, 3 *Journal of International Criminal Justice* (2005), at 51.

⁸⁰² S. R. Ratner, J. S. Abrams & J. L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009) 14.

⁸⁰³ Ratner, Abrams & Bischoff 2009, at 14. E.g., torture is a specific offence.

⁸⁰⁴ G. P. Fletcher, ‘The Indefinable Concept of Terrorism’, 4 *Journal of International Criminal Justice* (2006), at 894 (regarding terrorism). This will be considered further in Chapter 9.

Of the *chapeaus* and underlying offences, it is generally the *chapeaus* that primarily reflect the special features of international criminality, and the focus in this analysis section will therefore be on those crime elements. This being said, there are, however, particular underlying offences that clearly reflect upon the phenomenology of international criminality. For example, the underlying offences of extermination (mass victimization) and persecution (discriminatory animus). Fletcher has also pointed out that certain underlying offences emphasize the collective animus of the criminality in that they cannot be committed by individual soldiers alone, for example, declaring that no quarter be given.⁸⁰⁵ To a limited extent, underlying offences will therefore also be considered.

6.3.2. Nexus to Armed Conflict

Immediately after the bombing of the twin towers, I realized that the basic issue of the times is distinguishing between crime and war.⁸⁰⁶

Historically, the existence of an international armed conflict was the factor that justified international intervention in the form of supranational criminal law. Originally, both war crimes and crimes against humanity therefore had a war nexus requirement, which, however, has been abandoned in relation to crimes against humanity and which has been altered in relation to war crimes to also include non-international armed conflicts. Even though crimes against humanity and genocides often are committed “veiled under the cover of war,”⁸⁰⁷ it is thus only war crime that today has as a crime element that the criminal behaviour must take place in the context of and be associated with an armed conflict.

These legal developments can be explained with the perceived *illogicality* to treat similar behaviour as allowed in one context but as prohibited in another context. Why should it matter if a genocide has taken place in peacetime or in war?⁸⁰⁸ Or whether atrocities have been committed in international or internal armed conflicts?⁸⁰⁹ Ratner has, in this regard, talked about the historical “schizophrenias” of international criminal law.⁸¹⁰

The extending of the reach of international criminal law to peacetime and to non-internal armed conflicts is by most legal scholars regarded as a desirable development of international criminal law, even though criticism has been raised against the way in

⁸⁰⁵ Fletcher 2007(a), at 335.

⁸⁰⁶ Fletcher 2007(a), at xix-xx.

⁸⁰⁷ C. Sinatra, ‘The International Criminal Tribunal for the Former Yugoslavia and the Application of Genocide’, 5 *International Criminal Law Review* (2005), at 420.

⁸⁰⁸ Schabas has argued that the adoption of the Genocide Convention, which explicitly stipulates that genocide can be committed in times of peace, can be explained with the Nuremberg Tribunal’s refusal to address the violence against Jews that had taken place before the outbreak of the war. Schabas 2007-2008, at 36.

⁸⁰⁹ E.g., Mettraux 2005, at 34.

⁸¹⁰ S. R. Ratner, ‘The Schizophrenias of International Criminal Law’, 33 *Texas International Law Journal* (1998), at 237. See also S. R. Ratner, ‘Why Only War Crimes? De-Linking Human Rights Offenses from Armed Conflict’, 3 *Hofstra Law and Policy Symposium* (1999), at 76.

which the development has occurred.⁸¹¹ Akhavan has, however, pointed out that the legal non-recognition of an armed conflict nexus requirement in relation to crimes against humanity is not completely unproblematic. More specifically, he asks whether conduct that is allowed according to the laws of war nonetheless may constitute crimes against humanity during an armed conflict.⁸¹² Due to the fact that armed conflicts are governed by an alternative legal order, the non-recognition this alternative legal order may result in disruption of the delicate balance between military necessity and humanitarian concerns that the laws of armed conflict has tried to establish. While Akhavan's point is interesting in theory, its practical relevance is not significant. As the law of armed conflicts prohibits attacks against non-military objects and crimes against humanity must be directed towards a civilian population, the risk that the laws of war would allow crimes against humanity is, in practice, non-existent.

The question to what extent the international crime definitions should recognize the alternative legal order of war (which is Akhavan's fundamental point) is, however, important. By limiting the applicability of criminalizations to armed conflicts *or* peacetime, it is possible to stress that there are two alternative legal orders in which different rules apply. At the same time, the rules applicable in the two legal systems are not completely different, which makes it artificial to create two completely separate regulative systems. The present system of international criminal law, in which the criminalization of war crimes essentially reflects the content of the alternative legal order of armed conflicts and where the criminalizations of crimes against humanity and genocide represent rules that apply in both legal orders, therefore reflects both the differences and similarities between the legal orders. The distinction between absolute and context-dependant criminalizations could, however, be made clearer in international criminal law.

6.3.3. Nexus to Collective Action

6.3.3.1. Introductory Remarks

Fletcher has argued that armed conflicts are characterized by collective action in which "individuals are beside the point." "No one cared about the Japanese pilots who returned safely from the attack on Pearl Harbor. They were not criminals but rather agents of an enemy power", he continues.⁸¹³ War crimes are therefore for him something that exists "at the frontier between two legal orders", viz. the collective legal order of war and the individual-focused legal order of criminal law.⁸¹⁴ In connection to war crimes, the fact that an individual's conduct has to have a nexus to an armed conflict therefore, in practice, entails that a nexus to a collective happening has to be established. In relation to crimes against humanity, the requirement that the underlying offence must be part of a widespread or systematic attack directed against any civilian population entails a

⁸¹¹ E.g., Marston Danner 2006, at 1 ff.

⁸¹² Akhavan 2008, at 22.

⁸¹³ G. P. Fletcher, *Romantics at War – Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002), 5.

⁸¹⁴ Fletcher 2002(a), at 54.

similar requirement of a connection to collective action.⁸¹⁵ Also genocide has today the (debated) quasi-contextual element in the legal regime of the ICC.⁸¹⁶ Finally, some underlying offences, such as attack on a civilian population as a war crime, foresee a broader criminal context.⁸¹⁷

In German, the *chapeau* elements of the international crimes are sometimes referred to as the “common act” (*Gesamttat*).⁸¹⁸ According to Ambos, the existence of *Gesamttaten* requires a *double perspective* on the criminal event. More concretely, he puts forward that: “First, the collective perspective focuses on the *context element* belonging to all participants; that is, the supra-individual objective criminal context or situation. Secondly, this context may be attributed *as a whole* or in part(s) to the *individual participants* by recourse to the concrete rules of attribution that are yet to be established.”⁸¹⁹ A difficult legal question is thus how to connect individual actors to contextual crime elements.

6.3.3.2. Connecting Individuals to Contexts through Knowledge of the Context

As was noted in connection to the crime definitions of war crimes and crimes against humanity,⁸²⁰ individuals are connected to the contextual *chapeau* elements through their *individual knowledge* of the context.⁸²¹ It is, however, not necessary that the individuals make a correct legal evaluation of the context. It is enough that they are *aware* of the *factual circumstances* constituting the context.⁸²² Sluiter has pointed out that the knowledge requirement in connection to crimes against humanity is more demanding than in connection to war crimes in that for “war crimes, it is not required that the accused knew of the nexus between his acts and the armed conflict, whereas knowledge that the acts are part of the attack is required for crimes against humanity.”⁸²³

⁸¹⁵ Osiel notes that in the wake of World War II, “international law soon began to take on board the idea that the victim of crime could be understood as a group, independent of attendant suffering by particular members.” In connection to collective action, he, however, observes that: “International law has been much slower [...] to grapple seriously with the notion that crime’s perpetrators might also be groups.” Osiel 2005(a), at 1751-1752. In this regard, it is noteworthy that in domestic criminal law, offences are sometimes defined so that “they can only be committed by two or more co-principals” (e.g., riot and violent disorder). Ashworth 2006, at 411. Also some international crimes are by their nature such that they demand more than one participant (e.g., persecution). In the crime definitions, the requirement of collective action is hence sometimes *indirect*. See also Section 6.3.4.4. on policy requirements.

⁸¹⁶ See further Section 6.2.4.

⁸¹⁷ Cf. Bonafè 2009, at 93.

⁸¹⁸ K. Ambos, ‘Remarks on the General Part of International Criminal Law’, 4 *Journal of International Criminal Justice* (2006), at 663. And the underlying offences are referred to as the *Einzelstaten* or “individual acts. *Ibid.*

⁸¹⁹ Ambos 2006, at 663-664.

⁸²⁰ In connection to genocide and the ICC, the mental element connected to the contextual element has not yet been elaborated upon. See further Section 6.2.4.2.

⁸²¹ In this regard, Werle and Jessberger have pointed out that the contextual/circumstantial crime elements appear to be an exception to the general ICC requirement that all material crime elements must be covered by intent and knowledge. Werle & Jessberger 2005, at 38 (see also 42-43 and 49-51). See also Piragoff & Robinson 2008, at 857.

⁸²² *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 311. See also *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, paras 113 and 119. La Haye has observed that in early case law, proof of knowledge was not required. La Haye 2008, at 112.

⁸²³ Sluiter 2011, at 137.

Boas *et al.* have pointed out that the *ad hoc* tribunals have not always been clear on who should have knowledge of the context of action. More specifically, they argue that the *physical perpetrators* are not necessarily the *accused persons*, which raises both the question of whose action must have a nexus to the context and who must be aware of this nexus. While it is settled that the underlying offences must form part of the context, that is, the physical perpetrator's acts must be part of the context, the question of who should be knowledgeable of this fact is more complicated. Boas *et al.* find that the physical perpetrator knowledge is only relevant in situations where it is the physical perpetrator who stands trial, while it in other cases is the knowledge of the accused person that is legally significant.⁸²⁴ In relation to war crimes requiring a connection to an international armed conflict, it is thus the accused person who must be aware of the foreign involvement in the conflict, not necessarily the foot soldiers physically committing the underlying offences. This is indeed the approach the *ad hoc* tribunals implicitly have adopted.

6.3.3.3. Establishing the Context

To ensure a conviction for war crimes the existence of an armed conflict must be proven, and to secure a crimes against humanity conviction the existence of widespread or systematic attack against a civilian population.⁸²⁵ In connection to genocide, the *ad hoc* tribunals have not found a genocidal context to be a crime element, but have found it evidentiary significant when establishing genocidal intent. Before the ICC, a genocidal context must explicitly be proven. It is thus often *necessary* for international criminal tribunals to establish *contexts*. (It has furthermore been put forward that international criminal tribunals sometimes voluntarily establish additional contexts that do not directly relate to the crimes charged “to lend credibility to their subsequent findings with respect to the defendant.”⁸²⁶) A legally significant question is therefore *how* these contexts are defined and established. In this regard, it is important to note that the establishment of a context may entail that a tribunal has to take a stand regarding disputed historical

⁸²⁴ Boas, Bischoff & Reid 2008, at 35-41, 236-239, and 249-250. Boas *et al.* argue that in international crimes, the physical perpetrators and more high-level actors can together satisfy the crime elements. For an individual to be criminally responsible, he/she must namely furthermore satisfy the elements of at least one form of responsibility. *Ibid.*, at 39-40.

⁸²⁵ Fletcher and Ohlin have criticized the Report of the International Commission of Inquiry regarding the Darfur region for focusing on Sudan's human rights violations that are “irrelevant and potentially prejudicial for the ICC prosecutions” and they put forward that: “The degree of Sudan's violation of international human rights law is a question of collective responsibility for the entire nation [...], which] has little bearing on the individual responsibility of individual actors indicted and standing trial before the ICC.” They also find that: “To suggest that the former is relevant for the latter is to punish the individual for the crimes of his nation as a collective or, by association, for the actions of other citizens in the same nation.” G. P. Fletcher & J. D. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005), at 544. This criticism of Fletcher and Ohlin is, however, problematic. As crimes against humanity, e.g., demands the existence of a widespread or systematic attack against any civilian population, the existence of proof of large-scale human rights violations is indicative of the fact that crimes against humanity have been committed. The existence of factors that speak for State responsibility can thus at the same time also speak for individual responsibility, even though individual responsibility obviously demands that further criteria are fulfilled.

⁸²⁶ Alvarez 1998, at 2044-2045 (regarding the *Tadić* case before the ICTY).

facts. The outcome of international criminal trials is often a (controversial) *historical record*.⁸²⁷

As regards the question of how the contexts are defined, Mettraux has in relation to war crimes observed that it is possible to take both a micro and a macro approach to armed conflicts.⁸²⁸ In a macro approach, the focus is on whole countries and the existence of an armed conflict in these countries, whereas in a micro approach the focus is on the existence of armed conflicts in more limited geographical areas. The ICTY has opted for the micro approach and has hence considered that the Balkan conflict consisted of several geographically more limited armed conflicts.⁸²⁹ Mettraux notes that this approach has allowed the trial chambers to limit the scope of relevant evidentiary considerations to the material directly pertinent to the case at hand, without having to review evidence not remotely related to the case.⁸³⁰ Also in relation to genocide, the international criminal tribunals have sometimes only considered limited geographical areas when considering whether there has been an intent to destroy a group in whole or in part.⁸³¹ This being said, compared to most domestic criminal trials, the war crime trials before the ICTY still concern “large political events” and a difficult “interpretation of the context”, which, as noted by Koskenniemi, can be as disputed as the individual actions that should be the main object of the trial.⁸³²

While the international criminal tribunals often have taken a rather micro approach to contexts, it is also possible to find examples of the opposite macro approach. In the *Bagosora and Nsengiyumva* case, Nsengiyumva argued that the Trial Chamber had erred in “taking the country of Rwanda as one crime scene” in relation to crimes against humanity instead of focusing on the Gisenyi area. The Appeals Chamber dismissed the complaint by noting that the legal element is simply that the acts form part of a widespread or systematic attack.⁸³³ It is therefore important to note that the crime definitions do not *per se* determine whether a micro or macro approach to contexts should be adopted. This may be found problematic from the point of view of equality between the defendants, as prosecutorial and judicial choices regarding the contexts may affect outcomes in cases.

Different outcomes may also be the result of different evaluations of the facts. The question can and should the tribunals “retry” contextual elements is therefore of great

⁸²⁷ The establishment of such a record has, in fact, been identified as one of the goals of international criminal justice. E.g., ‘Achievements’ [ICTY] <http://www.icty.org/sid/324> (last visited 16 September 2012) (“The Tribunal has established beyond a reasonable doubt crucial facts related to crimes committed in the former Yugoslavia. In doing so, the Tribunal’s judges have carefully reviewed testimonies of eyewitnesses, survivors and perpetrators, forensic data and often previously unseen documentary and video evidence. The Tribunal’s judgements have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region.”)

⁸²⁸ Mettraux 2005, at 30-33.

⁸²⁹ E.g., *Tadić*, Decision (jurisdiction), AC, ICTY, 2 October 1995, para. 77 (“On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.”) See also Mettraux 2005, at 32.

⁸³⁰ Mettraux 2005, at 32.

⁸³¹ See further Section 6.2.4.

⁸³² Koskenniemi 2002, at 16 (referring to *Leben*).

⁸³³ *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 390.

practical significance, as many of the court cases are related to each other. For example, in relation to ICTR, it has been questioned to what extent the existence of a widespread and systematic attack against the Tutsi group in Rwanda in 1994 is something that must be established again in each case.

Rule 94 of ICTY and ICTR establish that the tribunals shall not require proof of facts of *common knowledge* but *shall* take judicial notice of them and that the tribunals *may* decide to take *judicial notice of adjudicated facts* from other proceedings of the tribunal relating to matters at issue in the current proceedings.⁸³⁴ As regards facts of common knowledge, it has in the case law of the tribunals been put forward that facts of common knowledge include “notorious historical events and phenomena,” such as, the Holocaust and the South African system of apartheid.⁸³⁵ In the *Karemera* case, the ICTR Appeals Chamber controversially established that also *crime elements*, such as the existence of a widespread or systematic attack or an armed conflict, can constitute common knowledge, in which case the tribunal is required to take judicial notice of them.⁸³⁶ In the particular case, the Appeals Chamber argued that the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification and the existence of a non-international armed conflict in Rwanda were facts of common knowledge, as well as the 1994 genocide in Rwanda.⁸³⁷ The *Karemera* decision has by scholars been criticized from the point of view of the presumption of innocence. For example Jørgensen has argued that “since international tribunals rely heavily on inferences, in particular as it concerns findings related to the mental element for crimes [...], the danger that a judicially noticed fact could end up forming the basis for a conviction [..., is] apparent.”⁸³⁸ Some *ad hoc* tribunal trial chambers have, however, before *and after* the *Karemera* decision refused to regard complex historical events as facts of common knowledge.⁸³⁹ Most scholars and trial chambers have instead found that, if these types of facts shall at all be considered as facts of which judicial

⁸³⁴ On interpretation of these rules, see further e.g., N. H. B. Jørgensen, ‘Judicial Notice’, in K. A. A. Khan, C. Buisman & C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010), at 695-722, J. G. Stewart, ‘Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent’, 3 *International Criminal Law Review* (2003), at 245-274, and J. Stewart, ‘Judicial Notice’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 397-399.

⁸³⁵ *Karemera et al.*, Decision (judicial notice), AC, ICTR, 16 June 2006, para. 30. See also *Stanišić*, Decision (judicial notice), TC, ICTY, 14 December 2007, para. 12.

⁸³⁶ “It is true that “widespread and systematic attack against a civilian population” and “armed conflict not of an international character” are phrases with legal meanings, but they nonetheless describe factual situations and thus can constitute “facts of common knowledge”. [...] Likewise, it is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution. There is no exception to Rule 94(A) for elements of offences.” *Karemera et al.*, Decision (judicial notice), AC, ICTR, 16 June 2006, paras 29-30.

⁸³⁷ *Karemera et al.*, Decision (judicial notice), AC, ICTR, 16 June 2006, paras 29 and 35.

⁸³⁸ N. H. B. Jørgensen, ‘Genocide as a Fact of Common Knowledge’, 56 *International and Comparative Law Quarterly* (2007), at 895.

⁸³⁹ See e.g., *Stanišić* Trial Chamber, which did not regard the existence of an armed conflict in the territory of Bosnia and Herzegovina during the relevant time period to be a fact of common knowledge nor the existence of a widespread or systematic attack against the Bosnian Muslim and Bosnian Croat population on the territory of the Republika Srpska. *Stanišić*, Decision (judicial notice), TC, ICTY, 14 December 2007, paras 15, 20, 21 and 27. See also *Semanza*, Decision (judicial notice), TC, ICTR, 3 November 2000, para. 36.

notice can be taken, the judicial notice should be taken based on Rule 94(B) on already adjudicated facts.⁸⁴⁰

Rule 94(B) of the *ad hoc* tribunals stipulate that a trial chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts from other proceedings of the tribunal relating to matters at issue in the current proceedings. The goal of the rule is, *inter alia*, to avoid the need to rehear witnesses on the same facts in multiple cases and to foster “consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair.”⁸⁴¹ The problem with judicial notice on adjudicated facts is, however, that defendants in different cases may have different interests which is reflected in different defence strategies and that the rule limits an accused person’s possibility to confront witnesses against him/her.⁸⁴² Kwon has observed that whereas the judges initially were reluctant to apply the rule, the trial chambers have started to increasingly take judicial notice of adjudicated facts since 2003.⁸⁴³ In the *Milošević* case, the Appeals Chamber held that the effect of taking judicial notice is that a “well-founded presumption for the accuracy” of a fact is created, which, however, may be challenged by the opposing party.⁸⁴⁴ In the case law, criteria for what kinds of facts can be taken judicial notice of have also been established. These criteria include that the fact must not contain characterisations of an essentially legal nature and that the fact proposed for notice must not relate to acts, conducts or mental states of the accused.⁸⁴⁵ As regards the question of what facts relate to the acts, conducts or mental states of the accused, it was in the case concerning Dragomir Milošević questioned whether the fact that the crimes committed by his predecessor, namely Stanislav Galić, had a strong link with the crimes Milošević was charged with prevented the tribunal from taking judicial notice of the already adjudicated facts. The ICTY Appeals Chamber in that case found that it saw “no reason why judicial notice could not be taken of adjudicated facts providing evidence as to the existence of crimes committed by others and which the accused is not even charged with [...] as long as the burden remains on the Prosecution to establish, by means other than the judicial notice, that the accused had knowledge of their existence.”⁸⁴⁶ Due to the interconnectedness of many cases before the tribunals, this ruling is of great significance.

Article 69(6) of the ICC Statute establishes that the “Court shall not require proof of facts of common knowledge but may take judicial notice of them.” The procedural rules

⁸⁴⁰ E.g., R. Mamiya, ‘Taking Judicial Notice of Genocide? The Problematic Law and Policy of the *Karemera* Decision’, 25 *Wisconsin International Law Journal* (2007), at 20. There are, however, also scholars who support the *Karemera* appeal approach. See e.g., R. Faulkner, ‘Taking Judicial Notice of the Genocide in Rwanda: The Right Choice’, 27 *Penn State International Law Review* (2009), at 895 ff.

⁸⁴¹ *Semanza*, Decision (judicial notice), TC, ICTR, 3 November 2000, para. 20 (referring to Cross and Tapper). See also O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, 5 *Journal of International Criminal Justice* (2007), at 369-372.

⁸⁴² Kwon 2007, at 370, and P. M. Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas on an International Court’, 5 *Washington University Journal of Law and Policy* (2001), at 111. See also e.g., M. Damaška, ‘What Is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008), at 341.

⁸⁴³ Kwon 2007, at 371.

⁸⁴⁴ *Milošević*, Decision (judicial notice), AC, ICTY, 28 October 2003.

⁸⁴⁵ E.g., *Popović et al.*, Decision (judicial notice), TC, ICTY, 26 September 2006, paras 10 and 12, and *Stanišić*, Decision (judicial notice), TC, ICTY, 14 December 2007, para. 34.

⁸⁴⁶ *Milošević*, Decision (judicial notice), AC, ICTY, 26 June 2007, para. 16.

of the ICC do hence not explicitly provide for the taking of judicial notice of already adjudicated facts. Jørgensen has, however, held that: “the goal of expediting cases while ensuring that no party is impaired in the presentation of its case renders almost inevitable a development of the jurisprudence on judicial notice by the ICC.”⁸⁴⁷

6.3.3.4. The Legal Relevance of Contextual Crime Elements

It is sometimes asserted that contextual crime elements involve a risk that individuals are not merely held responsible for their own behaviour, but also are blamed for the context or the “acts of others”.⁸⁴⁸ This has been found especially problematic in relation to low- and mid-level actors, who cannot readily be blamed for creating or maintaining large-scale contexts.⁸⁴⁹ In this vein, an accused in the *Naletilić and Martinović* case before the ICTY, asserted that it was wrong that they were held responsible for the character of the armed conflict. The argument of the accused was, however, not accepted by the Appeals Chamber, which noted that the accused were “not found responsible for the fact that the conflict was international, but rather for the crimes committed in the context of the international armed conflict.”⁸⁵⁰ Individuals are hence, according to prevailing case law, blamed for committing criminalized acts in particular contexts, and not for the contexts themselves. The approach of international criminal tribunals to contexts of action has been described by Bonafè in the following terms:

Due to the kind of jurisdiction they exercise, international criminal tribunals take into account the general criminal context as a sort of preliminary issue which is necessary to ascribe individual liability. They do not investigate whether the collective criminal phenomenon is the result of a state conduct or of the conduct of group of private individuals, because this is not required under international criminal law. International criminal tribunals focus on collective criminality with the specific purpose of identifying a nexus with the conduct of the accused.⁸⁵¹

The contexts are hence primarily pre-requisites for individual responsibility. This being said, the legal relevance of the contextual elements needs closer scrutiny.

There appears to two main strands of thought on the legal relevance of contextual elements among scholars. Some think that international crimes generally are *more blameworthy* than the corresponding ordinary domestic crimes due to the individual knowledge of the danger-increasing context of action.⁸⁵² Others, on the other hand, find that the function of the contextual elements primarily is jurisdictional, that is,

⁸⁴⁷ Jørgensen 2010, at 720.

⁸⁴⁸ E.g., Drumbl who argues that individuals in international criminal law must bear responsibility for the “myriad political, economic, historical, and colonial factors that facilitate the violence” that may have pushed them towards the criminality. Drumbl 2003, at 277.

⁸⁴⁹ Cf. Tallgren who speaks of offenders who “have little or no influence on those features of the crimes that actually make them international”. Tallgren 2002(b), at 572.

⁸⁵⁰ *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, para. 109.

⁸⁵¹ Bonafè 2009, at 103.

⁸⁵² E.g., Marston Danner 2001, at 488-489 (‘In all likelihood, the best description of international criminalization incorporates substantive and procedural components. An international crime, especially the particular crimes within the jurisdiction of the Tribunals and the ICC, connotes a greater degree of seriousness than does a domestic crime. [...] [T]he *chapeau* elements of the crimes within the Tribunals’ jurisdictions should be considered when assessing the harm caused by the defendant’s actions.’)

to distinguish crimes that are of international concern from crimes that only can be prosecuted in domestic legal systems. For example, Piragoff and Robinson have put forward that the “contextual elements do not relate directly to the conduct of the accused, but rather to the context creating an international dimension”.⁸⁵³ Also Haque has held that the contextual element of war crimes “does not directly contribute to their wrongfulness.”⁸⁵⁴ Especially some *chapeau* elements, such as the requirement of an *international* armed conflict, have been found to be mere “legal prerequisites” that “do not have a bearing on the accused’s conduct.”⁸⁵⁵

The content-wise approach to contextual crime elements *can* be found problematic in that it assumes the greater blameworthiness of international criminality in relation to ordinary criminality. While international criminality generally causes *more harm* than ordinary criminality,⁸⁵⁶ it may namely be asked whether not international criminality sometimes is characterized by *lesser culpability*. As was noted in the criminological investigation of international criminality, situational factors have been found to have a significant impact on individual behaviour in connection to international criminality. Furthermore, one *may* ask whether not, for example, a rape is a rape regardless of in what context it is committed.⁸⁵⁷ The idea of merely jurisdictional contextual crime elements, however, seems to understate the relevance of contextual elements. As was noted in the phenomenological survey, identical physical acts may be evaluated morally differently depending on in which context they take place. Furthermore, the context of action may give the underlying offences “special features”. For example, rapes that are

⁸⁵³ Piragoff & Robinson 2008, at 857. The same opinion is expressed by Kirsch regarding the *chapeau* element of crimes against humanity. S. Kirsch, ‘Two Kinds of Wrong: On the Context Element of Crimes against Humanity’, 22 *Leiden Journal of International Law* (2009), at 525 and 539.

⁸⁵⁴ A. A. Haque, ‘International Crime: in Context and in Contrast’, in R. A. Duff *et al.* (eds.), *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011), at 114. According to him, the function of the nexus requirement is either: a) to exempt certain acts from a lawful combatant’s “general immunity from prosecution in national courts”, or b) to recognize the contexts wrong-enabling function. *Ibid.*, at 111-112. Also regarding crimes against humanity, he emphasis the jurisdictional nature of the *chapeau* element. *Ibid.*, at 117. The genocidal intent requirement, he, however, concedes a blameworthiness increasing function. *Ibid.*, at 125.

⁸⁵⁵ *Delalić et al.*, Judgement (sep. and diss. op. of Judges Hunt and Bennouna), AC, ICTY, 20 February 2001, para. 26. Cf. L. Arbour, *War Crimes and the Culture of Peace* (Toronto: University of Toronto Press, 2002) at 38.

⁸⁵⁶ There are different viewpoints on the nature of, e.g., the contextual crime element of crimes against humanity, and of its dangerousness. May essentially regards the context as the aggregation of the individual acts. He notes that: “In crimes against humanity, an individual human person cannot commit the mass crime, the mass murder for instance, only lots of such persons can do so by their acts of murder. But then the problem is merely an aggregation problem. The individuals act wrongly, by murdering say, and the conceptual problem is how to link these already wrongful acts to the larger wrongs, which are only the aggravated wrongful acts of lots of people.” L. May, ‘State Aggression, Collective Liability, and Individual *Mens Rea*’, 30 *Midwest Studies in Philosophy* (2006), at 314. Drumbl, on his part, however finds that: “The prevailing paradigm views mass atrocity as something greater than the sum of its parts, namely each of its ordinary constituent murders.” Drumbl 2005(a), at 540.

⁸⁵⁷ Bassiouni makes a distinction between a victim-centric perspective and a conflict-centric perspective, and argues that the suffering experienced by the victims should be given a more prominent role than the context in which the suffering has taken place. M. C. Bassiouni, ‘International Recognition of Victims’ Rights’, 6 *Human Rights Law Review* (2006), at 204.

underlying offences to international crimes often differ from domestic rapes in that they are public, very brutal and regularly connected to other types of victimization. For a content-wise approach also speaks the fact that it *appears* that contextual crime elements have been adopted *both* to counteract impunity (procedural reasons) and to stigmatize certain behaviour in a particular way (substantive reasons). In this regard, it should also be noted that many domestic legal systems today have criminalized international crimes, and at least in those legal systems where an act constituting an international crime can be prosecuted both as an ordinary crime and an international crime, it must be considered what it from a blameworthiness perspective means that the acts are labelled as international crimes with contextual elements.

When international criminalizations have been adopted (or they have emerged), it has thus not been explicitly regulated what the role of the contextual element should be. This is problematic in that the function of contextual elements may be many: Their role may, for example, be to: (a) stress that a particular behaviour *also* is criminal in a “new” or alternative context;⁸⁵⁸ (b) to clarify that certain acts *merely* are criminal in particular contexts; or (c) to signal that the behaviour is *especially reprehensible* or *less reprehensible* in particular contexts. An especially significant distinction in this regard appears to be whether the international criminalization with a contextual crime element: (1) makes previously non-criminal behaviour criminal; or (2) merely affects the labelling of already criminal behaviour.⁸⁵⁹ Judge Shahabuddeen has, in this regard, noted that “[i]n general, there is a difference between saying an “act” becomes a certain crime “when” committed in specified circumstances and saying that a “crime” becomes another crime “when” committed in specified circumstances.”⁸⁶⁰ When it is the context of action that transforms previously non-criminal behaviour into criminal behaviour, the context clearly has an effect on blameworthiness evaluations.

Contexts that “merely” transform previously criminal acts into international crimes are, however, more difficult to assess legally. First, there is the question of whether and how the blameworthiness of individual behaviour is altered due to the contextual elements. This will be considered further in Chapter 9, where it will be asked whether there is a hierarchy between the different international crimes. Second, there is the question of how the previous criminality of the underlying offence affects the applicability of the principle of legality. If a person knows that it is criminal to rape in peacetime, should he/she also automatically know that it is criminal to rape in wartime?

As was noted in the introductory chapter, much international criminality consists of acts that in peacetime are criminalized as ordinary crimes: Murder, rape, assault, etc. Often they even represent criminality that is characterized as *mala in se* criminality in domestic legal systems. As was noted in the phenomenological chapter, the alternative

⁸⁵⁸ Cf. rapes have for a long time been universally criminalized, but rapes committed in armed conflicts have historically rarely been prosecuted. This made some distinguish between “criminal” peace-time rapes and “acceptable” war-time rapes. The development of international criminal law, which clearly also criminalizes war-time rape, has made many regard rape as criminal in all contexts.

⁸⁵⁹ Cf. A difference has been made between *hate crimes* and *parallel crimes*. The hate crimes are otherwise defined identically to the parallel crimes, but they have an additional requirement of bias. V. Jenness, ‘The Hate Crime Canon and Beyond: A Critical Assessment’, 12 *Law and Critique* (2001), at 295 (referring to Lawrence). Many international crimes also have parallel crimes in domestic criminal law.

⁸⁶⁰ *Tadić*, Judgement (sentencing, sep. op. of Judge Shahabuddeen), 26 January 2000, at 39.

legal order of war, however, entails that much behaviour that usually is regarded as criminal becomes legal and sometimes even expected behaviour.⁸⁶¹ This raises the question of whether certain contexts of action may affect evaluations of whether particular crimes are *mala in se* or *mala prohibita*. Whereas individuals generally are assumed to know that *mala in se* criminality is criminal, the same presumption cannot be made regarding *mala in prohibita* criminality. As such, the question of whether particular international crimes and/or underlying offences are *mala in se* or *mala prohibita* is legally significant.

The prevailing assumption in international criminal law appears to be that most of international criminality is *mala in se* criminality despite the abnormal contexts of individual action.⁸⁶² This is, for example, reflected in the acceptance of *ad hoc* tribunals' "law-making" jurisprudence (for example, the broadening of the war crime criminalization to cover violations of international humanitarian law during non-international armed conflicts)⁸⁶³ as well as in the acceptance of open criminalizations (for example, the underlying offence of "other inhumane acts" in connection to crimes against humanity). As such, it may be said that international criminal law has not been willing to generally recognize that different moral codes would apply in the contexts in which international crimes usually are committed.

6.3.3.5. The Contextual Crime Elements as Factors Contextualizing Individual Behaviour?

Finally as regards the contextual crime elements, it must be asked whether they entail that international criminal law to a greater extent than ordinary criminal law takes into consideration the context in which the individual acts or his/her "life circumstances". As was noted in Chapter 4, domestic criminal law has been criticized for not taken into consideration such factors. For example, Norrie has argued that: "Law is concerned with a dehumanised form of individualism which ignores the context of individual action."⁸⁶⁴ In a similar vein, he notes that: "Law is inherently concerned with *individual* responsibility and individual blame, and therefore it must focus on *individual* agency to the exclusion of its existence: law must *decontextualize* action if it is to attribute responsibility to individuals."⁸⁶⁵ Criminal law does therefore not generally care if an individual perpetrator has been poor, unemployed, brought up in deprivation, etc.⁸⁶⁶ The

⁸⁶¹ Contextual crime elements may hence be connected to alternative legal orders. As has been noted before, in armed conflicts different rules apply than in times of peace. It is, however, not legally self-evident, that the distinction between peace and armed conflicts is substantially relevant, whereas the distinction between internal and non-international armed conflicts is purely jurisdictional. Alternative legal orders may be defined in different ways, and even though the difference between war and peace is established, it is not absolute. In connection to societal evaluations of the context, it is also noteworthy that the moral evaluations may be so diverse that a codification is difficult (e.g., some feel that terroristic violence committed in a freedom fight context should be covered by an alternative legal order similar to that of armed conflicts, whereas others feel that the context of action in connection to terrorism is rather an aggravating factor).

⁸⁶² E.g., Fletcher 2007(a), at 31 and 82. There are, however, some war crimes that more readily can be characterized as *malum prohibitum*. In this regard, Fletcher mentions the war crimes of transferring own population to occupied territories and of declaring that no quarter will be given. *Ibid.*, at 31.

⁸⁶³ See further Section 5.1.2.3.

⁸⁶⁴ Norrie 1991, at 165.

⁸⁶⁵ Norrie 1991, at 164.

⁸⁶⁶ Norrie 2001, at 23.

law is thus only interested in a very small piece of what many view as a much larger puzzle.⁸⁶⁷

Marston Danner has regarding the contextual crime elements held that they import the concept of group perpetration into some of the international crimes.⁸⁶⁸ To some extent, the contextual crime elements indeed shed light on the context in which individuals act in connection to international criminality. It is, however, important to recognize that international criminal law does not contextualize the action of individuals in the way desired by, for example, Norrie. The goal of the contextual crime elements is namely not to better understand why particular atrocities take place or why particular individuals participate in them. The approach of international criminal law is clearly reflected in the following statement by the *Delalić et al.* Trial Chamber:

It is important to note that the Trial Chamber does not seek to identify causal factors, nor through history explain why the conflict with which we are concerned occurred. It would indeed do no justice to the victims of this conflict to attempt to explain their suffering by proffering historical “root causes” which somehow inexorably led to the violence which engulfed them. Such an endeavour would, in any case, be an exercise in futility.⁸⁶⁹

International criminal law therefore essentially follows the traditional decontextualized approach to individual criminal responsibility.⁸⁷⁰

6.3.4. Possible Perpetrators and State Involvement

6.3.4.1. Introduction

Critical criminologists have pointed out that criminal law traditionally has directed its attention towards the criminal behaviour of the “problematic classes” of society, whereas the harmful behaviour of the powerful has been given little attention. As was noted in connection to the phenomenology of international crimes, one characteristic of international criminality is that high-level politicians and military leaders often take part in it. As such, international criminal law is a branch of criminal law where the criminality of the powerful potentially could be given a lot of attention. An interesting question is therefore whether the international crime definitions reflect the “white collar nature” of international criminality.

Possible ways to take into account State involvement in the criminality at the level of crime definitions is, for example: (a) to require that the perpetrator is a public official or State representative; (b) to demand that a State policy lies behind the criminality; or (c) to demand that a prohibited act by a State has been established before the question

⁸⁶⁷ Osiel 1997, at 61.

⁸⁶⁸ Marston Danner 2001, at 465-466.

⁸⁶⁹ *Delalić et al.*, Judgment, TC, ICTY, 16 November 1998, para. 89.

⁸⁷⁰ The question of whether individual life circumstances can be considered as defences or as sentencing factors is elaborated in Chapters 8 and 9 respectively.

of individual criminal responsibility can be considered.⁸⁷¹ The downside of these kinds of crime elements is, however, that they exclude from the scope of the crimes acts committed by non-State actors. As was noted in Chapter 2, even though international criminality often is characterized by State-involvement, the role of non-State actors has changed in relation to international criminality.⁸⁷²

The special role played by high-level actors in international criminality, on the other hand, can be legally recognized in the crime definitions by making a difference between crimes of authority and crimes of obedience,⁸⁷³ and hence by including crime elements that entail that leaders and followers are convicted for different crimes in relation to common acts.

6.3.4.2. Restrictions Regarding Possible Offenders

The crime definitions of war crimes, crimes against humanity or genocide do not restrict the group of possible perpetrators to individuals holding particular positions or to individuals having particular affiliations. Also the case law of the *ad hoc* tribunals has constantly stressed that when an individual possesses ability to commit particular crimes, he/she should also be held responsible for them.⁸⁷⁴ In relation to war crimes, there is, for example, no requirement that the perpetrator is a commander, a combatant or other member of an armed force.⁸⁷⁵ War crimes can thus be committed by civilians but due to the armed conflict nexus requirement this is rarely the case in practice.⁸⁷⁶

⁸⁷¹ Cf. The crime of aggression requires an *act* of aggression by a State before an individual can be held responsible for the *crime* of aggression. ICC Doc. RC/Res.6 (“act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”).

⁸⁷² See further e.g., M. C. Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, 98 *Journal of Criminal Law and Criminology* (2008), at 711 ff.

⁸⁷³ Cf. H. C. Kelman, ‘The Policy Context of International Crimes’, in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 26-28.

⁸⁷⁴ This approach is, e.g., reflected in the following statement of the *Kunarac et al.* Trial Chamber: “A violation of one of the relevant articles of the Statute will engage the perpetrator’s individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. The involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims. It may also trigger the application of a different set of rules, in the event that its involvement renders the armed conflict international. However, the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question. [...]” *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 493. The Trial Chamber made a reference to the *Flick* judgment, where it was observed that: “Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong [...]” *Flick*, Judgment, CCL, 22 December 1947, at 1192.

⁸⁷⁵ *Akayesu*, Judgement, AC, ICTR, 1 June 2001, para. 444.

⁸⁷⁶ In relation to certain war crimes, it is not only typical that the perpetrators are soldier, but that they are members of a State army. It is, e.g., usually only well-equipped State military apparatuses that have access to certain types of weapons. Bonafè 2009, at 92.

In connection to two international crimes, the question of whether only particular types of individuals can commit these crimes has, however, been topical.⁸⁷⁷ Regarding *torture* (which is both an independent international crime and a possible underlying offence to war crimes and crimes against humanity) a contested question has been whether the perpetrator must be a public official or another person acting in an official capacity. Such a requirement is suggested by the Torture Convention.⁸⁷⁸ In the *ad hoc* tribunals' case law, it has, however, been held that in international criminal law there is no requirement of State involvement. More specifically, the *Kunarac et al.* Trial Chamber found that: "The characteristic trait of the offence in [the context of international criminal law, ...] is to be found in the nature of the act committed rather than in the status of the person who committed it."⁸⁷⁹ The public official requirement can neither be found in the ICC Statute or the ICC Elements of Crimes. According to Gaeta, it is justified to not have the public official requirement when torture is the underlying offence of war crimes or crimes against humanity, as the *chapeau* elements of these crimes already contain factors that transform an "ordinary crime" into a concern of the international community.⁸⁸⁰

Secondly, the crime of aggression (which is not studied in detail in this study) is generally characterized as a *leadership crime*. Only individuals who are "in a position effectively to exercise control over or to direct the political or military action of a State" can, according to the ICC definition of aggression, be held individually responsible for the crime.⁸⁸¹ Meron has in this regard noted that: "Aggression is an act of state" and the crime of aggression involves "state responsibility to a far greater degree than the other [international crimes, ...]."⁸⁸² This limitation is interesting as the crime of aggression in the same way as the other international crimes also is characterized by collective action. For example, the Nuremberg Tribunal famously remarked that: "Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen,

⁸⁷⁷ A third possible example is the war crime of denying quarter, in connection to which the ICC Elements of Crimes demand that the "perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed." ICC Doc. ICC-ASP/1/3 (Part II-B). Triffterer has questioned whether this kind of crime elements legally can be introduced in the Elements of Crimes. Triffterer 2009, at 383-384.

⁸⁷⁸ Article 1, Torture Convention.

⁸⁷⁹ *Kunarac et al.*, Judgement, TC, ICTY, 22 February 2001, para. 495. See also *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 148. For references to further case law, see e.g., Boas, Bischoff & Reid 2008, at 78-79.

⁸⁸⁰ P. Gaeta, 'When Is the Involvement of State Officials a Requirement for the Crime of Torture?', 6 *Journal of International Criminal Justice* (2008), at 183 and 190.

⁸⁸¹ ICC Doc. RC/Res.6. On the leadership requirement, see further e.g., K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *European Journal of International Law* (2007), at 477 ff. There are different opinions on whether the leadership requirement should be a crime element (always applicable) or a jurisdictional element (e.g., ICC-specific). N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008), at 194.

⁸⁸² T. Meron, 'Defining Aggression for the International Criminal Court', 25 *Suffolk Transnational Law Review* (2001), at 3 and 13.

military leaders, diplomats, and business men.”⁸⁸³ The crime of aggression hence in the same way as the other international crimes demands hands-on criminals.⁸⁸⁴

The leadership requirement of aggression, in practice, entails that the role played by the State and influential persons is stressed, whereas the role played by the hands-on criminals is ignored. In this regard, the crime of aggression differs from war crimes, crimes against humanity and genocide, in which case there is no requirement of ability to affect the context in order for individual criminal responsibility to arise. For example, foot soldiers can be convicted for crimes against humanity in the same way as the architects behind the attack against the civilian population. The fact that a perpetrator is a high-level actor is instead taken into consideration when considering the nature of the participation and/or at sentencing. In relation to genocide, the ICTR Appeals Chamber in the *Semanza* case stressed that it is not necessary that a person has fulfilled a “key coordinating role” to be convicted for genocide as a perpetrator.⁸⁸⁵

6.3.4.3. More Offender-Specific Crime Definitions?

Kreß finds it “perhaps unfortunate” that the definitions of genocide and crimes against humanity have not been “drafted *from the perspective of the leadership level* of a criminal regime, i.e. from the perspective of those persons who direct the overall collective activity from behind, and who are considered to be most responsible for the commission of the crimes and therefore the primary if not the exclusive targets of international prosecutions.”⁸⁸⁶ More specifically, he finds in connection to genocide that the combination of (a) *actus reus* elements that typically reflects the conduct of subordinate participants with (b) *mens rea* requirements that usually only the leadership stratum of participants possess is prone to cause “conceptual problems.”⁸⁸⁷

Kreß’ argumentation is based on the phenomenological fact that whereas the criminal behaviour of low-level actors generally has a much closer relationship to the specific underlying offences, the criminal behaviour of high-level actors is often different. Leaders rather create contexts and affect the behaviour of others. At present, high-level actors are, however, generally⁸⁸⁸ not punished for creating the context, but for their involvement in their subordinates’ underlying offences.

A difficult question is, therefore, whether the crime definitions should be adapted to meet the fact that different types of actors in the crimes often play different roles in them and, for example, can have different degrees of knowledge of

⁸⁸³ *Göring et al.*, Judgment, IMT, 1 October 1946, at 226.

⁸⁸⁴ E.g., D. Rodin, ‘The Liability of Ordinary Soldiers for Crimes of Aggression’, 6 *Washington University Global Studies Law Review* (2007), at 591.

⁸⁸⁵ *Semanza*, Judgement, AC, ICTR, 20 May 2005, para. 260.

⁸⁸⁶ Kreß 2006, at 472-473. Instead, he notes, “the prohibited acts within the definition of genocide as much as those within the definition of crimes against humanity describe the *typical conduct of those who execute the overall plan.*” *Ibid.*, at 473.

⁸⁸⁷ C. Kreß, ‘The Darfur Report and Genocidal Intent’, 3 *Journal of International Criminal Justice* (2005), at 575.

⁸⁸⁸ E.g., the crime of aggression through which an armed conflict often is created (see further Section 6.3.4.2) and incitement to genocide (see further Section 7.2.2) could, however, be regarded as crimes in which the perpetrator creates or tries to create a “criminogenic context”. Cf. Sunga who argues that: “As most abuses occur in the context of armed conflict, omitting the crime of aggression from the [ICC] Statute would be tantamount in many cases to treating mere symptoms while ignoring the pathogenic cause.” Sunga 1998, at 380.

the more large-scale happenings. The fact that the crimes can be committed through different underlying offences and through different modes of participation (see further Chapter 7) already to some extent recognizes the existence of different types of participants. Ambos has, however, suggested that the mental element of genocide should be defined differently depending on the type of offender.⁸⁸⁹ It, however, appears that this suggestion has not found broader resonance. While the suggestion would entail an adaptation of the crime definition to the social reality of the criminality, it would at the same time make the crime definition complicated. It would namely become necessary to legally define the different categories of perpetrators to which the different crime definitions apply.

6.3.4.4. Policy Requirements in the Crime Definitions

While it is today clearly established that war crimes, crimes against humanity and genocide can have both high-level and low-level perpetrators, the question of to what extent the existence of a *State policy* or another policy to commit these crimes is a precondition for criminal responsibility has been more debated regarding crimes against humanity and genocide. Historically, crimes against humanity namely had such a policy requirement.⁸⁹⁰ Regarding genocide, it has been submitted that genocides hardly as a matter of fact can occur without an underlying policy.⁸⁹¹ In relation to genocide, Rummel has even argued that genocide is a “confused and confusing concept” and that it would be more useful to have an international crime called “democide”, which would stand for murder by government.⁸⁹² In the case law of the ICTY and ICTR, the existence of policy requirements for crimes against humanity and genocide has, however, been negated.⁸⁹³ Before the ICC, the Statute and the Elements of Crimes seem to demand some policy

⁸⁸⁹ Ambos has suggested that the mental elements (intent/knowledge) for genocide should differ depending on whether the perpetrator is a high-, mid-, or low-level actor and depending on whether he/she is a State agent or a private actor. He bases his suggestion on criminological research and the idea that adding categories of imputation would make the approach more realistic. K. Ambos, ‘Criminologically Explained Reality of Genocide, Structure of the Offence and the “Intent to Destroy” Requirement’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice – An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), at 153 ff. (see especially at 163-165). He, e.g., notes that whereas low-level stage agents generally know about a genocidal State plan, low-level private actors are generally not informed. *Ibid.*, at 168. More specifically, Ambos suggests a mix of a purpose and knowledge-based approach to genocidal intent. See further Section 6.3.5.3. See also K. Ambos, ‘What Does “Intent to Destroy” in Genocide Mean?’, 91 *International Review of the Red Cross* (2009), at 833-858.

⁸⁹⁰ E.g., *Tadić*, Judgement, TC, ICTY, 7 May 1997, para. 654, and W. A. Schabas, ‘Punishment of Non-State Actors in Non-International Armed Conflict’, 26 *Fordham International Law Journal* (2003), at 925.

⁸⁹¹ A proposal to include “with the complicity of the Government” as a crime element of genocide was explicitly rejected in the Genocide Convention negotiations. Most delegates in the *Ad Hoc* Committee on Genocide, however, recognized that, in practice, a certain amount of government participation often is characteristic for genocide. UN Doc. E/AC.25/SR.4, at 3 ff. Fletcher and Ohlin have also emphasized that genocides are not planned at the level of active military operations, but that the ethnic hatred at the heart of genocide stems from the intent of nations. Fletcher & Ohlin 2005, at 548.

⁸⁹² R. J. Rummel, ‘When and Why to Use the Term Democide for “Genocide”’, 6 *Idea* (2001).

⁸⁹³ E.g., *Jelisić*, Judgement, AC, ICTY, 5 July 2001, para. 48, *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 98, *Semanza*, Judgement, AC, ICTR, 20 May 2005, para. 260, and *Simba*, Judgement, AC, ICTR, 27 November 2007, para. 260.

behind the crimes,⁸⁹⁴ but the exact scope of these policy requirements has not yet been clarified by the Court through case law. In relation to war crimes, no requirement of a State policy or plan exists,⁸⁹⁵ and there has not even been a serious discussion about the existence of such a requirement. The ICC Statute, however, contains the jurisdictional clause that the “Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁸⁹⁶

The *ad hoc* tribunals’ rejection of policy requirements for crimes against humanity and genocide has been strongly criticized by Schabas who finds that the case law both conflicts with the history of the crimes and with the international criminalization rationale.⁸⁹⁷ Especially regarding crimes against humanity he is worried that the elimination of the State plan or policy element has the prospect of making the concept applicable to a wide range of criminal acts, such as crimes committed by motorcycle gangs.⁸⁹⁸ Schabas finds that international criminal tribunals should address criminality which traditionally has been met with impunity, which often has been the case in relation to criminality that has a State connection.⁸⁹⁹ Schabas’ criticism clearly deserves merit, but from the point of view of the *ad hoc* tribunals’ other practice the rejection of a State policy requirement is logical. An underlying assumption in the case law of the *ad hoc* tribunals has been that all individuals who are capable of committing particular crimes also should be held responsible for them.⁹⁰⁰

It should also be noted that even though the *ad hoc* tribunals have not recognized policy elements or limitations regarding prosecutable persons, the existence of a State policy or the fact that a perpetrator has been a public official have not been insignificant when the tribunals have investigated the occurrence of particular crimes. For example, in the *Jelisić* case, the ICTY Appeals Chamber held that even though the existence of a plan or policy is not a legal ingredient of genocide, in the context of proving specific intent, the existence of a plan or policy may become an important factor.⁹⁰¹ In relation to

⁸⁹⁴ Article 7, ICC Statute on crimes against humanity namely stipulates that an attack directed against any civilian population means a course of conduct involving the multiple commission of the prohibited acts against any civilian population *pursuant to or in furtherance of a State or organizational policy to commit such attack*. In relation to genocide the Elements of Crimes suggest that the individual conduct should take place in the *context of a manifest pattern of similar conduct* or be conduct that could itself effect destruction. ICC Doc. ICC-ASP/1/3(Part II-B).

⁸⁹⁵ E.g., *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 58.

⁸⁹⁶ Article 8(1), ICC Statute.

⁸⁹⁷ E.g., Schabas 2008(e), at 959-960, and W. A. Schabas, ‘Crimes against Humanity: The State Plan or Policy Element’, in L. N. Sadat & M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008), at 347 ff. See also e.g., M. C. Bassiouni, ‘Revisiting the Architecture of Crimes against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention’, in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (New York: Cambridge University Press, 2011), at 54-55.

⁸⁹⁸ E.g., Schabas 2003(c), at 922 ff., and Schabas 2008(e), at 960.

⁸⁹⁹ Schabas 2008(e), at 974.

⁹⁰⁰ This approach has been received favourably by some scholars, e.g., J. K. Kleffner, ‘The Collective Accountability of Organized Armed Groups for System Crimes’, in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 248-250.

⁹⁰¹ *Jelisić*, Judgement, AC, ICTY, 5 July 2001, para. 48.

crimes against humanity, the *Limaj* Trial Chamber noted that “the existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action.”⁹⁰² Likewise, in relation to war crimes the facts that the perpetrator is a combatant and that the crime is committed as part of or in the context of the perpetrator’s official duties are factors that speak for the existence of a nexus between the individual conduct and an armed conflict.⁹⁰³ State participation may thus be legally relevant despite not constituting a crime element *per se*.

6.3.5. The Discriminatory Animus of the Violence

6.3.5.1. Victim Requirements

The typical environments in which international crimes occur are: (1) armed conflicts, where strong we-they constellations are the norm; and (2) totalitarian regimes, in which certain segments of the population often are singled out as the regime’s enemies. The perpetrators and victims of international crimes therefore typically belong to different population groups and the victims of the crimes are generally not selected based on individual criteria but rather based on group belonging. International criminality is therefore by its nature often *discriminatory*. International criminality can also be characterized as *symbolic*, in that the victims often are chosen based on what they symbolize, rather than, for example, the actual threat they pose to the opponent.⁹⁰⁴

The crime definitions of international crimes contain numerous victim requirements. These requirements may be categorized into: (a) such where the “objective” fact that the perpetrator selected his/her victims discriminatory is given legal significance (that is, regardless of why such a selection was made); and (b) such where the subjective states of mind associated with the discriminatory selection of victims are given legal significance.⁹⁰⁵ The subjective victim criteria will be considered in next Section on specific intent requirements. The various victim requirements in practice entail that certain individuals and groups are given protection through the international criminal law whereas others are excluded from the protection. The legal choices made in this regard have not escaped criticism.⁹⁰⁶ Besides *normative* victim requirements (such that the victim is a protected person), some underlying offences of international crimes have *factual* victim requirements (such as the age of the victim).⁹⁰⁷

⁹⁰² *Limaj*, Judgement, TC, ICTY, 30 November 2005, para. 194.

⁹⁰³ *Kunarac et al.*, Judgement, AC, ICTY, 12 June 2002, para. 59.

⁹⁰⁴ Symbolic crimes are sometimes distinguished from actuarial crimes. In actuarial crimes, the victims are chosen for their real or imagined social characteristics for *instrumental* reasons (e.g., the victims are persons in a wheelchair, because they are presumed to be easier to rob). E.g., Jenness 2001, at 295-296.

⁹⁰⁵ Jenness 2001, at 297-298.

⁹⁰⁶ E.g., the fact that genocide does not protect political groups or women as a class has been criticized. Note also that feminist legal scholars have pointed out that the focus on the protected groups may entail that the fact that women are targeted because of their gender is concealed. C. A. MacKinnon, ‘Rape, Genocide, and Women’s Human Rights’, in A. Stiglmeier (ed.), *Mass Rape – The War against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994), at 188 (‘Attacks on women, it seems, cannot define attacks on people. If they are gendered attacks, they are not ethnic; if they are ethnic, they are not gendered.’)

⁹⁰⁷ E.g., forcibly transferring children of the group to another group in connection to genocide and conscripting or enlisting children as a war crime. G. Werle, ‘General Principles of International Criminal Law’, in A. Cassese *et al.* (eds.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 56.

Regarding objective victim requirements it may, for example, be noted that so-called common Article 3 war crimes only can be committed against persons no longer taking active part in hostilities, that is, individuals *hors de combat*.⁹⁰⁸ In relation to grave breach war crimes, on the other hand, the victims must be so-called protected persons, that is, belong to the categories of individuals who in the 1949 Geneva Conventions have been provided special protection. For example, GC IV defines as protected persons “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals” (Article 4). The prevailing idea in international humanitarian law that enemy combatants has been questioned by May who asks whether the distinction made not rather should be between those guilty (participants in an unjust war) and those innocent.⁹⁰⁹ More specifically, he finds argues that: “When we make moral judgments on the basis of rough-grained markers, such as large social group membership, we necessarily must eliminate or diminish morally relevant differences among members of a group. Individual combatants are not all guilty to the same extent, even if the basis of their guilt is that they are representing an aggressing State.”⁹¹⁰ In international humanitarian law, the focus is hence often on victim *status* rather than on victim *behaviour*.⁹¹¹

Also the crime “crimes against humanity” has victim requirements in that the crime definition demands that the attacks are directed towards a civilian population. In relation to crimes against humanity, the nationality of the civilian population is, however, irrelevant. The crime definition speaks of *any* civilian population. It is the population that must be civilian, not necessarily all individual victims.⁹¹² Also in relation to war crimes, the significance attached to the victim’s nationality has decreased. For example, the requirement that the victim must be of another nationality in relation to grave breaches has been interpreted to be satisfied when the victim has an allegiance to another party to the conflict.⁹¹³ The focus of war crimes and crimes against humanity on civilians and/or persons *hors de combat* reflects the crimes background in the law of armed conflict. In this regard, it should be noted

⁹⁰⁸ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 420.

⁹⁰⁹ May 2007, at 104.

⁹¹⁰ May 2007, at 108.

⁹¹¹ May 2007, at 168.

⁹¹² E.g., *Martić*, Judgement, AC, ICTY, 8 October 2008, paras 303-314.

⁹¹³ “This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.” *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 166.

that in connection to genocide there is no requirement that “the perpetrator seeks to destroy only civilians”.⁹¹⁴

Even though it is sometimes argued that genocide derives from crimes against humanity, its protected victims, however, indicate that the crime follows another criminalization rationale. The origin of genocide is clearly in human rights law. The UN General Assembly, in this regard, in 1946 noted that: “Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings”.⁹¹⁵ To goal of the criminalization is explicitly to protect supra-individual *group interests*.⁹¹⁶ A question of contention in the case law has been whether the victims *de facto* must be members of the protected groups or whether it is enough that the perpetrator perceives them to be members of the group. The prevailing interpretation appears to be that the perpetrator’s subjective perception is most significant although this perception must have some objective founding.⁹¹⁷ In relation to persecution as a crime against humanity, which requires a discriminatory act, the ICTY Appeals Chamber has also argued that the fact that the perpetrator errs in relation to, for example, the real ethnicity of a victim does not *per se* mean that the act cannot be categorized as persecution.⁹¹⁸

6.3.5.2. Specific Intent and Motive Requirements

In relation to most crimes so-called general intent is enough, that is, in relation to *conduct* that the individual means to engage in the conduct and in relation to a *consequence* that the individual means to cause that consequence or is aware that it will occur in the ordinary course of events.⁹¹⁹ The consequence or harm that in fact has been produced does thus not have to be meant. It is enough that it has been reasonably foreseen.⁹²⁰ In relation to certain crimes, there is, however, an additional requirement that the perpetrator must have meant to cause a certain specific consequence or harm. These crimes are often called specific intent crimes. In relation to these crimes, a central question is therefore *what goal or purpose* the conduct of the perpetrator has had. This question is very similar to the question of *why* the perpetrator acted as he/she did. The questions are, however, not

⁹¹⁴ *Krštić*, Judgement, AC, ICTY, 19 April 2004, para. 226 (‘Finally, the intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group.’)

⁹¹⁵ UN Doc. GA Res. 96(I) of 11 December 1946.

⁹¹⁶ See e.g., Werle 2009(b), at 256-257. Additionally to this, the Werle argues that “the human dignity of the individual victim is also protected.” *Ibid.*, at 257.

⁹¹⁷ See further Section 6.2.4. See also Boas, Bischoff & Reid 2008, at 173-176, and K. Roberts, ‘Striving for Definition: The Law of Persecution from Its Origins to the ICTY’, in H. Abtahi & G. Boas (eds.), *The Dynamics of International Criminal Justice – Essays in Honour of Sir Richard May* (Leiden: Martinus Nijhoff Publishers, 2006), at 279-280.

⁹¹⁸ *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 185.

⁹¹⁹ Article 30(2), ICC Statute. See also G. Binder, ‘The Rhetoric of Motive and Intent’, 6 *Buffalo Criminal Law Review* (2002), at 27.

⁹²⁰ Sometimes the concept of *dolus eventualis* is used to denote this type of intent. Fletcher, however, argues that the concepts are not identical as *dolus eventualis* refers to a negative attitude towards causing harm (a certain attitude), but recklessness only requires the conscious running of an unjustified risk (a certain knowledge). Fletcher 2007(a), at 317.

identical. People that desire the same outcome may namely act for different reasons. In specific intent crimes, it is thus not necessary to prove that the perpetrator, for example, hated his/her victims or that certain political views motivated the act. What is required is proof of that the victims were selected due to a certain characteristic and that a certain outcome was meant.⁹²¹ In criminal law, specific intent therefore refers to the mental resolution to cause particular harm, whereas motive refers to the inducement behind the behaviour.⁹²² This differentiation between intentions and motives is a historical⁹²³ and difficult one.⁹²⁴

Whereas objective selection requirements are common in international criminal law, the subjective state of mind associated with the discriminatory selection of victims is not always given legal significance. In international criminal law, it is the criminalization of genocide and persecution as a crime against humanity that demands particular subjective states of mind associated with the discriminatory selection. Genocide requires intent to destroy in whole or in part a national, ethnical, racial or religious group, and persecution discriminatory intent. In the *Blaškić* case, the Appeals Chamber of ICTY clarified that discriminatory intent entails that there must be intent to cause injury to a human being because he/she belongs to a particular community or group.⁹²⁵ These types of purpose-based specific intent requirements come very close to requiring a discriminatory motive behind the crimes. The *ad hoc* tribunals have, however, constantly emphasized that there is a difference between specific intent and motive.⁹²⁶ In international criminal law, there are hence no crimes with discriminatory motive as a crime element. In that sense,

⁹²¹ Jenness notes that a similar development can be seen in so-called hate crime legislation, and that the term “bias crime” therefore often is preferred today. Jenness 2001, at 301.

⁹²² Cf. *Black's Law Dictionary*, 9th ed. (2009) (‘intent’).

⁹²³ Binder notes that legal scholars began to distinguish motive from intent in the late 18th century, and the goal was then to reduce the discretionary powers of judges. The legal reformers namely then associated intentions with behaviour, which could be compared to rules of conduct, whereas they associated motives with character, which only could be evaluated by discretionary moral judgment. Later on, when the role of the legislators had become stronger, the distinction between intentions and motives did not disappear, but it was reinterpreted. It then became a psychological distinction between different mental states. Binder 2002, at 3-4.

⁹²⁴ Binder argues that 20th century legal scholars have essentially made three different types of distinctions between intentions and motives: (1) intentions are cognitive states of mind (like expectations or perceptions of risk), whereas motives are desiderative states of mind (desires, purposes, or ends); (2) intentions are connected to immediate goals and motives with remote goals; and (3) intentions are those goals that are offence elements, while motives are more remote goals. All distinctions, however, have their own problems. Alternative 1 does not correspond to reality as criminal law is interested in desiderative states, alternative 2 does not recognize that there may be numerous goals, and alternative 3 is a tautology. Binder 2002, at 4-5.

⁹²⁵ Persecution does thus not require persecutory intent or the intent to remove targeted persons from society or humanity. E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 165. Cf. however, *Kordić & Čerkez*, Judgement, TC, ICTY, 26 February 2001, paras 214 and 220. On the ICTY case law on persecution, see further Roberts 2006, at 270 ff. In the ICC Elements of Crimes, it is suggested that in relation to persecution the perpetrator shall target persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such and that such targeting was based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. ICC Doc. ICC-ASP/1/3(Part II-B).

⁹²⁶ E.g., *Jelisić*, Judgement, AC, ICTY, 5 July 2001, para. 49, *Kayishema & Ruzindana*, Judgement, AC, ICTR, 1 June 2001, para. 161, and *Simba*, Judgement, AC, ICTR, 27 November 2007, para. 269.

international criminal law follows the usual criminal law approach to motives at the conviction stage.⁹²⁷

The question of whether it in international criminal law is desirable to uphold the distinction between specific intent and motives can be discussed from different perspectives. From a more practical perspective, it may be questioned whether it in reality is possible to completely distinguish the two. While specific intent requirements legally speaking do not attach importance to individual *reasons for* action, the fact that the individual *goals of* action are significant, however, indirectly make the reasons relevant. Partly this has to do with the question of evidence. To prove specific intent, evidence on related motives is often significant. As both intentions and motives are internal states of minds, it is not surprising that the available evidence to prove both often is the same. In the absence of direct evidence (for example, confessions regarding intentions or motives), the tribunals often deduce specific intent from circumstantial evidence. Secondly, as mental processes intentions and motives are connected. Norrie has in this regard noted that it is “as impossible in practice to image people forming intentions without having motives as it is to imagine them developing motives without creating intentions to put them into effect.”⁹²⁸ Various inducements or motives to commit criminal acts, such as personal feelings, life conditions, superior orders, thus *precede* intentions. The inducements can thus be seen as *intent causes*.⁹²⁹ At the same time, the personal feelings, life conditions, etc. usually continue to exist at the point in time when the crime is committed, and they are hence not only the background to the action but a part of it. It is, therefore, also possible to view motives as a *form* of intention (known as *ulterior intention*).⁹³⁰

Secondly, it has been put forward that motives are morally highly relevant, which can make it problematic to completely disregard motives at the conviction stage. For example, people generally regard euthanasia killings as clearly less blameworthy than racist killings.⁹³¹ As regards the international specific intent crimes, viz. genocide and persecution, some therefore feel that their real blameworthiness lies in the real (or imagined) detestable inducements. Genocides and crimes of persecution *should* thus be committed due to anti-Semitic attitudes, bigotry, etc. and not due to, for example, unhappy childhoods or poverty. For example, Schabas has regarding genocide argued that the “organizers and planners must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide.”⁹³² To consider the motives merely at the sentencing stage could therefore be viewed as giving motives both too little and too late attention.

⁹²⁷ Motives can, however, be considered at the sentencing stage. An interesting fact is that the *ad hoc* tribunals have held that in relation to specific intent crimes that require discriminatory intent, discriminatory motives cannot be regarded as aggravating factors at the sentencing stage as this would result in double-counting of the same aggravating fact. See further Section 9.2.4.2. It is noteworthy that while intentions and motives at the conviction stage are distinguished from each other, they are not clearly separated at the sentencing stage.

⁹²⁸ Norrie 2001, at 36.

⁹²⁹ Norrie 2001, at 37.

⁹³⁰ Norrie 2001, at 37.

⁹³¹ Fletcher 1998, at 124.

⁹³² Schabas 2009, at 305. More specifically, Schabas argues that genocide in its collective dimension must be committed with genocidal motives, whereas it is possible that individual participants may be motivated by other types of motives. *Ibid.*, at 305-306. See also *Krštić*, Judgement, TC, ICTY, 2 August 2001, para. 549.

While many intuitively feel that evil motives must lie behind international atrocities, criminology, however, indicates that this is not always the case. For international criminal law this presents a moral dilemma. On the one hand, criminology suggests that individual life circumstances to a great extent can explain individual decisions to participate in international criminality, which could morally make it justified to consider motives behind the conduct already at the conviction stage. When non-racists are convicted for specific intent crimes such as genocide and persecution their possible more acceptable motives are not given legal relevance. On the other hand, however, it is not unproblematic to give motives legal significance. To begin with, not everybody wants the possible banality of evil to be discovered and endorsed. If evil motivations would be demanded, individuals who commit atrocities without evil motivations should namely be acquitted. Secondly, if the question of why a person has committed a crime becomes legally relevant, it is necessary to allow evidence through which the perpetrator can show that he/she did not commit the crime due to him/her being a wicked person with evil motives, but that the crime can be explained with poverty or, for example, tragic family history. This is, however, not the type of evidence that everybody finds desirable in international criminal trials.⁹³³ In relation to serious criminality, such as genocide, this type of evidence has, for example, been found offensive from a victim perspective.⁹³⁴ Finally, it has been argued that many evil motives, such as feelings of hate, are difficult to define and prove.⁹³⁵ To take motives into consideration could therefore make international criminal trials even longer and more complicated. The legal assumption underlying international criminal law is therefore rational individuals who make good and bad choices, not evil individuals or individuals who have been formed by the environment. In this regard, international criminal law follows the model suggested by modern criminal law in general.

Even though international crimes often have political and/or ideological goals, such specific intent elements have not been included in the crime definitions. In this regard, the international core crimes depart from terrorism, in connection to which it sometimes is suggested that political or ideological goals are a possible crime element.⁹³⁶

⁹³³ Norrie has argued that it is the link between social causes and individual motives that lies behind the exclusion of motive from the consideration of legal responsibility. Norrie 2001, at 37.

⁹³⁴ E.g., Schabas has argued that: "Individual offenders should not be entitled to raise personal motives as a defence to genocide, arguing for instance that they participated in an act of collective hatred but were driven by other factors." Schabas 2009, at 306.

⁹³⁵ Marston Danner uses the concept of "bias crimes" instead of "hate crimes", and notes in a footnote that psychologists have pointed out that the term "hate crime" is inaccurate because little is known about the emotion of hatred. A. Marston Danner, 'Bias Crimes and Crimes against Humanity: Culpability in Context', 6 *Buffalo Criminal Law Review* (2002), at fn 6.

⁹³⁶ E.g., in the 2002 EU Council Framework Decision on Combating Terrorism a possible element of terrorism is that an act has been performed with the aim of "unduly compelling a Government or international organisation to perform or abstain from performing any act". EU Doc. OJ L 164, 22 June 2002, at 4.

6.3.5.3. Are the Specific Intent Crimes Overly Individualistic?

The specific intent of genocide has been interpreted to require that the prosecuted individual *individually* desire the destruction of the protected group.⁹³⁷ It has therefore been put forward that genocide lacks a crime element that demands collective action and that genocide, in principle, can be committed by an individual acting alone. For example, in the *Jelisić* case, a Trial Chamber of ICTY held that:

The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide [...]. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.⁹³⁸

This individualistic interpretation of genocide has been much criticized.⁹³⁹ May, for example, has argued that:

Individuals can hate whole groups, and even intend to discriminate against all of the members of a group. But individuals generally do not intend to destroy whole groups. Individuals may wish that whole groups would be destroyed. Yet intending their destruction is a different matter. To intend to destroy a group, it must be plausible to think that one can do so. It does not make sense to say that one intends to do what one knows one could not do [...].⁹⁴⁰

⁹³⁷ The question to what extent also the physical perpetrator must have had genocidal intent in the case where the accused person and the physical person are not the same has resulted in conflicting case law. E.g., *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 857 ('A peculiarity of the present case, which involves multiple levels of actors, is that a crime committed by a person of low political or military rank without genocidal intent may nevertheless be characterized as an act of genocide if it was procured by a person of higher authority acting with that intent'), and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 523 ('It is the person who physically commits one of the enumerated acts in Article 2(2) of the Statute who must have such intent. However, an accused can be held responsible not only for committing the offence, but also under other modes of liability, and the *mens rea* will vary accordingly.') See also Boas, Bischoff & Reid 2008, at 157-159.

⁹³⁸ *Jelisić*, Judgement, TC, ICTY, 14 December 1999, para. 100. See also *Jelisić*, Judgement, AC, ICTY, 5 July 2001, para. 48.

⁹³⁹ E.g., J. R. W. D. Jones, "'Whose Intent Is It Anyway?' Genocide and the Intent to Destroy a Group', in L. C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), at 468, and Schabas 2008(a), at 354-355.

⁹⁴⁰ L. May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005) 168-169. Vest has argued that the contextual element is inherent in the *mens rea* requirement of genocide, as the individual perpetrator in fact must intend "that the own conduct in combination with the conduct of some other persons produce a certain consequence". H. Vest, 'A Structure-Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007), at 785. The genocidal intent requirement suggested by Vest is, however, not the one to be found in the in the case law of the *ad hoc* tribunals.

As an alternative to the individual purpose-based conception of genocidal intent, some legal scholars have suggested a knowledge-based approach to genocidal intent. For example, Greenawalt has argued that the requirement of genocidal intent should be satisfied when “the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.”⁹⁴¹ In essence, these scholars argue that what is required is evidence of a genocidal plan or campaign, in which a collective genocidal intent is manifested, and evidence of that the accused participated in this plan or campaign knowingly. The specific intent would thus be an attribute of the plan or campaign and not a *mens rea* requirement that must be proved in relation to an individual accused.⁹⁴² The knowledge-based approach has been found to stress that it is the *collective genocidal goal* that hallmarks genocide as the horrible crime it is.⁹⁴³ It has also been noted that this approach better reflects the nature of genocide as a collective crime, as genocidal goals cannot be realized by individuals acting alone, and the fact that the executors of the crime are not always “personally imbued with [the collective] intention.”⁹⁴⁴ While the knowledge-based approach has been given limited support in the case law of the *ad hoc* tribunals⁹⁴⁵ and the ICC Elements of Crimes⁹⁴⁶ the prevailing approach to genocide, however, emphasizes individual states of mind.

The individual specific intent requirement can furthermore from a criminal law perspective be criticized for being a crime element that often is difficult to prove in a sound way. As the genocidal intent is a personal state of mind and direct evidence of the state of mind rarely is available, much weight is often in practice given to the *behaviour* of the accused and the *context* in which his/her behaviour takes place.⁹⁴⁷ The ICTY has, for example, found that it is very difficult to prove individual genocidal intent if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system.⁹⁴⁸ This idea of an individual guilty mind, which essentially is proved through evidence of the context and *criminal behaviour of others* has been criticized by, *inter alia*,

⁹⁴¹ Greenawalt 1999, at 2288.

⁹⁴² Jones 2003, at 468. Schabas has, however, rightly pointed out that “States [...] do not have specific intent. Individuals have specific intent. States have policy.” Schabas 2008(e), at 970. Also Schabas finds that knowledge of policy would be a more appropriate legal requirement. *Ibid.*, at 971

⁹⁴³ Kreß 2006, at 497.

⁹⁴⁴ Kreß 2006, at 496 (referring to the Eichmann case).

⁹⁴⁵ In the sense that intent may be inferred from circumstantial factors, such as, the existence of a genocidal context. E.g., *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, para. 823. In the *Krštić* Appeal Judgement, ICTY, however, emphasized that knowledge of genocide alone ‘cannot support an inference of genocidal intent.’ *Krštić*, Judgement, AC, ICTY, 19 April 2004, para. 134.

⁹⁴⁶ Through the quasi-contextual element. ICC Doc. ICC-ASP/1/3 (Part II-B). Kreß finds that the quasi-contextual element may be justified with the argument that without a genocidal campaign, realistic individual genocidal intent is impossible. Kreß 2007, at 622.

⁹⁴⁷ E.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 523, and *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 40.

⁹⁴⁸ E.g., *Jelisić*, Judgement, TC, ICTY, 14 December 1999, para. 101. Malmström, in this regard, interestingly points out that the ICTY has not found that an accused personally has possessed genocidal intent (except in the overturned Krstić trial judgement). The Krstić and Blagojević genocide convictions were based on “findings of the intent of other individuals in the VRS Main Staff.” S. Malmström, ‘Genocide Case Law at the ICTY’, in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Farnham: Ashgate, 2010, at 283.

Jones.⁹⁴⁹ At present, the law on genocide therefore recognizes the collective dimension of the criminality “through the evidentiary backdoor.”⁹⁵⁰

6.3.6. The Scope of Harm Caused and the Crime Definitions

The genocidal intent requirement has from a phenomenological perspective been criticized for directing the attention away from the *outcome* of the criminal behaviour. Genocide is namely phenomenologically “a mass-crime and a collective phenomenon,”⁹⁵¹ often entailing serious consequences such as mass deaths. The specific intent requirement of genocide entails that the crime follows the *intentionalist approach*, in which the mental states of the perpetrator are strongly stressed, in contrast to a *consequentialist approach*, in which the focus is on the harm caused. It has therefore been suggested that the crime should have a requirement of an expectation that the collective goal of destruction will actually be realized, that is, that the intended outcome is more than a vain hope.⁹⁵² Also in relation to persecution (as a crime against humanity), scholars have criticized the trend in the jurisprudence to emphasize the presence of a discriminatory intent rather than the seriousness of the underlying offences. For example, Sluiter and Zahar have questioned to what extent persecution should include “peripheral acts of persecution” (such as exclusion from professions and burnings of book symbolizing a particular culture) in addition to “core persecutory acts” (such murder and enslavement).⁹⁵³

Fletcher has argued that specific intent crimes are examples of a more general trend in modern criminal law “which de-emphasize[s] the context and objective contours of criminal acts for the sake of the *mens rea* as the essence of criminal behaviour.”⁹⁵⁴ Fletcher calls the alternative traditional approach the *principle of objective criminality*, which does not make the perpetrator’s intent irrelevant, but which takes the issue of intent to be a subsidiary question, dependent upon a preliminary finding of a manifestly incriminating act. In the traditional approach, a particular act thus gives rise to a *presumption* of a particular intent. In the modern approach, the focus is instead on establishing intent. Fletcher thus argues that while both traditional and modern criminal law generally require that both *actus reus* and *mens rea* requirements are fulfilled, the focus has shifted from a strong emphasis on the *actus reus* to a *mens rea* orientation.⁹⁵⁵

While the focus on *mens rea* is especially evident in connection to specific intent crimes, such as genocide and persecution, it may be asked to what extent the definitions of the other international crimes emphasize the mass harm often caused by international criminality. Interestingly, of the *chapeau* elements, it is only the crime definition of crimes against humanity which reflects this feature of the criminality by requiring

⁹⁴⁹ Jones 2003, at 473.

⁹⁵⁰ Cf. Kreß 2005, at 571. See also Vest 2007, at 796.

⁹⁵¹ E. Fronza, ‘Genocide in the Rome Statute’, in F. Lattanzi & W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, Volume 1* (Ripa Fagnano Alto: il Sirente, 1999), at 117.

⁹⁵² Kreß 2006, at 497-498.

⁹⁵³ Zahar & Sluiter 2008, at 212-215.

⁹⁵⁴ Fletcher 2006, at 903.

⁹⁵⁵ G. P. Fletcher, ‘The Metamorphosis of Larceny’, 89 *Harvard Law Review* (1976), at 476 and 502 (the article focuses on larceny).

that individual underlying offences must be part of a widespread or systematic attack against a civilian population. Cryer *et al.* therefore in relation to crimes against humanity speak of a contextual *threshold*.⁹⁵⁶ There are also some underlying offences that stress the mass victimization aspect of the criminality, such as extermination (which demands the killing or intentional infliction of conditions of life calculated to bring about the destruction of part of a population), persecution (which demands a pattern of conduct that *de facto* discriminates) and *apartheid*. In relation to war crimes, for example, war crimes involving attacks on civilian populations or bombing of towns by their nature entail that more large-scale harm is caused.

As presently construed, genocide and war crimes convictions are thus in theory possible in cases where very little or none actual harm has been caused. The *chapeaus* of these crimes do not demand the causation of actual harm and this also applies to certain underlying offences. The taking of hostages and declaring that no quarter will be given, which both are possible underlying offences to war crimes, do not, for example, require that anybody is physically harmed.⁹⁵⁷ Certain scholars have therefore found that there are some war crimes that can be categorized as *mala prohibita*, that is, as acts which criminality is not self-evident, but the result of legislative activity.⁹⁵⁸ In relation to these types of war crimes, Fletcher has argued that the “relevant standard defining liability” does not have to be “harm but generally accepted norms in the conduct of warfare.”⁹⁵⁹ Also May has emphasized that in connection to war crimes, the international criminalization is not always connected to the harm caused or the feelings of revulsion caused by the conduct. He notes that:

death by poison, long prohibited by the law of war, strikes few contemporaries as much more terrible than death by any number of other weapons, many of them lawful. [...] For these reasons, it would be wrong to seek a litmus test of manifest criminality in the moral revulsion allegedly felt by soldiers in response to particular orders. Such a test would be radically underinclusive of the universe of misconduct for which soldiers should be held responsible. The test would be radically overinclusive as well. Many actions in combat, including many that are entirely lawful, often evoke in soldiers intense feelings of revulsion or closely related emotions, such as anticipation of remorse, disgust, or horror.⁹⁶⁰

For the individual victims of crimes, it may be difficult to understand why similar harm, but caused by different types of weapons, may be legally evaluated completely differently.

⁹⁵⁶ Cryer *et al.* 2010, at 234.

⁹⁵⁷ Fletcher 2007(a), at 109. A difference may be done whether crime elements requiring particular: (a) conduct; (b) consequence; and (c) circumstances. It has been observed that most international underlying offences in international criminal law also require consequences. Werle 2009(a), at 56.

⁹⁵⁸ K. Ambos, ‘Current Issues in International Criminal Law’ [book review], 14 *Criminal Law Forum* (2003), at 248, and Fletcher 2007(a), at 31. Other examples, of such war crimes are compelling a prisoner of war or other protected person to serve in the forces of a hostile power and making improper use of a flag of truce.

⁹⁵⁹ Fletcher 2007(a), at 109. Fletcher distinguishes between: (1) crimes as violations of duties; (2) crimes as causing harm; and (3) crimes as violations of norms, and argues that as all international crimes do not require the causation of actual harm, the starting-point of some international criminalizations is rather the duties of the actors. *Ibid.*, at 40-41 and 109.

⁹⁶⁰ Osiel 1999, at 116.

6.3.7. The Time Perspective Inherent in the Crime Definitions

International crimes are often characterized by patterns of conduct that take place over a longer period of time. In criminal law, it is often possible the focus either on particular moments in time or to instead consider sequences of happenings. This may change how the seriousness of the criminality is perceived. In connection to domestic criminal law, feminist scholars have, for example, pointed out that there is a difference whether one regards wife battering as a number of minor cases of assault (short-time perspective) or as a pattern of abuse (long-term perspective).

In international criminal law, the nature of certain underlying offences is such that they usually take a longer period of time to accomplish. For example, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (genocide), persecution, enforced disappearance of persons, and *apartheid* (crimes against humanity), and starvation (war crimes). Also the *chapeau* elements of crime against humanity (requiring a pattern of conduct) and war crimes (not regarding isolated and sporadic acts of violence as armed conflict) can be said to consider the fact that international crimes often are committed as part of a longer process, even though the underlying offences of both these crimes can be isolated acts committed in a short period of time. In pattern crimes, such as persecution, it is usually possible to legally take into consideration lesser incidents that do not by themselves rise to the level of international crimes.

6.3.8. On the Relationship between the Different Crimes

Horde observes that “the theory of the special part of criminal law divides into a normative theory of criminalisation (a theory explaining which wrongs should, and which should not, be criminal), and a theory of the classification of criminal wrongs.”⁹⁶¹ In criminal law, it is hence usual to categorize crimes into different groups. Regarding these categorizations, Horde further notes that: “In the criminal law, sound classification may act (*inter alia*) as a heuristic guide to what is, morally speaking, at stake in the crimes classified in a given way. Crimes fall to be classified in different ways, ways that will give salience to different kinds of moral distinction between them.”⁹⁶² In international criminal law, the idea of categorization of crimes raises the following questions: What kinds of crimes are international crimes, and what is their internal relationship?

In domestic criminal law, it is common to distinguish between, for example, *mala in se* crimes and *mala prohibita* crimes, property crimes and violent crimes, and inchoate crimes and completed crimes.⁹⁶³ As has been discussed earlier, in relation to international crimes it is difficult to say whether they constitute *mala in se* or *mala prohibita* crimes.⁹⁶⁴ The criminalization technique of the crimes also makes it impossible to meaningfully

⁹⁶¹ J. Horde, ‘The Classification of Crimes and the Special Part of the Criminal Law’, in R. A. Duff & S. P. Green (eds.), *Defining Crimes* (Oxford: Oxford University Press, 2005), at 23.

⁹⁶² Horde 2005, at 21.

⁹⁶³ Cf. Horde 2005, at 21 (fn 1).

⁹⁶⁴ See further Section 6.3.3.4.

categorize them into property crimes/violent crimes, and inchoate crimes/completed crimes, as most crimes can due to the different underlying offences be both.⁹⁶⁵

Professor Bassiouni has put forward that when analyzing international crime elements, the following questions are central: “1. What is the social/human interest sought to be protected? 2. What is the category of persons sought to be protected? 3. What is the category of perpetrators sought to be deterred?”⁹⁶⁶ To answer these questions are, however, not easy in connection to international crimes: often the interests sought to be protected are many and have (due to the unusual criminalization process in international criminal law) not always been clearly articulated.⁹⁶⁷ In this regard, it is, however, noteworthy that the international criminal tribunals sometimes have used teleological arguments when considering the content of international criminalizations. The ICTR has, for example, noted that the criminalization rationale behind certain war crimes is the protection of people as victims of armed conflicts, not the protection of people against crimes unrelated to the conflict, however reprehensible such crimes may be.⁹⁶⁸

As was noted in connection to the phenomenology of the international crimes,⁹⁶⁹ their phenomenology is very similar even though they legally have been distinguished from each other. This reflects the fact that *it is often impossible to take into account all typical features in a single crime definition, especially if the for the social problem that the criminalization tries to address is complex*. Mettraux has in this regard noted that: “No criminal offense can claim to capture each and every factual aspect of the context that characterizes a particular type of criminal conduct. Instead, criminal law provides for those elements that, if met, would bring that conduct into the realm of the law.”⁹⁷⁰ Too complex crime definitions may (due to evidentiary difficulties) entail that convictions cannot be ensured in cases where they would be merited.⁹⁷¹ Furthermore, it is not usually legislatively meaningful to create crime definitions which an excessive number of crime elements. The crime elements must namely be proven by the prosecutors to ensure convictions, and if the crime definitions are too complex the prosecutors may

⁹⁶⁵ Cf., however, the German domestic criminalization of war crimes that distinguishes between war crimes against persons, war crimes against property and other rights, war crimes against humanitarian operations and emblems, war crimes consisting in the use of prohibited methods of warfare, and war crimes consisting in employment of prohibited means of warfare. *Völkerstrafgesetzbuch* (2002). As such, it is not impossible to make such distinction if the legislator so desires.

⁹⁶⁶ Bassiouni 2011(b), at 44

⁹⁶⁷ See further Section 2.8.

⁹⁶⁸ *Semanza*, Judgement, TC, ICTR, 15 May 2003, para. 368.

⁹⁶⁹ See further Chapter 2.

⁹⁷⁰ Mettraux 2011, at 152.

⁹⁷¹ Cf. “Early legal analysts of the Holocaust defined “crimes against humanity” as involving ordinary crimes committed for particular motives. Underlying this doctrinal move was a normative concern with stripping high-ranking officials of their asserted immunity under international law, by depicting them as “common criminals” – no different in nature from garden variety murderers, despite their statesmanlike air and plumage. This way of cognizing their conduct, however, came to be seen as “banalizing” or trivializing the historically unprecedented features of their wrong. Additionally, jurisprudential efforts to reconceptualize crimes against humanity in more limited ways greatly impeded effective prosecution of their perpetrators, by introducing doctrinal requirements that are exceedingly difficult to meet, as the prosecution of Paul Touvier abundantly revealed.” Osiel 1995, at 552-553 (referring to Herzog and Wexler).

opt to prosecute the criminal behaviour with criminal labels that are less challenging to establish.⁹⁷² Good criminalizations therefore capture the essence of the criminality, but still allow for convictions.

As regards “the” essence of the various international criminalizations, it is often put forward that whereas the rationale of war crimes is the “duty of humane treatment of soldiers and civilians during war”, the rationale of crimes against humanity is rather the “duty of a sovereign State to protect its citizens”.⁹⁷³ By stressing different things, the different international crimes highlight different typical aspects of the criminality and complement each other. This essence is reflected in certain paradigm examples of the crimes, for example, the killing of prisoners of war as a war crime and ethnic cleansing as crimes against humanity. The broadening of the scope of war crimes to crimes committed during internal armed conflicts has, however, made the distinction between war crimes and crimes against humanity “less neat”.⁹⁷⁴ There has been a general move within international criminal law away from the logic of the law of armed conflict (emphasizing reciprocity and allowing particular violence in particular contexts) towards the logic of human rights law (emphasizing the inviolability of particular rights, such as the right to life, and humanitarian concerns). The rationale of genocide is generally recognized to be the protection of societal groups from destruction and it is also a human rights-oriented criminalization.

There is, however, much internationally criminal conduct that is not paradigm examples of the various crimes and in these situations it is not so clear how the behaviour should be legally addressed. It is, in fact, common that a single act or transaction connected to an armed conflict can be prosecuted and adjudicated as more than one crime. This is often referred to as the *inter-article multiplicity of offences* in international criminal law. A rape committed against a civilian during an armed conflict, which is part of a systematic attack against a civilian population, may for example be characterized both as a war crime and as a crime against humanity. The same factual conduct may also fulfil the crime elements of more than one underlying offence (*intra-article multiplicity of offences*). For example, mass killings may possibly be characterized both as murders and as extermination. The *ad hoc* tribunals have addressed this multiplicity of offences by adopting a complicated case law on concurrence of offences, which will not be considered in detail here.⁹⁷⁵ Sufficient to note in this study is that the relationship between the various crimes and underlying offences is sometimes everything but clear-cut.

⁹⁷² Cf. “It should be noted that the clarity in the jurisprudence with respect to the requirement that the conflict be international in order for the grave breach regime to apply may have had the unintended consequence of reducing the number of grave breach charges brought by the prosecution, due to the heavy evidentiary burden of proving the international nature of the conflict.” K. Roberts, ‘The Contribution of the ICTY to the Grave Breaches Regime’, 7 *Journal of International Criminal Justice* (2009), at 760.

⁹⁷³ Cf. May 2007, at 15.

⁹⁷⁴ May 2007, at 13. Minow has made an interesting comparison between the development of domestic and international criminal law: “A conception of inviolable boundaries is used to shield both the intimate and intergroup violence from public scrutiny and intervention. For husbands and wives, it was the boundary of the home [...]. For conflicting ethnic and religious groups, it was the boundary of the state; no one outside could be heard on matters within without triggering claims that the nation’s sovereignty was at stake.” M. Minow, ‘Between Intimates and Between Nations: Can Law Stop the Violence’, 50 *Case Western Reserve Law Review* (2000), at 852.

⁹⁷⁵ See further e.g., S. Walthers, ‘Cumulation of Offences’, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 475-495.

6.4. Concluding Evaluative Remarks

6.4.1. On Different Types of Criticism and Evaluative Tools

When criticizing the international criminal law on international crimes, scholars usually do this from two different perspectives. Firstly and most commonly, scholars criticize the identifications and interpretations made with arguments deriving from the sources of law and the legal history of the crimes. A clear difference is made between *lex lata* and *lex ferenda*, and it is stressed that the *nullum crimen sine lege* principle demands that the interpretation of the law is not law-making. In international criminal law, the legal sources of the law, however, make the identification of the law especially challenging. For example, the fact that the law derives from legislative processes that are more characterized by political compromises than in-depth theoretical analysis gives rise to difficulties.⁹⁷⁶ The legal sources of international criminal law hence explain why leading scholars may have very different opinions about the content of the law.

Secondly, *teleological* arguments are often used when trying to establish the correct interpretation of the law. Mettraux has, for example, regarding crimes against humanity pointed out that the “debate over the definition of that crime is also a debate over its soul, over what it *should* be, as much as over what it is.”⁹⁷⁷ Often these teleological arguments are connected to the *legislator’s will*, that is, the question of why a particular criminalization has been adopted. Teleological argumentation is, however, plagued by the fact that there is not always agreement on what the rationale of a particular criminalization is. For example, in the *Aleksovski* Appeal Judgement, the ICTY argued that the goal of GC IV was to ensure the protection of civilians to the maximum extent possible.⁹⁷⁸ This interpretation of the goal of the GC has, however, been put in question by some scholars who find that the rationale rather is to balance military and humanitarian needs.⁹⁷⁹ These different opinions about the rationale of the law add to the difficulty to find “the” correct interpretation of the law.

As was noted in the introductory chapter, the primary goal of this study is, however, not to find “the” correct interpretation of the law. Rather, the study aims at considering more fundamentally the nature of the criminality and its reflection in the law. For this study, two other ways to evaluate the law regulating international crimes are therefore of greater interest. Firstly, there is criticism deriving from the type of *instrument* used to address international criminality, that is, *criticism that has its basis in established criminal law doctrines and thinking*. Do the international crime definitions constitute “good criminal law”? When making these types of assessments also human rights law can be relevant in that also it contains some criteria that the instrument of criminal law should fulfil.

The second important evaluative perspective for this study is the *fair labelling perspective*. Ashworth has regarding the principle of fair labelling noted that this

⁹⁷⁶ Cf. the discussion on how the creation of criminal law has changed in Sweden from a process in which lawyers played the central role to a process in which political parties are the main actors. D. Victor, ‘Politics and the Penal System – A Drama in Progress’, in A. Snare (ed.), *Beware of Punishment – On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag, 1995), at 68-69.

⁹⁷⁷ Mettraux 2011, at 145.

⁹⁷⁸ *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 146.

⁹⁷⁹ Marston Danner 2006, at 32, and Robinson 2008, at 935.

principle requires that “widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law” and that where “people generally regard two types of conduct as different, the law should try to reflect that difference.”⁹⁸⁰ The fair labelling perspective hence raises questions about the phenomenological “reality” of the criminality and its reflections in the legal responses to it. It is important to note that the principle of fair labelling is a *principle* (and not an absolute rule) and it does not as such provide an answer to the question of what “the” right definition of a crime is. To some extent, the fair labelling perspective is, however, connected to teleological thinking in that when assessments are made about fair labelling, it often becomes necessary to consider what one aims at with a criminalization.

6.4.2. The International Crime Definitions and the Ideal of “Good Criminal Law”

Criminal law criticism against international criminal law has often been directed against the general part of the law (that is, the modes of participation and defences), whereas the special part largely has escaped this type of criticism. This may be explained with the fact that the general principles of criminal law do not as such “regulate” the content of the special part of criminal law. Many different legislative choices are often possible. As criminal law is connected to the intentional infliction of pain, not every type of behaviour can, however, be criminalized. Criminalized behaviour should be *harmful* or at least *dangerous*, or to put it another way: *threaten legally protected interests*.⁹⁸¹ As international crimes often cause considerable harm, the international criminalizations are from this perspective unproblematic. Furthermore, human rights law contains certain criteria that the criminalization process and outcome must fulfil.⁹⁸² More specifically, human rights law demands that the criminal responsibility through the crime definition is *foreseeable* to the accused person and that the crime definition has a certain *precision*.⁹⁸³

It is clearly possible to criticize the special part of international criminal law from a *lex certa* perspective. The crime definitions contain both open formulations (for example, the underlying offence to crimes against humanity of “other inhumane acts of a similar character”) and crime elements that have attracted considerable legal debate (for example, the policy element in connection to crimes against humanity). In the last two decades, international criminal law has become much more settled, but uncertainties and disputes remain. Many of these can (as note above) be explained with the legal sources of the law.

⁹⁸⁰ Ashworth 2006, at 88-89.

⁹⁸¹ According to the so-called harm principle, criminal law should primarily address conduct that causes harm to others or creates an unacceptable risk of harm to others. Ashworth 2006, at 30.

⁹⁸² E.g., the *nullum crimen sine lege* principle (containing e.g., the prohibition of retroactive criminal law to the detriment of the accused person). The application of the legality principle in international criminal law has attracted much debate and criticism. See further e.g., S. Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 733 ff., and B. Van Schaack, ‘Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’, 97 *Georgetown Law Journal* (2008), at 119-192.

⁹⁸³ On the foreseeability requirement and the application of the legality principle in connection to international crimes, see e.g., *Van Anraat v. The Netherlands*, Decision (admissibility), Third Section, ECtHR, 6 July 2010, paras 81-96.

The process of establishment is by many – including the present author – seen as something positive. It is, however, important to note that it in connection to international criminal law sometimes has been deemed advisable to deliberately leave a certain amount of openness into the crime definitions.⁹⁸⁴ New ways to commit atrocities can be invented and if the crime definitions are construed too narrowly the new atrocities can escape punishment. As such, a good international crime definition appears to be one which entails that an accused person can foresee his/her criminal responsibility but which still covers all “relevant” criminal behaviour.

The international crime definitions are, however, not “open” only due to the legal sources of the branch of law or due to deliberate legal choices. The international criminalizations address unusually complex societal phenomena and this is reflected in the crime definitions. War crimes and crimes against humanity, for example, have contextual crime elements that must be proven before a conviction can be entered. As the contextual crime elements are non-existent or very rare in domestic criminal law their compatibility with the basic tenets of criminal law has not been much debated in domestic criminal law scholarship. In this regard, it is noteworthy that Ashworth has argued that criminalizations should respect the *principle of individual autonomy*, that is, that “each individual should [only] be treated as responsible for his or her own behaviour.”⁹⁸⁵ To avoid collective responsibility accusations, the contextual crime elements of international crimes have been construed in a way that entails that nobody is directly are blamed *for* the context, but rather for *individually* committing crimes *in* the context. From an attribution perspective, this solution is satisfactory. What, however, from a legal certainty perspective is problematic is that the contexts often can be defined in very different ways by the prosecutors and judges, and that the legal relevance of the contextual elements is not completely settled.⁹⁸⁶

As the present author sees it, the main problem of the international crime definitions is, however, that they with their *chapeaus* and underlying offences all-in-all are very complex. The relationship between the different crimes/underlying offences is not always clearly settled and in many cases alternative convictions are possible. In connection to complexity of crime definitions, Jareborg has noted that: “If a legal rule is difficult to interpret and contains terms that refer to phenomena that are difficult to prove, the application of the rule becomes uneven and the criminalization can appear ineffective and unjust (for example, because the rules involves a risk that many guilty ones are acquitted and many innocents are punished).”⁹⁸⁷ A central question is therefore why it is necessary to have complex generic international crimes, when many of the criminal deeds, in practice, could be prosecuted as ordinary simple crimes, such as murder or assault. This is, however, a fair labelling question, which will be considered below.

⁹⁸⁴ E.g., the underlying offence of “other inhumane acts” in connection to crimes against humanity.

⁹⁸⁵ Ashworth 2006, at 25.

⁹⁸⁶ See further Section 6.3.3.4.

⁹⁸⁷ Jareborg 1994, at 341 [originally in Swedish, translated to English by the present author].

6.4.3. A Fair Labelling Evaluation of the International Crime Definitions

6.4.3.1. Generally on Fair Labelling and Crime Definitions

When a societal problem is transformed into a crime, a decision has to be made what typical features of the phenomena are included in the crime definition and in what way. If the societal phenomenon is multidimensional, there are often many possible ways to do this. In this regard, terrorism serves as a good example, as the legal definition of that phenomenon has been much debated. Schmid has, for example, argued that terrorism often is characterized by the demonstrative use of violence against human beings, the threat of more violence, the deliberate production of terror or fear in a target group, the targeting of civilians, non-combatants and innocents, the purpose of intimidation, coercion and propaganda, etc.⁹⁸⁸ Fletcher has identified similar typical variables.⁹⁸⁹ The definitional problem is, however, that all key characteristics do not necessarily apply all the time,⁹⁹⁰ which raises the question of what typical features should be included in a crime definition and which should be left outside. Also in connection to international core criminality it is possible to identify typical variables, which apply often, but not always.⁹⁹¹

It has been observed that when a real-life phenomenon is made into a legal phenomenon, the legal definition can generally be characterized as a *stipulative definition*, that is, as a definition which function is to settle how a term shall be used in a particular context.⁹⁹² A criminalization decision or process therefore, in practice, entails giving *legal significance* to certain aspects of a real-life phenomenon. Crime definitions are therefore always socially construed and as such not self-evident or immutable.⁹⁹³ Or to put it another way, criminalizations are “time- and place bound” rather than absolute.⁹⁹⁴ This is true also in connection to globally condemned *mala in se* criminality⁹⁹⁵ and in connection to international crimes.

As the legal definitions bear some relationship to reality, they can, however, also be characterized as *precising definitions*. Depending on how a term is legally defined, the legal definition may be more or less inclusive than the term’s common usage (*lexical definition*) or how, for example, individual scholars feel that a term should be defined. The stipulative character of crime definitions entail that they cannot be right or wrong as such. As the crime definitions, however, also are precising definitions they may, however, be evaluated based on to what degree they reflect the features of the social problem that has given rise to the impulse to criminalize. The fair labelling principle hence makes it possible to criticize the crime definitions to the extent that they do not recognize widely felt distinctions between different types of wrongdoing. In the following, the international crime definitions are considered from this perspective.

⁹⁸⁸ A. Schmid, ‘Terrorism – The Definitional Problem’, 36 *Case Western Reserve Journal of International Law* (2004), at 403-404.

⁹⁸⁹ Fletcher 2006, at 894.

⁹⁹⁰ Fletcher 2006, at 894.

⁹⁹¹ This is what has been done in Chapter 2 of this study.

⁹⁹² Cf. Fletcher 2006, at 901.

⁹⁹³ Cf. Ashworth 2006, at 90.

⁹⁹⁴ Cf. May 2007, at 119.

⁹⁹⁵ The crimes of murder and rape can, e.g., be defined in many different ways.

6.4.3.2. International Crimes and the Typical Features of International Criminality

While it sometimes has been put forward that international crimes (or at least some parts of them) can or should be addressed through ordinary criminal law,⁹⁹⁶ it appears evident that international criminality is a societal phenomena with its own special characteristics that demand legal recognition.⁹⁹⁷ The question is, however, how the societal phenomenon of international criminality should be transformed into legal offences. In the *lex lata* of international criminal law, the social phenomenon of international criminality has been divided into three legal categories or crimes: war crimes, crimes against humanity and genocide.⁹⁹⁸ In theory, there is no reason why there could not be more or less international crimes having the phenomenological reality of international criminality as their background. Or that the crimes would be defined differently and hence that their internal relationship would be different.⁹⁹⁹ With this in mind, some consideration should be given to whether the established crimes reflect widely felt distinctions regarding wrongdoing.

War crimes, crimes against humanity, and genocide have all become established concepts that are used in everyday speech, including, for example, in mass media reporting. This mass media reporting, however, reveals that the distinction between the three crimes often appears to be unclear to non-lawyers. Sometimes all three crimes are characterized as types of war crimes.¹⁰⁰⁰ If mass killings have occurred this is often characterized as genocide (irrespective whether the attack has been directed towards a protected group) to signal the severity of the happening.¹⁰⁰¹ In fact, what appears clear is that of the three crimes, genocide is the crime with a special societal stigma, that is, governments, NGOs and the public generally perceive genocide as the worst international crime.¹⁰⁰² All in all, it may be concluded that while the public generally perceives the difference between international and ordinary crimes, the distinction between the three international crimes is less known. Also the relationship between other established concepts, such as torture, persecution, and ethnic cleansing, and the crime definitions appears to be unclear to many non-legally trained people, as well as the

⁹⁹⁶ See further e.g., the discussion whether crimes against humanity should have a State-policy element and whether hence crimes committed by non-State actors should be addressed as ordinary domestic crimes. Section 6.3.4.4.

⁹⁹⁷ See further Chapter 2. See also the discussion on impunity, in Chapter 1.

⁹⁹⁸ Or four-five, if the crimes of aggression and torture are included.

⁹⁹⁹ In sociological contexts, distinctions between different types of genocides have, e.g., been put forward. It would, in theory, be possible to reflect these distinctions in the law too. See e.g., F. Chalk & K. Jonassohn, *The History and Sociology of Genocide – Analyses and Case Studies* (New Haven: Yale University Press, 1990), at 9 ff.

¹⁰⁰⁰ An illustrative example of this is a claim made in a BBC article: “Genocide, crimes against humanity, mistreatment of civilians or combatants during war can all fall under the category of war crimes.” T. Kafala, ‘What Is a War Crime?’, *BBC News*, 22 July 2008, <http://news.bbc.co.uk> (last visited 23 June 2009).

¹⁰⁰¹ Nersessian has likewise noted that: “The common label for these mass slaughters is “genocide”” D. L. Nersessian, ‘The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals’, 37 *Texas International Law Journal* (2002), at 233.

¹⁰⁰² S. R. Ratner, ‘Can We Compare Evils? The Enduring Debate on Genocide and Crimes against Humanity’, 6 *Washington University Global Studies Law Review* (2007), at 583-584. Ratner also argues that governments, NGOs and the public generally perceive genocide and crimes against humanity as distinct crimes. *Ibid.*, at 583. The present author is, however, not convinced that the public always distinguishes the two crimes.

difference between different types of war crimes (grave breaches, violations of common article 3 of the 1949 Geneva Conventions etc.).

One may find that it is not necessary for legal concepts to be mastered by ordinary citizens, but as the present author sees it, if legal concepts often are misunderstood (or if they appear completely superfluous from a labelling perspective) one should consider whether alternative legal solutions would better reflect widely felt distinctions between different types of wrongdoing. In connection to international criminal law, it is, however, important to note that the nature of international law (and especially customary international law), makes it difficult, if not impossible, to adopt new criminal legislation that would repeal all earlier regulation. This being said, some alternatives to current solutions will be put forward.

As has been noted in this study, the typical variables of international criminality are: (a) the crimes often take place in armed conflicts; (b) State involvement in the criminality is common; (c) the criminality is often collective in nature; (d) the criminality often has a political/ideological component or a bias element; and (e) the crime often result in different types of severe victimization.¹⁰⁰³ Simplifying, it may be said that of the existing international crimes, war crimes emphasizes the armed conflict context, crimes against humanity the collective action context, and genocide the bias elements. All three crimes, however, also to varying degrees give legal recognition to other typical features, which increases their reflection of the social reality, but which at the same time makes the difference between the three crimes less clear-cut. State involvement in the criminality and the political/ideological background of the criminality are, however, two typical features of the criminality that have not found their way into the crime definitions.

As regards connection to armed conflicts, it appears evident that armed conflicts still constitute alternative legal orders. Most people hence morally perceive acts of violence connected to armed conflicts differently from peacetime violence. At the same time, human rights thinking has gained ground, which has made many people regard particular acts (for example, acts of torture and rape) as prohibited wherever and whenever committed. The alternative legal order of war has hence shrink. As long as fighting in armed conflict is not completely outlawed, it is, however, impossible to completely get rid of the “schizophrenias of international criminal law”, that is, the fact that the same behaviour is treated differently depending on the context of action. The schizophrenias may, however, still be lessened. It namely appears that “war is war” for most people,¹⁰⁰⁴ and that the different types of war crimes are legislative relicts that derive from the public international law background of the crimes rather than meaningful criminal regulation. From a labelling perspective, it is therefore positive that there in international criminal law has been a trend towards harmonizing the regulation of international and non-international armed conflicts. From the same perspective, it is, however, disappointing that the Rome Statute of the ICC has maintained the historical difference between different types of war crimes. ICC Article 8 on war crimes represents unnecessarily complex legal regulation.

¹⁰⁰³ See further Chapter 2.

¹⁰⁰⁴ In the same way as war crimes committed in international armed conflicts often have been met with impunity, war crimes in non-international armed conflicts have also traditionally escaped punishment. In contrast, murders during peacetime are generally prosecuted. La Haye 2008, at 121.

Due to the development of the international criminalization of war crimes into a direction where the nature of the armed conflict has lost in significance, the function of the international criminalization of crimes against humanity cannot anymore be said to be only to fill gaps in the war crime criminalization. The “soul” of crimes against humanity has hence changed, but exactly what it is today is not completely settled, which is problematic from a labelling perspective. What a message does one hence send with a crimes against humanity conviction? The requirement of a widespread or systematic attack directs the attention to the collective aspect of international criminality. Some, however, feel that the more typical feature of crimes against humanity is the frequent State-involvement in it.¹⁰⁰⁵ In this regard, it should be noted that a requirement of State involvement or the involvement of a State-like entity has been put forward to ensure that the violence really meets the requirement of severity and to ensure that there is an international interest in its prosecution. While it is true that State-involvement often is usual in international criminality, the present author, however, believes that all individuals belonging to collectives that have the capability to cause widespread or systematic harm should continue to be potential perpetrators of the crime.¹⁰⁰⁶ For the present author, the collect aspect of the criminality is hence more significant than the State involvement aspect. This is, however, essentially a question of legal choice: What aspect of the criminality does one want to emphasize in the criminalization? To send many different messages can be possible, but multiple simultaneous messages may also confuse those who are the addressees of the message. Furthermore, when the amount of crime elements increases, the possibility to ensure convictions decreases. One therefore has to consider which those crime elements are that are central for the criminality in question.

More generally, it may be found problematic that there today does not appear to be clear “division of work” between the various international crimes, but that in many cases it is up to the prosecutor to decide which crime label he/she finds suits the case best, especially as regards war crimes and crimes against humanity. It is, for example, not so that war crimes *only* focuses on settling what violence is accepted in wartime, but in the same way as crimes against humanity and genocide contains absolute prohibitions also applicable in peacetime (for example, the war crimes of torture and rape). Many of the underlying offences of war crimes and crimes against humanity are the same or similar. The relationship between some forms of crimes against humanity and genocide is also from a labelling perspective unnecessarily unclear.

More specifically, in persecution as a crime against humanity, the bias element of the criminality is significant, but as a whole, crimes against humanity do not emphasize the discriminatory nature of international criminality. Rather, genocide is the international crime where that feature is put in the forefront. If international criminality has a strong bias element, laymen often characterize the violence as genocide, even though genocide legally speaking is both narrower (requiring the intent to physically destroy the group) and broader (not requiring mass killings) than generally perceived.

¹⁰⁰⁵ See further Section 6.3.4.4.

¹⁰⁰⁶ The principle of complementarity and the possibilities of international criminal prosecutor's to chose which cases they prosecute generally ensures that cases that have no international dimensions are not prosecuted before international criminal tribunals.

The difference between the legal concepts persecution (as a crime against humanity) and genocide is hence difficult for people not familiar with international criminal law. The non-legal, but popular, concept of “ethnic cleansing” adds to the confusion. From a labelling perspective, it could therefore be advisable to internationally address bias criminality differently. A difference could, for example, be made between persecution and aggravated persecution, so that the common feature of both crimes would be “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”¹⁰⁰⁷ and so that aggravated persecution would largely correspond with the current criminalization of genocide. In both forms of bias criminality, actual large-scale or systematic causation of harm to the persecuted group should be a legal criterion. The present author therefore agrees with those who argue that the purpose-based conception of genocidal intent does not in a satisfactory way reflect why genocide has been internationally criminalized nor the phenomenology of genocidal violence.

Finally, it is submitted that the present criminalization technique used in international criminal law to a very limited extent differentiates between different degrees of wrongdoing. In this regard, it has been noted that: “one of the main functions of criminal law is to express the *degree* of wrongdoing, not simple the fact of wrongdoing”.¹⁰⁰⁸ Regarding the international crime definitions, it is noteworthy that, for example, no hierarchical difference is done between different types of underlying offences or the degree to which these are committed. Especially the crime of war crimes can involve everything from isolated individual acts leading to limited harm to large-scale attacks against civilians resulting in mass victimization. In this regard, it is significant that in some domestic criminalizations of war crimes, a difference is made between different petty, standard and aggravated war crimes.¹⁰⁰⁹ This model is from a phenomenological perspective functional in that it does not exclude minor violations of international humanitarian law from the scope of the law, but at the same time already at the conviction stage emphasizes differences between different types of war crimes. Also in connection to the other international crimes it would be possible to make differentiations depending on the type of harm caused.¹⁰¹⁰ In connection to crimes against humanity, the contextual element of the crime, however, already excludes internationally insignificant criminality from the scope of the crime. Also in connection to crimes against humanity and genocide, however, may the underlying offences range from individual harmful acts to large-scale patterns of violence.

¹⁰⁰⁷ Article 7(2)(g), ICC Statute (definition of persecution).

¹⁰⁰⁸ Ashworth 2006, at 35.

¹⁰⁰⁹ The Criminal Code of Finland, Chapter 11, Sections 5-7. Factors that make a war crime aggravated in Finland include that the crime victimizes a great number of individuals, that the crime is committed in a particularly brutal and humiliating manner, and that the crime is committed in a systematic and organized manner. The Criminal Code of Finland, Chapter 11, Section 6.

¹⁰¹⁰ In Finland, a difference is also made between “standard” and aggravated crimes against humanity, and the criteria that make the crime aggravated are similar/the same as in connection to war crimes. The Criminal Code of Finland, Chapter 11, Sections 3-4.

7. PARTICIPATION AND RESPONSIBILITY

7.1. Introduction

7.1.1. Connecting Individuals to Crimes

In the previous chapter, the definitions of the international crimes were considered. These definitions do, however, not by themselves determine the scope of the international criminal responsibility. Also the general part of criminal law is central in this regard.¹⁰¹¹ In most criminal justice systems, the general part of the criminal law entails that when a certain act is criminalized, some other “activities logically connected with that activity” simultaneously become criminal.¹⁰¹² This is the case also in international criminal law. A person can, for example, besides for committing a crime, be held responsible for ordering or aiding and abetting it. The *attribution alternatives* (that is, the possible ways to connect individuals to crimes) are many and they significantly affect the scope of criminal responsibility.

The extremely collective nature of international criminality gives rise to various legal difficulties. To begin with, the fact that international criminal tribunals only can prosecute a handful of offenders raises the question of which individuals should be prosecuted. This question is often defined as a *procedural* one involving prosecutorial discretion, and it lies as such beyond the scope of this study. It may, however, be noted that the international community has opted for a solution according to which international criminal tribunals shall focus on the more high-level criminals, whereas domestic courts are expected to deal with the more low-level actors. In domestic legal systems, participants in international crimes are, however, still often met with impunity. Other international prosecutorial strategies could, however, also be possible. Due to the frequent State involvement in international crimes, it is, for example, possible to ask whether international criminal law only should focus on perpetrators with a State connection. In this regard Schabas has questioned the strong focus of the ICC Prosecutor on the crimes committed by rebels in Uganda and Congo.¹⁰¹³ International criminal tribunals could also strive to function as an example to domestic criminal courts by prosecuting many different types of participants in the crimes.

Secondly, the mass involvement in international criminality gives rise to the question of where the line should be drawn between criminal and non-criminal behaviour. This is clearly a substantive law question and it will as such be elaborated upon in this Chapter. It should be noted that mass violence usually only can take place in situations of large-scale bystander acquiescence and passive complicity, which can make it difficult to distinguish criminal participants from non-criminal bystanders.

¹⁰¹¹ It should be noted that in some early international criminal law instruments, the possible modes of participation were included in the provisions defining the crimes. E.g., Article 6, Nuremberg Charter.

¹⁰¹² J. Gardner, ‘On the General Part of the Criminal Law’, in A. Duff (ed.), *Philosophy and the Criminal Law – Principle and Critique* (Cambridge: Cambridge University Press, 1998), at 207. Gardner furthermore notes that the main doctrines of the (English) “auxiliary general part of criminal law” are those dealing with inchoate forms of liability and those governing secondary participation in crimes.

¹⁰¹³ Schabas 2008(c), at 751.

Thirdly, international criminality has features that can render attribution difficult. As an example of this is often mentioned the geographically far removed leader who directs his/her subordinates by very indirect means. It is, in fact, rather common in connection to international criminality that leaders do not publicly give orders, but influence their subordinates more indirectly and discreetly.¹⁰¹⁴ This makes it often difficult to establish a clear causal relationship between the behaviour of the leader and his/her followers. The international criminal tribunals focusing on the leadership stratum of perpetrators have therefore often been faced with cases where the guilt has been “obvious” from a non-legal perspective, but where it still has been problematic to establish the individual responsibility in a legally sound way. International criminal law’s problem to connect individuals to crimes is, however, not limited to high-level actors only. The individual criminal responsibility of mid- and low-level actors may also be difficult to establish. The relationships between individuals in collective mass criminality are namely often devious, complex and ambiguous.¹⁰¹⁵ Furthermore, the crimes often take place in chaotic, violent contexts, in which it may be difficult for witnesses to separate individual incidents from each other and in which much forensic evidence is destroyed.

The unique features of international criminality raises the question to what extent attribution doctrines developed in domestic criminal justice systems primarily to deal with ordinary criminality fit international criminality. It has, for example, been observed that whereas remoteness to the physical perpetration in domestic legal systems generally is connected to presumptions of insignificance of participation, remoteness from the scenes of the crimes in relation to international criminality by no means corresponds with insignificance of participation. Due to this, Osiel argues that the traditional criminal law categories get the “moral valences entirely wrong.”¹⁰¹⁶ International criminal law has responded to this challenge by adopting attribution doctrines that are rare or non-existent in domestic legal systems. The various attribution doctrines will be addressed in this Chapter, where it will be considered how individuals chosen for prosecution are and can be connected to the international crimes.

7.1.2. Different Approaches to Attribution in Relation to Collective Criminality

Before attribution in international criminal law will be investigated, a more theoretical inquiry into how collective criminality can be approached is necessary. Domestic legal systems namely vary in how they distinguish between different types of participants in crime and in how criminal behaviour is distinguished from non-criminal behaviour. The focus here will be on how persons who have not themselves physically fulfilled any of the

¹⁰¹⁴ E.g., R. Cryer, ‘Prosecuting the Leaders: Promises, Politics and Practicalities,’ 1 *Göttingen Journal of International Law* (2009), at 56-57. Exceptional in this regard were the Nazi atrocities. In the post-World War II trials, documents drafted, signed, and/or distributed by the defendants played a central role. T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crime Trials under Control Council Law No. 10* (Washington D.C., 1949), 86.

¹⁰¹⁵ Cohen 1995, at 27. This has been called the “qualitative problem” of international criminal law. Möller 2003, at 315. The quantitative problem, on the other hand, refers to typically usual high number of participants in mass atrocities. *Ibid.*, at 298.

¹⁰¹⁶ Osiel 2005(b), at 807.

crime elements can be connected to the crimes (*indirect responsibility*).¹⁰¹⁷ When a *single* person commits a crime *alone* it is namely not generally challenging to attribute the crime to that person. The same applies when more than one person physically commit a criminal act together. Then the individuals are co-perpetrators and all clearly responsible for the crime in question or at least for their share in the crime. Physical actors or hands-on criminals are generally prosecuted for crimes as perpetrators or principals (*direct responsibility*).

In relation to the non-physical participants, it must be determined whether they at all should be held criminally responsible and, if yes, how the scope of their liability should be settled. In this regard, it is significant to note that the relationship between the person physically committing the crime (“person A”) and the non-physical actor (“person B”) can vary considerably. There may, for example, be: (1) situations where A and B engage in the criminal activity together and are more or less equally involved even though only A performs the physical acts constituting the elements of crimes; (2) situations where A clearly is the main actor and B merely has provided some influence or help; and (3) situations where B commits a crime through A, that is, situations where A is a person who cannot be held liable for the crime or where A is so to say “part of a system directed by B.” These three alternatives show that an evaluation of a person’s *contribution* to a crime cannot be assessed merely based on whether the person has been the physical actor or not.¹⁰¹⁸

In relation to establishing individual responsibility for crimes, it has been put forward that there essentially are two main approaches. In the first approach, the focus is on *causality* or *participation*. The starting-point of this approach is the individual who has physically committed the crime and who can be characterized as the direct physical cause to the crime. An investigation is thereafter made into which other individuals are causally connected to the crime or can be said to have participated in it. This approach has been called the “bottom-up approach”, as the approach in connection to large-scale collective criminality entails that the starting-point is the physical perpetrator who often is a low-level actor.¹⁰¹⁹

In criminal law, a causal relationship is generally required between the behaviour of an individual and the criminal outcome for criminal responsibility to arise. It may therefore be said that criminal law generally follows a bottom-up approach. The required causal relationship required may, however, vary. There may be a requirement that the participation of the person must be a condition *sine qua non* for the crime to occur or, for example, that the participation of a person has had a substantial effect on the crime in question. Causality is, however, not generally enough to give rise to criminal

¹⁰¹⁷ The terms “direct responsibility” and “indirect responsibility” are often used to distinguish responsibility for physical participation from non-physical participation. In international criminal law, the concept of direct responsibility is, however, sometimes used to refer to all types of participation in the crimes and indirect responsibility to refer to so-called superior responsibility or omission responsibility. See e.g., *Blaškić*, Decision (indictment), TC, ICTY, 4 April 1997, para. 31.

¹⁰¹⁸ In relation to collective crimes, it is also significant to note that it for outsiders may be challenging to evaluate the relationship between the actors, viz. e.g., in the examples given, whether the relationship should be characterized as one of type 1 or type 2.

¹⁰¹⁹ J. Vogel, ‘How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models’, *Cahiers de défense sociale* (2002), at 154.

responsibility, as causality considerations can lead to a situation where too many individuals can be connected to a crime from the point of view of criminal law. Hörnle has in this regard observed that:

Causality is a necessary condition, but not a sufficient condition to attribute harm to accomplices and principals. [...] [C]riminal law should be “ultima ratio”, restricted to the core of actions which are most closely related to the harm done. This requires a more discriminating assessment of attribution [...]. The question is whether we (the collective made up by all citizens) want to use criminal justice resources or ignore those acts on the periphery of events.¹⁰²⁰

In criminal law, there is therefore a need for more precise criteria for how a certain criminal outcome (harm) may be ascribed to a certain individual.¹⁰²¹ More concretely, the criminal law must establish what behaviour is not permitted, and what the required relationship between this non-permitted behaviour and the result has to be.¹⁰²²

The legal systems in the world vary in to what extent they at the *conviction* stage recognize the existence of different types of participants and evaluate the degree of participation of individuals. A difference in this regard is often made between: (a) legal systems where everybody who contributes to the carrying out of a crime is regarded as a perpetrator (the *unitary perpetrator or monistic model*); (b) legal systems where various modes of participation are distinguished, but regarded as legally equivalent at the conviction stage (the *equivalence theory*); and (c) legal systems where the type of participation is reflected already in the conviction and where the different participation modes are evaluated differently (*differential participation model*).

In legal systems adhering to the unitary perpetrator model, it is not at the *conviction stage* distinguished between different types of actors in the crimes.¹⁰²³ “[E]ach participant in a crime is [hence] treated as a perpetrator irrespective of his or her degree of participation” in it.¹⁰²⁴ This has to do with the fact that “a plurality of persons implies a plurality of offenses,”¹⁰²⁵ which means that each individual’s actions are evaluated in

¹⁰²⁰ T. Hörnle, ‘Commentary to “Complicity and Causality”’, 1 *Criminal Law and Philosophy* (2007), at 145.

¹⁰²¹ Hörnle also notes that causality cannot be used as a means to distinguish principals from accomplices, as causation is a necessary condition for both. Hörnle 2007, at 147.

¹⁰²² This is in Germany called *Zurechnung Objektiven Tatbestand* or objective imputation. See e.g., G. Jakobs, ‘Imputation in Criminal Law and the Conditions for Norm Validity’, 7 *Buffalo Criminal Law Review* (2004), at fn 17, and C. Roxin, *Strafrecht Allgemeiner Teil, Band I*, 4th ed. (München: C. H. Beck, 2006), 307 and 371-373.

¹⁰²³ See e.g., A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 781, and V. Militello, ‘The Personal Nature of Individual Criminal Responsibility and the ICC Statute’, 5 *Journal of International Criminal Justice* (2007), at 948, and Olásolo & Pérez Cepeda 2004, at 482. Traditionally, e.g., Italy and Austria are mentioned as countries that follow this model. As the relative degrees of responsibility in these legal systems instead are considered at the sentencing stage, Vogel has called these legal systems sentencing-oriented (in contrast to responsibility-oriented systems). Vogel 2002, at 158-159.

¹⁰²⁴ *Gacumbitsi*, Judgement (sep. op. of Judge Schomburg), AC, ICTR, 7 July 2006, para. 6.

¹⁰²⁵ E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T. M. C. Asser Press, 2003), 61.

isolation and that each participant due to this *de facto* becomes a principal to his/her own crime.¹⁰²⁶

In legal systems applying the equivalence theory, on the other hand, the underlying assumption is that numerous individuals can be connected to a single offence and a distinction is made between different types of participants in the crimes. For example, in the United States, a distinction is made between principals and accomplices. Which participants are regarded as principals varies, but it can, for example, be the physical actors.¹⁰²⁷ In this model, the responsibility of the accomplice is connected to the principal's actions, that is, the accomplice's liability derives from that of the primary party.¹⁰²⁸ For this reason, accomplice responsibility is *derivative or accessorial*.¹⁰²⁹ At the conviction stage, this distinction between principals and accomplices is, however, immaterial as the two forms of participation are of "formal equivalence".¹⁰³⁰ The complicity doctrine namely makes the accomplice liable for the unlawfulness of the principal's action,¹⁰³¹ that is, for the principal's crime. The two forms of responsibility are thus just two alternative doctrinal routes to hold a person guilty of an offence.¹⁰³² From this perspective, international criminal tribunals, which mainly has dealt with the non-physical leadership stratum of actors, has therefore mainly tried to "catch the accomplices."¹⁰³³

In the differential participation model, the underlying assumption is also that several individuals can be responsible for a single offence. In legal systems applying this model, it is, however, significant that each individual only is punished for what she/he has actually done,¹⁰³⁴ which entails that it already at the conviction stage is important to specify the role an individual has played in the commission of a crime. In these legal systems, aiders and abettors are, for example, not held liable "for the crime" but for their "contributions

¹⁰²⁶ A distinction is sometimes made between "pure unitary systems," which do not make the distinction between perpetrators and other crime participants, and "functional unitary systems," which do make the distinction but which do not recognize the derivative nature of participant/accomplice liability. H. Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court', C. Stahn & G.. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 340 (including further references).

¹⁰²⁷ Dubber notes that there are numerous differences between the various common law approaches to complicity and that, e.g., the American approach has changed due to the Model Penal Code of 1962. He furthermore observes that whereas in traditional common law principals were those were *present* when the physical act was committed, according to the model penal code the central question was whether a person had committed the *physical act by his own conduct*. M. D. Dubber, 'Criminalizing Complicity – A Comparative Analysis', 5 *Journal of International Criminal Justice* (2007), at 977 ff.

¹⁰²⁸ Kadish 1985, at 339.

¹⁰²⁹ E.g., Eser 2002, at 783.

¹⁰³⁰ Fletcher 1998, at 189-190. See also, e.g., Ashworth 2006, at 412-413, and van Sliedregt 2003, at 62. Note, however, the opinion of Judge Schomburg, who argues that: "It is impossible to make a difference in terms of substantive law between planning, instigating, ordering, committing or aiding and abetting without acknowledging that, in principle, each of these modes warrants distinction on the sentencing level as well." *Gacumbitsi*, Judgement (sep. op. of Judge Schomburg), AC, ICTR, 7 July 2006, para. 6.

¹⁰³¹ Kadish 1985, at 327.

¹⁰³² Dubber 2007, at 989.

¹⁰³³ W. A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *International Review of the Red Cross* (2001), at 439-440.

¹⁰³⁴ Cf. Fletcher 1998, at 200.

to the crime.¹⁰³⁵ To distinguish those actors who are responsible for the crime from those who only have contributed a difference is often made between perpetrators and other participants.¹⁰³⁶ Different theories how perpetrators should be distinguished from mere participants have, however, been put forward. For example, the German scholar Roxin has made a difference between: (a) *formal objective theories*, which views the individuals who physically fulfil the crime elements as perpetrators; (b) *material objective theories*, which regard the individuals who are causally responsible for the crimes as perpetrators (as examples of material objective theories Roxin, for example, mentions the *condition sine qua non* theories and the theories that focus on those present when the crime is committed); (c) *subjective theories*, which regard as perpetrators those who have a certain mental state or those in whose interest the crime is; and (d) *mixed theories*.¹⁰³⁷ He himself argues for a so-called theory of domination or control over the crime (German *Tatherrschaft*), which has become an influential theory in many legal systems adhering to the continental legal tradition.¹⁰³⁸ According to this theory, the individuals who “stand in the centre of the committing of a crime or who steer it by means of predominant influence”¹⁰³⁹ are regarded as perpetrators. For the purpose of labelling the individual contribution correctly, the perpetrators and participants can furthermore be categorized into subcategories such as “solitary perpetrators”, “co-perpetrators”, “intermediate perpetrators”, “instigators”, “aiders and abettors”, etc. In addition to making the labelling more precise, these distinctions make it possible to sanction the different modes of participation differently and limit the applicability of certain modes of participation to certain crimes.¹⁰⁴⁰ In the same way as in the equivalence model, the distinction between different types of participants in the crimes makes it possible to “premise that the punishability of the secondary party is based on the principal offence.”¹⁰⁴¹

Of the three different models, the differential participation model is the one that describes the criminal event most precisely and which already at the conviction stage reflects that various individuals may contribute to the crime in ways that to a high degree vary “in weight and closeness to the accomplishment of a crime.”¹⁰⁴² At the same time, the model, however, makes the difference between perpetrators and other participants so significant that it becomes very important to adopt precise criteria for distinguishing between the different types of participants. Much time has therefore been devoted in the legal doctrine to finding the best test. Scholars not coming from legal systems adhering to this model have, however, not always been that impressed over the outcome of the extensive doctrinal debate.

¹⁰³⁵ E.g., van Sliedregt 2003, at 64, and E. M. Wise, ‘Commentary’, in L. S. Wexler & M. C. Bassiouni (eds.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome, June 15-July 17 1998* (Paris: Érès, 1998), at 42.

¹⁰³⁶ Eser, however, observes that in the case of co-perpetrators, the persons are not held liable for the wrongdoing of others, as the “basis for criminal responsibility is the individual blame placed on each perpetrator for having participated in the planning of the crime and for having consented to the illegal contributions of the other co-perpetrators.” Eser 2002, at 780.

¹⁰³⁷ C. Roxin, *Täterschaft und Tatherrschaft*, 8th ed., (Berlin: De Gruyter Recht, 2006), 34-59.

¹⁰³⁸ See e.g., Roxin 2006(b), at 60 ff., and C. Roxin, *Strafrecht Allgemeiner Teil, Band II* (München: C. H. Beck, 2003), 9-10.

¹⁰³⁹ Eser 2002, at 782.

¹⁰⁴⁰ E.g., Eser 2002, at 782, and Militello 2007, at 948.

¹⁰⁴¹ van Sliedregt 2003, at 64.

¹⁰⁴² Cf. Eser 2002, at 782.

For example, Dubber has found the test of *Tatherrschaft* to be vague and underjustified.¹⁰⁴³ In legal systems where the distinction between principals and accomplices is of little legal significance, it is possible to apply less sophisticated tests to distinguish between the different types of participants. In all legal systems, the *sentence* should, however, reflect the culpability of the individual. The legal systems therefore only vary in relation to at what stage of the proceedings the evaluation of the scope of the contribution to the crime has to be done and how explicitly it has to be articulated in the form of legal labels.

The causality or participation approach that criminal law generally follows may, however, lead to situations where individuals who from a criminal policy perspective should be connected to a crime cannot be because a relationship cannot be proven. This may happen especially in situations of mass criminality or network criminality, that is, in relation crimes such as genocide and terrorism where the high-level actors may be very remote from the physical actors. In this regard, it is noteworthy that some legal systems exceptionally accept “top-down approaches” to individual criminal responsibility. In such approaches, the pivotal concept is not causality or participation, but *responsibility*.¹⁰⁴⁴ It should be emphasized that criminal responsibility in situations where causality or participation cannot be proven is considered problematic by many criminal law scholars.

7.2. Modes of Responsibility in International Criminal Law

7.2.1. Attribution in Early International Criminal Law

In international criminal law, the attribution discussion has essentially centred around two main questions, namely what legal tradition international criminal law should follow and to what extent the law should take into consideration the special nature of the criminality. In the early days of international criminal law, the law was strongly characterized by two features: a significant Anglo-American influence, and a lacking codification and specificity. The lacking specificity especially plagued the general part of the criminal law.¹⁰⁴⁵ The nature of the Nazi criminality, however, affected some legal choices made. For example, Pomorski has observed that when the Nuremberg Charter was negotiated consideration was given to how to address the massive and systematic nature of the criminality.¹⁰⁴⁶ In the negotiations, the Americans put forward a plan according to which it would be established in a multinational trial that certain Nazi organizations conspired to crimes and certain individuals would be convicted as representatives of these criminal organizations. After this, members of the organizations declared criminal could be convicted for membership in the

¹⁰⁴³ Dubber 2007, at 1001.

¹⁰⁴⁴ Vogel 2002, at 155.

¹⁰⁴⁵ Some scholars even today find international criminal law to be of limited “doctrinal maturity” as regards attribution. E.g., Werle 2009(b), at 136-137, and Eser 2002, at 774.

¹⁰⁴⁶ S. Pomorski, ‘Conspiracy and Criminal Organization’, in G. Gingsburgs & V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), at 213.

organizations before national courts.¹⁰⁴⁷ The American proposal was controversial, but eventually endorsed.¹⁰⁴⁸ The Nuremberg Charter therefore contained provisions on both *conspiracy* and *criminal organizations*.

In the Nuremberg Charter, the provisions on attribution were primarily placed in Article 6, which contains the crime definitions. The article provided for criminal responsibility for the *commission* of the crimes and in relation to the crime against peace, for *planning, preparation, initiation* or *waging* of a war of aggression or a war in violation of international treaties, agreements and assurances, or *participation in a common plan or conspiracy* for the accomplishment of any of the foregoing. Furthermore, in the last paragraph of Article 6, it was stipulated that *leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy* to commit any of the crimes were responsible for all acts performed by any persons in execution of such plans. An article similar to Article 6 in the Nuremberg Charter was later included in the Tokyo Charter (Article 5). Articles 9 and 10 of the Nuremberg Charter regulated the declaration of certain organizations as criminal.

The prosecutors before the Nuremberg Tribunal had divided their indictment into four counts, namely count one on the common plan or conspiracy, count two on crimes against peace, count three on war crimes and count four crimes against humanity.¹⁰⁴⁹ In relation to count one, the prosecutors argued that all the defendants participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, crimes against peace, war crimes and crimes against humanity, and that the defendants were individually responsible for their own acts and for all acts committed by any other persons in the execution of such plan or conspiracy.¹⁰⁵⁰ Also in relation to the counts on war crimes and crimes against humanity, it was argued that the defendants, acting in concert with others, formulated and executed a common plan or conspiracy to commit the crimes (count three and four).¹⁰⁵¹ The prosecutors also argued that certain groups or organizations should be declared criminal “by reason of their aims and the means used for the accomplishment thereof and in connection with the conviction of such of the named defendants as were members thereof [...]”¹⁰⁵² In an analysis of the Nuremberg indictment, Pomorski notes that the American Prosecutor Jackson wanted to “push” the conspiracy case to the fullest and that count one of the indictment was extremely broad in that all the defendants were accused of participation with “diverse other persons” in a conspiracy lasting over twenty years.¹⁰⁵³

¹⁰⁴⁷ B. F. Smith, *The American Road to Nuremberg – The Documentary Record 1944-1945* (Stanford: Hoover Institution Press, 1982), 36-37. See also e.g., T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston: Little, Brown and Company, 1992), 36-41.

¹⁰⁴⁸ Pomorski 1990, at 217-221.

¹⁰⁴⁹ *Trial of the Major War Criminals before the International Military Tribunal* (1947), Volume 1, 27 ff.

¹⁰⁵⁰ *Trial of the Major War Criminals before the International Military Tribunal* (1947), Volume 1, 29.

¹⁰⁵¹ *Trial of the Major War Criminals before the International Military Tribunal* (1947), Volume 1, 43 and 65.

¹⁰⁵² *Trial of the Major War Criminals before the International Military Tribunal* (1947), Volume 1, 28.

¹⁰⁵³ Pomorski 1990, at 227 and 229.

A conspiracy can be defined as “an agreement between two or more persons to pursue an illegal objective, or to pursue a legal objective by illegal means.”¹⁰⁵⁴ In common law jurisdictions, conspiracy is generally an inchoate crime, that is, a conspiracy can be committed “even though the substantive offence is not successfully consummated.”¹⁰⁵⁵ If the substantive offence materializes, the participants in the conspiracy can be held responsible both for the substantive crime and the additional *crime* of conspiracy.¹⁰⁵⁶ This common law understanding of conspiracy was behind both the conspiracy and criminal organization schemes in the American suggestion. In civil law jurisdictions, on the other hand, unexecuted criminal plans are rarely criminalized. In the rare cases where criminal plans are given a legal significance, there is therefore generally a requirement that the substantive offence must have been materialized or at least attempted.¹⁰⁵⁷ Due to the different understandings of conspiracy, the conspiracy charges led to much controversy among the judges, but they were in the end able to reach a compromise.¹⁰⁵⁸ The judges gave the conspiracy provisions a restrictive reading and limited the application of conspiracy to crimes against peace and declared that the conspiracy should not be “too far removed from the time of decision and of action.”¹⁰⁵⁹ Those who gave Hitler their *cooperation* despite *knowing* of his aims (or plan) were treated as parties to the plan.¹⁰⁶⁰ Conspiracy was thus not at Nuremberg treated as a separate crime in connection to war crimes and crimes against humanity, but rather as a “more inclusive” mode to commit the crime.¹⁰⁶¹ Participation in a conspiracy thus became “the legal equivalent of complicity.”¹⁰⁶²

Even more controversial than the conspiracy provisions was, however, the Nuremberg Tribunal’s possibility to declare certain organizations as criminal and the connected idea of membership responsibility. The tribunal itself recognized this and pointed out that the application of the provision may produce great injustice unless properly safeguarded.¹⁰⁶³ The judges therefore concluded that:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will [...] fix the criminality of its members, that definition should exclude persons who had no knowledge of

¹⁰⁵⁴ May 2006, at 317.

¹⁰⁵⁵ *Black’s Law Dictionary*, 9th ed. (2009) (‘inchoate’). Ohlin has, however, noted that the law of conspiracy at least in the United States is under pressure. J. D. Ohlin, ‘Group Think: The Law of Conspiracy and Collective Reason’, 98 *Journal of Criminal Law and Criminology* (2007), at 148-149.

¹⁰⁵⁶ E.g., Fletcher 1998, at 191-192.

¹⁰⁵⁷ E.g., Pomorski 1990, at 218, and Schabas 2009, at 310.

¹⁰⁵⁸ Pomorski 1990, at 230.

¹⁰⁵⁹ *Göring et al.*, Judgment, IMT, 1 October 1946, at 225-226 and 253. See also *Justice*, Judgment, CCL, 4 December 1947, at 956.

¹⁰⁶⁰ *Göring et al.*, Judgment, IMT, 1 October 1946, at 226. In this regard, the Nuremberg case law departed from the legal standards that May finds typical for conspiracy, viz. the intent to agree and the intent to plan to do a specific illegal act. May 2006, at 319.

¹⁰⁶¹ W. R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* (Dallas: Southern Methodist University Press, 1954), 555.

¹⁰⁶² Pomorski 1990, at 224.

¹⁰⁶³ *Göring et al.*, Judgment, IMT, 1 October 1946, at 256.

the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal [...] as members of the organization. Membership alone is not enough to come within the scope of these declarations.¹⁰⁶⁴

The tribunal's criminalization of membership in Gestapo therefore, for example, excluded persons employed by the Gestapo for purely clerical, stenographic, janitorial and similar unofficial routine tasks, and it required that the members who could be convicted became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by the Nuremberg Charter or were personally implicated as members of the organizations in the commission of such crimes.¹⁰⁶⁵ The Nuremberg Tribunal thus rejected a broad membership liability.¹⁰⁶⁶ It should be noted that the Nuremberg doctrine on criminal organizations is really not a *mode of participation* as such, but a doctrine creating a separate *crime* of membership.¹⁰⁶⁷

In relation to the Tokyo Tribunal, Boister and Cryer argue that the tribunal interpreted its conspiracy provisions in a more common law way than the Nuremberg Tribunal, that is, as an inchoate crime. More specifically they observe that whereas the Nuremberg Tribunal "limited the grand conspiracy and merged it into the substantive counts," this option was not open to the Tokyo Tribunal "because many of the accused would have escaped liability entirely as they were not party to the substantive offences."¹⁰⁶⁸ They criticize the Tokyo Tribunal's approach from the point of view that the inchoate conspiracy crime was not part of international customary law at the time being, and find that the Japanese leaders instead could have been prosecuted for, for example, the *crimes* of planning or preparing.¹⁰⁶⁹ All in all, the Tokyo Tribunal in the same way as the Nuremberg Tribunal appears to have given attribution little consideration.¹⁰⁷⁰ In contrast

¹⁰⁶⁴ *Göring et al.*, Judgment, IMT, 1 October 1946, at 256.

¹⁰⁶⁵ *Göring et al.*, Judgment, IMT, 1 October 1946, at 267-268.

¹⁰⁶⁶ Bonafè distinguishes between three possible relationships between collective and individual responsibility: (1) The establishment of collective criminal conduct entails that all members of the collective are individually criminally responsible; (2) the establishment of collective criminal conduct entails that some members (e.g., leaders) are individually criminally responsible; and (3) the establishment of collective criminal conduct does not automatically connect to individual criminal responsibility, but has other functions, such as to provide partial presumptions of the members' criminal responsibility. Bonafè 2009, at 168-169.

¹⁰⁶⁷ Bonafè 2009, at 172. Engelhart has, however, correctly noted that, in the end, the application of the provisions on criminal organizations did not become a precedent for punishing organizations, but a precedent for individual criminal responsibility based on the conspiracy and the joint criminal enterprise doctrines. Engelhart 2010, at 180.

¹⁰⁶⁸ N. Boister & R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 219. See also R. Cryer, 'The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth,' 6 *Journal of Conflict and Security Law* (2001), at 20.

¹⁰⁶⁹ Boister & Cryer 2008, at 220-221 and 244-245.

¹⁰⁷⁰ Regarding modes of responsibility and the Tokyo Tribunal, see e.g., Boister & Cryer 2008, at 205-236, and G. Boas, 'Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial,' in Y. Tanaka, T. McCormack & G. Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2011), at 163-173.

to the Nuremberg Charter, the Tokyo Charter did not contain a provision on criminal organizations.¹⁰⁷¹

Finally, World War II was followed by numerous other trials against more low-level actors, of which the most famous ones are the trials held based on CCL adopted by the Allied Control Council. This law contained a more specific, but very broad, provision on attribution, viz. Article II(2), which stipulated that: “Any person [...] is deemed to have committed a crime [...], if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to [..., crimes against peace] if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.”

In the case law based on the CCL some discussion on attribution can be found. For example, in the *High Command* case, the tribunal argued that: “to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.”¹⁰⁷² In the *Justice* case, the tribunal, on the other hand, argued that in cases where it is argued that there has been a pattern or plan of criminality, this pattern or plan must be proved as well as the specific conduct of the individual defendant in furtherance of this plan.¹⁰⁷³ The tribunal also noted that: “The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.”¹⁰⁷⁴ In the *Pohl* case, the tribunal likewise emphasized that the international crimes may have many different types of participants and that “the [individual] acts [...] within the scope of the over-all plan, become the acts of all the others”¹⁰⁷⁵

From the point of view of this study, it is interesting to note that the legal discussions in relation to the Nuremberg Tribunal primarily concerned the *crimes* of conspiracy and membership in criminal organizations, and not *modes of participation* in the international crimes as such. This stresses that the question of how individuals are connected to criminal behaviour can be legally addressed both through criminalizations addressing the way in which the participation takes place and through separate modes of participation. In an analysis of the post-World War II case law from the point of view of attribution, Ambos notes that this case law “pragmatic rather than dogmatic” and that an “old-fashioned” cause-effect or causality approach was used.¹⁰⁷⁶ He also observes

¹⁰⁷¹ The only reference to membership responsibility can be found in Article 5 of the Tokyo Charter, which provides that the tribunal shall have jurisdiction over the criminals as individuals or as *members of organizations*.

¹⁰⁷² *High Command*, Judgment, CCL, 28 October 1948, at 510.

¹⁰⁷³ *Justice*, Judgment, CCL, 4 December 1947, at 1063.

¹⁰⁷⁴ *Justice*, Judgment, CCL, 4 December 1947, at 1063.

¹⁰⁷⁵ *Pohl*, Judgment, CCL, 3 November 1947, at 1173.

¹⁰⁷⁶ K. Ambos, ‘Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to The Hague,’ in G. Kirk McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Volume I* (The Hague: Kluwer Law International, 2000), at 8.

that jurisprudence did not distinguish between principals and accessories on the level of attribution of criminal responsibility.¹⁰⁷⁷ According to Ambos, it can therefore be argued that the “structure of the relationship between the crime(s) and the accused – the rules of attribution – were only of secondary interest”¹⁰⁷⁸ in the post-World War II trials. Despite its shortcomings, the case law has, however, not been without influence. Conspiracy and membership responsibility have been found problematic due to wide nets of criminal responsibility these liability forms potentially cast and have for this more or less completely been abandoned in modern international criminal law.¹⁰⁷⁹ The case law that has had greatest later significance in relation to attribution has therefore been the American and British war crimes trials that followed the trial of the major war criminals in Nuremberg.¹⁰⁸⁰ The common plan responsibility envisaged in some of these cases is the legal basis for the presently influential JCE doctrine.

7.2.2. Attribution in Modern International Criminal Law

The adoption of the ICTY Statute was characterized by rapidity and the lack of extensive participation by criminal law scholars.¹⁰⁸¹ Questions of attribution were not elaborated in detail during the adoption process. The report of the Secretary-General shortly notes that *all* persons who *participate* in the planning, preparation or execution of the crimes contribute to the commission of the violation and are, therefore, individually responsible.¹⁰⁸² In the ICTY Statute, this has been transformed to a provision that a person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of a crime shall be individually responsible for the crime.¹⁰⁸³ A similar provision can be found in the ICTR Statute.¹⁰⁸⁴ Due to the brevity of the provisions and the fact that statutes of the *ad hoc* tribunals are expected to reflect customary international law, the modern *ad hoc* tribunals have often turned to the case law of the post-World War II tribunals when trying to identify the content of concepts, such as ordering. As noted above, the case law in relation to these questions has, however, not always been that elaborate. Furthermore, as the explicitly mentioned participation forms have been found to be unsuitable in many of the cases before the tribunals, the prosecutors and judges have also looked into customary international law to find more suitable attribution theories. The theory they have “found” there is most notably the theory of joint criminal enterprise responsibility.

¹⁰⁷⁷ Ambos 2000, at 8-11. Olásolo, on his part, argues that even though Control Council Law No. 10, Article II(2) introduced into international criminal law the distinction between principals and accessories, the military tribunals applying the law adhered to the unitary model. H. Olásolo, ‘Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?’, 20 *Criminal Law Forum* (2009), at 272.

¹⁰⁷⁸ Ambos 2006, at 661.

¹⁰⁷⁹ As regards conspiracy, the ICTY and ICTR Statutes provides for criminal responsibility for conspiracy to commit genocide. Article 4, ICTY Statute, and Article 2, ICTR Statute.

¹⁰⁸⁰ van Sliedregt 2003, at 64.

¹⁰⁸¹ On the process, see e.g., Scharf 1997, at 51-63.

¹⁰⁸² UN Doc. S/25704, 3 May 1993, para. 54.

¹⁰⁸³ Article 7(1), ICTY Statute.

¹⁰⁸⁴ Article 6(1), ICTR Statute.

Besides in the ICTY/ICTR statute articles on individual criminal responsibility, behaviour that gives rise to criminal responsibility is identified in the articles defining genocide. Both articles on genocide provide that it is not only genocide that is punishable, but conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.¹⁰⁸⁵ These provisions that follow the model of the Genocide Convention separate between genocide proper, on the one hand, and other acts of genocide, on the other hand.¹⁰⁸⁶ Of the four other acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide are often inchoate, that is, they do not require that a genocide *de facto* has taken place.¹⁰⁸⁷ In the *ad hoc* tribunals' jurisprudence, it is especially the relationship between the *mode of participation* of aiding and abetting and the *act* of complicity in genocide that has caused debate.¹⁰⁸⁸ Also the relationship between genocide and conspiracy to commit genocide has caused uncertainty.¹⁰⁸⁹ In some case law, it has been suggested that they should not be regarded as separate crimes, but rather as different modes to commit genocide.¹⁰⁹⁰ Other chambers, on the other hand, have treated them as distinct crimes and have foreseen the possibility of cumulative convictions.¹⁰⁹¹ The *ad hoc* tribunals hence deal with attribution both as a question of separate modes of participation and as a question of criminalized acts. This

¹⁰⁸⁵ Article 4, ICTY Statute, and Article 2, ICTR Statute.

¹⁰⁸⁶ See e.g., Schabas 2009, at 307.

¹⁰⁸⁷ E.g., Schabas 2009, at 307. In an ICTR judgement, the legal elements of conspiracy to commit genocide were articulated in the following way: "The *actus reus* of the crime is "an agreement between individuals to commit genocide". The agreement need not be formal. An agreement may be proved by direct evidence of the conspiracy itself, such as evidence of planning meetings for the genocide, or may be inferred from circumstantial evidence. The concerted or coordinated action of a group of individuals may also constitute evidence of an agreement. The qualifiers "concerted or coordinated" are important: it is not sufficient to simply show similarity of conduct. In certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. When based on circumstantial evidence, the finding of a conspiracy must be the only reasonable inference based on the totality of the evidence." *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2045.

¹⁰⁸⁸ See e.g., G. Dawson & R. Boynton, 'Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations *Ad Hoc* Tribunals,' 21 *Harvard Human Rights Journal* (2008), at 241.

¹⁰⁸⁹ Article 2(3), ICTR Statute distinguishes between different punishable acts and makes the distinction between "genocide" and "complicity in genocide."

¹⁰⁹⁰ *Karemera et al.*, Decision (JCE), TC, ICTR, 18 May 2006, paras 3-10. See also e.g., *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, paras 678-679, and *Stakić*, Decision (acquittal), TC, ICTY, 31 October 2002, paras 45-68. Cf. however, *Karemera et al.*, Decision (JCE, sep. op. of Judge Short), TC, ICTR, 18 May 2006, para. 8 ('In my view, complicity in genocide has the indicia of a criminal offence, whilst encompassing a particular mode of liability. [...] In the case of *Semanza*, for example, the Accused [...] was found not guilty of genocide and convicted of complicity in genocide. It certainly cannot be said that the Accused in that case was convicted of a mode of liability. I am therefore of the view that the term "complicity in genocide" referred to under Article 2(3)(e) is a crime (genocide) to which a particular mode of criminal responsibility is attached (complicity, or accomplice liability).')

¹⁰⁹¹ Due to fairness to the accused considerations, multiple convictions have, however, generally not been entered. See e.g. *Karemera & Ngirumpatse*, Judgement, TC, ICTR, 2 February 2012, paras 1709-1713, and *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, paras 2117-2127.

is problematic in that it entails that the same question is addressed in two different types of provisions, which relationship is not clearly settled.

When the ICC Statute was negotiated, the continental legal tradition was for the first time influential in the formation of an international criminal law instrument. In practice, this is reflected in a categorization of the various modes of participation in a form that is more familiar to lawyers coming from the civil law tradition. Article 25(3) of the ICC Statute distinguishes between: (a) those committing a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) those ordering, soliciting or inducing the commission of a crime which in fact occurs or is attempted; (c) those that for the purpose of facilitating the commission of a crime, aids, abets or otherwise assists in its commission or attempted commission of a crime; and (d) those that in any other way contribute to the commission or attempted commission of a crime by a group of persons acting with a common purpose. In relation to genocide, it is also possible to directly and publicly incite others to commit the crime (e). It should be noted that the ICC Statute, in contrast to the Genocide Convention and the statutes of ICTY and ICTR, does not in the crime definition of genocide distinguish between genocide and other genocidal acts.

In an analysis of ICC Article 25(3), Eser (who is German and hence a representative for the continental legal tradition) notes that the ICC Statute distinguishes between perpetration (subparagraph a) and participation (subparagraphs b and c) in a way that is “traditional for many jurisdictions”, but also includes “extensions of criminal co-responsibility” that are not so familiar in domestic systems (subparagraphs d and e).¹⁰⁹² He also argues that even though the ICC Statute does explicitly connect varying sentencing ranges to the different modes of participation, it seems to imply a hierarchy between the different forms beginning from committing and ending in inciting.¹⁰⁹³ The same conclusion is made by Werle (also German) who finds that Article 25(3) “establishes a value oriented hierarchy of participation in a crime under international law.”¹⁰⁹⁴ Both German scholars thus stress a move towards a differential participation model of attribution in international criminal law.

In the following discussion on attribution, the focus will be on the provisions and case law of the *ad hoc* tribunals, however, so that the provisions of the ICC and its initial case law also will be commented upon. As the attribution of criminal responsibility is legally unproblematic in cases where there is evidence that an individual physically has committed a crime, the attention will here be directed on how individuals can be committed to crimes where there is no evidence that they physically have caused the harm. The study focuses on situations where the social phenomenon of international criminality *de facto* has taken place. Inchoate responsibility and responsibility for attempts will hence not be considered.

¹⁰⁹² Eser 2002, at 771. Likewise, K. Ambos ‘Article 25 – Individual Criminal Responsibility’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 746.

¹⁰⁹³ Eser 2002, at 787.

¹⁰⁹⁴ G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, 5 *Journal of International Criminal Justice* (2007), at 957.

7.2.3. Modes of Participation and Legally Significant Pre-Crime Behaviour

7.2.3.1. Introductory Remark

International criminal law has, since World War II, reserved special treatment for persons in the highest echelons of military or political hierarchy who, by virtue of their position, are able to influence, formulate and subsequently order the execution of criminal schemes.¹⁰⁹⁵

Certain of the possible participation modes in international crimes are such that they stress that the non-physical perpetrator has mainly played his/her part *before* the physical criminal act takes place.¹⁰⁹⁶ Such participation modes are planning, instigating, soliciting, inducing and ordering. In all these participation forms, it is thus assumed that the non-physical actor has *influenced* the physical actor and that this influence has been such that it can be reproached. Kadish notes in this regard that: “Recognizing that a person is influenced by what other people say and do, just as a person is influenced by all his experiences, does not imply that volitional actions are caused, in the physical sense, the way natural events are determined by antecedent conditions.”¹⁰⁹⁷ With an alternative definition of causation, it may, however, be argued that individuals planning, instigating, soliciting, inducing and ordering crimes are possible *interpersonal causes* to crimes to which the physical actors are the *physical causes*.¹⁰⁹⁸ Even though these participation forms indicate that the participation has taken place before the physical criminal acts occur, it should be noted that, for example, inciting may have long-term effects on people’s minds.¹⁰⁹⁹

7.2.3.2. Planning

Planning has in the statutes of the *ad hoc* tribunals explicitly been identified as a participation mode that can give rise to individual criminal responsibility.¹¹⁰⁰ An

¹⁰⁹⁵ Bantekas 2002, at 43.

¹⁰⁹⁶ Eser categorizes these participation modes as “accessory before the fact”. Eser 2002, at 795. Kadish, on his part, makes a difference between two alternative modes of involvement in another’s criminal act: influence and assistance. Influence largely overlaps with what here is referred to as legally significant pre-crime behaviour. Kadish points out that: “Various terms are used to capture the central notions of assistance and influence. [...] Influence is expressed in a greater variety of terms, sometimes with overlapping meanings, sometimes with different connotations. Advise, like counsel, imports offering one’s opinion in favor of some action. Persuade is stronger, suggesting a greater effort to prevail on a person, or counseling strongly. Command is even stronger, implying an order or direction, commonly by one with some authority over the other. Encourage suggests giving support to a course of action to which another is already inclined. Induce means to persuade, but may suggest influence beyond persuasion. Procure seems to go further, suggesting bringing something about in the sense of producing a result. Instigate as well as incite suggest stirring up and stimulating, spurring another to a course of action. Provoke is roughly equivalent to incite, with the added sense of producing a response by exploiting a person’s sensitivities. Solicit is generally equivalent to incite in legal usage, although in common usage it suggests simply asking or proposing.” Kadish 1985, at 343.

¹⁰⁹⁷ Kadish 1985, at 343.

¹⁰⁹⁸ Cf. Kelman & Hamilton 1989, at 208.

¹⁰⁹⁹ This has made some call incitement to commit genocide a continuing crime W. K. Timmermann, ‘Incitement in International Criminal Law’, 88 *International Review of the Red Cross* (2006), at 842.

¹¹⁰⁰ Article 7(1), ICTY Statute, and Article 6(1), ICTR Statute.

individual may be held liable for planning a crime: (a) where he/she designs the criminal conduct with intent that the crime is committed; or (b) where he/she designs the criminal conduct with awareness of the substantial likelihood that a crime will be committed.¹¹⁰¹ The planning can be proven with circumstantial evidence.¹¹⁰² Usually, the planning takes place before the crimes are committed, but the planning may, however, also continue during the execution phase of the crime.¹¹⁰³ From the point of view of the fact that the international crimes can be very large-scale and of long duration this is of significance. If, however, a person has been found guilty of committing a crime, he/she should, however, not be convicted for having planned the same crime.¹¹⁰⁴ The planning may, however, then aggravate the crime and be reflected in the sentence.¹¹⁰⁵ It is not legally necessary for the planner to have a position of authority.¹¹⁰⁶

Depending on whether there is a requirement that the planned crime, in fact, has taken place, planning is either an inchoate offence (no requirement of materialization) or a form of accomplice or participation responsibility (a requirement of materialization). In the case law of the *ad hoc* tribunals, planning has clearly been given the latter function.¹¹⁰⁷ For example, in the *Kordić and Čerkez* Appeal Judgement it is argued that: ““planning” requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.”¹¹⁰⁸ It is noteworthy that the ICC Statute does not explicitly provide for criminal responsibility for planning.¹¹⁰⁹

7.2.3.3. Ordering

Due to the fact that many international crimes are committed by members of military groups and with State support, there seems to be a widespread belief that most of the physical acts constituting the underlying offences to the international crimes have been explicitly *ordered* by superiors and that low-level actors “just follow orders”. Even though this presumption has been challenged,¹¹¹⁰ there are obviously situations where superiors explicitly order their subordinates to commit crimes or to engage in activity aware of the

¹¹⁰¹ E.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, paras 29 and 31, and *Gatete*, Judgement, TC, ICTR, 31 March 2011, para. 573.

¹¹⁰² E.g., *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 279.

¹¹⁰³ E.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 480, and *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 279.

¹¹⁰⁴ E.g., *Kordić & Čerkez*, Judgement, TC, ICTY, 26 February 2001, para. 386.

¹¹⁰⁵ E.g., *Stakić*, Judgement, TC, ICTY, 31 July 2003, para. 443, and *Ndindabahizi*, Judgement, AC, ICTR, 16 January 2007, para. 122.

¹¹⁰⁶ *Kanyarukiga*, Judgement, AC, ICTR, 8 May 2012, para. 258.

¹¹⁰⁷ E.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 26, and *Limaj et al.*, Judgement, TC, ICTY, 30 November 2005, para. 513. See, however, Cassese who argues that planning of international crimes as such should be criminal. Cassese 2008, at 226. See also Mettraux who notes that planning in a number of domestic legal systems in an inchoate crime. Mettraux 2005, at 280.

¹¹⁰⁸ *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 26. See also e.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 473, and *Gatete*, Judgement, TC, ICTR, 31 March 2011, para. 573.

¹¹⁰⁹ See also *Ngudjolo*, Judgment (conc. op. of Judge Van den Wyngaert), TC, ICC, 18 December 2012, para. 15.

¹¹¹⁰ See further Chapter 3.

substantial likelihood that a crime will be committed in the realization of that activity. The statutes of all modern international criminal tribunals explicitly recognize ordering as a possible participation mode in the international crimes.¹¹¹¹

In situations of ordering, there has to be a person who has the *ability* to give orders, that is, ordering presupposes a hierarchical relationship between the superior and the subordinate. The *ad hoc* tribunals have in their case law defined ordering as using a position of authority to issue an order to engage in criminal conduct with the intent that a crime be committed or an order to engage in an act or omission aware of the substantial likelihood that a crime will be committed in the realization of that act or omission.¹¹¹² This position of authority needs not have been formalized and may only last for as long as it takes for the order to be given and obeyed.¹¹¹³ The authority of the person ordering may be informal and temporary, but this requirement of authority or a “vertical relationship” still distinguishes ordering from most other participation forms, which can occur between equals.¹¹¹⁴ The order may have been given in any form and it may be implicit or explicit. The existence of the order may be established circumstantially.¹¹¹⁵ This is important, as many others are given verbally and in the presence of only a limited group of persons.

Also in relation to ordering it has been asked whether ordering an international crime is an inchoate crime, that is, whether the order must be acted upon or not.¹¹¹⁶ The ICC Statute explicitly requires that the ordered crime must have occurred or at least has been attempted.¹¹¹⁷ Also the case law of the *ad hoc* tribunals establishes that the liability for ordering is not inchoate. For example, in the *Kamuhanda* Appeal Judgement, the ICTR

¹¹¹¹ Article 25(3)(b), ICC Statute, Article 7(1), ICTY Statute, and Article 6(1), ICTR Statute.

¹¹¹² E.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, paras 28–30, *Galić*, Judgement, AC, ICTY, 30 November 2006, paras 152 and 176, and *Semanza*, Judgement, AC, ICTR, 20 May 2005, para. 361. Boas, Bischoff and Reid note that “although some trial jurisprudence states that the accused must use his position of authority to ‘convince’, ‘persuade’, ‘impel’, or ‘compel’ the person ordered to engage in criminal conduct, several other judgements [...] hold simply that the accused must use his position of authority in issuing the order or instruction [...]” G. Boas, J. L. Bischoff & N. L. Reid, *International Criminal Law Practitioner Library, Volume 1* (Cambridge: Cambridge University Press, 2007), 365. In the case law, it has been stressed that ordering, in contrast to some other modes of responsibility, always requires a “positive action”. See e.g., *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 277, and *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 176.

¹¹¹³ See e.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 28, and *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 181. The *ad hoc* tribunals’ case law on this has, however, not always been consistent. After the *Kordić* and *Čerkez* Appeal Judgement, it has, however, been established that a formal superior-subordinate relationship between the accused and the perpetrator is not required. See further e.g., Mettraux 2005, at 282, and Boas, Bischoff & Reid 2007, at 367–368.

¹¹¹⁴ Eser 2002, at 796. The *Gacumbitsi* Appeals Chamber expressed this by noting that ordering does not demand a superior-subordinate relationship, but “authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.” *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 182. See also *Setako*, Judgement, AC, ICTR, 28 September 2011, para. 240 (“It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.”)

¹¹¹⁵ E.g., *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 281, and *Hategekimana*, Judgement, AC, ICTR, 8 May 2012, para. 67.

¹¹¹⁶ Mettraux 2005, at 283.

¹¹¹⁷ Article 25(3)(b), ICC Statute.

held that the “order [must] have a direct and substantial effect on the commission of the illegal act”.¹¹¹⁸ In the *Brđanin* case before the ICTY, the Trial Chamber explicitly required that the crime in question had actually been committed by the principal offender(s).¹¹¹⁹

7.2.3.4. Soliciting, Inducing and Instigating

According to the statutes of the *ad hoc* tribunals, *instigating* is a further mode of participation in international crimes.¹¹²⁰ The ICC Statute likewise stipulates that *soliciting* and *inducing* is criminal.¹¹²¹ The three concepts of instigating, soliciting and inducing have in legal commentaries been given somewhat varying definitions.¹¹²² All three concepts, however, refer to similar behaviour and it is therefore difficult to establish a clear difference between them. The common denominator in these modes of participation is that someone prompts another to engage in criminal conduct (or to some other conduct aware of the substantial likelihood that a crime will be committed in the realization of that conduct).¹¹²³ In the same way as, for example, those ordering a crime, the instigators, solicitors and inducers must set in motion a chain of events that eventually leads to the commission of a crime. In this regard, instigating differs from the inchoate crime of “direct and public incitement to commit genocide”.¹¹²⁴

Soliciting, inducing and instigating are suitable “labels” in situations where a person has influenced another to commit a crime, but where it cannot be argued that the influencing person is able to give orders and/or that the person has been giving orders. These participation modes do thus not require any vertical relationship between the actors, but may take place between peers horizontally. It has, however, been noted that in reality “the exertion of influence would hardly function without a certain capability to impress others”.¹¹²⁵ The prompting must namely affect the physical perpetrator, even though it is not necessary to prove that the crime would have not been perpetrated without the prompting.¹¹²⁶ If it can be argued that the physical perpetrator had “definitely decided to commit the crime” already before the accused person tried to influence him/her, the encouragement is more suitably labelled aiding and abetting.¹¹²⁷

¹¹¹⁸ *Kamuhanda*, Judgement, AC, ICTR, 19 September 2005, para. 75.

¹¹¹⁹ *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 267. Some legal scholars have, however, argued that in customary international law there does not seem to be a requirement that the order is executed. See e.g., Cassese 2008, at 230, and Mettraux 2005, at 283.

¹¹²⁰ Article 7(1), ICTY Statute, and Article 6(1), ICTR Statute.

¹¹²¹ Article 25(3)(b), ICC Statute.

¹¹²² E.g., soliciting has been defined as “urging, advising, commanding, or otherwise inciting another to commit a crime”, inducing as an “act or process of enticing or persuading another person to take a certain course of action” and instigation as goading or inciting (someone) to take some action or course. *Black’s Law Dictionary*, 9th ed. (2009) (‘inducement’ and ‘solicitation’).

¹¹²³ See e.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, paras 27 and 29.

¹¹²⁴ On direct and public incitement to commit genocide, see further e.g., *Muvunyi*, Judgement, TC, ICTR, 11 February 2010, paras 23-28, and *Ruggiu*, Judgement, TC, ICTR, 1 June 2000, para. 14. See also e.g., D. C. M. Byron, ‘Hate Speech and the Rwanda Genocide: ICTR Jurisprudence and Its Implications’, in C. Eboe-Osuji (ed.), *Protecting Humanity – Essays in International Law and Policy in Honour of Navanethem Pillay* (Leiden: Martinus Nijhoff Publishers, 2010), at 53 ff. Inchoate crimes are not considered in detail in this study.

¹¹²⁵ *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 272.

¹¹²⁶ *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 27. See also e.g., *Gatete*, Judgement, TC, ICTR, 31 March 2011, para. 574.

¹¹²⁷ *Orić*, Judgement, TC, ICTY, 30 June 2006, paras 271 and 281.

In the *Mpambara* case before the ICTR, it is held that instigation should take place “verbally or by other means of communication.”¹¹²⁸ The case law of the ICTY, however, suggests that instigation can take many different forms. For example, in the *Orić* case, it was put forward that:

Instigation can be performed by any means, both by express or implied conduct, as well as by acts or omissions, provided that, in the latter case, the instigator is under a duty to prevent the crime from being brought about. As regards the way in which the perpetrator is influenced, different from ‘incitement’ to commit genocide [...] instigation to the crimes included in the Statute needs neither be direct and public nor require the instigator’s presence at the scene of the crime. Thus, instigating influence can be generated both face to face and by intermediaries as well as exerted over a smaller or larger audience, provided that the instigator has the corresponding intent.¹¹²⁹

In most real-life situations, the influence is of *psychological nature*, but Ambos notes that it may also include physical pressure in the sense of *vis compulsiva*.¹¹³⁰

In the case law, it has been stressed that in contrast to direct and public incitement to commit genocide, instigation is a form of accomplice liability, that is, there must be a principal perpetrator who has committed (or at least attempted) the instigated crime.¹¹³¹ An instigator must act intentionally, that is, intend to provoke or induce the commission of a crime or must at least be aware of the substantial likelihood that the commission of the crime would be a probable consequence of his/her acts.¹¹³² Where the crime instigated is a specific intent crime, the instigator must also act with the specific intent.¹¹³³

7.2.4. Participation Forms Focusing on the Relationship between the Crime Participants

7.2.4.1. Introduction

While planning, ordering, soliciting, inducing and instigating are participation modes that imply that the person in question has played his/her role primarily before the physical act constituting the crime takes place, there are other participation modes that

¹¹²⁸ *Mpambara*, Judgement, TC, ICTR, 11 September 2006, para. 18.

¹¹²⁹ *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 273. Timmermann has observed that public incitement is different from private incitement in that public incitement often contributes to the creation of an atmosphere of hatred and xenophobia, and such hatred is therefore especially dangerous. Timmermann 2006, at 825.

¹¹³⁰ Ambos 2008(a), at 756. In situations of *vis absoluta* a person is completely excluded from exercising his or her will, whereas in situations of *vis compulsiva* there is some freedom to decide.

¹¹³¹ E.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 27, and Article 25(3)(b), ICC Statute.

¹¹³² E.g., *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 252, *Naletilić & Martinović*, Judgement, TC, ICTY, 31 March 2003, para. 60, and *Nchamihigo*, Judgement, AC, ICTR, 18 March 2010, para. 61.

¹¹³³ *Nchamihigo*, Judgement, AC, ICTR, 18 March 2010, para. 61.

do not in the same way emphasize the temporal aspect of the participation.¹¹³⁴ Such participation modes are aiding and abetting, participation in a joint criminal enterprise and other forms of commission responsibility. In these participation modes, the focus is instead placed on the *type of relationship* between the participants in crime.

7.2.4.2. Aiding, Abetting or Otherwise Assisting

The aiding and abetting in the planning, preparation or execution of a crime (*ad hoc* tribunals) or the aiding, abetting or otherwise assisting in the commission or attempted commission of a crime (ICC) has been declared criminal in the statutes of the international criminal tribunals.¹¹³⁵ It has been argued that the *ad hoc* tribunals have interpreted this responsibility mode “exceedingly broad” and that individuals therefore have been convicted based on this responsibility mode in relation to a “wide variety of participatory conduct in the perpetration of crimes by others.”¹¹³⁶ From a prosecutorial perspective, the attraction to claim this mode of participation is, however, reduced by the fact that aiding and abetting has been declared a “less grave mode of participation.”¹¹³⁷ The label of aiding and abetting is hence not suitable if one wants to make the argument that an individual has played a central role in relation to the criminality.

It should also be observed that the statutes of the ICTY and the ICTR also contain a provision on *complicity* in genocide.¹¹³⁸ Even though the *Krstić* Appeal Judgement suggests that complicity in genocide could encompass broader conduct than aiding and abetting genocide,¹¹³⁹ in practice, the *ad hoc* tribunals have not clearly distinguished complicity in genocide from aiding and abetting genocide.¹¹⁴⁰

In the *ad hoc* tribunal case law, the terms “aiding” and “abetting” have sometimes been given separate definitions, but today “aiding and abetting” is generally regarded as a singular legal concept.¹¹⁴¹ For responsibility under this heading to arise, the following conditions must be met: (1) the aider and abettor must lend practical assistance, encouragement or moral support to the perpetrator of the crime; (2) the assistance or support has a substantial effect on the perpetration of the crime, but need not be causal to the act of the physical perpetrator; and (3) the aider and abettor acted intentionally with knowledge or awareness that his/her act would lend assistance, encouragement or moral support to the perpetrator.¹¹⁴² Very significantly, the aider and abettor does thus

¹¹³⁴ Jessberger and Geneuss, e.g., in line with this note that when a person orders or induces a crime, he/ she does not have to have control over the commission of the crime. F. Jessberger & J. Geneuss, ‘On the Application of a Theory of Indirect Perpetration in *Al Bashir* – German Doctrine at the Hague?’, 6 *Journal of International Criminal Justice* (2008), at 865.

¹¹³⁵ Article 7(1), ICTY Statute, Article 6(1), ICTR Statute, and Article 25(3)(c), ICC Statute.

¹¹³⁶ Boas, Bischoff & Reid 2007, at 301.

¹¹³⁷ *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 281.

¹¹³⁸ Article 4(3)(e), ICTY Statute, and Article 2(3)(e), ICTR Statute.

¹¹³⁹ *Krstić*, Judgement, AC, ICTY, 19 April 2004, para. 139.

¹¹⁴⁰ See further e.g., Dawson & Boynton 2008.

¹¹⁴¹ See e.g., *Akayesu*, Judgement, TC, ICTR, 2 September 1998, para. 484, *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, paras 182-200, *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 254, *Ntakirutimana & Ntakirutimana*, Judgement, TC, ICTR, 21 February 2003, para. 787, and *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 280. See also Boas, Bischoff & Reid 2007, at 307, and Mettraux 2005, at 284.

¹¹⁴² E.g., *Furundžija*, Judgement, TC, ICTY, 10 December 1998, paras 235 and 249, *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 140, and *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 102.

not have to share the intent of the physical perpetrator.¹¹⁴³ This is especially significant in relation to specific intent crimes, such as genocide and persecution.¹¹⁴⁴ The aider and abettor must, however, have *knowledge* of principal perpetrator's specific intent.¹¹⁴⁵

Even though the acts of the aider and abettor are connected to the acts of the physical perpetrator, the physical perpetrator does not have to be tried or even identified.¹¹⁴⁶ It is enough that the commission of the crime is proven. The case law of the *ad hoc* tribunals has, however, been unsettled in relation to whether it has to be proven that the aider and abettor acted with the knowledge that he/she aided and abetted *a specific* crime or whether it is enough to prove that he/she aided and abetted the commission of *a* crime.¹¹⁴⁷ In the *Perišić* Appeal Judgement, the ICTY recently by majority held that the "specific direction remains an element of the *actus reus* of aiding and abetting liability."¹¹⁴⁸ In the *Stanišić* and *Simatović* Trial Judgement, the Trial Chamber interpreted the *Perišić* finding to mean that even though specific direction generally may be considered both explicitly and implicitly, it "must be analyzed explicitly in cases where the person is remote from the crimes he or she is alleged to have aided and abetted."¹¹⁴⁹ This new focus on the specific direction has been criticized by a number of scholars.¹¹⁵⁰ For example, Milanović has found that it entails that: "it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing that they are engaging in mass atrocities, so long as that leader is remote from the actual operations and is not so thoroughly stupid to leave a smoking gun behind him."¹¹⁵¹ The ICC Statute also provides for aider and abettor responsibility in relation to *attempted* commissions of crimes.¹¹⁵²

The aiding and abetting may take place at the planning, preparation or execution stages of the crime.¹¹⁵³ In aiding and abetting, the focus is therefore not on the temporal aspect of the participation. Instead, aiding and abetting could be said to be characterized by its requirement of *substantial effect* on the perpetration of the crime. Cryer *et al.*,

¹¹⁴³ E.g., *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 162.

¹¹⁴⁴ E.g., *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 52, and *Krštić*, Judgement, AC, ICTY, 19 April 2004, para. 140.

¹¹⁴⁵ See e.g., *Kalimanzira*, Judgement, AC, ICTR, 20 October 2010, para. 86, *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 52, and *Ntakirutimana & Ntakirutimana*, Judgement, AC, ICTR, 13 December 2004, paras 500-501.

¹¹⁴⁶ E.g., *Stakić*, Judgement, TC, ICTY, 31 July 2003, para. 533.

¹¹⁴⁷ Boas, Bischoff & Reid 2007, at 321-324. See also e.g., *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 273 ('the aider and abettor must be aware of the essential elements of the crime committed by the principal offender').

¹¹⁴⁸ *Perišić*, Judgement, AC, ICTY, 28 February 2013, para. 36.

¹¹⁴⁹ *Stanišić & Simatović*, Judgement, TC, ICTY, 30 May 2013, para. 1264.

¹¹⁵⁰ See e.g., M. Milanović, 'The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perišić', *EJIL Talk!* [blog], 11 March 2013, J. G. Stewart, 'Guest Post: The ICTY Loses its Way on Complicity – Part 1', *Opinio Juris* [blog], 3 April 2013, and J. G. Stewart, "'Specific Direction" is Unprecedented: Results from Two Empirical Studies', *EJIL Talk!* [blog], 4 September 2013.

¹¹⁵¹ Milanović 2013 [blog].

¹¹⁵² Article 25(3)(c), ICC Statute.

¹¹⁵³ *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, para. 85. The chambers of the *ad hoc* tribunals have generally been unwilling to recognize support *after* the physical act constituting the crime as aiding and abetting. E.g., *Strugar*, Judgement, TC, ICTY, 31 January 2005, para. 355, and *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, para. 731.

however, observe that “this should not be taken as setting a high standard”.¹¹⁵⁴ They note that individuals have, for example, been convicted as aiders and abettors for preventing victims to escape and for providing the physical perpetrator with weapons.¹¹⁵⁵ The presence of a superior at the scene of the crime has furthermore been viewed as aiding and abetting the crime, when the presence has a significant legitimizing or encouraging effect on the physical perpetrators and the superior has the required mental state.¹¹⁵⁶ This emphasizes that in contrast to some other participation modes aiding and abetting can be “intangible,” that is, it can be in the form of moral support and encouragement.¹¹⁵⁷ Taking into consideration the phenomenology of international crimes this is significant. Tacit support and encouragement by leaders is namely common in connection to international criminality. In relation to high-level actors aiding and abetting, the ICTR Appeals Chamber has stressed that for an individual to be convicted for abetting a crime, it is not necessary to prove that he had authority over the principal perpetrator.¹¹⁵⁸ The ICTY Appeals Chamber has also pointed out that “the fact that his or her participation amounted to no more than his or her “routine duties” will not exculpate the accused.”¹¹⁵⁹

It should be noted that ICC Article 25(3)(c) regulating aiding and abetting before the ICC introduces a mental element not required by customary international law, namely that the person acts *for the purpose of* facilitating the commission of a crime. It has been observed that this seems to introduce a motive element, which makes it more difficult to prosecute acts that “on their face, are neutral and professional acts”.¹¹⁶⁰

7.2.4.3. Participation in Joint Criminal Enterprises

Already at an early stage of the functioning of the *ad hoc* tribunals, it was recognized that the statutes of the tribunals do not *explicitly* contain a participation mode that would express that non-physical actors may play (or continue to play) a very central role at the crime execution stage of the crimes. To overcome this problem, ICTY made an investigation into customary international law and argued in its *Tadić* Appeal Judgement that participation in a joint criminal enterprise (JCE) was a participation form included in the statute *implicitly*

¹¹⁵⁴ Cryer *et al.* 2010, at 375. Also Ambos has made the same evaluation in 1999. K. Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10 *Criminal Law Forum* (1999), at 11.

¹¹⁵⁵ E.g., Cryer *et al.* 2010, at 375. See also *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 134, and *Ntakirutimana & Ntakirutimana*, Judgement, AC, ICTR, 13 December 2004, para. 530.

¹¹⁵⁶ E.g., *Furundžija*, Judgement, TC, ICTY, 10 December 1998, para. 232, *Aleksovski*, Judgement, TC, ICTY, 25 June 1999, para. 64, and *Kalimanzira*, Judgement, TC, ICTR, 22 June 2009, para. 20. Boas, Bischoff and Reid argue that aiding and abetting by omission should not be accepted, but there should be a requirement that the superior has intentionally made himself available at the scene or intentionally stayed at the scene if already there for the express purpose of showing solidarity with the physical perpetrator or approval of their actions. In these situations, it may namely be argued that the aider and abettor has acted actively. If there only has been an omission, the individual should instead be convicted based on his/her possible superior responsibility. Boas, Bischoff & Reid 2007, at 313. It should be emphasized that whereas certain physical presence can constitute aiding and abetting, the physical presence of the aider and abettor at the scene of the crime is not as such a condition for aiding and abetting responsibility. *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, para. 85.

¹¹⁵⁷ Cf. Ambos 2000, at 24, and Boas, Bischoff & Reid 2007, at 308.

¹¹⁵⁸ *Muhimana*, Judgement, AC, ICTR, 21 May 2007, para. 189.

¹¹⁵⁹ *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, para. 189 (see also para. 193).

¹¹⁶⁰ Cryer *et al.* 2010, at 377. See also Ambos 2008(a), at 760, and Eser 2002, at 801.

(as a form of committing).¹¹⁶¹ This identification of customary international law has been challenged by numerous scholars,¹¹⁶² but ICTY has reaffirmed the existence of JCE responsibility in several cases and it has, in fact, become the tribunal's most important attribution doctrine. Subsequently, the ICTR has also applied the JCE theory.

In the *Tadić* case, the ICTY besides arguing for the existence of JCE responsibility identified the central elements of this participation form. As regards the objective elements of the responsibility, the Appeals Chamber held that it must be established: (1) a plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the statute; and (3) participation of the accused in the common design.¹¹⁶³ All three objective elements have been reaffirmed in numerous subsequent cases.¹¹⁶⁴

In interpreting the content of the requirement of a "plurality of persons," the ICTY has established that this plurality need not be organized in a military, political or administrative structure.¹¹⁶⁵ In order to show that there is such a plurality of persons, it must simply be shown that there are *two or more individuals* who share a *common purpose* and who *act together or in concert with each other* to implement the purpose.¹¹⁶⁶ A complicated question has been to what extent the individuals making up the plurality of persons should be identified. In some cases, it has been suggested that the identities of the other enterprise participants should if possible be clarified,¹¹⁶⁷ but such identification has not been aimed at in all cases.¹¹⁶⁸ The prevailing legal standard appears to be that: "While a Trial Chamber must identify the plurality of persons belonging to the JCE, it is not necessary to identify by name each of the persons involved. Depending on the circumstances of the case, it can be sufficient to refer to categories or groups of persons."¹¹⁶⁹

¹¹⁶¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 188 and 226.

¹¹⁶² E.g., A. Marston Danner & J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005), at 110-112, J. D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007), at 75-76, and S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *Journal of International Criminal Justice* (2004), at 615-617.

¹¹⁶³ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

¹¹⁶⁴ E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 64, and *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 100.

¹¹⁶⁵ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

¹¹⁶⁶ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 69. In relation to the requirement of *acting together*, it was in the *Krajišnik* case noted that: "a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives." *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 884. The fact that also collective *action* is required is also stressed by the fact that for joint criminal enterprise responsibility convictions, a crime must in fact have been committed. *Milutinović et al.* Decision (JCE), AC, ICTY, 21 May 2003, para. 23.

¹¹⁶⁷ See e.g., *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 346, *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 430, *Brđanin & Talić*, Decision (indictment), TC, ICTY, 20 February 2001, para. 21, *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, paras 156-157, *Krnojelac*, Decision (indictment), TC, ICTY, 11 May 2000, para. 16, and *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, para. 22.

¹¹⁶⁸ V. Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', 5 *International Criminal Law Review* (2005), at 182. See also e.g., *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 1086.

¹¹⁶⁹ *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 156.

It is also important to note that the ICTY *Brđanin* Appeals Chamber has argued that “what matters [...] is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.”¹¹⁷⁰ The physical actor does thus not have to be a member of the enterprise and may hence be used as a “tool” by the JCE members. In these cases, it has to be shown that the crime can be imputed to one member of the enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.¹¹⁷¹ Wirth has argued that this “enables international criminal law to address situations where the members of a (relatively small) “leadership” JCE use non-members to carry out the actual crimes.”¹¹⁷² The *Brđanin* Appeal Judgement has, however, by others been criticized for not answering exactly how the relevant physical perpetrator in these situations should be linked to the defendant (or the enterprise).¹¹⁷³ In the *Krajišnik* case, it was, however, with reference to the *Brđanin* Appeal Judgement clarified that:

The establishment of a link between the crime in question and a member of the JCE is a matter to be assessed on a case-by-case basis. Factors indicative of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime. However, it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that he knew of the existence of the JCE; what matters in JCE Category 1 is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.¹¹⁷⁴

In JCE responsibility, the most central objective element is the common plan, design or purpose (hereinafter “common plan”), which knits together the different actors in the crime. In the case law, it has been established that this common plan does not have to be previously arranged or formulated.¹¹⁷⁵ It may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE.¹¹⁷⁶ In some cases, the question has been raised whether the arrangement or understanding has to amount to an *agreement*, or more specifically, an *express agreement* to commit a specific crime. Some ICTY trial judgements suggest the existence of such a

¹¹⁷⁰ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 410. Earlier ICTY case law, however, seems to establish that, in the basic form of enterprises, the accused person and the physical perpetrator must share the same criminal intent. E.g., *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, paras 83-84, *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 220, and *Vasiljević*, Judgement, TC, ICTY, 29 November 2002, paras 64 and 68.

¹¹⁷¹ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 413. See also *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, paras 225-226.

¹¹⁷² S. Wirth, ‘Committing Liability in International Criminal Law’, C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009), at 334.

¹¹⁷³ J. D. Ohlin, ‘Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability’, 25 *Leiden Journal of International Law* (2012), at 774. Ohlin elaborates on the possibility of arguing that there are subsidiary or interlinked JCEs. *Ibid.*, at 775-776. See also C. Farhang, ‘Point of No Return: Joint Criminal Enterprise in *Brđanin*’, 23 *Leiden Journal of International Law* (2010), at 152 ff.

¹¹⁷⁴ *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 226.

¹¹⁷⁵ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

¹¹⁷⁶ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

requirement,¹¹⁷⁷ but the Appeals Chamber has explicitly rejected it.¹¹⁷⁸ The ICTY Appeals Chamber has emphasized that the common plan may evolve and change over time.¹¹⁷⁹ If the common purpose alters, a Chamber must, however, make a finding “when the expanded crimes became incorporated into the common objective”.¹¹⁸⁰

When enterprise responsibility is argued, a central question is therefore how the common plan is defined, that is, which crimes form part of the enterprise and which do not. In the case law, not many requirements on the common plan have been settled. In fact, only two requirements have so far been identified, namely that the common plan must amount to or involve the commission of a crime¹¹⁸¹ and that the definition of common plan should be strict.¹¹⁸² In many cases before the ICTY, the common plan has been defined in terms of persecution and/or forcible transfer of certain segments of the population in/from a certain region¹¹⁸³ or the running of camps in which atrocities have been committed,¹¹⁸⁴ that is, the common plan has been wider than a single international crime.¹¹⁸⁵ In the legal doctrine, it has been dreaded that enterprises would be defined even broader, for example, in terms of nation-wide genocidal campaigns.¹¹⁸⁶ Such definitions of common plan namely entail that *numerous* individuals and *numerous* crimes become part of the enterprise, which has been seen to increase the risk of guilt by association. In situations of large-scale enterprises, it is also often possible to identify numerous sub-enterprises (for example, concentration camps), which raises the complicated question about the relationship between various enterprises.¹¹⁸⁷ Despite the concerns raised,

¹¹⁷⁷ Most notably, *Brđanin*, Judgement, TC, ICTY, 1 September 2004, paras 344 and 347. See also e.g., *Krnjolelac*, Judgement, TC, ICTY, 15 March 2002, para. 80, and *Vasiljević*, Judgement, TC, ICTY, 29 November 2002, paras 66 and 208.

¹¹⁷⁸ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 418, *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, paras 96-97 (regarding the systematic form of enterprises), and *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 118. The express agreement requirement has also been criticized by legal scholars. E.g., K. Gustafson, ‘The Requirement of an ‘Express Agreement’ for Joint Criminal Enterprise Liability – A Critique of *Brđanin*’, 5 *Journal of International Criminal Justice* (2007), at 134 and 145.

¹¹⁷⁹ *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 163.

¹¹⁸⁰ *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 171.

¹¹⁸¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227. In the *Martić* case, the Trial Chamber noted that: “[...] The Trial Chamber considers that [...], the] objective [...] to unite with other ethnically similar areas, in and of itself does not amount to a common purpose within the meaning of the law on JCE [...]. However, where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose.” *Martić*, Judgement, TC, ICTY, 12 June 2007, para. 442.

¹¹⁸² *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 116. More concretely, the chambers should specify the common criminal purpose in terms of both the criminal goal intended and its scope, that is, e.g., the temporal and geographic limits of this goal, and the general identities of the intended victims. E.g., *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 430, and *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, para. 22.

¹¹⁸³ E.g., *Martić*, Judgement, TC, ICTY, 12 June 2007, para. 442, *Simić et al.*, Judgement, TC, ICTY, 17 October 2003, paras 984 and 987, *Stakić*, Judgement, AC, ICTY, 22 March 2006, paras 73 and 78, and *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 230.

¹¹⁸⁴ E.g., *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 319.

¹¹⁸⁵ Cf. Haan 2005, at 181.

¹¹⁸⁶ E.g., Marston Danner & Martinez 2005, at 134-135, and E. van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, 5 *Journal of International Criminal Justice* (2007), at 200.

¹¹⁸⁷ Cf. *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 307.

the *ad hoc* tribunals have not wanted to limit enterprises responsibility to small-scale enterprises only.¹¹⁸⁸ This approach has been justified with the additional requirement of participation, which has been seen to take away the risk of guilt by association.¹¹⁸⁹

Thirdly, JCE responsibility demands *participation* of the accused in the common purpose.¹¹⁹⁰ According to the case law, this participation need not involve commission of a specific crime, but may take the form of assistance in, or contribution to, the execution of the common plan.¹¹⁹¹ The required degree of participation is somewhat unsettled in the case law of the tribunals. The ICTY Appeals Chamber has noted that not every type of conduct would amount to a significant enough contribution,¹¹⁹² but it has not wanted to uphold the suggested requirement of substantial contribution.¹¹⁹³ It is, however, clear that there are *no* requirements that participant in the enterprise physically commits any of the crime elements,¹¹⁹⁴ that the participation amounts to a *conditio sine qua non* for the crime commission,¹¹⁹⁵ nor that the accused is present in the JCE at the time the crime is committed by the physical actor.¹¹⁹⁶ In relation to the requirement of participation, it should furthermore be noted that ICTY has been criticized for sometimes conflating *personal conduct* with *organizational role, function or position*. In this connection, Ambos has argued that: “Culpability implies personal conduct, which finds expression in individual contributions to the enterprise, contributions that do not necessarily correspond to the function assigned to the accused in the enterprise.”¹¹⁹⁷ That the ICTY, especially in the systemic cases of enterprise responsibility, sometimes has given much attention to the accused person’s position of employment is exemplified by the *Kvočka*

¹¹⁸⁸ E.g., *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 424, and *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 876. The *Brđanin* Trial Chamber, however, wanted to limit enterprise responsibility only to smaller enterprises. *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 355.

¹¹⁸⁹ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 424.

¹¹⁹⁰ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

¹¹⁹¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227. In the *Kanyarukiga* case before the ICTR, it was questioned whether a JCE participant must take part in the *execution* of the common plan or purpose, or whether also planning can constitute significant participation. Most AC Judges did not consider this question at all, but Judge Pocar held that also “planning a crime may amount to a significant contribution to the execution of the common purpose”. *Kanyarukiga*, Judgement (sep. op. of Judge Pocar), AC, ICTR, 8 May 2012, para. 4.

¹¹⁹² *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 427. E.g., mere membership is not “participation” enough. E.g., *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 263. The ICTR has suggested that also omissions can constitute participation: “Involvement in a joint criminal enterprise may also be proven by evidence characterized as an omission. The objective element of participation is satisfied as long as the accused has “committed an act or an omission which contributes to the common criminal purpose”. Although it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship, an omission in combination with positive acts might have great significance.” *Mpambara*, Judgement, TC, ICTR, 11 September 2006, para. 24.

¹¹⁹³ E.g., *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 430, *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 215, and *Kvočka et al.* Judgement, AC ICTY, 28 February 2005, paras 97, 104 and 187.

¹¹⁹⁴ E.g., *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 427, *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 81, and *Kvočka et al.* Judgement, AC, ICTY, 28 February 2005, para. 99.

¹¹⁹⁵ *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 98.

¹¹⁹⁶ *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 81.

¹¹⁹⁷ K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 173-174.

case, where the Appeals Chamber held that: “A position of authority [...] may be relevant evidence for establishing the accused’s awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating his level of participation for sentencing purposes.”¹¹⁹⁸

Besides the objective elements, JCE responsibility demands that certain mental elements are present. In this regard, the international case law has differentiated between three different JCE forms with different *mens rea* requirements.¹¹⁹⁹ Of these three, the *basic form* of JCE (JCE I) is characterized by the *shared intent* of the participants to advance the goal of the enterprise, that is, to commit the commonly intended crimes.¹²⁰⁰ There may be a division of labour between the different participants, but they all intend the same result. In civil law legal systems, this type of participation is often characterized as co-perpetration.¹²⁰¹ The shared intent is often inferred from knowledge of the common plan and participation in its advancement.¹²⁰² This inference must be “the only reasonable inference on the evidence.”¹²⁰³ The shared intent does not require the participant’s personal satisfaction or enthusiasm or his personal initiative in contributing to the enterprise.¹²⁰⁴

The second form of enterprise responsibility is often called the *systemic form* (JCE II) and in this JCE form it must be established the personal *knowledge of the nature of the system of ill-treatment and intent to further the system* (common plan).¹²⁰⁵ In cases concerning the systemic form of enterprise responsibility, the existence of a system of ill-treatment, such as, a detention or prison camp in which atrocities are committed, must first be proven.¹²⁰⁶ Only after this, can the accused person’s knowledge of the system and intent to further it be established. The knowledge may be proven by direct evidence or

¹¹⁹⁸ *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 101.

¹¹⁹⁹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 228. See also e.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 65.

¹²⁰⁰ *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 220 and 228. In the *Brđanin* case, the Appeals Chamber noted that the criminal purpose should not merely be the *same*, but *common* to all of the persons acting together within the enterprise. *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 430. In some cases, the ICTY has not made a clear distinction between crimes that are intended (shared intent) and part of the enterprise, and crimes that are not intended by all enterprise participants and which thus are not part of the enterprise. E.g., in the *Babić* case, the Appeals Chamber makes the following point: “Under these circumstances, the Trial Chamber was right to imply that the Appellant’s guilt is not “lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the [joint criminal enterprise, ...].” *Babić*, Judgement (sentencing), AC, ICTY, 18 July 2005, para. 28. In the *Krajišnik* case, it was suggested that JCE I requires “a consensus or shared understanding amounting to a psychological causal nexus.” The existence of such a requirement was, however, rejected by the Appeals Chamber. *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 185.

¹²⁰¹ *Ambos 2007(a)*, at 170-171. Eser notes in this regard, that ICTY has adopted a wide notion of co-perpetration. Eser 2002, at 791.

¹²⁰² *Kvočka et al.*, Judgement, TC, ICTY 2 November 2001, para. 271.

¹²⁰³ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 429.

¹²⁰⁴ E.g., *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 100, and *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 106.

¹²⁰⁵ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 220.

¹²⁰⁶ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 65.

be inferred from the accused person's position of authority or duties in the system.¹²⁰⁷ Especially when the duties have been performed during a longer period of time, may the knowledge be inferred from the participation.¹²⁰⁸ Also the intent may be inferred from such indicia.¹²⁰⁹

Finally, in the *extended form* of JCE responsibility (JCE III) a person is held responsible for crimes that go beyond the common plan, but which are its natural and foreseeable consequences. More specifically, this enterprise responsibility form requires: (a) the intention to take part in a JCE and to further the criminal plan of that enterprise; and (b) the *foreseeability* of the possible commission by other members of the group of offences that do not constitute the object of the common criminal plan.¹²¹⁰ Furthermore, the Appeals Chamber in the *Tadić* case argued that what is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless *willingly took that risk*.¹²¹¹ This mental state is in many legal systems called either *dolus eventualis* or advertent recklessness.¹²¹² In the *Kvočka et al.* case, the Appeals Chamber emphasized that it is the *accused person's knowledge* that is central, that is, what was natural and foreseeable to this person. More specifically, the Appeals Chamber held that:

[...] participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.¹²¹³

This mixture of *knowledge/awareness* and *foreseeability* required for extended enterprise responsibility has been criticized by Ambos who points out that:

Either an accused knows that a certain result will occur or this result is foreseeable to him; both at once are logically impossible. In fact, knowledge is a standard for intent crimes [...], while foreseeability belongs to the theories of recklessness or negligence. The only way out of this impasse is to construe foreseeability as an objective requirement (in the sense of a reasonable man standard), leaving the knowledge standard as the (only) subjective or mental requirement of liability. [...] As a consequence, JCE III responsibility presupposes, first, the objective foreseeability of

¹²⁰⁷ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 228. See also e.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 65.

¹²⁰⁸ *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 111.

¹²⁰⁹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 203.

¹²¹⁰ *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 206, 220 and 228.

¹²¹¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 220 and 228.

¹²¹² *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 220. Here, it should be noted that Fletcher and Ohlin argue that there is a difference between *dolus eventualis* and recklessness. They argue that recklessness focuses on the *risk* that the perpetrator is willing to take, whereas *dolus eventualis* is about the *attitude* of the actor. The punishable attitude is one of approval and identification with the evil result. Fletcher & Ohlin 2005, at 554.

¹²¹³ *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 86. Likewise e.g., *Limaj et al.*, Judgement, TC, ICTY, 30 November 2005, para. 512.

crimes that went beyond the object of the enterprise [...] and, second, the knowledge of the concrete participant with regard to this (objective) foreseeability.¹²¹⁴

This lower mental state requirement for the secondary crimes has been justified with the fact that in this form of responsibility, the actor already possesses the intent to participate and further the common criminal plan of a group.¹²¹⁵ In relation to specific intent crimes, the ICTY has held that JCE III responsibility does not demand that the prosecuted person shares the specific intent of the crime in question.¹²¹⁶ This finding has been strongly criticized in academia. It has, *inter alia*, been submitted that JCE III responsibility reflects a general legal hostility towards criminal enterprises due to the increased risk of injury they give rise to.¹²¹⁷

7.2.4.4. Shortly on the Criticism Directed towards the JCE Doctrine

It has been noted that it is ironic that “the most complex and conceptually challenging liability theory in international criminal law is the only one not mentioned explicitly in the statutes”.¹²¹⁸ Enterprise responsibility is indeed a complicated attribution theory that has raised a vivid discussion among legal scholars. As this discussion is central to the topic of this study, the debate surrounding enterprise responsibility will be briefly summarized here and the points raised will be analyzed in greater detail in the analysis section following the discussion on the *lex lata*.

Enterprise responsibility has first and foremost been criticized for *casting a too wide net of criminal responsibility* and hence for conflicting with the principle of *individual responsibility*.¹²¹⁹ This criticism can generally be categorized into two sub-groups. First, some think that the enterprises can be defined too broadly, which results in numerous individuals and crimes being part of the enterprises. Second, some think that the level of participation required is too low, which also results in too many enterprise participants.

As noted, the *enterprise size* affects both which *individuals* and which *crimes* come within the ambit of the enterprise. For most scholars, the use of the enterprise doctrine to

¹²¹⁴ Ambos 2007(a), at 175. See also *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 882. Also Cassese notes that the foreseeability standard is an *objective* one (what a person ought to have foreseen/reasonable man standard), and not a *subjective* one (what the person actually foresaw). A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,’ 5 *Journal of International Criminal Justice* (2007), at 122-123. See also W. A. Schabas, ‘*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia,’ 37 *New England Law Review* (2003), at 1033. In an appeal decision, the ICTR, however, seems to suggest a subjective test. *Karemera et al.*, Decision (JCE), AC, ICTR, 12 April 2006, para. 17 (‘In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused’.)

¹²¹⁵ *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 33. See also *Babić*, Judgement (sentencing), AC, ICTY, 18 July 2005, para. 27.

¹²¹⁶ E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 38, and *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, paras 1195 and 1332. See, however, the opposite view in *Ayyash et al.*, Decision (applicable law), AC, STL, 16 February 2011, para. 249, and *Taylor*, Judgement, TC, SCSL, 18 May 2012, para. 468.

¹²¹⁷ D. L. Nersessian, ‘Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes,’ *Fletcher Forum of World Affairs* (2006), at 86-87.

¹²¹⁸ Marston Danner & Martinez 2005, at 103.

¹²¹⁹ E.g., Darcy, who characterizes enterprise responsibility as a “nuanced form of guilt by association”. S. Darcy, ‘Imputed Criminal Liability and the Goals of International Justice,’ 20 *Leiden Journal of International Law* (2007), at 386.

mob-type of criminality (as for example in the *Tadić* case before the ICTY) is unproblematic. In these situations, the non-physical and physical perpetrators know each other and the enterprise participants are usually aware of the various crimes that are committed within the enterprise. Most scholars also think that it is justified to use the enterprise doctrine to slightly larger enterprises, such as prison and concentration camps, in which it often can be assumed that the individuals involved have knowledge about how the prison, camp, etc. is run.¹²²⁰ When, however, enterprise responsibility is used to prosecute loosely knit network (such as, al-Qaeda terrorists)¹²²¹ or nation-wide genocides, it becomes much more problematic to assume that enterprise participants have the needed comprehension of the functioning of the enterprise. This is problematic, as a central element of the JCE responsibility doctrine is that *every member* of the enterprise is criminally liable for *all* crimes committed within the enterprise (hereinafter, the principle of equal culpability or equal guilt). For individual members of large-scale enterprises this can signify that they are held responsible for crimes they did not know about and which have been physically committed by individuals who they are unfamiliar with. Furthermore, as the natural and foreseeable consequences of large-scale enterprises generally are more or less unlimited there is a potential for very far-reaching extended criminal responsibility. This kind of extensive criminal responsibility has been found somewhat more acceptable in situations where it can be argued that a high-level actor can be said to be able to influence the functioning of the large-scale enterprise. As the enterprise doctrine, however, does not distinguish between participants based on their ability to influence the functioning of the enterprise, the doctrine has been found to entail a risk of an unacceptable extension of criminal liability for low-level and mid-level actors.¹²²²

In the *Brđanin* case, ICTY responded to this kind of criticism by limiting the applicability of the JCE doctrine to small-scale enterprises and by requiring a specific agreement to commit a crime between the non-physical and physical actors.¹²²³ The Trial Chamber judgement was, however, not well received either, as it was pointed out that these kinds of limitations made it impossible to convict structurally remote leaders and that it was precisely these leaders that the doctrine was “developed for.”¹²²⁴ High-level political leaders do not, for example, usually make explicit agreements with low-level perpetrators.¹²²⁵ The limitations of the enterprise

¹²²⁰ E.g., Marston Danner & Martinez 2005, at 134-135.

¹²²¹ Osiel 2005(b), at 799-800.

¹²²² H. Olásolo, ‘Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement,’ 7 *International Criminal Law Review* (2007), at 158.

¹²²³ *Brđanin*, Judgement, TC, ICTY, 1 September 2004, paras 347 and 355.

¹²²⁴ E.g., Gustafson 2007, at 149, A. O’Rourke, ‘Joint Criminal Enterprise and Brđanin: Misguided Overcorrection,’ 47 *Harvard International Law Journal* (2006), at 307 and 323, and H. van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations,’ 5 *Journal of International Criminal Justice* (2007), at 99.

¹²²⁵ E.g., Gustafson 2007, at 153-154, and O’Rourke 2006, at 323. On the difference between “agreements” and “common purposes” it has been noted that: “[A common purpose] presumably requires less of prosecutors, since individuals may independently choose to subscribe to a single purpose without entering into even a tacit agreement. To form an agreement, participants must be aware, at least, that others exist who share its terms. One may share a purpose with others, by contrast, while completely ignorant of their existence.” Osiel 2005(a), at 1794. Ohlin has, however, criticized the dismissal of the agreement requirement by stressing that an agreement can be implicit. According to Ohlin, the requirement of an agreement is necessary to distinguish joint behaviour from crowd behaviour. J. D. Ohlin, ‘Joint Intentions to Commit International Crimes,’ 11 *Chicago Journal of International Law* (2011), at 699 and 701.

doctrine suggested by the *Brđanin* Trial Chamber were later rejected by the Appeals Chamber in the same case.¹²²⁶ It should also be stressed that the enterprise doctrine in reality has been used to indict and/or convict very high-level actors for large-scale enterprises, for example, in the *Krajišnik* case. In that case, the Trial Chamber, in fact, argued that the JCE doctrine is well suited to cases in which “numerous persons are all said to be concerned with the commission of a large number of crimes.”¹²²⁷

Secondly, it has been argued that it is not enough that the enterprise doctrine requires participation, but that it should require *substantial* participation.¹²²⁸ ICTY has, in fact, in one case suggested such a requirement,¹²²⁹ but the present legal standard seems to be that “there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise”, but that “there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.”¹²³⁰ In the *Krajišnik* Trial Judgement, an alternative legal requirement was suggested, namely that of *concerted action*. The Trial Chamber namely argued that what must be proven is that the person in a criminal enterprise must be shown to act together or in concert with each other members of the enterprise in the implementation of a common objective.¹²³¹ In the Appeal Judgement of that case, many aspects of the JCE doctrine were considered, but not whether the requirement of concerted action entails an additional participation requirement.¹²³²

While the challenges regarding the way in which the requirements of a common plan and participation have been defined are applicable to all forms of enterprise responsibility, a lot of additional criticism has been raised against the extended form of enterprise responsibility.¹²³³ In this form of enterprise responsibility, an individual may namely be held responsible for crimes he/she did not *intend* to be committed. The extended form of responsibility is instead based on *foresight* and *voluntary assumption of risk*.¹²³⁴ This lowering of the *mens rea* requirements has been found to be the most problematic aspect of the extended enterprise responsibility,¹²³⁵ as it has been questioned whether it is appropriate to convict individuals acting “without intent” for international crimes. Especially in relation to specific intent crimes, it has been put in question whether

¹²²⁶ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, paras 418 and 425. Also the Appeals Chamber of the ICTR has expressed the view that the joint criminal enterprises may very well be of a vast scope. *Karemura et al.*, Decision (JCE), AC, ICTR, 12 April 2006, para. 16, and *Rwamakuba*, Decision (JCE), AC, ICTR, 22 October 2004, para. 25. Also e.g., the *Krnjolelac* Appeals Chamber has rejected the express agreement requirement. *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 97.

¹²²⁷ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 876.

¹²²⁸ E.g., Cassese 2007, at 109 and 127-128, Marston Danner & Martinez 2005, at 150, and J. A. Ramer, ‘Hate by Association: Joint Criminal Enterprise Liability for Persecution’, 7 *Chicago-Kent Journal of International and Comparative Law* (2007), at 110.

¹²²⁹ *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, paras 310 and 312.

¹²³⁰ *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 97. See also *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 427.

¹²³¹ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 884.

¹²³² *Krajišnik*, Judgement, AC, ICTY, 17 March 2009.

¹²³³ E.g., Ambos 2006, at 672-673, and Ohlin 2007(b), at 76.

¹²³⁴ Cassese 2007, at 113.

¹²³⁵ E.g., Ambos 2007(a), at 174.

it is appropriate to attribute not just the *acts* of other individuals, but also *thoughts*.¹²³⁶ It has also been argued that any good lawyer knows that “virtually any consequence can be characterized as foreseeable”,¹²³⁷ that is, that the criterion is vague and unreliable.

7.2.4.5. Other Types of Commission Responsibility in the Case Law of the *Ad Hoc* Tribunals

The JCE doctrine is an attribution theory that is not familiar in many domestic legal systems and it has also been found to have many problematic aspects. Not surprisingly, therefore, alternatives to the doctrine have been put forward both by academic scholars and by individuals practicing international criminal law. Often the authors behind these alternatives have come from civil law countries, such as Germany and Spain. It appears that it especially two theories that have found support among individuals who are sceptical towards the enterprise doctrine.

The first popular alternative theory is the theory of control of the act by virtue of a hierarchical organization (German *Organisationsherrschaft*) or the “perpetrator behind the perpetrator theory” which is often connected with the German scholar Claus Roxin.¹²³⁸ Roxin notes that in contrast to normal situations where a distance to the victims and the execution of the criminal act generally entails that an individual does not have control of the criminal act and hence is a marginal actor, in situations of organized structures of power such an assumption cannot be made.¹²³⁹ An organized structure of powers refers to an apparatus exercising powers comprised of individuals organized into a *hierarchy* so that there are leaders and *replaceable* physical actors.¹²⁴⁰ Such structures are common, for example, in relation to war and State criminality.¹²⁴¹ In organized structures of power, it is the leaders who are the most blameworthy actors and the theory therefore focuses on the leader’s ability to control his/her organization committing the crimes.

The other popular theory is that of *functional perpetration*.¹²⁴² In functional perpetration the underlying rationale is that individuals have divided the “essential functions for the commission of the crime”, which means that they together share the control of the crime.¹²⁴³ In the same way as in the JCE model, there is thus a requirement of a common agreement or common plan.¹²⁴⁴ In functional perpetration, however, only those individuals who make an *essential* contribution to the crime are regarded as perpetrators,¹²⁴⁵ that is, there is a stronger requirement of participation than in the enterprise model. In contrast to the theory of control of the act by virtue of a hierarchical organization, functional control emphasizes that also the physical perpetrators are

¹²³⁶ Ramer 2007, at 114.

¹²³⁷ Fletcher & Ohlin 2005, at 550.

¹²³⁸ Roxin 2006(b), at 242 ff.

¹²³⁹ Roxin 2006(b), at 243 and 247.

¹²⁴⁰ Roxin 2006(b), at 245 (referring to “*der Fungibilität des Ausführenden*”). Furthermore, the organized structure of power must, according to Roxin, not only exceptionally act outside the law. *Ibid.*, at 249. See also Olásolo & Pérez Cepeda 2004, at 492.

¹²⁴¹ Roxin 2006(b), at 243 and 247.

¹²⁴² Olásolo & Pérez Cepeda 2004, at 498 and 506 (referring to Jakobs and Jescheck/Weigend).

¹²⁴³ Olásolo & Pérez Cepeda 2004, at 499.

¹²⁴⁴ Olásolo & Pérez Cepeda 2004, at 500.

¹²⁴⁵ Olásolo & Pérez Cepeda 2004, at 499-500. Scholars, however, disagree on whether the essential contribution must take place at the execution stage or not. *Ibid.*, at 504.

“fully responsible and free.”¹²⁴⁶ The theory does not have a vertical starting-point and at such it is capable to take into consideration that not all relevant relationships between individuals are vertical.

The *ad hoc* tribunals have addressed these alternatives theories mainly in one case, namely the *Stakić* case before the ICTY, where the Trial Chamber applied a participation mode it called coperpetratorship, which has been found to be a combination of the two above mentioned theories.¹²⁴⁷ According to the *Stakić* Trial Chamber, where the Presiding Judge was Wolfgang Schomburg from Germany, coperpetration is characterized by “an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct.”¹²⁴⁸ In the same case, the Appeals Chamber, however, found that the “introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion”¹²⁴⁹ and that coperpetratorship as a mode of liability “does not have support in customary international law or in the settled jurisprudence of [the ICTY].”¹²⁵⁰

The ICTR has, however, in some more recent cases found non-physical crime participants as perpetrators without applying the JCE doctrine.¹²⁵¹ In these cases, a central criterion has been whether the role played by the accused has been “an integral part of the crimes.”¹²⁵² The ICTR decisions have been criticized for not clearly spelling out the elements of the non-physical commission liability as well as for lacking references to sources that would establish the customary basis of the responsibility mode.¹²⁵³ The

¹²⁴⁶ Olásolo & Pérez Cepeda 2004, at 506.

¹²⁴⁷ Olásolo & Pérez Cepeda 2004, at 508. Also Haan has found that this participation mode is a combination of two forms of commission, viz. co-perpetration (*Mittäterschaft*) and perpetrator behind the direct perpetrator responsibility (*mittelbare Täterschaft*). Haan 2005, at 197.

¹²⁴⁸ *Stakić*, Judgement, TC, ICTY, 31 July 2003, paras 438 and 440.

¹²⁴⁹ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 59.

¹²⁵⁰ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 62. See also *Milutinović et al.*, Decision (indirect co-perpetration), TC, ICTY, 22 March 2006, paras 32-41. A contrary view is expressed by Judge Schomburg in the *Simić* Appeal Judgement. It should be noted that Judge Schomburg was the presiding judge in the *Stakić* trial judgement. *Simić et al.*, Judgement (diss. op. of Judge Schomburg), AC, ICTY, 28 November 2006, para. 23.

¹²⁵¹ *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 61, *Ndindabahizi*, Judgement, AC, ICTR, 16 January 2007, para. 123, *Seromba*, Judgement, AC, ICTR, 12 March 2008, para. 161. (It should be noted that Judge Schomburg was a Judge in the ICTR Appeals Chamber in these three cases.) See also *Munyakazi*, Judgement, AC, ICTR, 28 September 2011, paras 135-136. In some other ICTR cases, it has, however, been held that commission responsibility “covers the direct and physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, and participation in a joint criminal enterprise”, that is, the new type of commission responsibility is not mentioned. *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 1912. See also *Gatete*, Judgement, TC, ICTR, 31 March 2011, para. 576.

¹²⁵² E.g., *Kalimanzira*, Judgement, AC, ICTR, 20 October 2010, para. 219, and *Munyakazi*, Judgement, AC, ICTR, 28 September 2011, para. 135.

¹²⁵³ F. Z. Giustiniani, ‘Stretching the Boundaries of Commission Liability – The ICTR Appeal Judgment in *Seromba*,’ 6 *Journal of International Criminal Justice* (2008), at 795-796. See also Cryer *et al.* 2010, at 362-363. In relation to commission liability in connection to multi-person criminality, Wirth distinguishes between: (1) co-perpetration, which includes joint commission and JCE responsibility; (2) indirect perpetration; and (3) “uncategorized multi-person commission.” In the third category, he includes the *Gacumbitsi*, *Ndindabahizi* and *Seromba* ICTR appeal judgements as well as the ICTY *Limaj* Trial Judgement. Wirth 2009, at 330 and 336-337.

decisions have also had separate opinions, in which certain Appeals Chamber Judges have been critical to the new approach. For example, Judge Liu has noted that the new interpretation of commission conflates the difference between commission and other forms of participation in the crimes (as the evidence used to prove commission often has been that the accused has ordered, instigated etc. the crimes). More specifically, he argues that the new “notion of commission not only embraces acts that technically amount to secondary forms of participation, but also extends to conduct that contributes to the commission of crimes of others. In this regard, this novel form of commission uncannily resembles joint criminal enterprise, without requiring the satisfaction of its more stringent pleading criteria.”¹²⁵⁴ Despite the criticism, also the ICTY has applied the integral-part-of-the-crime doctrine in a few cases.¹²⁵⁵

7.2.4.6. The ICC and Commission Responsibility

In the ICC Statute, the possible modes of participation in the international crimes are settled in Article 25(3) which is partly similar and partly different from the corresponding provisions in the statutes of the *ad hoc* tribunals.¹²⁵⁶ The greatest difference lies in that the ICC Statute distinguishes between different ways of committing a crime, namely committing individually, committing jointly with another and committing through another person. Furthermore, the ICC Statute explicitly criminalizes the contribution to commission of a crime by a group of persons acting with a common purpose. In relation to these provisions, the question has arisen to what these differences are just differences in formulation and to what extent they reflect real differences in regulation. The most disputed question has in this regard been what role the *ad hoc* tribunals’ JCE doctrine should be given.¹²⁵⁷ It should be noted that the ICC Statute (1998) predates the ICTY Appeal Judgement in the *Tadić* case (1999).

Especially scholars coming from civil law jurisdictions have found that the ICC Statute finally “frees” international attribution from its common law history. According to these scholars, the ICC Statute has clearly opened the door for some alternative attribution theories and closed the door for the most dubious attribution theories in customary international criminal law, viz. primarily the enterprise doctrine and especially its extended form.¹²⁵⁸ For example, committing jointly with another has been seen as an explicit recognition of co-perpetration as a “separate head of responsibility [...] no longer subsumed under complicity”,¹²⁵⁹ and it has been noted that committing through another

¹²⁵⁴ *Munyakazi*, Judgement (sep. op. of Judge Liu), AC, ICTR, 28 September 2011, paras 2-4.

¹²⁵⁵ *Lukić & Lukić*, Judgement, TC, ICTY, 20 July 2009, paras 898-899 and 908, and *Haraquija & Morina*, Judgement (contempt), TC, ICTY, 17 December 2008, paras 101-102.

¹²⁵⁶ It should be noted that based on Regulation 52 of the Court, the document containing the charges shall contain a legal characterization of the facts to accord the *precise form of participation* under Article 25. The same applies to Article 28 on superior responsibility. ICC Doc. ICC-BD/01-01-04, Regulations of the Court.

¹²⁵⁷ In the scholarly literature, the *ad hoc* tribunals’ enterprise doctrine is sometimes discussed in relation to Article 25(3)(a) of the ICC Statute (committing jointly with another) and sometimes in relation to Article 25(3)(d) (contribution to commission of a crime by a group of persons acting with a common purpose). See e.g., Boas, Bischoff & Reid 2007, at 126-128, and Eser 2002, at 791 ff.

¹²⁵⁸ E.g., Ambos 2007(a), at 172-173, and Werle 2007, at 963. Note, however, Cassese 2007, at 132.

¹²⁵⁹ van Sliedregt 2003, at 76.

person could include so-called perpetrators behind perpetrators.¹²⁶⁰ In all respects, the ICC statute does not, however, adhere to the civil law tradition, but contains expansions of attribution not known in these systems. Most notably, contribution to the commission of a crime by a group acting with a common purpose is not a familiar concept for continental law lawyers.¹²⁶¹ To what extent the deviations from the civil law systematic should be seen as signs of the continued relevance of the common law influenced customary international law in the field is, however, open to debate. It appears that the exact content of Article 25(3) cannot be known before it has been extensively interpreted by the ICC.

The prosecutorial strategy in relation to Article 25(3) has been interesting. The prosecutor has in some cases argued that the individuals have committed the crime individual, jointly with another or through another person (subparagraph a),¹²⁶² in other cases that the individuals have ordered or induced the crimes (subparagraph b),¹²⁶³ and finally in some cases that the individuals have contributed to crimes as part of a group of persons acting with a common purpose (subparagraph d).¹²⁶⁴ In some cases, the charges were presented in the alternative.¹²⁶⁵ It is doubtful whether these differences in the charging merely can be explained with differences in the factual circumstances of the cases. In contrast, it appears that the prosecutor through this strategy wanted to get first interpretations of the various subparagraphs even though the prosecutor, for example, in the *Lubanga* case argued that he had chosen the form of responsibility he thought best represented the criminal responsibility of Lubanga.¹²⁶⁶ This multi-paragraph strategy, however, suggests that the prosecutor does not share the view expressed by some legal scholars that the participation modes in Article 25(3) have been hierarchically enumerated and that subparagraph (d) responsibility in general would be less blameworthy than, for example, aiding and abetting (subparagraph c).¹²⁶⁷ It should namely be noted that in *Situation in Darfur, Sudan*, the prosecutor in one case based his charges primarily on subparagraph (d) even though both persons charged were high-level, influential actors. Mr. Harun served as a Minister of State for the Interior of the Government of Sudan¹²⁶⁸ and Mr. Kushayb was characterized as “one of the most senior leaders in the

¹²⁶⁰ E.g., Ambos 2008(a), at 753, and Werle 2007, at 964.

¹²⁶¹ E.g., R. Lahti, ‘Towards Harmonization of the General Principles of International Criminal Law’, in *International Criminal Law: Quo Vadis?* (Ramonville Saint-Agne: Éditions érès, 2004), at 349.

¹²⁶² E.g., *Ntaganda*, Warrant of Arrest, PTC, ICC, 22 August 2006.

¹²⁶³ E.g., *Kony*, Warrant of Arrest, PTC, ICC, 27 September 2005, *Odhiambo*, Warrant of Arrest, PTC, ICC, 8 July 2005, *Ongwen*, Warrant of Arrest, PTC, ICC, 8 July 2005, and *Otti*, Warrant of Arrest, PTC, ICC, 8 July 2005. In the warrant of arrest of Kony, it is, however, also argued that Kony individually or together with other persons “committed” the crimes. *Kony*, Warrant of Arrest, PTC, ICC, 27 September 2005, paras 10 and 42. In the *Odhiambo* arrest warrant, it is also suggested that Odhiambo himself physically committed crimes, but he is despite this only charged for having ordered crimes. *Odhiambo*, Warrant of Arrest, PTC, ICC, 8 July 2005, para. 9.

¹²⁶⁴ *Harun*, Warrant of Arrest, PTC, ICC, 27 April 2007 (regarding most counts).

¹²⁶⁵ *Katanga & Ngudjolo*, Prosecutor’s Submission (charges), PTC, ICC, 24 April 2008, Annex 1.

¹²⁶⁶ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, para. 319.

¹²⁶⁷ E.g., Eser 2002, at 787.

¹²⁶⁸ *Harun*, Warrant of Arrest, PTC, ICC, 27 April 2007.

tribal hierarchy in the Wadi Salih Locality” and as a commander of thousands of Militia/Janjaweed.¹²⁶⁹

The first ICC decision in which Article 25(3) was interpreted was the *Lubanga* confirmation of charges decision. In that decision, the Pre-Trial Chamber followed the interpretation suggested by many civil law legal scholars by accepting the ideas of a hierarchy between the various subparagraphs¹²⁷⁰ and of control over the crime as the distinguishing factor between perpetrators and other participants.¹²⁷¹ In later case law, the ICC has upheld the idea of a hierarchy,¹²⁷² which is likely to affect prosecutorial strategies towards prosecutions based on subparagraph (a). The hierarchy case law has been criticized by some ICC judges.¹²⁷³

In relation to co-perpetration, the *Lubanga* Pre-Trial Chamber put forward that:

The concept of co-perpetration based on joint control over the crime is rooted in the *principle of the division of essential tasks* for the purpose of committing a crime between two or more persons *acting in a concerted manner*. Hence, although none of the participants has overall control of the offence because they all depend on one another for its commission, they all share control because *each of them could frustrate the commission of the crime* by not carrying out his or her task.¹²⁷⁴

Interestingly, the ICC Pre-Trial Chamber made explicit references to the *Stakić* Trial Judgement, which was not upheld by the ICTY Appeals Chamber, when interpreting the legal meaning of co-perpetration.¹²⁷⁵ The argumentation was further developed in the *Lubanga* Trial Judgement, where the Trial Chamber identified as the elements of *direct co-perpetratorship*:

(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime; [...]

¹²⁶⁹ *Ali Kushayb*, Warrant of Arrest, PTC, ICC, 27 April 2007, at 5-6.

¹²⁷⁰ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, paras 321 and 337.

¹²⁷¹ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, paras 330-332 and 338.

¹²⁷² E.g., in the Trial Chamber judgement, the majority supported the hierarchy approach whereas the dissenting judge, Judge Fulford, did not. *Lubanga*, Judgement, TC, ICC, 14 March 2012, paras 996-999, and *Lubanga*, Judgement (sep. op. of Judge Fulford), TC, ICC, 14 March 2012, para. 8.

¹²⁷³ *Lubanga*, Judgement (sep. op. of Judge Fulford), TC, ICC, 14 March 2012, para. 8, and *Ngudjolo*, Judgment (conc. op. of Judge Van den Wyngaert), TC, ICC, 18 December 2012, paras 22-27.

¹²⁷⁴ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, para. 342 (emphasis added). The Pre-Trial Chamber specifies its finding by identifying two objective and three subjective requirements: (1) the existence of an agreement or common plan between two or more persons; (2) co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime; (3) the suspect must fulfil the subjective elements of the crime; (4) the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime; and (5) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crime. *Ibid.*, paras 342-367.

¹²⁷⁵ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, fn 422-423. See also *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 347-348.

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; [...]¹²⁷⁶

The agreement or common plan must include a “critical element of criminality”, that is, “its implementation [... must embody] a sufficient risk that, if events follow the ordinary course, a crime will be committed.”¹²⁷⁷ The commission of the crime does, however, not have to be “the overreaching goal of the co-perpetrators.”¹²⁷⁸ Regarding the required contribution, the majority of the Trial Chamber held that co-perpetrator responsibility demands a more significant contribution than subparagraphs c and d of Article 25(3), namely an *essential* contribution.¹²⁷⁹

The *Katanga and Ngudjolo* Pre-Trial Chamber made an even more explicit approval of the ICTY *Stakić* case law by recognizing the existence of the participation mode of *indirect co-perpetration*, in which the accused person has control over a hierarchical apparatus of power.¹²⁸⁰ The elements of this responsibility mode were enumerated in the *Ruto et al.* confirmation of charges decision:

- (i) the suspect must be part of a common plan or an agreement with one or more persons;
- (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime;
- (iii) the suspect must have control over the organisation;
- (iv) the organisation must consist of an organised and hierarchal apparatus of power;
- (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;

¹²⁷⁶ *Lubanga*, Judgement, TC, ICC, 14 March 2012, para. 1018 (see also para. 1006). In some cases an additional element has been suggested, namely awareness of the factual circumstances enabling joint control. E.g., *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 351.

¹²⁷⁷ *Lubanga*, Judgement, TC, ICC, 14 March 2012, para. 984. See also K. Ambos, ‘The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues’, 12 *International Criminal Law Review* (2012), at 139-140. The inclusion of a new *objective* requirement (viz., that the plan must in the ordinary course of events result in the commission of the crime) has been criticized by Wirth, who finds that the previous *subjective* test was enough (viz., awareness of risk). S. Wirth, ‘Co-Perpetration in the *Lubanga* Trial Judgment’, 10 *Journal of International Criminal Justice* (2012), at 974 and 986. Judge van den Wyngaert has been critical towards the idea that a common plan is an *objective* element of joint perpetration. *Ngudjolo*, Judgment (conc. op. of Judge Van den Wyngaert), TC, ICC, 18 December 2012, paras 31-35.

¹²⁷⁸ *Lubanga*, Judgement, TC, ICC, 14 March 2012, para. 985.

¹²⁷⁹ *Lubanga*, Judgement, TC, ICC, 14 March 2012, paras 996-999. See further on the essential contribution requirement e.g., *Ngudjolo*, Judgment (conc. op. of Judge Van den Wyngaert), TC, ICC, 18 December 2012, paras 40-48, and J. D. Ohlin, E. van Sliedregt, & T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law*, at 731-734.

¹²⁸⁰ *Katanga & Ngudjolo*, Decision (confirmation of charges), PTC, ICC, 30 September 2008, paras 480-538. On the decision, see further e.g., J. L. Černić, ‘Shaping the Spiderweb: Towards the Concept of Joint Commission through another Person under the Rome Statute and Jurisprudence of the International Criminal Court’, 22 *Criminal Law Forum* (2011), at 539-565.

- (vi) the suspect must satisfy the subjective elements of the crimes;
- (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and
- (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).¹²⁸¹

In the *Katanga and Ngudjolo* case, the Pre-Trial Chamber discussed the concept of an organised and hierarchal apparatus of power and noted that:

The Chamber finds that the organisation must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.¹²⁸²

All in all, the early ICC case law on committing through another person (including *Organisationsherrschaftslehre*) and indirect co-perpetration follows closely Roxin's thinking.

In connection to responsibility based on Article 25(3)(d)¹²⁸³ the ICC has held that the *common plan* must be defined in the same way as in connection to Article 25(3)(a) and that the contribution to the crime must be *significant*.¹²⁸⁴ The ICC has stressed that Article 25(3)(d) responsibility differs from JCE responsibility in that it is a residual form of responsibility of an *accessorial* type.¹²⁸⁵ When a person is convicted based on Article 25(3)(d), he/she is hence not convicted as a perpetrator.

In relation to attribution, the ICC has hence "emancipated itself from the *ad hoc* tribunals"¹²⁸⁶ and there exists "two diverging bodies of international criminal law,"¹²⁸⁷ that is, one applied by the *ad hoc* tribunals and one applied by the ICC. Whether this is a good

¹²⁸¹ *Ruto et al.*, Decision (confirmation of charges), PTC, ICC, 23 January 2012, para. 292. Also in the arrest warrant against President Al Bashir, the charges have been brought under Article 25(3)(a) claiming that Al Bashir is responsible as an indirect perpetrator or as an indirect co-perpetrator. *Al Bashir*, Warrant of Arrest, PTC, ICC, 4 March 2009, at 7. See also Jessberger & Geneuss 2008, at 853 ff. In the arrest warrant, the Pre-Trial Chamber concludes that there are reasonable grounds to believe that Al Bashir was "in full control of all branches of the "apparatus" of the State of Sudan" and that he used that control to secure the implementation of the counter-insurgency plan of the Government of Sudan. *Al Bashir*, Warrant of Arrest, PTC, ICC, 4 March 2009, at 7.

¹²⁸² *Katanga & Ngudjolo*, Decision (confirmation of charges), PTC, ICC, 30 September 2008, para. 512.

¹²⁸³ Article 25(3)(d), ICC Statute: 'In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.'

¹²⁸⁴ *Mbarushimana*, Decision (confirmation of charges), PTC, ICC, 16 December 2011, paras 271 and 283.

¹²⁸⁵ *Mbarushimana*, Decision (confirmation of charges), PTC, ICC, 16 December 2011, para. 282.

¹²⁸⁶ K. Ambos, 'Commentary' [on the *Lubanga* confirmation of charges decision], in A. Klip & G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Volume XXIII (Antwerp: Intersentia, 2010), at 748.

¹²⁸⁷ Cf. van Sliedregt 2003, at 115.

or bad thing is open to debate. So far, ICC has only had one case in which there has been a conviction and there are no appeals chamber convictions yet. As such, it is most likely that the interpretation of Article 25(3) will still evolve.

7.2.5. Non-Participatory Responsibility: The Doctrine of Superior Responsibility

7.2.5.1. Introduction

So far in this chapter, it has been investigated what kind of *participation* in or *contribution* to international crimes is enough to give rise to individual criminal responsibility. International individual criminal responsibility is, however, not restricted to contributory responsibility. Non-contributory responsibility can arise in situations where no criminal harm has occurred or where the harm is insignificant for the responsibility, for example, in relation to attempts or inchoate offences.¹²⁸⁸ Responsibility in these situations is, however, not considered in this study, where the focus is on the criminal law that is used to deal with the “social reality of international criminality.” Furthermore, non-participatory responsibility can arise in situations where a person is convicted for the acts of another person as though they were his/her own acts due to a special relationship between the persons.¹²⁸⁹ This type of responsibility is often called *vicarious responsibility*.

In international criminal law, superiors have a special criminal responsibility called superior or command responsibility. The doctrine has its origin in military thinking according to which a rigid superior-subordinate is essential for successfully carrying out military operations.¹²⁹⁰ Furthermore, for the law of war to be effective, it is regarded as crucial that the combatants are under the control of a superior. In this context, superior responsibility is seen as an *incentive for superiors* to ensure that their troops abide the law.¹²⁹¹ As the doctrine of superior responsibility sometimes is characterized as a form of vicarious responsibility,¹²⁹² it has been a matter of considerable “discussion and reflection.”¹²⁹³

In the statutes of the *ad hoc* tribunals, it is established that the fact that an international crime was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about

¹²⁸⁸ See further e.g., Cassese 2008, at 219-220. Vogel distinguishes between four types of criminal responsibility without proof of criminal harm, viz. (1) (common law) conspiracy; (2) climate offences (German *Klimadelikte*), which refers to inchoate offences, such as, attempted instigation, private or public incitement and certain forms of hate crime; (3) criminalization of membership in a criminal or terrorist organization; and (4) criminalization of collective violent actions regardless of results (e.g., rioting in football stadiums). Vogel 2002, at 163-164.

¹²⁸⁹ Fletcher 1998, at 190.

¹²⁹⁰ E.g., Bantekas 2002, at 70, and N. Tsagourias, ‘Command Responsibility and the Principle of Individual Criminal Responsibility: A Critical Analysis of International Jurisprudence’, in C. Eboe-Osuji (ed.), *Protecting Humanity – Essays in International Law and Policy in Honour of Navanethem Pillay* (Leiden: Martinus Nijhoff Publishers, 2010), at 817.

¹²⁹¹ M. Lippman, ‘The Evolution and Scope of Command Responsibility’, 13 *Leiden Journal of International Law* (2000), at 139.

¹²⁹² E.g., Feinberg 1970, at 227. The exact nature of the superior responsibility is, however, disputed. See further Section 7.2.5.6.

¹²⁹³ B. B. Jia, ‘The Doctrine of Command Responsibility Revisited’, 3 *Chinese Journal of International Law* (2004), at 1.

to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹²⁹⁴ In the case law of the tribunals, this rule has been seen to include three essential requirements, namely (1) the existence of a superior-subordinate relationship; (2) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹²⁹⁵ Article 28 of the ICC Statute makes a difference between military commanders and other superiors, and the exact requirements for superior responsibility are dependent on the type of superior in question. In relation to superior responsibility, the customary and the ICC norms thus differ.

7.2.5.2. The Requirement of a Superior-Subordinate Relationship

The first requirement for superior responsibility identified in the case law of the *ad hoc* tribunals is thus a *superior-subordinate relationship*. This requirement has been found to lie at the very heart of the doctrine, as it is the special relationship that establishes the duty to act.¹²⁹⁶ According to the case law, there exists a superior-subordinate relationship when there is a superior who has *effective control* over his/her subordinate. Effective control has been understood to mean *material ability to prevent or punish the commission of offences* by subordinates.¹²⁹⁷ This effective control standard signifies that substantial influence and other lower forms of influence are not enough for superior responsibility.¹²⁹⁸ Despite being a demanding standard, effective control should, however, not be equated with the superior having powers to control every aspect of the subordinate's behaviour. This was stressed by the *Bagosora and Nsengiyumva* Appeals Chamber when it observed that "the fact that subordinates might perpetrate crimes independently of orders does not show that a superior lacks the ability to prevent or punish those crimes."¹²⁹⁹

As regards the source of the effective control, a difference has in the case law been done between *de jure* powers and *de facto* powers. Whereas *de jure* powers refer to positions of power resulting from official/formal appointments, *de facto* powers refer to equal positions not resulting from such appointments. The case law of the *ad hoc*

¹²⁹⁴ Article 7(3), ICTY Statute, and Article 6(3), ICTR Statute.

¹²⁹⁵ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 346. Marston Danner and Martinez identify the appeal judgement in the *Delalić et al.* case before the ICTY as the "definitive statement of ICTY and ICTR doctrine." Another standard was put forward in the *Blaškić* Trial Judgement. Marston Danner & Martinez 2005, at 128.

¹²⁹⁶ *Strugar*, Judgement, TC, ICTY, 31 January 2005, para. 359. Likewise, in the *Aleksovski* case it was observed that the superior must have such powers prior to his failure to exercise them. *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 76.

¹²⁹⁷ E.g., *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 378. Article 28, ICC Statute requires "effective command and control" or "effective authority and control".

¹²⁹⁸ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, paras 263-264 and 266. See also *Musema*, Judgement, TC, ICTR, 27 January 2000, paras 140-141. Cf. also *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 295 ("The only demonstrable link the Trial Chamber found between Nsengiyumva and the civilian attackers was the "coordination between soldiers and civilians" [...] However, the Appeals Chamber is not convinced that coordination between soldiers and civilians is sufficient to establish that a superior-subordinate relationship existed between Nsengiyumva and the civilian attackers.")

¹²⁹⁹ *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 472.

tribunals clearly establish that the effective control can result from either *de jure* or *de facto* powers.¹³⁰⁰ This is especially important taking into consideration the phenomenology of international criminality, that is, the fact that armed groups which do not appoint officials formally are involved in many contemporary armed conflicts.¹³⁰¹ In addition, it is important to recognize that a person who on the paper is the superior does not necessarily have effective control.¹³⁰²

The case law of the *ad hoc* tribunals have furthermore clearly settled that superior responsibility is not limited to military superiors functioning in clear chains of command, but extends to civilians.¹³⁰³ There is, however, a requirement of a *hierarchical relationship* between the actors also in relation to civilian superiors.¹³⁰⁴ The relationship does not, however, have to be permanent or fixed, but may be temporary.¹³⁰⁵ Effective control must thus also be proven in relation to civilian superiors, but the concept may have a different meaning in non-military hierarchies.¹³⁰⁶

Finally, it should be noted that there may exist numerous superiors at various hierarchical levels that may become responsible for the same criminal act. Superior responsibility is namely not limited to the most senior superiors, but applies to all superiors who have effective control over some subordinates.¹³⁰⁷ The doctrine can hence be applicable to, *inter alia*, *policy commanders* (that is, “high-level” superiors who determine the overall missions or objectives and who decide whether the projects should be continued or not), *strategic commanders* (that is, “high-level” superiors who make the overall mission into a strategic plan), *operational commanders* (that is, “mid-level” superiors who exercise operational control over, for example, military corps and

¹³⁰⁰ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, paras 192-193, *Bagilishema*, Judgement, AC, ICTR, 3 July 2002, para. 50, *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 143, and *Kajelijeli*, Judgement, AC, ICTR, 23 May 2005, para. 85. See also e.g., J. A. Williamson, ‘Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda’, 13 *Criminal Law Forum* (2002), at 369-373.

¹³⁰¹ *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 193.

¹³⁰² E.g., *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, para. 791. It should also be noted that while the legal standard of effective control in theory is clear, *de facto* as well as *de jure* powers often are difficult to establish in practice. E.g., B. I. Bonafè, ‘Finding a Proper Role for Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 608, and Marston Danner & Martinez 2005, at 130.

¹³⁰³ E.g., *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 76. The ICTR was initially cautious in applying command responsibility to civilians. Williamson 2002, at 366. The concept of command responsibility is sometimes used as a synonym to superior responsibility. Sometimes, however, command responsibility is given a more limited meaning, that is, it is used to refer to the responsibility of military superiors. See e.g. Boas, Bischoff & Reid 2007, at 144.

¹³⁰⁴ See e.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, paras 251-252 and 303.

¹³⁰⁵ E.g., *Kunarac et al.* Judgement, TC, ICTY, 22 February 2001, para. 399.

¹³⁰⁶ See e.g., *Kajelijeli*, Judgement, AC, ICTR, 23 May 2005, para. 87. See also Boas, Bischoff & Reid 2007, at 192-193 and 199-200.

¹³⁰⁷ In the *Orić* case, it was questioned whether superior responsibility can become topical in relation to remote superiors. The Appeals Chamber found that both proximate and remote superiors may be held responsible based on the doctrine. *Orić*, Judgement, AC, ICTY, 3 July 2008, para. 20. The Appeals Chamber also elaborated on the degree to which the individual subordinates had to be individualized. In that context, the Appeals Chamber stipulated that: “notwithstanding the degree of specificity with which the culpable subordinates must be identified, in any event, their existence as such must be established.” *Ibid.*, para. 35.

divisions) and *tactical commanders* (mid- and low-level superiors who in concrete situations issue orders and exercise command).¹³⁰⁸ In practice, also this means that the concept of effective control does not always bear the same meaning. In this regard, Osiel has noted that in relation to heads of states effective control cannot mean control over specific individuals, that is, so-called micro-management of behaviour at the lowest echelons.¹³⁰⁹ This is stressed by case law emphasizing that the superiors do not need to know the exact identity of their subordinates in order to incur liability.¹³¹⁰ In the *Hategekimana* case before the ICTR, the Appeals Chamber, for example, held that “the Trial Chamber’s finding that a soldier from the Ngoma Military Camp perpetrated the rape provided a reasonable identification of the subordinate.”¹³¹¹ In relation to low-level actors, it is, however, more natural to require micro-management and identification of subordinates.

7.2.5.3. Requirements of Knowledge and Intent

The second requirement of superior responsibility before the *ad hoc* tribunals has been that the superior knew or had reason to know that his/her subordinate was about to commit a crime or had done so.¹³¹² Superiors can thus be held responsible if they *actually knew* about their subordinates’ behaviour (*actual or positive knowledge*) or if they had a reason to know (*constructive knowledge*). It should be noted that it is not enough that it is proven that the accused knew or had reason to know that *crimes* had been committed or were about to be committed. Rather, the superior must know or have reason to know that *his/her subordinates* were involved in the crimes or were about to become involved.¹³¹³ In relation to specific intent crimes, the superior does not have to share the specific intent of his/her subordinate.¹³¹⁴

As regards actual knowledge, it can according to the case law of the tribunals be proven with direct or circumstantial evidence.¹³¹⁵ As direct evidence often is difficult

¹³⁰⁸ Cf. D. Kaye, ‘Are There Limits to Military Alliance? Presidential Power to Place American Troops under Non-American Commanders,’ 5 *Transnational Law and Contemporary Problems* (1995), at 407-409.

¹³⁰⁹ Osiel 2005(b), at 796.

¹³¹⁰ E.g., *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 196, and *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, para. 287. See also E. van Sliedregt, ‘System Criminality at the ICTY,’ in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 186-187.

¹³¹¹ *Hategekimana*, Judgement, AC, ICTR, 8 May 2012, para.166.

¹³¹² Article 7(3), ICTY Statute, and Article 6(3), ICTR Statute. Boas *et al.* note that the *Orić* Trial Chamber tried (without citing any authority) to introduce a further mental element, viz. that the superior was aware of his/her superior position. Boas, Bischoff & Reid 2007, at 200 (fn 351), and *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 316.

¹³¹³ E.g., *Orić*, Judgement, AC, ICTY, 3 July 2008, paras 55-60, and *Bagilishema*, Judgement, AC, ICTR, 3 July 2002, para. 42 (‘With regard to the arguments advanced by the Prosecution, the Appeals Chamber, however, deems it necessary to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes.’).

¹³¹⁴ E.g., *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 384.

¹³¹⁵ E.g., *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 386.

to find,¹³¹⁶ factors such as type and scope of illegal acts, the number and types of troops involved and the officers and staff involved are used to prove actual knowledge.¹³¹⁷ It should be stressed that the superior's superior position as such does not allow a presumption of actual knowledge.¹³¹⁸

While superior responsibility in situations of actual knowledge is relatively accepted, the acceptability of superior responsibility in cases of constructive liability is more controversial. This is partly due to uncertainties regarding the legal standard. In the *Blaškić* case, the Trial Chamber suggested that a superior should be held responsible where the absence of knowledge is the result of negligence in the discharge of duties.¹³¹⁹ This interpretation of the constructive knowledge standard has, however, been overruled and today a superior can only be held responsible if information was available to him/her that puts him/her on notice that his/her subordinates were about to engage, were engaging or had engaged in criminal conduct and he/her after this admonitory information failed to carry out reasonable investigation to become informed.¹³²⁰ While this requirement of wilful blindness or gross negligence is more restrictive than the negligence standard suggested by the *Blaškić* Trial Chamber, it is, however, plagued by the difficulty to qualify the information that is required to alert the superior.¹³²¹ It should be noted that as there is always in armed conflicts a more or less heightened risk of subordinates committing crimes,¹³²² the question of what sort of behaviour should attract the attention of the superior is especially complicated. If not much is required in respect to the prior notice, the difference between the negligence standard and the wilful blindness standard is not that significant.

¹³¹⁶ Mundis mentions as examples of direct evidence oral or written reports that the accused commander acknowledged receiving or such reports written by the commander himself. D. A. Mundis, 'Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute', in G. Boas & W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers, 2003), at 256-257.

¹³¹⁷ E.g., *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 307, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 57.

¹³¹⁸ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 57. Jia has noted that if the superior based on his/her position is expected to know about the behaviour of his/her subordinates, the superior would become liable based on his/her status alone, which would mean that superior responsibility would be a form of strict liability. B. B. Jia, 'The Doctrine of Command Responsibility: Current Problems', 3 *Yearbook of International Humanitarian Law* (2000), at 159.

¹³¹⁹ *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 332. This standard is a negligence standard, as it implies that the superior has not exercised the standard of care that a reasonably prudent superior would have exercised in a similar situation. Cf. *Black's Law Dictionary*, 9th ed. (2009) ('negligence'). Cf. also the Report of the UN Secretary General preceding the ICTY Statute, in which superior responsibility is characterized as a form of "criminal negligence." UN Doc. S/25704, 3 May 1993, para. 56.

¹³²⁰ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 241, *Bagilishema*, Judgement, AC, ICTR, 3 July 2002, paras 33-35, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 62. Bantekas makes a distinction between the *must have known standard*, which according to him is a rebuttable presumption test, and the *had reason to know standard*, which he calls an objective negligence test which takes into account the circumstances at the time. Bantekas 2002, at 113-114.

¹³²¹ See further Boas, Bischoff & Reid 2007, at 210-220. See also I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *American Journal of International Law* (1999), at 590.

¹³²² Triffterer makes a difference between an *abstract/a latent threat of crimes* that always exists and a *concrete threat*. O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', 15 *Leiden Journal of International Law* (2002), at 193.

7.2.5.4. A Failure to Prevent or Punish

The third requirement for superior responsibility is that the superior has failed to take the necessary and reasonable measures to prevent the criminal acts of his/her subordinate or to punish the perpetrators thereof.¹³²³ In relation to this requirement, the central question is how to qualify necessary and reasonable measures, which the *ad hoc* tribunals, however, have refused to do in abstract. For example, the *Delalić et al.* Trial Chamber put forward that “any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.”¹³²⁴ The superior’s material ability in a concrete case and his/her exercise of this ability is thus what matters. In the *Strugar* case, the Trial Chamber, however, identified certain *indicia* that in most cases are relevant, namely what measures to secure the implementation of these orders were taken, what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances, and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.¹³²⁵

The obligation to prevent or punish contains two separate types of legal obligations,¹³²⁶ namely the obligation to prevent, which concerns *future* or *ongoing* crimes of subordinates and the obligation to punish which concerns *past* crimes committed by subordinates.¹³²⁷ If a superior has knowledge of future or ongoing crimes, he/she thus has an obligation to prevent them and is not entitled to wait and punish them afterwards.¹³²⁸

As regards the failure to prevent, a contentious question has been whether there has to be a *causal relationship* between the superior’s failure and the subordinate’s crime. In relation to causation, a difference between *causation in situations of an act* and *causation in a situation of an omission* should be made. With regard to omission responsibility requiring harm, the causality cannot directly be assessed in relation to the harm, but must be evaluated with an *assessment of the probability* with which a “correct act” would have changed the outcome.¹³²⁹ Furthermore, a difference has to be made between: (a) situations where the omission of a person directly causes harm; and

¹³²³ Article 7(3), ICTY Statute, and Article 6(3), ICTR Statute. See also e.g., *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 346.

¹³²⁴ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 394. See Bantekas who has made a difference between different types of command (e.g., operational commanders and executive commanders) and analyzed what is reasonable to expect from the different types of commanders. Bantekas 1999, at 584-587.

¹³²⁵ *Strugar*, Judgement, TC, ICTY, 31 January 2005, para. 378.

¹³²⁶ Article 7(3) does thus not provide a superior with two alternative options. *Strugar*, Judgement, TC, ICTY, 31 January 2005, para. 373.

¹³²⁷ *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 83. See also e.g., *Halilović*, Decision (indictment), TC, ICTY, 17 December 2004, para. 31, and *Hadžihasanović & Kubura*, Judgement, TC, ICTY, 15 March 2006, para. 127 (regarding ongoing crimes).

¹³²⁸ *Strugar*, Judgement, TC, ICTY, 31 January 2005, para. 373. See also e.g., *Halilović*, Judgement, TC, ICTY, 16 November 2005, para. 72.

¹³²⁹ See e.g., Nuotio 1998(a), at 288. Nerlich, on his part, argues that it should be enough to prove that the superior’s failure increased the risk for the subordinate’s crime. V. Nerlich, ‘Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?’, 5 *Journal of International Criminal Justice* (2007), at 673.

(b) situations where the omission of a person influences another person who physically causes the harm.¹³³⁰ In the latter case, which the superior responsibility cases represent, the outcome is dependent on the “free decision” of the other person, which makes it impossible to speak of causation in the natural science sense.¹³³¹ To establish causation in “human chains” generally requires that the person influenced acknowledges that she/he has been influenced.¹³³² As superior responsibility in most cases involve “human behavior [...] [where] no precise law of natural science exists to predict, in what cases and by which means human beings can definitively be influenced”, Triffterer argues that emphasis should be put on what “experience over the years, generations, and even centuries” have taught us of how (military) hierarchies function.¹³³³ In criminal law, it is thus possible to use, for example, criminological and psychological knowledge to assess whether it is reasonable to conclude that the superior has influenced, inspired, supported, etc. his/her subordinates. The *ad hoc* tribunals have not opted for this possibility, as they have in relation to superior responsibility not demanded any proof of causation.¹³³⁴

The *ad hoc* tribunals’ approach to causality in connection to preventive superior responsibility has been criticized by a number of scholars.¹³³⁵ The question of whether causality should be demanded is partly connected to the question for what a superior is punished for in cases of superior responsibility.¹³³⁶ Meloni has, for example, noted that if the superior is merely punished for his failure to act there is no need to require causality, whereas a punishment for the crime of the subordinate (“contribution”) makes a causality requirement more called for.¹³³⁷ It should be noted that if causality is demanded, the question of the relationship between superior responsibility and responsibility for participation/contribution through an omission becomes topical,

¹³³⁰ Nuotio has observed that psychological influencing is especially problematic to assess from the point of view of traditional theories of causality and that causality in situations of complicity and omissions are very different from “traditional cases” of physical perpetration of a crime. Nuotio 1998(a), at 279-280.

¹³³¹ Triffterer 2002, at 194-196.

¹³³² Triffterer 2002, at 195-196.

¹³³³ Triffterer 2002, at 197.

¹³³⁴ E.g., *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 398 (see, however, also para. 399), *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 77, and *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 40. See also *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 338 (‘Although the superior’s measures must be directed at preventing imminent crimes of subordinates or at deterring future crimes through punishment, and thereby at least pursue a causal aim, this represents mere finality on the level of the superior’s intention. As concerns objective causality, however, it is well established case law of the Tribunal that it is not an element of superior criminal responsibility to prove that without the superior’s failure to prevent, the crimes of his subordinates would not have been committed.’)

¹³³⁵ E.g., K. Ambos, ‘Superior Responsibility’, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 851, K. Ambos, ‘Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the “Most Responsible”’, in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 134, Mettraux 2005, at 309, and D. Robinson, ‘How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution’, 13 *Melbourne Journal of International Law* (2012), at 3.

¹³³⁶ See further Section 7.2.5.6.

¹³³⁷ C. Meloni, ‘Command Responsibility – Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’, 5 *Journal of International Criminal Justice* (2007), at 629.

and it may be questioned what the function of superior responsibility then would have.¹³³⁸

In relation to the failure to punish, it has, however clearly been settled that “it would make no sense to require a causal link between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.”¹³³⁹ In the *Ndindiliyimana et al.* case, the ICTR therefore suggested that there does not have to be a temporal concurrence between a superior’s effective control and the time when the crimes were committed in relation to the obligation to punish. When a new superior assumes command he/she “should be required to punish the perpetrators provided that he has the material ability to do so.”¹³⁴⁰ The ICTY Appeals Chamber has, however, in a majority decision held that: “an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Appeals Chamber is aware that views on this issue may differ.”¹³⁴¹ In failure to punish situations, the focus is on whether the superior has initiated any for him/her possible punitive measures, such as investigations regarding the subordinate’s misconduct or reporting them to competent authorities.¹³⁴²

7.2.5.5. The ICC and Superior Responsibility

In the ICC Statute, the regulation of superior responsibility is more detailed than in the statutes of the *ad hoc* tribunals. The ICC Statute, *inter alia*, makes a difference between military commanders and other superiors. More specifically, Article 28 stipulates that *military commanders or persons effectively acting as a military commander* shall be criminally responsible for crimes within the jurisdiction of the court committed by forces under their effective command and control (or effective authority and control as the case may be) as a result of their failure to exercise control properly over such forces, where that commander either knew or owing to the circumstances at the time should have known that the forces were committing or about to commit such crimes and the commander failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. *Other superiors* shall be held criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under their effective authority and control, as a result of their failure to exercise control properly over such subordinates, where the superior either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes, the crimes concerned activities that were within the effective responsibility and control of the superior and the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

¹³³⁸ *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 338. See also Jia 2004, at 32, and Meloni 2007, at 629.

¹³³⁹ *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 338. See also *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 400, and *Hadžihasanović & Kubura*, Judgement, TC, ICTY, 15 March 2006, para. 188.

¹³⁴⁰ *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, paras 1961-1962.

¹³⁴¹ *Hadžihasanović et al.*, Decision (command responsibility), AC, ICTY, 16 July 2003, para. 51 (see also para. 37). See also Cryer *et al.* 2010, at 391.

¹³⁴² See e.g., *Hadžihasanović & Kubura*, Judgement, TC, ICTY, 15 March 2006, paras 173-178.

The most significant difference between the ICC Statute and the case law of the *ad hoc* tribunals is the distinction between military and non-military superiors in relation to requirements of constructive knowledge. While the legal standard before the *ad hoc* tribunals is “had reason to know,” the ICC standard is “owing to the circumstances at the time should have known” in respect of military commanders and “consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes” in respect to non-military commanders. This raises the question exactly how does the ICC standard differs from the standard applied by the *ad hoc* tribunals.¹³⁴³

In respect of military commanders, the ICC standard of “owing to the circumstances at the time should have known” can be seen to reintroduce the negligence standard explicitly rejected by the *ad hoc* tribunals.¹³⁴⁴ On the other hand, it has also been suggested that the ICC provision could be construed so that it does not that much depart from the *ad hoc* tribunals’ doctrine.¹³⁴⁵ In the *Bemba* case, a Pre-Trial Chamber seems to have followed the first approach, as the chamber interpreted the “should have known” standard to introduce negligence responsibility.¹³⁴⁶ It should be noted that due to the fact that the *ad hoc* tribunals have rejected negligence responsibility, the difference between the *ad hoc* tribunals gross negligence/wilful blindness standard and the ICC standard of “consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes” in respect to non-military commanders is, in fact, not that considerable.¹³⁴⁷ The “disjointed” or “bifurcated” system of superior responsibility established by the ICC Statute has been criticized for making it necessary for the ICC to separate the two different types of superiors, as this may sometimes be difficult as there are superiors who have both civilian and military responsibilities.¹³⁴⁸

¹³⁴³ It should be noted that the ICC Statute predates much of the case law of the *ad hoc* tribunals, including the significant judgments in the *Delalić et al.* case. Regarding the negotiations of Article 28 in the ICC Statute, see e.g., UN Doc. A/CONF.183/2/Add.1, at 51, M. H. Arsanjani, ‘The Rome Statute of the International Criminal Court’, 93 *American Journal of International Law* (1999), at 37, and Boas, Bischoff & Reid 2007, at 254-257.

¹³⁴⁴ E.g., N. Pisani, ‘The Mental Element in International Crime’, in F. Lattanzi & W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, Volume II* (Ripa di Fagnano Alto: il Sirente, 2004), at 135-136, and Triffterer 2002, at 192.

¹³⁴⁵ E.g., Boas, Bischoff & Reid 2007, at 258-259. See, however, Mundis who prefers the *Blaškić*/ICC approach over the current ICTY standard. Mundis 2003, at 261-262 and 275.

¹³⁴⁶ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 429 and 434. See also R. Cryer, ‘Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element’, *EJIL Talk!* [blog], 20 July 2009 (“This cuts quite directly against what the ICTY and ICTR have consistently held, at least since the decision of the Appeals Chamber in *Bagilishema* [...] that negligence is not the standard. The mental element in the ICTY is summed up by the Appeals Chamber in *Čelebići*, as not covering negligence in failure to find out about offences, instead requiring either actual knowledge or that the superior ‘had in his possession information of a nature, which, at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation’ [...]”)

¹³⁴⁷ Boas, Bischoff & Reid 2007, at 259-260. Cf., however, Vetter who argues that the consciously disregarded standard “may go much further” in lessening a civilian superior’s duty to remain informed. G. R. Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’, 25 *Yale Journal of International Law* (2000), at 124.

¹³⁴⁸ G. Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009) 26-27. See also e.g., *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 408-410.

A second difference between the statutes of the *ad hoc* tribunals and the ICC is the requirement in the ICC Statute that the crimes of the subordinate occur *as a result of* the superior's failure to exercise control. The ICC Statute thus seems to introduce a requirement of *causation* not supported by the case law of the *ad hoc* tribunals.¹³⁴⁹ Such a requirement of causation has been found to be in line with the fact that according to the ICC Statute, the superior is held responsible for crimes within the jurisdiction of the court committed by their subordinates. On the other hand, however, it has also been noted that a requirement of causation blurs the line between participation liability and superior liability,¹³⁵⁰ and strongly limits the superior's obligation to punish crimes by subordinates. In the *Bemba* case, the Pre-Trial Chamber noted that the requirement of causality was fulfilled when it was established that the commander's omission "increased the risk of the commission of the crimes charged".¹³⁵¹ Here, it should be noted that Mettraux has argued that the requirement of causation is different in relation to aiding and abetting responsibility and superior responsibility, and that whereas it in relation to aiding and abetting is required substantial effect on the commission of the crime by the principal offender, the requirement in relation to superior responsibility should be that "the failure to act was a significant – though not necessarily the sole – contributing factor in the commission of the crime [...] [and that this causation] goes [...] to the general ability of the perpetrator to carry out his deeds [...]".¹³⁵² Also Mettraux seems to suggest a "causation" corresponding to creating an increased risk for harm.

7.2.5.6. Superior Responsibility and the Type of Responsibility

In some domestic criminal justice systems, criminal responsibility for omissions is divided into responsibility for genuine and non-genuine omission offences. *Genuine omission offences* then refer to offences that *only* can be committed through an omission and where the relevant consideration is that a person has omitted to do something he/she should have done. The omission in these situations does not have to result in a special criminal harm. *Non-genuine omission offences*, on the other hand, refer to offences causing harm that can be committed both through acts and omissions ("commission through omission"). Omission responsibility for these crimes generally requires a special obligation to act, as it is felt that criminal responsibility otherwise becomes too broad. The sentences for genuine omission offences are, as a rule, less severe than for offences connected to the causing of harm.¹³⁵³

Another similar distinction is that between *direct responsibility* for a dereliction of duty and *indirect responsibility* for the criminal acts of another person. While responsibility for a genuine omission offence generally equals responsibility for a dereliction of a duty, indirect responsibility and responsibility for non-genuine omission offences are by no means equivalent. Non-genuine omission responsibility generally arises in situations where a harmful outcome has been caused by an omission. The central question is then whether individuals causing harm through omissive behaviour

¹³⁴⁹ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 423-424. See also e.g., Ambos 2002(b), at 860, Boas, Bischoff & Reid 2007, at 260-262, and Jia 2004, at 14-15.

¹³⁵⁰ Cf. Jia 2004, at 15.

¹³⁵¹ *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, para. 425.

¹³⁵² Mettraux 2009, at 42-43 (see also 87-89).

¹³⁵³ See e.g., Jareborg 1995(a), at 118-121.

can be blamed for the harm. In indirect responsibility, on the other hand, the focus is not on what kind of behaviour has *caused* the harm (that is, act or omission), but on whether a person not personally causing any harm any way can be blamed for it. As noted before, the responsibility is often called *vicarious* when it is based on the special relationship between the individuals.

In the legal literature, superior responsibility has, *inter alia*, been called responsibility for a genuine omission offence,¹³⁵⁴ vicarious liability,¹³⁵⁵ imputed liability,¹³⁵⁶ co-perpetrator/accomplice responsibility,¹³⁵⁷ and functional responsibility.¹³⁵⁸ These differences in categorization can partly be explained with uncertainties regarding the content of the doctrine, especially regarding the required relationship between the superior's omission and the subordinate's crime. The differences are, however, also due to variations in terminology and difficulties connected with trying to use domestic concepts to describe international phenomena. If the superior is held responsible for the crime of his/her subordinate *without a causal connection* between the omission and the subordinate's crime, it, in fact, appears that superior responsibility is a *sui generis* form of criminal responsibility with very few domestic equivalents. A special feature is that the responsibility form entails *dual liability*. The superior is blamed both for his/her omission and the crime of his/her subordinate.¹³⁵⁹ The sentence imposed on the

¹³⁵⁴ E.g., Ambos 2002(b), at 824, and Ambos 2009(a), at 131 (regarding the ICC version). It should, however, be noted that in relation to superior responsibility mere failure to act is not sufficient for responsibility. The superior's subordinates must *de facto* commit underlying offences, that is, produce harm. On the concept of subordinates' "committing" crimes, see further *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, para. 280.

¹³⁵⁵ E.g., Darcy 2007(b), at 391. The opposite view is expressed by e.g., Bantekas 2002, at 98, and Mettraux 2005, at 297.

¹³⁵⁶ E.g., Bantekas 1999, at 577.

¹³⁵⁷ E.g., Schabas 2009, at 361 and 363 (speaking of command responsibility as a form of criminal *participation*). The contrary view is expressed by e.g., Meloni 2007, at 632. Ambos has found that one of the problems with the doctrine of superior responsibility, is that the doctrine seems to establish direct or principal responsibility, and not accomplice responsibility. Ambos 2009(a), at 132.

¹³⁵⁸ E.g., H. van der Wilt, 'Joint Criminal Enterprise and Functional Perpetration', in A. Nollkaemper & H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 180, and M. Wladimiroff, 'Former Heads of State on Trial', 38 *Cornell International Law Journal* (2005), at 954. On the nature of command responsibility, see also e.g., R. Cryer & O. Bekou, 'International Crimes and ICC Cooperation in England and Wales', 5 *Journal of International Criminal Justice* (2007), at 446, and W. A. Schabas, 'Canadian Implementing Legislation for the Rome Statute', 3 *Yearbook of International Humanitarian Law* (2000), at 342.

¹³⁵⁹ In some trial chamber judgements it has, however, been suggested that the superior is only punished for his omission. E.g., *Hadžihasanović & Kubura*, Judgement, TC, ICTY, 15 March 2006, para. 2075, and *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 293. The *Orić* Appeals Chamber did not consider the nature of superior responsibility, as it reversed the conviction of *Orić* based on Article 7(3). See, however, *Orić*, Judgement (decl. of Judge Shahabuddeen), AC, ICTY, 3 July 2008, paras 18-26. The *Hadžihasanović & Kubura* Appeal Judgement, however, clearly stressed that "the gravity of a subordinate's crime remains [...] an 'essential consideration' in assessing the gravity of the superior's own conduct". *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 313. It is therefore questionable whether one can argue that the doctrine of command responsibility has changed from a doctrine emphasizing responsibility for the acts of the subordinates to a doctrine emphasizing the omission of the superior. Cf. T. Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law', in C. Burchard, O. Triffterer, & J. Vogel (eds.), *The Review Conference and the Future of the International Criminal Court* (Alphen aan den Rijn: Kluwer Law International, 2010), at 70.

superior may, however, be more lenient than the one imposed on the subordinate.¹³⁶⁰ It thus appears that the much debated question whether superior responsibility is a form of indirect liability *or* an offence of dereliction of duty is a false one.

Another special feature of superior responsibility is that it is the special relationship between the superior and the subordinate (link to physical perpetrator) that compensates for the lack of a causal relationship between the superior and the underlying offence (link to crime).¹³⁶¹ In superior responsibility, the superior is thus not found to have committed the underlying offence through his/her omission (which would be the case in non-genuine omission offences) or to have participated in/contributed to the crime.¹³⁶² Instead, it is the combination of a personal omission and the special relationship with the subordinate that is the ground for the superior's responsibility for the underlying offence. It should be noted that this very indirect relationship between the superior and the underlying offence raises the question to what extent the seriousness of the underlying offence should affect the sentence of the superior. The prevailing answer appears to be that it is not the seriousness of the underlying offence alone that should influence the outcome, but the seriousness of the superior's omission taking into consideration the gravity of the subordinate's criminality.¹³⁶³ Superior responsibility is in this regard especially problematic in situations of constructive knowledge. Taking into consideration the seriousness of the crimes, it has namely been found problematic that a superior can be punished harshly for getting drunk at the wrong time, for taking an ill-advised holiday or for being incompetent or distracted.¹³⁶⁴ On the other hand, it could be argued the other way around that taking into consideration the seriousness of the crimes, there is a greater need for society to also criminalize non-prudent behaviour. It should further be emphasized that in superior responsibility, it is not only a causal connection to the harm or participation that is lacking, but also the traditional requirement of intent, which makes superior responsibility a responsibility form that significantly differs from traditional criminal responsibility.¹³⁶⁵

From the point of view of this study, it is furthermore interesting that Ambos besides calling superior responsibility a form of genuine offence of omission has characterized it as an *offence which creates danger*,¹³⁶⁶ that is, an *endangerment offence*. This characterization is interesting as Duff has observed that attacks ("normal crimes") and endangerments constitute two completely different types of criminal wrongs as endangerments are characterized by failures of proper concern whereas attacks are characterized by hostility

¹³⁶⁰ van Sliedregt 2009, at 188.

¹³⁶¹ Jia 2004, at 33.

¹³⁶² This is, *inter alia*, reflected in the fact that the *mens rea* of the superior does not need to be established with reference to all the objective and subjective elements of the subordinate's crime. Meloni 2007, at 630-631. See, however, the *Blagojević & Jokić* and *Brđanin* judgements, in which it was required that the superior had knowledge of the subordinate's genocidal intent. *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, para. 686, and *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 721.

¹³⁶³ See e.g., *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 313, which emphasizes that two matters must be taken into account, viz. (1) the gravity of the underlying crime committed by the convicted person's subordinate; and (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes. See further Section 9.2.3.

¹³⁶⁴ Nersessian 2006, at 93.

¹³⁶⁵ *Hadžihasanović & Kubura*, Judgement, TC, ICTY, 15 March 2006, para. 2076.

¹³⁶⁶ Ambos 2002(b), at 824, 828 and 845.

towards the interests or people that are attacked and hence intent to cause harm.¹³⁶⁷ By calling superior responsibility an endangerment offence, it is thus possible to stress that completely different criminalization rationales underlie superior responsibility and participation responsibility. The main goal of superior responsibility is often understood to be to ensure a responsible command,¹³⁶⁸ that is, to function as an incentive for superiors to perform their duties properly and carefully. This is a very *utilitarian* or goal-oriented rationale, which makes more *retributive* or backwards-looking concerns of exact blameworthiness of the behaviour difficult to apply to the doctrine.¹³⁶⁹ It should be noted that the number of endangerment offences has grown in many domestic criminal justice systems during the last decades.¹³⁷⁰ Endangerment criminalizations are thus possible, even though they raise the difficult question of which risks are acceptable and which unacceptable.¹³⁷¹

From the point of view of the phenomenology of the international crimes, this idea that superior responsibility is an endangerment offence and not merely an offence of dereliction of duty is intriguing. It should namely be remembered that most international crimes are committed in armed conflicts and in totalitarian societies, that is, in contexts where there is often much violence and many crimes. Furthermore, the possible harms resulting from derelictions of duties are often significantly more serious than in normal contexts of peace.¹³⁷² These two factors clearly can influence what is regarded as risk-behaviour. It would be possible to require from superiors functioning in armed conflicts and in totalitarian regimes constant monitoring of their subordinates and to punish negligence in this regard.¹³⁷³

On the other hand, and especially in relation to more low-level superiors, it is often pointed out that armed conflicts and totalitarian regimes are chaotic environments, in which it can be difficult to supervise subordinates effectively. The context characteristics,

¹³⁶⁷ R. A. Duff, 'Criminalizing Endangerment', 65 *Louisiana Law Review* (2005), at 945. It should namely be noted that the present doctrine of superior responsibility is not concerned with the "potential danger inherent in the failure to control", but with inactivity in a situation where a legally protected interest *de facto* is concretely endangered. Triffterer 2002, at 199.

¹³⁶⁸ Cf. e.g., the discussion on the relationship between the concepts of "responsible command" and "superior responsibility". *Hadžihasanović et al.*, Decision (command responsibility), AC, ICTY, 16 July 2003, para. 22 ("The Appeals Chamber recognizes that there is a difference between the concepts of responsible command and command responsibility. The difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But, [...] the elements of command responsibility are derived from the elements of responsible command.")

¹³⁶⁹ See Womack on utilitarian and retributive perspectives on superior responsibility, even though Womack discusses these perspectives regarding the *mens rea* requirement only. B. Womack, 'The Development and Recent Applications of the Doctrine of Command Responsibility: With Particular Reference to the *Mens Rea* Requirement', in S. Yee (ed.), *International Crime and Punishment, Volume 1* (Lanham: University Press of America, 2003), at 105-111 and 138-142.

¹³⁷⁰ Takala 1995, at 52.

¹³⁷¹ Takala 1995, at 56 ff.

¹³⁷² Bantekas 2002, at 95.

¹³⁷³ Regarding the relationship between endangerment and negligence criminalizations, Takala has noted that some criminal law scholars have suggested that negligence criminalizations should be replaced with endangerment criminalizations, as offences of negligence are considered to be "relics of an uncivilized sense of justice". Takala 1995, at 54.

as well as the seriousness of the consequences of mere negligence, can thus be used to argument in the other way, that is, to speak against extensive superior responsibility. The question of what legitimately can be expected from superiors and what are “excessive obligations”¹³⁷⁴ is thus not straightforward.

7.2.5.7. The Relationship between Superior Responsibility and Other Forms of Responsibility

Besides the question of the nature of superior responsibility, the question of the relationship between superior responsibility and participatory responsibility has been debated. In the indictments before the *ad hoc* tribunals, the prosecutors have often charged the accused persons in the alternative based on both forms of responsibility. Some scholars have noted that this is odd, at least if the charges in relation to the participatory responsibility is framed in terms of *active* participation and the charges on superior responsibility claim that the accused person remained *passive* in the same situation.¹³⁷⁵ The prosecutorial practice can often be explained with the desire to ensure a conviction in situations where the prosecutor is not sure that he/she can prove active participation. It has, however, also sometimes been suggested that two alternative heads of responsibility concern different aspects of the accused’s criminal actions.¹³⁷⁶ It should also be noted that in the case law of the *ad hoc* tribunals, it has been established that participatory responsibility also can arise from omissions.¹³⁷⁷ This emphasizes that the difference between participatory and superior responsibility is not merely the act or omission distinction. Whether the ICC will accept participatory responsibility based on omissions is unclear. A draft article, which explicitly provided that the conduct for which a person may be criminally responsible and liable can constitute either an act or an omission, was deleted at the Rome Conference.¹³⁷⁸

In the case law of the *ad hoc* tribunals, the alternative charging has primarily been discussed from the point of view of the following two questions: (1) Can an individual be convicted for both responsibility forms for the same behaviour; and (2) What responsibility form should be chosen if a conviction for both is possible but not permissible. As regards the first question, some early convictions allowed convictions based on both heads of responsibility for the same crime,¹³⁷⁹ but today the prevailing case law is that it is inappropriate to convict an accused for both forms of responsibility.¹³⁸⁰

¹³⁷⁴ Ambos 2002(b), at 847.

¹³⁷⁵ See e.g., Ambos 2007(a), at 179-180, and Mettraux 2005, at 311.

¹³⁷⁶ Cf. Mettraux 2005, at 311.

¹³⁷⁷ See e.g., the discussion on aiding and abetting by omission. Boas, Bischoff & Reid 2007, at 310-315.

¹³⁷⁸ UN Doc. A/CONF.183/2/Add.1, at 54, and UN Doc. A/CONF.183/C.1/WGPP/L.4/Add.1, at 4 (draft Article 28). See also B. Goy, ‘Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals’, 12 *International Criminal Law Review* (2012), at 5, and R. Cryer, ‘General Principles of Liability in International Criminal Law’, in D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004), at 236-240.

¹³⁷⁹ E.g., *Aleksovski*, Judgement, TC, ICTY, 25 June 1999, para. 228.

¹³⁸⁰ See e.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 91, *Gacumbitsi*, Judgement, AC, ICTY, 7 July 2006, para. 142, *Kajelijeli*, Judgement, AC, ICTR, 23 May 2005, para. 81, and *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, para. 368.

The tribunals have, however, not clearly reasoned *why* concurrent convictions should not be tolerated.¹³⁸¹

As regards the second question, it is also possible to find case law pointing at different directions and not that much reasoning and discussion. In some cases, the tribunals have suggested that the responsibility mode that *better characterizes* the criminality of the accused should be chosen.¹³⁸² In other cases, the tribunals have, however, expressed a *preference for participatory responsibility*, and have argued that when both forms of responsibility are possible a conviction should only be entered based on participatory responsibility.¹³⁸³ This preference for participatory responsibility has now been endorsed by the appeals chambers of the *ad hoc* tribunals.¹³⁸⁴ The ICC appears to follow the approach taken by the *ad hoc* tribunals.¹³⁸⁵

While the preference for participatory responsibility reflects the fact that the wrongfulness of active participation generally is greater than the wrongfulness of passive tolerance,¹³⁸⁶ the rule can, however, be criticized for being too categorical¹³⁸⁷ and for unnecessary limiting the trial chambers' powers especially as participatory responsibility also can arise from omissions.¹³⁸⁸ While most scholars clearly appreciate perpetrator responsibility as the most serious type of responsibility, the question of whether superior responsibility or aiding and

¹³⁸¹ See further Boas, Bischoff & Reid 2007, at 396 ff. According to Ambos, the Trial Chamber in the *Krštić* case apparently resolved the conflict between enterprise and superior responsibility by drawing an analogy to the rules on concurrence of offences, that is, looking to the rules of false or apparent concurrence whereby the larger crime (subparagraph 1) prevails over and absorbs the smaller crime (subparagraph 3). Ambos 2007(a), at 163. It has also been suggested that it is illogical to at the same time claim that both active and passive behaviour has occurred. *Kamuhanda*, Judgement (sep. and part. diss. op. of Judge Shahabuddeen), AC, ICTR, 19 September 2005, para. 410 ('The *Blaškić* rule is based on the *illogicality* of holding, under article 7(1) of the ICTY Statute, that the crime committed by a subordinate was in the first instance ordered by the accused himself, and of at the same time holding, under article 7(3), that the accused, as the superior, failed to prevent the commission of the crime by the subordinate or failed to punish the subordinate for committing it. The assumption of the ordering situation under the article 7(1) is that the accused actively advanced the commission of the crime; the assumption of the command responsibility situation under article 7(3) is that he did not.')

¹³⁸² E.g., *Gacumbitsi*, Judgement, TC, ICTR, 17 June 2004, para. 266, *Galić*, Judgement, TC, ICTY, 5 December 2003, para. 177, *Krnjolelac*, Judgement, TC, ICTY, 15 March 2002, para. 173, and *Ntagerura et al.*, Judgement, TC, ICTR, 25 February 2004, para. 623.

¹³⁸³ See e.g., *Krštić*, Judgement, TC, ICTY, 2 August 2001, para. 605, *Stakić*, Judgement, TC, ICTY, 31 July 2003, paras 465-466, and *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 342 ('the Trial Chamber finds that active involvement by way of participating in the principal crime carries greater weight than failure by omission. Further, the Trial Chamber finds that participation in the crime means to have made a causal contribution to the impairment of the protected interest, whereas the failure as a superior need not necessarily contribute to the injury as such, but may merely involve the omission of his duty, as is particularly evident in the case of failure to punish.')

¹³⁸⁴ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 91, *Kajelijeli*, Judgement, AC, ICTR, 23 May 2005, para. 81, and *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, para. 104.

¹³⁸⁵ E.g., *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 342 and 402 (Bemba was primarily charged based on Article 25(3) and only alternatively based on Article 28).

¹³⁸⁶ *Orić*, Judgement, TC, ICTY, 30 June 2006, paras 342-343.

¹³⁸⁷ The idea that results caused by acts always are more wrongful than those caused by omissions has, e.g., been questioned. See e.g., F. Muñoz-Conde & L. E. Chiesa, 'The Act Requirement as a Basic Concept of Criminal Law', 28 *Cardozo Law Review* (2007), at 2473.

¹³⁸⁸ Cf. Boas, Bischoff & Reid 2007, at 401.

abetting is more blameworthy is by no means easy to answer. For example, Bonafè appears to think that superior responsibility is more stigmatizing than “mere” accomplice liability.¹³⁸⁹ It is likely that many others think the same way. It may therefore be argued that the hierarchy created by the *ad hoc* tribunals between the different responsibility forms can be criticized for not reflecting the fact that the active participation form of aiding and abetting in many domestic legal systems is reserved for insignificant participants in crimes and that superior responsibility from a labelling perspective is more neutral.

7.2.6. The *De Facto* Popularity of the Different Attribution Alternatives

As this Chapter has demonstrated, the international prosecutors have many alternative attribution doctrines they can use when making claims about individual criminal responsibility. At least in the beginning of the functioning of the *ad hoc* tribunals, the tribunals also made use of many different participation modes and it was difficult to identify a clear favourite among the alternatives. Increasingly, however, the non-statutory JCE doctrine has found its way to the indictments and has already for some time now been the most popular participation mode at least before the ICTY.¹³⁹⁰ The popularity of the enterprise theory is often explained with the fact that it is felt that the theory allows “convictions not possible with more traditional theories of liability”¹³⁹¹ and that it makes it possible for the prosecutor to overcome special evidentiary problems.¹³⁹² For example, Schabas has called the JCE theory the “magic bullet of the Office of the Prosecutor.”¹³⁹³ Some other scholars, however, have argued that the enterprise doctrine better than the other attribution theories describes the reality of joint action common in relation to many international crimes.¹³⁹⁴ It has also been noted that there is a “clear symbolic dimension to convicting a defendant for having participated in a JCE [... as] ‘joint criminal enterprise’ sounds more serious than simply alleging that someone [...] has been found liable on a complicity theory.”¹³⁹⁵

¹³⁸⁹ See e.g., Bonafè 2007, at 615.

¹³⁹⁰ The first public indictment to explicitly rely on the enterprise doctrine was confirmed in June 2001. Marston Danner and Martinez have calculated that 64 % of the ICTY indictments confirmed between 25 June 2001 and 1 January 2004 contained enterprise responsibility claims. Marston Danner & Martinez 2005, at 107. The popularity of the enterprise doctrine has continued after this. Marston Danner and Martinez also think that some of the early ICTY cases (e.g., the *Delalić et al.* case) probably today would be prosecuted with the enterprise doctrine. *Ibid.*, at 131.

¹³⁹¹ Cf. D. S. Donnelly-Cole, ‘Not Just a Few Bad Apples: The Prosecution of Collective Violence’, 5 *Washington University Global Studies Law Review* (2006), at 159.

¹³⁹² Marston Danner & Martinez 2005, at 133.

¹³⁹³ Schabas 2003(b), at 1032.

¹³⁹⁴ E.g., Mettraux 2005, at 292.

¹³⁹⁵ Marston Danner & Martinez 2005, at 145. Some responsibility forms that take into consideration the collective nature of international criminality have been more or less completely abandoned in modern international criminal law, namely conspiracy and criminal organization responsibility. Chouliaras has, however, characterized JCE as the “evolution and refinement” of these doctrines applied by the post-World War II tribunals. It may thus be argued that the doctrines have in this regard not completely been abandoned. A. Chouliaras, ‘From ‘Conspiracy’ to ‘Joint Criminal Enterprise’: In Search of the Organizational Parameter’, in C. Stahn & L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010), at 572-573. Furthermore, in connection to genocide, conspiracy responsibility is still sometimes asserted.

Despite the merits of the enterprise theory, its advancement has not been applauded by everybody. On the contrary, many academics have found it problematic primarily due to questions relating to its compatibility with established criminal law thinking. It is therefore possible that the popularity of JCE doctrine in the future will decrease. Such a development is, in fact, likely due to the alternative participation modes suggested by the ICC Statute and the refusal of the ICC to accept the JCE in its early case law.¹³⁹⁶ The early ICC case law indicates that direct and indirect co-perpetratorship responsibility will be popular before that court.

It should be observed that superior responsibility, in the same way as enterprise responsibility, often has been charged before the international criminal tribunals. Not that many individuals have, however, been convicted for superior responsibility. Schabas, in this regard, notes that:

In the early years of the tribunals, superior responsibility was presented as the silver bullet of the prosecution. It was an endless source of fascination for commentators and postgraduate students. Its practical results have been almost insignificant. [...] The handful of convictions by the *ad hoc* tribunals that have depended upon superior responsibility alone have resulted in short sentences, reflecting the fact that these are most definitely not in the category of the most serious crimes committed by the most serious perpetrators.¹³⁹⁷

Bonafè explains the decrease of the doctrine's popularity with the *ad hoc* tribunals' explicit preference for participatory liability.¹³⁹⁸ Osiel, on his part, has found that it has been made too hard to find people liable under the doctrine of command responsibility.¹³⁹⁹ The popularity of various responsibility forms is hence besides the prosecutorial choices dependent on *judicial decision-making*. In the *Kalimanzira* Appeal Judgement, the ICTR Appeals Chamber stressed that it is enough that the chambers implicitly consider all forms of liability pleaded in the indictment, that is, that it is up to the chambers to decide which indicted responsibility forms they discuss explicitly and convict upon.¹⁴⁰⁰ It is hence up to the chambers to decide which indicted and established responsibility form they find "most appropriate"¹⁴⁰¹ or the one that "best describes" the criminal behaviour of the accused.¹⁴⁰²

Before the ICC, "the Chamber is only bound by the factual basis and the evidence and information provided by the Prosecutor in his application", that is, a chamber

¹³⁹⁶ See e.g., *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, paras 325-338. See also T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges', 6 *Journal of International Criminal Justice* (2008), at 478.

¹³⁹⁷ Schabas 2007, at 222-223.

¹³⁹⁸ Bonafè 2007, at 599 and 602.

¹³⁹⁹ Osiel 2005(b), at 794.

¹⁴⁰⁰ *Kalimanzira*, Judgement, AC, ICTR, 20 October 2010, para. 207. The Appeals Chamber of the ICTY has also reaffirmed that it considers that it has a right to enter convictions based on alternate modes of responsibility. *Gotovina & Markač*, Judgement, AC, ICTY, 16 November 2012, paras 106 and 155.

¹⁴⁰¹ *Kalimanzira*, Judgement, AC, ICTR, 20 October 2010, para. 207.

¹⁴⁰² *Rukundo*, Judgement, AC, ICTR, 20 October 2010, para. 39.

may legally characterize the conduct as it best sees.¹⁴⁰³ After a chamber has decided upon what modes of responsibility the trial shall be held, it may, however, be difficult to modify them afterwards. In the *Lubanga* case, Judge Fulford emphasized this in a separate opinion:

Abandoning the control of the crime theory for the purposes of the Article 74 Decision [= judgement] would significantly modify the law governing the charges, at a stage when the evidence is closed and the parties have made their submissions. The alternative approach which I have described above arguably involves applying a “lesser” test. If at this stage in the proceedings (and without prior notice) the Chamber ruled that the prosecution only has to establish a contribution – as opposed to an “essential” contribution – the trial would be rendered unfair [...]. The accused is likely to have made a number of tactical decisions that, at least in part, have been informed by the legal requirements for a conviction. [...]¹⁴⁰⁴

Also a recent decision in the *Katanga and Ngudjolo* case emphasizes the significance of the legal characterization of facts before the ICC. In that case, the majority of the trial chamber decided to recharacterize the charges after all evidence in the case had been heard, which made Judge van den Wyngaert put forward a strong dissent:

With this decision, the Majority gives notice under Regulation 55(2) that it is considering a recharacterisation of the facts of the case to accord with a different form of criminal responsibility. Instead of pronouncing itself on whether or not the evidence establishes beyond a reasonable doubt that Germain Katanga is guilty as charged, i.e. under Article 25(3)(a) of the Statute, the Majority now proposes to consider whether he is guilty under Article 25(3)(d)(ii) of the Statute. This mode of liability differs noticeably from the one under which the charges in this trial have been brought and on the basis of which the entire trial has proceeded. As a result, Germain Katanga can now be potentially convicted under Article 25(3)(d)(ii), even if he were to be acquitted under Article 25(3)(a) on all charges.¹⁴⁰⁵

¹⁴⁰³ *Gaddafi et al.*, Decision (arrest warrant), PTC, ICC, 27 June 2011, para. 70. See also Regulation 55 of the ICC Regulations of the Court: “1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes [...] or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges. 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change. [...]” ICC Doc. ICC-BD/01-01-04. Before the *ad hoc* tribunals there is no provision similar to Regulation 55.

¹⁴⁰⁴ *Lubanga*, Judgment (sep. op. of Judge Fulford), TC, ICC, 14 March 2012, paras 20-21 (‘In my view, this requirement for notice means that the accused should not only be informed of the factual allegations against him, but he needs to be aware of the basic outline of the legal framework against which those facts will be determined.’)

¹⁴⁰⁵ *Katanga & Ngudjolo*, Decision (Regulation 55, diss. op. of Judge van der Wyngaert), TC, ICC, 21 November 2012, para. 2.

The decision has been found to give rise to “serious fair trial issues”.¹⁴⁰⁶

7.3. Analysis

7.3.1. Introduction: Fair Labelling as the Starting Point for the Analysis

The discussion of the various attribution possibilities has shown that there exist multiple different possibilities to connect individuals to international crimes. From a prosecutor’s or judges’ perspective, this multitude is, however, sometimes a chimera, as lack of evidence may make certain prosecutorial strategies or convictions impossible to make. From the point of view of this study, more interesting is, however, the question of what responsibility form is chosen when the evidence would allow for alternative convictions. Also the modes of responsibility may hence be analyzed from a fair labelling perspective. The label chosen should both send an accurate picture of what the offender has done and signal his/her blameworthiness correctly. The label chosen is important both for fairness to the accused and for public communication.¹⁴⁰⁷

The responsibility form chosen may hence send different signals about the offender’s *individual* behaviour. At the same time, however, the choice of a certain participation mode may also portray the *collective* criminal happening in different ways. Piacente has, for example, observed that while the ICTY indictments issued before 2001 often alleged that the accused had committed the crimes charged in isolation or in cooperation with co-perpetrators, the more recent ICTY indictments portray the events differently, as collective enterprises.¹⁴⁰⁸ The chosen participation mode does thus emphasize certain characteristics of the prosecuted criminality and the prosecutorial and judicial choices affect the way in which the historical events are pictured. These different emphases will be analyzed next. Before that, the relationship between international criminal law and the leading attribution traditions will, however, be shortly commented upon.

7.3.2. What Attribution Tradition Does International Criminal Law Follow?

International criminal law contains elements of all three leading attribution models (that is, the unitary perpetrator model, the equivalence theory and the differential participation model), which is interesting as the theories in comparative law accounts sometimes are portrayed as alternative approaches. For example, in line with the unitary perpetrator model, international criminal law does not make the criminal responsibility of the physical

¹⁴⁰⁶ W. A. Schabas, ‘Serious Fairness Issues Raised by New Ruling in Katanga Case’, *PhD Studies in Human Rights* [blog], 2 December 2012 (‘For the two majority judges, who come from a culture of inquisitorial proceedings, the idea of reframing a mode of liability in this way is perhaps not as unusual as it might be for a judge from a background in adversarial proceedings. [...] Regulation 55 allows the judges to intervene and propose changes to the charges, but this is not really that different from a situation where the prosecutor proposes an amendment to the charges. It is acceptable – within reasonable bounds – while the trial is underway, and especially before the defence has played its hand, but it becomes increasingly intolerable from the standpoint of fairness as the trial advances.’)

¹⁴⁰⁷ Ashworth 2006, at 88-89.

¹⁴⁰⁸ N. Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Strategy’, 2 *Journal of International Criminal Justice* (2004), at 448.

actor a prerequisite for the criminal responsibility of the non-physical actor,¹⁴⁰⁹ although it usually requires that a crime has taken place or at least been attempted. On the other hand, international criminal law clearly departs from the unitary perpetrator model in that it recognizes that numerous individuals can be connected to a single crime and distinguishes between different types of actors in the crime. As the various participation modes, however, mainly only serve a “descriptive and classificatory purpose,”¹⁴¹⁰ that is, the participation modes are not connected to alternative sentencing ranges, it can be argued that international criminal law, at least as applied by the *ad hoc* tribunals, primarily follows the equivalence model favoured by common law jurisdictions. The equivalence thinking is especially evident in the *ad hoc* tribunals’ JCE doctrine which is based on the idea of the equal guilt of all enterprise participants.¹⁴¹¹ The fact that the *ad hoc* tribunals have recognized that aiding and abetting is a participation mode that generally warrants a lower sentence than perpetration¹⁴¹² and that aiders and abettors are not held responsible “of the crime itself” but for their individual participation in it,¹⁴¹³ and that the ICC Statute allegedly has established a hierarchy between the various participation modes, have, however, been seen as signs that international criminal law now is moving towards the differential participation model.¹⁴¹⁴

In the scholarly analysis of this perplexing international practice, it is usually only scholars coming from civil law jurisdictions who at all discuss alternative approaches in relation to attribution. Usually, these scholars also find the differential participation model, which generally is applied in their own legal system, to be more sophisticated and hence more suitable for any type of criminality. In line with this, they therefore find international criminal law’s more recent orientation towards this model as a sign of the growing maturity of the branch of law. Not everybody, however, agrees that the differential participation model is superior in all respects, and, for example, Dubber who belongs to the minority of common law scholars who have discussed attribution from a comparative perspective, has noted that differential participation model is prone

¹⁴⁰⁹ E.g., O. Triffterer, ‘Bestandsaufnahme zum Völkerstrafrecht’, in G. Hankel & G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg: Hamburger Edition, 1995), at 230, Eser 2002, at 788, and Militello 2007, at 948.

¹⁴¹⁰ Cassese 2008, at 188. See also B. Burghardt, ‘Modes of Participation and Their Role in a General Concept of Crimes under International Law’, in C. Burchard, O. Triffterer & J. Vogel (eds.), *The Review Conference and the Future of the International Criminal Court* (Alphen aan den Rijn: Kluwer Law International, 2010), at 88 ([they] are merely phenomenological descriptions of conduct’).

¹⁴¹¹ E.g., *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 191, *Brđanin*, Judgement, AC, ICTY, 3 April 2007, paras 431-432, and *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 111.

¹⁴¹² E.g., *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 182. Van Sliedregt has suggested a further graduation of culpability. More concretely, she has put forward that the extended form of enterprise responsibility should attract a lower sentence than perpetration, but higher than aiding and abetting the crime. van Sliedregt 2007, at 205. This suggestion is so far not approved in international case law. Even though the legal distinction between perpetrators and aiders and abettors today is established, Judge Hunt has questioned the usefulness of it. *Milutinović et al.*, Decision (JCE, sep. op. of Judge Hunt), AC, ICTY, 21 May 2003, para. 31.

¹⁴¹³ *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, para. 192.

¹⁴¹⁴ E.g., Burghardt 2010, at 91, and Eser 2002, at 787-788. Cf. however Goy, who argues that also the ICC follows a dualistic system, where the essential distinction lies between committing and other modes of liability. Goy 2012, at 6.

to cause problems of line-drawing and that, for example, the theory of control of the crime theory to be vague and underjustified.¹⁴¹⁵ Recently, strong criticism towards the differential participation model was also put forward by Judge Fulford in his dissenting opinion in the *Lubanga* trial judgement. He argued that it was not meaningful to interpret ICC Article 25(3) so as to avoid creating an overlap between the various modes of responsibility, as the underlying idea behind the various forms of participation was not to create a hierarchy, but to cover all eventualities.¹⁴¹⁶ An even stronger opposition to the recent development of international criminal law has been put forward by Stewart who suggests that international criminal law should completely abandon the idea of modes of responsibility and instead follow the unitary approach to attribution.¹⁴¹⁷ According to Stewart, this would return international criminal law to the preferable approach of the Nuremberg Tribunal “where most defendants were simply convicted because they were ‘concerned in’, ‘connected with’, ‘inculpated in’ or ‘implicated in’ international crimes.”¹⁴¹⁸

While all attribution models have their pros and cons, the central question for this study is how the different models take into account the special features of international criminality. In relation to the unitary perpetrator model, it has been suggested that this model has the advantage of not making the responsibility of one person dependant on the responsibility of another, which can be practical in relation to international crimes where the connection between the physical actor and the prosecuted non-physical actor can be remote.¹⁴¹⁹ At the same time this, however, is the weakness of the unitary perpetrator model, as it is in relation to collective crimes relevant to recognize that individual actions, in reality, are connected, even though these relationships may be complex and difficult to specify. In this vein, it has been argued that it is positive that international criminal law is moving towards the differential participation model as this model has the advantage of already at the conviction stage recognizing various contributions to a crime and that this “is particularly relevant with regard to system criminality where contributions to the crime cover a wide scale: from mere facilitation to instigation as an *auctor intellectualis*.”¹⁴²⁰ In the differential participation model it is often a central goal to find the responsibility form that best describes the criminal behaviour of the accused.

Whereas the various participation modes in some legal systems clearly establish the “level of personal involvement in the criminal events, and therefore the degree of individual responsibility for the crime,”¹⁴²¹ it is questionable whether it in relation to international criminality is possible to clearly rank the various participation modes in

¹⁴¹⁵ Dubber 2007, at 978 and 1001. See also e.g., Fletcher 1998, at 190, and Ohlin 2011(a), at 721.

¹⁴¹⁶ *Lubanga*, Judgement (sep. op. of Judge Fulford), TC, ICC, 14 March 2012, paras 6-7.

¹⁴¹⁷ J. G. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’, 25 *Leiden Journal of International Law* (2012), at 165-219. The suggestion by Stewart has prompted a vivid scholarly debate on the topic. See e.g., D. Robinson, ‘LJIL Symposium: Darryl Robinson Comments on James Stewart’s “End of ‘Modes of Liability’”’, *Opinio Juris* [blog], 21 March 2012, and T. Weigend, ‘LJIL Symposium: Thomas Weigend Comments on James Stewart’s “The End of ‘Modes of Liability’ for International Crimes”’, *Opinio Juris* [blog], 22 March 2012.

¹⁴¹⁸ J. Stewart, ‘LJIL Symposium: James Stewart Responds to Jens Ohlin’, *Opinio Juris* [blog], 23 March 2012.

¹⁴¹⁹ See e.g., Triffterer 1995, at 230, and Eser 2002, at 788.

¹⁴²⁰ van Sliedregt 2003, at 115.

¹⁴²¹ Werle 2007, at 970.

the same way as in some domestic legal systems.¹⁴²² While the nature of international crimes most often requires different types of participants in the crimes, most domestic crimes only demand a single physical perpetrator. This means, on the one hand, that the common law distinction between primary and secondary participants becomes problematic. Schabas has, for example, in relation to complicity and genocide noted that:

Complicity is sometimes described as secondary participation, but [...] there is nothing ‘secondary’ about it. The ‘accomplice’ is often the real villain, and the ‘principal offender’ a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, some might describe him as ‘only’ an accomplice to the crime of genocide.¹⁴²³

Likewise, the civil law viewpoint that perpetration is the most blameworthy participation mode faces problems when faced with the reality of international criminality. Civil law scholars (for example, Roxin) have tried to deal with this problem by expanding the concept of perpetration. In this vein, Judge Liu in the *Munyakazi* case before the ICTR questioned the “new” interpretation of committing by noting that it conflates the difference between the various modes of responsibility, which according to him might raise fair trial concerns.¹⁴²⁴ Cryer *et al.* have, however, questioned the advisability of this approach taken into consideration that the various participation modes in international criminal law are not connected to particular sentencing ranges.¹⁴²⁵ Also, for example, Boas has been critical towards the “obsessive preoccupation with the apportionment of responsibility to political leaders for committing crimes [...]”¹⁴²⁶

¹⁴²² Likewise Judge Fulford has noted that: “Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious. I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it “through another person” (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly, I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history’s most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal.” *Lubanga*, Judgement (sep. op. of Judge Fulford), TC, ICC, 14 March 2012, para. 8.

¹⁴²³ Schabas 2009, at 340.

¹⁴²⁴ *Munyakazi*, Judgement (sep. op. of Judge Liu), AC, ICTR, 28 September 2011, para. 3 (‘Whether instances of ordering, instigating, and aiding and abetting may be classified as “committing” is ostensibly a question of nature and degree, requiring judicial scrutiny to determine whether the overall conduct of the accused should be “elevated” to commission. Inevitably, the conflation of these various forms of liability creates considerable ambiguity as to the scope of a convicted person’s criminal responsibility.’)

¹⁴²⁵ Cryer *et al.* 2010, at 364. See also *Krnjolelac*, Judgement, TC, ICTY, 15 March 2002, paras 74-75.

¹⁴²⁶ G. Boas, ‘The Difficulty with Individual Criminal Responsibility in International Criminal Law’, in C. Stahn & van der Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T. M. C. Asser Press, 2010), at 502. See also Giustiniani 2008, at 799.

7.3.3. Vertical or Horizontal Emphasis?

7.3.3.1. Introduction

In most human collectives, there are both *vertical* features (that is, leader-subordinate relationships) and *horizontal* features (that is, peer relationships). This being said, there are, however, collectives, where the vertical dimension defines the essence of the collective. In such hierarchical collectives, there are persons in positions of authority who have the ability and right to give orders to subordinates and to expect their orders to be followed.¹⁴²⁷ Such relationships of domination and subordination traditionally exist in armies and, for example, police forces.

In international criminal law, the frequent verticality of collectives engaged in international criminality is reflected in responsibility forms assuming or requiring a vertical relationship. An explicit requirement of a superior-subordinate relationship can be found in relation to ordering and superior responsibility. In the *Delalić et al.* case, the Appeals Chamber in this regard noted that it “does not consider the doctrine of command responsibility [...] as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.”¹⁴²⁸ In superior responsibility, the hierarchical relationship is especially decisive for the criminal responsibility, as the responsibility is not as in ordering based on the individual participation in the criminality.¹⁴²⁹ In relation to the ICC, the doctrine of control over the crime has furthermore been seen as a doctrine that emphasizes vertical features in relation to international criminality. For example, Ambos has observed that: “It is clear that such a model of attribution targets primarily the leadership level of the given organization since only the leaders are able to control and dominate the collective action with full responsibility.”¹⁴³⁰ The idea of a perpetrator behind a perpetrator, in fact, presupposes the existence of a vertical power structure, where the physical perpetrator is controlled by the non-physical actor.¹⁴³¹ However, also participation modes where a superior-subordinate relationship is not a legal requirement, such as planning, can reflect a hierarchical reality. It is namely often high-level actors who plan international crimes and more low-level actors who put the plans into action.

As regards the vertical attribution alternatives, an additional distinction may be made between doctrines where the focus is put on the leaders’ *causation or strong influence* on their subordinates’ action, and doctrines where the focus is on the leaders’ *responsibility and role*.¹⁴³² In international criminal law, it is especially superior

¹⁴²⁷ See e.g., Osiel 2005(a), at 1769-1770.

¹⁴²⁸ *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 303.

¹⁴²⁹ That is, in ordering more attention is instead paid to the behaviour of the accused. Bonafè 2007, at 612.

¹⁴³⁰ Ambos 2006, at 664 (referring to Schlösser).

¹⁴³¹ Olásolo and Pérez Cepeda have noted that in the *Stakić* case, the direct perpetrators did not belong to the structure of power controlled by Stakić, but to two other structures of powers. Therefore, the trial chamber could not base his criminal responsibility only on the notion of indirect perpetration. Olásolo & Pérez Cepeda 2004, at 509.

¹⁴³² Cf. the distinction made by Vogel regarding naturalistic and normative models. Vogel 2002, at 154-155.

responsibility¹⁴³³ and responsibility based on control of the act by virtue of a hierarchical organization that have features of role-based responsibility.¹⁴³⁴ The responsibility forms can also be categorized based on whether they *assume* that the superior at some point has ordered the commission of crimes. In this regard, Osiel finds that the doctrine of *Organisationsherrschaft* “assumes that superiors – at some point in the chain of command – have expressly ordered atrocities, even if there exists no direct evidence at trial to this effect”, whereas superior responsibility and JCE responsibility do not contain such a presumption.¹⁴³⁵

Participation modes, such as JCE and aiding and abetting, on the other hand, are often defined as horizontal.¹⁴³⁶ For example, JCE emphasizes *coordination*, not hierarchies.¹⁴³⁷

In relation to vertical respectively horizontal participation modes, it may be noted that whereas vertical models often stress *who are behind the collective action*, more horizontal responsibility models often rather emphasize the *outcome of the decision-making* or the *collective action itself*. This being said, soliciting, inducing or instigating, are examples of more horizontal models of responsibility that proceed from the assumption that certain individuals lie behind the criminality of others.

7.3.3.2. Where Should the Emphasis Be Put?

In academic texts, it is sometimes possible to find suggestions of suitable situations of use for the various modes of participation. Van Sliedregt has, for example, contemplated the situations in which planning could be charged and argues that: “Planning’ will normally occur in the initial stages of the commission of a crime and to those that find themselves at the top of a hierarchy. The link between the actual perpetrator and the *auctor intellectualis* can be quite distant. It is likely to pass through mid-level positions in the governmental hierarchy or a military command structure, where the plans are elaborated and implemented.”¹⁴³⁸ Boister and Cryer largely agree with van Sliedregt and argue that it could have been suitable to convict the leading Japanese World War II criminals for planning.¹⁴³⁹ In relation to ordering, Werle has suggested that the mode of participation is particularly relevant in relation to mid-level superiors who both receive and issue orders.¹⁴⁴⁰ The most high-level actors do namely generally not give specific

¹⁴³³ Kelman and Hamilton have noted that: “The greater the range of outcomes for which a superior can be held responsible on grounds of what was expected, the weaker the evidence becomes that the superior is causally responsible for any given outcome. [...] Superiors tend to be judged on their degree of role responsibility – perhaps in part because the greater the superior’s role responsibility, the less clear any specific causal responsibility is likely to be.” Kelman & Hamilton 1989, at 207.

¹⁴³⁴ Ambos 2006, at 664 (referring to a normativist or supervisionist model of attribution).

¹⁴³⁵ Osiel 2010, at 125.

¹⁴³⁶ Ohlin, however, calls both JCE and indirect co-perpetration *combined vertical-horizontal liability modes*, as both attribution theories can be used to connect low-level and high-level actors respectively peers. Ohlin 2012, at 771-772. As the present author sees it, the modes of liability, however, have different emphases.

¹⁴³⁷ E.g., Ambos 2009(a), at 139, and Osiel 2005(a), at 1786-1787.

¹⁴³⁸ van Sliedregt 2003, at 80.

¹⁴³⁹ Boister & Cryer 2008, at 245.

¹⁴⁴⁰ Werle 2007, at 968. Bantekas has noted that it is clearly established that liability attaches not only to the person who first issues the order, but also to those that further transmit it through a chain of command. Bantekas 2002, at 50-51.

orders. Rather, they envisage abstract political goals that more low-level actors then must implement by measures that may involve ordering.

These suggestions that try to find a match between different *actor types* and modes of responsibility are interesting in that they stress the fact that certain types of actors usually play certain types of roles in connection to international criminality. Certain actors hence usually have more vertical roles than others. It is, however, important to note that the chosen mode of responsibility does not merely portray the criminal behaviour of the individual offender. It also mirrors the context of action in which the individual offender behaves criminally. To from a phenomenological perspective choose a vertical respectively horizontal perspective in this regard is not simple as international criminality is often not one-dimensional: Vertical and horizontal structures often coexist. Or to put it another way, whereas one participation mode makes us see one thing, it may at the same time conceal another aspect of the social reality. Vertical participation modes direct our attention to *power structures* and to the *leaders*. These responsibility modes therefore often convey the picture that international criminality is the result of the criminal behaviour of a smaller group of leaders. A vertical approach also mirrors the fact that many international crimes are committed by members of strong vertical organizations, where there undoubtedly exists an “organizational culture” that superior orders and wishes shall not be questioned. A strong top-down vertical approach may, however, be criticized for making it possible that a handful of individuals serve as an alibi for the population at large to relieve itself from responsibility.¹⁴⁴¹

Of the vertical attribution alternatives, it is probably the theory of control of the act by virtue of a hierarchical organization which is the “most vertical”. It starts out from the assumption that in connection to international criminality high-level leaders often control organizations, and not individuals as individuals. From a criminological perspective, the extremely strong stressing of the fungibility of the hands-on criminals can, however, be questioned. The theory namely portrays the hands-on criminals as individuals with no will and no powers of their own. It has therefore been held that the theory is not “a theory of complicity at all but a denial of complicity and an allocation of total responsibility to the calculating perpetrator behind the scenes.”¹⁴⁴² Furthermore, if certain low-level actors in an organization are non-interchangeable, the foundation of the theory is fundamentally challenged.¹⁴⁴³ This has prompted Ambos to argue that the doctrine of *Organisationsherrschaft* needs a *normative* foundation to complement the problematic *empirical* one.¹⁴⁴⁴ By reference to Murmann, he argues that only individuals with a certain special position of duty should be convicted based on the doctrine, namely individuals who have a particular position of responsibility in combination with a specific power of violation.¹⁴⁴⁵ He therefore finds that the theory only can be applied in relation to “the leadership level of the formally established government” and in exceptional cases

¹⁴⁴¹ Koskenniemi 2002, at 14.

¹⁴⁴² Fletcher 1998, at 197 (Fletcher is not commenting Roxin’s theory in the quotation, but perpetration by means in general).

¹⁴⁴³ Ambos 2009(a), at 145-147.

¹⁴⁴⁴ Ambos 2009(a), at 148-151. Also e.g., Osiel has questioned the idea and relevance of the fungibility of subordinates thesis. Osiel 2010, at 114.

¹⁴⁴⁵ Ambos 2009(a), at 148 ff.

to “the top hierarchy of the military and police forces.”¹⁴⁴⁶ It is indeed less problematic to apply the doctrine to the most high-level actors who have exceptional abilities to ensure that their wishes are adhered to, but the theory is still problematic in that it only focuses on the powers of the leaders and completely disregards the image that it conveys of the participation of mid- and low-level actors (which essentially are portrayed as mindless members of apparatuses of power).

Horizontal attribution alternatives, on their part, stress that not all international crimes are explicitly ordered, but that malevolent influences may travel through informal and widely dispersed networks,¹⁴⁴⁷ and that international crimes may have numerous participants representing various hierarchical levels and societal strata. The roles played by individual participants in a collective may be multiple. A high-level actor may at the same time be a leader and a peer. Horizontal forms of criminal responsibility can, however, be very broad, and it has, for example, been noted that the JCE doctrine has been (mis)used to reach very “small fry” on the outermost fringes of collectives.¹⁴⁴⁸ It may, furthermore, be difficult to convict high-level leaders based on horizontal models. Van der Wilt has, for example, argued that the JCE doctrine must be stretched to its outer limits if one wants to convict “Bauman’s functionaries and Arendt’s *Schreibtischmörder*” based on the doctrine.¹⁴⁴⁹ Finally, horizontal approaches may be criticized for making us blind to the power structures and expectations of obedience that often are present in international criminality.¹⁴⁵⁰ The JCE may also be difficult to define in a way that portrays reality well. In this regard, Osiel has noted that:

On first introduction to the two doctrines, superior responsibility clearly seems the more formalistic, whereas enterprise responsibility appears the more sociologically realistic. [...] The opposite may be closer to the truth, however. *De facto* power – in all its sociological messiness – quickly asserts itself as central to the contemporary application of superior responsibility in international courts, whereas prosecutors there are free to define the criminal enterprise in ways tied only very loosely to any observable patterns of influence and interaction between putative participants.¹⁴⁵¹

It is noteworthy that criminology in relation to international crimes has devoted much attention to phenomena such as obedience to authority, and the result of this criminology has been found to support the use of vertical doctrines, such as control of the act by virtue of a hierarchical organization. Much less attention has been given to phenomena such as peer pressure and the striving towards conformity, which could be seen as supporting more horizontal approaches to attribution. Furthermore, the criminality can have elements (or causes) that cannot be described as either vertical or horizontal. In this regard, Fletcher has pointed out that Eichmann and the German State can be compared with a five-person improvisational jazz group and its drummer:

¹⁴⁴⁶ Ambos 2009(a), at 154.

¹⁴⁴⁷ Osiel 2005(a), at 1771.

¹⁴⁴⁸ Osiel 2005(b), at 802 (regarding terrorism).

¹⁴⁴⁹ van der Wilt 2009(b), at 168.

¹⁴⁵⁰ Osiel 2005(a), at 1804. Due to this, it has been suggested that horizontal theories, such as the joint criminal enterprise doctrine is not a suitable attribution theory when trying to convict the masterminds behind the crimes. van Sliedregt 2007, at 206.

¹⁴⁵¹ Osiel 2009(b), at 77.

The group expresses itself through the drummer as well as through other individual musicians, but the collective entity of jazz musicians does not cause the drummer to play. Nor would it be correct to say the group, improvising as it does, dominates its members or is complicitous in their playing.¹⁴⁵²

International criminality is hence not *only* obedience behaviour, *only* behaviour caused by peer pressure, etc.

In summary, it may therefore be concluded that the phenomenology and criminology of international crimes do thus not as such provide us with general answer regarding the suitability of different participation modes as both vertical and horizontal approaches have their weakness from a phenomenological and criminological perspective.

7.3.3.3. The Difficulty to Establish Vertical Relationships

So far, there have not been that many convictions for vertical forms of individual criminal responsibility in international criminal law.¹⁴⁵³ This is interesting as many individuals who have been prosecuted for international crimes have been individuals who have worked in armies or prisons, that is, in organizations that often *par excellence* are hierarchical. The more popular modes of participation have instead been horizontal in nature (most notably, JCE responsibility and aiding and abetting). While the popularity ratio may change when the ICC starts to produce more judgements, it should be noted that vertical relationships of power often are difficult to establish evidentiary. In relation to this, Triffterer has noted that:

the belligerent events after World War II demonstrated clearly that hierarchical structures of command played an increasing role in modern warfare. Commanders were no longer permanently present at the battle fields and the possibility to communicate by electronic technical means was more and more perfected. This raised their possibilities to influence their forces but at the same time made it more difficult to locate the exact chain of command, especially since paper trails, as the Nazis left behind them, were less frequently used.¹⁴⁵⁴

In a similar vein, Koskenniemi has argued that:

To create that chain will, in the absence of written orders, have to involve broad interpretations and assumptions about the political and administrative culture in the territory, including personal links and expectations between the various protagonists.¹⁴⁵⁵

Power relations can partly be established through documentary evidence, such as appointment decisions and organization charts, but at least in relation to *de facto* superiors in paramilitary and irregular militia forces it is often essential that individuals who have made part of the hierarchy testify about the power structures.¹⁴⁵⁶ While it sometimes

¹⁴⁵² Fletcher 2002(b), at 1539-1540.

¹⁴⁵³ National prosecutors in transitional democracies, on the other hand, have more often had a vertical focus and the prosecutors have made use of the doctrine of superior responsibility. Osiel 2005(a), at 1751.

¹⁴⁵⁴ Triffterer 2002, at 183.

¹⁴⁵⁵ Koskenniemi 2002, at 16.

¹⁴⁵⁶ Minow has stressed that it is very difficult to establish chains of command in *adversarial trials*, if individuals who have made part of the hierarchy do not give evidence. Minow 1998, at 59.

is easy to find willing insider witnesses, it may in other cases be utmost difficult. The functioning rationale of certain groups is namely that they work “in the dark” and that their internal structure shall remain unclear for outsiders. The use of insider evidence may also be problematic from the point of view that the members may be tempted to tell lies about their own role as well as of the role of their friends.

Another factor that makes the establishment of hierarchies difficult is that these assessments have to be made in court *post facto*. In this regard, Williamson argues in relation to superior responsibility that: “[P]ost facto assessments of events within a judicial context rarely allows for a full understanding of past chaotic realities. Likewise it remains difficult to truly comprehend the extent to which a superior could have acted in the given circumstances.”¹⁴⁵⁷ For him, these *post facto* assessments often therefore are nothing else than *speculations* about the superior’s possibilities to act, instead of being precise statements of facts. It should, however, be noted that it always lies in the nature of criminal court proceedings that the facts are established *ex post facto*.¹⁴⁵⁸ As such, this problem is not unique for vertical responsibility forms. What, however, can make the establishment of hierarchical power structures especially complicated is that the distribution of powers and control in organizations often is more complicated than what appears at first sight. Osiel has, in connection to this, noted that:

Chains of command often prove more complex than the organization chart depicts them because a subordinate may answer to one superior on certain matters and to another on different issues. The jurisdiction of two agencies may also overlap – perhaps deliberately, to encourage their competition for approval and resources from above. This means, however, that each superior will be able to point to another in a different agency who exercised similar responsibility over the criminal subordinate [...].¹⁴⁵⁹

Thirdly, it should be noted that even “when a written record is available, the chain of command on paper may differ significantly from the real one.”¹⁴⁶⁰

Finally, it should be remembered that the evidentiary standard required for establishing such a relationship is crucial both for the number of convictions and as regards to what extent the vertical doctrine reflects “the reality” of the criminality. Osiel has, in this regard, regarding the requirement of effective control noted that: (a) if the effective control is made very difficult to prove there is a risk of acquitting individuals who for good reason should be blamed for not acting; and (b) if effective control is made easy to establish there is the chance that too many individuals are classified as superiors.¹⁴⁶¹ From a phenomenological perspective, the fact that more and more collectives with non-traditional structures take part in armed conflicts has raises the question of whether

¹⁴⁵⁷ Williamson 2002, at 383.

¹⁴⁵⁸ E.g., Nuotio 1998(a), at 2 and 291.

¹⁴⁵⁹ Osiel 2005(a), at 1778.

¹⁴⁶⁰ L. Moranchek, ‘Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY’, 31 *Yale Journal of International Law* (2006), at 478 (also noting e.g., that ‘A lead investigator on the Milošević team suggested that one of the key commanders transmitting orders from Milošević to the Serbian police forces, deputy prime minister Nikola Sainović, did not even have a title in the police [...].’)

¹⁴⁶¹ Osiel 2005(b), at 795.

effective control should be broadened so as to include what could be characterized as significant influence. There is, however, a point at which one is not anymore dealing with “real” vertical structures and superiors anymore. It is not advisable to stretch vertical attribution models so much that they start to cover *de facto* non-vertical realities.

Even if the hierarchy as such could be established and individuals could be placed in the hierarchy, there furthermore remains the difficulty of identifying the roles played by the individual members of vertical structures of power in relation to individual crimes. In rare cases, are there, for example, written orders that certain crimes should be committed. Orders “rarely survive with any clarity the transition from one authority down a chain of subordinates to the ultimate actors.”¹⁴⁶² They are furthermore often oral and vague. Minow has, in this regard, noted that:

Officers breaching the borders of legality in their orders will most likely not give a directive that explicitly states, “Deprive this person of treatment required under international law,” or “Use torture on this detainee.” The commander may well instead say, “Keep this detainee quiet,” or “Make this detainee aware we mean business,” or “Make sure there is no local person aware of our approach toward the village.” [..., or] The officer may simply say, “Get the detainees ready for interrogation,” but mean, “Abuse and humiliate them.” Or he may say, “Clear the area” but convey, instead, “Kill the people who are there.”¹⁴⁶³

The vagueness of orders makes it both more difficult to hold the order-givers responsible for them and to excuse subordinates for following them.

7.3.4. Large v. Small Collectives and Tight v. Loose Collectives

The types of collectives engaged in the commission of international crimes can not only be categorized based on whether they are primarily vertical or horizontal. Other meaningful categorizations appear to be at least the *size* of the collective and the *tightness* of the organization. In sociology and social psychology, it is namely generally acknowledged that the size of the group affects the interaction between members of the group. In small collectives, all members of the collective often interact actively with each other. In large collectives, person-to-person links may be numerous, but not all members generally interact directly with each others. In large collectives, bureaucratic organization forms are more common.

In domestic judicial systems, it is generally collective activity that takes place in small groups that is to be attributed to individuals. In international criminal law settings, small-group and mob criminality occurs as well, but it is also often possible to connect individuals to large-scale collectives. This has been well articulated by Fletcher who puts forward that:

Imagine a large circle with several small circles within it. [...] The small circles stand for subgroups within the society [...]. The large circle stands for the nation defined historically by its language, sometimes by its religion, often by its historical struggle for survival and independence. Some [individuals,] within one of the smaller

¹⁴⁶² Kelman & Hamilton 1989, at 2

¹⁴⁶³ M. Minow, ‘Living up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence’, 52 *McGill Law Journal* (2007), at 48-49.

circles, call it the army, commit some great wrong but with the knowledge and spiritual support, to varying degrees, of everyone in the nation, defined by the outer circle. The problem is attributing the guilt for this action. Should the target of the attribution be the smaller circle, namely the army, or the larger circle, the nation?¹⁴⁶⁴

In relation to international criminality, two important attribution questions therefore arise, namely (1) how should the relationship between smaller and larger collectives be legally addressed; and (2) how should criminal law approach large collectives.

In international criminal law, the question of the size of the collective has primarily been discussed in connection to JCE responsibility. As has been noted, the applicability of the theory to large-scale enterprises, such as nation-wide genocides, has been questioned.¹⁴⁶⁵ Such applications of the theory have namely been seen as making it possible to hold individuals responsible for crimes they did not know of committed by individuals they were not personally acquainted with.¹⁴⁶⁶ It has also been observed that in relation to very large-scale enterprises, the enterprise becomes more or less equal to the general societal or historical context in which the individual acts,¹⁴⁶⁷ and that the enterprises in these cases are “legal fictions” in the sense that individuals do not generally perceive as participating in common enterprises in such contexts.¹⁴⁶⁸ It has in a similar vein been suggested that individuals do not necessarily understand that they are engaging in criminal activity due to the fact that so many other individuals in their surrounding likewise are involved. This is especially the case in situations when the criminal enterprise is equal to a State or regional policies, as such policies are generally *a priori* viewed as legitimate. In contrast to specific agreements to commit ordinary crimes, it may be more difficult to specify exactly when a large-scale enterprise has come into being and exact what the purpose of the enterprise is.¹⁴⁶⁹ If criminal responsibility is attributed to all members of very large collectives, the risk of wrongly convicting innocents also increases. In the scholarly literature, it has for these reasons been suggested that international prosecutors could “concentrate on the collective nature of the crime at a more local level: the conspiracy of the military leadership, the militia, the gang and the mob.”¹⁴⁷⁰ According to Ohlin, this is “the closest we can come to the collective nature of these crimes and still remain faithful to the basic foundation of criminal law and its commitment to holding individuals responsible for their actions.”¹⁴⁷¹

While it undoubtedly is more difficult for criminal law to deal with large-scale collectives than small groups, it has, however, been noted that “[a]lthough the criminal planning [...] may occur at the level of active military operations, through a joint criminal enterprise by military officers and militia leaders, the ethnic hatred at the heart of genocide stems from the intent of nations.”¹⁴⁷² Attribution alternatives that

¹⁴⁶⁴ Fletcher 2002(b), at 1529-1530.

¹⁴⁶⁵ See further Section 7.2.4.4.

¹⁴⁶⁶ Cf. Olásolo 2007, at 157-158. See also *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 355, and *Brđanin*, Judgement, AC, ICTY, 3 April 2007, paras 423-428.

¹⁴⁶⁷ Cf. Mettraux 2005, at 292.

¹⁴⁶⁸ E.g., Olásolo 2007, at 158, Osiel 2005(a), at 1802, and Osiel 2005(b), at 800.

¹⁴⁶⁹ E.g., Osiel 2005(a), at 1798.

¹⁴⁷⁰ Ohlin 2007(b), at 74.

¹⁴⁷¹ Ohlin 2007(b), at 74.

¹⁴⁷² Fletcher & Ohlin 2005, at 548.

telescopically focus on the acts of small groups (or individuals) may thus conceal the fact that international criminality often is State-level or at least large-scale phenomena. Furthermore, approaches in which the focus is on individuals and subgroups may lead to situations where the same historical incidents and facts in the different cases are described inconsistently or even contradictory.¹⁴⁷³ International criminal law is therefore also in relation to collective size facing the problem of having to choose perspective. A focus on large-scale collectives easily leads to conflicts with basic criminal law principles. A focus on small-scale collectives, on the other hand, often conceals the systematic aspect of the criminality and can result in incoherent case law.

It is, however, not only the size of the collective that affects what can be attributed to the members of the collective, but also its organization. In addition to usually dealing with small collectives, domestic criminal law generally deals with *tightly knit* groups. This obviously goes hand in hand as members of small groups generally interact actively with each other and, for example, share information with each other. In relationship to the question of the tightness of the collective, the distinction made by Ohlin regarding: (1) tightly knit horizontal conspiracies (characterized by shared decision-making and pooled information, for example, a group of individuals committing a bank robbery together), (2) tightly knit vertical conspiracies (characterized by hierarchical decision-making and pooled information, for example, a Mafia family); and (3) loosely net vertical conspiracies (characterized by hierarchical decision-making and low-level members who simply execute the decisions without being in active contact with the leaders, for example, system criminality) seems to be especially interesting.¹⁴⁷⁴ In relation to these different types of conspiracies, Ohlin argues that it is justified to hold all conspiracy participants responsible for the acts of others in tightly net horizontal conspiracies, as it is only in these conspiracies that there is shared decision-making.¹⁴⁷⁵

In relation to international criminality, it is increasingly common to find that loose vertical collectives lie behind the criminality. While the *verticality* primarily negates shared decision-making, the *looseness* makes it more difficult to assume knowledge and control over others. In a loose organization, it is quite foreseeable that a leader is unaware of the criminal behaviour of a low-level actor and that a low-level actor acts with limited knowledge of the overall criminal plan of the collective and the identity of the high-level leaders. This is especially the case in network type of organizations. In relation to the terrorist network al-Qaeda, it can, for example, be argued that “traditional” *strict control* and *explicit orders* have been replaced by *semi-autonomous cells* and leadership through mechanisms such as *indoctrination*.¹⁴⁷⁶ For criminal law, loose relationships between individuals are especially challenging. The theory of control of the act by virtue of

¹⁴⁷³ E.g., Mettraux 2005, at 292-293 (‘Although the indictments against Ms Plavšić, Mr Martić, and Mr Stanisić, for instance, relate to events and crimes alleged in the *Milošević* indictment, the joint criminal enterprises described therein – and of which Slobodan Milošević is said to be a member – are described differently to the alleged joint criminal enterprise in the *Milošević* indictment, including a different alleged membership.’), and Piacente 2004, at 451.

¹⁴⁷⁴ Ohlin 2007(a), at 190-195.

¹⁴⁷⁵ Ohlin 2007(a), at 201.

¹⁴⁷⁶ See e.g., N. Lubell, ‘The War (?) against Al-Qaeda’, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), at 425, and Lippens 2001, at 320-321 (referring to Heckscher).

a hierarchical organization and the JCE doctrine both explicitly recognize the possibility anonymous hands-on criminals, but the theories still demand some sort of individual or collective *control* over the hands-on criminals. It is hence very difficult in criminal law to give legal recognition to strong influence not amounting to control. The looseness of many modern organizations may also affect the “functioning” of other responsibility modes. May has, in this regard, argued that the looseness of many collectives entail that the leaders should be prosecuted based on their own acts and intentions, for example, in relation to planning a war, as it is only rarely that a group of leaders act truly in concert with one another and where it makes make sense to treat them as a unit.¹⁴⁷⁷

7.3.5. Legitimate and Illegitimate Collectives, and State Involvement in the Criminality

In criminology, a difference is sometimes made between: (a) crimes committed as part of legitimate organizations by respectable citizens (\approx white-collar criminality); and (b) crimes committed as part of non-legitimate or criminal organizations by individuals perceived by the society – and often by themselves too – as “criminals”. It is namely often different types of individuals who get involved in the two types of criminality and the mechanisms that lie behind them differ. Regarding the latter type of criminality, the idea of criminal organizations has been topical. This has been the case especially in relation to motorcycle gangs and terrorism organizations. In the law, there are at least two different possibilities to give legal relevance to criminal organizations. Firstly, it is possible to consider membership in a criminal organization a crime. The goal of this type of criminalizations is to discourage individuals to join the criminal organizations *ab initio*. Secondly, it is possible to view membership in the organization as relevant when attributing a crime to an individual.

What is interesting from a criminological perspective is that in international criminality both collectives that can be characterized as non-legitimate or criminal (such as paramilitary groups with bad reputation)¹⁴⁷⁸ and collectives that are “utmost legitimate” (most notably the State apparatus) participate.¹⁴⁷⁹ If brutal paramilitary groups can be characterized as criminal and participation in their activity can be considered a crime, should it also be possible to declare whole States criminal and to connect individual criminal responsibility to the State criminality? For most such State criminality would

¹⁴⁷⁷ May 2006, at 321-322.

¹⁴⁷⁸ E.g., in relation to the Balkan conflict a number of paramilitary groups with a questionable reputation participated in the commission of crimes (such as, the Tigers and the White Eagles) and in the Rwanda genocide the Hutu paramilitary organization Interahamwe played a central role. See e.g., Morris & Scharf 1995, at 95 (fn 298), and N. H. B. Jørgensen, ‘A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda’, 12 *Criminal Law Forum* (2001), at 375.

¹⁴⁷⁹ Here, it is interesting to make a comparison with terrorism, where a difference often is made between terrorist criminality by (illegitimate) terrorist organizations and State-sponsored terrorism. Schmid has investigated how the term “terrorism” historically has been used, and notes that while it historically often has referred to State-connected criminality (e.g., the *regime de la terreur* of the French revolution and the Nazi terror), it has since the 1960s primarily been used to refer to criminality by non-State actors (such as liberation groups and fundamentalists). Schmid 2004, at 399. The historical trajectory of the “terrorism” term is one explanation to the difficulty to define terrorism. What is interesting here is that both in connection to terrorism and international core criminality, it has been considered to what extent the criminalizations should cover both State actor and non-State actor criminality.

be extremely problematic. As was noted in Chapter 2, there is a “legality bonus” in State action, which discharges individuals morally,¹⁴⁸⁰ and to declare a State *post facto* criminal raises serious human rights concerns.¹⁴⁸¹ Secondly, States are collectives where membership is automatic and which do not have a so-to-say limited purpose.¹⁴⁸² Certain State entities may, however, have chosen membership and a limited purpose.

In international criminal law, the question of criminal organizations has in particular been debated in connection to the Nuremberg proceedings, as the IMT had the powers to declare certain organizations as criminal with the underlying idea that individual members thereafter could be convicted for membership alone.¹⁴⁸³ This idea that membership alone would be criminal was, however, rejected by the Nuremberg Tribunal, which held that only members who personally were implicated in the commission of acts declared criminal should be the object of criminal sanctions.¹⁴⁸⁴ This case law can most notably be explained with the desire to avoid guilt by association. From a phenomenological perspective, it is, however, interesting that the organizations that the Nuremberg Tribunal declared as criminal were all public entities applying traditional State functions.¹⁴⁸⁵ To some of these organizations, individuals were drafted.¹⁴⁸⁶ This may also partly explain the judges’ discomfort with the idea of criminal responsibility being directly connected with the membership in the organization. The negative approach to membership responsibility has later on been maintained in international criminal law in relation to the international core crimes. In connection to organized criminality, drug criminality and terrorism international law has, however, foreseen that *participation* in an organized criminal group can be defined as a criminal offence.¹⁴⁸⁷

¹⁴⁸⁰ Jäger 1992, at 76.

¹⁴⁸¹ Furthermore, it lies in the nature of totalitarian regimes to affect societal evaluations of what is legitimate or illegitimate, or who is guilty (“the enemy”) or who is innocent (“the friend”), that is, in totalitarian regimes these evaluations may differ drastically from evaluations made in “normal” societies. Smeulers & Werner 2010, at 26.

¹⁴⁸² Cf. According to Rikhof, in Canada, it is possible to attribute responsibility to individuals who are members of so-called brutal, limited-purpose organizations. In relation to these organizations membership combined with knowledge is usually sufficient to establish complicity. In non-brutal organizations, on the other hand, personal and knowing participation in the commission of crimes is generally required for responsibility. J. Rikhof, ‘Complicity in International Criminal Law and Canadian Refugee Law – A Comparison’, 4 *Journal of International Criminal Justice* (2006), at 712-713 and 716-717.

¹⁴⁸³ See further Section 7.2.1.

¹⁴⁸⁴ *Göring et al.*, Judgment, IMT, 1 October 1946, at 256.

¹⁴⁸⁵ In the indictment it was claimed that that the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS (*Schutzstaffeln*), the SD (*Sicherheitsdienst*), Gestapo, the SA (*Sturmabteilungen*), and the General Staff and the High Command of the German Armed Forces were criminal. *Trial of the Major War Criminals before the International Military Tribunal*, Volume I (1947), at 28.

¹⁴⁸⁶ *Einsatzgruppen*, Judgment, CCL, April 1948, at 578 (‘much evidence was introduced on behalf of the defendant to show that he did not enter the SS or SD organizations voluntarily, but was drafted. It is not sufficient however, in order to absolve oneself from the charge of membership in a criminal organization to show that one entered its ranks involuntarily. Attention is directed to that part of the International Military Tribunal decision which says that it charges with criminal membership in the SS those persons who become or remained members of the organization with knowledge that it was being used for criminal purposes, or “who were personally implicated as members of the organization in the commission of such crimes.”’)

¹⁴⁸⁷ E.g., UN Convention against Transnational Organized Crime (2000), Articles 2 and 5, EU Council Framework Decision of 13 June 2002 on Combating Terrorism (EU Doc. OJ L 164, 22 June 2002), Article 2, and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 3.

Bonafè has argued that “one of the major problems with international crimes is that these are prohibited under international rules directed at either states or individuals, when in practice international crimes are most often committed by groups of perpetrators.”¹⁴⁸⁸ Also Jørgensen has observed that international criminal law’s focus on individual responsibility makes it difficult for the law to recognize the *institutionalized* structures of violence.¹⁴⁸⁹ The problem of declaring organizations as criminals, however, involves the risk that human rights, such as the freedom of association, are wrongly restricted. It can also be difficult to formulate the criminalization so that the requirement of specificity of criminalizations is fulfilled. Jørgensen has in this regard stressed that “groups and organizations are difficult to define.”¹⁴⁹⁰ In relation to international criminality, in which commission many different types of collectives are involved, it also becomes a difficult question where the line should be drawn between criminal and non-criminal organizations. From this perspective, the negative approach of modern international criminal law to criminal organizations is understandable.

While modern international criminal law has been hostile towards the idea of criminal organizations, it has, however, not rejected the idea that a criminal collective may be relevant in connection to attribution. In the JCE doctrine, the prosecutor must prove the existence of a collective that has a common purpose that amounts to or involves the commission of a crime.¹⁴⁹¹ *Indirectly*, the enterprise doctrine therefore portrays certain collectives as criminal groups.¹⁴⁹² This is evident especially in relation to the so-called systemic form of JCE where, for example, prison camps may be labelled as organized systems of ill-treatment or as brutal organizations.¹⁴⁹³ Also the extended form of enterprise responsibility (JCE III) rests on the idea that it is justified to impose an additional responsibility burden on individuals who have embarked upon a forbidden course of endangering human life,¹⁴⁹⁴ that is, individuals who have so-to-say joined a

¹⁴⁸⁸ Bonafè 2009, at 187. Likewise Osiel has held that: “Responsibility for mass atrocity, although not *equally* shared among all citizens, is nonetheless very *widely* shared, in ways that make it difficult to identify, with satisfactory precision, the nature and extent of any individual defendant’s culpability and contribution [...]. [T]his study, which contends that collective sanctions directed against responsible groups – intermediate between the state and the individual – offer a workable middle way.” Osiel 2009(b), at xv.

¹⁴⁸⁹ Jørgensen 2001, at 375-376.

¹⁴⁹⁰ N. H. B. Jørgensen, ‘Criminality of Organizations under International Law’, in A. Nollkaemper & H. van der Wilt, *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), at 216.

¹⁴⁹¹ *Tadić*, Judgement, AC, ICTY, 15 July 1999, para. 227.

¹⁴⁹² See e.g., Mettraux who argues that enterprise responsibility sometimes has been dangerously close to assigning guilt for mere membership in a group. Mettraux 2005, at 293.

¹⁴⁹³ E.g., *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 98 (referring to extermination or concentration camps) and *Krnjolelac*, Judgement, AC, ICTY, 17 September 2003, para. 89 (“The Appeals Chamber holds that, although [... JCE II] clearly draws on the Second World War extermination and concentration camp cases, it may be applied to other cases [...]. Although the perpetrators of the acts tried in the concentration camp cases were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. According to the *Tadić* Appeals Judgement, this category of cases [...] is characterised by the existence of an organised system set in place to achieve a common criminal purpose.”).

¹⁴⁹⁴ Cf. Fletcher 1998, at 193. It should be noted that it is increasingly common that punishment is imposed for an act that only includes the risk of harm (so-called endangerment offences). Takala 1995, at 52. Also in relation to attribution may causing danger be criminalized.

criminal group or organization. The JCE doctrine does not, however, *per se* or explicitly define the enterprises (or the collectives) as criminal. The ICTY Appeals Chamber has also held that in connection to aiding and abetting responsibility, the fact that a person has cooperated with “an organisation whose sole and exclusive purpose was the commission of crimes” can support a finding of responsibility.¹⁴⁹⁵ Before the ICC, the doctrine of indirect co-perpetration by virtue of control over an organization engaged in international crimes raises the “question [...] whether it is appropriate [...] to give a special position to ‘organizations’ as a legally significant mediator that stands between the defendant and the relevant physical perpetrators who commit the actual crimes.”¹⁴⁹⁶

In connection to attribution, the frequent State involvement in the criminality is not a relevant consideration. All responsibility forms can be applied to both State-affiliated offenders and to offenders with no State-affiliation.

7.3.6. Alternative Time Perspectives and Shifting Roles

While many ordinary domestic crimes can consist of “simple, atomic actions that can be completed in a single moment”,¹⁴⁹⁷ the nature of the international crimes is such that they generally are part of a broader pattern or chain of events. The underlying offences in relation to the international crimes can be specific incidents that do not take long to perpetrate, but they may as well consist of numerous individual acts (for example, in connection to persecution).¹⁴⁹⁸ In situations where the crime (or its pre-phase) has a longer duration, the role played by the individual offender may vary over time, which is a factor that has to be considered in relation to attribution.

As noted in relation to the survey of the different modes of participation, some participation forms suggest that the offender has played his role primarily *before* the physical act that entails the realization of the crime. For example, in planning, ordering and instigation, the criminal conduct has to take place before the physical act if the underlying offence consists of a single act.¹⁴⁹⁹ In reality, the persons planning, ordering

¹⁴⁹⁵ *Perišić*, Judgement, AC, ICTY, 28 February 2013, para. 52. See also Ohlin who notes that: “How does complicity work in the organizational context? If an organization engages in a mix of illegal and “legal” activities, when does assistance to that organization trigger liability? Such questions do not often arise in domestic criminal law, since criminal organizations (like the Mafia) are usually understood to be criminal through and through. Since they do not have a legitimate purpose, the Perisic issue does not arise. I have been searching for a good comparison in another area of domestic law where the mixed nature of an organization is relevant in this way. I haven’t found one yet.” J. D. Ohlin, ‘Why Did the ICTY Acquit Stanisić and Simatović?’, *Lieber Code* [blog], 1 June 2013.

¹⁴⁹⁶ Ohlin, van Sliedregt & Weigend 2013, at 737. Cf. “Article 25(3)(a) only speaks of commission “through another person”. It is hard to see how this could be read to mean that this form of criminal responsibility also attaches when an accused commits crimes through an *organisation*.” *Ngudjolo*, Judgment (conc. op. of Judge Van den Wyngaert), TC, ICC, 18 December 2012, para. 52.

¹⁴⁹⁷ Ohlin 2007(a), at 176.

¹⁴⁹⁸ Nissel makes a difference between *completed crimes* (such as, a murder), *continuing crimes* (such as enforced disappearances) and *composite crimes* (such as discrimination that require a plurality of acts or omissions). A. Nissel, ‘Continuing Crimes in the Rome Statute’, 25 *Michigan Journal of International Law* (2004), at 661-663.

¹⁴⁹⁹ Jessberger and Geneuss, e.g., in line with this note that when a person orders or induces a crime, he/she does not have to have control over the commission of the crime. Jessberger & Geneuss 2008, at 865.

and instigation, however, often continue to support the criminal activity when it happens and even afterwards, and it may be argued that at least in situations when this continued support is strong, labelling the criminal behaviour “merely” as planning, ordering or instigation depicts the criminal behaviour deficiently. More general modes of participation, such as participation in a JCE or co-perpetration may therefore be more suitable in situations where the offender has played varying significant roles during the criminal incident. This appears to be the case in many cases of international criminality. It should furthermore from a phenomenological perspective be noted that there may also be situations where superiors create “criminal enterprises” that after a certain time period *start to function by themselves*, that is, without superior involvement. In these situations, it may be impossible to convict the high-level actors for responsibility forms that at the point of time when the harm occurs require effect control over the subordinates (viz. superior responsibility).¹⁵⁰⁰

In the case law of the international criminal tribunals, the leading principle has been that a conviction for a pre-crime participation is not suitable when commission also can be established. For example, in the *Stakić* case, the ICTY found that “an additional conviction for ordering a particular crime is not appropriate where the accused is found to have committed the same crime.”¹⁵⁰¹ While this approach can be justified in relation to ordinary domestic crimes where the individuals who plan the crimes often also are those who execute it, it is questionable, whether it also in connection to international criminality is justified to always exclude the possibility of two different types of attribution for the same crime. This is due to the nature of the criminality where a division of work generally is necessary and where a person may play multiple roles simultaneously. Due to the fact that different attribution principles highlight different aspects of a person’s criminal behaviour, fair labelling may speak for applying multiple attribution grounds, especially as the various attribution alternatives are not connected to specific sentencing ranges. The fact that a person has been convicted based on two heads of responsibility for the same crime should then naturally be considered at the sentencing stage.

In relation to international criminality, the time factor is not only significant in the sense that wrongdoing can alter over time, but in that there may be legally relevant connections between previous *non-criminal* behaviour and following criminal behaviour. In this regard, Nuotio has (in a domestic criminal law context) noted that the difference made between acts and omissions may be simplistic. As an example he mentions a teacher who *actively* takes his class to an indoor swimming pool and *omits* to supervise his class as a result of which one of his pupils drowns. The blameworthy behaviour of the teacher does not begin before the teacher omits to supervise his swimming pupils, but Nuotio notes the way in which the teacher’s *active* lawful behaviour creates a specific situation in which *passive* behaviour can become blameworthy.¹⁵⁰² In connection to international criminality, Ambos has observed that a superior may actively further a criminal enterprise and fail to supervise his/her subordinates, and that “the antagonism between a positive act

¹⁵⁰⁰ Osiel 2010, at 117-118.

¹⁵⁰¹ *Stakić*, Judgement, TC, ICTY, 31 July 2003, para. 445.

¹⁵⁰² Nuotio 1998(a), at 287 (see also 289).

and an omission [..., therefore] only applies, strictly speaking, to single crimes, not to collective commissions.”¹⁵⁰³ The criminal law’s focus on certain moments of time may thus obscure relevant connections between different types of behaviours. In relation to international criminality, much behaviour that from a criminological or phenomenological perspective is relevant (that is, the creating conditions conducive for international crimes) and which consist of *active acts* by leaders is left outside the scope of criminal law. The focus of the various attribution alternatives is largely on the execution stage of the crime or the stages temporally close to that. While this focus can be explained with the difficulty to establish causal connections between remote acts/omissions and crimes, it can be questioned whether, for example, the scope of a superior’s responsibility to prevent and punish, should be connected to the extent he/she personally has been involved in creating an environment in which crimes are likely to occur.¹⁵⁰⁴

7.3.7. The Modes of Responsibility and the Abnormal Contexts of Action

More generally, it may be asked to what extent the various attribution theories used in international criminal law take into consideration the fact that most international crimes are committed in armed conflicts and in other similar abnormal societal contexts. The abnormal crime contexts can both be regarded as factors that speak for lighting the requirements for attribution (the individuals act in a high-risk context and they should therefore behave especially prudently) and as factors that speak for being especially strict as regards attribution (in collective crime commission contexts there is an increased risk that individuals are blamed for the acts and omissions of others). In this regard, it is noteworthy that whereas most crime definitions take into account the special context of action, most attribution theories are also applied in connection to ordinary domestic criminality.¹⁵⁰⁵ The attribution theories do therefore not generally take into account the fact that most international crimes are committed in armed conflicts. The doctrine of superior responsibility is an exception in this regard as it has its origin in military settings, but the broadening of the doctrine to also cover civilian superiors entails that the doctrine is not anymore only based on a “military logic.” In relation to most attribution theories “civilians are treated no differently from military officers in that identical criteria are employed in defining each as participants.”¹⁵⁰⁶ All responsibility modes in international criminal law can be applied in connection to all

¹⁵⁰³ Ambos 2007(a), at 181.

¹⁵⁰⁴ It has been noted that problems relating to lack of evidence could be “solved” by switching the evidentiary burden, e.g., so that the superiors would be presumed to have ordered the commission of crimes, if they do not establish that the contrary is true. Even though such switched evidentiary burdens are used in relation to certain crimes in domestic legal systems (e.g., environmental damage and driving while intoxicated), they are clearly problematic from the point of view of the presumption of innocence. Schabas 2007, at 220.

¹⁵⁰⁵ Milanović calls JCE and superior responsibility “international forms of responsibility” and notes that these do generally not exist in domestic legal systems. M. Milanović, ‘An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’, 5 *Journal of International Criminal Justice* (2007), at 1142.

¹⁵⁰⁶ Osiel 2009(b), at 57 (regarding JCE responsibility).

three international core crimes, which entails that they all can raise both in wartime and in peacetime.

In both societies engaged in armed conflicts and in totalitarian regimes propaganda is often in frequent use, which often leads to strongly criminogenic atmosphere. The criminalization of direct and public incitement to commit genocide, in this regard, recognizes the dangers of genocidal propaganda. In connection to other international crimes, such incitement is not criminalized.¹⁵⁰⁷ In practice, incitement can, however, often be punished through other forms of responsibility, and most notably instigation. These forms of responsibility do, however, not in the same way as direct and public incitement emphasize the special danger of “speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area.”¹⁵⁰⁸

7.3.8. Bystander Responsibility and the “Waves of Punishable Responsibility”

One function of attribution doctrines is to distinguish non-criminal behaviour from criminal behaviour. This function is important in relation to all criminality, but it is of special significance in connection to international criminality. The law to begin with distinguishes between non-criminal creation of societal conditions conducive for international criminality and, for example, criminal aiding and abetting. A similar relationship between non-criminal and criminal behaviour can be found in relation to *bystanders*. The non-criminal bystanders to mass atrocities play a significant role in that their passivity allows the perpetrators to see their behaviour as acceptable or even right.¹⁵⁰⁹ In relation to criminality in which public officials are involved, it has been argued that these crimes can be seen as being made in the name of the citizens, which entails a form of “political complicity” for everybody who does not protest.¹⁵¹⁰ Fletcher likewise notes that those “who participate in creating the banality of evil bear a portion of the guilt for the accidental offender whose actions bespeak the mentality of the crowd”.¹⁵¹¹ The question of how far the “waves of punishable responsibility”¹⁵¹² should be allowed to spread is therefore of special importance in relation to international criminality.

The responsibility of bystanders is generally regarded as so diffuse and distant that it cannot give rise to a meaningful criminal responsibility.¹⁵¹³ In some domestic

¹⁵⁰⁷ Cf. G. S. Gordon, ‘Formulating a New Atrocity Speech Offense: Incitement to Commit War Crimes’, 43 *Loyola University Chicago Law Journal* (2012), at 281-361.

¹⁵⁰⁸ *Kalimanzira*, Judgement, AC, ICTR, 20 October 2010, para. 156.

¹⁵⁰⁹ Staub 2002, at 12 and 27. Likewise Drumbl notes: “As atrocity becomes more wide scale in nature [...] it becomes more difficult to construct participation therein as deviant. [...] Even less deviant is the complicity and acquiescence of the bystander. This complicity and acquiescence fall outside of the criminal law paradigm but constitute an essential prerequisite for violence to become truly massive in scale.” Drumbl 2011, at 29.

¹⁵¹⁰ Cf. L. Farmer, ‘Complicity beyond Causality: A Comment’, 1 *Criminal Law and Philosophy* (2007), at 154-155.

¹⁵¹¹ Fletcher 2002(b), at 1544.

¹⁵¹² Zahar & Sluiter 2008, at 220.

¹⁵¹³ Cf. Farmer 2007, at 154.

jurisdictions, it is criminal not to try to hinder a serious crime¹⁵¹⁴ or not to help people in danger,¹⁵¹⁵ but in international criminal law such a requirement to intervene could have significant effects on the number of individuals who could be held criminally responsible. International criminal law therefore requires a special relationship between the offender and the person watching the crime being committed (superior position, colleague to the physical perpetrator, etc.) before individual criminal responsibility at all can be considered.

More specifically, the question has arisen in some cases before the international criminal tribunals to what extent individuals are allowed to stand by and do nothing when they are at or near the scenes of the crimes. The question of mere or knowing presence at the scene of the crime can give rise to criminal responsibility was for the first time raised before the ICTY in the *Furundžija* case, where Anto Furundžija, a local commander of a unit of the Croatian Defence Council (HVO), raised the argument that the Trial Chamber had erred in finding that presence alone would implicate him as an aider and abettor.¹⁵¹⁶ In the judgement, the Trial Chamber had namely laid down that the *actus reus* of aiding and abetting is “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime” and noted that in the so-called German post-World War II cases “the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals”.¹⁵¹⁷ In the topical case, the Trial and Appeals Chambers, however, found that the accused had not just been present, but found that he had continued to interrogate a witness when the other actors had committed the physical acts.¹⁵¹⁸ The requirement of *substantial effect* on the perpetration of the crime for aiding and abetting responsibility, excludes bystander aiding and abetting responsibility in cases where the link between the person watching the crime being committed and the criminal outcome is more indirect.

¹⁵¹⁴ E.g., in Finland it is an offence against the administration of justice not to report a serious offence. Section 10(1) of Chapter 15 of the Criminal Code of Finland provides that: “A person who knows of imminent genocide, preparation of genocide, crime against humanity, aggravated crime against humanity, war crime, aggravated war crime, breach of the prohibition of chemical weapons, breach of the prohibition of biological weapons, compromising of the sovereignty of Finland, treason, aggravated treason, espionage, aggravated espionage, high treason, aggravated high treason, rape, aggravated rape, aggravated sexual abuse of a child, murder, manslaughter, killing, aggravated assault, robbery, aggravated robbery, trafficking in persons, aggravated trafficking in persons, hostage taking, aggravated criminal mischief, aggravated endangerment of health, nuclear device offence, hijacking, an offence committed with terrorist intent [...], aggravated impairment of the environment or aggravated narcotics offence, and fails to report it to the authorities or the endangered person when there is still in time to prevent the offence, shall be sentenced, if the offence or a punishable attempt thereof is committed, for a failure to report a serious offence to a fine or to imprisonment for at most six months. [...]”

¹⁵¹⁵ E.g., in Finland, Section 15 of Chapter 21 of the Criminal Code, establishes that: “A person who knows that another is in mortal danger or serious danger to his or her health, and does not give or procure such assistance that in view of his or her options and the nature of the situation can reasonably be expected, shall be sentenced for *neglect of rescue* to a fine or to imprisonment for at most six months.”

¹⁵¹⁶ *Furundžija*, Judgement, AC, ICTY, 21 July 2000, para. 124.

¹⁵¹⁷ *Furundžija*, Judgement, TC, ICTY, 10 December 1998, paras 232 and 235.

¹⁵¹⁸ *Furundžija*, Judgement, AC, ICTY, 21 July 2000, para. 126.

Taking into consideration the limited number of convictions that there still has been for international crimes, it may furthermore be argued that the waves of punishability have not spread very far in international criminal law, at least yet. The international criminal tribunals are expected to focus on the high-level actors, even though the prosecution of some low-level hands-on criminals has occurred. Domestic prosecutions for international crimes have increased in numbers, but are still rare. In relation to international criminal law, it has thus not only been the *law*, but also prosecutorial *practice* and *jurisdictions* of courts that have affected the scope of the punishability.

From the point of view of this study, it may finally be noted that the law to some extent has been moulded to focus on the leaders. In attribution, many of the attribution theories are namely designed to make it possible to prosecute the “top of the pyramid.” It is, for example, generally recognized that the *goal* of doctrines, such as the JCE doctrine, is to make it possible to prosecute leaders, even though it has been noted that the doctrine as a *side effect* may make extensive prosecutions possible. The goal of international criminal law today is thus not to prosecute everyone who causally has affected the criminality, but rather to direct the attention towards the leaders.

7.3.9. Objective and Subjective Focuses, and the Connection between Modes of Responsibility and Crime Definitions

It has been argued that: “A reason for the difficulty of defining what “to perpetrate an offense” should entail is the [...] disparity that exists between the offenses.”¹⁵¹⁹ The relationship between the crime definitions and participation modes is indeed a complex one. In the same way as the definitions of the crimes establish certain elements that must be proven, the modes of participation in international criminal law also have *actus reus* and *mens rea* elements that the prosecutor must establish in order to secure a conviction.¹⁵²⁰ This strict distinction between proof of the crime itself and proof of the forms of responsibility has been questioned by Zahar and Sluiter who argue that the approach chosen has hindered the international criminal tribunals from systematically considering “how far [...] the waves of punishable responsibility [should] be allowed to spread” from the physical perpetrator.¹⁵²¹

Whereas some participation modes can be said to emphasize objective or behavioural elements, other participation modes have their focus on the mental side. The possible objective elements include requirements of *causality* in relation to the

¹⁵¹⁹ C. E. Herlitz, *Parties to a Crime and the Notion of a Complicity Object* (Uppsala: Iustus förlag, 1992), 43 (italics omitted).

¹⁵²⁰ The question of whether it is the crime’s *mens rea* requirement or the mode of responsibility’s *mens rea* requirement may affect *who* should have the *mens rea*. See e.g., *Milutinović et al.*, Judgement, TC, ICTY, 26 February 2009, vol. 1, para. 181 (“With regard to the question of who must have the requisite discriminatory intent, namely the physical perpetrator or the accused who planned, ordered, or instigated the conduct of the physical perpetrator, the Trial Chamber considers that, so long as it is proved that one of these individuals possessed discriminatory intent, this element is satisfied. The Chamber reiterates here that this analysis should not be confused with the question of whether the accused bears criminal responsibility for persecution. Instead, the above is simply a determination as to whether such persecution was committed at all.”) See also *Boskoški & Tarčulovski*, Judgement, AC, ICTY, 19 May 2010, paras 67-68.

¹⁵²¹ Zahar & Sluiter 2008, at 220.

harm, requirements of *effect* on the behaviour of the physical perpetrator and various requirements regarding the type and degree of *participation*. The most extreme focus on the objective side is in strict or absolute liability, where there are no mental elements that need to be proven. The subjective requirements are often expressed in terms of *intent* and *knowledge*, but may also include, for example, requirements of special *motives*. Conspiracy could be called the opposite of strict liability, at least in its common law form, where there is no requirement that the conspired crime in fact has been committed or attempted. In international criminal law, all presently accepted attribution alternatives contain both objective and subjective elements, and the relevant question is therefore rather which elements the different attribution alternatives *emphasize* and hence where the essence of the wrongdoing so to say lies.

As regards the objective elements and the required types and degrees of participation, the various responsibility modes clearly differ in how demanding they are in relation to the objective side. In relation to some participation modes, the required participation is – at least in theory – straight forward. For example, ordering requires ordering, planning requires planning, etc. The responsibility forms thus differ to the extent they capture “the true situation,”¹⁵²² that is, the extent to which they describe exactly what the individual has done or not done. Responsibility forms where the exact type of participation is not emphasized (for example, JCE and aiding and abetting) have been popular in international criminal law. In relation to these more open participation modes, the required participation has also been more controversial. The fact that JCE responsibility as a form of perpetration requires *some participation* whereas aiding and abetting responsibility as a lesser form of responsibility demands *behaviour that has a substantial effect on the perpetration of the crime* has been found odd in that the requirements are more demanding on the objective side in relation to aiding and abetting. The ICC requirement of *essential contribution* for perpetrator responsibility is more logical in this regard.

The crime definitions contain further objective elements that must be attributed to individuals. In this regard, Roxin has argued that concepts such as perpetrator, instigator and aidor and abettor become problematic, because these participation modes merely are aimed at connecting individuals to the underlying offences.¹⁵²³ Roxin’s solution to the problem is his own theory of control of the act by virtue of a hierarchical organization.¹⁵²⁴ In international criminal law, however, both underlying offences and *chapeau* elements must always be attributed to a person before a conviction can be entered. Roxin’s collective attribution theory, in the same way as the JCE doctrine, however, makes it easier to attribute underlying offences to non-physical participants in mass atrocities.¹⁵²⁵ As has

¹⁵²² *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 367 (referring to a Prosecution Appeal Brief).

¹⁵²³ Roxin 2006(b), at 243.

¹⁵²⁴ Roxin 2006(b), at 242 ff.

¹⁵²⁵ High-level actors rarely personally cause the harm and as such fulfil the objective elements of the underlying offence. E.g., H. Olásolo Alonso, ‘Current Trends on Modes of Liability for Genocide, Crimes against Humanity and War Crimes’, in C. Stahn & L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010), at 521. It should further be noted that the collective context of action that these two collective attribution theories take into account does not have to match the contextual crime element of the crimes. The common purpose of a JCE may, e.g., be to kill civilians in a certain area, whereas the crime charge may be war crimes and the context element is the existence of an armed conflict to which the killings are connected.

been noted before in this study, in connection to high-level actors the problem often lies at connecting them to the underlying offences, whereas the problem in connection to low-level actors more often is to establish their link to the *chapeaus*.

Of the international responsibility modes, it is especially the JCE doctrine that is found to focus on the *subjective side*.¹⁵²⁶ A strong emphasis on subjective elements is, however, inherently connected with the risks of finding individuals criminally responsible for not much more than thoughts or intentions.¹⁵²⁷ The JCE doctrine has, in fact, been criticized for not requiring much as regards the link between the person and the crime.¹⁵²⁸ Mettraux has, for example, has noted that the descriptions of the JCE in the indictments are generally no more than general descriptions of the sets of factual events that form the background of the charges.¹⁵²⁹ In international criminal law, the emphasis on the subjective side is furthermore connected with two additional difficulties.

The first is related to the fact the fulfilment of mental elements often is inferred from objective participation. For example, when an individual actively participates in a system of ill-treatment, and does so with a certain position of authority, he/she is regarded as having the required knowledge and intent for JCE II responsibility.¹⁵³⁰ Haan has called this “an objectification of the subjective requirements” and has argued that ICTY in practice has shifted the burden of proof with regard to knowledge and intent in the systemic JCE cases.¹⁵³¹ While there is some merit in Haan’s criticism, it must be emphasized that it in criminal law is common to establish mental elements from factual circumstances. This “objectification of the subjective requirements” can, however, be regarded as especially problematic in situations where difficulties to secure specific evidence about the participation are usual and where differences in the mental elements significantly affect how the criminal behaviour is characterized. In international criminal law, an omission by a superior may, for example, dependant on the superior’s mental state lead to superior responsibility, aiding and abetting responsibility¹⁵³² or perpetration

¹⁵²⁶ E.g., Olásolo 2007, at 147. See also *Krnojelac*, Judgement, TC, ICTY, 15 March 2002, para. 75 (“The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent.”)

¹⁵²⁷ Due to the focus on the subjective side, some scholars find that JCE responsibility resembles responsibility for conspiracy. Ambos 2007(a), at 167-168.

¹⁵²⁸ E.g., Haan 2005, at 196, and van Sliedregt 2007, at 201.

¹⁵²⁹ Mettraux 2005, at 292.

¹⁵³⁰ Cf. *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 278. Also so-called specific intent (e.g., discriminatory intent for persecution) has been inferred from participation in an enterprise. See e.g., *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 201, and *Simić et al.*, Judgement, TC, ICTY, 17 October 2003, para. 51.

¹⁵³¹ Haan 2005, at 190 (see also at 199). For this reason, the replacement of the systemic form of enterprise responsibility with the basic form has been suggested, as the shared intent in the basic form is not simply a rebuttable presumption. *Ibid.*, at 190. ICTY has itself numerous times called the systemic form of responsibility a variant of the basic form. *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 203 and 228.

¹⁵³² In the *Orić* case, it was, in this regard, found that if the superior has knowledge of his/her subordinate’s criminal behaviour and he/she acts intentionally with knowledge or awareness that his/her omission will lend assistance, encouragement or moral support to his/her subordinate, the superior should be convicted as an aidor and abettor. E.g., *Orić*, Judgement, AC, ICTY, 3 July 2008, para. 43.

responsibility.¹⁵³³ From blameworthiness and labelling perspectives, the difference between the various responsibility forms is significant, but the factual differences in the cases may be rather subtle. It is therefore not surprising that the appeals chambers of the international criminal tribunals in a number of cases have overturned the *mens rea* evaluations of the trial chambers.¹⁵³⁴

Secondly, it has been put forward that certain responsibility forms can be used to overcome the difficulty to prove challenging crime elements. The two sets of *actus reus* and *mens rea* requirements are namely especially problematic in situations where the crime definitions have demanding *mens rea* elements and the participation modes do not require much in this regard. Individual responsibility for a specific intent crime based on the extended form of enterprise responsibility has, for example, been found irreconcilable by many legal scholars.¹⁵³⁵ In this regard, Nersessian has ironically given his article on genocide and JCE responsibility the title “Whoops, I Committed Genocide!”¹⁵³⁶ Likewise the relationship between superior responsibility and specific intent crimes has been found to be problematic. For example, Schabas has put forward that “command responsibility is an offence that resembles negligence, and exactly how a specific intent offence can be committed by negligence remains somewhat of a paradox.”¹⁵³⁷ Ambos, on his part, argues that negligence liability for intentional acts is “not only logically impossible but, more importantly, hardly compatible with the principle of guilt.”¹⁵³⁸

At last, it may be emphasized that the phenomenology of international crimes has put pressure on relaxing both objective and subjective elements for responsibility, which has caused criminal law scholars to criticize many attribution doctrines in international criminal law. The problem is especially acute in situations where both the objective and subjective elements have been relaxed. May has, in this regard, held that:

Regardless of which types of international crime we are considering [...] my view is that we should not weaken the intent element. It may be justifiable to weaken the act element when looking at high-ranking officials, and perhaps joint criminal enterprise theory is one of the acceptable ways to do that. For it is not these leaders who do the torturing or murdering on their own. [...] But having already weakened the act element of criminal liability, it seems an especially bad idea also to weaken the intent element. If we weaken both act and intent elements, then we run the risk of moving toward mere guilt by association for these leaders.¹⁵³⁹

The present author shares May’s concern.

¹⁵³³ If the superior intentionally omits to act and shares the criminal intent of his/her subordinate, perpetrator responsibility appears more suitable.

¹⁵³⁴ E.g., the *Krstić* case, where the ICTY Appeals Chamber did not agree with the Trial Chamber’s identification of genocidal intent and instead convicted Krstić as an aider and abettor to the genocide. *Krstić*, Judgement, AC, ICTY, 19 April 2004, paras 134 and 143.

¹⁵³⁵ E.g., M. E. Badar, “Just Convict Everyone!” – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 *International Criminal Law Review* (2006), at 302, Cassese 2007, at 121-122, Haan 2005, at 200, Marston Danner & Martinez 2005, at 151, and Ramer 2007, at 114.

¹⁵³⁶ Nersessian 2006, at 81 (the article also addresses command responsibility).

¹⁵³⁷ Schabas 2009, at 363. See also Nersessian 2006, at 92-93.

¹⁵³⁸ Ambos 2002(b), at 871.

¹⁵³⁹ May 2006, at 323.

7.4. Concluding Evaluative Remarks

7.4.1. The Modes of Responsibility and the Ideal of “Good Criminal Law”

The phenomenology of international crimes entails that the attribution of crimes to individuals often is demanding. In relation to high-level actors, the challenge often lies in connecting the actors to the physical acts causing the harm, whereas it in relation to low-level actors can be difficult to individualize the harm caused by them and to connect them to the contexts in which their acts take place. Due to this, attribution doctrines often used in domestic criminal law have a tendency to function badly in connection to international criminality. This has made international criminal law look for alternative attribution doctrines, such as the doctrines on superior responsibility, JCE responsibility and responsibility based on control of the act by virtue of a hierarchical organization. From a criminal law perspective, these doctrines are, however, not completely new. The JCE doctrine, for example, can be said to combine complicity law (essential element “participation”) with conspiracy (essential element “mutual agreement”).¹⁵⁴⁰ In superior responsibility, one can identify a combination of responsibility for own omissions with responsibility for the acts of others due to a special relationship. In this sense, international criminal law follows established criminal law thinking in what kinds of factors are relevant at attribution. International criminal law also largely adheres to domestic criminal law thinking as regards what is *not* relevant in attribution. The motives of the actor are, for example, often disregarded at the conviction stage both in domestic and international criminal law. In this regard, the ICTY Appeals Chamber in the *Kvočka et al.* case, for example, noted that participants in JCE do not need to act with enthusiasm.¹⁵⁴¹

It has been put forward that the purpose of international criminal law is “to determine the *individual* criminal responsibility of individual offenders” instead “of focusing on *collective* guilt”, that is, to reject “the tendency in times of conflict to blame an entire people for the crimes committed by certain individuals”.¹⁵⁴² The most common criticism directed towards attribution in international criminal law, however, is that it does not adhere to the criminal law principle of *personal* responsibility. Especially, the JCE doctrine has often been accused of representing a collective form of responsibility. When addressing the claim that a certain responsibility form represents collective responsibility, the concept of “collective responsibility” must first be defined. This is, however, not an easy task as the term is used in many different meanings. The concept of “collective responsibility” can, to begin with, be used to denote the responsibility of States, companies and other legal persons. In these situations, collective responsibility equals holding the collective entity

¹⁵⁴⁰ van der Wilt 2009(b), at 164.

¹⁵⁴¹ *Kvočka et al.*, Judgement, AC, ICTY, 28 February 2005, paras 105-106. In the *Boškoški & Tarčulovski* case, it likewise held that: “the Appeals Chamber notes that the legitimate character of an operation does not exclude an accused’s criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation. In other words, even if the goal of an operation is to root out “terrorists”, this must not be achieved by an act that constitutes a crime. In addition, the Appeals Chamber recalls “that motive is generally not an element of criminal liability.”” *Boškoški & Tarčulovski*, Judgement, AC, ICTY, 19 May 2010, para. 172.

¹⁵⁴² A. Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, 9 *European Journal of International Law* (1998), at 9.

or unit *per se* responsible.¹⁵⁴³ This use of the concept is, however, prone to cause confusion and it is often more suitable to use other concepts, such as organizational responsibility or State responsibility, to denote responsibility forms where individuals are not held criminally responsible.¹⁵⁴⁴ Secondly, the concept of collective responsibility can refer to situations where individuals are punished as members of a collective entity. Collective responsibility can then be used to describe situations where a “penalty [is] inflicted on a group of persons without regard to individual responsibility for the conduct giving rise to the penalty.”¹⁵⁴⁵ If whole groups, nations, generations, etc. in this way are held criminally responsible there is usually much undeserved punishment or “too much guilt.”¹⁵⁴⁶ A similar phenomenon may occur when criminal responsibility is based on organizational role, function or position rather than personal conduct.¹⁵⁴⁷ In this form, collective responsibility denotes responsibility without culpability or fault, which conflicts with both criminal law and human rights thinking. Thirdly, the concept of collective responsibility can refer to situations in which members of a group are held responsible for acts committed by other members or by the group as a whole.¹⁵⁴⁸ This is a broad use of the concept and if the concept is used in this sense collective responsibility does not necessarily mean that an individual has been punished completely without fault. Feinberg has, for example, noted that there may be: (a) *collective responsibility with non-contributory fault*, which is the case when every member of the group shares the same fault, but only one member’s or some members’ fault leads to harm,¹⁵⁴⁹ and (b) *collective responsibility due to collective and distributive fault*, which is the case when a group engages in criminal activity and all members are held responsible for the whole crime even though they play different roles in the commission of the crime.¹⁵⁵⁰ In these cases of collective responsibility, there is no perfect correspondence between the individual conduct and the criminal outcome. Instead, the responsibility is first and foremost based on the fact that the individual has changed his/her normative position with an initial attack against protected interests, that is, for example, by intentionally engaging in criminal activity.¹⁵⁵¹ JCE responsibility is collective responsibility in this third sense.

¹⁵⁴³ E.g., Vogel 2002, at 165. The relationship between society and its constituent parts may be approached in different ways. With reference to Rousseau, Fletcher distinguishes between the popular will in the aggregative or liberal sense (i.e., the sum total of the individual wills in the society) and the popular will in the associative or romanticist sense (i.e., the society as an entity abstracted from the individuals who constitute it). Fletcher 2002(b), at 1509.

¹⁵⁴⁴ S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden: Transnational Publishers, 2007), xviii.

¹⁵⁴⁵ *Black’s Law Dictionary*, 9th ed. (2009) (‘collective punishment’). Feinberg calls this type of collective responsibility a form of liability without fault. J. Feinberg, ‘Collective Responsibility’, 65 *The Journal of Philosophy* (1968), at 681, and Feinberg 1970, at 241.

¹⁵⁴⁶ Cf. Fletcher 2002(b), at 1544.

¹⁵⁴⁷ Jareborg notes that a crime “consists in a separate event of wrongdoing” and that criminal law therefore directly only should be concerned with the act or omission and only indirectly with the offender. Jareborg 1995(b), at 22.

¹⁵⁴⁸ E.g., Darcy 2007(a), xiii and xvi.

¹⁵⁴⁹ The absence of a causal linkage to the harm is only a lucky incident and reflects no credit of the person who is at fault. Feinberg 1968, at 681, and Feinberg 1970, at 241.

¹⁵⁵⁰ Feinberg 1968, at 684-685, and Feinberg 1970, at 233.

¹⁵⁵¹ Ashworth 2008, at 412.

In comparative criminal law or, for example, human rights law there is no equivocal answer to the question of what the link between individual behaviour and the crime has to be to legitimately attributed to an individual. Fletcher has, for example, noted that in the American system the focus can be on “groups of people interacting in order to produce a crime”, which makes it “impossible under American law to hold individuals liable simply for what they do”, that is, simply for their own contribution to the crime.¹⁵⁵² Through the JCE doctrine also international criminal law accepts that the relationship between the individual behaviour and the criminal harm may be *indirect*¹⁵⁵³ and that the responsibility (at the *conviction* stage) can extend beyond individual contribution. Criminal responsibility that is based on *responsibility* (a normative model) rather than *participation and causality* (a naturalistic model) is thus sometimes accepted.¹⁵⁵⁴ When accepting this type of criminal responsibility, the scope of the individual responsibility must, however, at some point be measured or evaluated. Usually this is then done at the sentencing stage, where factors such as scope of participation influence the outcome.

The present author thinks that the current doctrines of responsibility in international criminal law are reconcilable with the basic tenets of criminal law. The doctrines do namely not create collective responsibility in the second sense. This is, however, not to say that the law always would represent ideal criminal law. Doctrines, such as the JCE and superior responsibility, stretch the boundaries of acceptable criminal law. The approach chosen is, however, understandable from the point of view of the phenomenology of international crimes.¹⁵⁵⁵ In Jareborgian terms, the phenomenology of international criminality has therefore pushed international criminal law towards an offensive criminal law approach, which is, *inter alia*, characterized by an increased criminalization of negligence and different forms of complicity.¹⁵⁵⁶ The opposite of an offensive approach is a defensive one, where the main goal is to protect individuals against abuse of power,¹⁵⁵⁷ and where expansive criminal law is not accepted even

¹⁵⁵² Fletcher 1998, at 189 and 192.

¹⁵⁵³ While enterprise responsibility generally is seen as “more common law”, some civil law lawyers have put forward similar schemes. E.g., Klaus Marxen has suggested that in relation to system criminality, three “elements” can be identified, viz. (1) the behaviour of an individual; (2) the supra-individual context of the crime (e.g., a criminal system); and (3) the harm. These three elements are connected to each other in that the individual behaviour is part of the context or system (connection I) and the harm is produced by the context or system (connection II). There does not have to be a *direct* connection between the individual behaviour and the criminal harm. Marxen 1998, at 231-233.

¹⁵⁵⁴ Vogel 2002, at 154-155.

¹⁵⁵⁵ Cf., however, Ohlin who finds that: “[T]here is no warrant for extending liability [...] simply because the very nature of these crimes is collective. The question is not whether it is collective or not but what kind of collective action is criminal [...]” Ohlin 2007(b), at 74.

¹⁵⁵⁶ Jareborg 1995(b), at 26-27. The gravity of the atrocities that international criminal law addresses probably explains why those eminent criminal law professionals working at international criminal tribunals often accept and justify the use of from a criminal law perspective dubious attribution doctrines. Drumbl has argued that the case law of international criminal tribunals is “schizophrenic” in the sense that the judges often claim to adhere to central criminal law tenets even though they in fact approve the use of doctrines that can be regarded as problematic from the point of view of exactly those tenets. E.g., in relation to the *Blaškić* case (ICTY) he notes that “these systems incorporate vicarious legal elements in order to secure convictions, but then express concern that criminalization ought not be based on vicarious liability.” Drumbl 2005(b), at 1310.

¹⁵⁵⁷ Jareborg 1995(b), at 21-22.

though this would entail that the social or societal problem that the criminality represents would be more effectively addressed.¹⁵⁵⁸ While the discussion on defensive/offensive criminal law primarily has started as a reaction to the modern trend to use of criminal law to address societal problems not clearly causing harm to others, it is interesting that the problems of modern criminal law that these discussions highlight also can be found in relation to international criminality, which often is characterized by extensive causing of harm to others. In international criminal law, the law clearly protects values and interests that generally are protected through criminal law, but the problem lies in protecting these values in a way that respects the fundamental tenets of criminal law.

In the same way as Osiel, the present author therefore feels that the phenomenology of international crimes is something that must be recognized at attribution. More specifically, Osiel argues that as “a normative matter, it is perfectly reasonable to hold to higher standards those who choose to assume control over large groups of armed young men – without seriously training them to avoid causing pointless suffering [...]”¹⁵⁵⁹ He, however, also correctly points out that: “This is not to say that the law need go so far as to hold the military leader “strictly liable,” that is, despite his diligent efforts to avoid criminal harm by his minions.”¹⁵⁶⁰ Also in connection to more low-level actors is it reasonable to accept attribution models such as the JCE doctrine. International crimes namely generally occur in especially dangerous contexts of action where all individuals should be prudent not to engage in or support serious violations of human rights.¹⁵⁶¹ The attribution principles should contain incentives for individuals not to engage in international criminality.¹⁵⁶²

As the present author sees it, what is more troublesome with international attribution from a legality perspective is the uncertainty and fragmentation that surrounds the *lex lata*. For example, in connection to commission responsibility the approaches of the *ad hoc* tribunals and the ICC depart considerably and it may be asked whether the coexistence of several different commission theories is justified. Also the superior responsibility doctrine is plagued by unjustified fragmentation between the *ad hoc* tribunals and the ICC.

¹⁵⁵⁸ The offensive approach hence regards criminal law as a solution of social or societal problems and allows expansive criminal law to achieve this goal. Jareborg 1995(b), at 24-25.

¹⁵⁵⁹ Osiel 2009(b), at 127-128.

¹⁵⁶⁰ Osiel 2009(b), at 128.

¹⁵⁶¹ As such, the present author does not think that the armed conflict context of action should be regarded as something that decreases individual responsibility.

¹⁵⁶² This being said, the present author recognizes that the question of incentives is a difficult one. In this regard Osiel has argued that: “Moreover, the problem of perverse incentives to remain ignorant and hence inculpable does not suggest that the law ought to impose shared responsibility among all people involved, even in episodes of administrative massacre. When the law imposes shared responsibility, there may be perverse incentives of a very different kind. Intellectual architects might ensure that so many people are involved that few are clean enough to assist any effort at prosecution. When the law imposes collective responsibility on all who are party to a common enterprise, it ensures that each individual will feel implicated in the acts of his peers. At a certain point, he will conclude that they have implicated him so deeply in their acts that he no longer has any stake in distancing himself from them. The law has linked their fate too closely to his own.” Osiel 1999, at 155.

7.4.2. A Fair Labelling Evaluation of the Modes of Responsibility

In attribution, a central consideration is not only to find a way to connect an individual to a crime so that a conviction can be secured. It is also important to find a label that describes the blameworthy behaviour of the individual in a representative manner.¹⁵⁶³ What attribution doctrines available in international criminal law do therefore best characterize the criminality of the accused persons¹⁵⁶⁴ or best capture their “true situation and the true culpability”?¹⁵⁶⁵ Obviously, there is no single answer to these questions. International criminality generally has many different dimensions and the various attribution alternatives highlight alternative aspects of the criminality. The same is often true in individual cases of international criminality. Some attribution doctrines emphasize vertical power relationships and others horizontal relationships. Others stress the individual criminal acts, whereas others put the emphasis on the fact that people have acted together. There are, however, aspects of international criminality that rarely, if at all, are recognized by the currently used attribution doctrines in international criminal law. Such characteristics are, for example, the participation of criminal organizations in the criminality, the significance of peer pressure, the fact that the criminality often is State affiliated and the fact that it often is committed in abnormal societal contexts. From this perspective, the international modes of responsibility differ from the crime definitions in which numerous dimensions of international criminality are given legal attention. It is, however, typical for criminal law that it is the special part of the law that the special characteristics of different types of criminality primarily are considered. The attribution belongs to the general part of criminal law, which in most domestic criminal justice systems is common for all types of crimes.

Ambos has found that the fact that certain conceptually or structurally different attribution doctrines in the case law have been applied simultaneously has entailed that the differences between the various responsibility modes have lost in importance.¹⁵⁶⁶ It is indeed awkward if the prosecutor simultaneously claims that a person has *actively* participated in a JCE to commit particular crimes and that he/she has *passively* failed to supervise his/her subordinates in relation to the same crimes. The reality obviously should be either or, but the conviction will often depend on what the prosecutor has been able to prove. This shows that fair labelling in relation to international criminality is a goal that is not always achieved due to evidentiary problems, which can be caused by both: (a) lack of available evidence; and (b) the degree to which the elements to be proven are demanding. It should, however, also be acknowledged that dichotomies, such as active-passive, can be difficult to apply in relation to criminal behaviour that spans over a long time period and where the individual behaviour at times may be characterized by passivity and at times by activity. The fact that alternative attribution doctrines often can be used in relation

¹⁵⁶³ Scholars, however, disagree on the importance of fair labelling. Van der Wilt, e.g., makes a distinction between the JCE doctrines “criminal law functions” and its “hermeneutic or narrative aspirations”, indicating that the narrative aspirations of a doctrine have to come second in relation to the criminal law function. van der Wilt 2009(b), at 160.

¹⁵⁶⁴ *Krnojelac*, Judgement, TC, ICTY, 15 March 2002, para. 173.

¹⁵⁶⁵ *Brđanin*, Judgement, AC, ICTY, 3 April 2007, para. 367 (referring to a Prosecution Appeal Brief).

¹⁵⁶⁶ Ambos 2009(a), at 139.

to individual cases, however, entails that very different stories about what has happened can be told through the criminal law.

Finally in international criminal law, where many cases often are related, the risk of incoherence between the stories told in different cases should be noted. If the high-level actors are prosecuted by using attribution doctrines that paint an image of complete dominance by the elites, it is awkward if the low-level actors in relation to the same crimes are prosecuted based on attribution doctrines that emphasize the individual decision-making by the low-level actors. The risk of fragmentation often increases if *special attribution doctrines* are used to high-level respectively low-level actors (for example, the control of the act by virtue of a hierarchical organization doctrine). Doctrines which can be applied to all different types of participants (such as the JCE doctrine), in theory, seems to make it possible to avoid fragmentation. In practice, the enterprises have, however, in connection to JCE often been defined differently from case to case, and as such also the stories told by two cases in which the JCE has been used may conflict.

All in all, attribution in international criminal law therefore emphasizes a central thesis of this study: that the nature of international criminality and the flexibility of international criminal law often allow very different stories to be told about various historical events forming the basis of the criminal proceedings.¹⁵⁶⁷ It is often some aspect of the criminality that becomes emphasized, as all dimensions of the criminality cannot be captured by the law.

¹⁵⁶⁷ This risk of different cases telling different stories can also arise regarding the crimes. Milanovic has, e.g., noted that the question of whether there in former Yugoslavia occurred genocide outside Srebrenica has been answered differently by different trial chambers in no case to answer proceedings. See further M. Milanovic, 'Karadzic Trial Chamber Finds No Genocide in Bosnia but for Srebrenica', *EJIL Talk!* [blog], 28 June 2012.

8. AVERTING CRIMINAL RESPONSIBILITY

8.1. Introduction

8.1.1. Introductory Remarks

In both criminal law and everyday moral judgments the concept of excuse plays a crucial role. This is because the practice of blaming is intrinsically selective. It cannot survive if all harm-doers are to be blamed, any more than it can if none are. Excuse is one of those central concepts that serve to draw the line between the blameworthy and the blameless and so make a blaming system possible.¹⁵⁶⁸

So far, it has been investigated how individual criminal responsibility in international criminal law may *arise* and how this law takes into consideration the special characteristics of international criminality. The elements of the international crimes and the attribution doctrines do not, however, alone settle which individuals can be held criminally liable. There are namely also grounds for excluding criminal responsibility, which limit the scope of responsibility. The study of *inculpat*ing factors must hence be complemented with an investigation into *exculpating* factors.¹⁵⁶⁹

In a concrete court case, the defence team may besides arguing that the prosecutor has not met his/her burden of proof in relation to the elements of crimes or modes of responsibility (*failure of proof arguments*)¹⁵⁷⁰ claim that there exists a *justification* (which is a challenge of the unlawfulness of the act) or an *excuse* (which is a challenge of the blameworthiness of the actor) for the behaviour.¹⁵⁷¹ The defence team may also make procedural objections, that is, for example argue that court cannot convict the accused person due to his/her *immunity* or due to the fact that the person in question already has been convicted for the same crime earlier.¹⁵⁷² While immunities traditionally have been of great significance in relation to international crimes, the statutes of all modern international criminal tribunals unequivocally deny immunities based on official capacity. For example, Article 27 of the ICC Statute stipulates that

¹⁵⁶⁸ S. H. Kadish, 'Excusing Crime', 75 *California Law Review* (1987), at 257.

¹⁵⁶⁹ Fletcher 1998, at 93.

¹⁵⁷⁰ A difference is sometimes made between: (a) true or affirmative defences (that is, justifications and excuses); and (b) defences that negate crime elements or failure of proof arguments. A true defence is an argument that leads to the conclusion that a person who fulfils all the crime and participation mode elements should not be convicted "all things considered". What in some legal systems is a true defence can in other merely be a failure of proof defence. E.g., van Sliedregt has noted that in relation to mistake of law this is dependent on whether the domestic legal system presumes knowledge of the law ("neutral intention") or requires *dolus malus* in which awareness of unlawfulness is required. In the latter case (e.g., Belgium and France) a mistake of law is a failure of proof defence. van Sliedregt 2003, at 233-234.

¹⁵⁷¹ E.g., Duff 1990, at 100.

¹⁵⁷² Note, however, Zahar and Sluiter who argue that the traditional discussion on defences has been too theoretical and who instead treat all submissions the defence teams in reality regularly make in seeking acquittals as defences. This interesting alternative approach has meant that they in connection to defences, e.g., discuss the claim that invalid inferences have been drawn from circumstantial evidence and the argument of politically motivated prosecutions. Zahar & Sluiter 2008, at 396 ff.

the Statute shall apply equally to all persons without any distinction based on official capacity and that official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility. Immunities will therefore not be considered further here.¹⁵⁷³ It should, however, be noted that whereas justifications and excuses *exculpate* a person, immunities merely procedurally hinder prosecutions and convictions.¹⁵⁷⁴

The question of excuses is especially interesting in relation to international criminality due to the phenomenology and criminology of the crimes. Particularly in relation to low-level actors, it is namely often suggested that it is the abnormal societal situations that push “ordinary people” into criminality. Individuals may be forced to commit crimes due to superior orders or prescription of law. While the phenomenology of international crimes challenges the idea that situations of complete lack of freedom of choice would be common, the frequent State involvement in the criminality and its collective nature entail that there are especially strong pushes towards criminality. In this regard, it has been noted that: “Situations in which international crimes are committed tend to be ones in which there is group activity, and therefore some level of coercion of an offender by colleagues is often to be expected.”¹⁵⁷⁵ In these situations, the question arises to what extent individuals can be expected to follow international norms. Or to pose the question another way: Are there situations where the pushes towards criminality are so strong that individuals should be excused for committing crimes? The relationship between defences and the social reality of the criminality is, however, not straightforward. The acceptance of particular defences is often highly dependent on societal moral evaluations. Even if criminology would tell us that high-level actors generally participate in international crimes due to significant peer pressure, society is not necessarily willing to give legal relevance to this push towards criminality.

Also the question of justifications is interesting in relation to international criminality. As noted in relation to the phenomenology of international crimes, armed conflicts have been characterized as alternative legal orders, in which much behaviour

¹⁵⁷³ Schabas argues that the defence of official capacity has to be distinguished from the procedural question of immunities. Schabas 2009, at 370 and 375. Also David finds that ICC Article 27 on irrelevance of official capacity makes a distinction between a substantive defence and a procedural one, and rejects both. E. David, ‘Official Capacity and Immunity of an Accused before the International Criminal Court’, in J. Doria, H. –P. Gasser & M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff Publishers, 2009), at 743.

¹⁵⁷⁴ M. Baron, ‘Excuses, Excuses’, 1 *Criminal Law and Philosophy* (2007), at 21. The following difference may be made between criminal responsibility and criminal liability: Criminal *responsibility* arises when an offence is committed by an agent and there are no non-exculpatory defences, such as immunity, lack of jurisdiction, double jeopardy and statute of limitations. Criminal *liability*, in turn, arises when a person who is responsible for an offence is not exculpated by a justification or an excuse. P. Westen, ‘Offences and Defences Again’, 28 *Oxford Journal of Legal Studies* (2008), at 565-566, and R. A. Duff, ‘Excuses, Moral and Legal: A Comment on Marcia Baron’s ‘Excuses, Excuses’’, 1 *Criminal Law and Philosophy* (2007), at 53. This terminological differentiation is not adhered to in this study, as many scholars use the concept of criminal responsibility to cover both situations.

¹⁵⁷⁵ Cryer *et al.* 2010, at 410-411.

that usually is regarded as unlawful suddenly becomes lawful.¹⁵⁷⁶ In such contexts, the question of what is right and wrong, and hence what can function as a justification is not as evident as in normal societal situations. In relation to this, David has, in fact, held that because the laws of armed conflict already by themselves allow violence that in normal societal situations generally is not accepted, the logic of justifications in ordinary domestic criminal law should not be automatically upheld in international criminal law. Or to use his words, “it is logical to think that defences admissible in peace time are no longer admissible in war time.”¹⁵⁷⁷ In the same way as criminalizations are societal expressions of what is considered right and wrong, justifications reflect such evaluations.

Even though the criminology and phenomenology of international criminality makes the question of defences especially topical, defences have, however, attracted little attention among international criminal law scholars. This has often been explained with the gravity of the criminality and the connected uneasiness with the idea that the atrocities could be justified or excused.¹⁵⁷⁸ The fact that the international law-makers and appliers are reluctant to consider justifications and excuses is interesting taking into consideration the traditional impunity that has characterized international criminality. The widespread acceptance of impunity may namely be seen as a sign of the fact that the man on the street does not regard certain acts of war as criminal or that he/she finds them excusable. In fact, it appears that whereas the international legal community increasingly has started to reject many explanations given to international crimes as legally irrelevant, these explanations continue to be morally relevant for many people on the ground.

¹⁵⁷⁶ Haque makes the interesting argument that one cannot claim that killing in war presumably would be lawful. Rather, he argues “the laws of war bar the domestic prosecutions of lawful combatants for murder unless they kill in violation of both domestic criminal law and the laws of war.” A. A. Haque, ‘Law and Morality at War’, *Criminal Law and Philosophy* (on-line 30 July 2012). For Haque, the laws of war are hence a sort of “procedural defence” that sometimes affects (“bars”) the applicability of ordinary domestic criminal law. A similar point is made by Doria, when he discusses the relationship between war crimes and crimes against humanity: “It is only when the act is expressly excused or justified by the positive laws of war, rather than when it is not prohibited, that the laws of war can take precedence, because this is in essence what the Martens clause says: namely the absence of prohibition does not make an act against civilians which is otherwise contrary to the principles of humanity and dictates of public conscience permissible.” J. Doria, ‘Whether Crimes against Humanity Are Backdoor War Crimes’, in J. Doria, H.-P. Gasser & M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff Publishers, 2009), at 658. Both authors hence regard the law of war as a branch of law that creates exceptions or “defences”. Haque has, however, correctly stressed that the law of war has a double function: it “can serve either as a basis for or as a bar to prosecution.” Haque 2011(a), at 111.

¹⁵⁷⁷ E. David, ‘Self-Defence and State of Necessity in the Statute of the ICC’, in J. Doria, H. – P. Gasser & M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff Publishers, 2009), at 769. David also at another point notes that: “IHL [= international humanitarian law] is at the centre of two conflicting demands [...] where military necessities oppose humanitarian necessities. To admit [...] necessities other than the ones on which IHL is built, challenges the very essence of IHL in spite of its nearly absolute character [...]” *Ibid.*, at 775.

¹⁵⁷⁸ E.g., Cryer *et al.* 2010, at 402, A. Eser, “Defences” in War Crime Trials’, in Y. Dinstein & M. Tabory (eds.), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers, 1996), at 252-253, van Sliedregt 2003, at 5 and 227, and R. J. Wilson, [‘Book review’], 96 *American Journal of International Law* (2002), at 517. Regarding some excuses, it has, however, been suggested that they have been accepted because of the seriousness of the crime. E.g., it has been argued that the partial defence of provocation in common law jurisdictions is due to the mandatory life sentence for murder. S. Silber, ‘Excusing Crime – Jeremy Horder’ [book review], *Law Quarterly Review* (2005), at 695.

The meagre attention defences has received in international criminal law scholarship can, however, also be explained with the fact that only a small fraction of possible cases are prosecuted at the international level. Due to the selection of cases, cases where valid defences could be put forward are rarely chosen for prosecution.¹⁵⁷⁹ International case law on defences is therefore scarce.

8.1.2. Different Approaches to Exculpation

Before the analysis of defences in international criminal law will be embarked upon, a few words should be said about defences in general. Also in relation to defences have namely the leading legal systems of the world chosen different approaches. While most legal systems theoretically recognize the difference between justifications and excuses, they clearly differ in the legal weight they give to the distinction. In many civil law jurisdictions, criminal responsibility requires the fulfilment of the elements of the crime, wrongdoing and guilt, and a clear difference is made between justifications that deny wrongdoing and excuses that deny guilt. In common law jurisdictions, on the other hand, the central distinction is often between inculpatory and exculpatory factors, and both justifications and excuses are possible defences that exculpate an individual.¹⁵⁸⁰

Regarding *justifications*, it has been noted that while some justifications are nearly universally recognized, the question of their rationale is more controversial. A difference in this regard is often made between the *deeds or objective theory* focusing on avoiding a greater harm, and the *reasons or subjective theory* emphasizing a person acting for the right reason.¹⁵⁸¹ The social function of justifications can correspondingly be either to *permit* people to act in a particular way or to *encourage* people to act in a certain way.¹⁵⁸² It is also possible to make a distinction between justifications based on whether they are examples of (a) waiver of protection of interest (most notably, victim consent), (b) action against invasion (most notably, self-defence), and (c) action in a state of conflict between interests (most notably, necessity).¹⁵⁸³

Also regarding *excuses*, it has been asked what the rationale for excusing individuals is or should be. While some argue that the main rationale of excuses is to ensure that those individuals who due to personal (for example, insanity) or situational factors (for example, duress) are *unable* to adhere to the behavioural expectation are not punished,¹⁵⁸⁴

¹⁵⁷⁹ In certain legal systems, a prosecutor may, e.g., choose not to indict in situations where a concentration camp prisoner has been forced to kill another inmate. The degree to which a prosecutor can choose whether to prosecute or not, however, varies strongly between different legal systems. It may be said that defences are of special importance in legal systems where the prosecutor has few possibilities to refrain from prosecuting. P. Akhavan, 'The Dilemmas of Jurisprudence', 13 *American University International Law Review* (1998), at 1522.

¹⁵⁸⁰ E.g., Fletcher 1998, at 101-102.

¹⁵⁸¹ P. H. Robinson & J. M. Darley, 'Testing Competing Theories of Justification', 76 *North Carolina Law Review* (1998), at 1095.

¹⁵⁸² Cf. Gardner 2012, at 114-115.

¹⁵⁸³ A. Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime', in A. Eser & G. P. Fletcher (eds.), *Rechtfertigung und Entschuldigung – Rechtsvergleichende Perspektiven, Band I* (Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht, 1987), at 49-50.

¹⁵⁸⁴ Baron 2007, at 23. People should hence have a fair possibility to adjust their behaviour to the requirements of the law. E.g. Hart 1968, at 181.

others have suggested that the main rationale rather is that there are contexts which prompt individuals to act out of character and the excuses reflect the fact that criminal law wants to punish those with “vicious character” rather than those with “unruly fate”.¹⁵⁸⁵ It has also been suggested that a person can be excused based on diminished objective wrongdoing (for example, in relation to excessive self-defence).¹⁵⁸⁶ A difference can hence be made between: (1) excuses where the mental state of the accused person has been such that it is felt that he/she cannot be blamed; and (2) excuses in situations where the accused person has acted intentionally and knowingly. In relation to the latter, it is not argued that an individual lacked the capacity to exercise choice.¹⁵⁸⁷ The question in regard to such excuses is rather whether it would be unfair to require that the individual would have behaved otherwise.

The distinction between justifications and excuses has in many legal systems practical consequences in that it affects the right of resistance and the right of assistance. Greenawalt has, in this regard, pointed out that:

Justified action is warranted action; similar actions could properly be performed by others; such actions should not be interfered with by those capable of stopping them; and such actions may be assisted by those in a position to render aid. If action is excused, the actor is relieved of blame but others may not properly perform similar actions; interference with such actions is appropriate; and assistance of such actions is wrongful.¹⁵⁸⁸

The characterization of something as justified action thus means accepting it as legitimate, or at least permissible, whereas excusing it does not in the same sense entail an approval. Fletcher has stressed this by noting that: “Claims of justification direct our attention to the property of the act *in the abstract*; claims of an excuse, to the blameworthiness of the actor *in the concrete situation*.”¹⁵⁸⁹ In collective crimes, the fact that the acts of an individual are merely excused also entails that other individuals may be held accountable for the crime in question.¹⁵⁹⁰ Due to these different third party consequences of justifications and excuses, Knoops has argued that in international criminal law all defences – with

¹⁵⁸⁵ See hereby e.g., W. Wilson, ‘The Structure of Criminal Defences’, *Criminal Law Review* (2005), at 109, and Lacey 1988, at 66-68. Finkelstein notes that this approach is based on Aristotelian virtue ethics according to which bad acts generally allow conclusions of bad character. In situations of excuses, it is, however, not possible to draw that inference. C. Finkelstein, ‘Excuses and Dispositions in Criminal Law’, 6 *Buffalo Criminal Law Review* (2002), at 318-319 and 324-325.

¹⁵⁸⁶ Eser has made a distinction between excusing due to: (a) lacking cognitive and/or voluntative elements of culpability; (b) extraordinary psychological pressure on the perpetrator; and (c) diminished objective wrongdoing. Eser 1987, at 58.

¹⁵⁸⁷ Cf. S. J. Morse, ‘Excusing and the New Excuse Defenses: A Legal and Conceptual Review’, 23 *Crime and Justice* (1998), at 358, and Norrie 1991, at 154-156.

¹⁵⁸⁸ K. Greenawalt, ‘The Perplexing Borders of Justification and Excuse’, 84 *Columbia Law Review* (1984), at 1900. Likewise e.g., A. Cassese, ‘Justifications and Excuses in International Criminal Law’, in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 952.

¹⁵⁸⁹ G. P. Fletcher, ‘The Right and the Reasonable’, in A. Eser & G. P. Fletcher (eds.), *Rechtfertigung und Entschuldigung – Rechtsvergleichende Perspektiven, Band I* (Freiburg: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht, 1987), at 77 (emphasis added).

¹⁵⁹⁰ E.g., Cassese 2002(c), at 952-953.

the exception of self-defence – should be regarded as excuses.¹⁵⁹¹ Lawful belligerent reprisals are, however, another defence in international criminal law that some view as a justification.¹⁵⁹²

Even if the distinction between justifications and excuses in theory is clear, it has, however, been observed that in practice there exists troubling borderline cases. According to Greenawalt permissible acts that are less than morally ideal is one such type of borderline cases, and he notes that a person may act in a manner that what many people would do although a different response would be morally preferable.¹⁵⁹³ In these situations, we may feel uncomfortable to justify the acts as this would imply that we recognize that the conduct was acceptable in the circumstances, but at the same time it may seem impossible to claim that something really hindered the individual from choosing the right action (that is, to excuse the actor).¹⁵⁹⁴ It appears that these kinds of borderline cases are especially typical for international criminality.

In relation to excuses, it should furthermore be noted that there is “a scale of exculpation” running from situations where it may be argued that it is morally completely impossible to blame the actor (for example, severe mental disorder) to situations where the factors identified as exculpatory are nothing more than extra pressure that hardly affect the culpability of the actor.¹⁵⁹⁵ Most of the excuse defences exist in strong and weak forms, for example, severe and insignificant mental disorder, and strong and weak duress.¹⁵⁹⁶ These gradations are reflected in the law in that whereas some excuses are *complete defences* others are merely *partial defences* or factors that mitigate the sentence.¹⁵⁹⁷ The excusing factors can hence both exclude and diminish responsibility. Sometimes different evaluations are made about a factors exculpating effect in the various legal systems of the world, that is, whether a factor is: (a) a complete excuse; (b) a mitigating factor; or (c) a legally completely irrelevant factor.¹⁵⁹⁸ The legal systems may also differ in whether something is regarded as an excuse or as a justification.¹⁵⁹⁹ In this study, mitigating factors are considered in the next Chapter on sentencing.

Finally, it should be noted that even though the difference between offence/responsibility elements and defences *in theory* is clear (*viz.*, the main function of

¹⁵⁹¹ G.-J. Kooops, *Defences in Contemporary International Criminal Law* (Ardsey, New York: Transnational Publishers, 2001), 30.

¹⁵⁹² Cassese *et al.* also include in the list of justifications lawful punishments. A. Cassese *et al.*, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011) 460.

¹⁵⁹³ Greenawalt 1984, at 1904.

¹⁵⁹⁴ Greenawalt 1984, at 1904.

¹⁵⁹⁵ Ashworth 2006, at 239.

¹⁵⁹⁶ Ashworth 2006, at 239.

¹⁵⁹⁷ Ashworth 2006, at 239. In a partial or qualified defence, the reduced culpability may, e.g., be reflected in that a less serious crime category is chosen.

¹⁵⁹⁸ Different approaches can e.g., be found in connection to the legal relevance of intoxication.

¹⁵⁹⁹ Eser has, in this regard, observed (in 1987) that: “Contrary to common law tradition, which seems to limit excuse to insanity, duress, mistake of fact and to some extent mistake of law, German law has recognized for quite some time that excessive self-defence by reason of confusion, fear or fright [...], excusing necessity [...] and conflict of duties [...]” Eser 1987, at 57. Cf., however, Horder who discusses the excusing of acts committed in response to provocation or acts of excessive defence in a common law context. J. Horder, *Excusing Crime* (Oxford: Oxford University Press, 2007), at 11, but 25 (mitigation of sentence) and 30.

defences is thus to function as a ground to avert criminal responsibility in situations where the offence and responsibility elements *a priori* are fulfilled), *in practice*, it can be complicated.¹⁶⁰⁰ This is partly due to the fact that certain things that in common or moral parlance are called excuses are not really excuses in criminal law.¹⁶⁰¹ For example, in criminal law, a mistake of fact generally negates intent and knowledge, which are essential responsibility elements, and the need to excuse in situations where responsibility has not been established does not arise.¹⁶⁰² Schabas has, in this regard, observed that, in fact, most “if not all” defences in fact entail a challenging of the fact that the *mens rea* has been established.¹⁶⁰³

8.2. International Criminal Law and Grounds for Excluding Criminal Responsibility

8.2.1. Introductory Remarks

The suggested defences in international criminal law include mental incapacity, intoxication, self-defence, duress, necessity, superior orders, victim consent, military necessity and mistake of fact and law, and they can be categorized based on whether their origin primarily is in public international law or in domestic criminal law.¹⁶⁰⁴ They can also be distinguished based on whether they exclude the fulfilment of a crime or responsibility element, or whether they rather justify the act or excuse the person. It should, however, be noted that the legal instruments of international criminal law (and most notably, the ICC Statute) do not clearly divide the defences into justifications and excuses.¹⁶⁰⁵ As such, their justificatory or excusing character can sometimes be debated. This can be criticized from a fair labelling perspective. Bergelson has in connection to provocation noted that: “The proper labeling of a defense [...] matters both to the defendant and society at large. Knowing whether, all things considered, the defendant was right or wrong in what he did and whether society can fairly expect others in his

¹⁶⁰⁰ J. Blomsma, *Mens Rea and Defences in European Criminal Law* (Cambridge: Intersentia, 2012), 285-286.

¹⁶⁰¹ Furthermore, it should be noted that the concept of defences sometimes is used to refer to any argument the defendant can use to avoid a conviction. In criminal law theory, the concept is, however, generally used only to arguments that do not deny the fact that a prohibited act has been committed by the defendant. E.g., alibi arguments and denials of *mens rea* are thus not defences in the strict sense.

¹⁶⁰² See further e.g., M. Scaliotti, ‘Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 2’, 2 *International Criminal Law Review* (2002), at 1-4.

¹⁶⁰³ Schabas 2010(a), at 501. Dinstein calls duress, mistake of fact or of law and mental disease all “defences based on lack of *mens rea*.” Y. Dinstein, ‘International Criminal Courts and Tribunals, Defences’, *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com (last update May 2009, last visited 17 August 2010).

¹⁶⁰⁴ E.g., Knoops 2001, at 37 and 73, and van Sliedregt 2003, at 228. See also the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, which distinguishes between: (1) Negation of liability (such as error of fact and diminished mental capacity); (2) Excuses and justification; and (3) Defenses under public international law. UN Doc. A/50/22, Annex II, at 59-60.

¹⁶⁰⁵ E.g., K. Ambos, ‘Defences in International Criminal Law’, in B. S. Brown (ed.), *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar, 2011), at 301.

situation to behave differently is essential for society's collective sense of justice and for people's ability to make personal decisions."¹⁶⁰⁶

Interestingly, most of the defences that have their origin in public international law and which generally are considered as justificatory defences have lost in legal relevance. Military necessity and *tu quoque* are, for example, generally not anymore accepted as valid defences.¹⁶⁰⁷ This reflects the trend in international human rights law and international humanitarian law to regard certain types of acts as prohibited whenever committed. Self-defence (which is globally recognized as a justification in domestic legal systems) has likewise lost in importance, but has, however, not completely been ruled out in international criminal law.¹⁶⁰⁸ The same can be said about reprisals.¹⁶⁰⁹

As regards excuses, international criminal law adheres to the principle universally found in domestic legal systems that when the mental state of the person is such that he/she does not appreciate the wrongfulness of his/her action, he/she cannot be blamed. Mental incapacity is therefore a valid excuse in international criminal law. While the questions who is insane or who has diminished mental capacity are not easily answerable questions, most studies indicate that persons committing international crimes are not generally insane or have diminished mental capacity *from a psychiatric perspective*.¹⁶¹⁰ As such that ground for excluding criminal responsibility is not studied in greater detail here.¹⁶¹¹ The relevance of intoxication, which is addressed differently in various domestic legal systems, will be considered shortly due to claims often made that many atrocities are committed by intoxicated hands-on criminals.¹⁶¹² The focus will, however, be put on suggested excuses in which it may be argued that the accused person has acted

¹⁶⁰⁶ V. Bergelson, 'Justification or Excuse? Exploring the Meaning of Provocation,' 42 *Texas Tech Law Review* (2009), at 308.

¹⁶⁰⁷ See e.g., van Sliedregt 2003, at 291-298, and David 2009(b), at 774 (regarding military necessity).

¹⁶⁰⁸ On self-defence, see e.g., T. L. H. McCormack, 'Self-Defence in International Criminal Law, in H. Abtahi & G. Boas (eds.), *The Dynamics of International Criminal Justice – Essays in Honour of Sir Richard May* (Leiden: Martinus Nijhoff Publishers, 2006) 231-255, and W. A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III),' 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998), at 108-109.

¹⁶⁰⁹ See further Section 8.2.5.3.

¹⁶¹⁰ It should, however, be noted that in (at least) the United States, some defendants have claimed that exposure to certain social environmental factors or "social toxins" (such as a violent childhood or TV violence) has made them legally insane or that the environment has diminished their mental capacity. Important to note is thus that it not claimed that the environment itself should excuse the offender. P. J. Falk, 'Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage,' 74 *North Carolina Law Review* (1996), at 731 ff. These types of arguments are interesting in connection to international criminality in that the context in which international crimes are committed often seen as a significant explanatory factor for the criminality. To what extent the environment affects an individual is both dependent on the character of the "social toxin" and the responsiveness of the individual for the toxin. *Ibid.*, at 802-803. Falk, however, observes that social toxins cannot obviate criminal liability for large segments of offenders as "only some individuals have a degree of mental impairment cognizable under the criminal law." *Ibid.*, at 805.

¹⁶¹¹ See further e.g., Ambos 2011(b), at 301-304, Cryer *et al.* 2010, at 405-406, Scaliotti 2002, at 16-28, and Schabas 2010(a), at 484-486. It should, however, be noted that some defendants have (often unsuccessfully) claimed diminished mental responsibility. Ambos 2011(b), at 302.

¹⁶¹² E.g., Cryer *et al.* 2010, at 406.

intentionally and knowingly, that is, on superior orders, prescription of law, necessity and duress.

8.2.2. Mistakes of Fact and Law

Many international crimes are committed in chaotic, abnormal societal contexts, in which it is not unlikely that some individuals make wrongful evaluations of facts or are uncertain about the level of violence that is legal.¹⁶¹³ In armed conflicts and totalitarian regimes, propaganda and the spreading of false information is common.¹⁶¹⁴ Kamber has in this regard held that: “Ethicists generally agree that factual ignorance or error can excuse or at least mitigate one’s responsibility for a wrongful act [... and that the] excuse is even stronger if my erroneous belief resulted from the lies of others.”¹⁶¹⁵ At the same time, international criminality is characterized by a severity, which should make most individuals suspicious that their behaviour is not lawful. Schabas observes this tension by noting that:

In national legal systems, claims to ignorance of law are hardly credible when serious crimes against the person are involved, and in real life the disputes tend to arise with respect to obscure regulatory offences of a highly technical nature. War crimes law is somewhat anomalous, however, for on the one hand it focuses on the most serious crimes [...] and thus should be evident to all, yet at the same time acknowledges that on occasion the individual may not be aware that a specific act is ‘manifestly unlawful’ [...].¹⁶¹⁶

Van Sliedregt has furthermore found that mistake of law is an especially appropriate and necessary defence in the context of international criminal law due to the “vagueness of the laws of war.”¹⁶¹⁷

¹⁶¹³ Osiel notes the argument of Arendt that under certain circumstances it is impossible for people to know or to feel that they are doing wrong and argues that in such circumstances the person “is likely to make mistakes of law.” Osiel 1999, at 146.

¹⁶¹⁴ Cf. *R. v. Finta*, Judgement (containing dissents), Supreme Court of Canada, 24 March 1994 (‘Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmerie would really know that they were part of a plot to exterminate an entire race of people.’)

¹⁶¹⁵ Kamber 1999, at 254.

¹⁶¹⁶ Schabas 2010(a), at 503. See also e.g. K. J. Heller, ‘Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute – A Critical Analysis’, 6 *Journal of International Criminal Justice* (2008), at 439.

¹⁶¹⁷ van Sliedregt 2003, at 315.

Before the ICTY and ICTR, the defences of mistake of fact or law have, however, not really been considered.¹⁶¹⁸ This may be explained with the fact that judges are unlikely to accept such claims, if there is no “air of reality” to them and evidence to support them.¹⁶¹⁹ Furthermore, to make a claim of mistake of fact, the defendant must first admit that he/she has fulfilled the *actus reus*. Some contempt proceedings, however, indicate that the *ad hoc* tribunals do not completely rule of mistakes of fact, whereas arguments of mistake of law are not accepted.¹⁶²⁰ In the Rome Statute of the ICC, the question of mistakes of fact and law has, however, been regulated in detail.¹⁶²¹

Article 32 of the ICC Statute stipulates that a mistake of fact shall be a ground for excluding criminal responsibility *only if it negates the mental element* required by the crime. A relevant mistake of fact may, for example, be that a person falsely believes that a particular vehicle is a military vehicle and hence a legitimate military target. Most crimes demand knowledge as a mental element, but in certain cases it is enough that the perpetrator should have known about a fact, for example, that a person was under the age of 18 years. In such cases, it is evident that the defence of mistake of fact cannot be raised successfully if the defendant has acted negligently.¹⁶²² It is noteworthy that Article 32 does not require that the mistake is a reasonable one or that the person cannot himself/herself be blamed for making the mistake (for example, due to voluntary drunkenness).¹⁶²³ Mistakes of fact can be made in relation to facts: (1) that relate to the elements of the crimes; (2) that would establish a ground for justification, and (3) that would establish a ground for excusing the offender.¹⁶²⁴ Article 32 only explicitly deals with mistakes of facts relating to crime elements.

¹⁶¹⁸ Regarding mistakes of fact, Schabas has observed that “the defence appears to be rarely if ever invoked by modern-day defendants.” Schabas 2010(a), at 501. See, however, the *Boškovski and Tarčulovski* case, where the defence team claimed that the principles of mistake of law and fact were relevant in the evaluation of whether the accused should have known about the existence of an armed conflict. *Boškovski & Tarčulovski*, Transcripts, TC, ICTY, 8 May 2008, at 11179-11181. See also *Brima et al.*, Judgement, AC, SCSL, 22 February 2008, paras 293 and 296 (“[...] Due to various factors, detailed in his Appeal Brief, Kanu submits that “he believed that his conduct [of conscripting or enlisting children under the age of 15 years] was legitimate.” [...] Kanu’s submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.”). On the use of these defences in the post-World War II trials, see e.g., O. Triffterer, ‘Article 32 – Mistake of Fact or Mistake of Law’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, Hart, Nomos, 2008), at 897.

¹⁶¹⁹ Schabas 2010(a), at 501.

¹⁶²⁰ See e.g., *Hartmann*, Judgement (contempt), SAC, ICTY, 14 September 2009, paras 64-65, and *Jokić*, Judgement (contempt), AC, ICTY, 15 March 2007, para. 27.

¹⁶²¹ For a discussion on the difference between mistakes of fact and mistakes of law, see e.g., van Sliedregt 2003, at 301-303. She notes, *inter alia*, that a difference can be made between *descriptive elements* (perceivable through the human senses) and *normative elements*, which require interpretation and application of a rule. Mistakes regarding descriptive elements can entail a relevant mistake of fact. Mistakes regarding normative elements, on the other hand, can constitute both relevant mistakes of fact and mistakes of law. *Ibid.*

¹⁶²² Schabas 2010(a), at 502.

¹⁶²³ Cryer *et al.* 2010, at 414.

¹⁶²⁴ Triffterer 2008(a), at 901.

Regarding mistakes of law, the ICC Article 32(2) stipulates that: “A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33 [on superior orders and prescription of law].” In relation to superior orders, Lappi-Seppälä has found that: “it is one thing to require that *people in general* find out the *content of criminal law*, and another thing to demand that a *subordinate should make sure* that his *superior is acting according to the law* when giving the orders. Those who are working in a hierarchical system have a certain right to rely on the fact that their superior’s act is in accordance with the law.”¹⁶²⁵ The ICC Statute reflects this type of thinking.

When interpreting Article 32(2), it is significant to note that the first sentence uses the verb “shall” and the second “may”. According to Triffterer, this entails that the ICC first has to decide whether the mistake concerns “the law or the rule to be applied” and if the answer is in the affirmative, the mistake cannot be regarded as legally relevant.¹⁶²⁶ Secondly, if the first question is answered in the negative, the Court has to consider whether “the mistake is based on a wrongful *legal evaluation*” in case of which the Court has to use its discretion and decide whether there is criminal responsibility or not.¹⁶²⁷ Heller similarly makes a distinction between “mistakes of law” (for example, not knowing that attacks against civilians are unlawful), which do not exempt from criminal responsibility, and “mistakes of legal element” (for example, not being aware of how a civilian population is legally defined), which can exempt from criminal responsibility.¹⁶²⁸

In relation to mistakes of law and legal elements, it has been asked to what extent individuals have an obligation to inform themselves of the content of the law. Bantekas has observed that the “ignorance of law defence does not presuppose that the ordinary citizen is fluent in all aspects of the criminal law or that one should keep pace with legal developments”, but that “we are asked to be social animals” and hence to possess knowledge of basic requirements of social behaviour.¹⁶²⁹ In relation to mistakes of law, the relevant question is, in fact, not generally what an individual accused person *de facto* knew, but rather what he or she *should have known* (an objective test). Dinstein observes this by noting that: “The question that usually arises in the concrete case is whether a reasonable person is objectively expected to be aware of the illegality of a particular conduct under international law.”¹⁶³⁰ This may be regarded as problematic from a *mens rea* perspective (if a truly guilty mind is required), and it has been observed that “extremely high demands on the individual actor’s knowledge of the law mean that a mistake of law will in the individual case virtually never be considered relevant, which may lead to

¹⁶²⁵ T. Lappi-Seppälä, ‘Defences Applicable to Third Party Involvement from a Scandinavian Point of View’, in A. Eser, B. Huber & K. Cornils (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1998), at 296-297.

¹⁶²⁶ Triffterer 2008(a), at 908.

¹⁶²⁷ Triffterer 2008(a), at 908.

¹⁶²⁸ Heller 2008, at 420-423.

¹⁶²⁹ I. Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), 117. See also I. Bantekas, ‘Individual Responsibility and the Application of *Ignoratio Juris Non Excusat* in International Law’, 19 *European Journal of Crime, Criminal Law and Criminal Justice* (2011), at 88.

¹⁶³⁰ Dinstein 2009, para. 13.

a dangerous qualification of the fundamental guilt principle.”¹⁶³¹ It should, however, be noted that a serious investigation into individual person’s knowledge of the law (a purely subjective test) would entail that the applicability of the law would vary from one person to another based on their knowledge, and that it often would become possible to evade responsibility by claiming ignorance.¹⁶³² Most domestic legal systems are very reluctant to legal relevance to claims of mistake of law.¹⁶³³ This is the case especially in connection to *mala in se* criminality.¹⁶³⁴ If mistakes of law are given legal relevance, there must generally be a special reason to do so (for example, that the legislation criminalizing the behaviour has been unusually vague).¹⁶³⁵

Scholars differ in relation to how much mistake defences they believe can be successful based on Article 32 of the Rome Statute. Most scholars do not think that the Statute allows for many mistakes of law or legal element, and the ICC has itself in the *Lubanga* case noted that “the scope of a mistake of law within the meaning of article 32(2) is relatively limited.”¹⁶³⁶ Heller has, however, argued that Article 32 “properly understood” allows for a wide variety of exculpatory mistakes of legal elements and that the Rome Statute therefore should be amended to explicitly apply a negligence standard to the legal elements.¹⁶³⁷ It should be noted that has also been suggested that what a person should know about the content of the law is dependent on the position of the person, that is, for example, so that people in a guarantee position should have more detailed knowledge of the content of international humanitarian law.¹⁶³⁸ This suggestion

¹⁶³¹ Schabas 2010(a), at 504 (referring to Ambos). See also Ambos 2011(b), at 321. An opposite view is expressed by Ohlin, who argues that ignorance of law does not affect culpability as “it is the act itself – not knowledge of its unlawfulness – that generates culpability.” J. Ohlin, ‘Mistake of Law’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 422.

¹⁶³² Cf. Cassese 2008, at 295.

¹⁶³³ Schabas has summarized the comparative law on mistake of law in the following manner: “Continental penal codes do not, as a general rule, allow a defence of mistake of law. German law appears as an exception, allowing a limited defence under what is called the ‘layman’s parallel evaluation test.’ The common law excludes mistake of law, but allows the related defence of mistake of legal element.” Schabas 2010(a), at 502.

¹⁶³⁴ As was noted in Chapter 6, it may be debated to what extent international crimes constitute *mala in se* or *mala prohibita* criminality. In this regard, Ambos notes that the presumption of knowledge of the law is a fiction especially in connection to *mala prohibita* crimes. He notes that: “the growing amount of special criminal law produces more and more ‘*mala prohibita*’. The same holds true for ICL [=international criminal law], at least as far as war crimes are concerned. Things are more complicated even if one includes grounds excluding criminal responsibility (‘defences’) in the analysis, since the scope and the existence of defences are often unknown to the average citizen.” Ambos 2006, at 668.

¹⁶³⁵ E.g., in Finland, the Criminal Code provides (in Chapter 4, Section 2) regarding that: “If the perpetrator errs in regarding his or her act as lawful, he or she is exempt from criminal liability if the mistake is to be deemed manifestly excusable due to the following factors: (1) the defective or erroneous publication of the law, (2) the particular obtuseness of the contents of the law, (3) erroneous advice by an authority, or (4) another reason comparable to these.”

¹⁶³⁶ *Lubanga*, Decision (confirmation of charges), PTC, ICC, 29 January 2007, para. 305.

¹⁶³⁷ Heller 2008, at 419-420.

¹⁶³⁸ E.g., van Sliedregt 2003, at 314-315 (referring to post-World War II case law), and G.- J. A. Knoops, ‘The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments’, in J. Doria, H. - P. Gasser & M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff Publishers, 2009), at 793. Also Cassese *et al.* suggest that mistakes of law could be especially relevant in relation to low-ranking members of an army. Cassese *et al.* 2011, at 507.

is supported by the ICC Statute, which makes the connection between mistakes of law and superior orders.¹⁶³⁹

8.2.3. Victim Consent

In international criminal law, the victims are often in the terms of Nils Christie “ideal victims”. They are namely often “weak”, they cannot be blamed for being where they were when the crime was committed, and the offender is “big and bad” and unknown to the victim.¹⁶⁴⁰ Due to this, victim consent is generally not considered a topical question in international criminal law.

More generally, it may be noted that whereas victim consent can annul wrongdoing in relation to crimes causing trivial harm or when it changes the nature of the conduct (for example, in relation to rape), individuals cannot generally consent to serious harm to them if such harm also violates human dignity (respecting human beings in themselves).¹⁶⁴¹ In most legal systems, individuals cannot, for example, consent to being murdered or tortured.¹⁶⁴² Furthermore, it is generally thought that international crimes primarily violate common interests, even though they also victimize individuals. In relation to international crimes, it can therefore be questioned whether individuals as individuals can consent to them.¹⁶⁴³ Ambos points out that it “is a general norm in criminal law that consent can only exclude criminal responsibility if the consenting victim is entitled to dispose exclusively of the (individual) legal interest protected by the offence” and that if “the offences also protect *collective* interests the individual’s consent cannot have an exonerating effect.”¹⁶⁴⁴ According to Ambos, this entails that international criminal law does not admit the consent defence.¹⁶⁴⁵

The ICC Elements of Crimes interestingly contain one footnote in relation to the war crime of mutilation, which states that consent is not a defence to that crime. Schabas has found that this exclusion might breach the presumption of innocence.¹⁶⁴⁶ As the present author sees it, a difference has to be made between: (a) crimes where the non-

¹⁶³⁹ Articles 32(2) and 33, ICC Statute.

¹⁶⁴⁰ Christie 1986, at 19.

¹⁶⁴¹ D. J. Baker, ‘The Moral Limits of Consent as a Defense in the Criminal Law’, 12 *New Criminal Law Review* (2009), at 97-98. In relation to behaviour causing harm, Baker has importantly emphasized that: “It is important to recognize that it is wrongful harmdoing that is criminalizable, not mere harmdoing. The focus has to be on nullifying the wrongfulness of inflicting [... harm to another] as the harmfulness of such conduct cannot be nullified by consent.” *Ibid.*, at 101-102.

¹⁶⁴² Cf. V. Hahto, *Uhrin myötävaikutus ja rikosentekijän vastuu* (Helsinki: Edita, 2004), at 241.

¹⁶⁴³ Cf. In domestic legal systems, where it is usual to regard crimes as violations against the public, victim consent can, however, function as a justification that takes away the unlawfulness of an act (justification) or as a factor that entails that the crime elements have not been fulfilled. Hahto 2004, at 243.

¹⁶⁴⁴ Ambos 2011(b), at 328. Cassese argues that individuals cannot consent to unlawful attacks on life, body or dignity of human beings, as these interests are protected by *jus cogens* norms to which are non-derogable both to States and individuals. Cassese 2002(c), at 953.

¹⁶⁴⁵ Ambos 2011(b), at 328. On victim consent and international criminal law, see also Cryer *et al.* 2010, at 420-422, and Werle 2009(b), at 226.

¹⁶⁴⁶ Schabas 2010(a) at 494. Interestingly, regarding genocide Schabas has, however, found that the “special nature of the crime” entails that the defence of victim consent is of little interest in relation to that crime. Schabas 2009, at 367.

consent of the victims is a crime element and hence affects the nature of the act (such as rape, forcible displacement and pillage); and (b) crimes in relation to which it may be asked whether victim consent is relevant or not. In relation to the first category, the question of victim consent clearly is of importance for the criminal responsibility.¹⁶⁴⁷ In relation to the latter group, however, the present author agrees with Ambos (and a number of other scholars) who find that victim consent cannot generally justify the underlying offences to international crimes. Hence, the present author does not find that it breaches the presumption of innocence to exclude victim consent as a valid defence in relation to most international crimes, including mutilation. The rationale for this is that while individuals due to their personal autonomy can consent to certain harms, there are in relation other harms societal interests to punish despite victim consent that override personal autonomy considerations.¹⁶⁴⁸ The general principle of law that can be derived from domestic legal hence does not support the claim that victim consent is relevant for *all types of criminality*.¹⁶⁴⁹

In relation to the phenomenology of international criminality it should furthermore be noted that international crimes often are committed in circumstances in which it can become a survival strategy for victims to *pretend* to consent or agree.¹⁶⁵⁰ In international criminal law, it is therefore especially essential to consider the difference between genuine and non-genuine consent. The international norms and case law on rape are especially illuminating in this regard. In the *Gacumbitsi* Appeal Judgement, the ICTR found that the prosecutor can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible.¹⁶⁵¹ If a rape victim has been detained by the accused person during an ongoing campaign against a civilian population, it is reasonable to assume that the victim consent has not been genuine. The ICC RPE and Elements of Crimes imply that a similar practice will also

¹⁶⁴⁷ In international criminal law, rape can be the underlying offence both to crimes against humanity and war crimes. The statutes of the *ad hoc* tribunals do not define the concept of rape, which has forced the tribunals to do this in their case law. This case law is not discussed in detail here, but the question of whether non-consent is a crime element of rape or whether consent is a defence to rape should be noted. In the rules of procedure and evidence of the *ad hoc* tribunals, it is namely put forward that consent *shall not be allowed as a defence* if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear. Rule 96(ii), ICTY RPE. See also Rule 96(ii), ICTR RPE. In their case law, the *ad hoc* tribunals have clearly settled that non-consent is a crime element and not “merely” a possible defence. *Kunarac et al.*, Judgement, TC, ICTY, 22 February 2001, paras 463-464, and *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, paras 153-154. This question has also been raised in domestic legal systems. See e.g., Westen 2008(b), at 571-572.

¹⁶⁴⁸ On this topic, see further e.g., Baker 2009, at 93.

¹⁶⁴⁹ The present author hence disagrees with Schabas who finds that: “Consent may be a defence to many crimes within the jurisdiction of the Court, just as it is for ordinary crimes. A theft is not a theft if the owner consents, and a similar norm is set out with respect to the property-related war crime of pillage.” Schabas 2010(a), at 493.

¹⁶⁵⁰ In the *Milch* case following World War II, it was suggested that individuals would have consented to medical experiments to (if they survived) transform a death sentence to life imprisonment. The tribunal, however, found that the “claim scarcely [...], merited] serious consideration.” *Milch*, Judgement, CCL, 17 April 1947, at 776. In that case, the type of victims, the types of medical experiments and the circumstances surrounding the experiments made the victim consent claims completely incredible.

¹⁶⁵¹ *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 155.

be followed by the ICC.¹⁶⁵² Also regarding forcible displacement (including deportation across a border and forcible transfer within a country),¹⁶⁵³ it has been noted that an individual may consent to or even request removal, but that the genuineness of the consent or request must be investigated and assessed in the light of the surrounding circumstances.¹⁶⁵⁴

In the ICC RPE and Elements of Crimes in relation to rape, it is furthermore expressly stressed that there are certain individuals who due to personal characteristics cannot give a genuine consent.¹⁶⁵⁵ Such incapacity may be due to “natural, induced or age-related incapacity.”¹⁶⁵⁶ This entails that, for example, victim consent clearly is legally irrelevant before the ICC in sexual violence cases involving minors.

8.2.4. Intoxication

It is not unusual that hands-on criminals participate in international crimes as intoxicated. That toxicants play a central role in the crime commission is, however, not unique for international criminality. In this regard it has been observed that criminology always has “dealt with alcoholism and the consumption of drugs because of their capacity to lead consumers to offend or commit crimes.”¹⁶⁵⁷ Often the intoxication in connection to international criminality is voluntary, that is, alcohol and drugs are used to alleviate the stress caused by the participation in the fighting. Sometimes military leaders, however, support the drug use of their subordinates or even demand it to ensure that their soldiers are not inhibited from killing and committing other crimes. Furthermore, when individuals have been made into addicts, there is no easy answer to the question of whether the drug use has been voluntary or not.¹⁶⁵⁸ The answer can then depend on whether one focuses on individual events of intoxication or whether one instead sees at the circumstances leading to the drug abuse. In many legal systems, voluntary intoxication is *not* accepted as a defence, and the legal systems simply presume culpability in situations of intoxication.¹⁶⁵⁹ In some legal systems, alcoholism can,

¹⁶⁵² Rule 70(a), ICC RPE (‘Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent.’), and ICC Doc. ICC-ASP/1/3 (Part II-B) (Crime against humanity of rape: ‘[...] 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. [...]’)

¹⁶⁵³ E.g., *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, para. 154, and *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 277-278.

¹⁶⁵⁴ See e.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, paras 279-282, *Krnjelac*, Judgement, TC, ICTY, 15 March 2002, para. 475, *Krnjelac*, Judgement, AC, ICTY, 17 September 2003, para. 229, and *Krstić*, Judgement, TC, ICTY, 2 Augusti 2001, paras 529-530.

¹⁶⁵⁵ Rule 70(b), ICC RPE (regarding sexual violence): “Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent”.

¹⁶⁵⁶ ICC Doc. ICC-ASP/1/3 (Part II-B), fn 16.

¹⁶⁵⁷ Scaliotti 2002, at 28 (referring to Mantovani).

¹⁶⁵⁸ Cf. the discussion in Chapter 7, regarding the sometimes complex relationship between non-criminal and criminal behaviour.

¹⁶⁵⁹ Lappi-Seppälä in this regard speaks of “fictive culpability”. Lappi-Seppälä 1998, at 299-300.

however, be equated with depression and other mental conditions, and the questions of mental incapacity or diminished mental responsibility may arise.¹⁶⁶⁰

The Rome Statute of the ICC is the first international legal instrument to address defences relating to intoxication. Relating to the Statute negotiations, Saland observes that:

There was no great substantive disagreement on permitting involuntary intoxication as a ground for excluding criminal responsibility. But voluntary intoxication presented big problems. For some delegations voluntary intoxication was a ground for excluding criminal responsibility except when the perpetrator had a specific intent to commit the crime which actually ensued. Others [...] would not accept voluntary intoxication as a ground under any circumstances. Still others would be prepared to accept it as a ground for excluding criminal responsibility except when the person realized that becoming intoxicated entailed a risk for the commission of crimes.¹⁶⁶¹

Article 31(1)(b) of the ICC Statute now provides that a person shall not be criminally responsible if, at the time of that person's conduct, the

person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.

Saland characterizes this as a compromise "which had the benefit of not satisfying anyone"¹⁶⁶²

Eser has emphasized that it is not based on Article 31(1)(b) sufficient that the intoxication *diminishes* the ability to appreciate the unlawfulness or nature of his/her conduct or capacity to control his/her conduct to conform to the requirements of law, but that this ability/capacity must be *destroyed*.¹⁶⁶³ He also notes that in relation to voluntary intoxication increasing the risk for a crime being committed, the question of how "disregarded the risk" should be interpreted is controversial. Eser sees this as introducing a recklessness standard (between negligence and *dolus eventualis*),¹⁶⁶⁴ whereas, for example, Werle argues that an "aggravated form of negligence" rules out the intoxication

¹⁶⁶⁰ Cf. Vasiljević, Judgement, TC, ICTY, 29 November 2002, para. 290.

¹⁶⁶¹ P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at 207. See also Ambos, who emphasizes that intoxication as oppose to mental disease is not universally accepted as a ground for excluding criminal responsibility. Ambos 2011(b), at 305.

¹⁶⁶² Saland 1999, at 207.

¹⁶⁶³ A. Eser, 'Article 31 – Grounds for Excluding Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 877. Tadros has found that those involuntarily intoxicated should only be excused when it can be proven that the intoxication *de facto* has shifted their character, that is, that those who are violent also when sober should not be excused for their violent behaviour when drunk. V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), 299.

¹⁶⁶⁴ Eser 2008, at 877.

defence.¹⁶⁶⁵ It remains to be seen how the Court will interpret that part of the provision. Article 31(1)(b) is, however, clearly held to rule out the possibility to use intoxication as a defence in situations where hands-on criminals voluntarily use intoxicants to get courage to participate in crimes.

It should be noted that while Article 31(1)(b) is applicable to all crimes in the ICC Statute, some delegations at the negotiations expressed the view that this ground “would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes.”¹⁶⁶⁶ In relation to this, Eser has, however, found that: “[a]lthough it seems practically inconceivable that masterminds of a prolonged genocidal engagement or of widespread or systematic attacks against a civilian population raise intoxication, it is not unlikely that an individual genocidal act or a particular crime against humanity is committed by an ordinary low-level person who is actually intoxicated throughout the whole crime and should thus not be precluded from raising [..., the argument of intoxication].”¹⁶⁶⁷ In a similar vein, Scaliotti has found that: “It goes without saying that genocide cannot be planned and ordered by someone when intoxicated. As regards war crimes or crimes against humanity, in theory a commander in a state of intoxication may order the commission of isolated acts constituting such crimes.”¹⁶⁶⁸ In this regard, it is noteworthy that in certain domestic jurisdictions intoxication is admissible in relation to specific intent crime prosecutions, but not in relation to general intent crimes.¹⁶⁶⁹ From a phenomenological and criminological perspective, it is interesting that many appear to be legally more prone to accept intoxication as a legally relevant fact in relation to low-level actors. Political leaders and other high-level actors may, however, also have problems with alcoholism and drug abuse and the use of intoxicants does not necessarily entail that one becomes unable to plan or act long-term. It is not completely inconceivable that intoxicants affect a leader’s perceptions of reality and make him/her more prone to draw up genocidal plans.

The approach taken by the Rome Statute is interesting in that *ad hoc* tribunals have been reluctant to accept intoxication even as a mitigating factor. For example, in the *Kvočka et al.* case, the Trial Chamber found that:

The [...] Defense submits that committing a crime under the influence of drugs or alcohol serves as a mitigating factor because the defendant’s mental capacity is diminished. In this regard, the Trial Chamber acknowledges that mental impairment is considered relevant in mitigation of sentences in many countries. However, when mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept [..., the Defence’s] contention that an intentionally procured diminished mental state could

¹⁶⁶⁵ Werle 2009(b), at 223-224.

¹⁶⁶⁶ UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, fn 8.

¹⁶⁶⁷ Eser 2008, at 876. See also Ambos 2011(b), at 305.

¹⁶⁶⁸ Scaliotti 2002, at 37.

¹⁶⁶⁹ M. Keiter, ‘Just Say No Excuse: The Rise and Fall of the Intoxication Defense’, 87 *Journal of Criminal Law and Criminology* (1997), at 492-493. Schabas has in relation to genocide found that intoxicants may entail that individuals do not have the specific intent required for that crime. Schabas 2009, at 398.

result in a mitigated sentence. Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.¹⁶⁷⁰

8.2.5. Compulsion Defences

8.2.5.1. Introduction

In domestic criminal justice systems, it is usual to find defences such as duress, compulsion, coercion, necessity, self-defence and *force majeure*. In common these defences have that they recognize that sometimes individuals are coerced into doing things they do *not desire* to do.¹⁶⁷¹ The criminal behaviour can hence be a *reaction* to something. A difference may, however, be made between the various compulsion defences depending on the type of phenomenon that causes the situation of compulsion, the extent to which the person in the compulsion situation is able to make choices, etc.¹⁶⁷²

In common law jurisdictions, a difference is often made between situations of choice between two evils, that is, *necessity* which often is regarded as a possible justification, and situations of overwhelming pressure, that is, *duress*, which generally is perceived as a possible excuse.¹⁶⁷³ Duress is often caused by another person, whereas necessity generally is brought about by a situation (for example, an accident or an emergency).¹⁶⁷⁴ In continental legal systems, on the other hand, the relevant difference is generally between *justifying necessity* and *excusing necessity*, and both forms of necessity require that there has been a threat against a legally protected interest, or to put it another way, that there has been a conflict between two interests (for example, between a life interest and a property interest).¹⁶⁷⁵ Whereas justifying necessity generally has to do with situations where a choice has to be made between two evils and the chosen evil is less serious, excusing necessity is rarer and refers to situations where there has been a threat against

¹⁶⁷⁰ *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 706. See also e.g., *Todorović*, Judgement, TC, ICTY, 31 July 2001, paras 94-95.

¹⁶⁷¹ Ashworth 2006, at 224. Sistaré has likewise observes that in duress situations, an individual makes choices, but the individual is not able to choose “in the normal way.” Sistaré 1989, at 315. See also Kadish 1987, at 273-274, and S. J. Morse, ‘Culpability and Control’, 142 *University of Pennsylvania Law Review* (1994), at 1596.

¹⁶⁷² E.g., a difference is in some legal systems made between *coercion* and *force majeure*, which leave to the actor no other choice, and *necessity*, where the actor is pressured but able to make a choice. UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 2) (Yearbook of the International Law Commission 1986, Volume II, Part Two), at 51 (paras 152-153).

¹⁶⁷³ E.g., *Black’s Law Dictionary*, 9th ed. (2009) (‘duress’ and ‘necessity’).

¹⁶⁷⁴ S. Janssen, ‘Mental Condition Defences in Supranational Criminal Law’, 4 *International Criminal Law Review* (2004), at 88. Ashworth makes the distinction between behaviour caused by threats from another person (duress *per minas*) and behaviour to avert dire consequences (necessity or duress of circumstances). Ashworth 2006, at 219.

¹⁶⁷⁵ E.g., regarding Germany Hörnle 2008, at 14, and regarding Finland A.-M. Nuutila, *Rikoslain yleinen osa* (Helsinki: Lakimiesliiton kustannus, 1997), 305-311.

a legally protected interest and “the offender could not reasonably have been expected to have acted otherwise”.¹⁶⁷⁶

Compulsion defences give rise to evaluations of: (1) how serious the threat against an interest has to be; (2) how serious the crime committed in response has been; and (3) what the relationship between these two should be. Simplifying, it may be said that in cases of justifying necessity, the main question is often the *proportionality* between the threat and the caused criminal act. Justifying necessity is rarely allowed in cases that involve the loss of human lives.¹⁶⁷⁷ For example, Ashworth has argued that: “Where it is a question of liability for taking one innocent life to save another, the rationale must be one of excuse, not justification.”¹⁶⁷⁸

In duress or “excusing necessity”, the proportionality between the threat and the response is not the main question.¹⁶⁷⁹ Instead, the focus is put on what can be expected from the person in duress. The duress defence may therefore be said to be a “concession to human frailty”¹⁶⁸⁰ or an expression of “understanding for the actor”.¹⁶⁸¹ The normative assessment of what can be expected can have as its basis what kinds of threats “ordinary people” generally endure or what kind of pressure the person in question can be expected to tolerate taking into consideration his/her age, education, etc.¹⁶⁸² In both cases, the law reflects social expectations, even though national legal systems differ in how explicitly they recognize this.¹⁶⁸³ The duress excuse is thus generally justified with: (a) the existence of a hard choice situation not caused by the perpetrator; and (b) with the fact that the criminal behaviour has been understandable in that situation. Often it is, however, also stressed that in situations of duress, (c) the perpetrator has not wanted or desired to behave criminally.¹⁶⁸⁴ Norrie has in this regard argued that the legal evaluation of duress

¹⁶⁷⁶ The Criminal Code of Finland, Chapter 4, Section 5. According to Hörnle, the legal standard in Germany is that there is an imminent danger for his life, health, or freedom of movement, or if someone from his family or a person otherwise close to him was thus endangered, and if this danger could not have been averted otherwise and the offender could not have been “reasonably expected” (German *zugemutet*) to endure the dangerous situation. Hörnle 2008, at 14.

¹⁶⁷⁷ Self-defence is, however, a justificatory defence that in some domestic legal systems is accepted also in connection to cases involving loss of life. In relation to self-defence, it is interesting that the ECHR provides that “[d]eprivation of life shall not be regarded as inflicted in contravention of [the right to life...] when it results from the use of force which is no more than absolutely necessary [...] in defence of any person from unlawful violence.” Article 2(2), ECHR.

¹⁶⁷⁸ Ashworth 2006, at 227.

¹⁶⁷⁹ In this regard, it is, however, noteworthy that duress in many common law jurisdictions is not accepted in connection to murder. In civil law jurisdictions, on the other hand, the defence generally applies to all crimes. P. Akhavan, ‘Should Duress Apply to All Crimes? A Comparative Appraisal of Moral Involuntariness and the Twenty Crimes Exception under Section 17 of the Criminal Code’, 13 *Canadian Criminal Law Review* (2009), at 271 ff.

¹⁶⁸⁰ Hörnle 2008, at 30-31.

¹⁶⁸¹ L. E. Chiesa, ‘Duress, Demanding Heroism, and Proportionality’, 41 *Vanderbilt Journal of Transnational Law* (2008), at 752.

¹⁶⁸² Cf. Kadish 1987, at 274. Barton has emphasized that the applicability of the excuses is not static, but something that has to be evaluated *in casu*. Baron 2007, at 23.

¹⁶⁸³ Hörnle 2008, at 31.

¹⁶⁸⁴ Horder has argued that the key issue in necessity is the moral imperative to act, whereas it in duress is the personal sacrifice the coerced person is asked to make. J. Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’, 11 *Canadian Journal of Law and Jurisprudence* (1998), at 143.

also often involves an investigation into *motives* of the accused person and an evaluation of the acceptability of these motives.¹⁶⁸⁵ Sadism and hatred are, for example, motives that are perceived to be irreconcilable with claims of duress or necessity.¹⁶⁸⁶ Likewise Hahto has observed that both the motives of the actor and the context in which an act occurs may affect the evaluation of whether the act should be considered justified, the actor should be considered excused or the punishment should be reduced.¹⁶⁸⁷ From a criminal law perspective (where motives largely are legally irrelevant at the conviction stage) the central role given to the motives in connection to certain defences is interesting.

8.2.5.2. Self-Defence and Necessity¹⁶⁸⁸

In international criminal law, the question of self-defence may be approached both from a “normal” criminal law perspective and from a public international law perspective. From a criminal law perspective, it may be asked whether a person has the right to avert an attack *directed against him/her* in a way that involves the commission of an international crime. This type of (individual) self-defence is an accepted ground for excluding criminal responsibility in most legal systems of the world. Individuals are hence perceived to have a right to “hold one’s own against assault.”¹⁶⁸⁹ In international criminal law, the acceptability and scope of self-defence is, however, not as evident. As noted by van der Wilt:

As assets of the state, soldiers are expected to perform their military defensive duties on behalf of the collective. As lawful combatants they have the right to kill and to be killed, a privilege which they share on a perfectly reciprocal basis [...]. This legal symmetry on the battlefield implies that any repulsion of an attack by another (fellow) soldier does not count as individual self-defence in a legal sense, because the latter would require the unlawfulness of the prior attack in the first place.¹⁶⁹⁰

From a public international law perspective, on the other hand, it may be questioned whether certain *attacks against a State* gives rise to a collective right to self-defence, which for individual persons entail that they have a right to participate in that self-defence and to commit an act that otherwise would constitute an international crime.¹⁶⁹¹ In common these two types of self-defence have the general requirements for acceptable self-defence,

¹⁶⁸⁵ Norrie 1991, at 156 (referring to Lord Simon).

¹⁶⁸⁶ Cf. J. D. Ohlin, ‘The Bounds of Necessity’, 6 *Journal of International Criminal Justice* (2008), at 298.

¹⁶⁸⁷ Hahto 2004, at 51.

¹⁶⁸⁸ Most scholars discuss the defence of necessity in connection to duress. The present author, however, finds that whereas necessity primarily has a justificatory character (and proportionality considerations are central), duress is an excusatory defence where the question of what can be expected of individuals is the central question. As such, the present author feels that necessity is closer to self-defence than duress.

¹⁶⁸⁹ Eser 1987, at 51 (referring to Jescheck). Eser notes that self-defence is also held to have a social function, viz. to self-defence is regarded as “the actualization of the legal interest in promotion of general peace.” *Ibid.*

¹⁶⁹⁰ H. G. van der Wilt, ‘Can Romantics and Liberals Be Reconciled? Some Further Reflections on Defending Humanity’, 7 *Journal of International Criminal Justice* (2009), at 532.

¹⁶⁹¹ Cf. M. Scaliotti, ‘Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 1’, 1 *International Criminal Law Review*, at 158. See also van Sliedregt 2003, at 254-255.

viz. that the self-defence is immediately connected to the initial illegal attack and that the self-defence reaction is proportional to the initial attack.

In international criminal law, the first codification of self-defence can be found in the Rome Statute. ICC Article 31(1)(c) stipulates that a person shall not be criminally responsible if, at the time of that person's conduct:

the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

This definition of self-defence – which by ICTY has been found to reflect customary international law¹⁶⁹² – has, however, attracted considerable criticism by some scholars. Most notably, it has been asked if international crimes ever can be characterized as *reasonable action* or as *proportionate*.¹⁶⁹³ For example, David has found that “to say that a genocide or a crime against humanity could find some justification through self-defence is at least strange, if not absurd, unless we give the States credit for a dark sense of humour.”¹⁶⁹⁴ It should also be noted that self-defence measures by States that violate *jus cogens* norms, such as genocide, are not accepted. The idea that individuals in corresponding situations would have a right to claim self-defence has found to be a legal anomaly.¹⁶⁹⁵ It, however, appears that numerous scholars find self-defence (at least in connection to war crimes)¹⁶⁹⁶ as conceivable. For example, Schabas asks if not a soldier who is attacked by an escaping prisoner of war has the right to harm the prisoner of war in self-defence.¹⁶⁹⁷ Many academic scholars therefore in relation to self-defence focus on elaborating how the concepts of reasonable, proportional, imminent etc. should be understood.¹⁶⁹⁸ The present author is inclined to agree with David that it is difficult to envisage that genocide and crimes against

¹⁶⁹² *Kordić & Čerkez*, Judgement, TC, ICTY, 26 February 2001, para. 451. It has, however, been argued that the right to protect property through self-defence is not part of customary international law. E.g., Cassese *et al.* 2011, at 463.

¹⁶⁹³ E.g., David 2009(b), at 762 (regarding genocide and crime against humanity) and 765.

¹⁶⁹⁴ David 2009(b), at 758-759.

¹⁶⁹⁵ It has, in this regard, been suggested that Article 21(3) of the ICC Statute (that the interpretation of the Statute must be consistent with human rights) can be interpreted to exclude justificatory defences to *jus cogens* norms. See further Grover 2010, at 558-559 (see also at 560).

¹⁶⁹⁶ Van Sliedregt (and some others), however, want to maintain the defence also in relation to genocide and crimes against humanity, as “reality can confront us with unpredictable situations.” Van Sliedregt 2003, at 258 (and 261).

¹⁶⁹⁷ Schabas 2010(a), at 489. That some force can be used in this situation is, however, already foreseen by Article 42, GC III, which stipulates that: “The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.” It is hence questionable whether this at all would be characterized as a war crime. See also Cassese 2002(c), at 953.

¹⁶⁹⁸ E.g., K. Ambos, ‘Other Grounds for Excluding Criminal Responsibility’, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 1032-1035, Ambos 2011(b), at 307-310, Eser 2008, at 880-883, van Sliedregt 2003, at 260-267, and Werle 2009(b), at 201-202.

humanity ever could be regarded as the right way to act and as a proportional response to an attack. The same applies also to most war crimes.

The ICC definition of self-defence emphasizes that a distinction has to be made between a *State's* right to self-defence and the *individual* right to take self-defence measures by stressing that the “fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under” the ICC Statute. ICTY has, in this regard, held that the legally relevant question is generally not whether an act has been committed pre-emptively, defensively or offensively, but whether it is criminal in itself,¹⁶⁹⁹ and that “military operations in self-defence do not provide a justification for serious violations of international humanitarian law.”¹⁷⁰⁰ In connection to genocide, crimes against humanity and war crimes, the central question is therefore whether the individual has an *individual* right to defend himself/herself.¹⁷⁰¹

It has been noted that the fact that the ICC Statute allows self-defence to protect other things as “self”, namely other person and property, has made self-defence in ICC international criminal law more into a general necessity defence.¹⁷⁰² The defence of necessity has in the international case law, *inter alia*, been discussed in the *Orić* case (ICTY), where the Trial Chamber suggested that a defence of necessity exists in customary international law and that its requirements are: (1) a present and imminent threat of severe and irreparable harm to life; (2) that the measure taken was the only means to avoid the aforesaid harm; (3) that the measure taken was not disproportionate to the expected harm; and (4) that the perpetrator did not voluntarily bring about the necessity situation.¹⁷⁰³ These criteria for necessity stress the close relationship between self-defence and necessity situations.¹⁷⁰⁴ Interestingly, in some post-World War II cases, the situations characterized as necessity situations were defined in very broad terms. For example, in the *Einsatzgruppen* trial, some defendants claimed that the Jews were dangerous bearers of bolshevism, which caused an emergency situation (necessity) justifying the mass killing of Jews. The court did obviously not accept this line of argumentation.¹⁷⁰⁵ The

¹⁶⁹⁹ E.g., *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 812.

¹⁷⁰⁰ *Kordić & Čerkez*, Judgement, TC, ICTY, 26 February 2001, para. 452. See also *Boškoski & Tarčulovski*, Judgement, AC, ICTY, 19 May 2010, paras 44-51.

¹⁷⁰¹ Cf. “Individuals within states, however, are only subject to moral rules about how they fight in war, not whether they fight. The determination to go to war is ascribed to the state, and the state, not its combatants, is responsible for the justness of that determination. On this perspective, while state may lose its right of self-defence by becoming an aggressor, combatants on both sides always retain their individual right of self-defence [...]” S. Viner, ‘Self-Defense, Punishing Unjust Combatants and Justice in War’, 4 *Criminal Law and Philosophy* (2010), at 315. According to international criminal law, those who fight on the just and unjust side of the war are hence morally and legally equal. Viner’s argument does not take into account the fact that individuals may be held responsible for the crime of aggression.

¹⁷⁰² Cf. David 2009(b), at 757. More generally, David finds that self-defence can be regarded as an under-category of necessity. *Ibid.*, at 757 (with reference to Hennau and Verhaegen). It should be noted that in some domestic legal systems, a difference is made between self-defence, defence of others and defence of property. J. Ohlin, ‘Excuses and Justifications’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 320.

¹⁷⁰³ *Orić*, Transcripts, TC, ICTY, 8 June 2005, at 9027.

¹⁷⁰⁴ Gaeta differentiates necessity and self-defence by arguing that in necessity the victim has to be innocent. E.g., P. Gaeta, ‘May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?’, 2 *Journal of International Criminal Justice* (2004), at 791.

¹⁷⁰⁵ *Einsatzgruppen*, Judgment, CCL, April 1948, at 464-465.

claims made in the *Einsatzgruppen* case, however, stress that different opinions exist on what constitutes situations of necessity. Morse has, in this regard, noted that the concept of “coercion” is not well established and that no consensus about its meaning exists among experts or laypeople.¹⁷⁰⁶ Most lawyers and laymen would, however, not regard situations where the objective existence of an imminent threat is as questionable as in the *Einsatzgruppen* case as situations of coercion.

8.2.5.3. But What about Military Necessity, Reprisals and *Tu Quoque*?

Self-defence can hence by its underlying rationale (that is, that harm is caused due to an unlawful attack by another) be connected to *military necessity*, but also to the related arguments of *legitimate reprisals* and *tu quoque*. In common self-defence, military necessity, reprisals and *tu quoque* namely have that they raise the question of how macro (often State) level reasons for action affect the question of individual responsibility (viz. the “micro level”). Military necessity, reprisals and *tu quoque*, however, depart from self-defence (and, for example, *force majeure*) in that the external compulsion to commit the crimes is not that strong.

Military necessity may be defined as “an exception that exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose.”¹⁷⁰⁷ Hayashi argues that military necessity should be distinguished from the general defence of necessity in that military necessity does not require that the measure taken is the only means available to safeguard the threatened interest.¹⁷⁰⁸ It is today generally found that military necessity is not an applicable defence in international criminal law, as the function of international humanitarian law and international criminal law is precisely to settle what is allowed to do in the name of gaining a military advantage. International humanitarian law and the corresponding international offence definitions do, however, at times connect the criminality of certain acts to the fact that they are not justified by military necessity.¹⁷⁰⁹

¹⁷⁰⁶ Morse 1994, at 1611 (and 1605).

¹⁷⁰⁷ N. Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’, 28 *Boston University International Law Journal* (2010), at 43.

¹⁷⁰⁸ Hayashi 2010, at 58. Some scholars, however, discuss necessity and military necessity as one. See e.g., May 2007, at 199-210.

¹⁷⁰⁹ See further e.g., van Sliedregt 2003, at 296, David 2009(b), at 774, Hayashi 2010, at 42, and H. van der Wilt, ‘Justifications and Excuses in International Criminal Law: An Assessment of the Case-law of the ICTY’, in B. Swart *et al.* (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011), at 286-288. E.g., the grave breach of “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Article 2, ICTY Statute. The ICTY Appeals Chamber has, however, emphasized that there is “an absolute prohibition on the targeting of civilians in customary international law” and that military necessity never can be claimed to justify such attacks. *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 109. In its case law, the ICTY has, however, held that when war crime provisions *explicitly* require that military necessity is considered (such as in relation to the destruction of property and forcible evacuation of population), the corresponding crimes against humanity provisions may also *implicitly* demand such an evaluation when crimes against humanity are committed in war time. *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, paras 593, 598 and 615.

Also the law on belligerent reprisals is concerned with settling the line between lawful and unlawful acts in armed conflicts. Whereas reprisals against, for example, wounded and sick and prisoners of war clearly are forbidden under international humanitarian law, the customary law prohibition of reprisals against civilians divides the academics.¹⁷¹⁰ In the *Martić case*, ICTY held that reprisals always are “drastic and exceptional measures” and hence subject strict conditions, such as that they are committed as a last resort and that they are proportional to the initial attack.¹⁷¹¹ The Trial Chamber interpreted the proportionality requirement to demand that “reprisals must be exercised, to the extent possible, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians.”¹⁷¹² In some cases, the ICTY has emphasized that reprisals against civilians are not legal.¹⁷¹³ Some scholars, however, interpret the *lex lata* of belligerent reprisals to allow certain acts that otherwise would be characterized as international crimes.¹⁷¹⁴

While the possibility to claim reprisals as a valid defence has not completely been ruled out, it is today generally submitted that the argument of *tu quoque* (that is, the argument “whereby the fact that the adversary has also committed similar crimes offers a valid defence”¹⁷¹⁵) has lost its legal validity.¹⁷¹⁶ In contrast to situations of self-defence and reprisals, in *tu quoque* situations, the unlawful act is not a direct response to an unlawful act of another and the intention is not to hinder the attack of another respectively to force the other party to cease with its violation.¹⁷¹⁷ In the *Kupreškić et al.* case, the ICTY stressed that the law of armed conflict is not today anymore characterized by reciprocity, that is, “a narrow bilateral change of rights and obligations”, but that the law generally

¹⁷¹⁰ See further e.g., Schabas 2010(a), at 497, and van Sliedregt 2003, at 293.

¹⁷¹¹ *Martić*, Judgement, TC, ICTY, 12 June 2007, paras 465-467.

¹⁷¹² *Martić*, Judgement, TC, ICTY, 12 June 2007, para. 467. This conclusion was not overruled in the Appeal Judgement, which only indirectly commented upon the Trial Chamber’s interpretation of the law on reprisals. *Martić*, Judgement, AC, ICTY, 8 October 2008, paras 263-267.

¹⁷¹³ *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, paras 527-531.

¹⁷¹⁴ C. J. Greenwood, ‘Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, in H. Fischer, C. Kreß & S. R. Lüder (eds.), *International and National Prosecution of Crimes under International Law* (Berlin: Berlin Verlag, 2001), at 540 (regarding the *Kupreškić* and *Martić* judgements ‘the assertion in both decisions that customary international law contains an absolute ban on reprisals against civilians is unfounded and was unnecessary for the decision in either case.’) See also *Galić*, Judgement, TC, ICTY, 5 December 2003, fn 77 (to para. 44). See also M. Bothe, ‘War Crimes’, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 387.

¹⁷¹⁵ *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 515.

¹⁷¹⁶ E.g., Ambos 2011(b), at 328-329, Bantekas 2010, at 121, van Sliedregt 2003, at 295, and Werle 2009(b), at 226-227.

¹⁷¹⁷ Osiel has in this regard noted that the *tu quoque* argument is not concerned with chronology in the same way as e.g., reprisals and that its main rationale is simply to “achieve fairness in the sense of common rules for all, regardless of whose breach came first.” M. Osiel, *The End of Reciprocity – Terror, Torture, and the Law of War* (Cambridge: Cambridge University Press, 2009), 103. Others, however, also regard *tu quoque* arguments as connected to reactions to crimes of others. Harhoff, e.g., notes that *tu quoque* acts are “purely retaliatory”. In contrast to reprisals, they do hence not try to seek the adversary to act lawfully. F. Harhoff, ‘*Tu Quoque* Principle’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 553.

contains absolute prohibitions.¹⁷¹⁸ This approach is understandable in that it emphasizes the importance of the values protected by the criminalizations. At the same time, it, however, entails that the “law has virtually no place for “comparative fault”, no doctrinal device for mitigating the wrongdoing or culpability of the accused in light of that of the accuser.”¹⁷¹⁹

8.2.5.4. Superior Orders

The defence of superior orders has its origin in the strict hierarchical relationships that are typical in military settings, that is, the same factual background as the doctrine of superior responsibility. The rationale of the defence is that subordinates in military hierarchies have an explicit duty to obey orders: Disobedience may lead to disciplinary measures or punishments. The punishment threat together with the military training emphasizing the duty to obey may make it be difficult for subordinates to resist criminal orders. Absolute military discipline is, however, often justified with the need to have structured actions in chaotic situations. Furthermore, it is sometimes suggested that military discipline increases the adherence to the law of war. The dilemma of superior orders is therefore that “telling soldiers that they face punishment unless they disobey illegal orders means telling them to think for themselves and question authority, yet directing them to do that risks undermining their training to follow orders, work as a cohesive whole, and subordinate their own desires and views to the collective enterprise.”¹⁷²⁰ It has also been noted that it is morally problematic if the law punishes the subordinate no matter how he/she chooses to act, that is, either for disobeying the order or for committing a crime based on the order.¹⁷²¹

In military law, the subordinate’s responsibility has traditionally been excluded or at least strongly restricted in situations where the subordinate’s criminal behaviour is ordered by a superior. The underlying idea is then that the responsibility should be born by the superior who has given the unlawful order. In international law, there were initially both those who thought that superior orders gave the subordinate a complete defence (the so-called *respondeat superior* principle) and those who argued that superior orders only exempted the subordinates from responsibility if the orders were manifestly unlawful.¹⁷²² In 1945, the Nuremberg Charter, however, adopted a third approach and established that superior orders should not be regarded as a *defence*, but only as a factor that can *mitigate* the sentence.¹⁷²³ This approach was for a long time the one favoured in international criminal law and, for example, the statutes of the international *ad hoc* tribunals only

¹⁷¹⁸ *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 517.

¹⁷¹⁹ *Osiel* 1995, at 553-554.

¹⁷²⁰ *Minow* 2007, at 5.

¹⁷²¹ *Lappi-Seppälä* 1998, at 285.

¹⁷²² See e.g., C. Garraway, ‘Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied’, 81 *International Review of the Red Cross* (1999), at 786-787.

¹⁷²³ Article 8, Nuremberg Charter. McCoubrey has, however, argued that the Nuremberg Charter did not in fact change the legal state, as the Nuremberg Charter should be seen in its context, that is, as an instrument used only in the prosecution of senior officials. H. McCoubrey, ‘From Nuremberg to Rome: Restoring the Defence of Superior Orders’, 50 *International and Comparative Law Quarterly* (2001), at 389-390. From a phenomenological perspective, it is interesting that this plea in the post-World War II trials of many trials were raised by people belonging to the *leadership* stratum of defendants.

recognize superior orders as a possible ground for mitigating the sentence.¹⁷²⁴ In contrast to the *ad hoc* tribunals' statutes, the ICC Statute, however, stipulates that superior orders, in certain limited situations, may relieve subordinates from criminal responsibility. Article 33 of the ICC Statute namely establishes that:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of [...] a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of [...] the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The ICC Statute can be said to follow one of the doctrines that was suggested before the Nuremberg trials, that is, the ought-to-know-doctrine which establishes that subordinates who follow orders that obviously are criminal cannot make use of the defence of superior orders.¹⁷²⁵ This doctrine has been found to one of "partially shared responsibility", that is, the doctrine "demands that the subordinate share responsibility with his superior only for the clearest, most obvious crimes."¹⁷²⁶ The ICC provision, however, departs from its historical predecessors in that it is also available in non-military hierarchies.¹⁷²⁷ In this regard, the ICC Statute reflects the legal development of the doctrine of superior responsibility. To what extent the defence of superior orders will be available to non-military subordinates remains, however, to be seen. Van Sliedregt has, in this regard, found that the superior-subordinate relationship "should be interpreted more strictly in the context of superior orders" due to the special military duty to obey, and that the doctrines of superior responsibility and the defence of superior orders should therefore not be regarded as two sides of the same coin.¹⁷²⁸ According to her, civilian subordinates should hence not, as a rule, be exempted from responsibility due to orders.

As regards the content of the manifestly unlawful standard, McCoubrey has noted that the ICC Statute contains the tripartite requirements of obligation, lack of knowledge of unlawfulness and non-apparent unlawfulness, and that the doctrine therefore is far from being a *carte-blanche* for the commission of war crimes under the shelter of orders.¹⁷²⁹ Likewise Garraway stresses that the requirements that must be fulfilled for exemption of criminal responsibility in situations of superior order to commit war crimes are cumulative, which means that the defence "will be extremely limited in scope".¹⁷³⁰

The "manifestly unlawful" requirement in the ICC Statute seems primarily to be an *objective standard*, which is reflected in the fact that the Statute in itself defines

¹⁷²⁴ Article 7(4), ICTY Statute, and Article 6(4), ICTR Statute.

¹⁷²⁵ McCoubrey 2001, at 386 and 389-390.

¹⁷²⁶ Osiel 1999, at 58.

¹⁷²⁷ Cassese *et al.* 2011, at 471.

¹⁷²⁸ van Sliedregt 2003, at 323-324.

¹⁷²⁹ McCoubrey 2001, at 392.

¹⁷³⁰ Garraway 1999, at 791. Gaeta has, however, questioned how it is possible to argue that the ICC Statute deals with the most serious crimes of concern to the international community as a whole at the same time as it is recognized that some of these crimes may not be manifestly unlawful. P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', 10 *European Journal of International Law* (1999), at 190-191.

certain acts as manifestly unlawful (that is, orders to commit genocide and crimes against humanity).¹⁷³¹ It has, however, been suggested that when considering whether an order was manifestly unlawful consideration should be given to the qualifications of the subordinate, so that more is expected from a “fully trained army lawyer” than from an inexperienced foot soldier.¹⁷³² Some consideration could hence be given to the individual circumstances of the subordinate and (maybe) his/her personal perception of the situation. To allow for personal considerations may, however, be problematic for the unity of the law. Smeulers and Werner have in this regard held that the “psychological reality in which perpetrators sometimes operate” is such that it does not have to be evident for perpetrators (subjectively) that even genocide and crimes against humanity are manifestly unlawful, as it is questionable whether one can “except normal perception in abnormal times”.¹⁷³³ Similarly, Osiel finds that “the ‘manifest illegality’ rule turns out to fail, in many situations, [...] because it relies on unrealistic assumptions about the strength and universality of ‘humanitarian’ moral sentiments.”¹⁷³⁴ Furthermore, the law of armed conflicts is not logical in all respects. The law, for instance, forbids certain ways to kill one’s adversaries (for example, poison), but allows others similarly horrendous.¹⁷³⁵ The manifest illegality test can also be problematic with regard to the criminalization technique used in international criminal law. Osiel has in this regard held that: “Any act the wrongfulness of which can be discerned only by a trip to the library, let us agree, is not manifestly illegal.”¹⁷³⁶ International criminalizations, however, sometimes deliberately contain crime elements requiring case specific assessments, such as “not justified by military necessity”, “as far as military requirements permit” and proportionality, and it may be difficult for foot soldiers to make these evaluations by themselves.¹⁷³⁷

An interesting question in relation to superior orders is to what extent the orders must result in a situation of compulsion, that is, to what extent the order must entail that the subordinate is acting against his/her own desires. In this regard, Triffterer has held that the ICC Statute only requires that the crime is committed *pursuant to orders*, that is, that there must be an *intent* to carry out the order. According to Triffterer, the

¹⁷³¹ The present author therefore disagrees with Paust, who argues that the primary rationale of the superior order defence is to “spare soldiers from criminal prosecution in group action or chain action situations when the lower ranking soldier does not possess the requisite criminal mind or criminal culpability.” J. J. Paust, ‘Superior Orders and Command Responsibility’, in M. C. Bassiouni (ed.), *International Criminal Law, Volume 1*, 2nd ed. (Ardsley, New York: Transnational Publishers, 1999), at 225. The focus in the defence does not lie in investigating the *mens rea* of an individual soldier, but on settling in general what can be required from individuals in subordinate hierarchical position.

¹⁷³² Cryer *et al.* 2010, at 419. Likewise e.g., L. C. Green, ‘Superior Orders and Command Responsibility’, 175 *Military Law Review* (2003), at 339-340, and van Sliedregt 2003, at 325.

¹⁷³³ Smeulers & Werner 2010, at 41. The same view is expressed by e.g., A. Zahar, ‘Superior Orders’, in A. Cassese *et al.* (eds.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 527.

¹⁷³⁴ Osiel 1999, at 25.

¹⁷³⁵ Osiel 1999, at 116-117.

¹⁷³⁶ Osiel 1999, at 91.

¹⁷³⁷ Osiel 1999, at 92-93.

motives of the subordinate are not of relevance.¹⁷³⁸ Likewise, for example, Cassese *et al.* have argued that that the defence “does not concern coercion of any kind directed to the subordinate”.¹⁷³⁹ The case law of ICTY on superior orders, however, indicates that the motives of the subordinate are relevant when evaluating whether there has been legally significant superior orders. For example, in the *Bralo* case, the Appeals Chamber noted that there was no evidence of Bralo trying to resist the unlawful orders, but rather evidence of his enthusiasm and willingness to commit the crimes.¹⁷⁴⁰

Finally, Lappi-Seppälä has pointed out that different legal systems emphasize different aspects in relation to superior orders. In some legal systems, the main focus is on the *status of the order*, that is, whether it is lawful/unlawful and binding/non-binding. In other legal systems, the emphasis is rather on the *balancing of interests*, that is, the arguments for and against following the orders. Furthermore, systems differ in what relevance they give to *the subordinate’s awareness* regarding the unlawfulness of the order. A difference may also be given to the *subordinate’s ability to resist* the order.¹⁷⁴¹ In international criminal law, all these factors are considered, but with varying emphases. Due to the coexistence of the ICC and *ad hoc* tribunals’ approaches to superior orders, it is difficult to ascertain “the” *lex lata* of superior orders in international criminal law.¹⁷⁴²

8.2.5.5. Prescription of Law

It is also possible that enacted laws or other legally binding instruments create legal obligations to commit international crimes. In the same way as subordinates are expected to follow superior orders, are individuals expected to follow the laws of the land. In international criminal law, the same rules apply to prescription of law (or “orders by a Government”) as to superior orders. Before the *ad hoc* tribunals a prescription of law may hence mitigate the punishment,¹⁷⁴³ whereas it before the ICC may function as a defence if it is not manifestly unlawful.¹⁷⁴⁴

8.2.5.6. Duress

Neither the statutes of the post-World War II tribunals nor the statutes of the modern *ad hoc* tribunals have regulated the defence of duress. Despite this, all tribunals have recognized its existence. For example, the Nuremberg Tribunal has held that: “The true

¹⁷³⁸ O. Triffterer, ‘Superior Orders and Prescription of Law’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 925.

¹⁷³⁹ Cassese *et al.* 2011, at 464.

¹⁷⁴⁰ *Bralo*, Judgement (sentencing), AC, ICTY, 2 April 2007, para. 24.

¹⁷⁴¹ Lappi-Seppälä 1998, at 293.

¹⁷⁴² Likewise e.g., A. Zimmermann, ‘Superior Orders’, in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford: Oxford University Press, 2002), at 965 and 972. It should be noted that there also are conflicting views on what the content of customary international law in relation to superior orders was before the establishment of the ICTY and the ICC. E.g., C. Fournet, ‘Judicial Development of the Law of Defences by the International Criminal Tribunals’, in S. Darcy & J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), at 236 (incl. fn 35).

¹⁷⁴³ Article 7(4), ICTY Statute, and Article 6(4), ICTR Statute.

¹⁷⁴⁴ Article 33, ICC Statute.

test, which is found in varying degrees in the criminal law of most nations, is [...] *whether moral choice was in fact possible*.¹⁷⁴⁵

In the CCL trials, similar pronouncements were made. In the *Flick* case, the defendants had used slave labour in their factories, but the tribunal recognized that the Third Reich was a “reign of terror” and that some of the defendants acted under a “clear and present danger” as the defendants would probably have suffered harsh consequences if they would have refused to use slave labour.¹⁷⁴⁶

As regards the modern *ad hoc* tribunals, these tribunals have only in a few cases been asked to consider the defence of duress. Famously, in the *Erdemović* case, the ICTY was faced with a claim of life-threatening duress. In that case, Erdemović admitted that he had killed numerous individuals in the Srebrenica massacre. When he pleaded guilty, he, however, also made the following statement:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: “If you’re sorry for them, stand up, line up with them and we will kill you too.” I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.¹⁷⁴⁷

The *Erdemović* Trial Chamber made an inquiry into the post-World War II case law and argued that duress can constitute a complete defence in rare circumstances, but that it in most cases only constitutes a factor that can mitigate the punishment.¹⁷⁴⁸ When evaluating the duress situation, the Trial Chamber found the following questions to be relevant: (1) Could the accused have avoided the situation in which he found himself?; (2) Was the accused confronted with an insurmountable order which he had no way to circumvent?; (3) Was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards?; and (4) Did the accused possess the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?¹⁷⁴⁹ In the topical case, the Trial Chamber, however, found that it could not accept the plea of duress (or extreme necessity as it called it) because the defence team had not provided the Trial Chamber with any evidence corroborating the duress situation.¹⁷⁵⁰

The *Erdemović* Sentencing Judgement was appealed, and the Appeal Judgement that followed was extremely split. With a majority decision, the Appeals Chamber concluded that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.¹⁷⁵¹ Judges McDonald and Vohrah came to this conclusion based on the nature of the crimes (the “most heinous crimes known to humankind”) and the “obligation under the Statute to

¹⁷⁴⁵ *Göring et al.*, Judgment, IMT, 1 October 1946, at 224 (emphasis added).

¹⁷⁴⁶ *Flick*, Judgment, CCL, 22 December 1947, at 1197-1198 and 1201-1202. See also e.g., *I. G. Farben*, Judgment, CCL, 30 July 1948, at 1179.

¹⁷⁴⁷ *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, para. 10.

¹⁷⁴⁸ *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, paras 18-19.

¹⁷⁴⁹ *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, paras 18 and 89.

¹⁷⁵⁰ *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, paras 20 and 91.

¹⁷⁵¹ *Erdemović*, Judgement, AC, ICTY, 7 October 1997, para. 19 (Judges McDonald, Vohrah and Li in majority, and Judges Cassese and Stephen in minority).

ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined”.¹⁷⁵² Of the dissenting judges, Judge Cassese claimed that duress may be a complete defence if the following elements are fulfilled: (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb; (ii) there was no adequate means of averting such evil; (iii) the crime committed was not disproportionate to the evil threatened; and (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.¹⁷⁵³ He noted that the criterion of proportionality will be difficult to satisfy in situations where the underlying offence involves the killing of innocents, but that consideration should be given to the fact whether the crime would have been committed in any case by a person other than the one acting under duress.¹⁷⁵⁴ In the final sentencing judgement, it was accepted that Erdemović acted under a death threat and his duress was taken into consideration as a mitigating factor. He was sentenced to a prison sentence of five years for having killed approximately seventy persons.¹⁷⁵⁵ The ICTY followed the *Erdemović* majority decision in its *Kvočka et al.* Trial Judgement, where the Trial Chamber observed that:

Even if a knowing participant in a criminal enterprise was unwilling to resign because it would prejudice his career, or he feared he would be sent to the front lines, imprisoned, or punished, the Trial Chamber emphasizes that this is not an excuse or a defence to liability for participating in war crimes or crimes against humanity. It is well established in the jurisprudence of this Tribunal that duress is not a defence to committing war crimes or crimes against humanity.¹⁷⁵⁶

All *Erdemović* judgements have been strongly criticized in academia. The majority appeal judgement has, for example, been criticized for creating an *absolute rule* prohibiting the shooting of civilians and for not recognizing that excusing is essentially about sympathy and compassion.¹⁷⁵⁷ In other words, the judgement has been found to require “demanding heroism”.¹⁷⁵⁸ It has also been put forward that the majority judgement wrongly treats duress as a justification.¹⁷⁵⁹ Fichtelberg, on his part, challenges the methodology used by

¹⁷⁵² *Erdemović*, Judgement (sep. op. of Judges McDonald and Vohrah), AC, ICTY, 7 October 1997, paras 75 and 88. Judge Li, on his part, argued that: “Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them. Such an anti-human policy of law the international community can never tolerate, and this International Tribunal can never adopt.” *Erdemović*, Judgement (sep. and diss. op. of Judge Li), AC, ICTY, 7 October 1997, para. 8.

¹⁷⁵³ *Erdemović*, Judgement (sep. and diss. op. of Judge Cassese), AC, ICTY, 7 October 1997, paras 12 and 16.

¹⁷⁵⁴ *Erdemović*, Judgement (sep. and diss. op. of Judge Cassese), AC, ICTY, 7 October 1997, paras 42-43. See also *Erdemović*, Judgement (sep. and diss. op. of Judge Stephen), AC, ICTY, 7 October 1997, para. 68.

¹⁷⁵⁵ *Erdemović*, Judgement (sentencing), TC, ICTY, 5 March 1998, paras 14-15 and 17.

¹⁷⁵⁶ *Kvočka et al.*, Judgement, TC, ICTY, 2 November 2001, para. 403.

¹⁷⁵⁷ E.g., I. R. Wall, ‘Duress, International Criminal Law and Literature’, 4 *Journal of International Criminal Justice* (2006), at 741-742, and V. Epps, ‘The Soldier’s Obligation to Die When Ordered to Shoot Civilians or Face Death Himself’, 37 *New England Law Review* (2003), at 1011.

¹⁷⁵⁸ Cf. Chiesa 2008, at 741 ff.

¹⁷⁵⁹ Chiesa 2008, at 742, and Janssen 2004, at 94.

the judges, that is, the fact that they essentially derived the conclusion that duress cannot be a complete defence in international criminal law from the purpose of international criminal law.¹⁷⁶⁰ Judge Cassese's dissent, on the other hand, has been criticized for disregarding the difference between justifications and excuses, as he suggested that the defence requires both a proportionality test (justification) and that the criminal act is a response to an overwhelming pressure (excuse).¹⁷⁶¹ It has also been noted that Erdemović needed to be punished both to honour the pain of the victims and, possibly, to restore his sense of himself as a moral person.¹⁷⁶²

Interestingly, when the ICC Statute was adopted in 1998, an approach similar to minority dissent in the *Erdemović* Appeal Judgement was chosen. Article 31(1) (d) of the Rome Statute establishes that a person shall not be criminally responsible if, at the time of that person's conduct, the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the *person acts necessarily and reasonably* to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person's control. Also the ICC Statute has been criticized for not distinguishing between justifying and excusing necessity.¹⁷⁶³

8.3. Analysis

8.3.1. The Relationship between the Defences and the Crimes

It has been noted that there are essentially two different ways to mark the conceptual borders between war crimes and defences. On the one hand, it is possible that the practical demands of war are taken into consideration when the crime is defined and that the rule is then considered as more or less absolute. Alternatively, it is possible to set "boundaries of acceptable conduct in a much more demanding way", but to allow a number of defences.¹⁷⁶⁴ Also in relation to genocide and crimes against humanity it is possible to adopt offence definitions that are more or less open to exceptions. In the former case, the balancing of conflicting interests is primarily done *ex ante* in the law,

¹⁷⁶⁰ A. Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović*', 6 *Journal of International Criminal Justice* (2008), at 11.

¹⁷⁶¹ Chiesa 2008, at 750.

¹⁷⁶² R. Ehrenreich Brooks, 'Law in the Heart of Darkness: Atrocity & Duress', 43 *Virginia Journal of International Law* (2003), at 885-886.

¹⁷⁶³ E.g., Ambos 2003, at 255, and Fletcher 2005, at 34.

¹⁷⁶⁴ Osiel 1999, at 285-286. Thorburn has argued that one characteristic difference between crimes and justifications is that offence definitions generally stipulate what is prohibited conduct or *means* (e.g., killing), whereas justifications are defined in terms of *preferred ends*. M. Thorburn, 'Justifications, Powers, and Authority', 117 *The Yale Law Journal* (2008), at 1080. In international criminal law, there are, however, several *specific intent* crimes, in which the intended ends of the action are of central concern. As will be considered further below, it is, however, true that defences, in general, give *motives* a greater significance than the crime definitions.

whereas the balancing in the latter case largely is left to the judiciary. So which one of these two approaches has international criminal law chosen?

As a whole, it is presumably correct to say that international criminal law has adopted the first approach. In armed conflicts much harmful behaviour occurs that does not rise to the level of international crimes. From this perspective, international crimes can be characterized as a sort of minimum standards, which under *all* circumstances should be obeyed. The general approach to defences in international criminal law has also been restrictive.¹⁷⁶⁵ Interestingly, however, the restrictive approach has recently to some extent been challenged from two directions. On the one hand, criminal law scholars have argued for the applicability of ordinary domestic criminal law defences in international criminal law. This trend was most notably visible when the ICC Statute was negotiated. Secondly, moral panics caused by shocking atrocities have made people question the idea of absolute prohibitions.

When the Rome Statute of the ICC was negotiated, the question of defences in international criminal law was for the first time seriously and systematically debated. In these negotiations, it became evident that many criminal law scholars felt that the defences that were available in domestic criminal law also *mutatis mutandis* should be available in international criminal law. This was true especially in relation to excuses, but also in connection to some justifications. In the ICC Statute, self-defence can, for example, be claimed in connection to all crimes even though most scholars think that it is highly unlikely that anyone successfully could claim self-defence in relation to those genocide and crimes against humanity. Especially, in relation to specific intent crimes, such as genocide and persecution, it seems impossible to successfully argue self-defence. In self-defence, the primary *reason for action* shall namely be to avert an imminent threat against a protected interest.¹⁷⁶⁶ Furthermore, most international crimes cannot be characterized as proportionate reactions.

As regards the relationship between the offences and the defences, it should furthermore be noted that the rationale of certain criminalizations is more easily combined with the rationale of particular defences than others. It is, for example, foreseeable that a prisoner of war is *killed* in self-defence by a prison guard, whereas it seems impossible to imagine that a prisoner of war could be *raped* in self-defence. In most domestic legal systems, the available defences are, however, in theory, applicable to all (or at least most crimes), and whether they *de facto* can be applied depends on whether the defence

¹⁷⁶⁵ Here, the core crimes differ from terrorism, where the absolute nature of the criminalization has been one of the main questions of contention. In relation to that crime, Cassese has controversially claimed that there already *lex lata* exists an international crime of terrorism, but that “disagreement continue to exist on a possible *exception* to such a definition”, viz. most notable whether freedom fighters should be exempted from criminal responsibility. Cassese 2008, at 163.

¹⁷⁶⁶ It also seems impossible to successfully claim duress in relation to specific intent crimes, as the reason for action is also significant in relation to that defence. S. Yee, ‘The *Erdemović* Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia’, 26 *Georgia Journal of International and Comparative Law* (1997), at 295-302 (regarding genocide. Yee, however, makes the false claim that crimes against humanity, in general, would be specific intent crimes).

elements can be established.¹⁷⁶⁷ This is essentially the situation in international criminal law too. There is, however, no obstacle to *ex ante* limit the applicability of defences to particular international crimes or underlying offences. In some domestic legal systems, duress cannot, for example, be claimed in relation to killing an innocent. In the Rome Statute of the ICC, the defence of superior orders has been explicitly excluded in relation to genocide and crimes against humanity. The question therefore arises whether this should be done to a greater extent? The present author thinks that all justificatory defences should be impossible to combine with genocide and crimes against humanity and most war crimes. The present author does namely not understand what those “extraordinary circumstances” could be that, for example, could justify the destruction of an ethnic group or systematic rapes.¹⁷⁶⁸ In this regard, it should be remembered that in connection to justifications, those victimized in the justified attack do not have a right to defend themselves as the attack against them is regarded as lawful.¹⁷⁶⁹

Defence-type of considerations can be considered in connection to factors excluding criminal responsibility, but also “earlier” in the offence definitions. As was noted in the discussion on the prevailing law, some war offence definitions demand that the prosecutor establish the acts were not justified by military necessity. The crime definitions may hence require balancing of conflicting interests. The definitions can, however, also explicitly exclude certain defences¹⁷⁷⁰ or, on the contrary, embrace them. Victim consent is, for example, excluded as a possible defence in connection to mutilation.¹⁷⁷¹ The crime element of aggression that the person must be one “in a position effectively to exercise control over or to direct the political or military action of a State”,¹⁷⁷² for example, indirectly entails an approval of a sort of superior order defence, that is, the criminal responsibility is borne by the superior alone. These kinds of crime-specific inclusions respectively exclusions of particular defences are important in that they may take special consideration to the nature of the crime in question and the criminalization policy desires in relation to that crime. At the same time, they open up the possibility for disharmony in the law. In this regard, Schabas has found that: “One of the anomalies in the codification of the crime of aggression is the idea that it is a ‘leadership crime’ [...]. Why this approach is acceptable to the crime of aggression, but not to the other three crimes, is not easy to understand.”¹⁷⁷³ Fournet has also questioned why the Rome Statute of the ICC only explicitly outlaws the defence

¹⁷⁶⁷ Before the adoption of the Rome Statute of the ICC, the legal source of most defences was general principles of law, that is, principles commonly applied in domestic criminal law. This explains why the special nature of the criminality has been given little legal consideration in connection to defences. Domestic legal systems have traditionally rarely dealt with international crimes.

¹⁷⁶⁸ Cf. Werle 2009(b), at 198 (‘In practice, the main area where grounds for excluding responsibility play a role is war crimes, with its broad range of offenses. In contrast, for genocide and crimes against humanity, exclusion from liability can be presumed only in extraordinary cases.’)

¹⁷⁶⁹ Eser 1987, at 31-32.

¹⁷⁷⁰ Cf. the war crime of mutilation in the ICC Elements of Crimes, where it in footnote 46 is explicitly stated that: “Consent is not a defence to this crime.” ICC Doc. ICC-ASP/1/3 (Part II-B).

¹⁷⁷¹ The reason for this can be found in Article 11(2), AP I. E. La Haye, ‘Article 8(2)(b)(x) – Mutilation and Medical or Scientific Experiments’, in R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, Transnational Publishers, 2001), at 166.

¹⁷⁷² ICC Doc. RC/Res.6.

¹⁷⁷³ Schabas 2010(a), at 513.

of superior orders in relation to genocide and war crimes. She notes that: “Article 33 automatically implies that orders to commit crimes against peace and war crimes are not always manifestly unlawful and can therefore be validly invoked as a defence”; and that: “Considering the seriousness of all international crimes, the suggestion that orders to perpetrate either crimes against peace or war crimes could not be manifestly unlawful is difficult to comprehend.”¹⁷⁷⁴ Offence-specific exclusions of defences can hence non-deliberately signal that other criminalizations are not absolute.

As regards the absolute nature of the international criminalizations, it should be noted that tragic happenings in the world and changes in the political climate can affect what is considered right and wrong. In situations of moral panic, it is common to find arguments that one should be able to fight “the evil” effectively. For example, after the 11 September 2001 terrorist attacks, people again started to question whether it is justified to torture terrorists, if this would save innocent lives.¹⁷⁷⁵ Before that, the prohibition of torture had for some time been considered as absolute in human rights law and it had been (more or less) politically incorrect to pose that kinds of questions. Criminalizations and defences are, however, policy decisions, which are “based on past, existing, or anticipated circumstances” and when the circumstances change “the perceived sufficiency of a particular balancing of military necessity and humanity may come into question.”¹⁷⁷⁶ When crime definitions have become established, deviations to them are often sought through the avenue of defences. As such, the uncertainty regarding the exact *lex lata* of many defences in international criminal law can open the door to undesired exceptions to the international criminalizations.¹⁷⁷⁷

Finally, it should be observed that international criminal law today (both as regards the crime definitions and the defences) sometimes reflect conflicting rationales. As noted by Osiel:

Human rights and humanitarian law share a concern for preserving human dignity in political hard times. [...] Humanitarian law treaties have set increasingly limits on the scope of reciprocity [...] even if state practice has lagged well behind. But human rights law goes still much further in that direction, virtually abandoning reciprocity altogether. The result is that the particular portions of humanitarian law allowing

¹⁷⁷⁴ Fournet 2010, at 237. See also C. Fournet, ‘When the Child Surpasses the Father – Admissible Defences in International Criminal Law’, 8 *International Criminal Law Review* (2008), at 525-526. Likewise Schabas has argued that the exclusion of the defence of superior orders in relation to crimes against humanity and genocide “is one of the more incoherent examples of the process of compromise and negotiation that resulted in the *Rome Statute*.” Schabas 2010(a), at 513.

¹⁷⁷⁵ See e.g., J. A. Cohan, ‘Torture and the Necessity Doctrine’, 41 *Valparaiso University Law Review* (2007), at 1587 ff., and T. Meisels, ‘Torture and the Problem of Dirty Hands’, 21 *Canadian Journal of Law and Jurisprudence* (2008), at 149 ff.

¹⁷⁷⁶ M. N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *Virginia Journal of International Law* (2010), at 799.

¹⁷⁷⁷ It should be noted that when the ICC Elements of Crimes (which have as their goal to clarify the elements of the crimes) were adopted, it was decided not to include the grounds for excluding criminal responsibility in the Elements. ICC Doc. ICC-ASP/1/3 (Part II-B), and e.g., M. Kelt & H. von Hebel, ‘General Principles of Criminal Law and the Elements of Crimes’, in R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001), at 38.

reciprocity – such as the right of reprisal – are precisely those most likely to run afoul of human rights law.¹⁷⁷⁸

In relation to law on war crimes, the law has often found to reflect the balancing between military necessity and the needs of humanity. Human rights thinking, on the other hand, is often seen as the background of the genocide and crimes against humanity criminalizations. Whereas humanitarian law accepts more causing of harm and is therefore more open towards the idea of exceptions, human rights law is more inclined towards absolute prohibitions.¹⁷⁷⁹ As the international core crimes often, however, are addressed as a whole, the balancing done between military necessity and the needs of humanity in connection to war crimes has, however, affected crimes against humanity and genocide too. This is, for instance, reflected in the ICTY case law that recognizes that certain crimes against humanity must be assessed from a military necessity perspective.¹⁷⁸⁰ Furthermore, most defences *a priori* apply to all three crimes.¹⁷⁸¹ For crimes with a human rights background, the co-existence with crimes and defences with a different rationale may entail problematic pushes towards giving legal relevance to factors such as reciprocity.¹⁷⁸² A difficult question is, however, to what extent it is human rights law that has to adopt towards international humanitarian law, or whether rather international humanitarian law to a greater extent should adopt a human rights philosophy and recognize more absolute prohibitions.¹⁷⁸³

8.3.2. The Relationship between the Defences and the Modes of Responsibility

In the same way as the modes of responsibility, the defences may affect the distribution of responsibility between different participants in crime, and the demarcation between criminal and non-criminal behaviour. This is most evident in relation to the defence of superior orders, which has a clear connection to ordering. Also other similar connections have, however, been noted. For example, Lappi-Seppälä has argued that mistakes of law in relation to superior orders should be accepted more easily than other mistakes of law because:

¹⁷⁷⁸ Osiel 2009(a), at 112.

¹⁷⁷⁹ Osiel has, however, stressed that international humanitarian law also contains some absolute norms. More specifically he argues that the law “enshrines two very different theories of morality”, viz. (1) “Kantianism, imposing strict side-constraints on violent conduct, applicable regardless of consequences”, and (2) utilitarianism (e.g., proportionality and military necessity.) Osiel 1999, at 101.

¹⁷⁸⁰ *Blagojević & Jokić*, Judgement, TC, ICTY, 17 January 2005, paras 593, 598 and 615 (where the Trial Chamber considered whether the destruction of property could be considered an act of persecution).

¹⁷⁸¹ An exception to this is Article 33, ICC Statute, which characterizes superior orders to commit genocide and crimes against humanity as manifestly unlawful.

¹⁷⁸² It has been argued that the context of armed conflicts sometimes require that human rights are “reinterpreted” and that there also exist situations where “no interpretative method will be able to reconcile the prohibitions of human rights law with the allowances of humanitarian law (i.e., without subordinating one to the other.)” Osiel 2009(a), at 121.

¹⁷⁸³ It may also be questioned whether international criminal law should more often have a rationale of its own (or follow the example of domestic criminal law) due to that branch being concerned with individual responsibility. Gaeta has, e.g., in this regard discussed the conflict between approaches to necessity in human rights law and in international criminal law. Gaeta 2004, at 785-795.

Unlike a normal case of a mistake, the wrongfulness of the act would not remain unnoted by the acquittal of the defendant, as the superior would be held responsible anyhow – not only for a breach of his duty but as an instigator for the offence in question. In comparison with a normal case of mistake, the difference lies [...] in a *reduced need for punishment*.¹⁷⁸⁴

While the main question in relation to the modes of responsibility in international criminal law often has been how to connect the *leaders* to the crimes, the main question in relation to defences appears to be to what extent *low-level actors* should be excused. Both the modes of responsibility and the defences hence direct the criminal responsibility towards the more high-level actors. This approach has often been justified with criminological studies, such as the Milgram study, emphasizing the role played by leaders in international atrocities.¹⁷⁸⁵ As noted in relation to the analysis of the modes of responsibility, the present author is, however, concerned that too much blame from a phenomenological/criminological perspective sometimes is put on the leaders. High-level actors may also be pressured into criminality. It has, for instance, been noted that politicians may feel a strong political pressure to choose between two courses of action both of which would be wrong for to undertake and that a “particular act of government [...] may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong.”¹⁷⁸⁶ Furthermore, the idea that “ordinary people” should not be blamed for international crimes as the criminality does not represent their “true character” is problematic.¹⁷⁸⁷

In the same way as the crimes and the modes of responsibility, the defences furthermore affect what “story” of the criminality is told through the law. In this regard, it may be asked to what extent the various stories told are reconcilable. In relation to modes of participation, the most popular responsibility form in recent years has been JCE responsibility that tells a story of high-level and low-level actors actively acting together. Many of the defences, on the other hand, tell stories about ignorant, drunk etc. low-level actors who completely are in the hands of their superiors. Many defences would therefore better suit responsibility modes, such as ordering and indirect co-perpetration, which portray the leaders as active and the subordinates as more passive. Some responsibility modes (such as acting through another person) and defences can furthermore be in harmony in the sense that they may both reflect the fact that in collective criminality not all persons involved in the criminality can necessary be blamed for the criminal outcome. In practice, the defences have, however, not played an important role in international criminal proceedings, and there has therefore not been significant fragmentation in case law caused by disharmony between modes of responsibility and the defences.

¹⁷⁸⁴ Lappi-Seppälä 1998, at 297.

¹⁷⁸⁵ See further Section 3.5.4.

¹⁷⁸⁶ M. Walzer, ‘Political Action: The Problem of Dirty Hands’, 2 *Philosophy and Public Affairs* (1973), at 160-161.

¹⁷⁸⁷ Cf. “The general claim behind the character theory of excuse is that an excuse ought to be provided to the defendant insofar as the act that she has performed is not a manifestation of her character. The role of character in determining the ambit of excuses has been heavily criticised. One simple objection is that the criminal responsibility is about responsibility for acts. In attributing criminal responsibility, criminal acts are not properly seen merely as evidence of character of the agent.” Tadros 2005, at 294.

8.3.3. Different Types of Participants in International Criminality and the Defences

Many of the defences accepted in international criminal law are hence such that they more often exculpate individuals in a subordinate position, even though superior orders is the only defence that explicitly requires a position of subordination. Regarding duress, Ambos has, in this regard, argued that top-level actors cannot benefit from the defence of duress as “people at the top [...] cannot be coerced.”¹⁷⁸⁸ While the present author disagrees with the general submission that leaders cannot be coerced, she accepts the submission that the position of an individual may affect the scope of excuses, and that certain individuals may be excepted “tolerate greater dangers and higher risks.”¹⁷⁸⁹ Individuals in a guarantee position may be expected to adhere to the law to a greater degree than individuals not having such a position. Likewise, soldiers are persons who have been trained to manage battlefield situations, and it may be reasonable to demand more from them than from civilians.¹⁷⁹⁰ As noted above, care should, however, be taken to ensure that not *all* blame is put on high-level actors when more low-level actors also deserve reprimand.

In relation to superior orders, it has, furthermore, been noted that if the defence would have been given a broad interpretation in connection to the Nazi atrocities, only the *Führer* could have been held criminally responsible.¹⁷⁹¹ This is not the interpretation given to the defence in international criminal law. As such, the law recognizes that also more low-level actors may take initiatives in relation to international criminality and participate willingly.

8.3.4. Armed Conflicts as the Typical Context of Action

Combat generally involves sustained exposure to “continuous fatigue, filth, hunger, sleep deprivation, cold, heat, anxiety, stress, and fear” and that the “capacity of the human mind to process complex information in situations of extreme adversity, such as those on the battlefield, is quite limited.”¹⁷⁹² For criminal law, the question arises to what extent liability should be reduced due to these types of cognitive constraints. Military law has traditionally responded to the battlefield reality by excusing classes of perpetrators (rather than focusing on individual states of mind).¹⁷⁹³ In modern international criminal law, the stress caused by armed conflicts is, however, not really considered at the conviction stage. Mistakes of fact are, for example, rarely admitted. The focus is rather on to what extent the armed conflict creates situations of duress or other forms of coercion.

When looking at the phenomenology of international crimes, it may be noted many compulsion situations do occur in armed conflicts and in totalitarian regimes. It has, for example, been observed that child soldiers often face extremely brutal initiation

¹⁷⁸⁸ Ambos 2011(b), at 314.

¹⁷⁸⁹ Ambos 2011(b), at 313.

¹⁷⁹⁰ Ambos 2011(b), at 313.

¹⁷⁹¹ E.g., J. L. Bakker, ‘The Defense of Obedience to Superior Orders: The *Mens Rea* Requirement’, 17 *American Journal of Criminal Law* (1989), at 63, and Minow 2007, at 4 (referring to McCoubrey).

¹⁷⁹² Osiel 1999, at 53.

¹⁷⁹³ Osiel 1999, at 68.

ceremonies and severe threats and punishments in cases of disobedience.¹⁷⁹⁴ Also adults can be governed with terror. In armed conflicts, kill-or-get-killed situations are more common than in peacetime. This being said, the phenomenology of international crimes does not support the claim that most international crimes would be committed in life-threatening duress. The crimes are rather committed under different forms of *pressure*.

As regards situations of life-threatening compulsion, such as the duress situation in the *Erdemović* case, the present author agrees with those scholars who have pointed out that if duress is accepted as a defence, proportionality between the threat and the committed crime should not be the most central criterion.¹⁷⁹⁵ International crimes are generally not crimes that based on a proportionality assessment can be *justified*. The approach chosen in the *Erdemović* appeal dissents and in the ICC Statute are hence problematic in that they emphasize the question of proportionality of the reaction to the duress situation. The focus in relation to duress should rather be on social expectations. Is heroism and personal sacrifice expected or should human frailty rather be legally recognized? For “requirements of heroism” speak the important values the international criminalizations protect and the connected need to uphold the provisions absolute nature. Against, on the other hand, the principle that criminal law should not demand the impossible from individuals.¹⁷⁹⁶ In this regard, some authors have argued that heroism should not be required when the heroism does not entail any prevention of harm. As, for example, Erdemović could not have stopped the massacre, Chiesa has argued that “punishing Erdemović for not symbolically resisting the coercion is unnecessarily harsh” and that Erdemović for this reason should have been excused.¹⁷⁹⁷

As regards pressure not amounting to veritable compulsion, that is, for example, military obedience culture, the legitimating effect of State participation, propaganda and peer pressure, international criminal law only to some extent recognize the two first ones by in rare situations allowing the defences of superior orders and prescription of law. Furthermore, as noted by Olusanya:

Another traditional requirement of the duress defense [...] is that the coercer must either expressly or by implication order the commission of the offense committed by the accused. A generalized fear of harm of death unconnected with any specific and clear demand to commit a crime will not excuse. Thus the reality is that, although some wartime offenders may commit their crimes in the shadow of indoctrination,

¹⁷⁹⁴ See e.g., H. Chatlani, ‘Uganda: A Nation in Crisis’, 37 *California Western International Law Journal* (2007), at 282-283 (regarding Uganda).

¹⁷⁹⁵ The present author agrees with Chiesa who argues that a central criterion in excusing is whether the society finds that the criminal behaviour has been *understandable*. Chiesa 2008, at 763. See also O. Olusanya, ‘Excuse and Mitigation under International Criminal Law: Redrawing Conceptual Boundaries’, 13 *New Criminal Law Review* (2010), at 28-29 (‘In cases concerning the excuse theory, the critical issue is not the heinousness of the crime nor is it the role of the victims; instead it is whether, based on a unique set of facts, a reasonable person would have responded in the same way as the accused.’)

¹⁷⁹⁶ Chiesa 2008, at 757.

¹⁷⁹⁷ Chiesa 2008, at 772. A similar position is held by e.g. Ambos who stresses that the law must take into consideration human weakness. Ambos 2011(b), at 315.

increased brutality, obedience and group conformity, unless they can connect their crime to a clear demand, their claim of duress will likely fail.¹⁷⁹⁸

This reluctance to give legal relevance to pressure not amounting to severe compulsion is, however, not unique for international criminal law. Criminal law does not generally consider more indirect causes behind the criminality.

8.3.5. Defences and Different Time-Perspectives

Falk has observed that:

As currently framed, much of criminal doctrine is premised on a fairly tight connection between the cause of the behavior and the resulting criminal conduct. [... Some sociological theories] suggest that the causal window should be expanded to include more longitudinal views of criminality. For example, in order to understand the impact of television violence on criminal behavior, the question should not be whether viewing one television program caused the defendant to kill. Rather, the inquiry should be whether the cumulative impact of watching ten years of violent television significantly contributed to the defendant's mental state and his criminal behavior. A more expansive perspective is necessary to understand better effects that are impossible to detect in the short-run. In summary, if the criminal law restricts itself to the consideration of only short-term causal explanations for criminal behavior, it will miss the rich contribution these theories of defense can make by elucidating more diffuse and long-term pathogenic factors in criminal behavior.¹⁷⁹⁹

Also international criminal law follows the traditional criminal law approach with limited time-frames in connection to defences. Article 31 of the ICC Statute on grounds for excluding criminal responsibility, for example, is only applicable to factors that temporally take place "at the time of that person's conduct". Eser has found that the temporal approach is "a rather narrow". It even excludes "the time at which the statutory result of the conduct as irrelevant."¹⁸⁰⁰

The question of time-perspectives is especially interesting in connection to compulsion defences, where it may be asked to what extent it is relevant whether an individual himself/herself has contributed to the emergence of the compulsion situation.¹⁸⁰¹ In this regard, the Trial Chamber in the *Erdemović* case asked itself whether Erdemović could have avoided the situation in which he found himself.¹⁸⁰² Likewise, Cassese in his *Erdemović* Appeal Judgement dissent argues that one criterion for the duress defence is that the situation leading to duress must not have been voluntarily

¹⁷⁹⁸ Olusanya 2010, at 54-55.

¹⁷⁹⁹ Falk 1996, at 808-809.

¹⁸⁰⁰ Eser 2008, at 872.

¹⁸⁰¹ A person may be blamed for his/her previous behaviour on two different types of grounds: (a) for his/her unintentional behaviour as *culpa in causa*; and (b) for his/her intentional behaviour, *dolus in causa*. Van Sliedregt notes that: "In *culpa in causa* cases, the perpetrator can be blamed for having put himself in a situation in respect of which he *should have known* that he would lack the required capacity or knowledge. [...] *Dolus in causa* concerns the perpetrator who intentionally puts himself in a situation in respect of which he can rely on a defence exempting him from criminal liability." van Sliedregt 2003, at 239.

¹⁸⁰² *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, paras 18 and 89.

brought about by the person coerced.¹⁸⁰³ The question of the contributory fault of the individual in a situation of duress is especially interesting taking into consideration the phenomenology of the international crimes. In armed conflicts, almost anything can be expected. For example, Fichtelberg has here with reference to the *Erdemović* case put forward that:

For an individual to assert that, only in the very limited circumstances of the killing that he was under duress, ignoring the choices that he made that led to this situation is bad faith at best, and is probably more explicable in terms of a last minute 'loss of nerve' on the part of the killer. For example, a person who joins a militia organization that he knows has been involved in atrocities in the past and may do so again, but shrinks back when a weapon is thrust into his hand accompanied by an order to murder innocent civilians (or join them in their death) cannot claim that these acts truly were committed under duress. Such an assertion would be a claim of criminal stupidity on the part of the defendant, or at a minimum a level of incompetence that precludes any responsibility [...].¹⁸⁰⁴

While Fichtelberg's argument has its merits, it should, however, be remembered that unemployment often is high under armed conflicts and that, for example, Erdemović himself indicated that he had joined the armed forces to put bread on his family's table.¹⁸⁰⁵ Erdemović clearly took a risky decision when he joined the armed group, but membership in armed groups is not by itself criminal. In this regard, the claim made by Katz (already cited in this study) that the "route to evil often takes the form of a sequence of seemingly small, innocuous incremental steps, in each of which one tries to solve a problem within one's immediate situation"¹⁸⁰⁶ and that a decision to commit an international crime often is preceded by many "insignificant" decisions is intriguing. The requirement that the accused person should not himself/herself have put himself/herself in the duress situation thus puts a *longer time-perspective* on the happening.¹⁸⁰⁷

The question of whether an individual can be blamed for himself/herself causing his/her duress, is also strongly connected to how the situation of coercion or duress is defined. As noted, in some CCL cases, the Nazi State was seen to cause a general situation of coercion through its terror. Obviously, if duress is defined in such broad terms ("coercive environment"), it is very few low- and mid-level actors who could be blamed for causing their own duress. If, however, the duress situation is given a more limited meaning ("coercive situation"), that is, for example, a concrete situation where an individual has been physically coerced, an individual can be blamed for taking various risky decisions. In this regard, Wilson has argued that many defences are limited to

¹⁸⁰³ *Erdemović*, Judgement (sep. and diss. op. of Judge Cassese), AC, ICTY, 7 October 1997, para. 16.

¹⁸⁰⁴ Fichtelberg 2008, at 15-16. Swaak-Goldman has argued that one of the main questions in the *Erdemović* Appeal Judgement, in fact, was whether combatants can claim that they did not voluntarily bring about the situation of duress leading to the killing of civilians. O. Swaak-Goldman, 'Prosecutor v. *Erdemović*, Judgement. Case No. IT-96-22-A. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, October 7, 1997', 92 *American Journal of International Law* (1998), at 287.

¹⁸⁰⁵ See e.g., Ehrenreich Brooks 2003, at 863-864.

¹⁸⁰⁶ Katz 1993, at 13.

¹⁸⁰⁷ Ehrenreich Brooks has with regard to the *Erdemović* Appeal Judgement argued that whereas the minority saw the case as a narrative about inevitability and determinism, the majority had a longer time-perspective and saw the case as a narrative about choice. Ehrenreich Brooks 2003, at 881.

situations of crisis, as we are expected to find alternative solutions to more enduring pushes to criminality.¹⁸⁰⁸ At least in the context of international criminality, giving legal relevance to a coercive environment which has not developed into a more concrete coercive situation could have very far-reaching consequences for the scope of individual responsibility in societies, such as Nazi Germany or the genocidal Rwanda.

8.3.6. State Involvement in the Criminality and the Defences

As regards pressure to commit crimes, a difference may be made between pressure caused by public actors (such as public officials and the law) and pressure caused by private actors (such as peers and the family).¹⁸⁰⁹ It is generally held that it is especially difficult for “good soldiers” and law-abiding citizens to disobey orders and to reject laws that originate from public sources. Minow has, for example, regarding superior orders argued that the phenomena such as cognitive dissonance and adherence to authorities make it utmost difficult for ordinary soldiers to disobey explicit orders.¹⁸¹⁰ The “gist” of the defences of superior orders and prescription of law is hence that the accused persons in cases where these defences are raised thus at least from some perspective “live up to our expectations” regarding appropriate behaviour.¹⁸¹¹ It is therefore not surprising that criminal law in general appears to be more inclined to give legal recognition to pressure caused by public actors. This is the situation also in international criminal law. For the individual person faced with the pressure, both types of pressure can, however, be overwhelming. Also public pressure must, however, entail concrete situations of coercion to exculpate individuals. Morse has also observed that a rotten society which makes it difficult for individuals to “fly straight” rarely is an excusing condition. According to him, it is rather a factor that affects society’s moral right to blame.¹⁸¹²

Historically, a debated question has been whether State-affiliated criminality only should lead to State responsibility. Since the post-World War II-trials, individual criminal responsibility in connection to international criminality has, however, been firmly established. Article 7 of the Nuremberg Charter in this regard provided that: “The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.” The ICC Statute likewise provides that it “shall apply equally to all persons without any distinction based on official capacity” and that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility”.¹⁸¹³ Eser has therefore characterized official capacity as an “explicitly rejected defence” in international criminal law.¹⁸¹⁴ It may, however, be noted that

¹⁸⁰⁸ Wilson 2005, at 110-111.

¹⁸⁰⁹ Cf. Jäger and the idea of a “legality bonus” is action sanctioned by the State. Jäger 1992, at 76.

¹⁸¹⁰ Minow 2007, at 25-35. The theory of cognitive dissonance argues that two simultaneous contradictory ideas (e.g., the absolute duty to follow orders and the obligation to disobey illegal orders) gives rise to stress, which an individual tries to reduce by rejecting one of the ideas.

¹⁸¹¹ Cf. J. Gardner, ‘The Gist of Excuses’, 1 *Buffalo Criminal Law Review* (1998), at 578.

¹⁸¹² Morse 1994, at 1653.

¹⁸¹³ Article 27, ICC Statute. See also Article 7(2), ICTY Statute, and Article 6(2), ICTR Statute.

¹⁸¹⁴ Eser 2008, at 869.

international criminal law (in contrast to public international law in general) always has focused on holding high-level politicians and militaries responsible, and the contested legal question in that branch of law rather has been to what extent non-militaries and non-State actors also can be blamed. As such, the act of State doctrine has never been part of international *criminal* law.

8.3.7. Defences and Political or Ideological Violence

In addition to compulsion and pressure, various other types of “human weaknesses” may affect the behaviour of people. For example, feelings of hurt, anger, despair and fear are human emotions that may influence behaviour.¹⁸¹⁵ Criminal law is, however, generally not interested in giving these types of emotions legal relevance. In some domestic legal systems, provocation or “passion” is, however, accepted as a partial defence and so is excessive self-defence.¹⁸¹⁶ This is interesting from the point of view of the phenomenology of international criminality. Propaganda, indoctrination and hate speech, through which strong emotions and false perceptions of threats are created, are namely common in connection to that criminality.

With this in mind, it is interesting to note that the applicability of the necessity defence has been debated in connection to political violence.¹⁸¹⁷ Individuals engaged in international criminality can namely *perceive* that they are averting a greater evil by their criminal behaviour, that is, essentially that they are doing the right thing. The political or ideological background of the criminality may also entail that the victims who legally are not legitimate targets *by the perpetrator* is perceived as non-innocent and hence as a legitimate target. Cohan has (in connection to terrorism) noted that what the general public view as innocent civilians may by the offender be regarded as guilty opponent accomplices.¹⁸¹⁸ The political/ideological nature of international criminality could hence also be seen as giving rise to the defences of (mistaken) self-defence and mistake of fact.¹⁸¹⁹

Possible differences between the individual perpetrator’s perception of reality and the judging society’s perception of it results in a legitimacy problem à la Arendt: does the society have a right to punish individuals who do not have a “truly guilty mind” and who do not recognize that they are acting criminally? Despite its focus on individual guilt and individual *mens rea*, criminal law does not, however, support completely

¹⁸¹⁵ Horder makes a distinction between explanatory reason and adopted reason. In relation to *adopted reason* a person positively chooses to act in a particular way, whereas in relation to *explanatory reason* the (sometimes intentional) acts of a person are not chosen. The behaviour of a person in reaction to provocation or in situations of excessive defence can according to Horder be explained with “the desire at the heart of the emotion” which “spontaneously eclipses or bypasses the restraining or moderating power of reason.” Horder 2007, at 10-11. Horder notes that intentional action based on explanatory reason does not have to be irrational, however. *Ibid.*, at 11 (fn 16).

¹⁸¹⁶ Morse 1998, at 335.

¹⁸¹⁷ Cf. J. A. Cohan, ‘Necessity, Political Violence and Terrorism’, 35 *Stetson Law Review* (2006), at 903 ff.

¹⁸¹⁸ Cohan 2006, at 940 and 968. Cohan argues that terrorists in this regard apply a concept of collective guilt.

¹⁸¹⁹ Olusanya e.g., asks the question: “Was Finta a racist, or did he genuinely mistakenly believe that Jewish people posed a threat?”. Olusanya 2010, at 74.

unreasonable perceptions of reality. In international criminal law, for example, it would be completely against the rationale of the criminalization of genocide if the belief that certain ethnic groups as such can pose a threat would seriously be considered as a possible “mistake of fact.” Many defences therefore include objective evaluations of reasonableness and proportionality.¹⁸²⁰ Likewise, criminal law generally presumes that individuals know what is lawful and what is criminal, that is, mistakes of law are rarely accepted.

It may, however, more generally be asked whether violence with political or ideological *motives* to a larger degree should be tolerated by society. In connection to this, it should be noted that in relation to terrorism a debated question is whether the fact that the person is a “criminal with a conviction” (German *Gewissenstäter*) should exclude criminal responsibility.¹⁸²¹ It is hence possible to define political or ideological motives as a defence. In relation to the international core crimes, it has, however, not seriously been suggested that political or ideological motives should exculpate the offenders. The whole idea of international criminal law can be said to settle boundaries for political and ideological strives. From a victim-perspective, it is furthermore problematic to exculpate ideological perpetrators causing serious harm. It should also be noted that genocide, crimes against humanity and war crimes are considered as *jus cogens* violations that at the State responsibility-level cannot be justified with ideological or political reasons.¹⁸²² To give the individual political and ideological motives/reasons a justificatory function would therefore lead to a legal anomaly. Furthermore, as was noted in Chapter 2, the idea of politically or ideologically motivated offenders is phenomenologically problematic. Not all individuals who engage in criminality with political or ideological purposes are necessarily individually motivated by corresponding motives.

8.4. Concluding Evaluative Remarks

8.4.1. The International Defences and the Basic Tenets of Criminal Law

It has sometimes been put forward that the defences in international criminal law do not to a sufficient degree reflect the nature of that criminality. For example, Olusanya has criticized the fact that a person cannot claim the defence of State propaganda, *because such a defence does not exist in international criminal law*, but instead has to “mold the truth into the framework of [the law]” and claim, for example, diminished mental responsibility.¹⁸²³ International criminal law indeed largely follows traditional domestic criminal law approaches to defences, even though superior orders and prescription of law are defences that reflect the special nature of the criminality. In this regard, the

¹⁸²⁰ Cf. Cohan 2006, at 942-944.

¹⁸²¹ K. Ambos, ‘*Amicus Curiae* Brief Submitted to the Appeals Chamber of the Special Tribunal for Lebanon on the Question of the Applicable Terrorism Offence with a Particular Focus on “Special” Special Intent and/or a Special Motive as Additional Subjective Requirements’, 22 *Criminal Law Forum* (2011), at 395.

¹⁸²² Cf. e.g., the draft articles on state responsibility that do not foresee exceptions to peremptory norms. See UN Doc. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001 (United Nations, 2008), at 84-85.

¹⁸²³ Olusanya 2010, at 35-36.

defences differ from the crime definitions that have been adopted as a response to the societal problem international criminality represents.

That the law does not give legal relevance to all factors that explain the criminality is, however, not unique for international criminal law. Domestic criminal law has, for example, been challenged for making individuals take “full responsibility” for their behaviour and by doing this disregarding all criminological and psychological research that indicates that parents, schools, communities and so forth also could be blamed.¹⁸²⁴ To this, Morse has, however, found that “[d]iscovering a cause for behavior, whether it is biological, psychological or social, does not mean that the agent is not responsible” since “[a]ll behavior has causes”. According to him, the causes should only exclude criminal behaviour when they severely diminish an individual’s capacity for rationality.¹⁸²⁵ In a similar vein, Kadish has observed that taking into consideration factors, such as the social background of the perpetrator, would make affect law’s deterrent effect, and, once recognized, it would be hard to justify punishing anyone, for even evil has its causal roots somewhere.¹⁸²⁶ The problem with criminal law is, however, that it sometimes gives legal relevance to the causes behind the criminality, but not always. In relation to duress Norrie has, for example, found that the “determinist may quite legitimately argue that there is no distinction in principle between a gun pointed at the head, and an intolerable socio-economic background.”¹⁸²⁷ More generally he finds that “lawyers and legal theorists seek to isolate certain aspects of human conduct from the social context in which it occurs” and that they are selective in giving legal significance to various elements of the criminality.¹⁸²⁸ By being selective, the criminal law reflects societal sentiments about what is and should be considered relevant for criminal responsibility.¹⁸²⁹ A central distinction is, for example, generally considered to be the one between *compulsion* and *causes* (for example, beliefs and desires, environmental influences and character traits),¹⁸³⁰ so that compulsion is generally considered legally relevant whereas causes are not.

¹⁸²⁴ Maruna & Copes 2005, at 287-288.

¹⁸²⁵ Morse 2007, at 2569. He has also noted that: “Having criminogenic beliefs, desires, and values acquired through no fault of one’s own could be said to be true of most criminal offenders from almost any background.” S. J. Morse, ‘Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense’, *Alabama Civil Rights & Civil Liberties Law Review* (2011), at 161. Furthermore, he points out that: “Causation and determinism and lack of contra-causal, libertarian free will are not criteria for or excusing conditions in the criminal law. Most scientifically informed people believe that all events in the universe, including human action, are fully caused. Moreover, most accept the truth of some form of determinism as a working hypothesis. Thus, if causation or determinism per se were an excuse, no one would ever be responsible for any behavior. Some people welcome such a conclusion, but it would be a radical change in American law. Further, causation and determinism are not the underlying rationales for the positive law of excuses. Even if the universe is causal and determined, some people lack rational capacity or are compelled, and most people have substantial rational capacity and do not lack control capacity or otherwise act under compulsion.” *Ibid.*, at 149.

¹⁸²⁶ Kadish 1987, at 284.

¹⁸²⁷ Norrie 1991, at 157.

¹⁸²⁸ Norrie 1991, at 163.

¹⁸²⁹ Moore has noted that there are certain causes behind criminality that people *intuitively* feel that should be recognized as excuses (“unhappy causes of crimes”), but that all causes do not attract sympathy. M. S. Moore, ‘Causation and the Excuses’, 73 *California Law Review*, at 1146-1147.

¹⁸³⁰ Moore 1985, at 1129-1130 (including references to e.g. Schlick).

The selective approach regarding exculpating factors opens up the door for criticism and challenges regarding the moral foundation of the law. In relation to international criminality Sloane has noted that extreme circumstances make it easier to recognize individuals are affected by their surroundings.¹⁸³¹ It is therefore not surprising that international criminal law to such an extent has been criticized for not giving sufficient legal relevance to the special nature of the criminality. At the same time Sloan, however, asks why the pressure created by circumstances of war, mass violence and collective psychology should be qualitatively more problematic than, for example, extreme socioeconomic deprivation.¹⁸³² From the point of view of equality between offenders, it would indeed seem unfair that individuals pushed into criminality by war would be exempted from responsibility whereas individuals pushed into criminality by other types of factors would not.

As regards legally relevant and legally irrelevant facts, it should also be noted that international criminal law does not always give legal relevance to what the defendant *de facto* knew or intended even though these *a priori* are central criminal law considerations. As noted, for instance, in relation to voluntary intoxication, there is a *presumption of mens rea* and the degree to which this presumption adheres to reality is generally not considered. Or to put it another way, in relation to certain defences, legal relevance is given to *objective standards* (for example, reasonableness) rather than to subjective ones.¹⁸³³ Also in this regard, international criminal law follows the example of domestic criminal law. In domestic contexts, criticism has been raised against this, by noting that there is a conflict between the “logic” of excusing defences and the “infiltration of objective requirements.”¹⁸³⁴ The present author, however, agrees with Ashworth who points out that criminal law is not merely about individual autonomy, choice and control. Criminal law by its nature also entail that members of a legal community have certain responsibilities.¹⁸³⁵ More specifically Ashworth argues that: “[o]ne such duty might be to show reasonable steadfastness in the face of pressure, and to avoid uncontrollable behaviour that might lead to harm to others.”¹⁸³⁶ In criminal law, there is therefore a

¹⁸³¹ R. D. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, 43 *Stanford Journal of International Law* (2007), at 62-63.

¹⁸³² Sloane 2007(a), at 62-63.

¹⁸³³ Heller makes a distinction between four different interpretations of the reasonableness standard: (1) the objective standard; (2) a purely subjective standard (which according to Heller in effect is not anymore a real reasonableness standard); (3) a standard that asks the court to assess the objective reasonableness of the defendant’s act under the circumstances as he believed them to be; and (4) the particularizing standard, which requires the court to take into account one or more of the defendant’s personal characteristics when assessing the objective reasonableness of his/her act. K. J. Heller, ‘Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases’, 26 *American Journal of Criminal Law* (1998), at 5. Heller’s account emphasizes that objective standards may to some extent recognize individual circumstances by, e.g., having different object standards to different categories of individuals. In international criminal law, e.g., more is generally demanded from persons in high-level positions.

¹⁸³⁴ Ashworth 2006, at 244.

¹⁸³⁵ Ashworth 2006, at 244.

¹⁸³⁶ Ashworth 2006, at 244.

tension between giving consideration to the individual offender and being a system of “generally accepted standard of conduct”.¹⁸³⁷

8.4.2. Fair Labelling and the Defences in International Criminal Law

It has been noted that: “If punishment tells the members of a community what it considers wrong, the absence of punishment must tell them what it does not consider wrong.”¹⁸³⁸ While this statement to some extent oversimplifies reality (not all harmful and disapproved behaviour can or should be regulated with criminal law), it is important to recognize that also factors excluding criminal responsibility send signals about societal evaluations. This is the case especially with justifications which so-to-say *ex ante* characterize something as lawful and expected behaviour. Excuses, on the other hand, are evaluated *ex post facto* in relation to concrete situations.¹⁸³⁹ This being said, accepting something as an excuse also sends signals about what society considers as *understandable* behaviour. For this reason, the present author feels that excuses should be scarcely accepted in international criminal law, if one wants to uphold the idea of international criminalizations as absolute prohibitions.

Osiel has argued that the manifest illegality doctrine in relation to the defence of superior orders portrays the modern soldier as “a spirited, free-thinking conscience, quick to perceive evil in his superiors and to intercede against it” and that this is a fiction which “departs too radically from the reality of industrialized mass slaughter for it to remain coherent, intelligible, or morally defensible.”¹⁸⁴⁰ Comments such as these give rise to the interesting question when does international criminal law depart *too far* from the reality? And who are those who *really deserve* punishment? As has been noted above, the present author is sceptical to accounts of international criminality that put *all* blame on the leaders. The phenomenology and criminology of international criminality rather supports the view that many different types of participants take part in international criminality *with the leaders playing an important role*. The reality of international criminality is complex and international criminal law’s approach to defences refuses to exonerate classes of participants in international atrocities.

An important reason for the scarce legal recognition of the typical features of international criminality in the law on defences is that most typical features of international criminality can be characterized as *pushes towards criminality* and which hence raise questions of diminished responsibility for individuals. Causes behind criminality are, however, not generally considered as legally relevant (which can be regarded as morally problematic). To give legal significance to all the factors that cause the criminality would make it almost impossible anybody for the criminality. Also criminal leaders are namely affected by their environment. The outcome of this restrictive attitude is that the prohibitions of the crimes have become absolute, which protects the important values protected by international criminalizations.

¹⁸³⁷ Heller 1998, at 4.

¹⁸³⁸ J. Q. Wilson & R. J. Herrnstein, *Crime and Human Nature* (New York: Simon & Schuster, 1985), 495.

¹⁸³⁹ E.g., K. Ambos, ‘May a State Torture Suspects to Save the Life of Innocents?’, 6 *Journal of International Criminal Justice* (2008), at 286-287 (regarding torture).

¹⁸⁴⁰ Osiel 1999, at 142.

9. SENTENCING

9.1. Introduction

The legal systems in the world vary in how clearly they procedurally distinguish the conviction stage from the sentencing stage. In some jurisdictions, the two phases are completely separated. The rationale for such a separation is that it from the point of view of the presumption of innocence is problematic if evidence only relevant for sentencing (for example, evidence regarding previous convictions) is considered before conviction. In other legal systems, the two phases are integrated and the judges are expected to be able to hear sentencing evidence without this affecting their evaluation about the guilt of the accused person.¹⁸⁴¹ Also in international criminal procedure, the two procedural models can be found. What is relevant for this study is, however, that in both types of procedural models is recognized that the legally relevant factors at sentencing partly depart from those at the conviction stage.

Sentencing has received relatively little attention by international criminal law scholars.¹⁸⁴² If sentencing at all has been considered, the focus has usually been on: (1) what the possible penalties are and what penalties individuals *de facto* have received;¹⁸⁴³ or (2) the philosophical foundation of international sentencing.¹⁸⁴⁴ Both these questions are beyond the scope of this study. With reference to Tonry, it may, however, be noted

¹⁸⁴¹ Simplifying, it may be argued that common law jurisdictions clearly separate the conviction phase from the sentencing phase, whereas civil law jurisdictions often have a combined trial where both factors relevant for conviction and sentencing are considered. See e.g., M. S. - A. Wattad, 'Is Terrorism a Crime or an Aggravating Factor in Sentencing?', 4 *Journal of International Criminal Justice* (2006), at 1018.

¹⁸⁴² This is interesting as the penalty phase may be regarded as the culmination of the criminal process. E.g., Schabas 2007, at 312. For many (including generally the convicted person and the general public), the sentence handed down at the end of the process is hence the most important thing in the whole process. E.g., M. B. Harmon & F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes', 5 *Journal of International Criminal Justice* (2007), at 707, and S. Dana, 'Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY', 4 *International Criminal Law Review* (2004), at 323.

¹⁸⁴³ E.g., B. Holà, A. Smeulers & C. Bijleveld, 'Is ICTY Sentencing Predictable? Empirical Analysis of ICTY Sentencing Practice', 22 *Leiden Journal of International Law* (2009), at 79-97, B. Holà, C. Bijleveld & A. Smeulers, 'Punishment for Genocide – Exploratory Analysis of ICTR Sentencing', 11 *International Criminal Law Review* (2011), at 745-773, and M. R. Bassett, 'Defending International Sentencing: Past Criticism to the Promise of the ICC', 16 *Human Rights Brief* (2009), at 22-28.

¹⁸⁴⁴ E.g., R. Haveman, 'Supranational Expectations of a Punitive Approach', in R. Haveman & O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (Antwerp: Intersentia, 2006), at 145-160, R. Henman, 'The Philosophical Foundations of International Sentencing', 1 *Journal of International Criminal Justice* (2003), at 64-85, R. Henman, 'Some Issues for Sentencing in the International Criminal Court', 52 *International and Comparative Law Quarterly* (2003), at 81-114, R. Henman, 'Evaluating Sentencing as a Force for Achieving Justice in International Criminal Trials', in R. Henman & M. Findlay (eds.), *Exploring the Boundaries of International Criminal Justice* (Farnham, Surrey: Ashgate, 2011), at 227-251, and F. P. King & A.-M. La Rosa, 'Penalties under the ICC Statute', in F. Lattanzi & W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, Volume 1* (Ripa Fagnano Alto: il Sirente, 1999), at 329-332. See also Ewald, whose article combines both approaches U. Ewald, 'Predictable Irrational' – International Sentencing and Its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices', 10 *International Criminal Law Review* (2010), at 365-402.

that the possible functions of sanctions are many and include normative functions (such as the retributive function of punishment), distributive functions (such as consistency and even-handedness), preventive functions (such as minimizing crime), management functions (such as cost-effectiveness and resource management) and communicative functions (such as denunciation of wrongful behaviour).¹⁸⁴⁵ These rationales or functions are to varying degrees reflected in the sentencing law as *sentencing determinants (or criteria)*. The sentencing determinants are the factors that must or may be considered by those deciding upon the sentence.¹⁸⁴⁶ In this study, the focus will be on these determinants. Or to put it another way, the approach chosen in relation to sentencing is substantive. A difference may namely be made between a *procedural approach to sentencing*, which sees sentencing as the final act of the process of judging individuals requiring a certain form and appropriate motivation, and a *substantive approach to sentencing*, which focuses on the identification of the factors contributing to the determination of the content of the sentence and on their respective weight for calculating penalties.¹⁸⁴⁷ No attempt to statistically analyze the sentencing practice of the international criminal tribunals will, however, be made here. Instead, attention is given to what the tribunals themselves characterize as significant in relation to sentencing.

There are many different types of sentencing determinants and in this regard Lappi-Seppälä has made a distinction between sentencing factors connected to the offence, sentencing factors connected to the offender and external sentencing factors, such as mercy.¹⁸⁴⁸ A similar distinction is made by von Hirsch and Ashworth who distinguish between desert-based and instrumental sentencing factors.¹⁸⁴⁹ Also in international sentencing many different types of sentencing determinants can be found and in that context D'Ascoli has distinguished between general influential factors (such as, the rationales of punishment and the sentencing practices in the country where the crime was committed), case-related factors (most notably the gravity of the offence and the individual circumstances of the accused), and proceeding-related factors (such as, voluntary surrender, guilty plea, comportment in detention and disrespectful court

¹⁸⁴⁵ M. Tonry, 'The Functions of Sentencing and Sentencing Reform', 58 *Stanford Law Review* (2005), at 44-45.

¹⁸⁴⁶ The connection between the functions of punishment and sentencing factors is, e.g., illustrated by Sloane who distinguishes mitigating factors that are: (i) pragmatic (voluntary surrender, guilty pleas and cooperation with the court); (ii) moral or rehabilitative (remorse, sympathy for the victims, rehabilitative potential, good character or prior acts); and based on (iii) clemency (old age and health problems). He notes that the pragmatic factors have a direct connection to resource constraints, whereas moral and clemency considerations are connected to judgments about the propriety or utility of punishment. Sloane 2007(b), at 729.

¹⁸⁴⁷ A. Carcano, 'Sentencing and the Gravity of Offence in International Criminal Law', 51 *International and Comparative Law Quarterly* (2002), at 588.

¹⁸⁴⁸ T. Lappi-Seppälä, 'Penal Policy and Sentencing Theory in Finland', R. Lahti, K. Nuotio & P. Minkkinen (eds.), *Criminal Policy and Sentencing in Transition: Finnish and Comparative Perspectives* (Helsinki: University of Helsinki, 1992), at 11-22.

¹⁸⁴⁹ Cf. A. von Hirsch & A. Ashworth, *Proportionate Sentencing – Exploring the Principles* (Oxford: Oxford University Press, 2005), 4. Desert-based aggravating and mitigating factors relate to reduced or increased culpability or harm. A. von Hirsch, 'A Principled View of English Sentencing Law [book review]', 4 *Criminal Law Forum* (1993), at 397 (referring to Ashworth).

behaviour).¹⁸⁵⁰ In this chapter, the focus will be on the *case-related sentencing factors*, which often are desert-based in nature. It is namely in connection to these types of sentencing determinants that it can be considered to what extent the nature of the criminality is reflected in the law. Relevant question here are therefore, for example: What significance is at sentencing given to State involvement in the criminality? Or to superior orders to commit crimes?

In this Chapter, two questions are given special attention. Firstly, it is asked to what extent it at the sentencing stage is possible to give legal relevance to factors that at the conviction stage are disregarded. In this regard, Sloane has found that in international sentencing it is possible to “accommodate the factors relevant to appraising culpability in contexts that often differ dramatically from those presumed by national criminal justice systems.”¹⁸⁵¹ To what extent this, in practice, is done is hence something that will be explored. Secondly, most case-related sentencing factors are also factors that are legally relevant at the conviction stage. The other central object of inquiry is therefore the relationship between the conviction and sentencing determinants in international criminal law.

9.2. Sentencing in International Criminal Law

9.2.1. Introduction

What punishments fit international crimes has been found to be one of the most difficult questions facing international criminal law. Debated issues have been both the *ordinal scaling of punishments* (that is, the question of how the blameworthiness of different international crimes and modes of participation should be evaluated in relation to each other) and the *cardinal scaling of punishments* (that is, the question of the overall levels of punishment in international criminal law).¹⁸⁵² These difficulties of international sentencing do not, however, “release judges from their duty to impose one.”¹⁸⁵³

From a normative perspective, it is interesting that sentencing has not been regulated in great detail in international criminal law. The statutes of the various international criminal tribunals usually only settle what penalties the tribunals can hand down. Provisions on how the penalty *de facto* should be determined have generally been scarce. For example, the Nuremberg Charter only shortly established that the punishments were to be “just” and that official status of the defendant was not to be considered as a mitigating factor. The Charter also stipulated that the fact that the defendant had acted pursuant to order of his Government or of a superior could be considered in mitigation of punishment, if the Tribunal determined that justice so required.¹⁸⁵⁴ In practice, it has been noted that the Nuremberg Tribunal and the other post-World War II courts had an

¹⁸⁵⁰ S. D’Ascoli, *Sentencing in International Criminal Law – The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart Publishing, 2011) 135, 145 and 174.

¹⁸⁵¹ Sloane 2007(a), at 42.

¹⁸⁵² Regarding the concepts of ordinal and cardinal scaling of punishment, see Von Hirsch & Ashworth 2005, at 138.

¹⁸⁵³ Marston Danner 2001, at 418.

¹⁸⁵⁴ Articles 7-8 and 27, Nuremberg Charter.

“extremely wide degree of discretion” in relation to settling the penalties¹⁸⁵⁵ and that the tribunals did not in their judgements elaborate on why particular sentences were handed down.¹⁸⁵⁶ It has been found that, in practice, the approach of the Nuremberg Tribunal was that in the absence of mitigating factors, the penalty was to be death penalty.¹⁸⁵⁷

Also the statutes and RPE of the ICTY and the ICTR contain very few provisions on sentencing. The statutes establish that: “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”¹⁸⁵⁸ In the same way as the Nuremberg Charter, the statutes of the ICTY and the ICTR furthermore stipulate that the official position of an accused person shall not relieve such person of criminal responsibility nor mitigate punishment, but that the fact that an accused person acted pursuant to an order of a Government or of a superior may be considered in mitigation of punishment if the tribunals determine that justice so requires.¹⁸⁵⁹ The statutes also require the tribunals to pay attention to the sentencing practice in the former Yugoslavia respectively Rwanda.¹⁸⁶⁰ In the RPE, Rules 101 establish that the tribunals shall take into account any aggravating circumstances and any mitigating circumstances when determining the sentence.¹⁸⁶¹ The only explicitly mentioned mitigating factor in the RPE is substantial cooperation with the prosecutor by the convicted person before or after conviction.¹⁸⁶²

In their case law, the *ad hoc* tribunals have identified numerous aggravating and mitigating factors. In the *Blaškić* Appeal Judgement, the ICTY, for example, mentioned as possible aggravating factors:

- (1) the position of the accused, that is, his position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia;
- (2) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime;

¹⁸⁵⁵ R. E. Fife, ‘Article 77 – Applicable Penalties’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd ed. (München: C. H. Beck, 2008), at 1421.

¹⁸⁵⁶ See further e.g., Marston Danner 2001, at 418 and 435-436, and F. N. M. Mumba, ‘Topics within the Sphere of Sentencing in International Criminal Law’, in L. C. Vohrah *et al.* (eds.), *Man’s Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), at 587. In the post-World War II *Hostages* case, it was argued that the punishment can be mitigated due to various considerations (such as the age and experience of the accused person), but that that the mitigation should not be seen as a factor that would “reduce the degree of the crime”, but as a matter of grace. *Hostages*, Judgment, CCL, 19 February 1948, at 1317.

¹⁸⁵⁷ W. A. Schabas, ‘International Sentencing: From Leipzig (1923) to Arusha (1996)’, in M. C. Bassiouni (ed.), *International Criminal Law, Volume III, International Enforcement*, 3rd ed. (Leiden: Martinus Nijhoff Publishers, 2008), at 622.

¹⁸⁵⁸ Article 24(2), ICTY Statute, and Article 23(2), ICTR Statute.

¹⁸⁵⁹ Article 7, ICTY Statute, and Article 6, ICTR Statute.

¹⁸⁶⁰ Article 24(1), ICTY Statute, and Article 23(1), ICTR Statute. See also Rule 101, ICTY RPE, and Rule 101, ICTR RPE. In practice, the influence of domestic law in international sentencing has, however, not been that significant. See further e.g., D’Ascoli 2011, at 115-123, and 141-143.

¹⁸⁶¹ Rule 101, ICTY RPE, and Rule 101, ICTR RPE.

¹⁸⁶² Rule 101, ICTY RPE, and Rule 101, ICTR RPE.

- (3) the length of time during which the crime continued;
- (4) active and direct criminal participation, if linked to a high-rank position of command, the accused's role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates;
- (5) the informed, willing or enthusiastic participation in crime;
- (6) premeditation and motive;
- (7) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims;
- (8) the status of the victims, their youthful age and number, and the effect of the crimes on them;
- (9) civilian detainees;
- (10) the character of the accused; and
- (11) the circumstances of the offences generally.¹⁸⁶³

In some cases, the ICTY has held that only circumstances directly related to the commission of an offence can be viewed as aggravating.¹⁸⁶⁴ The *Blaškić* Appeal Judgement also enumerated possible mitigating factors:

- (1) co-operation with the Prosecution;
- (2) the admission of guilt or a guilty plea;
- (3) an expression of remorse;
- (4) voluntary surrender;
- (5) good character with no prior criminal convictions;
- (6) comportment in detention;
- (7) personal and family circumstances;
- (8) the character of the accused subsequent to the conflict;
- (9) duress and indirect participation;
- (10) diminished mental responsibility;
- (11) age;
- (12) assistance to detainees or victims; and
- (13) exceptionally, poor health.¹⁸⁶⁵

¹⁸⁶³ *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686 (with minor stylistic changes).

¹⁸⁶⁴ E.g., *Orić*, Judgement, TC, ICTY, 30 June 2006, para. 731, and *Stakić*, Judgement, TC, ICTY, 31 July 2003, para. 911.

¹⁸⁶⁵ *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 696 (with minor stylistic changes).

Sometimes aggravating and mitigating factors can be connected to the same fact. For example, character can function as an aggravating factor if it is poor and as a mitigating factor if it is good. The ICTY has, however, emphasized that the absence of a mitigating factor does not itself constitute an aggravating factor.¹⁸⁶⁶ As regards the *de facto* application of the various sentencing determinants, the practice of the tribunals strongly stresses the discretion of the trial chambers. Only if a trial chamber has committed a discernible error will the sentence be altered by the appeals chamber.¹⁸⁶⁷ In practice, sentences have, however, every now and then been revised, especially by the ICTY Appeals Chamber.¹⁸⁶⁸ In most cases where the Appeals Chamber has revised sentences, it has, however, not found that the Trial Chamber has committed a discernible error in sentencing. Rather the new sentence has been due to revisions regarding convictions, acquittals and/or the applicable modes of responsibility.¹⁸⁶⁹

The tradition of scarce regulation regarding sentencing is also followed by the Rome Statute of the ICC. The Statute only stipulates that the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.¹⁸⁷⁰ Like its predecessors, the ICC Statute also lays down that official capacity shall not in and of itself constitute a ground for reduction of sentence.¹⁸⁷¹ In contrast to the *ad hoc* tribunals, the ICC RPE, however, contain a specific rule on aggravating and mitigating circumstances, namely Rule 145 which stipulates that the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

- (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
- (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

- (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
- (ii) Abuse of power or official capacity;

¹⁸⁶⁶ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 687, and *Plavšić*, Judgement (sentencing), TC, ICTY, 27 February 2003, para. 64.

¹⁸⁶⁷ E.g., *Vasilijević*, Judgement, AC, ICTY, 25 February 2004, para. 9.

¹⁸⁶⁸ S. M. Sayers, 'Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia', 16 *Leiden Journal of International Law* (2003), at 753 ('Despite an ostensibly narrow and challenging standard of appellate review, sentencing judgements in the ICTY have been revised or reversed with surprising frequency. Sentencing appeals in the ICTR, by contrast, have been almost uniformly unsuccessful')

¹⁸⁶⁹ See further J. J. Clark, 'Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 96 *The Georgetown Law Journal* (2008), at 1685-1718.

¹⁸⁷⁰ Article 78(1), ICC Statute.

¹⁸⁷¹ Article 27(1), ICC Statute.

- (iii) Commission of the crime where the victim is particularly defenceless;
- (iv) Commission of the crime with particular cruelty or where there were multiple victims;
- (v) Commission of the crime for any motive involving discrimination [...];
- (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.¹⁸⁷²

All in all, the aggravating and mitigating factors that are recognized by the *ad hoc* tribunals and the ICC are very similar.

9.2.2. The Gravity of the Crime for which a Conviction Has Been Entered

The gravity of the offence for which a conviction has been entered is hence in international criminal law the most important sentencing determinant. The *ad hoc* tribunals have in their case law acknowledged this by noting that the gravity of the offence is “the litmus test for the appropriate sentence” and that it is essential that the sentence reflects “the inherent gravity of the criminal conduct of the accused”.¹⁸⁷³ As such, international criminal law follows the idea that punishments should be proportionate to the committed wrongdoing.

In domestic legal systems, the gravity of the offence is generally evaluated both at the law-making (*in abstracto*) and law-application (*in concreto*) stages.¹⁸⁷⁴ Gravity *in abstracto* “is based on an analysis, in terms of criminal law of the subjective and objective elements of the crime” whereas the *in concreto* gravity “depends on the harm done and on the degree of culpability of the offender.”¹⁸⁷⁵ As regards the law-making stage, in most domestic legal systems, the criminal statutes establish both the minimum and maximum sentences for each crime individually. This approach is not followed in international criminal law, where the possible penalties for all crimes and all modes of responsibility are the same. In practice, this entails that in international sentencing, the judges have to consider both factors that relate to *in abstracto* and *in concreto* gravity.

There are two traditional parameters in gravity assessments: harm and culpability.¹⁸⁷⁶ In connection to both parameters difficult legal choices have to be made. In relation

¹⁸⁷² On the drafting of this rule, see R. E. Fife, ‘Penalties’, in R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational Publishers, 2001), at 557-565.

¹⁸⁷³ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 731, and *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1225. The *Čelebići* Appeals Chamber furthermore established that “the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.” *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 430.

¹⁸⁷⁴ A similar distinction is that between “legislative determination of penalties” and “judicial determination of penalties” that is made by Olásolo. H. Olásolo, ‘Complementarity Analysis of National Sentencing’, in R. Haveman & O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (Antwerp: Intersentia, 2006), at 42.

¹⁸⁷⁵ Carcano 2002, at 609.

¹⁸⁷⁶ von Hirsch 1993, at 396. See also e.g., R. A. Duff, ‘Guidance and Guidelines’, 105 *Columbia Law Review* (2005), at 1178.

to harm, one must first determine which harms are recognized as legally relevant and secondly agree on how the harm should be measured.¹⁸⁷⁷ Some harms are universally recognized as serious (such as violations of the right to life), but the fact remains that it is difficult to “develop criteria for measuring harm [...] that are more illuminating than simple intuition.”¹⁸⁷⁸ The problem is especially evident in international criminal law where all crimes are so to say inherently grave.¹⁸⁷⁹

In the literature pertaining to international crimes, a debated question has been whether there is or should be an *in abstracto* gravity hierarchy between the various international crimes. The *ad hoc* tribunals have, however, in their case law established that there is in law no distinction between the seriousness of the various international crimes. In the *Stakić* case, the ICTY Appeals Chamber, for example, argued that “there is no hierarchy of the crimes within the jurisdiction of the Tribunal and that [...] the sentence of life imprisonment can be imposed in cases other than genocide.”¹⁸⁸⁰ In the *Kayishema and Ruzindana* Appeal Judgement, Kayishema alleged that the Trial Chamber erred in finding that genocide is the “crime of crimes” because there is no such hierarchical gradation of crimes. The ICTR Appeals Chamber responded to this claim by remarking that there is no hierarchy of crimes under the statute and that all of the crimes specified therein are “serious violations of international humanitarian law” capable of attracting the same sentence and that the Trial Chamber’s description of genocide as the “crime of crimes” was at the level of general appreciation and did not impact on the

¹⁸⁷⁷ Harmfulness is namely generally perceived as the central criterion when evaluating the seriousness of crimes. E.g., von Hirsch and Jareborg have in their typology on crime seriousness evaluated the interests violated or threatened, and the degree to which the living standard of a victim typically is affected by the crime. A. von Hirsch & N. Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’, 11 *Oxford Journal of Legal Studies* (1991)), at 1-38. Also Robinson and Darley observe that in domestic legal systems, empirical studies have indicated that besides the actor’s conduct and culpable state of mind, the resulting criminal harm affects clearly how people morally evaluate an incident. Robinson & Darley 1998, at 1130.

¹⁸⁷⁸ A. von Hirsch, ‘Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”’, 1 *Criminal Law Forum* (1990), at 288 (fn 85).

¹⁸⁷⁹ Haveman has pointed out that all the crimes that are prosecuted by international criminal tribunals fall “within the category of extremely grave cases” if one takes as the point of reference cases tried by ordinary domestic courts. He therefore submits that the cardinal scaling of punishments in international criminal law must be different than in domestic legal systems. (He speaks of “a new hierarchy”). R. Haveman, ‘Sentencing and Sanctioning in Supranational Criminal Law’, in R. Haveman & O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (Antwerp: Intersentia, 2006), at 5. At the same time, Ohlin has, however, claimed that reserving the harshest penalties to the very top-level international criminals may entail that the punishments handed down to the low-level actors become too lenient. J. D. Ohlin, ‘Proportional Sentences at the ICTY’, in B. Swart, A. Zahar & G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011), at 322 ff.

¹⁸⁸⁰ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 375. See also e.g., *Tadić*, Judgement (sentencing), AC, ICTY, 26 January 2000, para. 69, and *Furundžija*, Judgement, AC, ICTY, 21 July 2000, para. 243. There is, however, some case law/individual opinions suggesting that some crimes more serious than others. E.g., *Furundžija*, Judgement (decl. of Judge Lal Chand Vohrah), AC, ICTY, 21 July 2000, para. 2, *Tadić*, Judgement (sentencing, sep. op. of Judge Cassese), AC, ICTY, 26 January 2000, and *Perišić*, Judgement, TC, ICTY, 6 September 2011, para. 1799. (‘Moreover, while there is no codified hierarchy, it is reasonable to conclude that some crimes are of a more grievous nature than others. Because of their inherently discriminatory character, crimes of genocide and targeted persecutions may thus warrant enhanced scrutiny.’).

sentence it imposed.¹⁸⁸¹ Even though the *ad hoc* tribunals have not wanted to establish a hierarchy in their case law, the sentencing practice of the tribunals, however, implies that there is one. The harshest penalties have generally been handed down in connection to genocide followed by crimes against humanity and war crimes.¹⁸⁸² The fact that a number of factors influence sentencing, however, entails that one should approach this type of statistics carefully. To begin with, all international crimes can be committed through alternative underlying offences. In most genocide cases the underlying offence has been killing members of the protected group, whereas the underlying offences in connection to crimes against humanity and war crimes have varied more. Secondly, there may have been case-specific *in concreto* gravity factors which have affected the sentence handed down, such as the number of victims.¹⁸⁸³

The Rome Statute of the ICC also characterizes the gravity of the crime as one of the two central sentencing determinants.¹⁸⁸⁴ No *in abstracto* hierarchy between the various crimes is established in the Statute, that is, the possible maximum penalty for all crimes is the same.

9.2.3. The Modes of Responsibility and Blameworthiness

When offence gravity is evaluated, it is not only the crime *per se* that is considered, but also the mode of responsibility for which the individual is convicted. The *culpability* of offenders may differ, as well as the degree to which they may be held responsible for the *harm* caused. Ashworth has in this vein noted that “the internal architecture of the criminal law consists, to a significant extent, of distinctions according to the degree of fault”.¹⁸⁸⁵ A central sentencing factor is therefore the “degree of participation and intent of the convicted person”.¹⁸⁸⁶ The ICTR Appeals Chamber has in this regard held that the “modes of liability may either augment [...] or lessen [...] the gravity of the crime.”¹⁸⁸⁷

In international criminal law, the modes of responsibility have not been explicitly been put in a hierarchy in the founding documents of the courts, even though some legal scholars find that Article 25(3) of the ICC Statute contains a hierarchy.¹⁸⁸⁸ In international case law, it has, however, been established that some responsibility forms are more blameworthy than others. In short, it has been found that *perpetrator responsibility* is the most blameworthy form of responsibility. Perpetrator responsibility clearly includes

¹⁸⁸¹ *Kayishema & Ruzindana*, Judgement, AC, ICTR, 1 June 2001, para. 367.

¹⁸⁸² J. Meernik & K. King, ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, 16 *Leiden Journal of International Law* (2003), at 735-736 (who have statistically investigated the sentencing practices of the ICTY trial chambers).

¹⁸⁸³ *Milutinović et al.*, Judgement, TC, ICTY, 26 February 2009, vol. 3, para. 1147. Cf. In Rwanda, genocide and mass killings have been connected. In other cases (such as Cambodia), mass killings have instead been connected to political persecution (that is, crimes against humanity).

¹⁸⁸⁴ Article 78(1), ICC Statute. See also *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, paras 36-44.

¹⁸⁸⁵ Ashworth 2008, at 411.

¹⁸⁸⁶ Cf. *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, at 20. See also e.g. *Kupreškić et al.*, Judgement, TC, ICTY, 14 January 2000, para. 852 (‘The determination of the gravity of the crime requires a consideration of [...] the form and degree of the participation of the accused in the crime.’), and *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, paras 182-183.

¹⁸⁸⁷ *Ndindabahizi*, Judgement, AC, ICTR, 16 January 2007, para. 122.

¹⁸⁸⁸ See further Sections 7.2.2 and 7.2.4.6.

committing a crime and *participation in a JCE*.¹⁸⁸⁹ *Aiding and abetting*, on the other hand, has been found to be “a mode of participation that illustrates secondary responsibility and a rather low degree of individual guilt for the crime.”¹⁸⁹⁰ The placement of ordering and instigating in “the hierarchy” is not as evident and not as settled.¹⁸⁹¹ In some cases, the *ad hoc* tribunals have, however, treated ordering as a form of direct responsibility comparable to perpetration.¹⁸⁹² It has even been suggested that ordering should be viewed as one of the most serious forms of participation in the crimes, as well as *planning*. The Trial Chamber in the *Ndindabahizi* case, for example, held that “the highest penalties are to be imposed upon those who planned or ordered atrocities, or those who committed crimes with particular zeal or sadism.”¹⁸⁹³ In this regard, the case law of the *ad hoc* tribunals seems to differ from the hierarchy indicated in the Rome Statute, where orders, solicits and induces have been placed between perpetration and aiding and abetting in Article 25(3). According to Osiel the (low) hierarchical position of ordering in the Rome Statute has affected prosecutorial choices, so that the ICC Prosecutor has avoided prosecuting individuals for ordering crimes:

Ordering atrocity bears a superficial resemblance to “suggesting” or recommending it, insofar as both entail speech acts. Yet the two are profoundly different in social meaning, even were their wording identical. To effectively order another person to do one’s murderous bidding requires an organizational machinery that stands behind the speaker; otherwise, the statement is just instigation, a form of complicity, with punishment diminished accordingly. It is no accident that, in the ICC Statute, the word “orders” is paired in the same clause with “solicits” and “induces,” verbs associated with liability as a mere accessory. The ICC Prosecutor hence prefers to avoid invoking this mode of participation, even when there is plenty indication, as in *Katanga*, of a [defendant] [...] having ordered people about.¹⁸⁹⁴

¹⁸⁸⁹ See further Section 7.2.4. and the subsections on commission responsibility.

¹⁸⁹⁰ Werle 2007, at 970. See also e.g., *Krstić*, Judgement, AC, ICTY, 19 April 2004, para. 268, *Ntagerura et al.*, Judgement, TC, ICTR, 25 February 2004, para. 813, and *Semanza*, Judgement, AC, ICTR, 20 May 2005, para. 388.

¹⁸⁹¹ See further e.g., Goy 2012, at 11, Olásolo 2010, at 534-535, and H. Satō, ‘International Criminal Responsibility Concerning ‘Control over an Organization’ and Command Responsibility *Lato Sensu*’, 12 *International Criminal Law Review* (2012), at 295-300. The placement of ordering and instigating in a hierarchy is furthermore complicated by the fact that the ordering or instigation in certain cases can found the basis for commission responsibility. *Munyakazi*, Judgement (sep. op. of Judge Liu), AC, ICTR, 28 September 2011, para. 3 (‘In effect, the newly expanded form of commission has subsumed various modes of individual criminal responsibility enumerated in the Statute. Specifically, ordering, instigating, and aiding and abetting appear to have been amalgamated into this mode of liability, to a large extent rendering redundant the distinctions envisaged by Article 6(1) of the Statute. Whether instances of ordering, instigating, and aiding and abetting may be classified as “committing” is ostensibly a question of nature and degree, requiring judicial scrutiny to determine whether the overall conduct of the accused should be “elevated” to commission. Inevitably, the conflation of these various forms of liability creates considerable ambiguity as to the scope of a convicted person’s criminal responsibility.’)

¹⁸⁹² E.g., *Mrkšić & Šljivančanin*, Judgement, AC, ICTY, 5 May 2009, para. 407, and *Ntawukulilyayo*, Judgement, AC, ICTR, 14 December 2011, para. 244.

¹⁸⁹³ *Ndindabahizi*, Judgement, TC, ICTR, 15 July 2004, para. 500. See also e.g., *Kalimanzira*, Judgement, TC, ICTR, 22 June 2009, para. 744, *Kanyarukiga*, Judgement, AC, ICTR, 8 May 2012, para. 280, and *Ntawukulilyayo*, Judgement, TC, ICTR, 3 August 2010, para. 469.

¹⁸⁹⁴ Osiel 2010, at 110.

Finally, *superior responsibility* has by the *ad hoc* tribunals sometimes been identified as a form of responsibility that warrants a lower sentence.¹⁸⁹⁵ This has been found to be the case especially when the accused has only been charged with *post facto* knowledge of the crimes. For example, in the *Rugambarara* case, the ICTR noted that: “Saving lives was therefore not at stake, which makes the crime less serious than if it were otherwise.”¹⁸⁹⁶ At the same time, there is also appeals chamber case law, in which it is stressed that as a matter of law superior responsibility is not less grave and that the fact that the offender only has been convicted for superior responsibility should therefore not *automatically* be considered as a factor that mitigates the punishment. For example, in the *Milošević* case, the Appeals Chamber held that:

The Appeals Chamber acknowledges that in appropriate cases, a conviction under Article 7(3) of the Statute may result in a lesser sentence as compared to that imposed in the context of an Article 7(1) conviction. However, in this particular case, the Appeal Chamber finds that its conclusions with respect to the form of Milošević’s responsibility for the crimes at stake do not in any way diminish his active and central role in the commission of the crimes.¹⁸⁹⁷

In this regard, it is noteworthy that the doctrine of superior responsibility can be used in very different types of cases. Firstly, the doctrine “has not specified the degree of liability for each level of command down the chain” and it is hence not restricted to “finding of responsibility to a commander of a certain level”.¹⁸⁹⁸ Secondly, the doctrine of superior responsibility can be applied both in cases of actual knowledge *and* in cases of constructive knowledge. A knowing failure is generally more blameworthy than wilful blindness. And thirdly, in superior responsibility, it is not only the superior’s conduct in failing to prevent or punish the subordinate’s offence that is evaluated when the gravity of the offence is considered. Also the gravity of the subordinate’s offence is a relevant sentencing determinant.¹⁸⁹⁹ In the Rome Statute of the ICC, superior responsibility has been placed in a different article than the other modes of responsibility and the question of what level of blameworthiness superior responsibility represents has not yet been settled in the case law. In the same way as before the *ad hoc* tribunals, it, however, also appears that the ICC only considers responsibility based on Article 28 in situations where Article 25(3) responsibility cannot be established.¹⁹⁰⁰

The suggested *in abstracto* hierarchy between the various modes of responsibility has, in practice, not always had a clear significance on the sentence handed down. Individuals found to have taken part in a JCE can, for example, receive very different sentences even though they all are regarded as perpetrators and as persons with

¹⁸⁹⁵ E.g., *Delić*, Judgement, TC, ICTY, 15 September 2008, para. 562.

¹⁸⁹⁶ *Rugambarara*, Judgement (sentencing), TC, ICTR, 16 November 2007, para. 20.

¹⁸⁹⁷ *Milošević*, Judgement, AC, ICTY, 12 November 2009, para. 334. See also *Bagosora & Nsengiyumva*, Judgement, AC, ICTR, 14 December 2011, para. 740, *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 735, and *Ntabakuze*, Judgement, AC, ICTR, 8 May 2012, paras 282, 299 and 303.

¹⁸⁹⁸ *Jia* 2004, at 40-41.

¹⁸⁹⁹ E.g., *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 732, and *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 313.

¹⁹⁰⁰ See e.g., *Bemba*, Decision (confirmation of charges), PTC, ICC, 15 June 2009, paras 342 and 402.

“equal culpability.”¹⁹⁰¹ And while persons convicted based on the doctrine of superior responsibility generally have received light sentences before the *ad hoc* tribunals, there are at least some notable exceptions.¹⁹⁰² This raises the question of whether there are other aspects in the participation that more strongly affect gravity evaluations.

What, in fact, to a great extent appears to affect sentences are certain factors connected to the “form and degree of participation”¹⁹⁰³ that sometimes are considered when assessing offence gravity and sometimes as aggravating factors, namely the leadership role of the accused and zeal in the commission of the crimes. Also the question of whether the participation has been direct (“dirty hands”) or indirect (“clean hands”) has sometimes been found to be relevant.¹⁹⁰⁴ D’Ascoli has in her empirical analysis of the *ad hoc* tribunals’ sentencing practice observed that “while for ICTY Chambers there is no direct or automatic link between harsher penalties and perpetrators with ‘dirty hands,’ conversely ICTR Chambers have sentenced direct perpetrators more severely than indirect ones.”¹⁹⁰⁵ In connection to high-level actors, the *ad hoc* tribunals have also explicitly found that the fact that the convicted persons have not personally committed any acts of violence does not necessarily entail that the persons should be entitled to a lesser sentence.¹⁹⁰⁶

More generally, it has been held that when individual culpability is assessed in connection to mass atrocities, it is also central to evaluate the role played by the actor in the actual historical events or the “criminal context.” In the *Krstić* case, the ICTY Appeals Chamber, for example, noted that the Trial Chamber “was entitled to consider the conduct of Krstić in the proper context, which includes the conduct of any alleged co-perpetrators.” More specifically, the Appeals Chamber held that: “A comprehensive

¹⁹⁰¹ The JCE doctrine establishes equal perpetrator culpability at the conviction stage. This has been criticized in the doctrine. E.g., Ohlin has held that: “Relative culpability is not simply a matter of serving the appropriate time in a penal facility. It goes deeper to the very heart of the criminal offence. The minor participant and the chief conspirator are not simply deserving of different sentences. Their guilt is different and it is this central truth that the current version of joint criminal enterprise obscures.” Ohlin 2007(b), at 88.

¹⁹⁰² Schabas 2010(a), at 455 (referring to the *Nahimana et al.* (30 years) and *Bagosora et al.* (life imprisonment) cases before the ICTR).

¹⁹⁰³ E.g., *Karemera & Ngirumpatse*, Judgement, TC, ICTR, 2 February 2012, para. 1721, and *Nyiramasuhuko et al.*, Judgement, TC, ICTR, 24 June 2011, para. 6189.

¹⁹⁰⁴ E.g., *Mrkšić & Šljivančanin*, Judgement, AC, ICTY, 5 May 2009, para. 407 (“The Appeals Chamber agrees with Šljivančanin that the fact that an accused did not physically commit a crime is relevant to the determination of the appropriate sentence.”)

¹⁹⁰⁵ D’Ascoli 2011, at 232 (see also 238-239).

¹⁹⁰⁶ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 380 (“The Appeals Chamber wishes to clarify that [...] the fact that an accused is found guilty as an “indirect co-perpetrator” does not in itself entitle him to a lower sentence. [...] Moreover, the Appeals Chamber notes that the role of the “indirect co-perpetrators” can be very significant, particularly in cases of large scale crimes which could not be committed without the help of the indirect co-perpetrators in such ways as planning, instigating, co-ordinating or organising. [...]). Like in connection to abuse of superior position, the directness of the participation may alternatively be considered as an aggravating factor (or in connection to indirect participation as a mitigating factor). See also e.g., *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, para. 739, and *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 1054, and *Gotovina et al.*, Judgement, TC, ICTY, 15 April 2011, para. 2602 (“The fact that neither of them acted as principal perpetrator does not reduce their responsibility in any way.”)

understanding of the facts of a particular case not only permits a consideration of the culpability of other actors; indeed, it requires it in order to accurately comprehend the events in question and to impose the appropriate sentence.”¹⁹⁰⁷ In the *Tadić* case, the ICTY in a similar vein noted that: “Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.”¹⁹⁰⁸ Both *ad hoc* tribunals have, however, stressed that this does not entail that only the architects behind international atrocities can receive the harshest penalties. In certain cases, the criminal behaviour of low-level actors is so heinous that also they deserve the maximum penalty.¹⁹⁰⁹

9.2.4. Aggravating Factors

9.2.4.1. Introduction

In domestic legal systems, the factors that courts can take into account in aggravation of the sentence are often explicitly enumerated in law through special provisions on aggravating factors or as part of the crime definitions (when there exists aggravated forms of the crimes). Such written provisions are often found necessary due to the principle of legality.¹⁹¹⁰ In international criminal law, the existence of aggravating factors has not been as evident due to the lack of explicit provisions and/or the nature of the criminality. In connection to the post-World War II trials Schabas, for example, notes that “the various national military tribunals did not as a rule address themselves to aggravating factors” and that “[g]iven the horror of the crimes over which such tribunals had jurisdiction, discussion of aggravating factors must have seemed completely superfluous.”¹⁹¹¹ Likewise, Sloane has pointed out that “[i]t is difficult to identify an act of genocide or a crime against humanity that is not ‘heinous.’”¹⁹¹² Early ICTY case law also seemed to exclude the idea of aggravating circumstances in connection to international crimes. In the *Erdemović* case, the Trial Chamber namely held that “when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration.”¹⁹¹³ Later ICTY and ICTR case law has, however, clearly confirmed the existence of aggravating factors in international criminal law.¹⁹¹⁴ This case law is in line

¹⁹⁰⁷ *Krstić*, Judgement, AC, ICTY, 19 April 2004, para. 254.

¹⁹⁰⁸ *Tadić*, Judgement (sentencing), AC, ICTY, 26 January 2000, para. 56.

¹⁹⁰⁹ In the *Čelebići* Appeal Judgement, ICTY emphasized that the *Tadić* Sentencing Appeal Judgement should not be read to require that “in every case before it, an accused’s level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused’s place was by comparison low, a low sentence should automatically be imposed.” Also low-level actors can hence receive a severe penalty, if their criminal behaviour merits that. *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 847. See also e.g., *Muhimana*, Judgement, AC, ICTR, 21 May 2007, para. 233.

¹⁹¹⁰ See e.g., the *Achour* case before the ECtHR, where it in connection to ECHR Article 7 was considered whether it was foreseeable to the accused that his recidivism would be considered as an aggravating factor. *Achour v. France*, Judgment, GC, ECtHR, 29 March 2006.

¹⁹¹¹ Schabas 2008(b), at 622.

¹⁹¹² Sloane 2007(b), at 728.

¹⁹¹³ *Erdemović*, Judgement (sentencing), TC, ICTY, 29 November 1996, para. 45.

¹⁹¹⁴ See e.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

with the tribunals' RPE, which stipulate that the tribunals shall consider "any aggravating circumstances" at sentencing.¹⁹¹⁵

The ICC follows the approach of the *ad hoc* tribunals, however, so that the RPE explicitly enumerate some aggravating factors. More specifically, ICC Rule 145(2)(b) mentions relevant prior criminal convictions, abuse of power or official capacity, commission of the crime where the victim is particularly defenceless, commission of the crime with particular cruelty or where there were multiple victims, and commission of the crime for any motive involving discrimination. The list in the RPE is, however, non-exhaustive in that the Court can also consider other circumstances which, although not enumerated "by virtue of their nature are similar to those mentioned." Such similar factors could, for example, be the long duration of the crime and the sexual, violent, and humiliating nature of the acts, which the *ad hoc* tribunals in their case law have identified as aggravating.¹⁹¹⁶

The aggravating factors can be categorized based on whether they are *backwards looking* (relating to the guilt) or *forward-looking* (relating to dangerousness, for example, recidivism).¹⁹¹⁷ In this study, the focus will be on backwards-looking aggravating factors, which are connected to the situation in which the crime was committed. In this regard, it is noteworthy that recent ICTY case law has stressed that "[o]nly those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence [...] may be considered in aggravation."¹⁹¹⁸ These aggravating factors are generally justified with the increased culpability of the actor or the special harm caused. Sometimes both types of justifications for aggravation are raised. The special blameworthiness of bias crimes has, for example, been explained both by enhanced culpability¹⁹¹⁹ and by greater harm caused.¹⁹²⁰

9.2.4.2. Aggravating Factors Relating to the Offence

The magnitude of the crime, discrimination against the victims, the special trauma, suffering or humiliation caused to the victims, the special vulnerability of the victims, and special cruelty or sadism shown in the execution of the crime are factors that often in international criminal jurisprudence have been considered in aggravation.¹⁹²¹ Many of these are also recognized as aggravating factors in domestic legal systems. Their use

¹⁹¹⁵ Rule 101, ICTY RPE, and Rule 101, ICTR RPE.

¹⁹¹⁶ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

¹⁹¹⁷ Wattad 2006, at 1020, and M. S.-A. Wattad, "The Meaning of Guilt: Rethinking *Apprendi*", 33 *New England Journal of Criminal and Civil Confinement* (2007), at 547-548. Most of the persons who have been convicted by international criminal tribunals have, however, been first time offenders and have in the prisons behaved well. This indicates that traditional criminal law parameters for evaluating dangerousness do not necessarily function well in relation to international criminality. Regarding the role of rehabilitation in international sentencing, see e.g., Harmon & Gaynor 2007, at 693-694.

¹⁹¹⁸ E.g., *Milutinović et al.*, Judgement, TC, ICTY, 26 February 2009, vol. 3, para. 1149.

¹⁹¹⁹ Carcano has e.g., found that bias crimes entail that "the offender disregards principles of international law based on the equality of all human beings". Carcano 2002, at 603. See also Wattad 2007, at 547.

¹⁹²⁰ Marston Danner notes that: "First, bias crimes are more likely to be committed by groups of people. Second, bias crimes inflict greater harm on the immediate victim. Third, bias crimes have many secondary victims – notably, the other members of the group against whom the defendant acted." Marston Danner 2001, at 466 (referring to Lawrence).

¹⁹²¹ D'Ascoli 2011, at 209. See also e.g., *Milutinović et al.*, Judgement, TC, ICTY, 26 February 2009, vol. 3, para. 1151.

in the international context is, however, not as self-evident.¹⁹²² Many of the aggravating factors are namely typical features of international criminality. International crimes are generally brutal, discriminatory and so forth, and some of the aggravating features are therefore included in the crime definitions. Genocide, for example, has discriminatory animus as a crime element and extermination (as a crime against humanity) mass victimization.¹⁹²³

International jurisprudence establishes that if a certain factor already has been taken into account when the offence gravity has been considered, it cannot be considered again as an aggravating circumstance.¹⁹²⁴ Genocide and persecution, which have a discriminatory intent as a crime element, cannot hence be aggravated due to discrimination, but they may be aggravated by the especially brutal way of committing the crimes.¹⁹²⁵ The war crime of torture, on the other hand, is generally¹⁹²⁶ not aggravated by the fact that crime is committed in a heinous way, but may be aggravated if the offender has acted with discriminatory intent.¹⁹²⁷ War crimes can also, for example, be aggravated if they are committed in a systematic manner or as part of an organisational framework.¹⁹²⁸ The aggravating circumstances can hence entail that factors that are crime elements in connection to particular crimes become legally relevant in connection to all crimes, and as such diminish the differences between offences. The difference between genocide with numerous victims and extermination committed with discriminatory intent is, for example, not that great with regard to the legally relevant factors that affect the outcome in the case. It should be noted that the prohibition of double-counting does not prevent the consideration of a factor when the factor is present in a manner that “exceeds” the requirements for a conviction. For example, the huge number of victims has in certain extermination cases been considered in aggravation.¹⁹²⁹ Likewise, the

¹⁹²² E.g., Sloane 2007(b), at 722-723, and Dana 2004, at 343.

¹⁹²³ Regarding extermination, see e.g., *Semanza*, Judgement, TC, ICTR, 15 May 2003, para. 571. In connection to the crime of detention, the fact that the victims are vulnerable and at the detention holder's mercy is likewise inherent to the crime. The Appeals Chamber in the *Limaj et al.* case therefore found that the Trial Chamber had not erred when it did not consider the vulnerability of the detainees as an aggravating factor. It instead considered it when assessing the gravity of the crime. *Limaj et al.*, Judgement, AC, ICTY, 27 September 2007, para. 142.

¹⁹²⁴ E.g. *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, paras 172-173, *Ntakirutimana & Ntakirutimana*, Judgement, TC, ICTR, 21 February 2003, para. 893, and *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, para. 78.

¹⁹²⁵ E.g., *Kayishema & Ruzindana*, Judgement, AC, ICTR, 1 June 2001, para. 350 (where the way in which the victim was killed in a genocide case was considered in aggravation).

¹⁹²⁶ To what extent a factor *de facto* is considered as a crime element is not always clear. In the *Vasiljević* Appeal Judgement, the Appeals Chamber, e.g., found that even though the mental suffering of the victims is an element of the crime of inhumane acts, a trial chamber is allowed to consider the “long term effect of the trauma” as an aggravating factor, if it considers it suitable. *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, paras 163 and 167.

¹⁹²⁷ On discriminatory intent as an aggravating factor, see e.g., *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 173. Likewise, humiliation suffered by the victims cannot generally be considered in aggravation when the underlying offences are “humiliating and degrading treatment”. *Češić*, Judgement (sentencing), TC, ICTY, 11 March 2004, para. 53.

¹⁹²⁸ *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 352.

¹⁹²⁹ E.g., *Ndindabahizi*, Judgement, AC, ICTR, 16 January 2007, para. 135, and *Nyiramasuhuko et al.*, Judgement, TC, ICTR, 24 June 2011, para. 6195.

long-term effect of trauma can aggravate inhumane acts, where mental suffering is a prerequisite for conviction.¹⁹³⁰ It should also be emphasized that the prohibition against double-counting may pose special challenges in cumulatively charged cases. In the *Češić* case, the Trial Chamber, in this regard, made the following analysis:

[T]he Appeals Chamber has recently deemed that, when the same criminal conduct is cumulatively charged under two separate counts, a factor taken into account as an element of the crime under one count does not prevent its being considered as an aggravating factor under the other count for the determination of the sentence. In the present case, humiliation is clearly an element of the crime of humiliating and degrading treatment, as a violation of the laws or customs of war, while it is not explicitly an element of the crime of rape. However, it is uncontested that rape is an inherently humiliating offence and that humiliation is always taken into account when appreciating the inherent gravity of this crime. The distinction between the crimes thus lies in the emphasis placed on this particular aspect of the offence. The crime of humiliating and degrading treatment clearly places emphasis on the humiliation caused to the victims. Consequently, the Trial Chamber would not normally treat very serious humiliation as an aggravating circumstance in the context of this particular crime but would rather consider it in appreciating the gravity of the crime. By contrast, the crime of rape, although inherently humiliating, places emphasis on the violation of the physical and moral integrity of the victim. Under these circumstances, exacerbated humiliation may be considered in aggravation of this crime. [...] Applied to this case, the Trial Chamber finds that the humiliation suffered by the victims was exacerbated both because they were brothers and because guards were present, watching and laughing. [...] However, it should be kept in mind that there is no fixed standard in evaluating the totality of an accused's criminal conduct. While determining the appropriate sentence in this particular case, the Trial Chamber will not consider exacerbated humiliation twice, *i.e.* once as an element of a violation of the laws or customs of war and once as an aggravating factor in the context of the conviction for a crime against humanity. Rather, it will only impose one single sentence and eventually consider the degree of humiliation only once in the final evaluation.¹⁹³¹

The analysis of the Trial Chamber stresses that what distinguishes international crimes from each other sometimes is *where the emphasis is put*, rather than what is legally relevant (either as a conviction or sentencing factor).

In the case law of the *ad hoc* tribunals, there have furthermore been some additional, occasionally accepted aggravating factors. In the *Gatete* case, it was, for example, found that the fact that the crimes were committed in places that are “universally recognised [...] as sanctuaries”, such as parishes, could be considered in aggravation.¹⁹³² This aggravating factor reflects the fact that in armed conflicts even the most sacrosanct places can be attacked. In the *Ndindiliyimana et al.* case, on the other hand, it was found legally relevant who the victims were. More specifically, the Trial Chamber held that: “The killings of the Prime Minister, a figurehead of the Rwandan government, and the UNAMIR peacekeepers, international representatives ensuring adherence to the Arusha Accords,

¹⁹³⁰ *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 167.

¹⁹³¹ *Češić*, Judgement (sentencing), TC, ICTY, 11 March 2004, paras 53-54.

¹⁹³² *Gatete*, Judgement, TC, ICTR, 31 March 2011, para. 679.

carried particular symbolic weight and removed impediments to the genocide and other crimes that ultimately occurred.¹⁹³³ The Trial Chamber also found it aggravating that the peacekeepers had been “sent to Rwanda by the UN Security Council under its Chapter VI peacekeeping authority.”¹⁹³⁴ In the *Vasiljević* case, the Appeals Chamber held that it lies within the discretion of the Trial Chamber to regard verbal abuse in connection to the execution of the crimes as an aggravating factor.¹⁹³⁵

In some cases the chambers have, however, not clearly ruled on the aggravating effect of particular facts. For example, in the *Stakić* case the question was at the appeal stage raised whether the fact that a crime is a white collar crime should aggravate the sentence. No ruling was made on this, as the Appeals Chamber found that the Trial Chamber had not made this argument.¹⁹³⁶ It has also been asked whether State involvement in the criminality should be considered in aggravation. In the *Gacumbitsi* case, the prosecutor, for example, argued that the fact that Gacumbitsi had used “the police, armed, uniformed, and responsible for public security” to launch attacks should have been regarded as “extremely aggravating.” The Appeals Chamber did, however, not find a discernible error as the Trial Chamber had taken into account Gacumbitsi’s “abuse of his powers as *bourgmestre*, of which his use of the police was merely a part.”¹⁹³⁷ In fact, it appears that State involvement in the criminality in international sentencing generally has been taken into account as an aggravating factor relating to the offender, that is, by regarding abuse of power as an aggravating factor. The collective nature of international criminality has similarly been considered indirectly, that is, by taking into account at sentencing the hierarchical position of the individual in the collective. A controversial question has been whether the effects of the crimes on indirect victims may be taken into consideration at sentencing.¹⁹³⁸

The ICC has not yet developed a significant case law on aggravating factors. In the *Lubanga* case, it was, however, put forward that crimes not charged by the prosecutor could affect the sentence: (a) if the Trial Chamber was satisfied beyond reasonable doubt that the crimes had taken place; and (b) if the crimes were attributable to the

¹⁹³³ *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2257 [UNAMIR = United Nations Assistance Mission for Rwanda].

¹⁹³⁴ *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2257.

¹⁹³⁵ *Vasiljević*, Judgement, AC, ICTY, ICTY, 25 February 2004, para. 161. In the *Vasiljević* case, the Trial Chamber furthermore considered in aggravation the fact that one of the victimized individuals was well known to the accused. *Vasiljević*, Judgement, TC, ICTY, 29 November 2002, para. 279.

¹⁹³⁶ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 426.

¹⁹³⁷ *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, paras 189-191.

¹⁹³⁸ *Krnojelac*, Judgement, AC, ICTY, 17 September 2003, para. 260 (“the case-law of some domestic courts shows that a trial chamber may still take into account the impact of a crime on a victim’s relatives when determining the appropriate punishment. The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.”). Cf. however, *Kunarac et al.*, Judgement, TC, ICTY, 22 February 2001, para. 852 (“The Trial Chamber is unable to accept that a so-called *in personam* evaluation of the gravity of the crime could or should also concern the effect of that crime on third persons [...]. Such effects are irrelevant to the culpability of the offender, and it would be unfair to consider such effects in determining the sentence to be imposed. Consideration of the consequences of a crime upon the victim who is *directly* injured by it is, however, always relevant to the sentencing of the offender.”)

convicted person.¹⁹³⁹ The majority of the Trial Chamber, however, held that the in this way suggested sexual violence against the children could not be attributed to Lubanga “in a way that reflects his culpability.”¹⁹⁴⁰

9.2.4.3. Aggravating Factors Relating to the Offender

Sloane has in his analysis of the ICTR sentencing practice found that because more or less all crimes that the tribunal has prosecuted has been so extremely serious, the “adjustments to and individualization of the sentence virtually all take place at the level of ‘individual circumstances.’”¹⁹⁴¹ Individual circumstances are considered both: (a) in connection to the gravity of the offence; and (b) in relation to aggravating and mitigating factors. If a particular factor has been considered when assessing offence gravity, it cannot be considered again as an aggravating or mitigating factor.¹⁹⁴²

The elements of the mode of responsibility are conviction determinants and they are as such factors that should be evaluated when the gravity of the offence is assessed. In connection to modes of responsibility, it is, however, noteworthy that the *ad hoc* tribunals have found that modes of participation for which a person not is convicted for may aggravate the offence (for example, planning and ordering when the person is convicted for having committed the crime, or superior responsibility when the person is convicted based on Articles 7(1) ICTY respectively 6(1) ICTR). The rationale for this is according to the ICTY Appeals Chamber both the *contribution* to the crime the additional modes of participation entail as well as the enhanced *moral culpability* of the offender.¹⁹⁴³

The most significant aggravating factor relating to the offender has, in international case law, been *abuse of superior, prominent and/or official position*.¹⁹⁴⁴ The position of power does not have to be a superior-subordinate relationship as in connection to superior responsibility. Mere influence/authority may entail a position of power or trust, in which abuse can be considered at sentencing.¹⁹⁴⁵ The type of position, however,

¹⁹³⁹ *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, paras 67-69.

¹⁹⁴⁰ *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, para. 74. See also the dissenting opinion of Judge Odio Benito. *Lubanga*, Decision (sentencing, diss. op. of Judge Odio Benito), TC, ICC, 10 July 2012, paras 21-22.

¹⁹⁴¹ Sloane 2007(b), at 722.

¹⁹⁴² E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 413.

¹⁹⁴³ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 413. See also e.g., *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2253. In connection to this it is, however, significant that general procedural requirements for aggravating facts are that they have been proven beyond a reasonable doubt. *Delalić et al.*, Judgement, AC, ICTY, 20 February 2001, para. 763, and *Kajelijeli*, Judgement, AC, ICTR, 23 May 2005, para. 294. Some ICTR case law also suggests that aggravating factors should have been pleaded in the indictment. *Nyiramasuhuko et al.*, Judgement, TC, ICTR, 24 June 2011, para. 6193. ICTY appears to have chosen another approach in some cases. E.g., *Kupreškić et al.*, Judgement, AC, ICTY, 23 October 2001, para. 376, and *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 423.

¹⁹⁴⁴ E.g., *Aleksovski*, Judgement, AC, ICTY, 24 March 2000, para. 183, and *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

¹⁹⁴⁵ E.g., *Ntawukulilyayo*, Judgement, TC, ICTR, 3 August 2010, para. 472, and *Rukundu*, Judgement, AC, ICTR, 20 October 2010, para. 250.

affects what can be expected and required from the person in question.¹⁹⁴⁶ The abuse of power may consist of acts (active) or omissions (passive).¹⁹⁴⁷ In the *Stakić* case, it was, for example, considered as aggravating that “the Appellant was unwilling to help individuals in need notwithstanding the fact that he had the power to do so”¹⁹⁴⁸ Furthermore, abuse of *previous* positions of authority may constitute an aggravating factor if the person uses the “influence he derived from such a position to lend encouragement and approval to the commission of crimes.”¹⁹⁴⁹ In the case law, it has been stressed that it is the *abuse of power* and not the position *per se* which may aggravate sentences.¹⁹⁵⁰ This has been found to entail that aggravation due to abuse of authority is also possible in connection to modes of responsibility where superior position is a prerequisite (ordering, superior responsibility).¹⁹⁵¹ In those cases, for example, the high-level superior position of an individual may be taken into account.¹⁹⁵² Furthermore, *active and direct participation* in combination with a superior position may function in aggravation.¹⁹⁵³

Authority may attach to certain *public functions*. As noted by the ICTY in the *Mrđa* Sentencing Judgement:

The Trial Chamber deems that committing a crime while exercising a public function – such as that of a policeman – may be considered as an aggravating factor. A policeman is vested with authority and a duty to uphold law and order. Civilians subjected to his authority are entitled to expect that a person of his role will abide by this duty. If the policeman commits a crime in the exercise of his function, the

¹⁹⁴⁶ E.g., in the *Milošević* case, the Trial Chamber observed that: “the Accused was the Commander of the SRK [= Sarajevo Romanija Corps], the corps that conducted a protracted campaign of sniping and shelling of civilians, civilian areas and the civilian population of Sarajevo. [...] The Accused had a special responsibility to uphold the standards of international humanitarian law. The Trial Chamber considers that the Accused’s position as commander of the SRK obligated him to prevent the commission of crimes and to ensure that the troops under his command conducted themselves with respect for international humanitarian law. However, the evidence presented to the Trial Chamber shows that the Accused abused his position and that he, through his orders, planned and ordered gross and systematic violations of international humanitarian law.” *Milošević*, Judgement, TC, ICTY, 12 December 2007, para. 999.

¹⁹⁴⁷ Aggravation due to lack of action to prevent crimes, e.g., *Musema*, Judgement, TC, ICTR, 27 January 2000, para. 1003. See, however, the *Ndindabahizi* case, where the Appeals Chamber noted that: “The Appellant has not demonstrated that the first two aggravating circumstances identified by the Trial Chamber are in fact the same aggravating circumstance. [...] the important element in the first aggravating circumstance is the abuse of trust. This differs from the second aggravating circumstance, in which the Trial Chamber considered [...] the fact that, instead of promoting peace and reconciliation as would be the duty of a Minister, the Appellant supported and advocated a policy of genocide [...]” *Ndindabahizi*, Judgement, AC, ICTR, 16 January 2007, para. 134. Lack of preventive action may also evidence abuse of position.

¹⁹⁴⁸ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 420.

¹⁹⁴⁹ *Haradinaj et al.*, Judgement, AC, ICTY, 19 July 2010, para. 327.

¹⁹⁵⁰ E.g., *Babić*, Judgement (sentencing), AC, ICTY, 18 July 2005, para. 80.

¹⁹⁵¹ E.g., *Kayishema & Ruzindana*, Judgement, AC, ICTR, 1 June 2001, para. 358, and *Milošević*, Judgement, AC, ICTY, 12 November 2009, paras 302-303. Judge Liu, however, dissented in the *Milošević* case as he found that “abuse of a position of authority is inherent to the mode of liability of ordering.” *Milošević*, Judgement (partly diss. op. of Judge Liu), AC, ICTY, 12 November 2009, para. 30.

¹⁹⁵² *Galić*, Judgement, AC, ICTY, 30 November 2006, para. 412 (“While the mode of liability of ordering necessarily entails that the person giving the order has a position of authority, the level of authority may still play a role in sentencing as it is not an element of the mode of liability of “ordering” that an accused is high in the chain of command and thus wields a high level of authority. [...]).

¹⁹⁵³ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

breach of public duty and legitimate expectations attaching to his function should be considered as an aggravating factor.¹⁹⁵⁴

More generally, the ICTY has, however, held that *professions* (for example, priest or doctor) *per se* should not be considered in aggravation.¹⁹⁵⁵ In some ICTR cases, it has, however, been found that occupation can be relevant at sentencing.¹⁹⁵⁶ There is, furthermore, some case law suggesting that *character* in general may be considered in aggravation,¹⁹⁵⁷ and more specifically intelligence and good education. In some cases, it has namely been put forward that it is especially egregious that highly educated, intelligent people who previously have been respectable citizens have engaged in the criminality.¹⁹⁵⁸ Likewise the ICC in the *Lubanga* case held that Mr. Lubanga's intelligence and high education entailed that he had a "marked level of awareness", which it considered relevant at sentencing.¹⁹⁵⁹ That "certain people" engage in criminality has hence been found to be especially blameworthy. The approach of the *ad hoc* tribunals regarding character at sentencing is, however, inconsistent. D'Ascoli has observed that while good character in the sense "innate character of the accused" often has been viewed as a mitigating factor, character in the more objective sense (educational and professional background) has sometimes been considered in aggravation.¹⁹⁶⁰

Taken into consideration that many international crimes are committed by members of collectives, an interesting question is to what extent membership in an organization may aggravate the sentence. For example in Finland, the commission of an offence as "member of a group organised for serious offences" is a possible ground to increase the

¹⁹⁵⁴ *Mrđa*, Judgement (sentencing), TC, ICTY, 31 March 2004, para. 51. Mrđa was, however, a low-ranking police officer and as such the Trial Chamber only gave his public function a limited weight as an aggravating factor. *Ibid.*, paras 53-54.

¹⁹⁵⁵ See further e.g., *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, para. 274, and *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 416. See also *Simić et al.*, Judgement, TC, ICTY, 17 October 2003, para 1084 ("The Trial Chamber agrees with the Prosecution that the fact that Blagoje Simić is intelligent, educated and a member of the medical profession constitute an aggravating circumstance.") This finding was *not* upheld at appeals. *Simić et al.*, Judgement, AC, ICTY, 28 November 2006, paras 270-274.

¹⁹⁵⁶ In connection to G. Ntakirutimana, the Trial Chamber, e.g., held that: "It is particularly egregious that, as a medical doctor, he took lives instead of saving them." *Ntakirutimana & Ntakirutimana*, Judgement, TC, ICTR, 21 February 2003, para. 910. In the *Seromba* case, the Trial Chamber noted that Seromba's "training as a priest and his experience within the church should have enabled him to understand the reprehensible nature of his conduct during the events." *Seromba*, Judgement, TC, ICTR, 13 December 2006, para. 385.

¹⁹⁵⁷ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

¹⁹⁵⁸ E.g., *Brđanin*, Judgement, TC, ICTY, 1 September 2004, para. 1114, and *Hategekimana*, Judgement, TC, ICTR, 6 December 2010, para. 744. See further D'Ascoli 2011, at 159-162. Intelligence and good education can, however, also be considered in mitigation (as factors that indicate potential for rehabilitation). E.g., *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, paras 325 and 328.

¹⁹⁵⁹ *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, paras 55-56.

¹⁹⁶⁰ D'Ascoli 2011, at 190. A factor that should be considered is, e.g., what is understood by character. Also the connection to related concepts, such as reputation, should be clarified. (Brennan has made a distinction between character and reputation. According to him, character refers to a "generalized description of a person's disposition or a general trait of that person's disposition" whereas reputation is a "community's [collective] estimation of a person's character." L. C. Brennan, 'Admissibility of Character Evidence in Illinois Criminal Cases', *DCBA Brief* (2010), at 38.)

punishment.¹⁹⁶¹ The rationale behind this provision is the society's need to protect itself against organized crime.¹⁹⁶² Even though membership in a criminal group/organization could be a rational ground to aggravate punishments in international criminal law, such membership has not been considered. To have such an aggravating factor could namely be problematic in situations where the offender has participated in the criminal activities of the group due to peer pressure and/or group discipline.¹⁹⁶³ This emphasizes that the typical features of international criminality and the corresponding sentencing factors may have a *double nature*: they can speak for both aggravation and mitigation.

Besides aggravating factors that relate to the offender's societal position, there are aggravating factors that are connected to the offender's state of mind. Two important such ones are *discriminatory intent* and *premeditation*.¹⁹⁶⁴ For example, in the *Stakić* case, it was found that a long phase of planning and preparation (indication premeditation) is a possible aggravating factor.¹⁹⁶⁵ Premeditation has been found to increase culpability in that it reflects an especially intense criminal will.¹⁹⁶⁶ Aggravating factors relating to the offender's state of mind are, however, not limited to blameworthy intentions. In culpability evaluations, consideration can be given to the actor's freedom of choice (for example, duress), to what extent the actor has been the one who has initiated the criminal behaviour (for example, superior orders), and to what extent the actor has desired to commit the crime. Also reprehensible motives may hence be considered in aggravation. An actor who has acted with zeal/enthusiasm, in revenge or with biased motives may hence receive a harsher sentence.¹⁹⁶⁷ When sentencing Hazim Delić, an ICTY Trial Chamber, for example, considered in aggravation that he had "a general sadistic motivation" and "was driven by feelings of revenge against people of Serb ethnicity".¹⁹⁶⁸

9.2.5. Mitigating Factors

9.2.5.1. Introduction

Buchanan notes that the Latin verb *mitigare* refers to making gentler and that there in criminal law are two reasons to mitigate sanctions. The punishment can be mitigated

¹⁹⁶¹ Criminal Code of Finland, Chapter 6, Section 5.

¹⁹⁶² Governmental Bill No. 44/2002 (Finland), at 191-192. In the Governmental Bills preceding the regulation some criteria for applying the provision are identified. It is put forward that the group should be tightly organized and be characterized by a division of tasks and superior-subordinate relationships. Groups engaged in human trafficking and money laundering are mentioned as examples. It is explicitly noted that youth groups engaged in, e.g., stealing and vandalism are not organized in the sense required by the law. There must also be a connection between the activities of the organized group and the crime in question. *Ibid.* See also Governmental Bill No. 125/1975 II (Finland).

¹⁹⁶³ Governmental Bill No. 44/2002 (Finland), at 192.

¹⁹⁶⁴ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686.

¹⁹⁶⁵ *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 423. To its nature, this is an aggravating factor similar to premeditation.

¹⁹⁶⁶ Governmental Bill No. 44/2002 (Finland), at 191.

¹⁹⁶⁷ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 686. See also D'Ascoli 2011, at 150-151. In the *Popović et al.* case, the Trial Chamber, however, found that if one with willingness understands voluntariness it is not an aggravating factor, but a necessary component of the crimes. *Popović et al.*, Judgement, TC, ICTY, 10 June 2010, para. 2154.

¹⁹⁶⁸ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1269.

because the law is seen as too severe and/or to obtain a “better fit between the punishment on the one hand, and the individual and the circumstances of his offence on the other.”¹⁹⁶⁹ Some mitigating factors directly relate to the crime that has been committed (for example, superior orders). Many mitigating factors, however, are connected to the accused person’s behaviour after the crime has been committed (for example, voluntary surrender, guilty plea and remorse)¹⁹⁷⁰ or to the offender as a person (for example, age, diminished mental capacity and family situation).¹⁹⁷¹ Through the various mitigating factors it is possible to show mercy or compassion, and to give recognition to human frailty. Mitigation may, however, also be justified with reduced culpability. Furthermore, mitigating factors may have more practical rationales, such as to save the resources of the judiciary.¹⁹⁷² In this study, only mitigating factors that have direct connection to the committed crimes will be considered.

9.2.5.2. Mitigating Factors Relating to the Offence

Duress, superior orders, just cause underlying the criminal behaviour, indirect participation and chaotic context of crime commission are examples of factors relating to the offence that have been suggested to constitute mitigating factors in international criminal law. Of these, duress is relevant for culpability evaluations in that it indicates that the offender has not *desired* to commit the crime for which he/she is responsible. As noted in the previous Chapter, it is disputed whether duress can function as a complete defence in international criminal law. Uncontested is, however, that duress can be considered in mitigation of punishment. In the *Erdemović* case, the ICTY, for example, denied the exculpating effect of duress, but accepted duress as a mitigating factor and sentenced Erdemović to a five year imprisonment sentence for having killed 70-100 people.¹⁹⁷³ This judgement indicates that duress is a mitigating factor that can have a significant impact on the sentence.

The statutes of the *ad hoc* tribunals also explicitly establish that the “fact that an accused person acted pursuant to an order of a government or of a superior [...] may be considered in mitigation of punishment if [...] justice so requires.”¹⁹⁷⁴ In the *Limaj et al.* case, the fact that Bala “was acting under orders from a higher authority” was therefore

¹⁹⁶⁹ A. Buchanan, *Psychiatric Aspects of Justification, Excuse and Mitigation in Anglo-American Criminal Law* (London: Jessica Kingsley Publishers, 2000), 43.

¹⁹⁷⁰ “Two groups of considerations relate to the offender himself. The first concerns his character. In some instances, the courts take into account those aspects of this character which can be inferred from the circumstances surrounding his being apprehended and tried. [...] The other group of considerations relating to the offender concerns the likely effects of a sentence upon him.” Buchanan 2000, at 48.

¹⁹⁷¹ It should, however, be noted that it in an empirical study on sentencing has been observed that the most commonly applied mitigating factors before ICTY has been surrender, good conduct during detention/proceedings, family status. As other often applied mitigating factors are mentioned first-time offending, remorse, co-operation with the office of the prosecutor. D’Ascoli 2011, at 251. Many of the popular mitigating factors are hence procedural in nature.

¹⁹⁷² This is the case with, e.g., substantial cooperation with the prosecutor.

¹⁹⁷³ *Erdemović*, Judgement (sentencing), TC, ICTY, 5 March 1998. See also *Rutaganira*, Judgement, TC, ICTR, 14 March 2005, paras 161 and 162.

¹⁹⁷⁴ Article 7(4), ICTY Statute, and Article 6(4), ICTR Statute.

considered.¹⁹⁷⁵ In practice, superior orders and duress can coincide, and for superior orders to have a significant mitigating effect some level of compulsion appears to be necessary. In the *Bagosora et al.* case, the Trial Chamber did not, for example, grant mitigation even though it recognized that Nsengiyumva and Ntabakuze “were at times following superior orders”. Instead, the Trial Chamber found that their own senior status, the repeated execution of the crimes, and the manifestly unlawful nature of the orders rather reflected acquiescence in committing the crimes.¹⁹⁷⁶

In some case law, it has, furthermore, been considered whether the fact that the accused person has not himself/herself initiated the criminal behaviour or/and has participated reluctantly is legally relevant. The *Krstić* Trial Chamber, for example, found this distinction relevant.¹⁹⁷⁷ Likewise, the *Delalić et al.* Trial Chamber considered that “if the accused is found to have committed the offence charged reluctantly and under the influence of group pressure and, in addition, demonstrated compassion towards the victim or the group to which the victim belongs, these are certainly mitigating factors which the Trial Chamber will take into consideration in the determination of the appropriate sentence.”¹⁹⁷⁸ As will be elaborated to a greater extent below, societal or peer pressure to engage in criminality has, however, not generally been considered in mitigation in international criminal law.¹⁹⁷⁹

It is interesting that while non-desire to commit the crimes sometimes has been considered as legally relevant, it has also been asked whether a particular desire to commit the crimes could function in mitigation. More specifically, it has been suggested that political or ideological motives behind the criminality could (justify or)¹⁹⁸⁰ mitigate it. In the *Kordić & Čerkez* case, the ICTY when discussing the role of affirmative prevention at sentencing, however, emphasized that “people have to understand that international law is applicable to everybody, in particular during times of war” and that it is unfortunate that “many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a “just cause”.”¹⁹⁸¹ The SCSL case law has not generally been considered in this study, but in relation to just cause arguments at sentencing the Appeals Chamber of the SCSL has made an interesting finding. In the *Fofana and Kondewa* case, a majority of the Appeals Chamber namely held that to take into account political motives behind the action would undermine the bedrock principle of international humanitarian law (that is, that the applicability of the *jus in bello* is not connected to the *jus ad bellum*) and be inconsistent with sentencing purposes

¹⁹⁷⁵ *Limaj et al.*, Judgement, TC, ICTY, 30 November 2005, para. 727 (however, when assessing the gravity of the offence). See also *Limaj et al.*, Judgement, AC, ICTY, 27 September 2007, para. 133.

¹⁹⁷⁶ *Bagosora et al.*, Judgement, TC, ICTY, 18 December 2008, para. 2274.

¹⁹⁷⁷ *Krstić*, Judgement, TC, ICTY, 2 August 2001, para. 711.

¹⁹⁷⁸ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1235. See also *High Command*, Judgment, CCL, 27 October 1948, at 563 (‘We believe that there is much to be said for the defendant von Leeb by way of mitigation. He was not a friend or follower of the Nazi Party or its ideology. [...] It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.’)

¹⁹⁷⁹ E.g., *Bralo*, Judgement (sentencing), AC, ICTY, 2 April 2007, para. 13.

¹⁹⁸⁰ See further Section 8.3.7.

¹⁹⁸¹ *Kordić & Čerkez*, Judgement, AC, ICTY, 17 December 2004, para. 1082.

(such as prevention).¹⁹⁸² This SCSL ruling was adopted as a response to a Trial Chamber judgement, in which it was found that the fact that the two convicted persons had acted “in defence of constitutionality” was a mitigating factor.¹⁹⁸³ While the ICTY and the SCSL case law hence indicates that political or ideological motives behind action is not to be considered in mitigation, the ICTR case law on the topic is more ambiguous. In the *Simba* case, the Appeals Chamber namely found that the Trial Chamber had not made a finding that “motive was itself a separate mitigating factor”, but that Prosecution had “not demonstrated that the Trial Chamber erroneously considered in mitigation that the Appellant ‘might have acted out of patriotism and government allegiance rather than extremism or ethnic hatred.’”¹⁹⁸⁴ Likewise in the *Ntawukulilyayo* case, a Trial Chamber found it legally significant that Ntawukulilyayo’s “participation in the killings may have resulted from external pressures to demonstrate his allegiance to the government rather than from extremism or ethnic hatred.”¹⁹⁸⁵

An interesting question in connection to international criminal law is also to what extent the *situation in which the crime is committed* can be considered in mitigation. In some domestic legal systems, provocation, for example, is recognized as a mitigating factor.¹⁹⁸⁶ As noted in connection to defences, self-defence can function as a justification, whereas *tu quoque* arguments have not been accepted in modern international criminal law. Also at the sentencing stage, the approach of international criminal law is negative towards *tu quoque* arguments.¹⁹⁸⁷ In legal systems where provocation is accepted in mitigation, a difference is sometimes made between immediate reactions to acts by others (provocation) and prolonged reactions to acts by others (revenge), and whereas provocation can mitigate punishment revenge can aggravate it.¹⁹⁸⁸ Also in international criminal law, it has sometimes been suggested that the fact that a person is acting in revenge can aggravate the sentence.¹⁹⁸⁹ More often, it has, however, been put forward that the societal contexts in which international crimes occur are characterized by high levels of animosity between individuals and groups, and that these criminogenic environments could be considered in mitigation. In the post-World War II *Hostages Case*, it was, in this regard, suggested that provocation could be considered in mitigation as a “matter of grace.”¹⁹⁹⁰

International criminal law, there has been some cases where the chambers have given legal relevance to the contexts in which the crimes have occurred. For example, when evaluating the criminal behaviour of Mr. Mucić, the Trial Chamber found

¹⁹⁸² *Fofana & Kondewa*, Judgement, AC, SCSL, 28 May 2008, paras 530-534.

¹⁹⁸³ *Fofana & Kondewa*, Judgement (sentencing), TC, SCSL, 9 October 2007, paras 78-80 and 86.

¹⁹⁸⁴ *Simba*, Judgement, AC, ICTR, 27 November 2007, para. 330.

¹⁹⁸⁵ *Ntawukulilyayo*, Judgement, TC, ICTR, 3 August 2010, para. 474.

¹⁹⁸⁶ E.g., in Finland where the Criminal Code of Finland, Chapter 6, Section 6 stipulates: “The following are grounds for reducing the punishment: [...] (2) [...] an exceptional and sudden temptation that has led to the offence, the exceptionally great contribution of the injured party or a corresponding circumstance that has been conducive to decreasing the capability of the perpetrator to conform to the law [...]”.

¹⁹⁸⁷ E.g., *Galić*, Judgement, TC, ICTY, 5 December 2003, para. 765 (“The behaviour of the other party, however is not an excuse for the deliberate targeting of civilians and, as such, does not alleviate the responsibility of the Accused.”)

¹⁹⁸⁸ Governmental Bill 44/2002 (Finland), at 196.

¹⁹⁸⁹ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1269.

¹⁹⁹⁰ *Hostage*, Judgment, CCL, 19 February 1948, at 1317.

that: “It is relevant, and crucial, to take into account the circumstances in which the events occurred as well as the social pressures and hostile environment within which the accused was operating.”¹⁹⁹¹ The same Trial Chamber also found in relation to Mr. Landžo that “the harsh environment of the armed conflict as a whole, and the events in the Konjic municipality in particular must also be considered.”¹⁹⁹² This being said, the Appeals Chamber of the ICTY has, however, not found it appropriate to consider the context of war in mitigation. In the *Blaškić* case, the Appeals Chamber, for example, argued that it “sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants” and that a “finding that a “chaotic” context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone.”¹⁹⁹³ Likewise in the *Bralo* case, an ICTY Trial Chamber found that even though there had been “enormous pressures” and justifiable fears due to breakdown of community relations, the contexts *per se* do not mitigate the crimes committed. The Trial Chamber noted that “[l]arge sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.”¹⁹⁹⁴ The Trial Chamber in the *Krajišnik* case gave a very limited weight in mitigation to “the history of the conflict and [...] the growing inter-ethnic tensions preceding it”, but the Appeals Chamber did not support this finding.¹⁹⁹⁵

Besides various reasons behind the criminality, it has been put forward that the type of participation also could be considered in mitigation. The question of limited/indirect/insignificant participation is, however, generally considered when the gravity of the offence is assessed. It has, however, also sometimes been taken into account as a mitigating factor.¹⁹⁹⁶ For example, in the *Krstić* case, the Appeals Chamber noted that the accused was “was present in and around the Potočari compound [...] for at most two hours, a period which, the Appeals Chamber finds, is sufficiently brief so as to justify a

¹⁹⁹¹ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1248 (see also para. 1245).

¹⁹⁹² *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, paras 1283-1284. See also e.g., *Rugambarara*, Judgement (sentencing), TC, ICTY, 16 November 2007, para. 47, and *Kayishema & Ruzindana*, Sentence, TC, ICTR, 21 May 1999, paras 21-22.

¹⁹⁹³ *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 711. See also *Blaškić*, Judgement, TC, ICTY, 3 March 2000, para. 770 (‘Nonetheless, the Trial Chamber brings out the explanations given by Tihomir Blaškić whilst testifying to the disorganisation of the armed forces due, essentially, to the lack of experienced troops and the want of proper training and suitable materiel. It also observes the crimes allegedly committed by the other party and the difficulty of controlling the spontaneous reactions of some Croats. Nonetheless, even were they verified, these allegations are still not such as to constitute an excuse for a commander such as Tihomir Blaškić – *a fortiori* once it has been established as in this instance that the accused acted in accordance with a discriminatory policy which he deliberately implemented. The Trial Chamber finds the accused guilty of crimes against humanity and thereby excludes the possibility of disorder ensuing from an armed conflict constituting a mitigating circumstance.’)

¹⁹⁹⁴ *Bralo*, Judgement (sentencing), TC, ICTY, 7 December 2005, paras 51-52. See also *Bralo*, Judgement (sentencing), AC, ICTY, 2 April 2007, paras 13-14.

¹⁹⁹⁵ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, paras 1167-1168, and *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, paras 794-795 and 816.

¹⁹⁹⁶ See further e.g., *Babić*, Judgement (sentencing), AC, ICTY, 18 July 2005, para. 39.

mitigation of sentence.”¹⁹⁹⁷ Likewise in the *Ruggiu* case, the Trial Chamber found it to be a mitigating factor that Ruggiu had not personally participated in the genocidal killings.¹⁹⁹⁸ In the *Strugar* case, the Appeals Chamber, however, held that indirect participation should not be regarded as a mitigating factor in relation to superior responsibility, as the failure to act in that responsibility form is the relevant culpable conduct.¹⁹⁹⁹

9.2.5.3. Mitigating Factors Relating to the Offender

Possible mitigating factors relating to the offender include young age, inexperience and good character.²⁰⁰⁰ In the *Delalić et al.* case, an ICTY Trial Chamber noted that the convicted person’s “immature and impressionable state of mind” especially in the combination with abnormal societal situations can be taken into consideration. In that case, the casualties of the armed conflict included persons close to the convicted person.²⁰⁰¹ Likewise, in the *Ruggiu* case, the ICTR noted that the accused was “a European with a moderate level of education” and that “the accused was not sufficiently knowledgeable to be able to make informed assessments of the situation” when he was “indoctrinated by a biased picture of the socio-political situation in Rwanda.”²⁰⁰² These pronouncements indicate that even though abnormal societal situations do not *per se* constitute mitigating factors, they can do so in combination with personal factors. Some individuals can hence be considered as “victims of the chaos of war” due to their personal characteristics. To be a victim of the chaos of war, however, also seems to demand that the participation in itself does not indicate enthusiasm. In the *Lukić* and *Lukić* case, Milan Lukić stressed that he had no previous criminal record and referred to the chaotic circumstances of war, but the Trial Chamber found that the “circumstances of the crimes he committed and the attitude with which he carried out these crimes show that [...], he] was not a victim of the “chaos” of war, as [... he] submits, but rather an opportunist who took advantage of an environment in which he could commit crimes against Muslims with impunity.”²⁰⁰³

Mitigating factors relating to the offender are also previous good character and efforts to help victims (in relation to other crime incidents). Both of these mitigating factors have been considered in a number of ICTY and ICTR cases.²⁰⁰⁴ The mitigating

¹⁹⁹⁷ *Krstić*, Judgement, AC, ICTY, 19 April 2004, para. 273. In the *Gacumbitsi* case, the Prosecutor challenged the argument that the short duration of active involvement in crimes should be taken into account as a mitigating factor. In that case, the Trial Chamber had, however, not considered duration in mitigation. *Gacumbitsi*, Judgement, AC, ICTR, 7 July 2006, para. 199.

¹⁹⁹⁸ *Ruggiu*, Judgement, TC, ICTR, 1 June 2000, paras 77-79.

¹⁹⁹⁹ *Strugar*, Judgement, AC, ICTY, 17 July 2008, para. 381.

²⁰⁰⁰ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 696, and *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 332 (regarding lack of training for a particular position).

²⁰⁰¹ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1284.

²⁰⁰² *Ruggiu*, Judgement, TC, ICTR, 1 June 2000, paras 62-63.

²⁰⁰³ *Lukić & Lukić*, Judgement, TC, ICTY, 20 July 2009, para. 1076.

²⁰⁰⁴ See further J. Galbraith, ‘The Good Deeds of International Criminal Defendants’, 25 *Leiden Journal of International Law* (2012), at 799-813. See also M. Drumbl, ‘LJIL Symposium Vol 25-3: Good Deeds of International Defendants: Grace, Goodness, Greed: Saving While Killing’, *Opinio Juris* [blog], 10 October 2012, and M. deGuzman, ‘LJIL Symposium Vol 25-3: Good Deeds of International Defendants: A Comment by Margaret deGuzman’, *Opinio Juris* [blog], 10 October 2012.

effect of previous good moral character has, however, generally been low.²⁰⁰⁵ As regards efforts to help victims or hindering others from committing crimes, for example, in the *Sikirica et al.* case, the Trial Chamber at sentencing took into account that the accused persons had tried to ease the situation of the detainees at the Keraterm camp.²⁰⁰⁶ In *Blagojević and Jokić* case, the Appeals Chamber, however, noted that “[m]ere compliance with the law is not ordinarily a factor in assessing an accused’s good character” but that “a Trial Chamber, in the exercise of its discretion, may credit an accused for [...] preventing the commission of crimes.”²⁰⁰⁷ From the point of view of the phenomenology of international crimes this ruling is significant. To prevent others from committing crimes may namely require special courage.

Finally, subordinate position may be considered in mitigation. However, if the insignificant role played by the convicted person has been taken into account when assessing the gravity of the crime disallowed double-counting may occur.²⁰⁰⁸ This mitigating factor can be connected to that of following orders. For example, in the *Boškoski and Tarčulovski* case, Tarčulovski argued that he just was carrying out directives by the Government of the Former Yugoslav Republic of Macedonia. The Appeals Chamber held that the Trial Chamber had not disregarded this, as it had considered his junior role.²⁰⁰⁹

If the offender’s intoxication is not accepted as a defence, it is theoretically possible to consider it as a mitigating factor, especially if the offender has been forced or pushed into intoxication or addiction.²⁰¹⁰ The present author is, however, not aware of any international case law where intoxication would have been successfully claimed as a mitigating factor.

9.3. Analysis

9.3.1. Sentencing Factors and Their Relationship to the Crime Definitions, the Modes of Participation and Defences

It is generally submitted that the crime definitions and modes of responsibility should settle the *general framework* for what is criminal behaviour, whereas defences and sentencing factors should allow for exceptions to the main rules and adaptation to *individual situations*. This being said, the question of where a particular factor should be legally considered is not always evident. As noted in the previous Chapter regarding the relationship between offences and defences, it is, for example, possible to either: (a) define crimes strictly and to allow very few exceptions; or (b) to establish broad crime

²⁰⁰⁵ E.g., *Nahimana et al.*, Judgement, AC, ICTR, 28 November 2007, para. 1069. In certain cases, one may identify a contradiction between the crimes committed by the individuals and the characterizations given by the chambers of them. E.g., Sagahutu was by a ICTR Trial Chamber characterized as a “disciplined officer who was one of the best commanders in the Army and was brave, valiant, trustworthy, courageous, respectful, kind and not prejudiced” at the same time as it convicted him to a 20 years’ imprisonment sentence for serious crimes. *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2260.

²⁰⁰⁶ *Sikirica et al.*, Judgement (sentencing), TC, ICTY, 13 November 2001, paras 195 and 229.

²⁰⁰⁷ *Blagojević & Jokić*, Judgement, AC, ICTY, 9 May 2007, para. 342.

²⁰⁰⁸ *Limaj et al.*, Judgement, AC, ICTY, 27 September 2007, para. 143.

²⁰⁰⁹ *Boškoski & Tarčulovski*, Judgement, AC, ICTY, 19 May 2010, paras 214 and 216.

²⁰¹⁰ Cf. Schabas 2008(b), at 623-624.

definitions and to allow numerous exceptions. Many different types of legal solutions are therefore often possible within the paradigm of criminal law. The legal systems of the world also vary in the extent to which evaluations of blameworthiness are made at the conviction respectively sentencing stage. In some legal systems, a difference is at the conviction stage between aggravated, ordinary and petty war crimes, which entails that already at the conviction stage must rather specific evaluation of blameworthiness be made.²⁰¹¹ In international criminal law, in contrast, blameworthiness evaluations are mostly left to sentencing stage, as the minimum and maximum penalties for all crimes and all modes of participation are the same in law. The restrictive attitude to justifications and excuses in international criminal law has further enhanced the need to make blameworthiness evaluations at the sentencing stage.²⁰¹²

The wide range of factors that can be considered in mitigation raises the question of how these sentencing factors affect the censuring function of criminal law. Some find that they do not, as mitigation “only relates to sentencing”.²⁰¹³ Some mitigating factors, however, have an excusatory nature and a clear connection to excuses.²⁰¹⁴ It is, for example, a central sentencing question whether war crimes are “just ‘inevitable’ or in some way ‘excusable’ as the necessary cost of a war”?²⁰¹⁵ In the same way as excuses, mitigating factors can reflect societal perceptions of what behaviour is considered as such that should be met with mercy and/or understanding. The lenient punishment in the *Erdemović* duress case, for example, sent strong signals of mercy and understanding. In a similar way, aggravating factors can express societal disapproval. As such, legal evaluations about blameworthiness done at the sentencing stage should not be disregarded as irrelevant from a censuring perspective.

The possibility to at the sentencing stage give legal relevance to factors that at the conviction stage have been disregarded raises the question of whether this, in fact, is done. As noted in Chapter 6, State involvement in the criminality and the existence of a policy behind the criminality are examples of factors that have been found to be phenomenologically typical for international crimes, but which have not found their way to the customary international law criminalizations of war crimes, crimes against humanity and genocide.²⁰¹⁶ In connection to these typical features of the criminality, the sentencing stage, in fact, makes it possible to give them legal relevance. In many cases, the typical features are, however, already to some extent considered at conviction. Due to the fact that the sentencing-factors are not crime-specific they may, however,

²⁰¹¹ E.g., The Criminal Code of Finland, Chapter 11, Sections 5-7.

²⁰¹² A very lenient punishment for a very serious crime is, however, not completely equivalent to an acquittal, most notably due to the stigmatizing effect of a conviction.

²⁰¹³ E.g., *Kambanda*, Judgement, TC, ICTR, 4 September 1998, para. 56 (“The Trial Chamber holds the view that a finding of mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.”)

²⁰¹⁴ Rule 145, ICC RPE in this regard, refers to “circumstances falling short of constituting grounds for exclusion of criminal responsibility.”

²⁰¹⁵ F. Harhoff, ‘Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment,’ in O. Engdahl & P. Wrangé (eds.), *Law at War: The Law as It Was and the Law as It Should Be* (Leiden: Martinus Nijhoff Publishers, 2008), at 133.

²⁰¹⁶ The question of the policy elements legal status is, however, contested in connection to genocide and crimes against humanity. See further Chapter 6.

broaden the legal relevance of certain typical features. Discriminatory intent is, for example, not merely relevant in connection to genocide and persecution, but becomes relevant in connection to all international crimes. It is also important to note that at the sentencing stage the strict distinction between specific intentions and motives disappears. At sentencing, both discriminatory intent and discriminatory motives may be legally relevant.

As regards the relationship between defences and sentencing factors, it is possible to identify different types of relationships. Sometimes the law on defences and the law on mitigating factors both clearly reject particular claims as legally irrelevant (for example *tu quoque* arguments). Other times, on the other hand, what is rejected as a defence may be utmost significant at sentencing (for example, duress).²⁰¹⁷ In these latter situations, sentencing law is used to “complement” the law relevant for conviction.

The legal choice made when placing a factor as a conviction determinant or as a sentencing determinant is significant in that different positionings send different signals. In criminal law, the focus is on the conviction determinants and there the labelling effect of the law is the strongest. In international criminal law, a central consideration has been to establish absolute minimum standards for behaviour, and there has been a reluctance to allow exceptions to the rules. At the conviction level, international criminal law has therefore been unwilling to show mercy. The reality of international criminality is, however, complex, and this is to a greater extent recognized at the sentencing stage. At that stage, it is, for example, possible to differentiate between those who eagerly take part in the crimes and those whose participation is characterized by reluctance. At the sentencing stage, international criminal law also makes many important distinctions between different types of actors in collective criminality.

In addition to the differences as regards the censuring force, the placing of a factor merely as a sentencing factor has practical implications. Firstly, it may have consequences for the evidentiary standards and the onus of proof.²⁰¹⁸ Secondly, the sentencing stage is a trial phase that in many jurisdictions is characterized by the fact that judges have considerable discretion.²⁰¹⁹ If a certain factor is a crime element or a requirement to establish a certain mode of participation, this is something that the judges *must* take into consideration in their legal assessments. At the sentencing stage, the legally relevant factors are, however, generally so many more that the use of discretion becomes possible. Due to the number of available sentencing determinants Norrie has, in fact, argued

²⁰¹⁷ The close relationship between excuses and mitigation factors is sometimes explicitly recognized in the law. In the ICC RPE, it is referred to “circumstances falling short of constituting grounds for exclusion of criminal responsibility” as mitigating factors (Rule 145). The Criminal Code of Finland, on its part, stipulates that the sentence should be “determined in accordance with a mitigated penal latitude if [...] the offence has been committed in circumstances that closely resemble those that lead to the application of grounds for exemption from liability [...]” Criminal Code of Finland, Chapter 6, Section 8(1).

²⁰¹⁸ E.g., Cryer *et al.* 2010, at 500 (noting that the Prosecutor must establish aggravating factors beyond a reasonable doubt, whereas it is enough that the defence proves mitigating factors on a balance of probabilities).

²⁰¹⁹ The legal systems in the world vary to what extent sentencing criteria are discretionary or regulated. When the sentencing criteria are regulated and become factors that the judges must take into account, the discretion of the individual judges diminishes. Even with specific sentencing guidelines, some discretion is, however, often left to the judges.

that “when we come to the sentencing stage of the criminal process, [...] the rules and principles of the criminal law largely evaporate and the system becomes much more discretionary and less regulated by law.”²⁰²⁰

At the sentencing stage, the judges must take into account both offence gravity and factors in aggravation and mitigation. The difference between the different types of factors should, in principle, be clear,²⁰²¹ but in practice it appears that the chambers have often made overall assessments of blameworthiness and the different types of sentencing factors have not been distinguished from each other. Certain factors have hence been placed in some judgements as factors that affect gravity of the offence and in others as aggravating/mitigating factors. The Appeals Chambers of the *ad hoc* tribunals have generally not found the different placings to be problematic.²⁰²² The central consideration has been that the same fact is not double-counted by giving it legal relevance at multiple stages. The majority in the ICTR *Simba* Appeal Judgement, however, criticized the Trial Chamber for evaluating whether the convicted person had acted with zeal and sadism when considering offence gravity mainly because zeal and sadism were not crime elements of genocide.²⁰²³ Motives should hence generally be taken into account as aggravating or as mitigating factors.²⁰²⁴

It should also be noted that it, in practice, sometimes has turned out to be difficult to determine whether a certain fact already has been accounted for. A question where case law has been inconsistent is most notably abuse of superior position as an aggravating factor and modes of responsibility that prerequisite a superior position (superior responsibility and ordering) and where a conviction hence already indicates abuse of power. In some cases, it has been suggested that abuse of superior position may not be considered as an aggravating factor in these cases,²⁰²⁵ but in other cases the special aggravating effect of abuse of power has been accepted.²⁰²⁶ It may hence be difficult to define the “facts” which double-counting should be avoided. In the *Milošević* case, the prosecutor furthermore argued that it is allowed to rely on different aspects of the same fact at sentencing, but the Appeals Chamber did not accept this argument.²⁰²⁷

In summary, it may be concluded that in international criminal law many central blameworthiness evaluations are made at the sentencing stage and that the legal regulation

²⁰²⁰ Norrie 2001, at 200.

²⁰²¹ Cf. *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 157 (“The Appeals Chamber notes that the method and circumstances surrounding a killing are factors which normally would be taken into account in a Trial Chamber’s consideration of the “inherent gravity” of the offence.”)

²⁰²² E.g., *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 157, *Deronjić*, Judgement (sentencing), AC, ICTY, 20 July 2005, paras 106-107, *Simba*, Judgement (partly diss. op. of Judge Liu), AC, ICTR, 27 November 2007, and *Krajišnik*, Judgement, AC, ICTY, 17 March 2009, paras 751 and 787 (“The Appeals Chamber is of the view that, while a Trial Chamber should strive to distinguish between the gravity of the criminal conduct and the aggravating circumstances, it might be difficult or artificial to separate the two in some cases.”)

²⁰²³ *Simba*, Judgement, AC, ICTR, 27 November 2007, para. 320.

²⁰²⁴ E.g., *Blaškić*, Judgement, AC, ICTY, 29 July 2004, para. 694.

²⁰²⁵ E.g., *Naletilić & Martinović*, Judgement, AC, ICTY, 3 May 2006, paras 613 and 626, *Hadžihasanović & Kubura*, Judgement, AC, ICTY, 22 April 2008, para. 320, and *Milošević*, Judgement (partly diss. op. of Judge Liu), AC, ICTY, 12 November 2009, para. 30.

²⁰²⁶ *Milošević*, Judgement, AC, ICTY, 12 November 2009, paras 302-303.

²⁰²⁷ *Milošević*, Judgement, AC, ICTY, 12 November 2009, para. 309.

of the procedural stage is much more relaxed than the regulation of the conviction stage. This raises the question of whether blameworthiness evaluations in international criminal law to a higher degree should be done in the law regulating convictions, for example, by creating a hierarchy between the crimes or by adopting aggravated respectively petty forms of the crimes.

9.3.2. Should There Be a Hierarchy Between the International Crimes?

The question of whether there is or should be a hierarchy between the various international crimes has been much debated. Many legal scholars have also suggested rankings. In these rankings, genocide is often found to be the most serious crime, followed by crimes against humanity and war crimes.²⁰²⁸ The focus is then often put on the *chapeau* elements, such as genocidal intent (genocide)²⁰²⁹ or the fact that the crime is characterized by collective victimization and group criminality (crimes against humanity).²⁰³⁰ Sloane has, however, noted that while international crimes have elements that enhance culpability, they also have characteristics that diminish culpability. More specifically, he points out that the international crimes, such as genocide, which “resemble bias crimes under national law and produce comparable secondary harms that render the same act more culpable” at the same time have a “collective character and authority of the perpetrator” which diffuse moral responsibility and accordingly culpability.²⁰³¹ Some other scholars have therefore found that the focus is gravity assessments should be put on the underlying offence or the harm *de facto* caused. Harmon and Gaynor have, for example, held that: “Common sense would dictate that a person who has murdered 200 victims should spend much longer in prison than a person who has murdered two victims, regardless of whether the murders are characterized as crimes against humanity, genocide or war crimes.”²⁰³² In attempts to rank underlying offences, it is, however, not only the harm *de facto* caused that has been central. Persecution has, for example, often been regarded as a particularly serious crime due to its requirement of discriminatory intent.²⁰³³

On a general level, it has been put forward that when the *in abstracto* blameworthiness of different crimes is considered there are two central considerations: the *harmfulness* of the crime and its *dangerousness*.²⁰³⁴ It has also been stressed that the harmfulness and dangerousness should be estimated in relationship to the interests one aims at

²⁰²⁸ The position given to the crime of aggression varies, but e.g., the Nuremberg Tribunal categorized crimes against peace as the “supreme international crime” containing “within itself the accumulated evil of the whole.” *Göring et al.*, Judgment, IMT, 1 October 1946, at 186.

²⁰²⁹ Cassese has in this regard found that the “viciousness” of the international crimes go “far beyond the underlying offence”. A. Cassese, ‘Crimes against Humanity’, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford: Oxford University Press, 2002), at 363.

²⁰³⁰ Marston Danner 2001, at 474.

²⁰³¹ Sloane 2007(a), at 59. Marston Danner, on her part, stresses the collective perpetration as a factor that generally entails more large-scale victimization. Marston Danner 2001, at 470-471.

²⁰³² Harmon & Gaynor 2007, at 696-697.

²⁰³³ E.g., *Todorović*, Judgment (sentencing), TC, ICTY, 31 July 2001, paras 32 and 57, *Blaškić*, Judgment, TC, ICTY, 3 March 2000, para. 785, and *Stakić*, Judgment, TC, ICTY, 31 July 2003, para. 907.

²⁰³⁴ Governmental Bill 44/2002 (Finland), at 187.

protecting.²⁰³⁵ Taking into account the criminalization technique used in relation to the international crimes (that is, the fact that all international crimes can be committed in various different ways and hence protect many different types of interests), it is, however, extremely difficult to rank the crimes *in abstracto*.²⁰³⁶ How should one, for example, evaluate the comparative harmfulness of the genocidal murder of 50 persons and the war crime of raping of 1,500 women?²⁰³⁷ This being said, there are, however, situations where the criminal behaviour of an accused person and hence the factual situation (for example, the killing of 1,000 persons) fulfils the crime elements of several crimes simultaneously. In these situations, the question of whether there is an *in abstracto* hierarchy between the various international crimes is more relevant. It is, in fact, in these situations that most scholars would say that genocide is the most serious crime (due to the genocidal intent requirement) followed by crimes against humanity (due to the requirement that the crimes form part of an attack against a civilian population) and war crimes.²⁰³⁸ Before the ICC, where there is a jurisdictional requirement that the Court should focus on war crimes as part of a plan or policy or in the context of a large-scale, the hierarchical relationship between crimes against humanity and war crimes is, however, not as evident.²⁰³⁹

While a hierarchy between the international crimes to some extent could clarify international evaluations of blameworthiness, a strict hierarchy between the crimes may, however, be problematic from a labelling perspective. As has been noted earlier in this study, it is common in connection to international criminality that the same factual events allow alternative convictions. The current system of a non-hierarchy makes it possible for the prosecutor to freely charge the offender with the crime label that according to him/her best describes the criminal behaviour (and for the judge to judge). If the crimes would be in a strict hierarchy, the prosecutor could be tempted to (or pushed towards) prosecuting the crimes as the crime with the harshest *in abstracto* gravity. Already today – without an established hierarchy – have there been pushes towards using crime labels that are perceived to have a high stigmatizing effect. Feminist scholars have, for example, emphasized the need to prosecute sexual violence as “*jus cogens* violations” (such as

²⁰³⁵ Governmental Bill 44/2002 (Finland), at 187.

²⁰³⁶ Cf. *Tadić*, Judgement (sentencing, sep. op. of Judge Cassese), AC, ICTY, 26 January 2000, para. 3 (‘Firstly, international criminal rules, being still at a rudimentary stage of development, do not provide for offences that are specific and well-defined. They do not describe in detail an individual class of conduct (say, murder, or the destruction of private property, or rape). Rather, they contemplate broad categories of disparate offences. In effect, they normally envisage a cluster of prohibited offences that are diverse both in nature and gravity. [...]’)

²⁰³⁷ In the *Furundžija* case, it was suggested that crimes resulting in loss of life should be punished more severely. The Appeals Chamber, however, refused to make categorizations of the underlying offences in the abstract. *Furundžija*, Judgement, AC, ICTY, 21 July 2000, paras 244 and 249-250.

²⁰³⁸ Marston Danner has found that the “judges sentencing defendants convicted of violations of international law should consider the elements of the *chapeau* in evaluating the harm caused by the defendants’ acts.” Marston Danner 2001, at 420. While it is true that the *ad hoc* tribunals have not wanted to establish a formal hierarchy between the crimes, it is, however, not true that the tribunals have not considered the *chapeau* elements at all in sentencing.

²⁰³⁹ M. M. El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’, 19 *Criminal Law Forum* (2008), at 39 and 41.

torture and genocide) to stress the serious nature of sexual violence.²⁰⁴⁰ In the *al-Bashir* case before the ICC, one can question whether not the genocide charges were primarily put forward for communicative purposes.²⁰⁴¹

9.3.3. The Hierarchy Established in Connection to the Various Modes of Responsibility and Pushes towards Using Particular Responsibility Forms

In domestic criminal law, it is generally the individual who physically and intentionally produces harm who is found to be the most blameworthy. As has been noted before in this study, the nature of international criminality challenges this *ab initio* presumption. A distant negligent leader who omits to fulfil his/her duties (or who tolerates crimes by his/her subordinates)²⁰⁴² can *de facto* cause much more harm than his/her intentionally acting subordinate. Or as Werle has put it, “the degree of criminal responsibility does not diminish as distance from the actual act increases.”²⁰⁴³ From this perspective, it is interesting that international criminal law has adopted a rather conventional hierarchy as regards the modes of responsibility. In the same way as in most domestic legal systems, perpetrator responsibility reflects the highest degree of responsibility, and aiding and abetting responsibility indicates a lower degree of responsibility. International criminal law has, however, to some extent defined perpetrator responsibility differently than is usual in domestic legal systems.²⁰⁴⁴

²⁰⁴⁰ E.g., K. D. Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’, 21 *Berkeley Journal of International Law* (2003), at 346-349.

²⁰⁴¹ In this regard, it is noteworthy that the ICC Prosecutor has *not* chosen to charge Al Bashir’s special representative in Darfur with genocide. W. A. Schabas, ‘Has the Prosecutor Changed His Mind About Genocide in Darfur?’, *PhD Studies in Human Rights* [blog], 4 March 2012 (‘Why isn’t Bashir’s Special Representative also charged with genocide? The Elements of Crimes of the International Criminal Court require that the acts constituting genocide take place ‘in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’. Does it make sense that Bashir’s acts occurred ‘in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’ but that those of his deputy did not? If Hussein was in on the ‘common plan’, does this mean that the Prosecutor does not think there was a common plan to perpetrate genocide, and that this was some private, individual obsession of President Bashir that he did not share with his henchmen. The inconsistency in the Prosecutor’s approach is difficult to understand.’)

²⁰⁴² See Triffterer who stresses the difference between tolerating the commission of international crimes and superior responsibility by noting that tolerating can be given a broad interpretation including responsibility for mere omissions and negligence. Triffterer 2002, at 183. Triffterer makes his arguments in relation to the 1968 *Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity*, Article II, which stipulates that statutory limitations should not apply to State authorities who tolerate the commission of the crimes. More specifically, Article II provides that: “If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.”

²⁰⁴³ Werle 2009(b), at 166.

²⁰⁴⁴ See further Section 7.2.4.

When analyzing the “semi-hierarchy” established between the various modes of responsibility in international criminal law,²⁰⁴⁵ it is noteworthy that categorization of blameworthiness in international criminal law is logical or “traditional” as regards how demanding the *subjective elements* are, that is, it follows the differentiation between intentional, reckless and negligent behaviour that is common in domestic legal systems. The only exception in this regard is JCE III responsibility as a form of perpetrator responsibility. As regards the *objective side* (viz. the connection to the harm produced and the degree of participation), it can, however, not be said that the demands are the greatest regarding perpetrator responsibility, intermediate regarding aiding and abetting responsibility and least demanding regarding superior responsibility.²⁰⁴⁶ In relation to JCE responsibility, for example, no requirement of substantial participation has been accepted.²⁰⁴⁷ This has been found contradictory in that the main rationale for characterizing all forms of JCE as perpetrator responsibility is that an individual *through his/her participation* in a criminal plan “contributes to the creation of a wider criminogenic factor with a specific dynamic [...]”²⁰⁴⁸ Ambos has, in connection to this, found that it is odd that it is enough that the enterprise perpetrator performs acts that in some way are directed to further the common purpose, whereas the aider and abettor must perform substantial acts that are specifically directed to assist the perpetration of the crime. According to Ambos this “turns the traditional distinction between co-perpetration and aiding and abetting (the distinction as to the weight of the contribution, which must be more substantial in the case of co-perpetration) on its head.”²⁰⁴⁹ The *ad hoc* tribunals have neither accepted the idea that direct participation always should be regarded as more blameworthy than indirect participation.²⁰⁵⁰ In relation to this, Dana has noted that while “terms such as “direct participation” are sufficient in ordinary criminal proceedings at the domestic level, they are somewhat bankrupt in international criminal law when seeking to substantiate and justify punishment [...]”²⁰⁵¹

The characterization of perpetrator responsibility as the most blameworthy form of responsibility has, in practice, entailed that there in international criminal law is a *push towards finding the leaders responsible as perpetrators*. The semi-hierarchy, in combination with the fact that similar hierarchies exist in many domestic legal systems, namely entails that it would send wrong signals to convict the leaders as “mere” aiders and abettors. This push towards perpetrator responsibility has especially concerned the most high-level actors.²⁰⁵² Judge Liu has criticized this broadening of perpetrator responsibility by noting that when ordering, instigating, and aiding and abetting may be

²⁰⁴⁵ See further Section 9.2.3.

²⁰⁴⁶ Cf. Haan 2005, at 194-197. In relation to superior responsibility, the objective requirement of effective control has, however, been construed strictly. This has prompted Osiel to argue that the ICTY has made it too hard to find people liable under superior responsibility and too easy to hold them liable as enterprise participants. Osiel 2005(b), at 793-794.

²⁰⁴⁷ See further Section 7.2.4.3.

²⁰⁴⁸ Chouliaras 2010, at 575.

²⁰⁴⁹ Ambos 2007(a), at 171.

²⁰⁵⁰ E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 380.

²⁰⁵¹ Dana 2004, at 339.

²⁰⁵² Cf. some mid-level leaders who have been convicted for the superior responsibility and who have received rather light penalties. Harhoff 2008, at 136.

classified as “committing” the distinctions envisaged by Article 6(1) in the ICTR Statute become redundant, and the question “whether the overall conduct of the accused should be “elevated” to commission” becomes unfortunately central.²⁰⁵³ From a fair labelling perspective, it is indeed problematic if a particular form of responsibility is used merely to ensure that the person is punished severely enough and not because this responsibility form best describes the criminal behaviour of the person.

It is also worth noting that the mode of responsibility and sentencing law may mismatch from another perspective. Some legal scholars have namely found that there has been a tension between judgements regarding guilt (portraying the role of the convicted person as purely accessorial) and sentencing judgements (portraying the role of the sentenced person as central) in some recent cases which have resulted in long prison sentences.²⁰⁵⁴ For example, Heller has, regarding the Charles Taylor conviction (by the SCSL) held that:

I should add, for the record, that my problems with the sentence are unrelated to my personal view of Taylor’s culpability. Having followed the trial relatively closely for the past few years, I think the Trial Chamber’s judgment understates – perhaps seriously – Taylor’s responsibility for the AFRC [=Armed Forces Revolutionary Council] and RUF’s [=Revolutionary United Front] crimes. In particular, although I agree with the Trial Chamber’s rejection of ordering and command responsibility, I would have had no problem convicting Taylor for many of the charged crimes via JCE. My problem with the sentence is that, although the Trial Chamber refused to convict Taylor on the basis of JCE or ordering, it has imposed a sentence that seems to require viewing Taylor as much more than an aider and abettor.²⁰⁵⁵

The accurate portrayal of the participation of high-level actors in international crimes can indeed be difficult. The harsh sentences handed down to some aiders and abettors before international criminal tribunals indicate that the mode of responsibility is not always a crucial sentencing factor in international sentencing.

Finally, it is interesting that a mode of participation for which a person is not convicted may function in aggravation at the sentencing stage (for example, planning or ordering when the person is convicted for having committed the crime).²⁰⁵⁶ From a labelling perspective this is significant, as it gives the possibility to legally recognize the multiple ways an individual has participated in a crime. In practice, it is likely that it will be more high-level offenders’ criminal conduct that is aggravated in this way, as it is usually these offenders who play multiple roles in the crimes.

9.3.4. The Especially Blameworthy High-Level Leaders

The ICTR Appeals Chamber has recently held that it is a “well-established principle of gradation in sentencing” that “leaders and planners should bear heavier criminal

²⁰⁵³ *Munyakazi*, Judgement (sep. op. of Judge Liu), AC, ICTR, 28 September 2011, para. 3.

²⁰⁵⁴ J. D. Ohlin, ‘Sentencing at the Top’, *Lieber Code* [blog], 5 June 2012, discussing the Charles Taylor sentencing judgement by the SCSL (50 years imprisonment) and the Hosni Mubarak conviction (life imprisonment).

²⁰⁵⁵ K. J. Heller, ‘Taylor Sentenced to 50 Years Imprisonment’, *Opinio Juris* [blog], 30 May 2012.

²⁰⁵⁶ E.g., *Stakić*, Judgement, AC, ICTY, 22 March 2006, para. 413.

responsibility than those further down the scale, subject to the proviso that the gravity of the offence is the primary consideration [...] in imposing a sentence.”²⁰⁵⁷ In international criminal law, there are indeed many different types of mechanisms geared towards emphasizing the role played by superiors in connection to that criminality: prosecutorial policies focusing on leaders, responsibility modes such as perpetration through control over a hierarchical apparatus of power, etc. At the sentencing stage, it is especially the tendency to prosecute and convict leaders as perpetrators, the aggravation of punishment due to abuse of power, and the stressing of the role played by leaders when assessing the gravity of the offence that entail that leaders often are punished harsher than followers. Furthermore, when different sentencing factors are balanced with each other, the high-level position of the accused is often regarded as one of the most significant sentencing factor. In the *Blaškić* case, the Trial Chamber, for example, held that “command position is more of an aggravating circumstance than direct participation.”²⁰⁵⁸ The focus on the leaders is also increased by the possibility to take into account the insignificant role played by low-level offenders as a mitigating factor.

This approach to leaders respectively followers prompts the question exactly what it is that justifies the harsher penalties to the leaders and the more lenient sentences to the followers. Firstly, regarding *harm*, leaders can generally as individuals cause more harm than the rank-and-file participants.²⁰⁵⁹ In this regard, ICTY has held that the “consequences of a person’s acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.”²⁰⁶⁰ High-level actors may have the resources of a full-fledged army or an entire nation to carry out their criminal efforts.²⁰⁶¹ Secondly, the criminal behaviour of leaders usually causes more *danger* than the criminal behaviour of low-level actors. Through control over societal institutions and mass media they may exercise propaganda, order crimes, etc. High-level actors may even be responsible for creating the criminogenic environment (for example, the violent military culture or the totalitarian regime) in which the crimes occur. Thirdly, it can also be argued that due to the leaders’ powers, it makes sense to require more law-abiding and prudent behaviour from them, that is, to evaluate blameworthiness differently. Leaders may hence have “particular responsibilities” towards certain people or even an entire population.²⁰⁶² Fourthly, and most controversially, it may be asked whether leaders generally act with greater *culpability* than their followers. In this regard, it is sometimes submitted that whereas leaders often act non-coerced and with knowledge of the “overall situation”, low-level actors often are pushed into the criminality and lack knowledge of the “big picture”.

The present author is not aware of any detailed analysis of the “lesser culpability of followers” argument in connection to international criminality. In connection to juvenile offenders, these types of arguments have, however, been considered. Lesser culpability claims often come in two different forms: “(1) a *cognitive* claim, that juveniles have less

²⁰⁵⁷ *Kanyarukiga*, Judgement, AC, ICTR, 8 May 2012, para. 280.

²⁰⁵⁸ *Blaškić*, Judgement, TC, ICTY, 3 March 2000, paras 790-791.

²⁰⁵⁹ Sloane 2007(a), at 60.

²⁰⁶⁰ *Krstić*, Judgement, TC, ICTY, 2 August 2001, para. 709.

²⁰⁶¹ *Krstić*, Judgement, TC, ICTY, 2 August 2001, para. 708.

²⁰⁶² *Simić et al.*, Judgement, TC, ICTY, 17 October 2003, para. 1082.

capacity to assess and appreciate the harmful consequences of their criminal actions”; and “(2) a claim concerning *volitional controls*, that they have had less opportunity to develop impulse control and resist peer pressure to offend.”²⁰⁶³ Theories suggesting lesser understanding can, however, often be criticized with reference to numerous examples suggesting that the juvenile offenders for sure have understood what they have done (at least with regard to elderly juveniles). Also in connection to international criminality, theories suggesting that low-level offenders cannot reckon the criminal nature of the behaviour can generally be questioned. A more relevant question is therefore whether it can be made volitional arguments about difficulties to resist pressure to offend. Von Hirsch and Ashworth have in this regard found that: “To make a case that an offender is less culpable for his crime would seem to require that almost anyone in his situation would find it extraordinarily difficult to desist – that compliance would be a matter of heroism or something akin to it.”²⁰⁶⁴ In connection to juvenile offenders, von Hirsch and Ashworth therefore suggest compassion or tolerance as grounds for scaling down punishments for juveniles.²⁰⁶⁵ Also in connection to international criminality, compliance with the law does not generally require heroism, even though situations of real duress occur in connection to that criminality. As the present author sees it, lesser punishments for low-level actors should therefore generally be based on the lesser harm and danger they cause. Also the idea that leaders should have special responsibilities in high-crime-risk contexts (such as armed conflicts) is supported by the present author, as long as it is clearly settled what these special responsibilities are. At the sentencing stage, there is more room to focus on the idea of dangerous individuals than at the conviction stage that primarily focuses on deviant acts.²⁰⁶⁶ The claim that high-level actors generally would act with greater *culpability* is, however, questionable.

Not all, however, think that high-level actors automatically should receive harsh sentences. Podgor has, for example, suggested that there in criminal law in general is a lack of sympathy for white collar criminals, which is reflected in very severe penalties for that type of offenders.²⁰⁶⁷ In connection to international sentencing, there is indeed also a *risk* that too much blame is put on the leaders due to the multiple mechanisms geared towards emphasizing the role played by them. The criminological research indicating that people have a tendency to obey authorities has in this regard been highly influential, and has reinforced the idea that the leaders are those who should receive the harshest penalties. As noted in connection to the criminology of international crimes, very little research has, however, been conducted on factors that might explain why high-level actors engage in international criminality. There *might* therefore exist factors that could be considered in mitigation at sentencing (such as, peer pressure and the chaotic context of war). The image of the leaders conveyed by international criminal law is generally that

²⁰⁶³ von Hirsch & Ashworth 2005, at 36.

²⁰⁶⁴ von Hirsch & Ashworth 2005, at 68.

²⁰⁶⁵ von Hirsch & Ashworth 2005, at 45.

²⁰⁶⁶ Cf. “The major alternative to character theories of punishment are act-based theories. Instead of premising punishment on underlying character – on who the criminal is – act theory instead focuses on the criminal action – what the offender does.” E. N. Yankah, ‘Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment,’ 25 *Cardozo Law Review* (2004), at 1053-1054.

²⁰⁶⁷ Podgor 2007, at 732-733 and 740.

they are smart calculating people who master their environment. The idea of careless and ignorant high-level actors seems to be strange for international criminal law. The same is true for high-level actors who follow orders. The ICTR has, however, been faced with this scenario and addressed it by noting that:

The Chamber is aware that Nsengiyumva and Ntabakuze were at times following superior orders in executing their crimes, which is a mitigating factor under [...] the Statute. However, given their own senior status and stature in the Rwandan army, the Chamber is convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them reflects their acquiescence in committing them. No mitigation is therefore warranted on this ground.²⁰⁶⁸

The leaders' criminal behaviour is simply too harmful and too dangerous to be met with understanding and mercy.²⁰⁶⁹ A similar restrictive attitude towards accepting mitigating factors in connection to leaders was expressed by ICTY in the *Krajišnik* case:

Good conduct contemporaneous to the crimes may serve as a mitigating factor when the convicted person had taken steps to save lives or alleviate the suffering of the victims. The Chamber may mitigate a sentence where the convicted person provided selective assistance to the victims or persons of the same ethnicity as the victims, even though his or her actions had little practical effect. The mitigating effect is less, however, where the convicted person is shown to have been in a position to take steps to control or prevent all acts of violence. In such case, sporadic benevolent acts or ineffective assistance may be disregarded.²⁰⁷⁰

From a more empirical perspective, it may be noted that high-level actors *de facto* generally have received harsh sentences by the *ad hoc* tribunals.²⁰⁷¹ Mid-level actors, on the other hand, have often been sentenced more leniently.²⁰⁷² From the empirical perspective, it is furthermore noteworthy that many low-level actors have been convicted to long prison sentences. This has been explained by prosecutorial decisions, that is, the fact that those low-level actors who have been prosecuted often have been those who have shown special cruelty and sadism in their criminality.²⁰⁷³ While the cases that are prosecuted and which eventually lead to convictions are affected by prosecutorial decisions and does not necessarily reflect international criminality as a whole, it is from a phenomenological perspective still interesting that international case law appears to reinforce the idea that there are three common types of international criminals: (1) vicious political and military leaders who mastermind the international crimes; (2) passive/bureaucratic mid-level actors who fail to hinder their criminal subordinates from committing crimes; and (3) sadistic and cruel low-level actors.

²⁰⁶⁸ *Bagosora et al.*, Judgement, TC, ICTR, 18 December 2008, para. 2274.

²⁰⁶⁹ Cf. "A parent repeatedly batters an infant child because the child cries. We see from where the impetus to batter arises, but we simply cannot grant any sympathetic validity to the act arising out of the impetus." Darley 1992, at 201.

²⁰⁷⁰ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 1162.

²⁰⁷¹ D'Ascoli 2011, at 235-237.

²⁰⁷² As noted above, many mid-level superiors have received rather lenient punishments by the *ad hoc* tribunals. E.g., Harhoff 2008, at 135, and Hola, Bijleveld & Smeulers 2011, at 753.

²⁰⁷³ Harhoff 2008, at 136.

9.3.5. Criminogenic Crime Commission Contexts and Sentencing

That individuals in position of authority may prompt other individuals to engage in international criminality is hence clearly recognized at international sentencing. This raises the question to what extent the push to engage in the criminality that peer pressure (or collective criminality) entails also is recognized in the law. Or more generally, the context of action that in connection to international criminality often is highly criminogenic. In this regard, it has been put forward that ethically speaking erroneous belief resulting from the lies of others should be given a considerable mitigating effect when considering blameworthiness.²⁰⁷⁴ Fletcher, on his part, asks how an individual can be blamed for violence his/her “culture” said was right.²⁰⁷⁵

Some legal scholars have pointed out that it at the sentencing stage is possible to give legal recognition to criminogenic crime commission contexts, and that the sentencing stage in this regard differs from the conviction stage. For example, Norrie has held that:

For conviction, the individual is regarded as a free, juridical individual, unhindered by his or her personal or social conditions. In relation to the sentence, however, considerations of background are admitted as a means of mitigating punishment, and these normally take the form of analysis of the accused’s circumstances and consideration of his or her motives.²⁰⁷⁶

In relation to international crimes, some scholars have even found that it would be especially important to consider the crime commission context at sentencing. For example, Fletcher has put forward that he is “very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime.”²⁰⁷⁷ In connection to collective mass atrocities, Fletcher argues for a *humanistic approach to collective guilt* that would lead to mitigation of punishment.²⁰⁷⁸

Criminogenic environments can be found to justify the mitigation of punishment in many different ways. Firstly, it has been put forward that mitigation is justified because the environment has reduced the offender’s incentives for compliance with the law.²⁰⁷⁹ Secondly, it has been suggested that social failure justifies sentence reductions if it is the State’s and the larger society’s fault that the societal condition has been permitted to exist.²⁰⁸⁰ The fault hence “weakens the state’s moral authority to condemn and hence to

²⁰⁷⁴ Kamber 1999, at 254.

²⁰⁷⁵ See Fletcher’s account on romanticism and the problem of “guiltless sincerity”. Fletcher 2002(b), at 1544 and 1553-1554.

²⁰⁷⁶ Norrie 1991, at 160.

²⁰⁷⁷ Fletcher 2002(b), at 1539.

²⁰⁷⁸ Fletcher 2002(b), at 1542-1543. Chifflet and Boas ask to what extent it should at sentencing be considered that a crime has been committed in the context of war respectively in a time of peace. P. Chifflet & G. Boas, ‘Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo’, 23 *Criminal Law Forum* (2012), at 136. It should, however, be noted that also international crimes committed in times of peace often are committed in criminogenic environments.

²⁰⁷⁹ Cf. von Hirsch & Ashworth 2005, at 66-67.

²⁰⁸⁰ Cf. von Hirsch & Ashworth 2005, at 66 and 69.

punish offences”.²⁰⁸¹ Von Hirsch has, however, noted that this suggestion is puzzling in that what matters then is not the degree of social failure itself, but the degree to which that failure is the fault of the State. This means that there does not have to be a direct link between degree of social failure and the mitigation of punishment.²⁰⁸² Thirdly, the context of action may be found to give rise to pressure to commit crimes, however, not necessarily arising to the level of real compulsion.²⁰⁸³ Fourthly, propaganda and State involvement in the criminality may affect individual’s perceptions of what is right and wrong, and their beliefs of what the reality is. Finally, it has in connection to mass criminality been argued that the many hands involved in the criminality attenuate the individual responsibility.²⁰⁸⁴

All in all, there seems to be two major types of arguments regarding the possible legal relevance of contexts of action. Firstly, criminogenic contexts of action are found to challenge the State’s right to punish individuals. The question of whether individual States or the international community has a right to punish State-supported criminality, however, lies beyond the scope of this study.²⁰⁸⁵ The more relevant question here is rather whether the criminogenic context of action entails that *compassion* should be shown to individuals who engage in the criminality. Secondly, criminogenic contexts of action are sometimes found to affect *culpability* by influencing the offender’s knowledge and will.²⁰⁸⁶

In domestic criminal law, most seem to suggest mitigation based on compassion rather than diminished culpability with regard to crimes committed in criminogenic environments, if they at all support mitigation of punishment.²⁰⁸⁷ This may be explained by the evidentiary difficulties to establish causal connections between criminogenic

²⁰⁸¹ von Hirsch & Ashworth 2005, at 69. Von Hirsch and Ashworth refer in this connection to Duff, who, however, elaborates on the State’s right to punish at all (and hence not sentence reduction). See further R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), 183.

²⁰⁸² A. von Hirsch, ‘Proportionate Punishment and Social Deprivation’, in *Flores juris et legum – festskrift till Nils Jareborg* (Uppsala: Iustus förlag, 2002), at 327.

²⁰⁸³ Cf. The Finnish Criminal Code recognizes as a possible ground for reducing the punishment that there has been a “significant pressure” to commit the crime. The Criminal Code of Finland, Chapter 6, Section 6.

²⁰⁸⁴ “As more people participate in a criminal act, we tend to hold each of them less responsible. Robert Nozick describes this defense in the following terms: Responsibility is contained in something like a bucket, and as more people share what is in the bucket, less is attributable to each person. Nozick rejects this defense and asserts that the fact that many people are responsible for a deed should not necessarily diminish the responsibility each one bears. This is correct, but it is also true that in some cases the intervention of many people imply an attenuation of responsibility.” Nino 1996, at 166.

²⁰⁸⁵ See further Chapter 1.

²⁰⁸⁶ See e.g., A. Ashworth, *Sentencing and Criminal Justice*, 5th ed. (Cambridge: Cambridge University Press, 2010), 150-151 (who notes that it sometimes is unclear whether social deprivation should be regarded as a factor reducing culpability or as a personal mitigating factor).

²⁰⁸⁷ In many domestic legal systems, the general background of offences/offenders – e.g., that the offender is a member of a youth gang or comes from a dysfunctional family – is not considered at sentencing. Modern criminal law is hence generally act-oriented and not actor-oriented. Von Hirsch has in connection to deprived social status noted that: “[Focusing on the offender’s background ...] would call for fundamental alterations in existing paradigms of responsibility and culpability in the criminal law – ones that would result in the law’s focussing much less on the circumstances of the particular criminal act, and more on the offender’s generalised social position.” He suggests that the question should not be considered as one of diminished culpability, but rather as one of compassion. von Hirsch 2002, at 322. See also von Hirsch & Ashworth 2005, at 69.

environments and individual behaviour. Many individuals namely remain law-abiding in the most criminogenic environments.²⁰⁸⁸ The criminological research indicating a correlation between certain background factors and criminality do therefore not in individual cases establish diminished culpability. It has also been stressed that whereas reduced culpability entails an evaluation that the criminal behaviour has been less reprehensible, compassion does not *per se* signal lesser reprehensibility.²⁰⁸⁹ Horder has, for example, in connection to deprived upbringing referred to it as a “morally, purely passive factor underlying the crime’s commission not amounting, as such, to a denial of responsibility”.²⁰⁹⁰ To say that compassionate mitigating factors never would reflect evaluations of responsibility is, however, simplistic. This point is made by von Hirsch and Ashworth who note that *mitigating factors based on compassion may imply an altered valuation of the conduct if many offenders receive a reduced sentence based on them*.²⁰⁹¹ They emphasize that the majority of offenders cannot benefit from mitigating factors if one wants to maintain the distinction between the norm (punishment according to the offence’s degree of seriousness) and the exception (punishment reduced on compassionate grounds).²⁰⁹²

Taking into account that most international crimes are committed in criminogenic environments, allowing the context to be a mitigating factor in connection to these crimes would entail a significant reevaluation of the reprehensibility of the criminality. From this perspective, it is not surprising that international criminal law has generally been unwilling to consider crime commission contexts in mitigation even though criminological research indicates that mitigation could be justified based on compassionate grounds.²⁰⁹³ In some cases, limited consideration has, however, been given to factors such as propaganda. For example, in the early *Tadić* case, the ICTY held that:

the Trial Chamber does not accept that Duško Tadić’s actions were anything but criminal, constituting offences against individuals, and indeed, against all mankind. To condone Duško Tadić’s actions is to give effect to a base view of morality and invite anarchy. However, the virulent propaganda that stoked the passions of the citizenry in opština Prijedor was endemic and contributed to the crimes committed in the conflict and, as such, has been taken into account in the sentences imposed on Duško Tadić.²⁰⁹⁴

Likewise, the ICTR recognized that Ntawukulilyayo seemed to act out of character, which it held to imply that “his participation in the killings may have resulted from external pressures to demonstrate his allegiance to the government rather than from extremism or ethnic hatred.”²⁰⁹⁵ In the *Čelebići* case, an ICTY Trial Chamber suggested

²⁰⁸⁸ von Hirsch & Ashworth 2005, at 68.

²⁰⁸⁹ Cf. von Hirsch & Ashworth 2005, at 71.

²⁰⁹⁰ Horder 2007, at 14.

²⁰⁹¹ von Hirsch & Ashworth 2005, at 71.

²⁰⁹² Societal deprivation is not exceptional in the same sense as, e.g., illness of the offender. von Hirsch & Ashworth 2005, at 70, and von Hirsch 2002, at 328.

²⁰⁹³ See further Chapter 3.

²⁰⁹⁴ *Tadić*, Judgement (sentencing), TC, ICTY, 14 July 1997, para. 72.

²⁰⁹⁵ *Ntawukulilyayo*, Judgement, TC, ICTR, 3 August 2010, para. 474.

that group pressure could be considered in mitigation,²⁰⁹⁶ but this has not become a much employed mitigating factor in international criminal law. In fact, international criminal law has rather opted for the opposite approach, that is, to regard the context of action as something that aggravates the individual criminal conduct. Drumbl in this regard observes that: “Paradoxically, persons with a weakened sense of individual responsibility and independence commit crimes that international criminal justice institutions call more serious than ordinary domestic crimes.”²⁰⁹⁷ The contexts of the individual acts namely often constitute *chapeau* elements of the international crimes, which generally are found to aggravate the underlying offences. This being said (and as also noted by Drumbl), international criminal tribunals have not handed down harsher sentences than domestic criminal courts in connection to serious ordinary criminality.²⁰⁹⁸

9.3.6. Why Are the Crimes Committed? The Role of Motives in International Sentencing

The motives underlying criminal acts are generally not considered legally relevant at the conviction stage.²⁰⁹⁹ At the sentencing stage, they can, however, be very significant. Byrne Hessick in this regard notes that:

[A]n actor’s *actus reus* and *mens rea* are not always the best indicators of her culpability. Sometimes her motive may provide information that many would believe is more important to determining the appropriate amount of punishment. The classic example of this phenomenon is the mercy killer who ends a loved one’s life in order to end her suffering. Even motive’s critics appear to acknowledge that this individual is not as blameworthy as – and thus does not deserve the same punishment as – those individuals who purposefully kill out of malice. But the example proves even more. The mercy killer appears to deserve less punishment not only than purposeful killers with other motives, but she also appears less blameworthy than the actor whose reckless decision to drive at an excessive speed results in the death of a pedestrian. The mercy killer’s motives also appear to provide more information about her blameworthiness than her illegal act. If asked to assign punishment to different actors, it is doubtful that many individuals would impose as much punishment on the mercy killer as they would impose on a kidnapper or a drug dealer, even though murder is usually perceived as the crime deserving the most punishment.²¹⁰⁰

This being said, it has also been put forward that “criminal law should not be used to moralize, but to protect central societal and individual interests.”²¹⁰¹ Even though a crime has been committed for a reason that is not sympathetic (for example, envy, greed, egoism and jealousy), it is not self-evident that the punishment should be aggravated due

²⁰⁹⁶ *Delalić et al.*, Judgement, TC, ICTY, 16 November 1998, para. 1235.

²⁰⁹⁷ Drumbl 2005(a), at 571.

²⁰⁹⁸ Drumbl 2005(a), at 572.

²⁰⁹⁹ See further Section 6.3.5.2.

²¹⁰⁰ C. Byrne Hessick, ‘Motive’s Role in Criminal Punishment’, 80 *Southern California Law Review* (2006), at 111.

²¹⁰¹ Governmental Bill 44/2002, at 188 (Finland) [originally in Finnish, translated to English by the present author].

to this.²¹⁰² When motives are considered at sentencing, some therefore feel that there should be a *special reason* to consider them, such as increased dangerousness.²¹⁰³ In this regard, it has been questioned why crimes committed with specific discriminatory intent or racist motives deserve enhanced punishment. Fletcher, for example, asks why the law regards genocide as worse as simple murder, and why, for example, the hate crime statutes do not include idiosyncratic hatreds (such as, hatred of bald people) that might be just as virulent as racial hatred. For him, the answer is that crimes such as genocide reflect collective conflict and that these crimes as such bear the dangers of collective action.²¹⁰⁴ Minow, on her part, stresses the additional harm bias criminality causes members of targeted group, who have to live in a state of terror and degradation.²¹⁰⁵ Also Marston Danner notes that the most widely accepted justification for the penalty enhancement in relation to bias crime derives from evidence that these crimes potentially engender more harm than ordinary crimes do. The personal culpability of the individuals who commit bias crimes is correspondingly enhanced by their individual decision to harm individuals who are members of groups that experience discrimination in the community.²¹⁰⁶ It may also be argued that the bias crimes are more blameworthy in that they offend important societal norms. In this regard, it has been argued that enhancing punishment for discriminatory intent is particularly appropriate in an international forum, as the “commitment to equality constitutes one of the foundational principles of the United Nations.”²¹⁰⁷

It has also been put forward that it may be justified to consider motives at sentencing “when that motive materially differs from the motive for which the offense ordinarily would have been committed.”²¹⁰⁸ For example, in connection to economic criminality, it is typical that the offender aims at improving his/her economic situation, whereas jealousy may be regarded as a characteristic background factor to domestic violence.²¹⁰⁹ More generally, it has been suggested that criminal law assumes that the offender is a person who aims at hurting other people and making individual profit, and that when this assumption does not hold true – that is, when, for example, a violent crime is committed for non-selfish motives – there may be a reason to consider that at sentencing.²¹¹⁰ At least in connection to mitigation, the question of whether the offender’s motives have been significantly “better” than normally associated with the offence in question, has been found central. It is, however, more difficult to distinguish between the “ordinarily bad” and “worse” motives in connection to aggravation. In this regard, the central question

²¹⁰² Governmental Bill 44/2002 (Finland), at 188.

²¹⁰³ Governmental Bill 44/2002 (Finland), at 188.

²¹⁰⁴ Fletcher 2002(b), at 1523-1424.

²¹⁰⁵ Minow 2000(b), at 1269.

²¹⁰⁶ Marston Danner 2002, at 391-392.

²¹⁰⁷ Marston Danner 2001, at 480.

²¹⁰⁸ Byrne Hessick 2006, at 129-130.

²¹⁰⁹ It should be noted that the identification of this kind of connections can be based on prejudice. In connection to sexual violence, the motive behind the act does not need to be to gain sexual gratification, but may rather be the desire to have power over another individual. In his regard, it has been pointed out that sexual violence is more common in hierarchical societies with traditional gender roles. E.g., S. Pohjonen, ‘Kvinnor, våld och straffrätt’, in G. Nordborg (ed.), *13 kvinnoperspektiv på rätten* (Uppsala: Iustus förlag, 1995), at 200-201.

²¹¹⁰ Governmental Bill 44/2002 (Finland), at 188.

rather appears to be which motives the society views as especially reprehensible.²¹¹¹ Sadism and racism are examples of motives that in many legal systems are considered as especially wicked.

In connection to international crimes, the discussion above raises the question of what the ordinary motives behind international crimes are. This question is not easy to answer, as the criminological research into international criminality so far only to a limited extent has considered the question. One can, however, find logical links between certain motives and crimes, for example, between sadism and torture, and zeal and mass extermination. From this perspective, it, in fact, *appears* to be inherent to many international crimes that they are committed with reprehensible underlying motives. It should, however, be born in mind what earlier has been noted, that is, that the most abhorrent acts are not necessarily brought about by wicked motives.²¹¹² Not all international criminals are hence sadists or racists, even though the nature of the criminality could suggest that. As was noted in connection to the phenomenology of international crimes, it has also been suggested that international crimes are characterized by the fact that political and ideological motives often lie behind them.²¹¹³ For example, Harhoff has suggested that whereas ordinary crimes often are committed for personal advantage and “personal emotions or petty greed”, the background of international crimes is generally collective pressure and “nationalist, ideological or religious motives”.²¹¹⁴ Also here, it may, however, be questioned whether the crimes really have such underlying *individual* motives.

This, firstly, raises the question to what extent it in international sentencing is possible to find out the true reasons behind the criminality. Byrne Hessick notes that the literature discussing motives in criminal punishment has identified three practical problems with taking into account motives at sentencing: “first, that the evidence necessary to prove motive may be difficult to locate; second, that a defendant may have many different “levels” of motive; and third, that a defendant may act with “mixed motives.””²¹¹⁵ How should one therefore, for example, find out whether a person *really* has acted with racist motives and whether this has been his/her *primary* motive? Most perpetrators do namely not spell out their reasons for action and even if they do, how can one know whether the perpetrator is telling the truth? While it *theoretically* hence is possible to distinguish between the criminal behaviour of the accused, the outcome the person desires with his/her behaviour (specific intent) and the background reasons that prompt the person to act (motives), *in practice*, this can be difficult. If one wants to give motives legal relevance, one must therefore accept that the same evidence may be used both to identify crime elements, intent and motives. International sentencing law recognizes this interconnectedness by considering it to be impermissible double-counting if crimes that have specific discriminatory *intent* as a crime element (genocide and persecution) are aggravated by racist *motives*.²¹¹⁶

²¹¹¹ Cf. “The classification and determination of the relative culpability of motives may prove challenging, as there is no easy theory to explain why some motives are perceived as more blameworthy than others.” Byrne Hessick 2006, at 141.

²¹¹² See further Section 2.7.

²¹¹³ See further Section 2.7.

²¹¹⁴ Harhoff 2008, at 123-124.

²¹¹⁵ Byrne Hessick 2006, at 144.

²¹¹⁶ See further Section 9.2.4.2.

Secondly, if one gives motives legal relevance, one has to decide whether the motives should be considered in aggravation or mitigation. Are, for example, crimes against humanity committed “purely for personal reasons” less or more severe than crimes against humanity committed for political reasons?²¹¹⁷ As regards the motives that have been given legal relevance, international criminal law has generally followed a very traditional approach. Racist motives, sadism and premeditation have been considered in aggravation, and compassion towards the victims in mitigation. In this regard, international criminal law reflects widespread moral distinctions about the blameworthiness of different types of motives. In one important regard, international criminal law does not, however, always mirror societal sentiments: while politically or ideologically motivated violence sometimes *morally* is met with understanding, international criminal law does not *legally* accept this as a mitigating factor.²¹¹⁸ This approach has been found to be necessary if the law wants to maintain the *jus ad bellum* and *jus in bello* dualism of international law.²¹¹⁹ In *jus ad bellum* the reasons behind the acts are central, but not in *jus in bello*. More importantly, showing understanding to politically/ideologically motivated criminality would divert the attention away from the serious harm that the criminality causes and the plight of the victims.

On a more principled level, Sloane has asked whether international criminal law always should follow traditional criminal law approaches to aggravating motives. More specifically, he notes that “it is worth bearing in mind that zeal is not always, or even in most instances, more culpable than emotionless orchestration of the crimes of conviction by elites, who at times may well prefer to remain aloof from the actual atrocities.”²¹²⁰ For Sloane, the special features of international criminality thus challenge the idea that the most eager participants always should be regarded as the most blameworthy. In a similar vein, D’Ascoli has questioned whether reluctant participation or “unwillingness” should be considered at sentencing in cases where it has been established that the offender has had the required *mens rea*.²¹²¹ As the present author sees it, zeal and unwillingness are, however, factors that generally are considered when criminal behaviour is morally evaluated, and as such it is understandable that they also legally are considered in international sentencing.

9.3.7. The Harm Caused and Sentencing

The harm caused is one of the most central sentencing determinants in international criminal law. It can either be considered when assessing the gravity of the offence (most

²¹¹⁷ In the *Tadić* case, it was considered whether it was a crime element of crimes against humanity that they were not committed for purely personal reasons. *Tadić*, Judgement, AC, ICTY, 15 July 1999, paras 269-270. D’Ascoli has suggested that it could be regarded as an aggravating factor that an international crime has been committed for “personal gain”. D’Ascoli 2011, at 309. The present author is not convinced that such a legal development would be positive.

²¹¹⁸ See further Section 9.2.5.2.

²¹¹⁹ See further R. D. Sloane, ‘The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War’, 34 *Yale Journal of International Law* (2009), at 48-49.

²¹²⁰ Sloane 2007(b), at 727.

²¹²¹ D’Ascoli 2011, at 313.

notably, if it is a crime element)²¹²² or as an aggravating circumstance (for example, degree of suffering and humiliation inflicted, and creation of an atmosphere of terror). Despite this, international sentencing is often criticized for not adequately reflecting the gravity of the crimes that has been committed.²¹²³ For example, Harmon and Gaynor have criticized the *ad hoc* tribunals, and especially the ICTY, for handing down ordinary sentences for extraordinary crimes.²¹²⁴ In their critical article, they suggest that the leniency probably is due to the fact that the international judges give too much weight to various mitigating factors.²¹²⁵

The impossibility of finding a punishment that perfectly fits the horror of many international crimes is, however, eloquently expressed by the *Krajišnik* Trial Chamber when it notes that:

There is no need to retell here the countless stories of brutality, violence, and depravation that were brought to the Chamber's attention. But hidden amidst the cold statistics on the number of people killed and forced away from their homes, lies a multitude of individual stories of suffering and ordeal – psychological violence, mutilation, outrages upon personal dignity, rape, suffering for loved ones, despair, death. A sentence, however harsh, will never be able to rectify the wrongs, and will be able to soothe only to a limited extent the suffering of the victims, their feelings of deprivation, anguish, and hopelessness.²¹²⁶

Similarly, D'Ascoli has stressed that “it is not possible to apply at the international level the same scale of penalties used at the national level within domestic jurisdictions” as if the same scale of gravity was used “one could argue that [...] all international crimes are already characterised by ‘extreme gravity,’ therefore they should all fall into the ‘extreme gravity’ category and all attract life imprisonment.”²¹²⁷ There is no easy answer to the question of how offence gravity should be assessed in connection to the type of criminality international criminality represents.

Interesting for this study is also that it at the sentencing stage is possible to give legal recognition to types of harm that are not considered as crime elements. For example, in the *Milošević* case, the Appeals Chamber held that it was acceptable that the Trial Chamber had considered as an aggravating fact the fact that Milošević had introduced and supported the use of indiscriminate weapons, as the use of such weapons was not “an element of the crimes of terror, murder, or inhumane acts” for which he was convicted.²¹²⁸ In the *Vasiljević* case, the fact that the crimes had resulted in long-term

²¹²² *Kunarac et al.*, Judgement, TC, ICTY, 22 February 2001, para. 852 (‘Consideration of the consequences of a crime upon the victim who is *directly* injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part and parcel of the definition of the offence, though, care should be taken to avoid considering them separately in imposing sentence. For example, the fact that an offender took someone's life cannot be considered as a *separate* sentencing circumstance when imposing a sentence for a murder conviction – it is part and parcel of the crime charged.’)

²¹²³ Cf. Meernik & King 2003, at 726.

²¹²⁴ Harmon & Gaynor 2007, at 683 ff.

²¹²⁵ Harmon & Gaynor 2007, at 688–689.

²¹²⁶ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 1146.

²¹²⁷ D'Ascoli 2011, at 50.

²¹²⁸ *Milošević*, Judgement, AC, ICTY, 12 November 2009, para. 305.

trauma was considered legally relevant as an aggravating factor.²¹²⁹ In many cases, the special vulnerability of the victims has been taken into account in aggravation. Children, elderly, the disabled and wounded as well as individuals in confinement are examples of such especially vulnerable victims.²¹³⁰ There have furthermore been some occasionally accepted victim-related aggravating factors, such as the fact that the victims have been international peacekeepers.²¹³¹

9.3.8. Sentencing and the Unusual Enforcement Mechanisms of International Criminal Law

As was noted in connection to the special features of international criminal law, it is not uncommon that only certain individuals who have participated in crimes are chosen for prosecution, and that only some of the crimes these individuals have participated in find their way to the indictments. From this perspective, it is interesting that the prosecutor in the *Lubanga* case suggested that the non-charged sexual violence should affect the sentence (concerning child soldier crimes) as an aggravating factor.²¹³² In this regard, the majority of the Trial Chamber held:

The prosecution's failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence. The Chamber is entitled to consider sexual violence under Rule 145(1) (c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.²¹³³

Even though the present author finds it important that the victimization of the victims of sexual violence would have been legally recognized, the legal solution adopted in the *Lubanga* case is clearly problematic. The sentencing stage is a too late procedural stage to take on new offences. Rape and other forms of sexual violence namely *are crimes* under the ICC Statute, and if one wanted the Court to give these acts legal relevance, they should have been properly prosecuted and judicially investigated at the conviction stage.²¹³⁴ The idea that certain crimes are natural consequences of other crimes can in the context of international criminal law have very far-reaching consequences.

²¹²⁹ *Vasiljević*, Judgement, AC, ICTY, 25 February 2004, para. 167. See also e.g., *Perišić*, Judgement, TC, ICTY, 6 September 2011, para. 1824.

²¹³⁰ *Krajišnik*, Judgement, TC, ICTY, 27 September 2006, para. 1149.

²¹³¹ *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2257.

²¹³² *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, paras 61-62.

²¹³³ *Lubanga*, Decision (sentencing), TC, ICC, 10 July 2012, para. 67. Also the dissenting Judge held that the sexual violence could (and should) have been considered at sentencing. *Lubanga*, Decision (sentencing, diss. op. of Judge Odio Benito), TC, ICC, 10 July 2012.

²¹³⁴ The *Lubanga* decision could, in this regard, also be considered in Section 9.3.1. on the relationship between offences and sentencing factors.

9.4. Concluding Remarks

9.4.1. Sentencing and Human Rights/Fairness Considerations

In connection to substantive criminal law, there has in recent years been a growing tendency to consider what criteria criminalizations should fulfil to be considered as lawful and good criminalizations.²¹³⁵ In sentencing, on the other hand, the discussion has often focused on the goals of sentencing and less attention has been given to elaborating on which factors are appropriate sentencing factors and which not. In human rights law, the issues discussed have primarily centred around the acceptability of particular sentence types (most notably death penalty and life imprisonment), the prohibition of retroactive application of sentences, and juvenile justice,²¹³⁶ and as such, sentencing factors have not really been considered there either. The question of what all factors appropriately can be considered at sentencing has neither received much attention from criminal law scholars, even though there is a considerable consensus that at least certain factors are central at sentencing: the harm done and the culpability of the offender. In this regard, at least at the level of law, international criminal law follows established approaches to sentencing. The *de facto* application of the proportionality principle is more debated, but Meernik and King have held that: “despite the ad hoc examples of unequal treatment towards some defendants, such as Tadić and Plavšić, there is a fair degree of consistency in the sentences conferred on the guilty.”²¹³⁷

Schabas has in connection to international criminal law argued that the law “has rarely accorded more than summary consideration to the issue of sentencing.”²¹³⁸ Also in many domestic criminal justice systems the focus lies on the criminal law affecting convictions. Also the interplay between conviction criteria and sentencing criteria has received little attention, which is surprising taken into consideration how closely the two trial phases are connected. As noted by Byrne Hessick: “Criminal liability is essentially a binary inquiry: is the defendant guilty or not guilty? Finer distinctions about a defendant’s culpability – not issues of guilt, but issues of relative guilt – are usually made [...] at sentencing.”²¹³⁹ One may indeed ask exactly what the logic is to strictly separate “substantive criminal law from other dimensions of criminal justice”, and most notably sentencing.²¹⁴⁰

From the point of view of this study, the wide discretion granted to the judges in deciding upon aggravating factors is interesting in that it opens up an avenue for taking legally into consideration additional typical features of international crimes, that is, the phenomenology and criminology of international atrocities. For example, factors such that political killings may trigger additional violence.²¹⁴¹ From a legality perspective, it

²¹³⁵ E.g., Lernestedt 2003, and R. A. Duff *et al.* (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010).

²¹³⁶ See e.g., S. - R. Kwon *et al.*, *Cruel and Unusual - U.S. Sentencing Practices in a Global Context* (San Francisco: School of Law, University of San Francisco, 2012). See also e.g. Articles 6-7, ICCPR.

²¹³⁷ Meernik & King 2003, at 718.

²¹³⁸ Schabas 2008(b), at 613.

²¹³⁹ Byrne Hessick 2006, at 92.

²¹⁴⁰ Cf. R. A. Duff *et al.*, ‘Introduction – The Structures of the Criminal Law’, in R. A. Duff *et al.* (eds.), *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011), at 7.

²¹⁴¹ *Ndindiliyimana et al.*, Judgement, TC, ICTR, 17 May 2011, para. 2257.

is, however, troublesome that the law on aggravating factors is so flexible. The idea that non-prosecuted crimes could function in aggravation is especially problematic.

The openness characterizing international sentencing raises the fair trial question of whether the accused individuals always have received a fair warning that a particular factor will be considered at sentencing. From a fair trial perspective, more established approaches to aggravating and mitigating factors would therefore be preferable.²¹⁴² One could also consider whether more blameworthiness evaluations in international criminal law should be made at the conviction stage that is more regulated. In this regard, Morse has similarly questioned the approach in certain legal systems to relegate “crucial responsibility determinations [...] explicitly or implicitly [...] to the sentencing process rather than incorporated into the doctrines of liability that are adjudicated at trial.”²¹⁴³

9.4.2. Sentencing and Fair Labelling

From a labelling perspective, the sentencing criteria are utmost interesting in that they allow many typical features of international criminality to be legally recognized. Some typical features are both conviction criteria and sentencing factors, and that a feature is considered at both stages indicates its centrality. The sentencing stage is also a stage at which factors that have not been considered legally relevant at conviction suddenly can become legally relevant. This is interesting especially from the point of view of the *criminology* of international crimes: the underlying reasons behind the criminality are generally not considered at conviction, but they may be relevant at sentencing. The scant attention given to sentencing factors by, *inter alia*, legal scholars, however, affects their labelling. The type of sentence handed down for sure sends strong legal signals, but the criteria based on which it is decided not that much.

This being said, according to the present author, international sentencing, however, sends some signals worth noting: International sentencing – in the same way as the law affecting convictions – stresses the role played by leaders in connection to the criminality and the special reprehensibility of discriminatory motives. Trough some mitigating factors (most notably duress and superior orders) international criminal law gives recognition to human frailty, but, all in all, international sentencing does not support the idea that the collective crime commission context dilutes responsibility. From a criminological perspective, it may therefore be submitted that international sentencing gives some acknowledgement to theories à la Milgram stressing individuals’ inclination to adhere to authorities, but not that much to other factors that often can be found behind the criminality (peer pressure, the brutalization that often takes place in armed conflicts, etc.).

²¹⁴² A distinction is sometimes made between rights and privileges (e.g. parole). According to Judges Zupančič and Maruste: “Rights, especially in criminal law, require restrictive substantive criteria (*lex certa*, *lex clara*, principle of legality, etc.) and strict procedural formalism – whereas privileges (clemency, rewards, awards, prizes, honours, etc.) do not. Rights and duties lend themselves to legal remedies and regulation, whereas privileges do not.” *Case of Eze and Connors v. The United Kingdom*, Judgment (diss. op. of Judges Zupančič and Maruste), GC, ECtHR, 9 October 2003, para. 13. In this regard, it is sometimes suggested that mitigating factors based on mercy do not need to be regulated to the same degree as, e.g., aggravating factors. At the same time, the present author, however, feels that the principle of equality before the law demands that the application of mercy is not completely random.

²¹⁴³ Morse 1998, at 337.

10. CONCLUDING ANALYSIS

10.1. Recapitulation of the Goal of the Study

The starting-point of the study is that there is a real-life phenomenon that can be characterized as international criminality. The features of this criminality were investigated in Chapters 2 and 3 by making use of sociological, historical, and criminological research. The main goal of the study has been to high-light *to what extent* and *how* the typical features of this criminality have been reflected in the existing international criminal law (Chapters 6-9). Important questions in the study have therefore been: (a) what is legally relevant in international criminal law and what is not; and (b) at what stages and how are different dimensions of international criminality considered in international criminal law. A goal of the study has, however, *not* been to suggest “the best” legal solutions. Most solutions namely have both their pros and cons. The aim of the study has therefore been more modest, that is, to increase the understanding of the international criminal law that *de facto* is used by international criminal tribunals to prosecute individuals. An underlying assumption has been that the *fundamental structures of international criminal law hitherto have not received sufficient attention*.

More specifically, an impetus to this study has been pronouncements, such as the one by Osiel, that international criminal law has “largely [been] content to rely on fictions remote from the empirical reality of mass atrocity discerned by historians and social scientists.”²¹⁴⁴ For the present author, these kinds of statements have triggered an urge to investigate exactly what “the empirical reality” is that sometimes is put forward to criticize the *lex lata*. To find out “the truth” or “the reality” is, however, always to some extent a mission impossible. The systematic survey into sociological, historical, and criminological accounts of international atrocities conducted here has nevertheless shed some light on the empirical reality of international atrocities. All in all, the investigation emphasizes that while international criminality has some special features of its own (Chapter 2), it is not, from a criminological perspective (Chapter 3) a completely unprecedented societal phenomenon. As such, the present author does not accept the idea of international crimes as completely incomprehensible or as phenomena beyond moral scrutiny.²¹⁴⁵

Secondly, Osiel’s argument raises questions about the inadequacy or inappropriateness of the legal responses to international criminality.²¹⁴⁶ For some, the solution to the problem is to abandon criminal law altogether. In this study, it is, however, not suggested that the criminal law should be replaced with alternative mechanisms, such as truth commissions. In modern society, criminal law is often the conventional

²¹⁴⁴ Osiel 2005(a), at 1752. Cf. also “If criminal law sometimes seems so inadequate in grappling with mass atrocity, is this because the law rests on assumptions simply inapplicable to such events?” *Ibid.*, at 1755.

²¹⁴⁵ Cf. e.g., “Massive human rights violations involve what Kant deemed “radical evil” – offenses against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate. If someone had confronted Adolf Hitler and told him that his acts were wrong, it would have sounded almost laughable. “Wrong” is too weak an adjective to describe actions that knowingly caused deaths of more than twenty million people and the unimaginable suffering of millions more.” Nino 1996, at vii-viii.

²¹⁴⁶ Cf. Arendt and her idea about Nazi crimes exploding the limits of the law. H. Arendt (letter dated 17 August 1946) in *Hannah Arendt Karl Jaspers Correspondence 1926-1969*, at 54.

way to address the intentional infliction of serious harm to others. The question here has rather been how one with the “international criminal law instrument” (Chapters 4-5) has been able to address the societal reality of international criminality.

An underlying assumption in the study is that the fact that international criminal law is *criminal law* entails certain limitations. Or to phrase this another way, the law has some in-built ideas about what is relevant/irrelevant and what kind of regulation is good. In this regard, it is noteworthy that the phenomenology of international crimes often has been found to stretch the boundaries of acceptable criminal law. This being said, criminal law as an instrument is not static, but subject to change. When new types of criminal regulation emerge one must consider whether the new type of regulation breaks with the tenets of the law or rather changes/develops them. While, for example, corporate criminal law at some point was a legal anomaly, this type of criminal responsibility is today accepted in many criminal justice systems. That international criminal law does not exactly follow the model of domestic criminal law does hence not *per se* mean that the law violates the basic tenets of criminal law. One must rather, from a human rights perspective, consider whether the regulation is foreseeable to individuals and adheres to the principle that criminal responsibility should be personal and be based on individual guilt. As the present author sees it, international criminal law does not today in any significant way violate the basic tenets of criminal law, even though the certainty and specificity of the regulation in certain areas clearly could be improved.

Finally, a central perspective in the study has been the *labelling perspective*, that is, a central question has been what *signals* the law sends. Signals can both be sent with the law’s norms and with its lacunas and silences.

10.2. The Multitude of Possible Legal Choices: Different Types of Crime Structures and Legal Reasoning

That legally relevant factors often can be considered in alternative ways in the law is emphasized both by comparative criminal law and legal philosophy. There are, for example, different conceptions of how the *structure of crimes* should be understood. In common law jurisdictions, a central distinction is generally that between *actus reus* (the external side of the conduct) and *mens rea* (the internal side of the conduct).²¹⁴⁷ When deciding on criminal responsibility, the distinction between *offence elements* (*actus reus* + *mens rea*) and *defences* is central. In other legal systems (for example, German, Spanish and Nordic), tripartite structures of crimes are popular.²¹⁴⁸ In these systems, a distinction is done between the elements of the offence (German *Tatbestandmäßigkeit*), wrongfulness (German *Rechtswidrigkeit*) and culpability (German *Schuld*). All these three affirmative dimensions of the crime can be negated (by denials of the elements of the definition, justifications and excuses respectively).²¹⁴⁹

²¹⁴⁷ E.g., Fletcher 2007(a), at 43-44.

²¹⁴⁸ See e.g., K. Ambos, ‘Toward a Universal System of Crime: Comments on George Fletcher’s *Grammar of Criminal Law*’, 28 *Cardozo Law Review* (2007), at 2650-2651, Fletcher 2007(a), at 49-55, and Jareborg 1988, at 12.

²¹⁴⁹ E.g., Fletcher 2007(a), at 50-51.

The structures of the crimes are relevant in that they can make one see on exactly what the criminal responsibility is based. It has, for example, been noted that the three-step perspectives distinguishing between wrongfulness and culpability make it possible to excuse a person by denying culpability, but still maintaining that the act has been wrongful.²¹⁵⁰ As such, the distinction between excuses and justifications becomes more evident in three-tiered structures of crimes. Two-step thinking focusing on inculpatory and exculpatory factors, however, probably to a greater extent adheres to how people generally think about responsibility: what speaks for criminal responsibility and what against? In this regard, it is noteworthy that in some legal systems where tripartite thinking about the structure of crime has been common, some legal scholars have recently started to consider the usefulness of bipartite models.²¹⁵¹ Furthermore, it is significant to observe that even though one accepts a tripartite perspective, it is not always clear as what a particular factor shall be considered. Subjective elements, such as general and specific intent, have, for example, to varying degrees been considered as matters of culpability or as offence elements. According to the finalist understanding of the structure of the crime, the psychological aspects of culpability (acting with a certain required state of mind) are part of the offence definition, whereas the more normative assessment of blameworthiness is a question of culpability.²¹⁵²

The existence of different types of conceptions about the structure of the crime raises the question of how international criminal law has approached this more doctrinal question. In this regard, Burghart has held that:

To determine the accused's individual criminal responsibility, the *ad hoc* tribunals apply a two-tiered test: First, the conduct of the accused must be a kind that he can be held accountable for the crime, i.e. his conduct must qualify as one of the modes of participation, and second, the accused must not be exempted from individual criminal responsibility by means of a defence or – with the words of the ICCSt – ‘grounds for excluding responsibility’. [...] At first glance this concept of crimes under international law may seem self-evident. However, it differs significantly from its national equivalent in both civil and common law traditions. Indeed, the concept of crimes in international law corresponds neither with the German three-tiered test of criminal liability, distinguishing between ‘Tatbestandsmäßigkeit’, ‘Rechtswidrigkeit’

²¹⁵⁰ E.g., Hörnle 2008, at 16-18.

²¹⁵¹ E.g., in Finland. See further Melander 2010, at 88.

²¹⁵² Ambos 2007(b), at 2652 (‘the change brought about by finalist doctrine was twofold: on the one hand, the psychological elements of culpability (dolus and specific intentions, equivalent to descriptive *mens rea*) were “moved up” from (psychological) culpability to the *Tatbestand*; on the other hand, the finalist doctrine confirms or reinforces the normativization of the free standing culpability [...]. Thus, *culpa* is no longer (only) understood psychologically, i.e., as the (psychological) intent to cause a certain result (this intent is now—as *Vorsatz*—part of the *Tatbestand*), but as the (moral) blameworthiness of the perpetrator's conduct, i.e., in the sense of a *normative concept of culpability*). See also Fletcher 2001, at 272 (‘While it is fairly clear where most issues fall, there was considerable debate in the post-war German literature about the proper classification of intention and negligence. The traditional, harm-oriented school treated these factors as bearing exclusively on culpability, which implied that accidentally causing the death of another, without any culpability at all, was still considered unlawful behavior. A more subjective school, calling itself “finalist” or teleological, insisted that intention be treated as part of the definition of the offense.’)

and ‘Schuld’, nor with the dichotomy of offence and defence in common law systems.²¹⁵³

He therefore finds that international criminal law has an own approach to the structure of crimes. The present author, however, feels that the approach adopted in international criminal law should be characterized as “rather common law”. The central distinction in international criminal law is namely that between inculpatory and exculpatory factors. This has been criticized by both Ambos and Fletcher, who note that this has made it impossible for international criminal law to, for example, make a clear difference between justifications and excuses,²¹⁵⁴ and wrongdoing and culpability.²¹⁵⁵ Ambos has, however, held that the ICC Statute is open to interpretations that make the system more “civil law”, that is, that the drafters of the ICC Statute have not as such conclusively adopted a particular structure of crime.²¹⁵⁶

Besides different perceptions about the structure of the crime, the legal systems of the world may also differ in their legal reasoning “style”. Fletcher has, in this regard, differentiated between *structured legal discourse* (exemplified by German criminal law) and *flat legal discourse* (exemplified by American criminal law). According to him, structured legal discourse is characterized by absolute norms (absolute rights) and qualifications (for example, the idea of abuse of rights), whereas flat legal discourse contains qualified norms only (for example, by modifiers such as substantial and reasonable).²¹⁵⁷ Hence, the legal systems of the world differ in how the criminal law is framed. Despite differences in legal style, there are, however, many factors that all legal systems consider albeit in different manners.²¹⁵⁸ To exemplify this, one may mention the concept of a “reasonable man”, which is an important legal concept in many common law jurisdictions. The structured legal system of Germany does not contain the concept, but instead recognizes societal expectations in other ways.²¹⁵⁹

The point in this study is, however, not to make a “diagnosis of fundamental differences” between various legal systems,²¹⁶⁰ but to investigate the structures of

²¹⁵³ Burghardt 2010, at 85-86.

²¹⁵⁴ Ambos 2007(b), at 2667-2668.

²¹⁵⁵ Fletcher 2007(a), at 107 and 324.

²¹⁵⁶ Ambos 2007(b), at 2672 (‘All this confirms that the Rome Statute does not decide the question of the “system”’)

²¹⁵⁷ G. P. Fletcher, ‘The Right and the Reasonable’, 98 *Harvard Law Review* (1985), at 951-953 (‘Flat legal discourse proceeds in a single stage, marked by the application of a legal norm that invokes all of the criteria relevant to the resolution of a dispute. Structured legal discourse proceeds in two stages: first, an absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm.’)

²¹⁵⁸ Cf. “Criminal responsibility, which is concerned with offences, is seen as a prior logical ‘stage’ to that of criminal liability (Duff [...]); and that the effect of defences is characterised as that of ‘blocking the transition’ from the first ‘stage’ to the second. This contention is, I think, mistaken. [...] Hence we need first to be able to grasp and explain the distinction between offences and defences in order to fully understand the conditions under which a decision to prosecute count as correctly made, and thus before (and independently) of any answer that the person actually charged may successfully come to offer *in her defence*. Defeaters, in other words, operate already at the first ‘stage’ of criminal liability.” L. Duarte d’Almeida, ‘O Call Me Not to Justify the Wrong’: Criminal Answerability and the Offence/Defence Distinction, 6 *Criminal Law and Philosophy* (2012), at 230 and 232.

²¹⁵⁹ Hörnle 2008, at 1-3.

²¹⁶⁰ Cf. Hörnle 2008, at 2.

international criminal law. In this context, the differences between the domestic legal systems serve as a background factor that helps one acknowledge that different legal solutions send different messages. The force of the legal signal sent may depend on the specificity of the legal system in question. A justification, for example, sends a completely different message than an excuse in legal systems where a strict distinction is made between the two. The legal solutions adopted are hence significant from a labelling perspective.

In this study, the investigation has not been divided into chapters investigating offence elements, wrongfulness, and culpability, and as such the focus has not been on to what extent international criminal law recognizes these differentiations.²¹⁶¹ Instead, the relevant division has been that between: (1) elements of crimes; (2) elements of modes of responsibility; (3) exculpatory factors; and (4) sentencing determinants, which hereinafter are referred to as the *various responsibility-determining stages*.

Regarding the structures of crimes, Fletcher has noted that it is “fairly clear where most issues fall”, that is whether particular facts should be considered as offence elements, justifications, excuses, etc.²¹⁶² The offence elements, for example, contain the requirements regarding the act, result and causation.²¹⁶³ In connection to the typical features of international crimes, it may, however, be noted that *their placement in the various responsibility-determining stages is frequently not self-evident*. It is often felt that the placement is primarily a question of what one wants to emphasize, rather than certain placements being right or wrong. In this regard, it is interesting that Haque has recently criticized the ICC Statute for ignoring or misapplying the fundamental criminal law distinction between offences and defences.²¹⁶⁴ More specifically, he argues that:

The final structural defect embedded in the definitions of Attacking Civilians and Excessive Incidental Death under the Rome Statute stems from the failure of the drafters to distinguish between the inculpatory function of distinction and discrimination and the exculpatory function of proportionality and necessity. [...] The formal distinction between offenses and defenses is how the criminal law marks the substantive difference between defendants who have nothing to answer for and defendants who must answer for what they have done. International criminal law should use the same distinction to mark the same difference. Every combatant who kills civilians has done something that requires justification; only combatants who kill civilians incidentally, unavoidably, and proportionately act with such a justification. [...]. The Rome Statute declares that Attacking Civilians is presumptively wrongful and that no additional elements are required to inculcate an offender. However, by defining Excessive Incidental Death as it does, the Rome Statute declares that incidental killing of civilians is presumptively permissible and legitimate unless the additional inculpatory element of clear excessiveness is introduced. These two prohibitions deliver two vastly different moral messages.²¹⁶⁵

²¹⁶¹ Furthermore, the approach of international criminal law in general to mental elements, such as intent and knowledge, has been left outside the study.

²¹⁶² Fletcher 2001, at 272.

²¹⁶³ E.g., Ambos 2007(b), at 2651.

²¹⁶⁴ A. A. Haque, ‘Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute’, 14 *New Criminal Law Review* (2011), at 519.

²¹⁶⁵ Haque 2011(b), at 556-558.

Haque's critique can essentially be reduced to the question of whether international criminal law, as a reflection of international humanitarian law or human rights law, only should contain *absolute prohibitions* (which only can be rightfully violated if there is a justification at hand) or whether the law also can contain *qualified prohibitions* (for example, requiring assessments of proportionality at the offence stage). As was elaborated in Chapter 8, there are different opinions on how the relationship between offences and defences should be framed.²¹⁶⁶ The different viewpoints are reflected both in the extent to which the scholars accept justifications and excuses, and in how they feel that the offences should be defined. Partly, the question is also one of legal style, that is, whether one prefers structured or flat legal reasoning. Moreover, procedural aspects may affect viewpoints in this regard, that is, whether one feels that the prosecutor or the defence should bear the burden of proof.²¹⁶⁷ Haque is, however, completely right that the distinction between offences and defences is not merely an "empty formalism", but an important avenue for the law to express its underlying moral values.²¹⁶⁸ Both offences and defences hence *carry labels*.²¹⁶⁹

What, however, may generally be said about the various responsibility-determining stages, and what should be included in the various stages is that it is often held that the offence definitions and modes of responsibility should establish the *rules*, which should guide individual behaviour, whereas the factors excluding criminal responsibility should represent *exceptions*.²¹⁷⁰ As noted by Haque regarding justifications:

A defendant who commits no offense has not infringed a value that the law protects. By contrast, a defendant who commits an offense but is justified in doing so has infringed a protected value but has done so in the service of another value the law respects. [...] But by declaring that the defendant has committed an offense that requires justification, the criminal law affirms the importance of the value infringed and demonstrates the law's commitment to its protection and vindication.²¹⁷¹

Offence definitions that settle *all* central parameters for responsibility are therefore problematic in that they "suppress the distinction between the ordinary and the extraordinary."²¹⁷² It is also often held that central blameworthiness evaluations should be made at the conviction stage, and that the sentencing stage should be a stage where the blameworthiness evaluation is fine-tuned.

²¹⁶⁶ Fletcher, in this regard, makes a distinction between *comprehensive rules* (which do not admit defences and which only can be met with denying that the elements have been established) and *defeasible rules* (which can be met with a defence). Fletcher 1998, at 96.

²¹⁶⁷ See in this regard e.g., Fletcher 1998, at 94 ff.

²¹⁶⁸ Haque 2011(b), at 522.

²¹⁶⁹ Fletcher 1998, at 93.

²¹⁷⁰ E.g., Osiel 1999, at 150-151. In relation to mitigating sentencing factors and exculpatory excuses, it is also sometimes submitted that these primarily should be regarded as decision-rules (directed to the judges) and not as conduct rules (aimed at affecting the behaviour of potential offenders). Regarding conduct/decision rules and criminal law, see further M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law', 97 *Harvard Law Review* (1984), at 625 ff. See also Gardner 1998(a), at 596-598.

²¹⁷¹ Haque 2011(b), at 558.

²¹⁷² Fletcher 1998, at 97.

10.3. The Legal Choices Made in International Criminal Law

10.3.1. The Crimes

The crime definitions make up the *special* part of criminal law, and as such it is the responsibility-determining stage in which it is most likely that the “societal reality” or the phenomenology of international crimes is reflected. As was noted in Chapter 6, the crime definitions indeed recognize many typical features of international criminality: the discriminatory animus of the violence, the abnormal contexts of action, the collective nature of the criminality, etc. The typical features of international criminality can be reflected both in the *chapeau* elements and in the underlying offences. It is in particular the underlying offences of the international crimes that emphasize that the criminality can result in many different types of harm. There are some typical features in international criminality that, however, have not been significantly acknowledged in the crime definitions: the frequent State-involvement in the criminality and the fact that the crimes often have different types of participants. This has been criticized by some legal scholars, who have suggested State policy requirements respectively that the crimes should be defined differently depending on the type of participant.

The reflection of the typical features of international criminality in the crime definitions raises the question of exactly what values or interests the crimes aim at protecting. For example, it is often submitted that the goal of genocide is to protect the physical existence of groups, but this being said, the *actus reus* of the crime does not demand large-scale destruction of the group. In this regard, it may be asked whether it primarily is the *chapeau* or the list of underlying crimes that should contain “the” essential crime element of the offence in question. While the crime definitions of the international crimes of course must be viewed as a whole, the present author is inclined to emphasize the special role of the *chapeau* elements in connection to the international crimes. The existence of many corresponding ordinary domestic crimes suggests that the function of international crimes is to protect values that go beyond purely individual interests.²¹⁷³ This is the case especially in connection to genocide with its specific intent element²¹⁷⁴ and crimes against humanity with its collective crime commission context element. What values the *chapeau* element of war crimes protects is more difficult to discern. War crimes simply violate the agreed laws of war. In this regard, it is noteworthy that the German *Völkerstrafgesetzbuch* (2002) addresses genocide and crimes against humanity in singular paragraphs (§ 6 and § 7 respectively), while the criminalization of war crimes is divided into many paragraphs to indicate that the various war crimes attack different interests: war crimes against persons (§ 8), war crimes against property and other rights (§ 9), war crimes against humanitarian operations and emblems (§ 10), war crimes consisting of prohibited methods of war (§ 11), and war crimes of prohibited means of warfare (§ 12). The distinction could be even more specific in that, for example,

²¹⁷³ See further Section 6.3.1.

²¹⁷⁴ Cf. Regarding specific intent elements that distinguish hate crimes from corresponding ordinary crimes, it has been noted that there is an “increasing acceptance of the idea that criminal conduct is *somehow different* when it involves an act motivated by bigotry and manifest as discrimination”. Jenness 2001, at 282 (emphasis added).

the war crimes against persons many violate many different types of interests (right to life, right to sexual integrity, etc).

From a labelling perspective, it is significant that a conviction for an international crime *sends different signals* than a conviction for an ordinary domestic crime, and that many feel that international atrocities therefore should be addressed with international crime labels.²¹⁷⁵ The question is what are these signals? That the offender is not an “ordinary criminal”,²¹⁷⁶ but an offender who has taken part in an especially dangerous type of collective criminality or in criminality that threatens international peace and security is an answer international criminal law scholars are likely to give. In the eyes of the general public, what most characterizes international criminality is presumably the often large-scale and severe harm that it causes. Also the ethnic and/or political violence aspect of the criminality appears significant in this regard. It is noteworthy that there are also some scholars who think that the international crime definitions do not enough stress the amount of harm the criminality causes. The focus on the individual intent in connection to genocide has been especially criticized for being overly individualistic.²¹⁷⁷ Furthermore, Haque has criticized the international war crime definition for being defined as a *conduct offence* (prohibiting certain behaviour irrespective of its consequences) rather than as a *result offence* (prohibiting the causing of certain consequences irrespective of the behaviour that causes them) with regard to war crimes causing civilian casualties.²¹⁷⁸ As being defined today, some international crimes (most notably genocide) indeed have the *dangerousness* of the criminality as the primary source of wrongfulness, rather than the harm actually caused. International criminality is as a societal phenomenon characterized by both significant dangerousness and severe victimization.

Regarding legal labels, it has been noted that atrocities “never became a legal term of art, however, with a settled meaning distinct from ordinary Latin. It no longer occupies any place within the formal language of international military law. It was first replaced by the term ‘manifest illegality’, then ‘war crimes’, later the subset of war crimes constituting ‘grave breaches’ of the Geneva Conventions, and finally ‘exceptionally serious war crimes.’”²¹⁷⁹ Legal terms and ordinary language can change over time and the two are not necessarily in full concordance. This is not necessarily a problem. However, when a certain type of criminality in everyday speech frequently starts to be referred to with a certain term that does not exist in the law, one should consider whether there is a legal

²¹⁷⁵ Cf. “The famous trial of the Auschwitz guards that began in Frankfurt in 1963 provided a particularly vivid, if not egregious, example of this problem, as the atrocities committed at Auschwitz had to be pigeonholed into the legal concept of simple “murder,” the most serious offense that the guards could be charged with under available German law at the time. This had the regrettable consequence of transforming the everyday horrors of Auschwitz into the “normal,” against which the particularly savage and murderous conduct of certain guards or functionaries could be measured.” L. Douglas, ‘The Holocaust, History and Legal Memory’, in S. R. Ratner & J. L. Bischoff (eds.), *International War Crimes Trials: Making a Difference?* (Austin, Texas: The University of Texas at Austin School of Law, 2004, at 110.

²¹⁷⁶ Cf. Fletcher 2006, at 899 (“Terrorists are not ordinary criminals but they nonetheless constitute a threat of violent activity of the same sort engaged in by criminals. They are criminals who are also enemies.”)

²¹⁷⁷ See further Section 6.3.5.3.

²¹⁷⁸ Haque 2011(b), at 550-551.

²¹⁷⁹ Osiel 1999, at 45.

lacuna or whether the legal categorizations are inapt. In this regard, one may mention the phenomenon of “ethnic cleansing”. Legally speaking, this phenomenon is covered by persecution as a crime against humanity, but it may be asked whether the international criminalization of discriminatory violence is meaningfully organized. The relationship between genocide and persecution as a crime against humanity is unclear for many. More generally, it may be noted that the difference between the three international core crimes often is obscure for the general public, as is some concepts that can be found in the crime definitions (such as, non-international armed conflict and grave breaches). From a labelling perspective this is problematic, but as the crimes already legally are so settled, it is impossible to start from scratch and to mould the law so that it to a greater degree would adhere to everyday language and understanding about the atrocities. The international criminalization process has largely consisted of reactions to specific historical atrocities and it has been surrounded by the Westphalian State-centred system and political compromises, which has influenced the content of the law. Ratner, Abrams and Bischoff have in this regard characterized international criminal law as a “product of an *ad hoc* process of prescription”.²¹⁸⁰ This being said, the legal development of the branch of law has entailed that some “seemingly arbitrary schisms”²¹⁸¹ in the law have lost in importance, such as the difference between war crimes committed in international and non-international armed conflicts. One significant dilemma, however, remains: The international crimes have their background in both the law of war (allowing a lot of violence normally criminal) and human rights law (emphasizing the inviolability of many interests) and the relationship between these two sometimes conflicting rationales is not completely settled.

With regard to the international crime definitions, it should finally be noted that even though they are complex, they do not contain detailed blameworthiness evaluations. In domestic legal systems, it is common to find crimes of different blameworthiness level protecting the same legal interests.²¹⁸² In international criminal law, all crimes are serious, but it is still possible to grade the offences, as is shown in connection to domestic criminalizations of these crimes.²¹⁸³ In practice, the approach taken in international criminal law has entailed that the role of the sentencing stage has become especially significant in blameworthiness evaluations.

10.3.2. The Modes of Responsibility

In domestic legal systems, the doctrines of attribution generally form part of the *general* part of criminal law, and as such those doctrines are *a priori* applicable to all different types of crimes. As international criminal law, however, only consists of a few crimes, it would be possible to adapt the attribution doctrines to the special features of the

²¹⁸⁰ Ratner, Abrams & Bischoff 2009, at 365 (italics added).

²¹⁸¹ Ratner, Abrams & Bischoff 2009, at 368.

²¹⁸² Cf. e.g., the difference between coercion into a sexual act, rape and aggravated rape in Finland. The Criminal Code of Finland, Chapter 20.

²¹⁸³ E.g., Finland where a difference is done between petty, ordinary and aggravated war crimes, and ordinary and aggravated crimes against humanity (The Criminal Code of Finland, Chapter 11) and Germany where the different underlying offences to crimes against humanity and war crimes have different sentencing ranges (Völkerstrafgesetzbuch, 2002).

criminality.²¹⁸⁴ By and large, international criminal law has, however, followed domestic models in attribution, which is interesting from the point of view that international criminality breaks with some central attribution assumptions. The physical perpetrators are, for example, not usually the main villains in connection to international crimes. There are only a few (albeit important) attribution doctrines not in frequent use in domestic criminal law that have been endorsed in international criminal law: JCE responsibility, superior responsibility and responsibility based on control of the act by virtue of a hierarchical organization.²¹⁸⁵ These doctrines to varying degrees reflect the special features of international criminality. As regards the different attribution schools used in domestic legal systems (that is, unitary perpetrator model, the equivalence theory and the differential participation model), international criminal law applies a mixture of these schools using different labels to describe the criminal conduct of the offender, however, leaving much of the blameworthiness evaluation to the sentencing stage.

From a labelling perspective, it is interesting that among legal scholars there exist very different opinions about the degree to which one at attribution must specify the role played by the offender. Ohlin has, in this regard, recently in a blog entry criticized some legal scholars for not recognizing the need to label the type of participation with precision:

The great objection to this early notion of JCE was that it ignored differentiation between different levels of culpability, especially as between principal perpetrators and foot soldiers best described as accomplices. All of them could be described as participants in a JCE. I pressed this point several times with Cassese, and his answer was always the same: let the Trial Chamber sort out these distinctions at sentencing. I take Stewart to be saying roughly the same thing. To the extent that his unitary model fails to make these distinctions, let the sentencing reflect them. So why doesn't this solve the problem, either for Cassese or Stewart? First of all, it proves too much. There's something significant about the criminal law's need to classify perpetrators and codify their relative culpability with different labels. Moreover, this function needs to take place on the side of the substantive doctrine, not the side of sentencing. Otherwise, as I have said before, we could eliminate the crimes themselves and replace them with a global crime called "Felony" (or in ICL [= international criminal law] "Atrocity") and let all other matters relevant to culpability get decided in sentencing. Of course, this would violate the principle of legality.²¹⁸⁶

In essence, Ohlin points out that legal scholars generally accept that the modes of responsibility are less specific than the crimes. This is interesting in that the attribution doctrines to such a great extent determine the scope of criminal responsibility.

Of the typical features of international criminality, the attribution doctrines especially address the criminality's collective nature and the different roles played by different types of actors in the criminality. As was noted in Chapter 7, a central question has been whether one in attribution desires to emphasize vertical or horizontal relationships

²¹⁸⁴ Cf. "Rather than trying to curb the reality in order to fit our legal concepts, we might instead search for alternative modes of criminal responsibility." van der Wilt 2007, at 91.

²¹⁸⁵ The question of whether terrorism is an international crime is controversial. Cf. in this regard the question of whether responsibility for terrorism can be combined with "uniquely international forms of criminal responsibility" (that is, JCE and superior responsibility). Milanović 2007, at 1139 ff.

²¹⁸⁶ J. D. Ohlin, 'LJIL Symposium: Names, Labels, and Roses', *Opinio Juris* [blog], 23 March 2012.

between individuals. The phenomenology of international crimes indicates that both types of relationships frequently exist in connection to international criminality, and it is partly a question of what one wants to stress that determines which viewpoint one finds more appropriate. Many of the attribution alternatives emphasize the role played by leaders in international criminality.

From the point of view of the phenomenology of international criminality, it is noteworthy that many other typical features of international criminality are not considered at attribution. It is, for example, not an element of any responsibility mode that the offender must be a State or public official. Even though the ICC applies different standards for military leaders and other leaders regarding superior responsibility, the general approach in attribution has been that it does not matter in attribution whether the offender is a military or not, and whether the action takes place in an armed conflict or in times of peace.

In connection to international crimes, it was noted that a controversial question has been to what extent the law should focus on actual causation of harm respectively the causing of danger. In attribution, this question has also been debated. More specifically, in connection to the high-level actors, it can be difficult to prove intentional infliction of harm and in these situations it has been asked whether the leaders could rather be held responsible for failure to act, that is, for allowing harm and danger to occur by not acting according to societal expectations. The doctrine of superior responsibility in this regard constitutes regulatory criminal law, that is, criminal law that applies only to people having particular societal roles.²¹⁸⁷ The doctrine does not, however, establish negligence responsibility proper,²¹⁸⁸ but rather omission responsibility in situations of an obligation to act. Also JCE III responsibility is a doctrine, which has as its basis the idea that individuals who decide to engage in dangerous activities can be held responsible for consequences that spring from that decision. JCE III convictions have, however, not been many in international criminal law, and as such the causing of harm has been the primary basis for responsibility in international criminal law and not the willingness to take unjustified risks.

The phenomenology/criminology of international criminality indicates that bystander approval of the criminality is essential for its occurrence, but in line with traditional criminal law thinking, the waves of punishability have not been broadened to cover mere bystanders. Criminal responsibility for inactivity demands an obligation to act.

10.3.3. Grounds for Excluding Responsibility

On the paper there exist a number of exculpatory factors (mostly excuses) in international criminal law. In practice, justifications and excuses have, however, not played a significant role in international criminal jurisprudence. This can to some extent be explained by the fact that international criminal tribunals only prosecute a limited number of cases, and cases in which exculpation appears possible are likely not chosen for prosecution. More significantly, justifications would, however, send the signal that the prosecuted

²¹⁸⁷ Gardner 1998(a), at 593 (on the concept of 'regulatory criminal law').

²¹⁸⁸ See further Section 7.2.5.6.

behaviour has been lawful and right, which in connection to international atrocities is a problematic signal.

As was noted in Chapter 8, the relationship between offences and defences can be construed in different ways. One may choose to adopt strictly construed absolute prohibitions and allow very few defences. Or one may rather define the offences broadly and allow a number of defences. In general, it may be submitted that international criminal law has opted for the first alternative. The international criminalizations should generally be viewed as absolute prohibitions. Military necessity and political/ideological reasons are examples of justificatory claims sometimes advanced in connection to international criminality, which are not (anymore) in law accepted as justifications. As the present author sees it, it is, however, surprising that international criminal law has not opted for an even more absolute approach, that is, to declare *all* justifications (including most notably self-defence) as inapplicable in connection to genocide and crimes against humanity, and in relation to most war crimes. In practice, the requirement of proportionality in connection to justificatory claims will generally entail that they become inapplicable in connection to international crimes, but as a matter of legal style and from a labelling perspective an explicit rejection of justificatory claims would be merited.

In connection to excuses that do not deny wrongdoing but culpability, consideration must, however, be given to human frailty. People with serious mental defects should, for example, not be held criminally responsible. Serious mental defects are, however, rare in connection to international crimes in the same way as they are rare in relation to ordinary criminality. Individuals who follow orders are more common in connection to international crimes, and it is international criminal law's approach to this types of exculpatory claims that significantly can affect the distribution of responsibility for international crimes. As was noted regarding the phenomenology of international criminality, State participation in the criminality and prescription of the law/superior orders can entail that people loose grip of what is right and wrong and feel a strong pressure to engage in the criminality. In armed conflicts, the context of action is often criminogenic and may even amount to legally recognized situations of duress. The use of alcohol and drugs is common in armed conflicts. How should hence international criminal law address these pushes towards criminality that the phenomenology and criminology of international crimes indicate that often – or at least regularly – exist in connection to international crimes? If typical features of international criminality are recognized as possible excuses, they do not merely entail an occasional showing of mercy in an individual case, but a significant demarcation of societal expectations in relation to international crimes.

As was noted in Chapter 8, the *ad hoc* tribunals have generally adopted a very restrictive approach to defences, and superior orders, duress, intoxication, etc. have not been accepted as defences before ICTY and ICTR. The ICC Statute, on the other hand, does not as categorically exclude the exculpatory effect of these kinds of claims. The approach of the ICC, in practice, entails a directing of the responsibility to those who issue orders, cause situations of duress, allow and prompt people to fight intoxicated rather than those who act based on the orders, in duress or as intoxicated respectively. As such, the more accepting approach of the ICC to excuses is likely to emphasize the role played by leaders. It is important to note, however, that international criminal law has not in the law limited the applicability of particular defences to individuals holding

particular positions only (with the exception that a person following superior orders must be a person in a subordinate position).²¹⁸⁹

While the ICC seems to be a bit more allowing than the *ad hoc* tribunals regarding exculpatory claims, it must be submitted that international criminal law generally has adopted a restrictive approach to accepting excuses. Criminological explanations to why individuals participate in international crimes are hence usually not legally relevant at the conviction stage. In this regard, international criminal law follows the model of domestic criminal law, where individuals generally are viewed as rational actors who themselves decide how to act and not as victims of their environment.

10.3.4. Sentencing Factors

The sentencing stage is the least regulated responsibility-determining stage, which means that a lot of different types of factors theoretically can be considered there. One could, for example, at that stage recognize the reasons behind (or the criminology of) the crimes. International criminal law's restrictive attitude to justifications and excuses has indeed entailed a special pressure to consider some of these criminological factors as mitigating factors at sentencing. As was noted in Chapter 9, many criminologically relevant factors (such as peer pressure, and criminogenic environments) are, however, not given much attention at sentencing either. International sentencing rather emphasizes the same typical features of the criminality as the law at the conviction stage: the role played by leaders and the special reprehensibility of bias violence. As a whole, the sentencing stage therefore entails a fine-tuning of the legal choices made in international criminal law, rather than being a responsibility-determining stage that would contradict the "story" told at the conviction stage.

10.4. The Emphases of International Criminal Law

How an issue is framed can make a significant difference in the moral and legal responses it gets. This is exemplified by Osiel who notes that:

²¹⁸⁹ Cf. "A large and ever growing body of criminal law today is what academic commentators call "regulatory" criminal law, criminal law that applies to us only in our roles as shopkeepers, householders, social security claimants, witnesses, motorists, parents, waste-disposal contractors, and so forth, and purports to judge our actions, inter alia, by standards of character specifically befitting these roles. But the law of homicide is not part of the regulatory criminal law in this sense. Like the law of theft and the law of assault, it applies to us all, whatever furrows we may plough in life. So shouldn't the standards of character applicable to it, including those which govern the availability of excuses in it, be uniform? And if so, the question remains, what exactly should they be? My own view is that there is no fundamental objection to making excusatory standards vary, even in the law of homicide, according to the standards applicable to roles which the defendant occupies when he kills. If he kills while on duty and armed as a police officer, then there is no fundamental objection to judging him by the standards of courage, level-headedness and self-restraint applicable specifically to police officers. But I agree that the problem is more difficult when we are dealing with people who kill while occupying a role (such as that of robber or slave) the internal standards of which should not be supported by law because the role should not exist, or a role (such as that of lover or friend) the internal standards of which should be supported by law but do not include any relevant standards (for example, they have nothing specifically to say about level-headedness or courage)." Gardner 1998(a), at 593.

If Calley's acts were described as 'intentionally shooting civilian women and children,' he was guilty of murder. [...] But if his acts were described as 'following superior orders unreasonably believed to be lawful,' then he was guilty only of negligent manslaughter [...]. Both accounts can be accurate in the sense of 'consistent with known facts.'²¹⁹⁰

Of course, the facts of a case set some limits for how the situation legally can be addressed, but it is not uncommon in international criminal law that a certain criminal behaviour can fulfil the crime elements of many different crimes or modes of responsibility. In these situations, *alternative stories* can be told about the same historical event.²¹⁹¹ This recognition has made some legal scholars put forward suggestions how the historical records best should be framed. For example, Osiel has criticized international criminal tribunals for not "providing any clear criteria – logically coherent or morally sound" how they choose between JCE responsibility and superior responsibility, and he has argued that the "law of superior responsibility has proven to best serve national purposes of reconciliation after civil war and democratic transition."²¹⁹² The present author agrees that the prosecutorial/judicial labelling choices in international criminal law sometimes appear to be arbitrary, but is not persuaded that superior responsibility always is the responsibility mode that sends the most appropriate signal.

As a whole, it is submitted that criminological research à la Milgram emphasizing the pivotal role of leaders in connection to international criminality has been very influential in international criminal law. The law provides many alternatives to emphasize the role played by high-level actors, and these alternatives are often employed. Some other typical features of international criminality, on the other hand, have received surprisingly little attention in the law. For example, State involvement in the criminality has hardly been legally recognized at the conviction stage. Studies indicating the relevance of peer pressure have not influenced the law, and at sentencing suggestions regarding the legal relevance of a criminogenic environment have generally not been approved. The strong focus on the leaders entails a risk that too much blame is put on them. In this regard, one should note the point made by Osiel that "what makes men risk death in combat is not bureaucratic discipline, but small group loyalties."²¹⁹³ He continues by observing that "atrocities can also result from orders from above, anomic discipline from below, connivance, or brutalization" and that the "law must deal with all these sources at once."²¹⁹⁴

The present author is not questioning the idea that leaders play a central role in connection to international crimes, but rather wants to emphasize that there are also other processes and phenomena that lie behind the criminal outcomes. The law should

²¹⁹⁰ Osiel 1999, at 125-126.

²¹⁹¹ The author is not suggesting that the primary function of criminal law is or should be to produce a historical record, but in connection to international criminal law it easily becomes an important byproduct of the proceedings. Cf. also Osiel who argues that the post-World War II trials for a long time affected the historians' interpretation of World War II. He argues that by focusing on the acts and intentions of the very top elites, the courts both missed the "macro-picture", that is, the story of mass collaboration and institutional support for administrative brutality, and the "micro-picture", that is, the story of the victims. Osiel 1997, at 100-103.

²¹⁹² Osiel 2009(b), at 13-14 and 156.

²¹⁹³ Osiel 1999, at 227.

²¹⁹⁴ Osiel 1999, at 230.

be careful not to portray all more-low-level actors as dehumanized cogs in machineries geared only by a few individuals. This point is made also by Ohlin regarding the former Yugoslavia, when he notes that: “There were only a few architects of the tragedy in the former Yugoslavia, but there were hundreds of mid-range perpetrators whose contributions to the criminality produced the majority of the outrages upon human dignity. In the end, the bulk of the criminality – in the aggregate – was located in these offenders, not in the highest-level offenders.”²¹⁹⁵ It is also morally problematic if the international cases focusing on leaders portray the low-level actors as passive and ignorant, at the same time as domestic cases concerning the same low-level actors portray them as active and malevolent. The risk of overemphasizing the role played by leaders is especially significant before the international criminal tribunals that based on their statutes or prosecutorial policies only shall focus on high-level actors.

At present, most provisions in international criminal law apply to high-level actors and low-level actors alike, which can be seen as something positive if one wants to see the criminality as a singular phenomenon in which many different types of individuals participate. There are, however, one crime that demand a leadership position (crime of aggression), some responsibility modes that directly or indirectly demand high-level position (superior responsibility, responsibility based on control of the act by virtue of a hierarchical organization, and ordering) and one defences that indirectly demands a subordinate position (superior orders, prescription of law). At sentencing, the hierarchical position of an individual may be taken into account both in aggravation (abuse of high-level position) and in mitigation (low-level position). These provisions make it possible to stress that individuals may play different roles in connection to the criminality. In this regard, it is interesting that some scholars feel that the hierarchical position of an individual should be given an even stronger legal relevance. Ambos, for example, has suggested that the genocidal intent requirement should be defined differently depending of type of actor.²¹⁹⁶ In a similar vein, Osiel has suggested that the contextual elements should be approached differently depending on the type of offender:

The contextual requirement in core international crimes serves quite different purposes in trials of high-ranking versus lower-echelon defendants. For “big fish” like Milosevic or Charles Taylor, the pertinent context consists in facts establishing the defendant’s abuse of the powers attendant upon sovereignty. [...] Through their attendant control of the state (and its appendages, e.g., paramilitaries, death squads), these people effectively create or make the very legal and political context that makes possible the sort of wide-ranging harm of greatest concern to the international community. For smaller fry, the relevant features of sociopolitical context are quite distinct, but no less inculpatory. These defendants do not make the larger context, but rather take it, that is, accept it too readily and unquestioningly. They resign themselves to their immediate normative environment without sufficiently critical reflection [...]. Theirs are “crimes of conformity,” i.e., to prevailing norms and societal expectations. Their evil is banal, not radical, for these people do not seek to engineer any transvaluation of national values, employing high public office to disseminate an oppressive ideology and implement it as a political program.²¹⁹⁷

²¹⁹⁵ Ohlin 2011(b), at 340.

²¹⁹⁶ See further Section 6.3.4.3.

²¹⁹⁷ M. Osiel, ‘Why the “Contextual Element” in All ICC Crimes?’, *Opinio Juris* [blog], 7 September 2009.

The underlying assumption of these kinds of suggestions is that leaders generally know more and want more with their criminality than their subordinates. The present author, however, feels that these kinds of assumptions are dangerous. Schabas has, for example, correctly noted that leaders are not necessarily experts in international law, and that it may also be difficult for them to correctly assess what use of force is lawful.²¹⁹⁸ Low-level actors are not always unaware about the political context in which their action takes place.²¹⁹⁹ Investigations about knowledge, intent and motives should therefore always be made *in casu*. It is, however, another thing that the criminality of leaders is usually more dangerous and that it for that reason may be reasonable to demand more from individuals in high-level positions. A clear legal distinction must hence be made between: (a) in-built legal assumptions about reality; and (b) societal expectations expressed in the law.²²⁰⁰

The picture portrayed by international criminal tribunals about the history is partial also from another perspective: As criminal law does not cover the behaviour of bystanders, the way in which bystanders are portrayed in judgements may send signals about collective innocence, if their role at all is considered. In an analysis of the *Simić* trial before the ICTY, Fletcher notes that:

The Trial Chamber largely considers bystanders [...] as passive objects of the events orchestrated by defendants and a small group of leaders. Only in the separate opinion of Judge Lindholm do bystanders play a critical, if subsidiary role. [...] We read the names of the accused and others who are involved in carrying out the acts of persecution, but with few exceptions, we are left to imagine how those not actively taking part in persecution reacted or related to the unfolding events.²²⁰¹

According to Fletcher, bystanders are thus primarily used in judgements as a “neutral tool to illustrate the war crimes individuals committed.”²²⁰² Fletcher has argued that it could be useful for national reconciliation, if the judicial proceedings would try to recognize that there in international crimes often are both “good bystanders”, who have not approved the crimes and whose behaviour in that sense has been exemplary, and “complicit bystanders”, who have not behaved criminally but whose behaviour still should be disapproved, although she emphasizes how difficult it is to do this within the parameters set by the basic criminal law principles.²²⁰³ As the behaviour of mere bystanders is not regulated in the law, it seems impossible to demand the courts to do these kinds of determinations.

²¹⁹⁸ Schabas 2010 (a), at 514.

²¹⁹⁹ The present author therefore has problems with accounts of low-level actors that portray them as persons who cannot make any reasonable judgements about their surrounding. Cf. “the manifest illegality rule implicitly portrays him [= a soldier] as a spirited, free-thinking conscience, quick to perceive evil in his superiors and to intercede against it. This fiction departs too radically from the reality of industrialized mass slaughter for it to remain coherent, intelligible, or morally defensible.” Osiel 1999, at 142.

²²⁰⁰ Cf. Osiel, who considers them both in one question: “What does the law of war crimes assume about how much of what kind of information, technical and ethical, fighters at all levels know or can be expected to acquire?” M. Osiel, ‘Rethinking the Law of War Crimes: “Collateral Damage” and “Distinction”’, *Opinio Juris* [blog, guest-post], 23 February 2010.

²²⁰¹ L. E. Fletcher, ‘From Indifference to Engagement: Bystanders and International Criminal Justice’, 26 *Michigan Journal of International Law* (2005), at 1062-1063.

²²⁰² Fletcher 2005, at 1064 (discussing the *Simić* Trial Judgement).

²²⁰³ Fletcher 2005, at 1073-1074 and 1083.

Regarding the crimes, it is sometimes difficult to exactly see where international criminal law has put its emphases, as the crime definitions are so complex and often protect many different types of interests. Genocide and crimes against humanity, however, both clearly indicate that the victims of international crimes often are targeted because of group-belonging, and such the *collective victimization* aspect of the criminality. This aspect of the criminality is also emphasized at sentencing where discriminatory motive is recognized as a significant aggravating factor. That the perpetrator often belongs to a group or is State-affiliated is, however, not generally recognized at the crime level (an exception to this is the ICC requirement regarding crimes against humanity that the crime is committed in furtherance of a state or organizational policy).²²⁰⁴ The collective perpetration is rather considered at the mode of responsibility stage, where some responsibility modes emphasize the collective animus of the violence. From a blameworthiness perspective, it is noteworthy that the various collective dimensions of international crimes (collective action/collective victims) can be seen to pull into different directions with regard to culpability. Collective victimization may be seen to enhance culpability, whereas collective action can be seen to spread out and diminish culpability.²²⁰⁵ Or to phrase this another way: The phenomenology and criminology of the crimes can speak for opposite legal solutions: collective participation increases the criminality's dangerousness and speaks for aggravation, but from the point of view of the individual it entails peer pressure which speaks for mitigation. By emphasizing the danger of collective action, the approach of international criminal law has been that also the collective action enhances the culpability. All in all, international criminal law has been unwilling to accept defences and mitigating factors that would exculpate numerous individuals or express diminished culpability.²²⁰⁶ The lesser culpability of certain individuals is primarily recognized *indirectly* by portraying others as especially culpable or by sentencing individuals leniently.

From a legal emphases perspective, it may be noted that many typical features of international criminality can be legally considered at multiple stages and that this sends a signal that that factor is found to be of special importance when considering the question of responsibility. As noted above, the hierarchical position of an individual is an example of such a variable. In this regard, it is interesting that it has been asked to what extent it is useful or even acceptable that the same factor is considered at multiple responsibility-determining stages. More specifically, Osiel has questioned the need to have contextual crime elements taken into consideration that there are collective modes of responsibility:

There's a common intuition that, for all these crimes, no defendant's acts or intentions could be properly understood and hence legally assessed in isolation from those of other people acting in some relevant relation to him – often kindred spirits, engaged in similarly reprehensible conduct. [...] This explanation for the law's requirement of context is not entirely convincing, however, because the same intuition about shared responsibility already finds ample expression in the doctrinal requirements for modes of participation, e.g., joint criminal enterprise, command responsibility, etc... These rules too seek to capture the ways in which responsibility for certain, large-scale harm is shared with others, and that the defendant's conduct is otherwise

²²⁰⁴ Osiel 2009(b), at 6.

²²⁰⁵ Sloane 2007(a), at 58-59.

²²⁰⁶ See further e.g., Chapter 8.

not adequately intelligible. Why, then, require that the fact of shared responsibility be shown both in the definition of offenses and in the rules by which the acts of some are then attributed to others?”²²⁰⁷

The present author does not generally see that it is problematic that a particular factor is considered at multiple stages, if it is different aspects of the same factor that are considered. The multiple consideration of a factor may, however, lead to very strong emphases and it must then be considered whether these are merited. In this regard, Jacobs has asked whether the suffering of victims should be considered again at sentencing as an aggravating factor as it is “the whole *rationale* behind the creation of international tribunals is to address crimes which have these consequences.”²²⁰⁸ There is a point in Jacobs’ argument, but at the same time it should be remembered that there may be significant differences between cases as regards the amount and type of harm caused. As such, it may be important to consider the harm caused more specifically at the sentencing stage.

The placement of a particular factor in a particular responsibility-determining stage is not neutral from a labelling perspective, even though all responsibility-determining stages affect the final outcome in a case. The legal choice to make the crime of aggression a leadership crime by, in the crime definition, limiting the applicability of the crime to persons “in a position effectively to exercise control over or to direct the political or military action of a State”, for example, sends strong signals about who should be blamed for aggression.²²⁰⁹ Factors that only are sentencing factors have a lesser labelling effect. From this perspective, it is interesting that many significant blameworthiness evaluations in international criminal law are made at the sentencing stage. Due to this, international criminal law scholars should give the sentencing stage more attention.

10.5. Epilogue

In a preface, Professor George P. Fletcher notes that one of his books has raised as many questions as it has resolved and that he hopes to make “greater intellectual progress” in a forthcoming book.²²¹⁰ The present author also feels that there still is much to say about the legal choices made in international criminal law, and their relationship to the phenomenology and criminology of international crimes. At the same time, there is not always *one* right answer to every question. In this study, the attempt has hence not been to say what “the” right legal solutions would have been. The goal has instead been to highlight the legal choices made and to investigate the signals the law sends. Without this type of consideration, the adopted solutions easily become self-evident and it is stopped asking questions about their appropriateness and about alternatives to them. As such, the author hopes that her thesis will inspire other scholars to continue investigating the nature of international criminality and to critically assess the legal choices made.

²²⁰⁷ Osiel 2009 [blog].

²²⁰⁸ D. Jacobs, ‘Guest Post: Suffering Victims and Collective Crimes: The Limits of International Criminal Law’, *Opinio Juris* [blog], 11 June 2012.

²²⁰⁹ ICC Doc. RC/Res.6.

²²¹⁰ Fletcher 2007(a), at xx.

SVENSKT SAMMANDRAG

Väpnade konflikter och totalitära regimer karaktäriseras allmänt av utbredd användning av våld och av omfattande kränkningar av mänskliga rättigheter. Traditionellt har brott som begåtts i dessa onormala samhällsliga förhållanden inte lagförts. Under och efter krig/diktaturer saknas ofta både politisk vilja och ekonomiska resurser för rättsliga åtgärder.

År 1993 beslöt FN:s säkerhetsråd att det skulle grundas en internationell krigsförbrytartribunal för att lagföra brott som hade begåtts under Balkankriget. Jugoslavientribunalen innebar en vändpunkt för internationella straffrätten, som under de två senaste årtiondena har utvecklats till en etablerad och sofistikerad del av folkrätten. I dag är utgångspunkten att de som begår krigsförbrytelser, brott mot mänskligheten och folkmord skall åtalas och dömas för sina brott.

Avhandlingens målsättning är att belysa de internationella brotternas särdrag samt att analysera de rättsliga lösningar som har antagits inom rättsområdet "internationell straffrätt". Avhandlingens inleds med en fenomenologisk och kriminologisk analys av brotten med syftet att identifiera typiska karaktäristika för dem. En central fråga i dessa kapitel är om man kan säga att internationella brott skiljer sig från "vanliga" brott som begås under fredstid, och, ifall svaret är jakande, hur. I kapitlet om brotternas fenomenologi dras slutsatsen att de internationella brotten har särdrag som påverkar deras lagföring: brottsligheten har till exempel ofta en stark koppling till staten/myndigheter, brotten är ofta kollektiva både när det gäller gärningsmän och brottsoffer, och de flesta internationella brott begås under onormala och ofta våldsamma samhällsliga omständigheter. Kriminologiskt har de internationella brotten däremot mycket gemensamt med vanliga brott, d.v.s. samma typ av faktorer verkar förklara båda typer av brottslighet, men de internationella brotternas fenomenologi gör att vissa sociala processer (till exempel gruppsytryck) blir särskilt betydelsefulla i anslutning till just dem. De internationella brotternas särdrag har fått många att ifrågasätta möjligheten att med hjälp av straffrätten fördöma och motverka internationell brottslighet.

För att förstå varför det är problematiskt att använda straffrätt i anslutning till internationell brottslighet diskuteras det även i avhandlingen vad det innebär att ett samhällsligt problem angrips med hjälp av straffrätten. Mer specifikt argumenteras det i avhandlingen att straffrätten har vissa inbyggda antaganden och utgångspunkter och när dessa inte uppfylls blir användningen av straffrätt problematisk. Straffrätten utgår till exempel från principen om individuellt ansvar, medan de internationella brotten har en kollektiv karaktär.

I avhandlingens tredje del diskuteras det mer konkret hur den internationella straffrätten har strukturerats och var och på vilket sätt juridiken tar i beaktande de internationella brotternas särdrag. Vilka karaktäristika lyfts fram som rättsligt särskilt relevanta och vilka ges föga eller ingen rättslig relevans? Vilka signaler sänder den internationella straffrätten om vem som bör bära ansvaret för brotten? I avhandlingen diskuteras separat brottsdefinitionerna (kapitel 6), tillskrivande av ansvar (kapitel 7), rättfärdigande och ursäktande grunder (kapitel 8) samt straffmätning (kapitel 9). Syftet med denna indelning är att belysa *i vilket skede* och *hur* de olika särdragen beaktas. Avhandlingens slutsats är att vissa karaktäristika betonas i många olika skeden (särskilt de

överordnades ansvar), medan andra har fått en undanskymd roll om de överhuvudtaget har ansetts vara rättsligt relevanta (till exempel motiven bakom brotten). I många fall följer den internationella straffrätten den modell som den nationella rätten ger om vad som är rättsligt relevant. Avhandlingen visar emellertid också att det i många fall är möjligt att godta alternativa rättsliga lösningar. Trots att den internationella straffrätten idag karaktäriseras av etablering är det därför viktigt att fortsätta diskutera och analysera rättens struktur.

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Coping with International Atrocities through Criminal Law

A Study into the Typical Features
of International Criminality and the
Reflection of these Traits in International
Criminal Law

International criminal law has during the last two decades developed into an established branch of public international law. The aim of the thesis is to elaborate on the special nature of international crimes (that is, war crimes, crimes against humanity and genocide) and to illuminate how the typical characteristics of international crimes have affected the content and functioning of international criminal law. The study starts from the assumption that the law is not merely reflecting what is regarded as central in international criminality, but also affects sentiments about relevance. An interdisciplinary approach is followed in the study, that is, even though the study is a legal study, special attention is given to historical and criminological viewpoints, and to more philosophical thinking about criminal law.

