TREATISE ON INTERNATIONAL CRIMINAL LAW

Volume I: Foundations and General Part

SECOND EDITION

KAI AMBOS

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Volume I: Foundations and General Part

Second Edition

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with the assistance of

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Preface to the Second Edition

This second edition is—about eight years after the publication of the first edition—overdue. International Criminal Justice is a flourishing field, with the birth of new international criminal tribunals and both accountability and investigative mechanisms, increasing and consolidated case law, and burgeoning substantive scholarship. This is also true for International Criminal Law's foundations and general principles, to be dealt with in this volume. Thus, the previous edition has been completely revised, updated, and rewritten in some parts. We strived to include all relevant case law and also take into account all relevant scholarship up to March 2021.

I have first of all to thank my team at the Göttingen Chair, above all Dr. Alexander Heinze (Chapters I, II, V) and Prof. Dr. Peter Rackow (Chapters III, IV, VII) as well as my former doctoral student Jacopo Governa (Chapters VI, VIII). We have been supported by Luca Petersen, who at the same time coordinated several student researchers providing valuable assistance: Carolin Jaquemoth, Julian Vornkahl, Poppea Antonia Patrick, Alina Sviridenko, and Marius Münkel. I also thank our library staff, especially Steffen Faulhaber, for getting important bibliographical information fast and efficiently, even in challenging Covid times. For editorial support I thank Jack McNichol from OUP and the great copy-editors.

Kai Ambos
Göttingen/The Hague
4 May 2021

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A. The Versailles Peace Treaty and Historical Precedents

Crimes against the basic principles of humanity are nothing new to the history of mankind. The Crusades of the 11th century may be considered as early forms of genocide. Their ultimate goal was to force a religion, ideology, or theory upon people with different beliefs, while, at the same time, the appropriation of material wealth and the expansion of the empire played an important role. Other examples are the Spanish and Portuguese Conquista of the Americas accompanied by the extermination of great numbers of the native population, the massacre of thousands of the French Huguenots during St Bartholomew's night 23 August 1572, and the massacre of Glen Coe in 1692. In all these cases, investigations never took place and criminal sentences were never passed on the responsible persons. In the case of Glen Coe, William III of England at least established a parliamentary Commission of Inquiry in 1695. Still, impunity was the rule and punishment the exception.

There was only one conviction in another remarkable case, that of Peter von Hagenbach in 1474.[1] Charles the Bold, Duke of Burgundy—known by his enemies as Charles the Terrible—had placed Landvogt Peter von Hagenbach at the helm of the government of the fortified city of Breisach (located at the French-German Rhine border). In following his master's instructions, the overzealous governor introduced a regime of arbitrariness, brutality, and terror to reduce the population of Breisach to total submission. When a large coalition put an end to the ambitious goals of the powerful Duke, the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat. Hagenbach was then brought before a tribunal established by the Archduke of Austria and charged, among other crimes, with murder, rape, and perjury. He was found guilty and was deprived of his rank and related privileges and then executed. This trial is often referred to as the first in international criminal law (ICL), or war crimes prosecution. And it kept this doubtful privilege until the 19th century when the first serious efforts to prosecute

[1] cf. Maogoto, *War Crimes* (2004), p. 21; Kemper, *Weg* (2004), pp. 7 ff.; Hofstetter, *Verfahrensrecht* (2005), pp. 26 ff. Going as far back as the ancient times, see König, *Legitimation* (2003), pp. 38 ff.; Cryer, *Prosecuting* (2005), pp. 17 ff.

and punish persons guilty of international crimes began. However, the case of Hagenbach must be evaluated as an isolated case, which—like all isolated cases[2]—does not change the finding that it was not until the 19th century that the first systematic approach to create a duty to prosecute international crime emerged.

At the beginning of the 19th century, the punishability of *piracy* was acknowledged under customary international law.[3] Furthermore, *slavery* was declared a crime of international concern due to numerous international treaties, which had been concluded since 1815.[4] The first efforts towards the creation of a 'Convention of War' began in the middle of the 19th century, trying to achieve the humanization of war,[5] first with regard to the legitimate *means and methods of warfare* (so-called Hague law, see Section C. (2)),[6] and later on with regard to the *protection of victims of conflict* who either do not take part in the fighting (civilians, medics, aid workers) in the first place or—as (former) combatants—can no longer fight (wounded, sick, and shipwrecked troops, prisoners of war) (so-called Geneva law) (see Section C. (2) for more details).[7] However, the proposal of the president of the International Committee of the Red Cross (ICRC), Gustave Moynier, to set up an International Criminal Court (ICC) after the Franco-Prussian War in 1870–1, remained without any serious political resonance.[8]

When the Allied and Associated Powers convened the 1919 Preliminary Peace Conference, the first international investigative commission was established.[9] At the conference, Germany's surrender was negotiated and a peace treaty—the Versailles Peace Treaty (VPT)[10]—was dictated. This Treaty established a new policy of prosecuting war criminals of the vanquished aggressor State after the end of hostilities. The legal basis of that policy was laid down in 1919 in the Paris Peace Treaties concluded by the victorious Allies (Britain, France, Russia, Italy, the USA, and Japan) and the Central Powers (Germany, Austria, Bulgaria, Hungary, and Turkey). Four groups of offences were created: crimes against the sanctity of the treaties, crimes against the international moral—which were

[2] Bassiouni, *Introduction* (2013), pp. 28–9 with fn. 99; on the case of Hagenbach see ibid. p. 416.

[3] Oehler, *Strafrecht* (1983), mn. 433; see König, *Legitimation* (2003), pp. 50 ff.

[4] Bassiouni, *Crimes* (1999), pp. 305 ff.; Sellers and Kestenbaum, *JICJ*, 18 (2020), 517 ff.

[5] cf. about the impact of the US-American 'Lieber Code' (USA 1863), see Carnahan, *AJIL*, 92 (1998), 215; König, *Legitimation* (2003), pp. 55, 59; Maogoto, *War Crimes* (2004), pp. 19 ff.; Cryer, *Prosecuting* (2005), p. 28.

[6] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 1868, St Petersburg); Declaration concerning the Laws and Customs of War (adopted 1874, Brussels); The Hague Conventions (Hague Conv., adopted 1899 and 1907); cf. Bothe, in Vitzthum, et al., *Völkerrecht* (2019), pp. 815–16; Schindler and Toman, *Armed Conflicts* (1988), pp. 101 ff.; about the enforceability under customary international law (CIL) and the proscriptions of the Hague Conv., cf. König, *Legitimation* (2003), pp. 281 ff.

[7] First Geneva Convention (*GC I*) 'for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (first adopted in 1864, revised in 1906 and then lastly in 1949); *GC II* 'for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea' (first adopted in 1949, successor of the 1907 Hague Convention X); *GC III* 'relative to the Treatment of Prisoners of War' (first adopted in 1929 as 'Convention relative to the Treatment of Prisoners of War', last revision in 1949); *GC IV* 'relative to the Protection of Civilian Persons in Time of War' (first adopted in 1949, based on parts of the 1907 Hague Conv. IV). See also the three additional protocols: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (AP III 2005).

[8] cf. König, *Legitimation* (2003), p. 60; Maogoto, *War Crimes* (2004), pp. 21 ff.; Hofstetter, *Verfahrensrecht* (2005), p. 29; Satzger, *Internationales Strafrecht* (2020), § 12 mn. 3; on Bismarck's proposal to establish an ICC as a reaction to the Franco-Prussian War see Brockman-Hawe, *TulsaLRev*, 52 (2017), 241 ff.

[9] cf. König, *Legitimation* (2003), pp. 64 ff.; Maogoto, *War Crimes* (2004), pp. 47 ff.; Cryer, *Prosecuting* (2005), pp. 31 ff.

[10] 2 *RGBl.* (1919), 687–1349.

II
Concept, Function, and Sources of International Criminal Law

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A. Concept, Meaning, and Object of International Criminal Law

(1) International criminal law

Georg Schwarzenberger identified in his seminal paper on ICL six meanings of the concept, referring to different types of crime of or under ICL.[1] In a modern reading his second, third, and fourth groups[2] can be merged into one group which we may call 'treaty-based transnational' or 'international' crimes. We remain then, following Claus Kreß's masterful summary, with four meanings of ICL,[3] the last two of which (ICL as transnational criminal law and ICL as supranational ICL *stricto sensu*)[4] reflect the distinction between treaty-based/transnational crimes and supranational, 'true' international crimes[5] or ICL in a broad or narrow sense.[6] ICL *stricto sensu* ('Droit pénal international', 'Derecho penal

[1] Schwarzenberger, *CLP*, 3 (1950), 264–74. Thereto Stahn, *Introduction ICL* (2019), p. 1.

[2] Schwarzenberger, *CLP*, 3 (1950), 266–71: ICL 'in the meaning of internationally prescribed municipal criminal law', 'internationally authorised municipal criminal law', and 'municipal criminal law common to civilised nations'.

[3] cf. Kreß, in Wolfrum, *Encyclopedia* (2008), online edition, available at <http://www.mpepil.com> accessed 8 March 2021, paras. 1–14: ICL as the Law Governing the Prescriptive Criminal Jurisdiction of States; ICL as the Law of International Co-operation in Criminal Matters; ICL as Transnational Criminal Law; ICL as (supranational) International Criminal Law *stricto sensu*.

[4] About this distinction Boister, *TLT*, 6 (2015), 15–16 (teleological, dogmatic und institutional distinction); Guilfoyle, in Heller et al., *Oxford HB ICL* (2020),p p. 791 ff.; crit. Kotiswaran and Palmer, *TLT*, 6 (2015), 55 ff. (denying that Boisters differentiation has any relevance in normative terms, p. 58); rejecting the distinction Mégret, in Heller, et al. *Oxford HB ICL* (2020), pp. 811 ff. (considering ICL not as 'a legal term of art' but 'a particular disciplinary modality of framing a set of disparate manifestations' (811) and arguing that core and transnational ICL belong to the same field, therefore suggesting a holistic definition including 'the totality of manifestations of criminal justice that transcend the state' (813, see also 829 ff., 838)).

[5] cf. Kreß, in Wolfrum, *Encyclopedia* (2008), paras. 6–14 (transnational and supranational international criminal law *stricto sensu*); previously Boister, *EJIL*, 14 (2003), 953, 967 with fn. 73; see also Gaeta, in Cassese, *Oxford Companion* (2009), p. 69 (international crimes proper and treaty-based crimes); Luban, in Besson and Tasioulas, *Philosophy* (2010), p. 572 (treaty-based transnational and pure international criminal law); Milanović, *JICJ*, 9 (2011), 28 with n. 7; Cryer, in Cryer et al., *ICL* (2019), pp. 4–5 (transnational and international crimes); also Ambos, *Internationales Strafrecht* (2018), § 7 mn. 117 v. 275; Ambos, *Treatise ICL II* (2014), pp. 222 ff.; Ambos and Timmermann, in Saul, *HB Terrorism* (2020), pp. 18 ff.; Bassiouni, *Introduction* (2003), pp. 114–15 lists twenty-eight different categories of international crimes and divides them up into further groups ('International Crimes', 'International Delicts', 'International Infractions'). See also Mohamed, in DeGuzman and Oosterveld, *Companion ICC* (2020), p. 55. Crit. of the distinction Mégret, in Heller et al., *Oxford HB ICL* (2020), pp. 822–4; Schwöbel-Patel, in Heller et al., *Oxford HB ICL* (2020), pp. 771 ff. ('lines … blurry or even collapse').

[6] On this distinction see also Schröder, in Vitzthum and Proelß, *Völkerrecht* (2019), pp. 691-2; Stuckenberg, *Vorstudien* (2007), pp. 2–4; Pastor, *Poder* (2006), pp. 80 ff.

internacional', 'Diritto penale internazionale', 'internationales Strafrecht'),[7] which is the core object of this treatise, comprises 'the totality of international law norms of a penal nature which conjoin typical legal consequences of criminal law with a decisive conduct—namely the international crime—and as such can be applied directly'.[8] According to this definition ICL consists, at its core, of a *combination of criminal law and public international law principles*.[9] The idea of individual criminal responsibility and the concept of prosecuting an individual for a specific (macrocriminal) act[10] is derived from criminal law, while the classical (Nuremberg) offences[11] form part of (public) international law and thus the respective conduct is directly punishable under ICL (principle of direct *individual criminal responsibility* in public international law).[12] The dualistic base of ICL is also reflected in the reading of the mandates of the international criminal tribunals; one can either take a 'security, peace, and human rights'-oriented approach, or a 'criminal justice'-oriented approach, either of which may entail a paradoxical goal or purpose ambiguity of ICL.[13] In any case, the strong grounding in criminal law, together with the actual enforcement of ICL by way of international criminal proceedings and trials, converts ICL into criminal law on a supranational level and thus entails the full application of the well-known principles of liberal, post-enlightenment criminal law, in particular the principles of legality, culpability, and fairness. These principles constitute the minimum standard of any criminal justice system based on the rule of law and thus must also apply

[7] On the German term—first used by Ernst Beling—see Gardocki, *ZStW*, 98 (1986), 706–13; Jescheck and Weigend, *Lehrbuch* (1996), p. 119; Möller, *Völkerstrafrecht* (2003), pp. 5–7; Schlösser, *Verantwortlichkeit* (2004), pp. 17–21; Neubacher, *Grundlagen* (2005), pp. 31 ff.; Werkmeister, *Straftheorien* (2015), p. 34; on the German term 'Völkerstrafrecht' crit. Schünemann, in Bublitz et al., *FS Merkel* (2020), p. 1362; from the Anglo-American perspective Cryer, in Cryer et al., *ICL* (2019), pp. 3–5; from the Spanish-speaking perspective Pastor, *Poder* (2006), pp. 28–33. For further references see Ambos, 'Vor § 3', in Joecks and Miebach, *Münchener Kommentar*, i (2020), mn. 5 n. 41. See also Boister, *TLT*, 6 (2015), 16–17.

[8] Triffterer, *Untersuchungen* (1966), p. 34 ('Völkerstrafrecht im formellen Sinne … die Gesamtheit aller völkerrechtlichen Normen strafrechtlicher Natur, die an ein bestimmtes Verhalten—das internationale Verbrechen—bestimmte, typischerweise dem Strafrecht vorbehaltene Rechtsfolgen knüpfen, und die als solche unmittelbar anwendbar sind.'). See also Cassese, *ICL* (2011), pp. 11–14 and Safferling, *Internationales Strafrecht* (2011), p. 38; summarising Jesse, *Verbrechensbegriff* (2009), pp. 58 ff. In a similar vein Gur-Arye and Harel, in Heller et al., *Oxford HB ICL* (2020), p. 215 ('Nor is ICL *international* by coincidence or due to contingent features such as the greater competence of international tribunals, their better accountability, or impartiality. Rather, the goods of international criminal law and the values it promotes can only be provided by international entities.' (emphasis in the original)).

[9] cf. van Sliedregt, *Responsibility* (2003), p. 4: 'meeting of two worlds'; also Höpfel and Angermaier, in Reichel, *Handbook* (2005), p. 310; Stuckenberg, *Vorstudien* (2007), p. 2; Zahar and Sluiter, *ICL* (2008); Cryer, in Cryer et al., *ICL* (2019), p. 17 ('two bodies of law'); Borsari, *Punitivo* (2007), p. 88; Kindt, *Menschenrechte* (2009), pp. 51–2. On the components of ICL see Bassiouni, *Introduction* (2003), pp. 1–8, who speaks of a system *sui generis* (ibid, p. 53); on the identity crisis of ICL in this context Robinson, *LJIL*, 21 (2008), 925–6; Robinson, *Justice* (2020), pp. 20-55 and 237-248; Muñoz, *ARSP*, 104 (2019), 456 (ICL rather public international than criminal law).

[10] On politically motivated macrocriminality as an object of ICL Ambos, *Völkerstrafrecht* (2002), pp. 50 ff.; most recently Möller, *Völkerstrafrecht* (2003), pp. 240–97; Neubacher, *Grundlagen* (2005), pp. 18, 24, 30, 240–3, 479; Burkhardt, *Vergewaltigung* (2005), pp. 109–22; Borsari, *Punitivo* (2007), pp. 442–4; Chouliaras, *EJCCLCJ*, 22 (2014), 252; Werkmeister, *Straftheorien* (2015), pp. 48–9.

[11] cf. Article 6 International Military Tribunal Statute (IMTS): Crimes Against Peace, War Crimes and Crimes Against Humanity.

[12] See generally Dahm, *Problematik* (1956), pp. 14–17; more recently Werle, in Grundmann et al., *FS Schwark* (2009), p. 1225; Jesse, *Verbrechensbegriff* (2009), p. 57; Ambos, in Mulgrew and Abels, *Research Hb IntPenSyst* (2016), p. 57; on the relationship between individual and State responsibility Benzig, in König et al., *Law Today* (2008), pp. 17, 42–9; Chouliaras, *EJCCLCJ*, 22 (2014), 275.

[13] cf. Stahn, *LJIL*, 25 (2012), 259–60; Stahn, *Introduction ICL* (2019), pp. 174 ff.; Scalia, in De Hert, Smis, and Holvoet, *Convergences and Divergences* (2018), pp. 29 ff.; Aksenova, in De Hert, Smis, and Holvoet, *Convergences and Divergences* (2018), pp. 54 ff; Burchard, *KritV*, 103 (2020), 194 ('Völkerstrafrecht, das […] vom Legalismus zehrt'); Robinson, *Justice* (2020), pp. 20-55.

in an international criminal justice system.[14] They will be considered more extensively in Chapter III (Section C.).

(2) International criminal justice

International criminal justice is a controversial concept, and there is a burgeoning body of literature on its exact contours.[15] Understood broadly, the term 'international criminal justice' constitutes an umbrella concept, integrating ICL within an overarching interdisciplinary enterprise including 'philosophical, historical, political and international relations, sociological, anthropological and criminological perspectives'.[16] While the terms international criminal justice and ICL are generally used synonymously, they are conceptually distinct. This distinction becomes most apparent in light of a narrow reading of ICL, referring to the 'corpus of legal rules defining international crimes and procedures'.[17] In fact, an even narrower reading would exclude the rules of procedure from this definition, assigning them a separate term of art, namely 'international criminal procedure' (dealt with extensively in the third volume of this treatise). A more common approach, however, defines ICL broadly as 'legal norms, the institutions—courts, tribunals, treaty regimes, international organisations, etc.—created to implement, apply and develop international criminal laws'.[18] Considering that the term 'criminal justice' on a domestic level is defined broadly as 'society's formal response to crime and is defined more specifically in terms of a series of decisions and actions taken by a number of agencies in response to a specific crime or criminal or crime in general',[19] the same applies to international criminal justice.

(3) The institutionalization of ICL

The adoption of the Rome Statute of the ICC in 1998 and the effective establishment of the Court in 2002[20] has led to an institutionalization of

[14] This view gains more and more ground in the international literature; see Sander, *LJIL*, 23 (2010), 105 ff. (125 ff.) calling for respect for criminal law principles, in particular the principle of culpability. See also Robinson, *LJIL*, 21 (2008), 925–6, 961–2 (speaking of a 'liberal system of criminal justice' and warning of ICL's illiberal tendencies derived from a human rights and victims-oriented discourse, pp. 927 ff.), Robinson, *LJIL*, 26 (2013), 127 ff. and Robinson, *Justice* (2020), pp. 59-84 (speaking of the 'humanity' of fundamental principles); also Fichtelberg, *JICJ*, 6 (2008), 11 ff.

[15] Ambos and Heinze, in Pontell, *OxfResEncycl* (2018); Findlay and Ying, *Principled ICJ* (2019), pp. 6 ff., 19 ff. For an ideal type international criminal justice 'designed to demonstrate the illiberal construct of international criminal law institutions to date', see Carlson, *Model(ing) Justice* (2018), pp. 6 ff., holding that international criminal tribunals '(i) bring progressive international criminal law to bear on individual actors, (ii) establish the facts of crimes committed in the chaos of war or secret chambers of government and (iii) assist in social reconstruction and reconciliation through both the content and the process of their practice'.

[16] Roberts, in Örücü and Nelken, *Comparative Law* (2007), p. 341. For a socio-legal perspective Mégret, in Heller, et al. *Oxford HB ICL* (2020), pp. 811 ff.

[17] Roberts, in Örücü and Nelken, *Comparative Law* (2007), p. 341.

[18] Ibid.

[19] Davies, Croall, and Tyrer, *Criminal Justice* (2005), p. 8; Heinze, *Disclosure* (2014), p. 116.

[20] For an overview see Tomuschat, *Friedenswarte*, 73 (1998), 335 ff.; Seidel and Stahn, *Jura*, 21 (1999), 14; Triffterer, in Gössel and Triffterer, *Gedächtnisschrift* (1999), p. 495; Ambos, *ZStW*, 111 (1999), 175; Schwartz, *TJICL*, 24 (2016), 409 ff.; monographic Schabas, *Introduction* (2020); on the historic development Bassiouni, *ICL* (2008), pp. 18–19; Guilfoyle, *ICL* (2016), pp. 84 ff.; Chazal, *ICC* (2016), pp. 11 f.; Werle and Jeßberger, *Principles ICL* (2020), mn. 59 ff.

III
Imputation and General Structure of Crime in International Criminal Law

*The full chapter bibliography can be downloaded from www.oup.com/ambos.

A. General Part of International Criminal Law

In the continental or civil law tradition the criminal law is organized along the lines of a general and a special part. The former encompasses the general rules of attribution or imputation (*imputatio*, *Zurechnung*), in particular the rules regarding individual responsibility and grounds excluding responsibility; the latter encompasses the specific offences. Yet, the general part (GP)—sometimes called 'general principles' in common law systems—was not particularly important in ICL in the days of the Nuremberg and Tokyo judgments. This situation did not really change until the establishment of the ICC Preparatory Committee (PrepCom) and the trial of the first cases against middle- or high-ranking accused before the ICTY and the ICTR. Until the emergence of these new tribunals, ICL had been applied with only a rudimentary system for the imputation of criminal responsibility. It was sufficient to hold that A was responsible for a certain criminal result, X, because he or she causally contributed to this result one way or another. The central task for the court was to prove the criminal act(s) and the emphasis was clearly placed on procedural questions (evidence) and the crime(s). The structure of the relationship between the crime(s) and the accused—the rules of attribution/imputation—was only of secondary interest.

The reasons for this prevalence of procedure and crimes over general principles may have a twofold explanation. First, the creation of ICL was, and still is, predominantly the responsibility of politicians, diplomats, and, in the best case, (public) international lawyers. The international negotiations on ICL instruments, including the ICC Statute,[1] leave little room, if any, for criminal law considerations, not to mention more profound and fundamental reflections on criminal law doctrine.[2] It is fair to say that the ICL-making process, as to its underlying normative foundations and theoretical justification of ICL, is largely unprincipled, policy driven, and pragmatic; the negotiations leading to an agreement on the definition of the crime of aggression[3] (treated in detail in the second volume of this

[1] On the 'tension between consistency and consensus' in these negotiations see Keitner, *UCLA J Int'l l Foreign Aff*, 6 (2001), 215, 217, 219–24, 262; cf. also Steer, in van Sliedregt and Vasiliev, *Pluralism* (2014), pp. 39 ff., 40 ('Rome Statute … is the result of long diplomatic discussions and political compromises').

[2] According to Fletcher, *Grammar I* (2007), the ICC is on the one hand 'both a disappointment and a source of promise' (p. 109) and on the other hand 'theoretically and conceptually underdeveloped' (p. 340).

[3] Very crit. e.g. Cowell and Magini, *ICLR*, 17 (2017), 517 ff. arguing that 'the adopted definition of the crime of aggression is both over-inclusive and under-inclusive' (527); in a similar vein de Hoon, *EJIL*, 29 (2018), 922

Treatise)[4] and the related trigger mechanism[5] are the most recent example in this regard. The negotiation process often makes recourse to Nuremberg and other precedents, as if such a predominantly positivist, anti-normative approach would render the discussion of the underlying normative and theoretical issue superfluous. Secondly, the application of ICL was, after all, a US invention. Indeed, were it not for the USA and its decision to bring Nazi and Japanese war criminals to justice, the trials at Nuremberg and Tokyo would not have come into existence and, consequently, modern international criminal justice as we take it for granted today could not have been built upon this precedent. There was, however, a negative side effect to the US dominance as regards the law applied by these international criminal tribunals. It was basically US criminal law, which takes a rather pragmatic and less systematic or principled approach to the underlying questions of criminal attribution.[6] Thus, it is fair to say that ICL was not imbued with a systematic or rational criminal law approach to the atrocities of WWII. Rather, it consisted of a spontaneous and improvised set of rules driven by the moral and political imperative not to leave unpunished atrocities on a scale unknown until then.

Today the situation in ICL is rather different. The necessity of a GP is generally recognized,[7] and finds its most advanced expression in Part III of the ICC Statute. Certainly, the GP of ICL is still a 'work in progress'[8] but two prerequisites have clearly emerged. First, ICL must be based on comparative criminal law and not on one legal tradition alone.[9] It was precisely for this reason that the ICC drafters avoided the use of 'catch words' which are synonymous with concepts of a particular legal system or tradition (e.g., the term 'defences').[10] Secondly, an international GP must be comprehensible and accessible to lawyers from all

ff.. Bassiouni, *HarvardILJ*, 58 (2017), 87–9 considers the crime of aggression as outdated; see further Stahn, *Introduction ICL* (2019), pp. 102 ff.

[4] Ambos, *Treatise ICL II* (2014), 187 ff., 198–9.

[5] The definition and the conditions for the exercise of jurisdiction for the crime of aggression are largely the outcome of an agreement on different technical and political positions, see Ambos, *GYbIL*, 53 (2010), 463–509; Ambos, *Treatise ICL II* (2014), 190 ff., 212 ff. See also 'on the power of consensus' in this context, Blokker and Kreß, *LJIL*, 24 (2011), 889–95; Trahan, *ICLR*, 18 (2018), 197 ff.

[6] This may sound a little arrogant when said by a German lawyer but it is nevertheless true: on the one hand, the Model Penal Code (MPC) was the first systematic approach to the GP in the Anglo-American world and it was not published by the American Law Institute (ALI) until 1962 (see <http://www.ali.org> accessed 3 July 2020); for a good introduction, see Dubber, *MPC* (2015); see on its possible impact on a common European Criminal Law, Ambos, in Klip, *Criminal Law* (2011), pp. 227 ff., 231–2. On the other hand, as to doctrine, Fletcher, *Rethinking* (1978), the first US work on criminal law from a systematic and comparative perspective, was only published in 1978. cf. also Cryer, *JICJ*, 12 (2014), 267–9 (arguing that 'general principles of liability in the common law world' are generally 'less thought through … than they are in the civilian tradition' and calling for 'a more sophisticated approach to liability for international crimes').

[7] Eser, in Bassiouni, *Commentaries* (1993), pp. 43–53; Eser, Albrecht et al., *FS Kaiser* (1998), pp. 1514–15; Lagodny, *ZStW*, 113 (2001), 815–16; Bassiouni, *Introduction* (2013), pp. 291–2; Mantovani, *JICJ*, 1 (2003), 26–7; Fletcher, *Grammar I* (2007), p. 107; Borsari, *Diritto Punitivo* (2007), pp. 477 ff.; on the increasing relevance of a GP, see Ambos, *JICJ*, 4 (2006), 660–73.

[8] See also Werle and Jessberger, *Principles ICL* (2020), mn. 528; Bassiouni, *Crimes* (1999), p. 446; Bassiouni, in Schabas, *Cambridge Companion ICL* (2016), pp. 353 ff., 380 ('lack of doctrinal cohesiveness and methodological coherence found in other disciplines'); Knoops, *International Criminal Tribunals* (2014), p. 94.

[9] See also Petersdorf, *Eigenverteidigung* (2010), pp. 95 ff. On the importance of comparative law, see also Mylonopoulos, *ZStW*, 121 (2009), 79; Steer, in van Sliedregt and Vasiliev, *Pluralism* (2014), pp. 39 ff., 41 ff. and Eser, in Böse et al., *Essays in Honour of Schomburg* (2018), pp. 137 ff., 148–58 with special emphasis on the ICTY case law; Ambos, *UCLA J Int'l l Foreign Aff*, 24 (2020), 16 ff. On comparative law as a source of ICL, see Chapter II, Section C.(4).

[10] Welcoming this as 'one of the merits' of the Statute Stuckenberg, *JICJ*, 12 (2014), 317.

legal traditions, not only to those trained in a specific legal tradition.[11] In sum, the universal acceptance of a GP of ICL is dependent on its openness towards foreign ('alien') criminal law as well as the comprehensibility and accessibility of its rules.

From a methodological perspective, this means that a GP of ICL must not derive from the GP of a given national legal system but from the autonomous sources of ICL,[12] as essentially provided for in Article 21 of the ICC Statute. Clearly, going beyond Part III of the ICC Statute, these sources refer, as already explained (Chapter II, Section C.(3)), to national law—either as general principles of (comparative) law per Article 38(1)(c) ICJ Statute or the national law of the State which has jurisdiction per Article 21(3) ICC Statute. This latter reference to national law is of utmost importance for the GP of ICL since the other applicable law—the ICC Statute and principles and rules of international law per Articles 21(1) and (2) ICC Statute—do not offer rules for a GP or, for that matter, any rules on the basis of which a sufficiently sophisticated system of attribution could be developed. Yet, as the European experience demonstrates, even recourse to comparative law does not guarantee a successful outcome. For example, there is no *ius poenale commune europaeum* which extends beyond mere principles[13] and it has proven difficult to develop a GP of criminal law for Europe.[14] In fact, the Council of the EU has so far only agreed on a set of model provisions, which basically proposes some very general, albeit important, principles, for example, *ultima ratio* (last resort), proportionality, subsidiarity, certainty, the harm principle, and culpability.[15]

B. Imputation in International Criminal Law

Before addressing the fundamental principles of criminal law and the structure of crime (see sections C. and D.), it is necessary to give some thought to the *particularities* of imputation in ICL. The idea of imputation in its original naturalistic sense can be explained through the relationship of *imputatio facti/imputatio iuris* or *imputatio physica/imputatio moralis*, that is, through the idea of attribution of a certain act to a certain person, who causally and voluntarily sets the chain of events in motion.[16] At the level of ICL the question arises whether and, if so, to what extent an (international criminal) act can be imputed to an individual and what kind of (international criminal) legal response this imputation should entail. Imputation in ICL thus presupposes the recognition of *individual responsibility*[17] for international crimes.[18] The following questions arise: did an individual violate

[11] cf. Jareborg, *RIADP*, 52 (1981), 520: 'The important thing is to have a general part that is simple and easy to apply and at the same time conceptually rich enough to enable a judge to make all those distinctions that must play a role in the administration of criminal justice.' See also Ambos, *GA* 163 (2016), 190; Ambos, *RP*, 37 (Jan. 2016), 18–19.

[12] See Stuckenberg, *Vorsatz* (2007), pp. 26 ff., 30 ff.

[13] cf. Donini, in Terradillos Basoco and Acale Sánchez, *Derecho Penal Económico* (2004), p. 209.

[14] See Ambos, *MaastrJECompL*, 12 (2005), 173; Ambos, in Klip, *Criminal Law* (2011), pp. 227 ff., 231–2.

[15] cf. Council of the EU, 'Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations' (27 November 2009) EU Doc. 16542/2/09 REV 2; cf. also EU Doc. 9726/19, p. 8. See generally on the EU harmonization of substantive criminal law Ambos, *EurCrL* (2018), pp. 319 ff.

[16] See Ambos, *Völkerstrafrecht* (2002), pp. 517 ff.

[17] Individual criminal responsibility always operates parallel to classical State responsibility; see for example Graaff, *Staatenverantwortlichkeit* (2008), pp. 216 ff. with more references on pp. 62–3; Mégret, in Kastner, *ICL in Context* (2018), pp. 28 ff., 38.

[18] See Chapter IV, Section A.

IV
Individual Criminal Responsibility

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A. The Recognition of Individual Criminal Responsibility in International Criminal Law

In its judgment against the major war criminals of WWII, the International Military Tribunal (IMT)[1] held quite apodictically that individual criminal responsibility has 'long been recognized', and stated further with a very famous *dictum* that:

> [E]nough has been said to show that individuals can be punished for violations of International Law. 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.[2]

The IMT simply referred to the decision of the US Supreme Court in *Ex parte Quirin*[3] and thus drew, it could be argued, a 'domestic analogy'.[4] Although this opinion was not thoroughly justified, it has been restated by Principle I of the famous Nuremberg Principles.[5] Subsequently it has been confirmed by the various war crimes trials since WWII,[6] the establishment of the (permanent) International Criminal Court (ICC),[7]

[1] The Nuremberg War Crimes Trials are documented online: <http://avalon.law.yale.edu/subject_menus/imt.asp> accessed 3 May 2021.

[2] IMT, *Trial*, xxii (1947), p. 447 (*The Trial*). See also the statement of English Chief prosecutor *Sir Hartley Shawcross* in IMT, *Trial*, iii (1946), pp. 123–4; for a recent critical analysis of the concept of individual criminal responsibility in international law, see Boas, in Stahn and van den Herik, *Perspectives* (2010), pp. 501–19.

[3] *Ex parte Quirin v Cox*, 317 U.S. 1 (1942). The Supreme Court recounted various historical examples and stated at 27–8: 'From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy *individuals*' (emphasis added).

[4] See *Prosecutor v Blaškić*, No. IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, para. 40 (29 October 1997).

[5] Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as adopted by the ILC: ILC, 'Report of the International Law Commission Covering its 2nd Session' (5 June–29 July 1950) UN Doc. A/1316, in YbILC, ii, 2 (1950), 374–8. Principle I states: 'Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.'

[6] See the excellent historical analysis of McCormack, in McCormack and Simpson, *Law of War Crimes* (1997), pp. 31–63; Marschik, in ibid, pp. 65–101; Wenig, in ibid, pp. 103–22; Triggs, 'War Crimes Trials', in ibid, pp. 123–49; Williams, in ibid, pp. 151–70.

[7] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference: 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc. A/CONF.183/9 <https://undocs.org/en/A/CONF.183/9> accessed 3 May 2021 (Rome Statute), reprinted in *ILM*, 37 (1998), 999. See <https://www.icc-cpi.int> accessed 3 May 2021; and Ambos, *Internationales Strafrecht* (2018), § 6 mn. 22 ff. with further references.

and, in particular, by the growing jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[8] and that for Rwanda (ICTR).[9] Thus, it is not surprising that this classical statement of the IMT was quoted in a decision in the *Tadić* case. In this decision the Chamber laid down the foundations of individual criminal responsibility for violations of Common Article 3 of the 1949 Geneva Conventions and other customary rules, notwithstanding the existence of an international or internal conflict, concluding that:

> All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles, and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles, and rules regarding means, and methods of combat in civil strife.[10]

Given these developments, it is fair to conclude that the concept of *individual criminal responsibility* for violations of humanitarian and human rights norms is universally *recognized*.[11] However, another question to be dealt with here is what the *constituting elements* of such a responsibility are. Most writings on ICL concentrate on the historical development, and organizational and procedural matters relating to an international criminal court, or the specific crimes, but neglect the development and analysis of the elements of individual criminal responsibility. Only recently have the technical issues received a more profound treatment in the academic literature.[12] The most promising approach to refine the elements of individual criminal responsibility is to go back to the primary sources of ICL, that is, international and national war crimes jurisprudence since Nuremberg, ICL conventions, and other written sources. The emphasis will lie on the case law here; the written sources will be treated in relation to this case law.

The analysis of the jurisprudence will cover, first of all, the Nuremberg and Tokyo Trials, and the trials documented by the United Nations War Crimes Commission (UNWCC trials (see Section B. (1)). Secondly, selected judgments of national tribunals on Nazi crimes (*Eichmann*, *Barbie*, *Touvier*, and *Finta*),[13] and other State-tolerated or -sponsored criminality (*My Lai*, *Comandantes*, *Letelier/Moffitt*, *Fujimori*; East German border killings) will be examined (see Section B. (2)).

[8] See <https://www.icty.org> accessed 3 May 2021.

[9] See <https://unictr.irmct.org/> accessed 3 May 2021.

[10] See *Prosecutor v Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 128–37, 134 (2 October 1995).

[11] For the historical development of the idea of punishing war criminals and serious crimes through international tribunals, see Eiroa, *Políticas* (2009), pp. 33 ff.

[12] For a first approach, see Bassiouni, *Crimes* (1999), pp. 369 ff. See also Tornaritis, in Bassiouni, *Treatise I* (1973), pp. 103–21; Sunga, *Individual Responsibility* (1992); van Sliedregt, *Responsibility IHL* (2003); van Sliedregt, *Responsibility* (2012); Ambos, *Internationales Strafrecht* (2018), § 7 mn. 1 ff.; Ambos, *La parte general* (2006); Werle and Jessberger, *Principles ICL* (2020), mn. 524 ff. See also Werle, *JICJ*, 5 (2007), 953 ff.

[13] The cases *Prosecutor v Menten*, Summary of Proceedings, in ILR, 75 (1987), 331 (the Netherlands); *Polyukhovich v Commonwealth of Australia and Another*, Judgment of the High Court of Australia, in ILR, 91 (1993), 1 (14 August 1991); Kappler and Priebke, Tribunale Militare di Roma (1 August 1996 and 22 July 1997); Sentenza del Corte Militare D'Appello (7 March 1998); Sentenza del Corte Suprema di Cassatione (16 November 1998) (Italy), (all on file with the author) did not require substantial consideration of individual responsibility.

V
Omission, in Particular Command Responsibility

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A. Rationale, Concept, and Forms of Omission

From a naturalistic perspective, omission is the opposite of action—it is non-action (not-doing), absence of action, failure to act.[1] From this perspective, an act or active conduct can be easily identified because of the expenditure of energy it generates, for example, through a bodily movement causing a certain result in the empirical world. In contrast, an omission lacks a physical reality, it does not display any (causal) energy; it is, in this sense, simply non-existent.[2] As a consequence of such a naturalistic approach, it has been argued that omissions cannot actually cause any result and thus cannot have any legal relevance, let alone create criminal liability.[3] This argument is inherently flawed, however. It comes close to a naturalistic fallacy in that it draws an erroneous conclusion from the mere empirical existence of things (the 'is') to the moral world of goals and values (the 'ought').[4] But

[1] See generally Ambos, in Ambos et al., *Core Concepts I* (2020), pp. 17 ff. The revision of Section A is largely based on this paper.

[2] See for example Roxin, *Strafrecht AT II* (2003), § 31 mn. 70 referring to Radbruch's naturalistic distinction between active conduct and passivity in terms of the generation or not of (causal) energy. See also Kirchheimer, *HarvLR*, 55 (1942), 617–19; Gómez-Aller, *NCLR*, 11 (2008), 431 referring in addition to Franz von Liszt and Ernst Beling. For the common law debate see Husak, *Philosophy* (1987), pp. 156–86; Moore, *Act and Crime* (1993), p. 28 and *passim*; crit. Fletcher, *UPaLR*, 142 (1993–94), 1443–54; Simester, *Theory* (1995), pp. 313 ff. From a comparative perspective Keiler and Roef, *Concepts* (2019), p. 123.

[3] cf. Moore, *Act and Crime* (1993), pp. 267–78. On the variety of causal idioms in this regard, especially 'causing as making to happen', see Feinberg, *Harm to Others* (1984), pp. 172–81 (180–1).

[4] The *locus classicus* of the 'Is-Ought' problem is David Hume's *Treatise of Human Nature* (1739) where he states: 'In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that … a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from the others, which are entirely different from it … [I] am persuaded, that a small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.' (Book III, Part I, Section I, (reprint Buffalo: Prometheus Books, 1992), p. 469). Kant in his *Critique of Pure Reason* formulated it as follows: 'For as regards nature, experience presents us with rules and is the source of truth, but in relation to ethical laws experience (alas!) is the parent of illusion, and it is in the highest degree reprehensible to limit or to deduce the laws which dictate what I *ought* to do, from what *is* done.' ('Denn in Betracht der Natur gibt uns Erfahrung die Regel an die Hand und ist der Quell der Wahrheit; in Ansehung der sittlichen Gesetze aber ist Erfahrung (leider!) die Mutter des Scheins, und es ist höchst verwerflich, die Gesetze über das, was ich tun *soll*, von demjenigen herzunehmen, oder dadurch einschränken zu wollen, was getan *wird*.') *Kritik der reinen Vernunft* (1781), in Preussische Akademie, at 203; transl. by J.M.D. Meiklejohn (emphasis added)). According to Malec, *Studies in Logic, Grammar*

law is not just nature, it is an order of values; it is based on normative decisions, on value judgements. Criminal law in particular, as was said before,[5] serves to protect given legal interests and strives to prevent the occurrence of any harm to those interests. Thus, the naturalistic distinction between act and omission—more precisely, the existence or absence of bodily movement—has no moral, normative relevance with a view to the establishment of criminal responsibility.[6]

In fact, the recognition of criminal liability for 'commission by omission', as so aptly expressed in the French concept '*commission par omission*',[7] makes clear that the issue is not about bodily movements but about the *normative question* of whether and when we can expect someone to act,[8] so that her omission—understood in a legal sense as opposed to a mere naturalistic not-doing[9]—amounts to a commission of a crime. This is the reason why the German doctrine—followed by the Spanish and Portuguese doctrines—speaks in this type of case of an 'improper' (*unechte*) omission: it is not really an omission, but rather a form of commission, namely one by omission.[10] Take the protection of human life by the universally recognized offence of homicide or murder: can it make a legally (normatively) relevant difference, whether someone is killed by action or by omission with regard to the violation of the respective legal interest/the causation of the respective harm? Whether A kills B by shooting at her (an action) or by (only) letting her drown in the sea despite being able to save her (an omission), the life of B has been taken in both cases by a conduct imputable to A, notwithstanding the naturalistic distinction between act and omission (and further conditions of A's criminal responsibility). Thus, *with regard to the legal interest violated or the harm caused*,[11] it is irrelevant whether the result was brought about by action or omission, as long as it was—in a normative sense—'caused' or 'committed';[12] and this is the

And Rhetoric, 24 (2007), 11–12, Hume's thesis can be restated in the following way: 'Deontic statements are logically separated from non-deontic statements, ie, neither can deontic statements be derived from non-deontic statements (simple Hume's thesis) nor can non-deontic statements be derived from deontic statements (reverse Hume's thesis).... it is impossible to infer obligations from facts or to infer facts from obligations. Intuitively, the thesis holds. Some formal argumentation is also possible. The true meaning of the thesis is that the so called "positive sciences" cannot help us with moral dilemmas. What is important here is that a similar thesis can be put forward in relation to axiological modalities: it is impossible to infer values from facts or to infer facts from values' (fn. omitted). Greene, *Nature*, 4 (2003), 847 also recently gave a good definition of the naturalistic fallacy: 'the mistake of identifying that which is natural with that which is right or good (or, more broadly, the mistake of identifying moral properties with natural properties)'.

[5] Chapter II, B. (2).

[6] The point has most forcefully been made by Fletcher, *UPaLR*, 242 (1993–4), 1445, 1448, 1453. He rightly criticizes the location of the discussion on omission under the act requirement and the ensuing implication that there can be no criminal liability, because omissions are not voluntary acts. Indeed, the question is one of human agency which is independent of the act/omission distinction (ibid, 1444). In the same vein, see Gómez-Aller, *NCLR*, 11 (2008), 431–4, 437, 444; Husak, in Deigh and Dolinko, *Oxford HB PhilCrL* (2011), pp. 107 ff. (for a general critique of the act requirement).

[7] See below Section A.(1) and main text.

[8] On this underlying, pre-existing normative expectation cf. Roxin, *Strafrecht AT II* (2003), § 31 mn. 6–7; Simester, *Theory* (1995), p. 320; Duff, *Answering* (2007), p. 108; Freund, in Kindhäuser et al., *Strafrecht und Gesellschaft* (2019), pp. 379 ff. (summary at p. 401).

[9] On this juxtaposition see also Duff, *Answering* (2007), p. 108; Ashworth, *Obligations* (2013), p. 31.

[10] See for example, Gómez-Aller, *NCLR*, 11 (2008), 444; Keiler and Roef, *Concepts* (2019), p. 133. For the distinction proper/improper omission, see below fn. 26–32 and main text.

[11] On the concepts of harm and Rechtsgut from a comparative perspective cf. Ambos, *Crim Law Philos*, 9 (2015), 301–29 and Chapter II, B.2.(a).

[12] We will not deal here with the complex issue of hypothetical or negative causation in cases of omission according to which the failure to act (non-performance of the relevant duty to act) can be said to have 'caused' the harmful result since the active intervention (performance of this duty) would have avoided it (i.e. the result would not have ensued but for that omission). In fact, the underlying naturalistic concept of causation had already been

case if the omitter had the material possibility to intervene[13] and she took a conscious decision not to do so, thereby accepting the possibility of a harmful outcome.[14] In other words, from a normative perspective, there are results that can be seen as the product of omissions, namely, if the non-performance of an act produces a circumstance harmful to legal interests.[15] As a consequence, criminal liability is not predicated on an act[16] but on conduct encompassing both act and omission.[17] The relevance of the distinction is thus limited to the question of whether we focus on the act or omission limb of the respective conduct when we conceptualize the agent's responsibility;[18] at any rate, in both cases criminal responsibility may ensue.The perspective may change if we draw our attention to the *responsible agent* rather than to the harmful outcome. We normally do not treat action as equivalent to non-action. Our moral intuition distinguishes between them.[19] Thus, a person who actively commits a wrong, for example, kills another by shooting, generally seems to be more to blame than a person who just lets the death happen, for example, does not intervene to prevent the other from drowning. I have already expressed this imbalance above when adding the word 'only' in brackets: in the second alternative of our example, A 'only' omitted to act. Yet, a closer look at the prima facie, intuitively convincing act/omission distinction reveals that many of its apparent implications are flawed. Take, for example, the argument that acts and omissions are different already critically discussed above: while this is, from a naturalistic perspective, indeed true, it does not entail the normative conclusion that omissions are never morally wrong per se, or are less wrong than actions.[20] It is, of course, true that letting someone die is a worse wrong than slapping someone's face. What grounds this normative judgement of the two kinds of conduct, however, is not their form, as act or omission, but the seriousness of the harm that flows from them. If the harm was the same—compare fatally shooting someone with letting him drown—and if the omitter was under an obligation to prevent the relevant harm, our normative judgement of the wrongfulness of each kind of conduct should be the same. In other words, the important difference does not lie in the

displaced by a normative one at the end of the 19th century (Jescheck, *ZStW*, 77 (1965), 115–16). From a normative perspective, it must be inquired—in line with the theory of objective (fair) imputation—whether the harmful result was produced by the omitter's failure to act and thus can be imputed to her. See further Duff, *Answering* (2007), p. 111; Simester et al., *Criminal Law* (2019), pp. 85–6, 114–16; Horder, *Principles* (2019), pp. 127–8; Cryer, in Cryer et al., *ICL* (2019), p. 376 ('idea of negative causation'); Robinson, *Justice* (2020), pp. 179-81, 260-61 and 269-70; for a stricter test, see Law Commission, *Criminal Code* (1989), 51, cl. 17(1)(b) (causing a result as omission 'to do an act which might prevent its occurrence'; emphasis added); crit. insofar Ormerod and Laird, *Criminal Law* (2018), p. 57; against any 'true' causation but instead in favour of 'double' objective imputation, see Luzón Peña, *GA*, 165 (2018), 520 ff.; for a similar normative approach, see Gómez-Aller, *NCLR*, 11 (2008), 429–30, 444; also Kolb, in Kolb and Scalia, *DIP* (2012), pp. 194, 202-3 ('considérations normatives') ('imputation par le droit', 'considérations normatives'). For a more naturalistic approach apparently, see in a similar naturalistic fashion for hypothetical causation, see Duttwiler, *ICLR*, 6 (2006), 6–7.

[13] cf. Roxin, *Strafrecht AT II* (2003), § 31 mn. 8–15; Weigend, '§ 13', in Cirener et al., *LK I* (2020), mn. 4, 65; for a 'defence of impossibility' Simester et al., *Criminal Law* (2019), pp. 126–8.

[14] cf. Roxin, *Strafrecht AT II* (2003), § 31 mn. 3 (arguing that the agent's decision to violate a certain legal interest, independent of the nature of the conduct, is decisive).

[15] cf. Horder, *Principles* (2019), pp. 127–8; Robinson, *Justice* (2020), 179-81, 260-61 and 269-70.

[16] For a general critique of the act requirement, see Husak, in Deigh and Dolinko, *HB CrL* (2011), pp. 107 ff.

[17] See in this sense § 2.01(1) MPC, below fn. 53 ff.

[18] cf. Roxin, *Strafrecht AT II* (2003), § 31 mn. 69 ff.; Weigend, '§ 13', in Cirener et al., *LK I* (2020), mn. 5 ff.; Ormerod and Laird, *Criminal Law* (2018), pp. 57–61; also Horder, *Principles* (2019), pp. 113–15; Simester et al., *Criminal Law* (2019), pp. 85–6.

[19] See for a critical discussion Simester, *Theory* (1995), pp. 311, 321 ff.; against equivalence also Duff, *Answering* (2007), pp. 113–14; Ashworth, *Obligations* (2013), pp. 31, 78.

[20] Against the 'moral significance claim', see Feinberg, *Harm to Others* (1984), pp. 166–72, 186.

naturalistic act/omission distinction, but in the normative status of the kind of conduct at stake,[21] and in the seriousness of the harm produced by it.[22] Also, even if one holds that the omitter is less responsible/culpable than the active agent, he/she may still be responsible/culpable, albeit to a lesser, 'secondary' extent,[23] especially in the mere failure-to-rescue cases (to be looked at more closely below).

(1) Two forms of omission: Pure omission and commission by omission

It follows from the above considerations that crimes of omission can appear in two different forms: as an offence of the special part of criminal law (a special, statutory offence) that makes certain omissions punishable; or as a commission by omission based on a rule in the general part/a general principle.[24] Details have been explained elsewhere.[25] Here it suffices ro recall the distinction in a general way: In the case where a proper (genuine, authentic, or separate) offence of a pure omission (*délit de pure omission*;[26] *echtes Unterlassungsdelikt*) is created; the classical failure to rescue offence—the failure to assist other citizens in need under certain circumstances—is perhaps the most important example of such a pure omission,[27] although by no means the only one.[28]

In the case of *commission by omission* a general provision defines the requirements under which crimes of active conduct can be committed by omission causing a result—i.e. by omitting to prevent a result ('improper' or 'inauthentic offence of omission', *délit de commission par omission, unechtes Unterlassungsdelikt*).[29] While this twofold distinction prevails, notwithstanding certain controversies[30] in civil law

[21] Tadros, *Criminal Responsibility* (2005), pp. 188–90, 208.

[22] Feinberg, *Harm to Others* (1984), p. 140.

[23] Tadros, *Criminal Responsibility* (2005), p. 196 ('secondarily rather than primarily responsible').

[24] On that basis especially Kaufmann, *JuS*, 1 (1961), pp. 173–5 has argued that statutory omission offences are always written (codified in the special part) while commission by omission offences are unwritten ones, albeit not as (reverse/negative) forms of commission but *delicta sui generis*. See also Fletcher, *Grammar II* (2020), p. 111.

[25] Ambos, in Ambos et al., *Core Concepts I* (2020), pp. 20 ff.

[26] Sometimes also called '*délit d'omission simple*' or '*vraies infractions d'omission*', see for example Pradel, *DPComparé* (2016), p. 76.

[27] See e.g. Articles 223–6 French CP ('Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire est puni.… Sera puni … quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours.') and § 323c StGB ('Whosoever does not render assistance during accidents or a common danger or emergency although it is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment not exceeding one year or a fine.' Translation Bohlander, *German Criminal Code* (2008)). See also Article 195 Spanish CP (De la omisión del deber de socorro), Article 593 Italian CP (Omissione di soccorso) and Article 162 § 1 Polish CC. For overviews see Maihold, in Hirsch, Neumann and Seelmann, *Solidarität* (2013), pp. 137–8; Wittmann, in *FS Yamanaka* (2017), pp. 367–9.

[28] See e.g. § 123 alt. 2 StGB ('remains therein without authorization') and § 138 ('omission to bring planned offences to the attention of the authorities'), all translations from Bohlander, *German Criminal Code* (2008); see also Gómez-Aller, *NCLR*, 11 (2008), 426–9.

[29] In more detail Ambos, in Ambos et al., *Core Concepts I* (2020), pp. 21–2; Roth, in Hemptinne et al., *Modes* (2019), p. 58 mn. 2, pp. 60–1, mn. 6–7.

[30] Thus e.g. the German juxtaposition 'echt-unecht' has been criticized (cf. Schmidhäuser, in Britz and Müller-Dietz, *FS Müller-Dietz* (2001), p. 761; Harzer, *Situation* (1999), pp. 83–4; Weigend, '§ 13', in Cirener et al., *LK I* (2020), mn. 16; Freund, '§ 13', in Heintschel-Heinegg, *MüKo I* (2020), mn. 60; crit. also Fletcher, *Rethinking* (1978), p. 422, fn. 8) but at least the qualifier '*unecht*' can be reasonably understood as a *commission par omission* within the ambit of application of § 13 StGB (insofar conc. Weigend, '§ 13', in Cirener et al., *LK I* (2020), mn. 16 in fine).

VI
Attempt as a Special Form of Individual Criminal Responsibility

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A. General Considerations

In the so-called *iter criminis*—that is, the stages towards the actual commission of a crime—the attempt is the last stage before the actual commission, following the planning and preparatory phases.[1] Attempt constitutes an inchoate offence, that is, an incomplete offence where something is lacking, namely the fulfilment of the *actus reus* of the respective crime by its actual commission.[2] Thus, in objective terms, an attempt does neither produce harm nor does it violate a protected legal interest or good (*Rechtsgut*).[3] National legal systems normally provide for the punishment of attempt with regard to serious crimes.[4] Thus, it is not surprising that there is considerable national case law on the attempt of international

[1] cf. Kühl, *Strafrecht AT* (2017), pp. 484–9; Heaton and de Than, *Criminal Law* (2013), p. 498; Keiler and Roef, *Concepts* (2019), pp. 255, 263. See in this sense also ILC, 'Summary Records of the Meetings of the 37th Session' (6 May–26 July 1985), UN Doc. A/CN.4/SER.A/1985, p. 103.

[2] cf. Ashworth, in Deigh and Dolinko, *Oxford HB PhilCrL* (2011), p. 126.

[3] Than and Shorts, *ICL and HR* (2003), p. 8 mn. 01–011 (inchoate offences are 'a form of liability designed to cover situations where a full criminal offence has not yet been committed but was suggested (incitement), agreed to (conspiracy) or begun but not completed (attempt)'). See also *Prosecutor v Akayesu*, No. ICTR-96-4-T, TC Judgment, para. 562 (2 September 1998).

[4] In **German** law, for example, the attempt of '*Verbrechen*' (serious offences with a minimum punishment of one year, § 15 German Criminal Code (StGB)) is punishable (§ 22 StGB); besides, the attempt of '*Vergehen*' (less serious offences with lower punishment) is punishable if the specific offence of the Special Part provides so. In **France**, according to Articles 121–4 of the French Criminal Code ('Code Pénal'), attempt of '*un crime*' (serious offences punished with imprisonment) is punishable, while an attempt of '*un délit*' (offences of lesser gravity punishable with a fine of €3,750 or more, Article 381(2) CP) is punishable only if provided by law (Desportes and Le Gunehec, *DP Général* (2009), p. 73). In **Italian** law only attempted '*delitti*' (serious offences subject to the II Book of the Italian Criminal Code, 'Codice Penale') are punishable (Article 56 CP); the same applies now (amended in 2015 by Article 10 único of Ley Orgánica 1/2015) to **Spain** (Article 15(2) CP). In **England and Wales**, according to s. 1(4) of the Criminal Attempts Act 1981, attempt liability only applies to indictable offences (i.e., more serious offences to be tried by the Crown Court), with the exception of conspiracy and offences committed as accessories Ashworth and Horder, *Principles* (2013, 2019), p. 7; Ormerod and Laird, *Smith and Hogan* (2018), pp. 431–2; see also Safferling, *Vorsatz* (2008), p. 410. The same is true in **Canada** (cf. the general provision of s. 463 Canadian Criminal Code referring to an 'indictable offence' and some special provisions, e.g., s. 239 for attempted murder; see also Stuart, *Canadian Criminal Law* (2018), p. 730 (with reference to case law). In contrast, in the **USA** all offences (felonies and misdemeanours) are punishable for attempt, cf. s. 5.01(1) MPC and for example s. 664 California Criminal Code (both referring generally to crimes); see also Klotter and Pollock, *Criminal Law* (2013), pp. 27, 129–39. For a comparative overview of attempt provisions in twelve jurisdictions (China, the Ivory Coast, England and Wales, France, Italy, Korea, Austria, Poland, Scotland, Sweden, Spain, and Turkey), see Sieber and Cornils, *Nationales Strafrecht*, iii (2008), pp. 799–954.

crimes, especially war crimes.[5] The Statutes of the ICTY and ICTR do not contain a provision on attempt apart from attempted genocide.[6] Under the STLS, an attempt is only punishable by reference to the Lebanese law, for example, in the case of homicide.[7] As a consequence, the codification of criminal liability for attempts in the Rome Statute is a novelty in ICL, although supported by a doctrine which, largely driven by the desire to efficiently fight impunity for international crimes, has always demanded and supported the punishment of attempts.[8] The corresponding subparagraph 3(f) of Article 25 provides for criminal liability for a person who:

> Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

The Statute of the Iraqi Special Tribunal and the Special Panels for Serious Crimes in the District Court of Dili (East Timor) have copied the definition of the ICCS.[9] In light of these rather oversimplified attempt regulations in ICL, one wonders whether and why attempt should be punished in ICL in the first place. To answer this, the history of attempt in ICL must be briefly restated.

(1) Why punish attempt?

While the principled 'why' question is rarely addressed in the Anglo-American systems,[10] it is the starting point of any attempt discussion in Germany and in jurisdictions influenced by the German approach. In the '*Germanique*' jurisdictions there are different objective, subjective, and mixed theories trying to explain why the attempted commission of crimes

[5] See, for example, Germany: Judgment against Karl Dietrich Otto (Landgericht Detmold, Schwurgericht, 22 December 1965) in Rüter-Ehlermann and Rüter, *Justiz und NS-Verbrechen*, xx (1968–81), pp. 449–96, 485 (the issue was that of ill-treatment of Jews in occupied territory; the competent Court ruled out attempted murder on the facts); Judgment against Friedrich Otto Köhler (Landgericht Darmstadt, Schwurgericht, 22 August 1949), in ibid, v, pp. 269–76, 274 (the defendant was a police officer charged with killing German and foreign detainees in 1945). Canada: Judgment against Johann Neitz, in Canada Military Court, *Record of Proceedings* (1946), p. 209; USA: Judgment against Charles W. Keenan (31 January 1969) by a US Court of Military Appeals, 18 *USCMA* 108, p. 114; cit. by Cassese and Gaeta, *ICL* (2013), p. 200.

[6] Article 4(3)(d) ICTYS, Article 2(3)(d) ICTRS.

[7] Article 2 STLS. See also STL AC, No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, p. 4 (16 February 2011).

[8] Schabas, *Introduction* (2020), p. 233. According to Werle and Jessberger, *Principles ICL* (2020), mn. 803 Article 25(3)(f) 'reflects' customary law.

[9] Article 15(2)F ISTS; s. 14.3(f) of UNTAET Regulation No. 2000/15.

[10] cf. Safferling, *Vorsatz* (2008), p. 409 demonstrating that in the most important treatises a systematic and principled analysis of attempt is lacking. But for an—albeit limited—discussion, see LaFave, *Criminal Law* (2017), pp. 615–16; Ashworth, *RutLJ*, 19 (1988), 733–8; Ashworth, in Deigh and Dolinko, *Oxford HB PhilCrL* (2011), pp. 129–31 (discussing preventive, consequentialist, and retributive reasons); Horder, *Principles* (2019), pp. 494–5; Dubber and Hörnle, *Criminal Law* (2014), pp. 349–51. See also Forster, in Sieber and Cornils, *Nationales Strafrecht*, iii (2008), pp. 821–2. Generally on the reasons for sanctioning preparatory offences even before the criminal attempt, see Bock and Stark, in Ambos et al., *Core Concepts* (2020), pp. 64–5

should be punished.[11] According to the *objective theory*, the reason for punishing attempt lies in the actual risk or endangerment posed to protected *Rechtsgüter* and thus the ensuing risk of harm. The International Law Commission (ILC) adopts this very reasoning when it states that the fact that 'an individual has taken a significant step towards the completion of one of the crimes … entails a threat to international peace and security because of the very serious nature of these crimes'.[12] The *subjective theory* focuses on the hostile attitude towards the law expressed by the agent attempting a crime. Following this theory, the attempted commission entails culpability of the agent just because he has demonstrated a certain criminal energy and malice. In a similar vein, the ILC focuses on the degree of culpability: ' … a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his control rather than his own decision to abandon the criminal endeavour'.[13] The mixed theories try to combine both objective and subjective considerations, sometimes complementing them with aspects derived from prevention theories. Thus, it is argued that not only the actual commission of a crime, but even its attempt, may weaken general trust in the legal order and thus must be punished to re-establish this trust. In other words, even the attempt of a crime tests the integrity of the legal order, and, consequently, only the punishment of such behaviour can restore balance. In the ICL literature the point has been made most convincingly by Albin Eser: 'From a more social-psychological perspective, an essential detrimental effect can be seen in the impression of shattered confidence of the population in the stability of the legal order exerted by the attempt.'[14]

Clearly, from the perspective of a criminal law based on the act (*Tatstrafrecht*), instead of on the actor (*Täterstrafrecht*), the legitimacy of attempt liability depends on the actual harm or at least the risk produced for a *Rechtsgut* by way of the attempt. This again shows the interplay of the *Rechtsgut* and harm theories already discussed in Chapter II.[15] The closer the attempt comes to the actual violation of the protected interest, the more legitimate is its punishment. In turn, if the attempt is, for whatever reason, far from the actual violation, for example, because the means to perform the act is completely inappropriate (killing someone with an unloaded gun) or the object of the attack cannot be violated (killing of an already dead person), its punishment comes close to the criminalization of a mere intent or will, reminding us of a pure criminal law of ideas and thoughts (*Gesinnungsstrafrecht*).[16]

(2) History of attempt in international criminal law

Prior to the ICCS, attempt liability only existed implicitly in the criminalization of the 'preparation' and 'planning' of a crime, especially a crime against peace as well as in the

[11] For a summary of the different theories, see Ambos, '§ 22', in Dölling et al., *Strafrecht* (2021), mn. 4–8; Merle and Vitu, *DP* (1997), mn. 493–7; Quintero Olivares, 'Articulo 16', in Quintero Olivares, *Comentarios* (2016), pp. 168–9; Nappi, *DP* (2010), p. 790. cf. also Keiler and Roef, *Concepts* (2019), pp. 254–5, 264–5.

[12] ILC, 'Report of the Commission to the General Assembly on the Work of its 48th Session' (1996) UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), p. 22.

[13] Ibid.

[14] Eser, 'Art. 25', in Cassese et al., *Rome Statute I* (2002), p. 809.

[15] Chapter II, B. (2)(a).

[16] cf. for example Horder, *Principles* (2019), pp. 502–3; Duff, *Attempts* (1996), pp. 33, 36–7. On the philosophical dimension of the debate Dias, *InDret*, 3 (2019), 3; on *Gesinnungsstrafrecht* generally see Ambos and Rackow, *FS Sancinetti* (2020), pp. 19 ff.; in the NS-context Ambos, *NS Criminal Law* (2019), pp. 145–6, 158–9.

VII
The Subjective Requirements of International Crimes

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A. The General Mental Requirement: Intent and Knowledge (Article 30 ICC Statute)

(1) Preliminary remarks and terminological clarifications

Article 30 of the ICC Statute contains the general *mens rea* rule for international criminal law. It requires that the material elements of a crime are committed with *intent* and *knowledge*, that is, it pursues a *binary approach*, apparently excluding any lower standard. In fact, this is one of the several issues of interpretation of Article 30, which we will have to analyse in more detail below.[1] Another issue refers to the meaning of the term '*committed*' in Article 30. Apparently, it is, however, not limited to the material commission or perpetration of a crime but also embraces the other modes of criminal liability provided for in Article 25(3) of the ICC Statute.[2] Apart from that, Article 30 raises several other issues of interpretation. Before we analyse these in more detail, two preliminary clarifications have to be made.

First of all, the meaning of the term '*intent*' must be clarified. A literal interpretation—leaving alone the underlying philosophical issue of a psychological understanding of intent as opposed to a normative understanding of culpability (discussed previously)[3]—yields ambiguous results. Intent can be understood either in the general sense, embracing the cognitive and volitional aspects of the mental element,[4] or in a mainly volitional, purpose-based sense.[5] While traditional *common law* knows specific intent crimes implying aim and purpose, for example burglary,[6] intent or intention was always understood, if defined at all,[7] in both a volitional and cognitive sense.[8] Modern English law still includes in the definition of

[1] Section A. (3)(d).
[2] Piragoff and Robinson, 'Article 30', in Ambos, *Commentary* (2021), mn. 14.
[3] Chapter III, C. (2).
[4] A broad understanding of intent would also embrace its less intensive forms, that is, recklessness and *dolus eventualis* (for a good comparative summary, see Finnin, *ICLQ*, 61 (2012), 328–30).
[5] Ambos, *Internationales Strafrecht* (2018), § 7 mn. 63.
[6] Williams, *Criminal Law* (1983), p. 34, but see also p. 49 where he says on the term 'specific intent' that the 'adjective "specific" seems to be somewhat pointless, for the intent is no more specific than any other intent required in criminal law'.
[7] cf. Judicial College, *Compendium I* (2020), s. 8-1 para. 1 ('when directing a jury upon intent it is best to avoid any elaboration or paraphrase what is meant by intent. It is an ordinary English word.').
[8] See Williams, *Mental Element* (1965), p. 20 ('Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else of foresight that

intention, separate from purpose, 'foresight of virtual certainty';[9] at best, the core meaning of intent or intention is reserved to desire, purpose, and so on.[10] In *R v Woolin*, the House of Lords, with regard to a murder charge, defined intention by referring to 'virtual certainty' as to the consequence of the defendant's actions.[11] Also, the US Model Penal Code (MPC), which served as a reference for the ICC Statute in many regards,[12] albeit distinguishing between 'purpose' and 'knowledge' (s. 2.02(a)), defines the former in a cognitive sense by referring to the perpetrator's 'conscious object' with regard to conduct and result.[13] According to the Australian Criminal Code Act (CCA) a person acts with 'intention', with regard to conduct, if he 'means to' engage in it, or, with regard to a result, if he 'means to bring it about or is aware that it will happen in the ordinary course of events'.[14] Interestingly, with regard to the knowledge or awareness standard, common law jurisdictions oscillate between 'practically' or 'virtually certain'[15] and a lower awareness that a certain result 'will occur in the ordinary course of events'.[16]

In *civil law jurisdictions*, the distinction between purpose and knowledge and, thus, the meaning of 'intention' is likewise not always clear-cut.[17] In French law,[18] the expression '*intention criminelle*' was introduced into the former Criminal Code (Article 435) by a legislative Act on 2 April 1892 but was never explicitly defined. The Code employed the expressions '*à dessein, volontairement, sciemment, frauduleusement, de mauvaise foi*' ('intentionally, voluntarily, knowingly, fraudulently, and mala fide'). The current Criminal Code refers to criminal intent in Articles 121–3, but does not define it either. The French judges, apparently considering themselves—in the sense of Montesquieu's famous proverb—as only the '*bouche de la loi*', have refrained from proposing a general definition of criminal

the result will certainly follow'). See also Fletcher, *Rethinking* (1978), p. 440 tracing this doctrinal tradition to the 19th-century utilitarian John Austin; Wilson, *Criminal Law* (2017), pp. 133 ff.; Badar, *CLF*, 19 (2008), 479.

[9] cf. Judicial College, *Compendium I* (2020), s. 8-1 para. 3 ('virtually certain consequence').

[10] Horder, *Principles* (2019), pp. 191 ff.; Simester et al., *Criminal Law* (2019), pp. 138 ff.; Cryer, in Cryer et al., *ICL* (2019), p. 366 (using 'deliberate' with reference to the *Čelebići* AC Judgment). In this sense, see also Kugler, *Intention* (2002), pp. 4 ff. distinguishing between direct and oblique intention. For a 'basic' definition (albeit not recommending one, above fn. 7) see Judicial College, *Compendium I* (2020), s. 8-1 para. 2 (acting 'in order to bring' a result 'about').

[11] *R v Woolin* 1 Cr App R (1999) 8, HL, 20–1 ('… the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions …'). On *Woolin* see Wilson, *Criminal Law* (2017), pp. 135–38; Badar, *Concept* (2013), pp. 41–3 (with a reference to earlier case law—*DPP v Smith*, *Hyam v DPP*, *R v Moloney*, *R v Hancock and Shankland, R v Nedrick*—in which the House of Lords applied different tests, pp. 35 ff.).

[12] Fletcher, *Grammar II* (2020), p. 179 argues that the MPC's 'element analysis' 'became the basis' of Article 30 ICCS.

[13] The respective part of s. 2.02(a) MPC reads: 'A person acts purposely with respect to a material element of an offense when … if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result …' (emphasis added). See also Fletcher, *Rethinking* (1978), pp. 440 ff.; Badar, *Concept* (2013), pp. 102 ff.

[14] Australian Capital Territory, Parliamentary Counsel, Criminal Code 2002, s. 18.

[15] Section 2.02(2)(b)(ii) MPC and *R v Woolin* as quoted in fn. 11.

[16] Section 18(2) CCA which follows s. 18(b)(ii) of the English Draft Criminal Code Bill (DCCB), cf. Law Commission, *Criminal Code* (1989). But see Fletcher, *Grammar II* (2020), pp. 38–9 mistakenly arguing that Article 30(2)(b)'s ordinary course of events threshold 'is unique in the annals of criminal law theory and practice'.

[17] For a comparative overview of the mental element in twelve jurisdictions (China, the Ivory Coast, England and Wales, France, Italy, Korea, Austria, Poland, Scotland, Sweden, Spain, and Turkey) see Sieber and Cornils, *Nationales Strafrecht II* (2008), pp. 635–796 and Sieber et al., *National Criminal Law*, III.2 (2017), pp. 235–366 (on Austria, Bulgaria, France, Greece, Turkey, and Uganda); see also Badar, *Concept* (2013), pp. 172–97 (with regard to Chinese Criminal Law) and pp. 198–230 (on Islamic Criminal Law).

[18] An intelligible summary on the mental element in French criminal law can be found in Lelieur et al., in Sieber et al., *National Criminal Law*, III.2 (2017), pp. 268–85.

intent.[19] In the scholarly literature, 'intention' is defined in both a volitional sense[20] and a cognitive sense.[21] On this basis, a distinction between the volitional *dolus directus* (direct intent) and the cognitive *dolus indirectus* (indirect or oblique intent) is drawn.[22] In German and Spanish law, *dolus directus* in the first degree ('*dolus specialis*', '*intención*', '*Absicht*') is normally understood as expressing a strong volitional (will, desire) and a weak cognitive (knowledge, awareness) element.[23] *Dolus* in this sense means the desire to bring about the result, or can be defined as a 'purpose-bound will'.[24] Yet, this apparently straightforward interpretation is by no means uncontroversial. In the Spanish doctrine, '*intención*' is understood by an important part of the doctrine either as intent in a general sense ('*dolus*', '*dolo*')[25] or as encompassing both forms of *dolus directus* (desire and knowledge).[26] Even the German term '*Absicht*', which in ordinary language possesses a clear volitional tendency, is, in legal terminology, not invariably understood in a purpose-based sense.[27] Apart from that, '*Absicht*' need not necessarily refer to all preconditions, transitional stages, intermediate goals, or side effects which are inevitably connected with the desired ultimate aim and are necessary steps to be taken on the way to this aim (e.g., the destruction of a group in the case of genocide). Such inevitable, closely interconnected side effects or intermediate steps are encompassed by the '*Absicht*', if the perpetrator knows with virtual certainty of their occurrence.[28] On the other hand, the perpetrator may desire or wish, for example, the destruction of a group (as required by Article 6 ICC Statute) only as an intermediate goal—as a means to a further end.[29] He may, for example, pursue the final aim of a military occupation of a region populated by the affected group and, in order to reach this final goal, kill or deport members of the respective group with the intent to destroy it. While in this case, this intermediate goal would still be part of the main consequences brought about by the perpetrator's conduct and as such would be willingly and intentionally produced on the way to the final goal, the situation would be different if the destruction of the group would only be an unwelcome side effect of the perpetrator's conduct to gain final control of the respective region, that is, it would not be part of the main consequences as envisaged by the perpetrator but only an unfortunate, subsidiary collateral consequence.[30]

Another issue refers to the—often ignored—difference between *intent and motive* in criminal law. The principle of culpability[31] requires that the perpetrator acts with a certain

[19] Pradel, *DP Général* (2019), p. 477 ('Sans doute, les juges estiment-ils que, tenus de statuer sur des espèces particulières, il ne leur appartinent pas de poser des définitions générales.'); Lelieur et al., in Sieber et al., *National Criminal Law*, III.2 (2017), p. 269 ('courts have made no effort to flesh out the term').

[20] Larguier, *DP* (2018), p. 47: 'volonté orientée vers l'accomplissement d'un acte interdit'.

[21] cf. Crim. 7 janvier 2003, Bull. no. 1: 'la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite' ('the agent's knowledge or awareness that he commits an illegal act'). See also Garçon, *Code pénal annoté* (1952), no. 77; Merle and Vitu, *DP* (1997), p. 579.

[22] Pradel, *DP Général* (2019), p. 478; Hennau and Verhaegen, *DP* (2003), pp. 350 ff.

[23] Roxin and Greco, *Strafrecht AT I* (2020), § 12 mn. 7 ff.; Mir Puig, *DP* (2015), pp. 270–1, mn. 82–3.

[24] Badar, *ICLR*, 5 (2005), 222.

[25] cf. Cerezo Mir, *Teoría Juridica* (2003), p. 153; Gil Gil, *DPI* (1999), pp. 236 ff., 259 with further references.

[26] cf. Luzon Peña, *Lecciones* (2016), pp. 228–9.

[27] See in general Gehrig, *Absichtsbegriff* (1986), *passim* (on German law); Gukelberger, *Absichtsdelikte* (1968), pp. 20 ff. (on Swiss law). This seems to be overlooked by Finnin, *ICLQ*, 61 (2012), 330–1.

[28] See Vest, *JICJ*, 5 (2007), 788 with references in fn. 20.

[29] Gropengießer, *ICLR*, 5 (2005), 339. Generally on this possibility Kugler, *Intention* (2002), p. 4.

[30] See generally on the relationship between an intermediate goal and specific intent Joecks and Kulhanek, '§ 16', in von Heintschel-Heinegg, *MüKo I* (2020), mn. 13; Roxin and Greco, *Strafrecht AT I* (2020), § 12 mn. 10 ff.; Kühl, *Strafrecht AT* (2017), § 5 mn. 35.

[31] See previously on its importance in ICL, Chapter III, C. (2).

state of mind, normally with intent; possible motive(s), that is, the reason(s) why the agent performed the act, is (are) irrelevant in this respect.[32] This—here so-called—*irrelevance thesis* has been correctly recognized by the international case law.[33] Thus, in principle, a certain motive only becomes relevant at the sentencing stage as a mitigating or aggravating factor.[34] However, the irrelevance thesis requires two qualifiers. First, the legislator may include certain motives in the offence definition and make them part of the *mens rea* element, in particular of a special intent.[35] Secondly, there is a classical scholarly discussion over whether certain motives or convictions of a '*délinquant par conviction*' ('*Gewissenstäter*') may exclude the agent's criminal responsibility (by way of a justification or excuse).[36] Yet, while this would make motives relevant at the level of attribution, it does not affect the constituent elements of the offence (the *actus reus*, *élément matériel*,[37] *tipo*, *Tatbestand*), that is, the '*délinquant par conviction*' fulfils the elements of the *actus reus*, acting, by all means, '*tipicamente*' ('*tatbestandsmäßig*').

We can now turn to the actual interpretation of Article 30. While the reference in paragraph 1 to 'intent' and 'knowledge' seems to be quite straightforward in that it expresses the volitive and cognitive side of the mental element, a closer look at the provision as a whole reveals some inconsistencies. Thus, to begin, the subject matter or objects of reference of Article 30 must be analysed. Then, the different degrees or standards of *mens rea* are to be examined. The Figure 8 tries to summarize the provision and its main problems.

[32] Fletcher, *Rethinking* (1978), p. 452; see also Judicial College, *Compendium I* (2020), s. 8–1 para. 1 ('intent' 'quite distinct from "motive" ').

[33] *Prosecutor v Tadić*, No. IT-94-1-A, AC Judgment, paras. 270, 272 (15 July 1999) (' … under customary law, "purely personal motives" do not acquire any relevance …'); *Prosecutor v Limaj et al.*, No. IT-0366-A, AC Judgment, para. 109 (27 September 2007) ('motive is generally not an element of criminal liability'); *Prosecutor v Jelisić*, No. IT-95-10-A, AC Judgment, para. 49 (5 July 2001) (' … existence of a personal motive does not preclude the perpetrator from also having the specific intent …'), para. 71 (' … the irrelevance and "inscrutability of motives in criminal law" insofar as liability is concerned, where an intent—including a specific intent—is clear'); *Prosecutor v Kvočka et al.*, No. IT-98-30-1-A, AC Judgment, para. 106 (28 February 2005) (' … it has repeatedly confirmed the distinction between intent and motive …'); *Prosecutor v Karadžić,* No. IT-95-5/18-T, TC Judgment, para. 554 (24 March 2016) ('Specific intent is distinguished from personal motive …'); furthermore, *Prosecutor v Popović,* No. IT-05-88-A, AC Judgment, para. 516 (30 January 2015) with regard to the interrelation/differentiation between motive and genocidal intent. On this issue see also Jarvis and Tieger, *JICJ*, 14 (2016), 862–3. See also Mettraux, *Crimes* (2005), p. 211; Zahar and Sluiter, *ICL* (2008), p. 180; Gómez Benítez, *RDPP*, 4 (2000), 151; Ambos and Wirth, *CLF*, 13 (2002), 45.

[34] cf. *Tadić*, No. IT-94-1-A, para. 269 ('motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence').

[35] See Ambos, *Völkerstrafrecht* (2002), pp. 413–14. Thus, for example, according to Article 1 of the EU Framework Decision on Combating Terrorism (13 June 2002, 2002/475/JHA), the perpetrator must act with the aim to intimidate a population or compel a government to perform or abstain from performing any act or destabilize the structures of a country.

[36] See Roxin, *GA*, 158 (2011), 1 ff., who argues that the conviction of a perpetrator can never justify the commission of a criminal offence (5), but the act may be excused if only insignificant harm was caused (15); Hirsch, *Überzeugungstäter* (1996), arguing that a perpetrator may be justified if she acts because of a serious moral conflict (20–1), while a political motivation can only be taken into account as a mitigating factor (27–8); generally in favour of a justification: Peters, in Geerds and Naucke, *FS Mayer* (1966), p. 276; for an excuse: Bopp, *Gewissenstäter* (1974), pp. 249 ff.; against an exclusion of responsibility Baucells i Lladós, *Delincuencia* (2000), p. 387.

[37] The French doctrine on the structure of the crime (*théorie de l'infraction pénale*) has traditionally been governed by an elements theory distinguishing between *éléments légal*, *matériel*, *injuste*, and *moral/psychologique/intellectuel* (see Ambos, in Leblois-Happe, *Procès Pénal* (2008), pp. 147 ff.; in German: Ambos, *ZStW*, 120 (2008), 180 ff., with further references). Accordingly, the *élément matériel* can be compared to the *actus reus* (see ibid, 154 or 187), although other authors would rather compare the objective offence definition with the *élément légal* (see ibid, 152 ff. or 185 ff.). Modern authors opt for a new terminology more similar to the German *Tatbestand* or the Italian and Spanish *tipo*, see, for example, Pin, *DP* (2019), pp. 169 ff. (*fait typique*).

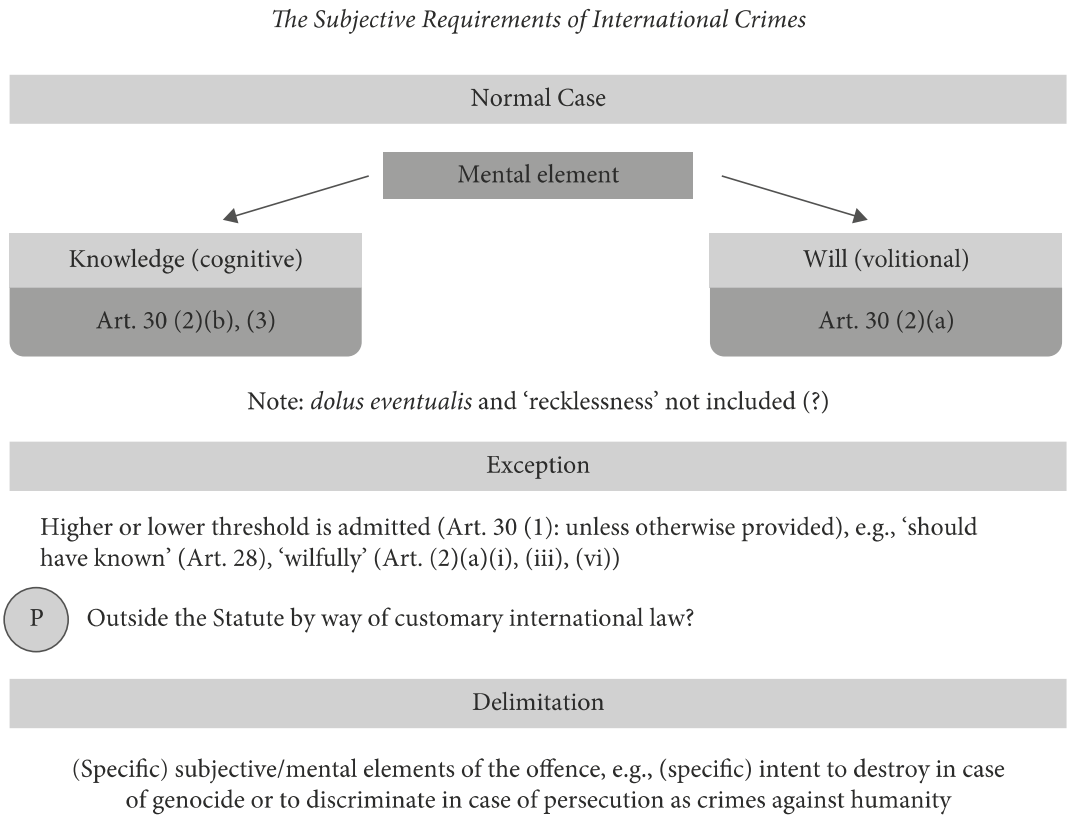

Figure 8. The mental element in International Criminal Law (Article 30 ICC Statute)
Source: own elaboration

(2) The subject matter or objects of reference of Article 30 in general

(a) The general object of reference of the mental element: material elements

Article 30(1) of the ICC Statute refers to the 'material elements' of the offence. In the original text which was submitted to the Drafting Committee of the Rome Conference the term 'physical elements' was used. However, the drafters substituted 'physical' with 'material', invoking problems with translation into the other official UN languages and questioning the identical meaning of both terms.[38] This is not very convincing because the term 'material' has more substance than 'physical'. It at least makes clear that substantive—and not procedural—elements are intended within the meaning. In any case, Article 30 takes an 'element analysis'—as opposed to a 'crime analysis'—approach, which draws on the MPC.[39] Section 1.13(10) MPC defines a 'material element of an offence' as 'an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such

[38] cf. Cherif M. Bassiouni, who was the Chairman of the Drafting Committee during the intersessional meeting of experts in Siracusa (31 January 2000–6 June 2000); Clark, *Notes* (2000), p. 11.

[39] *Prosecutor v Jean-Pierre Bemba*, No. ICC-01/05-01/08-424, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 355 (15 June 2009). For further explanation, see Finnin, *ICLQ*, 61 (2012), 337 with fn. 58; also Summers, *WashUGlSLR*, 13 (2014), 685 ('Similar to the approach taken in the Model Penal Code, different mental states relate to different material elements') and Badar and Porro, 'Article 30', in Klamberg, *Commentary* (2017), note 305.

VIII
Grounds Excluding Responsibility ('Defences')

*The full chapter bibliography can be downloaded from www.oup.com/ambos

A. Introduction

Judging from the relevant statutes, defences originally played only a very limited role in international criminal law (ICL).[1] The founding documents of the discipline do not provide for a *general rule* on defences but only for *negative rules* excluding the classical defences of official position and superior order.[2] Rule 67(B)(i)(b) of the ICTY RPE at least clarifies that 'the defence shall notify the Prosecutor of its intent to offer … any special defence'. Similar provisions can be found in the procedural codes of the ICTR and the SCSL.[3] While such a rule is, apparently, predicated on the existence of defences in general, the legal regime of the ad hoc tribunals leaves the identification of concrete defences (apart from negating official position and superior order)[4] and, above all, their definitional elements to the judges.[5] The situation may be different in the case of a mixed tribunal if its legal regime allows for taking recourse to the *national law* which may provide for a system of defences. Thus, for example, the Cambodia Extraordinary Chambers (ECCC) may revert to national Cambodian law[6] and thereby the defences of the 1956 Cambodian Penal Code (Cambodian PC 1956) are applicable. Such a solution may, however, be problematic if the respective national law lacks a complete system of defences recognized in ICL. This is in fact the case for the Cambodian PC 1956.[7]

Given the uncertainty, especially for the defence,[8] of such a lack of general rules, it is to be welcomed that the ICCS with its Article 31 contains explicit rules regarding

[1] cf. Werle and Jessberger, *Principles* (2020), mn. 716; Rebut, 'Article 31', in Fernandez et al., *Commentaire* (2019), p. 1152; Kittichaisaree, *ICL* (2001), p. 258; Satzger, *Internationales Strafrecht* (2020), § 15 mn. 29; van Sliedregt, *Responsibility IHL* (2003), p. 239; van Sliedregt, *Responsibility* (2012), p. 213; Schabas, *ICC Commentary* (2016), p. 636–38; Safferling, *Internationales Strafrecht* (2011), § 5 mn. 41; van der Wilt, in Swart et al., *Legacy* (2009), p. 275; Schabas, *Introduction* (2020), p. 240. In a similar vein, see Knoops, *Defenses* (2008), p. 127 who criticizes that '[u]ntil 1998 no serious efforts for any form of codification were administered by the international community'.

[2] Article 7 IMTS excludes the 'official position' of head of State and Article 8 IMTS acting 'pursuant to order' as grounds excluding responsibility. Article 6 IMTFES, Article 7(2), (4) ICTYS and Article 6(2), (4) ICTRS adopt the same approach.

[3] cf. common Rule 67(A)(ii)(b) ICTR RPE/SCSL RPE.

[4] Fn. 2.

[5] Werle and Jessberger, *Principles* (2020), mn. 717.

[6] cf. *Prosecutor v Guek Eav*, No. 001/18–07–2007/ECCC/TC, TC Judgment, para. 35 (26 July 2010).

[7] Linton, *CLF*, 12 (2001), 197.

[8] This was also criticized by the Defence of *Esad Landžo* before the ICTY. It argued that the failure to lay down the legal test to be applied with regard to certain defences (*in casu* diminished responsibility) significantly reduced the ability of the Defence to prepare its case. This was inconsistent with the right of the accused to a fair trial (Article 20(1) ICTYS), the right to have adequate time and facilities for the preparation of the Defence

defences.[9] The title of this Article—'grounds for excluding criminal responsibility' instead of defences—was chosen deliberately. The drafters wanted to avoid certain 'catch words' too closely associated with either the common or civil law system to make sure that the Statute would be truly universal and would not be interpreted by way of recourse to a specific national system.[10] For the purpose of this chapter, both terms are treated synonymously, that is, they are understood autonomously as covering 'all grounds, which, for one reason or another, hinder the sanctioning of an offence—despite the fact that the offence has fulfilled all definitional elements of a crime'.[11]

B. Classification and Structure of Defences

Defences vary from each other with regard to their rationale, their social meaning, their legal consequences, and for other reasons. Their classification[12] is no end in itself but reveals conceptual differences between these defences and may therefore contribute to their better understanding and proper interpretation.[13] Thus, this section will suggest some major differentiation criteria with a special focus on ICL.

(1) Substantive and procedural defences

A primary distinction has to be made between *substantive* and *procedural* defences.[14] The former, to be treated in detail in this chapter (Section C.), relate to specific features of the conduct in question which make it lawful or negate the actor's blameworthiness;[15] the presence of these conditions 'bears on the merits of the issue of liability'.[16] Thus, substantive defences always require the examination of the alleged facts.[17] Only after the gathering and consideration of evidence does it become clear whether or not the

(Article 21 (4)(b) ICTYS) and the right to obtain the attendance and examination of witnesses on his behalf (Article 21(4)(e) ICTYS), cf. *Prosecutor v Delalić et al.*, No. IT-96-21-T, TC Judgment, para. 1159 (16 November 1998). The TC, however, dismissed this objection considering it sufficient that the Defence was informed of the nature of the burden and the required standard of proof, ibid, para. 1160; confirmed in *Prosecutor v Delalić et al.*, No. IT-96-21-A, AC Judgment, paras. 576–8 (20 February 2001).

[9] Adopted by Section 19 UNTAET Regulation No. 2005/15.

[10] Ambos, *CLF*, 10 (1999), 2; Ambos, in Cassese et al., *Rome Statute I* (2002), p. 1028; Ambos, *Völkerstrafrecht* (2002), p. 825; Eser and Ambos, 'Article 31', in Ambos, *Commentary* (2021), mn. 17; Schabas, *Introduction* (2020), p. 240; Schabas, *ICC Commentary* (2016), p. 639–40; Merkel, *ZStW*, 114 (2002), 441; Klamberg, 'Article 31', in Klamberg, *Commentary* (2017), note 311.

[11] Eser, in Dinstein and Tabory, *War Crimes* (1996), p. 251; Schabas, *Genocide* (2009), p. 367; Schabas, *Introduction* (2020), p. 240; cf. also Jesse, *Verbrechensbegriff* (2009), pp. 227–9.

[12] cf., for example, the overview of the different classification schemes by Husak, *CLF*, 3 (1992), 371–2.

[13] In this vein, see also Robinson, *Defenses*, i (1984), p. 63.

[14] cf. also Bantekas and Nash, *ICL* (2007), p. 52; Bantekas, in McGoldrick et al., *Permanent ICC* (2004), p. 264; Cryer, in Cryer et al., *ICL* (2019), p. 380; Scaliotti, *ICLR*, 1 (2001), 111; Eser, in Dinstein and Tabory, *War Crimes* (1996), p. 251; Weigend, in Heller and Dubber, *HB CompCrL* (2011), p. 269; implicitly also Merkel, *ZStW*, 114 (2002), 441; Ambos, *Internationales Strafrecht* (2018), § 7 mn. 77; van Sliedregt, *Responsibility* (2012), p. 215; for a legal theory perspective see Duarte d'Almeida, in Bartels and Paddeu, *Exceptions* (2020), pp. 179 ff.

[15] Ambos, in Brown, *RH ICL* (2011), p. 300. This implies a distinction between justification and excuses which is analysed in Section B. (3).

[16] cf. Duarte d'Almeida, in Bartels and Paddeu, *Exceptions* (2020), p. 180.

[17] Scaliotti, *ICLR*, 1 (2001), 111; cf. also Ferzan, in Deigh and Dolinko, *HB Criminal Law* (2011), p. 241.

defendant has indeed acted pursuant to a substantive defence, for example, self-defence or due to mental illness.

By contrast, *procedural* defences challenge—more broadly—*any* fact which is a prerequisite for conviction,[18] for example the jurisdiction and the right of a court to try an accused.[19] In a similar vein, Paul H. Robinson, in his seminal two-volume treatise on defences, recognizes a category of non-exculpatory defences which are based not on the innocence or blamelessness of the suspect, but on public policy considerations.[20] This group includes the legality principle (*nullum crimen sine lege*), the *ne bis in idem* principle, immunities, the statute of limitations, amnesties, pardons and other waiver of punishment, unfitness to plead, abuse of process, as well as the exclusion of jurisdiction over juveniles.[21] Apart from the legality principle, which has already been dealt with above,[22] all these procedural defences will be examined later in Section D. Their objective is not to justify the conduct or to excuse the actor but to exempt him from criminal prosecution regardless of his culpability. Unlike substantive defences, procedural defences hinder all investigative and procedural measures, including the examination of the alleged facts.[23]

(2) Full and partial defences

Another fundamental classification refers to the *legal consequences* of a defence. Full or perfect[24] defences preclude the actor's criminal liability entirely, that is, they result in an *acquittal*.[25] In contrast, in case of a partial or imperfect[26] defence, the perpetrator is convicted but his punishment *mitigated*.[27] This raises the question of the way in which partial defences differ from (other) mitigating factors. Some authors argue that, while the latter are only relevant for determining the severity of a sentence, partial defences result in the conviction for a different, separate (lesser) offence, although all elements of the more serious offence are fulfilled.[28] Take the most prominent example of the traditional common law defence of *provocation* (in modern English law replaced by 'loss of control'). If raised successfully, the perpetrator is convicted for manslaughter instead of murder.[29] The rationale of this partial defence is to exclude the mandatory sentence for the more serious offence, for example the death penalty or life imprisonment.[30] A more sophisticated explanation is offered by

[18] cf.Duarte d'Almeida, in Bartels and Paddeu, *Exceptions* (2020), p. 180.

[19] Ambos, in Brown, *RH ICL* (2011), p. 300; cf. also Eser, in Dinstein and Tabory, *War Crimes* (1996), p. 253.

[20] Robinson, Defenses, i (1984), p. 103; Robinson, *ColLR*, 82 (1982), 229. In the same vein, see Milhizer, *St. John's LR*, 78 (2004), 810; LRC, *Defences* (2009), mn. 1.12; Berman and Farrell, *Wm & Mary LR*, 52 (2011), 1046.

[21] See also Bantekas, in McGoldrick et al., *Permanent ICC* (2004), p. 264 and Robinson, *Defenses*, i (1984), p. 103who qualifies most of these jurisdictional limitations as non-exculpatory defences.

[22] See Chapter III, C. (1).

[23] Scaliotti, *ICLR*, 1 (2001), 111. See also Robinson, *Defenses*, i (1984), p. 501.

[24] Lippman, *Criminal Law* (2018), p. 198.

[25] Knoops, *Defenses* (2008), p. 112; Husak, *Philosophy* (2010), p. 311; Wolswijk, in Reed and Bohlander, *Loss of Control* (2011), p. 329; cf. also Tolmie, *NZLR*, 122 (2005), 26 and *Delalić et al.*, No. IT-96-21-A, para. 582.

[26] Lippman, *Criminal Law* (2018), p. 198.

[27] Knoops, *Defenses* (2008), p. 112; Husak, *Philosophy* (2010), p. 313; Wolswijk, in Reed and Bohlander, *Loss of Control* (2011), p. 330; cf. also Gardner, in Simester and Smith, *Harm* (2003), p. 107.

[28] Berman and Farrell, *Wm & Mary LR*, 52 (2011), 1045. In the same vein Horder, *Excusing* (2006), pp. 143–6.

[29] In more detail Berman and Farrell, *Wm & Mary LR*, 52 (2011), 1045–65; Tolmie, *NZLR*, 122 (2005), 26; Freiberg and Stewart, in Roberts, *Mitigation* (2011), p. 102; cf. also Horder, *Excusing* (2006), p. 102.

[30] *Delalić et al.*, No. IT-96-21-A, para. 590; Watzek, *Rechtfertigung* (1997), p. 246; Krug, *AJIL*, 99 (2000), 330; Janssen, *ICLR*, 4 (2004), 87; Horder, *Principles* (2019), p. 260; Reed and Wake, in Reed and Bohlander, *Loss of Control* (2011), pp. 183–4.