Philosophical Foundations of International Criminal Law: Foundational Concepts

Morten Bergsmo and Emiliano J. Buis (editors)

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Front cover: *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance.*

Back cover: *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faith-ful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law.*

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International Criminal Responsibility as a Founding Principle of International Criminal Law

Javier Dondé-Matute*

5.1. Introduction

The notion of international criminal responsibility is what makes international criminal law work. The possibility of holding individuals accountable for international law violations requires examining the acts and the circumstances which are necessary for such accountability. These questions are answered in national jurisdictions by criminal law. Since international criminal responsibility is the starting point for all these questions, it can be affirmed that it is a founding principle of international criminal law.

The rules of international criminal law establish the conditions by which international criminal responsibility can be imposed and, conversely, international criminal responsibility sets out the conditions under which international criminal law rules exist.

In this chapter, the previous statement will be explained and arguments will be presented to uphold this proposition. It will be argued that international criminal responsibility has its historical origin at the Nuremberg trials, and once it materialised, it created a need to generate rules of international criminal law. In turn, this new concept can be distinguished from State responsibility and national criminal responsibility. This is a fundamental part of the argument because it could be asserted that international criminal responsibility derives from these previously conceived forms of accountability. If, however, they are clearly distinguished, then the case for fundamental principle becomes more credible.

* **Javier Dondé-Matute** is Research Professor at the National Institute of Criminal Sciences, Mexico. He holds a Ph.D. from the University of Aberdeen. He is a member of the National Research System Level II, National Council for Science and Technology (CONACYT).

Once these distinctions are explained, a concept and definition of international criminal responsibility will be suggested. First, this proposal will have a formal and material perspective. Second, the elements that make up this new concept will be described, mainly, the culpability requirement and the group element.

To prove that international criminal responsibility is a founding principle of international criminal law, two examples will be provided: the mental element as it is understood in the Rome Statute, and massive violence as it pertains to international crimes.

Before moving on, however, a note on methodology is necessary. This chapter is normative. This means that the nature and elements of international criminal responsibility will be derived from positive law. This does not mean that this is based on pure theory of law. Nevertheless, it does mean that an inductive method will be used to identify international criminal responsibility as a general principle of law.[1] Additionally, the Rome Statute of the International Criminal Court ('ICC') will be the basis of this inquiry. It could be argued that international criminal law includes other sources of law, including not only treaties but also customary international law. However, the Rome Statute is a reflection of earlier developments in this area since the inception of the International Criminal Tribunal for the former Yugoslavia ('ICTY').[2]

5.2. The Nuremberg Precedent

The Nuremberg Charter and the subsequent Judgment[3] can be criticised for several reasons.[4] However, what is less questionable is that it consti-

[1] See Rolando Tamayo y Salmorán, *Razonamiento y Argumentación Jurídica: El Paradigma de la Racionalidad y la Ciencia del Derecho*, Universidad Nacional Autónoma de Mexico, Mexico City, 2003, pp. 83–85.

[2] See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed., Kluwer Law International, The Hague, 1999, pp. 446–447; Francisco Muñoz Conde, "Rethinking the Universal Structure of Criminal Law", in *Tulsa Law Review*, vol. 39, no. 4, 2004, p. 942.

[3] International Military Tribunal, *United States of America et al. v. Hermann Wilhelm Göring et al.*, Judgment, 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1 October 1946) ('Nuremberg Judgment') (http://www.legal-tools.org/doc/45f18e/).

tuted the first legal foundation of international criminal responsibility. Even though there were previous attempts to put individuals on trial for international law violations, especially war crimes,[5] none of these had enough momentum to start the development of international criminal law. Therefore, it is important to review the Judgment's reasoning in upholding the existence of international criminal responsibility.

We should start with some context. The Nuremberg Tribunal's reasoning seeks to uphold the existence of crimes against peace before the Nuremberg Charter came into force.[6] The reasoning starts by stressing that the Tribunal has jurisdiction over crimes against peace for the mere fact that the Nuremberg Charter so stated, and the Tribunal's only mandate is to apply the Charter – it does not have the power to question its founding document. However, it seems that the judges saw through the weakness of this statement because they chose to further explain why they believed crimes against peace preceded the Tribunal's creation. It is in this setting that the discussion regarding international criminal responsibility takes place – as it was necessary to ascertain its existence before arguing that crimes against peace preceded the Charter.

The Tribunal starts out by asserting that at least since the Treaty of Paris of 1928, there has been an express rejection of war as an instrument of State policy and a way to solve international conflicts by the Contracting Parties. However, the Judgment also acknowledges that an internationally wrongful act does not necessarily entail criminal responsibility.

The Judgment goes on to explain that international law does not have a legislature, so treaties only recognise certain general principles. The Tribunal argues that the prohibition contained in the Treaty of Paris is the reflection of international customary law at the time, but since then, there have been further developments that have transformed the prohibition into an international crime. To support this reasoning, the Tribunal

4 Among the more prevalent criticisms are the violation of the principle of legality, particularly the *ex post facto* rule, and the fact that it was an *ad hoc* tribunal that represented victor's justice.

5 See, generally, Edoardo Greppi, "La evolución de la responsabilidad penal individual bajo el derecho internacional", in *Revista Internacional de la Cruz Roja*, 1999, no. 835.

6 The analysis in this section is based on the *dictum* included in the Nuremberg Judgment, p. 52, see *supra* note 3.

mentions several international instruments that criminalise the unlawful use of force:

- The 1923 draft Treaty on Mutual Assistance of the League of Nations;
- The Preamble to the 1926 Protocol for the Peaceful Resolution of International Disputes;
- The unanimous resolution adopted by the Sixth Pan-American Conference in Havana dated 18 February 1928; and
- Articles 227 and 228 of the Treaty of Paris that ordered the trial of Kaiser William II for the violation of international morality and the sanctity of treaties.

The rest of the section deals with the very narrow point of the possibility of indicting heads of State. Since this discussion is not relevant to the current topic, it will not be addressed here.

We must accept that the Tribunal's reasoning is flawed since there is no logical connection or evolution from State responsibility to the existence of international crimes. The aforementioned instruments do not seem to support the proposition that crimes against peace had already developed into an international crime by the time the Nuremberg Charter was drafted. The first two documents were proposals that never came into force, and the third is only a regional resolution, which, at most, will only have effect in the Americas. The Treaty of Paris provisions are limited to one person and do not entail the creation of international courts and procedures – at most Kaiser William II would have been tried locally.

Regardless, the Nuremberg Tribunal reached the conclusion that these precedents were enough to establish the existence of international criminal responsibility for crimes against peace. In doing so, the Tribunal confuses State responsibility with international criminal responsibility for individuals. It justifies the efficiency of international law by instituting criminal sanctions. This is summarised in its famous phrase: "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".[7]

[7] Nuremberg Judgment, p. 55, see *supra* note 3.

While the reasoning is clearly defective, the Judgment can be cited as the starting point in international criminal law, since the conclusion reached became a precedent and the recognition of the founding principle of 'international criminal responsibility'.[8]

The weak argument required a more solid legal basis so that it would not be lost in the criticisms of the Nuremberg Tribunal. This is why the General Assembly of the United Nations decided to give the core findings of the Nuremberg Charter and Judgment more legitimacy. Hence, it drafted the Nuremberg Principles.[9] Later on, the General Assembly instructed the International Law Commission to codify these principles.[10] In short, the Nuremberg Principles recognise the existence of international criminal responsibility and the basic conditions which must be met for criminal sanctions.

This resolution starts out by giving a definition of international criminal responsibility, stating that, "[a]ny person who commits an act which constitutes a crime under international law is responsible and therefore liable to punishment" (Principle I). Other very rudimentary aspects of criminal liability are also included, such as the international crimes that can incur punishment (Principle VI), and a very basic notion of complicity (Principle VII).

Other elementary conditions are also mentioned. International criminal responsibility is not dependent on national jurisdictions – essentially setting out the building blocks for international criminal adjudication (Principle II). It also excluded heads of State and government immunities (Principle III) as well as conditioning the defence of superior orders (Principle IV). Additionally, it mentions that any person accused should

8 See International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 172. ('Bosnia-Herzegovina v. Serbia and Montenegro Case, Judgment') (http://www.legal-tools.org/doc/5fcd00/). It recognizes that the origin of international criminal responsibility can be found in the Nuremberg Charter and Judgment.

9 United Nations General Assembly ('UNGA'), Resolution 95 (I), UN Doc. A/64/Add.1, p. 188, 11 December 1946 (http://www.legal-tools.org/doc/bb7761/).

10 UNGA, Resolution 177 (II), UN Doc. A/519, p. 111, 21 November 1947 (http://www.legal-tools.org/doc/57a28a/).

be subject to a fair and impartial trial (Principle V). These principles started to set the limits and standards of international criminal responsibility.

The Nuremberg Principles are the basis of international criminal law. They have not changed over time, although they have evolved and have become more sophisticated. Even today, the Rome Statute is broadly based on these first rules.[11]

In conclusion, although the origins of international criminal responsibility were erratic, the concept has thrived and developed since its introduction. The actual conditions that must be met to establish liability are still open for debate, but this can be seen as part of the natural evolution of any branch of international law.

5.3. Core Differences Between State Responsibility and International Criminal Responsibility

To establish that individuals can be liable for international crimes, it is necessary to overcome the classic proposition that only States and international organisations are subjects of international law. While this proposition has been true for a long time, there are two notable exceptions: international human rights law and international criminal law.[12]

In international human rights law, treaties such as the American Convention on Human Rights[13] and the European Convention on Human Rights[14] contain duties for States Parties. Individuals have standing to seek relief before the regional tribunals set up to enforce States' obligations contained in these treaties.

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[11] See, for an analysis of the evolution and current state of the Nuremberg Principles, Javier Dondé-Matute, *Principios de Núremberg: Desarrollo y Actualidad*, Instituto Nacional de Ciencias Penales, Mexico City, 2015.

[12] Cf., Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2001, pp. 10 ff. It can be argued that international humanitarian law should be included in this list. However, individuals have not been afforded standing to ask for relief when a State violates these norms. States are responsible before other States for compliance with this area of law. In any case, some aspects of this discipline may amount to human rights violations or war crimes.

[13] American Convention on Human Rights, adopted 22 November 1969, entry in force 18 July 1978 (http://www.legal-tools.org/doc/1152cf/).

[14] European Convention on Human Rights, adopted 4 November 1950, entry in force 3 September 1953 (http://www.legal-tools.org/doc/8267cb/).

Something similar happens in international criminal law. Before we can entertain the notion of international criminal responsibility for international crimes, we must first recognise as a premise that individuals are international law subjects. That idea is now widely accepted.[15]

We can now identify two forms of international responsibility. It is important to distinguish between State responsibility and individual (criminal) responsibility. The first is the duty of a State to redress another State or international organisation for a violation of international law. The second is more akin to a sanction and it entails punishment and reparations for certain violations of international law which amount to international crimes.[16]

However, these two forms of responsibility are not mutually exclusive. The same conduct can be a violation of international law or human rights law, which in both cases would result in State responsibility. Additionally, the person who carries out the action would be internationally responsible, subject to the rules of liability as direct perpetrator or participant, including the notion of command responsibility.

The International Court of Justice supported the co-existence of both forms of responsibility in the *Bosnia-Herzegovina v. Serbia and Montenegro* case concerning genocide.[17] In the relevant part of the Judgment, it stated that although the Convention on the Prevention and Punishment of the Crime of Genocide was designed to establish criminal responsibility of individuals that commit this crime, States could also be held responsible for the same acts.

Moreover, this duality is also present in Article 25(4) of the Rome Statute, which states that "[n]o provision in this Statute relating to indi-

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15 See Malcolm N. Shaw, *International Law*, Oxford University Press, Oxford, 2003; Matthias Herdegen, *Derecho Internacional Público*, Universidad Nacional Autónoma de Mexico, Mexico City, 2005.

16 See International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, para. 129 ('Croatia v. Serbia, Judgment') (http://www.legal-tools.org/doc/1f2f59/).

17 International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, para. 32 (http://www.legal-tools.org/doc/356fe2/).

vidual criminal responsibility shall affect the responsibility of States under international law".[18]

To reinforce the notion of international criminal responsibility before international tribunals in a more modern context, it is important to note that the Rome Statute recognises this idea in paragraphs 5 and 6 of its Preamble. In the body of the treaty, it is also mentioned in Article 1 that the International Criminal Court ('ICC') "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern". In turn, Article 25(1) emphasizes that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute". At this point, it is only relevant to mention the norms that recognise individual responsibility in a contemporary context. These will be further developed in the following sections.

So far, we have looked at the co-existence of State responsibility and international criminal responsibility as two separate but complementary ways to confront international law violations. For example, a State can be held responsible for torture, and the State officials who actually commit the conduct can be criminally responsible for the individual act or, possibly, as a crime against humanity or a war crime.

However, there are other differences. International criminal responsibility has to be more 'human' since it is aimed at individuals. This is achieved primarily, although not exclusively, by requiring a mental element to avoid strict liability offences.[19] The mental element requirement has become an important part of responsibility in international criminal law, but it will be further argued that blameworthiness is also present as a component of international criminal responsibility. While this would

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[18] See also Bosnia-Herzegovina v. Serbia and Montenegro Case, Judgment, para. 173, see *supra* note 8. This part of the Judgment builds on the Rome Statute to support the co-existence of these two forms of responsibility.

[19] See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 2, Commentary 10 (http://www.legal-tools.org/doc/e174dd/). State responsibility only requires two elements: the act must be attributed to the State, and it must constitute a breach of international obligations by the State. The commentaries further explain that no mental element is required. See *Croatia v. Serbia*, Judgment, paras. 132–142, see *supra* note 16. In this case, the mental element of genocide was looked into, but only because the elements of the crime of genocide include *dolus specialis*, that is, specific intent.

make international criminal responsibility similar to criminal responsibility in domestic jurisdictions, there are some differences that need to be pointed out.

5.4. International Criminal Responsibility v. Criminal Responsibility Before National Jurisdictions

The difference between these two types of criminal responsibility can be seen on several levels. Formally, provisions on international criminal responsibility can be found in treaties and generally in any source of international law. However, Article 21 of the Rome Statute lists as possible sources the general principles found in the legal systems of the world.[20] Although this is only a secondary source, it seems to suggest that there is no clear-cut distinction that can be found from the sources of law alone.

Another criterion that can be used are the legal interests that are protected by the international and the national systems. It could be argued that international criminal law protects interests that are only relevant to the international community, while each national system will look to protect interests relevant to its own legal order. In an earlier publication, I suggested that international legal interests can be found in the United Nations Charter, *jus cogens* norms, international human rights and in specific international criminal law treaties.[21]

This way, we can distinguish between international crimes that are based on international interests, and offences that are identified locally by States. While this distinction is grounded in material standards, it does not help distinguish between the different types of criminal responsibility, since it is only directly applicable to crimes and offences.

Bassiouni takes the view that the difference between both types of criminal responsibility is clearly established in the Rome Statute. According to this position, Articles 25 to 28 provide forms of liability which are unique to international criminal responsibility and which are clearly different from those found in national legal systems. Thus, the forms of liability, the exclusion of minors from criminal responsibility, the irrelevance

[20] Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Article 21(1)(c) ('Rome Statute') (http://www.legal-tools.org/doc/7b9af9/).

[21] See Javier Dondé-Matute, *Tipos Penales en el Ámbito Internacional*, Instituto Nacional de Ciencias Penales, Mexico City, 2012, pp. 21–39.

of official capacity and command responsibility are unique to international criminal law and help distinguish international from national criminal responsibility.[22]

While Bassiouni's arguments are convincing, some calibration is in order. Article 25 of the Rome Statute includes forms of liability that are usually present in national jurisdictions such as direct perpetrator, co-perpetrator and indirect participation. Similarly, several jurisdictions do not punish under-aged persons.[23] Official capacity is not always an obstacle for national criminal prosecutions, although in some cases it must be justified by impeachment or a similar special procedure.[24]

Nevertheless, Bassiouni was right in asserting that there are some forms of liability that are unique to international criminal law, and not common in national jurisdictions unless linked to international criminal law, such as group responsibility[25] and command responsibility.[26] It is interesting to note that both forms of liability entail group responsibility – this will be dealt with in the next section. The legal literature has already highlighted the idea that groups play an important role in international criminal law. For example, Ohlin notes two differences between international criminal responsibility and national criminal responsibility: in the former, crimes are usually committed by groups, and the leader does not execute the crime; neither is the case in national jurisdictions.[27]

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22 Bassiouni, 1999, pp. 370–373, see *supra* note 2.

23 Convention on the Rights of the Child, UNGA Resolution 44/25, adopted 20 November 1989, entered into force 2 September 1990, Article 1 (https://www.legal-tools.org/en/doc/f48f9e/).

24 See as an example the Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States), 5 February 1917, Article 111 ('CPEUM') (http:// www.legal-tools.org/doc/b0da60/).

25 See Rome Statute, Article 25(3)(d), see *supra* note 20.

26 See Rome Statute, Article 28, see *supra* note 20.

27 See Jens D. Ohlin, "Co-Perpetration: German Dogmatik or German Invasion?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 6.

On a related note, part of the legal literature has found that international criminal law goes beyond what would be expected of national jurisdictions for criminal prosecutions, testing the limits of criminal law.[28]

5.5. Group Responsibility

Group responsibility is not new to international criminal law. The relevant literature has explained this link from different angles. However, it must be stressed that this concept creates tension between the limits that have been set in modern criminal law, at least in European and American jurisdictions, based on the idea of punishing only individuals for crimes.[29] This is linked to the idea of culpability and blameworthiness, and its applicability in international criminal law. This will be discussed in the following section.

To prove that groups are indispensable to international criminal responsibility, a normative approach may be appropriate. This is mainly evident in the forms of liability recognised in the Rome Statute and applied by the ICC. This section will not include an analysis of the forms of liability, but will only highlight the 'group element' therein.[30]

Since the Nuremberg Judgment, group responsibility has been evident and important to international criminal law. The Nuremberg Charter

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[28] See Darryl Robinson, "International Criminal Law as Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, p. 702.

[29] See George P. Fletcher, "Collective Guilt and Collective Punishment", in *Theoretical Inquiries in Law*, 2004, vol. 5, no. 1, pp. 163–178 (accepting the existence of collective guilt which would go beyond the requirement that a person is only guilty of his or her own actions); Kai Ambos, *Fundamentos de la Imputación en el Derecho Internacional Penal*, Editorial Porrúa, Mexico City, 2009, pp. 69–70 (noting the double standards in international criminal law of collective context and traditional individual guilt); Mark Osiel, "Banality of Good: Aligning Incentives Against Mass Atrocity", in *Columbia Law Review*, 2005, vol. 105, no. 6, pp. 1751–1862 (explaining the relationship between mass atrocities, criminal law and individual criminal responsibility); Darryl Robinson, "International Criminal Law as Justice", in *Journal of International Criminal Justice*, September 2013, vol. 11, no. 3, p. 705; and Pamela J. Stephens, "Collective Criminality and Individual Responsibility: The Constraints of Interpretation", in *Fordham International Law Journal*, 2014, vol. 37, no. 2, pp. 501–547.

[30] See Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, no. 2, pp. 39–40 (the tension between individual responsibility and group responsibility is more evident in forms of liability such as joint criminal enterprise, command responsibility and aiding and abetting).

included the possibility of prosecuting someone for membership in a criminal organisation.[31]

This idea gained momentum at the ICTY with the creation of joint criminal enterprise as a form of liability. Commentators have divided this form of liability into three categories. First, the basic form, in which co-perpetrators acts in accordance to a common plan with the same criminal intent. Hence, everyone involved in the common plan is guilty of the crime, whether they directly committed the act or not.[32] The second category, known as systematic joint criminal enterprise, includes all the elements of the first category, but it takes place within a "system of repression".[33] Consequently, the person prosecuted must know that there is a system and that she or he participates in that system.[34] The third category is known as the extended joint criminal enterprise. It shares the same elements of the first two since there is a common plan, which may or may not be part of the system of oppression, and the intent of the person to take part in the plan, without directly committing the crime. However, the main difference is the mental element, because the crimes are committed beyond the plan, but are a "natural and foreseeable consequence of the common plan".[35]

The Rome Statute does not include joint criminal enterprise.[36] However, the drafters included several modes of liability that entail the involvement of several individuals or group liability. Article 25 alone in-

[31] Charter of the International Military Tribunal, 8 August 1945, Articles 9–11 (http://www.legal-tools.org/doc/64ffdd/).

[32] International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Duško Tadić*, Appeal Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 196 ('Tadić Judgment') (http://www.legal-tools.org/doc/8efc3a/).

[33] *Ibid.*, *para*. 202–203.

[34] ICTY, *Prosecutor v. Simić* et al., Trial Chamber, Judgment, 17 October 2003, IT-95-9-T, para. 157 (http://www.legal-tools.org/doc/aa9b81/).

[35] ICTY, *Prosecutor v. Kvočka* et al., Appeal Chamber, Judgment, 28 February 2005, IT-98-30/1-A, para. 83 (http://www.legal-tools.org/doc/006011/).

[36] See International Criminal Court ('ICC'), Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 335 ('Lubanga Decision on the Confirmation of Charge') (http://www.legal-tools.org/doc/b7ac4f/) (joint criminal enterprise was rejected at the Rome conference by the drafters).

cludes "ordering"[37] which implies that there is a group or organisation with some form of hierarchy involved and the contribution to a group.[38] Similarly, command responsibility implies the existence of an organisation, which in the case of the military commander requires "command and control" or "effective authority and control".[39] In the case of non-military leaders, they may commit crimes perpetrated by their subordinates under their "effective authority and control".[40]

Although the Rome Statute does not include joint criminal enterprise, it has replaced it with other modes of liability that achieve the same policy result: co-perpetration and co-perpetration through organisations. What is interesting about these new forms of liability is that they are not included in the plain reading of Article 25, however, group responsibility has been incorporated by the Court's case law.

Co-perpetration was the form of liability charged in the *Lubanga* case. According to the convicting chamber, co-perpetration has two objective elements: the existence of a common plan with a criminal component between at least two persons,[41] and an essential contribution by each perpetrator to the commission of the crime.[42] The Trial Chamber held that the

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37 See Rome Statute, Article 25(3)(b), see *supra* note 20.

38 See ICC, *Prosecutor v. Sylvestre Mudacumura*, Situation in the Democratic Republic of the Congo, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 63 (http://www.legal-tools.org/doc/ecfae0/) (the first objective element is the position of authority, which is impossible without a well-organised group or organisation).

39 Rome Statute, Article 25(3)(d), see *supra* note 20; ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 996 ('Lubanga Judgment') (http://www.legal-tools.org/doc/677866/) ("Both Articles 25(3) (a) and (d) address the situation in which a number of people are involved in a crime"); ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 351 ('Ruto, Kosgey and Sang Decision') (http://www.legal-tools.org/doc/96c3c2/).

40 See Rome Statute, Article 28(b), see *supra* note 20.

41 Lubanga Judgment, para. 980, see *supra* note 39; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his Conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras. 469–473 (http://www.legal-tools.org/doc/585c75/).

42 Lubanga Judgment, para. 981, see *supra* note 39.

common plan is not necessarily criminal in nature, but there must be a substantial risk that a crime will be committed in the natural course of events.[43] On the other hand, the contribution must be essential, as to distinguish this form of liability from accomplice liability.[44] As for the mental element, the Trial Chamber held that co-perpetration requires that the person must have the intention to bring about the crime and to provide the essential contribution for the commission of the crime.[45] It should be noted that in the confirmation of charges decision, the Pre-Trial Chamber found another mental element that was not mentioned in the Trial Judgment but has been upheld by other chambers. The co-perpetrators must be aware and mutually accept that the implementation of the common plan will result in the commission of the crime.[46]

Co-perpetration through an organisation is based on the simple form described above. Consequently, the confirmation of charges decision in *Katanga and Ngudjolo* started out by applying the pre-existing case law[47] and proceeded to explain how co-perpetration can be exercised through an organisation. The individual must have control over the organisation,[48] which can be proven by the existence of an organised group and a hierarchical structure. Therefore, it is important to have evidence that pertains to the leadership of the person charged and to the automatic obedience.[49]

When taken together, it is easy to reach the conclusion that since Nuremberg, the main modes of liability which are unique to international criminal law entail the existence and participation of a group in the com-

43 Lubanga Judgment, para. 984, see *supra* note 39.

44 Lubanga Judgment, para. 997, see *supra* note 39.

45 Lubanga Judgment, para. 1013, see *supra* note 39.

46 Lubanga, Decision on the Confirmation of Charges, paras. 361–363, see *supra* note 36; see also ICC, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 351 ('Bemba Decision') (http://www.legal-tools.org/doc/07965c/).

47 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, paras. 494, 519–539 ('Katanga and Ngudjolo Decision') (http://www.legal-tools.org/doc/67a9ec/).

48 *Ibid.*, paras. 500–510.

49 *Ibid.*, paras. 511–514.

mission of international crimes. Moreover, up to this point, there has only been one charge based on direct participation and another for inducing the commission of a crime before the ICC. However, in the case of direct participation, the accused was charged in the context of a military attack.[50] In the case of inducing, the accused was charged in the alternative to "ordering", but was eventually proven with the same set of facts.[51] So even in these cases, group responsibility was present.

5.6. Culpability

This concept is commonly used in Western legal systems, although there does not seem to be a unique definition or definite elements. For the purposes of this section, Luigi Ferrajoli's model will be used, because it includes both the common and civil law approaches to the concept. Three elements are essential in understanding culpability:

- a link between the decision to commit the crime, the conduct (act or omission) and the result;
- the capacity of the person to understand and to wish to carry out the conduct; and
- the concrete conscience and will to carry out the crime.[52]

The basis of culpability is free will since it is paramount in determining if the person could have acted in any other way.[53] Consequently, criminal sanction is not based on the status of the person, but on the over-

[50] See ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 137–143 (http://www.legal-tools.org/doc/5686c6/).

[51] *Ibid*., paras. 154–157.

[52] See Luigi Ferrajoli, *Derecho y Razón: Teoría del Garantismo Penal*, Trotta, Madrid, 2001, pp. 489–490. This author derives the elements from the German '*Schuld*' and the Anglo-American '*mens rea*', even though they are usually distinguished by the legal literature. The common law term refers (narrowly) to the mental element, while the German dogmatic theory is closer to blameworthiness (although this is not a unanimous approach). In any case, this three-prong conceptualisation seems appropriate for the current chapter since it narrows the gap between both legal families.

[53] *Ibid*., p. 493; see also Stephanie Bock, "The Prerequisite of Personal Guilt", in *Utrecht Law Review*, 2013, vol. 9, no. 4, pp. 184–186. The individual responsibility concept has two basic elements: the psychologic relation between the author and the act, and the moral blameworthiness.

all commission of the crime. Conversely, culpability is excluded when the person had no other choice but to carry out the criminal conduct.[54]

If this premise is accepted, one must look at the elements that stress individual responsibility in international criminal law, that is, punish the individual for her or his actions. This would be contrary to what was held at Nuremberg where, according to its Statute, membership in an illegal organisation was a crime itself, regardless of the acts or omissions of the person. In line with the conceptual proposal mentioned above, and based on the notion of free will, a person can only be sanctioned if given the opportunity to make a decision and a moral choice to carry out the specific act or omission.

The ICTY took the first step in this direction. The Appeals Chamber first recognised in *Tadić* that culpability was part of international criminal responsibility, by stressing the need for a conduct (*actus reus*) and a mental element:

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).[55]

However, culpability was not mentioned in any subsequent decision of the *ad hoc* tribunals, so it is fair to ask if it is still present in international criminal law. Although culpability, as understood by Ferrajoli, is not mentioned in the Rome Statute or by the ICC, there is sufficient evidence to affirm that it is implicitly included. To reach this conclusion, it is necessary to look at several of its provisions.

First, individual responsibility is present in Article 25(2) which reads: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute". This clause sets the primary principle of culpability –

[54] *Ibid.*, p. 503.

[55] Tadić Judgment, para. 186, see *supra* note 32.

individual responsibility. Therefore, group responsibility and status crimes are excluded.[56]

Article 25(3)(d) has rarely been studied in this context, but there are several words that point to a culpability element in international criminal responsibility:

> In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be *intentional* and shall either:
>
> i. Be made with the *aim* of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii. Be made in the *knowledge* of the intention of the group to commit the crime.[57]

A careful analysis of this provision will lead to the conclusion that these are the same elements of joint criminal enterprise. However, diverse mental elements are included where, before, they were at best doubtfully established. It was actually this lack of mental elements that was the focus of the criticisms of the legal literature.[58] Clearly, the drafters of the Rome Statute took note of this reproach and made sure that culpability was incorporated in this new jurisdiction.[59]

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[56] See Alicia Gil and Ana E. Maculan, "Current Trends in the Definition of 'Perpetrator' by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga Case to the Katanga Judgment", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 361–362. The *Lubanga* Judgment came dangerously close to establishing membership responsibility, since the accused leadership role was stressed over the individual conducts of his subordinates.

[57] Rome Statute, Article 25(3)(d) (emphasis added), see *supra* note 20.

[58] See Alicia Gil, "Principales Figuras de Imputación a Título de Autor en Derecho Penal Internacional: Empresa Criminal Conjunta, Coautoría por Dominio Funcional y Coautoría Mediata", in *Cuadernos de Política Criminal*, 2013, vol. I, no. 109, Época II, pp. 117–118.

[59] For a more in-depth analysis of the differences and similarities between joint criminal enterprise and the new modes of liability, see Javier Dondé-Matute, "Reflexiones Sobre la Empresa Criminal Común, la Coautoría y las Formas de Imputación del Estatuto de la Corte Penal Internacional Desde la Política Criminal", in José Guevara and Javier Dondé-Matute (eds.), *Ensayos sobre temas selectos de la Corte Penal Internacional*, Tiran Lo Blanch, Mexico City, 2016, pp. 81–86.

This is further confirmed by Article 30(1) of the Rome Statute, which reads: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". In explaining the meaning of "intent", Article 30(2)(a)–(b) further reads:

> For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

This phrasing is important because the requirement is not limited to the existence of a mental element, but to Ferrajoli's third point, which is more closely linked to moral choice or blameworthiness since the person must weigh in the consequences of the action. This means that the Rome Statute has components of Ferrajoli's minimal criminal law theory, at least as far as culpability is concerned.

These assertions find further footing in Article 31, which deals with grounds for excluding criminal responsibility. A close look at several of these grounds reveals that criminal responsibility is excluded when a mental element is absent or moral choice is not possible.

Culpability is also addressed in paragraph 4 of the general introduction to the Elements of Crimes:

> With respect to mental elements associated with elements involving value judgement, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

This paragraph acknowledges that an individual is usually faced with several moral choices. However, here an exception to the general rule is established. While moral choice will be irrelevant in the mentioned cases, it is still present in the other terms that involve a value judgment. This inference is in line with Article 30 that requires that the individual consider the commission of the crime.

There is another important observation that has to be made. The recognition of the culpability requirement is also part of human rights law, in particular, part of the principle of legality as incorporated in Article 22(1) of the Rome Statute: "A person shall not be criminally responsible

under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court". Clearly, the use of the word "conduct" brings this provision in line with what has been said so far, since it implies that only acts or omissions can be criminalised by the ICC. This interpretation is consistent with the scope of the principle of legality before the Inter-American Court of Human Rights:

> The assessment of the agent's dangerousness implies the judge's appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur. The State's criminal function is based on this principle. In the end, the individual will be punished – even with the death penalty – not based on what he has done, but on what he is. It is not even necessary to weigh in the implications, which are evident, of this return to the past, absolutely unacceptable from the point of view of human rights. The prediction will be made, in the best of cases, based on the diagnosis offered by a psychological o[r] psychiatric expert assessment of the defendant.[60]

It is important to remember at this point that international human rights law is part of the interpretation methods that the ICC must follow according to Article 21(3) of the Rome Statute.

Despite these arguments, some commentators believe that group responsibility and culpability are incompatible.[61] This idea rests on the perception that modes of liability like joint criminal enterprise and co-perpetration give more weight to groups than to individual actions. However, cases like *Ntaganda* exemplify that while there is a tendency to use modes of liability which involve groups, in the end, what is recognised is the individual's behaviour within the activities of the group. The individual's acts within groups are only means describing the context in which

[60] Inter-American Court of Human Rights, *Case of Fermín Ramírez v. Guatemala*, Judgment on Merits, Reparations and Costs, 20 June 2005, Series C No. 126, para. 95 (http://www.legal-tools.org/doc/c942e5/).

[61] See George P. Fletcher, "The Storrs Lectures: Liberals and Romantics at War – The Problem of Collective Guilt", in *The Yale Law Journal*, 2002, vol. 111, no. 7, pp. 1499–1573. Fletcher proposes a theory by which an entire nation can be held responsible for international crimes through collective culpability.

international crimes occur. This is the way international criminal responsibility works.

This chapter concedes that liability is individual and subject to the culpability requirements of mental elements and value judgments, but these actions do not occur in a vacuum.[62] However, culpability and group responsibility are mutually dependent, since international responsibility cannot take place outside of a group context, but culpability is a necessary requirement for punishment.

5.7. Relationship with Other Principles of International Criminal Law[63]

In preceding sections, we have seen that international criminal responsibility is the starting point of international criminal law. As its cornerstone, there are other principles that derive from it. In particular, given the elements of group responsibility and culpability, two principles are directly relevant: 'international *mens rea*' and 'mass violence'. In this section, it will be argued that these two principles of international criminal law derive from international criminal responsibility.

5.7.1. International *Mens Rea*

As previously explained, the mental element is one of the important differences between international criminal responsibility and State responsibility, as it is not present in the latter. Nonetheless, the way in which the mental element is regulated in the Rome Statute is different from national criminal law.

The mental element is present as a general requirement for crimes in Article 30 of the Rome Statute. However, unlike national criminal law, the requirement transcends the notion of international crimes and can be found in particular crimes, in the forms of liability and in the grounds for excluding criminal responsibility.

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62 See Drumbl, 2005, pp. 32–33, see *supra* note 30 (the network of participation in international crimes is more complex than those present in national or transnational crimes, even in cases of collective wrongdoing like organised crime).

63 This section is a summary of a broader study into general principles of international criminal law.

It is not novel to point out that some crimes have mental elements of their own. The most evident example is the intention to destroy a national, religious, ethnic or racial group in the crime of genocide.[64] Nevertheless, there is also the case of extermination as a crime against humanity that involves the "imposition of conditions of life […] aimed at causing the destruction of part of the population".[65] In addition, all crimes against humanity are subject to a specific mental state, governed by State or organisational policy. The ICC has established that the phrase "with knowledge of the attack" implies that the person must know that she or he takes part in the attack,[66] and should seek to carry out the policy or at least promote it. This means that the will of the individual must be to try to achieve an ultimate end.

The international *mens rea* is also relevant for the modes of responsibility. In general, all that is required as a mental element is intent and knowledge, and where appropriate, a specific element as in the material commission in "ordering" or "inducing". However, in some cases, it is necessary that the person be aware of the circumstances that make him the author. This is the case of indirect perpetration, where the person must know the circumstances that allow her/him to exercise control over the crime.[67]

Likewise, in indirect co-perpetration, in addition to the particular mental elements, all perpetrators must be aware that the common plan may result in the commission of the material elements of the crime in question, as well as the factual circumstances that allow each one to have joint control over the crime.[68] This logic is replicated in the indirect co-perpetration through an apparatus of power. In this particular case, it is necessary to know the character of the organisation, the person's position

64 Rome Statute, Article 6, see *supra* note 20.

65 Rome Statute, Article 7(2)(b), see *supra* note 20.

66 See Katanga and Ngudjolo Decision, paras. 401–402, 459, see *supra* note 47; Bemba Decision, paras. 87, see *supra* note 46.

67 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga*, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1399. ('Katanga Judgment') (http://www.legal-tools.org/doc/f74b 4f/).

68 Lubanga Judgment, paras. 980–1018, see *supra* note 39; Bemba Decision, paras. 350–351, see *supra* note 46.

of command in the organisation and the automatic fulfilment of the orders.[69]

What is relevant to the present discussion is that group responsibility as a characteristic of international criminal responsibility is linked to the individual, by way of his or her state of mind. The awareness that a group exists and the relation that the individual keeps with it is what is essentially required in these cases.

It can be concluded that if international criminal responsibility depends on the existence of a mental element, then all the grounds for excluding criminal responsibility must be based on the same element. In almost all defences there is a mental element.[70] The element that connects the grounds for excluding criminal responsibility is the absence of the former.

International *mens rea* is present in the crimes in particular in the forms of liability and in the grounds for excluding criminal responsibility. This is the component that links the person to the group, and consequently, to group responsibility, a key element of international criminal responsibility.

5.7.2. Mass Violence

International criminal responsibility is an individual responsibility but it is always committed in a group context and, as stated before, one of its characteristics is group responsibility. High levels of violence are necessary for international jurisdiction to be activated.

In order to prove that international criminal law applies in contexts of mass violence, it is enough to look at previous situations that have triggered international criminal adjudication. World War II in the case of Nuremberg is a prototypical example, but also the ex-Yugoslav wars and the Rwandan genocide. Even in the cases of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Panels of East Timor, where international criminal law has been implemented by hybrid courts, the common denominator is mass violence.

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69 Katanga and Ngudjolo Decision, para. 534, see *supra* note 47.

70 Jérémie Gilbert, "Justice Not Revenge: The International Criminal Court and the 'Grounds to Exclude Criminal Responsibility': Defences or Negation of Criminality?", in *The International Journal of Human Rights*, 2006, vol. 10, no. 2, p. 4.

Only through groups can the mass violence associated with these situations take place. The criminally responsible persons act as members of the armed forces, police corporations or organised armed groups. A single person cannot create a context of massive violence. Undoubtedly, a single person may commit crimes such as torture or enforced disappearance, but without the context required they will not be prosecuted before international or hybrid tribunals.

Moreover, all international crimes in the Rome Statute have an element that links them with mass violence. The context that has to be proven in genocide, crimes against humanity, war crimes and aggression is the reflection of the principle of mass violence. In the case of genocide, at first glance, it seems that it is only necessary to commit any of the acts listed in Article 6 of the Rome Statute, provided they are carried out with the intention to destroy one of the protected groups. Nonetheless, after a careful analysis of each of the conducts listed in the genocide definition, it is clear that the violence is not directed at one person. The terms used imply a plurality of persons, "killing members of the group",[71] "causing serious bodily or mental harm to members of the group",[72] "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction",[73] "prevent births within the group"[74] and "transferring children".[75] There is no doubt that the conduct is violent, nevertheless, the plurality of victims shows the massiveness that is required for their commission.[76]

The Elements of Crimes of the ICC confirm that genocide constitutes an act of mass violence. All genocidal conduct must be committed "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".[77] This 'contextual element' excludes the possibility that the conduct could be an

71 Rome Statute, Article 6(a), see *supra* note 20.

72 Rome Statute, Article 6(b), see *supra* note 20.

73 Rome Statute, Article 6(c), see *supra* note 20.

74 Rome Statute, Article 6(d), see *supra* note 20.

75 Rome Statute, Article 6(e), see *supra* note 20.

76 Fletcher, 2002, p. 1524, see *supra* note 61 (genocide evidences a social conflict typical of a collective crime).

77 ICC, Elements of Crimes, Article 6 (http://www.legal-tools.org/doc/3c0e2d/).

isolated event or action.[78] While it is possible that a single conduct may constitute genocide if committed with the intention of destroying a group, it should be part of an attack against this group. Even assuming that a single act can be enough to commit genocide, its destructive character must be such that it would be hard to deny its massiveness, at least in the results.

The next crime that shows the massive violence that accompanies the applicability of international criminal law is crimes against humanity. The heading of the Article 7 indicates that "[…] 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[79]

It is important to analyse Article 7 *vis-à-vis* the definition of "attack directed against any civilian population", which is defined in the Rome Statute as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[80]

It is crucial that the definition applies to both widespread and systematic attacks. While it is easy to see how a widespread attack can bring about massive violence, it is not as clear in the case of systematic attacks. However, even systematic attacks, which may be conceived as isolated acts, have to fulfil the contextual element.[81] Hence, even these have to be carried out as part of a "multiple commission of acts".[82] Therefore, both

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78 This was the position of the *ad hoc* Tribunals. See ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, 19 April 2004, IT-98-33-A, paras. 8–9 (http://www.legal-tools.org/doc/86a108/); ICTY, *Prosecutor v. Radoslav Brdjanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36-T, paras. 700–703 (http://www.legal-tools.org/doc/4c3228/); International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Bagosora et al.*, Trial Chamber I, Judgment and Sentence, 18 December 2008, ICTR-98-41-T, para. 2115 (http://www.legal-tools.org/doc/6d9b0a/); ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber, Judgment, 7 July 2006, ICTR-2001-64-A, para. 44 (http://www.legal- tools.org/doc/aa51a3/).

79 Rome Statute, Article 7, see *supra* note 20.

80 Rome Statute, Article 7(2)(a), see *supra* note 20.

81 Ruto, Kosgey and Sang Decision, paras. 179, 210, see *supra* note 39. It is understood as systematic that the attack is planned, directed or organised, as opposed to spontaneous acts.

82 Katanga and Ngudjolo Decision, para. 397, see *supra* note 47.

attacks imply a multiplicity of victims,[83] which shows the mass violence character of these crimes.

It is important to explain the case of torture and enforced disappearance which are considered international crimes but can be committed without any context according to the treaties that prohibit these crimes.[84] These treaties are not aimed at international tribunals. The investigation, prosecution and sanction are to be carried out by national authorities.[85] Torture and enforced disappearance become crimes against humanity only when they are perpetrated in a context of mass violence.

The term 'civilian population' can further corroborate this argument. There are many efforts to distinguish the civilian population from the military population, as part of the contextual element of crimes against humanity.[86] However, a different reading confirms the principle of mass violence. The word 'population' implies that the attack cannot be limited in its scope.[87] Once again, we must speak of a considerable number of victims. Even the ICC has used terms like "humanitarian catastrophe" to establish the scope of the attack.[88] This does not happen when the acts are isolated. The civilian population is another element that confirms that crimes against humanity are committed in the context of mass violence.

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83 Katanga and Ngudjolo Decision, para. 398, see *supra* note 47.

84 See, for a further study of legal interests protected by crimes against humanity, Dondé-Matute, 2012, pp. 97–109, see *supra* note 21.

85 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, Article 12 (http://www.leg al-tools.org/doc/713f11/); International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entry into force 23 December 2010, Article 12 (http://www.legal-tools.org/doc/0d0674/); Inter-American Convention to Prevent and Punish Torture, adopted 9 December 1985, entry into force 28 February 1987, Article 8 (http://www.legal-tools.org/doc/56bf3b/); Inter-American Convention on Forced Disappearance of Persons, adopted 9 June 1994, entry into force 28 March 1996, Article 1 (http://www.legal-tools.org/doc/7c67e0/).

86 Katanga Judgment, para. 1102, see *supra* note 69; Bemba Decision, para. 78, see *supra* note 46; ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, 29 July 2004, IT-95-14-A, para. 110–113 (http://www.legal-tools.org/doc/88d8e6/).

87 Bemba Decision, para. 77, see *supra* note 46.

88 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 246 (http://www.legal- tools.org/doc/63028f/).

War crimes are the clearest example of the mass violence principle, given the fact that it can only be committed in the context of an armed conflict, whether international or non-international. An armed conflict is the prototypical case of mass violence.

Furthermore, the Rome Statute states that situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence of other acts of a similar nature are not an armed conflict.[89] This shows that there must be a minimum degree of intensity in the use of force, namely, a minimum threshold of mass violence in order to talk about armed conflict.

The crime of aggression involves the closest link with the contexts indicated in the preamble. In United Nations General Assembly Resolution 3314 (XXIX) of 1974, which is the basis for the definition of the crime of aggression in the Rome Statute, it is stated that it seeks to contribute to the "prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace […]".

Likewise, Article 8*bis* of the Rome Statute limits the acts of aggression to those against "the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".

Actions such as bombing or use of arms against a State do not constitute the crime of aggression if they lack enough intensity to endanger, undermine or damage the State as mentioned in the *chapeau*. This establishes a threshold that proves that the violence exercised by one State against another must be of a great scale and, at a minimum, equivalent to a context of massive violence.[90]

The conclusion reached is that international criminal responsibility can only be comprehended in a group context. On the other hand, the sheer magnitude of the crimes that are relevant to international criminal law can only be achieved in cases of mass violence. If mass violence is

89 Rome Statute, Article 8(2)(d) and (f), see *supra* note 20.

90 Giovanni Distefano, "Aggression, Self-Defence and the Legitimate Use for Force", in Andrew Clapham and Paola Gaeta (eds.) *The Oxford Handbook of International Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 550–551 (UNGA Resolution 3314 (XXIX) establishes thresholds of gravity, although it is possible to take joint incidents to establish such a threshold).

absent, then international criminal law is not applicable. Perhaps some of these crimes may be adjudicated nationally, but they are not relevant to international jurisdictions. This is why it can be considered a principle of international criminal law. Only groups, not individuals acting alone, can achieve this.

5.8. Conclusion

International criminal responsibility is a principle of international criminal law, which has the added characteristic of being a founding principle. Its first features can be found in the distinction between criminal responsibility and State responsibility. This principle is international since it derives from the protection of international interests, based on the international legal system. These are the formal and material elements of international criminal responsibility.

International criminal responsibility is based on a mental element, which is not required for State responsibility, but there is enough evidence to reach the conclusion that, culpability, understood as the need to make a moral choice (*blameworthiness*) is also part of this principle.

This was expressly mentioned in the *Tadić* appeals decision and can be inferred from the Rome Statute and the Elements of Crime. In this study, it has been shown that there are a number of Rome Statute's provisions that support this assessment. Culpability can be understood as the individual liability[91] for a conduct[92] committed with a minimal mental element[93] which must allow the person to make a moral choice.[94] Taken together, with the principle of legality and the guidance of the case law of the Inter-American Court of Human Rights, we can reach the conclusion that there is a recognition of culpability as understood in the minimal criminal law theory in the way international criminal responsibility is understood in the Rome Statute.

In the last section, it was shown, by way of example, that there are at least two principles of international criminal law which derive from

91 Rome Statute, Article 25(1), see *supra* note 20.

92 Rome Statute, Article 22(1), see *supra* note 20.

93 Rome Statute, Articles 23(3)(d) and 30(1), see *supra* note 20.

94 Rome Statute, Article 30(2), see *supra* note 20; ICC, Elements of Crimes, general introduction, paragraph 4, see *supra* note 77.

international criminal responsibility. This means that this principle is no ordinary general principle, but that it is the basis of other principles or at the very least from which basic characteristics of international criminal law derive.

Finally, we can suggest a definition of international criminal responsibility as a founding principle of international criminal law as "the possibility to punish individuals for violations of international law (understood both formally and materially), with the elements of a conduct (*actus reus*) and committed with intent (*mens rea*) and the possibility of moral choice; within a group context".

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