ARTICLES

Remarks on the General Part of International Criminal Law

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Abstract

After decades of little reflection on the General Part of International Criminal Law ('ICL'), the practice of the Ad Hoc Tribunals and Part III of the ICC Statute both offer a unique opportunity and create a necessity to give more thought to the rules of attribution for international crimes. Indeed, the aim of further research must be to develop a more refined system of attribution. This is especially important in ICL, since it is primarily concerned with high level perpetrators who rarely commit the crimes themselves but use mid- or low-level perpetrators to execute their criminal plans. While ICL 'in action' is recognized today as primarily criminal law, the rules of attribution are still underdeveloped. Some rules developed by the case law even violate, when applied in their extreme form, fundamental principles of criminal law. Identifying and applying these principles, specifically the principles of legality and culpability, will be the first step in constructing a more legitimate system of attribution.

1. The Rise of the General Part

The General Part (hereinafter 'GP') — also known as the 'general principles' in common law — was *not particularly important* in International Criminal Law (ICL) in the days of the Nuremberg and Tokyo judgments. This situation did not really change until the establishment of the Preparatory Committee for the International Criminal Court (ICC) and the first cases against middle or high ranking accused before the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). Until the emergence of these new tribunals, ICL was applied with only

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a modestly sophisticated system of attribution or imputation (*Zurechnung*) of criminal responsibility. It was sufficient to hold that A was responsible for a certain criminal result X because he causally contributed to this result one way or another. The central task for the court was to prove the crime 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 — were only of secondary interest.

The reasons for privileging procedure and crimes over general principles are complex. I submit two possible *explanations*.

First, the creation of ICL was, and still is, predominantly the responsibility of politicians, diplomats and, in the best case scenario, (public) international lawyers. The international negotiations on the ICL instruments, including the ICC Statute, leave little room, if any, for criminal law considerations, not to mention more profound and fundamental reflections of criminal law doctrine.

Secondly, the application of ICL was, after all, an American invention. Indeed, were it not for the United States and its principled decision to bring Nazi and Japanese war criminals to justice, Nuremberg and Tokyo would not have come into existence and, consequently, modern international criminal justice as we know it could not have been constructed on this precedent. There was, however, a negative side effect to the American dominance as regards the law applied by these international criminal tribunals. These tribunals applied US criminal law, which takes a rather pragmatic and less systematic or principled approach to the underlying questions of criminal attribution. The Model Penal Code, for example, was the first systematic approach to the GP in the Anglo-American world, and it was only published by the American Law Institute in 1962.[1] As to doctrine, George Fletcher's *Rethinking Criminal Law*, the first American work on criminal law from a systematic and comparative perspective, was only published in 1978. Thus, it is fair to say that ICL was not imbued with a systematic and rational criminal law approach to the atrocities of the Second World War. 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 for a GP is generally recognized.[2] It finds its most advanced expression in Part III

1 See http://www.ali.org (visited 7 May 2006). Good introduction by M.D. Dubber, *Criminal Law: Model Penal Code* (NY: Foundation Press, 2002), at 1 *et seq.*

2 A. Eser, 'The Need for a General Part', in M.C. Bassiouni, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (Toulouse: Edition Erès, 1993), 43 *et seq.*; *ibid.*, 'Funktionen, Methoden und Grenzen der Strafrechtsvergleichung', in H.-J. Albrecht et al., *Festschrift für G. Kaiser* (Berlin: Duncker und Humblot, 1998), 1514–1515; O. Lagodny, 'Legitimation und Bedeutung des Internationalen Strafgerichtshofs', 113 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* (2001) 815–816; M.C. Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnat. Publ., 2003), at 265; F. Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', 1 *Journal of International Criminal Justice (JICJ)* (2003), at 26–27.

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of the ICC Statute. Certainly, the GP of ICL is still a 'work in progress'[3] but two prerequisites have clearly emerged. First, ICL must be based on comparative criminal law and not on one legal tradition alone. It was precisely for this reason that the ICC drafters avoided the use of 'catch words' that are synonymous with the concepts of a particular legal system or tradition (e.g. the term 'defences'). Second, an international GP must be comprehensible and accessible not only to those limited experts from a specific legal tradition, but also to lawyers from all legal traditions.[4] In sum, the universal acceptance of a GP of ICL is dependent on its openness towards foreign ('strange') criminal law and 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. Clearly, going beyond Part III of the ICC Statute, these sources refer to national law — either as general principles of (comparative) law per Article 38(1)(c) of the International Court of Justice Statute or the national law of the state, which has jurisdiction per Article 21(3) of the 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) of the 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* that extends beyond the principles[5] and thus it is difficult to develop a GP of criminal law for Europe.[6]

2. Attribution in ICL

Before addressing the concept of crime in ICL (as discussed in Part 3 subsequently) and the fundamental principles of criminal law (as discussed in Part 4 subsequently) more specifically, it is necessary to first give some thought to the *particularities* of attribution in ICL. There are two reasons why the attribution of a given criminal result to the conduct of a given person requires a different

3 See also G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 91 marginal number (mn) 270; M.C. Bassiouni, *Crimes against Humanity* (The Hague: Kluwer Law International, 1999), at 446.

4 Cf. N. Jareborg, 'Some Comments and Remarks on the General Part of Professor Bassiouni's Draft International Criminal Code (1980)', 52 *RIDP* (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'.

5 Cf. M. Donini, 'Una nueva edad media penal?', in J.M. Terradillos Basoco and M. Acale Sánchez (eds), *Temas de Derecho penal económico* (Madrid: Trotta, 2004) 197–217, at 209.

6 See K. Ambos, 'Is the development of a common substantive criminal law for Europe possible?' 12 *Maastricht Journal of European and Comparative Law* (2005) 173.

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process under ICL than under national law. On the one hand, ICL, as aforereferenced, is based on different legal traditions. On the other hand, and more specifically, international crimes (genocide, crimes against humanity and war crimes) occur in a certain collective context of commission,[7] they thus require — apart from the individual (sub-) crimes or acts (*Einzeltaten*) — an additional *international or contextual element* (*Gesamttat*)[8] targeting a certain group with the corresponding intent to destroy (genocide), a systematic or widespread commission (crimes against humanity) or an (international or non-international) armed conflict (war crimes).

This additional 'context' element complements the traditional *individual* attribution. In other words, to establish these core crimes, ICL requires the attribution to a person (by way of a relationship between the agent and the criminal result) along with an added *collective* element — the attribution to a (criminal) organization which is often, but not always, the state. From this perspective, one may distinguish two models of attribution: on the one hand, a *systemic* — not only individualistic — *model*;[9] on the other hand, a kind of *double attribution*[10] model whereby the individual and collective/systemic components (individual and collective attribution) do not operate in a parallel sphere but are mutually interrelated. What is required is a *double perspective*: First, the collective perspective focuses on the *context element* belonging to all participants; that is, the supra-individual objective criminal context or situation. Secondly, this context may be attributed *as a* whole or in part(s) to

7 Fundamentally H. Jäger, *Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt* (Frankfurt a.M.: Suhrkamp, 1989); see also G.P. Fletcher, 'The Storrs Lectures: Liberal and Romantics at War: The Problem of Collective Guilt', 111 *Yale Law Journal* (2002) 1499, at 1514 *et seq.* invoking the collective nature of international crimes for his broader argument of the possibility of collective guilt which, however, as argued elsewhere (*id.*, 'Collective Guilt and Collective Punishment', 5 *Theoretical Inquiries in Law* [2004] 163) does not necessarily entail (collective) punishment. See also K. Ambos, *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht* (München: Beck, 2006), § 7, mn 11 *et seq.*

8 On the terminology 'Einzeltat' and 'Gesamttat' originally G. Werle, 'Völkerstrafrecht und geltendes deutsches Strafrecht', *Juristenzeitung* ('*JZ*') (2000) 757 referring to K. Marxen, 'Beteiligung an schwerem systematischem Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre', in K. Lüderssen, *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?* (Baden-Baden: Nomos, 1998), 231–232; conc. S. Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes* (Berlin: Berliner Wissenschaftsverlag, 2004), at 115.

9 See already Marxen, *supra* note 8, at 228, 231–232; also J. Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht', 114 *ZStW* (2002), 409–510, 420 *et seq.* Crit. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003), 345–346, 351 *et seq.*; G. Arzt, 'Der Internationale Strafgerichtshof und die formelle Wahrheit', in J. Arnold et al., *Festschrift für Albin Eser* (München: C.H. Beck, 2005), 691, at 698; from a criminological perspective F. Neubacher, *Kriminologische Grundlagen der Internationalen Strafgerichtsbarkeit* (Tübingen: Mohr Siebeck, 2005), 442–443.

10 J. Schlösser, *Mittelbare individuelle Verantwortlichkeit im Völkerstrafrecht* (Berlin: Berliner Wissenschaftsverlag, 2004), 30 *et seq.*

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the *individual participants* by recourse to the concrete rules of attribution that are yet to be established.

At this stage, one arrives at a classical criminal law operation in ICL, namely the *individualization of responsibility* with regard to a specific offending situation (the crime scene) followed by the determination of the role, function, position or status of the participants/accused in the given criminal organization and the quality and weight of their contribution to the criminal context or collective/group crime. Both aspects — status in the organization and concrete contribution — determine the legal qualification of participation. It is clear that such a model of attribution targets primarily the leadership level of the given organization since only the leaders are able to control and dominate the collective action with full responsibility.[11]

In turn, the collective context and its domination by those few leaders, calls for the mitigation of punishment for the numerous mid- or low-level executors.[12] From the domination of the leaders follows the particular importance of a model of attribution that highlights the *control or supervision* exercised by the leaders over lower direct participants — so-called normativist or supervisionist model of attribution.[13] This model is represented by the command responsibility doctrine and the (German) doctrine of control or domination by means of a (criminal) organization (*Organisationsherrschaftslehre*). This recognition of 'indirect perpetration' or 'perpetration by means' has been entrenched, in principle, in Article 25(3)(a) the ICC Statute. In contrast, the joint criminal enterprise doctrine can be viewed as part of an institutional-participative[14] or systemic model of attribution.[15]

3. Towards a Concept of Crime in ICL

If, on the basis of international case law and codified rules of ICL, one tries to develop the structure or concept of the crime in ICL (*Verbrechensaufbau, teoría del delito, teoria del reato*), the result is a *twofold system* along the lines of

11 See Schlösser, *supra* note 10, 33 *et seq.*

12 The argument quite naturally flows from the distribution of responsibility between the leaders and the minor participants but it has only recently been developed with a view to collective guilt by Fletcher, *supra* note 7, at 1537 *et seq.* (1543–1544), 1572.

13 On a 'supervisionist' and (five) other models of attribution see H. Jung,'Begründung, Abbruch und Modifikation der Zurechnung beim Verhalten mehrerer', in A. Eser et al. (eds), *Einzelverantwortung und Mitverantwortung im Strafrecht* (Freiburg im Breisgau: Ed. Iuscrim, 1998), 180 *et seq.* (182–183); see also G. Heine, 'Einführung', in A. Eser and K. Yamanaka, *Einflüsse deutschen Strafrechts auf Polen und Japan* (Baden-Baden: Nomos, 2001), at 101. On a normativist and (eleven) other models of attribution Vogel, *supra* note 9, 406 *et seq.*, 419–420.

14 See Jung, *supra* note 13, 183 *et seq.*

15 Vogel, *supra* note 9, 420 *et seq.*

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the Anglo-American *actus reus/mens rea* versus defences dichotomy.[16] This two-fold structure ignores the dominant system in civil law based on the Germanic tradition at least in two respects. First, it does not distinguish between the subjective/mental element of the offence in the sense of a *Tatvorsatz* (*dolus*) and the blameworthiness of the act belonging to a separate and autonomous (third) level of culpability (*Schuld*). Second, the structure does not distinguish between wrongfulness/justification and culpability/excuse as the two- or threefold structure of an offence as applied in the Germanic systems.[17]

Perhaps not surprisingly, I prefer the continental system's approach. This is not the case for reasons of patriotism, lack of critical capacity towards one's own system or similar irrational factors. In fact, I believe that the Germanic doctrines on the European continent (apart from Germany, especially Greece, Italy, Poland, Portugal, Spain, all with more or less autonomy) suffer, to some degree, from '*Überdogmatisierung*' — that is to say, from a doctrinal tendency that exaggerates the theoretical construction, that theorizes excessively. As such, these theories are fairly distant from the practice of the respective criminal justice systems. Notwithstanding, I am convinced that a more sophisticated system of criminal attribution offers substantial advantages in terms of fairness and justice.

16 I. Offence/individual responsibility/attribution
- 1. Objective requirements (*actus reus*)
  - (a) Participation
    - (1) (Direct/immediate) perpetration
    - (2) Co-perpetration, including jce (I, II)
    - (3) Indirect perpetration/p. by means, especially control by virtue of a hierarchical organization
    - (4) Complicity: Inducement/instigation/incitement and aiding/abetting
  - (b) Expansion/extensions of responsibility/attribution
    - (1) Command/superior responsibility
    - (2) Attempt
    - (3) Other contribution to collective/group crime, including conspiracy (sic!), jce III
- 2. Subjective requirements (*mens rea*)

II. Defences/grounds excluding responsibility
- 1. Substantive ('material') grounds
  - (a) Complete exclusion of responsibility (culpability) because of mental or other defect (intoxication!)
  - (b) Self defence
  - (c) Superior order
  - (d) Necessity/duress, especially threat to life and limb of perpetrator ('Nötigungsnotstand')
  - (e) Mistake of fact/of law
- 2. Other ('procedural') grounds
  - (a) Immunities
  - (b) Amnesties, pardons, others

See for a comprehensive analysis of the case law and the codifications K. Ambos, *Der Allgemeine Teil* (hereinafter 'AT') *des Völkerstrafrechts* (Berlin: Duncker und Humblot, reprint 2004), 1st and 2nd part (summarizing at 70–71, 515); see also H. Satzger, *Internationales und europäisches Strafrecht* (Baden-Baden: Nomos, 2005), § 14 mn 17.

17 A twofold structure distinguishes between wrongfulness (*Unrecht*) and culpability (*Schuld*); a threefold one between the objective and subjective elements of the offence (*actus reus/mens rea* = *Tatbestandsmäßigkeit*), wrongfulness (*Unrecht*) and culpability (*Schuld*).

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A good example in this respect is the *distinction between justification and excuse*. Ignoring this distinction leads to great inflexibility in borderline cases where a prevailing interest based upon a balancing of the interests at stake (that is, the harm to be avoided and the harm caused) cannot be easily determined. Thus, it becomes difficult to decide whether the act in question was right or wrong with regard to the abstract legal order. In fact, this decision is transformed into a pure value judgment. The classic situation is that of the so-called survival cases in which one or a few persons only can survive at the cost of taking another's life. Such a case, albeit in a modified form, came before the ICTY in the *Erdemović* proceedings. In that case, the accused was allegedly threatened with his own death and that of his family if he refused to kill innocent civilians. The issue before the court was whether, because of this threat, Erdemović should be exempted from criminal responsibility for his killings. While the Trial Chamber recognized duress as a defence under certain strict conditions,[18] the Appeals Chamber rejected it with a slight three to two majority.[19] Erdemović was finally sentenced to 5 years imprisonment by the Trial Chamber which at least considered the duress situation as a mitigating factor.[20]

As I have argued in more detail elsewhere,[21] a correct answer to the question of exclusion of responsibility in such cases can only be achieved on the basis of the distinction between justification and excuse.[22] Specifically, an act (or omission) that leads to the death of another innocent person can never be *justified* — it always constitutes a wrong. However, the same act may be *excused* — such that it may not be blamed on the perpetrator because of the enormous pressure applied upon them in a particular context. In fact, Article 31(1)(d) of the ICC Statute follows this view leaving open the possibility of an exemption from criminal responsibility, even in this

18 Sentencing Judgment, *Erdemović* (IT-96-22-T), Trial Chamber, 29 November 1996, §§ 16–20.

19 Judgment, *Erdemović* (IT-96-22-A), Appeal Chamber, 7 October 1997, § 19. The majority view was expressed in the opinions of Judges McDonald and Vohrah, Judge Li consenting; the minority view in the opinions of Judges Cassese and Stephen.

20 Sentencing Judgment, *Erdemović* (IT-96-22-T*bis*), Trial Chamber II, 5 March 1998, §§ 8, 23; reprinted in 37 *ILM* (1998) 1182 *et seq.*

21 K. Ambos, 'Other Grounds for Excluding Criminal Responsibility', in A. Cassese, P. Gaeta, J. Jones (eds), *The Rome Statute of the ICC: A Commentary*, Vol. I (Oxford: OUP, 2002), at 1042 *et seq.*

22 On the general importance of this distinction see A. Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime', in A. Eser and G.P. Fletcher (eds), *Justification and Excuse. Comparative Perspectives*, Vol. I (Freiburg i.Br.: Max-Planck-Institute, 1987), at 17; *id.*, in R. Lahti and K. Nuotio (eds), *Criminal Law Theory in Transition. Finnish and Comparative Perspectives* (Helsinki: Finish Lawyers' Publisher, 1992), at 303. See also G.P. Fletcher, *Rethinking Criminal Law (*Boston: Little, Brown, 1978), 454 *et seq.*, 759 *et seq.*; *id.*, *Basic Concepts of Criminal Law* (NY, Oxford: OUP, 1998), at 74 *et seq.*, 80–81, 83 *et seq.* and the various international conferences on the issue organized by the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany: A. Eser and G.P. Fletcher, *Justification and Excuse. Comparative Perspectives*, Vol. II (Freiburg i. Br.: Max-Planck-Institute., 1988); A. Eser and W. Perron (eds), *Rechtfertigung und Entschuldigung*, Vol. III (Freiburg i. Br.: Max-Planck- Institute., 1991); A. Eser and H. Nishihara (eds), *Rechtfertigung und Entschuldigung*, Vol. IV (Freiburg i. Br.: Max-Planck-Institute., 1995).

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extreme case. One may even argue that this provision implicitly recognizes the distinction between justification and excuse. This provision contains an element of justification in the form of a balancing of interests — that is, the 'threat of imminent death or of continuing or imminent serious bodily harm' versus the harm caused by the threatened person. This provision also appears to excuse the accused even in the extreme case of the death of a third person (normally the victim).

A further argument in favour of a more sophisticated system of attribution is that there are certain 'inventions', even in law, which are so fundamental that they cannot be ignored. Such an invention is the *distinction between the mental element of an offence (*dolus, Tatvorsatz*) and culpa (*Schuld*)*.[23] In short, the distinction traces its roots to the finalist school of thought (above all represented by the German scholar Hans Welzel).[24] This school, which asserts that human *conduct* is always *purpose-orientated*, prevailed over the classical and neo-classical distinction between the objective and subjective aspect (external and internal side) of an offence (still expressed today in common law by the classical Latin terms *actus reus* and *mens rea*).[25] It follows that a human act is not only an objective cause for a given effect or result but that it determines the result achieved and, as such, possesses a mental element, i.e. the wish, desire, knowledge, etc. that the causal act produces a certain result. In this sense, the finalist act is 'seeing' while the pure causal act is 'blind'.[26] If it were otherwise, it would be a futile exercise to try to command or control human conduct by normative rules. Indeed, in Welzel's understanding, the human ability to determine one's conduct is the necessary prerequisite of all legal rules.[27] This approach adheres, in fact, to Austin's concept of laws or rules as commands.[28]

The finalist doctrine goes hand in hand with the recognition of a *normative concept of culpability* — where *culpa* is no longer (only) the intent to cause a certain result, but the blameworthiness of the perpetrator's conduct. If A kills B, he may have intended this result since he knew — cognitive element — that firing a bullet into B's heart would lead to his death and A may have also wanted — volitive element — this end result. It is quite another question, however, as to whether B's death can be blamed on A if, for example, A acted under the influence of drugs or was suffering from a mental illness.

23 This distinction is the result of the long and complex evolution of the theory of crime, a detailed explanation of which is beyond the scope of this article. However, it is worth noting that one of the few common law lawyers who makes this distinction is Bassiouni, *supra* note 3, at 411.

24 Cf. H. Welzel, *Das deutsche Strafrecht* (11th edn, Berlin: de Gruyter 1969), 33 *et seq.*

25 '[*A*]*ctus non facit reum nisi mens sit rea*'. In the Roman tradition, this principle goes back to canon law [cf. W. Gropp, *Strafrecht AT* (3rd edn, Berlin: Springer, 2005), 108]. Common law scholars quote in this context Judge Edward Coke (1552–1634), see J. Vogel, 'Elemente der Straftat: Bemerkungen zur französischen Straftatlehre und zur Straftatlehre des common law' 145 *Goltdammer's Archiv für Strafrecht* (*GA*) (1998), 136.

26 Welzel, *supra* note 24, at 33.

27 See F. Loos, 'Hans Welzel (1904–1977)', *Juristenzeitung* 2004, 1116 with fn. 22.

28 J. Austin, *Lectures on Jurisprudence* (13th edn, London: Murray, 1920), 11.

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This distinction between (subjective) responsibility and culpability also has consequences with regard to the relevance of a *mistake or error* and, above all, for the further distinction between mistake of fact and mistake of law. In reality, the lack of knowledge of the law constitutes a mistake of law and such a mistake leaves intent as part of responsibility (the *actus reus*) untouched. If a soldier kills an enemy '*hors de combat*' and he does not know this is a war crime, the soldier certainly acts with intent, knowing the result of his act and wanting this result. Another question, however, is whether the soldier can be held culpable given his ignorance of the law. The traditional *error* or *ignorantia iuris doctrine*, still dominant in the common law system, would answer in the affirmative since the doctrine is based on a *presumption of knowledge* of the law. Obviously, this is a fiction; for not all crimes are '*mala in se*' and, as such, known to everybody. In fact, the growing amount of special criminal laws produces more and more '*mala prohibita*'. The same holds true for ICL, at least as far as war crimes are concerned. Things are more complicated even if one includes grounds excluding criminal responsibility ('*defences*') in the analysis, since the scope and the existence of defences are often unknown to the average citizen.

Take, for example, the highly practical case of a soldier who kills a civilian on the basis of an order, believing the order's legality. The soldier acts with intent and, consequently, commits the war crime of killing civilians in both the objective (*actus reus*) and subjective (*mens rea*) sense. Another question, however, is whether the soldier's error regarding the validity of the order, i.e. an *error iuris*, has an exonerating effect, thereby negating his culpability. Article 32(2) of the ICC Statute provides — in this respect — for an exception from its strict *error iuris* rule with regard to Article 33(1)(b) of the ICC Statute as far as war crimes are concerned (Article 32(2) *e contrario*). As a consequence, if the soldier is not aware of the unlawfulness of the order and the order was not manifestly unlawful, such a mistake will be considered relevant (as negating his or her *mens rea*). While such a privilege for subordinates can only be explained with the balance of power and sense of compromise dominating the negotiations surrounding the ICC Statute, a *generally* more flexible approach with regard to mistakes of law certainly finds a strong argument in the growing complexity of (international) criminal law. As a result, a criterion of *avoidability* or even *reasonableness* could make practical and just solutions possible on a case by case basis.[29] Article 32 of the ICC Statute follows, however, in essence, the *error iuris* doctrine, which excludes any mistake of law as

29 See Ambos, *supra* note 16, at 822 *et seq.*; *ibid.*, *La Parte General del Derecho Penal Internacional* (1st reprint, Bogotá: Temis, 2006), at 449 *et seq.* For a flexible approach with various examples and taking into account the Elements of Crime (UN Doc. PCNICC/2000/1/Add. 2), see also C. Kreß, 'Römisches Statut des Internationalen Strafgerichtshofs', in H. Grützner and P.-G. Pötz (eds), *Internationaler Rechtshilfeverkehr in Strafsachen*, Vol. 4 (2nd edn, Heidelberg: v. Decker, loose-leaf 56. set, 2002), preliminary remarks III 26, mn. 56, at 52.

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relevant except where it negates the element or where it refers to a superior order.

Clearly, while such fundamental systematic questions should not lead to a (new) common-/civil law divide, they should lead to adjusting the rules of Part III of the ICC Statute to the *modern developments of comparative criminal law*. In fact, this process of a 'dogmatization' of the GP of ICL is currently navigating a complex terrain of conflicting sources and interests that all deserve due attention. International criminal *lex lata* includes apparently correct and rational principles and doctrines of criminal law applicable to ICL as well as, political interests channelled through diplomatic negotiations.[30] This delicate mixture sometimes results in compromise solutions that are not very satisfactory from a purely doctrinal standpoint. Nevertheless, compromise is the price for a legal order that pretends to be universally applicable and accepted and thus cannot delve too deeply into the profound waters of a (German, Italian or Spanish) doctrine that may be, at times, excessively theoretical and abstract (*überdogmatisiert*).

4. The Recognition of Fundamental Principles of Criminal Law

It is more or less settled today that ICL is, above all, criminal law. As such, it must *respect and ensure* universal human rights treaties and the fundamental principles of criminal law recognized in all democratic criminal justice systems as a result of revolutions and reforms brought about by the enlightenment. Although ICL deals with the most serious crimes, the corresponding punishment sought must not come at the price of sacrificing the fundamental human rights of the suspects or accused. The cost of such a sacrifice would result in the erosion of the legitimacy of ICL and the tribunals that apply it.[31] For this discussion, I will highlight in particular two principles that some scholars would consider the most fundamental: the principle of legality and the principle of culpability.

It can be said that *nullum crimen nulla poena* in ICL contains, as its basic components, the rules of *lex praevia* and *lex certa*.[32] As to *lex stricta*,

30 On the 'tension between consistency and consensus' during such negotiations, see Ch.I. Keitner, 'Crafting the International Criminal Court: Trails and Tribunals in Art. 98(2)', 6 *UCLA Journal of International Law and Foreign Affairs* (2001) 217, at 219–220, 224, 262.

31 See in this respect the detailed criticism of the human rights case law and movement in Latin America by D. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', *Nueva Doctrina Penal* (Buenos Aires) 2005 A, 73 *et seq.*

32 See also A. Ashworth, *Principles of Criminal Law* (5th edn, Oxford: OUP, 2006), at 68: 'governed by rules which are fixed, knowable, and certain'; also A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd edn, Oxford: Hart, 2004), at 37. The *lex certa* rule in US law consists of the Void-for-Vagueness Doctrine of the US Supreme Court, see W.R. LaFave, *Criminal Law* (4th edn, St Paul, MN: Thomson, West, 2003), at 103: 'Undue vagueness in the statute will

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the situation is less clear. It may be considered as the equivalent of the rule of strict construction or interpretation,[33] as developed in English law.[34] Accordingly, judges are required to interpret the criminal law strictly, favouring the defendant in case of doubt. Yet, if one understands the *lex stricta* requirement only in the sense of the prohibition of analogy in *malam partem*, it is difficult to apply it in (traditional) common law jurisdictions since there the recourse to analogy is not prohibited but must rather be seen as part of the discovery process of judicial law-making[35] — as far as judicial law-making is still accepted (as in the legal systems of the United Kingdom).

Articles 22–24 of the ICC Statute go beyond these developments since they provide for a comprehensive concept of *nullum crimen*, including all four of its elements generally recognized in civil law jurisdictions: *lex praevia*, *lex certa*, *lex stricta* and *lex scripta*. Nevertheless, the ICC Statute still presents certain problems. For example, Article 7(1)(k) of the ICC Statute refers to 'other inhumane acts of a similar character', which is a classic example of punishment by analogy in contradiction to the *lex stricta* requirement under Article 22(2) of the ICC Statute.[36] The German solution to this problem, in the Code of ICL (*Völkerstrafgesetzbuch*),[37] was to create a crime of 'severe physical or mental harm' modelled according to the offence of grave injury of section 226 of the German Penal Code.

Questions also arise with regard to *lex certa* since various sub-crimes, especially the ones belonging to the category of war crimes, lack the necessary precision. A classic example of this is the war crime of 'widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' pursuant to Article 8(2)(b)(iv) of the ICC Statute. Even if one reduces the *lex certa* requirement to mere foreseeability, this legal definition of criminal conduct can hardly be considered certain since it relies heavily on value judgments ('clearly excessive', 'military advantage'). Further, the crime

result in it being held unconstitutional, whether the uncertainty goes to the persons within the scope of the statute, the conduct which is forbidden, or the punishment which may be imposed (*US v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed 823 (1948))'.

33 In this (broad) sense S. Dana, 'Reflections on the ICC Sentencing Provisions and the Rights of the Accused in light of the Nulla Poena Principle', in A.H. Klip et al. (eds), *Liber Amicorum et Amicarum voor Prof. mr. E. Prakken* (Deventer: Kluwer, 2004), 351 *et seq.*, at 352–353.

34 J. Hall, *General Principles of Criminal Law* (2nd edn, Indianapolis: Bobbs-Merill, 1960), at 38 *et seq.*; Ashworth, *supra* note 32, at 80–82.

35 See R. Haveman, 'The Principle of Legality', in R. Haveman et al. (eds), *Supranational Criminal Law: A System Sui Generis* (Antwerpern: Intersentia, 2003), at 47-8 with further references.

36 See also G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *JICJ* (2005), at 551.

37 *Bundesgesetzblatt* 2002 I at 2254; for translations of the text and motives, see http://jura.uni-goettingen.de/kambos/Forschung/laufende.Projekte.Translation.html (visited 27 May 2006).

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also hinges on an assessment of prospective events. On the other hand, the Statute contains *'blanket' norms* that make the punishability dependent on rules outside the Statute.[38]

As to the *lex scripta* requirement of Article 23 of the ICC Statute, the more fundamental question arises as to whether the ICC is allowed to invoke rules and principles that are not part of the ICC Statute and/or based on customary international law or general principles. Article 21 of the ICC Statute on applicable law seems to imply this (§§ 1(b) and (c)) but such an interpretation is difficult to reconcile with the clear wording of Article 23 of the ICC Statute. The reference to norms outside the Statute in favour of the accused, especially with respect to additional grounds excluding responsibility (Article 31(3) of the ICC Statute), does not present major problems in terms of fairness to the accused.[39] Yet, it is a totally different question as to whether the ICC could invoke norms outside the Statute to *create* or *increase* punishment. In addition to general considerations derived from the principle of legality, this would be incompatible with Article 23 of the ICC Statute.[40]

The second fundamental principle that also merits our consideration is that of *culpability*. Although this principle is not explicitly contained in the ICC Statute, it clearly follows from the applicable law, either as a principle and rule of international law within the meaning of Article 21(1)(b) of the Statute or as a general principle of law within the meaning of Article 21(1)(c) of the Statute. The International Military Tribunal at Nuremberg (IMT) already recognized this principle with its famous phrase that 'criminal guilt is personal, and mass punishments should be avoided'.[41] In the IMT's conception 'personal guilt' meant that the accused would be individually responsible in objective and subjective terms and that no defence would negate their responsibility. Similarly, the ICTY's Appeals Chamber recognized the principle of culpability in *Tadić*, stating that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'.[42] While this sounds reasonable, it seems like mere lip-service in light of the Ad Hoc Tribunals' expansion of responsibility in the field of participation, especially by the application of the command responsibility doctrine and the creation of the joint criminal enterprise doctrine.

With respect to the *command responsibility*, as I have tried to demonstrate elsewhere,[43] a very broad definition of liability for the superior as a direct

38 See e.g. Art. 7(1) (h) referring to 'grounds that are universally recognized as impermissible under international law'; see also on this point M. Catenacci, *'Legalità' e 'tipicità del reato' nello Statuto della Corte Penale Internazionale* (Milano: A. Giuffrè, 2003), at 80.

39 See also Fletcher and Ohlin, *supra* note 36, at 552.

40 Cf. Fletcher and Ohlin, *supra* note 36, at 555 *et seq.*; on the complex relationship between Arts 21 and 22 in this context see Catenacci, *supra* note 38, at 79 *et seq.*

41 International Military Tribunal, The Trial of the Major War Criminals, vol. 22, at 469.

42 See Judgment, *Tadić* (IT-94-1), Appeal Chamber, 15 July 1999, § 186 with further references.

43 See Ambos, 'Superior responsibility', in Cassese et al., *supra* note 21, at 832 *et seq.*; *id.*, *supra* note 16, at 666 *et seq.*; *id.*, *supra* note 29, at 295 *et seq.*

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perpetrator (principal) for the acts of third persons (the subordinates) is established by the Ad Hoc Tribunals and Article 28 of the Statute. In fact, a kind of vicarious liability (*responsabilité du fait d'autrui*) is created that comes very close to strict liability if one lowers the subjective threshold to a standard of mere negligence ('should have known') and infers the potential knowledge not from objective facts but mere presumptions ('constructive knowledge' in its worst form). This doctrine further puts liability for the failure of a superior to intervene in the commission of crimes on an equal footing with (accomplice) liability for not adequately supervising subordinates and not reporting their crimes. Finally, the doctrine fails to distinguish between preventive (supervision, timely intervention) and repressive (reporting the crimes) countermeasures on the superior's part. In sum, the superior's liability is so broad that some kind of limitation must be imposed in order to avoid a violation of the principle of culpability.

It is worth pointing out in this context, that the German *Völkerstrafgesetzbuch* distinguishes between liability as a perpetrator (principal) for the failure to prevent subordinates from committing crimes (Section 4) on the one hand, and accomplice liability for the (intentional or negligent) failure to properly supervise the subordinates (Section 13) and the failure to report crimes (Section 14) on the other.[44]

Last but not least, although it is conceptually possible to make a clear distinction between liability for ordering (an affirmative or direct act) and for superior responsibility (an omission), these forms of responsibility are not clearly distinguished in the case law of the Ad Hoc Tribunals. In fact, there is a tendency to use the superior responsibility doctrine (Articles 7(3) of the ICTY Statute and 6(3) of the ICTR Statute) as a kind of *default liability* for cases in which an affirmative or direct act (Articles 7(1) and 6(1)) cannot be proven.[45]

With respect to *joint criminal enterprise* (JCE), as I will set out in further detail in a forthcoming article for this journal,[46] this doctrine, on the one hand, conflicts with the *lex stricta* component (prohibition of analogy) of the *nullum crimen* principle since there is no explicit basis in the ICL instruments. While JCE I and II may be considered as co-perpetration and as such be included in Article 25(3)(a) ICC Statute — joint commission — the collective and conspiracy-like JCE III liability could not (even) be read into Article 25(3)(d) of the ICC Statute since this would mean bypassing the will of the drafters who rejected the conspiracy liability in the first place. On the other hand, JCE III also conflicts with the principle of *culpability* since it creates liability for *all* members of a criminal enterprise. Indeed, this doctrine assumes liability for those criminal acts by *some* members which were not agreed upon by

44 See for the text of these provisions in English, the web reference in *supra* note 37.

45 Cf. Ambos, *supra* note 43, 835–836; *id.*, *supra* note 16, at 670 *et seq.* (esp. 672).

46 K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', forthcoming in vol. 5, no. 1 (March 2007) of this *Journal*.

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all members *before* the actual commission of the act, but were, nonetheless, attributed to *all* of members on the basis of foreseeability. This foreseeability criterion introduces a standard which, by itself, is neither precise nor reliable. It is worth recalling in this context, that the IMT, on account of the principle of culpability, predicated the liability of a member of a criminal organization on their voluntary membership and awareness of the crimes committed by the organization.[47]

5. Conclusion

Before elaborating the *more specific rules of attribution* in ICL, first a consensus must be reached on the model of attribution in ICL (as discussed in Part 2 above), the concept of crime (as discussed in Part 3 above) and the applicable fundamental principles of criminal law (as discussed in Part 4 above). It is only once consensus is reached on these points that future research can begin to focus on the more specific issues of attribution, taking into account as its most important sources the existing case law and the general principles of criminal law in the major criminal justice systems. Such careful analysis will generate concrete rules that must then be harmonized with a view to creating a coherent system of attribution in ICL.

47 See Ambos, *supra* note 16, at 103–104 with further references; see also Bassiouni, *supra* note 3, at 385.

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