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ROUGH JUSTICE: ANATOMY AND INTERPRETATION IN THE EXCLUSION OF INDIVIDUAL CRIMINAL LIABILITY IN INTERNATIONAL CRIMINAL JUSTICE

JUSTICIA DURA: ANATOMÍA E INTERPRETACIÓN EN LA EXCLUSIÓN DE LA RESPONSABILIDAD PENAL INDIVIDUAL EN LA JUSTICIA PENAL INTERNACIONAL

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ABSTRACT

The present study aims to explore the relationship between the dogmatic conditions of the founding and the exclusion of international individual criminal responsibility. There are few cases in which an International Criminal Court has used previous international jurisprudence to establish a crime of conduct in international customary law, and in any case the importance of international judgments can not be underestimated as a general interpretative tool.

RESUMEN

El presente estudio tiene como objetivo explorar la relación entre las condiciones dogmáticas de la fundación y la exclusión de la responsabilidad penal individual internacional. Hay pocos casos en los que un tribunal penal internacional ha utilizado jurisprudencia internacional anterior para establecer un delito de conducta en el derecho

internacional consuetudinario, y en cualquier caso, la importancia de las sentencias internacionales no puede ser subestimada como una herramienta interpretativa general.

KEYWORDS

International criminal justice, ICC, ICTY, ICTR, SCSL, individual responsibility.

PALABRAS CLAVES

Justicia penal internacional, CPI, TPIY, ICTR, SCSL, responsabilidad individual

SUMMARY

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1.INTRODUCTION

The impact of politics in the field of international criminal law is clearly increased in relation to a national criminal system-as the former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Louise Arbour has rightly stated: "(…) there is no hope to promote the rule of law at international level if the most powerful international organization makes it subject to the validity of political feasibility (...)"[1]. It is right to observe, of course, that it has also chosen not to investigate in depth the allegations of crimes by NATO soldiers in Kosovo[2]-in which the sovereign state power ensures the prosecution of criminals[3]. In the self-evident view of criminal justice as a

[1]F. BENSOUDA, Looking back, looking ahead-reflections from the Office of the Deputy Prosecutor of the ICC, International Criminal Court, in Washington University Global Studies Law, 11 (3), 2012, pp. 442ss. And as we saw in praxis, in particular in the next cases: Prosecutor v. Bemba Gombo, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, para. 356, Prosecutor v. Bemba, ICC PT. Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, paras. 359ss; Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1011; Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-A-5, 1 December 2014. See for details: M. BERGSMO, C. WUI LING, P. PING (a cura di), Historical origins of international criminal law. Vol. 1-3, TOAEP, Brussels, 2014. F. BENSOUDA, Reflections from the International Criminal Court Prosecutor, in Case Western Journal of International Law, 44, 2012, pp. 506ss.

[2]F. MÉGRET, The politics of international criminal justice, in European Journal of International Law, 13 (4), 2002, pp. 1282ss. D. LIAKOPOULOS, Kritik an friedenserhaltenden/Peacekeeping Operationen und die Entwicklung des Konzepts der Souveränität im Völkerrecht, in International and European Union Legal Matters, 2011. D.LIAKOPOULOS, State-building of Kosovo. The role of European Union in Mediterranean zone, in University of La Verne Law Review, 31, 2009.

[3]H. ABTAHI, S.A. KOH, The emerging enforcement practice of the International Criminal Court, in Cornell International Law Journal, 45 (1), 2012, pp. 1ss. J.P.L. ACEVEDO, The legitimacy of international criminal

mechanism with specific and mapped boundaries, rigid principles and technical-institutional nature, a new law-based field is challenged, in which the principles of justice are transformed into a dialectical relationship with power of States Parties to international law[4]. The creation of international criminal courts is attributed, from a pragmatic point of view, to the desire of states to legitimize their objectives and to control the direction of the international legal order, under the (possibly) view that "the rules are not valid but the validity determines the rules"[5].

In view of the above considerations, it is for the interpreter of the law to study the dogmatic particularities and characteristics of relatively new international criminal law in a comparative light with the concepts and constructions known by national criminal jurisdiction[6]. The systematic and generally organized way in which international crimes are committed makes them different from crimes under national law and, if so, to what extent? In the end, international criminal law is a genuine expression of criminal law in the international environment or a legal pretext for using the mechanisms of international criminal justice to legitimize repression by powerful men[7].

Based on the empirical observation that in more than half a century of modern history and litigation by various international criminal tribunals, the allegations made by

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Tribunals, in Nordic Journal of Human Rights, 35 (1), 2017, pp. 164ss. G. ACQUAVIVA, War crimes at the ICTY: Jurisdictional and substantive issues, in R. BELLELLI (a cura di), International criminal justice. Law and practice from the Rome Statute to its review, Ashgate publishing, Farnham, 2010, pp. 299ss. H. AHLBRECHT, M. BÖHM, R. ESSER, Internationales Strafrecht, C.F. Müller, Heidelberg, 2018. K. AINLEY, The International Criminal Court on trial, in Cambridge Review of International Affairs, 31 (1), 2011. M. AKSENOVA, Complicity in international criminal law, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 189ss. B.B. JIA, The differing concepts of war crimes and crimes against humanity in international criminal law, in G.S. GOODWIN-GILL, S. TALMON, The reality of international law. Essays in Honour of Ian Brownlie, Oxford University Press, Oxford, 2012.

[4]As a phenomenon which: “anchored in power yet simultaneously capable of transcending it”) according to F. MÉGRET, The politics of international criminal justice, op. cit., pp. 1264.

[5]D. LIAKOPOULOS, Responsabilità internazionale penale individuale e statale, in Rivista Strumentario Avvocati. Rivista di diritto e procedura penale, 2009. L. ALIÑÁN, M. OLLÉ SESÉ, Estudios sobre derecho penal internacional, ed. M. Pons, Madrid, 2018.

[6]M. AKSENOVA, Symbolism as a constraint on international criminal law, in Leiden Journal of International Law, 30 (3), 2017, pp. 478ss. C. ALFONSO, El crimen de reclutamiento y utilizacion de ninos soldados en el primero fallo de la Corte Penal Internacional, in K. AMBOS, E. MALARINO, C. STEINER (a cura di), Analisis de la Primera Sentencia de la Corte Penal Internacional. El Caso Lubanga, Konrad Adenauer Stiftung, Berlin, 2014, pp. 157ss. K. AMBOS, Internationales Strafrecht, C.H. Beck, 2018. K. AMBOS, I. STEGMILLER, Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?, in Crime, Law and Social Change, 60, 2013.

[7]D. HOILE, Justice denied: The reality of the international criminal Court, in The Africa Research Center, 2014, pp. 25-34.

the defendants for lifting their criminal responsibility either in the form of justification of their act or in the form of their forgiveness for her[8], have almost never been accepted on the merits, and in many cases have been rejected at first sight without even being discussed[9].

Although international criminal law is still far from the elaboration of a general theory of crime, from the analysis of the texts governing the activities of the various international jurisdictions (special and permanent) and the jurisprudence emerges the adoption of a bipartite conception of crime, inspired by the dichotomy of Anglo-Saxon tradition between *actus reus* and *mens rea*[10]

2. INTERNATIONAL CRIMINAL RESPONSIBILITY: THE DOGMATIC CHARACTER OF INTERNATIONAL CRIME

The strict observance of the principle of legality, at least in the way that it is understood as the foundation for most criminal laws in the world[11], seems impractical in international criminal law due to the specificity of its method of production, and in particular the possibility of establishing a criminal offense in the international custom law[12]. In a direction of international compromises, many solutions were proposed, such as the analogous application of the traditional criminal principle of legality, weighing the

[8]The distinction between justifications and excuses has in many legal systems practical consequences in that it affects the right of resistance and the right of assistance. Greenawalt has, in this regard, pointed out that: "(...) justified action is warranted action; similar actions could properly be performed by others; such actions should not be interfered with by those capable of stopping them; and such actions may be assisted by those in a position to render aid. If action is excused, the actor is relieved of blame but others may not properly perform similar actions; interference with such actions is appropriate; and assistance of such actions is wrongful (...)". See for details: K. GREENWALT, The perplexing borders of justification and excuse, in Columbia Law Review, 84, 1984, pp. 1902ss.

[9]See, ICTY, Prosecutor v. Anto Furundžija, Judgment, IT-95-17/1-T, Trial Chamber, 10 December 1998, parr. 168-9. M. JARVIS, The practice of international criminal law. Some reflections from an ICTY Prosecutor, in International Criminal Law Review, 17 (3), 2017, pp. 400ss. D. JOYCE, The historical function of international criminal trials: Rethinking international criminal law, in Nordic Journal of International Law, 80 (4), 2011, pp. 462ss.

[10]K. AMBOS, Treatise on International Criminal Law. Volume I: Foundations and General Part, Oxford University Press, Oxford, 2013, pp. 97ss.

[11]M. CHERIF BASSIOUNI, Principles of legality in international and comparative criminal law, in M. CHERIF BASSIOUNI (ed.), International criminal law, vol. I: Sources, subjects and contents, Martinus Nijhoff Publishers, Leiden, Boston, 2008, pp. 73-105. F. VON LISZT, The rationale for the nullum crimen principle, in Journal of International Criminal Justice, 5, 2007, pp. 1005-1008. I.J. PAUST, Nullum crimen and related claims, in Denver Journal of International Law and Politics, 25, 1997, pp. 322ss.

[12]See, ICTY, Prosecutor v. Duško Tadić, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, par. 194.

customary tradition of international law[13], in essence as *nullum crimen nulla poena sine iure*[14]. According to A. Cassese[15], who attempted to reconcile inherent contradictions by distinguishing between substantive justice and strict legality, pointing out that international criminal law is in a period of transition from the requirements of the first principle to that of the second principle[16].

One of the first attempts to approximate the concept of international criminal law to the regulatory grid of international criminal law was made by G. Schwarzenberger, who argued that the term "international criminal law" can have many meanings: a) local law (b) the introduction of national criminal law as a result of the fulfillment of an international obligation; (c) the punishment of "crimes against the law of nations", in particular piracy and war crimes[17], (d) the rules common to most criminal justice systems; (e) the rules governing transnational cooperation in criminal matters; and (f) the law of international crimes "affecting the very roots of international society"[18]. The last and narrower view was taken by the author[19], according to which criminal behavior under international law is the one that violates the foundations of the international community, the fundamental principles and values that all states want to be protected as much as possible[20].

[13]C. MARXSEN, What do different theories of customary international law have to say about the individual right to reparation under international humanitarian law?, in Zeitschrift für äuslandisches öffentliches Recht, n. 78, 2018 (3).
[14]K. AMBOS, Nulla poena sine lege en Derecho penal internacional, in Revista de Ciencias Penales de Costa Rica, 26, 2009, pp. 36 ss.
[15]A. CASSESE, International criminal law, Oxford University Press, Oxford, 2008, pp. 22, 193ss.
[16]D. MCGOLDRICK, Criminal trials before international Tribunals: Legality and legitimacy, in D. MCGOLDRICK, P. ROWE, R. DONNELLY (ed.), The permanent international criminal Court, Hart Publishing, Oxford & Oregon, Portland, 2004, pp. 15ss.
[17]J. DE HEMPTINNE, La définition de la notion de “population civile” dans le cadre du crime contre l’humanité. Commentaire critique de l’arrêt Martić, in Revue Général de Droit International Public, 114, 2010, pp. 93-104. P. DE HERT et al., (a cura di), Code of international criminal law and procedure, ed. Larcier, Brussel, 2013. S.DOTHAN, Deterring war crimes, in North Carolina Journal of International and Commercial Regulation, 40, 2014, pp. 742ss. D. LIAKOPOULOS, Responsabilità dei superiori per i crimini commessi dai subordinati, in Rivista Strumentario Avvocati. Rivista di diritto e procedura penale, 2009, pp. 22-26.
[18]M. DEGUZMAN, Harsh justice for international crimes?, in Yale Journal of International Law, 39, 2014.
[19]G. SCHWARZENBERGER, The Problem of an international criminal law, in Current Legal Problems, 3, 1950, pp. 264ss.
[20]Separate Opinion of Judge Adrian Fulford to Prosecutor v. Thomas Lubanga Dyilo, Judgment, Trial Chamber I, ICC-01/04-01/06, 14 March 2012; ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled: “Decision on the implementation of Regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, Appeals Chamber, ICC-01/04-01/07 OA 13, 27 March 2013, par. 15. See for analysis: J.D. OHLIN, E. VAN SLIEDREGT, T. WEIGEND, Assessing the control-theory, in

In the same sense, C. Kress most recent vision identifies four possible concepts of international criminal law: (a) the national and international rules governing the limits of the exercise of national criminal jurisdiction; (b) the rules governing the transnational cooperation in criminal matters; (c) rules contained in international treaties and creating in States the obligation to standardize crimes of "transnational character"[21]; and (d) the rules which primarily establish individual criminal responsibility[22] for acts directed against the international community as such, in the sense of infringing universal values such as international peace and security and human rights enjoyed protection under international law[23]. The latter concept has in fact prevailed as the content of the term "international criminal law"[24], with the other categories of rules not being physically meaningless but regulating very important issues such as the limits of the exercise of national criminal

Cornell Law Faculty Publications. Paper 1242, 2013. B. BURGHARDT, G. WERLE, Die mittelbareMittaterschaft–Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?, in R. BLOY (ed.), Gerechte Strafe und legitimes Strafrecht: Festschrift für Manfred Maiwald zum 75. Geburtstag, Duckler & Humblot, Berlin, 2010, pp. 850ss. S. ANOUSHIRVANI, The future of the International Criminal Court: The long road to legitimacy begins with the trial of Thomas Lubanga Dyilo, in International Criminal Law Review, 14, 2014, pp. 513ss. B.J. APPEL, In the shadow of the International Criminal Court. Does the International Criminal Court defer human rights violations?, in Journal of Conflict Resolution, 60, 2016, pp. 6ss. D. ARCHIBUGI, A. PEASE, Crime and global justice: The dynamics of international punishment, ed. Polity, London, 2018. A. ASHWORTH, J. HORDER, Principles of criminal law, Oxford University Press, Oxford, 2013. T. BACHVAROVA, The standing of victims in the procedural design of the International Criminal Court, ed. Bruylant, Bruxelles, 2017. M. KLINKNER, Is all fair in love and war crimes trials? Regulation 55 and the Katanga Case, in International Criminal Law Review, 15, 2015, pp. 396-410. S. MEROPE, Recharacterizing the Lubanga Case: Regulation 55 and the consequences for gender justice at the ICC, in Criminal Law Forum, 22, 2011, pp. 311-346.

[21]K.J. HELLER, F. MÉGRET, S. NOUWEN, J.D. OHLIN, D. ROBINSON, The Oxford handbook of international criminal law, Oxford University Press, Oxford, 2018.

[22]International Law Commission (ILC), "Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)" (ARSIWA), submitted to the UN General Assembly as part of the Report of the International Law Commission on the work of its 53rd session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, with commentaries on the articles. The General Assembly included the articles in Resolution 56/83, "Responsibility of States for internationally wrongful acts" (28 January 2002) UN Doc A/RES/56/83. The ultimate case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (30 April 1990), XX UNRIAA 215 (“Rainbow Warrior”), par. 75.

[23]R. DIXON, A.A. KHAN KARIM, R. MAY, Archbold International Criminal Courts. Practice, procedure and evidence, ed. Sweet & Maxwell, London, 2003.

[24]K. AMBOS, Internationales Strafrecht, Strafanwendungsrecht, Völkerstraftecht, europäisches Strafrecht, Rechtshilfe, ein Studienbuch, C.H. Beck, Münich, 2008, pp. 81-84. G. WERLE, Principles of international criminal law, TMC Asser Press, The Hague, 2009, pp. 44ss.

jurisdiction, transnational cooperation on criminal matters[25] and transnational crimes committed by States to incorporate in their criminal law[26].

In Nuremberg, the judges had to face the "immeasurable" crimes for the first time[27]. The "limits of legal imagination"[28] were opposed to the Nazi inventiveness of the

[25]D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, in International and European Union Legal Matter, 2014. D. LIAKOPOULOS, Le rôle politique de la Cour pènale internationale entre droit et relations internationales, in International and European Union Legal Matters, 2014. D. LIAKOPOULOS, Parità di armi nella giustizia penale internazionale, vol. 1, ed. Libellula University Press, Puglia, 2018.

[26]E. BIKUNDO, International criminal law using or abusing legality?, ed. Routledge, London & New York, 2014. G. BOAS, P. CHIFFLET, International criminal justice, Edward Elgar Publishing, Oxford & Portland, Oregon, 2017. D. BOSCO, Rough justice: the International Criminal Court in a world of power politics, Oxford University Press, Oxford, 2014. A. BOWER, International Criminal Court, Wolf Legal Publishers, The Netherlands, 2011. I. BOUSQUET, Debido proceso y cooperacion estatal en el proceso ante la Corte penal internacional, in Aequitas, 5, 2011. B.S. BROWN, Research handbook on international criminal law, Edward Elgar Publishing, Oxford & Portland, Oregon, 2011, pp. 86ss. C. SAFFERLING (ed), International criminal procedure, Oxford University Press, Oxford, 2012. P. CABAN, The definition of the crime of aggression-Entry into force and the exercise of the Court's jurisdiction over this crime, in Czech Yearbook of Public & Private International Law, 6, 2015. L. CARTER, M.S. ELLIS, C. CHERNOR JALLOH, The International Criminal Court justice system, Edward Elgar Publishing, 2016. T. DANNENBAUM, The crime of aggression, humanity and the soldier, Cambridge University Press, Cambridge, 2018.

[27]See in particular the next cases: Nuremberg and Post Second World War Judgments and Decisions IMT, The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part I, 20th November 1945 to 1st December 1945, London, 1946; The Peleus Trial, Trial of Kapitanleutnant Heinz Eck and Four Others for the Killing of Members of the Crew of the Greek Steamship Peleus, Sunk on the High Seas, British Military Court for the Trial of War Criminals Held at the War Crimes Court, Hamburg, 17th-20th October 1945; Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. I, London: HMSO, 1947; Trial of General Tomoyuki Yamashita, United States Military Commission, Manila (8th October-7th December 1945), and the Supreme Court of the United States, judgment, 4th February 1946 (327 US 1, 66 S.Ct. 340, 90 L.ed. 499 (1946)), reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. IV, London: HMSO, 1948; The United States v. Otto Ohlendorf et al. (The Einsatzgruppen Case), Nuremberg Military Tribunals under Control Council Law No, Law Reports of Trials of War Criminals, Volume IV, Nuremberg October 1946-April 1949; United States v. List and Others (Hostage case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. VIII, London: HMSO, 1949; United States v. Krauch and Twenty Two Others (The I.G. Farben Trial), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, London: HMSO, 1949; Trial of Max Wielen and 17 Others (The Stalag Luft III Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XI, London: HMSO, 1949; United States v. Wilhelm von Leeb et al., (High Command Case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XII, London: HMSO, 1949. See also: D. LIAKOPOULOS, International standards and responsibility competition according to the International Criminal Court: Anatomy, interpretation, proposals, in Revista Eletrônica de Direito Penale Polìtica Criminal-UFRGS, 5, 2018.

[28]T. DANNENBAUM, The crime of aggression, humanity and the soldier, op. cit.,

perpetration of evil: the systematic nature of the conduct, the macro-offensive character of the events and the identification of the passive subject with entire populations put the categories of classical criminal law to a severe test they had clear repercussions on how to conceive modern international criminal law. Even the author of the crime had changed face: the offender identified himself not only with the leading exponents of the political class and society but also, and perhaps even more disturbingly, with every ordinary citizen who thanks to the Nazi exaltation of efficiency, of the "totalitarianism of the technique" and of the "corporate mentality" of the extermination, had hidden his conscience behind the veil of authority and obedience[29]. And not to mention that, for the first time in history, Prosecutors, judges and defense lawyers had to manage an enormous number of events, different in nature and geographic-temporal location. Faced with these brutal news, it may not be entirely naive to think that some complex issues, first of all that relating to the pursuit of rules and crimes, gave way to the frustrating urgency of devising legal solutions to respond to the imputation of macro events, above all on the level of typicalness[30], the causes of justification and the models of criminal responsibility[31].

As for the *ad hoc* tribunals and the International Criminal Court (ICC), we can say that, first of all, there is a lack of juridical aesthetics capable of conferring dogmatic, credibility and legitimacy to the entire normative body[32]. Absent is the formulation of general principles, such as that of specialty or consumption, suitable to provide the interpreter with coordinates and to ensure a high degree of organicity to the system, relating the institute of the competition with other fundamental issues, first and foremost the practice some so-called cumulative charges (imputation phase)[33], the cumulative

[29]E. DREYER, Droit pénal général, ed. LexisNexis, Paris, 2016. P. KOLB, L. LETURMY, Droit pénal général. Les grands principes, l'infraction, l'auteur, les peines, Lextenso, Paris, 2013. R. KOLB, D. SCALIA, Droit international pénal. Précis, Helbing Lichtenhan, Bâle, 2012. J. LEROY, Droit pénal général, ed. Lextenso, Paris, 2012. Y. MAYAUD, Droit pénal général, Presses Universitaires de France, Paris, 2013. X. PIN, Droit pénal général, Dalloz, Paris, 2017. J. PRADEL, Droit pénal géneral, Cujas, Paris, 2016. H. RENOUT, F. FOURMENT, Droit pénal général, ed. Larcier, Bruxelles, 2013.

[30]O. OLUSANYA, Emotions, decision-making and mass atrocities. Through the lens of the macro-micro integrated theoretical model, Ashgate Publishing, Farnham, 2014.

[31]K. AMBOS, Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente, in Revista Persona y Derecho, 68, 2013, pp. 5-38.

[32]S. SZOKE-BURKE, Avoiding belittlement of human suffering. A retribuvist critique of ICTR sentencing practice, in Journal of International Criminal Justice, 10, 2012, pp. 561-580.

[33]For details see: D. LIAKOPOULOS, International standards and responsibility competition according to the International Criminal Court: Anatomy, interpretation, proposals, op. cit.

convictions (judgment phase)[34] and the penalty determination (sentencing phase)[35]. There is no jurisprudential set-up based on structural analysis between cases, the only one capable of conferring logic on the subject of the competition rules[36]. Finally, there is no more general direction of criminal policy, which leads to a high level of degree of systematic coherence by linking the problem of convergence with the functions of punishment[37].

3. INTERNATIONAL "CRIMINALIZATION" THROUGH STANDARDIZATION IN INTERNATIONAL TREATIES.

The law-making method of the international legal order highlights the importance of an empirical research to respond to the problem and to distinguish international crimes from other international crimes, basically Deinstein's attempt to capture the ways of criminalization at international level[38].

According to this survey, there are five ways of criminalizing: a) explicit and clear statement that a prohibited behavior is an international crime involving individual criminal responsibility, as in the case of the Nuremberg Court Statute[39] and the Convention on the Suppression and Punishment of Crime[40]; b) a simple statement that behavior is an

[34]E. MACULAN, A. LIÑÁN LAFUENTE, Relaciones concursales, in A. GIL GIL, E. MACULAN (a cura di), Derecho penal internacional, ed. Dykinson S.L., Madrid, 2016, pp. 303-322.
[35]A.Z. BORDA, The use of precedent as subsidiary means and sources of international criminal law, in Tilburg Law Review, 18, 2013, pp. 65-82. B. HOLÁ, Consistency and pluralism of international sentencing: An empirical assessment of the ICTY and ICTR Practice, in E. VAN SLIEDREGT, S. VASILIEV (a cura di), Pluralism in international criminal law, Oxford University Press, Oxford, 2014, pp. 187-210. B. HOLÁ, C. BIJLEVELD, A. SMEULERS, Consistency of international sentencing: ICTY and ICTR Case Study, in European Journal of Criminology, 9, 2012, pp. 539-552. B. HOLÁ, A. SMEULERS, C. BIJLEVELD, International sentencing facts and figures. Sentencing practice at the ICTY and ICTR, in Journal of International Criminal Justice, 9, 2011, pp. 411-439.
[36]S. DARCY, Judges, law and war: The judicial development of international humanitarian law, Cambridge University Press, Cambridge, 2014.
[37]B. BOULOC, Droit pénal général, Dalloz, Paris, 2013. A. GIL GIL, E. MACULAN (a cura di), Derecho penal internacional, op. cit.
[38]Y. DEINSTEIN, International criminal law, in Israel Law Review, 20 (2), 1985, pp. 206-242.
[39]Art. 6 of the statute: Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 UNTS, pag. 280. S.J. SFEKAS, A court pure and unsullied: Justice in the justice trial at Nuremberg, in University of Baltimore Law Review, 46, 2017, pp. 462ss. S. VALIANI, Genocide left unchecked: Assessing hte ICC's difficulties detaining Omar al-Bashir, in Berkeley Journal of International Law, 35, 2017, pp. 152ss.
[40]See the 1st article of International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, A/RES/3068 (XXVIII), 1015 UNTS, pag. 243. For details see: A. BULTZ,

international crime without any further provision for accountability as in the case of genocide crime[41]; c) a vague statement that behavior is a crime, without specifying whether it is an international crime, such to the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation[42]; d) establishing an obligation on States Parties to prosecute an act without expressly stipulating that it is an international crime, such as the Geneva Treaties that are the source of international humanitarian law[43]; and e) the provision that the act should be a crime in accordance with the national law of the Contracting Parties, such as the Convention on the Physical Protection of Nuclear Material[44]. Very important in this research is the contribution of M. Cherif Bassiouni[45], who recorded 267 international treaties with penalties, of which only 34 clearly stated that conduct constitutes an international crime or a crime under international law.

Redefining apartheid in international criminal law, in Criminal Law Forum, 24, 2013. M. DU PLESSIS, International criminal law: The crime of apartheid revisited, in South African Journal of Criminal Justice, 24, 2011, pp. 417-428. J. DUGARD, L'apartheid, in H. ASCENSIO, E. DECAUX, A. PELLET (a cura di), Droit international pénal, Pedone, Paris, 2012. P. EDEN, The role of the Rome Statute in the criminalization of apartheid, in Journal of International Criminal Justice, 12, 2014. M. JACKSON, A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme, in Journal of International Criminal Justice, 13, 2015, pp. 933-950.

[41]See art. 1 of Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS, pag. 277. P. BEHRENS, R. HENNAM, Elements of genocide, ed. Routledge, London & New York, 2013, pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, ed. Palgrave, London, 2011. R.S. SÁNCHEZ REVERTE, Referencia al crimen de genocidio aprocimation genocide crime, in Revista de estudios juridicos, 16, 2016. M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, in Davis Journal of International Law & Policy, 19 (1), 2012, pp. 208ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 9 (1), 2016, pp. 80ss. R. MAISSON, Justice pènale internationale, ed. PUF, Paris, 2017. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?, in Notre Dame Journal of International and Comparative Law, 1 (1), 2011, pp. 102ss. H. BLAISE NGAMENI, La diffusion du droit international pènal dans les ordres juridiques africaines, ed. L'Harmattan, Paris, 2017.K. CALVO-GOLLER, La procèdure et la jurisprudence de la Cour pènale internationale, ed. Lextenso, Paris, 2012. M.A. DRUMBL, Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials, in Columbia Human Rights Law Review, 29, 1998.

[42]See artt. 1-3 of Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS, pag. 177, which referred: "unlawful and intentional offences" and "severe penalties".

[43]See the artt. 3 and 4 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS, pag. 287.

[44]See art. 3 of Convention on the Physical Protection of Nuclear Material, 26 October 1979, 1456 UNTS, pag. 101.

[45]M. CHERIF BASSIOUNI, International crimes: The ratione materiae of international criminal law, in M.C. BASSIOUNI(ed.), op. cit., pp. 164ss.

In the end, this investigation revealed 28 broad concepts of "international crimes"[46]: attack, genocide, crimes against humanity[47], war crimes, nuclear terrorism,

[46]ICC, Prosecutor v. Bemba, ICC PT Ch. 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, ICC-01/05-01/08, 15 June 2009, par. 405. In tha same spirit in the next cases: ICTY, Prosecutor v. Mucić et al., ICTY T. Ch., 16 November 1998, par. 333, Prosecutor v. Mucić et al., ICTY A Ch., 20 February 2001, par. 198, ICTY, Prosecutor v. Aleksovski (Case No. IT-95-14/1-T), ICTY T. Ch., Judgment, par. 67. ICTY, Prosecutor v. Halilović, ICTY T. Ch., Judgment, IT-01-48-T, 16 November 2005, par. 293. ICTY, Prosecutor v. Halilović, ICTY T. Ch., 16 November 2005, par. 54. The connection between the responsibility of the superior and the gravity of the "principal crime" is further developed in the Hadžihasanović Appeal Judgment: ICTY, Prosecutor v. Hadžihasanović (Case No. IT-01-47-A), ICTY A. Ch, Judgment, 22 April 2008, parr. 312-318). See also: D. LIAKOPOULOS, Responsabilità internazionale penale individuale e statale, op. cit., R. ARNOLD, Responsibility of commanders and other superiors, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, 2nd ed., C.H. Beck/Hart/Nomos, Münich, Oxford, Baden-Baden, 2008, pp. 824ss. A. CULLEN, Definition of non-international armed conflict in the Rome Statute of the International Criminal Court: An analysis of the threshold of application contained in article 8(2)(f), in Journal of Conflict and Security Law, 12, 2008. L.M.GROSSI, D. GREEN, An international perspective on criminal responsibility and mental illness, in Practice Innovations, 2(1), 2017, pp. 4ss.

[47]T.L.H. MCCORMACK, Crimes against humanity, in D. MCGOLDRICK, P. ROWE, E. DONNELLY (a cura di), The Permanent International Criminal Court. Legal and policy issues, op. cit., pp. 192ss. M. CHERIF BASSIOUNI, Crimes against humanity, op. cit., pp. 381ss. W.J. VAN DER WOLF, D. DE RUITER (a cura di), Crimes against humanity and international criminal law, Wolf, Oisterwijk, 2011, pp. 96 ss. and 246 ss. S. CHESTERMAN, An altogether different order, defining the elements of crimes against humanity, in Duke Journal of Comparative and International Law, 10, 2002, pp. 332ss. M. CHERIF BASSIOUNI, Crimes against humanity. Historical evolution and contemporary application, Cambridge University Press, Cambridge, 2011, pp. 400ss. O. OLUSANYA, Sentencing war crimes and crimes against humanity under the International Criminal Tribunal for the Former Yugoslavia, ed. Europa Law, Groningen, 2005, according to which crimes committed with discriminatory intent must be punished more severely than those committed on an arbitrary basis. On the need to give systematicity and organicity to the phase of sentencing. C. BYRON, War crimes and crimes against humanity in the Rome Statute of the International Criminal Court, Manchester University Press, Manchester, 2009, pp. 242ss. G. SLUITER, "Chapeau elements" of crimes against humanity in the jurisprudence of the UN ad hoc Tribunals, in L.N. SADAT (a cura di), Forging a Convention for Crimes Against Humanity, Cambridge University Press, Cambridge, 2011, pp. 102-141. G. METTRAUX, The definition of crimes against humanity and the wuestion of a "policy" element, in L.N. SADAT (a cura di), Forging a Convention for Crimes Against Humanity, Cambridge University Press, Cambridge, 2011, pp. 142-176.G. WERLE, B. BURGHARDT, Do crimes against humanity require the partecipation of a State or a "State-like" Organization?, in Journal of International Criminal Justice, 10, 2012, pp. 1151-1170.S. KIRSCH, Two kinds of wrong: On the context element of crimes against humanity, in Leiden Journal of International Law, 22, 2009, pp. 539ss. With the exception of persecution and apartheid, it is not required that the author acts with a discriminatory intent as was instead foreseen by articles of the statute of the ICTR. B.B. JIA, The differing concepts of war crimes and crimes against humanity in international criminal law, op. cit., A. APONTE, Persecución penal de los crímenes internacionales, ed. Ibáñez, Bogotà, 2010, pp. 23ss. D.J. LBAN, Una teoría de los crímenes contra la humanidad, Ezequiel Malarino y Marisa Vásquez (trad.), Bogotá, Temis, 2011. H. OLÁSOLO, Ensayos de derecho penal y procesal internacional, ed. Diké, Bogotà. 2011. J.M. DÍAZ SOTO, Una aproximaciòn al concepto de crìmenes contre la humanidad, in Revista Derecho Penal y Crinologia, n. 95, 2015, pp. 123ss.C.A. SERNÍN RODRÍGUEZ, La evoluciòn del crimen de lesa humanidad en el derecho penal internacional, in Boletin Mexicano de Derecho Comparado, 47, 2017, pp. 210ss. A. ESER, The need for a general part, in M. CHERIF BASSIOUNI (a cura di), Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind, ed. AIDP, Touluse, 1993, pp. 43-61. K. AMBOS, Remarks on the general part of international criminal law, in Journal of International Criminal

theft of nuclear materials, mercenary employment, apartheid[48], slavery and similar practices, torture and other forms of cruelty, inhuman or degrading treatment or punishment, unlawful human experimentation, piracy, hijacking and unlawful acts against the safety of international aviation, unlawful acts against the safety of air navigation and the safety of offshore platforms, threat and use of force against internationally protected persons, crimes against the United Nations and its co-operating personnel, hostage arrest, explosive attack, illicit use of correspondence, terrorist financing, illicit drug trafficking and other crimes related to drugs, organized crime, destruction of cultural heritage, destruction and/or theft of national and archaeological treasures[49], illicit acts against internationally protected elements of the environment, international trafficking of obscene material, counterfeiting of coins, unlawful interference on underwater cables and bribery of foreigners of officials[50]. In addition, there is a lack of proportion in the gravity of crimes, with some (e.g. genocide) having a significantly different weighting than others (e.g. international trafficking of obscene material)[51].

Justice, 4, 2006, pp. 660-673. F. MANTOVANI, The general principles of international criminal law: The viewpoint of a national criminal lawyer, in Journal of International Criminal Justice, 1, 2003, pp. 26-38. K. AMBOS, La parte general del derecho penal internacional. Bases para una elaboración dogmática, ed. Duncker & Humblot, Berlin, 2005.

[48]C. LINGAAS, The crime against humanity of apartheid in a post apartheid world, in Oslo Law Review, n. 2, 2015. F. BRACHTHÄUSER, A. HAFFNER, Transformative reparation: Should reparation change societies?, in Zeitschrift für äuslandisches öffentliches Recht, n. 78, 2018 (3).

[49]The Prosecutor v. Ahmad Al Faqi Al Mahdi, No. ICC-01/12-01/15, Warrant of Arrest, par. 7 (18 September 2015). See in argument: M. STERIO, Individual criminal responsibility for the destruction of religious and historic buildings: The Al Mahdi Case, in Case Western Reserve Journal of International Law, 49, 2017, pp. 67ss. E. VOGELVANG, S. CLERC, The Al Mahdi case: Stretching the principles of the ICC to a breaking point?, in Justice Hub, 2016. B. LACOCQ, G. KLUTE, Tuareg separatism in Mali, in International Journal, 68 (3), 2013, pp. 424ss. M. KERSTEN, The al-Mahdi case is a breakthrough for the International Criminal Court, in Justice in Conflict, 2016. M. BADAR, N. HIGGINS, Discussion interrupted: The destruction and protection of cultural property under international law and islamic law-the Case of Prosecutor v. Al Mahdi, in International Criminal Law Review, 17 (4), 2017, pp. 488ss. K. WIERCZYŃKSA, A. JAKUBOWSKI, Individual responsibility for deliberate destruction of cultural heritage: Contextualizing the ICC judgment in the Al-Mahdi case, in Chinese Journal of International Law, 17 (1), 2017, pp. 66ss. M.S. ELLIS, The ICC's role in combatting destruction of cultural heritage, in Case Western Reserve Journal of International Law, 49, 2017. D. LIAKOPOULOS, Individual criminal responsibility of religious and historic buildings. The case of Al Mahid and the protection of international cultural heritage under international criminal justice, in ArtPaths, 2018. T. NEUMANN, The International Criminal Court reparations order in re Al Mahdi. Three remarks in its relevance for the general discussion on reparations, in Zeitschrift für äuslandisches öffentliches Recht, n. 78, 2018 (3).

[50]R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law procedure, Cambridge University Press, Cambridge, 2010, pp. 16ss. J. FERNANDEZ, X. PACREAU (eds), Statut de Rome de la Cour Pénale Internationale, Commentaire article par article, ed. Pedone, Paris, 2012.

[51]See, Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, pag. 3, “States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (c) The exploitative use of children in pornographic performances and materials”. For details see also: S. FATIMA,

In the latter direction, A. Cassese approaches the question that a behavior may fall under the concept of international crime if it is cumulatively characterized by the following: a) a violation of international customary or customary law; b) the rule which violates is binding on states and individuals and protects fundamental values for the international community; (c) there is universal interest in the suppression of behavior and (d) the State of the offender can not, if he is a state official, invoke the privilege of his immunity by virtue of the customary rule of international law on extraterritorial jurisdiction[52]. With this more restrictive approach, A. Cassese concludes with six international crimes: crimes against humanity[53], genocide, war crimes[54], assault, torture and terrorism[55].

Protecting children in armed conflict, Hart Publishing, Oxford & Oregon, Portland, 2018. N. WAGNER, A critical assessment of using children to participate actively in hostilities in Lubanga. Child soldiers and direct participation, in Criminal Law Forum, 24, 2013, pp. 145-203.

[52]M. LANGER, The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes, in American Journal of International Law, 105, 2011, pp. 1, 42ss.

[53]From the inter-American Court see the next cases in relation on crimes against humanity: Almonacid Arellano v. Chile, excepciones preliminares, fondo, reparaciones y costas, 26.09.2006 ; Bámaca Velásquez v. Guatemala, fondo, 25.11.2000 Barrios Altos v. Perú, fondo, 14.03.2001; Bueno Alves v. Argentina, fondo, reparaciones y costas, 11.05.2007; Bulacio v. Argentina, sentencia de fondo, reparaciones y costas, 18.09.2003; Castillo Páez v. Perù, fondo, 03.11.1997; Comunidad Moiwana v. Surinam, excepciones preliminares, fondo, reparaciones y costas, 15.06.2005; García Asto y Ramírez Rojas v. Perù, excepciones preliminares, fondo, reparaciones y costas, 25.11.2005; Gelman v. Uruguay, fondo y reparaciones, 24.02.2011; Godínez Cruz v. Honduras, fondo, 20.01.1989; Goiburú y otros v. Paraguay, fondo, reparaciones y costas, 22.09.2006; Gomes Lund y otros v. Brasil (Guerrilha do Araguaia), excepciones preliminares, fondo, reparaciones y costas, 24.11.2010; Heliodoro Portugal v. Panamá, excepciones preliminares, fondo, rearaciones y costas, 12.08.2008; Ticona Estrada y otros v. Bolivia, fondo, reparaciones y costas, 12.08.2008; Trujillo Oroza v. Bolivia, reparaciones y costas, 27.02.2002; Velásquez Rodríguez v. Honduras, fondo, 29.07.1988. For more details and analysis of the above cases see: C. TOMUSCHAT, Human rights between idealism and realism, Oxford University Press, 2014. L. HENNEBEL, The inter-American Court of human rights: The Ambassador of universalism, in Quebec Journal of International Law, 57, 2011, pp. 58ss. D.J.L. QUISPE-REMÓN, El debido proceso en el derecho internacional y en el sistema interamericano, ed. Tirant lo Blanc, Valencia, 2010. X. MEDELLÍN URQUIAGA, The normative impact of the inter-American Court of Human Rights on Latin-America national prosecution of mass atrocities, in Israel Law Review, 46 (3), 2013, pp. 410ss. A. VON BOGDANDY, I. VENZKE, International judicial law making, ed. Springer, New York, London, 2012. A. E. FERRER MAC-GREGOR, Conventionality control and the new doctrine of the inter-American Court of Human Rights, in AJIL Unbound, 109, 2015, pp. 95ss. A. HUNEEUS, Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights, in Cornell International law Journal, 44, 2011, pp. 520ss.M. DE PAUW, The inter-American Court of human rights and the imperative method of external referencing regional consensus v. universality, in Y. HAECK, O. RUIZ-CHIRIBOGA, C. CHERRERA, The inter-American Court of human rights: Theory and practice, present and future, ed. Intersentia, Antwerp, Oxford, 2016, pp. 4ss.156. G.L. NEUMANN, Inter-American Court of Human Rights (IACtHR), in R. WOLFRUM, The Max Planck Encyclopedia of Public International Law, Oxford University Press, Oxford, 2012. Y. HAECK, O. RUIZ, CHIRIBOGA, C. BURBANO-HERRERA, The inter-American Court of human rights: Theory and practice, present and future, ed. Intersentia, Antwerp, Oxford, 2016, 46ss.D.GONZÁLEZ-SALZBERG, The effectiveness of the inter-American human rights system. A study of the American States compliance with the judgments

However, the importance of conceiving the concept of transnational crime[56] and its distinction from international crime is inherent in the consequences of classifying an act as an international crime[57], namely that: a) it is not subject to a limitation period; b) to be prosecuted without the existence of a national criminal rule (as long as there is, of course, the international criminal rule); c) an obligation to cooperate with States for mutual assistance in the prosecution and extradition of perpetrators on the basis of the principle *aut dedere aut judicare*[58]; d) there are specific provisions on the possibility of excluding criminal liability with limitations on certain allegations; e) relax or marginalize the rules of international law on the immunity and amnesty of Heads of State or Government officials[59]; and f) may be tried by a national criminal court on the basis of the principle of global justice.

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of the inter-American Court of human rights, in Revista Colombiana de Derecho Internacional, 15, 2015, pp. 116ss. D. LIAKOPOULOS, The advisory power of the inter American Court, in International and European Union Legal Matters-working paper series, 2016.

[54]L. BALCELLS, S. N. KALYVAS, Does warfare matter? Severity, duration, and outcomes of civil wars, in Journal of Conflict Resolution, 58 (8), 2014, pp. 6ss.

[55]A. CASSESE, International criminal law, Oxford University Press, Oxford, 2013, pp. 79ss. A. CASSESE, F. JESSBERGER, R. CRYER, U. DÉ, International criminal law, ed. Routledge, London & New York, 2016. P. CLARK, International Criminal Courts and normative legitimacy: An achievable goal?, in International Criminal Law Review, 15, 2015, pp. 763-783.

[56]M.D. BURBER, T. HÖRNLE, The Oxford handbook of criminal law, Oxford University Press, Oxford, 2014. J. ALMEVIST, C. ESPOSITO, The role of courts in transitional justice. Voices from Latin America and Spain, ed. Routledge, London & New York, 2013, pp. 177ss. V. BOSTER, An introduction to transnational criminal law, Oxford University Press, Oxford, 2012, pp. 24ss.

[57]W.A. SCHABAS, International crimes, in Armstrong (ed.), Routledge handbook of international law, ed. Routledge, London & New York, 2009, pp. 274ss. M. CHERIF BASSIOUNI, Crimes against humanity. Historical evolution and contemporary application, op. cit., pp. 365ss.

[58]See the The Obligation to Extradite or Prosecute (aut dedere aut judicare), Final Report of the International Law Commission, 2014. D. LIAKOPOULOS, State responsibility and the obligation of aut dedere aut judicare obligation, in International and European Union Legal Matters, 2017. N.H.B, JØRGENSEN, State responsibility for aiding or assisting international crimes in the context of the arms trade treaty, in The American Journal of International Law, 108 (4), 2014, pp. 722-749. C. BRANDTS, Guilty landscapes: Collective guilt and international criminal law. Cosmopolitan justice and its discontents, ed. Routledge, London, 2010, pp. 53-68.

[59]See: A. GUELKE, Truth for amnesty? The truth and reconciliation Commission and human rights abuses in South Africa, in Irish Studies in International Affairs, 10 (1), 1999, pp. 21-30. M. SCHARF, The amnesty exception to the jurisdiction of the International Criminal Court, in Cornell International Law Journal, 32 (4), 1999, pp. 508ss.

The theory of the joint criminal enterprise was superseded[60] in the first case of the ICC, the so-called *Lubanga* case[61], with the pre-trial Chamber stating explicitly that the correct interpretation of the provision of Article 25 par. 3 (d) of the Statute ICC (StICC)[62] and art. 3 of the Special Tribunal for Sierra Leone (STSL) requires that it be understood in any other way to contribute to the commission of the crime through a group of

[60]ICTY, Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-A, A. Ch., 17 September 2003, paras. 30, 73; ICTY, Prosecutor v. Krstić, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, parr. 266-269; ICTY, Prosecutor v. Kvoćka et al., Judgment, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, parr. 79-91. See for more details: H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, T.M.C. Asser Press, The Hague, 2010, pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, in Journal of International Criminal Justice, 9 (1), 2011, pp. 165ss. A. CASSESE, The nexus requirement for war crimes, in Journal of International Criminal Justice, 10, 2012. B. DON TAYLOR III, Crimes against humanity in the Former Yugoslavia, in R. BELLELLI (a cura di), International criminal justice. Law and practice from the Rome Statute to its review, ed. Ashgate Publishing, Farnham, 2010, pp. 285-294.

[61]K. AMBOS, The first judgment of the international criminal Court (Prosecutor v. Lubanga) A comprehensive analysis of the legal issues, in International Criminal Law Review, 12 (1), 2012, pp. 117ss. K. AMBOS, Treatise on unternational criminal law: vol. 2: The crimes and sentencing, Oxford University Press, Oxford, 2014. K. AMBOS, Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente, op. cit., pp. 12ss.

[62]ICC, Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Confirmation of Charges Decision, ICC-01/04-01/07-717, 30 September 2008, para. 500. The requirements of indirect perpetration include the existence of an organised apparatus of power, within which the direct and indirect perpetrators operate, and which enables the indirect perpetrator to secure the commission of the crimes (Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, paras. 515–518). Which must include "an element of criminality", according to Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 343. The Pre-Trial Chamber found that the plan did not need to be specifically directed at the commission of a crime, according to Prosecutor v. Lubanga, ICC T. Ch. I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 2984. In the case Lubanga: "(...) noting that the crime in question need not be the overarching goal of the coperpetrators, nor explicit in nature, the Chamber did stress that the existence of a common plan can be inferred from circumstantial evidence (...)", ICC, Prosecutor v. Lubanga, Judgment, para. 988. See also: Prosecutor v. Blé Goudé, PT. Ch. I, ICC-02/11-02/11, 31 December 2014, para. 134 and Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3132-Red, 1 December 2014, fn. 863. In its confirmation of charges decision "(...) that the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated (...)", according to Prosecutor v. Mbarushimana, PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, par. 279. See in argument, also: Z. SANIKIDZE, The level of "contribution" required under article 25 (3) (d) of the Rome Statute of the International Crimnal Court, in Revue Internationale de Droit Pénal, 83 (2), 2012, pp. 224ss. R.C. DEFALCO, Contextualizing actus reus under article 25 (3) (d) of the ICC statute: Thresholds of contribution, in Journal of International Criminal Justice, 11, 2013. R. LÓPEZ, The duty to refrain: A theory of State accomplice liability for grave crimes, in Nebraska Law Review, 97, 2018, pp. 122ss. H. OLASOLO, Artigo 25 (1)-(3) (a): Responsabilidade individual e autoria, ed. Belo Horizonte, Konrad Adenauer Stiftung, Brazil, 2016, pp. 448ss.

individuals[63] acting as an alternative form of participatory responsibility rather than as an abusive[64], expressly stating that it is not appropriate to follow the case-law of *ad hoc* international criminal tribunals on this issue[65]. In the view of the court, the reference to the StICC in Article 25, par. 3 (a) for the joint crime of "another or through another person"[66] should be used to distinguish the performer in cases where there is a cartel of the direct natural perpetrator between the (indirect) perpetrator that controls over the crime[67] without realizing it himself and his accomplices who merely reinforce the criminal

[63]See form the UK giurisprudence regarding crimes of humanity the next cases: Abbott v The Queen [1977] A.C. 755 (Privy Council); B (A Minor) v D.P.P. [2000] A.C. 428. Barnett v Chelsea and Kensington Hospital Management Committee (1969) 1 QB 428; Bratty [1963] AC 386, [1961] 3 All ER 523; Brown and Isaac v The State [2003] UKPC 10; Chan Wing-Siu v The Queen [1985] AC 168; Chief Constable of Avon v Shimmen [1987] 84 Cr.App.R.7 (Queen's Bench Division); Cunliffe v. Goodman [1950] 2 K.B. 237; Director of Public Prosecutions v Smith [1961] A. C. 290; DPP v Lynch (1975) AC 653; D.P.P. v Morgan [1976] A.C. 182; Elliott v C. [1983] 1 W.L.R. 939; Hyam v DPP [1975] A.C. 55; Grant v Borg [1982] 1 W.L.R. At 646; R v Adomako [1995] 1 A.C. 171 (House of Lords); R v Anderson; R v Morris [1966] 2 QB 110; R v Bateman (1927) 19 Cr. App. R. 8; R v Caldwell [1982] A. C. 341 (House of Lords); R. v Clegg [1995] 1 A.C. 482; R v Dudley & Stephens, L.R. 14 Q.B.D. 273 (1884); R v G [2004] 1 A.C. 1034 (House of Lords); R v Graham (1982) 74 Cr App R 235; R v Hancock and Shankland [1986] A. C. 455; R v Hardie [1984] 3 All ER 848, [1985] 1WLR 64, CA; R v Hennessy (1989) 1 WLR 287. R v Howe (1987) AC 417; R v Hudson and Taylor [1971] 2 All ER 244; R v K [2002] 1 A.C. 462; R v Kemp (1957) 1 QB 399; R v Lawrence [1982] A. C. 510 (House of Lords); R v Martin (1989) 88 Cr.App.R.343 (Court of Appeal, Criminal Division); R v McNaughten, 8 E.R. 718; (1843) 10 Cl. & F. 200; R v Moloney [1985] A.C. 905; R v Morby (1882) 8 QBD 571; R v Nedrick [1986] 1 W.L.R. 1025 (Court of Appeal, Criminal Division); R v Pomell [1995] 2 Cr.App.R.607 (Court of Appeal, Criminal Division); R v Powell (Anthony), R v English [1999] 1 AC 1; R v Rose [1884] 15 Cox 540; R v Quick & Paddison (1973) 3 AER 397; R v Safi and others [2003] EWCA Crim 1809, (2003) LR 721.R v Smith (Wesley) [1963] 1 WLR 1200; R v Sullivan [1984] AC 156; R v Van Butchell, 3 C. & P. 629 (1829); R v Williams (Gladstone) [1984] 78. Cr.App.R.276; R v Woollin [1999] 1 A. C. 82; Reg. v Tolston, L.R. 23 Q.B.Div. 168, 185 (1889); Reg. v. William Murphy [1980] Q.B. 434; Rex v. Steane [1947] K.B 997; Watmore v Jenkins [1962] 2 All ER 86. For more details see: D. LIAKOPOULOS, International standards and responsibility competition according to the International Criminal Court: Anatomy, interpretation, proposals, op. cit.

[64]R. CRYER et al., An introduction to international criminal law and procedure, Cambridge University Press, Cambridge, 2014. D. LIAKOPOULOS, Schutz und Grenzen der gefährdeten Menschen im internationalen Recht, in International and European Union Legal Matters, working paper series, 2014.

[65]Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, ICC-01/04-01/06, Pre-Trial Chamber I, 29 January 2007, parr. 336-337.

[66]D. LIAKOPOULOS, Schutz und Grenzen der gefährdeten Menschen im internationalen Recht, op. cit.

[67]In particular see: according to M. MUNIVRANA VAJDA, Distinguishing between principles and accessories at the ICC. Another assessment of control theory, in Zborkik PFZ, 2014, working paper series, pag. 1058, "(...) as noted by the European Court of Human Rights, "(...) in any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances (…) as long as the interpretation is foreseeable and accessible, it does not violate the principle of legality. In fact, the ECHR has found that one of the circumstances making judicial interpretation reasonably foreseeable is the fact that such an interpretation was supported by a number of scholars at the relevant time of the commission of the crime (…) the ICC's interpretation of modes of liability, unlike interpretation according to

effort[68]. The logic of this distinction lies in the need for fair and proportional liability to be given by international criminal tribunals, which, with the traditional view of criminal

the principles propounded by the ECHR, should be guided by the rule of strict construction and the favor rei principle (…) this may not appear at first glance, the result of "control of the crime" theory application seems to be in line with the rule of strict construction and the favor rei principle much more than the application of any subjective test. Grounding commission on the subjective state of mind potentially broadens the class of perpetrators and leaves (...)". See also in argument: I. MARCHUK, The fundamental concept of crime in international criminal law. A comparative law analysis, ed. Springer, 2015. A. NOVAK, The International Criminal Court: An Introduction, ed. Springer, Berlin, 2015. K.J., HELLER, What is an international crime?, in Harvard International Law Journal, 59, 2018. R. O'KEEFE, International criminal law, Oxford University Press, Oxford, 2015. H. OLÁSOLO, Derecho internacional penal y humanitario, ed. Tirant Lo Blanch, Valencia, 2016. E.S. PODGOR, R.S. CLARK, Understanding international criminal law, ed. LexisNexis, New Jersey, 2013. C. ROBERTS, On the definition of crimes against humanity and other widespread or systematic human rights violations, in University of Pennsylvania Journal of Law and Social Change, 20, 2017, pp. 4ss. E. SCHRAMM, Internationales Strafrecht, C.H. Beck, Münich, 2018. C. SCHWÖBEL, Critical approaches to international criminal law: An introduction, ed. Routledge, London & New York, 2014. M. SHAHABUDDEN, International criminal justice at the Yugoslav Tribunal-A judge's recollections, Oxford University Press, Oxford, 2012. Y. SHANY, Assessing the effectiveness of international Courts: A goal-based approach, in American Journal of International Law, 106 (2), 2012, pp. 225ss. Y. SHANY, How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation, in Israel Law Review, 51, 2013, pp. 4ss. C. STAHN, The law and practice of the International Criminal Court, Oxford University Press, Oxford, 2015. G. STAMPER, Infusing due process and the principle of legality into contempt proceedings before the International Criminal Tribunal for the Former Yugoslavia ad the International Criminal Tribunal for Rwanda, in Michigan Law Review, 110, 2011, pp. 1552. R.H. STEINBERG, Contemporary issues facing the International Criminal Court, ed. Brill, Leiden, 2016. H. TAKEMURA, Reconsidering the meaning and actuality of the legitimacy of the International Criminal Court, in Amsterdam Law Forum, 4, 2012, pp. 3-15. A. TIEMESSEN, The International Criminal Court and the politics of prosecutions, in The International Journal of Human Rights, 18, 2014. R. DUBLER SC, M. KALYK, Crimes against humanity in the 21st century. Law, practice and threats to international peace and security, ed. Brill, Leiden, 2018. R. KOLB, The jurisprudence of the Yugoslav and Rwandan criminal Tribunals on their jurisdiction and on international crimes (2004-2013), in British Yearbook of International Law, 86, 2014, pp. 136ss. A. KUNIEWICZ, International Criminal Court Prosecutor v. Bosco Ntaganda preliminary ruling, in Chicago-Kent Journal of International & Comparative Law, 14, 2015, pp. 12ss. D. LIAKOPOULOS, Il sistema esecutorio nel diritto internazionale penale, in Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale, 2009. D. LIAKOPOULOS, Protection of the witness in the criminal process under international law rules: Procedural and comparative approaches in Temple International and Comparative Law Journal, 29, 2015, pp. 239ss.

[68] For the analysis, see: C. ROXIN, Zur neuesten Diskussion über die Organisationsherrschaft, in Goltdammer's Archiv für Strafrecht, Vol. 159, No. 7, 2012, pp. 395-415. A.A. AGBOR, A reflection on the phrase "widespread or systematic" as part of the definition of crimes against humanity, in C. JALLOH, E. OLUFEMI, Shielding humanity. Essays in international law in honour of Judge Adbul G. Koroma, ed. Brill, Leiden, 2015, pp. 354ss. K. AINLEY, The responsibility to protect and the International Criminal Court: Counteracting the crisis, in International Affairs, 91, 2015. D. AKANDE, Classification of conflicts: Relevant legal concepts, in E. WILMSHURST, International law and the classification of conflicts: Relevant legal conflicts, Oxford University Press, Oxford, 2012, pp. 34ss. A.I. GOLDMAN, A theory of human action, Princeton Legacy Library, Princeton, 2016.

responsibility[69], are in a position to condemn as mere executive organs the perpetrators of international crimes, but on the other hand to impose a much smaller penalty on the natural perpetrator who is but a gear in the extermination mechanism that may have been inspired and directed by the indirect perpetrator[70] who controls the criminal activity[71].

With regard to the elements of these forms of crime, and beyond the classic form of "real" sovereignty in practice in the case of individual-manual committal, in *Lubanga* analyzed the form of "functional" sovereignty over the act by combining a crime ("Joint perpetration")[72] based on the assignment of specific tasks to each co-chief. As to its objective nature, committing one another presupposes the existence of an agreement or a joint project (albeit implied) between two or more and the co-ordinated necessary contribution (essential contribution)[73] of each of the perpetrators who are involved in the realization of the data objective crime[74]. As regards the subjective status, the court

[69]M. HEIKILLÅ, Coping with international atrocities through criminal law: A study into the typical features of international criminality and the reflection of these traits in international law, Åbo Akademis förlag, Åbo Akademi Uniersity Press, Finland, 2013.

[70]For a rejection of the idea that indirect perpetration through an organisation can be derived from the language of Article 25(3)(a), see ICC, Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Trial Chamber II), 18 December 2012. In argument: G.P. CALLIESS, Introduction: Transnational corporations revisited, in Indiana Journal of Global Legal Studies, 18 (2), 2011, pp. 604-605.

[71]See the case: Krnojelac, ICTY, Prosecutor v. Milorad Krnojelac, Judgment, IT-97-25-T, Trial Chamber II, 15 March 2002, par. 77ss.

[72]L. YANEV, T. KOOIJMANS, Divided minds in the Lubanga trial judgment: A case against the Joint Control Theory, in International Criminal Law Review, 13, 2013, pp. 792ss. T. WEIGEND, Perpetration through an Organization. The unexpected career of a german legal concept, in Journal of International Criminal Justice, 11, 2011, pp. 102ss. P. ELIADIS, Lubanga: new direction in reparations liability from the International Criminal Court, in PKI Global Justice Journal, 2, 2018.

[73]See, ICTY, Prosecutor v. Bralo Miroslav, Sentencing Judgment, TC, IT-95-17-S, 7 December 2005. ICTY, Prosecutor v. Miroslav Bralo, Sentencing Judgment, TC, IT-95-17-S, 7 December 2005, par. 28. P. CHIFFLET, G. BOAS, Sentencing coherence in international criminal law: The cases of Biljana Plavšić and Miroslav Bralo, in Criminal Law Forum, 23, 2012.

[74]C. DAVIDSON, How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court, in Saint John's Law Review, 91, 2017, pag. 4. C. DAVIDSON, Human rights protection before the International Criminal Court, in International Community Law Review, 18, 2016, pp. 72ss. M. DEGUZMAN, How serious are international crimes? The gravity problem in international criminal law, in Columbia Journal of Transnational Law, 51 (4), 2012, pp. 20ss. M. DEGUZMAN, The International Criminal Court's gravity jurisprudence at ten, in Washington University Global Studies Law, 12, 2013, pp. 475ss. D. DE RUITER, W. VAN DER WOLF, Aggression and international criminal law, Wolf Legal Publishers, The Netherlands, 2011. C. DE THAN, International criminal law, Oxford University Press, Oxford, 2012. R. DUBLER SC, M. KALYK, Crimes against humanity in the 21st century. Law, practice and threats to international peace and security, op. cit., N. HAJDIN, The nature of leadership in the crime of aggression The ICC's new concern?, in International Criminal Law Review, 17, 2017, pp. 545ss. C. KRESS, On the activation of ICC jurisdiction over the crime of aggression, in Journal of International Criminal Justice, 18, 2018. B. KRZAN,

considered that all co-workers should know and accept the possibility that the realization of their joint project would lead to the realization of the elements of the objective status of the crime[75], but also to cover in the same way (subjectively and deliberate) each individual crime committed[76], thus setting a sufficiently demanding criterion.

Prosecuting international crimes: A multidisciplinary approach, ed. Brill, Leiden, 2016. D. LIAKOPOULOS, Die Hypothese des Rechts auf ein faires Verfahren internationalen Strafgericht, in International and European Union Legal Matters, 2012. S. MOAMED, Leadership crimes, in California Law Review, 105, 2017.

[75]T. WEIGEND, Intent, mistake of law and co-perpetration in the Lubanga Decision on Confirmation of Charges, in Journal of International Criminal Justice, 8 (4), 2008, pp. 472ss.

[76]See from the US giurisprudence the next cases: Accord Weeks v. Commonwealth, 248 Va. 460, 477, 450 S.E.2d 379, 390 (1994); Alaska-Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983); Alaska-Pears v. State, 698 P.2d 1198 (Alaska 1985); Ariz.-State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984); Ariz.-State v. Walton, 133 Ariz. 282, 650 P.2d 1264 (Ct. App. Div. 1 1982); Arp v State, 97 Ala. 5, 12 So. 301 (1893); Auguste v. Ridge, 395 F.3d 123, 133 n. 7 (3d Cir.2005); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 697 n. 9, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995); Callahan v. A.E.V., Inc., 182 F.3d 237, 261 n. 15 (3d Cir.1999); Carlos-Colmenares, 253 F.3d 276 (7th Cir. 2001); Carter v. United States, 530 U.S. 255, 268, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); Clozza v. Commonwealth, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984); Coles v. Com., 270 Va. 585, 621 S.E.2d 109 (Va. Nov 04, 2005); Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003); Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895); D.C.-Garcia v. U.S., 848 A.2d 600 (D.C. 2004); Ga.-Ward v. State, 252 Ga. 85, 311 S.E.2d 449 (1984); Green v. Commonwealth, 266 Va. 81, 104, 580 S.E.2d 834, 847 (2003); Hart v. State, 75 Wis.2d 371, 383 n. 4, 249 N.W.2d 810, 815 (1977); Hunt v State, 753 So.2d 609 (Fla.App.2000); Ill.-People v. Castillo, 188 Ill. 2d 536, 243 Ill. Dec. 242, 723 N.E.2d 274 (1999); Ill.-People v. Santiago, 108 Ill. App. 3d 787, 64 Ill. Dec. 319, 439 N.E.2d 984 (1st Dist. 1982); Ky.-Cook v. Com., 129 S.W.3d 351 (Ky. 2004); La.-State v. Fuller, 414 So. 2d 306 (La. 1982); Mass.-Com. v. Levesque, 436 Mass. 443, 766 N.E.2d 50 (2002); Merritt v. Commonwealth, 164 Va. 653, 657, 180 S.E. 395, 397 (1935); Mich.-People v. Nowack, 462 Mich. 392, 614 N.W.2d 78 (2000); Mitchell v. State, 114 Nev. 1417, 971 P.2d 813 (1998); Mo.-State v. Skinner, 734 S.W.2d 877 (Mo. Ct. App. E.D. 1987).Mo.-State v. Thomas, 161 S.W.3d 377 (Mo. 2005); Morissette v. United States, 342 U.S. 246, 252 (1952); Neb.-State v. Stewart, 219 Neb. 347, 363 N.W.2d 368 (1985); N.H.-State v. Howland, 119 N.H. 413, 402 A.2d 188 (1979); N.J.-State v. Jamerson, 153 N.J. 318, 708 A.2d 1183 (1998); Nobles v. Commonwealth, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977); N.Y.-People v. Montanez, 41 N.Y.2d 53, 390 N.Y.S.2d 861, 359 N.E.2d 371 (1976); Pa.-Com. v. Youngkin, 285 Pa. Super. 417, 427 A.2d 1356 (1981); People v. Colantuono (1994) 7 Cal.4th 206, 217, 26 Cal.Rptr.2d 908, 865 P.2d 704; People v. Garris, 159 A.D.2d 744, 551 N.Y.S.2d 971 (N.Y.A.D. 3 Dept., Mar 01, 1990) (NO. 57607); People v. Davis (1995) 10 Cal.4th 463, 519, fn. 15, 41 Cal.Rptr.2d 826, 896 P.2d 119; People v. Dollar (1991) 228 Cal.App.3d 1335, 1342, 279 Cal.Rptr. 502; People v. Haney, 30 N.Y.2d 328, 335, 333 N.Y.S.2d 403, 284 N.E.2d 564; People v. Hawkins (1993) 15 Cal.App.4th 1373, 1376, 19 Cal.Rptr.2d 434; People v. Lara, 44 Cal.App.4th 102, 51 Cal.Rptr.2d 402, 96 Cal. Daily Op. Serv. 2281, 96 Daily Journal D.A.R. 3793 (Cal.App. 2 Dist. Apr 02, 1996); People v. Lisnow (1978) 151 Cal.Rptr. 621, 88 Cal.App.3d Supp. 21, 24; People v. McCoy et al., 25 June 2001, 24 P.3d 1210; People v Merhige, 212 Mich. 601, 180 N.W. 418 (1920); People v Pantano, 239 N.Y. 416, 146 N.E. 646 (1925); People v Prettyman, 14 Cal.4th 248, 58 Cal.Rptr.2d 827, 926 P.2d 1013 (1996); People v. Ricardo B., 73 N.Y.2d 228, 235-236, 538 N.Y.S.2d 796, 535 N. E.2d 1336; People v. Rippberger (1991) 231 Cal.App.3d 1667, 1682, 283 Cal.Rptr. 111; People v. Watson (1981) 30 Cal.3d 290, 296, 179 Cal.Rptr. 43, 637 P.2d 279; Pierre v. Attorney General of U.S., 528 F.3d 180, 192 (3rd Cir., Jun 09, 2008); S.D.-State v. Schouten, 2005 SD 122, 707 N.W.2d 820 (S.D. 2005); Schroeder v. State, 123 S.W.3d 398 (Tex.Crim.App., Dec 03, 2003) (NO. 561-03); State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct.App.1983); State v. Gorman, 648 A.2d 967 (Me. Oct 21, 1994); State v. Lindvig, 205 Wis.2d 100, 555 N.W.2d 197 (Wis.App. Sep 30, 1996); State v. Perfetto, 424 A.2d 1095, 1098 (Me.1981); State v. Smith, 747 S.W.2d 678 (Mo.App. S.D. Mar 04, 1988) (NO. 14994); State v. Tempesta, 617 A.2d 566, 567 (Me.1992); Tison v. Arizona,

The interpretation of the pre-trial Chamber of the Court was confirmed in the ICC judgment for the *Lubanga* case and it became clear that the court accepted the theory of control over crime. Interestingly is the minority opinion of Judge Fulford[77], who considers that the notion of a necessary contribution to the realization of crime unacceptably constrains the wording of article 25 par. 3 (a) of the StICC[78] and rejects the adoption of the

481 U.S. 137, 150, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); US v. Jewell, 532 F.2d 697 (1976); U.S.-Rent v. U.S., 209 F.2d 893 (5th Cir. 1954); U.S.-U.S. v. Anton, 683 F.2d 1011 (7th Cir. 1982) (overruled on other grounds by U.S. v. United StateUnited States v. Bailey, 444 U.S. 394, 405, 100 S.Ct. 624, 62 L.Ed.2, 575 (1980); United States v. Blair, 54 F.3d 639, 642 (10th Cir.1995); United States v Holmes, 26 F.Cas. 360 (No. 15,-383) (C.C.E.D.Pa. 1842); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986); United States v LaFleur, 971 F.2d 200 (9th Cir.1991); United States v. U.S. Gypsum Co., 438 U.S. 422, 445, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); Williams v. Texas, 680 S.W.2d 570, 579 (Tex.Ct.App.1984); Wis.-State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810 (2004); Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir.2003).

[77]Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo.

[78]ICC, Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Confirmation of Charges Decision, ICC-01/04-01/07-717, 30 September 2008, para. 500). The requirements of indirect perpetration include the existence of an organised apparatus of power, within which the direct and indirect perpetrators operate, and which enables the indirect perpetrator to secure the commission of the crimes (Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, paras. 515–518). The Pre-Trial Chamber in Lubanga identified five factors of individual criminal liability in order to find co-perpetration under Article 25(3)(a). These five elements were confirmed and used in the trial chamber decision of Lubanga, as well as by the appeals chamber decision of Lubanga, in order to find the accused guilty as a co-perpetrator under Article 25(3)(a). The five elements include two objective and three subjective elements under: Prosecutor v. Lubanga, ICC T. Ch. I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 2984. The crime in question need not be the overarching goal of the coperpetrators, nor explicit in nature, the Chamber did stress that the existence of a common plan can be inferred from circumstantial evidence. See, Prosecutor v. Lubanga, Judgment, para. 988; Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, para. 994; Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803, 29 January 2007, para. 351; Prosecutor v. Lubanga, ICC T. Ch. I, ICC-01/04-01/06- 2842, 14 March 2012, paras. 1007–1014). Unde the separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012, para. 9, that refers: "(...) to the question of whether the new language of individual criminal liability found in Article 25 has created a hierarchy of seriousness in crimes (with 25(3)(a) representing the most serious of crimes and 25(3)(d) representing the least. He rejects this notion, stating that (…) there is no proper basis for concluding that ordering, soliciting, or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it "through another person" (Article 25(3)(a) (…) similarly, I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history's most serious crimes occurred as the result of the coordinated actions of groups of individuals, who jointly pursued a common goal (…) within the Lubanga case (…) the test laid out by the Pre-Trial Chamber should be applied as the case has been conducted on the basis of the legal framework established by the Pre-Trial Chamber (…) this requirement means that the accused should not only be aware of the basic outline of the legal framework against which those facts will be determined. This ensures that the accused knows, at all stages of the proceedings, what he is expected to meet (…) in the Al Bashir arrest warrant, the Prosecution broke new ground, exclusively basing the charges on the concept of indirect perpetration. According to the Prosecutor's application, this mode of liability under Article 25(3)(a) included the following three elements: a) the Prosecution must establish the existence of a relationship such that the indirect perpetrator may impose his dominant will over the direct perpetrator to ensure that the crime is committed. Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organisation or group, that institution must be "hierarchically

organised". b) Second, the indirect perpetrator must have sufficient authority within the organisation such that he has "the final say about the adoption and implementation" of the policies and practices at issue. c) Third, the indirect perpetrator must be "aware of his unique role within the [organisation] and actively use it" in furtherance of the crimes charged (...)". Under: Prosecutor v. Bashir, PT. Ch. I, Public Redacted Version of the Prosecution's Application under Article 58, ICC-02/05-157-AnxA, 12 September 2008, para. 248; Prosecutor v. Bashir, PT. Ch. I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-3), 4 March 2009, paras. 209–223, The Chamber found: "(...) that Al Bashir played an essential role in coordinating the design and the implementation of the common plan, which consisted in the unlawful attack on a part of the civilian population of Darfur, belonging to specific ethnic groups (…) the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person. As the Chamber has underscored, in these types of situations co-perpetration or joint commission through another person is not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if thereis a low and unaccepted probability that such would be a result of their activities (...)". In the Appeals Chamber: Prosecutor v. Bashir, PT. Ch. I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ((ICC-02/05-01/09-3), 4 March 2009, para. 213). Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 464, it is also noted that: "(...) the Court's jurisprudence contained differing views on the existence of a fourth form of commission liability where a perpetrator may commit a crime jointly with another as well as through another person: indirect co-perpetration. The Appeals Chamber expresses no particular view on whether they find this form of commission liability valid, leaving the issue open to further litigation on the matter (Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3132-Red, 1 December 2014, fn. 863). In the same spiriti see also: The Mbarushimana Pre-Trial Chamber, which commented that: "(…) in its Confirmation of Charges decision that the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated (...)". Prosecutor v. Mbarushimana, PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 279-282, which is noted that: "(...) one difference that has been pointed out with regard to sub-paragraph (c) of the ICC Statute as compared to the jurisprudence of the ad hoc tribunals is that the latter does not require the aider and abettor to share the intent of the perpetrator to commit the crime. With the drafting of sub-paragraph (c) "the aider and abettor must act with the purpose of facilitating the commission of that crime (…) there has been debate as to whether the actus reus required should likewise differ from the ad hoc tribunals' 'substantial contribution' requirement. See in argument for more details and analysis: J.D. VAN DER VYVER, The Al Bashir Debacle, in African Human Rights Law Journal, 15, 2015, pp. 559ss. H. VAN DER WILT, C. PAULUSSEN, Legal responses to transnational and international crimes, Edward Elgar Publishing, Cheltenham, 2017. B. MARTINS AMORIUM DUTRA, Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law, in Revista de Faculdade de Direito da UERJ, 26 (1), 2012, pp. 5ss. T. 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German-based theory of control over crime[79] by proposing the criterion of causal link[80] and claiming that the same doctrinal effect arrives with a simple reading of the StICC[81]. What is different is the interpretation given by Judge Van den Wyngaert in the *Katanga*[82] and *Chui*[83] cases, namely his assent to the judgment of the *Ngudjolo Chui* case[84], even though he starts from the same starting point, favoring the concept of "direct contribution"[85] instead of the necessary contribution to the realization of the elements of the crime.

Considering that the notion of necessary contribution encapsulates the judicial judgment in the search for a negative hypothetical causality, and in particular to control

[79]In particular the criminal offence in German criminal law, irrespective of whether it constitutes *Verbrechen or Vergehen*, has the three-layered (tripartite) structure: (a) *Tatbestandsmäßigkeit*-a cumulative term for the objective and subjective elements of a crime; (b) *Rechtwidrigkeit*-unlawfulness unless there is a presence of a justificatory defence; (c) *Schuld*-culpability unless there is a presence of a valid excuse. The criminal offence involves prohibited behaviouer that meets the description of the statutory elements of a crime (*tatbestandsmäßig*), is unlawful (*rechtswidrig*) and culpable (*schuldhaft*). The subjective element of a particular crime (*Tatvorsatz)* is distinct from culpability (*Schuld*) pertinent to the tripartite structure of a crime. See in argument: N. WIENER, Excuses, justifications and duress at the international criminal tribunals, in Pace International Law Review, 26, 2014, pp. 92ss. S.E. CROCO, The decider's dilemma: Leader culpability, war outcomes, and domestic punishment, in American Political Science Review, 105 (3), 2011, pp. 458ss.

[80]J.D. OHLIN, E. VAN SLIEDREGT, T. WEIGEND, Assessing the control-theory, op. cit., pp. 728.

[81]See: C. ROXIN, Täterschaft und Tatherrschaft, ed. Gruyter, Berlin, 2000. P.R. ALTER, K.J. ROMANO, Y. SHANY, Oxford Handbook of international adjudication, Oxford University Press, Oxford, 2013, pp. 438ss. K.J. ALTER, The multiplication of international Courts and Tribunals after the end of the cold war, in P.R. ALTER, K.J. ROMANO, Y. SHANY, Oxford Handbook of international adjudication, Oxford University Press, Oxford, 2013. J. ALUOCH, Ten years of trial proceedings at the International Criminal Court, in Washington University Global Studies Law Review, 12 (4), 2013, pp. 444ss. P. AMBACH, The "lessons learned" process at the International Criminal Court-A suitable vehicle for procedural improvements?, in Zeitschrift für Internationale Strafrechtsdogmatik, 2016, pp. 856ss. K. AMBOS, The first judgment of the international criminal Court (Prosecutor v. Lubanga) A comprehensive analysis of the legal issues, op. cit., pp. 117ss. K. AMBOS, Treatise on international criminal law: Volume III: International criminal procedure, Oxford University Press, Oxford, 2016, pp. 89ss. N.A. AMOURY COMBS, Legitimizing international criminal justice: The importance of process control, in Michigan Journal of International Law, 34, 2012, pp. 360ss.

[82]ICC, Prosecutor v. Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", Dissenting Opinion of Judge Cuno Tarfusser, A. Ch., 27 March 2013, Case No. ICC-01/04-01/07-3363, paras. 15-16.

[83]ICC, Prosecutor v. Mathieu Ngudjolo Chui, Concurring opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art. 74 of the Statute, Case No. ICC-01/04-02/12-4, T. Ch. II, 18 December 2012.

[84]Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Mathieu Ngudjolo, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12, Trial Chamber II, 18 December 2012.

[85]M. RADKE, B. SIMMONS, J. HYERAN, J.,Assessing the International criminal Court, in T. SQUATRITO, O. YOUNG, A. FOLLESDAL, G. ULSTEIN, The performance of international courts and Tribunals, Cambridge University Press, Cambridge, 2018.

without which condition the criminal outcome would not have occurred, it considers both that criterion irrelevant and that of Fulford, for which essentially believes that it unnecessarily extends the circle of potential perpetrators with a function similar to that of *condicio sine qua non*. Instead, he proposes that the criterion of direct contribution to the realization of the elements of crime as a more consistent solution with the grammatical and teleological interpretation of article 25, par. 3 (a)[86], without, however, avoiding

[86]See: ICTY (Appeals Chamber), Prosecutor v. Delalić et al. ("Čelebici Camp"), sentence of 20 February 2001, par. 197: "In general, the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced". ICTY (Chamber of first instance); Prosecutor v. Kordić and Čerkez, sentence of 26 February 2001, par. 402: "The factor that determines superior responsibility is the actual possession, or non-possession of effective powers of control, in the sense that the superior must be found to have the material ability to prevent and punish the commission of crimes by subordinates (...)". ICTY (Appeals Chamber), Prosecutor v. Delalić et al. ("Čelebici Camp"), sentence of 20 February 2001, par. 266: "The Appeals Chamber considers (…) that customary law has specified a standard of effective control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed (...)". ICTY (Chamber of first instance), Prosecutor v. Halilović, sentence of 16 November 2005, par. 74: "(...) The determination of what constitutes "necessary and reasonable measures" to prevent the commission of crimes or to punish the perpetrators is not a matter of substantive law but of evidence. These measures are such that can be taken within the material ability of a commander as evidenced by the degree of effective control he wielded over his subordinates. It is well established these measures may "vary from case to case" (...)". See also in argument: J. DONDÉ MATUTE, Responsabilidad penal internacional: Los nuevos escenarios dogmàticos, in Anuario Mexicano de Derecho Internacional, 18, 2018. S. FORD, Fairness and politics at the ICTY: Evidence from the Indictments, in North Carolina Journal of International Law & Commercial Regulation, 13, 2013, pp. 45ss. J.A. WILLIAMSON, Some consideration on command responsibility and criminal liability, in International Review of the Red Cross, 90, 2008, pp. 306ss. S. FORD, The complexity of international criminal trials is necessary, in Georgetown Washington International Law Review, 151 (1), 2015, pp. 152ss. M. GILLETT, The anatomy of an international crime aggression at the International Criminal Court, in International Criminal Law Review, 13 (4), 2013, pp. 832ss. B. GOY, Individual criminal responsibility before the International Criminal Court: A Comparison with the ad hoc Tribunals, in International Criminal Law Review, 12, 2012, pp. 34ss. P. GRÉCIANO, Justice pènale internationale, ed. Mare & Martin, Paris, 2016. L. GROVER, Interpreting crimes in the Rome statute of the International Criminal Court, Oxford University Press, Oxford, 2016. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, in Russian Law Journal, 3, 2015, pp. 144ss. D. LIAKOPOULOS, Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechun, in International and European Union legal Matters, 2012. G. TURAN, Responsibility to prosecute in an age of global governamentality: The International Criminal Court, in Cooperation and Conflict, 50, 2015. M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, in Revista Electrònica de Ciencia Penal y Criminologia, 17, 2015, pp. 7ss. K. AMBOS, Treatise on international criminal law. Volume I: Foundations and general part, Oxford University Press, Oxford, 2013, pp. 97ss.

concessions: admits that often by the nature of the crime and the design that it requires, there may be no physical presence of the victim at the crime scene, the contribution lies in being an "intrinsic part of the actual execution of the crime"[87].

And if this form of sovereignty over crime appears to provide greater legal certainty than the common criminal enterprise, it is not very clear whether one could say the same about the third and last form of "the willful" dominance in crime[88], in which the dominant indirect perpetrator[89] controls the will of what constitutes the objective nature of the crime. This has been analyzed in the *Katanga* and *Chui* court judgment and has been the vehicle for prosecuting crimes committed in the context of an organized power mechanism[90]. According to the ICC this form of indirect instigation, which is expressly formalized in article 25, para. 3 (a) and permits the indirect perpetrator to be penalized even if the direct perpetrator is a person criminally responsible[91], is based on the control of the will of the perpetrator by the indirect perpetrator, who may, in many cases, direct the criminal of the will through the control of an organization. In justifying its position beyond the *de lege lata* foundation[92], the court expressed its disagreement with the ICTY in the *Stakić* case[93], noting that the ICC is not bound by the decisions of *ad hoc* international criminal tribunals.

A different approach, close to the tradition of civil law and not of common law[94] was adopted by the Pre-trial Chamber of ICC in *Bemba Gombo* case, in which the judges

[87]W.J. VAN DER WOLF, The ad hoc Tribunals and the International Criminal Court, Wolf Legal Publishers, The Netherlands, 2011. W.J. VAN DER WOLF, The rights of parties and international criminal law, Wolf Legal Publishers, The Hague, 2011. E. VAN SLIEDREGT, S. VASILIEV, Pluralism in international criminal law, op. cit., pp. 285ss.

[88]W.A. AMBOS, Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung, Duncker & Humblot, Berlin, 2002. M.E. BADAR, N. HIGGINS, General principles of law in the early jurisprudence of the ICC, in T. MARINIELLO (ed.), The International Criminal Court in search of its purpose and identity, op. cit.,

[89]K.M. CLARKE, Refining the perpetrator culapibility history and international criminal law's impunity gap, in The International Journal of Human Rights, 19, 2015, pp. 594ss.

[90]see, A.N. TRAJNIN, La responsabiligte penale des Hitleriens, ed. Zeluck, 1945, pp. 147-149.

[91]C. ROXIN, Straftaten im Rahmen organisatorischer Machtapparate, in Goltdammer's Archiv für Strafrecht, 1963, pp. 193-207, which the author noted the significance of ("*Täter hinter dem Täter*").

[92]K. AMBOS, Internationales Strafrecht, op. cit., par. 4.

[93]ICTY, Prosecutor v. Milomir Stakić, Judgment, IT-97-24-A, Appeals Chamber, 22 March 2006, par. 62.

[94]V. JEUTNER, Irresolvable norm conflicts in international law. The concept of a legal dilemma, Oxford University Press, Oxford, 2017. M. MILANOVIC, The lost origins of lex specialis: Rethinking the relationship between human rights and international humanitarian law, in J.D. OHLIN (a cura di), Theoretical boundaries of armed conflict and human rights, Cambridge University Press, Cambridge, 2016. D.LIAKOPOULOS, L'ingerenza umanitaria nel diritto internazionale e comunitario, ed. Cedam, 2007.

considered the cumulative imputation of the crimes of rape and torture (qualified as crimes against humanity)[95] because of the fact that the former is in a relationship of specialty with respect to the second. The test applied by the judges is very clear: it is legitimate to resort to cumulative charging only if the offenses show each of the elements distinct from the other[96]. In other words, the accumulation of charges should be limited to the cases in which a formal criminal offense appears to be (at least *prima facie*).

In practice we must say with regard to the central elements of indirect instigation through an organization as a form of willful domination on the ground, the court stood in the element of the "organized and hierarchical apparatus of power"[97], something which presupposes hierarchical relations between the upper and lower, a number of lower ones that ensure the implementation of leadership directives and effective leadership of the leader on the mechanism, which is tantamount to compliance with his orders. Additionally, and as a result of the above characteristics, the automatic perpetrator's adherence to the leader's autonomous will arises, with the former not working as a free

[95] Art 6 Abs. 1 Statute of the Special Court for Sierra Leone, SCSL-Agreement v. 16.1.2002 (SCSL-Statut); Art. 29 Abs. 1 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Dem-ocratic Kampuchea, ECCC-Agreement v. 6.6.2003 (ECCC-Statute). ICC, Prosecutor v. Katanaga, ICC-01/04-01/07-3436 7 march 2014, par. 1176: "(...) in this connection the Chamber is of the view that the perpetrator's conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of the battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed (...)", which the same spirit repated also in the case: Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3343, 21 March 2016, par. 142. ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-803, 29 January 2007.

[96] ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC-II, ICC-01/05-01/08, 15 June 2009, par. 202-205. "(...) as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges (...)".

[97] K.E. CARSON, Reconsidering the theoretical accuracy and Prosecutorial effectiveness of international Tribunals ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity and acts of genocide, in Fordham Urban Law Journal, 39, 2012, pp. 1250ss. N. CHAZAL, Beyond borders? The International Criminal Court and the geopolitics of international criminal justice, in Griffiths Law Review, 22 (4), 2013, pp. 715ss. N. CHAZAL, The International Criminal Court and global social control: International Criminal Justice in late modernity, ed. Routledge, London & New York, 2015. C.P. EBY, Aid "specifically directed" to facilitate war crimes. The ICTY's anomalous actus reus standard for aiding and abetting, in Chicago Journal of International Law, 115, 2014. P.BEHRENS, R. HENHAM, Elements of genocide, op. cit., P. SULLO, Beyond genocide: Transitional justice and Gacaca Courts in Rwanda, ed. Springer, Berlin. 2018. A. HUNEEUS, International criminal law by other means: The quasi-criminal jurisdiction of the human rights court, in American Journal of International Law, 107, 2013, pp. 6ss.

and independent person, but as an "anonymous, interchangeable figure"[98]. It is precisely this form of responsibility that differs from the previous one, that of joint committing to another, since in its own context every co-perpetrator can not prevent the crime, but it is an insignificant unit that can be replaced at any time by the indirect perpetrator of the criminal activity with another supportive unit.

The latter form of dominance on the ground, "organizational void domination"[99], caused intense discussion and reflection in theory, as it was not only used extensively in *Katanga* and *Chui* in the form of "indirect co-perpetration"[100], but also because in general is used in the formation of indictments in many of the ICC's latest cases[101], given the need for the court to find the doctrine of prosecution and punishment of high-ranking criminals[102] not involved in physical assault of crime, but they move the yarns in an extremely efficient way. Thus, despite the abandonment of the theory of the joint criminal enterprise[103], the dogmatic content of individual criminal responsibility remains different

[98]A. ESER, Procedural structure and features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR, G. SLUITTER (eds), The legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford University Press, Oxford, 2011.

[99]ICTY, Prosecutor v. Kunarac, Kovać, Vuković, IT-96-23, IT-96-23/1-A, 12 June 2002, par. 58. ICTY, Prosecutor v. Tadić, IT-94-1-T, 7 May 1997, par. 573. ICTY, Prosecutor v. Brđanin, IT-99-36-T, 1st September 2004, par. 123. ICTY, Prosecutor v. Karadžić, IT-95-5/18-T, 23 March 2016, par. 442. ICTR, Prosecutor v. Semanza, ICTR-97-20-T, 15 May 2003, par. 517.

[100]Prosecutor v. Radoslav Brđanin (Judgment) ICTY-99-36-A (3 April 2007) parr. 409-414; Prosecutor v. Milan Martìc (Judgment) ICTY-95-11-A (8 October 2008) par. 82; Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu (Judgment) ICTY-03-66-A (27 September 2007) par. 120; Prosecutor v. Momcilo Krajisnik (Judgment) ICTY-00-39-T (27 September 2006) par. 883. See, L.D. YANEV, Theories of co-perpetration in international criminal law, ed. Brill, Leiden, 2018. J. OHLIN, Second order linking principles: Combining horizontal and vertical modes of liability: International law and practice, in Leiden Journal of International Law, 26, 2013. M. CUPIDO, Common purpose liability versus joint perpetration: A practical view on the ICC's hierarchy of liability theories, in Leiden Journal of International Law, 29, 2016, pp. 898ss. N. JAIN, Perpetrators and accessories in internatonal criminal law. Individual modes of responsibility for collective crimes, Hart Publishing, Oxford & Oregon, Portland, 2014.

[101]Situation in the Republic of Kenya, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on Confirmation of Charges, ICC-01/09-02/11, Pre-Trial Chamber II, 23 January 2012. D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, in International and European Union Legal Matters, 2014.

[102]K. SIKKINK, The justice cascade: How human rights prosecutions are changing world politics. ed. W.W. Norton, New York, 2011.

[103]The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Prosecutor v. Brđanin, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010.

and more flexible in international criminal law than in the context of national criminal jurisdiction.

5. THE PROBLEM OF EXCLUSION OF INDIVIDUAL PENAL LIABILITY IN INTERNATIONAL CRIMINAL LAW.

The significant difference between national criminal systems with regard to the foundation and exclusion of criminal responsibility, with the centralized European systems being more distinctive for their dogmatic purity and the systems of common law to be more pragmatic, leads to a lack of common ground as concerns the application of a theory of exclusion of criminal responsibility, with specific stages, such as that distinct (original and final) unfair and (initial and final) imputation are examined[104].

This basic distinction in objective element[105] (or *actus reus*) and subjective element (or *mens rea*)[106] also appears in the theory of international criminal law[107], with the

[104]G. SLUITER, H. FRIMAN, S. LINTON, S. ZAPPALÁ, International criminal procedure. Rules and principles, Oxford University Press, Oxford, 2013, pp. 1576ss. C. STAHN, Justice delivered or justice denied? The legacy of the Katanga judgment, in Journal of International Criminal Justice, 14, 2014.

[105]Similarly, in the case of Renzaho, Judges Güney and Pocar opined that the Trial Chamber's finding that the accused was aware of a "likely outcome" meets the standard of awareness of a substantial likelihood, Tharcisse Renzaho v. The Prosecutor (ICTR-97-31-A), Judgment, Appeals Chamber, 1 April 2011, partially dissenting opinion of Judge Güney, parr. 3-4; partially dissenting opinion of judge Pocar, parr. 5-6, 10. The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the "Decision on the Confirmation of Charges", Pre-Trial Chamber I, 7 March 2011, para. 156. François Karera v. The Prosecutor (ICTR-01-74-A), Judgment, Appeals Chamber, 2 February 2009, para. 211; Ferdinand Nahimana et al. v. The Prosecutor (ICTR-99-52-A), Judgment, Appeals Chamber, 28 November 2007, para. 481; Renzaho Appeals Judgment, par. 315; partially dissenting opinion of judge Güney. See also Blaškić Appeal Judgment, par. 471. Ephrem Setako v. The Prosecutor (ICTR-04-81-A), Judgment, Appeals Chamber, 28 September 2011, par. 240; Jean de Dieu Kamuhanda v. The Prosecutor (ICTR-99-54A-A), Judgment, Appeals Chamber, 19 September 2005, par. 75. The Prosecutor v. Clément Kayishema & Obéd Ruzindana (ICTR-95-1-T), Judgment and Sentence, Trial Chamber II, 21 May 1999, par. 200. Prosecutor v. Alex Tamba Brima et al. (SCSL-04-16-T), Judgment, Trial Chamber II, 20 June 2007, par. 776; confirmed on appeal: Prosecutor v. Alex Tamba Brima et al. (SCSL-2004-16-A), Judgment, Appeals Chamber, 22 February 2008, para. 243. In the same spirit the case from ICTY: The Prosecutor v. Laurent Semanza (ICTR-97-20-T), Judgment and Sentence, Trial Chamber III, 15 May 2003, para. 385; Orić Trial Judgment, par. 280; for the distinction between the two concepts see: The Prosecutor v. Sylvestre Gacumbitsi (ICTR-2001-64-T), judgment, Trial Chamber III, par. 286 and Semanza Trial Judgment, par. 384. Prosecutor v. Radoslav Brđanin (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, par. 10. According to the Appeals Chamber of the Special Tribunal for Lebanon (STL), the better approach under international criminal law is not to allow convinctions under Joint Criminal Enterprise (JCE) III for specific intent crimes: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I), Appeals Chamber, 16 February 2011, par. 249. The STL Appeals Chamber argued that: "(...) applying JCE III to specific intent crimes would lead to the "serious legal anomaly" that a person is convicted as a co-perpetrator of a specific intent crime without possessing the

specific intent (...)", par. 248. See in argument also: In the Kvočka et al. case, the Appeals Chamber emphasized that it is the accused person's knowledge that is central, that is, what was natural and foreseeable to this person. More specifically, the Appeals Chamber held that: "(...) participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him (...)". Kvočka et al., judgment, AC, ICTY, 28 February 2005, para. 86, in trhe same spirit: Limaj et al., judgment, TC, ICTY, 30 November 2005, par. 512. See for details and analysis: B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss. A. AZZOLINI BIANCAZ, La construcciòn de la responsabilidad construcciòn de la responsabilidad penal individual en el àmbito internacional, in Alegatos Revista, 18, 2018.

[106]The International Court of Justice ("ICJ") expert legal panel described the actus reus element as satisfied if the company's conduct had "enabled," "exacerbated," or "facilitated" the abuses. "(...) if a company facilicated a gross human rights violation by enabling, exacerbating, or facilitating human rights abuses, the company or its officials would enter a zone in which they could be held criminally liable as an aider or abettor of a crime or as a participant in a common criminal plan, or under the law of civil remedies for intentionally or negligently causing harm to a victim (...). See, D. CASSEL, Corporate aiding and abetting of human rights violations: Confusion in the courts, in Northwestern Journal of International Human Rights, 6, 2008, pp. 305ss. See in particular in argument the next cases: judgment Limaj (IT-03-66-T), Trial Chamber, 30 November 2005, par. 509; judgment, Krstić (IT-98-33-A), Appeals Chamber, 19 April 2004, par. 188; judgment, Kunarać (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Gacumbitsi (ICTR-2001-64-T, Trial Judgment, 17 June 2004, par. 285 ("committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); judgment, Kayishema (ICTR-95-1-A), Appeals Chamber, 1 June 2001, par. 187; judgment, Vasiljević (IT-98-32-T), Trial Chamber, 29 Nov. 2002, par. 62 ("The accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law (...)"); judgment, Kamuhanda (ICTR-99-54A-T), Trial Chamber, par. 595 ("(...) to commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law (...)"); judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, par. 188; judgment, Kunarac (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Krstić (IT-98-33-T), Trial Chamber, 2 August 2001, par. 601; judgment, Krnojelac (IT-97-25-T), Trial Chamber, 15 March 2002, par. 73. judgment, Blagoje Simić (IT-95-9-T) Trial Chamber, 17 October 2003, par. 137 ("(...) any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge (...)". See in argument: M.E. BADAR, The concept of mens rea in international criminal law. The case for a unified approach, Hart Publishing, Oxford & Oregon, Portland, 2013. J. PEAY, Mental incapacity and criminal liability: redrawing the fault lines?, in International Journal of Law and Psychiatry, 42, 2015, pp. 4ss. M.E. BADAR, The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective, in Criminal Law Forum, 19 (3), 2008, pp. 477ss. According to the above author: "(...) a number of theories havve emerged in criminal law to istinguish between *dolus eventualis* and advertent negligence, among others, consent or approval theory (*die Billigungs-oder Einwilligungtheorie*), indifference theory (*die Gleichgültigkeitstheorie*), possibility theory (*die Vorstellungs- oder Möglichkeitstheorie*), probability theory (*die Wahrscheinlichkeitstheorie*), combination theory (*Kombinationstheorien*) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)". R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, in Criminal Law Forum, 12, 2001, pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, op. cit., A. ESER, Mental elements-Mistake of fact and mistake of law, in A. CASSESE, P. GAETA, G.R.W.D JONES (eds.), The Rome Statute of the International Criminal Court: A

definitions given not to fully agree with both the objective and the subjective element. Particularly in relation to the latter there is a fundamentally different understanding between two basic theories, the "psychological" and the "normative" theory[108]. A volitional element and a representative element constitute an envelope that expresses a unitary psychic datum. The difference, if anything, lies in the diversity of the elements constituting the object of malice, which the Rome Statute identifies in conduct, consequences and circumstances[109]. Some requirements of the offense can only be the object of knowledge, not of volition: these include certain specific circumstances in individual cases, such as the context of an institutionalized regime of oppression and domination of a racial group in the crime of apartheid, and some elements present in the

Commentary, Oxford University Press, Oxford, 2002, pp. 890ss. A. GIL GIL, Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator, in International Criminal Law Review, 14, 2014, pp. 87ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBBER (eds.), The handbook of comparative criminal law, Stanford Law Books, Stanford, 2011, pp. 597ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, ed. Nomos, Baden-Baden, 2014. K.M.F. KEITH, The mens rea of superior responsibility as developed by ICTY Jurisprudence, in Leiden Journal of International Law, 14, 2001, pp. 618ss. P.H. ROBINSON, J.A. GRALL, Element analysis in defining criminal liability: The model penal code and beyond, in Stanford Law Review, 35, 1983, pp. 685ss. D. FLECK, The law of non-international armed conflict, in D. FLECK (a cura di), The Handbook of International humanitarian law, Oxford University Press, Oxford, 2013, pp. 581-610. E. WILMSHURTS (a cura di), International law and the classification of conflicts, Oxford University Press, Oxford, 2012.

[107]C. DE THAN, Shorts international criminal law and human rights, Sweet & Maxwell, London, 2003, pp. 3ss. I. BANTEKAS, S. NASH, International criminal law, Routledge-Cavendish, London & New York, 2007, pp. 51ss. G.J.A. KNOOPS, Mens rea at the International Criminal Court, ed. Brill, Leiden, 2016, pp. 29ss.

[108]O. DE FROUVILE, Droit international penal, ed. Pedone, Paris, 2012. C. DEPREZ, L'applicabilitè des droits humains à l'action de la Cour pènale internationale, ed. Bruylant, Bruxelles, 2016. C. DEPREZ, La cour pènale international à l'èpreuve du droit à la libertè, ed. Anthemis, Paris, 2017. C. FERNÁNDEZ-PACHECO ESTRADA, The international criminal Court and the Ćelebići test: Cumulative convictions based on the same set of fact's from a comparative perspective, in Journal of International Criminal Justice, 17, 2017, pp. 692ss. D. GUIFOYLE, International criminal law, Oxford University Press, Oxford, 2016, pp. 20ss. M. HEIKKILÄ, Coping with international atrocities through criminal law: A study into the typical features of international criminality and the reflection of these traits in international criminal law, op. cit., pp. 38-70. B. HOLÁ, Sentencing of international crimes at the ICTY and ICTR: Consistency of sentencing case law, in Amsterdam Law Forum, 4, 2012, pp. 6ss.

[109]S. FINNIN, Mental elements under article 30 of the Rome Statute of the International Criminal Court: A comparative analysis, in International and Comparative Law Quarterly, 65, 2012, pp. 336ss. M.E. BADAR, S. PORRO, Rethinking the mental elements in the jurisprudence of the ICC, in C. STAHN (a cura di), The law and practice of the International Criminal Court, op. cit., pp. 651ss. A. ESER, Mental elements-Mistake of fact and mistake of law, in A. CASSESE, P. GAETA, J.R.W.D. JONES (a cura di), The Rome Statute of the International Criminal Court, op. cit., pp. 907ss. In giurisprudence see also: ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), cit., par. 357; ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., 529. And the contrary opinion of the author: U. ROSSKOPF, Die innere Tatseite des Völkerrechtsverbrechen. Ein Beitrag zur Auslegung des Art. 30 IStGH Statut, Berliner Wissenschafts, Berlin, 2007, pp. 90ss.

context elements, such as the existence of an armed conflict or an extensive or systematic attack on the civilian population. Such circumstances can not be desired by the agent, but must be known: proof that both the war crimes and the crimes against humanity[110] requires that the conduct be-respectively-connected with the armed conflict and placed in use under the extended or systematic attack. In addition: on what grounds is it possible to state that crimes against humanity are motivated exclusively (or tendentially) for reasons of ethnic cleansing? Or that war crimes are committed to demoralize the enemy or gain a military advantage? An account is to establish, through a statistical survey, that such crimes are usually put in place with the aforementioned reasons, other is to include them within the typicality: the first operation is of fundamental importance for that branch of criminology and psychology that deals with the study of macro-contexts of violence[111], but scarcely relevant for the positive criminal law in force. The risk underlying this perspective is twofold. On the one hand, by predetermining a specific motivation as the engine of action, the theory under review tells the norm what it does not say, and leads to excluding all those typical behaviors that have not been committed with a precise (arbitrarily) determined purpose. On the other hand, the absence of an exhaustive list (*rectius*: of any type of list) capable of resolving the problem of regulatory overlapping only increases the discretionality of the accusation-in the formulation of the indictments-and of the judicial body -in the judgment-in choosing the applicable standard[112]. Other theses are inclined towards the hierarchy of crimes by making a single reference to the *mens rea*[113] within the

[110]ICTY, Prosecutor v. Vasiljević, IT-98-32-A, 25 February 2004, par. 100. ICTR, Prosecutor v. Bizimungu and others, ICTR-99-50-T, 30 September 2011, par. 1907. ICTY, Prosecutor v. Brđanin, IT-99-36-A, 30 April 2007, parr. 410ss. ICTY, Prosecutor v. Karadžić, IT-95-5/18-T, 24 March 2016, par. 567. ICC, Prosecutor v. Katanga, Ngudjolo Chui, ICC-01/04-01/07-717, 30 September 2008, par. 480ss. ICC, Prosecutor v. Bemba Gombo, ICC-01/05-01/08-424, 15 June 2007, par. 348. ICC, Prosecutor v. Muthaura, Kenyatta, Hussein Ali, ICC-01/09-02/11-382, 29 January 2012, par. 296. ICC, Prosecutor v. Ruto, Kosgey, Sang, ICC-01/09-01/11-373, 5 February 2012, par. 291. ICC, Prosecutor v. Al Mahdi, ICC-01/12-01/15-84, 24 March 2016, par. 24. ICC, Prosecutor v. Ntaganda, ICC-01/04-02/06-309, 14 June 2014, par. 104.

[111]See, D.G. DUTTON, The psychology of genocide, massacres, and extreme violence. Why "normal" people come to committ atrocities, Praeger Security International, London, 2007. J. WALLER, Becoming Evil. How ordinary people committ genocide and mass killing, Oxford University Press, Oxford, 2002.

[112]According to judge Wald in case Jelisić: "(...) the view that there is no additional public interest in determining a genocide charge simply because the underlying killings have already been dealt with as crimes against humanity and violations of the laws or customs of war may be problematic in the development of international criminal law (...)": ICTY, Prosecutor v. Goran Jelisić, Partial Dissenting Opinion of Judge Wald, AC, IT-95-10-A, 5 July 2001, par. 13. In the same spirit see: G. METTRAUX, International Crimes and the ad hoc Tribunals, and the ad hoc Tribunals, Oxford University Press, Oxford, 2005, pp. 26ss.

[113]The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind proposes to impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of

context element of each criminal category, which incorporates the notions of "collective perpetration" and "collective victimization"[114] absent in the descriptions of the individual conduct[115]. War crimes can also be committed by a single soldier without acting in the context of a collective action, given that the war itself is not a criminal phenomenon and the context element does not require the presence of a collective plan nor the direction of the deeds towards a particular group of individuals. For these reasons war crimes represent the criminal category with the least offensive disvalue. The situation is different with regard to crimes against humanity[116]. The element of context requires, in fact, that the author is aware of acting in the context of an extensive or systematic attack (active collective dimension) against the civilian population (passive collective dimension)[117]. As

such a crime, including providing themeans for its commission". The ICTY deemed the ILC Draft Code an "authoritative international instrument" In the Einsatzgruppen case (Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 572 (William S. Hein & Co., Inc. 1997) (1949) quoted in Furundzija, case No. IT-95-17/1-T, par. 218), the American military court also used a knowledge test, in contrast to the aforementioned purpose test, to convict defendant Fendler; the court determined that the defendant knew that executions were taking place. The ICTY Trial Chamber in Furundzija adopted a knowledge test: "(...) the mens rea required is the knowledge that these acts assist in the commission of the offence (...)". The ILC code also adopted the knowledge test. Under the ILC code, a person can only be found guilty of aiding and abetting, or otherwise assisting if they know that their help will facilitate a crime. The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the ad hoc tribunals. The mens rea of aiding and abetting is knowledge that the acts performed by an individual assist the commission of the specific crime by the principal perpetrator. Under this code, the aider and abettor need not share the mens rea element of the principal; but instead, must be aware of the essential elements of the crime that was ultimately committed by the principal. In crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent. In particular in the case of genocide, the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or ethnic group.

[114]The law on mens rea is plagued with many grey areas largely due to the vagueness and inconsistent use of terms. The utmost contribution of the Model Penal Code to the scholarship of criminal law is the introduction of a limited number of culpability terms such as "purposely", "knowingly", "recklessly" and "negligently". See also for details: A. SMEULERS, B. HOLA, ICTY and the culpability of different types of perpetrators of international crimes, in A. SMEULERS (ed.) Collective violence and international criminal justice, ed. Intersentia, Antwerp, Oxford, 2010, pp. 175-206.

[115]A.M. DANNER, Constructing a hierarchy of crimes in international criminal law sentencing, in Virginia Law Review, 87, 2001, pp. 465ss and in giurisprudence see, ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 803-804; ICTY, Prosecutor v. Dražen Erdemović, Judgment, AC, IT-96-22-A, 7 October 1997, par. 10.

[116]ICC, Prosecutor v. Lubanga, ICC/01/04-01/06-2842, 14 March 2012, parr. 980, 989. ICC, Prosecutor v. Bemba Gombo and others, ICC-01/05-01/13-1989, 19 October 2016, par. 64. ICC, Prosecutor v. Muthaura, Kenyatta, Hussein Ali, ICC-01/09-02/11-382, 29 January 2012, par. 297. ICC, Prosecutor v. Ruto, Kosgey, Sang, ICC-01/09-01/11-373, 05 February 2012, par. 292. ICC, Prosecutor v. Al Mahdi, ICC-01/12-01/15-84, 24 March 2016, par. 24. ICC, Prosecutor v. Ntaganda, ICC-01/04-02/06-309, 14 June 2016, par. 104.

[117]Y. DINSTEIN, Crimes against humanity, in J. MAKARCZYK (a cura di), Theory of international law at the threshold of the 21st century. Essays in Honour of Krzysztof Skubiszewski, ed. Brill-Nijhoff, Leiden, 1996, pp. 903ss.

stated by the ICTY Chamber of First Instance in the *Tadić* case, "(...) the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population (...)"[118]. For this reason crimes against humanity express a greater offensive against war crimes[119]. Finally, the crime of genocide constitutes the most serious

[118]ICTY, Prosecutor v. Duško Tadić, Opinion and Judgment, op. cit., par. 644.

[119]See for the crimes against humanity and in war: Criminal Code for Armenia (adopted on April 18, 2003). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 34, arts. 384-397); Criminal Code for Azerbaijan (adopted Sept. 30, 1999). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 16, arts. 100-113). Belgium, of June 16, 1993, as amended in August 2003, on the Punishment of Serious Violations of International Humanitarian Law. In Bosnia-Herzegovina the Law has been incorporated into the Penal Code under Articles 136bis to 136octies. Article 136bis defines genocide; Criminal Code for Bosnia-Herzegovina (entered into force on Mar. 1, 2003). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 17, arts. 171-172). Criminal Code of the Republic of Bulgaria (adopted in April 1968, amended as of May 2005). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 14, arts. 407-418); In Cambodia, April 17, 1975, to January 6, 1979. (Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/0801/12 (2001), as amended by NS/RKM/1004/006 (2004). Although Colombia has not adopted any specific law implementing the Rome Statute, the following provisions of the Criminal Code are applicable to crimes against humanity: Genocide: arts. 101-102; Forced disappearance: arts. 165-167; Kidnapping: arts. 168-171; Arbitrary detention: arts. 174-177; Torture: arts. 178-179; Forced displacement: arts. 180-181; Crimes against people and assets protected by international humanitarian law: arts.135-164; Crimes of terrorism: arts. 340-348; Code Penal Congolais, of November, 30, 2004. Denmark also has a statute on genocide, Danish Law No. 132 of 29 of April 1955 (Law Concerning Punishment of Genocide (Lov nr. 132 af 29.04.1955 om straf for folkedrab); Criminal Code of Estonia (entered into force on Sept. 1, 2003, amended as of March 15, 2007); Finnish Penal Code, amended to include Law 212/2008, Laki rikoslain muuttamisesta (Law Amending the Criminal Code) of May 1, 2008, The original provisions were enacted in December 1964; they were last amended by Law 2004-800 of August 6, 2004. Subtitle I specifically addresses crimes against humanity: genocide (art. 211-1); other crimes against humanity, including deportation, enslavement, systematic practice of summary executions, and other additional offenses (arts. 212-1 to 212-3); and common provisions (arts. 213-1 to 213-5). Subtitle II governs eugenic practices and human reproductive cloning (arts. 214-1 to 214-4 and 215-1 to 215-4); German Code of Crimes Against International Law (of June 26, 2002) (Gesetz zur Einführung des Völkerstrafrechtsgesetzbuches, June 26, 2001, Bundesgesetsetzblatt [BGBl.] I at 1842. The Penal Code of the Ivory Coast was adopted in 1981 as Law No. 81-640 and was modified by Laws 95-522, of July 6, 1995; 96-764 of October 3, 1996; 97-398 of July 11, 1997; and 98-756 of December 23, 1998; The Penal Code of Mali: Law No. 01-079 of August 20, 2001; Mexico's Federal Criminal Code includes a chapter entitled "Delitos Contra la Humanidad," which can be roughly translated as Crimes against Humanity. This chapter comprises two legal provisions: Articles 149 and 149-Bis. Article 149 describes a crime called "Violación de los deberes de humanidad," which can be roughly translated as "Violation of the Duties of Humanity." Article 149-Bis describes the crime of genocide. Articles 149 and 149-Bis do not appear to include statements on the extent of jurisdiction. Time constraints prevented a determination of whether other provisions of the Federal Criminal Code address this issue. Mexico's Federal Criminal Code. the Netherlands International Crimes Act 270, Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act). Norwegian law on crimes against humanity are contained in Law No. 4 of March 7, 2008, Act Amending the Penal Code 20 May 2005 No. 28, etc.; The Polish

crime because of the specific malice which expresses the will to destroy a protected group in whole or in part: the greatest disvalence therefore lies in the intention to provoke collective destruction on a discriminatory basis[120]. Apart from the multiple justifications put forward to support the existence of a hierarchy of crimes, it is possible to note that all the different theories are united by the fact that the greater (or lesser) collective capacity directly affects the overall disvalue of the fact. And this consideration is consistent with the

Criminal Code, adopted on July 6, 1997, Chapter XVI: Offenses Against Peace, Humanity and War Offenses, art. 118, With the Law No. 31 of July 22, 2004, was adopted the Portuguese Penal Law to the Rome Statute of the International Criminal Court, to criminalize conduct that constitutes a crime against humanity. (Lei No. 31/2004, de 22 de Julho (in Portuguese); Slovakia's Criminal Code (adopted in July 2005) Articles 4-7 of the Code establish jurisdiction over all crimes committed by anyone in the territory of the Slovak Republic Chapter 12 of the Code provides for the prosecution of crimes against peace, humanity, and war crimes. Article 418 prosecutes genocide, which is defined as the intentional elimination of a group of people because of their national, ethnic, racial, or religious origin; The applicable law in South Africa concerning crimes against humanity is the Implementation of the Rome Statute of the International Criminal Court, Act No. 27 of 2002 South African courts assume jurisdiction over a crime of genocide, a crime against humanity, or a war crime if: The crime was committed in South African territory; The suspect is a South African citizen; The suspect is a resident of South Africa; The suspect, after having committed the alleged crime, is present in South Africanterritory; or The alleged crime was committed against a South African citizen or resident. (Id.§4(3); Systematische Sammlung des Bundesrechts (SR) Switzerland cooperates with the International Criminal Court under a Federal Act on Cooperation with the ICC (Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, June 22, 2001, 351.6; Trinidad and Tobago: the International Criminal Court Act 2006, 2006 Trin. and Tob. Laws, No. 4, par. 10; The relevant provisions on crimes against humanity under United Kingdom law are contained in the International Criminal Court Act 2001, c. 17; Northern Ireland is also included in the scope of the Act's jurisdiction by virtue of section 58; Scotland has separate legislation-the International Criminal Court (Scotland) Act 2001, ASP [Act of Scottish Parliament] 13; Uruguay: Law 18026 of September 25, 2006. From the European Union see also: Council Framework Decision 2008/913/JHA of 28 November 2008 on CombatingCertain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (2008 Official Journal of the European Union [OJ] (L328) 55; Council Decision 2003/335/JHA of 8 May 2003 on the Investigation and Prosecution ofCrimes of Genocide, Crimes Against Humanity and War Crimes (2003 OJ (L118) 12; Council Decision 2002/494/JHA of 13 June 2002 Setting Up a European Network ofContact Points in Respect of Persons Responsible for Genocide, Crimes AgainstHumanity and War Crimes (2002 OJ (L167) 1.

[120]See, A.M. DANNER, Constructing a hierarchy of crimes in international crmes law sentencing, op. cit., par. 482. G. VERDIRAME, The genocide definition in the jurisprudence of the ad hoc tribunals, in International and Comparative Law Quarterly, 49, 2000, pp. 588ss. See also: ICTR, Prosecutor v. Georges Rutaganda, Judgment and Sentence, Trial Chamber, ICTR-96-3-T, 6 December 1999, par. 451; ICTR, Prosecutor v. Kayishema and Ruzindana, First Amended Indictment, ICTR-95-1-I, 11 April 1997 and ICTR, Prosecutor v. Jean de Dieu Kamuhanda, Indictment, ICTR-99-, 27 September 1999; Prosecutor v. Omar Serushago, Sentence, TC, ICTR, 98-39-S, 5 February 1999, par. 4; Prosecutor v. Jean Kambanda, Judgment and Sentence, TC, ICTR-97-23-S, 4 September 1998. See, A. KLIP, Commentary on Prosecutor v. Georges Rutaganda, in A. KLIP, G. SLUITER (a cura di), Annotated leading cases of international criminal tribunals. Volume II: The International Criminal Tribunal for Rwanda 1994-1999, ed. Intersentia-Hart Publishing-Verlag, Antwerp-Groningen-Oxford-Wien, 2001, pp. 787-792. K. AMBOS, S. WIRTH, Commentary on Prosecutor v. Kayishema and Ruzindana, in A. KLIP, G. SLUITER (a cura di), Annotated leading cases of international criminal tribunals, op. cit., pp. 701-708.

assertions that international crimes are collective in nature and offend legal assets belonging to the international community[121].

The subjective element is limited to *stricto sensu* subjective substance of crime "definitional subjective element"[122], ie the subjective link of the offender's internal world to the criminal act. According to the second, which has been adopted by the case law of *ad hoc* international criminal Tribunals[123], the subjective element, beyond the strictly subjective hypostasis, extends to a further regulatory requirement and characterizes at a valuation level the behavior as the impersonator of the perpetrator criminal "blameworthiness"[124].

[121]E. VAN SLIEDREGT, Individual criminal responsibility in international law, Oxford University Press, Oxford, 2012, pp. 20ss. H. VAN DER WILT, A. NOLLKAEMPER (a cura di), System criminality in international law, Cambridge University Press, Cambridge, 2009. H.C. KELMAN, V.L. HAMILTON, Crimes of obedience, toward a social psychology of authority and responsibility, Yale University Press, New Haven-London, 1989, pp. 46ss.

[122]S. VASILIEV, Between international criminal justice and injustice: Theorising legitimacy, in N. BAILLIET, C.M. HAYASHI (eds.), The legitimacy and effectiveness of International Criminal Tribunals, Cambridge University Press, Cambridge, 2016.

[123]The *mens rea* purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting- which appear in the legal instruments of the East Timor Panels of Judges and the IHT955Article 15(2)(c) of the IHT Statute. A similar purpose test is applied in a number of domestic jurisdictions: Canada's Section 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 and New Zealand's Section 66(1) Crimes Act 1961; the Model Penal Code of the American Law Institute; Section 14(3)(c) of Regulation 2000/15. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia's withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor. Farrell's approach here seems to be in keeping with the brief observations made by the Pre-Trial Chamber in The Prosecutor v. Callixte Mbarushimana, and also the manner in which the Panels of Judges attributed accomplice liability in East Timor. See, Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center American Law Institute, Model Penal Code: Official Draft and Explanatory Notes, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985); The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges) (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: "(...) the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)". and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15. See also: M.E. BADAR, Rethinking mens rea in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in O. OLUSANYA (ed.), Rethinking international criminal law: The substantive part, Europa Law Publishing, 2007, pp. 13-33.

[124]ICC, Prosecutor v. Thomas Lubanga Dyilo, Decision on Confirmation of Charges, Case No. ICC-01/04-01/06-803-, P-T. Chamber I, 29 January 2007, para. 320. Katanga Confirmation of Charges, para. 518 implicitly endorses not just the lesser blameworthiness of accessories, but also the lesser degree of blameworthiness of "merely ordering" in comparison to committing (through an organization). See also Lubanga Trial

The above issues lead the interpreter to a comprehensive investigation into the question of excluding criminal liability in international criminal law[125] by examining reasons that would be considered as grounds for the removal of the unfair character[126] as well as grounds for exclusion (in the event that they exclude from the outset the establishment) or lifting (in the event that it was destroyed by an evaluation) the attribution of the act to the perpetrator. For the purpose of characterizing these reasons, the concepts of "defenses" or "grounds for exclusion of criminal responsibility"[127]. In any case, these are reasons that respond to the category, not by denying the class, leading to the non-punishment of the perpetrator despite the fact that all the conceptual elements of the crime have been realized[128].

Concerning the dogmatic link between foundation and exclusion of responsibility in the event that the crime is deemed to have been committed[129] two central views have been supported: according to the first view that has its roots in common law and supported by G. Werle, the objective and subjective element of the crime are not abolished: they are confessed, but they are avoided on some grounds that prevent criminal liability[130]. According to the second view supported by the majority of the theoreticians, the reasons for exclusion of responsibility abolish the subjective element, without necessarily distinguishing whether as such they perceive the underlying concept of subjective crime or its final assessment on the basis of the distinction it was done

Judgment, par. 999, in which the Court said that: "(...) lowering the threshold [of the accused's contribution] would deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern (...)". G.J. KNOOPS, Defences in contemporary international criminal law, Transnational Publishers, 2001, pp. 97ss. J. GEERT, J. KNOOPS, Defenses in contemporary international law, Martinus Nijhoff, The Hague, 2008, pp. 7ss.

[125]M.I.F. FRANCISCO, Aspects of implementaing the culpability principle both under international and national criminal law, Wolf Legal Publishers, The Hague, 2008.

[126]See from the ICTY the case: Kunarac, Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković, Judgment, IT-96-23-T & IT-96-23/1-T, Trial Chamber, 22 February 2001, parr. 463.

[127]G.R. SULLIVAN, Knowledge, belief, and culpability, in S. SHUTE, A. SIMESTER (eds.), Criminal law theory: Doctrines of the general part, Oxford University Press, Oxford, 2002, pp. 209ss. J. VAN DER VYVER, The International Criminal Court and the concept of mens rea in international criminal law, in University of Miami International and Comparative Law Review, 12, 2004, pp. 50ss. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, op. cit., 2015, pp. 145ss.

[128]A. ESER, ''Defences'' in war crime trials, in Y. DINSTEIN, M. TABORY (a cura di), Waw crimes in international law, Kluwer International Law, The Hague, 1996, pp. 251ss.

[129]J. BLOMSMA, Mens rea and defences in european criminal law, ed. Intersentia, Antwerp/Oxford, 2012, pp. 277ss.

[130]G. WERLE, Principles of international criminal law, Oxford University Press, Oxford, 2014.

above[131]. It has been rightly observed that these two views do not necessarily contradict each other, as they are likely to work complementarily in the case of e.g. which, as a general condition for the establishment of criminal responsibility, understands those which the normative view of the subjective element prefers and the accused confesses to his crime and intent, but puts forward a reason that renders him incapable or unworthy of imputation.

Given the origin of the construction of the exclusion of responsibility from the forecasts of national criminal jurisdictions, it is not surprising that the StICC itself is not limited to the provision of article 21 par. 1 (c) which provides for general principles of law by the national jurisdictions (as a subsidiary source of law)[132], but specifically on the grounds of exclusion of liability has also specific express provision in article 31 (3)[133].

[131]I. BANTEKAS, Defences in international criminal law, in D. MCGOLDRICK, P. ROWE, E. DONNELLY (ed.), The permanent international criminal Court, op. cit., pp. 266ss.

[132]B. HOLÁ, A. SMEULERS, C. BIJLEVELD, International sentencing facts and figures: Sentencing practice at the ICTY and ICTR, op. cit., pp. 415ss. S. JOSEPH, M. CASTAN, The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary, Oxford University Press, Oxford, 2013. J. KELDER, B. HOLÁ, J. VAN WIJK, Rehabilitation and early release of perpetrators of international crimes: A case study of the ICTY and ICTR, in International Criminal Law Review, 14, 2014, pp. 1180ss. L.A. KHAN, B.L. DIXON, L. PULFORD, International criminal Courts, ed. Sweet & Maxwell, London, 2014. R. KOLB, La Cour internationale de justice, ed. Pedone, 2014. R. KOLB, Peremptory international law, Jus cogens. A general inventory, Hart Publishing, Oxford & Oregon, Portland, 2017. R. KOLB, D. SCALIA, Droit international pènal, op. cit., R. KOLB, The international Court of justice, Hart Publishing, Oxford & Oregon, Portland, 2013, pp. 1280ss.

[133]The ICTY Trail Chamber in Kordić and Čerkez has stated that the principle of self-defence enshrined in Article 31(1)((c) "reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law"; Prosecutor v. Kordić and Čerkez (Case No. IT 95-14/2), ICTY T. Ch., Judgment, 26 February 2001, para. 451). According to the same Trial Chamber "(...) the notion of 'self-defence' may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack" (para. 459); ICTY, Prosecutor v. Erdemović, ICTY A. Ch., Judgment, Joint Separate Opinion of Judge Mcdonald and Judge Vohrah, 7 October 1997, para. 88) while Judge Cassese in minority considered that: "(...) the defence of duress could be accepted taking into account at minimum the following four criteria:(1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat ; (4) the situation of duress should not have been self-induced (Prosecutor v. Erdemović, ICTY Appeals Chamber Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 41)". For analysis see: A. ESER, Article 31-Grounds for excluding criminal responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit., pp. 863-893. C.F. MORAN, A perspective on the Rome statute's defence of duress: The role of imminent, in International Criminal Law Review, 18, 2018, pp. 156ss. M. JOYCE, Duress: From Nuremberg to the International Court, funding the balance between justification and excuse, in Leiden Journal of International Law, 28, 2015, pp. 624ss. M. KLAMBERG, Evidence in international criminal trials: Confronting legal gaps and the reconstruction of disputed events, Martinus Nijhoff Publishers, Leiden, 2013, pp. 121, 124, 127. G. VERMEULEN, E. DEWREE, E., Offender reintegration and rehabilitation as a component of international criminal justice? Execution of sentences at the level of international tribunals and courts: Moving beyond the mere protection of procedural rights and minimal

According to it, the court has the discretion to apply other grounds for the exclusion of liability beyond those expressly provided for in its statutes.

The *ratio* of the above arguments to exclusion of responsibility rests on the very core of the international criminal phenomenon as a social phenomenon which, in the context of the international community, is linked to the creation of a universal perception of unfairness[134], which could not only consist of the ideal of justice for the victims, but also presupposes fair treatment and trial for the alleged perpetrators. The hitherto unreasonable reluctance of international criminal tribunals to accept substantive claims of exclusion of liability does not weaken their foundation in international criminal law[135]. They are admitted *in principio*[136], but are rejected *in-casu* probably because of the psychological bias against the accused for special gravity in close terms international crimes, as well as the fact that in the international criminal courts the choice of the accused is carefully made by the Public Prosecutor's Office in order to the most responsible for international crimes, who will rarely be able to claim the exclusion of their responsibility.

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fundamental interests?, ed. Maklu, Antwerp, Apeldoorn, 2014. V. GHAREH BEHJI, T.R. MARTHI, The principle of proportionality in international criminal law, in Acta Universitatis Danubius, 2011, pp. 7ss. N.A.J. CROQUET, The role and extent of a proportionality analysis in the judicial assessment of human rights limitations within international criminal proceeding, ed. Brill, Leiden, 2016. M.A. DRUMBL, Stepping beyond Nuremberg's halo. The legacy of the Supreme National Tribunal of Poland, in Journal of International Criminal Justice, 13, 2015, pp. 903-932.

[134]K. AMBOS, C. STEINER, On the rationale of punishment at the domestic and international level, in M. HENZELIN, R. ROTH, Le droit penal a l'epreuve de l'internationalisation, ed. LGDJ, Paris, 2002, pp. 317ss. N.A.J. CROQUET, The role and extent of a proportionality analysis in the judicial assessment of human rights limitations within international criminal proceeding, op. cit.,

[135]The aggregation principle grounds the criminal liability of corporations on the combined acts or omissions of individual agents where each act or omission is in itself insufficient. Mental states and conduct on the part of different individuals are joined together and considered as a whole. The underlying rationale is that a combination of personal transgressions or minor failures might reveal a gross breach of duty on the part of the company, or collective awareness that warrants the entity's responsibility for a criminal consequence. Some jurisdictions have been hesitant to extend the application of aggregation to crimes requiring proof of intent as opposed to only knowledge. Other legal systems have recognised the utility of the principle with regard to situations entailing recklessness and even gross negligence. See in argument: E.POSNER, A. PORAT, Aggregation and law, in J.M. Olin Program in Law and Economics Working Paper No. 587, 2012. M. FINDLAY, J. CHAH HUI YUNG, Principled international criminal justice: Lessons form tort law, ed. Routledge, London & New York, 2018. M. FINDLAY, R. HENHAM, Exploring the boundaries of international criminal justice, ed. Routledge, London & New York, 2016, pp. 83ss.

[136]See from the ICTY the case: Kordić and Čerkez, Prosecutor v. Dario Kordić, Mario Čerkez, Judgment, IT-95-14/2-T, Trial Chamber, 26 February 2001, par. 449. F. KALSHOVEN, T. FONTEIN, Some reflections on self-defence as an element in rules of engagement, in M. MATTHEE, B. TOEBES, M. BRUS (eds.), Armed conflict and international law: In search of the human face. Liber Amicorum in memory of Avril McDonald, T.M.C. Asser Press, The Hague, 2013, pp. 97ss.

6. SYSTEMATIC DELIMITATION AND TYPES OF REASONS FOR FORECLOSURE OF CRIMINAL LIABILITY IN INTERNATIONAL CRIMINAL LAW. THE DISTINCTION BETWEEN "JUSTIFICATIONS" AND "EXCUSES"

Although the grounds for exclusion of liability in international criminal law have not been subject to different categories from the case-law or the statutes of international criminal tribunals, which, moreover, follows the logic of common law which does not make the clear dogmatic differences in the law of mainland systems[137]. It is crucial to distinguish grounds for exclusion of liability from justifications and excuses. The former refer to cases where the elements of the legal form of crime have been filled, but behavior is not considered unfair, as the legal order applauds the choice of the perpetrator. The latter are related to the evaluation of the subjective association of the offender's internal world with the act in the sense given to it by the normative view of the subjective element and refer to cases where behavior is unfair and subjected to the required subjective cover by the perpetrator, but the act should not be imputed to him because he was unable to do otherwise[138].

The notion of the reason for removing the offender as *a causa justifica* of a crime is first mentioned by Grotius in the 17th century[139], while the question of the different moral and legal weight between justification and forgiveness[140]-understanding is traditionally a point of friction and different views as to the precise delimitation of the two regions, with Kant distinguishing first between inculpable and impunity[141]. The distinction has been consistently followed in the criminal systems of the countries of continental law, while the least clear image in the systems of ordinary law, which has also been transposed into the area of international criminal law because of its structural similarity with the ordinary law of law, must be attributed to the lack of emphasis of these systems on dogmatic purity.

[137]J. LOVELESS, Criminal law: Text, cases and materials, Oxford University Press, Oxford, 2010, pp. 334ss, the author noticed: "(...) theories of excuse and justification are not generally adhered to by the courts (…)".
[138]Expression used from: M. KRABBE, Excusable evil: An analysis of compklete defenses in international criminal law, ed. Intersentia, 2013, pp. 36ss
[139]See the: De iure belli ac pacis libri tres το 1625, H. GROTIUS (F .W. KELSEY, B. SCOTT (eds.)), De jure belli ac pacis libri tres, the clasics of international law, vol. 2, Oxford University Press, Oxford, 1925.
[140]K.J. FISCHER, Moral accountability and international criminal law: Holding agents of atrocity accountable to the world, ed. Routledge, London & New York, 2013.
[141]See I. KANT, (K. Vorländer (ed.)), Metaphysik der Sitten, Felix Meiner Verlag, 1966, pp. 41.

Moving on to the essence of discrimination, with regard to the justification of the act, the idea of matching this concept with the choice of the worst of two evils was adopted. Justification as a reason for exclusion of responsibility has as its own basis the act itself and works objectively: it justifies the act due to the lack of substantial devaluation, as it results from the comparison between a threatened attack on a substantial asset and the necessary infringement of another analogous or lesser importance, resulting in a situation acceptable to the legal order. On the contrary, forgiveness as a reason for exclusion of responsibility has as its axis the person of the perpetrator and operates subjectively: it is linked to the evaluation of the subjective association of the particular perpetrator with a finely unfair act, in cases where he could not otherwise do or was unable to realize the unfairness of his act[142]. If recognition of unfairness is understood as a socio-ethical "condemnation" of an act based on the recognition of certain social goods as fundamental to social coexistence and protected by law, forgiveness is the socio-ethical "discharge"[143] of a particular offender who has done wrongly and his conduct is not tolerated by the legal order, but he is admitted that under the specific conditions of his behavior he could not do otherwise and be forgiven. Although the above figure seems quite clear in terms of the qualitative difference between the two sizes, in practice there are boundary issues that are the cause of a strong theoretical controversy, coming to speak of "fallacy" around reason to remove the unjust[144].

The need for legal certainty, in any case, to develop the relevant debate in the field of international criminal law stems from the extremely important consequences of the above distinction. In particular, the grounds for justification and the grounds for forgiveness are in the context of a mutual exclusion and a specific order of consideration, since a justifiable act does not need to be checked in terms of the right to be charged to the perpetrator. Regarding the functioning of the grounds for exclusion, as stated above, the basic difference between justification and forgiveness is that the former operate objectively, affecting the unjust and potential participants, while the latter operate purely subjectively, affecting solely its criminal responsibility to whom the person is present[145].

[142]A. ESER, Justification and excuse, in American Journal of Criminal Law, 4, 1976, pp. 622ss.
[143]K.J. FISCHER, Moral accountability and international criminal law: Holding agents of atrocity accountable to the world, op. cit.
[144]L. VINJAMURI, The International Criminal Court and the paradox of authority, in Law and Contemporary Problems, 79, 2016.
[145]C. ROXIN, Strafrecht Allgemeiner Teil-Band I Grundlagen-Der Aufbau der Verbrechenslehre, C.H. Beck Verlag, Münich, 2006, pp. 661-662.

Lastly, a major consequence of discrimination is the possibility of a right of defense against an attacker who claims a reason to exclude his liability, since one can legitimately defend himself against an attacker without being charged, but not against an attacker who does not unfairly acts.

7. OTHER DISCRIMINATION AND THE BURDEN OF PROOF ON THE GROUNDS OF EXCLUSION OF RESPONSIBILITY.

First of all, distinction is made between substantive and procedural grounds for exclusion of liability. As with any national criminal jurisdiction, international criminal courts have their own special procedural rules to ensure a fair trial and respect for the rights of both victims and the accused[146]. A procedural reason for exclusion of liability precedes the substantive and does not refer to the substance of the case, but invokes the illegality of the continuation of the lawsuit due to the violation of mandatory procedural rules. Further distinction is made between the grounds of criminal law defense and those of international law[147]. This distinction is more important for the interpretation of the grounds for exclusion of liability, since both may be invoked by an accused before an ICC if their particular conditions are met[148].

Finally, there is a distinction between the grounds for exclusion of liability and the burden of proof, namely between affirmative and non-affirmative grounds for exclusion of liability[149]. The practical consequence of discrimination is that in the case of the former, the defendant's defense must prove the content of the allegation of liability, while in the latter case the burden of proof continues to be borne by the accused authority. As has been explained in the case law of international criminal tribunals, the burden of proving a

[146]D. LIAKOPOULOS, La parità di armi nella giustizia penale internazionale, op. cit.,

[147]E. VAN SLIEDREGT, E., The criminal responsibility of individuals for violations of international humanitarial law, ed. Springer, Berlin, 2003, pp. 215ss, the author noticed: "(...) lawful belligerent reprisal and (…) tu quoque which consists in claiming that the act accused by someone was also committed by the person who claims to be the victim (...)". D. LIAKOPOULOS, U. ZAGER, Victim-perpetrator and individual criminal responsibility in international criminal law, in International and European Union Legal Matters, 2014.

[148]P.S. WEGNER, The International Criminal Court in ongoing intrastate conflicts: Navigating the peace-justice divide, Cambridge University Press, Cambridge, 2015.

[149]D. LIAKOPOULOS, Schutz des angeklagten im Strafverfahren, op. cit., R. MAISSON, Justice pènale internationale, op. cit., M. MILANOVÍC, The Impact of the ICTY on the Former Yugoslavia: An anticipatory postmortem, in American Journal of International Law, 110, 2016, pp. 258ss. F. O'REGAN, Prosecutor vs. Jean-Pierre Bemba Gombo: The cumulative charging principle, Gender-based violence, and expressivism, in Georgetown Journal of International Law, 13, 2012, pp. 1344ss.

claim of exclusion of responsibility, that is to say, the obligation to prove the facts on which it is based, is the defense of the accused. As regards the measure of this obligation, it has been judged that for at least some cases of exclusion of liability, this is the measure of the balance of probabilities[150], ie the assumption that it is more likely to be true than something else[151], while in other cases it may be sufficient to have a lower level of proof of the claim[152]. With regard to the non-affirmative grounds for exclusion of criminal liability[153], they, in view of the above, are confined to questioning the narrow sense of the subjective nature of the crime, that is to our respective level of initial imputation, and will not concern us further in this analysis.

8. SELF-DEFENSE...

Perhaps the most traditional reason for exclusion of responsibility, and in particular justification for the act of the perpetrator, is the self-defense, which has been a major concern for the practice of international criminal tribunals and is now explicitly formulated

[150]D. LIAKOPOULOS, Schutz des angeklagten im Strafverfahren, op. cit.

[151]See from the ICTY the case: Hadžihasanović & Kubura, Prosecutor v. Hadžihasanović and Kubura, Decision on Requests for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, IT-01-47-T, Trial Chamber, 27 September 2004, par. 230.

[152]See in particular the case from ICT: Delalić, Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalić, Judgment, IT-96-21-A, Appeals Chamber, 20 February 2001, par. 582.

[153]See the case: Khbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law (...) held that the mens rea can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and wilfully in order to show culpability (...) the Amicus had to prove that the accused "(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various circumstances (...) if only wilful blindness is established, that alone suffices knowledge whichgives reason to impute criminal liability (...). Dee also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing judgment, 5 September 2016, para. 2. (Akhbar, Sentencing judgment) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)".

in article 31 (1) (c) of the StICC[154]. Distinct in two types of defense, defense in criminal law and defense under international law[155].

The Nuremberg Military Court in *Erich Raeder,* relying on the criteria set out in the *Caroline v. United States* (11US 496 (1813))[156], accepted that defense was a reason to exclude liability, but rejected it in this case, considering that preventive action in a foreign territory is permissible only when there is an "instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation"[157]. This was judged by the court that it did not exist in this case, as the imminent invasion of the allies in Norway called by the Raeder, had not yet taken place, while the evidence examined by the court showed that this ally plan was not as advanced as the corresponding German plan and therefore could not be considered as the cause. The International Military Court for the Far East, which recognized that any international or national law prohibiting the use of force is necessarily restricted by the right to defense[158]. As regards the thinking to exercise the right, the court has stated that it can not be accepted that it belongs exclusively to the State making use of it but must be judged objectively. On the argument of some defendants (including *Shimada, Tojo* and *Togo*)[159] that Japan's aggressive actions against

[154]M. KLAMBERG, Evidence in international criminal trials: Confronting legal gaps and the reconstruction of disputed events, op. cit., pp. 121-127.
[155]K. VAN DEN HOLE, Anticipatory self-defence under international law, in American University International Law Review, 19, 2003, pp. 70-106. J.A. GREEN, F. GRIMAL, The threat of force as an action in self-defense under international law, in Vanderbilt Journal of Transnational Law, 44, 2011, pp. 285-329. J. MOORE, Reasonable provocation: Distinguishing the vigilant from the vigilante in self-defense law, in Brooklyn Law Review, 78, 2013, pp. 1698ss.
[156]C. GREENWOOD, Caroline, The, in Max Planck Encyclopaedia of Public International Law, 2009, par. 5. See also M. GILLETT, The anatomy of an international crime: Aggression at the International Criminal Court, op. cit.
[157]A. REED, M. BOHLANDER (a cura di), General defences in criminal law. Domestic and comparative perspectives, Ashgate Publishing, Farnham, 2014. S.DARCY, Defences to international crimes, in WA. SCHABAS, N. BERNAZ, Handbook of international criminal law, Routledge, London & New York, 2011, pp. 231-245. K. AMBOS, Defences in international criminal law, in S. BROWN, Research handbook on international criminal law, Edward Elgar Publishing, Cheltenham, 2011. H. VAN DER WILT, C. PAULUSSEN, Legal responses to transnational and international crimes, op. cit.,
[158]The United States of America et al. v. Araki et al., Judgment, International Military Tribunal for the Far East (Tokyo), 4 November 1948, par. 47. R.H. MINEAR, Victor's justice. Tokyo war crimes trials, Princeton University Press, Princeton, 2016. Y. TANAKA, T. MCCORMACK, G. SIMPSON, Beyond victor's justice? The Tokyo war crimes trial revisited, Martinus Nijhoff Publishers, Leiden-Boston, 2011. R. RYER, The Tokyo IMTR and crimes against peace (aggression) is there anything to learn?, in L.N. SADAT, Seeking accountability for the unlawful use of force, Cambridge University Press, Cambridge, 2018.
[159]M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, op. cit.

allied forces were in lawful defense, the court ruled that the opposite was the case[160]. Both courts, which accepted the defense as a reason to exclude liability in general and abstract, then rejecting the in-case claims, did not seem to distinguish between the exclusion of state liability and individual criminal responsibility.

One of the most important judgments of the latter in the *Kordić* & *Čerkez* case of the ICTY, was discussed extensively[161]. The defense of *Dario Kordić*, who was a high-profile political figure on the Bosnian side of Croatian origin, claimed that the acts of serious violations of the Geneva Conventions, war crimes and crimes against humanity attributed to him were defensive, as the Bosnians Croatian origin in these areas were victims of attacks by Muslims in central Bosnia[162].

On the basis of this allegation, the court has considered the matter in a more general manner, noting that although the defense is not provided for in the statute of the court, it is a reason for excluding responsibility to be part of the general principles of criminal law applied by the court. By defining the defense, it defines it as the act of defense in favor of the person or property of the defense or third party against an attack, since the defenses constitute a reasonable, necessary and proportionate response to the attack, referring also to the corresponding definition of article 31 1 (c) of the StICC. At this point, the court proceeded with a very important clarification: it pointed out, in relation to the concept of "defensive operations"[163], that the participation of a person in a defense

[160]The United States of America et al. v. Araki et al., Judgment, International Military Tribunal for the Far East (Tokyo), op. cit.,

[161]G. GINSBURGS, V.N. KUDRIAVTSEV (a cura di), The Nuremberg trial and international law, Martinus Nijhoff Publishers, Boston-London, 1990. J.R. AMENGE OKOTH, The crime of conspiracy in international criminal law, ed. Springer, Berlin, 2014. C. RUDOLPH, Power and principle: The politics of international criminal Courts, Cornell University Press, Cornell, 2017. F. TUERKEIMER, Reflections on Nuremberg, in Loyola Los Angeles International & Comparative Law Review, 40 (1), 2017, pp. 26ss. O. UGUMANIM BASSEY, D. EKPE, Africa and the International Criminal Court: A Case of imperialism by another name, in International Journal of Development and Sustainability, 10, 2015. N. BAILLIET, C.M. HAYASHI (eds.), The legitimacy and effectiveness of International Criminal Tribunals, Cambridge University Press, Cambridge, 2016. R. MERKEL, The law of the Nuremberg trial: Valid, dubious, outdated, in G. METTRAUX (a cura di), Perspectives on the Nuremberg Trial, Oxford University Press, Oxford, 2008, pp. 555-576.

[162]ICTY, Prosecutor v. Dario Kordić, Mario Čerkez, op. cit., par. 448. L.N. SADAT, The Nuremberg trial, seventy years latewr, in Washington University Global Studies Law Review, 15, 2016. V. DAMNJANOVIC, Die Beteilingunsformen im deutschen und serbischen Stafrecht sowie in der ICTY-Rechtsprechung, BWN Berliner Wissenschafts Verlag, Berlin, 2013, pp. 246ss. J. HOLLING, Internationaler Strafgerichtshof und Verbrechens prävention, LIT Verlag, Münster, 2016, pp. 148ss. A. GRESCHKOW, Feindbilder der Nachkriegsgeneration in Bosnien und Herzegowina: Bosniens Jugend zwischen Hoftung und den Schatten der Vergangenheit, Diplomica Verlag GmbH, Hamburg, 2014.

[163]A. GRESCHKOW, Feindbilder der Nachkriegsgeneration in Bosnien und Herzegowina: Bosniens Jugend zwischen Hoftung und den Schatten der Vergangenheit, op. cit.,

company does not in itself give rise to a right of defense in the sense of the exclusion of individual criminal liability for that person[164]. Any argument alleging exclusion of a person's individual criminal responsibility must be supported by specific facts relating to each individual offense for which the person is accused. The court then proceeded to substantively examine *Kordić's* claim by rejecting him, as the evidence at his disposal did not reveal that Bosnian Croatian origin enterprises could be considered as defense companies, as they seemed to be the beginning of a plan to exterminate Muslims in the region[165].

The Court's contribution to defense law in international criminal law and its judgments in the *Stakić* case[166] was important. The court concluded that all of the

[164]For the criminal liablity see the next cases: The Prosecutor v. Sam Bockarie (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Trial judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Appeal judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Trial judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Appeal judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008); The Prosecutor v. Johnny Paul Koroma (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003); The Prosecutor v. Fofana and Kondewa (CDF Case) (Trial judgment) (Special Court-xxii-for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); The Prosecutor v. Fofana and Kondewa (CDF Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008); The Prosecutor v. Foday Saybana Sankoh (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003); The Prosecutor v. Charles Ghankay Taylor (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007). For more details and analyisis of the above cases see: M.J. KELLY, The parameters of vicarious corporate criminal liability for genocide under international law, in A. BYRNES, C. HAYASHI-MICHAELSEN, International law in the age of globalization, op. cit., R. BEHRENS, J. HENHAM, Elements of genocide, op. cit., pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, op. cit., M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, op. cit., C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, op. cit., pp. 80ss. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?, op. cit., pp. 102ss.
S. MOUTHAAN, Sexual violence against men and international law. Criminalising the unmentionable, in International Criminal Law Review, 13, 2013, pp. 668ss. P. KIRBY, How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence, in European Journal of International Relations, 18, 2012. J.R. MCHENRY, The prosecution of rape under international law: Justice that is long overdue, in Vanderbilt Journal of Transnational Law, 35, 2002, pp. 1310ss. N. LAVIOLETTE, Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda, in The Canadian Yearbook of International Law, 36, 1998, pp. 94ss. J.A. WILLIAMSON, Some consideration on command responsibility and criminal liability, op. cit., pp. 306ss. D.A. NEBESAR, Gender-based violence as a weapon of war, in U.C. Davis Journal of International Law and Policy, 4, 1998, pp. 148ss. I. PICCOLO, The crime of rape in international criminal law, International Courts Association, 2013.
[165]ICTY, Prosecutor v. Milomir Stakić, Judgment, IT-97-24-T, Trial Chamber, 31 July 2003.
[166]G. ACQUAVIVA, M. HEIKKILÄ, Protective and special measures for witnesses, in G. SLUITTER et al. (eds), International criminal procedure-Principles and rules, Oxford University Press, Oxford, 2013.

elements and considerations above show that Serbian forces functioned on the basis of a comprehensive ethnic cleansing plan of the region by the Muslim populations and did not act in self-defense[167], which has implicitly involved an essential element in defense. The same reasoning regarding the rejection of a defense as a result of an assessment of the accused's behavior as motivated by other motives and not for defensive purposes was also initiated by the court in *Galić*[168] and *Strugar*[169]. For the purposes of this attack, the court also dealt with *Delić*[170], where the claim of legal defense was rejected, since the acts of the soldier (stabbing and shooting) were not defensive operations after that[171]. In case *Gotovina and others*[172] of ICTY, the findings of this judgment of the first instance court are extremely important as regards the relationship between national and international criminal jurisdiction[173], as an exceptional case of justification of a defense homicide was examined *ex officio* because the defendants had been acquitted to a Croatian national criminal court for the same act for that reason[174]. The substantive rejecting judgment of the tribunal is rather devoid of significance in relation to the indirect finding that the judgment on the existence and the conditions of defense may differ from a national to the international criminal jurisdiction[175] as the latter is weighed against different facts such as the status of potentially attacked as a civilian in control eg. the proportionality of the defense.

At the ICC level, there has so far been no reason for the court to address the defense issue as a reason for foreclosure and to analyze its data, in addition to a defense defense as a reason for justifying acts by United Nations peacekeeping missions in *Abu*

[167] R. ESTUPIÑAN SILVA, Principios que rigen la responsabilidad internacional penal por crìmenes internacionales, in Anuario Mexicano de Derecho Internacional, 12, 2012, pp. 136ss.
[168] ICTY, Prosecutor v. Stanislav Galić, Judgment and Opinion, IT-98-29-T, Trial Chamber, 5 December 2003, par. 576.
[169] ICTY, Prosecutor v. Pavle Strugar, Judgment, IT-01-42-T, Trial Chamber, 31 January 2005, par. 214.
[170] ICTY, Prosecutor v. Rasim Delić, Judgment, IT-04-83-T, Trial Chamber, 15 September 2008.
[171] S. FINNIN, Mental elements under article 30 of the Rome statute of the International Criminal Court. A comparative analysis, op. cit., pp. 328ss. B.S. BROWN, Research handbook on international criminal law, op. cit., pp. 86ss. A. COLE, International criminal law and sexual violence, in C. MCGLYNN, V.E. MUNRO, Rethinking rape law. International and comparative perspectives, ed. Routledge, London & New York, 2010, pp. 49ss. M.E. BADAR, S. PORRO, Rethinking the mental elements in the jurisprudence of the ICC, op. cit.,
[172] ICTY, Prosecutor v. Gotovina et al., Judgment Vol. II/II, IT-06-90-T, Trial Chamber, 15 April 2011.
[173] A. LETT, The meanigless existence of universal jurisdiction, in Michigan State International Law Review, 23, 2015, pp. 547ss.
[174] ICTY, Prosecutor v. Gotovina et al., Judgment Vol. II/II, IT-06-90-T, Trial Chamber, 15 April 2011.
[175] M. LANGER, The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes, op. cit., pp. 42ss.

Garda case[176]. In the StICC, defense is provided as a reason for exclusion of liability in article 31 (1) (c), whereas under article 145 (2) (a) (i) of the Rules of Procedure and Evidence even a failed defense may be assessed for the purpose of assessing the accused's criminal liability. The issue of the right to defense time is worth a bit longer, as a critical difference with the national criminal system, as mentioned, is that it did not appear in the window of the house. *Rašići* was acquitted by the court for the defense and the other defendants as having no involvement in homicide the current attack is required, but the "imminent" is enough[177]. This phrase, which has been expressed mainly by the concepts "imminent" and "immediately antecedent" in international criminal law[178] is used to attribute the nature of the defense act to an emergency[179]. The historical interpretation of article 31 (1) (c) provision, which explicitly rejected the concepts of "immediate threat or force"[180] and "use of force"[181] by States Parties' representatives, and preferred that of "imminent force"[182], leads to the conclusion that there is no necessity of the existence of

[176]Situation in Darfur, Sudan, in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on the confirmation of Charges, ICC-02/05-02/09, Pre-Trial Chamber I, 08 February 2010, par. 71. J.D. VAN DER VYVER, Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court, in African Human Rights Law Journal, 11, 2011, pp. 691ss. L.A. CAMARGOS, A responsabilidade penal internacional dos individuos: Estudo do caso Darfur, in Revista de Direito Brasileira, 8, 2013, pp. 199ss.

[177]A. ESER, Article 31 Grounds for Excluding Criminal Responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit.

[178]A. ESER, Article 31 Grounds for Excluding Criminal Responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit., pp. 881ss.

[179]H. TONKIN, Defensive force under the Rome Statute, in Melbourne Journal of International Law, 6, 2005, pp. 11ss.

[180]R. WHITE, S. PERRONE, Crime, criminality and criminal justice, Oxford University Press, Oxford, 2015. G. ZYBERI, C. ROHAN, Defense perspectives on international criminal justice, Cambridge University Press, Cambridge, 2017, pp. 436ss. G. ZYBERI, The role of international Courts in post-conflict societies, in I. BOEREFIJN et al. (eds) Human rights and conflict: Essays in honour of Bas de Gaay Fortman, ed. Brill, The Hague, 2012, pp. 368ss.

[181]O. DÖRR, Use of Force, Prohibition of, in Max Planck Encyclopedia of Public International Law, 2011, parr. 11-12. See also the case: Olsson v. Sweden (No 1) of 24 March 1988, par. 67, whcih the European Court of Human Rights stated that: "(...) the assessment as to whether or not an act of self-defence was lawful can be compared to the steps followed (…) in evaluating whether an interference with certain human rights was arbitrary or not. In delivering judgments, it is firstly determined whether or not the relevant limitations pursued a legitimate aim and secondly, whether or not the adopted measures were necessary and proportionate to achieve such purposes (...)". According to our opinion the limits of the right of self-defence can be rather found within the tests of reasonableness, necessity and proportionality, which are applied in reference to the purpose of the defence, i.e. the protection of oneself, another person or, as regards war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.

[182]M. CHERIF BASSIOUNI, The statute of the international criminal Court: A documentary history, Transnational Publishers, New York, 1999, pag. 320.

the offensive as an empirical magnitude, but this must be forthcoming soon. As a result, some margin for "preventive defense" is left in the sense of waiting for an attacker to be attacked, who suspects a risk of the attack being carried out in the future, although this has not yet been done[183]. This possibility, however, must not be confused with accepting the simple and abstract prediction that the enemy is going to attack in the future[184], but it must be required a concrete manifestation of the aggression proclaimed either by the existence of an earlier attack or by specific objective indications of both the intentions of the (soon) assailant and of their apparent immediate occurrence. Thus, it is right to interpret the "imminent force" of article 31 (1) (c) as a "direct imminent attack"[185].

The concept of illegal assault must be interpreted in the light of applicable international criminal law and not in terms of national criminal law, resulting, for example, that the use of force between combat troops in an ongoing war can not be regarded as an illegal assault. Regarding the issue of protected goods, from the time of the drafting of the statutes, the choice of assimilation to war crimes of property necessary for a military mission with values such as life and physical integrity traditionally considered to be protected by the right to defense[186], with the wording of the statutes being more readable in the light of the principle of proportionality with other goods for property elements without which it would in any case extremely difficult to achieve the military mission and therefore may be created and danger to life.

In addition to the defense elements now defined in the StICC, it is worth keeping the basic distinction analyzed by the ICTY. In particular, between the invocation of the defense in the context of the *ius ad bellum* on the lawfulness of a defense firm of a State or a quasi-State entity which is intended to lead subsequently to the legal defense and to the person of the defendant and the rights of the person in the defense that does not depend on the legitimacy of collective action, but refers to the personal right of the accused to defend himself or a third person from an illegal assault. By combining the categories of this distinction, it has been proposed to recognize a third category that

[183]See from the german civil law: BGH 18/04/2002, NStZ 2002, pp. 203ss.
[184]G.P. FLETCHER, A crime of self-defence, The University of Chicago Press, Chicago, 1988, pp. 20. R. DUBLER SC, M., KALYK, Crimes against humanity in the 21st century. Law, practice and threats to international peace and security, op. cit., N. GERAS, Crimes against humanity. Birth of a concept, Manchester University Press, Manchester, 2011.
[185]H. TONKIN, Defensive force under the Rome Statute, op. cit.,
[186]A. CASSESE, The Statute of the International Criminal Court: Some preliminary reflections, in European Journal of International Law, 10 (1), 1999, pp. 154-155.

defines defense in international criminal law and deals with acts of self-defense *in bello* in order to examine *ad hoc* each time the assistance conditions for the exercise of this right, taking into account the specificities of international crime.

9. NECESSITY AND DURESS AS A DEFENCE

The same traditional defense-for-exclusion reason, with a difference in its dogmatic nature, is the emergency situation in which the accused invokes a particular and extreme risk situation to justify his deed or ask him not to be attributed to it. First of all, it would be important to clarify the conceptual issue of the difference between the term necessity and the relative term of duress, as the two terms are used in international criminal law to describe a similar cases of exclusion of liability, but it is not clear whether they are classified into different categories of grounds for exclusion of liability (grounds for justification/grounds for forgiveness). Although the traditional approach to common law distinguishes the two cases by putting the duress into the area of the excuses and the necessity in the field of justifications it should be pointed out that it seems rather frivolous to conclude that the same applies in the area of international criminal law.

A common element of the two provisions is the requirement that the person should not have been faced with this situation by his own fault, with the wording of the statutes referring to a threat from a person or beyond the person's control. There has been a controversy over the limits of the last wording, namely whether it can extend to the logic of the previous fault that covers behaviors such as entering an organization. In both views to find a basis in theory, it would be very important preoccupation of the court to the question of its jurisdiction under article 31 (2) to interpret the grounds for exclusion of the Statute responsibility.

In case of *Erdemović* of ICTY[187], the crucial questions raised before the tribunal went beyond the specific case and concerned the nature of coercion as a reason for justification or forgiveness of an act, whether coercive coercion can serve as a reason for foreclosure in one crime against humanity[188] and whether the reason for the exclusion of

[187]ICTY, Prosecutor v. Drazen Erdemovič, Indictment, IT-96-22-T, Office of the Prosecutor, 22 May 1996, parr. 1-12.
[188]ICTY, Prosecutor v. Vasiljević, IT-98-32-A, 25 February 2004, par. 102. ICTY, Prosecutor v. Furundžija, IT-95-12/1-T, 10 December 2008, par. 233. ICTY, Prosecutor v. Perišić, IT-04-81-T, 06 September 2011, par. 126. ICTY, Prosecutor v. Karadžić, IT-95-5/18-T, 24 March 2016, par. 575. ICTR, Prosecutor v. Bagilishema, ICTR-95-

liability is to be applied in the sense of proportionality between the damage caused and the threat to the accused[189]. The court of first instance initially accepted the possibility of coercion by threatening to remove the offender (negate the mens rea of the offence)[190], by linking its application to the requirement and proving a relevant superior order that should be made clear under which conditions was given and how it was perceived.

But to make clear what it considers the activation conditions of this speech, subjects coercion by threat to a proportionality test, concluding that the criterion was never satisfied in the case of crimes against humanity, including the one contrasted the life of the offender and on the other hand, humanity as a whole[191]. In any case, rejecting the substantive claim, holding that this case did not prove the circumstances that would justify the total exclusion of the defendant's liability, and merely take it into account when determining[192].

We can say that the incorrect application of the *Čelebići* criterion is detected, with the appeal ruling in the *Kordić & Čerkez* case the ICTY has adopted a diametrically opposed solution, concluding in favor of the criminal offense[193]. The accumulation of legal qualifications was considered legitimate due to the fact that both rules each have a distinct and additional element with respect to the other[194]: while persecution does not

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1A-T, 07 June 2001, par. 33. ICTR, Prosecutor v. Ngirabatware, ICTR-99-54-T, 20 December 2012, par. 1294. ICTR, Prosecutor v. Ndahimana, ICTR-01-68-T, 30 December 2011, par. 723.

[189]L.E. CHIESA, Duress, demanding heroism and proportionality: The Erdemović case and beyond, in Vanderbilt Journal of Transnational Law, 42, 2008, pp. 743ss.

[190]See, ICTR, Prosecutor v. Clément Kayishema & Obed Ruzindana (ICTR-95-1-A), Judgment (Reasons), Appeals Chamber, 1 June 2001, par. 187: "(D)irect commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute"; ICTR, Callixte Kalimanzira v. The Prosecutor (ICTR-05-88-A), Judgment, Appeals Chamber, 20 October 2010, par. 219: "[P]hysical perpetration need not only mean physical killing and (…) other acts can constitute direct participation in the actus reus of the crime". ICTY, Prosecutor v. Drazen Erdemovič, Judgment, IT-96-22-A, Appeals Chamber, 7 October 1997, par. 14. ICTY, Prosecutor v. Fatmir Limaj et al. (IT-03-66-T), Judgment, Trial Chamber II, 30 November 2005, par. 509; ICTY, Lukić & Lukić Trial Judgment, par. 900; ICTY, Prosecutor v. Miroslav Kvočka et al. (IT-98-30/1-T), Judgment, Trial Chamber I, 2 November 2001, par. 251.

[191]M. DEGUZMAN, Harsh justice for international crimes?, op. cit.,

[192]ICTY, Prosecutor v. Drazen Erdemovič, Judgment, IT-96-22-A, Appeals Chamber, op. cit.,

[193]ICTY, Prosecutor v. Kordić and Čerkez, Appeals Judgment, op. cit., par. 1040.

[194]ICTY, Prosecutor v. Milorad Krnojelac, Appeals Judgment, cit., par. 188. A different opinion and orientation in cases: Krstić, Vasiljević and Krnojelac, the judge Shahabudden affirmed that: "(...) were it otherwise, the legal elements of the crime of persecution would vary according to the legal elements of the particular crime on which the persecution is based. The legal elements of the crime of persecution would include the legal elements of the crime of enslavement if enslavement were alleged to be the basis of the persecution charged. Similarly with respect to deportation, imprisonment, torture and rape. The legal elements of a charge for persecution would thus vary from case to case; in the present case, they would include the legal

require the presence of an action or omission[195] that causes the death of an individual, murder does not require a discriminatory act and intent. The same reasoning is extended "discriminatory intent and is therefore more specific than murder as a crime against humanity (...)"[196].

The majority of the court proceeded to a section by denying *a priori* the operation of coercion as a reason for foreclosure of soldiers accused of war crimes or crimes against humanity involving the removal of innocent lives. Judges McDonald and Vohrah developed the majority argument, supported by Judge Li, pointing to six arguments for their position[197]. Firstly, they consider the decision of the court of first instance to be contradictory, since it states (in paragraph 19) that the criterion of proportionality can not in any case be satisfied in the case of crimes against humanity, but also accepts (in paragraph 14) coercive coercion can generally work in such cases as a reason for foreclosure. Secondly, in the judgment of the two judges, the international case-law after the Second World War II does not argue in the statement of the foundation of coercion as a reason for the exclusion of liability in international customary law in cases involving the killing of innocent people. Thirdly, on the same issue of argument for the lack of foundation of coercion in international customary law, they add the argument that some cases that have been accepted are not enough to impose a stable and uniform practice in the states that would lead to the acceptance of international customary. Fourthly, they reject the basis of the specific ground of exclusion of liability and the general principles of law recognized by civilized nations[198] which are an independent source of international law according to art. 38 of the Statute of the International Court of Justice on account of the different solutions to be found between the criminal law systems of ordinary law and

elements of all the crimes on which the persecution is alleged to have been based. That variability is not reconcilable with the stability, definitiveness and certainty with which the legal elements of a crime should be known. Those elements must not depend on accidents of prosecution; they must clearly appear once and for all from a reading of the provision defining the crime (...): ICTY, Prosecutor v. Radislav Krstić, Partial Dissenting Opinion of Judge Shahabuddeen, AC, IT-98-33-A, 19 April 2004, par. 91. See also: G. BOAS, J.L. BISCHOFF, N.L. REID, Elements of crimes under international law. Volume II, Cambridge University Press, Cambridge, 2008, pp. 340ss.

[195] C. GOSNELL, Damned if you don't liability for omissions in international criminal law, Ashgate Publishing, Farnham, 2013.

[196] G. BOAS, J.L. BISCHOFF, N.L. REID, Elements of crimes under international law. op. cit.

[197] ICTY, Prosecutor v. Erdemovič, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 7 October 1997.

[198] G. WERLE, Völkerstrafrecht, M. Siebeck, Tübingen, 2003.

the continental law[199]. Beyond this, the fifth argument arises from the judges' argument that the court is operating in the context of international humanitarian law, the purpose of which is to protect the weak. If the exclusion of responsibility for coercion in a case such as that of *Erdemović* is accepted, the incumbents are automatically encouraged to commit murder in the belief that they will be relieved by coercion and consequently the purpose of the supporters is better served.

Consequently, the approach of the majority stemming mainly from political causes is judged by A. Cassese as contrary to the fundamental principle *nullum crimen sine lege*[200]. Afterwards, however, and recognizing the operation of coercion in the face of a threat in principle and pointing out its differences with the emergency situation and the superior order, it introduces a strict proportionality criterion, interpreting coercion as a reason for justifying the act and stipulating that the crime committed within its framework is not disproportionate to the harm that has been threatened[201]. While admitting that such a criterion would very hardly be met in the case of crimes like crimes against humanity, it finds an exception for very specific cases: when the victim is about to die in any case, so we do not have a real choice between loss of life of the offender and loss of life of the victim, but between either the loss of life of the victim or the loss of life of both[202]. A. Cassese states, however, that in every case the other elements of coercion must be checked against a threat, including the imminent threat of serious and irreparable harm to life or physical integrity and otherwise unavoidable, but particularly the lack of fault of the coerced person to the situation in which it came before being forced.

In the same spirit judge Stephen[203], stressing that the need to justify and protect innocent victims such as Muslims in ex Yugoslavia can not overrule the need for a fair trial and recognition of a legitimate reason for foreclosure of a person who was unable to

[199] Joint Separate Opinion of Judge McDonald and Judge Vohrah, op. cit., par. 66.
[200] G.E. BARCO, Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine lege Prinzips im Völkerstrafrecht, Duncker & Humblot, Berlin, 2018. C. KRESS, Nulla poena nullum crimen sine lege, in Max Planck Encyclopedia of Public International Law, 2010, pp. 4ss. G.E., COTE BARCO, Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht, Duncker & Humblot, Berlin, 2018.
[201] See, D. ROBINSON, Criminal law defenses, Thomson West, Minesota, 1984, pp. 367-368.
[202] D. ROBINSON, Criminal law defenses, op. cit.,
[203] ICTY, Prosecutor v. Erdemovič, Separate and Dissenting Opinion of Judge Stephen, Appeals Chamber, 7 October 1997. M.N. WAKE, E. SMITH, (eds.), General defences in criminal law. Domestic and comparative perspectives, ed. Routledge, London & New York, 2016, pp. 255-272. C. HENDERSON, Research handbook on international conflict and security, Edward Elgar Publishing, Cheltenham, 2013, pp. 375-420.

influence by its own will the protection of the life of innocent people (strict utilitarian logic)[204]. In McDonald's and Vohrah's view, it is impossible to "weigh" human lives in such a proportionality test, while Judge Li adds that accepting the minority argument could even justify the killing of innocents by a criminal organization which would invoke coercion. The case eventually returned to the first instance for a different reason[205], where *Erdemović* re-apologized, but could no longer rely on coercion for reasons other than measurement[206].

In case *Kvoćka* and others of the ICTY[207], where the choice of the court to discuss in essence the coercion of the accused for coercion, was previously confused with *obiter dictum* for the accused *Miroslav Kvoćka* who had not invoked the specific reason for foreclosure that "it is a well-established case law of the court that coercion can not act as a reason for excluding war crimes or crimes against humanity"[208]. From the case law of the International Criminal Tribunal for Rwanda (ICTR) in the case of *Kajelijeli*[209], more in his judgment on the burden of proving the assertion of coercion by threatening, as he considered that after proof of the factual facts underlying the allegation the burden of defusing them the facts are again borne by the accused authority and in case of doubt this should lead to discharge of the accused.

The manner in which A. Cassese defined his coercion in his distinctive opinion in the judgment of the Appeals Chamber of the ICTY in the *D. Erdemović* case[210] was to have a catalytic effect on the definition used in article 31 (1) (d) of the StICC[211]. Although the term "duress" is used only, it is clear from the article's interpretation that this essentially includes the necessity situation, since it distinguishes between cases where the threat comes from other persons (coercion from threat) and cases in which the threat is posed by other circumstances beyond the control of the person (emergency)[212]. According to the

[204]Joint Separate Opinion of Judge McDonald and Judge Vohrah, op. cit., par. 80ss.
[205]See, Joint Separate Opinion of Judge McDonald and Judge Vohrah, par. 11.
[206]ICTY, Prosecutor v. D. Erdemović, Sentencing Judgment, IT-96-22-Tbis, Trial Chamber II, 5 March 1998.
[207]ICTY, Prosecutor v. Miroslav Kvoćka et al., Judgment, IT-98-30/1-A, Trial Chamber, 2 November 2001.
[208]C. HENDERSON, Research handbook on international conflict and security, op. cit.,
[209]ICTR, Prosecutor v. Juvénal Kajelijeli, Judgment and Sentence, ICTR-98-44A-T, Trial Chamber, 1 December 2003.
[210]ICTY, Prosecutor v. Erdemovič, Separate and Dissenting Opinion of Judge Cassese, par. 16. See also: S. DARCY, Defences to international crimes, op. cit., pp. 231-245.
[211]B. KREBS, Justification and excuse in article 31 (1) of the Rome statute, op. cit.
[212]A. ESER, Article 31 Grounds for Excluding Criminal Responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit.

following definition, which has not yet been discussed by the court in other cases[213], the invocation of coercion implies the existence of a threat of imminent killing or of persistent or imminent serious bodily injury against the accused or other person not against property. In particular, it is claimed that the defendant did not intend to cause a greater harm than the one he sought to avoid (the defendant must not have intended to cause a greater harm than the one sought to be avoided)[214]. Finally, as mentioned above, the threat may come from either other people or from circumstances beyond the control of the offender, while unregulated and thus open to interpretation remains the question of A. Cassese's last criterion, that lack of prior responsibility for the perpetrator's involvement in the state of coercion, with the court being in any case and pursuant to article 31 (2) of the StICC responsible for the proper implementation of coercion by threat[215].

10. SUPERIOR ORDERS

Another reason to exclude responsibility with strong historical foundations in international criminal law, a branch of law that constitutes a privileged field of regulation of the dependency of the actions of its subjects on an organized criminal action, is superior orders[216], which resembles the former reason of coercion from a threat to its operation. This is a much-discussed reason for exclusion of liability, the standardization of which now in article 33 of the StICC as a separate reason for the exclusion of responsibility distinguished from the coercion of article 31 (1) (d) demonstrates the purpose of distinguishing cases to provide the coercion of threats to a last resort in cases where the

[213]See, Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, ICC-01/04-01/06, Trial Chamber I, 14 February 2008, par. 10.

[214]M. KRABBE, Excusable evil: An analysis of complete defenses in international criminal law, op. cit., pp. 8ss. R. CRYER, Prosecuting international crimes: slctivity in the international crminal law, op. cit., pp. 228ss, on the problem posed by a subjective criterion of proportionality. In the writer's view, it does not allow the classification of the reason nor the reasons for the justification of the act, since it is not necessary for the perpetrator to avoid the greatest harm or the reasons for forgiveness of the perpetrator, as a perpetrator may have been subjected to unbearable psychological pressure would allow his act to be imputed, but he did not intend to act proportionately (he simply wanted to save his life!).

[215]A. ESER, Article 31 Grounds for Excluding Criminal Responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit.

[216]Y. DINSTEIN, The defence of obedience to superior orders in international law, Oxford University Press, Oxford, 2012, pp. 5ss. D. LIAKOPOULOS, The defence of superior order in common law system. Approaches and influences in international criminal law, in Jindal Global Law Review, 5, 2014.

illegality of the order is obvious[217]. In the theoretical debate developed, the first opinion, known as the respondeat superior, had its roots in the military law of certain countries and argued that the superior order must be accepted as a reason for foreclosure on the ground that an existing one is obliged to obey to his superior. A second view, known as the theory of absolute responsibility[218] has argued that superior order should not be regarded as a reason to exclude the responsibility of the subordinate, since an existing person is under no obligation to obey unlawful orders from his superior.

The solution finally adopted in the StICC was that of an intermediate theory, also known as the moral choice principle, according to which an existing person should be punished in cases where either exceeds the limits and the purpose of a mandate given to him or knowingly executed it to lead to a crime[219]. In his answer, the court upholds the absolute prohibition and points out that it is in harmony with the law of all nations[220] which does not recognize the exclusion of liability in the case of a soldier who has been ordered to kill or to torture in violation of international law of the war[221], while leaving as the only window for the release of such an accused to prove not the existence of the mandate but the inability of the moral choice of the wrongdoer. The absolute prohibition was depicted in almost identical terms to that of the Nuremberg Tribunal Statute in article 7 (4) of the ICTY Statute and confirmed by its case law[222], whereas it was adopted by article 6 (4) of the ICTR Statute with even greater degradation in his case law that examined the superior order only once during the measurement and rejected it[223].

[217]V. EPPS, The soldier's obligation to die when ordered to shoot civilians or face death himself, in New England Law Review, 38, 2003, pp. 1012ss.
[218]S. ZGAGA, Intoxication and criminal liability in international criminal law, in Journal of the Higher School of Economics, 2014, pp. 152ss.
[219]L. DOUGLAS, From IMT to NMT. The emergence of a jurisprudence of atrocity, in K.C. PRIEMEL, A. STILLER, (eds.), Reassessing the Nuremberg military tribunals: Transitional justice, trial narratives, and historiography, ed. Berghan Books, Oxford, New York, 2012, pp. 276-295.
[220]C. ROXIN, Strafrecht, C.H. Beck, Münich, 2003.
[221]See: MAOGOTO, The defense of superior orders, in OLUSANYA, (ed.), Rethinking international criminal law: The substantive part, op. cit., pp. 109-113.
[222]See the case of Appeals Chamber: Boškoski and Tarčulovski, Prosecutor v. Boškoski and Tarčulovski, Judgment, IT-04-82-A, Appeals Chamber, 19 May 2010, par. 167. S. BARON-COHEN, The science of evil. On empathy and the origins of cruelty, Basic Books, New York, 2011, pp. 342ss. S. EASTON, C. PIPER, C., Sentencing and punishment. The quest for justice. Fourth edition, USA, Oxford University Press, Oxford, 2016.
[223]ICTR, Prosecutor v. Bagosora, Judgment and Sentence, ICTR-98-41- T, Trial Chamber, 18 December 2008, par. 2274.

From this rigid ban, they chose to derogate from the authors of the StICC, with the definition in article 33[224] allowing the superior to be relied on as a reason for the exclusion of liability, provided that the perpetrator was legally obliged to obey the government's mandate; his superior officer or superior, did not know that the order was illegal and the illegal nature of the offense was not obvious. The second paragraph of article 33, however, essentially limits the application of the superior war crimes warfare, as it gives the irrefutable presumption that the orders to commit genocide and crimes against humanity are manifestly unlawful[225].

Critical legal issues arise as to the possible error of a soldier on the one hand as to the question of the existence of his legal obligation to obey the mandate of the government or the superior and on the other as to the nature of the mandate as manifestly unlawful. For the first question there is a controversy in theory, as it is argued that in such a case the reason for excluding the error of law[226] which is also standardized in article 32 of the StICC[227], and the view that this provision of article 32 on the error differs

[224]W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, Oxford, 2010, pp. 508-514. O. TRIFFTERER, Article 33, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit., pp. 917-929. A. ZIMMERMANN, A. CASSESE, P. GAETA, J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court: A commentary, Oxford University Press, Oxford, 2002, pp. 958-974.

[225]See: M.D. BIDDIS, From the Nuremberg Charter to the Rome Statute: A historical analysis of the limits of international criminal accountability, in R. THAKUR, P. MALCONTENT (ed.), From sovereign impunity to international accountability The search for justice in a world of States, UN University Press, Oxford, 2004, pp. 42-60. J. HAFETZ, Punishing atrocities through a fair trial. International criminal law from Nuremberg to the age of global terrorism, Cambridge University Press, Cambridge, 2018. H.H. JESCHECK, The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute, in Journal of International Criminal Justice, 2, 2004, pp. 42ss.

[226]The relationship between “mistake” and “superior orders” also surfaced in the Calley case, as the Court held that: “(...) superior orders will not exculpate a defendant if the order is one which a man of ordinary sense and understanding would (...) know to be unlawful, or if the order in question is actually known to the accused to be unlawful (...)” (Calley v. Callaway, 382 F. 650, M.D. GA. 1975). See, V. EPPS, L. GRAHAM, Examples and explanations for international law, Wolters Kluwer Law, Alphen aan den Rijn, 2014. E.R. FIDELL, E.L. HILLMAN, D.H. SULLIVAN, Military justice: Cases and materials, Lexis Nexis, New York, 2012. J.D. OHLIN, Targeting and the concept of intent, in Cornell Law Faculty Publications, paper 774, 2013, pp. 84ss. T. WEIGEND, Intent, mistake of law, and co-perpetration in the Lubanga Decision on the confirmation of charges, op. cit., pp. 476ss. G. WERLE, F. JESSBERGER, Principles of international criminal law, Oxford University Press, Oxford, 2014. G. WERLE, F. JESSBERGER, Unless otherwise provided: Article 30 of the ICC Statute and the mental element of crimes under international criminal law, in Journal of International Criminal Justice, 3, 2005, pp. 37ss. K. AMBOS, Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung, Duncker and Humblot, Berlin, 2002.

[227]In particular see from the ICTY the case: Prosecutor v. Dario Kordić & Mario Čerkez, Case no IT-95-14/2-T ICTY T. Ch.,Judgment, 26.02.2001, par. 452. And from the STSL the case: Fofana and Kondewa, Case no SCSL-04-14-A, SCSL, Appeals Judgment, 28.5.2008, para 523. O. TRIFFTERER, Article 32: Mistake of fact or mistake of law, in O. TRIFFTERER (eds.), Commentary on the Rome statute of the international criminal Court, op. cit.,

from the provision in article 33 in that it does not cover cases in which the offender's subjective association is maintained with the act, so that it can not be applied in the present case[228]. On the second issue, this seems to be the case in which the soldier was unaware that the mandate was illegal and it is necessary to investigate how the manifest or unlawful nature of the illegality of the mandate, that is, subjective or objective[229] should be interpreted. In this context, an objective view is taken of the manifestation of illegality, since the subjective criterion is first considered whether the soldier was aware of the illegality of the mandate, namely the perception of the average prudent person, the defendant's experience. Given all the above, it is clear that the superior rule in international criminal law acts as a reason for forgiveness of the offender (excuse)[230], as if accepted as a claim is tantamount to the lack of ability to choose the offender by the

pp. 928ss. A. VAN VERSEVELD, Mistake of law, excusing perpetrators of international crimes, T.M.C. Asser Press, The Hague, 2012, pp. 152ss. F. DONLON, The transition of responsibilities from the Special Court to the residual Special Court for Sierra Leone. Challenges and lessons learned for other International Tribunals, in Journal of International Criminal Justice, 11, 2013, pp. 857-874.

[228]Y. DINSTEIN, The defence of "obedience to superior orders" in international law, op. cit.

[229]The relationship between “mistake” and “superior orders” also surfaced in the Calley case, as the Court held that superior orders will not exculpate a defendant if the order “(...) is one which a man of ordinary sense and understanding would (...) know to be unlawful, or if the order in question is actually known to the accused to be unlawful” (Calley v. Callaway, 1975). see also the case of: Prosecutor v. Brima et al., SCSL T. Ch., 20 June 2007, par. 730. Y. DINSTEIN, The defence of "obedience to superior orders" in international law, op. cit.

[230]According to our opinion we could say that we have four possibilities for application of duress, which would look, first of law: Justification excuse means duress as a consequential justification and duress as a consequential excuse according to the spirit of a deontologist duress we could faced up as a deontological justification and duress as a deontological excuse. Far from being dead letter law, this principle was reaffirmed in the 1987 English case of Regina v. Howe: Lord Hailsham described the common law rule: “(...) as “good morals” and categorically rejected the conclusion “that the law must “move with the times” in order to keep pace with the immense political and social changes since what are alleged to have been the bad old days of Blackstone and Hale (…) the question of excusing a coerced killer should not be determined by juries (…) it is one of principle (...)”. See for analysis, J. DRESSLER, Exegesis of the law of duress: Justifying the excuse and searching for its proper limits, in Southern California Law Review, 63, 1989, pp. 1332ss. In the Einsatzgruppen case tried before an American military tribunal, it's stated that: “(...) let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever (...)”. See in argument also the Flick Case, United States of American against Friedrich Flick, Tribunal IV, case No. 5, Vol. VI, Trials of war criminals before the Nuremberg Military Tribunals, 2012-2 (1949). In argument also: N. WIENER, Excuses, justifications, and duress at the International Criminal Tribunals, op. cit., pp. 94ss. V. BERGELSON, A fair punishment for Humbert Humbert: Strict liability and affirmative defenses, in New Criminal Law Review, 14, 2011, pp. 66-67. B.J. RISACHER, No excuse: The failure of the ICC's art. 31 “duress” definition, in Notre Dame Law Review, 90, 2014, pp. 1406ss. B. KREBS, Justification and excuse in article 31 (1) of the Rome statute, in Cambridge Journal of International and Comparative Law, 63, 2013, pp. 384ss.

perpetrator and not by the choice non-unfair or less unfair behavior that would justify the act. Based on the above considerations, the theory of international criminal law has long been regarded as a reason for forgiveness of the perpetrator (excuse)[231], which does not affect the still illegal nature of the act of the perpetrator, but acknowledges that he has not been able to choose the wrong due to the conflict of tasks he was experiencing.

In case *Milosevič* of ICTY[232], according to which the objective circumstances of the case are examined, it is considered abstract if there is a reasonable chance of justifying an error in the matter. As regards the disturbance of intellectual functions due to frenzy, it should be noted that its explicit recognition in Article 31 (1) (a) of the StICC with elements similar to those of a disturbance of intellectual functions or consciousness that removes the imputation must be considered as an option seeking to reconcile the different systems of imperative principles of legality[233]. The *in abstracto* recognition, but *in casu* refusal of the specific reason for forgiveness of the perpetrator in international criminal case law, even in cases where there were reasonable data, may be influenced by the suspicion that this claim was dealt with in the field of ordinary law. In the early stages of its appearance and until the middle of the 19th century, it was argued that this claim is not even a reason for foreclosure but a mechanism for categorizing the different ways of materially executing the sentence (a device for sorting out suspects for different modes of treatment), as the offender is punished again through the imposition of his confinement in a special detention facility, but not criminal. The interpretation of article 31 is more stringent as regards the conditions for its activation in relation to article 31 (1) (a) StICC because of the identification of the disorder as "morbid", which is not the case in the last provision, it should be noted that this aggressive determination is rather redundant. The rating criterion of destroying that person's capacity to perceive or control the illegality of his act clearly presupposes a serious disturbance rather than any disruption, at least in terms of its operation as a reason for exclusion of responsibility.

11. MISTAKE OF FACT-MISTAKE OF LAW

[231]M. KRABE, Excusable evil: An analysis of complete defenses in international criminal law, ed. Intersentia, Antwerp, Oxford, 2014.
[232]Prosecutor v. Dragomir Milosević, par. 207. In the same spirit the case: Prosecutor v. Thomas Lubanga Dyil, par. 294.
[233]B. KREBS, Justification and excuse in article 31 (1) of the Rome statute, op. cit.

The only possible reason for foreclosure of the most analyzed responsibility within the ICC in relation to previous international criminal case law is that of the error, that is, the defendant's assertion that he should be relieved of his criminal responsibility because at the time when the crime committed the perception for the world did not coincide with reality. It was necessary to reconcile the difference between the systems of continental law which generally accept the possibility of relying on an error of law where the misconception is justified, contrary to the systems of ordinary law which adopt a more rigorous application of known and classical principle *ignorantia legis non excusat.*

It should be noted that in both cases of error of reasoning by the Nuremberg Court (*Hermann Göring* and *Erich Raeder*)[234], the court has accepted *in principio* the erroneous assumption of liability in international criminal law, although it is not was provided for in its statute, but rejected the allegations as unfounded. The case law of *ad hoc* international criminal tribunals on the issue is limited, with the ICTR not considering the error as a reason for foreclosure at all, and the ICTY is examining it a few times with the most important and interesting example of *D. Milosević*[235].

In this case, the war crimes indicted and anti-humanity *Milosević* invoked during the debate in the Appeals Chamber on his responsibility as superior for the murder of a young boy that his soldiers might have been mistaken about the legal status of the victim, as it was known that the enemy army was giving weapons to young children, and reasonably believed it could be fighting[236]. The argument was not accepted and the Appeals Chamber referred to the judgments already made at first instance, according to which the probability of error does not appear to be valid, since: a) the victims were young boys in civilian clothes; b) there was no conflict that day; c) did not keep soldiers of hostile force on the path that the crime was committed; d) had good weather and good visibility that day; and e) the distance from which the perpetrator would shoot would allow a soldier to accreditation of if his target was a civilian or a combatant. Thus, the allegation was dismissed as unfounded on the basis of an objective assessment of what the

[234]K. AMBOS, F. CORTÉS RODAS, J. ZULANGA, Justicia transicional y derecho penal internaconal, Hombre Editores, Bogotà, 2018.
[235]ICTY, Prosecutor v. Dragomir Milosević, Judgment, IT-98-29/1-T, Trial Chamber, 12 December 2007.
[236]ICTY, Prosecutor v. Dragomir Milosević, Judgment, IT-98-29/1-A, Appeals Chamber, 12 Novemebr 2009, par. 202.

perpetrator should know, with the appeal body rejecting the possibility that it was actually in error[237].

At ICC level, article 32 regulates in the first paragraph the actual and in the second paragraph the legal error[238]. Since the statutes do not define the two concepts, the real

[237]G. WERLE, Völkerstrafrecht, ed. M. Siebeck, Tübingen, 2012, pp. 610ss.

[238]Hartmann, ICTY Contempt Case, 14 September 2009, para. 63. The Trial Chamber: "(...) rejected this argument holding that the defendant's "misunderstanding of the law does not, in itself, excuse a violation of it (...)"; Hartmann, ICTY Contempt Case, 14 September 2009, para. 65). The Chamber recalled the standard set in the Jović case that: "(...) if mistake of law were a valid defence (...) orders would become suggestions and a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled (...)"; Hartmann, ICTY Contempt Case, 14 September 2009, para. 65. See in particular the defence team of Kanu before the Special Court of Sierra Leone, which also invoked a mistake of law: "(…) the defence held that Kanu was not aware of the unlawfulness of conscripting, enlisting or using child soldiers below the age of 15, because "the ending of childhood (in the traditional African setting) has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults"; Prosecutor v. Brima et al., SCSL T. Ch., 20 June 2007, para. 730: "(...) the defence contended that various governments in Sierra Leone, prior to the war, had recruited persons under the age of 15 into the military (…) The Trial Chamber rejected this defence holding the crime of enlisting and conscripting child soldiers had attained the status of customary international law, and that this customary status required that the victim to be younger than 15 years of age (...) the defence of mistake of law could be invoked in this particular case: The rules of customary international law are not contingent on domestic practice in one given country. Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms (...) rejected all defences related to the definition of childhood and the cultural differences thereto (…) mistake of law defences based on the tu quoque argument were also rejected. The Trial Chamber refused to evaluate evidence related to the conditions of the Sierra Leonean State prior to 1997 because this had "no bearing on the perpetration of international crimes by individuals within the State (...) the ambiguous nature of "customary international law", as was already recognised by the ILC in 1986 (...) "brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified (...)". See also: Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803-T, 29 January 2007, para. 296). Under the heading: "(...) the principle of legality and mistake of law" the Trial Chamber elaborated on the issue and concluded that "absent a plea under Article 33 of the Statute, the defence of mistake of law can succeed under Article 32 only if (the defendant) was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning) (…) the principle of morality is essential: blindness to the wrongfulness of an act is not deemed to be an excuse (...)". See in argument: R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, op. cit., S. DARCY, Defences to international crimes, op. cit., pp. 231-245. Y. DINSTEIN, The defence of "obedience to superior orders" in International Law, op. cit., K.J. HELLER, Mistake of legal element, the common law, and Article 32 of the Rome Statute: A critical analysis, in Journal of International Criminal Justice, 6, 2008, pp. 420-445. G.J. KNOOPS, Defenses in contemporary international law, Martinus Nijhoff Publishers, Leiden, 2008. S. STOLK, The victim, the International Criminal Court and the search for truth. On the interdependence and incompatibility of truths about mass atrocity, in Journal of International Criminal Justice, 13 (4), 2015, pp. 974ss. C. DAVIDSON, How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court, op. cit., L. HOVIL, Challenging International Justice: The initial years of the International Criminal Court's intervention in Uganda, in Stability: International Journal of Security and Development, Vol. 2013, pp. 2ss. L. VINJAMURI, Deterrence, democracy and the pursuit of international justice, in Ethics and International Affairs, 24 (2), 2010, pp. 195ss. L.N. MALU, The International Criminal Court and conflict transformation in Uganda: Views from the field, in African Journal on Conflict Resolution, 15, 2015, pp. 81-103. J. MCKNIGHT,

error was interpreted as the non-recognition of a material element of the crime that effectively excludes the subjective link of the perpetrator's inner world to the act, that is to say, the strictly subjective hypostasis. According to the narrow interpretation chosen by the StICC in article 32, par. 2b[239], however, legal error is a reason for foreclosure only when it demolishes the subjective nature of the crime. The same wording of article 32 requiring both types of error to negate the mental element[240] raises the question whether they ultimately have the same doctrinal function as grounds for exclusion[241]. In both cases, we have an influence on the subjective nature of the crime, except that the former is not even the case where the international crimes are not punished by unconscious negligence, while the second is the subjective nature of the crime because the perpetrator had differently assessed the rules governing his behavior, which should be judged if he should lead to his forgiveness based on what he ought to understand.

Accountability in Northern Uganda: Understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice, in Journal of African Law, 50, 2015, pp. 193-219. L.M. KELLER, The continuing peace and with justice debate. Recent events in Uganda and the ICC, in The University of the Pacific Law Review, 48, 2017, pp. 265ss.

[239]The relationship between "mistake" and "superior orders" also surfaced in the Calley case, as the Court held that superior orders will not exculpate a defendant if the order "(...) is one which a man of ordinary sense and understanding would (…) know to be unlawful, or if the order in question is actually known to the accused to be unlawful (...)" (Calley v. Callaway, 1975).

[240]R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, op. cit., pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, op. cit., J.N. CLARK, Elucidating the dolus specialis. An analysis of ICTY jurisprudence on genocidal intent, in Criminal Law Forum, 26, 2015, pp. 499ss. M.E. BADAR, Dolus eventualis and the Rome Statute without it?, in New Criminal Law Review, 12, 2009, pp. 436ss. M.E. BADAR, The concept of mens rea in international criminal law. The Case for a unified approach, op. cit., M.E. BADAR, N. HIGGINS, General principles of law in the early jurisprudence of the ICC, in T. MARINIELLO (ed.), The International Criminal Court in search of its purpose and identity, ed. Routledge, London & New York, 2014. M.E. BADAR, S. PORRO, Rethinking the mental elements in the jurisprudence of the ICC, in C. STAHN (ed.), The law and practice of the International Criminal Court, op. cit., A. GIL GIL, Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator, op. cit., pp. 85ss. M. GRANIK, Indirect perpetration theory: A defence, in Leiden Journal of International Law, 28, 2015, pp. 980ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBER (eds.), The Handbook of comparative criminal law, op. cit., pp. 594ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, op. cit., G. WERLE, F. JESSBERGER, Principles of international criminal law, 3rd ed., op. cit., pp. 795ss. S. FINNIN, Mental elements under article 30 of the Rome statute of the International Criminal Court. A comparative analysis, op. cit., pp. 328ss. D. PIRAGOFF, D. ROBINSON, Mental element, in K. AMBOS, O. TRIFFTERER, The Rome Statute of the International Criminal Court. A Commentary, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016, pp. 114ss. K. JANJAC, The mental element in the Rome statute of the International Criminal Court, Wolf Legal Publishers, The Hague, 2013.

[241]H.H. JESCHECK, The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute, op. cit., pp. 42ss. P.H. ROBINSON, J.A. GRALL, Element analysis in defining criminal liability: The model penal code and beyond, op. cit., pp. 685ss.

The error was dealt with by the ICC in the above-mentioned *Lubanga* case, and in particular at a pre-trial stage[242]. The court rejected the defense claim, stating that there are good reasons to believe that *Lubanga* knew that both the voluntary and forced recruitment of under-15 years old and their use in armed conflicts rendered him criminally responsible under the provisions of the statutes[243]. Among the arguments in his rationale, he stressed that the fact that the accused knew the social meaning of his actions. Thus, if the court held that the accused (can only) had knowledge and will, and there is no claim under article 33, the requirement of article 32 par. 2 to abolish the subjective nature of the crime and reject the allegation of legal error[244].

12. THE DISTURBANCE OF SPIRITUAL FUNCTIONS DUE TO FRENZY (INSANITY).

The main difference of intellectual disruption due to the other reasons for exclusion of liability from international criminal law seems to recognize three types of disruption of intellectual functions[245], which are also reflected in the provision of article 31 (1) (a). The first case is that of the perpetrator who does not understand the nature of his act, e.g. kills a man because he sees hallucinations as a monster. The second case is where the perpetrator is not able to understand the illegality of his act, his intellectual functions are poorly developed to process his social meaning. The third case is that he understands both the nature and the illegality of his act, but he can not control it because of his intellectual disorder, e.g. kills six women because of a psycho-mental disorder that gives him this instinct. Commonplace in the above cases, which have some common features with the reasons for excluding the responsibility for the error and the coercion we have discussed above, is the logic that it is not fair to punish someone who has not actually chosen to do unfairly but has been pushed into it by incomplete growth or anomalies of his spiritual functions[246].

[242]ICC, Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, parr. 294-316.
[243]M.G. KOHEN, La promotion de la justice des droits de l'homme et du règlement des conflits par le droit international. Liber amicorum Lucius Caflisch, Martinus Nijoff Publishers, The Hague, 2007.
[244]TRIFFTERER, O., Article 32: Mistake of fact or mistake of law, in O. TRIFFTERER (eds.), Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, op. cit.
[245]R. CRYER, General principles of liability in international criminal law, in R. CRYER et al, An introduction to international criminal law and procedure, op. cit., pp. 405ss.
[246]J. HARDER, A future perspective on the disposition of the insane and the unfit to stand trial in the International Criminal Court, in New Zealand Yearbook of International Law, 8, 2010, pp. 5ss. I. XAVIER, The incongruity of the Rome statute insanity defence and international crime, in Journal of International Criminal Justice, 14 (4), 2016, pp. 795ss.

It was opportune to engage the Nuremberg International Military Court in disrupting intellectual functions due to frenzy, as the matter was raised only for the accused Rudolf Hess and with different content, namely his fitness to stand trial[247]. In case *Mucić* of ICTY and others (also known as the *Celebići* camp case)[248], accused *Esad Landzo,* relied on "diminished responsibility" [249]. The court faced the allegation on two bases: it first must prove the anomaly of the intellectual functions at the time of committing the crime and then prove that this anomaly substantially weakens its ability to control its actions[250]. The problem, however, in the court was that it was not easy to put this psychological disorder on time as, on the assumption of the psychiatrists themselves, their opinion was based on the accused's words, without having them to consider other elements. The court rejected the allegation that the only source of information on the mental state of the accused was his (contradictory in many cases) narratives, his inability to prove that his alleged intellectual disorder was time-consuming at the time he committed war crimes for which he is also accused of his substantial judgment on the basis of psychiatrists' statements about the likelihood of *Landzo* suffering from a personality disorder caused by dependence traits[251]. *Landzo* appears to have suffered from a personality disorder, but not to an extent that would make him unable to control his actions. Different was the interpretation of the Appeals Chamber in the same case concerning the construction of the reduced liability[252]. According to our opinion, the disturbance of intellectual functions due to frenzy, although not accepted as a substance, was in principle recognized by previous international criminal jurisprudence and is now provided for by the StICC in Article 31 (1) (a)[253].

13. THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE PARTICIPANT

[247]France et al. v. Göring et al., par. 489.
[248]ICTY, Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalić, Judgment, IT-96-21-T, Trial Chamber, 16 November 1998.
[249]D. RADOSAVLJEVIC, Some obvservations on the lack of a specific diminished responsibility defence under the ICC statute, in European Journal of Crime, Criminal Law and Criminal Justice, 19, 2011, pp. 39ss.
[250]N. ANCKASÄTER, T. BENETT, T. NILSSON, S. RADOVIC, Mental health and international crimes, in Criminological Approaches to International Criminal Law, 12, 2014, pp. 265ss.
[251]ICTY, Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalić, Judgment, IT-96-21-T, Trial Chamber, 16 November 1998.
[252]V. GHAREH BAGHI, Critical study on mental incapacity in International Criminal Court, in Acta Universitatis Danubius Journal, 2011, pp. 80ss.
[253]B., KREBS, Justification and excuse in article 31 (1) of the Rome statute, op. cit.

The problem of purely participatory responsibility in international criminal law and its foundation and exclusion, it is important to note that it presents the basic forms we encounter in national law, also means aiding[254], abetting or assistance[255] and (order[256], solicitation or inducement[257]) which are dependent on the unfairness of the main act and are now standardized in article 31 (3) (c) and (b) of the StICC[258]. Regarding synergy, although the distinction in direct and simple synergy does not seem to be the same, it seems to be interpreted as the first, and a substantial effect or else "substantial contribution" to the crime[259] is considered to be an essential element. As a result, excluding the individual's criminal liability by invoking one of the possible reasons for exclusion requires nothing more than to prove that he actually supported the commission of the crime because either this was required to prevent a greater harm, because his own

[254]The ICTY Trial Chamber in Furundzija adopted a knowledge test for aiding and abetting, the Rome Statute of the ICC adopted a purpose test. Article 25(3)(c) of the Rome Statute makes one who, "(...) for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission (...) criminally responsible (...)". This phrase introduced a mental element that went beyond the ordinary mens rea requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test.

[255]V. VIJ, Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišć cases, op. cit.,

[256]L. ANSERMET, Manifest illegality and the ICC superior orders defense: Schuld Theorie mistake of law doctrine as an article 33 (1) (c) panacea, in Vanderbilt Journal of Transnational Law, 40, 2014, pp. 1426ss.

[257]T. GUT, Counsel, misconduct before the International Criminal Court, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 346ss. B. KROSS, The exercise of Prosecutorial discretion at the International Criminal Court. Towards a more principles approach, H. Utz Verlag, München, 2017. P.S. WEGNER, The International Criminal Court un ongoing intrastate conflicts: Navigating the peace. Justice divide, op. cit., pp. 96ss. M. JACKSON, Complicity in international law, Oxford Univerrity Press, 2015. E. VAN SLIEDREGT, S. VASILIEV, Pluralism in international criminal law, op. cit.

[258]See: B.B. JIA, The doctrine of command responsibility revisited, in Chinese Journal of International Law, 3, 2004, pp. 14-15. K. YOKOHAMA, The failure to control and the failure to prevent, repress and submit. The structure of superior responsibility under art. 28 International Criminal Court statute, in International Criminal Law Review, 18, 2018, pp. 278ss. D. ROBINSON, A justification of command responsibility, in Criminal Law Forum, 2017, pp. 136ss. G. KEMP, Individual criminal liability for the international crime of aggression, Cambridge University Press, Cambridge, 2017. G.J.A. KNOOPS, An introduction to the law of international criminal Tribunals: A comparative study, ed. Brill, Leiden, 2014, pp. 234ss. D. KONATÉ, La Cour Pènale Internationale: Entre nècessitè de justice et impèratif de pax, ed. L'Harmattan, Paris, 2018. T. EINARSEN, Prosecuting aggression through other universal core crimes at the International Criminal Court, in L.N. SADAT, Seeking accountability for the unlawful use of force, Cambridge University Press, Cambridge, 2018. M.J. VENTURA, The illegal use of armed force (other inhuman act) as a crime against humanity an assessment of the case for a new crime at the International Criminal Court, in L.N. SADAT, Seeking accountability for the unlawful use of force, op. cit.

[259]See for example: ICTY, Prosecutor v. Anto Furundžija, op. cit., parrr. 190-249; ICTY, Prosecutor v. Dragoljub Kunarac, et al., par. 491; ICTR, he Prosecutor v. Alfred Musema, Judgment and Sentence, ICTR-96-13-T, Trial Chamber I, 27 January 2000, par. 126. ICTY, Prosecutor v. Aleksovski, IT-95-14/1-T, parr. 87-89. ICTY, Prosecutor v. Tadić, IT-94-1-T, par. 670 and ICTY, Prosecutor v. Blaškić, IT-95-14-T, par. 300. And not in the same spirit in case of ICTY, Court of Appeal, Prosecutor v. Čelebići, IT-96-21-A, parr. 364ss.

participatory act was at a time when he was not in a position to choose something different[260]. As for instigation, it also depends on the unfairness of the main act, but there are some important differences such as accepting the possibility of committing instigation by omission[261] and the requirement to cover the perpetrator's intent and the criminal offense of the principal act. As a result, in this case, the exclusion of responsibility follows the aforementioned logic of exclusion from synergy[262].

Individual criminal responsibility is "mutated" by individual crimes of a different nature even because of its participation as a member of the Joint Criminal Enterprise[263], its classic arrest in a liberal national criminal system and it presents reduced demands both at the level of wrongdoing and guilt assured direct involvement of the perpetrator in the specific crime. The actor's ability to direct a state or quasi-state mechanism capable of threatening international peace, security and prosperity by committing serious criminal behavior calls for the revision of traditional dogmatic tools created to resolve different qualitative dimensions.

Finally, as regards the element of proportionality required by the wording of article 31 (1) (c), there is a discrepancy between the two provisions which allow for a weighting in the defense provided for in Article 31 (1) (c) StICC similar to that in emergency situations. This should be a contradiction, as the wording of the provision and its interpretation does not appear to be so. In particular, article 31 (1) (c) refers explicitly to the disproportion between the way in which the defense acts "the person acts reasonably to defend himself (...) in a manner proportionate (...)" and the degree of the threat to the law goods of the defense or of the third risk (... to the degree of danger to the person or the other person

[260]ICC, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016. The lack of legal framework among the majority of international Courts and Tribunals, corporate criminal liability is becoming more acceptable as a form of liability in international criminal law. Domestic law serves as legal basis for interpretation and application of criminal law when grave crimes have been commenced by corporate bodies and provide the courts with concise examples on how it is best applied in prace. Justice demands to hold legal entities liable for the commence of illicit acts regardless of the gravity of involvement; therefore, it is time for international criminal law to develop to the better.

[261]ICTY, Prosecutor v. Tihomir Blaskič, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, par. 280.

[262]G.P. FLETCHER, Rethinking criminal law, Oxford University Press, Oxford, 2000, pp. 817ss. According to the author: “there is no term fraught with greater ambiguity that that venerable phrase that haunts Anglo-American criminal law: *mens rea*". The confusion over the meaning of the term continues to exist in modern criminal law, which is fuelled by the perpetual theoretical debates on the nature of various mens rea standards and the principle of culpability (...)".

[263]ICTY, Prosecutor v. Radoslav Brđanin, Decision on Interlocutory Appeal, IT-99-36-A, Appeals Chamber, 19 March 2007, par. 6.

or property protected)[264]. This logic does not appear to be different from the control of the necessary measure, since criteria are, *inter alia,* the type of endangered damage (in terms of the quality of the damage and the degree of damage to the legal good, risk or damage) and the way the defense acts (in the sense of the intensity of the defensive act as attacking the assailant).

In that regard, the ICTY in case *Stakić* also held that any armed reaction must be commensurate with the initial attack (the armed response must be proportionate to the initial attack)[265] by comparing the two actions rather than the result of the first one with the intensity of the second.

Supporting this view, which distorts the defense of Article 31 (1) (c) with elements of proportionality control of the outcome of the defensive act, which is in any case linked to the way in which the defense is carried out but does not characterize it in itself, shrinks the scope of its application and therefore *a contrario* expands the offense contrary to the wording of article 22 (2) (a) of the Statute. Moreover, where the authors of the Statute wanted to introduce a proportional weighting between the (intentionally) effect of the act of the person in a position to be entitled to protect himself or a third person and the threat of the damage he did so in an explicit wording. However, if the issue arises from the need to tighten the conditions of the provision because it is not standardized in the Statute that there is no overlapping of defense, it should be noted that its scope of application is abolished in accordance with article 31 (2) of the Statute[266], according to which the court has jurisdiction to interpret the scope of the grounds for exclusion of liability. Consequently, and as has been argued in theory[267], a defensive act that does not observe the necessary measure could be considered by the court as a reason for forgiveness of the perpetrator.

14. THE REASON FOR THE CAUTIOUS HANDLING OF EXCLUSION OF RESPONSIBILITY GROUNDS AND THE PROPOSED TREATMENT.

[264]O. YASUAKI, International law in a transcivilizational world, Cambridge University Press, Cambridge, 2017.
[265]A. CLAPHAM, P. GAETA (a cura di), The Oxford Handbook of international law in armed conflict, Oxford University Press, Oxford, 2014. G.S. CORN et al., The war on terror and the laws of war. A military perspectives, Oxford University Press, Oxford, 2015.
[266]B. KREBS, Justification and excuse in article 31 (1) of the Rome statute, op. cit.
[267]A. ESER, Article 31 Grounds for excluding criminal responsibility, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, op. cit., pp. 889ss.

The international criminal courts have applied the law of grounds for exclusion of liability, accepting in many cases that they are based on international customary law, but have (almost) never been acquitted of an accused on the basis of such a reason.

The previous systematic analysis of this study shows that this choice was neither coincidental nor hidden behind the often misplaced simple explanation that the harsh nature of the close concept of international crimes (*Strafrechtliche Systembildung*) does not allow the exclusion of the responsibility of their perpetrators. The thread that can provide an explanation for this choice in a comparative study with the main case that raised issues of exclusion of liability in international criminal law, the *Erdemović* case, should be sought in the extremely important case of ordinary law *Regina v. Dudley & Stephens*[268], which founded the 19th century legal precedent in the common law, that a man-made act is always excluded from the field of necessity[269], the court considered the matter only in unfair terms, concluding that they had not right to kill the loophole and are therefore guilty of murder.

In the light of this discussion, the investigator now perceives the fifth majority argument in the *Erdemović* case, according to which the international humanitarian law applied by the court seeks to protect the weak, which is served by the rejection of the assertion of coercion from a threat in case of killing due to the normative effect of this option[270]. This logic could not be more eloquently attributed to the wording of the words used by judges McDonald and Vohrah: "(...) the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role (...) it would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy (...)"[271].

This utilitarian logic was invested with the mantle of moral, technical and practical arguments in favor of hesitation in accepting the operation of the grounds for exclusion of responsibility in international criminal law. Above all, the prominent character of *stricto*

[268]Her Majesty The Queen v. Dudley & Stephens, in Queen's Bench Division, 1884, pp. 273ss.
[269]A. SIMONSON, Der Mignonette-fall in England, in Zeitschrift für die gesamte Strafrechtswissenshaft, 1885, pp. 367ss. W. SCHILD, Verwirrende Rechtsbelehrung. Zu Ferdinand von Schirachs "Terror", Lit Verlag, Hamburg, 2016.
[270]Joint Separate Opinion of Judge McDonald and Judge Vohrah, par. 75-77.
[271]M.H. ZAKERHOSSEIN, Situation selection regime at the International Criminal Court, ed. Intersentia, Antwerp, Oxford, 2018.

sensu of international crimes, which are often brutal and massive human rights violations on a large scale. These serious crimes are, in that regard, banned by an absolute rule of *jus cogens,* which was alleged to be incompatible with the functioning of the grounds for exclusion of liability. From a technical point of view, it was argued that the structural difference between the concepts of international criminality and common crimes, namely the "framework element" presupposes double subjective cover by the perpetrator (eg intention for individual murder and knowledge of the wide or systematic attack against the civilian population and part of which is the act) is incompatible with the functioning of the grounds for exclusion of liability. Lastly, practical arguments have been put forward against the recognition of the grounds for exclusion of responsibility, such as the fact that international criminal justice focuses on the prosecution of the most important international criminals, usually dictators and senior military leaders with the greatest responsibility for committing international crimes, and the nature organized crime that is planned on a large scale and is carried out in a methodical and systematic way, with unpredictable factors that would justify the exclusion of liability actor does not seem possible. Finally, the purely political weightings of the outline of an innocent decision by an international criminal tribunal as an unpopular choice to meet the demands of the surviving victims of international crimes for justice[272].

15. CONCLUDING REMARKS.

By studying the theoretical and practical data on the nature of individual criminal responsibility in international law in order to accept and enforce the reasons for the exclusion of responsibility, the rejection of utilitarian logic that has impacted on their extremely limited use in practice is highly summarized in an aversion of the decision of International Court of Justice for Southwest Africa[273]. According to it: "(...) law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and

[272] K. ZEEGERS, A. OVERY, International Criminal Tribunals and human rights law. Adherence and contextualization, T.M.C. Asser Press, The Hague, 2016, pp. 18ss.

[273] South West Africa (Ethiopia v. South Africa), Judgment of 18 July 1966 (2nd phase), 18 July 1966, par. 49. K.M. CLARKE, A.S. KNOTTNERUS, E. DE VOLDER, Africa and the ICC, Cambridge University Press, Cambridge, 2016. J. VAN DER MERWE, H.J. KEMP, International criminal justice in Africa. Issues, challenges and prospects, Konrad Adenaur Stiftung, 2016. C. EBOE-OSVJI, The ICC and the African Court and the extended notion of complementarity of international criminal jurisdictions, in Nigeria Yearbook of International Law, 2018. D.ROBINSON, Three theories of complementarity: Charge, sentence or process?, in Harvard International Law Journal, 53, 2012, pp. 87ss.

within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered (...)".

In no national criminal system, the gravity of crime is not a criterion for the *a priori* and indiscriminate use of the grounds for exclusion of criminal liability, except to specify the application of a specific reason. The guaranteeing function of criminal law requires that the application of the grounds for exclusion depend on the circumstances in which an act is potentially subject to the real reason of the act or justifies the forgiveness of the perpetrator. In addition, and although in any case it would be unsafe to argue that all international crimes without *stricto sensu* are forbidden by *jus cogens* rules, it is important not to confuse the international obligation to prosecute crimes with an international obligation to convict the accused. Acceptance of the latter would lead to a genuine violation of *jus cogens,* since the construction of individual criminal responsibility is inextricably linked to the claim of its actual legal examination, stemming both from the very statutes of the international criminal courts.

With the customary foundation of the grounds for exclusion of responsibility to be testified by their numerous indirect recognition in the case law of international criminal tribunals, their application is also compatible with the objectives of international criminal law, as the promotion of the rule of law in international relations, the rationale of impunity and justice for victims could not in any way be achieved through the punishment of an offender who either chose the lesser of the two evildoers or was unable to choose to do wrong. Even at the level of the political objective of consolidating international peace and security, historical examples such as that of South Africa[274] have shown that reconciliation of peoples can not be pursued through deviation from the fundamental principles of law and the use of the criminal mechanism as a tool to promote arbitrary regulatory preferences in the name of the international community's interest.

In conclusion more than criticizing the utilitarian direction which made it difficult to accept the grounds for exclusion of liability in international criminal law, importance should be attached to the future contemplation of this law under the constant regulatory framework offered by the ICC system. In its brief and not very extensive judicial function, the court has already differentiated on important issues in relation to previous

[274] M. FULLARD, N. ROUSEAU, Truth telling, Identities, and power in South Africa and Guatemala, International Center for Transitional Justice Research Brief, June, 2009.

international criminal case law[275], allowing for optimistic predictions of respect for the principle of legality, both in terms of justice for victims and of justice for defendants. If peace-making at international level is based on liberal ties and inter-state co-operation, the application of international criminal law with claims to serve a substantial international fair regularity and not a primary political method of governance is undoubtedly a crucial achievement.

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