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Participation in Crime Falling within the Subject-Matter Jurisdiction of the International Criminal Court

Aleksandra Nieprzecka

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To my family

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Kraków, Poland
February 2024

Aleksandra Nieprzecka

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Chapter 1
Introduction

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Abstract Although at first glance it may seem that the topic of the modes of liability (forms of participation in crime) in International Criminal Law has already been exhausted, this subject attracts the continuous interest of academics and practitioners. After all, there is no attribution of criminal responsibility without determining under which ground for criminal responsibility the accused should be held responsible. This book is centred around the participation in crime within the ICC jurisdiction as well, but the approach adopted in this work differs from the one that prevails in judicial practice. It is because this book focuses on the textual interpretation of the Rome Statute, rather than on the simple evaluation of the ICC caselaw. The chapter sets out the aim, structure and approach of the book. It defines the subject of interpretation and explains why the approach adopted in this work might contribute to a better understanding of the ICC regime and the Rome Statute.

Keywords International Criminal Court · participation in crime · modes of criminal responsibility · legal interpretation · perpetration · aiding and abetting

1.1 Aim, Structure and Approach of the Book

Inevitably, the International Criminal Court (ICC) and the Rome Statute as the main legal act regulating its activity have played a crucial role in the contemporary history of international law and criminal law. Their significance cannot be reduced to a substantively narrow context involving a supranational law of the international core crimes (namely, genocide, crimes against humanity, war crimes and the crime of

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aggression),[1] though undisputedly the establishment of permanent international judicial authority was an important step towards bringing to justice those responsible for these crimes. In this sense, the International Criminal Court as a major institutional component of the International Criminal Law *sensu stricto* (ICL) system may be considered on two complementary sides—an individualistic and collective. It leads to a general assertion that the ICC at an individual level, to quote K. Ambos, 'aims to protect fundamental human rights by prosecuting and punishing international crimes violating these rights; on a collective level, it strives to contribute to the «peace, security and well-being of the world» by the effective prosecution of international crimes threatening these values'.[2]

It could be argued that along with the establishment of the permanent International Criminal Court, 'a single penal system of and for the international community'[3] has also been created or—at least (taking into account some deficiencies of the ICC Statute and nuances of the Court's practice) that the adoption of the Statute was a deliberate attempt to create a consistent penal system. From the moment the ICC (in this specific context understood as the judicial divisions of the Court and the Office of the Prosecutor) started their regular activity, the international community ceased to react solely *ex post facto* by setting up the competent authorities aimed strictly at addressing the very concrete atrocities that had already taken place. Although the former institutions—among which the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) deserve to be noted in the first place—have indeed laid the foundations for the single penal system based upon the activity of the ICC and the interpretation of the Rome Statute as its normative heart, they did not create any consistent normative systems themselves. From the very beginning and by their nature, these judicial bodies were directly placed in the specific context of factual, political and cultural circumstances of the atrocities that triggered the establishment of the given judicial authority.

After the Rome Statute came into force and the ICC started its regular activity, the competent authority empowered to adjudicate cases regarding international core crimes has been effectively 'detached' from the specific, individual circumstances of atrocities as it used to be when the authorities designated to adjudicate were established after the crime in question occurred and in the context of the concrete crimes along with their political, cultural, social and geographical surrounding. Inevitably, it has enriched a newly created normative system with an element of universality, however, without granting a universal and unconditional jurisdiction to the ICC. [4] It may be also claimed that the adoption of the Rome Statute encouraged and to some extent obliged the states to adopt their national regulations aimed at effectively investigating and prosecuting international core crimes.[5] In this context, the universality may be understood, in line with its linguistic meaning, as the quality (state) of

[1] Ambos 2013a, 2016, pp. 57–79.

[2] Ambos 2013a; Królikowski 2007, pp. 56–64.

[3] Ambos 2016, p. 59.

[4] Rastan 2012; Wagner 2003, pp. 481–483.

[5] Alebeek 2008, p. 216.

being involved or being shared by the whole or the majority of the community and the quality (state) of being appropriate for all situations.[6] The ICC contributes to the universal endeavours to effectively bring to justice the perpetrators of mass atrocity crimes.

It seems clear that although under the principle of complementarity the State maintains the priority to prosecute and adjudicate the case, the ICC Statute condemns the commission of international core crimes (i.e. genocide, crimes against humanity, war crimes and the crime of aggression) and contribution thereto whenever and wherever such conducts take place and expresses the willingness to prosecute these crimes fairly and effectively. A fairly pragmatic illustration of the latter is Article 12(3) of the ICC Statute 'designed to extend the Statute's scope of application by offering states that are not parties of the Statute but that have a nexus to the crimes committed (…) the opportunity to accept the Court's jurisdiction on an *ad hoc* basis'.[7] Even if it turns out that for some reasons (for example, due to the lack of all components of the ICC jurisdiction or inadmissibility of the case) the ICC is not empowered to carry out an investigation or prosecution against a person for her/his conduct, the Statute constitutes an important source of law and remains one of the key points of reference, even if it cannot be applied directly. In particular, the Rome Statute encompasses the universal definitions of the international core crimes (the elements of which are to a significant extent embedded in international customary law and treaties) and the model of individual attribution of criminal responsibility for such crimes agreed upon by all of the State Parties. Hence, this model has also universal character as the element that is pertinent to all crimes within the ICC jurisdiction. Also beyond the ICC regime, in the proceedings which are not governed by the provisions of the Rome Statute, the model of individual attribution is a strong indicative of how some normative concepts (such as indirect perpetration, superior responsibility or joint criminal enterprise) might be interpreted in respect of international core crimes.

This aspect of universality is one of the grounds for the statement that the ICC and its Rome Statute cannot be limited to the ICL *sensu stricto*. In a broad sense, the creation of the ICC required the general and mutual consent of the State Parties. This consensus cannot be confined solely to a general and abstract level that could be simplified to an undeniable statement that international core crimes should not go unpunished and need an effective and adequate institutional and judicial reaction. Without a doubt, the consensus underlying the adoption of the Rome Statute embodies also the consensus about the entire framework of substantive law, in particular crimes' definitions, sanctions for their commission, as well as the specific rules of individual attribution, grounds for excluding or mitigating liability, and also consent to the procedural matters regarding arrest proceedings, preliminary investigation, trial and appellation proceedings and also reparation measures. As summarized by K. Ambos, the Rome Statute represents 'an attempt to merge the criminal justice systems of more

[6] *See* the terms 'universal' and 'universality' in Collins English Dictionary 1990, p. 1596; Longman English Dictionary 2003, p. 1811; Macmillan English Dictionary 2010, p. 1635.

[7] Stahn et al. 2005, p. 422.

than 150 States into one legal instrument that was more or less acceptable to every delegation present in Rome'.[8]

Thus, it may be stated that the Rome Statute could be also seen as an accomplishment of dreams about the single supranational penal system though, clearly, with a rather narrow subject-matter jurisdiction. Compared with various regulations identified under the concept of International Criminal Law *sensu largo* (for instance, the partial regulations referring to co-operation in criminal matters under the EU law) the adoption of the Rome Statute was necessarily preceded by a higher degree of consensus between the State Parties over the details of the ICC regulation. In this context, it is worth noticing that, for instance, at the level of EU Law any efforts to reach an agreement concerning many of the elements that were agreed at the Rome Conference (regarding substantive law and criminal procedure) have been unsuccessful to date. For example, leaving aside the question of whether the search for a common understanding of such terms at any cost would be advisable, it is hard to imagine the adoption of one common European interpretation and understanding of such terms as: 'intent', 'guilt' or—to stick directly to the title of the present work—'participation in crime' under the EU law.

One might even say that by contrast to a detailed framework of the Rome Statute (at this point without drawing any inference of the internal and external consistency of this framework), the EU regulations focus solely on a few issues, *inter alia* minimal procedural safeguards or prevention of and dealing with selected types of crimes (such as terrorism, corruption, fraud, cybercrime, money laundering),[9] the significance of which obviously should be underestimated, are selective and far from aspirations to create a united penal system. Taking into account that the authority to introduce criminal law norms and punish for their infringement is one of the most sensitive spheres in any domestic legal system, the difficulties in achieving supranational consensus about a detailed penal regulation and also some states' reluctance to engage in the attempts to adopt a single unified criminal law system come as no surprise. In this light, the achievements of the Rome Conference as the outcome of the convergence of various legal systems at the supranational level should be even more appreciated.

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[8] Ambos 1999a, p. 1.

[9] For example Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty as the regulations regarding procedural safeguards; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

Having said that, hardly anyone could overlook that after almost twenty years of its activity, the ICC has attracted fierce criticism.[10] At first glance, it is apparent that such criticism has various sources, including—but not limited to—some particular political dimensions. Yet, in a general context, the current problems incurred by the ICC indicate a discernible trend to undermine the grounds of supranational co-operation relating to the law and judiciary, particularly in criminal matters. This trend is somewhat correlated with a crisis of confidence in the authorities entitled to provide judgements at the international level, not necessarily connected with the grave breaches of international law. To take another example, on several occasions the national courts have recently questioned some of the rulings issued by the Court of Justice of the European Union,[11] which regardless of the reasons for such national judgements, shows that for some reasons domestic judicial authorities, sometimes triggered by the legislative or executive, question the binding force of European caselaw.

Taking this into consideration, one may risk a statement that although it may seem that the challenges of globalization and digitalization that criminal law needs to face (such as transnational crimes) should rather encourage a need for greater international cooperation than undermine it, at this very moment the international judicial authorities need to establish the sense, grounds, effectiveness and fairness of their activity. Each of these aspects may and should be evaluated carefully and thoroughly at many levels. Such analysis covers also the substantive criminal law under which it seems advisable to explain satisfactorily the rationality of some concepts, their theoretical background and justification. That notwithstanding, some additional value might be attributed to the attempts to indicate all spheres and concepts that may seek some improvement or modification at the level of law interpretation or application. As for the Rome Statute, this evaluation is somewhat based upon the ICC practice, but also upon the practice of other international courts and tribunals that constitute the additional points of reference.

Certainly, it would be almost impossible to present such an analysis in one work concerning the whole ICC regime. For this reason, it seems completely understandable to select only one topic and use it as an example to visualize more general problems and dilemmas. Similarly, in the case of the present work, the participation in international core crimes while remaining the main subject, is used as a prism through which some fundamental problems regarding the rules of individual attribution in multi-actor scenarios may be seen, including some challenges and ambiguities that arose recently. Without a shadow of a doubt, much has been written about rules of individual attribution that may be interpreted from the Rome Statute and are or could be applied by the ICC. There are many notable works from the very beginnings of the ICC giving an insight into both the interpretation of the Statute and its drafting history,[12] other books and papers presenting remarks on the ICC's stance

[10] Rademaker 2014, 2021.

[11] Craig 2019.

[12] Ambos 1999a, b; Bassiouni 1998; Kress 1999; Lee 1999.

on the modes of participation in crime,[13] papers and monographs focusing on the comparison of the Rome Statute and ICC activity with the *ad hoc* Tribunals Statutes and caselaw[14] or distinguishing themselves by an in-depth dogmatic study on the wording of the ICC Statute.[15] Yet, I still believe that the analysis of Article 25(3) and Article 28 of the Rome Statute under a new approach may still bring some value to the table.

20 years after the Rome Statute came into force it is necessary to acknowledge not only the undisputed achievements of the Court but also some deficiencies that came into light in practice and unresolved doubts that after this time still surround the interpretation and application of the Rome Statute. Hence, this additional value that might be found in the present work amounts to the interpretation and analysis conducted with the awareness and a serious reflection on the crisis of supranational thinking about law and justice. This crisis, as already indicated, concerns not only the ICC but many other judicial bodies that are confronted with the challenges of the contemporary world and the increasing expectations towards the criminal justice system. In addition to that, it seems that every author inherently may enrich a process of interpretation by his or her perspective (a uniquely personal approach to the subject of interest) and, what is particularly important in the case of such a fruit of compromise as is the Rome Statute, by a background built upon not only one's personal educational and professional experience but also tradition of a domestic criminal law system the given author originates from. It is apparent that we all, even subconsciously, perceive the law and criminal justice system through a prism of our domestic frame of reference.

Bearing this in mind, it seems vital to indicate at the outset that with respect to the rules of individual attribution, Polish legal tradition (which constitutes one of the most important factors that influenced my way of thinking about law and justice) has never completely relied on either the unified perpetration model/unitarian concept of perpetration (*Einheitstätermodell*)[16] or participation in crime model (*Teilnahme*).[17] Instead, upon philosophical and theoretical foundations laid by J. Makarewicz before WWII, the Polish legislative adopted a specific model of individual attribution of criminal responsibility—distinct from both aforementioned models.[18] Over the years, these rules of attribution have developed (not always in the most appreciated direction), but still one of the Polish predominant standpoints is that perpetration and non-perpetration forms such as instigating and aiding (which under the Polish Criminal Code are generally not accessory) shall be viewed as three separate and equivalent forms of committing a crime. What is more, assuming that the penalty

[13] Ambos 2010; Block 2022; Giamanco 2011; Jackson 2022; Jessberger and Geneuss 2008; Lanza 2021; Minkova 2022; Stahn 2014; Weigend 2011; Wirth 2012.

[14] Damgaard 2008; Goy 2012; Manacorda and Meloni 2011; Olewiński 2015; Zorzi Giustiniani 2009.

[15] Aksenova 2016; Ambos 2013b, 2014; Finnin 2012; Noto 2013.

[16] Kardas 2001, pp. 29–43; Steer 2017, pp. 91–95.

[17] Ibid.

[18] Makarewicz 1906, 1938, pp. 129–137.

provided for each of these forms is the same, a degree of criminal wrongfulness (*quantum* of the wrong caused by the perpetrator) may be accurately mirrored at the level of sentencing.[19] For this reason, any efforts to extend the scope of strictly construed perpetration are unjustified or at least—not necessary. It is not an exaggeration to state that the latter presupposition has accompanied my whole reflection on the Rome Statute and ICC caselaw.

Having said that, it is also important to notice that since many components of rules of attribution (such as a derivative character of some forms of participation, adoption of the unitarian concept of participation, *Teilnahme*, or the concept of conspiracy) are to a great extent dependent on the plain wording of the analysed framework. Taking this into consideration, the present work is definitely not intended to propose a legal transplant of any domestic instruments or concepts into the interpretation and application of the Rome Statute without a justified reason. Such legal transplants would be particularly inaccurate where for a given subject, there is no need to provide such a national perspective (because the Statute is self-sufficient) or, what seems to be completely unacceptable, if the Statute supports the opposite view. Still, however, the rules of individual attribution have inevitably a general character (in the meaning of applying to all crimes falling within the subject-matter jurisdiction of the given authority) and the Rome Statute on which these rules are based, allows for a variety of interpretations. As accurately described by K. Ambos, '[t]he Rome Statute is not a dogmatically refined international model penal and procedural code. It could not be'.[20] Hence, the same legal framework may enable different reasoning and conclusions, especially where the legal text itself is ambiguous which is particularly true about Articles 25 and 28 of the Rome Statute.

Therefore, it is not an exaggeration to state in the beginning that for the present work an individual method of legal exegesis is of the utmost importance. As rightly reflected by U.S. Supreme Court Justice Antonin Scalia: the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis.[21] The reference to the thoughts of one of the most prominent representatives of American textualism in statutory interpretation and originalism in the interpretation of the U.S. Constitution in the introduction to the present work has been made purposefully, as in my opinion—with sufficient balance maintained—the interpretation of the Rome Statute may also be viewed as a subject of a dispute similar to the one between the advocates of originalism[22] and a 'living constitution' concept[23] in the United States. Take a closer look into the ways the Rome Statute may be read.

[19] Kardas 2001, pp. 930–956.

[20] Ambos 1999a, p. 1.

[21] Scalia 1989, pp. 1183–1184.

[22] Bobbitt 1991; Solum 2019, pp. 1261–1271; McGinnis and Rappaport 2013.

[23] Rehnquist 1975, pp. 693–706; Strauss 2011, pp. 973–984.

On the one hand, the Rome Statute may be interpreted in line with the whole heritage of international criminal law, following the expressed will of the delegations gathered in Rome that may be reconstrued from the Statute in conjunction with the preparatory materials that give a profound insight into the then state of thinking about the ICC role and framework.[24] It is inevitably a very enlightening and useful perspective, ascertaining that the interpretation process does not result in the rejection of the very basic assumptions of the Rome Statute's signatories. This perspective to a large extent resembles the assumptions of the American originalists who generally agree that the U.S. Constitution's text had an 'objectively identifiable' meaning that has not changed over time and it is the judicial role to construct its original meaning.[25] On the other hand, the Statute may also be read more pragmatically, including some adaptations and adjustments built upon the years of the ICC activity. Paraphrasing D. A. Strauss's explanation of the 'living Constitution' concept, this could be called a concept of 'living Statute' which changes over time in ways other than by formal amendment thereto; the Statute which while having the same wording, does not always require the same.[26] This attitude is generally much closer to my way of thinking about the law and legal system. In this particular context, one additional remark needs to be made. The norms of international law (derived from both written and unwritten sources) have one special feature that distinguishes them from the majority of norms existing in domestic legal systems. Namely, the norms of international norms are extremely challenging and complicated when it comes to their explicit modification, especially if it entails the necessity for the amendment of international treaties. Even though international treaties usually provide for the general procedure of proposing amendments thereto, for clearly apparent practical reasons a process of amending an international treaty is inevitably time-consuming and arduous. Therefore, as far as international treaties are concerned, it may be stated that the exact wording of their provisions usually remains the same and stable whereas the interpretation may evolve.

At the level of domestic law, a similar problem sometimes concerns the amendments to the Constitution or other supreme sources of law, the amendment of which depends on the satisfaction of special conditions (such as an unusual procedure or requisite of a substantial majority). This common characteristic of constitutional provisions in domestic legal systems and the provisions of international treaties justifies the above analogy to the 'living Constitution' concept and a profound belief of mine that it is sometimes advisable to change an interpretation paradigm, presumably well-established in the previous judicial decisions, by the way of corrective interpretation. The latter is especially actual where the proposal of amendments would encounter inherent difficulties. As aptly summarized by the U.S. Supreme Court 'in

[24] For example M. Jackson criticized the 'twofold duties' approach to the causal requirement under Article 28 of the Statute in the following words: 'it bears noting that this interpretation entails a significant structural reorganization of the doctrine as developed by the ad hoc tribunals, where there is no evidence in the preparatory works of such an intention'. *See* Jackson, 2022, p. 447.

[25] Solum 2015; 2019, p. 1266.

[26] Strauss 2011, p. 975.

cases (…) where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function'.[27] Besides, the process of trial and error seems to be also an imminent element of the academic work underlying the present work.

Yet, supposing one wishes to answer whether there is any need for corrective interpretation in respect of Article 25 and Article 28 of the Rome Statute and the ICC's concept of participation in crime, it seems necessary to begin with an in-depth analysis of the objectives of any regulations regarding participation in international core crimes in multi-actor scenarios. This, however, entails the elements of theoretical (and not only dogmatic or comparative) analysis which in turn, may pose questions as to how the interpretation process will be conducted (which stands for the approach and method of interpretation) under the present work. This issue deserves to be sketched at the very outset of this book, right before the more specific methodological remarks and the analysis in a strict sense. If a method was understood as 'a set of rules of proceeding that determine what actions must be undertaken in order to achieve a given aim' under the definition suggested but finally not adopted by J. Stelmach and B. Brożek in their work on the methods of legal reasoning,[28] any remarks concerning the adopted approach and methods of interpretation should invoke an initial question regarding the aim of the whole analysis. In this sense, a final destination somewhat determines the best paths leading to it, by which I mean that the process of selecting the most accurate method or methods of analysis cannot be detached from the aims a concrete scholar wishes to achieve. Bearing this in mind, it seems reasonable to briefly define the primary objectives of this work that will be clarified and accomplished further on.

Pertaining to this, it could be stated that the present work regarding the rules of individual attribution in multi-actor scenarios is aimed to 'bridge' at several levels. First, I would like to contribute to combining the spheres of 'what is' (*Sein*) with 'what should be' (*Sollen*) in respect of the conceptualization of the ICC model of attribution of criminal responsibility for crimes within its material jurisdiction. Briefly, one of the objectives of this work is to indicate some boundary conditions the model of attribution of criminal responsibility for the international core crimes committed in multi-actor scenarios should satisfy (for instance, which forms of participation should definitely be included in any regulation regarding the crime commission by two or more persons). Both written and unwritten sources of international law enable the interpretation not only of the elements of crimes but also the indication of some categories of acts and omissions (patterns of conduct) that might or should give sufficient factual basis for criminal liability, though they do not amount to the physical act of carrying out the material crime's elements. Among such conducts it is possible to point out the superior's passivity in light of the information indicating

[27] U.S. Supreme Court, *Burnet* v. *Coronado Oil & Gas Co.,* Opinion, 11 April 1932, 285 U.S. 393, paras 406–410.

[28] Stelmach and Brożek 2006, p. 10.

that the subordinates under his or her control committed the crimes within the ICC Statute or the transfer of ammunition and weapons with the knowledge that they will be used in criminal activity or with such purpose. One of the aims of this work is to indicate such acts and omissions (formulate these so-called boundary conditions) and, bearing them in mind, identify them within the ICC model of attribution under Articles 25(3) and 28 of the Rome Statute. In addition to that, one of the key aims is to evaluate the ICC model based on Articles 25–28 of the Statute to reflect on how successful the Rome Conference was in the fulfilment of these boundary conditions.

Notwithstanding the foregoing, the ICC regime is certainly not the first and probably not the last in the history of international criminal law and for this reason, it may be advisable to build bridges between the Rome Statute, the heritage of *ad hoc* tribunals, hybrid and special courts, as well as the domestic legal systems in order to indicate or at least suggest some solutions or instruments that, whilst satisfying boundary conditions, seem to be more effective in judicial practice than alternative instruments and concepts (with no presupposition that there is only one perfect, ideal model of attribution). This could be expressed in a short question: how may the model of individual attribution in multi-actor scenarios be construed? This part of the present book entails the elements of comparative study; which—because of the limited frames of the present work—will be conducted only selectively in the Chapters dedicated to the interpretation of Article 25(3) and Article 28 of the Rome Statute. The last bridge is probably the most challenging from the methodological perspective because it is based on the attempt at describing the forms of a crime's commission and the contribution to the crime's commission set out in Article 25(3) and Article 28 of the Rome Statute by means of one universal (though not self-sufficient) approach rooted in the normative analysis, namely the concept of interconnected—sanctioned and sanctioning—norms. In the endeavours to outline the ICC model of individual attribution with respect to Article 25(3) and Article 28, the concept of interconnected norms constitutes the 'bridge' which is used as a universal tool to describe various grounds of criminal responsibility and systematize the remarks dedicated to their structure and justification. In this sphere, the challenge certainly comes down to the fact that the normative analysis and the concept of interconnected norms have never been applied to the interpretation of treaties and hence, the endeavour to apply it in the context of the Rome Statute is quite novel. With that being said, I strongly believe that this approach—though unprecedented in the academic discourse and judicial practice—may crown the whole book and bring the readers back to the idea that commences the whole reflection on the Rome Statute in the present work, which is the idea of universality. After all, the concept of interconnected norms may be applied universally to a multitude of the models of individual attribution, not only on the grounds of the Rome Statute.

1.2 Subject of Interpretation

Whereas it is quite clear from the introduction what the objectives of the present work are and why the process of interpretation plays a crucial role in the accomplishment of these objectives, one may wonder about the understanding of the term 'interpretation of the law' adopted in the present work. According to the definition proposed by A. Barak*:* '[i]nterpretation is an intellectual activity, concerned with determining the normative message that arises from the text (…) interpretation shapes the content of the norm «trapped» inside the text'.[29] Generally, this approach towards the concept of legal interpretation is strongly endorsed in this work, however, with a notable exception regarding 'the text' as a subject of interpretation. It is due to the fact that, for A. Barak 'the word «text» is not limited to a written text, but any behaviour that creates a legal norm is a «text»',[30] which remains conceptually distinct from my basic and fairly intuitive assumption that the 'text' simply requires a written form. The unwritten sources may be subject to interpretation as well, but it does not attribute such sources to the category of 'legal texts'.

The question remains as to what the 'subject of interpretation' is then. In any case, one possible answer that *prima facie* may seem accurate, or comes to mind in the first place—namely: 'the law', does not mirror the complexity of the given issue. Since 'the law' may be considered as both the 'subject' of interpretation (as in the understanding of interpreting 'the law' to determine what its actual meaning is) and 'product' or 'result' of interpretation (as in the sense of an authority that applies 'the law' derived from legal sources), this aspect needs clarification. Under the present work, the term 'subject of interpretation' generally covers all the sources of law applied by the ICC in accordance with Article 21 of the ICC Statute. The 'effect' or 'fruit' of interpretation is a legal norm which—depending on the context and purpose of interpretation—may have a general or individual character. Referring to the legal norm is built upon the existing distinction between 'legal norm' (ger. *Rechtsnorm*; pl. *norma prawna*) and 'legal provision' (ger. *Rechtssatz*; pl. *przepis prawny*) which is generally, but apparently, not without some exceptions, endorsed by legal theorists and criminal law scholars.[31] In this view, it could be stated that the results of interpretation are legal norms which—from a theoretical perspective—will be evaluated in Chap. 2.[32]

Turning to the 'subject of interpretation', it may be stated that the sources of law applied by the ICC could be compared to the building blocks upon which the whole process of interpretation is based, among which the Rome Statute plays a predominant role. In this place, it seems important to note that the Rome Statute remains an exceptionally arduous and due to its ambiguity, problematic point of reference. As rightly diagnosed by K. Ambos on the threshold of the ICC activity:

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[29] Barak 2005, p. 3.

[30] Ibid.

[31] Binding 1872; Gizbert-Studnicki and Płeszka 1984; Kardas 2012; Opałek 1986; Weinberger 1988; Zoll 1990.

[32] Chapter 2

'a closer look at the Rome Statute brings us quickly back to the world of complex technicalities and insufficiencies, a product of the «spirit of compromise» hanging over the diplomatic negotiations'.[33] To put it in other words, the Statute is a fruit of compromise embroiled in the various legal traditions, which makes it a rather heterogeneous source of law. In addition to that, the exact wording of Article 21 of the ICC Statute refers to such sources as the principles and rules of international law, general principles of law derived by the Court from national laws of legal systems of the world, or principles and rules of law interpreted in the previous decisions of the ICC that may be applied by the Court. These heterogeneous sources of law constitute the subject of interpretation as well. Yet, in order to 'derive' any general rules or principles from either international law or domestic legal systems, some *par excellence* interpretative activities need to be undertaken. Bearing all of these aspects in mind, it may be inferred that such a diverged subject of interpretation also requires a more sophisticated and complex approach which entails the interplay of more than one method of analysis.

There is no doubt that the International Criminal Law *stricto sensu* is to a large extent drawn from or developed from the caselaw of judicial authorities, which starting from the Nuremberg and Tokyo tribunals, through the ICTY and ICTR as *ad hoc* tribunals established to address atrocities committed in the former Yugoslavia and Rwanda, the SCSL and ECCC, and finally the ICC itself, could be considered as yet another manifestation of the judicial lawmaking process. However, this process is implicit since any judgement does not constitute an independent and binding source of law, but becomes relevant in the process of law interpretation and application, as the established statement of the judicial organ and in fact, its significance is dependent on the actual authority of the organ that rendered a given judgement. Each of the aforementioned authorities has inevitably laid the foundations for what we currently consider the ICL *sensu stricto* and on no account this contribution should be underestimated. Notwithstanding the foregoing, it seems that due to the significant role of judicial activity, in the works dedicated to the sphere of international criminal law (in particular, its substantive aspect) there has emerged and perpetuated the practice of describing this field of law through the prism of judicial decisions evaluated in details.

It may be linked with a specific approach to the legal interpretation under which the law is 'what the judges say and what the judges do'. More precisely, in a rationalized interpretative model built upon this approach, the law should be understood in the way established through judicial decisions and the consistency with the previous decisions constitutes an independent value. Undoubtedly, many arguments supporting this approach may be found. Functionally, this approach is undeniably rooted in the common law tradition, although it (especially, certain attachment to the established caselaw and the concepts that prevail in the judicial practice) breaks through the systems identified within civil law tradition as well. The operative, practice-oriented model of legal interpretation provides valuable and useful insights into how the law

[33] Ambos 1999a, p. 1.

works in judicial practice. It is an indisputable asset of this approach. Such a 'law-in-action' perspective (to follow the famous distinction raised by R. Pound)[34] is advisable not only for practitioners (who naturally deal with 'law in action' daily) but also for scholars. For the latter, the operative approach is important, as it enables the identification of these problems concerning the interpretation of law that—at the same time—have some relevance for the practice. Somewhat humorously, it could be argued that the practice-oriented approach prevents scholars from losing contact with pragmatism and reality, and thus, directs them to seek optimal solutions to the normative conundrums that occur in practice.

First and foremost, it may be observed that the more convoluted or—what at first sight may pose a paradox—the more laconic is the exactly written description of the rules of individual attribution, the heavier an interpretive burden carried by the judges is. In short, an ambiguous or marginal regulation leaves many issues to be tackled by the judicial authorities within their discretion. In this perspective, considering the structure of statutes of the 'ancestor' courts and tribunals (especially the Nuremberg International Military Tribunal Statute[35] and the Statutes of ICTY and ICTR),[36] it seems completely understandable why the adherence to the caselaw of international judicial authorities prevails in the works dedicated to the substantive aspects of international criminal law. To provide only some notable examples of the judicial 'lawmaking' activity of the international courts and tribunals: in the *Tadič* Appeals Judgement the ICTY elaborated on the prerequisites of criminal responsibility under the joint criminal enterprise doctrine.[37] Later on, this reasoning was developed and applied in the majority of ICTY and ICTR cases (despite some initial resistance expressed by the ICTR).[38] Similarly, the specific elements of superior responsibility were to a large extent shaped under the influence of the ICTY.[39] There is no escape from the conclusion that the rules of individual attribution, as understood today,

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[34] Pound 1910.

[35] Charter of the International Military Tribunal, Annex to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 (IMT Charter).

[36] UN Security Council 1993 (ICTY Statute); UN Security Council 1994 (ICTR Statute).

[37] ICTY AC, *Prosecutor v. Duško Tadič,* Judgement on the appeal, 15 July 1999, IT-94-1-A, paras 185–220.

[38] ICTR AC, *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Judgement on the appeal, 13 December 2004, ICTR-96-10-A and ICTR-96-17-A, para 466; ICTY AC, *Prosecutor v. Miroslav Kvočka, Mlađo Radič, Zoran Žigič, Dragoljub Prcać,* Judgement on the appeal, 28 February 2005, IT-98-30/1-A, paras 82–86, 97–99, 117–118; ICTY AC, *Prosecutor v. Milomir Stakič,* Judgement on the appeal, 22 March 2006, IT-97-24-A, paras 64–65; ICTR AC, *Prosecutor v. Sylvestre Gacumbitsi,* Judgement on the appeal, 7 July 2006, ICTR-2001-64-A, para 158; ICTY AC, *Prosecutor v. Milan Martić,* Judgement, 8 October 2008, IT-95-11-A, paras 78–84; MICT, *Prosecutor v. Ratko Mladič,* Judgement on the appeal, 8 June 2021, MICT-13-56-A, paras 175–181.

[39] ICTY TC, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo,* Judgement, 16 November 1998, IT-96-21-T, para 333; ICTR TC, *Prosecutor v. Clément Kayishema and Obed Ruzindana,* Judgement, 21 May 1999, ICTR-95-1-T, para 219; ICTR TC, *Prosecutor v. Ignace*

applied to war crimes, crimes against humanity and genocide were developed by the *ad hoc* tribunals and probably without their activity, many dogmatic problems would remain unsolved.

Secondly, it seems that despite some characteristics—often of a cultural, social, historical, religious or geographical nature—distinguishing the atrocities committed under concrete circumstances, there are some recurrent features and patterns of these crimes that need to be addressed at the level of rules of individual attribution. The recurrence of the same elements of atrocities and patterns was strongly emphasized by a Polish journalist W. Tochman in his reportage 'Like Eating a Stone: Surviving the Past in Bosnia' (pl. *Jakbyś kamień jadła*) showing retrospectively the events that took place during Bosnian War in Srebrenica and the Municipalities in the context of the identification process carried out by forensic anthropologists:

> All of this has happened before camps, barracks, selections, ghettos, hideouts, hiding the persecuted, bands on the sleeves, piles of shoes after the exterminated, starvation, looting, knocking on doors at night, disappearances from before the house, blood on the walls, burning of houses, burning of barns with people inside, pacifications of villages, besieged cities, human shields, rape of women, killing of the intellectual elites first, columns of wanderers, mass executions, mass graves, exhumations of mass graves, international tribunals, disappeared without trace.[40]

Some of these patterns invoke certain legal dilemmas and questions at first glance. For example, how to assess the conduct of the gatekeeper in the concentration camp or detention centre who was aware of the crimes committed therein, but the evidence is not sufficient to link this person with any specified crime, or such link might be shown only in respect of a few out of thousands of crimes committed in this camp/centre? The international criminal law needs to find the accurate answer. It might also happen that the pattern of conduct does not fit a particular form of participation understood in a strict sense. To illustrate this point, during the situation in the Democratic Republic of Congo evaluated by the ICC 'due to ethnic loyalties within the respective organizations led by Germain Katanga (FRPI) and Mathieu Ngudjolo Chui (FNI), some members of these organizations accepted orders only from leaders of their own ethnicity'.[41] Consequently, Germain Katanga and Mathieu Ngudjolo Chui could effectively exercise their control powers only over their subordinates from the same ethnicity. In this context, a question arose as to whether the concept of co-perpetration aimed at mutual attribution of the criminal activity undertaken by a co-perpetrator following a common plan or agreement, may also involve the attribution of the elements of criminal offence carried out not physically by a co-perpetrator, but through their subordinates (through another person in the meaning of indirect perpetration).[42] Certainly, it is an example of how some factual patterns recurring during mass atrocities give rise to some serious interpretative questions.

Bagilishema, Judgement, 7 June 2001, ICTR-95-1A-T, para 37; ICTR TC, *Prosecutor v. Naser Orić,* Judgement, 30 June 2006, IT-03-68-T, para 291.

[40] Tochman 2022, p. 73.

[41] ICC PTC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07, para 493.

[42] Eldar 2013; Manacorda and Meloni 2011.

In addition to the above, general awareness of how history repeats itself with regard to the most disastrous crimes of the world may also reinforce an organizational function and clarification function of some legal concepts. The systemic form of joint criminal enterprise as the concept adapted to deal with so-called concentration camp cases is a visualization of this mechanism.[43] This concept is not a single coherent model of individual attribution, however, under this concept the ICTY has identified a useful set of core criteria that may be an efficient instrument applicable to the concrete patterns associated with crimes committed in the concentration or detention camps. This set of criteria is inevitably the manifestation of the judicial law-making process, but also of a more problem-oriented approach towards the substantive criminal law issues and dilemmas. Once such recurring issue or interpretative problem is handled by a judicial authority, the practitioners are provided with instruments (concepts) sufficient and on many occasions also designed to cope with similar cases. Moreover, supposing these instruments or interpretive concepts have not been explicitly and effectively challenged in terms of the line of reasoning used to support them and their outcomes (that is, under a fierce and unambiguous criticism the given instrument or concept has not been definitely abandoned or abstained from, which is—in fact—a very rare situation), such instruments and concepts spread in practice with an implicit power of precedent, even if the legal system in question does not straightforwardly provide for any binding force of the views expressed in the previous decisions of a given authority. Consequently, also in literature, the instrument or concept formulated by judicial authorities is referred to as a formula established by the court on the grounds of concrete cases.

The third aspect that needs to be exposed in this regard is the exceptional authority of judicial bodies that have considered cases regarding international core crimes. Apart from unavoidable objections based on political grounds that accompanied the activity of international courts and tribunals from the very beginning on the one hand, and completely natural disputes over the views presented in any judgements or other decisions on the merits on the other, the description of rules of individual attribution through the prism of law application (as every decision or judgement on the merits constitutes an official act of the application of law) is also strengthened by the inevitable authority of international courts and tribunals. After all, the international courts and tribunals are not only institutions but also assemblies of individualized outstanding judges who have decided one of the major cases based on the events that for their heinousness attracted public and international attention. Furthermore, there is also one pragmatic argument. Though it could be stated that considering the gravity of crimes within the jurisdiction of international tribunals there are always too many situations that need to be addressed by judicial authorities (as there is a constant but unrealistic wish that no more atrocities would be committed), the description based on the reference to the previous cases is also kept grounded by a purely quantitative

[43] ICTY AC, *Prosecutor v. Duško Tadič,* Judgement on the appeal, 15 July 1999, IT-94-1-A, para 203; ICTY AC, *Prosecutor v. Mitar Vasiljević,* Judgement, 25 February 2004, IT-98-32-A, para 101; ICTY AC, *Prosecutor v. Miroslav Kvočka, Mlađo Radič, Zoran Žigič, Dragoljub Prcać,* Judgement on the appeal, 28 February 2005IT-98-30/1-A, para 198; ICTY TC, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu,* Judgement, 30 November 2005, IT-03-66-T, para 511.

factor. In short, the number of criminal cases of this kind enables us to present every case in detail and refer to them with a precision uncommon in any domestic legal system. Generally, the decisions and judgements of international tribunals and courts are publicly available and only a language barrier could theoretically make the reference to these cases impossible or impeded in any way.

All things considered, the description of ICL in the prism of law application (in other words, the description under which the case-oriented, operative interpretation of law made by judicial authorities constitutes sufficient grounds to establish the understating of law in general) is for many aforementioned reasons an extremely attractive and prevalent approach. Therefore, it seems necessary to explain why, at the methodological level, (regardless of such a significant factor as personal habits and preferences) the present work is somewhat countervailing this approach, or at least does not follow it completely. Indeed, while the interpretation of the Rome Statute could hardly be provided without any reference to the jurisprudence of the ICTY, ICTR and other international criminal courts and tribunals, I do not channel my efforts to exhaustively present Article 25(3) and Article 28 of the Rome Statute and the ICC practice in this regard amidst the jurisprudence of other international judicial authorities. Also, the emerging ICC caselaw will be addressed with caution and some degree of criticism aimed at inquiring whether the interpretation of Article 25(3) and Article 28 of the Rome Statute mirrored in the existing decisions reflects the text of the Rome Statute and adequately serves the purpose of international criminal law.

The primary methodological assumption behind the present work concerns the theoretical debate over the factors and criteria that determine the accuracy of the interpretive model and the process of interpretation as a whole. It could be simplified to the following question: ‘what are the criteria for stating that a particular model of interpretation or a result of interpretation (for example, the understanding of the term ‘aids, abets or otherwise assists in its commission or its attempted commission’ from Article 25(3)(c) of the ICC Statute) is adequate and correct?’. In other words, ‘on what basis a proposed way of reasoning may be evaluated?’. In particular, whether the established and consistent practice of any judicial authority or a view prevailing in the academic community—may imply that the model of interpretation and the result of interpretation will be positively evaluated. Certainly, in this regard, several answers might be given. However, it appears to me that even the well-established standpoints and concepts may be referred to as convincing, persuasive and well-grounded or not, which in turn would suggest a mere fact that if a proposed interpretation has been accepted in judicial practice, it should not serve as a decisive criterion of the interpretation’s adequacy and accuracy in any case.

According to the derivational theory of interpretation (pl. *derywacyjna koncepcja wykładni*), primarily outlined by Z. Ziembiński[44] and later developed by M. Zieliński,[45] which—alongside the clarification/semantic theory (pl. *klaryfikacyjna*

[44] Ziembiński 1966, p. 208.

[45] Zieliński 1972, 2006.

koncepcja wykładni) created by J. Wróblewski[46]—remains one of the two most powerful Polish theories of legal interpretation,[47]

> (…) The rules of interpretation (steps undertaken in the interpretation process) are determined not by the interpretive behaviour/activities of anyone, but by the real features of legal texts which, if accurately recognized, imply that the process of interpretation should be conducted in a certain way.[48]

Generally, under the grounds of the present work, the first part of this statement prevails. It means that for this work, the accuracy of the interpretation process and the choice of interpretation model is in no way determined by the previous judicial practice of any authority. To put it differently, an operative interpretation presented by the authority in the circumstances of any concrete case does not constitute any argument supporting the view that a particular legal reasoning is accurate and adequate. Yet, the established way of reasoning incorporated into the judicial decisions and to some point, also in the separate and dissenting opinions, will not remain underestimated.

However, the thing that somehow differentiates an approach adopted in this work from the basic assumptions of the derivational theory is the fact that the present work is generally far from an entirely textual perspective focused on decoding the 'objectively identifiable' meaning of the legal text. Due to the heterogeneous subject of interpretation involving both unwritten and written sources of law, it would be difficult to maintain the statement that it is for the accurately identified and defined real features of legal texts that the process of interpretation should be conducted in a certain way and should lead to concrete results. For instance, it may happen that some hypotheses and statements presented in this work will not have even a pale reflection in any legal text because they will be rooted solely in the unwritten sources of law or the legal text will only confirm a concept that has already been known and established in the customary law.

For these reasons, the present work is oriented on the legal system viewed as a unique system of communicating vessels, under which both written and unwritten sources of law exist and interplay. They may also contradict to some extent, or at least give rise to some ambiguities at the level of law interpretation and application. What is, however, crucial is that the systemic approach provides for the criteria (or in other words, standards of validation) that are used to access the legal system as a whole or—as it will be shown in the present work—its parts, such as the model of participation in international core crimes. The standards of validation adopted in this book are as follows:

(1) coherence with the objectives of the legal system (compatibility with teleological conditions of the system);
(2) the internal coherence of regulation (the compatibility of the system's elements; the elements of the system need to be integrated into one mechanism and should be complementary);

[46] Wróblewski 1959.

[47] For the comparison and the attempts at presenting a synthesis of these two theories *see* Gizbert-Studnicki and Płeszka 1984; Grabowski 2015.

[48] Zieliński 2006.

(3) the condition of non-contradictory results (the elements of the system should not contradict each other);
(4) clarity and readability (though not necessarily adherence to the rules of classic, formal logic; the standard of clarity and readability is met where the system may be explained plainly and intuitively).[49]

Naturally, meeting these standards may be graded and maximized, which makes it possible to apply them to resolve a potential concurrence between two possible interpretations. In short, the interpretation that is more coherent with the objectives of the system, rather complementary with other elements of the system than contradictory and more readable, should prevail. Having said that, it should be noted that the practical application of such standards requires also the identification of the objectives of the legal system. This, bearing in mind that the topic of the present book concerns the model of participation in international core crimes falling within the ICC's subject-matter jurisdiction, consists in the indication of a desirable scope of responsibility for these crimes committed in multi-actor scenarios to some point separately from the exact wording of the Rome Statute. In particular, Articles 25(3) and 28. For the main purpose of this book (i.e. determination of the scope of responsibility), the reference to legal norms as the product of the interpretation process seems to be valuable and will be evaluated in details in next two Chapters.

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