University of Groningen

A criminological approach to the ICC Control Theory

Smeulders, Alette

Published in:
The Oxford Handbook of International Criminal Law

DOI:
[10.1093/law/9780198825203.003.0017](https://doi.org/10.1093/law/9780198825203.003.0017)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Smeulders, A. (2020). A criminological approach to the ICC Control Theory. In K. J. Heller, F. Mégret, S. MH. Nouwen, J. D. Ohlin, & D. Robinson (Eds.), *The Oxford Handbook of International Criminal Law* (pp. 379-399). Oxford University Press. <https://doi.org/10.1093/law/9780198825203.003.0017>

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

A Criminological Approach to the ICC's Control Theory

Alette Smeulers

The Oxford Handbook of International Criminal Law

Edited by Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin, and Darryl Robinson

Print Publication Date: Feb 2020 Subject: Law, International Law, Criminal Law

Online Publication Date: May 2020 DOI: 10.1093/law/9780198825203.003.0017

Abstract and Keywords

This chapter tackles the Control Theory of Perpetration, a German-inspired mode of participation that is applied only by the International Criminal Court (ICC). The Control Theory, developed by the German scholar Claus Roxin, provides a doctrinal apparatus for distinguishing between principal perpetrators and mere accomplices. Instead of defining the principal perpetrator as the individual who performs the actus reus of the offence, or who has the mens rea for the offence, the Control Theory states that they who control the crime are the principal perpetrator, even if that person uses another individual, or even an organization, to carry out the crime. Although much has been said of this mode of liability, this chapter considers a far broader question: whether the Control Theory as applied by today's ICC (or by other courts that have adopted it) accords with the social reality of how atrocities are committed. In other words, this chapter does not consider whether the Control Theory is a good criminal law theory, but rather whether it could pass a criminological test..

Keywords: International criminal law, International Criminal Court ICC, Perpetration, Control Theory, Modes of liability, Criminology, Political and ideological context, Organizational and social context, Perpetrator, Individual criminal responsibility

I. Introduction

¹The attribution of individual criminal responsibility for international crimes is the most essential, but also the most problematic, task international criminal courts and tribunals have to deal with.

Although national judges have to accomplish a similar task, the one of their colleagues within the international criminal justice realm is far more complex. International courts focus on crimes committed within a period of structural violence in which up to several hundreds, thousands, and in some cases even millions of people are involved. The sheer number of people makes it practically impossible to figure out exactly who did what and

to try everyone accordingly. Another complicating factor is that those who are most responsible for the crimes—the people at the top of the chain of command who design the policies, the so-called criminal masterminds or *auctores intellectualis*—are usually the ones furthest removed from the crime scene. International criminal lawyers have struggled with the question of how to qualify their role and legally construe their culpability.

During the early war crimes trials in Nuremberg, the prosecutors and judges relied on theories of conspiracy and qualified a number of organizations as criminal organizations. The ICTY chose the theory of joint criminal enterprise (JCE), while the ICC (p. 380) adopted the control theory.² These theories have all been fiercely debated and heavily criticized within academic scholarship, and even the judges themselves do not always seem to agree on the value and practical applicability of these theories.³ Within the legal debate, one of the underlying questions is whether international crimes need a *sui generis* mode of liability. Some scholars argue that because international crimes constitute a different kind of criminality and the perpetrators of such crimes are subsequently a different kind of perpetrator, there is a need for a separate and new type of individual criminal responsibility.⁴ Others are sceptical and argue in favour of relying on liability concepts used within national criminal law systems.⁵ International criminal law is still struggling with the question of how to fairly attribute individual criminal responsibility for international crimes, and a satisfactory solution with unanimous support has not yet been found.⁶

The aim of this chapter is not to provide yet another legal analysis or to give an answer as to which theory is best from a legal perspective. The aim is to take a criminological approach to the theories of co-perpetration and, in particular, to compare the legal requirements in Article 25 of the Rome Statute (hereafter ICC Statute), and the ICC case law adopting the control theory, with the social reality in which international crimes are committed. The main question is whether Article 25 and its subsequent case law can adequately deal with its task to fairly attribute individual criminal responsibility to the different types of perpetrators involved.

I will argue that most perpetrators of international crimes are ordinary and otherwise law-abiding citizens who commit their horrendous crimes within a very particular political, ideological, and institutional context.⁷ Without relieving the hands-on perpetrators of their responsibility, I will argue that the political leaders and criminal masterminds should be held responsible for *creating this context*, which instigates and induces others to commit such crimes. Liability for creating such a context (which can be qualified as an atrocity-producing situation) cannot easily be fitted under the current scope of Article 25 of the ICC Statute, as the article does not explicitly refer to such a role. However, this must be done to fairly attribute individual criminal liability to those most responsible. The control theory (as adopted by the ICC) seems to make (p. 381) this type of liability possible, and may therefore be applauded from a criminological perspective.

The second section of this chapter will focus on the nature and typical features of international crimes. The third section will focus on the perpetrators of international crimes and their role within the commission of these crimes. In the fourth section, I will assess

whether the legal requirements of the control theory (as applied by the ICC) sufficiently match the social reality of international crimes. I argue for a refinement of some elements, such as 'effective' contribution, in order to better attribute individual criminal responsibility on the basis of actual blameworthiness.

II. International Crimes: A Different Type of Criminality?

This section will focus on the features of international crimes, to assess whether they are a different type of criminality and, if so, to what extent. The first typical feature is that international crimes are by definition manifestations of *collective* violence, in which many people are involved. Although the underlying acts of international crimes such as murder, torture, and rape are ordinary crimes, the outstanding legal characteristic is that they can only be qualified as international crimes if they are committed as part of a more structural form of violence. This follows from the legal definitions found in Articles 6–8 of the ICC Statute: there should either be an *armed conflict* (war crimes), the crimes should be part of a *widespread or systematic attack* (crimes against humanity), or should be committed with the *purpose to destroy a group in whole or in part* (genocide).

The second feature of international crimes, which closely relates to the first, is that they can be qualified as manifestations of *system criminality*, which means that collective entities are involved in the commission of these crime. The term system criminality was used by Röling and can be defined as: 'a situation where collective entities order or encourage international crimes to be committed, or permit, or tolerate the committing of international crimes.'⁸ The source of the behaviour is thus not the individual, but the collective. These collectives are hierarchically structured units in which policies developed at the top of the chain of command travel through the various units and are ultimately translated into orders given to the low-ranking officials: the foot soldiers.⁹ The people who physically commit international crimes do so because they operate in a collective that incites, urges, requires, or orders them to commit such (p. 382) crimes. The crimes can consequently be qualified as crimes of obedience. Kelman and Hamilton, who developed the term crime of obedience, defined it as 'an act performed in response to orders from an authority that is considered illegal or immoral by the international community.'¹⁰

The third feature of international crimes is that they are in essence political crimes, as they are typically committed as part of a political campaign or within a political conflict. The collective entities involved in the conflict always aim to gain or maintain political power. The parties involved can be the state and state authorities abusing their power, or rebel forces, political opponents and/or terrorist groups challenging the power and legitimacy of the state. Although not every individual participant is necessarily ideologically driven, the underlying conflict is always political and/or ideological in nature.¹¹

If we want to understand the behaviour of the people involved, we need to take the particular political, ideological, and organizational context into account. Unlike ordinary criminals, perpetrators of international crimes commit their crimes on instigation or with approval of their superiors in hierarchically structured collectives, and thus in line with the prevailing normative order. Consequently, the prime detriments of their behaviour are obedience and conformity rather than deviance, as is the case with most ordinary and common criminals.¹² Although some ordinary crimes do share some of these features, we can nevertheless conclude that international crimes, indeed, are different from ordinary crimes. In the following subsection, I will explain the way and extent to which context can shape human behaviour.

A. The Political and Ideological Context

As stated already, international crimes are always committed as part of a political campaign or within a broader political conflict. This means that they are committed in a setting in which the ordinary normative and legal framework or the norms that can be derived from this framework are set aside by either or both sides. This can mean that the warring parties: (i) either reject these norms (as the Islamic State is currently doing in relation to many human rights); (ii) give a very limited and restrictive meaning to (p. 383) them so that their violations cannot be qualified as violations of these norms (as the United States did in the War on Terror when giving a very restrictive interpretation of the definition of torture); or (iii) believe that there are higher principles that can override these norms in particular circumstances (this is the case when states rely on the internationally widely recognized right to self-defence or national security doctrine). States faced with a political or terrorist threat they cannot handle tend to argue that because national security is threatened, the state has the right to protect itself using all possible means.¹³ Both the national legal framework and international human rights—which are meant to limit the state's legitimate use of force and violence—are partially, temporarily, or sometimes completely set aside.¹⁴ Because states are sovereign, they believe they have the right to do this. Political opponents, rebel groups, and terrorist organizations who fight the state generally do so because they dispute the state's legitimacy or deny the political power-holders' right to rule. Just like the state, they no longer consider themselves to be bound by rules of the international community, and feel that they can legitimately violate these rules in particular situations. In other words, they rely on their right to resist an oppressive and abusive regime. Both sides feel they are involved in a fight of good against evil, but obviously have different opinions on who is good and who is evil. Usually, the violations are legitimized and justified by an ideology in which either the safety of the state (e.g. national security doctrine) or the right to resist are the overriding principles that give the warring parties, at least in their own eyes, the right to use (extreme) violence.

Article 33(2) of the ICC Statute states that 'orders to commit genocide or crimes against humanity are manifestly unlawful'. The law assumes that everybody who is faced with an order to commit an international crime recognizes that this is an unlawful order, but this is not necessarily the case. First of all, moral perceptions are not fixed and, as history has shown, can change overtime. For instance, today we qualify both torture and slavery as

examples of the most extreme crimes that shock the human conscience, but for many years the practice of torture and the use of slaves was a common, perfectly legitimized, and lawful practice. This shows that there are no overriding moral principles that each and every individual should at all times instinctively recognize. Secondly, people very much tend to look at others in order to figure out how to judge and qualify a situation. In other words, we tend to define what is right and wrong based to a large extent on what we see and hear around us. We look at others to judge what is right and wrong, normal and abnormal, socially acceptable and unacceptable, and what (p. 384) kind of behaviour is required in a specific situation.¹⁵ We learn what the prevailing socially accepted norms and values within a particular situation are via a process of socialization. Political leaders, whether the ruling elite or the political opposition, play an important role in this as they can largely shape our perception of right and wrong, especially in relation to the use of force and violence. In a political conflict we look at them for guidance, as they are vested with a kind of absolute and sovereign power and their main task is to protect us. They are thus in a position to convince subordinates that their position entitles them to authorize certain forms of violence, and that this authorization is legitimate. Ultimately, this can lead to a situation in which people can come to see extreme violence such as genocide, crimes against humanity, and war crimes as a justified and legitimate means to fight their enemies and thus no longer see the manifest illegality of such behaviour. Indeed, research on perpetrators of international crimes has shown that many of them can come to believe that, when committing horrendous crimes, they are nevertheless doing the right thing.¹⁶

B. The Organizational and Social Context

In addition to the political and ideological context, the organizational context in which people operate has an enormous impact on them as well. Social-psychologists have shown that humans are social beings who are very susceptible to social influence by the people around them and the context in which they find themselves.¹⁷ Although we like to see ourselves as free and independent human beings—and the law assumes that we, indeed, are—our behaviour is largely shaped by the social context in which we operate and the people around us. Collective entities can differ very much from each other; they can differ according to size, organizational structure, legal nature, extent to which they are free or more coercive, and the overall aim of the organization. All collective entities shape the behaviour of their members, but the extent of this influence depends very much on the type of group, unit, and organization: this can vary from limited to extreme. Some groups exert extreme pressure on their members to accept certain social rules, norms, and values, and sometimes new members must pass certain tests to show they (p. 385) are worthy of group membership.¹⁸ In addition to the external pressure, group members also feel a strong internal pressure to adapt and conform to the prevailing norms within the groups, units, and organizations they are members of. The fact that we are social beings also means that we have a strong urge to belong and search for groups, units, organizations, or mass movements in which we feel comfortable.¹⁹ If we want to become a member of a group, we want to identify with the group and strive to prove ourselves and show

that we fit in.²⁰ We instinctively have a strong tendency to conform and accept the social norms and values that are predominant in the group. In any case, we certainly do not want to stand out, as was made explicit in many social-psychological experiments, such as the one by Asch on conformity.²¹ Groups, units, organizations, and mass movements—in short, collective entities—generally have a strong impact on our behaviour, sometimes without our full awareness.

International crimes are usually committed by people within militarized units. Military units are well-known for controlling human behaviour. They are hierarchically structured and orders generally go through a very clear chain of command in which subordinates must obey the orders of their superiors. Defying an order usually leads to disciplinary sanctions or even criminal prosecution. In some countries, desertion or failure to obey a military order can be punished by death. Once in the army, recruits feel like they are in a completely different world. Soldiers are required to wear uniforms, which deindividualizes and depersonalizes them, making them feel less responsible as individuals, but more responsible as members of their particular military unit. Furthermore, they must go through a training programme designed to ingrain conformity and obedience. In order to stress and emphasize their transformation from civilians into soldiers, recruits generally have to go through a period of (extensive) ragging and initiation rites.²² They are told that they are now mere instruments in the hands of the state and that when they use violence they do so on behalf of the state. The whole environment in military organizations (especially in dictatorships or countries involved in military conflicts) is designed to instil obedience and conformity in the recruits and to ensure that they unquestioningly obey orders. This is important in order to make the militarized unit an effective fighting force and to ensure that soldiers fight (rather than flee) when ordered to do so in a dangerous situation. Furthermore, soldiers are trained to use force and violence and to kill.²³ The training programme is set up to ensure that (p. 386) soldiers overcome their natural resistance to using violence and killing a fellow human being.²⁴ Such training programmes often include elements that desensitize group members to violence and elicit automatic responses to orders to shoot and kill. Training programmes of militarized units can go to extreme ends to control the behaviour of their recruits.²⁵ A former torturer during the Greek colonel's regime explained that the training programme was tough and led to a feeling of utter helplessness, which ultimately resulted in complete, blind and unquestioning obedience. He explained: 'They changed us into instruments. People without a will of their own. Who obey ... You were trained not to think.'²⁶

The aim of (international) criminal law is to set normative standards by qualifying certain behaviour as criminal and punishable. Individuals can only be held responsible if they have intentionally committed a crime. They can only be held responsible if they have a guilty mind and if there is a personal fault. The underlying assumption is that, to be culpable, individuals must have control and a certain level of free will to decide whether to commit a crime. The freedom of choice is, however, restricted in these situations, especially for recruits of militarized units. These organizations are hierarchically structured and subordinates are under a general and legal obligation to obey orders, especially in a

period of armed conflict. Failure to obey orders is a serious offence and can be considered treason.

It is, however, not only the coercive environment that makes people obey, but also the urge to do the right thing, to live up to the expectations. Especially in relation to an authority figure who is perceived as legitimate, people want to do the right thing, want to be good. They thus feel a strong internal pressure to obey the authority even if they are given illegal orders. Perhaps even more importantly, they may not recognize the illegality of the order when given by a figure who carries an official state function and hence is seen as a legitimate authority. In most such circumstances, the legality of an order given by a legitimate authority may be considered as granted. In addition, people have a general tendency to obey orders, as was shown by Milgram in his (in)famous 'obedience to authority' experiment, in which he asked subjects to give electric shocks to fellow participants, with the majority of the subjects (65 per cent) complying.²⁷ Research also shows that once people start following orders, this leads to a diffusion of responsibility: they no longer feel responsible for the outcome of their actions.²⁸

It is important to be aware of the fact that in some extreme cases, such as the Nazi Holocaust, the entire extermination process was organized in such a way as to (p. 387) deliberately ensure that there was a division of labour in which people felt that they were no more than a small cog in a big machine. Within this bureaucratized and industrialized but genocidal process, moral responsibility was substituted by a technical responsibility. Violence, torture, and genocide became a technique; mass murder and genocide an organized routine.²⁹ Hilberg concluded: 'It must be kept in mind that most of the participants of genocide did not fire rifles at Jewish children or pour gas into gas chambers ... most bureaucrats composed memoranda, drew up blueprints, talked on the telephone and participated in conferences. They could destroy a whole people by sitting at their desks.'³⁰ This, of course, is not the case when small, independent fighting units commit atrocities, but reflects social reality when large (state sponsored) organizations are involved in the commission of international crimes.

C. The (Social-)Psychological Context

As noted in the previous subsection, obeying orders sometimes leads people to withdraw into an 'agentic state'.³¹ They no longer feel fully responsible for their own deeds and behaviour. Research on perpetrators of international crimes has shown that almost all perpetrators are shocked after they commit their first crime.³² They feel bad about what they did. This phenomenon is referred to in academic literature as *animal pity* or *perpetrators disgust* and leads to the nagging feeling of cognitive dissonance, which needs to be resolved.³³ This sets in motion a series of defence mechanisms (some conscious, some unconscious) in which perpetrators desperately try to convince themselves that they are doing the right thing; that what they did was necessary and legitimate and, within the given situation, the behaviour is not criminal and immoral, quite the contrary. In other words: out of a psychological urge to sooth their own conscience, perpetrators who just committed a crime start to rationalize and justify their own behaviour.³⁴ This process is support-

ed by their environment and ultimately transforms ordinary people into perpetrators who can commit terrible atrocities with a clear conscience.³⁵ Ervin Staub has called this process the continuum of destructiveness and explained that people learn by doing: each step in the continuum of destructiveness makes the following step possible, even likely. Staub explains: 'Once perpetrators begin to harm people, the resulting psychological (p. 388) changes make greater harm-doing probable'.³⁶ Zygmunt Bauman agrees: 'None of the steps was made inevitable by the already attained state of affairs, but each step rendered rational the choice of the next stage on the road to destruction.'³⁷ According to Bauman, the key factor in the social process leading to genocide is that 'the successive stages are arranged according to the logic of eviction from the realm of moral duty'.³⁸ Kelman and Hamilton, too, have noted that the underlying social-psychological processes that characterize crimes of obedience are authorization, dehumanization, and routinization, which all together can explain why perpetrators can come to see the horrendous crimes they commit as something that needed to be done—as something that was good.³⁹

D. Conclusion

At Nuremberg, the judges indicated that international crimes are 'committed by men not by abstract entities'.⁴⁰ While this is true, these men do operate within a particular *context*, which is an abstract entity. As explained in this chapter, this context to a large extent shapes their behaviour. Within such a context, people no longer operate as fully free and independent individuals, but take up new identities: state functionaries in a bureaucracy or soldiers in an army generally tend to abide by the rules and norms required to do their jobs well.

Hence, these organizations (read: abstract entities) do play an important role in the commission of international crimes. They do so not only by forcing people to conform and obey, but more importantly by ensuring that the subordinates no longer see and qualify their behaviour as criminal and immoral, but rather as necessary and legitimate. Most international crimes are crimes of obedience (committed in a context where the crimes are supported by an authority), and the perpetrators of these crimes are obedient followers rather than deviant individuals. This means that their behaviour is to a large extent shaped by the environment and context in which they operate. I am not saying that people are automatons and that within coercive military environments they completely lose their autonomy and independence; generally speaking, this is not the case. However, behavioural options are often limited within such coercive organizations. The environment is extreme and coercive and it takes a lot of courage, wisdom, and insight to escape the social pressure to conform and obey, to put oneself outside of the group, unit, or organization by disobeying an order or refusing to go with the flow. In such extreme circumstances, many just try to survive. Disobeying an order can only be done with great risk to oneself.

In many cases, the pressure used can be direct threats (as for instance in the *Erdemovic* case),⁴¹ while in other cases the pressure and threats are more subtle and less explicit, (p. 389) but still powerful. And in some cases, it is just an internal pressure to conform

and obey within the given context. One of the most illustrative examples described in literature on the social pressure in such situations is provided by Browning in his book *Ordinary Men on Reserve Police Battalion 101*. When asked why they followed the order to execute Jews, some of the recruits answered that they did so because they did not want to be seen as cowards.⁴² This example shows not only how extreme social and organizational pressure can be, but also how this can distort a human being's perception of what is right and wrong and make them believe that committing genocide within the given circumstances is the right thing to do.

III. Perpetrators of International Crimes

International crimes are, as stated in this chapter, manifestations of collective violence in which many different individuals are involved, sometimes even up to several millions, as in Nazi Germany. These individuals have different positions, roles, and motives. Some play a large role, others a minor one; some are close to the crime scene, others far removed; some are involved in planning and organization, and others in execution. Still, others are merely involved as accessories and accomplices offering services or delivering weapons. It is hard to compare the people involved with each other, and the more people involved, the harder it gets to figure out who did what. We should, however, distinguish between two types of perpetrators: those who control the context in which international crimes are committed, and those who merely operate within this context. In theory, this difference is very clear cut: the political powerholders like a head of the state or prime minister control the context, while the foot soldiers operate within it. In practice, this distinction might not be so clear-cut. For example, a head of state can be a figurehead and under the strong influence of others. As well, there are groups that operate within a grey zone. They are less in control than heads of state, but more so than foot soldiers. It is also true that power is never absolute (even a head of state needs support) and powerlessness is seldom complete (even a foot soldier has the power to decide how to act within a particular situation). Nevertheless, the distinction between those creating the political, ideological, and social context and those operating within it is crucial. As explained, it is the context itself that pressures individual subordinates to conform and obey, and provides the subordinates with the belief that they are doing the right thing even when obeying illegal orders. We can consequently say that political leaders and their close associates, who adhere to a violent or even genocidal policy, actually put their subordinates in an atrocity-producing situation.

(p. 390) If international crimes are induced and supported by the state, then the entire state can turn into a killing machine. The chain of command starts with a so-called criminal mastermind. This can be the head of state, another political powerholder, a military leader or any other high-ranking member within the government, a military unit, rebel organization, or terrorist group. The chain of command then runs through different organizations/levels such as the military and police. However, in extreme cases such as in Nazi Germany, it runs through the entire state apparatus, involving millions of people in a bureaucracy of death. Those at the top of the chain of command (head of state and, for in-

stance, the members of the government) decide on the overall policy, while top leaders within the state bureaucracy, the military and police, and the specialized units organize and plan the execution of the policies. They are usually far removed from the crime scene. The hands-on perpetrators of international crimes are those who physically execute the policies: they are the ones who maim, kill, torture, and rape with their own hands. They are usually the foot soldiers close to the crime scene, and they literally have blood on their hands. They physically commit the horrendous crimes.

When confronted with extreme mass atrocities, we instinctively tend to believe that the hands-on perpetrators must be mentally disturbed or insane, and certainly sadists. However, research has shown that most perpetrators of international crimes are ordinary, average people with no criminal record or violent past; prior to the period of armed conflict, they were law-abiding citizens.⁴³ As already explained, the low-ranking perpetrators commit their crimes in a very particular context, in which they feel a strong pressure to use (extreme) violence and also feel that there is an urgency and entitlement to do so. They feel that the violence is necessary and legitimate, and they need to protect their country and/or their people.⁴⁴ In other words, they are ordinary people in extra-ordinary circumstances. What is actually meant by this is that the perpetrators are not necessarily born criminals, but only act criminally in a very particular context. The commission of crimes is situational and contextual rather than a result of predispositions. When studying the behaviour of the perpetrators and the context in which they operate, it becomes clear that most ordinary and average people would probably behave in a similar way. In other words, in certain circumstances, it does not take particularly vicious and cruel people to commit mass atrocities; it rather takes particularly courageous and morally strong people *not* to do so. Again, this is not the same as saying that they no longer have any choice and that most perpetrators are mere automatons. They are not, and many of them (albeit not all) still have a choice. The point is that the social context is framed in such a way that some forms of extreme mass violence no longer seem to (p. 391) be criminal in the eyes of the perpetrators. The people who create such a context are to a large extent responsible for the behaviour of the people operating within this context.

Without denying the role and responsibility of the low-ranking foot soldiers who physically torture, maim, rape, and kill, the findings from social science research show how much the people who *shape the context* can influence the behaviour of those who operate within it. It follows that the people at the top of the chain of command, the criminal masterminds and the so-called *auctores intellectualis*, share the heaviest burden of guilt because they created a context in which the commission of international crimes has become the natural (maybe even the inevitable) outcome of the ordinary course of events. They, rather than the low-ranking foot soldiers who are the mere instruments of the state, should therefore be qualified as the persons most responsible, and the foot soldiers as their instruments.⁴⁵ The following section will focus on the ICC and the modes of liability it uses. The main aim is to assess the extent to which these modes sufficiently reflect the specific roles played by different kinds of perpetrators, and whether they sufficiently re-

flect the role of the political powerholders and military leaders who create the context in which others commit crimes.

IV. The ICC and the Concept of Individual Criminal Responsibility

Individual criminal responsibility is defined in Article 25(3) of the ICC Statute, which is fairly detailed and longer than, for instance, Article 7(1) of the ICTY Statute. The provision in the ICC Statute distinguishes between: (a) 'commits'; (b) 'orders, solicits or induces'; (c) 'aids, abets or assists'; and (d) 'in any other way contributes'. There is thus no specific reference and mode of liability that seems to be explicitly meant for the criminal mastermind, the *auctor intellectualis*, who creates the context in which others commit international crimes.⁴⁶ The modes of liability—planning, organizing, and conspiracy—are not specifically mentioned either.⁴⁷ This is striking because, in a period of collective violence, the planners, organizers, and conspirers are usually fairly high up in the chain of command, and thus largely control the context in which others operate. If the ICC aims to prosecute the 'most serious crimes' (preamble and Article 1 of the ICC Statute), it must be able to focus on those who are the most responsible for these crimes, such as the criminal masterminds and their closest associates. In my view, the lack of statutory reference to these types of perpetrators should not be taken literally. From Parts II and III, it follows that without these top leaders who initiated the conflict and/or designed the genocidal or otherwise violent policies, international crimes would not have been committed. Their responsibility should be subsumed under one of the available modes (p. 392) of liability. The question, however, is: how to legally construe the responsibility of these high-ranking perpetrators and which mode of liability to use? As the enumeration is exhaustive, the responsibility of the criminal masterminds needs to be construed according to one of the forms mentioned in Article 25 of the ICC Statute. In the following subsection, I will first focus on the alleged hierarchical structure of Article 25 and what the consequences of this are. I will then consider how we ought to construe the responsibility of the criminal masterminds.

A. The Difference between Principals and Accessories

The detailed enumeration of the various modes of liability in Article 25(3) of the ICC Statute led to a discussion on the extent to which this paragraph is meant to represent a hierarchical structure and what the consequences of this would be. As the ICC Trial Chambers came to different conclusions,⁴⁸ we can conclude that renowned international criminal lawyers and judges disagree on this issue.⁴⁹ The consequence of acknowledging the hierarchical order would be that only 'committing' would entail a form of direct and principal liability, whereas all other modes of liability would be derivate and accessory.⁵⁰ Specifically, ordering and inducing would then be forms of derivate liability and be less blameworthy and less morally reprehensible than committing. All scholars seem to agree that these consequences would be undesirable.⁵¹ It does not seem fair to qualify superi-

ors who order, solicit, and induce their subordinates (the hands-on perpetrators) to commit crimes as accessories, while the hands-on perpetrators are qualified as principals.

Van den Wyngaert is one of the ICC judges who has strongly voiced her opinion on this point. In her concurring opinion in the *Chui* case, she notes that 'the leadership element must not necessarily find expression in a particular form of participation but can equally be reflected in sentencing.'⁵² This can be questioned: in order to be perceived as just by the general public, judicial decisions should attribute criminal responsibility according to the level of culpability. The criminal masterminds are the main perpetrators: they initiate, instigate, and induce others by creating such a context. (p. 393) Consequently, they should receive the highest share of the blame: not just by giving them high(er) sentences, but also by qualifying them as such. Research has shown that for victims it is important that their victimization, as well as the wrongs and injustices committed to them, are officially acknowledged.⁵³ It thus seems logical that pinpointing the state and its functionaries as the wrongdoers is equally important if the state and its political leaders played a crucial role. This is especially true if the state has officially sanctioned the crimes committed against them and thus provided the hands-on perpetrators with a legitimization for doing so. Also, lower ranking perpetrators would probably not consider justice as fair when they realize that they—who had such limited choices—are considered principals while the powerful people putting them in such a situation are merely considered accessories. It does not seem that the length of the sentence can make up for the loss of fairly attributing individual criminal liability on the basis of blameworthiness.

If a distinction between principals and accessories is made, I suggest that it is preferable to merely qualify the political leaders and powerholders as having principal responsibility for crimes against humanity and genocide. The responsibility of the foot soldiers and hands-on perpetrators (who are the instruments) would then be secondary in relation to crimes such as genocide and crimes against humanity. According to the current case law, the *mens rea* of lower-ranking perpetrators for crimes against humanity requires the 'intent to commit the underlying offence plus the knowledge of the widespread or systematic practice constituting the general context of the offence.'⁵⁴ Thus knowledge of the widespread nature enhances the guilt and blameworthiness of a low-ranking officer. From a criminological perspective, this is problematic because this knowledge would *increase* the pressure on the individual, especially when they are low-ranking. Widespread occurrence could make them believe that the ordered crimes are nothing out of the ordinary since everyone else is committing them. From a criminological and psychological perspective, such knowledge should work in mitigating the individual's guilt rather than aggravating it. Having studied international crimes for many years, I fail to see how the lowest ranking foot soldiers can be held responsible as principals for large scale crimes such as genocide and crimes against humanity. Qualifying the criminal masterminds and their close associates as the principals and the foot soldiers as their accomplices and accessories would better reflect the social reality and the level of culpability.⁵⁵ In relation to the underlying ordinary and common crimes such as murder, torture, and rape, hands-on perpetrators would, of course, have principal liability. In order to ensure that the law is under-

standable and just, I believe the law should take the principle of fair-labelling into account.

(p. 394) B. Commission via Organizational Control?

A second point of debate has been on the question of how to fit the responsibility of criminal masterminds under Article 25(3) of the ICC Statute.⁵⁶ This provision explicitly states that a person can commit a crime alone, together with another or *through another person*. The latter is especially crucial in relation to international crimes and is generally understood as an important acknowledgement of the mode of liability of indirect perpetration or, in other words, the perpetrator behind the perpetrator.

In its case law so far, the ICC has relied on the control theory to legally construct the individual criminal responsibility of criminal masterminds under this provision. The control theory was developed by the German legal scholar Claus Roxin in his seminal work *'Täterschaft und Tatherrschaft'*.⁵⁷ Roxin noted that the law initially recognized only two forms of indirect perpetration: via coercion and via deception. In both cases the physical perpetrator is not responsible, but merely controlled by the indirect perpetrator. He argued that there should be a third form of indirect perpetration based on control via organized power structures. An important difference compared to the two other forms of indirect perpetration is that this type of perpetration does not deny the responsibility of the direct perpetrators.⁵⁸

The control theory is based on the belief that people can control others via organizations and that they can thus influence and control the will of the people functioning within them. The indirect perpetrators have control over the organization and, as such, determine whether the crime is committed. The low-ranking officials and subordinates function as cogs in a machine; the outcome of the process is automatic. These subordinates do not have the power to frustrate the commission of the crime because they can easily be replaced. The indirect perpetrator does not need to personally know the hands-on perpetrator as, according to Roxin: 'the individual is an anonymous interchangeable figure, a cog in the machine of the power structure that can be replaced at any time. ... The decision-making freedom of an undeceived, uncoerced actor, is to the initiator, no obstacle to the criminal goal.'⁵⁹

As of its very first decision, the ICC relied on the control theory to construe the individual criminal responsibility of criminal masterminds.⁶⁰ Since the crucial criterion is the 'control over the crime', both the physical perpetrator and the masterminds (who control the perpetrator via the organization) are liable. Weigend explains that the criminal mastermind does not need to have 'immediate personal control over each soldier who committed the crimes in question, the main issue is how they "controlled" the perpetration of offences.'⁶¹ The Pre-Trial Chamber further clarified which criteria should be met in order to conclude that criminal masterminds control their organizations:

(p. 395)

The chamber finds that the organization must be based on hierarchical relations between superiors and subordinates. The organization must also be composed of sufficient subordinates to guarantee that superior's orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognized leadership will generally be complied with by their subordinates.⁶²

Case law has furthermore established that the indirect perpetrator's contribution must be essential. This has been explained as *sine qua non*—meaning that the indirect perpetrator has the power to frustrate the commission of the crime.⁶³ In practice, this requirement led to a heavily criticized reversal of the burden of proof.

In my mind, the strength of the control theory is that it adequately reflects the social reality of state-sponsored international crimes. As explained in Parts II and III, criminal masterminds control the context in which others operate, and this context is often an organized power structure. It must be admitted, though, that the control theory is harder to apply in so-called new wars in which the state has often lost control and many different (organized but sometimes also unorganized) groups fight each other.⁶⁴ Overall, it can nevertheless be said that the control theory as a mode of liability seems to represent the actual role and blameworthiness of the criminal masterminds far better than the ordinary and more direct forms, such as ordering, instigating, and inducing, especially in cases of state-sponsored violence. These latter forms (ordering, instigating, and inducing) seem to imply a direct and personal relationship between the criminal mastermind and the foot soldiers. This relationship is seldom very direct, and the criminal mastermind uses indirect rather than direct means to influence the physical perpetrators' behaviour. From a criminological perspective, the control theory should be supported.⁶⁵ It better reflects the social reality of state-sponsored international crimes than conspiracy and the JCE concept. These theories are based on an agreement and on a common plan and/or common purpose. There is, however, no such plan between the criminal masterminds at the top of the chain of command and the rank and file soldiers who physically commit the crimes. First of all, the sheer number of people involved leaves no room for a direct link between them; secondly, the way in which the top leaders shape the behaviour of the foot soldiers is not via a shared common purpose, but by means of a coercive social dynamic in which obedience, conformity, and professional duty play an important role; thirdly, the motives and reasons for rank and file soldiers to get involved can be diverse and thus very different in (p. 396) nature from those of the top leaders.⁶⁶ Conspiracy might be useful to prosecute the criminal masterminds, but does not show how they shape the behaviour of their subordinates; while JCE might be useful for smaller groups and units fighting in a civil war, it does not grasp the nature of collective criminality when large groups and the state bureaucracy are involved. The control theory, as it stands now within the case law of the ICC, is consequently the theory that best reflects social reality. However, it does have a number of shortcomings that need to be addressed and ultimately corrected in order to make it practically applicable to international crimes. The following subsection will focus on these shortcomings.

C. Shortcomings of the Control Theory and How to Repair Them

First, the control theory seems to assume that there is just one organization involved. The problem, however, is that several organizational structures are usually intertwined with each other, and there is a long and sometimes diffuse chain of command. This is especially true if the state is involved. The head of state will direct the members of government who preside over their own departments and the state bureaucracy. Additionally, there are usually many different bureaucratic and militarized units such as the army, the police, secret services, and elite forces. The point is that there are perpetrators who, compared to the government, can be considered low-ranking and have little say in the overall state policy. However, within their organizations, they are high-ranking figures with organizational control over their subordinates. They run organizations that execute the policies and they usually have a lot of leeway and freedom in doing so. A typical example would be Adolf Eichmann, who was no more than a middle ranking perpetrator if we take the state hierarchy into account. However, due to his crucial position as head of transportation, Eichmann played a crucial role in executing the genocidal policies. The policies, however, had been designed and decided upon by people above him. In other words, Eichmann was not a criminal mastermind but nevertheless had organizational control over his organization. Ambos concluded that there is organizational control 'at different hierarchical levels' and people like Eichmann are 'neither - "downwards" - the sole person responsible for the events nor - "upwards" - completely independent.'⁶⁷ This leads Ambos to argue that the control theory can only be applied to men in the background, 'whose orders and instructions cannot without any further ado be revoked or cancelled... This is only the case for the leadership level of the formally established government and in exceptional cases, also for the top hierarchy of the military and police forces'.⁶⁸ In my view, it can be questioned whether it is wise to restrict the application of the control theory to these top leaders, as organizational control also seems to apply to middle ranking perpetrators like Eichmann. The way that the chain of command runs (p. 397) through the various organizations involved should therefore be carefully assessed in each case. A person's position, both within the state hierarchy and in the organization in which he operates, is an important indicator of his guilt and blameworthiness.

Secondly, the essence of the control theory is that the criminal mastermind has control over the crime committed. I fully agree that, in order to be held responsible, the criminal mastermind should control the course of events to a large extent. However, it is important to note that no one—not even an extremely powerful dictator—can fully control the entire course of events because there are simply too many people involved. If many people are involved, then this can set in motion a chain reaction of social dynamics that even a powerful leader cannot control. For instance, Kalyvas showed that, within a period of armed conflict, many ordinary people take advantage of the situation to commit crimes that they wouldn't have committed in peacetime. This shows that, in a period of armed conflict, the line between political violence and criminal violence becomes blurred.⁶⁹ If we take this into account, we can conclude that it would be too high a burden of proof to require the prosecutor to establish the criminal mastermind's control over each and every specific element of the crime. It would make more sense to hold him responsible for the

overall commission of these crimes and thus the crime *pattern*. In other words, the control of the criminal mastermind would be to instigate and induce genocide rather than the killing of any specific person. We should explain this control over the crime as control over the course of events in general terms, by creating a certain context (an atrocity producing situation). When judging such situations, we should take into account that there will always be diversions of this course of events and that complete control is impossible.

A third shortcoming of the control theory is that it seems to require that the execution be automatic. A better threshold would be to say that the execution could be expected in the ordinary course of events. As stated earlier, criminal masterminds can, to a large extent, create and control a situational context. This will trigger a certain social dynamic that almost inevitably leads to the perpetration of certain crimes. Shaping a certain context makes it possible to shape the behaviour of those operating within it, but this falls short of controlling the actual minds or will of the perpetrators. Human beings are not automata and, even in a very coercive situation, it is rare for them to completely lose their autonomy, individuality, or freedom. In almost all cases, they can still think and decide independently, although their choice of action might be severely constrained by the context in which they operate, as well as by the practical implications and consequences of their choices. Consequently, it is hard to say that any execution of whatever order is automatic, nor is control in those situations ever absolute or complete. This is already the case for commanders of small units⁷⁰—let alone for political leaders who are usually far removed from the crime scene. The point is that low ranking foot soldiers can frustrate certain acts, for instance, by refusing to kill, torture, (p. 398) or rape a specific individual, and can thus prevent this specific crime from being committed.⁷¹ In that sense, the control of the criminal mastermind is never complete and the execution never truly automatic. However, the outcome is the ordinary and logical course of events. Individual low ranking soldiers might be able to frustrate the commission of some of the crimes, but cannot frustrate the overall *crime pattern*. In other words, they cannot frustrate the commission of genocide or crimes against humanity as such. Setting the standard at 'ordinary course of events' thus better reflects social reality than the term 'automatic'.

A fourth shortcoming is the current standard of proof for the control theory, which requires that the role of the criminal mastermind be essential in the sense that it is a *sine qua non* contribution. This requirement, however, leads to a reversal of the burden of proof. Judges Fulford and Van den Wyngaert have noted that this burden of proof is far too high and practically impossible to meet, and I fully agree.⁷² If we take doing justice seriously, then it should be possible to hold the criminal masterminds responsible as principals. The burden of proof should not be impractically high, as this would result in failures to convict the high-ranking perpetrators. I suggest that we not define 'essential' as '*sine qua non*', especially not in relation to one specific crime, such as a single murder. Rather, we should define 'essential' in relation to the crime pattern: the genocide or crimes against humanity. Again, when we take into account the number of people involved into account and the impossibility to control everyone, we see that a contribution can be essential without being a *sine qua non*.

V. Conclusion

Although there are many similarities between ordinary crimes and international crimes, there are also significant differences between them. The most important factors are the number of people involved, the fact that perpetrators commit their crimes on behalf of collective entities and the fact that the crimes are committed as part of a political campaign or an armed political conflict. International crimes are a different form of criminality, that can be qualified as systemic violence or collective violence (p. 399) and warrants a specific mode of liability. This mode of liability should be designed to ensure that the criminal masterminds can be prosecuted and punished as principals. They are the *autores intellectuales*, the ones who are pulling the strings, and are therefore the most responsible. This mode of liability should acknowledge that there are people behind the scenes who create the atrocity-producing situation in which others commit crimes. These people are therefore the ones most responsible for these crimes. No matter how powerful a leader is, they cannot fully control the situation nor the will of their subordinates; however, by shaping a certain context, they can to a large extent shape and direct the behaviour of the people operating within that context.

The control theory acknowledges that people can control others via organizations. It therefore seems to be a suitable and valid theory to use when prosecuting political leaders for their crucial role in the commission of international crimes, especially when they are state sponsored. As it stands now, the required criteria create a burden of proof that is too high; it should be lowered to make the control theory practical and applicable. The law aims to set clear-cut criteria on when, how and under what circumstances individuals can be held criminally responsible for certain crimes, and thus tries to be as specific as possible; the principle of legality requires this. However, from a sociological/criminological point of view, it is hard (if not impossible) to set such strict criteria because the human behaviour and social dynamic related to this are complex and extremely difficult to fit into absolute terms. This is particularly true when dealing with large numbers of perpetrators who play different roles, have different motives, and interact with each other.

I would therefore suggest that when people at the top of the chain of command deliberately created a context in which others commit international crimes, they can be held responsible for creating this context. This is necessary because, by creating this context, they set a social dynamic in action in which, in the ordinary course of events, others commit international crimes. If the law requires excessive standards like 'absolute control' and 'automatic' course of events, this will create an undesirable situation in which hardly any leader can be held responsible. I therefore suggest that we use and apply criteria reflecting the social dynamics, which serve both justice and the principle of legality.

Notes:

(1) Alette Smeulers is professor of criminal law and criminology of international crimes at the University of Groningen in the Netherlands. She wishes to thank the editors of this volume for their useful comments on the first draft of this chapter.

- (2) See for an excellent overview Lachezar Yanev, *Theories of Co-perpetration in International Criminal Law*, PhD-thesis, (Tilburg University 2016).
- (3) See the dissenting opinions of Judge Fulford in *Prosecutor v. Lubanga* [2014] ICC 14 March 2014, and of Judge Van den Wyngaert in *Prosecutor v. Katanga* [2014] ICC 7 March 2014 and her concurring opinion in *Prosecutor v. Chui* [2012] ICC 18 December 2012.
- (4) Kai Ambos, *Treaties on International Criminal Law—Volume I: Foundations and General Part* (Oxford University Press 2013); Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); Herbert Jäger, *Makrokriminalität* (Suhrkamp 1989).
- (5) Elies van Sliedrecht, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Asser University Press 2003).
- (6) See a.o. Harmen G. van der Wilt, 'The Continuous Quest for Proper Modes of Liability' (2009) 7 *JICJ* 307, who concluded this in 2009. It is, however, still very much true today.
- (7) See more extensively Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations—A Multi- and Interdisciplinary Textbook* (Martinus Nijhoff 2011).
- (8) Andre Nollkaemper, 'Introduction' in Andre Nollkaemper & Harmen van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press 2009).
- (9) See, for an extreme example, the case of Nazi Germany and the role of the bureaucracy: Raul Hilberg, *The Destruction of the European Jews* (first published in 1961, Holmes & Meier 1985); Zygmunt Baumann, *Modernity and the Holocaust* (Polity Press 1989).
- (10) Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience* (Yale University Press 1989).
- (11) See, for a typology of perpetrators reflecting the wide variation in motives, Ronald Crelinsten, 'In Their Own Words: The World of the Torturer' in: Ronald Crelinsten & Alex Schmid (Eds.), *The Politics of Pain—Torturers and Their Masters* (COMT 1993); Michael Mann, *The Dark Side of Democracy—Explaining Ethnic Cleansing* (Cambridge University Press 2005) and Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in: Alette Smeulers & Roelof Haveman (Eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia 2008).
- (12) Within criminological theorizing criminal behaviour is usually equated with deviant behaviour. This can explain why criminologists have ignored studying international crimes for a long time and that up until today international crimes are more extensively studied within political science than within criminology.

A Criminological Approach to the ICC's Control Theory

(13) There are many examples of such a political rhetoric. See for instance the US government after 9/11 when it launched the War on Terror, or more recently Al-Assad, the head of state of Syria, who is faced with a civil war in his country and Erdogan who is taking extreme measures to enhance his position after the failed coup d'état.

(14) Of course the extent differs per state. Violent dictatorial states will do this to a larger extent than democracies that feel their national security is threatened.

(15) Especially the research on bystanders by, amongst others, Darley and Latané that shows that people have a very strong tendency to look at others to see how they should qualify a situation. When people are confronted with an emergency—a fire or someone drowning—bystanders tend to look at others to decide whether they indeed also qualify the situation as an emergency that requires action. If others do not seem to respond people tend to adapt their own position on how to qualify a situation and do not qualify the situation as an emergency that requires action either. John Darley and Bibb Latané, 'Bystander Intervention in Emergencies: Diffusion of Responsibility' (1968) 8 *Journal of Personality and Social Psychology* 377.

(16) See for many examples of this in my earlier publications such as Alette Smeulers, 'What Transforms Ordinary People into Gross Human Rights Violators', in Sabine Carey and Steven Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies* (Ashgate Publishing Ltd 2004) 239.

(17) See, e.g., Elliot Aronson, *The Social Animal* (Worth Publishers 2011).

(18) Such tests can be formal and legitimate such as an application procedure for a job, but can for instance in violent gangs also entail a test in which a group member has to show his or her loyalty to the group by for instance using violence or even killing a fellow human being.

(19) See for a more extensive description Erich Fromm, *Escape from Freedom* (Rinehart & Co 1941).

(20) See the social identity and self-identification theory in Tajfel's work, a.o. Henri Tajfel and John Turner, 'The Social Identity Theory of Intergroup Behaviour', in Stephen Worchel and William Austin (eds.), *The Psychology of Intergroup Relations* (Nelson-Hall 1986).

(21) Solomon Asch, 'Opinions and Social Pressure' (1955) 193 *Scientific American* 31.

(22) Donna Winslow, 'Rites of Passage and Group Bonding in the Canadian Airborne' (1999) 25 *Armed Forces & Society* 429.

(23) See, e.g., Theodore Nadelson, *Trained to Kill—Soldiers at War* (The Johns Hopkins University Press 2005).

(24) Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Little, Brown and co 1996).

- (25) A well-documented and extreme example is the Greek torture school. Janet Gibson and Mika Haritos-Fatouros, 'The Education of a Torturer' (1986) *Psychology Today* 50, 56. Mika Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture* (Routledge 2003).
- (26) Interview of Petrou in *Your Neighbour's Son*.
- (27) Stanley Milgram, *Obedience to Authority* (Harper and Row 1974).
- (28) Emilie Caspar, Juila Christensen, Axel Cleeremans, and Patrick Haggard, 'Coercion Changes the Sense of Agency in the Human Brain' (2016) 26 *Current Biology* 1.
- (29) See the work of Bauman (n 9) and Hilberg (n 9), but also Hannah Arendt, *Eichmann in Jerusalem—A Report on the Banality of Evil* (Penguin Books 1964).
- (30) Hilberg (n 9) 1024.
- (31) Milgram (n 27).
- (32) Alette Smeulers, 'Auschwitz and the Holocaust Through the Eyes of the Perpetrators' (1996) 50 *Driemaandelijks Tijdschrift van de Stichting Auschwitz* 23.
- (33) Ditte Marie Munch-Juriscic, 'Perpetrator Abhorrence: Disgust as a Stop Sign' (2014) 45 *Metaphilosophy* 270.
- (34) Ervin Staub, *The Roots of Evil—The Origins of Genocide and Other Group Violence* (CUP 1989).
- (35) See Smeulers (n 16). See also James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, (2nd ed, OUP 2007).
- (36) Staub (n 34) 79.
- (37) Bauman (n 9) 191.
- (38) Bauman (n 9) 192.
- (39) Kelman and Hamilton (n 10).
- (40) IMT Trials 22, 466.
- (41) *Prosecutor v. Erdemovic* (ICTY, 7 October 1997), IT-96-22-A.
- (42) Christopher Browning, *Ordinary Men—Reserve Police Battalion 101 and the Final Solution in Poland* (Aaron Asher Books 1992).
- (43) Harald Welzer, *Täter—Wie aus Ganz Normalen Menschen Massenmörder Werden* (Fischer 2005); See Waller (n 35) and Raul Hilberg, *Perpetrators, Victims, Bystanders—The Jewish Catastrophe 1933–1945* (Aaron Asher Books 1992); Smeulers (n 16).

(44) See for an illustrative example the situation in Abu Ghraib: Seymour Hersh, *Chain of Command—The Road from 9/11 to Abu Ghraib* (Penguin Books 2004); Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers—The Road to Abu Ghraib* (Cambridge University Press 2005); Philip Gourevitch and Errol Morris, *Standard Operating Procedure* (Penguin Press 2008).

(45) See also Harmen van der Wilt, *Het Kwaad in Functie* (Vossiuspers 2005).

(46) Ibid 8.

(47) In art 7 ICTY Statute, planning is mentioned.

(48) Trial Chamber I of the ICC concluded that art 25 ICC represented a hierarchical structure of modes of liability. Judgment pursuant to art. 74 of the Statute, Lubanga, Situation in the DRC, ICC-01/04-01/06-2842, TC-I, ICC 14 March par. 999. whereas ICC's Trial Chamber II concluded the opposite, in ICC 7 March 2014, Katanga Trial judgment, pp. 1383-7.

(49) Kai Ambos, 'The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehension Analysis of the Legal Issues' [2012] *JICJ* 115 at 144 believes it does, while Judges Fulford and Van den Wyngaert disagree.

(50) Not all countries recognize the principal difference between principal liability and derivate liability. See Yanev (n 2) 9-10.

(51) Fulford and Van den Wyngaert therefore reject the proposition that there is a hierarchical order, while Ambos, who believes there should be a hierarchical order, does not agree on qualifying planning as a derivate responsibility.

(52) *Prosecutor v. Chui* [2012] ICC 18 December 2012 [26].

(53) Stanley Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past' [1999] *Law and Social Inquiry* 7.

(54) Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 106.

(55) I fully agree with Ambos who states that: 'the new focus on top-down instead of bottom-up responsibility, i.e. that liability for macro criminality must be devised not as a variant of individual liability but with a focus on the criminal apparatus or organization responsible for the atrocities.' See Kai Ambos, 'A Workshop, a Symposium and the *Katanga* Trial Judgment of 7 March 2014' [2014] *JICJ* 4.

(56) This discussion is by the way closely related to the earlier one of the alleged hierarchy of art. 25 ICC. See *Prosecutor v. Chui* [2012] ICC 18 December 2012 [6] (Judge van den Wyngaert).

(57) Gerhard Werle and Boris Burghardt, 'Claus Roxin on Crimes as Part of Organized Power Structures' (2011) 9 *JICJ* 191.

(58) *ibid* 198.

(59) Werle and Burghardt (n 57) 199.

(60) Ambos (n 49).

(61) Thomas Weigend, 'Indirect Perpetration' in Carsten Stahn (eds.), *The Law and Practice of the International Criminal Court* (OUP 2015) 545.

(62) *Katanga and Ngudjolo* [2008] ICC 30 September 2008, [512].

(63) See Van den Wyngaert in her dissenting opinion in the *Chui* case in which she rejects the essential requirement: 'because it compels judges to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution': para. 42.

(64) Mary Kaldor, *New and Old Wars* (2nd edn, Polity Press 2006).

(65) See, for support from lawyers, Kai Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the Most Responsible', in Andre Nollkaemper and Harmen van der Wilt (eds.), *System Criminality in International Law* (CUP 2009) 127 and Harmen van der Wilt, 'Joint Criminal Enterprise and Functional Perpetrators', in Andre Nollkaemper and Harmen van der Wilt (eds.), *System Criminality in International Law* (CUP 2009) 158.

(66) See, for some typologies, Crelinsten, Mann and Smeulers (n 11).

(67) Ambos (n 60) 153.

(68) Ambos (n 60) 154.

(69) Stathis Kalyvas, *The Logic of Violence in Civil War* (CUP 2006).

(70) See for instance Amelia Hoover Green, 'The Commander's Dilemma: Creating and Controlling Armed Group Violence' (2016) 53 *Journal of Peace Research* 619.

(71) This by the way seldom happens. In a research project in which we tried to find low-ranking soldiers who refused to obey orders and broke the chain of command we could hardly find any examples. It turns out that foot soldiers who do not want to obey the orders find means to evade the order rather than more straightforwardly break the chain of command by refusing to obey the order.

(72) See also the criticism of Judge Fulford who in his separate opinion in *Prosecutor v. Lubanga* [2012] ICC 14 March 2012, (01/04-01/06), para. 18 stated that it sets too high a standard as it 'imposes an unnecessary and unfair burden on the prosecution' with Van den Wyngaert agreeing: 'it compels Chambers to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution.' See concurring opinion Judge van den Wyngaert, ICC 18 December 2012, *Prosecutor v. Chui*, ICC-01/04-02/12, para. 42. See for a discus-

A Criminological Approach to the ICC's Control Theory

sion of 'essential' a.o. Jens Ohlin, Elies van Sliedrecht, and Thomas Weigend, 'Assessing the Control-Theory' [2013] *LJIL* 725 and Yanev (n 2) 350–358.

Alette Smeulers

Alette Smeulers is a Professor in Criminal Law and Criminology of International Crimes at the University of Groningen.