

2 Germane Considerations

2.1 Introductory Remarks

Before beginning a consideration of the selected pertinent issues identified in relation to the concept of individual criminal responsibility for core international crimes, it is apposite to briefly examine some of the broader underlying issues of the proposed topic.

Firstly, the title of this thesis refers to selected pertinent issues concerning the concept of ‘individual criminal responsibility’ for core international crimes. But what does it mean to be ‘individually criminally responsible’ for core international crimes? A brief discussion of this matter will be undertaken for clarification purposes and to define the boundaries of this thesis.

Secondly, what are the actual objectives underlying the concept of individual criminal responsibility for core international crimes? Clearly an answer to this question is central to an understanding of the concept of individual criminal responsibility. Surprisingly perhaps, it is only in recent times that this topic has generated any substantial academic interest. A detailed and considered answer to the question posed cannot be achieved within the confines of this chapter, and neither is it the ambition of this thesis to provide such an answer. The aim is merely to set the background for the subsequent discussion on the pertinent issues of the concept of individual criminal responsibility for core international crimes, and to avoid the omission of many commentators, of neglecting to address this issue at all.

Thirdly, the sources of international criminal law will be addressed. A consideration of these sources is warranted on two grounds. To begin with, the sources of international criminal law are not well-established, notwithstanding their affinity to the sources of international law. Much international jurisprudence and academic literature appears, however, to presume what these sources are, without any consideration being given to whether the ‘source’ relied upon is actually a valid source of international criminal law, or whether it can be said to be merely of ‘persuasive authority’. Secondly, the identification of the sources of international criminal law is, clearly, relevant to every substantive aspect of this thesis. Accordingly, it is essential to identify the sources which can be relied upon for the purposes of this thesis. Consideration will be given to the general sources of international criminal law as well as the sources relevant to adjudication before the ICC and the *ad hoc* international criminal tribunals. Consideration will also be given to the status of the principle of judicial precedent before the *ad hoc* international criminal tribunals and the ICC, as the jurisprudence emanating from these institutions, and scholarly opinions on this matter are not in complete agreement.

Fourthly, the definition of core international crimes will be considered. Due to the uncertainty surrounding the key elements of the generic category of international crimes, consideration will be given to their definition and fundamental criteria. In addition, a brief description of the crime of genocide, war crimes and crimes against humanity will be undertaken, due to the relevance of such description for the purposes of the discussion of the pertinent issues addressed in this thesis. The definition of genocide is particularly relevant, both in the context of the discussion in Chapter 3 on the joint criminal enterprise doctrine and the crime of genocide, and the discussion in Chapter 5 concerning the role which the ICC can play in the prosecution of acts of terrorism. The definition of war crimes is similarly relevant in the context of the discussion in Chapter 5 concerning individual criminal responsibility for terrorism, as a war crime. Moreover, the definition of crimes against humanity is particularly relevant for the purposes of the discussion in Chapter 5 concerning individual criminal responsibility for terrorism as a crime against humanity and the role which the ICC can play in the prosecution of terrorism.

As this thesis concerns individual criminal responsibility for core international crimes, the final section of this chapter will review the evolution of the concept of individual criminal responsibility for core international crimes in international law. The purpose of this section is twofold: firstly, it is to trace the evolution of the concept of individual criminal responsibility for core international crimes in international law and in this connection, to demonstrate that the concept is a firmly established principle of international law today, and as an aside, to demonstrate that contrary to popular belief, the concept of individual criminal responsibility, at least as regards crimes committed in the context of an armed conflict, was recognised in international law prior to World War II; secondly, in the context of its examination of the relevant provisions of the ICTY, ICTR and ICC Statutes for the purposes of tracing the evolution of the concept of individual criminal responsibility, its additional purpose is to provide some general guidance as to the main constituent elements of the principle of individual criminal responsibility for core international crimes, as reflected in those statutes.

2.2 Meaning of ‘Individually Criminally Responsible’

The phrase ‘individually criminally responsible’ can, for current purposes, be divided into two parts, that of ‘individually’ and that of ‘criminally responsible’. The words ‘individual’ or ‘individually’ are employed to illustrate that the subject-matter of this thesis concerns the criminal responsibility of *individuals* or *natural persons*, as opposed to corporate entities or States.

The term ‘individual criminal responsibility’ is also commonly employed to describe the scenario where an individual is criminally responsible for his own unlawful actions, as opposed to being criminally responsible for the unlawful actions of others, which is encompassed by the term ‘collective criminal responsibility.’ One of the pertinent issues explored in this thesis is the joint criminal enterprise mode of liability, which has been criticised for *inter alia* undermining the principle

of *individual* criminal responsibility in favour of *collective* criminal responsibility.¹ It could thus be argued, that the employment of the phrase 'individual criminal responsibility' is inappropriate in the current context. However, as will be seen in Chapter 3, the author is of the view that the proposition that the application of the joint criminal enterprise doctrine amounts to the imposition of collective criminal responsibility is not warranted in relation to the first and second categories of the joint criminal enterprise doctrine, commonly referred to as 'co-perpetration cases' and 'concentration camp cases' respectively. Whereas the third category of the joint criminal enterprise doctrine, concerning crimes committed outside the common purpose, is, in the author's view, in danger of falling foul of the collective criminal responsibility concept, the author has nonetheless determined to employ the phrase 'individual criminal responsibility', to emphasise that this thesis concerns natural persons and not other juridical persons.²

The reference to 'criminal responsibility' for core international crimes in this thesis refers to the criminal (as opposed to civil) responsibility of individuals for core international crimes, as that responsibility arises under the provisions of *international criminal law*. By way of clarification, it does not encompass individual criminal responsibility for core international crimes resulting from the exercise, by a State, of universal jurisdiction over the perpetrator of a core international crime, notwithstanding that the concept of universal jurisdiction is a creature of international criminal law.³ Neither does it encompass individual criminal responsibility for core international crimes which is specifically provided for in domestic criminal legislation.⁴

This discussion begs another question: To whom, or to what, is one individually criminally responsible for the perpetration of a core international crime? Or in other words, what is the authority that a perpetrator of a core international crime must answer to, and what authority can impose penalties if an individual commits a core international crime? In many domestic criminal law scenarios, if a perpetrator commits a crime, he has to answer for that crime to the State. The victim forsakes his right to seek revenge for the crime committed to the State, who in turn establishes a legal system to prosecute the perpetrator(s). Bassiouni refers to this as the "implied social contract" between the individual and the State.⁵ But does such an implied

¹ See *infra* Chapter 3, section 3.7.1.2.

² *Ibid.*

³ See *infra* note 179.

⁴ A growing number of States, especially those which have introduced new domestic criminal legislation in response to their ratification of the ICC Statute have specific domestic legislation which enables local domestic courts to adjudicate over the perpetrators of core international crimes, in accordance with the provisions of *domestic criminal law*. The ICC Statute, which is available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (last visited 1 June 2007), was adopted on 17 July 1998 and entered into force on 1 July 2002.

⁵ M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Inc., Ardsley, New York, 2003, pp. 676–677.

social contract exist at the international level, and if it does, who represents the State in the comparable international scenario? Bassiouni posits that the implied social contract theory also applies in international criminal law, which results in the establishment of a duty on the part of the individual to obey the norms of international criminal justice in exchange for the *international community's* duty to provide security by punishing those who breach its norms.⁶ But on a practical level, what does this actually mean? As will be seen in sections 2.5 and 2.6, historically, the sources of international criminal law have occupied themselves with prohibiting certain acts, in order to ensure the waging of armed conflicts in compliance with the laws of war. They failed to articulate the actual criminal consequences for the perpetrators of breaching the specified prohibitions. Any enforcement of those prohibitions was left to *States* and not to some overarching international institution. By way of a direct comparison to the domestic scenario thus, there is no single international entity at the international level which is responsible for prosecuting the perpetrators of core international crimes and for imposing penalties on them. The international courts which have been established are all limited by their provisions concerning subject-matter and temporal jurisdiction. Even the ICC, which is hailed as a permanent international criminal court, is restrained by the numerous jurisdictional obstacles and the complementarity provisions contained in its Statute.⁷ Clearly, a direct comparison between the two systems does not generate a simple answer.

However, bearing in mind that this thesis concerns individual criminal responsibility which arises purely on an international criminal law level, the question posed can be answered in the following manner: For the purposes of this thesis, an individual is criminally responsible for the perpetration of core international crimes, to an *international criminal court/tribunal* or a *hybrid international-domestic body*, to the extent that the constitutive documents of such tribunal/court provides for jurisdiction over such crimes.⁸ This thesis is not concerned with an individual

⁶ *Ibid.*, p. 690.

⁷ For example, the ICC currently only has jurisdiction with respect to war crimes, crimes against humanity and genocide committed after the entry into force of the ICC Statute, i.e. 1 July 2002. See *supra* note 4, Article 11(1).

⁸ Of course, one of the complexities of international criminal law is that even the existing international criminal courts/tribunals are not totally independent of the involvement of States. For example, notwithstanding their status as international criminal courts/tribunals, each of the ICTY, ICTR and ICC rely on States to enforce their orders and judgments. Bassiouni has identified two legal regimes of enforcement for international criminal law: (i) the direct enforcement regime which encompasses international judicial institutions which have the power to enforce their orders and judgments without relying on States or any other legal authority (e.g. the IMT and the IMFTE which each could investigate, prosecute, adjudicate, determine sanctions and enforce its sentences without State or other involvement); and (ii) the indirect enforcement regime which encompasses the enforcement of international criminal law through national legal systems. Neither the ICTY, the ICTR nor the ICC fit neatly into either category, due to their reliance on States for the enforcement of their orders and judgments. See Bassiouni, *supra* note 5, pp. 18–21 and pp. 333–494.

who is criminally responsible for the perpetration of core international crimes to a domestic court, whether or not such liability has its foundations in domestic or international criminal law.

2.3 Objectives of Individual Criminal Responsibility for Core International Crimes

The objectives of individual criminal responsibility for core international crimes are inextricably linked with (i) the elementary objectives underlying international criminal law itself, and more particularly, (ii) the purposes of sentencing in international criminal law, as sentencing is the medium through which such objectives are expressed and hopefully, enforced. While much has been written about the objectives of domestic prosecutions, it is only in recent times that scholars have begun to focus on the objectives of punishment in international criminal law,⁹ and much research remains to be done. As one commentator has noted, international criminal law does not have “its own sense of why it operates” and as a result, he calls for an “intellectually honest appraisal” of the conceptual and philosophical

⁹ See, for example, unspecified authors, “Developments in the Law, International Criminal Law”, 114 Harv. L. Rev. 1962 (2000–2001), pp. 1961–1982; Immi Tallgren, “The Sensibility and Sense of International Criminal Law”, 12 EJIL 561 (2002); Mark A. Drumbl, “Toward a Criminology of International Crime”, 19 Ohio State Journal on Dispute Resolution 263 (2003); Ralph Henham, “The Philosophical Foundations of International Sentencing”, 1 J. Int’l Crim. Jus. 64 (2003); Paul Roberts and Nesam McMillan, “For Criminology in International Criminal Justice”, 1 J. Int’l Crim. Jus. 315 (2003); Bassiouni, *supra* note 5, pp. 673–740; James Meernik and Kimi King, “The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis”, 16 Leiden J. Int’l L 717 (2003); Stephen M. Sayers, “Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia”, 16 Leiden J. Int’l L 751 (2003); Salvatore Zappalá, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 206–207; Tzvetan Todorov, “The Limitations of Justice” 2 J. Int’l Crim. Jus. 711 (2004); Danilo Zolo, “Peace through Criminal Law?”, 2 J. Int’l Crim. Jus. 727 (2004); Mark A. Drumbl “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity”, 99 Northwestern University Law Review 539 (2005); Elies van Sliedregt, “Criminal Responsibility in International Law, Liability Shaped by Policy Goals and Moral Outrage”, 14 European Journal of Crime, Criminal Law and Criminal Justice 81 (2006); Mirko Bagaric and John Morss, “International Sentencing Law: In Search of a Justification and Coherent Framework”, 6 International Criminal Law Review 191 (2006); and Robert D. Sloane, “The Expressive Capacity of International Punishment”, Colombia Public Law & Legal Theory Working Papers, Paper no. 06100, 4 May 2006, available at <http://lsr.nellco.org/columbia/pllt/papers/06100/> (last visited 28 June 2007). See also Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 149–180.

foundations of international criminal law.¹⁰ Another has posited that the practice of the *ad hoc* international criminal tribunals indicates a

... significant lack of clarity... in addressing issues that are fundamental to any sentencing system. They concern the significance of punishment, the reasons for its imposition and its signification. Although the predominant purpose of imposing punishment in these international criminal tribunals appears to be retribution, the justification remains unclear beyond exhortations that the selected punishment is a necessary response on the part of the civilized world to gross violations of international humanitarian law.¹¹

There are a number of factors which arguably have contributed to this state of affairs. Firstly, the nascent stage of international criminal law. Unlike domestic criminal law systems which have often developed over centuries, international criminal law is, in reality, still quite rudimentary. Secondly, international criminal law has developed in response to current events, rather than being the product of a cohesive, well-thought-out and structured policy.¹² Thirdly, international criminal law has been, and continues to be, used as a means to achieve the goals underlying

¹⁰ Drumbl (2003), *supra* note 9, p. 279. See also generally Drumbl (2005), *supra* note 9; Zolo, *supra* note 9; “Remarks of Mark Drumbl”, at the Opening Session of the international conference “International War Crimes Trials: Making a Difference?”, 6 November 2003, printed in Steven R. Ratner and James L. Bischoff (eds.), *International War Crimes Trials: Making a Difference? Proceedings of an International Conference held at the University of Texas School of Law, November 6–7, 2003*, pp. 29–33; and William A. Schabas, “International Sentencing: From Leipzig (1923) to Arusha (1996)”, in M. Cherif Bassiouni (ed.), *International Criminal Law*, Transnational Publishers, Inc., Ardsley, New York, 2nd ed., 1999, Vol. III, p. 171 (“the goals underlying punishment are not necessarily clear, and do not always fit snugly with criminal law theory developed within the context of domestic systems”) and pp. 189–193.

¹¹ Henham, *supra* note 9, p. 72. This of course, can have many undesirable consequences, resulting *inter alia* in “*ex post facto* rationalizations” of the philosophical justifications for international punishment (see generally Henham, *supra* note 9, and more particularly p. 67); insufficient and/or inconsistent elaboration of the general principles of international criminal law and uncertainty and confusion in construing rules, and inconsistent sentences that are unsuitable to the goals underlying criminal justice (see Zolo, *supra* note 9, p. 728); and a disconnection between the *ad hoc* international criminal tribunals and the local communities in the former Yugoslavia and Rwanda (Drumbl, *supra* note 10, p. 30). Ralph Henham, moreover, posits that “the absence of penological justifications in the foundation documentation and Statute of the ICC weakens its claims to provide a rational foundation for the exercise of democratic principles of criminal justice”. See Ralph Henham, “Some Issues for Sentencing in the International Criminal Court”, 52 ICLQ 81 (2003), p. 87.

¹² Bassiouni, with whom the author agrees, does not see any change in this approach in the near future. “The international criminal justice system will not likely occur as a result of planning and sound legal techniques, but rather it will develop as a result of non-orderly processes in which fortuitous events and practical exigencies will incrementally enhance the goals intended to be attained.” See Bassiouni, *supra* note 5, p. 683.

realpolitik.¹³ A fourth factor has also been articulated, i.e. that the “abhorrent nature of ICL [international criminal law] violations and the catastrophic circumstances that serve as the principal catalyst for ICL’s development – the rupture, by war, national, religious or ethnic conflict, or otherwise, of basic social norms against brutal violence – invite “intuitive-moralistic answers”, making debate about the rationales for punishing serious human rights atrocities seem pejoratively academic”.¹⁴

Notwithstanding this, it is, possible to identify some of the apparent objectives of international criminal law and accordingly, the objectives underlying the imposition of individual criminal responsibility for core international crimes. A good starting point in our investigation is the constitutive documents of the ICC, ICTY, ICTR, SCSL, IMT and the International Military Tribunal for the Far East (“IMFTE”), each of which is/was empowered to prosecute the perpetrators of core international crimes. The Preamble of the ICC Statute provides.

The State Parties to this Statute...

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole, *must not go unpunished and that their effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation,

Determined to *put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...

Resolved to guarantee lasting respect for the enforcement of international justice.¹⁵

Accordingly, the ICC Statute appears to identify five objectives of individual criminal responsibility for core international crimes: (i) the prevention/removal of threats to the peace and security of the world (resulting from the perpetration of core international crimes); (ii) retribution; (iii) the ending of impunity; (iv) the

¹³ See Roberts and McMillan, *supra* note 9, p. 322, who note that “(international) legal prohibitions are the outcome of political strategy and negotiation, and therefore, in the straightforward sense, the product of political power”. In Bassiouni’s view, “contemporary international criminal justice is still locked in struggle against the practices of *realpolitik*, which reflect the political realist view of power’s precedence over legal legitimacy”. See Bassiouni, *supra* note 5, pp. 683 and 690. Furthermore, in Bassiouni’s view, the era of globalisation (which accommodates transnational crimes and the commission of international crimes) will have a significant impact upon the philosophy and policy of international criminal justice in the future. *Ibid.*, pp. 685 and 673–740. For a general discussion of the factors resulting in international criminal law lacking its own sense of why it operates, see also Drumbl (2003), *supra* note 9, p. 279. He identifies three grounds for this state of affairs: (i) the relative youth of international criminal law, (ii) the urgency with which international criminal law is undertaking its task and (iii) the reality that international criminal law operates within the “chaotic state of nature of international relations”. *Ibid.*

¹⁴ See Sloane, *supra* note 9, p. 1.

¹⁵ Emphasis added. Preamble, §§ 2–5 and 11, ICC Statute, *supra* note 4.

prevention of the perpetration of core international crimes; and (v) respect for international criminal law. Neither the Statute of the ICTY nor the ICTR expressly indicates which objectives underlie its establishment.¹⁶ However, the UN Security Council resolutions, pursuant to which these tribunals were established, identify the following objectives for the imposition of individual criminal responsibility for core international crimes: (i) the prevention/removal of threats to the peace and security of the world;¹⁷ (ii) retribution;¹⁸ (iii) the halting of the perpetration of core international crimes;¹⁹ and (iv) the restoration and maintenance of the peace.²⁰ The constitutive documentation of the SCSL indicates that the objectives behind the establishment of the SCSL include: (i) the ending of impunity; (ii) the restoration and maintenance of peace and national reconciliation;²¹ (iii) compliance with international criminal law; and (iv) the prevention/removal of threats to the peace and security of the world;²² while the objectives behind the IMT and the IMTFE were less ambitious than those of their institutional successors, confining themselves expressly to the aim of judging and punishing individuals.²³

Scholars²⁴ and the case law of the *ad hoc* international criminal tribunals

¹⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by UN Security Council Resolution 827, as amended, available at <http://www.un.org/icty/legal/doc-e/index.htm> (last visited 17 July 2007) (“ICTY Statute”), the Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994 by UN Security Council Resolution 955, as amended, available at <http://69.94.11.53/ENGLISH/basicdocs/statute.html> (last visited 17 July 2007) (“ICTR Statute”).

¹⁷ UN Security Council Resolution 827, U.N. SCOR, Annex, U.N. doc. S/RES/827 (1993) (“ICTY Resolution”), preamble, § 4 and UN Security Council Resolution 955, U.N. SCOR, Annex, U.N. Doc. S/RES/955 (1994) (“ICTR Resolution”), preamble, § 5.

¹⁸ ICTY Resolution, *ibid.*, § 7 and ICTR Resolution, *ibid.*, § 6.

¹⁹ ICTY Resolution, *supra* note 17, §§ 5 and 7 and ICTR Resolution, *supra* note 17, §§ 6 and 8.

²⁰ ICTY Resolution, *supra* note 17, § 6 and ICTR Resolution, *supra* note 17, § 7.

²¹ One commentator has posited that this is also one of the goals underlying international justice in the context of the Supreme Iraqi Criminal Tribunal. See Michael P. Scharf, “Is it International Enough? A Critique of the Iraqi Special Tribunal in the light of the Goals underlying International Justice”, 2 J. Int’l Crim. Jus. 330 (2004), p. 331.

²² UN Security Council Resolution 1315, U.N. SCOR, U.N. doc. S/RES/1315 (2000), Preamble, §§ 6, 7 and 13.

²³ See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis; 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited 17 July 2007) (“IMT Charter”), preamble, § 2 and Charter of the International Military Tribunal for the Far East dated 19 January 1946, as amended on 26 April 1946; TIAS 1589, available at <http://www.yale.edu/lawweb/avalon/imtfec.htm> (last visited 17 July 2007) (“IMTFE Charter”), Article 1.

²⁴ See, for example: retribution (Bagaric and Morss, *supra* note 9, p. 221–222; Bassiouni, *supra* note 5, pp. 681, 689, 697 and 737; Stuart Beresford, “Unshackling the paper tiger

identify similar objectives to those identified above, although the tribunals appear to be primarily concerned with retribution and deterrence.²⁵ The case law of the IMT

– the sentencing practices of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda”, 1 International Criminal Law Review 33 (2001), pp. 40–44; Drumbl (2003), *supra* note 9, p. 270; Drumbl (2005), *supra* note 9, pp. 577–588; Todd Howland and William Calathes, “The U.N.’s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation”, 39 Virginia Journal of International Law 135 (1998), p. 149; Meernik and King, *supra* note 9, pp. 721–724; Sayers, *supra* note 9, pp. 759–760; William A. Schabas, “Sentencing by International Tribunals: A Human Rights Approach”, 7 Duke Journal of Comparative and International Law 461 (1997), pp. 498–505; Sloane, *supra* note 9, pp. 47–52; van Sliedregt, *supra* note 9, p. 100; and Zolo, *supra* note 9, pp. 732–734; deterrence (Bagaric and Morss, *supra* note 9, pp. 219–221; Bassiouni, *supra* note 5, p. 737; Beresford, *ibid.*; Drumbl (2003), *supra* note 9, p. 270; Drumbl (2005), pp. 588–592; Howland and Calathes, *ibid.*; Meernik and King, *supra* note 9, pp. 721–724; Sayers, *supra* note 9, pp. 759–760; Schabas, *ibid.*, pp. 498–505; Sloane, *supra* note 9, pp. 39–47; and van Sliedregt, *supra* note 9, p. 100; however, Zolo questions the “pedagogical-deterrent impact of an ‘exemplary’ international criminal sentence”. See Zolo, *supra* note 9, pp. 731–732; enhance accountability (Bassiouni, *supra* note 5, p. 690); reduce impunity (Bassiouni, *supra* note 5, p. 690 and van Sliedregt, *supra* note 9, p. 101; however, as noted by Zolo, “international criminal justice has not yet proven to be capable of remedying widespread impunity, except to a minor degree and with normative ambiguities.” Zolo, *supra* note 9, p. 730); incapacitation (Beresford, *ibid.*, pp. 44–46 and Howland and Calathes, *ibid.*, pp. 149 and 153–154); protection of society (Meernik and King, *supra* note 9, pp. 721–724); preservation of world order and the maintenance of peace and security (Bassiouni, *supra* note 5, pp. 680–682 and 737 and van Sliedregt, *supra* note 9, p. 101–103); reconciliation (Bagaric and Morss, *supra* note 9, p. 219); educational (see *supra* notes 33–35); provide victims with redress (Bassiouni, *supra* note 5, p. 737; Meernik and King, *supra* note 9, pp. 721–724; and van Sliedregt, *supra* note 9, p. 100); rehabilitation (Bagaric and Morss, *supra* note 9, pp. 222–223; Bassiouni, *supra* note 5, pp. 681 and 697; Beresford, *ibid.*, pp. 44–45; Howland and Calathes, *ibid.*; and Meernik and King, *supra* note 9, pp. 721–724); and upholding the rule of international law (Antonio Cassese, “On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, 9 EJIL 2 (1998) and van Sliedregt, *supra* note 9, p. 101).

²⁵ With respect to the ICTY, see, for instance, *Prosecutor v Drazen Erdemovic*, Case No.: IT-96-22-T, Sentencing Judgment, T. Ch., 29 November 1996, §§ 57–66 (deterrence, reprobation, retribution, collective reconciliation and maintaining peace and security); *Prosecutor v Duško Tadić*, Case No.: IT-94-1-T, Sentencing Judgment, T. Ch., 14 July 1997, § 61 (just punishment, deterrence, incapacitation, and rehabilitation); *Prosecutor v Zejnil Delalić*, Case No.: IT-96-21-T, Judgment, T. Ch., 16 November 1998, §§ 1231–1234 (retribution, protection of society, rehabilitation and deterrence); *Prosecutor v Anto Furundžija*, Case No.: IT-95-17/1-T, Judgment, T. Ch., 10 December 1998, §§ 288–289 (retribution, deterrence, public reprobation and stigmatisation); *Prosecutor v Tihomir Blaškić*, Case No.: IT-95-14-T, Judgment, T. Ch., 3 March 2000, § 761 (retribution, protection of society, rehabilitation and deterrence); *Prosecutor v Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Judgment, App. Ch., 24 March 2000, § 185 (deterrence and retribution); *Prosecutor v Stevan Todorovic*, Case No.: IT-95-9/1-S, Sentencing Judgment, T. Ch., 31 July 2001, §§ 28–30 (retribution and deterrence); *Prosecutor v*

and IMFTE, as well as the post World War II military tribunals also indicate a preference for deterrence and retribution.²⁶

It is, of course, questionable to what extent these objectives are actually served by the international criminal law system. Deterrence is notoriously difficult to measure and in many respects, it is difficult to imagine that the perpetrators of core international crimes actually make a cost-benefit analysis before committing their crimes.²⁷ David Wippman posits that

When long delays in the administration of justice are coupled with a low probability of prosecution and modest penalties, the likelihood of significant deterrence is minimal... criminals do not necessarily act rationally. That is not to say deterrence is impossible because all criminals are irrational; rather war criminals may not be motivated by a logical decision calculus”.²⁸

As regards the objective of retribution and whether it can be said to be a feasible objective, Mark B. Harmon’s and Fergal Gaynor’s research is insightful. They have estimated that General *Radislav Krstić*, who was convicted of aiding and abetting genocide, and who received a sentence of 35 years by the ICTY for his role in the murder of 7–8,000 men at Srebrenica, will spend approximately 1.825 days in prison for each murdered victim. This figure drops to 1.205 days, when one takes into account that the practice of the ICTY is to release the convicted person after serving 2/3rds of his sentence. They opine that

A sentence of a day or two in prison for murder of a human being is inconsistent with any serious notion of human dignity. The startling disparity between sentences meted out at the ICTY for murdering a human being and sentences meted out in domestic jurisdictions

Momir Nikolić, Case No.: IT-02-60/1-S, Sentencing Judgment, T. Ch. I, 2 December 2003, § 82 (retribution and ending of impunity); and *Prosecutor v Momčilo Krajišnik*, Case No.: IT-00-39-T, Judgment, T. Ch. I, 27 September 2006, §§ 1134–1138 (retribution, deterrence and rehabilitation). With respect to the ICTR, see, for instance, *Prosecutor v Omar Serushago*, Case No.: ICTR-98-39-S, Sentence, T. Ch. I, 5 February 1999, § 20 (retribution and deterrence); *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, Case No.: ICTR-96-3-T, Judgment and Sentence, T. Ch., 6 December 1999, § 456 (retribution and deterrence); and *Prosecutor v Georges Ruggiu*, Case No.: ICTR-97-32-I, Judgment and Sentence, T. Ch. I, 1 June 2000, § 33 (retribution, deterrence, rehabilitation and justice).

²⁶ See *Prosecutor v Drazen Erdemovic*, *ibid.*, §§ 58 and 62. See also Schabas, *supra* note 10, p. 189 and van Sliedregt, *supra* note 9. Sloane posits, however, that “[d]espite a few isolated statements justifying international punishment by reference to its presumed deterrent value, the principal impetus for punishment after World War II consisted in an emotive reaction to the sheer magnitude and unconsciousability of the crimes.” See *supra* note 9, p. 33.

²⁷ See, for example, Tallgren, *supra* note 9, p. 584.

²⁸ See David Wippman, “Exaggerating the ICC”, in Joanna Harrington, Michael Milde and Richard Vernon (eds.), *Bringing Power to Justice, The Prospects of the International Criminal Court*, McGill-Queen’s University Press, Montreal & Kingston, London, Ithaca, 2006, p. 99, at pp. 114 and 116.

for the same conduct may give rise to a public perception that the sentencing objective of retribution [understood as making the punishment fit the crime] is of modest importance in the Tribunal's sentencing deliberations.²⁹

Moreover, Drumbl notes that many perpetrators of the violence in Rwanda are HIV positive. Prisoners at the ICTR, which have HIV, receive excellent medical care, which is far in excess of the quality of medical care which the victims of their crimes receive, if any. Accordingly, Drumbl posits that "[t]he retributive value of this punishment appears muddled, at best". In addition, the practice of plea bargaining at the ICTY also undermines the purpose of retribution, as the punishment meted out to the accused is dependent upon external factors, rather than assessing objectively the punishment which best fits the crime.³⁰

Other objectives underlying international criminal law and by extension, the concept of individual criminal responsibility for core international crimes, have been identified besides the, perhaps, more obvious ones mentioned above. For instance, the ICTY Trial Chamber in *Prosecutor v Drazen Erdemovic* described public reprobation or stigmatisation as one of the "appropriate purposes of punishment", particularly in relation to punishment for a crime against humanity.³¹ This reasoning was extended to war crimes and "other serious violations of international humanitarian law" by the ICTY Trial Chamber in *Prosecutor v Anto Furundžija*.³²

Gerry Simpson discusses *inter alia* the didactic and legitimating functions of adjudication proceedings for the perpetrators of core international crimes. He notes that the purpose of such proceedings is often as much to educate the present population concerning what occurred, as it is to punish the historical criminals.³³

²⁹ Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes", 5 J. Int'l Crim. Jus. 683 (2007), p. 692.

³⁰ See Drumbl (2005), *supra* note 9, pp. 579 and 583.

³¹ *Prosecutor v Drazen Erdemovic*, *supra* note 25, §§ 64–65.

³² *Prosecutor v Anto Furundžija*, *supra* note 25, § 289.

³³ See Gerry Simpson, "War Crimes: A Critical Introduction", in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes, National and International Approaches*, Kluwer Law International, The Hague/London/Boston, 1997, pp. 19–21. As an example of this purpose, Simpson refers to the *Eichmann* trial in Israel. Scharf has also identified this as one of the purposes underlying international criminal justice in the context of the Supreme Iraqi Criminal Tribunal, i.e. to educate the Iraqi people about the core international crimes committed by the Ba'ath regime. See Scharf, *supra* note 21. See also Schabas, *supra* note 24 who notes that the "eternal contribution of the Nuremberg judgment is not so much the individual punishment of the handful of accused... but rather in its affirmation of the facts of the Nazi atrocities. The jurisprudence of Nuremberg and the subsequent national military tribunals remains the most authoritative argument against revisionists who attempt to deny the existence of the gas chambers at Auschwitz and the other horrors of Nazi rule." *Ibid.*, p. 499. Lawrence Douglas notes that the multiple purposes of a didactic trial often pull the courts in different directions: "For example, the clarification of the historical record and the teaching of history lessons are obviously related, though importantly distinct: the former is largely descriptive and explanatory, while the latter is ineluctably normative. The distinction is important inasmuch as collective memory may have little to do with

Its legitimating function is that of categorising the behaviour of the accused as “evil” and associating the prosecuting states with “good”; and in the case of the *ad hoc* criminal tribunals, perhaps, it is, he posits, an example of the West and the United Nations simply wanting “to salvage some scrap of dignity from what remains of Western prestige”.³⁴ However, Tzvetan Todorov expresses his uneasiness with the supposed educational function of justice, of teaching the public the difference between good and evil. He questions whether the lessons learnt from international trials are of any great moral value. “Smoothly placing the public on the side of righteousness does not seem to further its education in any way.” He also takes issue with the view that the lessons taught by international justice are in reality of greater value, especially when they occur in countries far away from the place where the crimes were committed.³⁵

The comments of Cherie Booth QC, in relation to the functions the ICC is expected to perform, also highlight another interesting objective of the imposition of individual criminal responsibility for core international crimes: creating an opportunity for truth-telling, both the provision of a “judicial truth”, as the rules of evidence before a criminal trial ensure that a complete record of history is unachievable in such circumstances, and providing the occasion to counter the “attribution of collective responsibility for acts committed by individuals”, e.g. avoiding the guilt of the Nazis being attributed to the entire German population.³⁶ This truth-telling function has been emphasised by other commentators³⁷ and the ICTY Trial Chambers itself:

historical accuracy.” See Lawrence Douglas, “History and Memory in the Courtroom: Reflections on Perpetrator Trials”, in Herbert R. Reginbogin and Christoph J. M. Safferling (eds.), *The Nuremberg Trials, International Criminal Law Since 1945*, K. G. Saur München, 2006, p. 96–104. See also Bassiouni, *supra* note 5, p. 737, Roberts and McMillan, *supra* note 9, p. 335, and van Sliedregt, *supra* note 9, p. 101.

³⁴ Simpson, *ibid.*, pp. 21–26.

³⁵ See Todorov, *supra* note 9, p. 713. For a consideration of the extent to which international criminal trials should/can serve a pedagogic objective, see also Lawrence Douglas, “The Holocaust, History and Legal Memory”, and the accompanying “Question and Answer Session” in Ratner and Bischoff, *supra* note 10, pp. 107–121.

³⁶ See Cherie Booth, “Prospects and issues for the International Criminal Court: Lessons from Yugoslavia and Rwanda”, in Philippe Sands (ed.), *From Nuremberg to The Hague, The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, pp. 183–185. The other functions of the ICC identified by Booth are (i) a proclamation that certain conduct is unacceptable to the world community – a “public demonstration of justice” and (ii) upholding the rule of law and accordingly “exact[ing] retribution by embracing legal order”. *Ibid.*, pp. 177–183.

³⁷ See Cassese, *supra* note 24; Lepa Mladjenovic, “The ICTY: The Validation of the Experiences of Survivors” in Ratner and Bischoff, *supra* note 10, pp. 59–65 who notes the importance of the truth-telling function of the ICTY as a tool to validate the experiences of the victims in an international forum; and Daniel Joyce, “The Historical Function of International Criminal Trials: Re-thinking International Criminal Law”, 73 *Nordic Journal of International Law* 461 (2004). See also “Address by Chief Prosecutor Carla del Ponte at the Conference on “Establishing the Truth about War

The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.³⁸

Koskenniemi posits that the prosecution of *Adolf Eichmann* before the Israeli courts in 1961 was more about publicising the full extent of the “Nazi war against the Jews”, than the punishment of *Eichmann*.³⁹ He notes that

Recording “the truth” and declaring it to the world through the criminal process has been held important for reasons that have little to do with the punishment of the individual. Instead, it has been thought necessary so as to enable the commencement of the healing process in the victim: only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored.⁴⁰

However, heed should be taken of Koskenniemi’s warning that

For any major event of international politics – and situations where the criminal responsibility of political leaders is invoked are inevitably such - there are many truths and many stakeholders for them...

How to understand the actions of the leaders of the Yugoslav communities – whether they were “criminal or not” - depends on which framework of interpretation one accepts...

Crimes and Conflicts“ held in Zagreb, Croatia on 8 and 9 February 2007, Statement, 15 February 2007, available at <http://www.un.org/icty/pressreal/2007/cadelst-070215.htm> (last visited 26 June 2007). Del Ponte notes that “[t]ruth can be a very complex and very subjective issue based only loosely on facts, and it could easily be seen differently by two sides or individuals. Facts, on the other hand, are indisputable. A judicial process like war criminal prosecutions... can establish facts beyond reasonable doubt. By establishing these facts criminal prosecutions contribute to a clear understanding of the crime committed and a fair understanding of the context of the conflict... Major prosecutions generate a comprehensive record of past violations... The results of the judicial process, its record and established facts are a crucial part of efforts to establish the truth, face the past and embrace reconciliation.” See also Kirsten Campbell, “The Trauma of Justice: Sexual Violence, Crimes against Humanity and the International Criminal Tribunal for the Former Yugoslavia”, 13 *Social & Legal Studies* 329 (2004), who opines that by establishing the truth, “criminal justice functions as a therapeutic process, where the horror is told, and the perpetrator is judged... This model figures justice as a collective act of memory that can represent collective trauma, recreate social solidarity and reconstitute a traumatized society”. *Ibid.*, pp. 339–340. See, moreover, Drumbl (2005), *supra* note 9, pp. 593–595 and unspecified authors, *supra* note 9, p. 1973.

³⁸ *Prosecutor v Drazen Erdemovic*, Case No.: IT-96-22, Sentencing Judgment, T. Ch., 5 March 1998, § 21.

³⁹ Martti Koskenniemi, “Between Impunity and Show Trials”, 6 *Max Planck Yearbook of United Nations Law* 1 (2002), p. 3.

⁴⁰ *Ibid.*, p. 4.

Focusing on the individual abstracts the political context, that is to say, describes it in terms of the actions and intentions of particular well-situated individuals... But the truth is not necessarily served by an individual focus. On the contrary, the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects...

The engagement of a court with “truth” and “memory” is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance. Historians disagree on the interpretation of such events. So it is no surprise that judges may find it difficult to deal with them”.⁴¹

Finally, an objective which has gained recognition in more recent times is that of reparation, or the redress of victims.⁴² Article 75 of the ICC Statute specifically makes provision for reparations to victims and provides that the ICC may make an order against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. It may also order that reparations be made through the ICC Trust Fund for Victims.⁴³ The aim of such reparations is to help victims rebuild their lives.

Of the many objectives identified, retribution seems to be the most prominent objective of individual criminal responsibility for international crimes, followed by deterrence.⁴⁴ Although social integration and rehabilitation are often amongst the objectives underlying domestic criminal law systems, they appear to play a minor role in the context of international criminal law and international prosecutions.⁴⁵

⁴¹ *Ibid.*, pp. 12–14 and 25.

⁴² An additional sub-purpose worth noting, which has been identified in the context of the purpose to prevent future violations, is that of prosecuting as an alternative to vigilantism. See unspecified authors, *supra* note 9, pp. 1967–1968. Mark Lattimer and Phillipe Sands posit that two additional justifications for international criminal justice are to (i) distinguish individual from group responsibility and (ii) fill the enforcement gap created by the advance of human rights and humanitarian norms. See Mark Lattimer and Philippe Sands, “Introduction” in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes against Humanity*, Hart Publishing, Oxford and Portland, Oregon, 2003, pp. 20 and 22.

⁴³ Article 75(2), ICC Statute, *supra* note 4.

⁴⁴ See Drumbl (2003), *supra* note 9, p. 270; Bassiouni, *supra* note 5, p. 697; Schabas, *supra* note 10, pp. 189–193; Guénaél Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford University Press, Oxford, 2005, pp. 343–346; and Sloane, *supra* note 9, pp. 34–35. See also *Prosecutor v Drazen Erdemovic*, *supra* note 25, § 64, and *Prosecutor v Stevan Todorovic*, *supra* note 25, §§ 28–30.

⁴⁵ Zappalá has concluded that there does not currently exist a right of rehabilitation for the convicted person under international criminal law. See Zappalá, *supra* note 9, pp. 206–207. Bassiouni is of the view that “[r]etribution and just desert are more appropriate as philosophical and policy bases for the punishment of international crimes, whereas rehabilitation and social integration goals are more relevant to that of national criminal justice systems”. See Bassiouni, *supra* note 5, pp. 681 and 697. Meernik and King note that the rehabilitation of the offender tends to be dealt with as a mitigating or aggravating factor. See *supra* note 9, p. 723. Sloane concludes that international criminal law, “at least as applied by international tribunals, is not particularly well-tooled to

As Tallgren notes: “The context of the most serious crimes against international law made it nonsensical for some states [during negotiations on the ICC Statute] to discuss rehabilitation: how do you reform someone guilty of genocide?”⁴⁶ However, one commentator posits that one of the purposes of a system of international criminal law should be the rehabilitation of the criminal and argues that if a genuine attempt is not made at rehabilitation, then “international criminal justice may be misinterpreted as a means intended to exact revenge upon the vanquished, rather than to protect the international community from crimes under international law”.⁴⁷ It is also questionable whether international prosecution can ever achieve the goal of national reconciliation.⁴⁸ The note of warning of Gerry Simpson that it is “important to be modest about the potential of war crimes trials and international criminal law generally” is worth bearing in mind, in this context.⁴⁹

To conclude, the objectives of individual criminal responsibility for core international crimes are inextricably linked with the objectives underlying international criminal law itself and the purposes of sentencing in international criminal law.

pursue societal rehabilitation.” See Sloane, *supra* note 9, p. 59 and more generally pp. 56–60. Moreover, Harmon and Gaynor argue that the modest role of rehabilitation in international prosecutions is appropriate. They note that most ICTY detainees are characterised by a high average age and good social skills and are, generally speaking, not career criminals. Therefore, the offenders are already re-socialised. See *supra* note 29, pp. 693–694. See also Bagaric and Morss, *supra* note 9, pp. 222–223; Beresford, *supra* note 24, pp. 44–45; and Howland and Calathes, *supra* note 24.

⁴⁶ See Tallgren, *supra* note 9, p. 577. One category of perpetrators to which rehabilitation would, arguably, be applicable is child soldiers, who frequently take up arms involuntarily, due to threats or use of violence against them or their families, or due to appalling poverty. See generally, for example, Nienke Grossman, “Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations”, 38 *Geo. J. Int’l L.* 323 (2007).

⁴⁷ Lyal S. Sunga, *The Emerging System of International Criminal Law, Developments in Codification and Implementation*, Kluwer Law International, The Hague/Boston/London, 1997, pp. 324–329.

⁴⁸ See, for instance, “Remarks of Payam Akhavan” and Aloys Habimana, “Judicial Responses to Mass Violence: Is the International Criminal Tribunal for Rwanda Making a Difference towards Reconciliation in Rwanda?”, both in Ratner and Bischoff, *supra* note 10, pp. 76–90. Interestingly, David B. Hodgkinson notes that when the Transitional Justice Working Group in Iraq held a seminar concerning post-conflict justice, following the downfall of Saddam Hussein, not a single person turned up to participate in the breakout session concerning reconciliation. No one identified with reconciliation as part of any post-conflict justice package. See David B. Hodgkinson, “Preparations for a Precedent”, 13 *Mich. St. J. Int’l L.* 79 (2005), pp. 80–81.

⁴⁹ See Simpson, *supra* note 33, p. 29. On a similar note, Kelly Askin notes that in order to minimise unrealistic expectations and bitter disappointments with international criminal justice institutions, particularly from the perspective of the victims of core international crimes, it is important to be very specific about such institutions’ functions and limitations. See Askin, “International Criminal Tribunals and Victim-Witnesses”, in Ratner and Bischoff, *supra* note 10, pp. 49–59. Hodgkinson posits that “[e]xpectation management is a critical part of transitional justice and played an important part in the development of the [Supreme Iraqi Criminal Tribunal]”. *Ibid.*, p. 82.

A number of brief observations can be made on the objectives identified above. Firstly, the various purposes do, on occasion, overlap each other. They are also interconnected. Secondly, it is not suggested that each example of the enforcement of the principle of individual criminal responsibility satisfies every objective identified above. Different circumstances will dictate which objectives are to be achieved, although for the immediate future, it would appear that retribution and deterrence will remain the primary objectives of such enforcement. Thirdly, the objectives identified are, in many respects, very similar to those for domestic criminal law,⁵⁰ particularly Western domestic criminal law.⁵¹ While, this is hardly surprising, bearing in mind the origins of international criminal law, this state-of-affairs is less than desirable. Domestic and international crimes are not similar on every level and an approach which is appropriate in the context of domestic criminal law is not necessarily as appropriate in the context of international criminal law.⁵² Drumbl's concern that "international lawyers are actively and successfully developing mechanisms of international criminal justice without first developing a

⁵⁰ For example, retribution and deterrence. See Bassiouni, *supra* note 5, pp. 676–677 and 689.

⁵¹ Drumbl posits that Anglo-American common law, in particular, has stamped its mark clearly on the structure and functioning of international criminal law and international adjudication. As examples, he mentions *inter alia*, the use of precedence and inductive reasoning in reaching decisions, the adversarial process, the availability of plea bargaining, extensive cross-examination and the role of defence counsel and *amici*. See Drumbl (2003), *supra* note 9, pp. 272–275.

⁵² For example, if the main objective is to restore and maintain peace, any attempt at prosecution of the perpetrators may undermine that objective. See generally, Drumbl (2003), *supra* note 9. Drumbl notes that, for example, in the domestic context, a perpetrator of a domestic crime is punished for breaching accepted social norms; whereas this may not always be the case as regards a perpetrator of an international crime, because the conduct in question may not deviate from the norms of the place where it occurred, at the time it occurred. In addition, he posits that whereas incarceration is the favoured punishment in domestic criminal law, it may not necessarily be the most appropriate punishment for core international crimes. *Ibid.*, pp. 268–270. See also Drumbl (2005), *supra* note 9, p. 567, Drumbl, *supra* note 10, p. 31 and Tallgren, *supra* note 9, p. 575. Sloane opines that "[j]ustifications for punishment common to national systems of criminal law cannot be transplanted unreflectively to the distinct legal, moral, and institutional context of ICL [international criminal law]". See *supra* note 9, p. 2. He notes that international criminal law and national criminal law are different in three respects, which an analogy with national criminal law may obscure: (i) unlike national law, international criminal law purports to serve multiple divergent communities; (ii) an analogy with national law may obscure the collective character of international criminal law crimes (which collective character aggravates the culpability of the perpetrator), which feature is distinguishable from similar national crimes; and (iii) the perpetrators of international criminal law crimes "often act in a normative universe (e.g. during war, ethnic conflict or other social breakdown) that differs dramatically from the relatively stable, well-ordered society that most national criminal justice systems take as their baseline... Rather than persist in the futile and impracticable effort to make genuinely international criminal tribunals mimic national courts by dispensing proxy justice, ICL should candidly acknowledge that these tribunals serve distinct goals and constituencies." *Ibid.*, pp. 2–3 and 19–20.

criminology of mass violence, a penology for the perpetrators of this violence and a victimology for those who are affected by the violence” is not unfounded.⁵³ Finally, while the enforcement of individual criminal responsibility for international crimes has a role to play in international criminal law, in order to achieve, for example, the restoration or maintenance of peace, approaches other than, or in addition to, international judicial adjudication need to be accommodated. The ‘one-size-fits-all’ approach is neither viable nor productive. ‘Justice’ is a subjective word and its attainment, arguably, does not require personal international criminal accountability in every case. Other alternative mechanisms may be preferable and more appropriate, depending on the cultural environment in which the crimes were committed and the objectives to be achieved.⁵⁴

2.4 Sources of, and Judicial Precedent in, International Criminal Law

2.4.1 Introductory Remarks

As mentioned at the outset, a consideration of the sources of international criminal law is warranted on two grounds.⁵⁵ Firstly, while the sources of *international* law

⁵³ Drumbl, *supra* note 10, p. 30. Drumbl considers this issue further in a subsequent article. See Drumbl (2005), *supra* note 9.

⁵⁴ For example, truth and reconciliation commissions, investigatory commissions or compensation mechanisms. South Africa is a case in point. While to the Western mentality, individual criminal accountability for crimes of apartheid would, arguably, be the only acceptable solution, a Truth and Reconciliation Commission, with its focus on the establishment of a true account of events rather than criminal prosecution seems to have had success in South Africa. See Zolo, *supra* note 9, p. 734; Drumbl, *supra* note 10, p. 32; Howland and Calathes, *supra* note 24, pp. 166–167; Timothy Longman, “The Domestic Impact of the International Criminal Tribunal for Rwanda”, in Ratner and Bischoff, *supra* note 10, pp. 33–41; Habimana, *supra* note 48, p. 87, Antoine Garapon, “Three Challenges for International Criminal Justice”, 2 J. Int’l Crim. Jus. 716 (2004); Sloane, *supra* note 9, pp. 8–9 and Tallgren, *supra* note 9, p. 587. For an overview of the numerous accountability mechanisms available other than international prosecutions, see Bassiouni, *supra* note 5, pp. 704–736 and Drumbl, *supra* note 10. Also of interest in this regard is Mark J. Osiel’s identification of nine “major reasons for doubting the wisdom” of criminal prosecution for crimes of mass atrocity. See Mark J. Osiel, “Why Prosecute? Critics of Punishment for Mass Atrocity”, 22 Human Rights Quarterly 118 (2000), reprinted in Gerry Simpson (ed.), *War Crimes Law*, Ashgate/Dartmouth, Aldershot, 2004, Vol. I, pp. 91–120.

⁵⁵ In this context, the term “sources” is intended to mean “recognised manifestations of law” (i.e. the source from which a legal rule derives its legal validity), to employ the phrase used by Maarten Bos in Maarten Bos, *A Methodology of International Law*, Elsevier Science Publishers B.V., North-Holland, 1984, p. 49. For a discussion of the meaning of “sources” as well as the purpose behind the desire to identify “sources”, see Bos, *ibid.*, pp. 48–55. See also Sir Robert Jennings QC and Sir Arthur Watts QC (eds.), *Oppenheim’s*

have been well-established since the 1945 Statute of the ICJ,⁵⁶ the same cannot be said of the sources of *international criminal law*.⁵⁷ International criminal law is still quite rudimentary, but its sources are frequently taken for granted, without any forethought been given as to what sources can be relied upon when considering issues arising in international criminal law. Article 21 of the ICC Statute (1998) represents the first codification of the sources of *international criminal law*. While this is, of course, a welcome development, its use in the current context is limited, as Article 21 only describes the sources of international criminal law *relevant to adjudication before the ICC*. It does not provide a precise description of the *general* sources of international criminal law. The lack of precision as to the sources of international criminal law requires to be addressed.

Secondly, an identification of the sources of international criminal law is relevant to every substantive aspect of this thesis. For example, in order to identify the definitions of and/or the criteria for the core international crimes described herein, it is important to first establish the sources of international criminal law which can be relied upon in identifying such definitions/criteria.⁵⁸ The same applies as regards the determination of whether terrorism can be categorised as a crime

International Law, Longman, London, 9th ed., 1992, Vol. I, p. 23 for a discussion of the terms “formal sources” and “material sources”. Bassiouni draws distinctions between the sources of international criminal law and their application to different parts of international criminal law, as follows: “(a) The basis for international criminal accountability and *ratione personae* [subjects] is established by international law; (b) The special part of ICL [international criminal law], the *ratione materiae* [norms], is established by international law... (c) The general part of ICL, the elements of criminal responsibility, are established by international law whenever an internationally created judicial body adjudicates criminal responsibility... But whenever international crimes are enforced by national criminal justice systems, it is that domestic legal system’s principles of criminal responsibility that apply... (d) The procedural part of ICL, meaning those rules of procedure and evidence applicable in criminal proceedings, also have mixed sources... (e) The sanctions part of ICL will... depend on whether the proceedings are conducted by an internationally created adjudicating body or by national criminal proceedings... (f) Enforcement of sanctions is subject to the national laws of the enforcing state... (g) Enforcement modalities of ICL... derive from mixed sources of international law and national laws...”. See Bassiouni, *supra* note 10, Vol. I, pp. 10–11. Applying Bassiouni’s categorisation, this thesis is primarily concerned with categories (a) and (b). See also Bassiouni, *supra* note 5, pp. 8–10.

⁵⁶ See Article 38(1), Statute of the International Court of Justice, 26 June 1945, Department of State publications 2349 and 2353, Conference Series 71 and 74; entered into force 24 October 1945.

⁵⁷ See generally, however, Daniel Wade, “A Basic Guide to the Sources of International Criminal Law” in Ellen G. Schaffer and Randall J. Snyder (eds.), *Contemporary Practice of Public International Law*, Oceana Publications Inc., Dobbsferry, New York, 1997; Vladimir-Djuro Degan, “On the Sources of International Criminal Law”, 4 *Chinese Journal of International Law* 45 (2005); and Ilias Bantekas, “Reflections on Some Sources and Methods of International Criminal and Humanitarian Law”, 6 *International Criminal Law Review* 121 (2006).

⁵⁸ See *infra* section 2.5.

against humanity, war crime or genocide and similarly to what extent various documents/materials can be relied upon in the context of the author's discussion of the joint criminal enterprise doctrine.⁵⁹ Moreover, it is essential to identify the sources of international criminal law which can be relied upon for the purposes of this thesis.

The sources of international criminal law are addressed in this section in the following manner: Firstly, consideration will be given to the general sources of international criminal law. Secondly, the sources of international criminal law relevant to adjudication before the ICC and the *ad hoc* international criminal tribunals will be addressed. Thirdly, other materials referred to in this thesis will be considered, to determine their status as sources of international criminal law, or otherwise.⁶⁰ Finally, consideration will also be given to the recognition, or otherwise, of the principle of judicial precedent before the *ad hoc* international criminal tribunals, the SCSL and the ICC.

One final note of clarification: An in-depth and authoritative study on the sources of international criminal law could easily occupy an independent thesis in its own right. It is the intention of this section merely to give the reader a *general overview* of the sources of international criminal law, particularly those of relevance to this thesis.

2.4.2 General Sources of International Criminal Law

Unlike domestic law, international law is not the "product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence."⁶¹ Thus, the formation of international criminal law is substantially more complicated than that of national criminal law. As a corollary, the sources of international criminal law are also intricate. Maarten Bos, when commenting on the sources of international law, wrote in 1984:

The national and the international lawyer, when compared to each other, are in very different positions. The former operates in a legal order characterized by a number of luxuries such as the presence of a legislator hierarchically placed above the subjects of law, of courts with obligatory jurisdiction, and of officers charged with the enforcement of judicial decisions. This national legal machinery considerably influences the practising lawyer's task, and with some exaggeration it may be said that what is left to him amounts to no more

⁵⁹ See *infra* Chapters 5 and 3 respectively.

⁶⁰ For example, as evidence of the evolution of customary international law, or its potential to be of 'persuasive authority' to a court.

⁶¹ *United States of America v. Josef Altstoetter et al. (Justice case)*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. III, pp. 974–975, cited in *Prosecutor v Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No.: IT-99-37-AR72, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", App. Ch., 21 May 2003, § 39.

than a technical mission – which by the way, may be one of complexity. But whatever the degree of this complexity, the national lawyer, especially in codification countries, hardly ever will be in doubt on “where the law is to be found”, nor will he have to indulge in contemplating questions such as “how does law come into being”... The international lawyer, on the contrary, almost daily has to face these, and a host of other, problems, owing to the fact that no legal machinery exists in the international legal order bearing anything beyond a remote resemblance to the national legal machinery... his task is almost immeasurably more complicated than the national lawyer’s because of the existence side by side of not one or two, but a series of “sources” of international law, highly diverse inter se, and in many respects foreign to the “sources” of modern national legal orders.⁶²

His comments are just as applicable to the sources of international criminal law. Such sources are not immediately obvious. A good starting point in our enquiry, though, is Article 38(1) of the ICJ Statute which represents the most authoritative statement of sources of general international law. As noted by the *Kupreškić* Trial Chamber, the ICTY being international in nature and applying primarily international law cannot but rely upon the well-established sources of international law.⁶³ Article 38 provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognised by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶⁴

Article 38(1) of the ICJ Statute is, of course, not an exhaustive list of all of the sources of international law and strictly speaking the identified sources only concern the sources to be applied by the ICJ as regards adjudications before it. Notwithstanding this, it is generally accepted that Article 38(1) identifies the main sources of international law and it is “authoritative generally because it reflects state practice”.⁶⁵

⁶² See *supra* note 55, p. 1.

⁶³ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No.: IT-95-16-T, Judgment, T. Ch., 14 January 2000, § 540. Similar comments can be made in relation to the ICTR and the ICC.

⁶⁴ See *supra* note 56.

⁶⁵ See Jennings and Watts, *supra* note 55, p. 24, who also note that it is “the practice of states which demonstrates which sources are acknowledged as giving rise to rules having the force of law.” There is no hierarchy between the primary sources of international law set out in Article 38(1)(a)-(c), ICJ Statute. Ariel F. Sallows argues however that there should be a hierarchy of sources in international law. See Ariel F. Sallows, “Human Rights and the Hierarchy of International Law Sources and Norms: Delineating a Hierarchical Outline of International Law Sources and Norms”, 65 Sask. L. Rev. 333 (2002).

2.4.2.1 Treaties⁶⁶

Treaties and custom are the two main bodies of international law, and thus international criminal law. Treaties are of importance as they represent the agreement reached between two or more states and in accordance with the principle of *pacta sunt servanda*, states are obliged to perform the terms of treaties in good faith.⁶⁷ However, treaties only bind the signatory states.

Examples of treaties relevant in the context of international criminal law are the 1907 Hague Conventions, the four 1949 Geneva Conventions as well as Additional Protocols I and II thereto and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).⁶⁸ The ICC Statute is also a multilateral treaty. The ICTY Statute has similarly been treated as an

⁶⁶ See generally Jennings and Watts, *supra* note 55, pp. 31–36; Rodney Dixon, Karim A.A. Khan and Judge Richard May (eds.), *Archbold International Criminal Courts: Practice, Procedure and Evidence*, Sweet & Maxwell, London, 2002, p. 7, § 2–7; and Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford/New York, 2003, pp. 27–28. Treaties are also referred to as conventions, charters, statutes, agreements and protocols.

⁶⁷ Article 26, Vienna Convention on the Law of Treaties 1969, United Nations, *Treaty Series*, Vol. 1155, p. 331. Adopted on 22 May 1969 and entered into force 27 January 1980.

⁶⁸ *Hague Conventions of 18 October 1907*: Hague III: Opening of Hostilities; Hague IV: Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (“Hague Regulations”); Hague V: Rights and Duties of Neutral Powers and Persons in Case of War on Land; Hague VI: Status of Enemy Merchant Ships at the Outbreak of Hostilities; Hague VII Conversion of Merchant Ships into War Ships; Hague VIII: Laying of Automatic Submarine Contact Mines; Hague IX: Bombardment by Naval Forces in Time of War; Hague X: Adaptation to Maritime War of the Principles of the Geneva Convention; Hague XI: Restrictions with regard to the Exercise of the Right of Capture in Naval War; and Hague XIII: Rights and Duties of Neutral Powers in Naval War. Each of the 1907 Hague Conventions entered into force on 26 January 1910. *Geneva Conventions of 12 August 1949*: Geneva I: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces; Geneva II: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva III: Convention relative to the Treatment of Prisoners of War; and Geneva IV: Convention relative to the Protection of Civilian Persons in Time of War. Each of the Geneva Conventions entered into force on 21 October 1950. *Additional Protocols of 8 June 1977*: Additional Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts; and Additional Protocol II: Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts. The Additional Protocols entered into force on 7 December 1978. The *Convention on the Prevention and Punishment of the Crime of Genocide*, dated 9 December 1948 entered into force on 12 January 1951. All conventions/protocols are available at <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited 17 July 2007).

international treaty.⁶⁹ Both the ICTY and ICTR Statutes were adopted pursuant to Chapter VII (Action with respect to threats to the peace, breaches of the peace and acts of aggression) UN Security Council resolutions and are, accordingly, binding on all UN member states.⁷⁰

2.4.2.2 Custom⁷¹

Custom is the oldest source of international law and rules of customary law are binding on all states. It consists of two elements, practice and *opinio juris*.

A rule of customary international law is one which is created and sustained by the *constant and uniform practice of States and other subjects of international law* in or impinging upon their international legal relations, in circumstances which give rise to a *legitimate expectation of similar conduct in the future*... If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of 'general customary international law'... such a rule is binding on all States.⁷²

Not only must such practice be settled, States engaging in such practice must do so in the belief that they are under a *legal obligation* to do so.⁷³ It is not a requirement that *each and every* State conforms to a certain practice in order for a rule to be a rule of customary international law. It is sufficient that States, in general, conform to such practice and that where a State fails to do so, such behaviour is considered to be inconsistent with the general rule.⁷⁴ Current customary

⁶⁹ *Prosecutor v Slobodan Milošević*, Case No.: IT-99-37-PT, "Decision on Preliminary Motions", T. Ch. III, 8 November 2001, § 47.

⁷⁰ Cassese categorises them as "secondary international legislation... in that they have been adopted by virtue of provisions contained in a treaty, the UN Charter". See Cassese, *supra* note 66, pp. 26–27. See also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T. M. C. Asser Press, The Hague, 2003, p. 7 at footnote 21. For a consideration of the dynamic and evolutionary interpretation of treaties in international criminal law and the necessary limitations to such practice, see Bantekas, *supra* note 57, pp. 121–124.

⁷¹ See generally Jennings and Watts, *supra* note 55, p. 25–31; Dixon, Khan and May, *supra* note 66, pp. 7–9, §§ 2–8 to 2–14; and Cassese, *supra* note 66, pp. 28–30.

⁷² Emphasis added. International Law Association, London Conference, Report of 63rd Conference, p. 8, referred to in Dixon, Khan and May, *supra* note 66, p. 8, § 2–10.

⁷³ See, for example, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3. See also Attila Bogdan, "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia", 6 International Criminal Law Review 63 (2006), pp. 69–71.

⁷⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14. The *ad hoc* international criminal tribunals have been criticised for their methodology in concluding that the requirement of *opinio juris* has been satisfied. Degan posits: "The ICTY and ICTR... do not refer in their decisions to the former State practice and the *opinio juris* as the only, or even as the main, evidence of customary law. They rather rely on the practice of former *ad hoc*

rules are binding on both existing and new States, notwithstanding that they may disagree with such rules. The development of rules of customary law is generally a time-consuming process. It takes time for the practice to be established, in the first instance, and then it takes additional time for States to form the view that they are legally obligated to conform to such practice.

The report of the UN Secretary-General on the ICTY Statute gives some guidance as to the rules of customary international law which are relevant to international criminal law:

The part of conventional international humanitarian law which has beyond doubt become part of customary international law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of August 12, 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide 1948; and the Charter of the International Military Tribunal of August 8, 1945.⁷⁵

Both the ICTY and the ICTR have referred to customary international law in their judgments/decisions.⁷⁶

military tribunals established by Allied Powers after World War II in occupied Germany and in the Far East, as well as to their own practice. They thus call that former judicial practice, as a whole, “customary law”. However, considering themselves as organs of the international community, these *ad hoc* Tribunals do not hesitate to create new “customary rules” deducing them directly from “elementary considerations of humanity”, which are presumably their own *opinio juris sive necessitatis*... they expect that States themselves will conform their practices in warfare to that judge-made “customary law” in future international and non-international armed conflicts.” See Degan, *supra* note 57, pp. 75–76. See also generally, *ibid.*, pp. 73–79 and p. 82. The determination of the ICTY Appeals Chamber that the legal basis of the joint criminal enterprise doctrine is part of customary international criminal law in *Prosecutor v Duško Tadić*, Case No.: IT-94-1-I, Judgment, App. Ch., 15 July 1999, (“*Tadić* Appeals Judgment”), which has been the subject of much criticism, is a case in point. See *infra* Chapter 3, at footnotes 58 and 413. For a consideration of the emergence of international crimes as a creation of customary international law and the problems this may create with regard to the principles of retroactivity and specificity, see Bantekas, *supra* note 57, pp. 124–125.

⁷⁵ Report of the Secretary-General, Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993), § 35.

⁷⁶ See for example, *Prosecutor v Duško Tadić*, Case No.: IT-94-1, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, App. Ch., 2 October 1995, §§ 86–137: The Appeals Chamber referred *inter alia* to customary international law to determine whether the ICTY is empowered to adjudicate alleged violations of the laws and customs of war in both international and internal armed conflicts, or just the former (as contended by the Appellant); *Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Lando*, Case No.: IT-96-21-A, Judgment, App. Ch., 20 February 2001, §§ 64–72: In the context of its consideration of the nationality requirements set out in Article 4, Geneva Convention IV, *supra* note 68, the Appeals Chamber noted that Article 31 of the Vienna Convention on the Law of Treaties, *supra* note 67, reflects

2.4.2.3 General Principles of Law Recognised by Civilised Nations⁷⁷

The general principles of law recognised by civilised nations are also a source of international law and hence international criminal law. Such principles can be referred to where, for example, treaties or customary law do not provide applicable rules or assistance. Their main function is primarily that of a “gap-filler”.⁷⁸ It should be noted that in Article 38(1) of the ICJ Statute, general principles of law are recognised as an independent source of international law, on a par with treaties or custom and are not considered as a subsidiary source of law (like judicial decisions and the teachings of highly qualified publicists).

In the determination of general principles of law recognised by civilised nations, it is not necessary that the general principles of law of *each and every* civilised nation be examined. Judge Stephen of the ICTY Appeals Chamber noted:

I accordingly turn to those “general principles of law recognised by civilised nations”, referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a further source of international law... no universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled; it is enough that “the prevailing number of nations within each of the main families of laws” recognize such a principle. As was said in the *Hostage* case, if a principle “is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified”.⁷⁹

Some examples of general principles of law recognised by civilised nations, which are of relevance in the context of international criminal law are

1. The principle of legality, *nullum crimen sine lege*, i.e., a person cannot be held criminally responsible for conduct or an omission which was not a crime at the time the conduct or omission occurred;⁸⁰

customary international law; and *Prosecutor v Clément Kayishema*, Case No.: ICTR-95-1-T, Judgment, T. Ch., 21 May 1999, §§ 87–190 (in the context of its discussions on the crime of genocide).

⁷⁷ See generally Jennings and Watts, *supra* note 55, pp. 36–40; Dixon, Khan and May, *supra* note 66, p. 10, § 2–15a; and Cassese, *supra* note 66, pp. 31–32.

⁷⁸ See Wade, *supra* note 57, p. 210 and Bogdan, *supra* note 73, pp. 71–72. Additional functions attributed to general principles of law are that: (i) they serve as a source of interpretation for conventional and customary international law; (ii) they are a means of developing new norms of conventional and customary international law; (iii) they may serve as a modifier of conventional and customary international law; and (iv) they serve to shape conventional and customary international law for a greater good, i.e. the use of *jus cogens*. See Wade, *ibid.*, and Bogdan, *ibid.*

⁷⁹ Footnotes omitted. *Prosecutor v Dražen Erdemović*, Case No.: IT-96-22-A, Judgment, “Separate and Dissenting Opinion of Judge Stephen”, App. Ch., 7 October 1997, § 25. See also Bogdan, *supra* note 73, pp. 71–78.

⁸⁰ See Wade, *supra* note 57, pp. 210–211 and Cassese, *supra* note 66, p. 31.

2. The *nulla poena sine lege* principle, i.e., a person cannot be punished for a conduct or an omission in the absence of a law criminalising such conduct or omission;⁸¹ and
3. The presumption of innocence.⁸²

2.4.2.4 Judicial Decisions⁸³

As a general rule, judicial decisions are not sources of international law *per se*, i.e. they do not make law. They can be referred to in order to determine the content or the application of treaties, customary international law or general principles of law. Although they are not sources in their own right, they can have persuasive authority and/or be of practical utility.⁸⁴ Oppenheim notes that

... judicial decision has become a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally... [decisions of international tribunals] exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them. They are often relied upon in argument and decision. The International Court of Justice, while prevented from treating its previous decisions as binding,⁸⁵ has, in the interests of judicial consistency, referred to them with increasing frequency. It is probable that in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing international law.⁸⁶

In the context of international criminal law and the particular jurisprudence referred to in this thesis, a number of types of judicial decisions are worthy of

⁸¹ See Wade, *supra* note 57, p. 211.

⁸² See Cassese, *supra* note 66, p. 31. Bantekas is critical of the *ad hoc* international criminal tribunals' methodology in determining the existence of general principles of international criminal and humanitarian law and posits that "[i]nternational tribunals have... abused their power to ascertain the law in an objective manner and have made a strenuous effort to distil general principles from nowhere...". See Bantekas, *supra* note 57, p. 127. See generally *ibid.*, pp. 126–129.

⁸³ See generally Jennings and Watts, *supra* note 55, p. 41–42; Dixon, Khan and May, *supra* note 66, pp. 10–14, § 2–15b to 2–15f; and Cassese, *supra* note 66, pp. 36–37.

⁸⁴ The persuasive authority and practical utility of judicial decisions from different judicial bodies depends upon a number of factors including the type of court making the determination, its constitution and composition, the circumstances surrounding a case and the problem actually being addressed. Care is required when considering the weight to be accorded to different decisions or judgments and the extent to which they should contribute to the findings and jurisprudence of international criminal courts. See Dixon, Khan and May, *supra* note 66, p. 10, § 2–15b.

⁸⁵ Article 59 of the ICJ Statute, *supra* note 56, provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

⁸⁶ Footnotes omitted. See generally Jennings and Watts, *supra* note 55, p. 41.

individual comment: those of the *ad hoc* international criminal tribunals, the ICC, the ICJ, the IMT and IMTFE, post-World War II military tribunals applying Control Council Law 10 (“CCL 10”),⁸⁷ national courts and the US Military Commission. As an overriding principle, the comments of the Trial Chamber in the *Furundžija* case are noteworthy: “For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value.”⁸⁸ Clearly, the jurisprudence of the “highest calibre”, for current purposes, is that emanating from an international court/tribunal applying international criminal law or international law. However, as noted above, even jurisprudence falling within this category is not a source of international law, but it can be of persuasive authority.

Judicial Decisions of the *Ad Hoc* International Criminal Tribunals

The judicial decisions of the ICTY and ICTR are not sources of international criminal law, as such, but clearly they can be of substantial persuasive authority, particularly as they emanate from an international criminal tribunal applying international criminal law and the judges that sit on the benches of these tribunals are highly respected international lawyers.⁸⁹ The jurisprudence of the ICTY and ICTR has proved decisive in fleshing out the substance of certain customary rules in international criminal law.

Judicial Decisions of the ICC

The jurisprudence of the ICC is not a source of international criminal law *per se*. Article 21(2) of the ICC Statute provides that the ICC “*may* apply principles and

⁸⁷ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55 (1946) available at <http://www1.umn.edu/humanrts/in-stree/ccno10.htm> (last visited 17 July 2007).

⁸⁸ *Prosecutor v Anto Furundžija*, *supra* note 25, § 194. See also the comments set out at *supra* note 84.

⁸⁹ Bantekas notes, however, that the jurisprudence of the international criminal courts/tribunals has elevated the judicial decisions of both international and domestic courts to *primary* sources of international criminal law. As an example of this, he cites the sole reliance of the ICTY Appeals Chamber on the judicial decisions emanating from the post World War II courts as the basis for its decision in the *Tadić* Appeals Judgment, *supra* note 74, to formulate the joint criminal enterprise concept. He posits: “Clearly the sole employment of WW II case law to formulate the concept of joint criminal enterprise in international humanitarian law is an undisguised attempt to render as a primary source the judgment of a particular tribunal, chiefly because this fits with the judges’ line of legal reasoning. The selectivity and the use of supplementary sources and their slow elevation to primary sources is worrying, if not frightening.” See *supra* note 57, p. 132 and generally at pp. 129–133.

rules of law as interpreted in its previous decisions”.⁹⁰ Accordingly, while the ICC may refer and even rely on a previous decision of the ICC, it is not obligated to do so. It is likely, though, that the ICC will, in practice, follow its previous decisions and only depart from them in limited circumstances. Again, while the jurisprudence of the ICC is not a source of international law, it is likely that it will be of a highly persuasive authority, emanating from an international criminal court applying international criminal law.

Judicial Decisions of the ICJ

Although, the ICJ does not have jurisdiction over individuals and accordingly, cannot impose individual criminal responsibility for core international crimes, its judgments, clearly, have a bearing on international criminal law.⁹¹ Similiar to the ICTY/ICTR and ICC jurisprudence, the ICJ jurisprudence is not a source of international criminal law *per se*, but it can be of substantial persuasive authority, emanating from an international court applying international law.

IMT and IMTFE Judgments

In accordance with the general status of judicial decisions in international law, the jurisprudence of the IMT and IMTFE should not be considered a source of international criminal law. However, it has been suggested that the judgment of the IMT is arguably a source of law due to the adoption of the Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal (“Nuremberg Principles”).⁹² In the author’s view, however, as a general rule, the jurisprudence of these military tribunals is not a source of law, *per se*. Nonetheless, to the extent that some of the findings of the IMT have acquired the status of customary international law, for example, its definition of crimes against humanity, such findings are a source of international criminal law, due to their categorisation as customary international law.

⁹⁰ Emphasis added.

⁹¹ See, e.g. *Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, 2002 ICJ; *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951 I.C.J. 23; and *Application of the Convention on the Prevention and Punishment on the Crime of Genocide (Provisional Measures)*, 1993 I.C.J.

⁹² Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950, Yearbook of the International Law Commission, 1950, Vol. II, pp. 374–378, available at <http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument> (last visited 17 July 2007). See Dixon, Khan and May, *supra* note 66, p. 11, § 2–15c. But see *infra* section 2.4.4.1 for the status of the Nuremberg Principles.



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