System Criminality in International Law: Introduction

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This book reviews the main legal avenues that are available within the international legal order to address the increasingly important problem of system criminality, and to identify the need and possibilities for improving such avenues.

The term system criminality refers to the phenomenon that international crimes – notably crimes against humanity, genocide and war crimes – are often caused by collective entities in which the individual authors of these acts are embedded. Notable examples of situations of system criminality after the Second World War include the 'dirty war' in Argentina in the 1970s and 1980s, the atrocities committed during the Balkan Wars of the early 1990s of the previous century, in which states and organized armed groups played a dominant role, and the crimes committed during the ongoing armed conflicts in the Darfur area in Sudan.

While in many situations of system criminality the legal response of the international community has focused on individual perpetrators, who for instance have been the subject of criminal proceedings at the ICTY, ICTR, ICC or domestic courts, such individuals were often small cogs in larger systems that may be beyond the reach of individual responsibility. With regard to the international crimes committed in Darfur, for example, the Prosecutor of the ICC has indicted...
two individuals whom he thought were responsible for international crimes. But it is hard to believe that Ahmad Muhammed Harun, former Minister of State for the Interior of the Government of Sudan, was, on his own, responsible for the crimes that have been committed in Sudan, or even for the crimes in respect of which he was charged. It is equally hard to believe that Ali Muhammed Ali Adb-Al-Rahman, a leader of the Janjaweed and also indicted by the ICC, caused, on his own, the various crimes that have been attributed to the Janjaweed. Indeed, in his 2008 report to the Security Council, the Prosecutor of the ICC had to conclude that these two individuals were part of a much larger organizational context:

The information gathered points to an ongoing pattern of crimes committed with the mobilization of the whole state apparatus. The coordination of different bureaucracies, ranging from the military to the public information domains, suggest the existence of a plan approved and managed by GoS authorities at the highest level.

In examining the systemic context of international crimes, this book focuses in particular on the relevance, potential and limits of the law of international responsibility. We use the term 'international responsibility' as an umbrella term to refer to the various forms of responsibility under international law, including responsibility of individuals, states, international organizations and, much less well-established, organized armed groups like the Lord Resistance Army in Uganda or the Revolutionary United Front in Sierra Leone.

This introductory chapter will explain the context in which this book is situated and identify the key aspects of the phenomenon of system.

This hypothesis in certain respects challenges the dominant approach to international crimes. The Nuremberg Tribunal held that: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Since this judgment, the dominant response of international law to international crimes has been individualistic. This also was expressed in the prosecutor's opening statement in the trial of Slobodan Milosevic in the ICTY:

The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted on the basis of his individual criminal responsibility. No state or organization is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, even the crime of genocide.

The individualist nature, and antipathy against collective responsibility, pervades other fields of international law. An illustration is the Security Council's response to North Korea's nuclear policies, targeting...
the sanctions at luxury goods with the aim of affecting the rich individual leaders, rather than the population of North Korea. The book assumes that, for all its virtues, targeting responses to system criminality at individual authors of crimes is only a partial solution, and one which does not always take away the need to address the larger entities of which individuals are a part. If the goal is termination of the crimes and prevention of their recurrence, individual responsibility is unlikely to do the job. Holding Saddam Hussein individually responsible in May 1991, probably would not have made much of a difference to the system that continued to foster crimes.

Individuals who transgress fundamental norms of international law often are not acting on their own initiative or for their own cause. In some cases, individuals will carry out the plans of others, higher placed individuals. This may, under the doctrines of superior or command responsibility, result in prosecutions of higher ranked officials that supplement the prosecution of the lower ranked official or may lead to a decision not to prosecute such lower ranked officials. Such prosecutions still may fall within the paradigm of individual responsibility.

In other cases, individuals do what they do because they act on behalf, or as part, of a state or other larger collective entity. In situations where state authorities consider that the security of the state is under severe threat, or fear they may lose power, when they have a powerful apparatus at their disposal charged with protecting the security of the state, and when they have identified groups that are defined as enemies of the state, collective entities themselves can turn into actors that commit, or further the commission of, international crimes. This was what happened, for example, in relation to the criminal acts orchestrated or supported by Belgrade during the Balkan Wars. 

The emphasis on individual responsibility 'obscures a basic truth' about war crimes, that these are 'deeds that by their very nature are committed by groups and against individuals and their members of state or tribe.' The emphasis on individual responsibility 'obscures a basic truth' about war crimes, that these are 'deeds that by their very nature are committed by groups and against individuals and their members of state or tribe.' The emphasis on individual responsibility 'obscures a basic truth' about war crimes, that these are 'deeds that by their very nature are committed by groups and against individuals and their members of state or tribe.'


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Individual authors of international crimes, then, are often part of a context in which a variety of actors participate, and which are properly dealt with at the level of the state, or other entity, as such. Hannah Arendt wrote on the acts of Eichmann: 'crimes of this kind were, and could only be, committed under a criminal law and by a criminal state.' Talgryn writes that: 'instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state or, more loosely, in accordance with the political objectives of a state or other entity.'

Our starting point, then, is that collective entities can, as causal mechanisms, cause or contribute to individual international crimes. This is not much different from the familiar problems of structure and agency and of structural analysis that arise in case of ordinary criminality.


15 Hannah Arendt noted that 'the temptation to substitute violence for power,' H. Arendt, On Violence (Harvest Book, New York, London 1959) 54. She also wrote that, 'every decrease in power is an open invitation to violence — if only because those who hold power and feel it slipping away from their hands, be they the government or the governed, have always found it difficult to resist the temptation to substitute violence for it' (1964), p. 87.

16 H. C. Kefauver, 'The policy context of international crimes,' this volume, Chapter 2.

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2. Causal mechanisms

Several factors may connect the system with international crimes. A dominant factor appears to be the emergence of a normative climate within a collectivity. Rilling noted that the characteristic feature of system criminality is that it corresponds with the "prevailing climate in the system," in this volume, points to processes of neutralization and rationalization that may influence individual behaviour. A crucial aspect of system criminality, then, is that individual crimes are not, as is commonly the case for domestic crimes, contrary to a norm, but rather in conformity with norms that result from collective processes.

The transformation of the normative climate, and the resulting erosion of individual moral inhibitions against international crimes, may, as argued by Kelman and Bauman, in particular arise when there is an authorization of acts of violence, a routinization of violence by rule-governed practice, and a dehumanization of victims of violence by indoctrination. It may be much aided by the existence of large bureaucracies. However, it can be assumed that this may also hold for particular organized forms of non-state actors, such as organized armed groups, though much will depend on the organized nature of such groups.

A related factor that may help explain how collectivities may contribute to international crimes in particular cases is that, in the kind of (often military) acts that may generate individual crimes, individual autonomy may give way to group cohesion. Hannah Arendt wrote that: "in military as well as revolutionary action 'individualism is the first [value]..." followed by "the significant of the laws of war," in A. Cassese (ed.), Current Problems of International Law: Essays on the Law of Armed Conflict (Dott. A. Giuffre Editore, Milan 1975) p. 138. Also Fletcher (n. 21) 1541, referring to the "climate of moral degeneracy" produced by the "collective contributes to the crime.'

M. Pech, 'Why corporations kill and get away with it: the failure of law to cope with crime in organisations', this volume, Chapter 2.

Taligren (n. 21) 579. Similarly, H. C. Kelman, 'The policy context of international crimes,' this volume, Chapter 2. It is to be added, though, with Wells, that this in general will involve a two-way process, with acts of criminality not only using a climate for justification, but at the same time contributing to that climate. Wells (n. 19) 120. This is also implied in Fletcher (n. 21) 1541, referring to the "climate of moral degeneracy" produced by the "collective contributes to the crime.'

H. C. Kelman, 'The policy context of international crimes,' this volume, Chapter 2; Z. Bauman, Modernity and the Holocaust (Cornell University Press, Ithaca, NY 1989) 21; Vethesen (n. 3) 16. See also Osiol (n. 2) 64.

Vethesen (n. 3) 16.

I. Kiefner, 'The collective accountability of organized armed groups for system crimes,' this volume, Chapter 11.


16 Arendt (n. 15) 67, citing F. Fanon, Wretched of the Earth (Macgibbon 1963), p. 47.

17 Arendt (n. 15) 67, citing Fanon (n. 29) 93. See also I. Kiefner, 'The collective accountability of organized armed groups for system crimes,' this volume, Chapter 11.

18 That may make it appropriate to label the involvement of the system in terms of complicity; see Wells (n. 19) 130. The international law of responsibility would not in technical terms recognize such involvement as aid or assistance in the sense of Art. 10 of the Articles on State Responsibility, as that only applies between states; see Genocide Case (n. 22) para. 420. In the specific case of genocide, where the court found that a state can act in breach of the principle of complicity as that applies to individual responsibility, this may be different however; see (n. 22) para. 420.

19 J. Alvarez, 'Crimes of states/crimes of state'; lessons from Rwanda' (1999) 24 Yale Journal of International Law 367 (inviting that international lawyers characterize offences in Rwanda regions as crimes of states, because such offences, either by definition or because of their scale or scope, tend to require the concurrence of or at least acquiescence of governmental authority).

20 Alvarez (n. 32) 399-400.

21 The Trial of Major War Criminals (n. 10) 447 (emphasis added).
good, who have been willing to deceive themselves into believing that this aphorism represented the essence of wisdom. 35

3. Some possible objections

A few objections may be ventured to the line of argument developed here that international law should address the level of systems rather than that of individuals. One objection is that this argument leads to collective accountability and that ‘if all are accountable, no one is accountable’. 36 If individual responsibility is valued for its contribution to retribution and possibly reconciliation, collective accountability may be inadequate. 37 Moreover, collective responsibility has been said to undermine the efficacy of international law. Hersch Lauterpacht wrote that ‘there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one’. 38 However, responses at the collective level do not exclude responses at the individual level. 40 Moreover, in particular cases reconciliation may require precisely responses at the collective level. 41 Punishment of a relatively limited number of political and military authorities of the Third Reich would have been unlikely to allow for reconciliation between victimized groups and the German state.


41 Fletcher and Weinstein (n. 22) 601.


43 But note that development of the joint criminal enterprise doctrine had expanded the possibility that individuals could be held responsible for acts they did not themselves commit; see H. van der Wil, ‘Joint criminal enterprise and functional perpetration’, this volume, Chapter 7 and E. van Stedtregt, ‘System criminality at the ICTY’, this volume, Chapter 8.

44 Scharf and Williams (n. 37) 170.

45 A. Cassese, International Criminal Law (Oxford University Press, Oxford 2003), p. 136. A second objection to responsibility of a group, state or other collectivity is that it may confront innocent individual members of that collectivity with the consequences of the criminal acts of a few. Non-responsible persons are made to bear the responsibility for (or rather the consequences of) the acts of others. 42 It is a standard critique on traditional (say, pre-Second World War) international law that it located responsibility at the level of collectivities rather than individuals. 43 It often has been maintained that the idea of collective responsibility was primitive and immoral, in view of its effects on innocent members of a collectivity. 44 Modern international criminal law is premised on the idea that no individual may be held accountable, or be punished, for offences that he himself did not commit. In principle, members of a group are not criminally liable for acts performed by other members (notably leaders) of such a groups in which these members themselves did not participate. 45 Scharff and Williams note that ‘the first function of justice is to expose the individuals responsible for atrocities and to avoid assigning guilt to an entire people’. 46 Cassese writes: ‘Collective responsibility is no longer acceptable.’ 47 Resorting to...
collective responsibility would thus be a step back to the primitive collective responsibility from which the international legal order has just liberated itself.

A partial response to this objection is that, in particular situations, responses targeted at the level of the collectivity are justified because a large part of the population or ‘members’ of a group were in fact co-responsible for failing to prevent, for instance, the rise of a political party or a leader who led the collectivity into the criminal acts.10 In some cases, a substantial part of the group was indeed involved in the crimes, as was the case in Rwanda during the genocide in the early 1990s.11 Also, Jaspers recognized, in the form of political guilt, the responsibility of members of a collectivity for the acts that resulted from their active or passive behaviour.

Another part of the answer is that collective sanctions do not necessarily have effects for all members of the collectivity.12 While, in theory, it may be true that sanctions imposed on a collectivity affect members of that collectivity, in the practice of international reparations that certainly does not seem to be the case in any substantial way. Darcy notes that, for citizens who are the constituent members of a State, the impact upon them of any consequences of state responsibility is usually negligible.13

A third objection is that collective responsibility would (re-)introduce the notion of collective guilt in international law. However, responses targeted at the level of the system, particularly if these do not entail criminal responses, need not carry the connotation of collective guilt. They can be

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15 Larry Cata Backer argues that, for this reason, individual responsibility often indeed prevails: the individual is sacrificed so that the group can continue.16 This may explain the one-dimensional (because mainly focused on individual) international responses to the crimes committed by Serbian agents or by groups and individuals that acted with the support of Serbia – the international community had a prime interest in letting the state of Serbia continue and re-establish itself quickly as a stable political entity.

This objection needs to be taken seriously. However, it will have to be balanced against the objectives of responsibility in relation to system criminality: is stability more valuable than incapacitating a regime that is responsible for mass atrocities? More fundamentally, it will have to be taken into account that, while responses to system criminality may delegitimize regimes, they do not necessarily incapacitate them.

Each of these objections in particular cases may carry weight and may influence the fashioning of legal policy in regard to situations of system criminality. However, none of them fundamentally undermines the hypothesis that underlies this book: that in situations were international crimes are committed, the relevant actors’ law should not only pursue individual responsibility but also target the system in which the individuals concerned were embedded.

4. The individualistic nature of international law with regard to system criminality

Proceeding from the working hypothesis that responsibility in relation to system criminality should recognize the role of ‘the system’, this book is based on our preliminary assessment that international law in its present form does not adequately deal with the role of systems in international crimes.

The systemic nature of international crimes is recognized in the definitions of international crimes. That is certainly true for crimes of genocide and crimes against humanity. Although a Trial Chamber of the ICTY deemed the case of the ‘lone genocidaire’ theoretically possible, genocide as such does not seem possible without the involvement of a larger collectivity.

The situation for war crimes is slightly different in that, compared with genocide and crimes against humanity, these are more likely to be committed as individual acts. However, war distinguishes itself from individual ordinary crimes by its organized nature, and more often than not war crimes will have the systemic element as required by the definition of system criminality. Note also that the ICC Statute provides that the Court has jurisdiction over such crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. The systemic nature of crimes is particularly clear for aggression. Though not (yet) within the jurisdiction of the ICC, most definitions of aggression assume that perpetrators can commit aggression only if they order or participate actively in the planning, preparation, initiation or waging of aggression by a state. Finally, torture is also characterized as an official act. Though acts of torture of course can be committed by state officials against official policy (and, as such, would not be part of system criminality as defined in this book), there would seem to be many cases where torture indeed has a systemic character and is condoned and perhaps supported by the policy of an organization, exemplified by the events in Abu Ghraib.

40 See A. Nollkaemper and H. van der Wilt, ‘Conclusions and outlook’, this volume, Chapter 15.
41 O. Triffterer, ‘Prosecution of States for Crimes of State’ (1996) 67 Revue Internationale de Droit Pénal Mè, Democratic Republic of the Congo v Belgium, Case Concerning the Arrest Warrant of 11 April 2000, IJC Judgment (14 February 2002) dissenting opinion of Judge Al-Khasawneh (noting that such acts ‘are definitionally State acts’) (para. 46). This last remark should be qualified to encompass other organized groups that may oppose the state.
42 Article 6, ICC Statute. During the negotiations of the Genocide Convention, the United Kingdom took the position that the Convention should be directed at states and not individuals, as it was impossible to blame any particular (individual for actions for which whole governments or states are responsible). W. Schabas, Genocide in International Law (Cambridge University Press, Cambridge 2000), p. 419. Also, Denmark considered that in cases of genocide vs. aggression, the responsibility cannot be limited to the individual acting on behalf of the state, ibid., 412.
43 Article 7, ICC Statute (defining crimes against humanity as acts ‘when committed as part of a widespread or systematic attack directed against any civilian population’).
45 Van der Wilt notes: ‘It would be simply preposterous for an individual to boast that by his actions alone he could achieve the goal of destroying a whole group. In the normal situation, the perpetrator of genocide may at the most be confident that his conduct might contribute to the concerted action of annihilating the group’, see H. van der Wilt, ‘Genocide, complicity in genocide and international v. domestic jurisdiction. Reflections on the van Arend case’ (2006) 4 IJCL 242.
46 See section 11 below.
47 Article 8(I), ICC Statute.
However, while the law of individual responsibility thus recognizes the systematic nature of international crimes, the responsibility that it envisages (whether under the ICC Statute or under the various conventions such as the Geneva Conventions or the Torture Convention) is focused on the individual, rather than on the level of the system. The systemic level may be relevant for the jurisdiction of the ICC, but the principles and procedures of individual responsibility do not affect that level as such.\(^7\)

The law of international criminal responsibility increasingly has attempted to address the collective nature of international crimes, through such concepts as joint criminal enterprise. The international criminal law paradigm of individual responsibility has thus widened its scope.\(^7\) These attempts will be explored in various chapters in this book. But the question is whether these legalistic approaches will be enough to address the causal mechanisms referred to in section 1.2 of this introduction and reach the level of the system.

Of course, the international community does not entirely neglect these organizational contexts. In regard to the conflict in Darfur, the UN, the AU, the EU, and individual states have addressed the government of Sudan and to a lesser extent rebel groups as relevant actors who may have the power to change the course of events. However, compared to the relatively organized way in which the international community deals with individual suspects, responses that target these collective entities are unorganized and definitively legally less developed.\(^7\) The Genocide case before the ICJ was a rare exception to the predominantly political responses to the role of organized entities in situations of systemic criminality.\(^7\) The fact that, largely due to the jurisdictional limitations, neither the ICJ nor any other court was able to identify a collectivity that was responsible for the genocide illustrates the shortcoming of the law of international responsibility in dealing with collectivities in situations of system crimes and the need for rethinking the connection between international law and system criminality.\(^7\) Addressing the level of the system is essential if the power of the causal mechanisms identified above is to be mitigated. There is also a more pragmatic reason to supplement individual with collective forms of responsibility. The group as a whole may be better positioned to cause a change in behaviour: it is in a better position to monitor and control individuals whose actions matter.\(^7\)

It is for these reasons that the present book addresses the main legal avenues that are available within the international legal order to address the increasingly important problem of system criminality, and to identify the need and possibilities for improving such avenues.

II. The concept of system criminality

Until now, we have used the term system criminality in a rather loose way to refer to the organizational context of individual crimes or to collectivities of which individuals form part. It is now necessary to consider the concept in more detail, so as to provide a conceptual basis for the chapters that follow.

1. General definition

According to the Oxford English Dictionary, the term ‘system’ refers to ‘an organized or connected group of objects’, and ‘[a] group, set, or aggregate of things, natural or artificial, forming a connected or complex whole’.\(^7\) The definition is pertinent for our purposes, as it underlines the concept that systems which are involved in mass atrocities are more than collections of isolated individuals – key factors are connection and organization.

\(^7\) The concept of system criminality has been developed by noted scholars such as Levinson (n. 43) 348. It is for these reasons that the present book addresses the main legal avenues that are available within the international legal order to address the increasingly important problem of system criminality, and to identify the need and possibilities for improving such avenues.

\(^7\) Levinson (n. 43) 348.

The term 'system criminality' has not often been used in literature on international crimes. The most notable exception is B. V. A. Roling, who used the concept to refer to situations where 'governments order crimes to be committed, or encourage the committing, or favour and permit or tolerate the committing of crimes.' He argued that the commission of war crimes 'serves the system, and is caused by the system.' In this book we build on this definition of Roling, and define system criminality as a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes.

Three aspects of this definition need further clarification: the forms of involvement of collectivities with international crimes (II.2), the nature and forms of collectivities that may be involved in system criminality (II.3), and the focus on international crimes (II.4).

2. Modes of involvement
Collective entities can be involved in the commission of international crimes in an active or passive manner. Active involvement may take the form of ordering or encouraging international crimes to be committed, for instance by orders from military or civilian commanders, whose acts in term may be attributable to states or other collectivities. Encouragement may also take more subtle forms, as incitement and propaganda, dehumanisation of victims of violence by indoctrination, and policies directed as changing the normative climate. Passive involvement may take the form of permitting or tolerating the committing of international crimes, by systematically not acting when individuals commit international crimes which further the objectives of the state.

In general, the involvement of states or other collective entities will be "systematic" in terms of our definition of system criminality if it is supported by a plan or policy. In line with the definition of Roling, we are interested in situations where the commission of international crimes "serves the system, and is caused by the system." Though formally an ultra vires act of a commander to commit an international crime will be attributed to the state, and in that respect can then be said to be on the order of a state, this is not the type of state involvement that falls within the concept of system criminality. What we are concerned with is involvement of a collectivity that is based on a plan or policy and that remains in place, even when an individual author of a criminal act is removed.

3. Types of collectivities
Collective entities that are involved in system criminality can take many different forms. Roling confined himself to states. We believe this to be unduly narrow in view of the wide variety of organizational contexts and collective entities in which international crimes are committed. Collective entities that order or encourage international crimes to be committed may also include organized armed groups, ruling political parties, as in the case of Nazi-Germany, and perhaps also international organizations. As to the latter: while we tend to relate international organizations to noble objectives, experience has shown that, like any
other bureaucracies and institutions, they may slide into policies that condone systematic crimes – perhaps exemplified by the UN’s failure to protect the populations in Srebrenica and Rwanda. While this in itself may not be sufficient to engage international responsibility of the organization in relation to system crimes, the situation may be different where an organization provides aid to acts that violate peremptory norms of international law. The NATO bombadiments of the FRY in 1999 may be a case in point. It is noteworthy that the ILC did envisage the possibility of a ‘serious breach by an international organization of an obligation arising under a peremptory norm of general international law’.88

The collective entities that may be involved in system criminality can be differentiated on a number of dimensions. First, they may vary in size. In some cases, crimes may be committed or caused by a small group of individuals that constitute the leadership of collectivity. Tomuschat notes that, mostly, the commission of crimes by a state ‘means that a people has fallen prey to a criminal leadership’.89 An example may be the case of Liberia in the 1990s under the leadership of Charles Taylor. On the other extreme, a collectivity may take the form of a regime that extends through various layers of government, such as that of Saddam Hussein in the 1990s.

Collective entities involved in system criminality also may vary in organizational nature, ranging from the highly organized bureaucracy of Nazi-Germany to the seemingly loosely organized collective action by mobs in Somalia.90 Though the presence of some form of institutions and rules normally is a defining feature of system criminality, the degree of organization may vary, with obvious consequences for the proper legal responses.

Finally, collective entities involved in system criminality may differ in legal nature, as they may or may not possess legal personality. This is a matter of some relevance, as it is only when the collectivity has legal personality that responsibility (under domestic or international law, depending on the question whether the personality is recognized by domestic or by international law) may be attached to that legal person as such.91 This explains major differences between the way in which the international legal order deals with states, on the one hand, and rebel movements, on the other.92

4. System criminality and international crimes

There is one other aspect in which our definition differs from that by Bölling. Our definition, and this book, is confined to the narrow category of crimes that international law recognizes as international crimes under customary law. This category also has been referred to as ‘core crimes’.93 Though the category of crimes in which systems are involved may well be broader (it may, for instance, include corruption), there are good reasons for confining the book to this narrow category of ‘core crimes’.

First, it is precisely these crimes that are defined in terms of their systemic nature and that more often than not will involve system criminality.94 Second, as this category of crimes threatens the fundamental values of the international community,95 the legal responses to such crimes are largely influenced by the involvement of the international community. This is illustrated by the fact that a large number of states has brought such crimes within the jurisdiction of the International Criminal Court96 and that, when involving the responsibility of a state, the ILC thought it proper to subject them to a separate chapter on serious breaches of peremptory norms of international law.97 The effectuation of responsibility is, in the final analysis, thus not in the hands of individual states but can be ‘pulled’ by the international community.98 In regard to state

88 For the former, see Report of the Secretary-General pursuant to General Assembly Resolution 53/35, ‘The Fall of Srebrenica’ (1999) UN Doc. A/54/594. For Rwanda, see the remark by Kofi Annan that he could and should have done more to stop the genocide in Rwanda ten years ago and that ‘the international community is guilty of sins of omission’; see UN chief’s Rwanda genocidal regret, http://news.bbc.eo.uk/1/hi/world/ africa/8573229.stm, accessed 3 July 2008.


90 Tomuschat (n. 51) 240.

91 For the former, see Report of the Secretary-General pursuant to General Assembly Resolution 53/35, ‘The Fall of Srebrenica’ (1999) UN Doc. A/54/594. For Rwanda, see the remark by Kofi Annan that he could and should have done more to stop the genocide in Rwanda ten years ago and that ‘the international community is guilty of sins of omission’; see UN chief’s Rwanda genocidal regret, http://news.bbc.eo.uk/1/hi/world/africa/8573229.stm, accessed 3 July 2008.


93 Tomuschat (n. 51) 240.

94 J. E. Wells, ‘The collective accountability of organized armed groups for system crimes’, this volume, Chapter 11, see, on the influence of a state apparatus in producing the conditions for individual criminality, Vettoso (n. 3) 16.

95 For the former, see Report of the Secretary-General pursuant to General Assembly Resolution 53/35, ‘The Fall of Srebrenica’ (1999) UN Doc. A/54/594. For Rwanda, see the remark by Kofi Annan that he could and should have done more to stop the genocide in Rwanda ten years ago and that ‘the international community is guilty of sins of omission’; see UN chief’s Rwanda genocidal regret, http://news.bbc.eo.uk/1/hi/world/africa/8573229.stm, accessed 3 July 2008.


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109 Tomuschat (n. 51) 240.
responsibility, this follows from the fact that in the ILC Articles on State Responsibility injured states are not, as is the case in regard to ‘normal breaches’, allowed to waive a claim that they may have against a responsible state10 as well as from the rights of non-injured states. In regard to individual responsibility, this follows from the principles of complementarity in the ICC Statute102 and privity in the ICTY and the ICTR Statutes.103 Our focus is largely on the ways in which the international community can develop, organize and enforce the proper legal responses to situations of system criminality.

III. The role of international responsibility in respect of system criminality

The focus of this book is on one relatively narrow set of legal responses to system criminality, those provided by the law of international responsibility. We recognize that the law of international responsibility has only a relatively minor role in regard of system criminality. The international legal order has at its disposal a variety of ‘tools’ to address causes and effects of system criminality. International legal responsibility is one use of those tools, alongside such instruments as military intervention, economic sanctions, political pressure by states or international organizations, development aid, etc.

Many states, including the United States, have taken the position that the proper responses of the international community towards cases of system criminality are to be left to political organs, rather than to the domain of international responsibility.104 This explains the demise of the concept of ‘state crimes’,105 but also more generally the virtual non-use of the injured state(s). The result may often be a coexistence of latent claims to effectuate claims at domestic level.

At this point there is a noticeable difference between the domestic level and the international level. While domestically, responsibility (notably individual criminal responsibility) is seen as the harshest intervention, this certainly is not true at the international level (though it may be true for an individual targeted). Other means target the state much more directly; e.g. sanctions and military intervention.106 Tallgren observes: ‘Criminal law is not the ultima ratio for the international community. It is, instead, a subsequent means in addition to the mere exercise of military and economic power.’107

Despite the relatively modest role of international responsibility in relation to system crimes, this book is based on the assumption that international responsibility, in both its manifestations – criminal responsibility and as state responsibility – may play a distinct and potentially significant role in the responses of the international community to situations of system criminality. The law of international responsibility may, at least in theory, serve each of the aims to which international law in general may aspire in regard to situations of system criminality: termination, prevention of recurrence, prevention in other cases, reconciliation and reparation in regard of international crimes.108 Moreover, we proceed from the assumption that against the overwhelming dominance of political responses to situations of system criminality (only to a relatively limited extent subjected to and embedded in legal procedures and safeguards), the law of international responsibility can bring

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101 Tallgren (n. 20) 589.
103 N. White, ‘Responses of political organs to crimes by states’, this volume, Chapter 14.
as an important rule of law quality to the legal responses to situations of system criminality.\footnote{Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations (Martins Nijhoff Publishers, The Hague, Boston and Cambridge, MA 1988), pp. 79–80.}

Within the law of international responsibility there exists a variety of options that will be considered in this book. Some of these remain within the paradigm of individual responsibility, based on the notion that collective action is, after all, the product of individual action,\footnote{Kutz (n. 36).} but seek to widen the net so as to cover more persons involved and to make it easier to make individuals responsible.\footnote{I. Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations (Martins Nijhoff Publishers, The Hague, Boston and Cambridge, MA 1988), pp. 79–80.} These forms include command responsibility, responsibility based on the principle of joint criminal enterprise and responsibility based on membership of criminal organizations.\footnote{Clapham (n. 71).} Moving beyond the paradigm of individual responsibility, various forms of collective responsibility are available that concern acts of the group or system as a whole, rather than responsibility of the collectivity for acts of individuals.\footnote{Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations (Martins Nijhoff Publishers, The Hague, Boston and Cambridge, MA 1988), pp. 79–80.} These forms include criminal responsibility of organizations,\footnote{Kutz (n. 36).} responsibility of rebel groups,\footnote{Kutz (n. 36).} and responsibility of states.\footnote{Kutz (n. 36).} The responsibility of international organizations for situations of system criminality is not discussed in this book.

The various forms of international responsibility differ not only in their subjects, but also in regard to the nature of responsibility. Responsibility towards a community (a defining feature of international responsibility in regard to system criminality) may lead one quickly into associating responsibility with criminal law. However, in international law that only holds for the responsibility of individuals. The conceptual structures of existing law of international responsibility pose limits to what we can reasonably conceive as the aims of the law of international responsibility. The ill-fated history of the concept of state crimes illustrates the point.

However, it by no means is necessary to identify international responsibility for system crimes with criminal responsibility. It is to be recalled that the term system criminality refers to the involvement of systems, as described above, in criminal acts, not to the criminality of that system. It is not the system that is criminal – it is in the nature of criminality that is systematic. This implies that it is not necessary that the system (e.g. a state or organized armed group) is subject to criminal sanctions. Legal responses to cases of system criminality may also be modelled on a tort analogy, perhaps apart from the fact that criminal responses have the added value of moral condemnation.\footnote{Kutz (n. 36).} In view of the rather distinct nature of legal responses to the involvement of organized armed groups in situations of system criminality, this book extends the rather narrow legal concept of responsibility to the broader concept of accountability. While accountability, like responsibility, involves an assessment of conduct of actors against prior established norms and are generally followed by some sort of sanction, it does not, as responsibility, involve a determination of an internationally wrongful act.\footnote{Kutz (n. 36).}

The book as a whole takes as its starting point that the various forms of international responsibility are not mutually exclusive and may supplement each other. Trindade rightly observed that the current compartmentalized conception of international responsibility – of States and individuals – leads ... to the eradication of impunity in only a partial way.\footnote{Trindade (n. 70).} His observation can be extended to include other actors who may engage in, or be involved in, system criminality – international organizations and perhaps even rebel movements such as the Revolutionary United Front in Sierra Leone and terrorist networks such as Al Quaida (which, after all, is addressed as one entity by states and international organizations) – even though these latter entities are not generally subjected to the law of international responsibility but rather to the looser concept of accountability. In the majority of cases in which international law takes an interest in situations of system criminality, international law could thus address both the collectivity and individuals. The result is, in a way.\footnote{Trindade (n. 70).}

\footnote{Levinson (n. 44) 247–8.}
\footnote{Clapham (n. 71).}
\footnote{See Kutz (n. 36).}
\footnote{A. Eser, 'Criminality of organizations: lessons from domestic law – a comparative perspective', this volume, Chapter 10.}
\footnote{J. Kleffner, 'The collective accountability of organized armed groups for system crimes', this volume, Chapter 11.}


\footnote{ Irvine (n. 247) 247–8.}
situation that is confined to responsibility of states and individuals, what the ICJ in the Genocide Case called a 'duality of responsibility'—a situation that can be more complex if more actors are involved.122

IV. Roadmap
After this introduction, Chapters 2 and 3 (Kelman and Punch) discuss the policy context of international crimes. A major focus of the discussion in these chapters will be on the different ways in which individual responsibility is influenced by demands from system authorities and by other factors that may explain situations of system criminality. These chapters provide the essential background for a proper assessment of the legal options in regard to system criminality and indeed are key to assessing the validity of the working hypothesis of this book that, in certain cases, responsibility in relation to system criminality should be allocated to the level of 'the system', in its various manifestations, rather than only at the individual level. Though outside the purview of the legal discipline in the strict sense, and requiring excursions into political science, sociology and social-psychology, they are highly relevant for our understanding of proper legal policies in response to situations of system criminality.

Based on the working hypothesis that international crimes can often be explained with reference to the system in which the individual operates, the contributions in this book explore the main legal avenues that are available within the international legal order to address the various forms and manifestations of system criminality.

Chapters 4 and 5 by Simpson and Gattini provide a bridge between the extra-legal chapters and those dealing with more specific legal issues. Simpson and Gattini examine the historical development from the notion of collective responsibility to, post-Nuremberg, the emergence of individual responsibility and in recent years, a renewed recognition of the structural elements of international crimes.

Chapters 6–8 (Ambos, Van der Wilt and Van Sliedrecht) examine the power of key principles of the law on individual responsibility with regard to system criminality. They deal with the concepts of command responsibility, 'functional commission' and joint criminal enterprise. Though each of these concepts is intended to provide a basis for individual responsibility, they also recognize that individuals operate in larger contexts that may explain their acts.

Chapters 9 and 10 by Jørgensen and Esers address criminality of organizations. Specifically, they address the questions whether international criminal law should provide for criminal liability of organizations, either as a basis for holding individual members responsible (Jørgensen) or in regard to the organization as such (Esers). These questions are reviewed both from an international law and a comparative law perspective.

Chapters 11–14 by Kleffner, Scobie, Zimmerman and White address problems and possibilities of collective entities. Kleffner focuses on the accountability of non-state entities, in particular rebel movements. Zimmerman and Scobie discuss state responsibility with regard to system criminality and more in particular how, given the absence of a concept of state crimes, the law of state responsibility can be useful or should be developed to address problems of state criminality. Nigel White discusses the appropriateness of the procedures within political organs, notably the United Nations, for dealing with system criminality.

In Chapter 15, the editors synthesize the main outcomes, examine the relationship between the various options and suggest some ways for further developing international law in respect of system criminality.