

International criminal responsibility for abuse of power?

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This article surveys the possible application of International Criminal Law to address abuse of power. It thereby aims to stimulate discussion on criminal responsibility for abuse of power. Military commanders and civilian superiors, including politicians, can under conditions be held liable for abusing their power position in relation to the commitment of war crimes, crimes against humanity and genocide. War crimes require a state of conflict, while crimes against humanity and genocide can take place in both times of peace and war. Criminal forms of participation include committing and ordering such crimes. The abuse of a position of authority can be an aggravating factor in the sentencing. Even if the superior did not get involved in the crime directly, command responsibility can be established if the superior did not prevent his or her subordinates from committing the crime. It can also be established if the superior did not punish these subordinates for committing the crime. Criteria include that the commander or superior had effective control over his or her subordinates, whether on a legal basis or in fact, and knew or had reason to know that they were committing or about to commit such crimes. Therefore, people who abuse their position to, for example, cause or maintain a conflict situation at the cost of the human security of population groups, could find themselves accused of having committed international crimes.

During my research and interviews in conflict areas in Asia [1], again and again a pattern of abuse of power to safeguard interests at the cost of people at grassroots level appeared. One interviewee from the Philippines, who witnessed the emotions of both military and rebels, said that the war that took place seemed like a game played by ambitious men. Interviews in other countries also referred to interests of people far away from the conflict area and personally unaffected by the consequences of armed conflict. Interests in natural resources such as gas and wood were referred to as root causes to the conflict.

Based on reoccurring patterns, including those in the former Yugoslavia and Rwanda, it can be argued that (armed) conflicts at grassroots level often serve certain interests of people in power positions. Such conflicts can threaten the security of large groups of the population. International criminal tribunals focus their efforts on people in high positions as the people

with the greatest responsibility for the conflict. In its Policy Paper, the Office of the Prosecutor at the International Criminal Court states [2]:

The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.

This paper surveys the possible application of International Criminal Law to address abuse of power. It thereby aims to stimulate discussion on criminal responsibility for abuse of power. First, underlying interests in conflicts are touched upon. Second, international criminal law is introduced. Third, international crimes are elaborated upon. Fourth, individual criminal responsibility is discussed with a focus on command or superior responsibility.

Interests in conflict

Taking a look at the world map, there is a striking overlap between the location of natural resources, conflicts and human rights violations. The presence of big (international) companies is also noticeable in these areas. Our current consumption patterns result in transport of resources and products all over the world. The huge amount of trade and finances involved increase the stake for multinationals in access to resources and interests of States in exploitation of resources for export. Another big business at a global scale is the weapon industry, entailing high financial interests in (potential) conflict.

As an example, part of the conflict in Aceh concerns the wish for independence, often related to the call for an Islamic state. This fuels the fear of many Indonesians to loose (another) part of the country's territory. However, the main interests behind the conflict seem to be economic interests in natural resources such as gas and wood, influencing politics and social aspects. A comparative analysis on the atrocities against women of Aceh, East-Timor, Papua, and Jakarta reveals many similarities in the violence. Another reoccurring pattern appears to entail the soothing of a population by, for example, taking measures that underline their identity in response to unrest. For example, Islamic law might be granted to a certain extent, such as relating to the use of alcohol, but at the same time human rights and control over resources may be withheld. Similarly, in distracting the attention of people, measures claimed to be based on Christian values may actually serve expansion of access to resources. [3]

Raising or maintaining conflict, both abroad and internal, can form a distraction from other issues and interests. As stated by one of the interviewees, during a status of red alert another year of Martial Law can easily be provoked. When it was voiced that it was time to end the military status in this region, 'suddenly' a big accident happened that provided the authorities with an excuse to extend the military regime. In this case, the military interest was directly connected to the presence of an international oil company, which had to pay a high price for their security considering the conflict. In addition, it is noticeable that when peace is established in one conflict area, often escalation takes place in another area.

The diversity in society – ethnic, religious and cultural – is regularly abused to provoke hatred between population groups. To start or maintain an armed conflict, use of the

'divide-and-rule' strategy appears to have remained popular. By dividing the population, for example, (over-)exploitation of resources and confiscation of land can take place without too much consequence. Historical and present misunderstandings enable such strategies. Cases include situations in which members of one ethnic group were killed while rumours were spread that another ethnic group is responsible. Research also reveals a pattern in which, just before armed conflict takes place, groups of outsiders enter the area to stimulate polarisation and disturb existing good relations. For example, in the Philippines (Christian) militias instigated by outsiders attacked the Moro (Muslim) population at the start of the armed conflict in Mindanao in 1972. Minorities can serve as scapegoats, such as the Chinese population in Indonesia, who were the main victim of the 1998 Jakarta rapes during the downfall of Soeharto. The conflicts in the former Yugoslavia and in Rwanda played the ethnic card. According to the *Vasiljevic* Trial Judgment: 'During the Bosnian conflict, ethnicity has variedly been exploited to gain political prominence or to retain power, to justify criminal deeds, or for the purpose of obtaining moral absolution for any act coloured by the ethnic cause' [4].

International Criminal Law

International Criminal Law (ICL) is part of international public law [5]. International humanitarian law that has become part of customary international law includes the law embodied in the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Charter of the International Military Tribunal of 8 August 1945; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Geneva Conventions of 12 August 1949 for the Protection of War Victims.

Historically, humanitarian law would address the law of war between States. The laws and customs of war entailed a code of military conduct between combatant States. However, a shift has taken place toward a humanitarian-oriented view. On the state-oriented and human-oriented approaches Sands states (although not on the law of war as such) [6]:

The judgement of the House of Lords (a national court) in *Pinochet* and of the ICJ in *Yerodia* reflect, in my opinion, a struggle between two competing visions of international law. For the majority in the House of Lords, international law is treated as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest international crimes. The other vision, that reflected in the judgement of the ICJ, sees the rules of international law as being intended principally to facilitate relations between states, which remain the principal international actors.

The international criminal tribunals seem to be more in line with the focus on 'rooting out impunity for the gravest international crimes'. The Charters and trials of the International Military Tribunals in Nuremberg and Tokyo following the end of World War II lay the foundation of individual responsibility under international law, referring to crimes against peace, war crimes, and crimes against humanity [7]. According to the IMT in Nuremberg: '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' [8].

Between the end of World War II and the 1990s, the establishment of an international criminal tribunal was often regarded as unrealistic. In 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established under Chapter VII of the UN Charter, as a measure to maintain and restore international peace and security, and based on a UN Security Council Resolution [9]. In 1994, the UNSC adopted a resolution to establish the International Criminal Tribunal for Rwanda (ICTR) [10]. The ICTY and ICTR have turned dormant humanitarian law into a practical and speedily developing body of law.

Contrary to the ICTY and ICTR, the International Criminal Court (ICC) is a permanent court and established by treaty: the 1998 Rome Statute of the International Criminal Court that entered into force on 1 July 2002 and to which currently 108 countries are States Parties [11]. Another difference between the ICC and the *ad hoc* Tribunals can be found in Article 17 of the Rome Statute, which provides that it will only take up cases not (adequately) dealt with by national courts. The ICC has unsealed its first warrants in October 2005. The first person was surrendered to the Court in March 2006: Mr. Lubanga, a former leader of a militia group in the Democratic Republic of the Congo, who has been charged with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. 'The ICC continues its investigations of the situations in Democratic Republic of the Congo, Uganda, Central African Republic and Darfur, the Sudan [12].

Internationalised criminal courts were also established for Sierra Leone, East Timor, Kosovo and Cambodia [13]. As stated by the ICC: 'The Court and the United Nations are each part of an emerging system of international criminal justice. Within that system, the staff and officials of the different courts and tribunals regularly meet to share lessons from their experiences' [14]. With the coming into existence of the tribunals, ICL has become a far more realistic instrument to address international crimes and to prosecute the people responsible. As formulated by Mettraux, the following purposes of sentencing individuals for international crimes can be identified from the jurisprudence of the ICTY and ICTR [15]:

- (i) *retribution*, described as punishment of an offender for his specific criminal conduct; and
- (ii) *general deterrence*, understood as deterrence of future violations of international humanitarian law. In addition to the two principal purposes of sentencing mentioned above, a number of Chambers of the Tribunals have insisted that a sentence should also serve other purposes such as 'individual and affirmative prosecution aimed at influencing the legal awareness of the accused, the victims, the relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced', the 'protection of society, stigmatisation and public reprobation of international crimes', the 'rehabilitation' of the perpetrator, or even 'reconciliation'.

The law that tribunals can apply depends on both international law and on their Statute. For example, crimes against humanity do not as such require a state of armed conflict, but the Statute adds this requirement for the ICTY. On the applicable law, Article 21 of the Rome Statute for the ICC states:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

According to Kor: '[A]s it stands now, we must not see ICL as an autonomous and closed 'system' but as a 'multipolar space', open to interactions between general international law and international human rights law, and between international and national sources' [16].

International crimes

International crimes under ICL include war crimes, crimes against humanity and genocide. A shift toward a humanitarian approach also explains the currently fading difference between the applicable law, and the international crimes it entails, relating to international and internal conflicts. On the distinction between international and internal armed conflicts, the *Tadić* Appeal Chamber stated: 'that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value' and 'if international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight' [17]. For now, the distinction between international and internal armed conflict to a certain extent remains to determine the applicable body of law. 'Grave breaches' of the Geneva Conventions require the involvement of the armed forces of two states in combat, even if only on the territory of one state or with minimum intensity. These and other war crimes will be discussed first.

War crimes

War crimes are serious violations of the laws or customs of war. War crimes can only take place during a state of conflict. To constitute a war crime, a crime must have been closely related to the hostilities. War crimes can be committed by and against civilians and military. Originally, war crimes could not be committed against a state's own nationals. The *Tadić*

Appeals Chamber stated that actual allegiance and ethnicity can be determinative of 'nationality' for the purpose of the grave breaches regime of the Geneva Conventions, more so than formal bonds such as a passport [18].

War crimes include 'grave breaches' of the 1949 Geneva Conventions, which require an international armed conflict and are limited to certain categories of protected persons and properties. Grave breaches of the Geneva Conventions as laid down in Article 2 ICTY Statute are: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking civilians as hostages.

Other serious violations of the laws or customs of war as laid down in Article 3 ICTY Statute include, but are not limited to: employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property.

Crimes against humanity

Crimes against humanity can be committed both in times of war and peace. Crimes against humanity refer to inhumane acts such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population. These crimes can only be committed against civilians.

Crimes against humanity chapeau elements are: 1. an attack (commission of acts of violence); 2. nexus between acts and attack; 3. the attack is directed against any civilian population; 4. the attack is widespread or systematic; 5. the perpetrator must know that his acts are part of an attack on the civilian population. Crimes against humanity as laid down in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute are: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious ground; and other inhumane acts.

Genocide

The crime of genocide mainly resulted from the atrocities of World War II. This crime does not require a state of conflict. Genocide can be committed by and against civilians and military. Genocide contains acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, e.g. by killing members of the group and forcibly transferring children of the group to another group.

The chapeau elements of genocide are: 1. intent; 2. to destroy; 3. in whole or in part; 4. a protected group; 5. as such. Genocide requires a special or genocidal intent to destroy a protected group in whole or in part. Underlying offences are: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. Criminal participation in genocide refers to: committing genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

Individual criminal responsibility

The crimes as laid out above entail individual responsibility. Article 7 ICTY Statute on individual criminal responsibility, similar to Article 6 ICTR Statute, states [19]:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The reference to Articles 2-5 concerns: grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).

Forms of participation

Article 7(1) ICTY Statute entails the various forms of participation. For example, publications that encourage ICL crimes can under circumstances result in instigation. The ICTR in the *Nahimana* Trial Judgment states [20]:

977A. As founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians, the Chamber finds Hassan Ngeze guilty of genocide, pursuant to Article 6(1) of its Statute.

The various forms of participation included in Article 6(1) ICTR Statute are explained in the *Semanza* Trial Judgement as follows [21]:

- (i) Planning
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380. "Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.

(ii) Instigating

381. "Instigating" refers to urging, encouraging, or prompting another person to commit a crime. Instigation need not be direct and public. Proof is required of a causal connection between the instigation and the commission of the crime.

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it.

(iv) Committing

383. "Committing" refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.

(v) Aiding and Abetting in the Planning, Preparation, or Execution

384. The terms "aiding" and "abetting" refer to distinct legal concepts. The term "aiding" means assisting or helping another to commit a crime, and the term "abetting" means encouraging, advising, or instigating the commission of a crime. However, the terms "aiding" and "abetting" are frequently employed together as a single broad legal concept, as is the case in this Tribunal.

Command responsibility

People in power positions often do not personally commit the crimes but enable or allow others to commit them. Command responsibility as formulated in Article 7(3) ICTY Statute can under conditions address their (lack of) actions in such cases. The shared Appeals Chamber of the ICTY and ICTR states on command responsibility [22]:

Thus, whether Article 3 of the Statute is referring to war crimes committed in the course of international armed conflict or to war crimes committed in the course of internal armed conflict under Article 3 common to the Geneva Conventions, it assumes that there is an organized military force. It is evident that there cannot be an organized military force save on the basis of responsible command. It is also reasonable to hold that it is responsible command which leads to command responsibility. Command responsibility is the most effective method by which international criminal law can enforce responsible command.

Criminal responsibility of a superior or commander relates to his/her own acts or failures to act to prevent or punish the acts of others. The criteria for establishing command responsibility are summarised by Mettraux as follows [23]:

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- (i) the existence of a superior-subordinate relationship between the commander or superior and the alleged principal offenders;
 - (ii) the superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and
 - (iii) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Jurisprudence reaffirms that command responsibility can be established for both military and civil superiors, including politicians. In the *Čelebići* case, the Appeals Chamber elaborated on the application of command responsibility to civilian superiors, and reaffirmed that such responsibility can relate to both *de jure* and *de facto* command or control [24].

195. The Trial Chamber, prior to making this statement in relation to the case of Mucic, had already considered the origin and meaning of *de facto* authority with reference to existing practice. Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority. The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I [to the 1949 Geneva Conventions] may be considered as customary in nature. In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control. Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Blaskić* Trial Chamber for instance endorsed the finding of the Trial Judgement to this effect. The showing of effective control is required in cases involving both *de jure* and *de facto* superiors. This standard has more recently been reaffirmed in the ICC Statute, Article 28 of which reads in relevant parts:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court;

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, . . .

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates . . .

Therefore, command or superior responsibility requires establishment of effective (*de jure* or *de facto*) control of a (military or civilian) superior to prevent and/or punish a war crime, crime against humanity or genocide (to be) committed by subordinates.

While effective control may be presumed in case of *de jure* control, the ability to exercise effective control is required for the establishment of *de facto* command or superior responsibility [25]. Command responsibility can be established for more than one person, as stated in the *Krnjelac* Trial Judgment [26]:

Effective control means the material ability to prevent offences or punish the principal offenders. Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his subordinates. Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.

On superior responsibility relating to a leader of a political party, the ICTR in the *Nahimana* Trial Judgment states [27]:

976. The Chamber notes that in *Musema*, the Tribunal found that superior responsibility extended to non-military settings, in that case to the owner of a tea factory. The Chamber has considered the extent to which *Barayagwiza*, as leader of the CDR, a political party, can be held responsible pursuant to Article 6(3) of its Statute for acts committed by CDR party members and *Impuzamugambi*. The Chamber recognizes that a political party and its leadership cannot be held accountable for all acts committed by party members or others affiliated to the party. A political party is unlike a government, military or corporate structure in that its members are not bound through professional affiliation or in an employment capacity to be governed by the decision-making body of the party. Nevertheless, the Chamber considers that to the extent that members of a political party act in accordance with the dictates or instruction of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation. In this case, CDR party members and *Impuzamugambi* were following the lead of the party, and of *Barayagwiza* himself, who was at meetings, at demonstrations, and at road-blocks, where CDR members and *Impuzamugambi* were marshalled into action by party officials, including *Barayagwiza* or under his authority as leader of the party. In these

circumstances, the Chamber holds that *Barayagwiza* was responsible for the activities of CDR members and *Impuzamugabi*, to the extent that such activities were initiated by or undertaken in accordance with his direction as leader of the CDR party.

977. The Chamber finds that *Barayagwiza* had superior responsibility over members of the CDR and its militia, the *Impuzamugabi*, as President of CDR at Gisenyi Prefecture and from February 1994 as President of CDR at the national level. He promoted the policy of CDR for the extermination of the Tutsi population and supervised his subordinates, the CDR members and *Impuzamugabi* militia, in carrying out the killings and other violent acts. For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugabi*, the Chamber finds *Barayagwiza* guilty of genocide pursuant to Article 6(3) of its Statute.

That a superior 'knew' or 'had reason to know' needs to be established beyond reasonable doubt. The *Čelebići* Appeal Judgment refers to the Trial Chamber's statement in stating that a superior [28]:

may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.

Indicators of such knowledge include the number and type of troops allegedly involved and the nature and scope of the responsibility of the accused and his position in the hierarchy [29]. Punishment by the superior of his or her subordinates does not obsolete the duty to prevent their acts; the requirements to prevent and punish are cumulative.

The abuse of a position of authority can also constitute an aggravating circumstance in sentencing. According to Mettraux: 'An individual will not be sentenced more harshly simply because he finds himself higher up in the hierarchy, but his sentence may be aggravated if he has abused or wrongly exercised the powers and responsibilities placed upon him for the purpose of committing or facilitating crimes' [30]. In case an accused has been found guilty for both taking part in the commission of a crime and for failing to prevent the acts or punish the perpetrators, the *Blaškić* Appeal Judgment stated that the conviction will be based on the commitment of the crime while considering the superior position of the accused as an aggravating factor in sentencing [31].

Conclusion

Military commanders and civilian superiors, including politicians, can under conditions be held liable for abusing their power position in relation to the commitment of war crimes, crimes against humanity and genocide. War crimes require a state of conflict, while crimes against

humanity and genocide can take place in both times of peace and war. Criminal forms of participation include committing and ordering such crimes. The abuse of a position of authority can be an aggravating factor in the sentencing. Even if the superior did not get involved in the crime directly, command responsibility can be established if the superior did not prevent his or her subordinates from committing the crime. It can also be established if the superior did not punish these subordinates for committing the crime. Criteria include that the commander or superior had effective control over his or her subordinates, whether on a legal basis or in fact, and knew or had reason to know that they were committing or about to commit such crimes. Command responsibility may be hard to prove, although the jurisprudence of the ICTY and ICTR has shown that the judges will not be easily distracted by legalities such as a *de jure* command or control.

Therefore, people who abuse their position to, for example, cause or maintain a conflict situation at the cost of the human security of population groups, could find themselves accused of having committed international crimes. For example, abusing one's power position to order or allow people to be tortured, disappeared or killed during an armed conflict is likely to constitute a war crime. Instigating the prosecution of members of a certain population group as part of a widespread or systematic attack to safeguard land interests could very well constitute a crime against humanity.

Considering the development of ICL and the more than one hundred States Parties to the ICC, international criminal responsibility has become a suitable instrument to address and discourage certain forms of abuse of power, which can include power abused to serve interests such as in natural resources. The cooperation of States and international organisations is e.g. needed to arrest and transfer accused to international criminal tribunals, and to enable the gathering of evidence. Prosecution of crimes is one of many instruments to address injustice and human insecurity. The media and academic writing can, for example, assist in increasingly providing people with information that exposes the root causes of conflict and international crimes. In addition, positive measures such as peace-building efforts undertaken at the grassroots level can contribute to an environment in which people are less vulnerable to manipulation.

Notes

1. The interviews were undertaken on behalf of a network of development organisations and related to the work of peace-builders in conflict areas.
 2. ICC, Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 3.
 3. In addition to general literature on conflict and natural resources, such patterns were pointed out and confirmed during confidential research undertaken in 2005-2006.
 4. ICTY, Vasiljevic Trial Judgment, 29 November 2002, par. 278.
 5. See on International Criminal Law: G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005; A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003; A. Cassese, P. Gaeta and J.R.W.D. Jones (Eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, Oxford, 2002; L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester
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- University Press, Manchester, 2000; V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, 1998; and R.S. Clark and M. Sann (Eds.), *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia*, Transaction Publishers, New Brunswick, 1996.
6. P. Sands, 'After Pinochet: the role of international courts', in: P. Sands (Ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, p. 103.
 7. On the Tokyo tribunal, see B.V.A. Röling and A. Cassese, *The Tokyo Trial and Beyond*, Polity Press, Cambridge, 1993.
 8. IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, part 22, p. 447.
 9. UN Doc. S/RES/808 (22 February 1993). See ICTY website: <http://www.un.org/icty>.
 10. UN Doc. S/RES/955 (8 November 1994). See ICTR website: <http://www.un.org/icty>.
 11. See <http://www.icc-cpi.int>. See also A. Cassese, P. Gaeta and J.R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court*, Vol. 2, Oxford University Press, Oxford, 2002; P. Saland, Chapter Seven, in: R.S. Lee (Ed.) *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, 1999.
 12. See <http://www.icc-cpi.int>. ICC, Report of the International Criminal Court for 2005-2006, 3 August 2006, UN Doc. A/61/217.
 13. See Romano, Nollkaemper and Kleffner (Eds.), *Internationalized Criminal Courts*, Oxford University Press, Oxford, 2004. See also, for example, <http://www.sc-sl.org>: An agreement to establish the Special Court for Sierra Leone was signed by the UN and the Government of Sierra Leone on 16 January 2002. The Sierra Leone Court: 'It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.' Indictments include charges of war crimes, crimes against humanity, and other serious violations of international humanitarian law. 'Specifically, the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others.'
 14. See [13].
 15. Mettraux (see [5]), pp. 345-346.
 16. G. Kor (2006), discussion paper, part of his PhD research at the VU.
 17. ICTY, *Tadić* Jurisdiction Decision, 2 October 1995, par. 97.
 18. ICTY, *Tadić* Appeal Judgment, pars 164-166.
 19. See for an analysis of this Article e.g. Mettraux (see [5]), Chapters 20, 21 and 22.
 20. ICTR, *Nahimana* Trial Judgment, 3 December 2003.
 21. ICTR, *Semanza* Trial Judgement, 15 May 2003.
 22. ICTY, *Hadžihasanović* Decision of 16 July 2003 on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, par. 16.
 23. Mettraux (see [5]), p. 298.
 24. ICTY, *Čelebići* Appeal Judgment of 20 February 2001. See also ICTR *Kayishema and Ruzindana* Trial Judgment of 21 May 1999.
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25. ICTY, *Čelebići* Appeal Judgment of 20 February 2001. See also, e.g., ICTR Kayishema and Ruzindana Trial Judgment of 21 May 1999, par. 197.
 26. ICTY, *Krnjelac* Trial Judgment of 15 March 2002, par. 93.
 27. See [20].
 28. ICTY, *Čelebići* Appeal Judgment, par. 223.
 29. See Mettraux (see [5]), pp. 301-306 on the knowledge requirement.
 30. Mettraux (see [5]), pp. 353-354.
 31. ICTY, *Blaškić* Appeal Judgment of 29 July 2004, par 91.
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