

FACTS MATTER: A STUDY INTO THE CASUISTRY OF SUBSTANTIVE  
INTERNATIONAL CRIMINAL LAW

This dissertation is a study into the casuistry of substantive international criminal law. It analyses how international criminal courts use the facts of individual cases to shape and develop individual criminal liability for international crimes – that is, war crimes, crimes against humanity, genocide and the crime of aggression.

Chapter I is the prologue to the study. It sketches the background of the research and sets out the hypotheses that underlie it. The basic starting-point of the dissertation is that substantive international criminal law constitutes an open legal system. It is composed of statutory and customary rules that define international crimes and modes of liability in relatively abstract and indeterminate terms (such as ‘superior’, ‘inhumane acts’, or ‘armed conflict’). In this way, the rules attain a so-called ‘open texture’ that makes it difficult to determine which cases fall within the scope of the law and to apply the law deductively. International criminal courts – such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR, respectively) and the International Criminal Court (ICC) – accordingly play an important formative role. In particular in hard cases that are outside the law’s regular scope of application, the courts have leeway to discover and develop the law on a case-by-case basis. Thus, they can give shape and substance to rudimentary international crimes and modes of liability and have the ability to adapt these concepts to the realities of modern warfare.

The openness of substantive international criminal law can be appraised positively insofar as it enables courts to do justice to the specific circumstances of individual cases, to adapt the law to changed conditions, and to progressively advance criminal responsibility for international crimes. At the same time, the law’s susceptibility to change and its opportunities for creative progress also generate a certain degree of uncertainty and fluidity. This creates the risk that courts apply the law in an irregular, unforeseen, or incomprehensible way subject to the personal intuitions of individual judges. To prevent such *Einzelfallgerechtigkeit*, the international principle of legality requires that courts carefully explain and justify their findings according to so-called ‘secondary rules of adjudication’. These rules stipulate normative standards that regulate when and how courts have to clarify the reasons underlying their decisions. This study focuses on the normative standards that control the way in which courts substantiate the classification (of the specific facts) of individual cases under general legal rules. Insights from casuistry are particularly relevant in this respect.

Casuistry takes as a starting-point that the law is inextricably linked to its practical function. This implies that the meaning of the law is not determined by abstract rules alone, but develops in interplay with the questions and issues raised in individual cases.

Courts can thus adapt the law to case-specific circumstances. To prevent that courts abuse the law's context-dependency to freely tweak the law to fit the facts and to apply rules arbitrarily as if they are *lui-même la règle*, casuistry relies on a particular methodology of legal argumentation. This methodology is based on analogical reasoning from precedent. It stipulates that courts should determine whether a rule applies to the facts of an individual case by (i) analysing the previous cases in which this rule was applied; (ii) comparing the facts of the current case with the facts of previous cases; and (iii) evaluating the rule's applicability to the case at hand in light of this factual comparison.

Studies in the field of Artificial Intelligence and Law (AI&L) implement the rather abstract notions from casuistry and translate them into a practical reasoning model that offers concrete guidelines for analysing and structuring the law's judicial development. In particular, AI&L research assumes that courts decide cases on the basis of factors. Factors are open-ended illustrations of legally relevant patterns of facts that courts can use to make and explain their decisions. The existence of a factor does not automatically compel a specific outcome, but merely favours a decision and moves the decision-maker in that direction. To settle a case, courts have to make a holistic assessment and weigh all applicable factors favouring and disfavouring a decision against each other. This weighing exercise is structured and confined by a process of analogical reasoning. In this process, courts reapply prior judicial evaluations of factors in later cases that are characterised by a similar factual context. Thus, the fact that precedent (X) had outcome (Y) in the presence of factors (Z), justifies that the combination of factors (Z) produces outcome (Y) in future cases as well. According to this reasoning scheme, new cases are decided in the same way as precedent cases as long as the similarities between the factors of these cases outweigh the differences.

At first sight, the theory and methodology of casuistry and factor-based reasoning fit well with the open character of substantive international criminal law. Nevertheless, they have as yet played a limited role in studies of this field of law. Research has been focused on the ways in which international criminal courts use sources of law and methods of interpretation to develop a general legal framework of rules and principles. Little of no attention has been paid to the application of this framework in individual cases and to the role of the casuistic methodology of analogical reasoning in international criminal law practice. As a result, the interplay between law and facts remains largely unexplored. This dissertation seeks to fill this lacuna. In particular, it aims to (i) assess to what extent casuistic analyses can help to clarify the meaning and scope of substantive international criminal law and (ii) evaluate how the casuistic method of reasoning can help to structure and restrain judicial argumentation in such a way that the values underlying the principle of legality are respected. To provide such insights, the dissertation uses the

theory and methodology of casuistry to study (judicial reasoning on) three particular concepts/ questions of substantive international criminal law: (i) the policy element of crimes against humanity; (ii) the criminal liability of senior leaders under Joint Criminal Enterprise (JCE) and joint perpetration; and (iii) the contextual embedding of genocide.

Chapter II looks into the policy element of crimes against humanity. Crimes against humanity are crimes that are committed in the context of a widespread or systematic attack against a civilian population. In addition, Article 7(2) of the Rome Statute of the ICC requires that the attack was committed ‘pursuant to or in furtherance of a State or organizational policy’. According to the ICC, this so-called policy element warrants that crimes against humanity are carefully planned and committed according to a regular pattern. Thus, the element allegedly excludes isolated and random acts of violence from the scope of crimes against humanity. The policy element is, however, not generally recognised. In the *Kunarac* case, the ICTY has held that the finding of a policy is not a necessary requirement of crimes against humanity, but a mere evidentially relevant circumstance that courts can use to determine whether a civilian population was attacked in a systematic way. By reasoning in this way, the ICTY has explicitly distanced itself from the Statute and case law of the ICC.

Like the international criminal courts, legal scholars have taken different views on the function and added value of the policy element. Some scholars qualify the policy as a necessary requirement of crimes against humanity that needs to be met before an act can be qualified as a crime against humanity. Others, conversely, argue that the policy element is redundant and lacks a legal basis. They therefore maintain that the finding of a policy can only be taken into account as a relevant factual circumstance for establishing the widespread or systematic attack-requirement. Chapter II gives a new impulse to this debate by examining whether and how the different characterisation of the policy by the ICTY and the ICC has influenced the courts’ use of crimes against humanity in practice. For example, has the ICTY’s rejection of the policy element resulted in a broader concept of crimes against humanity that is applicable to cases of unorganised and randomly committed violence?

To answer this question, chapter II analyses the case law of the ICTY and the ICC by using the casuistic methodology of factor-based reasoning. The case law analysis makes clear that both courts establish crimes against humanity on the basis of similar factual circumstances concerning the preparation and nature of an attack against civilians and the context in which this attack was committed. The ICTY and the ICC thus apply their different theoretical frameworks in a similar way. This can be explained by the open texture of the crimes against humanity concept, which gives courts a certain leeway to nuance theoretical distinctions and to adapt the law to the specific facts of individual cases. Although this does not mean that the policy element will never have any added

value, it does imply that the meaning and scope of this element are shaped by its application in practice. It is therefore necessary to complement the current scholarly debate about the legal status of the policy element with a practical discourse in which the policy element is studied and assessed on the basis of insights from casuistry and factor-based reasoning.

Chapter III is a study into the criminal responsibility of senior political and military figures, such as Slobodan Milošević and Mohammed Al-Bashir. These senior figures normally do not commit any crimes physically. Nevertheless, they are often perceived as ‘the most responsible perpetrators’ of international crimes, because of their involvement in the drafting of political or military policies that underlie the commission of mass violence. To give adequate expression to the central role and principal responsibility of political and military leaders, the *ad hoc* Tribunals and the ICC primarily use two theories of liability: JCE and joint perpetration. Early ICC case law emphasises that these theories are based on different rationales. Whereas the *ad hoc* Tribunals’ JCE concept is allegedly premised on a subjective rationale that concentrates on the accused’s shared intent to implement a common criminal purpose (*mens rea*), the ICC’s concept of joint perpetration is thought to reflect an objective rationale that relates to the accused’s control over the crime (*actus reus*). According to the ICC, the objective ‘control over the crime’ approach allows for establishing a more precise relation between the senior policy-makers and (the physical perpetrators of) the crimes for which they stand trial. In this way, it does better justice to the principles of individual criminal responsibility and personal guilt.

Chapter III scrutinises the distinctive character of JCE and joint perpetration. In particular, it uses the casuistic method of factor-based reasoning to analyse whether the ICTY and the ICC establish these theories of liability on the basis of different factual circumstances. The analysis shows that the criminal responsibility of senior leaders under JCE and joint perpetration is based on similar facts concerning the leaders’ role in the development, implementation and/or execution of the (criminal) policy of a political or military organisation. This analogous practice of the ICTY and the ICC makes the distinction between JCE and joint perpetration in terms of their different rationales untenable. Both theories of liability create an autonomous form of criminal responsibility that focuses on the participation of senior leaders in, and their informed contribution to, certain (criminal) organisations that were involved in the commission of widespread and organised violence. The relation between the policy-makers and (the crimes committed by) the physical perpetrators is thereby left somewhat undetermined. In this sense, JCE and joint perpetration show traits of domestic concepts of functional co-perpetration and participation in a criminal organisation.

The ICTY's and the ICC's approach towards JCE and joint perpetration may seem appealing from a pragmatic point of view. After all, the large (geographical and structural) distance between the policy level and the executive level often makes it difficult to ascertain that senior political and military figures were directly involved in specific international crimes and worked closely together with the physical perpetrators. At the same time, the courts' practice attenuates the link between the accused and the crimes for which he stands trial, thus putting pressure on the principles of individual criminal responsibility and personal guilt. In this light, chapter III argues that there is need for a different approach to JCE and joint perpetration that recognises the autonomous character of these theories of liability and restricts them accordingly. This requires that the ICTY and the ICC critically reflect upon the organisational position and role of senior leaders. For example, they can determine that JCE and joint perpetration may only be applied in relation to persons who made a *structural* contribution to the *criminal* activities of an organisation. By formulating such restrictions, the ICTY and the ICC can develop a more honest and better confined concept of criminal responsibility for senior leaders.

Chapter IV relates to the crime of genocide. The traditional definition of genocide neither contains an explicit contextual element, nor alludes to a collective act. Instead, genocide is primarily characterised by the requirement of genocidal intent: *génocidaires* commit crimes with the specific intent to destroy in whole or in part a national, ethnic, racial or religious group. This raises the question of whether a single perpetrator acting with the intent to destroy can commit genocide. Legal discourse is divided about this question. On the one hand, scholars who adopt the so-called 'goal-oriented' model argue that individuals can commit genocide as long as they act with genocidal intent. On the other hand, adherents of the 'structure-based' model qualify genocide as a form of system criminality and accordingly assert that the conduct of individual perpetrators (*Einzeltaten*) should be observed and valued in light of a collective (destructive) act (*Gesamttat*).

The case law of the international criminal courts shows a similar disagreement. The *ad hoc* Tribunals take as a starting-point that there is no contextual element in genocide. Therefore, genocide can in theory be committed by a lone *génocidaire*. The existence of a collective campaign of (destructive) violence is only evidentially relevant for establishing that the accused acted with genocidal intent. By contrast, the ICC's Elements of Crimes require that the accused's conduct 'took place in the context of a manifest pattern of similar conduct'. The existence of a violent context thus constitutes an autonomous element that needs to be established in each genocide case.

Chapter IV seeks to determine whether and how the different approaches of the *ad hoc* Tribunals and the ICC to the contextual embedding of genocide influence the courts' application of genocide in individual cases. It therefore analyses the relevant case law by

using the casuistic method of factor-based reasoning. The case law analysis shows that the judicial assessment of genocide is subject to the facts of the situation under consideration and is shaped by the legal, historical and political challenges that this situation presents to the court. As a result, the type and level of contextual embedding differ per case. Whereas in some cases the acts and utterances of the individual accused are emphasised, in other cases the focus is on the course and purpose of the violent campaign in which the accused operated. This variable practice calls for a nuanced approach to the strict division between the structure-based and the goal-oriented model. Rather than seeing these models as alternatives that exclude each other, they should be perceived as two poles of a continuum along which the case law of the courts can be positioned.

The variable and case-dependent contextual embedding of genocide by the *ad hoc* Tribunals and the ICC can be explained and justified in terms of the open texture of the genocide concept. This open texture allows leeway for adjusting the meaning and scope of genocide to the specific facts of individual cases. At the same time, we should be mindful that the principle of legality prohibits that courts freely tailor the law to fit the facts. The judicial sensitivity for political and historical realities cannot lapse into an illegitimate use of such realities. To prevent this type of abuse, chapter IV advises the *ad hoc* Tribunals and the ICC to implement the methodology of casuistry more explicitly. Amongst others, it would be useful if the courts specify the relevant facts on which their decisions are based and explain how these decisions relate to the outcome of factually similar precedents. The chapter clarifies that scholars can play an important assisting role in this process by structuring cases on the basis of their common characteristics and by placing them on the continuum between the goal-oriented and the structure-based model.

The case-studies from chapters II, III and IV make clear that substantive international criminal law is not controlled by rules alone, but operates and develops in interplay with the facts of individual cases. Variations in the legal definitions of international crimes and liability theories may consequently have little effect in practice. Whereas international criminal courts sometimes define the law in different ways, their application of the law in individual cases can still be quite similar. Chapter V – the concluding epilogue of the dissertation – takes this finding as a starting-point for a critical appraisal of the reasoning practice of international criminal courts. The epilogue illustrates that the *ad hoc* Tribunals and the ICC accept the law's openness and acknowledge that the statutory and customary definitions of international crimes and modes of liability cannot be applied deductively. Instead, their meaning needs to be established on a case-by-case basis according to a casuistic reasoning process. To structure this process, the courts use different reasoning techniques that fit well with the methodology of casuistry and

factor-based reasoning. For example, they formulate criteria that explain the abstract elements of legal rules in more precise terms and draft lists of facts that are relevant or insufficient for establishing the legal elements and criteria for which they apply. By thus linking the law to specific facts, the *ad hoc* Tribunals and the ICC clarify the law's contours and frame the meaning and scope of substantive legal concepts.

Having said that, the epilogue also shows that the *ad hoc* Tribunals and the ICC have difficulties with making the interplay between law and facts explicit. The courts' judgments do not consistently clarify which facts underlie the decisions, what weight is attached to these facts and how this factual evaluation relates to the legal framework of rules, elements, criteria and precedents. Thus, the courts create uncertainties about the meaning of the law and generate the risk that judges apply the law inconsistently by attaching different relevance and weight to similar factual circumstances. This puts pressure on (the values underlying) the principle of legality. To address such legality concerns, the epilogue argues that the methodology of casuistry and factor-based reasoning should be implemented more explicitly in the practice and study of substantive international criminal law. In this respect, courts and scholars can rely upon the experience of national legal systems with casuistry and learn from the ways in which domestic courts make use of analogical reasoning from precedent. In particular, it seems useful to take account of the so-called reason-model of precedential reasoning, which is especially prominent in common law systems.

The reason-model requires that courts explicate the factors that are relevant for establishing criminal responsibility and clearly link these factors to the circumstances of individual cases. Based on this link, courts can pursue a process of analogical reasoning in which they justify the decision in the case at hand by comparing it to factually similar precedents. By using this reason-model as a framework for structuring judgments, international criminal courts will be able to better explicate the interplay between law and fact. This will contribute to the development of a more clear and confined concept of criminal responsibility for international crimes. Having said that, it can be argued that it is difficult to implement the fact-driven reason-model in international criminal law practice. In particular the process of analogical reasoning may impose a too onerous burden on international criminal courts. After all, international crimes cases usually involve highly complex facts and vast amounts of evidence that courts cannot compare with every applicable precedent in all relevant respects. The epilogue therefore urges legal scholars to assist the courts by conducting methodological research into casuistry and factor-based reasoning. Based on the insights following from this research, scholars can additionally pursue a conceptual and normative line of study in which they analyse and appraise the case law of international criminal courts according to the standards of casuistic reasoning with factors. Such analyses will help to specify and

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regulate the interplay between law and facts further. In this way, they can clarify the meaning and scope of substantive international criminal law and control the application of international crimes and modes of liability in individual cases. The values underlying the principle of legality can thus be upheld without impeding the development of the law.