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Complex criminality - an introduction

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Publication date

2016

Document Version

Final published version

Published in

Complex Criminality

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Citation for published version (APA):

Abels, D. (2016). Complex criminality - an introduction. In D. Abels, D. Bruin, & H. van der Wilt (Eds.), *Complex Criminality* (pp. i-iv). Eleven International Publishing.

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Complex Criminality

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international publishing

Published, sold and distributed by Eleven International Publishing

P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel: 1-800-944-6190 (toll-free)
Fax: +1-503-280-8832
orders@isbs.com
www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-713-5
ISBN 978-94-6274-622-0 (E-book)

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Publishing

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Printed in The Netherlands

Complex Criminality – an introduction

*Denis Abels*¹

This book presents a collection of essays on complex criminality. These essays were written for a national gathering of PhD candidates at the University of Amsterdam on 6 June 2014. Complex criminality, which was the theme of that gathering and is the title of this book, calls for a definition. Is not, after all, all criminality complex? Do not all legal dealings with criminality involve a complex factual and normative analysis of occurrences? And does conduct that is labelled as criminal not practically always involve a complex mixture of, partly interacting non-personal and personal circumstances?

So how can criminality not be considered complex?

Neither does it help to focus on the meaning of the term ‘complex’ if one wishes to get a clearer view of this book’s subject. Aside from ‘complicated’, or perhaps ‘multi-layered’, or ‘multi-dimensional’, the adjective ‘complex’ may have the meaning of ‘sophisticated’, which may at first blush appear difficult to apply to criminality, at least perhaps until one thinks of financial or economic criminality.

‘Complex’ may further refer to some activity that entangles, or complicates subject matter that to an outsider or a lay person does not necessarily seem complex. We often encounter such activity in criminal law. Just like practitioners of other disciplines, criminal lawyers translate a certain factual complex into their own jargon and thereby reduce or interpret facts in such a manner that those directly involved in the factual occurrences may feel alienated from the outcome of such an interpretation or translation.

‘Complex’ may yet have another meaning, *i.e.*, when used, as a substantive, in the phrase ‘the military-industrial complex’. If understood in this sense, complex does not refer to the complicated, or sophisticated nature of the criminality, nor to the activities of lawyers translating seemingly non-complicated subject-matter into legal jargon. It rather refers to the systemic nature of its object.

¹ Mr. Dr. D. Abels is associate professor at the Criminal law department of the University of Amsterdam.

Systemic, then, in connection to criminality, may be understood in at least three different ways. First, it may refer to the context in which criminal acts are committed, a context which may be characteristic or even a constitutive element of specific crimes; a context that may consist of, for instance, a State or a multi-layered organization, one which has certain purposes and officials working for it, occupying different roles or functions. This is what in international criminal law is meant by ‘system criminality’, *i.e.*, 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’.²

Second, systemic may assume the ordinary meaning of ‘system’ as listed in the Oxford Dictionary, *i.e.* ‘a set of things working together as parts of a mechanism or an interconnecting network; a complex whole’. An example would be the digestive system. The emphasis is hereby placed on the operational aspect: the functioning of the whole depends on the cooperation of the parts. If we shift our focus from criminality to criminal justice, then this interpretation of the term systemic makes sense as well. We simply need to look at the contributions of the various stages and agents of the criminal justice process to the system’s eventual output. Such an output has qualitative and quantitative aspects like, for example, a completed trial that may be labelled just, or the punishment of persons found guilty of committing an offence.³ But there appears to be something more to criminal justice than mere output defined in qualitative and quantitative terms. After all, output defined as ‘punishment of those found guilty’, even if that presumes the existence of reliable fact-finding and a fair criminal procedure, still remains rather vague. It does not say anything about the objectives of such punishment, or about what binds the justice apparatus together, aside from a shared strive for a certain output defined in terms of quality and efficiency.

A third meaning of the term ‘systemic’ may provide some further guidance. Complex may assume the meaning, also listed in the Oxford Dictionary, of ‘a set of principles or procedures according to which something is done; an organized scheme or method’. It is not difficult at all to see how the phrase ‘*procedures* according to which something is done’ is relevant to criminal justice and, more specifically, to the law of criminal procedure. Examples are evidence law and regulations governing unlawfully obtained evidence.

² A. Nollkaemper, ‘Introduction’, in: A. Nollkaemper and H. van der Wilt, *System Criminality in International Law*, Cambridge: Cambridge University Press 2009, p. 1-25, at 1.

³ These qualitative and quantitative aspects can, of course, not be completely separated in a criminal justice apparatus governed by the rule of law in a democratic society.

It would be more challenging to apply the phrase ‘a set of *principles* according to which something is done’ to criminal justice. Is there a set of principles that bind together criminal justice, all of its agents, and all of its stages? When searching for such principles, it might be convenient to link up with notions are usually referred to for this very reason, *i.e.*, the notions of retribution and prevention as overarching goals of criminal justice. If, however, retribution were the main principle, or objective, guiding the legislature when establishing sanctioning norms, would this necessarily require its expression an application in the other, subsequent stages of criminal justice? Back in 1975, Jonkers argued that, for a proper understanding of penal principles, a distinction must be made between the levels of legislation, application (by which he meant sentencing) and execution.⁴ According to him, these levels are not strictly separated. The level of execution refers to that of application which, in turn, refers to that of the legislature. The lower level should always take into account the aims governing the higher level(s).⁵ More contemporary scholars have, however, argued that the execution stage does neither look back at the sentencing phase, nor at the legislature’s purposes of punishment, but is rather forward looking, thereby assuming a character that differs from criminal justice’s other phases or stages. They recognize the existence of a relative autonomy that exists between the principles and purposes that guide sentencing judges and those that govern the enforcement stage.⁶

It may, therefore, be doubted that there exists some bunch of principles that can or ought to guide the whole gamut of criminal justice, which would render criminal justice a system under the third meaning of ‘systemic’.⁷ In other words: although *complex* criminal justice, may be understood as a *system* according the first and second meaning of systemic as described above, this does not yet imply that ‘one size fits all’ principles can be applied to all the different aspects and stages of criminal justice.

What transpires from the foregoing thoughts, is that ‘complex criminality’ is a very broad notion with many distinct meanings, *e.g.*, complicated criminality, which may actually apply to all forms of criminality, sophisticated criminality, common facts

⁴ W.H.A. Jonkers, ‘De strafrechtelijke straf: inhoud, grondslag, doeleinden’, in: Y. Buruma (ed.), *100 Jaar Strafrecht. Klassieke teksten van de twintigste eeuw*, Amsterdam: Amsterdam University Press 1999, p. 163-176.

⁵ W.H.A. Jonkers, ‘De strafrechtelijke straf: inhoud, grondslag, doeleinden’, in: Y. Buruma (ed.), *100 Jaar Strafrecht. Klassieke teksten van de twintigste eeuw*, Amsterdam: Amsterdam University Press 1999, p. 163-176, at 174.

⁶ D. van Zyl Smit & S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 76.

⁷ See, more detail, Denis Abels, ‘Limiting the Objectives of the Enforcement of International Punishment’, in: Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System*, Edward Elgar Publishing 2016.

rendered more difficult to understand for lay persons as a result of a translation into criminal legal jargon, or the systemic nature of certain crimes. This wide diversity of understandings is exemplified by the papers contained in this book, which cover a wide range of topics while they, nonetheless, all deal with complex criminality.