This dissertation explores the jurisdictional and factual boundaries of international prosecutions of core international crimes, i.e. war crimes, crimes against humanity, and genocide. By nature, such crimes have indistinct factual parameters. They generally occur on a massive scale, spread out over a large geographical area and a long time span, involving many perpetrators at various distances from the crime scene(s). These characteristics make international crimes difficult to demarcate from start (when determining the jurisdictional scope for the investigation in its earliest stage) to finish (pronouncing the final judgment on the charges as delineated in the indictment). Accurate jurisdictional and factual demarcation of international crimes prosecutions is important, though, for many reasons and from various perspectives: victims have an interest in knowing whether the particular harm they suffered is being dealt with in the criminal case addressing the events giving rise to international criminal charges; an accused must be notified of those charges and the exact events he or she personally stands accused of; moreover, if a particular international criminal court or tribunal does not have jurisdiction over (part of) the events, which domestic or international institution will deal with what happened on the ground, or in other words, how are impunity gaps addressed?

There are certain legal and factual characteristics of international crimes that differ from ordinary domestic crimes – i.e. a single murder or robbery committed in no discernible political or historical context. Characteristics such as the contextual element of an armed conflict, the massive scale upon which such crimes and victimization occur, and the wide range of perpetrators involved act as differentiating factors relevant for the parameters of the case. The premise here is that, despite institutional and legal diversity amongst national and international tiers of international criminal law (ICL) enforcement, the crimes and their typical features are the common factors that bind the ICL field. Instead of magnifying the differences between systems’ substantive and procedural laws, this dissertation departs from this crime-based common ground.

The main research question addressed in this dissertation is: what are the outer limits of an international criminal prosecution? Exploring the outer limits of international criminal prosecutions entails researching those legal aspects that influence demarcation: jurisdiction, charges, and identifying material facts by adequately distinguishing them from background information and evidence for the purpose of the indictment. Thus, the chapters in this dissertation, which consists of articles previously published or accepted for publication as indicated per chapter, deal with demarcation issues on various levels, taking the nature of international crimes as point of departure.
The first part of this dissertation, titled The Nature of the Crime, deals with this point of departure in Chapter 2 by exploring the sui generis nature of international crimes and the goals usually associated with international criminal justice. This Chapter shows that certain typical features of international crimes set these crimes apart from ordinary crimes. Such features lead to an exponential increase of information that must be considered and managed at all stages of investigation, prosecution, and adjudication. The amount of information can help prove the relevant fact where, due to subpar quality of individual pieces of evidence, it serves the purpose of corroboration (and not merely repetition). But quantity also leads to time- and information-management problems that should not be underestimated, and that may contribute to difficulties discussed in Parts II and III of this dissertation. Chapter 2 does not come up with new evidentiary rules allowing to better deal with the tremendous amount of information relevant in the prosecutions of international crimes. Instead, it illustrates the point that the search for procedural solutions that may prove effective in international crimes cases both at the international and national level should proceed from the systematic review of the unique characteristics of international crimes. Such a review will also be indispensable for identifying the problems intrinsic in core crimes prosecutions, such as demarcation difficulties, and the extent to which the available solutions provide an adequate response to those problems.

The second part of this dissertation, titled Factual Demarcation at Case Level and consisting of Chapters 3 and 4, discusses demarcation at the micro level of individual cases. Chapter 3 explores the factual scope of an international criminal prosecution by seeking to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences (lack of) specificity? The focus is therefore on case demarcation in light of an investigation or a case against an identified suspect or accused, and centers on the indictment phase of criminal proceedings. The Chapter identifies pleading principles (listed in Appendix 2) as developed at the international criminal courts and tribunals, and researches the difference between material facts, subsidiary facts, and evidence (outlined in Appendix 1). This Chapter also contains a review of all historical post-WWII indictments, both the international ones and the military ones. Since the indictment is the core document providing notice to the accused, it is of paramount importance to ensure charges are specific, and material facts, upon which the case’s outcome depends critically, are distinguished from subsidiary facts and background information. This Chapter addresses these issues of vague charges and evidentiary imprecision from new angles, being mindful of the fact that the accused’s right to know the case against him or her embodies the essence of a fair trial: the right to defend oneself.

Chapter 4 continues researching case demarcation at the micro level by taking a closer look at Regulation 55 of the ICC’s Regulations of the Court. Pursuant to this provision, the Chamber may modify the legal characterization of facts in its final judgment as long
as the new legal label does not exceed the facts and circumstances described in the charges. Building upon the pleading principles as identified in the foregoing chapter, Chapter 4 addresses the question which changes are permissible. It not only scrutinizes the ICC’s relevant case law to date, but also explores additional feasible types of recharacterization, i.e. with respect to changes regarding the contextual elements, the underlying (sub)categories of crimes or the form of participation. It then assesses for each type of alteration of a legal characterization of facts whether it (hypothetically) exceeds the facts and circumstances described in the charges of a case. Recharacterization must not exceed the facts and circumstances described in the charges, but material facts and their legal qualification are like communicating vessels. Changing the latter affects the former (and vice versa). In their application of Regulation 55 to date, ICC chambers have underappreciated this, treating cases as if they have blurry factual boundaries where material facts can be swapped, neglected, or created at will. This Chapter is not a plea for abolition of Regulation 55, though, but explores which modifications are permissible, and finds that when comparing a change regarding the contextual elements or (sub)categories of crimes to a change regarding the mode of participation the latter is most problematic and often detrimental to the rights of the accused.

Continuing the demarcation theme, the third part of this dissertation, titled Jurisdictional Reach of the International Criminal Court, consists of two chapters dealing with demarcation at the macro level, addressing jurisdictional delimitation of the ICC. Chapter 5 deals with admissibility in light of the due process thesis – the idea that, through the principle of complementarity, the ICC positively influences domestic due process protections. It scrutinizes critiques of the due process thesis by assessing whether there is a legal basis for the Court’s influence through an analysis of two of the Rome Statute’s safeguards against failing national justice systems, namely the admissibility criteria found in Article 17 and Article 20(3). It shows that the Court’s influence may extend to domestic due process rights. The Rome Statute’s complementarity principle leaves room for such an interpretation, inter alia, by demanding regard to due process as recognized by international law when the Court assesses admissibility – a liberal interpretation of which is known as the due process thesis. However, the Chapter suggests a narrower approach, only in cases of gross violations of core fair trial rights. Then, the Chapter examines how this moderate form of the due process thesis might affect evidence law. The reason for this is twofold. First, most evidentiary rules can be construed as a form of due process protection, rendering them a comprehensive area of law suitable for examination. Second, evidence law is inseparable from the practical problems of fact-finding impediments, which are currently widely discussed in the international criminal justice discourse.

Chapter 6 addresses the other side of the coin and makes demarcation at the macro level more concrete by researching situational demarcation in light of the ICC triggering and jurisdictional scheme. The Chapter explores the outer limits of the ICC’s factual reach
by examining whether the jurisdictional scheme of the ICC Statute, which in fact regulates the first step of demarcation, at times leads to inherently unrealistic conditions or demarcation difficulties. It uses two case studies pertaining to the Middle East and North Africa region to do so: (1) the ICC’s problematic jurisdiction over foreign fighters joining the ranks of the Islamic State (IS); and (2) Palestine’s accession to the ICC Statute. The triggering mechanisms and the preconditions for exercising jurisdiction are two separate matters and they should be carefully distinguished from one another in order to allow for exact situational demarcation of an examination or investigation. The two case studies in this Chapter show, however, that the jurisdictional scheme of the Rome Statute is complex and at times inevitably restricted, especially if active nationality is the basis for jurisdiction. What this Chapter also shows is that demarcation at its earliest stage – the ICC’s (triggering and) situation phase – is inevitable entangled with questions of public international law such as those regarding statehood, and even larger questions of how the Court operates in the world today. Particularly the rise of the Islamic State and the perpetual crisis in the Middle East demonstrate that demarcating the jurisdictional reach of the ICC, while technically a strictly legal matter, is an endeavor fraught with global politics – a realm in which the Court is merely one of many pawns.

What became apparent in this study is that the problems regarding the indistinct parameters of international crime prosecutions – caused by the challenges mentioned in the Introduction and Chapter 2: fact-finding impediments, the complexity of facts, the quantity of evidence, the magnitude of the crime, and the pursuance of idealistic goals – attach to one particular aspect of the prosecutorial effort most frequently, especially where the factual boundaries on the micro level are being examined: unearthing the connection between the accused and the crime(s). This connection is often the subject of legal dispute and scholarly debate in the international criminal justice field, and rightly so. Especially from a substantive law point of view, it has been observed many times before that there is an inherent ‘linkage’ challenge in terms of modes of liability in international crime cases. Also, the many studies into fact-finding impediments have shown the practical difficulties of establishing the position of the accused vis-à-vis the crime(s), and finding reliable linkage evidence to that end. However, the demarcation approach taken in this research sheds new light on the linkage dilemma. As such, this dissertation does not illuminate the modes of participation debate or the practical fact-finding concerns, but centers on that which lies in between and is often overlooked: the legal ramifications of how facts and evidence are used and the jurisdictional schemes that influence the overall parameters of international criminal prosecutions.

Summary