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Individual Criminal Responsibility of Corporate Leaders

A Comparison between International Criminal Law and Domestic Law

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Summary

The thesis investigates the expectations of international criminal law on the prosecution of corporate leaders on an international and domestic level for international crimes based on the sources, purposes, and principles guiding international criminal law. Also, this thesis examines whether domestic law, here Swedish, is compliant with the obligations and expectations presented by international criminal law. Moreover, the thesis aims to put the Swedish regulation on aiding and abetting into an international context by comparing the legal status to international and other domestic scholarship.

Although no business leaders have been put on trial on an international level for the commission of international crimes, guidance can be sought from international and domestic jurisprudence for civilian and military leaders. International criminal law requires an aiding and abetting act to have a 'substantial contribution' to the principal crime. However, the demarcations of the definition must be assessed by each singular case. In contrast, neither Swedish nor German law poses the same type of causality requirement. Further, the *actus reus* on aiding and abetting in Swedish law stretches far compared to other domestic regulations, motivated by alleged universal applicability of the general provisions of the Swedish Criminal Code in domestic courts. For *mens rea*, the Swedish rules accept all kinds of intent, while international criminal law requires a high *mens rea*. A distinction between neutral business activity becomes relevant for both *actus reus* and *mens rea* for the legal assessment overall.

The high thresholds of international criminal law seem to be motivated by the gravity principle and the mandate of the ongoing institutionalisation of the International Criminal Court (ICC) in international criminal law. However, the thesis finds that the investigated state which shares the jurisdiction over international crimes differs from the ICC in legislation and application of domestic and potential international norms. Ultimately, the conflict touches upon the inherent mixture of historically emergent principles of ICL respectively criminal law, making the individual, representing the collective corporation, stand out in a collective context of international crimes. In sorting the myriad of potential perpetrators in the broad collective context of international crimes, thresholds are of utmost importance for foreseeability and proportionality. The thesis finds that international criminal law's foreseen purposes are currently under development concerning the current legal status of aiding and abetting for corporate officers representing corporate responsibility in a globalised world.

Sammanfattning

Uppsatsen undersöker den internationella straffrättens förväntningar på ansvarighållandet av företagsledare på individnivå. Vidare utreds huruvida nationell rätt, här svensk rätt i jämförelse med tysk, uppfyller de krav och förväntningar som den internationella straffrätten ställer på nationell reglering. Dessutom syftar uppsatsen till att sätta svensk reglering av medverkansansvar för företagsledare i en internationell kontext genom att undersöka rättsläget utifrån internationell och komparativ doktrin.

Trots att ingen företagsledare hittills har ställts inför rätta på internationell nivå för folkrättsbrott kan vägledning för förväntningar återfinnas i rättsfall för civila och militära ledare med medverkansansvar. Generellt sett kräver den internationella straffrätten en viss tröskel för ett kausalsamband mellan den huvudsakliga och den medverkande handlingen, där graden av samband får avgöras i varje enskilt fall. I kontrast ställer varken svensk eller tysk rätt samma typ av höga tröskel på kausalsamband. Vidare omfattar den svenska medverkansläran en bred syn på *actus reus* i komparativ jämförelse som motiveras av en påstådd allmän räckvidd av medverkansreglerna i svensk domstol. För *mens rea* accepteras alla former av uppsåt inom svensk rätt, medan den internationella straffrätten huvudsakligen kräver de mer allvarliga formerna av uppsåt. Vidare är det av vikt att kunna skilja på olika typer av företagsaktivitet för bedömningen av *actus reus* och uppsåtsbedömningen.

Den internationella straffrättens trösklar verkar motiveras av allvarlighetsprincipen och den framväxande institutionaliseringens mandat hos ICC för internationell straffrätt. Uppsatsen finner dock att de ansvarsbärande subjekten för åtal av internationella brott, ICC och enskilda stater, skiljer sig åt beträffande normer och deras applicering i domstol. I slutändan handlar konflikten enligt författaren om den inneboende striden i föreningen mellan historiskt belagda principer hos den internationella straffrätten och hävdvunna grundsatser inom straffrättsdogmatiken; här möter individen i form av en företagsledare en kollektiv kontext i folkrättens brott. Vid en bedömning av relevanta gärningsmän och främjare är juridiska trösklar viktiga för förutsebarhet och proportionalitet. Uppsatsen finner att den internationella straffrättens avsedda syften befinner sig i ett utvecklingsstadium avseende företagsledare som representerar företagsansvar i en globaliserad värld.

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Preface

First, thank you to my supervisor, Christoffer Wong, for your guidance and many good ideas.

Thank you, Dankeschön, Merci Beaucoup and *Tack så mycket* to the countries, persons, cities, and experiences which have shaped me and my law degree. I have had the pleasure and privilege to spend my time as a law student in four European countries which have all taught me so much about law and myself. Also, the experiences have led to further career and personal choices. Thank you to Hamburg, Vienna, Paris, and finally, to Lund, where everything started and ended.

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Caroline Halfvarson
Paris, 23 May 2022

Abbreviations

ATCA	Alien Tort Claims Act
BGH	Bundesgerichtshof
CIL	Content of Customary International Law
CSR	Corporate Social Responsibility
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Charter of Human Rights
EU	European Union
ICC	International Criminal Court
ICCSt	International Criminal Court Statute
ICJ	International Commission of Jurists
ICJSt	Statute of the International Court of Justice
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTRSt	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTYSt	Statute for International Criminal Tribunal for the Former Yugoslavia
IL	International Law
ILC	International Law Commission
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
NMT	Nuremberg Military Tribunal
SCSL	The Special Court for Sierra Leone
StGB	Strafgesetzbuch
STL	Special Tribunal for Lebanon
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
VStGB	Völkerstrafgesetzbuch
WWII	The Second World War

1 Introduction

1.1 Problem

In an increasingly globalised world, transnational corporations may contribute to international crimes in pursuit of global trade. Currently, it is unconventional and cumbersome to prosecute corporations, leading to prosecution of their leading natural individuals on an international and domestic level. Although both domestic and international tribunals, mainly the ICC, have pledged to prosecute business leaders, very little is done in practice, resulting in an accountability gap both from a geopolitical and legal point of view.

For the longest of times, war and mass atrocities have unfortunately been ever relevant for human society. In times of conflict, several actors cooperate in promoting and continuing atrocities and the conflict itself: Governments and government representatives, paramilitary groups, natural individuals, and corporations. Legal entities have become increasingly more important in a growing globalised world, rendering them much power which can be used to control conflict. However, corporations are almost never prosecuted for international crimes. The debate on the physical individuals representing corporations in ICL is intense, arguably dominated by aiding and abetting. The debate is visible in a diversion in international jurisprudence and controversies among scholars in the ICL field, resulting in a plethora of academic literature and the formulation of the ICCSt.[1]

In general, according to ICL, it is unconventional and difficult to prosecute a corporation *per se*. Instead, its leaders might bear the blame due to the prevalent opinion that corporations cannot be criminally responsible.[2] It becomes relevant to look to the rules for individual prosecution when assessing the potential criminal liability of business leaders in such scenarios. The unconventionality and difficulty to prosecute individuals for corporate international crimes mainly manifest in unclear definitions on international norms on the legal area, referred to *Wirtschaftsvölkerstrafrecht* (economic international criminal law). Also, the lack of international and domestic case law contributes to the uncertainty of the legal position and approach to adequately prosecute business leaders. In addition to that, the current national legal systems typically differ from the relevant frameworks on individual perpetratorship for ICL. It might be true that the national outlook on criminal law has unexpected effects on the application of international criminal law in domestic courts.

[1] M.J. Ventura (2019), 4, 24.

[2] G Werle & F Jessberger (2020), 54.

In conclusion, the legal regulation in international criminal law applicable to business leaders is fragmented and arguably unsatisfactory. Moreover, it is not – and does not need to be – identical with the domestic law applied in individual states. As a result, the expectations of ICL *per se* and on national law might be unfulfilled in practice, potentially resulting in questionable findings in matters of justice and responsibility for victims, legal entities, and natural individuals. Also, the further development of ICL might be affected by the current legal position for corporate leaders.

1.2 Purpose

The purpose of this thesis is to present a comprehensive yet clear discussion on aiding and abetting in ICL and domestic regulation. Hopefully, this purpose and thereby the result of this thesis could shed some light on the unclear legal status of natural persons representing corporate entities taking part in international crimes, both on an international and domestic level.

Furthermore, the author aims to explore the legal status of business leaders in international criminal law. The author aims to clarify that individuals are to be investigated in this thesis. In order to do so, she discovers which mode of criminal liability is suitable for corporate leaders. Moreover, the collective context of international crimes might interfere with the individual criminal liability. The theme of individuals committing international crimes might give rise to clashes between individualism and collectivism which the author wishes to investigate further.

Thereby the author thinks it is interesting to compare the international status with the legal reasoning on individual perpetratorship for corporate leaders in a national court to discover any coherence and discrepancies in legislation and interpretation of domestic norms and IL. Furthermore, since the law degree of the author is Swedish, she will investigate the Swedish criminal legal system. In conclusion, she will focus on the individual perpetratorship of corporate leaders in war crimes from an international legal point of view and look at its effects in the Swedish legal system.

Moreover, the author wants to look at international crimes, specifically war crimes. The author believes that war crimes are interesting from a legal point of view to analyse, due to their potentially broad spectrum of actors, where legal entities could – and have throughout history indeed – played a role. Finally, the author seeks to provide a comparative study of domestic legal systems compared to international criminal law. Here, the author investigates the Swedish in relation to the German criminal legal system. Overall, she will focus on the application of international criminal law and criminal law within the Swedish system.

1.3 Questions at issue

This author aims to answer the following questions:

Does the Swedish legal system in comparison to the German criminal law fulfil the obligations and expectations of international criminal law in its application of the principal provisions and norms ruled by international criminal law for business leaders?

To answer this question, the author attempts to answer the following sub-questions:

- What obligations are upheld by international criminal law for physical individuals representing legal entities who are committing crimes?
- How could criminal responsibility for business leaders be framed in international criminal law? What components do the potential modes entail?
- What rules are applicable in Swedish law for business leaders related to war crimes? How do these norms compare to ICL and German criminal law?
- What legal expectations are set by international criminal law on domestic law on the topic? What is expected out of ICL? Why?

1.4 Scope of study

This thesis concentrates on international criminal law and its application in international and domestic courts. Since domestic courts are ruled not only by international law but also by domestic legislation, both ICL and Swedish law will be relevant to the thesis. The international frameworks will primarily extend to the most established courts, including the ICTY, the ICTR, the ECCC, the STL, the SCSL, and the ICC. However, the author will focus on the ICC and the *ad hoc* Tribunals, as the first one is the most established court of today and as the *ad hoc* Tribunals convey CIL.[3]

Oftentimes, the author will investigate the limits and possibilities of the ICC and the ICCSt. In general, the author will focus on international crimes and more specifically war crimes as described in the ICCSt. Although they do not represent CIL, or ICL overall *per se*, the ICCSt does indeed aim to animate CIL. Also, the institutionalisation of the ICC is still ongoing. In conclusion, the author believes that the weaknesses of the ICC and ICCSt could be compensated by its emerging status as one of the most relevant sources to assess the legal boundaries of ICL.

Moreover, this author borrows the delimitations on 'business leaders' from Hans Vest as "top actors of a (transnational) commercial company established under private or public law", e.g., members of the board, managing directors, and majority shareholders.[4]

[3] N Farrell (2010), 886.
[4] H Vest (2010), 852.

1.5 Delimitations

Profit-driven legal entities can take part in international atrocities in several ways, primarily by either aiding someone else in their criminal activity or by building the business idea on a criminal offence according to international law.[5] Van den Herik and Cernic point out that corporations usually are not the actual organiser of international crimes but instead benefit from a given situation and exploit the financial opportunities of those circumstances.[6]

In this thesis, this author chooses to focus on the former concept as there probably, and hopefully, are more "innocent" companies than dubious legal persons operating in the world, meaning the legal material in question would be relevant to a larger quantity of companies. Also, such an approach makes the legal questions of *mens rea* presumably more interesting.

Moreover, this author adopts this alternative out of philosophical reasons, too; companies showing their true colours by taking part in atrocities is a charged topic since it often involves established companies with inter-state bonds, which in turn could be connected to a fear of prosecution for the country in the matter and the general external view of companies with strong ties to its country of origin.[7]

Currently, the debate of corporate liability for international crimes primarily concerns war crimes which indicates them being an appropriate object of investigation. Moreover, for her questions, the author chooses not to investigate crimes against humanity, although they also could be relevant considering business activity. However, crimes against humanity only target the civilian population, whereas war crimes include civilians and combatants.[8] Consequently, more possible scenarios are included by war crimes, which fit to the other delimitations chosen by this author.

Moreover, this author adopts Hans Vest's model to determine business actions as criminal. The test is twofold, where the first step consists of determining the length between the business conduct and the criminal act, and the second step revolves around the knowledge of the business leader about the foreseen crime. The closer the proximity and the greater the knowledge, the more likely it is that commercial activity amounts to criminal activity.[9] Such will be the actions the author will apply to her thesis.

Finally, acts by omission will be excluded from the scope of study. These primarily concern main perpetrators, which it will become clear will not be

[5] J Kyriakakis (2021), 4.
[6] L Van den Herik & J.L. Cernic (2010), 742.
[7] Kyriakakis (2021), 9.
[8] G Mettraux (2006), 321.
[9] Vest (2010), 853.

the relevant mode of perpetration. Moreover, the author chooses to limit the thesis in the way that attempted crimes are excluded.

1.6 Method

The main question treats the law as *de lege lata*, in line with Swedish and international legal tradition. To answer her questions, the author will use a dogmatic legal method by laying down relevant international and Swedish rules to be interpreted and discussed. A hierarchy of sources is an integral part of the dogmatic legal method, which becomes relevant when ascertaining the legal position on areas which might or might not be readily defined.[10] I have turned to all sources available to comprehend the essence and the possible interpretation of the law. Thus, sources of international law and domestic law will be investigated to understand the legal position well with the pursuit of answering the questions at issue. Also, the author has chosen to use second-hand sources by scholarship. She motivates this by a wish to cover the debate on the thresholds on aiding and abetting. Also, scholarship is essential to understand the

Moreover, the author will be using a comparative method as she investigates expectations concerning reality. Also, the comparative method proves itself valuable when evaluating different jurisdictions, here Swedish criminal law in comparison with international law and German criminal law. When comparing international law with domestic law, the author will use a civil law approach rather than one focusing on common law due to the Nordic and civil legal character of the thesis. In addition, she will use theories of criminal law applicable to both international and domestic criminal law.

1.7 Material and status of research

The thesis and its analysis will be built on books, articles, and electronic sources written by scholars and lawyers within international criminal law. Several the sources will explore what the law should be, *de lege ferenda*, while the majority focus on the demarcations of the applicable law, *de lege lata*; however, the focus will be on *de lege lata*. As the topic of the ICL part is scrutinised and disputed, the author will try to cover both sides of the debate. However, she will primarily pick sources from the most established scholars to convey the basic concepts.

Corporate liability and individual perpetratorship for natural persons representing corporations is an emerging large field of law in doctrine, often referred to as *Wirtschaftsvölkerstrafrecht* in German doctrine (international economic criminal law). However, case law is minimal. Literature ranging from classic pieces on international criminal law, to articles, bring up

[10] J Kleineman (2018), 21–28.

corporate liability, both represented by legal and physical persons, and appropriate modes of liability. Here, very extensive doctrine is present, as scholars aim to understand the delimitations of the liability modes existing today, primarily the ones found in the ICCSt, on hypothetical scenarios concerning corporate leaders.

For domestic regulation, Swedish scholars argue that the broad application of the domestic rules on aiding and abetting are discussed, which is briefly summarised in the chapters focusing on Swedish law. Also, scholars establish the rather weak position of IL in Swedish law, maybe explaining the lack of any discussion on aiding and abetting in relation to ICL, especially focusing on corporations. Still, the anthology 'Lagföring i Sverige av internationella brott' edited by Mark Klamberg presents an extensive overview of domestic prosecution in Sweden of international crimes and is a cornerstone to the sources of this thesis.

International scholars, and to some degree, also Swedish scholars, examine options *de lege ferenda* for prosecuting legal entities for international crimes. However, there is very little discussion on the *de lege lata* application of Swedish rules for natural persons representing corporate entities for international crimes. Although criminal complicity is common and potentially represented by legal entities, a legal accountability gap exists for corporate leaders of legal entities in Swedish law, and to some degree, in ICL. Due to the lack of examination of the intersection between ICL and domestic rules on aiding and abetting, the author believes this thesis could make a humble contribution to an emerging discussion.

1.8 Disposition

Firstly, the author will present a background on the connection between corporations, international criminal law, and adjudication on an international level to illustrate the interconnections which contribute to and limit the expectations and abilities of ICL to prosecute natural persons of corporate entities. To investigate the accountability for such persons, the third chapter treats individual perpetratorship on an international level based on sources of ICL to investigate the legal status of corporate officers. She also accounts for a historical overview of individual perpetratorship, especially for war crimes, to assess expectations and the width of ICL as a tool to hold corporate leaders accountable. Also, the author makes a comparison between international crimes and domestic crimes to conclude any differences in legal spirit, legal theories, and application of the law in relation to both types of crimes.

In the third chapter, the author develops the legal status by accounting for individual perpetratorship for physical perpetrators of international crimes. Moreover, the author here discusses and chooses among appropriate modes of individual perpetratorship for persons representing corporations.

After choosing an appropriate mode of liability, the author explains its requirements in chapter five to describe the obligations ruled by international law. After that, she writes in chapter six about the chosen mode requirements in domestic law, using the former chapter as a backdrop to domestic regulation and incorporation of ICL.

The seventh and final chapter provides an analysis and conclusion to her questions which have not been covered thus far in this thesis. The analysis mainly covers a comparison between chapter five and six, i.e., between international and domestic law, to reach conclusions about potential discrepancies and coherence.

2 Background

Criminal activity is rarely a concern of singular participation but rather the work of a complex structure, which often is valid for international crimes, too. International crimes are the manifestation of a widespread attack from multiple sources. Often, domestic, and international legal entities are involved in international law offences, especially in zones of weak governance and conflict. Moreover, there is abundant evidence showing the large extent of the participation of corporations in the commission of international crimes.[11]

Today, most international crimes occur in sub-Saharan African countries and the Middle East, the so-called Global South. The main perpetrators, i.e., the governments and paramilitary groups, can be held accountable in front of national courts or the International Criminal Court if the country in question has adopted the ICCSt. Furthermore, governments and paramilitary groups can be aided by international companies which often happen to be of European or Western origin, creating a geopolitical gap on accountability for crimes taking place in the Global South. Moreover, Kyrikakais points out that such transnational companies as an institution have their roots in colonial corporations whose form has been later incorporated in their European home states[12], where she is supported by Marxist-oriented Baars.[13]Also Jessberger and Geneuss argue that profit could be the driving force before war as it is 'a money making business'.[14] Jessberger alone brings up statistics showing the importance of economic interests as an 'essential driving force' to the commission of international crimes.[15]

Transnational companies have been estimated to make up for around 80 per cent of global trade. This type of economic size translates to a vast political

[11] Van den Herik & Cernic (2010), 739; ICJ (2008), 1.
[12] Kyrikakais (2021), 9-12.
[13] G Baars (2012), 117.
[14] F Jessberger & J Geneuss (2010), 695.
[15] F Jessberger (2010), 801.

influence over the regulatory framework on an international level, although the legal systems are still mainly national, which creates an imbalance between the law and contemporary international corporate structures.[16] As a matter of fact, Kyrikakais points out that the economic power of some transnational corporations can be explained as real political power working against unfavourable regulation of corporate interests.[17] In fact, the challenge of establishing accountability mechanisms for powerful economic actors has been recognised by the international legal community, although mechanisms remain unsettled and the debate is heated.[18] Plomp notes that ICL tends to 'negate the contributions of businesses and other economic actors to armed conflict' and summarises the contributions of ICL on businesses as a matter of a political question.[19]

Kaleck and Saage-Maaß argue that the accountability gap is due to a wish to maintain domestic and commercial power structures, which businesses typically uphold as key economic players, as seen in both the Nuremberg Trials and the South African truth and reconciliation process.[20] Jessberger also claims that the IMT procedures were undertaken in an era marked by '(...) understanding the German industrialists more as partners than as enemies'.[21] Like Baars and Jessberger, Kaleck & Saage-Maaß argue that the Allies abstained from prosecution of key economic players in order to focus on the reintegration of the German economy into the Western world.

Moreover, Kaleck and Saage-Maaß relate the accountability gap to normative problems existing in ICL. Firstly, they bring up the problem of subjectivity in IL as business leaders, or businesses for that matter, do not adhere to the state principle, which dominates, and according to a large part of doctrine, is the only subject to IL. Secondly, drawing the line between business activity amounting to criminal offence and neutral actions regarding criminally relevant contributions becomes pertinent but challenging. Furthermore, Kaleck and Saage-Maaß mean that the current provisions on ICL for enterprises and their leaders are insufficient. Lastly, they point out that conflict resolution and reconciliation usually focus on the main perpetrators, leaving corporations and other indirect actors out.[22] However, Kaeb points out that the need for corporate accountability indeed has manifested in case law and legislation of norms and soft law, most clearly under the U.S. statute Alien Tort Claims Act (ATCA) and the adoption of the *U.N. Guiding Principles of Business and Human Rights*.[23] In fact, the issue on corporate liability was in fact explored at the STL for

[16] Kyriakakis (2021), 12–13.
[17] Ibid 17.
[18] W Kaleck & M Saage-Maaß (2010), 699–700.
[19] C Plomp (2014) 21.
[20] Kaleck & Saage-Maas (2010), 718.
[21] Jessberger (2010), 799.
[22] Kaleck & Saage-Maas (2010), 718–722.
[23] C Kaeb (2017) 351.

corporate criminal liability, but the court ultimately dismissed the jurisdiction.[24]

Ultimately, international crimes against human rights are still rarely prosecuted due to an unwillingness or inability of the state in mind to act.[25] Kyriakakis states that the state-centrism of international human rights law poses a problem for developing states alongside the disincentives to coordinate transnational corporate activity unilaterally.[26] However, van den Herik and Cernic mean that we currently experience a paradigm shift for human rights law as modern ICL approaches the individual, including legal and natural persons. Yet, the limited scope of ICL makes it an elusive instrument and needs to be supplemented by other, more extensive, approaches, the scholars suggest.[27] So far, mainly soft law instruments are internationally available to businesses, e.g., the *U.N. Guiding Principles on Businesses and Human Rights*.[28] Also, some countries, like Germany, have adopted legal acts for the protection of human rights in supply chains, see *Lieferkettensorgpflichtengesetz*. Thus, it seems like the world community and individual countries are walking towards greater accountability for corporations yet limited by economic incentives.

Moreover, the possibility of prosecuting legal entities not only on economic incentives, but also on legal reasons, as international crimes are largely fragmented. Both international and national jurisdictions can prosecute for international crimes. However, international tribunals differ from each other and concerning domestic court systems on the provisions of prosecution of legal entities for international crimes. The current principles in ICL are essentially traced back to the Nuremberg principles of the International Military Tribunal (IMT). Both at the foundation of the International Criminal Court and the IMT, the issue of accountability for legal persons was raised - both times, the issue was rejected.[29] Today, some scholars argue that an accountability gap exists due to the unwillingness and impossibility to prosecute legal entities and thereby promote criminal liability for legal persons[30], while Davoise and also jurisprudence mean that no such universal norm exists.[31] In return, Baars claims that corporate

[24] Ibid 364.

[25] Kyriakakis (2021), 9.

[26] Ibid 14.

[27] Van den Herik & Černic (2010), 740–741.

[28] https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[29] K Ambos (2021), 144-145.

[30] See Kyriakakis (2021), 9; http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/ https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/

[31] http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/.

liability without the identification of individuals leads to punishing the workers of corporations and also external society.[32]

Concerning the ICC, the proposal was rejected on the basis that the focus of ICL should lie on physical individuals and of the difficulty of investigation and prosecution of legal persons. Also, the general lack of accountability for legal persons in domestic systems was acknowledged, assuming the ICC would be overwhelmed by cases of complementary jurisdiction over legal persons due to that shortage. In conclusion, the issue was rejected overall, although voices were raised for recognition of accountability in ICL and front of the ICC for legal entities.[33] Moreover, Ambos points out that also national legislation and doctrine struggle with defining the criminal responsibility of legal persons.[34]

Consequently, today, the ICC is only concerned with individual criminal responsibility for natural persons for the modes of participation, which is in line with the IMT, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the common Article 3 of the Geneva Conventions.[35] Given this background, the only way to currently prosecute companies internationally is by prosecuting individuals tied to the company. Thereby the focus of this thesis will be on forms of accountability for individual criminal responsibility seen from ICL. Jurisprudence shows that the link between ICL and national legislation indeed is of interest in the sense of what expectations the states are expected to fulfil.[36]

In conclusion, Farrell finds it logical and appropriate to investigate findings and draw analogies on individual perpetratorship on physical individuals for corporate leaders in ICL due to the concept being applied domestically, the natural focus on leading individuals also in case of corporate criminality, and finally due to the application of modes of IL in domestic courts. Moreover, he believes that the overall struggles to determine responsibility in leaders' cases could serve as valuable sources for the corporate context.[37] ICJ comments that it is ‘widely accepted that corporate officials could face trial for crimes under international law at the international level’.[38] When entering office, then-Chief Prosecutor of the ICC, Luis Moreno Ocampo, promised to consider business leaders as accomplices in international crimes.[39] However, no such prosecution has taken place up until this day.

[32] Baars (2012), 252, 304.
[33] K Ambos (2021) 144–145.
[34] Ibid 84.
[35] Ibid 44.
[36] M Klamberg (2020), 20.
[37] N Farrell (2010), 875-876.
[38] ICJ (2008), 6.
[39] Vest (2010), 851.

3 Individual perpetratorship

3.1 Introductory section

In this chapter, the author focuses on individual perpetratorship for war crimes as suggested in the delimitations, see 1.5. Both scholarship and this author hold that war crimes are the type of international crimes which are the most relevant to corporations. The author has chosen war crimes as they refer to the geopolitical accountability gap described in the second chapter and make an interesting model for legal modes of individual perpetration as they include issues like superior responsibility for commanders. Also, war crimes entail a potential plethora of possibly criminal acts for corporations, which calls for a distinction between different *actus reus* of criminal acts.

The chapter starts with an overview of the legal prerequisites for a war crime found in the ICCSt. Afterwards follows a brief historical background on (corporate) accomplice responsibility for war crimes. Finally, before transitioning into the legal requirements on the chosen mode, the author reminds the reader of differences between international and domestic crimes and their origins to pronounce the legal spirit of ICL.

3.2 Outlook on international criminal law

As stated in the background, it is currently unconventional and legally cumbersome to prosecute legal entities according to ICL. To adequately estimate the expectations of ICL on the matter, one consequently needs to turn to the concept of individual criminal responsibility in ICL. Individual criminal responsibility is today a universally recognised theory thanks to the successful incorporation of the concept in war crime trials, and the establishment of the ICC.[40] ICL presupposes individual responsibility for international crimes.[41]

The theory of individual criminal responsibility in international law was initially established by the International Military Tribunal (IMT).[42] However, Kyriakakis claims that the concept of individual criminal responsibility originally was rooted in natural law as some acts are so offensive by nature that they can be nothing but criminal.[43] Ambos means that the history of the individual as a criminal subject in ICL starts with the

[40] Ambos (2021), 102-103.
[41] Ibid 83.
[42] Ibid 102-103.
[43] Kyriakakis (2021), 2.

post-WWII trials and was finalised with the incorporation of individual perpetratorship in the ICCSt.[44]

Paradoxically, the theory of individual perpetratorship stemming from criminal law needs a collective context in ICL. Thus, a collective context of commission is central to the concept of individual perpetratorship for ICL. The context consists of a state or a state-like authority which organises, promotes, or at least tolerates international crimes. The individual is tied to the authority by 'the participation in a criminal enterprise which produces the criminal result'. Finally, some scholars divide individuals into three hierarchies of responsibility for leadership, organisation, and execution.[45]

Also, international crimes require an international or contextual element. Historic crimes, such as the genocide in Rwanda and the Holocaust, fulfil this requirement as the atrocities were undertaken in a systematic and collective context. However, the context element makes the legal position for individual criminal responsibility more complicated than the individual perpetratorship in classical criminal law. Ambos clarifies that this increase is due to the extra burden in ICL of establishing a specific context for the crimes in question.[46]

Alas, individual criminal responsibility arises when an individual commits a crime under international law in a collective context. What truly defines a crime under international law is, however, debated by scholars, but typically an international crime consists of either (a) crimes against humanity, (b) genocide, (c) war crimes, or (d) the crime of aggression.[47]

After having assessed the contextual element, ICL ascertains in the next step the appropriate mode of liability for the individual based on status in the organisation and the concrete contribution. Mainly, the high-level staff is targeted. Its limited scope is an expression of the command responsibility doctrine and the German doctrine of control or domination by means of a criminal organisation (*Organisationsherrschaftslehre*)[48], see 4.1.1.2.

The author will focus on the current modern international criminal law on individual criminal responsibility, meaning in general, the *ad hoc* Tribunals[49] and the ICC, to determine the demarcations of the concept as of today. Occasionally, this author will also look to the hybrid courts to establish coherence.[50] Individual perpetratorship can be attained in several

[44] Ambos (2021), 83.
[45] Ibid 84-85.
[46] Ambos (2021), 85-86.
[47] Kyriakakis (2021), 3.
[48] Ambos (2021), 86-87.
[49] The ICTY and the ICTR.
[50] The ECCC, the SCSL, and the STL.

ways, illustrated in the identical wording of the rules for the ICTYSt (Article 7(1)) and the ICTRSt (Article 6(1)), reading:[51]

> "A person who planned, instigated, ordered, committed, or otherwise aided, and abetted in the planning, preparation or execution of a crime […] of the present Statute, shall be individually responsible for the crime."

The individual criminal responsibility and the modes of participation following the articles have been confirmed as fundamentals of CIL.[52] The international criminal liability for international crimes is primarily defined in the Rome Statute of 1998. The ICC applies the Rome Statute (ICCSt) for the crimes of member states committed after 2001. The ICCSt should reflect the ideas on the international customary law of the time the ICCSt was created.[53] However, the lawmakers of the ICCSt chose not to copy the wording but use a more individualised model in Article 25(3) which reads in the relevant parts.[54]

Individual perpetratorship is probably the most acknowledged and known mode of perpetration. Committing a crime individually poses generally no difficulties concerning the identification of the perpetrator. However, individual perpetratorship does not necessarily mean that only one person was involved in the criminal activity but relates to the relationship between the perpetrator and the criminal act as well as to potential other persons involved in the crime.[55]

3.3 Prerequisites in the ICCSt

The Nuremberg Principles from 1950 criminalised crimes against peace, war crimes and crimes against humanity, according to international law. A war crime requires a criminal action in an armed conflict. The armed conflict can take place in a domestic or international context. Armed conflicts persisting during a short period of time, or rather could be described as inner unrest and tensions, are not subject to ICL but are ruled by the rules on state sovereignty.[56]

For an action to be counted as a war crime, the action must firstly refute international humanitarian law, *ius in bello*. Such offences also encompass crimes against humanity. However, the author will deal with international crimes in the strict sense, codified in Article 8(1) ICCSt, concerning the

[51] Ibid 120.
[52] Ventura (2018), 102.
[53] Prop. 2013/14:146, 67.
[54] Ambos (2021), 120.
[55] E Svensson (2020), 103.
[56] K Ambos (2014), 123.

international criminal law of armed conflict. Such offences must be immediately punishable according to international law, see Article 8(1) ICCSt. However, the essence of the crime is not that it is committed in the context of war of aggression, but that it is indeed a crime of armed conflict.[57] The international humanitarian law consists of the Geneva protocols and the Hague protocol. The criminality is derived from either method, e.g., the weapon or the target, or the target group, which consists of protected persons. The mandate of the ICC is particularly pertinent for war crimes which make up part of a plan or alternatively form part of the perpetration of such crimes on a large scale. The assessment also takes components into consideration such as the official function of suspects and the severity of the singular act.[58]

Firstly, a war crime constitutes the context of an armed conflict, called the 'international element' or 'context element', as stated, delineating from inner tension within a country. The context requires at least two parties, whereof one is the armed forces of the government, and the other one is the disagreeing state or a paramilitary/non-state actor. Such armed forces can be of all kinds. Furthermore, the conflict should reach a certain degree of intensity to qualify for war crimes.

Secondly, a connection is needed between the individual crimes and the context element, called 'the nexus requirement'. Case law demands 'evident nexuses between these two to tell war crimes apart from other international crimes and from offences of domestic criminal law during armed conflict. The nexus element also serves as reinforcing the wrongfulness of the commission and the culpability of the perpetrator. Ambos writes that the nexus requires a 'functional relationship' between the acts and the conflict in the sense that the actions are 'considerably' influenced by the conflict.[59] Moreover, the ICC includes the nexus element in the ICC 'Elements of Crimes'. In practice, this means that the perpetrator acts as he or she commits the act to some degree due to the military campaign whose factual circumstances must be known to the perpetrator, altering the *mens rea* requirements on an international level.[60]

Also, some discussion has already touched upon the nature of war crimes. Corporate involvement in war crimes might be in the form of so-called 'neutral activity' due to the nature of corporations which should be aimed at making profit. Already the hallmark cases of *Krupp* and *Flick*, see 4.2, included such business activity which ultimately amounted to international crimes. In later case law, the ICTR brought up three cases of business leaders, though none of them concerned typical business activities and were thereby out of the scope of this thesis. However, the court concluded that the provision of arms to the principal perpetrator amounts to aiding and

[57] Ibid 117.
[58] Prop. 2013/14:146, 50-51.
[59] Ambos (2014) 140-42.
[60] Ibid 142-44.

abetting, which according to Vest should be applicable for business leaders, too, if production or trade of arms is included in the ordinary business, even if it simply amounts to 'routine duties,[61] see 5.2.3 for further discussion.

In summary, corporate leaders could be liable for war crimes by business activity. In turn, this activity needs to take place during an armed conflict and amount to offences of *ius in bello*. It suffices for the corporation to be geographically present in one part of the geographical area of the conflict However, the corporate act needs to be influenced by the conflict which needs to be known to the actor. This activity could amount to 'neutral activity' including routine duties.

3.5 History of corporate criminal liability

Scholars argue that corporate criminal liability for international crimes has been of marginal interest for war tribunals. However, there are early turning points in jurisprudence from the Nuremberg trials, as the IMT stated that the Nazi regime had relied on the complicity of many, including businessmen, who indeed were not innocent, if they possessed knowledge about the large-scale crimes of the Nazi regime.[62]

Only physical individuals can be prosecuted according to Article 25 of the ICCSt. By that, the international criminal law differs from international law since the latter typically only deals with states as legal subjects which could act unlawfully according to their obligations of international law. Thus, physical individuals have typically been exempted from legal obligations according to international law, which changed with the establishment of the international military tribunals of Nuremberg and Tokyo after WWII and thereby the prosecution of physical individuals.[63]

Landmark cases on corporate criminal liability from the time era include the *Industrialists* Trials split in I*G Farben/Trial of Carl Krauch and Twenty-Two Others, the Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others/Krupp, the Trial of Friedrich Flick* and *Five Others/Flick and the Trial of Bruno Tesch and Two Others/Zyklon B.* However, it is noteworthy to point out that the business leaders, not the corporations as such, were prosecuted. These cases in combination show that '[b]usinesses could not avert prosecution solely because a dictator conceived of the plan to violate international law and the businesses played no role in the initial planning'.[64]

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[61] Vest (2010), 858.

[62] Plomp (2018), 5.

[63] Prop. 2013/14:146, 26.

[64] MD Byrne, 'When in Rome: Aiding and Abetting in *Wang Xiaoning v Yahoo'* (2008-2009) 34 Brook J Int'l L 151, 177 in Plomp (2018), 5.

The *IG Farben* case found high-level business leaders guilty, however, as they were not military experts, they were acquitted since the court reasoned that they, based on their lack of military expertise, lacked the mental element for aiding Germany in its preparations for war.[65] The author will later elaborate on the *mental element*, but for now, these findings serve to outline the history of corporate criminal liability.

Further, in the *Flick* trial high-level business managers were convicted for war crimes on several grounds. The mode of liability of each accused was not specified, however, the NMT ruled that together with the required knowledge of financially assisting the criminal SS, the participation resulted in a 'if not a principal, certainly an accessory to such crimes.[66]

Additionally, the *Zyklon B* trial with business leaders and suppliers of poison gas for concentration camps demonstrated that civilians as accessories to war should be seen as war criminals themselves.[67] Van der Wilt underlines that these cases present 'a symbiotic relationship between big business and a criminal regime which could not have survived without the former's unfaltering support'.[68]

Queries were made already by the end of the First World War whether to establish some sort of permanent international criminal tribunal. Again, by the end of the Second World War, discussions re-emerged, however, were put on hold as the Cold War won political terrain. New, mostly non-international, conflicts rose outside Europe during the 1960s and shocked the world with their terror and atrocities. The world reacted by wanting international prosecution of the perpetrators. Here, the world community failed to introduce a supranational court and chose instead to extend the Geneva conventions with two amending protocols.[69] Due to the unwillingness to prosecute direct perpetrators, any potential discussion about indirect perpetration, such as by business entities, was set aside.[70]

Today, rules on aiding and abetting are found in all international criminal tribunals. Ventura points out that the continuous application of accomplice liability since WWII couples the legal concept with all international crimes.[71] The ICCSt has become the clearest model for rules on aiding and abetting[72], although its ambiguities will be the subject of this thesis later. Corporate criminal liability is regulated on an individual basis for international crimes in the ICCSt. No corporate leader has so far been

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[65] Plomp (2018), 5.
[66] Ibid 5.
[67] Plomp (2018), 6.
[68] H van der Wilt (2013), 43, 52; Plomp (2018), 6.
[69] Prop. 2013/14:146, 26-27.
[70] Kaleck & Saage-Maaß (2010), 702.
[71] Ventura (2019), 15.
[72] Hathaway (2020), 1605.

prosecuted at the ICC for international crimes. This despite the claim by experts such and Fauchald and Stiegen that corporations are accomplices to international crimes committed by governments and paramilitary groups.[73] Baars states that prosecution in ICL courts have mostly concerned members of the elite.[74] Plomp underlines that war crime trials of different kinds hitherto have neglected the involvement of businesses and other economic actors in war crimes.[75] Jessberger means that criminal liability for enterprises for international crimes has been of 'marginal interest in international prosecution efforts (...)'.[76]

In conclusion, early case law recognised the need for criminal liability for corporations, although manifested through individual perpetratorship. Jessberger and Geneuss write that these cases still play an essential role in legal analysis and rulings on business involvement in international crimes.[77] Jessberger alone further reasons that the trials together formed the basis of new economic international criminal law (*Wirtschaftsvölkerstrafrecht*).[78] However, scholars mean that the ICC rules, if seen as CIL, would be less useful for capturing corporate actors.[79] The findings yield space for further interpretation and discussion of the mode of liability and its different aspects for the thesis.

3.6 International crimes in relation to domestic crimes

International crimes differ largely from an ordinary domestic crime in the sense that they implicate a certain context and a standard of multiple perpetrators. The context of an international crime should be undertaken 'in a collective context and systematic manner'[80], see section 3.1, without necessarily immediately attaching culpability to a certain individual. International crimes often take place in 'a multi-perpetrator setting'. Ambos underlines that it can be difficult to distinguish the culpability of an individual since it 'is not always readily apparent'.[81] The broad context and thereby the special nature of international crimes welcomes criminal liability for aiding and abetting, which further can exist without any identification of the main perpetrator.[82]

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[73] OK Fauchald and J Stigen, 'Corporate Responsibility before International Institutions' (2009) *40 George Washington International Law Review 1025*, 1034 in Plomp (2018), 6.
[74] Baars (2012), 225.
[75] Plomp (2018), 4.
[76] F Jessberger (2010), 801.
[77] F Jessberger & J Geneuss (2010), 695.
[78] F Jessberger (2010), 801.
[79] G Baars (2012), 235.
[80] K Ambos, Article 25: Individual Criminal Responsibility' in O Triffterer (2008), 329.
[81] C Plomp (2018), 7.
[82] W Schabas (2001), 447.

Moreover, Ambos means that the imputation of a given person is more complex under ICL than under domestic law as the sources of ICL are more fragmented and differentiated, and as international crimes typically take place in a specific context focusing on the collective, making it difficult to distinguish individuals.[83] As stated, the statutes of the ICTR, the ICTY, the ECCC, and the STL set up only general guidance about aiding and abetting, which has led to the courts relying on case law when prosecuting for aiding and abetting.[84]

Svensson claims that applying established legal theories of aiding and abetting on ICL poses problems as the character and magnitude of those crimes are severely different from the crimes the legal theories typically are applied. He motivates this by referring to the lack of time and space for crimes of ICL in contrast to typical crimes, e.g., physical abuse. Ultimately, Svensson claims there is a conflict between "complex" types of crimes and classical criminal legal theory.[85] His argumentation is disputed by Asp, who says there should be no interference applying domestic rules for aiding and abetting rooted in established legal theories on ICL.[86]

Further, Jessberger and Geneuss write that it is vital to consider U.S. practice of the Alien Tort Claims Act (ATCA) when legally analysing the role of businessmen in international crimes. Moreover, they refer to national practice, namely from the Netherlands, when assessing corporate criminal liability[87]giving substantial weight to domestic jurisprudence to the development of ICL. However, Jessberger points out that corporate leaders are typically not prosecuted domestically[88], in line with the reasoning of him and Werle. Until the creation of the ICC, enforcement of ICL depended on domestic courts. Although the IMT and the *ad hoc* Tribunals were set in place, their jurisdiction was limited and thereby the continuous prosecution of ICL was in the hands of domestic courts. Due to the ICC having limited geographical and temporal jurisdiction, the scholars underline the continued importance of prosecution and enforcement of ICL at domestic courts.[89]

Also, Jessberger and Werle underline the significance of domestic prosecution of ICL due to the freshness of ICL as a system and thereby the institutionalised decentralisation of justice. Besides the complementary principle, the ICCSt lets the State parties decide how the ICCSt should be adopted to national law; it does not even oblige them to do turn it into national law, although it is encouraged. Moreover, the focus of the ICCSt is not to incorporate the statute into domestic law, but to effectuate the

[83] Ambos (2021), 84.
[84] Hathaway et al. (2020), 1606.
[85] Svensson, Erik (2020), 99.
[86] Asp, 'De osjälvständiga brottsformerna', 420.
[87] Jessberger & Geneuss (2010), 695.
[88] Jessberger (2010), 801.
[89] Werle & Jessberger (20 115–116.

prosecution of the most serious crimes under international law.[90] Until today, very limited jurisprudence on ICL has come from domestic courts.[91]

Finally, Jessberger and Werle observe the difficulties of ICL which might pose problems for domestic courts importing and interpreting ICL. The dilemma consists of conflicts of norms between ICL and domestic criminal law together with the 'interplay of various legal systems and legal cultures'. The scholars believe that the institutionalisation of ICL through the adoption of the ICCSt and the establishment of the ICC will lead to improvements of relations between ICL and domestic law.[92] Freeland means that we currently witness the 'upgrading' of domestic laws to be in line with the principles of the ICCSt, being part of the process of internationalisation of criminal justice.[93]

However, Jessberger and Werle highlight the importance of maintaining an international outlook on domestic law which is imported from ICL as the now domestic law finds its origins in IL and due to rules of interpretation necessarily leading courts to the ICCSt and CIL of ICL for guidance. Finally, they state that domestic courts 'must consider the "parent norms" of international law and their interpretation by international and, where relevant, foreign courts'.[94] Also, Kaleck and Maaß mean that 'national legal systems are generally not well equipped to deal with international crimes caused by corporations' and instead, existing norms are applied in an insufficient manner.[95]

3.7 Purposes of international criminal law

To decide what expectations ICL puts on domestic law, the author believes it is interesting to see what expectations ICL strives towards. Holm presents the purposes of ICL by examining jurisprudence, the ingress of the ICC Statute, legal principles established in the ICCSt and statutes of international courts. She lists non-exhaustive objectives of ICL which she means are a combination of traditional elements of criminal law and of novelties emerging from ICL itself[96]. Thus, ICL is a unique mixture of international law and criminal law whose objectives and sources mingle into ICL. The objectives found by Holm are as follows:

[90] Ibid 673–675.
[91] Ibid 54.
[92] Ibid 186.
[93] Freeland (2012), 50.
[94] Jessberger & Werle (2014), 186–187.
[95] Kaleck & Saage-Maaß (2010), 715.
[96] F Holm (2020), 52.

(a) Retribution (b) Prevention (c) Incapacitation (d) Efficiency (e) Rule of law (f) Reconciliation (g) Truth-seeking (h) Process economics (i) Crime victims' interests (j) State sovereignty (k) Harmony of norms.[97]

Also, she underlines the need for truth-seeking in ICL due to the exceptional cruelty of the criminalised actions. In addition, she explains the ICL proceedings as part of transitional justice which is the societal approach to combat atrocities and human rights violations and to restore society after such actions are undertaken.[98]

Further, Ambos underlines the unique character of ICL as a mixture of principles taken from criminal law and public international law. Thereby, ICL is ruled by legality, culpability, and fairness which were institutionalised with the adoption of the ICCSt and the establishment of the ICC in the years 1998-2002[99] Also, the scope of relevant cases to the ICC is limited due to the principle of complementarity, meaning that the ICC steps in when individual states lack the will or capacity to prosecute its own individuals. Thereby, the prosecution on an international level is bound by a lack of prosecution on a national level for state parties bearing the primary jurisdiction.[100] Van den Herik and Cernic interpret this as the ICCSt giving a special mandate to the member states to domestically prosecute possible perpetrators.[101] Thus, the expectation on individual domestic regulation is set high by ICL.

Also, it is essential to remember the purpose and mandate of the ICC, which is to investigate the most serious crimes which concern the international community.[102] The limited mandate presupposes that the ICC will deal with only a small number of all cases relevant to ICL, most likely related to persons directly involved in the crimes. Kaleck and Saage-Maaß point out that corporate leaders are thereby not prioritised to the ICC as business leaders 'often only play a supportive role and are furthermore usually located at a considerable distance from the crime scene'.[103] Van den Herik and Cernic even point out that corporations typically do not meet the criteria for ICC prosecution.[104]

Deriving from this character, the objections of ICL is thus a mixture of goals of criminal law **and** public international law: to protect and prevent the harm of fundamental individual and collective protected legal interests. The

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[97] Ibid 47.

[98] Ibid 47-48; https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf.

[99] Ambos (2021) 55–56.

[100] Werle & Jessberger (2020), 313–316.

[101] Van den Herik & Cernic (2010), 741.

[102] Plomp (2018), 25.

[103] Kaleck & Saage-Maaß (2010), 710.

[104] Van den Herik & Cernic (2010), 742.

legal interests are ultimately all different sides of human dignity on the collective and complex level in terms of peace, security, and the well-being of the world. However, ICL could also protect individual goods and interests related to fundamental rights of mankind. The specific international crimes regulated in the ICCSt protect certain such individual rights; crimes against humanity protect groups and individuals; genocide protects a group and its individual members against the violation of their dignity, and war crimes shall ensure human dignity even in times of armed conflict.[105]

In conclusion, the purposes of ICL are both abstract words with high expectations and concrete mandates regulated in statutes. Thereby, the expectations set are high, as ICL is supposed to serve the world community and ultimately somehow improve the state of the world by prosecuting the most gruesome atrocities, thereby setting a high standard for the world to follow.

4 Forms of individual perpetratorship in ICL

In this chapter the author accounts for different types of individual perpetratorship which could be relevant for business leaders. When choosing between the different modes of criminal liability for international crimes, it becomes relevant to ascertain the context of the committed crime. Plomp suggests that the search for this type of context leads to holding people accountable on different levels.[106]

When examining the modes of participation for the relevant questions of issue, it becomes relevant to look to the circumstances of the crime in question, here international crimes. They often take place remotely from the corporation; as, earlier described, a big geopolitical accountability gap exists between the headquarters of the involved corporations and the crime scene. Moreover, crimes by corporations could take place by desk-activity, words, omissions (here excluded), or individuals cooperating, leading to several possible scenarios for appropriate modes of liability.[107] The author will base the models on the ICCSt which entails three forms of perpetration: direct/physical perpetration, superior responsibility, and indirect perpetration.[108]

[105] Ambos (2021), 66–67.
[106] Plomp (2018), 7.
[107] Baars (2012), 230–231.
[108] Van Sliedregt (2012), 74.

4.1 Principal perpetration

General theories of criminal law establish a need for *mens rea* for the main perpetrator which is confirmed by Article 30 ICCSt requiring *mens rea* for international crimes. It is important to bear in mind that perpetration as a principal is seen as the most serious form of criminal liability in ICL.[109] Principal perpetration can either be understood as the actual perpetration by an individual, i.e., by typically a foot solider, or the principal perpetration as an integral part of the crime. *Ad hoc* case law confirmed that the latter form should rule 'principal perpetration', thus also reaffirming the principle of the collective context rather than individualism in ICL.[110]

The main incentive to undertake any action for a corporation is logically financial ones. The connection between such interests and the results of war crimes is not sufficiently certain in enough cases to draw the conclusion that a corporation typically acts as the main perpetrator. As corporations - especially transnational ones - could have an interest in its stock value and PR, high activity for war crimes, implying also conflict of arms, would most likely work against their interests, making it implausible for corporate leaders to act as principal perpetrators. However, the article could still hypothetically be relevant to corporations, probably as legal persons, which falls outside of the scope of my thesis. Thus, leaders of corporations are unlikely to participate in war crimes as the physical principal perpetrator.

4.1.1 Jointly with another

One reading of Article 25(3)(a) ICCS suggests individual criminal liability based on a common purpose, called *JCE* (joint criminal enterprise). JCE means that a group of two or more persons commit a collective criminal action in pursuit of a shared criminal objective. Still, all persons involved need to fully cooperate in the crime.[111] However, JCE is a concept established in jurisprudence and doctrine but finds no exact limits in statutory law.[112]

Moreover, JCE requires a stricter *mens rea* than direct perpetration as JCE demands a common plan, design, or purpose to commit crimes against international law. In fact, an individual does not need to alone commit an act serious enough to form part of JCE but could cumulatively amount to JCE together with the acts of others. In fact, those actions could be of neutral character related to political, military or business activity. If found operating together with the same intent, the persons will be found jointly responsible.[113]

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[109] Werle & Jessberger (2020), 170.
[110] Ambos (2021), 121–122.
[111] Van Sliedregt (2012), 99.
[112] Vest (2010) 866.
[113] Farrell (2010), 878.

However, some scholars criticise JCE as a model is used by the tribunals to reach a high number of members of a group committing a crime although the individual effort might not be sufficiently high, amounting to collective punishment.[114]

Farrell finds that JCE could be applied to business leaders in cases, for example, of collaboration between the government and corporations which share the same criminal intent. The main challenge remains, however, to prove the same intent for all members of the joint mission due to the higher *mens rea*. Farrell suggests a link between a higher number of links in a supply chain and a difficulty to establish the necessary *mens rea* seen in the *ad hoc* Tribunals.[115]

However, the ICC differs in wording from the *ad hoc* Tribunals which affects the limitations of individual criminal responsibility for corporate leaders. While the *ad hoc* Tribunals recognised *joint criminal enterprise*, the ICC distinguishes between joint commission (co-perpetration) under Article 25(3)(a) and common purpose under Article 25(3)(d). Farrell points out that JCE seems to hold a higher *actus reus* than at the *ad hoc* Tribunals since the co-perpetrators must exercise control over the crime. Also, they must share joint control to the degree that they both can start and stop the act, however, they do not need to control the act itself. Farrell finds it unlikely that the mode encompasses business leaders due to the high need of control of the physical acts which a business leader probably does not possess.[116]

Rather, Farrell finds Article 25(3)(d) ICCSt suitable for business leaders as it covers contributions to an international crime where the contribution aims to enhance the criminal activity or purpose of the group. Alternatively, the contribution could be made with the knowledge of the intention of the group to commit the crime. Alas, it must be intentional and made with knowledge of the group's criminal intention.[117]

However, the model of JCE has been criticised on a legal basis as it has been argued that JCE finds no support in CIL. Moreover, the lack of differentiation of intent and specification has been problematised. However, the mode has been applied at the *ad hoc* and hybrid Tribunals.[118] Bock notes that the tribunals choose other modes such as aiding and abetting when no common plan or purpose is found[119], which must not exist for the scope of corporations relevant to this thesis. Relevant to this thesis, van Sliedregt

[114] Baars (2012), 233–234.
[115] Farrell 878–879.
[116] Farrell 880.
[117] Farrell 880–881.
[118] Van Sliedregt 141-143.
[119] Bock 422.

notes that the mode seems appropriate for lower-level perpetrators[120], thereby making it irrelevant to the scope of this thesis.

4.1.2 *Organisationsherrschaftslehre*

However, Article 25(3)(a) ICCSt could still be relevant as it entails liability for perpetration 'through another person', which according to case law could be an organisation. The German concept of *Organisationsherrschaft* (transl. An 'organised and hierarchical apparatus of power' by the ICC Trial Chamber) is essential to understand this mode of perpetration.[121] The mode is relatively new to ICL as it did not constitute part of the statutes governing the *ad hoc* Tribunals.[122]

Before the introduction of the *Organisationsherrschaft*, German courts applied only rules on direct perpetration and accessorial liability, distinguishing among them based on the *mens rea* to define the role of each person. However, this approach was heavily criticised as it neglected a rational criterion for distinguishing between principals and accessories.[123]

The doctrine was established by the German jurists Roxin and Schroeder in the 1960s following the *Eichmann Trial* in Israel. It was applied for the first time by a German court in 1994 by the German Federal Court of Appeals (Bundesgerichtshof, [BGH]) which approved the model. It is part of the German legal theory on individual perpetratorship tied to the wrongful conduct of a third person, i.e., someone who commits a crime through or by another person. In other words, an indirect perpetrator is someone who uses a hierarchically structured organisation to urge others to commit a criminal act. This creates room for a 'Hintermann' (man behind) and 'Vordermann' (man in the front); one who rules and one who acts. The wrongfulness is based on the exploitation of a superior position by the indirect perpetrator. Roxin classifies *Organisationsherrschaft* as one of possible three modes of indirect perpetration.[124] In fact, the court which found Adolf Eichmann guilty stated: "

> (…) and the extent to which any one of the many criminals were close to or remote from the person who actually killed the victims says nothing as to the measure of his responsibility. On the contrary, the degree of *responsibility* generally *increases* as we draw further away from the man who uses the fatal instrument with his own hands and reach the *higher levels of command*, the 'counsellors', in the language of our law."[125]

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[120] Ibid 147.

[121] Baars (2012), 237-238.

[122] T Weigend (2011), 91.

[123] Ibid 95.

[124] T Rönnau (2021), 923–924.

[125] Eichmann (Israel), *ILR*, 36 (1968), 236–7, para. 197 (emphasis added by Ambos) in Ambos (2021), 114.

The perpetrator dominates the indirect commission of the crime in the sense that he decides whether the act is done or not. Moreover, the commission can occur when the person is the perpetrator himself, when he operates jointly with others, or uses another person as his tool.[126] Moreover, Weigend writes that the main idea of the theory is that the indirect perpetration is due to the perpetrator's domination of the human 'tool' who carries out the act, the *Vordermann*. This domination can be shown in several ways, e.g., by duress or misconception of relevant facts.[127] Ambos comments that only a very small circle of persons has sufficient control to replace one *Vordermann* by another, i.e., the circle is the leadership of the criminal organisation. Although they might be seen as indirect perpetrators, Ambos means that they in fact are main perpetrators from a normative perspective.[128]

Moreover, German scholars agree on the 'autonomy principle' which makes indirect perpetration impossible for cases when the person carrying out the actions is an autonomous and criminally responsible person. Thereby, such persons should not be completely shielded by the mode, yet still incur accessorial liability for e.g., instigation or aiding and abetting.[129]

In fact, Rönnau classifies *Organisationsherrschaft* as the most important mode of indirect perpetration. Roxin established it to penalise "Schreibtischtäter" (desk criminals) of the Nazi regime, which was applied by foreign courts and finally by the BGH in 1994 concerning criminal liability for politicians of the German Democratic Republic who were found responsible for firing orders by border soldiers towards refugees. Rönnau concludes that the model also is applicable to "Schreibtischtäter" due to the nature of organisations: The criminals do not only possess power over compulsion and deception, but also over a complex structure of power, which heightens the probability of the actual commission of crimes.[130]

The doctrine is tied to four preconditions: Firstly, the power apparatus must be hierarchically based and completely isolated from law. Secondly, the *Hintermann* must have the mandate to express orders to the *Vordermann* who directly carries out the deed. Thirdly, the *Vordermann* should be 'another brick in the wall' who is easily replaceable. Lastly, sometimes, a willingness to commit a crime is required, whereby unjust regimes in whose name's crimes are committed should be covered.[131] The requirement of fungibility was stressed by Roxin.[132]

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[126] Joecks/Scheinfeld (2020), Rn. 143–144.
[127] Weigend (2011), 96.
[128] K Ambos (2009), 156.
[129] Weigend (2011), 96.
[130] Rönnau (2021), 926.
[131] Ibid.
[132] Weigend (2011), 97.

However, these preconditions are criticised on different grounds. Firstly, the faultlessness of the *Vordermann* is questioned. Secondly, the criterion on 'detachment from lawfulness' is criticised. Nonetheless, legal solutions as instigation or co-perpetration do not serve as adequate expressions of the legal nature as they misjudge the superior standing of the *Hintermann* and do not entail situations where the *Vordermann* and *Hintermann* are unknown to each other. Therefore, the BGH has changed these conditions so that the concept simply includes regular processes in hierarchical structures aimed at the realisation of criminal offences. In this way, also economic enterprises could be included by the doctrine, mentioned by the BGH in an *obiter dictum*.[133] Weigend writes that this *obiter dictum* together with other findings by the BGH was an early attempt to extend Roxin's doctrine to business enterprise leaders for actions committed by their subordinate staff.[134]

However, Rönnau states that an overwhelming number of scholars suggest the opposite as employees are inclined *not* to follow unlawful instructions. According to the modifications, the organisation could also be lawful. However, scholarship disagrees as it means that only unlawful structures could build up the 'pressure' needed for the *Organisationsherrschaft*.[135] Furthermore, it has been stressed that businesses lack all the main traits required by the doctrine, i.e., a tight hierarchical structure, general lawlessness, and fungibility of members.[136] Also, such a wide interpretation of *Organisationsherrschaft* is all too loose and vague, finds Weigend, as it only requires 'rule-determined processes' within an organisation which the perpetrator uses for his purposes.[137]

Moreover, Weigend recognises the need for legal grounds to prosecute business enterprises, which might be using *Organisationsherrschaft*.[138] Whether it is appropriate, is another question. He points out that deviations from the autonomy principle can be made for exceptional cases, like *Eichmann*. If found to be an instigator, that person can face a punishment as severe as the main perpetrator might be attributed, according to the ICCSt. The form of punishment is beyond the scope of this thesis, but it is noteworthy to say that the ICTY established that 'the form and degree of the participation of the accused in the crime' is a substantial factor of the gravity of the crime and thereby also of the sentence. The identification of each role has been framed as particularly important in ICL due to the collective nature of international crimes.[139] Overall, Weigend finds the *Organisationsherrschaft* doctrine as an *ad hoc* invention to be framed by the atrocities committed by large-scale state-organised entities e.g., the SS or

[133] Bundesgerichtshof, judgment of 13 September 1994, (1995) 257.
[134] Weigend (2011), 99.
[135] Rönnau (2021) 926.
[136] Weigend (2011) 99.
[137] Ibid 107.
[138] Ibid 101.
[139] Ibid 101-102.

the Stasi, making its preconditions coloured by those needs rather than modelled for today.[140]

Further, the concept is criticised due to its focus on 'dominance' which might be difficult to prove in practice as it probably constitutes the grey area between mere influence and coercion. Weigend reminds us that individual perpetratorship holds that no indirect perpetration can be made if the main perpetrator is fully responsible, due to the impossibility of clearly differentiating between different degrees of psychological influence. This concept should be true for the view on groups and organisations, as well, finds Weigend. In total, Weigend criticises the doctrine and prefers accessorial liability in the form of instigation.[141]

Nevertheless, the doctrine was adopted in Article 25(3)(a) ICCSt and distinguished from other forms of perpetration. Also, the mode can naturally be used by domestic courts if found in the domestic criminal law of available modes of perpetration, such as in Germany. The ICCSt neither includes the autonomy principles nor connects perpetration to the physical commission of the criminal offence. However, the interpretation of the wording is still unclear. In ICC jurisprudence, *Organisationsherrschaft* as modelled by Roxin was largely adopted, due to an increase of the adoption of the model in national jurisdictions and to the incorporation of the concept in the ICCSt. However, other international tribunals have preferred to utilise the concept of JCE rather than *Organisationsherrschaft* to convict organisers and others from the crime scene geographically distant actors. Further, Weigend notes that the ICCSt includes the commission of a crime through another person but leaves out perpetration through an organisation. Weigend states that perpetration through an organisation doubtlessly finds no ground in CIL.[142]

4.2 Indirect perpetration by aiding and abetting

Another potential clause for corporate criminal responsibility for its leading physical individuals would be aiding and abetting, according to Article 25(3)(c) ICCSt. It is described as 'the subsidiary form of participation in the Rome Statute' by Ambos.[143] Moreover, Plomp points out that it is seen as a category of accomplice liability in international criminal law.[144] Also Farrell, ICTY Deputy Prosecutor, and Vest believe that co-perpetration/JCE together with aiding and abetting are the most relevant modes of liability for

[140] Ibid 106-107.
[141] Ibid 104-105.
[142] Weigend (2011), 105-106.
[143] Ambos (2021), 477.
[144] Plomp (2018), 7.

individual business leaders and legal persons.[145] Farrell points out the limitations of *mens rea* together with the aspect of the nature of the contribution to the criminal activity as the two main aspects worth discussing regarding aiding and abetting for corporate leaders[146], which will be analysed in chapter 5.

4.3 Superior responsibility

Business leaders could also be held accountable by command responsibility for actions of their subordinates. The doctrine on *command* or *superior responsibility* according to Article 28(b) ICCSt is mainly a concept in ICL and is part of CIL. Typically, the provision is linked to military commanders or civilian superiors who must meet the responsibility for the crimes of their subordinates, if they violate the duties of control given to them.[147]

Vest means that "[b]usiness leaders may under Article 28(b) ICCSt, which deals with hierarchical relationships outside the military sphere, may be applied to business as long as th activity is within the *effective* responsibility and control of the superior." The relationship resulting in that control could either be a result of a legal duty or of natural circumstances. The effective control means in practice that the act should be possible for the superior to prevent or punish. However, effective control might have a different outlook for civilian than military leaders as it puts a larger focus on submission in relation to authority than about 'power to prevent or repress' the commission of the crimes of subordinates.[148]

The doctrine on command or superior responsibility according to Article 28 ICCSt is mainly a concept in ICL. It was created to reflect the typically hierarchical organisations usually taking part as actors in international crimes. Jessberger and Werle write that the concept of superior responsibility 'acts as a safety net when evidence of direct criminal responsibility on the part of the superior is absent'. Also, it captures omissions in the form of 'looking the other way' which could signify potential danger if done by a superior with command authority. In fact, such actions were seen as omissions by the *ad hoc* Tribunals. However, the ICCSt framed it as a model of its own.[149]

It consists of four parts: A superior-subordinate relationship; the superior must know or fail to know by negligence that the subordinate is about to commit or has committed a crime under IL; the superior must fail to take necessary and reasonable measures to prevent the commission of the crime

[145] Farrell (2010), 873; Vest (2010), 851.
[146] Farrell (2010), 881.
[147] Werle & Jessberger (2020), 264-265.
[148] Vest (2010), 869-870.
[149] Werle & Jessberger (2020), 264-266.

or initiate criminal prosecution of the perpetrator; and Article 28(a) and (b) ICCSt also require the crime to be committed 'as a result of [the superior's] failure to exercise control properly over [the subordinate].[150] The knowledge for a civilian leader, such as a business leader, stretches to knowledge of the crimes undertaken or conscious disregard of information which clearly indicated that such a crime was to occur. Vest notes that the last one constitutes a very high threshold; much higher than for military leaders.[151] Ambos comments that the *mens rea* of the superior stretches to the concrete actions of subordinates.[152]

Moreover, this mode of liability must be connected to the activity executed by the perpetrator. Vest refers to case law when reasoning that a situation beyond the business spectrum, e.g., employees forming a militia, are not covered by the provision, in comparison to situations with businesses related to e.g., the production and sales of weapons, which would be encompassed by the provision.[153]

4.1.4 Conclusion

Ambos finds three modes of criminal liability suitable for 'top perpetrators', namely JCE, superior responsibility, and *Organisationsherrschaft*.[154] However, his analysis is provided for all kinds of executives; not specifically corporate officers. Therefore, the author will look to additional sources in pursuit of discerning appropriate modes for business leaders.

Although individual criminal responsibility as the main perpetrator is an option to prosecute physical individuals of corporations, the author believes that corporations to a larger extent could be found guilty of accomplice liability. Due to the economic interests of corporations[155], more coveted behaviour could still result in criminal responsibility when investigating the mode of aiding and abetting in comparison to the corporation as the main perpetrator. Moreover, the potentially fitting mode of *Organisationsherrschaft* might be appropriate for corporate leaders in theory as it captures the problem of executives exercising control over employees by employing dominance.

However, the harsh criticism by scholars on such an application makes it an unfavourable case. As stated by Weigend, the mode is largely biased by its domestic legal history and by historic atrocities itself. Nonetheless, this does not nullify its validity, as IL indeed is *international* law inspired by domestic legal traditions. Especially a civil law tradition as influential as the German might impress foreign and even international law. Moreover, due to

[150] Ibid 268.
[151] Vest (2010), 870.
[152] Ambos (2007), 137.
[153] Vest (2010), 872.
[154] Ambos (2007), 129.
[155] Jessberger & Geneuss (2010), 695.

the aim of ICL of prosecuting the most serious crimes, a doctrine which aims the purpose of truth-seeking and adequate retribution, the theory might indeed serve business leaders well. Ultimately, it is, however, not part of CIL. Moreover, international courts have preferred other modes than the *Organisationsherrschaft*, giving it little credibility to this author. Because of this in conjunction with the domestic negative approach towards it, the author will choose not to examine this mode any further.

Concerning JCE, the author rejects the mode as it is, like *Organisationsherrschaft*, is largely agreed that it does not constitute part of CIL. Also, as stated, it does not quite capture the executive function of corporate leaders, bringing it out of scope of this thesis. Moreover, the very high threshold, quoting Vest, might be 'too high' for business enterprises.[156]

Regarding superior responsibility which is recognised by CIL and works as a safety net, the author finds superior responsibility and aiding and abetting to be the most appropriate modes for business leaders. Yet, she will aim to choose only one of the modes. Due to its function as a safety net, the author finds superior responsibility the least attractive alternative as she wants to explore a mode *particularly* appropriate for business leaders. Moreover, the demand for a clear connection to the activity by the perpetrator rules out several actions, which does not fit the broad scope of activities executed by business leaders, in this thesis at least. Alas, the author will choose the mode of aiding and abetting for corporate leaders.

Farrell finds the main objects of analysis here to be the corporate actor's contribution, direct or indirect, to groups that commit crimes and the knowledge or intent of corporate actors when doing so. He concludes that the contribution does neither need to be direct nor criminal *per se* and could amount to only normal business transactions. Regarding the knowledge, he summarises that some type of knowledge is needed. Part 5 will provide an in-depth analysis of these elements.[157]

Also, the wording of Article 25(3)(c) ICCSt is suitable for both regular physical individuals as perpetrators and physical individuals representing corporations, in the sense that both could '[provide] the means for [the] commission [of a such crime]'. The commission could consist of either services or goods. Further, also Plomp concludes that Article 25.3.c) on aiding and abetting is the most relevant for business leaders[158], supported by, among others, Vest.[159] '

In conclusion, provisions on aiding and abetting are likely relevant for business leaders. Plomp claims that direct individual perpetratorship is rare for business leaders, who instead rather act as complicit in war crimes by

[156] Vest (2010), 869.
[157] Farrell (2010), 893.
[158] Plomp (2018), 20-21.
[159] Vest (2010), 851.

aiding and abetting crimes committed by governments or paramilitary groups, quoting Fauchald and Stiegen.[160] Meaning that aiding and abetting is the appropriate mode for business leaders, this thesis will from now on delve into the conditions and limitations of such a mode.

However, as suggested by Baars, the identification of relevant modes of liability for business leaders might lead to a *sui generis* position for businesses which is part of making it more difficult to see individual business leaders in the framework of ICL. Instead, corporations as such should remain in the focus, as Baars argues that its leaders otherwise remain anonymous.[161]

5 The Legal Requirements on Aiding and Abetting in ICL

5.1 Introductory remarks

The legal nature of aiding and abetting was explored for the first time in case law of the Nuremberg Trials. Aiding and abetting has both objective and subjective requirements in ICL. The 1940s case of *Einsatzgruppen/Ohlendorf* established an objective requirement for the aiding act to contribute with a 'substantial effect' on the crimes of the main perpetrator. Moreover, *mens rea* in the form of 'knowledge' was required. These requirements were repeated in the *Ministries Case* and *I.G. Farben*.[162]

Since then, the legal development has, as stated, taken several turns. Hathaway and co. observe that both international and domestic courts apply rules on aiding and abetting for international crimes with difficulty. Today, case law is fragmented.[163] The requirements which have emerged from jurisprudence and statutory law on *actus reus* and *mens rea* change between the courts. The prevalent fragmentation has led to extensive confusion among scholars and courts, including the relevant tribunals in question.[164]

However, Hathaway and co. underline that the general view on aiding and abetting within a certain court is clear, but that the courts differ among each other. Sometimes, the interpretation can be unexpected within one and the

[160] Plomp (2010), 6.
[161] Baars (2012), 239.
[162] Hathaway et al. (2020), 1602.
[163] Ibid 1593.
[164] Ibid 1607.

same court. The scholars also mean that the expression of aiding and abetting is flexible and must be interpreted considering the current time.[165]

The introduction of the Rome Statute brought clarity to the concept of aiding and abetting and led to several novelties compared to prior jurisprudence. The innovations gave rise to a doctrinal debate about the new requirements of *actus reus* and *mens rea*.[166]

Today, aiding and abetting is a customary norm in ICL, which is reflected in the ICTRS, ICTYS, and the ICCSt. The ICCSt differs lexically from the ICTRS and the ICTYS as it enlarged the criminality from "aiding and abetting" to "(...) [a person who] aids, abets, or otherwise assists", including "providing the means for its commission."[167] The author will in the following attempt to explain the requirements of aiding and abetting of current ICL, including summarising the discussion on their ambiguity.

5.2 Objective requirements

The objective requirements found in the ICCSt for *actus reus* demand the aider to support the committed or intended war crime by an action or omission to facilitate the criminal act. Also attempted international crimes may cause accomplice liability.[168] A failed international crime in the sense that it never was executed does, however, not lead to accomplice liability.[169]

The ICCSt does not further explain the meaning of 'aiding and abetting' apart from stating that 'providing the means for' as a type of requirement for the commission of the crime. Ambos notes that the conventional terms 'aiding and abetting' are not further explained in treatise law. Ambos means that 'aiding' is conform with assisting or helping, while 'abetting' might be compared to incitement.[170] Others, like Plomp and Ventura, interpret 'abetting' rather like encouragement or moral support for the commission of a crime[171], which is in line with the interpretation of the ICC.[172] The possible range of actions is limited by a causality requirement between the aiding act and the international crime, which, however, most likely, according to case law, does not oblige a strict causal link, see 5.1.1.[173] In relation to the concept of *Organisationsherrschaft*, where some scholars prefer terms of incitement, Ambos's definition might encompass such cases.

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[165] Ibid 1607-1608.
[166] Ibid 1606.
[167] Ambos (2014), 798.
[168] Ibid 799.
[169] Ventura (2021), 18.
[170] Ambos (2014), 799.
[171] Ventura (2021), 3; Plomp (2018), 8.
[172] Hathaway et al. (2020), 1610.
[173] Ambos (2014), 800.

Moreover, Ambos claims that 'aiding and abetting' should be used as an umbrella term for any action or omission which facilitates the commission of an international crime[174], and the terms are indeed bundled together by ICL.[175] However, case law distinguishes clearly between 'aiding' and 'abetting'.[176] Performing either or, suffices for applying the article. Also, even if someone tries to abet a crime by helping it but fails to do so, and thereby the objective help in form of aiding does not take place, the willingness of the perpetrator still makes the person potentially criminally liable.[177] In other words, the strong connection between aiding and abetting makes it suitable to treat them as one mode of liability.

However, scholars agree on that this mode of liability demands limitations. As of today, the *actus reus* of the Rome Statute reaches no threshold. Plomp recommends a study of the already existing jurisprudence from the *ad hoc* Tribunals to assess the true nature of the current observations on the provision. In fact, he points out, the draft of the Rome Statute did provide a threshold in the International Law Commission (ILC)'s Draft Code of Crimes against the Peace and Security of Mankind from 1996. There, the threshold reached 'directly and substantially'. Anyhow, as Plomp argues, some kind of threshold must be established since without it, 'the prosecution of the person who supplies an international criminal with coffee each morning [would be enabled] if the *mens rea* requirement was somehow met'. Moreover, he identifies that the very mandate of the ICC calls for an actual threshold for the *actus reus* of aiding and abetting.[178] In the following, the author will present potential limitations of *actus reus* on aiding and abetting discussed in ICL.

5.2.1 Substantial contribution

The degree of the causal link in ICL is a disputed topic. The requirement on the *actus reus* and thereby the causal link between the act or omission and the criminal result differ between the international courts.[179] Beyond the requirement for a certain action, the effort should reach a certain degree of intensity. Jurisprudence addresses '*direct and/or substantial contribution/effect*' when assessing the commission of aiding and abetting in an international crime. Although the statutes of the *ad hoc* courts did not entail such a requirement, *ad hoc* case law applied this threshold.[180] The courts did, however, not pronounce general rules, but rather matter-of-fact

[174] Ambos (2014), 799.
[175] Ventura (2021), 4.
[176] Hathaway et al. (2020), 1610.
[177] Plomp (2018), 8-9.
[178] Ibid.
[179] Ventura (2021), 7-8; Hathaway et al. (2020), 1611.
[180] Ambos (2014), 800.

statements for specific cases.[181] Today, a 'substantial contribution' for *actus reus* is seen as CIL.[182]

The ICTY was the first one to introduce the threshold on 'substantial' by reference to the ILC Draft Code, and thereby its provision on direction and substantiality, as 'an authoritative international instrument' for proving custom, clarifying unclear custom or for enlightening the opinions of the most qualified scholars. By this reference, the Draft Code was regarded proof of international law and the threshold on substantiality was established.[183]

Thus, the *ad hoc* and hybrid courts demand the act to have a 'substantial effect' on the crime alternatively having 'substantially contributed to' the commission of the crime. In comparison, the ICC has indeed recognised the need for causal link but has hitherto abstained from using the same wording as the *ad hoc* and hybrid courts.[184]

The ICCSt holds a relatively weak wording: 'Assistance with an *effect* on the principal crime', which deviates from prior case law and the ILC 1996 Draft Code as it does not require an 'substantial effect'.[185] For a long time, the ICC left the relationship to 'substantial effect' open, but clarified its position in 2016 as the court in two holdings declined the requirement on 'substantial effect' on the basis of the lack of any threshold in the ICCSt.[186] However, the requirement of 'substantial effect' is still part of CIL.[187] Yet, also the ICTYSt, ICTRSt and the SCSLSt lacked a requirement on 'substantial contribution', however, the courts still deduced that requirement from CIL.[188]

Ambos finds that the restriction only softens the requirement on a causal link in the way that both physical and psychological assistance are subject to the rules on aiding and abetting. Moreover, Ambos reasons about the requirement on 'substantial' and decides that it, still, carries weight, as it, despite its unclear character, sorts out forms of irrelevant aiding and abetting. However, such irrelevant cases are not further defined in doctrine, but the interpretation is for the court to decide in every individual case.[189]

Alas, Article 25(3) ICCSt contains no causality requirement. Also, nothing in the ICCSt suggests the need for a causal connection. Possibly, it could accommodate a causality requirement, which Plomp believes to be low, as

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[181] Vest (2010), 857.
[182] Ibid 860.
[183] Plomp (2018), 9.
[184] Plomp (2018), 7-8.
[185] Hathaway et al. (2020), 1612.
[186] *Bemba* Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 72 of the Statute, 1 90 (Oct. 19, 2016) in Hathaway et al. (2020), 1612.
[187] Plomp 11.
[188] Sharma (2019), 328–329.
[189] Ambos (2014), 800-801.

also attempted, and unsuccessful commission of a crime is criminalised. Such commission is, however, out of the scope of this thesis. Nonetheless, it is indisputable that a strong causal connection between the aiding or abetting act and the principal act must not exist. Strong in this sense refers to *conditio sine qua non*, thus an action without which the other action would not take place.[190]

However, scholars argue that *ad hoc* and hybrid case law has shown that 'the Tribunals require the conduct of the aider and abettor [to] have *some* effect on the commission of the crime by the principal perpetrator'. Plomp means that vague expressions like 'some', or for that matter 'substantial', might not be inherently negative, but an expression of the need for a case by case-oriented flexible approach by the courts. Furthermore, he even thinks that the ICC should uphold some kind of threshold for *actus reus* due to the limited but essential mandate of the ICC.[191] Vest agrees and even says it otherwise would be impossible to meet the gravity threshold, found in Article 17(1)(d) ICCSt.[192]

Aiding and abetting by an action might be manifest through assistance by the planning, preparation, or execution of a plan, a policy, a programme, or strategies which promote an international crime. It is important to bear in mind that an international crime typically is organised and comprehensive, which is also true for actions which not specifically aim to encourage the commission of international crimes[193], fitting into the delimitations of this thesis.

Finally, all hybrid and *ad hoc* courts, apart from the Special Tribunal for Lebanon (STL), reason in similar ways about the threshold on "substantial contribution". It is here noteworthy to mention that the STLS, which ruled as a hybrid court, is inspired by the national legislation of Lebanon which explicitly does *not* require "substantial effect" to qualify "aiding" or "abetting".[194]

Regarding the case-by-case assessment, Hathaway and co. write that an overall assessment of all evidence should be made. The overall assessment could revolve around a singular crime or multiple ones which together reach a 'substantial effect'. There is no need for the individual to hold a position of power or authority which theoretically enable actions of "substantial effect". Also, the action of an aider might only be of limited effect on the commission of the crime, yet still fulfil the requirements of 'substantial effect'.[195] Finally, it is not required for the international crime to be

[190] Ibid.
[191] Plomp (2018), 12.
[192] Vest (2010), 860.
[193] Plomp (2018), 17-18.
[194] Hathaway et al. (2020), 1613.
[195] Ventura (2021), 19.

dependent on the accomplice action.[196] Farrell notes that a substantial contribution could consist of routine business activity if it has a substantial effect on the commission of the crime.[197]

5.2.1.1 Case law of the ICTY and the ICTR

Since the ICCSt holds no threshold for *actus reus*, Plomp says, also after the rejection by the ICC on 'substantial effect', it becomes essential to find meaning through the case law of the *ad hoc* Tribunals. However, Plomp also underlines ICC has been reluctant to adopt ICTY and ICTR case law as the *ad hoc* Tribunals were geographically and timely limited and as their case law not yet was established in the world community. Plomp refutes the arguments and states that an examination of *ad hoc* jurisprudence becomes relevant to avoid fragmentation of ICL.[198]

The threshold for 'substantial effect' was discussed for the first time in the case of the Trial Judgment of *Tadić* at the ICTY. The case concerned Duško Tadić who was the president of the local board of the Serb Democratic Party in a city called Kozarac during the Yugoslavian Wars. In this city, close to a thousand non-Serb persons were killed. Other non-Serbians were assaulted and detained in prison camps. The requirement was a result of the analysis of case law stemming from after WWII and of the ILC Draft Code of Crimes from 1996. The analysis recognised a lack of criteria to discern 'substantial contribution' in old jurisprudence, while the ILC rules of 1996 entailed a requirement, although without further definition. Yet, the ICTY adopted case law from the WWII and stated: [accomplice liability] 'calls for a contribution that in fact has an effect on the commission of the crime' while 'in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused had in fact assumed'.[199] In fact, the ICTY concluded that simply psychological support counts as aiding and abetting, making this a standard of CIL.[200] However, Vest says that the degree of substantiality varies depending on the point of reference and the form of assistance, as mental and physical support naturally are different.[201]

In early case law of the ICTY in the Trial Judgment of *Furundžija*, the lower limits of 'substantial contribution' were clarified in relation to 'marginal participation' which was considered insufficient to form accomplice liability. *Furundžija* treated aiding and abetting of rape in the context of an ethnic cleansing where Anto Furundžija did nothing to stop sexual assault and rape but witnessed it in a position of authority. The conclusion was based on a comparison of military staff of low rank without

[196] Ibid.
[197] Farrell (2010), 892–893.
[198] Plomp (2018), 8.
[199] Ventura (2021), 38.
[200] Van Sliedregt (2012), 19.
[201] Vest (2010), 857-858.

any control or possibility to prevent or affect criminal actions, with persons who had located, examined, and submitted lists of communists, with knowledge of that the enumerated communists would be executed. Also, a high-ranking military *with* knowledge about the executions, who did nothing to prevent the executions or the summary process, was accounted for in the comparison material. Moreover, the legal application from the time era of WWII, the authority of a natural person was awarded great weight in the light of a superior or subordinate position and economic influence. *Furundžija* and the Appeal Judgment of *Šainović et al.* on the former deputy prime minister during the Kosovo war and ethnic cleansing on Albanians clarified that the relationship between the actions of the accomplice and the actions of the main perpetrator must be of such character that the action of the accomplice makes a "significant difference" for the execution of criminal offence by the main perpetrator.[202]

As the requirement of 'substantial contribution' was gradually established in their case law, the ICTY and the ICTR still left the degree of substantiality open in 'substantial contribution', until the Appeal Judgment of *Taylor* of the SCSL. The case concerned the former president of Liberia who was found guilty of aiding and abetting international crimes by financially and morally encouraging rebel forces in order to destabilise the country. In turn, the rebel forces raped, assaulted, killed, and abducted the civilian population. The court identified modern and historic cases with the requirement on a 'substantial contribution'. In brief, the court found that it typically involved a weakened position for the civilian population, a strong position for the perpetrators, and the furtherance of inhumane conditions for the victims. Moreover, the court singled out cases of *actus rei* not reaching a 'substantial contribution' based on insignificant acts, position, responsibilities, or distribution of orders. Finally, Ventura underlines the findings of the court on the provision of means to commit a crime. Here, the court did not find such provision alone necessarily sufficient for the criminal liability due to the fungibility of means (e.g., weapons, noted by this author) emphasises the lack of connection between the committed crime by the physical perpetrator and the aider and abettor, especially for crimes as isolated acts.[203]

In summary of the aforementioned cases and other case law not brought up here, case law fails to provide clear delimitations of the requirement of 'substantial contribution', but rather identifies individual circumstances as sufficient for the requirement. Ventura points out that this leaves much appreciation to the singular judges, which he finds is in line with ICL as it deals with very specific factual circumstances in each individual case of mass atrocity crimes, e.g., the fungibility of the assistance rendered by the potential aider and abettor.[204]

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[202] Ventura (2021), 39.
[203] Ibid 41–42.
[204] Ibid 44–45.

Furthermore, scholars mean that the impact of 'substantial effect' in the judgements of the courts might be questioned; Hathaway & co. point out that at least the *ad hoc* courts rarely acquit someone based on a lack of 'substantial effect' in the assessment of *actus reus*.[205] This could be supported by the finding of Ventura who says that legal thresholds indeed are inherently difficult to assess, even with legal language.[206]

5.2.2 Specific direction

The *actus reus* requirements have been modified by jurisprudence in more ways than 'substantial contribution'. At the ICTY, the obligations were amended by 'specific direction' in the *Tadić* Appeal Judgment, which later was quoted in the ICTY, the SCSL and once again by the ICTY in 2013-2014. The requirement became clear when contrasting 'aiding and abetting' with JCE. In relation to such acts, the acts of aiding and abetting consist of 'acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime'. Other courts simply quoted *Tadić* later, parallel to the development of other ICTY and ICTR appeal judgments without this requisite.[207] 'Specific direction' stipulated 'a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.[208] This requirement was later adopted by many other ICTY and ICTR appeal judgments, either directly or indirectly. So far, the ICC has not treated the doctrine. However, the requirement was later dropped to again be discussed in the following trials by the *ad hoc* and hybrid courts. Currently, Plomp observes that the requirement has not been discarded, nor established as a standard, however, the tendencies of today are rather negative towards it, thus its position seems weak.[209]

Its meaning can become relevant for mixed organisations carrying out both lawful and unlawful activities according to international humanitarian law. The concept could here sort out certain organisations whose actions measure up to criminality. ICTY jurisprudence (of the *Perišić* Appeal Judgement) has considered here the proximity between the accused and crimes in question, and in the case of geographical distance, other elements of aiding and abetting, e.g., substantial contribution.[210] However, Ventura points out the struggles of such a concept, together with the existing vagueness and ambiguity in *ad hoc* jurisprudence, decreasing conviction in this theory. Also, Ventura criticises the analysis of proximity in the light of contemporary technological developments.[211]

[205] Hathaway et al. (2020), 1611.
[206] Ventura (2021), 45.
[207] Ventura (2021), 24-25.
[208] Plomp (2018), 10.
[209] Ibid.
[210] Ventura (2021), 28.
[211] Ibid 34-37.

In conclusion, Ventura and many other scholars discard the theory as part of CIL due to its difficult application.[212] Also, Aksenova even claims that the requirement violates the principle of legality of specific direction as she means the sources of international law do not support it.[213] Her point of view could be supported by (the finding of the Appeal Judgments in *Šainović et al.* by) the ICTY and (*Taylor* by)the SCSL in refusing the 'specific direction' requirement found in the Tadić Appeal Judgment. The courts based their findings on a legal lack of statutory or CIL or State practice supporting the theory.[214] Currently, scholars argue that 'specific direction' is not required.[215]

However, Ventura also identifies the dangers of removing the concept overall as the *actus reus* might stretch too far without it. Some sort of threshold is thus needed for aiding and abetting, but its presentation is far from defined today.[216] The *specific contribution* requirement consists of three aspects which each can reach a certain degree of substantiality: geographical, temporal, and causal connections.[217] These will be discovered in the following.

5.2.2.1 Geographical connection

Plomp refers to ICTY and ICTR jurisprudence when stating that an accessorial object does not need geographical proximity to render accessorial criminal liability.[218] Both the ICTY and the ICTR have been concerned with political and military leaders geographically distant from the commission of international crimes. Instead of focusing on the physical or structural remoteness between the leader and the crime scene, the courts have assessed criminal liability on the base of the factual and legal nexus of JCE and aiding and abetting.[219]

This becomes especially relevant to transnational corporations which might be based geographically remotely from the crime scene. As noted in section 2, transnational companies are often based in the Global North but may still participate in atrocities in the Global South. Thus, the customary non-requirement for a geographical connection is pertinent when assessing accessorial criminal liability for business leaders. Also, Kaleck and Saage-Maaß and Farrell note that business leaders are likely to be located at a great distance from the crime scene, especially if they use suppliers for the commission of the crime.[220]

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[212] Ibid 37.
[213] M Aksenova (2015), 106.
[214] Plomp (2018), 10.
[215] Ibid.
[216] Ventura (2021), 37.
[217] Plomp (2018), 10.
[218] Ibid 10-11.
[219] Farrell (2010), 877–878.
[220] Kaleck & Saage-Maaß (2010), 716; Farrell (2010), 876.

Yet also the mere presence of an individual might render individual criminal responsibility. The courts have taken a hold of such presence consenting to the 'criminal nature' of atrocious circumstances. The type of presence has been concluded as part of the *actus reus* rather than the *mens rea* according to the ICTY.[221] Thereby, geographical proximity has a twofold approach: On one hand, it does not require the accessorial perpetrator to be at the crime scene, while on the other hand, the presence of an accessorial perpetrator weighs heavily, if actually present. The author believes that this should not be seen as an obligation for business leaders to be present at the crime scene to entail criminal liability, but as one of several possible options resulting in aiding and abetting.

5.2.2.2 Temporal connection

It is indisputable that an accessorial act to an international crime may take place before or after the commission of the crime. Scholars are, however, disagreeing whether aiding and abetting can take place *after* the commission of international crimes, *ex post facto*. It is not seen as impossible, but requires prior *mens rea* on the timeline, typically by an agreement entered prior to the commission of the action.[222]

Moreover, scholars question whether the ICC indeed is authorised to prosecute *ex post facto* accessorial crimes due to the principle of legality as the ICCSt does not include grounds for such prosecution.[223] However, Plomp writes that there indeed exists support *ex post facto* aiding and abetting under the ICCSt.[224] Also, Plomp states that the ambiguity of case law on the topic leads to the conclusion that it might not be relevant for the ICC to prosecute, also due to the scarcity of potential cases.[225] In theory, however, the potentiality of *ex post facto* prosecution is indeed of interest for business leaders as *ex post facto* scenarios could involve some kind of legal agreement between corporations as aiders and abettors, and i.e. a government taking part in war crimes.

5.2.3 Minimum contribution and neutral activity

The unclear threshold on *actus reus* for aiding and abetting finds similarities in Article 25(3)(d) ICCSt for JCE. Until now, the ICC has been indecisive in its interpretation of the demarcations of the provision. Ventura means that if the ICC applies a 'minimum contribution' standard there, so should be the

[221] Plomp (2018), 10-11.
[222] Plomp (2018), 11.
[223] Ibid.
[224] Ibid 15.
[225] Ibid 11.

case for aiding and abetting in Article 25(3)(c).[226] So far, the limitations of Article 25(3)(c) are, as stated, unclear and might not even exist. However, he refers to the *ad hoc* and hybrid tribunals which demanded a 'minimum contribution' in the form of a substantial contribution.[227] Hence, logically a requirement of a substantial contribution must somehow exist to some degree.

Vest finds that the lowest standard of neutral assistance must amount to a 'substantial' contribution. Regarding neutral actions, he refers to German speaking criminal law doctrine which describes it as harmless activity which could be harmful with a certain knowledge about the circumstances of the activity, e.g., lending a knife with or without the knowledge of a murder which will be committed with the knife.

Common law, rather than civil law, has tried to define the limits of neutrality. Common law reached the conclusion that a case-by-case assessment must be made. However, civil law tradition, which is the focus of this thesis, has found no such uniform conclusions, yet German law includes a discussion, see 6.3. Vest suggests and supports one theory, which means that neutral 'assistance' only provokes criminal responsibility when it '(clearly) increases a prohibited risk that the primary party commits the respective crime'.[228] This goes in line with reasoning on 'substantial contribution' by Plomp, see 5.1.1, underlining the importance of creating a reasonable threshold which exempts e.g. "(...) the owner of a shop delivering food and beverages to the guards of a concentration camp (...)"[229].

Business actors can participate in international crimes in several ways, either by cooperating with military regimes and dictatorships or by participating in the war and other conflicts. Cooperation can be subdivided into a) cases in which corporations' profit from state violence, b) cases in which the regime's human rights abuses are facilitated by providing the necessary means and c) cases in which corporations directly support repression without direct economic benefit.[230] Farrell points out the extensive breadth of which companies can take part in international crimes. As he says, it stretches from direct participation by private military companies in conflict zones to "simply" upholding business activity in areas of violations of international humanitarian law.[231]

Cases related to a) might be relevant when companies profit from state violence towards workers, trade unionists and other opponents of politico-economic projects. Alternative b) foresees facilitation through international

[226] Ventura (2021), 51.
[227] Ibid 101.
[228] Vest 863-864.
[229] Vest 864.
[230] Kaleck & Saage-Maaß (2010), 703.
[231] Farrell (2010), 873–874.

crimes, such as by chemicals, weapons, vehicles, computer systems, loans[232], legal services, medical treatment or by buying 'tainted' raw materials or products.[233] These might either be sold or bought, as long as they give energy to the armed conflict.[234] Lastly, c) finds cases where corporations support oppression by, e.g., passing on personal information of regime critics.[235]

The other main form of involvement is to be invested in war zones and other conflict areas. This activity could be performed in two ways; where the first could be described as inciting conflict through the provision of goods by trading, e.g., weapons, diamonds, and timber, or by financially supporting paramilitary or militia groups. The second category entails the provision of military and intelligence service.[236] For this thesis, the author will include all the ways of taking part and/or supporting conflict.

It is vital to discern neutral illegal assistance from neutral lawful assistance seen to human rights abuses and the upholding of conflicts in conflict zones. Moreover, Kaleck and Saage-Maaß write that the character of the activity might change the *mens rea* requirements as trade of dangerous goods requires less knowledge of the criminal purpose for the businessmen than other goods which require more knowledge.[237]

For delimiting the number of criminal scenarios by neutral actions, the International Commission of Jurists (ICJ) has published a set of criteria to ascertain whether a business activity is criminal or not, namely, if the company (1) enables the abuse to occur *sine qua non* (2) makes the situation worse, (3) facilitates the specific abuse by making it easier to carry out, as far as concerns the *actus reus*. Regarding *mens rea*, the corporation needs to actively aim to enable, exacerbate or facilitate the international crime; possess or should possess knowledge about the risk of their conduct; or they must be 'wilfully blind' to that risk. Lastly, there must be a connection between the company or its employees and the principal perpetrator or the victim of the abuses either due to geographic proximity, the duration, frequency, intensity and/or nature of the connection, interactions, or business transactions.[238] Overall, scholarship stresses the need for a case-by-case assessment for 'neutral' assistance.[239]

[232] Kaleck & Saage-Maaß (2010), 703.
[233] Vest (2010), 860.
[234] Ibid 852–853.
[235] Ibid 703–707.
[236] Kaleck & Saage-Maaß (2010), 707–709.
[237] Ibid 720–721.
[238] ICJ (2008), 10.
[239] Vest (2010), 869.

5.3 Subjective requirements

5.3.1 General remarks

In addition to the *actus reus*, international crimes require *mens rea* in international courts to establish criminal liability.[240] The level of *mens rea* varies across the international tribunals; it ranges from a degree of 'knowledge' to 'purpose' to 'intent'. The *ad hoc* Tribunals, the SCSL, and the ECCC share the lesser burdensome requirement of 'knowledge' of that the acts performed by the aider and abettor aid the commission of the crime of the main perpetrator. Also, the knowledge stretches to knowing the nature of the 'essential elements' of the committed crime yet does not require the aider and abettor to know the exact crime intended.[241] Additionally, the courts ruled there was no requirement on the accused to *consciously* decide to act for the purpose of aiding the commission of an international crime.[242]

These requirements are so far similar to the ruling requirements of the ICCSt. At the ICC, firstly, the aider and abettor must have knowledge that his actions help the main perpetrator. Secondly, the aider and abettor must understand the 'necessary elements' of the crime. However, like the statutes *ad hoc* and hybrid court, the ICCSt does not demand the aider and abettor to know the precise crime in question.[243] It is indisputable that the action of the accused does not need to have been undertaken to facilitate the commission of crimes,[244] like case law of the *ad hoc* and hybrid courts. Ambos reaches the conclusion that the objective requirements are put relatively low in proportion to the high requirements for *mens rea*.[245] While the lack of a threshold in the *actus reus* requirements of the ICCSt make them less strict than the *ad hoc* rules, the ICCSt requires a stronger *mens rea* since its domain is more specific.[246]

5.3.2 Purpose of facilitating

The ICCSt upholds in contrast to *ad hoc* case law of 'knowledge' a more profound requirement of *mens rea*, called '[f]or the purpose of facilitating' in Article 25(3) ICCSt, without further defining it. The lack of definition has clouded the mind of scholars, which in turn has been enhanced by the limitations in ICC jurisprudence on aiding and abetting liability under the Rome Statute. Hathaway and co. mean that it might be too early (stated in

[240] Hathaway et al. (2010), 1613.
[241] Farrell (2010), 882; Hathaway et al. (2020), 1614.
[242] Farrell (2010), 882.
[243] Ventura (2021), 22-23.
[244] Ibid 24.
[245] Ambos (2021), 801.
[246] Vest (2010), 859.

2019) to further define the demarcations of the definition. However, the ICC has clarified that 'purpose' is different than 'knowledge' and thereby a higher *mens rea* standard.[247] Thus, mere recklessness is insufficient for qualifying the aider and abettor for liability according to the ICCSt[248], in contrast to that 'recklessness' suffices for CIL, because of *ad hoc* jurisprudence.[249]

To understand the concept better, the author turns to potential methods of interpretation. Plomp means that Article 30 ICCSt cannot be used by the interpretation of '[f]or the purpose of facilitating' and that the notion of 'purpose' cannot serve as an additional *mens rea* requirement. Currently, scholars are divided into two camps where one holds that it strengthens the requirement of intent, while the other believes that it maintains the traditional 'knowledge' requirement intact. Also, it is disputed whether this wording has any base in CIL. Plomp finds the wording to require a higher *mens rea* than mere recklessness, as stated, was established by the *ad hoc* Tribunals. This *mens rea* would, however, not stretch to *dolus directus*, but rather *dolus indirectus*.[250]

Next, the author turns to case law. The ICC has pronounced that to act with 'purpose' means to have knowledge about and aim for the aiding and abetting to facilitate the commission of the crime. Here, the ICCSt has higher requirements than the ICTRS and the ICTYS which only demand aiding and abetting to *facilitate* the commission of the crime.[251] Alas, the ICCSt is incompatible with prior case law on the topic. When applying the new standard according to the ICCSt, Plomp finds it essential for the sake of predictability of the law to acknowledge that the ICCSt diverges from conventional theories on recklessness in customary law. Plomp reaches the conclusion that '[f]or the purpose of facilitating' should be read as a *mens rea* higher than recklessness but within the boundaries of customs, and thereby result in *oblique intent*,[252] which is higher than the intent standard set by the *ad hoc* Tribunals.[253]

Whether the requirement of 'purpose' constitutes CIL was discussed by Farrell with reference to the *Talisman* Case by the US Court of Appeals on the Alien Tort Claims Act (ATCA), a jurisdictional statute that allows for tort claims before U.S. courts for international violations committed abroad. Here, the court applied 'strictly international law', making domestic law interesting to this thesis. In conclusion, the court referred to the *mens rea* provisions of the ICCSt as CIL, claimed that aiding and abetting liability ever since IL at the time of the Nuremberg trials focused on 'purposeful

[247] Hathaway et al. (2020), 1616.
[248] Plomp (2018), 15.
[249] Schabas, 'Enforcing international humanitarian law' (n 32) 446 in Plomp (2018), 12.
[250] Plomp (2018), 15.
[251] Ambos (2021) 801; Ventura (2021), 8-9.
[252] Plomp (2018), 15.
[253] Ibid 21.

conduct', and that no source of IL requires a mere 'knowledge' standard. However, Farrell criticises the reasoning as it blatantly ignored ICTY practice which needed to reflect CIL while the ICCSt not necessarily constitutes CIL as it is not bound by customary law. Rather, Farrell points out that the ICC only is bound by the ICCSt and its elements of crimes. He means that the large adoption of the ICCSt by many states gives it substantial weight to ICL as the approval serves as a strong sign of *opinio juris*, however, it does not automatically turn the ICCSt into CIL. By that, the requirement on 'purpose' has been seen as an 'additional element' but not a reflection of CIL.[254]

Also, Plomp comments that the requirement on 'purpose' would make it more difficult to prosecute business leaders as this requirement would not capture persons knowingly assisted in the commission of a crime, but did not act in that way with the sole purpose of contributing to the commission of the crime.[255] However, some scholars argue that it is difficult proving intentions beyond making profit for a corporation.[256] Here, a distinction between criminal business activity and neutral actions must be made. Kaleck and Saage-Maaß mean that the supply of *per se* dangerous goods, e.g., weapons, must be distinguished from the supply of goods which might contribute to the commission of international crimes, such as computer programs or certain chemicals. Regarding the dangerous goods, a lower *mens rea* is sufficient, while a perpetrator providing less harmful goods needs to have greater knowledge about the circumstances of how the goods will be used.[257]

5.3.3 Forms of intent

International norms on *mens rea* are ruled by the wording of the singular provision. However, different legal systems differ on their view on the word 'intent', part of *mens rea*. Martinsson and Lekvall mean that the differences are reflected in ICL as the judges naturally are coloured by their domestic legal standards.[258] *Dolus directus* requires that the accused 'knows that his or her acts of omissions will bring about the material elements of the crime' and [that she or he] 'carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime'. Some scholars perceive the standard set as higher than civil law and common law due to a lack of knowledge of the perpetrator about the effect of his or her actions.[259] *Dolus indirectus* should be interpreted as the perpetrator realises and readily understands that his or her action brings

[254] Farrell (2010), 885–887, 889.
[255] Farrell (2010), 889.
[256] Plomp (2018), 13.
[257] Kaleck & Saage-Maaß (2010), 721.
[258] D Martinsson & E Lekvall (2020), 126–127.
[259] Ibid 130-31.

about a certain effect. This is in line with common law.[260] Moreover, *dolus eventualis* has come to signify 'recklessness' in international jurisprudence, meaning that the perpetrator acted knowlingly of the circumstances and risks yet still acts.[261] However, many scholars means that CIL on *mens rea* is vastly confusing.[262]

Although the interpretations made about *dolus directus* and *dolus indirectus* are clear, doubt remains about the width of Article 30 ICCSt as the ICC also has nudged the concept of 'recklessness' or *dolus eventualis*. However, this has been criticised as the concept neither is found lexically in the provision nor was touched upon in the creation of the article, per the conventional methods of interpretation according to Article 31 and 32 VCLT. The prosecutor agreed that *dolus eventualis* is too low of a threshold for the serious crimes committed by perpetrators standing in front of the ICC. Martinsson and Lekvall note that the demarcation is interesting as Swedish law accepts all kinds of *dolus* to prosecute crimes,[263] see 6.2.3.

To begin with, neither the ICYTS nor the ICTRS entails provisions clarifying *mens rea*. This lack resulted in the pronunciation of norms on *mens rea* found in their case law. However, the case law sometimes does not define *intent* and if it is defined, the limits between different types of intent are every now and then not drawn. Alas, case law is unclear regarding the meaning of different types of intent. However, Martinsson and Lekvall draw conclusions from some later case law that *dolus indirectus* requires the perpetrator to have knowledge about the probability of the effects of a certain action, for *dolus indirectus*.[264]

In contrast to the *ad hoc* Tribunals, the ICC works according to a clear provision on *mens rea* in Article 30 ICCSt. The relevant *mens rea* is narrowed down to 'intent' and 'knowledge'. Some crimes, such as war crimes towards civilians, can according to CIL be committed by lower forms of *mens rea*, such as recklessness. Thus, Martinsson and Lekvall state that the ICCSt requires a high standard for *mens rea*. Article 30 ICCSt is considered to include at least *dolus directus* and *dolus indirectus*.[265] Thereby, Martinsson and Lekvall mean that Article 30 ICCSt deviates from CIL. Cryer *et al* argue that such a reading of *mens rea* on intent 'will certainly make prosecuting those who sell arms or other war matériel which is used for international crimes difficult to prosecute' [sic]. Here, they make a point of the difficulty in showing intent beyond making economic profit for business leaders,[266] see 5.1.2 for some remarks. In contrast to Martinsson

[260] Ibid 131.
[261] Ibid 128.
[262] Ibid.
[263] Martinsson & Lekvall (2020), 133.
[264] Ibid 127-129.
[265] Ibid 129-130.
[266] Cryer and others, *An Introduction to International Criminal Law and Procedure* (Third edition, CUP 2011) in Plomp (2018), 13.

and Lekvall, Plomp states that Article 30 ICCSt is stricter than the customary standard of recklessness, however, neither that provision nor Article 25(3) ICCSt requires intent, yielding room for recklessness as a possible mode of *mens rea* for aiding and abetting.[267]

Alas, *mens rea* relating to aiding and abetting of the ICC concerns both Article 25(3) ICCSt and Article 30 ICCSt. Article 30 requires *dolus directus*. In fact, Plomp describes how *dolus directus* poses some problems when ascertaining aiding and abetting separately, as the *mens rea* is less apparent regarding aiding or otherwise assisting as such acts could be committed without the essential *mens rea*.[268] However, he reaches the conclusion that the limits of mens rea of article 25(3) ICCSt should be interpreted in line with article 30 ICCSt.[269]

5.3.4 Shared Intent

The ICTYS, ICTRS and the SCSLS do not require the abettor to accord the intent with the principal perpetrator.[270] Regarding current ICL, several scholars, e.g. Ventura and Baars, mean that the aider and abettor do not need to share the same intent, covering situations where the intent of a business is purely commercial.[271]Also, ICTY case law has stipulated that the main perpetrator and the aider and abettor do not need to share the same intent. Plomp concludes that it seems as if the aider and abettor indeed does not need to share the intent with the main perpetrator.[272]

Most scholars agree that the article should be read with a focus on 'purpose' in contrast to Article 25(3)(d) ICCSt which distinguishes between assistance by intent and assistance by knowledge. However, according to such a view, the aider and abettor needs to share the intent of the main perpetrator.[273] Vest writes that such a view allows for a more expansive reading of 'for the purpose' which would include business leaders who act 'primarily, or at least simultaneously', for economic purposes, which would be in line with case law.[274] Also, Vest points out that 'different ultimate goals may not hinder a shared intent with regard to the joint commission of certain crimes amounting to a (…) joint criminal enterprise'. He notes that a continuing relationship between the aider and abettor and the principal perpetrator might indicate a common plan or a shared intent. However, he points out the high standard for evidence of a 'shared plan'.[275]

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[267] Ibid 13.
[268] Plomp (2018), 13.
[269] Plomp (2018), 15.
[270] Hathaway et al. (2020), 1615.
[271] Ventura (2021), 23; Baars (2012), 234.
[272] Vest (2010), 861 in Plomp (2018), 14; Plomp (2018), 13-14.
[273] Vest (2010), 861.
[274] Ibid 862–863.
[275] Ibid 86–869.

Also, Farrell suggests that 'the purpose of facilitating in the commission of a crime' under Article 25(3)(c) ICCSt could be read as a requirement for the abettor to share the intent of the main perpetrator. Another explanation could be that the aider and abettor need to intend *to assist in the commission*, alas, with the specific purpose of assisting the commission of the crime. Anyhow, Farrell concludes that the standard of 'purpose', regardless of interpretation, prosecution of corporate leaders seems more difficult than under comparable *ad hoc* case law.[276]

6 Domestic regulation

6.1 Regulation of international (criminal) law in Sweden

The crime in question is stated in the *Swedish Act on Certain International Crimes* (2014:406) [Act on International Crimes]. The assorted crimes are based on universal jurisdiction, enabling Sweden to prosecute war crime offenders in Sweden regardless of the crime scene as long as the perpetrator was a Swedish citizen.[277] The law in question is a type of transformation which *per se* changes the national law.[278]

The act entered into force on 1 July 2014 and was amended on 1 January 2022 with the crime of aggression. The act was introduced for several reasons, mainly because Sweden should be able to prosecute the listed crimes just as well as the ICC. Parallel to the introduction of the act, the old provision on international crimes, 22. chapter 6 § in the Swedish Criminal Code (BrB), was suspended and replaced by the criminal liability in the new act.[279] However, the old provision is still applicable for crimes committed before 1 July 2014 and applies to most cases which have been prosecuted in Sweden up until this date.[280]

The current national regulation of ICL in Swedish law is the heritage of the first national Swedish recognition of international crimes in 1948.[281] The previous version of the criminal code was changed with the introduction of the Geneva Conventions in 1954. It was stated in the legal draft that due to a lack of agreement on general criminal law provisions, national provisions

[276] Farrell (2010), 882–883.
[277] Prop. 2020/21:204, 108.
[278] M Klamberg 'Förhållande mellan folkrätt och svensk rätt: Monism och dualism' (2020), 58–59.
[279] Prop. 2020/21:204, 53.
[280] Martinsson & Lekvall (2020), 137.
[281] M Klamberg, Mark, 'Tidigare och nuvarande straffbestämmelser' (2020), 87.

should be applied. Later changes to the code, made in 1962 and 1986, introduced a specific act for international crimes, act (1964:169), which later was replaced by the earlier mentioned Act on International Crimes (2014).[282]

Sweden joined the Rome Statute on 28 June 2001 and thereby committed to legal cooperation with the ICC.[283] By the access to the ICCSt, Swedish law was deemed compatible with the demands of the statute.[284] As of 2020, there have been 12 international crimes investigated and prosecuted in Sweden.[285] All of them have concerned physical individuals as direct perpetrators.[286] Alas, no case of aiding and abetting has reached Swedish courts.[287]

However, no obligation to regulate ICL in the domestic legislation follows by access to the ICCSt. Since Sweden has ratified the ICCSt, no additional legislation is needed which would criminalise the same crimes as are found in the ICCSt. Nonetheless, the ICCSt surmises that the ratifying states, as well as the ICC, have jurisdiction over all crimes stated in the ICCSt and that primarily the Member States are obliged to prosecute for those crimes.[288] Furthermore, it is unclear whether there exists an international obligation to criminalise international crimes to a larger extent than stated in binding international agreements.[289]

6.1.1 Monism and dualism

The degree and means of incorporation and interpretation of international law in domestic law is a subject with several angles. Also, it is important to this thesis as it is part of explaining the results of the expectations of IL on domestic Swedish law. Klamberg reasons about the Swedish approach to monism and dualism. Originally, in the 19th century, Swedish legal culture took a monistic turn. However, in the last century, dualism has dominated legal reasoning. This might be slightly less true for CIL. However, with the incorporation of the ECHR and Sweden's access to the EU in 1995, monistic relations reappeared. Klamberg underlines that the relationship does not entail the same monism as treaties can give rise to, however, its effect might be similar since Sweden actively recuses itself from national legislation on certain areas of law to non-domestic organs.[290] In conclusion,

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[282] Ibid 89–90.

[283] Prop. 2013/14:146, 22.

[284] Prop. 2000/01:122, 38.

[285] M Klamberg, 'Betydelsen av nationell lagföring av internationella brott' (2020), 19.

[286] M Klamberg, 'Rättegångar i Sverige' (2020), 35–38.

[287] Svensson, Erik, 'Gärningsmannaskap och medverkan till brott' (2020), 112.

[288] Prop. 2020/21:204 52, 67; Klamberg, 'Tidigare och nuvarande straffbestämmelser' (2020), 92.

[289] P Asp, 'Internationell straffrätt' (2012), 59.

[290] Klamberg, 'Förhållande mellan folkrätt och svensk rätt' (2021), 57–59.

he seems to believe that the Swedish legal system principally is dualistic with some recent monistic tendencies, derived primarily from supranational authorities.

Asp supports the view of the Swedish legal system as dualistic. When the Swedish lawmaker introduces new legal elements, scarce consideration is usually taken to objections of international law, however, Asp points out that this is not concerning as other mechanisms are in place to compensate for such a lack. Typically, Swedish law could take IL into consideration on three levels, either by incorporation with actual references to IL indirectly by IL as interpretation data to clarify domestic law which was introduced to establish international agreements or to use IL as a general interpretation method of domestic law. Here, the third and last method becomes relevant.[291]

Asp states that jurisprudence from the ICC regarding, for example, aiding and abetting, will affect the national view on the same instrument long-term, especially by being considered by doctrine, giving results both for national legislation and enforcement. However, he points out that the status of the national view on legal sources also plays a key role in determining the influence of international jurisprudence: A tendency to let domestic law be influenced by international norms might be larger if the domestic legal situation is uncertain, in contrast to clear statements from the lawmaker in the form of e.g., preparatory works. Lastly, Asp underlines that one should be very careful in judging the application of international norms in domestic courts.[292]

The national committee introducing the *Act on International Crimes* [the Committee] recognised the need for a uniform and all-encompassing national legislation which was emphasised by the time of the introduction of a certain law on ICL in Sweden. Apart from harmonising the crimes of ICL into a singular piece of legislation, the committee aimed to adequately formulate the liability control of the ICCSt for persons of a superior position.[293] Additionally, the committee members addressed the strengthened individual responsibility for ICL by the new act. In general, the committee wished to harmonise the treaty obligations with the Swedish provisions, thereby achieving the necessary requirements on foreseeability and concreteness by criminal law. At the same time, the act should provide a legal design in coherence with Swedish legal design possible with an internationally approved conceptual framework.-Finally, the committee underlined that the act, i.e., a national clarification of ICL, should be interpreted and applied in the light of the provisions of the ICCSt and their interpretation and application by international tribunals, e.g., the ICC.[294]

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[291] Asp, 'Internationell straffrätt', 64.

[292] Ibid 69–70.

[293] Prop. 2013/14:146, 68-69.

[294] Ibid 69–71.

Concerning the general provisions of the ICCSt, the committee establishes in the legislative bill that an introduction of them into Swedish law is neither urgent nor suitable since they do not form part of international customary law. Instead, the committee concludes that Swedish general provisions on criminal justice should be applied.[295] Although the suggestion of the committee to 'naturally' (givetvis) take principles and jurisprudence of the ICC into consideration when applying the new Swedish law, the government departed from the proposal.[296]

However, Klamberg pronounces the importance of not applying the ICCSt by default when searching for answers regarding the *Act on International Crimes*. He thereby establishes the ICCSt as a form of a guaranteed minimum standard.[297] Moreover, Klamberg points out that the obligations set up by the ICCSt primarily target international cooperation with the ICC for the concerned states.[298]The Swedish rules on aiding and abetting in ch. 23 sec. 4 BrB state that these provisions apply if not stated otherwise in law or by the intentions when the provision of a certain crime was promulgated.[299] Here, the central Swedish provision was intended to be read together with the Swedish rules on aiding and abetting, not the regulation of the ICCSt. Asp finds the result natural as he equates the severity of aiding and abetting in international crimes with aiding and abetting in domestic "classical" crimes such as offensive behaviour. However, he also states that it might be relevant in the future (written in 2021) to consider the ICCSt and its jurisprudence when applying domestic provisions on aiding and abetting in international crimes.[300]

Svensson is of another opinion. He proposes to interpret the Swedish act of 2014 in accordance with "considerations" of international law. As Svensson points out, the legal position on the extent of aiding and abetting in Swedish law is relatively unclear, which plays a role for its influence, which in turn is in line with the reasoning of Asp.[301]

6.1.2 Aiding and abetting in Swedish application by international law

By the investigation of a Swedish act on international crimes, the government unanimously found that national provisions on aiding and abetting should be applied to the crimes in the foreseen act. No consultation body objected.[302]

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[295] Prop. 2013/14:146 71.

[296] Svensson (2020), 115–116.

[297] Klamberg, 'Tidigare och nuvarande straffbestämmelser' (2021) 95.

[298] Ibid 93–94.

[299] Asp (2021), 373.

[300] Ibid 376–377.

[301] Svensson (2020), 115.

[302] Prop. 2013/14:146, 212.

Klamberg identifies the question of applicable general provisions for ICL in national Swedish proceedings. In particular, he raises the question whether general principles of ICL should be considered.[303] As accounted for, the Swedish lawmaker chose by the Act of 2014 *not* to take principles and jurisprudence of the ICC into account when prosecuting ICL in Sweden.

The government motivated the choice of Swedish law rather than international law by that the general part of the ICCSt does not constitute CIL and are primarily intended to be applied by the ICC, not by domestic courts.[304] This harmonises with the state of domestic proceedings of ICL, although it has increased during recent years. Werle & Jessberger note that domestic courts largely have relied on classic offences when approaching IL, however, recent tendencies show new habits of applying crimes of IL which have been incorporated into domestic legislation.[305]

In addition, the Swedish government states that the domestic provisions on aiding and abetting are 'extensive' in comparison to the ICCSt. [306] Finally, the government stated that the ICCSt encourages Member states to make use of their own legal traditions, which here motivates the choice of Swedish rules on aiding and abetting.[307] Asp states that there is no legal obligation for Sweden to enlarge criminal liability further than what is said in the ICCSt as there are a very limited number of situations where a treaty compliant interpretation is needed.[308]

However, for international crimes committed before 2014, other rules on aiding and abetting may apply, Svensson means. Back then, international crimes were ruled by the BrB with a clear reference to general norms and treaties of international humanitarian law. Svensson indicates that one thereby could have applied international customs or international law on aiding and abetting rather than national norms, as the provision was incorporated into Swedish law via the legal technicalities. Thereby, fewer people would probably be found criminally liable for aiding and abetting before 2014 than after due to the narrow fit of international norms on aiding and abetting.[309]

[303] Klamberg, 'Del III: Den svenska straffrättens allmänna del och generella principer inom internationell straffrätt' (2021), 97.
[304] Prop. 2013/14:146, 212.
[305] Werle & Jessberger (2014), 162–163.
[306] Prop. 2013/14:146, 212.
[307] Ibid 213.
[308] Asp, 'De osjälvständiga brottsformerna' (2021), 377.
[309] Svensson (2020), 115.

6.2 General Swedish rules on aiding and abetting

6.2.1 Perpetration of crimes

Only physical individuals can commit crimes according to Swedish criminal law. The role taken by the crime perpetrator is not further defined. Instead, Swedish criminal law looks to each legal provision of the criminal catalogue (brottsbeskrivning) to define the specific boundaries of the mode of perpetration (gärningsmannaskap) in each case where the crime is described, and an appropriate scale of penalty is established. In this thesis, the provisions for ICL in Swedish law become relevant.[310] In this setting, they include the crimes stated in the ICCSt that later are referred to in the Swedish 2020 Act.

Aiding and abetting as a mode of participation is codified in BrB, ch. 23 sec. 4 and 5:

> *4 § Punishment as provided for an act in this Code shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or act. The same shall also apply to any other act punishable with imprisonment under another Law or statutory instrument. A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.*
>
> *Each accomplice shall be judged according to the intent or the negligence attributable to him. Punishments defined in law for the act of a manager, debtor or other person in a special position shall also be imposed on anyone who was an accomplice to the act of such person.*
>
> *The provisions of this paragraph do not apply if the law provides otherwise in special cases*[311].

Asp notes that collaboration or accessory status can either legally be formulated as criminal offences of their own or as general principles. The Swedish lawmaker has chosen the last-mentioned step, where the results are found in ch. 23 sec. 4 and ch. 23 sec. 5 of BrB.[312] A criminal '(...) advice or deed' encompasses actions and omissions which promote the crime, even if they simply promote the intent of the main perpetrator. The guilt of the aider and abettor is judged based on subjective requirements of the individual legal provision. Thereby, the provision is applicable to international crimes. Aiding and abetting stretches generally to all criminal acts of BrB and for all crimes of the special criminal law which could be penalised with imprisonment.[313] However, *lex specialis* of other criminal areas take precedence over the general law, which even could be indirectly caused by

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[310] Svensson (2020), 100, 102.
[311] The Ministry of Justice, Official translation of The Swedish Penal Code, Ds 1999:36.
[312] Asp et al., *Kriminalrättens grunder* (2013), 425.
[313] See Zila (2018), 23:4:1; Bäcklund (2021), 23:4:2:4.

remarks in the Swedish preparatory works, see ch. 23 sec. 4 par. 4 BrB.[314] Since the lawmaker stated no special rules on aiding and abetting in international crimes, the general provisions are applicable.[315]

6.2.2 Mode of perpetration

Unlike the ICCSt, Swedish national legislation entails no central provisions on characterising the perpetrator from his peers. The central provisions in Article 25.3.a) ICCSt on a) "individual" b) "jointly with another person" c) "through another person" can be compared to the Swedish concepts of i) gärningsmannaskap i strikt mening ii) medgärningsmannaskap iii) medelbart gärningsmannaskap.[316] The Swedish concepts are not outlined in the way of ICCSt in the Swedish Criminal Code but are found in doctrine and jurisprudence. Lernestedt does not necessarily support different names for various roles but by other means such as different degrees of culpability, for the purpose of transparency and structure[317], assumed by this author to be expressions of the principle of legality.

Further, Asp describes that the rules on complicity, here aiding and abetting, are theoretically applicable on cases with involved persons who cannot be seen as 'physical main perpetrators' (gärningsman i strikt mening).[318] A physical main perpetrator means the one who committed the crime.[319] This should be distinguished from 'joint perpetration' (medgärningsmannaskap) according to Svensson.[320] Further, Swedish criminal law entails 'enlarged perpetration' (utvidgat gärningsmannaskap) and 'indirect perpetration' (medelbart gärningsmannaskap).

Essentially, Swedish criminal law recognises two types of participation: principal perpetration (gärningsmannaskap) and furthering of a crime through complicity (främjande). The principal perpetrator is seen as the one fulfilling the prerequisites of the crime. Complicity becomes relevant when more than one person as in involved as the criminal act needs to be produced by someone else than the aider and abettor.[321] Svensson underlines the importance on identifying the 'complicity object' (medverkansobjekt) executed by a perpetrator ('begången i gärningsmannaskap') and thereafter investigate the range and role of the criminal actors. Different theories have ideas about the distinction between perpetration and complicity, i.e., responsibility as an accomplice. Essentially, Svensson means that the

[314] Asp et al., 'Kriminalrättens grunder' (2013), 426.
[315] Svensson (2020), 115.
[316] Svensson (2020), 101.
[317] Lernestedt (2009) 57.
[318] Asp, 'De ofullständiga brottsformerna' (2021), 326.
[319] Holmqvist (2000), 628.
[320] Svensson (2016), 119.
[321] Asp & Ulväng (2013), 433.

individual punitive ban should function as guidance in each individual case.[322]

Alas, the one who has not furthered a criminal act found in a punitive ban is a physical main perpetrator (gärningsman i strikt mening). Enlarged perpetration (utvidgat gärningsmananskap) is the, somewhat disputed, result of persons who did not commit the act themselves yet still 'answer' for the crime. Further, Swedish case law established that more than one person can be physical perpetrators (medgärningsmannaskap) when they act 'together and in agreement' (tillsammans och i samförstånd). The assessment should be based on the joint act in relation to the punitive ban.[323] Svensson claims that its relation to other types of perpetration modes, e.g. furtherance, depends on that the involved persons adapt their behaviour in relation to each other.[324] Moreover, the Swedish criminal law has developed a concept in doctrine and jurisprudence on 'indirect perpetration' (medelbart gärningsmannaskap) which involves an inciter as the main perpetrator if the inciter has been a tool of someone else, for example being a child without knowledge or simply unaware of the character of the criminal action. However, it is rarely used but sparks a discussion about the identification of the main perpetrator.[325]

The Swedish rules on aiding and abetting of 24:4-5 BrB use the word 'complicit' (medverkande) which here includes all persons who have somehow aided or performed criminal activity linked to the crime in question, see 6.2.2. However, doctrine differs between different degrees of complicity, yet describing the complicit as indeed only the complicit. Asp points out that several persons can act as main perpetrators without being individually criminally liable as main perpetrators but together being complicit in a crime.[326]

Essentially, complicity requires an accomplice to have furthered the complicity object. Moreover, complicity consists of either instigation by inducing the principal to commit the act or for otherwise aiding by simply furthering the complicity object. Thus, Swedish criminal law does not refer to 'aiding and abetting' like IL but uses domestic legal concepts. In brief, an instigator carries a stronger legal responsibility than an aider as his or her contribution carries a more substantial causal link between the act of complicity and the principal act than the one of the aiders, who merely needs to further the complicity object.[327]

In conclusion, several modes of perpetration exist in Swedish criminal law. For corporate leaders, furtherance could be relevant as it is covered by the provision on aiding and abetting, see further discussion in 6.2.3. However,

[322] Ibid 113–115.
[323] Svensson (2016), 118–122, 125.
[324] Svensson (2016), 123.
[325] Asp et al. (2013), 435.
[326] Ibid 432.
[327] Asp et al. (2013), 436–437.

the other modes discussed in 4.3 find other possible legal translations in Swedish law.

6.2.3 *Actus reus*

Swedish law requires the aider and abettor to contribute to the main criminal act by an act, thereby somehow have contributed to the 'complicity object' by an 'advice or [a] deed'. In fact, anything that *might* promote the commission of the crime is criminalised as furtherance.[328] Asp describes the legal structure of the Swedish rules on aiding and abetting as "complex". Simply put, a complicit shall have (a) promoted (b) the criminal action of someone else. Naturally, general grounds for exemption from criminal liability apply, such as a lacking *mens rea* or existing exculpatory circumstances. In other words, the promotion of someone else's criminal activity and the *mens rea* of the complicit must be joined by a lack of both justifying and exculpatory circumstances.[329] Aiding and abetting can be carried out before or during the illegal act, however not afterwards, although aid which was provided after the crime but agreed on before the execution of the crime is a grey zone. If an agreement exists between the parties before the performance of the act, aiding or abetting is relevant.[330]

The Swedish provision on aiding and abetting encompasses three types of aiding and abetting: (a) abetting (b) instigation (c) aid (translated to international definitions from Swedish law by this author). A person who is not considered a perpetrator who compelled someone else to the commission of a crime is to be seen as an instigator. Aid is another promotion of the crime which does not qualify for abetting. A B and C are prioritised in that order, though precedented by the main perpetrator.[331]

Incitement includes supporting action by making mentally someone else execute a deed. That act does not necessarily include persuasion or deception but could simply entail giving the main perpetrator sufficient reason for his or her deed. Incitement is complemented by aiding or abetting, i.e., physical, or mental aid. Mental aid is typically advice or encouragement. In domestic jurisprudence, e.g., providing the main perpetrator of pornography crimes with a venue or apartment, has counted as aiding or abetting.[332] Someone who is not regarded as the main perpetrator should firstly be considered an incisor, and if not, an aider or abettor. Also, another complicit can under certain circumstances be considered the main perpetrator, as well, see 6.2.2.[333] Additionally, an

[328] Bäcklund (2021), subsection 2.3, italics by this author.
[329] Asp et al., *Kriminalrättens grunder* (2013), 429–30.
[330] Ibid 439.
[331] SOU 2002:98, 264.
[332] Asp et al. *Kriminalrättens grunder* (2013), 441.
[333] Ibid 446.

accomplice can under Swedish law be criminally liable even in the absence of finding the main perpetrator.[334]

To support or promote can be interpreted as a way of making it easier for the main perpetrator to carry out the action in question, however, this provision stretches longer by including a general strengthening of the *mens rea* of others. This also encompasses unneeded aid or aid which ultimately counteracts the criminal activity if the *mens rea* does not counteract the main act. In the famous Swedish case of NJA 1963 s. 574, holding the coat of someone committing assault counted as aiding and abetting, as the aider/abettor "strengthened the *mens rea* of the main perpetrator".[335]

However, aid which neither is needed nor known by the main perpetrator is lawful. Also, Asp comments that smiling during animal abuse or physical assault cannot be included in the rules of aiding and abetting, however joining a group of friends with their presence is a tricky case in a grey area of the law.[336]

To assess the criminal liability on aiding and abetting, one needs to begin with the responsibility of the main perpetrator. Only by the main perpetrator fulfilling all the requirements of criminal activity according to Swedish law, also other actors can come in question. However, a complicit can be criminally liable for something else than the main perpetrator did. This results in the independence of the 'complicit object'. It is important to remember that the rules on *mens rea* are not part of the ''complicit object',[337] see 6.3 for a discussion on *mens rea*.

The legal responsibility of the aider and abettor stretches far in several ways, as 'advice or deed' encompasses all physical and mental means. No uniform interpretation has been found which complicates the assessment on the legal status of aiding and abetting. By a lexical interpretation method, 'promotion' or 'furtherance' (främjande) should be seen as sorting out unnecessary aid. However, Swedish case law has clarified that even such aid which in insignificantly has contributed to the main criminal act also counts as criminal furtherance.[338] Overall, Swedish jurisprudence puts a very low threshold for aiding and abetting.[339] Asp states that there exists a discussion on the criminal policy regarding the width of the current accessorial criminal liability in Swedish law; he means that it is doubtful whether the current wide measurements on accessorial liability are justified.[340]

Yet, the Swedish - wide - rules on aiding and abetting could be limited by

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[334] Ibid 449.

[335] Asp et al. *Kriminalrättens grunder* (2013), 437–38.

[336] Ibid 438–39.

[337] Ibid 437

[338] SOU 2002:98, 265; SOU 1944:69, 91.

[339] Bäcklund (2021), subsection 2.4.2.

[340] Asp et al. *Kriminalrättens grunder* (2013), 425.

Swedish customary law for subordinates within a corporation when being complicit in an economic, environmental, or similar crime. This is true if the criminal prohibition is formulated for corporations and thereby excludes criminal liability for independent subordinates. However, as my thesis focuses on war crimes which typically hold no provisions either domestically or internationally, I will not delve deeper into this area of Swedish law.[341] However, the *sui generis* order of corporations might serve as an indicator of *de lege ferenda* for corporate criminal liability.

Asp concludes that the individual perpetratorship for aiding and abetting stretches "very far" in Swedish law which he finds questionable as in his findings, coincidences become of great importance in everyday crimes.[342] Svensson finds that the flexible rules on aiding and abetting of Swedish law contrast with endeavours of foreseeability and the rule of law.[343] Asp means the current law for limiting the scope between main perpetrator and complicit based on jurisprudence and legal preparatory works well, however, Asp means that the current law is "far from unobjectionable".[344]

Moreover, the heavy scholar Asp points out that the Swedish rules on aiding and abetting leave room for improvement, among other things when it comes to legal persons as special subjects represented by physical individuals. Currently, he says, the principle of legality does not support physical individuals taking penal responsibility for their company for aiding and abetting in crimes.[345] However, provisions regulating the responsibility for special subjects are not included in the scope of this thesis, yet the author believe it is interesting to see the overall criminal regulation of legal entities in Swedish law to determine the view of the lawmaker on aiding and abetting for legal entities.

However, Asp points out that it becomes clear in Swedish criminal law that physical persons are seen as criminally liable for the actions of the company that they represent. Asp contradicts that this would be an analogy and instead claims that it is seen as an implied part of the Swedish view on 'gärningsmannaskap' where the special subject is a legal person who cannot be criminally liable but can outsource the criminal liability to physical persons representing it. Instead of analogous, it could be seen as a further interpretation on a special subject when it comes to a legal person.[346]

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[341] Asp et al. *Kriminalrättens grunder* (2013), 429–30.
[342] Asp et al (2013), 438; Asp, 'De osjälvständiga brottsformerna' (2021), 372.
[343] Svensson (2016), 113.
[344] Asp et al. *Kriminalrättens grunder* (2013), 436.
[345] Asp, 'De osjälvständiga brottsformerna' (2021), 329.
[346] Ibid 329.

6.2.4 *Mens rea*

If a person has aided or abetted a criminal act by an 'advice or a deed', there still exists a requirement on the act being intentional, according to ch. 1 sec. 2 subsec. 1 BrB. Negligent actions can also be criminalised, however, that must be specified. Since both the Swedish and international provisions require *dolus*, the author will not look to negligence. Swedish criminal law recognises three modes of dolus/intent: premeditated intent (*dolus directus*), oblique intent (*dolus indirectus*), and *intentional indifference/reckless intent*.

The firstly mentioned entails an intentional and controlled act with a certain purpose. The secondly mentioned one, intention of insight, means that the perpetrator acted with insight of the facts of circumstances and consequences. The last one entails an indifference for the perpetrator towards the consequences or circumstances.[347] The modes of intent are not fixed in the legal text but are a result of discussion in case law and partly by doctrine.

Firstly, the *mens rea* is independent from the *mens rea* of the main perpetrator.[348] This means that an aider or abettor can be criminally liable without a main perpetrator being found criminally liable.[349] Secondly, regardless of which mode of intent is in place, the intent must cover the elements of the criminal act according to the "principle of coverage" (täckningsprincipen). The perpetrator is judged by whether he or she perceived the series of events as described in the legal provision.[350]

As in general Swedish criminal law, the *dolus* should be parallel to the prohibited act. Together, they form criminality.[351] Jareborg comments that a full accord between the notions of the perpetrator on the series of the events and the actual series of events is not demanded, as it cannot be required that all participators of a crime have knowledge about the course of events of a crime.[352] Moreover, the Swedish Supreme Court specified in NJA 2007 s. 929 that the required degree of coverage is not static but changes with the relevant provision. Nonetheless, *mens rea* for aiding and abetting should follow the relevant criminal provision.[353]

However, Martinsson and Lekvall point out that the provisions on *mens rea* in Swedish law as part of the general criminal provisions are not independent from the individual punitive bans, but rather must be read considering them, which partly also is true for the provisions on *mens rea*. The level of *intent* can, as stated, range between three different levels in

[347] Asp et al. (2013), 284–286.
[348] Martinsson & Lekvall (2020), 124.
[349] Asp, 'De osjälvständiga brottsformerna' (2021), 325.
[350] Martinsson & Lekvall (2020), 123; Bäcklund (2021), 1:1 BrB.
[351] Asp, 'De osjälvständiga brottsformerna' (2021), 424–26.
[352] Asp et al. (2013), 334.
[353] Asp, 'De osjälvständiga brottsformerna' (2021), 428–429; NJA 2007 s. 929.

Swedish law, whereas the difference between recklessness and intent is described by the individual articles on crimes. Regarding *mens rea* in Swedish law when applying norms for international crimes, guidance is found in the preparatory works of *Act on International Crimes*. Although the ICCSt entails an article about *mens rea*, the committee found it wise not to adopt it as the ICCSt does not require the member states to adopt it. Despite some differences exist between the concept of *intent* in the ICCSt and in Swedish law, those differences are insignificant and thereby can Swedish law easily be applied instead, the SOU of 2002 found.[354]

Also, Martinsson and Lekvall find that there is no reason to apply rules of international law regarding culpability, as those rules are not of customary character and since Swedish courts are not bound to directly apply the rules of Article 30 ICCSt in general on international criminal law.[355] This approach seems to be found in jurisprudence concerning cases before 2014 as Swedish courts do not concentrate on the assessment of *dolus* on international crimes. Ultimately, no consideration is taken there to ICL and its case law. Due to very limited application of the *Act on International Crimes*, Martinsson and Lekvall find it unwise to draw too many conclusions on the Swedish assessment of *dolus* on ICL.[356] However, they deduce that Swedish legal reasoning on intent is far from desirable and that it thereby could improve and be part of national law which makes up the comparative overview of the development of ICL.[357]

Since my thesis focuses on international crimes, it is relevant to look to provisions guiding Swedish courts in interpreting norms for war crimes. The Swedish lawmaker has chosen to strengthen the requirements for *intent* for certain international crimes. Regarding war crimes, a perpetrator killing another person must have intent for the action to kill another person. However, the Swedish lawmaker specifies no degree of required intent, thus Martinsson and Lekvall conclude that even 'intent of indifference' must be sufficient.[358] Paired with the fact that prosecuted subjects indeed were found liable with 'intent of indifference' under Swedish law before 2014, the current provisions must be found to impose a low threshold on *mens rea*. This author is supported by among others Svensson who finds the ICCSt rules on aiding and abetting narrower than the flexible Swedish law since the ICCSt rules require a strong *mens rea* - either *dolus directus* or *dolus indirectus* - in contrast to Swedish law which qualifies almost all aid – also such unnecessary – as unlawful.[359]

[354] Martinsson och Lekvall (2020), 134–135.
[355] Ibid 119.
[356] Martinsson & Lekvall (2020), 136–137.
[357] Ibid 139.
[358] Ibid 136.
[359] Svensson (2020), 114.

6.3 Regulation of aiding and abetting in German law

6.3.1 *Actus reus* and *mens rea*

German criminal law entails a certain legal codification for international crimes, *Völkerstrafgesetzbuch*, which uses domestic general provisions for aiding and abetting, see paragraph 2, annex I. Domestic rules on aiding and abetting do, like Swedish and international rules, not require a *condicio sine qua non* but suffice with physical and moral aid of all sorts including acts which *per se* are socially acceptable such as lending someone a knife as long as the *mens rea* provisions are fulfilled.[360] Also, it suffices for the aider and abettor to take part in a joint organisation which aims to carry out a complex offence without having knowledge about the other members.[361] Finally, aid can be given from before the start of an attempted commission of a crime until its execution.[362]

However, German criminal law draws a line for *per se* causal acts which do not effectuate an increased risk of the commission of the crime but rather decrease the risk of the commission of the crime.[363] Also, unnecessary aid is not penalised as long as it does not have an effect on the commission of the crime.[364] Rather than looking to causality for delimiting *actus reus*, German criminal law also relies on adding other requirements for deciding the limitations of aiding and abetting, mainly supported by the *Zurechnungsprinzip* (principle of attribution) which, here, says that causality alone as a requirement is too broad of a criterion to select relevant acts of aiding and abetting. Instead, the principle of attribution requires the aiding and abetting act to be tied to the aider and abettor. Also, the rule of law requires reasonable reasons to penalise this behaviour out of general prevention. Case law has shown that 'everyday acts' of insignificance which 'do not measurably facilitate the success of the offence' (translated from German) must be excluded from aiding and abetting.[365] Alas, German criminal law puts a threshold for its *actus reus*, differing from Swedish criminal law. In brief, German doctrine entails a wide discussion on the correct criteria for limiting the criminality of aiding and abetting.[366]

While mental aid by technical advice classifies as aiding and abetting, mental aid in the sense of reinforcing the decision of the main perpetrator to commit a crime could not necessarily be seen as aiding and abetting, as it is heavily disputed in literature. However, Kudlich comments that it could

[360] Leckner/Kühl (2018), Rn. 1–2.
[361] Kudlich (2022), Rn. 3.
[362] Ibid Rn. 8.
[363] Leckner/Kühl (2018), Rn. 2a.
[364] Kudlich (2022), Rn. 6.
[365] Ibid Rn. 7.
[366] Ibid Rn. 12.

very well serve as aiding and abetting if it not only serves the main perpetrator subjectively, but also encourages him objectively.[367] Also, mental aid by the mere presence of an aider and abettor is an exception rather than a rule; it is only relevant if the main perpetrator feels strengthened in his or her pursuit of committing the crime.[368] However, German doctrine disagrees with jurisprudence on demanding a causality requirement for the act of the aider and abettor in relation to the main offence. While doctrine follows rules on causation, case law aims at furtherance, which could be compared to 'främjande'. Anyhow, the two often lead to similar results.[369]

Furthermore, neutral activity as aiding and abetting is disputed, especially on the domain of occupational tasks, which could be of interest for this thesis, as it concerns everyday professionally adequate activity, yet with a certain *mens rea*. Here, the discussion reaches from a rejection of criminality for neutral actions due to the necessity of social adequacy and of an allowed risk, to full responsibility, in favour of protecting certain legal interests. Principally, case law has found that the level of *mens rea* varies on the level of danger of the professional constellation: For objectively dangerous ones, all levels of intent suffice, while for others, *dolus directus* is required.[370] Currently, case law finds guidance in selecting acts exclusively aimed at committing a punishable act with the *mens rea* of the aider and abettor. Further, these cases are found to no longer bear the everyday character necessary to exempt them from criminality for aiding and abetting. Moreover, without the necessary *mens rea*, but only with the suspicion that the neutral activity will render useful for the main criminal offence, the act is not encompassed by aiding and abetting as a rule.[371] In conclusion, neutral business activity is only privileged if the employee does not adjust his conduct 'more than usual' to the plans of the client. Such 'neutral' and 'unadjusted' business activity is usually exempt from criminal liability in cases of *dolus eventualis*.[372] Moreover, the BGH has found that 'neutral activity' where the main perpetrator primarily aims a criminal offence which the aider and abettor is aware of this loses its everyday character and thereby qualifies as a criminal act.[373]

Regarding *mens rea*, not only for neutral activity, the aider and abettor need to show intention for the execution of the commission of the crime and for the aiding and abetting act, so called *Doppelter Gehilfenvorsatz*. Regarding the first requirement, it is sufficient for the aider and abettor to comprehend the essentials of the main offence and thereby do not need to understand the whole legal context of the intended crime. Kudlich notes that the *mens rea* requirments are lower held than the same ones for instigation.[374]

[367] Ibid Rn. 10.
[368] Ibid Rn. 10.4.
[369] Kudlich (2022), Rn. 5.
[370] Ibid Rn. 13.
[371] Ibid Rn. 14.
[372] Ibid Rn. 16.
[373] Bock (2017), 420.
[374] Kudlich (2022), 18–20.

Furthermore, Bock means that the *ad hoc* Tribunals mainly have reasoned similarly to the German jurisprudence about aiding and abetting in the sense of that fundamentally all physical and mental aid is encompassed without the need for *conditio sina qua non*. However, she points out that the need for a 'substantial contrubution' is not found in German jurisprudence. Also, the need for 'special direction' is absent in German criminal law for international crimes.[375]

6.3.2 *Geschäftsherrenhaftung*

Although omission is excepted from this thesis as it is supposed that the corporate leader is not seen as a principal perpetrator, omission is relevant for corporate leaders as aiders and abettors in German general criminal law by the doctrine of *Geschäftsherrenhaftung* for the acts of their employees. Thus, together with *Organisationsherrschaft*, the doctrine of *Geschäftsherrenhaftung* are domestic models aimed at superior civilian responsibility. In brief, criminal responsibility of a principal arises when he or she does not intervene the criminal enterprise of the subordinates.[376] However, the doctrine is disputed both *per se* and for using the doctrine of *Garantenstellung* as a reason for criminal liability.[377] The doctrine of *Garantenstellung* means that criminal liability arises due to a position of a guarantor, which might be obtained by a corporate officer.[378]

Essentially, *Geschäftsherrenhaftung* for ICL is regulated by section 4 VStGB which coordinates its wording with superior responsibility in Article 28(a) and (b), however its limits must be understood in line with the teachings on *Geschäftsherrenhaftung* in general criminal law. Weigend comments that not all civilian leaders could be held accountable according to CIL, but that the doctrine in ICL refines its target group to civilian leaders comparable to military leaders. Thus, both the organisation must be criminally oriented to an international crime and the control of the superior must be equally strong as the one of military commanders.[379]

Firstly, for ICL, it is generally required that the organisation of the superior obtains a certain authority in contrast to upholding a few employees. Also, the aim of the organisation must be 'inherently dangerous' to legal interests, e.g., by programmes with the character of ethnical or religious discrimination, or nationalist or warmongering messages. For corporations, the same is true, but also encompasses the production, service, and distribution of e.g., dangerous goods. However, only the person responsible

[375] Bock (2017), 422–423.
[376] Rönnau (2022), 117.
[377] Weigend (2022), Rn. 34.
[378] Rönnau (2022), 117–118.
[379] Weigend (2022), 32–35.

for the ‘dangerous’ part of the corporation and thereby creates a source of danger could be held criminally liable.[380]

Also, the provision insinuates that the power control of the corporate officer must be of similar strength as to the one of a military commander. Thus, Weigend comments that his or her position must contain power to the degree that it is possible to hinder the commission of crimes by subordinates. In comparison to the provisions held by German labour legal principles, the prevailing norms do not suffice to amount to criminal liability according to section 4 VStGB. Instead, Weigend concludes that the common doctrine on *Geschäftsherrenhaftung* is applicable to corporate officers.[381]

Thus, the limitations of *Geschäftsherrenhaftung* will be analysed. Here, section 13 StGB forms a foundation for criminal liability by omission for superiors. However, the requirement on superiority is vaguely formulated yet still accepted by the BGH. Doctrine differs between guarantors of protection respectively supervision. Rönnau concludes that the first one mainly concerns corporate leaders as it revolves around the protection of damages of the corporation. However, it is unclear whether the corporate leadership is concerned with the protection of legal interests of a third party.[382] In conclusion, doctrine agrees that no corporate responsibility in form of a guarantor exists for crimes of subordinates. Nonetheless, the sources of the superior position are disputed; either they relate to a person or, currently favoured, to the corporation as a source of danger. Such sources could be objects and objects, but also the actions of individuals, so that they do not pose a risk of danger.[383]

Thus, a general duty for corporate officers to hinder danger emanating from objects and the conduct of their staff exists in German criminal law. However, the duty is limited to the commission of company-related crimes. Here, Rönnau means that consideration cannot be taken to whether the conduct was undertaken for the interest of the company or for the immediate interest of the physical individual committing the crime. The BGH has established that a company-related commission exists when the crime has a ‘close connection’ to the professional activity of the perpetrator.[384]

Lastly, the range of persons listed as a superior is not measured by scholarship. Also, the question on criminal liability for corporate officers of different hierarchies remains unanswered. Rönnau means that the natural bearer of legal rights behind the legal entity is the appropriate person to address.[385]

[380] Ibid Rn. 36–37.
[381] Weigend (2018), Rn. 38.
[382] Rönnau (2022), 117–118.
[383] Ibid 118-119.
[384] Ibid 119–120.
[385] Ibid 120.

In Swedish criminal law, doctrine offers ‘företagaransvar’ (corporate criminal liability), which, however, so far has not been discussed in terms of ICL. Briefly, criminal responsibility might arise for the one equipped with the best possibilities to hinder the commission of crimes by supervision and control.[386]

7 Analysis

In the analysis, the author aims to analyse how the Swedish provisions in relation to German ones compare to the norms of ICL on corporate criminal liability for corporate leaders. Moreover, the author also wants to discuss the expectations of ICL on itself and on domestic regulation on the subject. The international rules consisting of the general jurisprudence and the statutes governing a) *actus reus* b) *mens rea* c) the application and interpretation of a) and b). The assessment and comparison will mostly focus on CIL but could also focus on the ICC as it serves as an institutionalisation of ICL.

The author has responded to her first sub-question on obligations for physical individuals representing corporations in the third chapter where she concluded that individual criminal liability could be tied to corporate officers seen to case history, the purposes of ICL and the general outlook on ICL. Moreover, she responded to the second question of potential modes in the fourth chapter, where she chose aiding and abetting as a mode to further investigate. Furthermore, she analysed those rules in relation to domestic Swedish provisions and thereby answered to part of sub-question three. Now, she aims to compare Swedish law with German and international norms overall. Based on that, she will draw conclusions on the expectations of ICL on domestic law and their potential reasons. The reasons will be manifest through prevailing principles and abstract incentives.

7.1 Findings on *actus reus* and *mens rea*

Essentially, the thesis has shown that the demarcations of individual criminal responsibility for corporate leaders are far from clear today in international and domestic criminal law. Moreover, the Swedish so-far reluctance towards adopting IL by domestic application of ICL and in general might make it difficult to adequately assess individual criminal liability for corporate leaders as the legal area poses to be a gray zone.

Firstly, the research shown proves that the international rules differ from the Swedish criminal legal provisions on aiding and abetting. The discrepancy in norms presumably makes a difference in domestic adjudication of

[386] SOU 1997:127, 104.

corporate officers for international crimes in relation to international prosecution. Secondly, the differences manifest in several ways, which the author will present in the following.

The true meaning of the objective requirements is not further explained by ICCSt. It seems as if the threshold is partly motivated by the gravity principle of the ICCSt, partly by the nature of war crimes requiring a plan, policy etc. Here, theories of ICL and criminal law mingle. In conclusion, ICL expects a threshold on *actus reus*, which logically also should apply to expectations on domestic regulation of aiding and abetting, which then Swedish norms do not live up to. Currently, it is described as difficult to prosecute corporate officers according to the ICCSt. Logically, Swedish provisions should capture more businessmen than the international norms.

In conclusion, the Swedish rules on *actus reus* for aiding and abetting stretch very far in comparison to ICL rules. Also, in comparison to the German view on aiding and abetting, the Swedish rules can still be recognised as far stretching with their very low put threshold on *actus reus*. As the committee suggested and later the government agreed, the Swedish rules should be sufficient for all types of law. In fact, the *acts reus* of the ICCSt matches BrB as none requires a threshold. Yet, ICL finds reason to put a threshold on the *actus reus.* Moreover, the special mandate given to domestic courts by the ICC calls for appropriate measures.

In relation to these requirements, Swedish rules on *actus reus* for aiding and abetting entail 'anything that might promote the commission of the crime' by an advice or a deed. Also, the Swedish measurements on *actus reus* should reasonably include a wide set of variety for business activity including neutral activity, which would incorporate most business activity. Although no clear definition on neutral activity has been made in ICL, routine business activity should be able to qualify as a 'substantial contribution', which logically is included in the daily activity of most businesses. Thus, Swedish and international law seem to agree here.

Yet, this conflicts with the large mandate of ICL as war crimes entail 'wide-spread attacks from multiple sources', logically setting expectations to include corporations in prosecution. However, prosecution of business representatives is left to domestic regulation and prosecution. Due to the freshness of *Wirtschaftsvölkerstrafrecht* and the limited jurisdiction of the ICC, matters of aiding and abetting by corporate actors are expected to be treated by national courts. Ultimately, this must mean that domestic courts are expected to uphold *international* standard on individual perpetratorship. Since the limits on *actus reus* are far from clear, and partially the same is true for *mens rea* internationally, it is understandable that domestic courts do not wish to incorporate vagueness into their prosecution which becomes relevant domestic and potentially international case law. However, to fulfil the mandate given to domestic courts by ICL, the author believes indeed it is foreseen that domestic courts apply a threshold on *actus reus*. Currently,

domestic Swedish law does not fulfil these expectations as domestic law barely covers an objective threshold.

Moreover, the German discussion on neutral activity finds no equivalent in Swedish doctrine. Thus, expectations of ICL in the sense of *Wirtschaftsvölkerstrafrecht* to differentiate between actions is unmatched in Swedish law. Also, the discussion of international jurisprudence and scholarship on 'specific direction', yet without the classification of CIL, indicates that ICL might expect ICL applied both internationally and domestically to somehow reason about the type of activity included by aiding and abetting, especially in relation to corporations. Moreover, this is supported by doctrines on shared intent. Although it is difficult to draw conclusions on the need of shared intent, the Swedish generally low put threshold on *mens rea* for aiding and abetting could serve as an indicator for allowing non-shared intent between the main and accomplice actor.

However, the emerging field of *Wirtschaftsvölkerstrafrecht* is relevant both to ICL and Swedish criminal law, as transnational corporations apparently take part in atrocities which are prosecuted for internationally or domestically. However, international rules are unclear – and deemed insufficient – for physical perpetrators representing legal entities. Also, as international prosecution targets high-level perpetrators, corporations with normal business activity are expected to be left out, setting low expectations on ICL for corporate responsibility, which is acknowledged by scholarship.

Further, special subjects according to Swedish law, e.g., corporations, might be regulated differently for some crimes and are allowed to outsource criminal liability to physical individuals. Maybe this could serve as an indicator of tendencies in Swedish law to see corporations as *sui generis* and future possible extensions of responsibility to its leaders, something close to *Organisationsherrschaft*. However, barely any discussion on corporate superior responsibility exists in Swedish doctrine in comparison to extensive German scholarship on *Organisationsherrschaft* and *Geschäftsherrenhaftung*. Moreover, one could argue that the Swedish domestic provisions on aiding and abetting do not take due consideration to the expectations of ICL of a contextual and an international element, partially by the scarce discussion on neutral activity and corporate superior criminal responsibility in Swedish scholarship and legislation. Although doctrines on corporate criminal liability exist, the author finds their limited scope of applicability to interfere with the principle of legality, especially for grave international crimes.

7.2 General remarks

Since both international and domestic courts theoretically prosecute the same international crimes, and domestic courts should prosecute most of

those cases, ICL logically expects domestic law to take some sort of consideration to the nature of international crimes in domestic prosecution. It is natural that the ICC applies a high threshold for *actus reus* thinking of its mandate. Also, other international tribunals have used some sort of threshold. Although Swedish courts do not and should not have the same type of mandate, ICL clearly has certain ideas on a threshold for international crimes which Swedish law does not fulfil. The threshold itself is a sort of a sign of the strong yet limited mandate of the ICC. Nonetheless, ICL entails more content than the ICCSt and is indeed a source of law in domestic courts. Moreover, the special mandate given to domestic courts by the ICC calls for appropriate measures. Further, an objective threshold is important to the principle of proportionality and foreseeability in criminal law. However, as scholars suggested, thresholds are difficult to assess, even with legal language, proving the task very challenging.

Also, Swedish provisions on aiding and abetting are generally held and are broad to their character. However, since they are applied on international crimes just as well as on domestic crimes, they represent general criminal theory rather than theories on international criminal law which should be a mixture of international law and criminal law. Seen to the principle of legality, the Swedish lack of codified roles in criminal law poses no problem as the degree of criminality is presented in other ways. However, one could also argue that the wide scope of the Swedish rules on aiding and abetting are appropriate since ICL indeed essentially is criminal law and thereby general provisions should be appropriate for also ICL. Nonetheless, this author is of the opinion that corporate regulation might deem insufficient with current expectations, at least what concerns scholarship, due to the special nature, mandate, and political power of corporations, where the low expectations also manifest by scarce domestic prosecution.

ICL presents a wide set of case law and principles ranging from 1940s jurisprudence to current case law and doctrinal discussion on legal principle. As these are sources respectively interpretation methods of ICL, ICL presupposes, in line with the reasoning of Werle and Jessberger, that domestic law, which ultimately is inspired by IL, remembers its origins. Thereby, the expectations on the usage of sources and interpretation data are high, while Swedish courts prosecutes according to domestic legislation. Moreover, acclaimed modes of liability in ICL, e.g., *Organisationsherrschaft*, could inspire and develop domestic criminal law. As stated, ICL is essentially criminal law and domestic courts need to address international crimes. Alas, ICL equips domestic law with modes, models, and concepts, and expects them to participate in the development of ICL as national builders of the comparative overview constituting a source of law for IL, in line with reasoning of Swedish scholars for the coming influence of the ICCSt on Swedish domestic law.

As the gradual increase in legislation and adjudication on an international level has proven since the 1940s, adjudication of international corporate leaders is already established and will probably increase with the probable

rise of ICL by interpretation and incorporation into domestic law. As scholars have suggested, this will hopefully bridge the dissatisfactory normative gaps between domestic and international law for corporate leaders. However, as also the ICC struggles with capturing corporate leaders, one must also derive the low expectations of ICL on business leaders from political reasons. Nonetheless, the Swedish government ultimately chose the Swedish wide-ranging rules instead of the more limited rules of ICL, disagreeing with political incentives as the only reason to not incorporate provisions of ICL (on e.g., aiding and abetting) into domestic law.

In conclusion, individual criminal liability is indeed a theoretical possibility to prosecute transnational corporations for international crimes both on an international and national level. However, the vagueness of the norms might contribute to the current lack of prosecution on both levels. Perhaps the concept of individual criminal liability might be aided by domestic models of perpetratorship, e.g., *Organisationsherrschaft*, and in turn ICL can contribute with ideas to domestic regulation of ICL and domestic criminal law. The choice of liability modes probably proves valuable when assessing criminal liability for corporate officers as they provide different thresholds on *actus reus* and sometimes *mens rea*. Moreover, the discussion on neutral activity on an international and domestic-regional level has not reached any uniform conclusions, yet the discussion *per se* calls for greater accountability for corporations by ICL and by other norms, of perhaps soft law in the form of principles and CSR.

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Annex I

Strafgesetzbuch

Section 13
Commission by omission

(1) Whoever fails to prevent a result which is an element of a criminal provision is only subject to criminal liability under this law if they are legally responsible for ensuring that the result does not occur and if the omission is equivalent to the realisation of the statutory elements of the offence through a positive act.

(2) The penalty may be mitigated pursuant to section 49 (1).

Section 27
Aiding

(1) Whoever intentionally assists another in the intentional commission of an unlawful act incurs a penalty as an aider.

(2) The penalty for the aider is determined in accordance with the penalty threatened for the offender. It must be mitigated pursuant to section 49 (1).

Annex II

Völkerstrafgesetzbuch

Section 4
Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.

(2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.