

**Individual Criminal Responsibility of Company Directors under the Statute of the International Criminal Court**

**By:**

Panagiota Kotzamani

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Abstract

This research discusses the criminal responsibility of company directors for international crimes committed in the course of the corporation’s activities, focusing on the modes of responsibility of the Statute of the International Criminal Court. Despite the collective aspect of international crimes, international criminal law struggles to attribute criminal responsibility to the members of non-state collective entities. The underlying obstacle is that the modes of responsibility in international criminal law have been constructed and interpreted so far having in mind collective entities with state-like characteristics. Nevertheless, not all collective entities possess such characteristics and the corporation is a good example. This research argues that disentangling the interpretation of international criminal law from the state factor conforms with the aim of international criminal law, which is the protection of human dignity from any non-state actor with the capacity to violate it. It, consequently, adopts a capacity-oriented approach regarding the application of the international criminal law rules to non-state collective entities, in general, and the corporation, in particular. Under this approach, it initially identifies the relationship between the corporation, as a collective entity, and the individuals in control of it; it then re-interprets the international criminal law rules on the attribution of individual criminal responsibility and applies them against the company directors, focusing on the jurisdiction of the International Criminal Court. More specifically, it discusses the ‘control though an organisation’ doctrine; the ‘aiding and abetting with the purpose of facilitating the commission of the crime’ element of secondary responsibility; the nature of superior responsibility and the notion of ‘control over the acts of the subordinates’. At the same time, it applies the proposed interpretation upon these doctrines on different scenarios of corporate criminality, explaining how it can be proved useful in attributing criminal responsibility to the company directors at the international level.

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Table of Contents

[Table of cases 11](#_Toc42633257)

[Table of treaties and international instruments 21](#_Toc42633258)

[Abbreviations 24](#_Toc42633259)

[The scope and structure of the research 25](#_Toc42633260)

[I. Overview 25](#_Toc42633261)

[II. Originality and impact of the research 41](#_Toc42633262)

[IV. Methodology 43](#_Toc42633263)

[V. Research structure 46](#_Toc42633264)

[Chapter 1 49](#_Toc42633265)

[The nature of international criminal law: individual criminal responsibility and collective criminality by non-state actors including corporations 49](#_Toc42633266)

[Introduction 49](#_Toc42633267)

[I. Individual criminal responsibility and collective criminality in international criminal law 49](#_Toc42633268)

[II. Non-state actors’ involvement in international criminality 54](#_Toc42633269)

[III. Human dignity as the aim of international criminal law 57](#_Toc42633270)

[IV. Applying the ICC Statute to individuals belonging to non-state collective entities: the case of corporations 62](#_Toc42633271)

[Conclusion 65](#_Toc42633272)

[Chapter 2 67](#_Toc42633273)

[The relationship between the individual and the corporation in the context of corporate criminality 67](#_Toc42633274)

[Introduction 67](#_Toc42633275)

[I. Identifying the links between the individual and the corporation: corporate liability and individual criminal responsibility 68](#_Toc42633276)

[II. Which individuals within the corporation?: the different nominalist theory approaches 73](#_Toc42633277)

[III. Corporate governance: delegation of power and control exercise by the company directors 79](#_Toc42633278)

[Conclusion 94](#_Toc42633279)

[Chapter 3 96](#_Toc42633280)

[Attributing responsibility to the individual in the prior-ICC era: The development of the common plan model and its application to corporate criminality 96](#_Toc42633281)

[Introduction 96](#_Toc42633282)

[I. Individual participation to collective criminality: the common plan model 97](#_Toc42633283)

[II. Attributing criminal responsibility to the individual through the common plan model: The Nuremberg approach 101](#_Toc42633284)

[III. The application of the common plan model in the ICTY: the Joint Criminal Enterprise doctrine 107](#_Toc42633285)

[a. The types of JCE 109](#_Toc42633286)

[b. The problems with the JCE doctrine 112](#_Toc42633287)

[IV. The application of the Joint Criminal Enterprise doctrine in the company director scenario: unsatisfactory attribution of individual criminal responsibility 118](#_Toc42633288)

[Conclusion 122](#_Toc42633289)

[Chapter 4 123](#_Toc42633290)

[Perpetration through the theory of control in the ICC jurisdiction and its application to company directors 123](#_Toc42633291)

[Introduction 123](#_Toc42633292)

[I. Identifying the perpetrator under the theory of control in the ICC case law 123](#_Toc42633293)

[II. The elements of Roxin’s theory of control in the ICC case law 126](#_Toc42633294)

[a. Control over another person 126](#_Toc42633295)

[b. Control over an organisation 129](#_Toc42633296)

[III. Addressing the concerns over Roxin’s theory of control: how should the ICC case law approach control in crime commission? 131](#_Toc42633297)

[IV. Domination over the will of the physical perpetration: A more flexible approach to control theory 138](#_Toc42633298)

[V. Perpetration in Art. 25(3)(a) of the ICC Statute through the revised control theory and its application to corporate criminality 143](#_Toc42633299)

[Conclusion 147](#_Toc42633300)

[Chapter 5 149](#_Toc42633301)

[Identifying the criminal responsibility of company directors as aiders and abettors in the ICC Statute 149](#_Toc42633302)

[Introduction 149](#_Toc42633303)

[I. Secondary liability in Art. 25(3) of the ICC Statute and the *actus reus* of aiding and abetting the commission of a crime. 150](#_Toc42633304)

[II. The role of the *mens rea* element in identifying the responsibility of the aider and abettor in Article 25(3)(c) of the ICC Statute 159](#_Toc42633305)

[a. The *mens rea* standard in Art. 30 of the ICC Statute 159](#_Toc42633306)

[b. Identifying the aider and abettor in the ICC Statute: The combined approach 169](#_Toc42633307)

[III. Company directors as aiders and abettors in the commission of an international crime: the ‘purpose of facilitating the commission of the crime’ requirement revised 174](#_Toc42633308)

[Conclusion 185](#_Toc42633309)

[Chapter 6 188](#_Toc42633310)

[Applying civilian superior responsibility of Art. 28(b) of the ICC Statute to company directors 188](#_Toc42633311)

[Introduction 188](#_Toc42633312)

[I. Superior responsibility as a legal doctrine: Identifying the civilian superior in Art. 28 (b) of the ICC Statute 189](#_Toc42633313)

[a. The superior-subordinate relationship and the notion of effective control 195](#_Toc42633314)

[b. The superior’s failure to prevent or repress the crimes of the subordinates and the distinction between military commanders and civilian superiors 197](#_Toc42633315)

[c. The superior’s knowledge regarding their subordinates’ crimes 201](#_Toc42633316)

[II. The nature of superior responsibility in international criminal law 203](#_Toc42633317)

[III. The theory of omission in criminal law and its implications in attributing criminal responsibility to the individual 207](#_Toc42633318)

[a. Inauthentic omission theory 208](#_Toc42633319)

[b. Authentic omission theory 216](#_Toc42633320)

[IV. The omissions of the civilian superior: identifying the nature of individual criminal responsibility in Art. 28(b) of the ICC Statute 218](#_Toc42633321)

[a. Failure to prevent the crime of the subordinates 218](#_Toc42633322)

[b. Failure to punish the subordinates or refer their crimes to the competent authorities 222](#_Toc42633323)

[c. Synopsis: Art. 28 (b) incorporates two different types of individual criminal responsibility 226](#_Toc42633324)

[V. Applying Art. 28(b) to subsidiary corporations and supply chains: is there room for criminal responsibility of the parent/multinational corporation’s directors? 227](#_Toc42633325)

[Conclusion 238](#_Toc42633326)

[Concluding Remarks 239](#_Toc42633327)

[Bibliography 254](#_Toc42633328)

# 

# Table of cases

**International cases:**

ICC

*Prosecutor v Al Bashir* (Decision of the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009)

*Prosecutor v Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest), ICC-02/05-01/09, Pre-Trial Chamber I (12 July 2010)

*Prosecutor v Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, Pre-Trial Chamber I (12 July 2010)

*Prosecutor v Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), ICC-01/05-01/08, Pre-Trial Chamber II (15 June 2009)

*Prosecutor v Bemba* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”), ICC-01/05-01/08 A (8 June 2018)

*Prosecutor v Blé Goudé* (Decision on the confirmation of charges against Charles Blé Goudé) ICC-02/11-02/11, Pre-T Ch I (11 December 2014)

*Prosecutor v Chui* (Judgment on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”) ICC-01/04-02/12 A (7 April 2015)

*Prosecutor v Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12, T Ch II (18 December 2012)

*Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07, Trial Chamber II (7 March 2014)

*Prosecutor v Katanga and Chui* (Decision on the confirmation of charges) ICC-01/04-01/07, Pre-Trial Chamber I (30 September 2008)

*Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06, Pre-T Ch I (29 January 2007)

*Prosecutor v Lubanga* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014)

*Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, T Ch I (05 April 2012)

*Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10, Pre- T Ch I (16 December 2011)

*Prosecutor v Mbarushimana* (Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges") ICC-01/04-01/10 OA 4 (30 May 2012)

*Prosecutor v Muthaura, Kenyatta and Ali* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute), ICC-01/09-02/11, Pre-T Ch II (23 January 2012)

*Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014)

*Prosecutor v Ruto, Kosgey and Sang* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11, Pre-T Ch II (23 January 2012)

Situation in Darfur, Sudan, Public Redacted Version of the Prosecutor’s Application under Article 58, ICC-02/05-157-AnxA, Pre-Trial Chamber I (14 July 2008)

*Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation of the Republic of Kenya), ICC-01/09, Pre-Trial Chamber II (31 March 2010)

ICTY

*Prosecutor v Aleksovski* (Appeal Judgment) ICTY-95-14/1-A (24 March 2000)

*Prosecutor v Aleksovski* (Judgement) IT-95-14/1-T (25 June 1999)

*Prosecutor v Babić* (Judgment on Sentencing Appeal) ICTY-03-72-A (18 July 2005)

*Prosecutor v Blagojević and Jokić* (Judgment) ICTY-02-60-T (17 January 2005)

*Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004)

*Prosecutor v. Brđanin* (Appeal Judgment) ICTY-99-36-A (3 April 2007)

*Prosecutor v Brđanin* (Decision on Interlocutory Appeal) ICTY-99-36-A (19 March 2004)

*Prosecutor v Brđanin* (Judgement) ICTY-99-36-T (1 September 2004)

*Prosecutor v Delić* (Judgment), IT-04-83-T, Trial Chamber I (15 September 2008)

*Prosecutor v Đorđević* (Judgment) IT-05-87/1-T, T Ch II (23 February 2011)

*Prosecutor v Furundžija* (Judgment) ICTY- 95-17/1 (10 December 1998)

*Prosecutor v Galić* (Appeal Judgment), IT-98-29-A (30 November 2006)

*Prosecutor v* *Hadžihasanović* (Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility), IT-01-47-AR72, Appeals Chamber (16 July 2003)

*Prosecutor v Hadžihasanović and Kubura* (Appeal Judgment) ICTY-01-47-A (22 April 2008)

*Prosecutor v Hadžihasanović and Kubura* (Judgment), IT-01-47-T (15 March 2006)

*Prosecutor v Halilović* (Appeal Judgment), IT-01-48-A (16 October 2007)

*Prosecutor v Halilović* (Judgment), IT-01-48-T, Trial Chamber I (16 November 2005)

*Prosecutor v Jelisić* (Appeal Judgment) IT-95-10-A (5 July 2001)

*Prosecutor v Jelisić* (Judgment) IT-95-10-T (14 December 1999)

*Prosecutor v Karadžić* (Judgment) IT-95-5/18-T (24 March 2016)

*Prosecutor v Kordić and Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004)

*Prosecutor v* *Kordić and Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001)

*Prosecutor v Krajisnik* (Appeal Judgement) ICTY-00-39-A (17 March 2009)

*Prosecutor v Krajisnik* (Judgment) ICTY-00-39-T (27 September 2006)

*Prosecutor v Krnojelac* (Appeal Judgment) ICTY-97-25-A (17 September 2003)

*Prosecutor v Krnojelac* (Judgment), IT-97-25-T, Trial Chamber II (15 March 2002)

*Prosecutor v Krstić* (Appeal Judgment) IT-98-33-A (19 April 2004)

*Prosecutor v Krstić* (Judgment) IT-98-33-T (02 August 2001

*Prosecutor v Kunarac et al* (Appeal Judgment) T-96-23&IT-96-23/1-A (12 June 2002)

*Prosecutor v Kupreškić et al* (Judgment)

*Prosecutor v Kvočka et al* (Appeal Judgement) ICTY-98-30/1-A (28 February 2005)

*Prosecutor v Kvočka et al* (Judgment) ICTY-98-30/1-T (2 November 2001)

*Prosecutor v Limaj et al* (Judgment), IT-03-66-T, Trial Chamber II (30 November 2005)

*Prosecutor v Martić* (Appeal Judgment) ICTY-95-11-A (8 October 2008)

*Prosecutor v Martić* (Judgment) ICTY-95-11-T (12 June 2007)

*Prosecutor v Milošević* (Appeal Judgment), IT-98-29/1-A (12 November 2009)

*Prosecutor v Milošević* (Decision on Motion for Judgment or Acquittal) ICTY-02-54-T, T Ch (16 June 2004)

*Prosecutor v* *Milutinović et al* (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise) IT-99-37-AR72, Appeals Chamber (21 May 2003)

*Prosecutor v Mrkšić and Sljivancanin* (Appeal Judgment) ICTY-95-13/1-A (5 May 2009)

*Prosecutor v Mrkšić et al* (Judgment) ICTY-95-13/1-T (27 September 2007)

*Prosecutor v Mucić et al* (Appeal Judgment) ICTY-96-21-A (20 February 2001)

*Prosecutor v Mucić et al* (Judgment) IT-96-21-T (16 November 1998)

*Prosecutor v Naletilić and Martinović* (Judgment) ICTY-98-34-T (31 March 2003)

*Prosecutor v Orić* (Judgment) ICTY-03-68-T, T Ch II (30 June 2006)

*Prosecutor v Popović et al* (Judgment) IT-05-88-T, Trial Chamber II (10 June 2010)

*Prosecutor v Simić* (Appeal Judgment) ICTY-95-9-A (28 November 2006)

*Prosecutor v Simić* (Judgment) ICTY-95-9-T, T Ch II (17 October 2003)

*Prosecutor v Strugar* (Judgement), IT-01-42-T (31 January 2005)

*Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999)

*Prosecutor v Tadić* (Judgment) IT-94-1-T (7 May 1997)

*Prosecutor v Vasiljević* (Appeal Judgment) ICTY-98-32-A (25 February 2004)

*Prosecutor v Vasiljević* (Judgement) ICTY-98-32-T, T Ch II (29 November 2002)

*Prosecutor v Stakić* (Judgement) ICTY-97-24-A (22 May 2006)

ICTR

*Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, Trial Chamber 1 (2 September 1998)

*Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-05-86-S, Trial Chamber III (17 November 2009)

*Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T, Trial Chamber I (7 June 2001)

*Prosecutor v* *Bagilishema* (Judgment), ICTR-95-1A-A, 3 July 2002

*Prosecutor v Gacumbitsi* (Appeal Judgment) ICTR-2001-64-A (7 July 2006)

*Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004)

*Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-T, Trial Chamber II (1 December 2003)

*Prosecutor v Kamuhanda* (Judgment), ICTR-95-54A-T, T Ch II (22 January 2004)

*Prosecutor v Karemera et al* (Judgment) No. ICTR-98-44-T, Trial Chamber III (2 February 2012)

*Prosecutor v Karera* (Appeal Judgment), ICTR-01-74-A (2 February 2009)

*Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T, Trial Chamber I (7 December 2007)

*Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, Trial Chamber II (21 May 1999)

*Prosecutor v Muhimana* (Judgment and Sentence) ICTR-95-1B-T (28 April 2005)

*Prosecutor v Muhimana* (Judgment) ICTR- 95-1B-T, Trial Chamber III (28 April 2005)

*Prosecutor v Musema* (Judgment) ICTR-96-13-A, Trial Chamber I (27 January 2000)

*Prosecutor v Muvunyi* (Appeal Judgment) ICTR-2000-55A-A (1 April 2011)

*Prosecutor v Muvunyi* (Judgment) ICTR-00-55A-T, T Ch III (11 February 2010)

*Prosecutor v Muvunyi* (Judgment) ICTR-2000-55A-T, Trial Chamber II (12 September 2006)

*Prosecutor v Nahimana et al* (Appeal Judgment), ICTR-99-52-A (28 November 2007)

*Prosecutor v Ntagerura* *et al* (Appeal Judgment), ICTR-99-46-A (7 July 2006)

*Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004)

*Prosecutor v Ntakirutimana* *and Ntakirutimana* (Judgment) ICTR-96-10 & ICTR-96-17-T (21 February 2003)

*Prosecutor v Ntawukulilyayo* (Judgment and Sentence), ICTR-05-82-T (3 August 2010)

*Prosecutor v Rutaganda* (Judgement) ICTR-96-3-T, Trial Chamber I (6 December 1999)

*Prosecutor v Rutaganira* (Judgment and Sentence), ICTR-95-1C-T (14 March 2005)

*Prosecutor v Semanza* (Judgment) ICTR-97-20-T, Trial Chamber III (15 May 2003)

*Prosecutor v Seromba* (Judgment) ICTR-2001-661 (13 December 2006)

SCSL

*Prosecutor v Taylor* (Judgment), SCSL-03-01-T, T Ch II (18 May 2012)

ECCC

*Prosecutor vs Kaing Guek Eav ‘Duch’* (Decision on Joint Defence Request to Intervene on the Issue of Joint Criminal Enterprise, 001/18-07-2007-ECCC/OCIJ, Pre-Trial Chamber II (5 November 2008)

ICJ

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 11 July 1996

*Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America), Judgment of 26 November 1984

IMT

Judgment of the Nuremberg International Military Tribunal (1 October 1946)

**Internationalised cases:**

National Military Tribunals under Control Council Law No. 10

*Government Commission at the General Military Government Tribunal in the French Occupation Zone in Germany v Herman Roechling et al (*Indictment and judgement of the General Military Government Tribunal in the French Occupation Zone in Germany*)* 2 July 1948

*The Essen Lynching Case-Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945)*

*The IG Farben Trial: Trial of Carl Krauch and Twenty Two others*, United States Military Tribunal, Nuremberg (14 August 1947-29 July 1948)

*The United States of America v Wilhelm List and Others* (The Hostages Trial), United States Military Tribunal, Nuremberg (8 July 1947-19 February 1948)

*The United States of America vs. Wilhelm von Leeb et al.* (The High Command Trial), US Military Tribunal Nuremberg (27 October 1948)

*The Zyklon B Case: Trial of Bruno Tesch and two others*, British Military Court, Hamburg (1-8 March 1946)

*Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, United States Military Tribunal, Nuremberg (17 November 1947-30 June 1948)

*Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*

*Trial of Friedrich Flick and Five Others*, United States Military Tribunal, Nuremberg (20 April-22 December 1947)

*US v Ernst von Weizaecker et al.* (Ministries case), US Military Tribunal, Nuremberg (11-13 April 1949)

*US v Kurt Goebell et al* (Borkum Island case), General Military Government Court, Case No 12-489, Ludwigsburg (6 February-21 March 1946)

*US v Pohl et al,* US Military Tribunal, Nuremberg (3 November 1947)

**Regional courts cases:**

EU Court of Justice

Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR I-135

ECtHR

*Al-Jedda v UK* ECHR 2011-IV 305

*Behrami and Behrami v France, Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007)

*Nada v Switzerland* ECHR 2012-V 213

**National courts cases:**

*England and Wales*

*Adams v Cape Industries plc* [1990] BCLC 479

*Adams v Cape Industries Plc* [1990] Ch. 433 (AC)

*A-G’s Reference (No 2 of 1999)* [2000] 2BCLC 257

*Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62; [2014] A.C. 253

*Appeal Commissioners v Bank of Nova Scottia* [2013] UKPC 19; [2013] All ER (D) 90 (Aug)

*Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509

*Barron v Potter* [1914] 1 Ch. 895 (CD)

*Chandler v Cape plc* [2012] EWCA Civ 525

*Commissioners of HM Revenue and Customs v Holland* [2009] EWCA Civ 625 (AC)

*Customs* *and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 AC 181

*Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366

*EI Ajou v Dollar Land Holdings plc & Anor*, [1994] BCC 143 (AC)

*Foster v Foster* [1916] 1 Ch 532

*Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 (AC)

*Hawkes v Cuddy* [2009] 2 BCLC 427 (AC)

*Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC)

*Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL)

*Macleod vs Attorney General for New South Wales* [1891] AC 455 (PC)

*Madoff Securities International Ltd (in liquidation) v Raven and others* [2013] EWHC 3147(Comm); All ER (D) 216 (Oct)

*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC)

*Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 (QBD)

*Murphy v Brentwood* *DC* [1991] 1 AC 398 (HL)

*Prest v Petrodel Resources Ltd* [2013] 2 AC 415

*R v British Steel plc* [1995] 1 WLR 1356 (AC)

*R v Bryce* [2004] EWCA Crim 1231

*R v Gibbins & Proctor* (1918) 13 Cr App Rep 134

*R v Luffman* [2008] EWCA Crim 1739

*R v Moloney* [1985] AC 905 (HL)

*R v St Regis Paper Co Ltd* [2012] 1 Cr App R 14 (AC)

*R v Stone & Dobinson* (1977) QB 354

*R v Warner* [1969] 2 AC 256

*R. v Saik* [2007] 1 AC 18

*Re Brian D Pierson (Contractors) Ltd* [1999] BCC 26 (CD)

*Re Continental Assurance Co of London Plc* (*Singer v Beckett*) [2007] 2 BCLC 287 (CD)

*Re Supply of Ready Mixed Concrete (No 2), Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 BCLC 613 (HL)

*Re Westmid Packing Services Ltd (No 2)* [1998] BCC 836 (AC)

*Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284

*Salomon v Salomon* *and Co Ltd* [1897] AC 22

*Secretary of State for Trade and Industry v Baker (No 5)* [2000] 1 BCLC 523 (AC)

*Secretary of State for Trade and Industry v Hollier* [2007] BCC 11 (CD)

*Smith v Butler* [2012] BCC 645 (AC)

*Smith, Stone and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116

*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL)

*Twinsectra Ltd v Yardley and Others* [2002] UKHL 12; [2002] 2 AC 164

*Westminster City Council v Croyalgrange Ltd* [1986] 1 WLR 674

*USA*

*Backun v United States*, US Supreme Court 4th Cir. 112 F.2D 635 (10 June 1940)

*Bowoto v Chevron Corporation*, US Court of Appeals 9th Cir.621 F.3d 1116 (2010)

*Cardona et al v Chiquita Brands International Inc / Chiquita Fresh North America LLC*, US Court of Appeals 760 F.3d 1185 (11th circ. 24 July 2014)

*Cardona et al, v Chiquita Brands International Inc*, US Supreme Court, 135 S. Ct. 1842 (20 April 2015)

*Doe I v Unocal*, US Court of Appeals 9th Cir. 395 F.3d 932 (2002)

*In re South African Apartheid Litigation*, US District Court for the Southern District of New York 617 F.Supp.2d 228 (2009)

*Kiobel v Royal Dutch Petroleum Co*, US Court of Appeals 621 F.3d 111 (2nd Circ. 2010)

*Kiobel v Royal Dutch Petroleum Co*, US Supreme Court 569 U.S. 108 (2013)

*Presbyterian Church of Sudan v Talisman Energy, Inc.*, US District Court for the Southern District of New York 226 F.R.D. 456 (20 September 2005)

*Presbyterian Church v Talisman Energy, Inc*., US Court of Appeals 2nd Cir 582 F.3d 244 (2009)

Presbyterian Church v Talisman Energy, US Court of Appeals 2nd Cir 582 F.3d 244

*Saleh et al. V Titan et al.* (Petition for Writ of Certiorari) US Supreme Court (27 June 2011)

*The Presbyterian Church of Sudan et al. v Talisman Energy, Inc. et al*, US District Court for the Southern District of New York 244 F. Supp. 2d 289 (19 March 2003)

*United States v Jewell*, 532 F.2d 697 (9th Cir. 1976)

*Wiwa v. Royal Dutch Petroleum Co*., US Court of Appeals 226 F.3d 88 (2nd Circ. 2000), cert. denied, US Supreme Court 532 U.S. 941 (2001)

*The Netherlands*

*Judgement case against Frans van Anraat* (Sentence) District Court of The Hague, Criminal Law Section, Three-Judge Division (23 December 2005)

*Judgement case against Frans van Anraat,* Court of Appeal The Hague, Three-judge section for criminal matters, LJN: BA4676, 2200050906 – 2 (9 May 2007)

*Nuhanovic v Netherlands* (Appeal judgment) Gerechtshof's-Gravenhag/The Hague Court of Appeal, LJN: BR5388 (5 July 2011)

*The Public Prosecutor v Frans van Anraat*, Gerechtshof 's-Gravenhage/The Hague Court of Appeal, LJN: BA6734 (9 May 2007)

*The Public Prosecutor v Guus Kouwenhoven*, Gerechtshof 's-Hertogenbosch/'s-Hertogenbosch Court of Appeal, ECLI:NL:GHSHE:2017:1760 (21 April 2017)

*Germany*

*Prosecutor v Former Minister of National Defence Keßler and Others* (Judgment), German Federal Supreme Court (Bundesgerichtshof) (26 July 1994)

# Table of treaties and international instruments

**Treaties**

Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis(8 August 1945)

Charter of the International Military Tribunal for the Far East (19 January 1946)

Charter of the United Nations, 1 UNTS XVI (24 October 1945)

International Covenant on Civil and Political Rights, GA Res 2200A (XXI) (adopted 16 December 1966, entry into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) (adopted 16 December 1966., entry into force 3 January 1976)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977)

Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010)

The IV Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907)

Treaty establishing the European Coal and Steel Community (adopted 8 April 1951, entered into force 25 July 1952)

**International Instruments**

*United Nations*

Draft Articles on the Responsibility of International Organizations, UN Doc A/CN.4/L.778 (3 June 2011)

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (November 2001)

Draft Code of Crimes against the Peace and Security of Mankind, UN Doc A/CN.4/L.532, corr.1, corr.3 (1996)

Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, adopted on 26 June 2014, A/HRC/RES/26/9 (14 July 2014)

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc A/HRC/17/31 (21 March 2011), endorsed by the Human Rights Council Res 17/4, A/HRC/RES/17/4 (16 June 2011)

Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo’, UN Doc S/2003/1027 (23 October 2003)

Promotion and Protection of all Human Rights: Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5 (7 April 2008)

Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60 (25 January 2005)

Report of the International Law Commission on the Work of its 48th Session’, UN Doc A/51/10 (6 May - 26 July 1996)

Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10 (23 April - 1 June and 2 July - 10 August 2001)

Report of the International Law Commission on the Work of its 63rd Session, UN Doc A/66/10 (26 April-3 June and 4 July-12 August 2011)

Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1 (Rome 15 June–17 July 1998) (14 April 1998)

Report of the Preparatory Committee on the Establishment of an International Criminal Court - Proceedings of the Preparatory Committee during March-April and August 1996, UN Doc A/51/22 (13 September 1996)

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc A/HRC/17/31 (21 March 2011)

Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/37/67 (24 January 2018)

Seventh report on responsibility of international organizations, by Mr Giorgio Gaja, Special Rapporteur’, UN Doc. A/CN.4/610 (27 March 2009)

Universal Declaration of Human Rights, GA Res 217 A (III) (10 December 1948)

*European Council*

Council Regulation 1705/1998 (28 July 1998) OJ L 215

*European Commission*

Employee participation and company structure in the European Community', Bull Supp. 8/75 (1975)

*Organisation for Economic Co-operation and Development-OECD*

Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ 3rd ed. (April 2016)

# Abbreviations

|  |  |  |
| --- | --- | --- |
| CAR  DARIO  DASR  DRC  ECCC  ECtHR  EU  ICC  ICTR  ICTY  ILC  NGO  OECD  OTP  SCSL  UN  UNITA |  | Central African Republic  Draft Articles on the Responsibility of International Organisations  Draft Articles on the Responsibility of States for Internationally Wrongful Acts  Democratic Republic of Congo  Extraordinary Chambers in the Courts of Cambodia  European Court of Human Rights  European Union  International Criminal Court  International Criminal Tribunal for Rwanda  International Criminal Tribunal for the Former Yugoslavia  International Law Commission  Non-Governmental Organisation  Organisation for Economic Cooperation and Development  Office of the Prosecutor  Special Court for Sierra Leone  United Nations  National Union for the Total Independence of Angola |

# The scope and structure of the research

## Overview

Due to their nature, international crimes are committed by a collective entity. Genocide, due to the severity and the magnitude of the unlawful acts that constitute it, cannot realistically be committed by isolated individuals.[[1]](#footnote-2) By definition, crimes against humanity require a widespread or systematic attack, which presupposes the existence of a collective entity.[[2]](#footnote-3) War crimes, while they can be committed by an individual, they take place in an armed conflict which is a conflict between collective entities: states and armed groups.[[3]](#footnote-4) Nevertheless, the main principle of international criminal law is that criminal responsibility is attributed to their individual members, rather than the collective entity itself. Thus, the modes of responsibility describing the involvement of the individual in the commission of international crimes try to link individual acts with collective activities.

So far, this collective aspect of international crimes has been identified with state action. The defendants before the international criminal courts have been members of the state apparatus or, in cases they belonged to armed groups, the latter have been recognised as having state like characteristics. In the situations of Sudan and Libya before the ICC, for example, it is the government that is being investigated for the commission of international crimes against their own citizens.[[4]](#footnote-5) In the situations of DCR, Uganda and CAR, the ICC examined the commission of international crimes committed in the context of armed conflict/civil war by members of “resistance” groups against the official government.[[5]](#footnote-6) In these cases, the Court explained how the state-like characteristics of these non-state actors, such as a tight hierarchical structure and the exercise of effective control over subordinates and over a specific geographical area, had given to the collective entities’ leaders the opportunity to commit international crimes. [[6]](#footnote-7)

Nevertheless, international crimes are also committed by non-state collective entities that do not have state-like characteristics. On such entity is the corporation. Corporations do not operate on strict control but on a delegation of power process, which provides them with the necessary flexibility to carry out the multiple tasks trade requires from them. With the tolerance or even collaboration of states, though, they have the means and the infrastructure to get involved in international crimes.

Corporate involvement in international crimes has been acknowledged in the post-Second World War international law during the prosecutions of the internationalised criminal tribunals, establishing after the Nuremberg Trial. In three cases before the US Military Tribunal -the *IG Farben*, *Flick* and *Krupp* cases- high-level executives and/or owners of German corporations have been prosecuted and convicted for international crimes in the realm of their corporations’ activities, after undertaking economical agreements with the Nazi government. In the *IG Farben* case, the accused were convicted for being principals in and/or accessories to the commission of war crimes and crimes against humanity: pillage of public and private property in the occupied countries;[[7]](#footnote-8) and slave labour, torture and killing with poisonous gas of civilians in Germany and occupied territories.[[8]](#footnote-9) As mentioned in the judgment, these executives were able to commit or assist the commission of the alleged crimes ‘through the instrumentality of Farben’,[[9]](#footnote-10) due to their high-level position in the corporate hierarchy.[[10]](#footnote-11) Similar convictions were held in the *Flick*[[11]](#footnote-12) and *Krupp*[[12]](#footnote-13) cases, for corporate executives’ participation in plundering, enslavement, killing, torturing etc., as war crimes and crimes against humanity.

A similar case involving corporate executives was tried before the British Military Tribunal. In the *Zyklon B* case, Tesch and Weinbacher, the owner and the *prokurist*/general manager of “Tesch and Stabenow” respectively, were convicted to death for complicity in murder as a war crime.[[13]](#footnote-14) Their company was providing the Nazi regime with the poisonous pesticide Zyklon B, used in the gas chambers of the concentration camps, against the Jewish prisoners. As the Judge Advocate of the case pointed out to the court ‘the latter must be sure […][that] the accused knew that the gas was to be used for the purpose of killing human beings’.[[14]](#footnote-15)

Nowadays, a typical way in which a corporation contributes to the commission of international crimes is by collaborating with an authoritative state, such as a military dictatorship, in committing crimes against humanity. In the USA, the Union Oil Company of California -Unocal was sued for using forced labour in the construction of their pipelines, in Myanmar, with the assistance and allowance of the Myanmar military.[[15]](#footnote-16) The case closed with a settlement between Unocal and plaintiffs, the monetary terms of which were not made public. However, a statement was released, according to which Unocal would provide compensation for the victims, as well as money ‘to develop programs to improve living conditions, healthcare and education and protect the rights of people from the pipeline region.’[[16]](#footnote-17)

A more recent example can be found in terms of the land policy scheme introduced in Cambodia over the past decades, by the country’s repressive government. The regime has launched a policy of systematic and widespread “land grabbing” of millions of hectares of forests,[[17]](#footnote-18) leading to the exploitation of natural resources and destruction of the environment. During this campaign, NGO’s have been warning for the commissions of various crimes against humanity, such as forcible transfer, murder, illegal imprisonment and persecution of the local population, in order for their land to be allotted to corporations.[[18]](#footnote-19) More specifically, two Vietnamese corporations, Hoang Anh Gia Lai (HAGL) and the Vietnam Rubber Group (VRG), have been suspected of pulling the strings behind this governmental policy, each of them having multi-million contracts with the state to extract the country’s rubber. According to witnesses, all the operations of deforestation have been accomplished by these companies own infrastructure, under the allowance of the Cambodian government.[[19]](#footnote-20) In 2014, a “Communication” was filled with the ICC by Global Diligence, a London-based human rights law firm, against Cambodian officials and businessmen, urging the ICC Prosecutor to investigate the situation.[[20]](#footnote-21) Because of the links between land grabbing campaigns and the commission of crimes against humanity, the ICC OTP, in their 2016 policy paper on case selection, has declared their decision to ‘give particular consideration’ to this kind of environmental offences.[[21]](#footnote-22)

Another area of corporate criminality involves the illegal exploitation of conflict resources[[22]](#footnote-23) during hostilities, amounting to the war crime of pillage.[[23]](#footnote-24) Such a situation is the trading of conflict diamonds. After the failure of the 1992 elections, the civil war that broke out in Angola was mainly financed by the illicit trade of diamonds.[[24]](#footnote-25) Until 2002 when fire ceased, one of the parties to the conflict, UNITA, controlled 60-70% of Angola’s diamond production. Through the global diamond industry, diamonds reached the international market and was enabling UNITA to maintain their war effort. *De Beers*, a South African corporation, was the main buyer and distributor of the Angolan diamonds to the rest of the world. In 1998, the UN and EU announced an embargo to the direct or indirect export of unofficial Angolan diamonds.[[25]](#footnote-26) However, between 1992 and 1998, UNITA obtained an estimated minimum revenue of US$3.72 billion from diamond sales.[[26]](#footnote-27) Since 2003, an international certification scheme, called *Kimberley Process*, is being launched, requiring from the member states to establish an import and export control system for rough diamonds. Their goal is to remove conflict diamonds from the global supply chain, while the participants include all major rough diamond producing, exporting and importing countries.[[27]](#footnote-28)

In DRC, armed groups controlling areas rich in minerals, such as gold, diamonds, cassiterite, wolframite and coltan, have been involved in illegal trading with corporations, which buy these natural resources and, as a result, finance the armed groups to continue fighting. Ultimately, these natural minerals end up in products like jewellery and electronics, sold on global markets.[[28]](#footnote-29) The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act in the USA requires corporations using minerals from DRC to apply a due diligence policy over their supply chains, in order to determine whether their mineral purchases are funding the armed conflict.[[29]](#footnote-30) In 2017, the EU has adopted a Regulation, according to which certain EU companies are required to ensure that their mineral supply chains do not sustain conflicts or human rights abuses.[[30]](#footnote-31) OECD has also developed international guidelines[[31]](#footnote-32) for responsible sourcing and trading gold from high-risk areas, such as the Shabunda area in DRC. Under Congolese law, companies operating in DRC are required to implement this guidance. Nevertheless, the Congolese officials have been accused to turn a blind eye rather than enforce Congolese law and hold the companies doing business in the mineral sector accountable for their illegal activities.[[32]](#footnote-33) There have been allegations that a Chinese-owned company, Kun Hou Mining, paid the armed groups controlling the area Ulindi River in Shabunda territory in eastern Congo, in order to have access to the rich gold deposits on the river bed. Moreover, the company paid the members of the armed group to extract the gold, by exploiting the local population, and provided them with arms and other equipment.[[33]](#footnote-34)

The China National Petroleum Company (CNPC) has been accused of being involved in the commission of genocide in Darfur, by the Sudanese government. CNPC has allegedly allowed the *Janjaweed*/state militia to use the corporation’s infrastructure and the corporation’s airstrips in their operations, in exchange of clearing the land- where the corporation drills their oil- of its native population.[[34]](#footnote-35) Such a practice can be considered as aiding and abetting the commission of genocide, according to the ICC Statute, if it involves killings, serious bodily or mental harm to the Darfuri population or inflicting upon them conditions of life calculated to bring their destruction.[[35]](#footnote-36)

Another way of indirect involvement of corporations to the commission of international crimes is by providing finance and equipment to governments or paramilitia. Royal Dutch Petroleum/Shell, an oil company, alongside with one of their head directors, Brian Anderson, has been accused before US courts of assisting the Nigerian dictatorship in violently suppressing demonstrations of the Ogoni local population against the corporation’s activities in the Niger Delta in 1993.[[36]](#footnote-37) More specifically, they provided money, equipment and logistical support to the governmental forces launching a campaign of executions, torturing, raping and forcibly removing the local population, amounting to crimes against humanity.[[37]](#footnote-38) Shell agreed to a settlement of $15.5 million to compensate the plaintiffs and to the establishment of a trust for the benefit of the Ogoni people.[[38]](#footnote-39) Similarly, the Canadian corporation Talisman Energy has been accused in a US lawsuit for providing infrastructure to the Sudanese army to launch a policy of ethnic cleansing amounting to genocide against the local population surrounding oil concessions in South Sudan, in order for the corporation to promote their oil extraction activities.[[39]](#footnote-40)

From 1997 to 2003, it appears that Chiquita Brands was making payments to the Colombian paramilitary organisation “Autodefencas Unidas de Colombia”, acting in the banana-growing region, where Chiquita was conducting business. This organisation has been responsible for the commission of various war crimes against the local population, many of whom were working on Chiquita’s plantations. In 2007, a lawsuit was filed against the corporation before US courts for complicity in international crimes.[[40]](#footnote-41)

A similar situation took place in CAR. In 2013, a civil war broke in the country after the rebel group Seleka upheld the government and seized power. Corporations such as IFB from France, SEFCA from Lebanon, and Vicwood from China have been accused by NGOs to have made frequent payments to the rebel militia responsible for various war crimes, in order to maintain their timber trade.[[41]](#footnote-42)

In Zimbabwe, corporations have been accused of financing the repressive government to commit crimes against humanity, in return of getting access to Zimbabwe’s diamond sector. Sino Zimbabwe Development (Pvt) Ltd and their partner, Sam Pa, a Chinese businessman in control of a large network of corporations around the world, named the Queensway Syndicate,[[42]](#footnote-43) are suspected of directly funding the Central Intelligence Organisation-CIO, Zimbabwe’s secret police. One CIO document put this support at $100 million and 200 pick-up trucks.[[43]](#footnote-44) CIO has been implicated in widespread violence against members of the political opposition party, particularly during election periods in the country, including torturing and killings.[[44]](#footnote-45)

A Dutch businessman, Guus Kouwenhoven, was convicted in 2017 by the Dutch Appeal Court for aiding and abetting war crimes committed by then Liberian President Charles Taylor, during the civil war in Liberia from 1989 to 1996. Kouwenhoven, the director of the Oriental Timber Company and the Royal Timber Company doing business in Liberia, was delivering weapons to Charles Taylor in return for special treatment for his timber company. Taylor’s regime was not able to obtain the arms by themselves, due to the relevant embargo posed by the UN Security Council against Liberia. Kouwenhoven was sentenced to 19 years imprisonment.[[45]](#footnote-46)

Another category of corporate involvement in international crimes is providing to the state the means to commit them. Under this scenario, the Dutch businessman Frans van Anraat has been convicted by a Dutch criminal court for assisting the commission of war crimes by Saddam Hussein’s regime against Kurdish minorities in Iraq. More specifically, Van Anraat’s corporation was supplying Iraq with the chemicals needed to produce mustard gas, which was then used in attacks against the Kurdish population, resulting in massacres. During the trial, it has been established that Van Anraat ‘himself or through the intermediary of one or more of his firms, or at least firms in which he was a leading figure’[[46]](#footnote-47) provided to the then government of the Republic of Iraq the substance Thiodiglycol (TDG), a precursor for mustard gas. Similarly, in 2016, it has been revealed that UK manufactures have been selling cluster bombs to Saudi Arabia in the ‘80s, used by the government against Houthi rebels in Yemen.[[47]](#footnote-48) Cluster bombs pose an indiscriminate risk to the civilian population, which amounts to a grave breach of the Geneva Conventions and, thus, to a war crime.[[48]](#footnote-49)

Banks have been also accused of financing repressive regimes. The loans provided by foreign banks to the Argentinean junta supported the regime economically, helping the dictatorship to remain in power and continue with the systematic commission of crimes against humanity.[[49]](#footnote-50) Similarly, the Swiss bank UBS and the British bank Barclays have been sued in the US for aiding and abetting the apartheid government in South Africa. The lawsuit was dismissed, as the court ruled that the causal link between the loan providing and the commission of the alleged crimes was too loose to sustain the *actus reus* of aiding and abetting the crimes.[[50]](#footnote-51) Recently, Deutsche Bank has been accused of being a major investor of two of Vietnam’s largest companies, Hoang Anh Gia Lai (HAGL) and the state-owned Vietnam Rubber Group (VRG), which are involved in land grabbing operations in Laos and Cambodia.[[51]](#footnote-52)

Moreover, the actions of private security companies, hired by governments to support the state army, have been directly linked with the commission of international crimes. In the US a lawsuit has been filed against two companies providing military and intelligence services to the US government at detention centres in Iraq, including the Abu Ghraib prison. Plaintiffs argued that the corporations committed crimes against humanity and war crimes against the detainees, mainly torture and other forms of cruel and degrading treatment. Even though this case did not identify any particular individuals who committed the alleged crimes, it is discussed here as an example of corporate involvement in international criminality. On June 27, 2011, the Supreme Court declined to hear the case, arguing that private service contractors integrated into combatant activities are pre-empted from tort claims.[[52]](#footnote-53)

Despite the efforts of national jurisdictions to confront corporate international crimes, national law cannot always provide an effective solution. The involvement of corporations in international crimes almost always takes place in developing countries with poor human rights’ standards or in ‘failed’ states dealing with internal conflicts. In the situations when there exists the relevant legislation for international crimes, these states are often either unwilling to prosecute company directors, because of the significant benefits multinational corporations provide to the local economy, or unable to because of corruption and collapse of the state structures.

Nevertheless, even though corporate criminality flourishes usually in failed or corrupted states, most of the involved corporations are multinational corporations,[[53]](#footnote-54) which have their headquarters in advanced democratic states, bound by the rule of law. These states have the proper judicial mechanisms to deal with corporate criminality, both in terms of civil and criminal law. However, national jurisdictions do not seem keen to bring to justice corporations and their executives for international crimes committed extraterritorially. The former Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, in one of his reports to the Human Rights Council, has expressed his concerns about the approach of national jurisdictions to ‘the business and human rights agenda’. [[54]](#footnote-55) This statement leaves hints that there are political reasons for the countries not prioritizing the prosecution of corporations and their executives for international crimes.

Besides any political background, there exist also practical and legal matters. Collecting evidence, a very important aspect of a successful trial, for a crime committed outside national borders can be very challenging and time/money consuming. This process becomes even more complicated when it concerns multinational corporations, with a vast range of activities over the world translated in an elaborated corporate governance scheme, accompanied by a network of subsidiaries. As a result, national jurisdictions do not always have the resources to run a proper investigation.[[55]](#footnote-56) In additions, there is often an affiliation of corporate criminality with state criminality and governmental corruption. Thus, without the collaboration of the host state, where the alleged crimes were committed, it becomes even more difficult for national courts to successfully prosecute the corporation and its executives. [[56]](#footnote-57)

In terms of law, national legal orders are not always successful in adopting an effective legal framework against corporate criminality. In the UK, for example, the Corporate Manslaughter and Corporate Homicide (CMCH) Act has been criticized for obscuring even more the already thorny field of corporate criminal liability.[[57]](#footnote-58) The number of successful prosecutions remains low, with only 15 corporations being convicted from 2011 until 2017.[[58]](#footnote-59) Even though the CMCH Act was designed to apply mostly in large scale deaths of members of public the due to corporate negligence, so far the successful cases concern deaths of single (or a limited number of) individuals being employees of the corporation. Moreover, they concern mostly small to medium-sized corporations, leaving the large corporations intact.[[59]](#footnote-60) It is exactly these large multinational corporations, however, which are most probable to get involved in the commission of international crimes outside their state of nationality.

Even if the relevant framework exists, experience has shown that courts have tried to avoid the difficult task of attributing responsibility to corporations for international crimes. The failure of the Alien Tort Claims Act (ATCA) in the US is the most prominent example. Under ATCA, plaintiffs have been able to bring civil actions against corporations for the violations of international law they committed in a foreign nation. Even though ATCA does not attribute criminal responsibility per se, it creates a semi-criminal responsibility regime, as it bases the attribution of civil responsibility to criminal law notions of *mens rea* and *actus reus*. After a line of successful cases,[[60]](#footnote-61) the US Supreme Court, in *Kiobel v Royal Dutch Petroleum*,[[61]](#footnote-62) decided to disentangle themselves from attributing civil responsibility to corporations under ATCA. The Supreme Court, affirming the decision of the Court of Appeals,[[62]](#footnote-63) held that corporate liability is not a customary international law rule, and, as a result, US courts cannot decide upon violations committed by foreign corporations outside of the US territory.[[63]](#footnote-64) On top of this, in 2014, the US Supreme Court refused to hear a similar case against Chiquita for facilitating war crimes in Colombia, even though Chiquita is a US company with headquarters within the US territory. The Supreme Court agreed with the Court of Appeals judgment that the alleged international law violations lacked sufficient connection to the US.[[64]](#footnote-65)

In terms of English law, the common law principle of *forum non conveniens* requires the courts to consider carefully on the danger of duplicative procedures between the different jurisdictions, which may lead to conflicting judgments.[[65]](#footnote-66) Despite the recent promising outcome of the *Vedanta* case, it is generally considered a difficult task for the claimants to succeed in the preliminary proceedings -in order for an English court to hear the substantial arguments of their case- when the parent corporation is not directly involved in the unlawful conduct.[[66]](#footnote-67) Moreover, it is doubtful whether English courts are prepared to apply the *Vedanta* precedence in relation to supply chain corporations.[[67]](#footnote-68) Similarly, a German court followed a rather cautious approach on admissibility in the *KiK* case.[[68]](#footnote-69) EU institutions have been also concerned by the lack of effective remedies in the member states for victims of corporate human rights abuses in third countries.[[69]](#footnote-70)

If national law does not (yet) provide an adequate forum, the question is whether international law can make a more effective contribution. For now, there is no international treaty on corporate duties and, most importantly, not an international mechanism to impose these obligations. However, the International Criminal Court (ICC) does exist, which can bring to justice individuals from any member state when they have violated certain human rights, in a certain way, in order for their abuses to be considered as international crimes. At this stage, the ICC seems to be the only international court with the jurisdiction to deal with corporate human rights abuses around the world, as long as they constitute international crimes under its Statute. However, prosecuting corporate directors for their corporation’s involvement in international criminality is not without its own problems. These problems have to do with the identity of international criminal law in combination with the particularities of the ICC approach to international crimes commission.

The ICC possesses the appropriate infrastructure for operations on the ground, which are necessary for collecting evidence in a foreign and usually disorganized or even dangerous foreign country.[[70]](#footnote-71) It has also established a sophisticated witness protection programme, which becomes vital in situations where a corrupted and oppressive state is also involved in corporate criminality. Most importantly, in contrast to national authorities who do not have sufficient expertise in prosecuting international crimes, ICC is the most adequate legal forum to ‘identify both the necessary evidence and the relevant legal theories to establish a link between the conduct of business people or companies and the crimes committed by armed groups’.[[71]](#footnote-72) For that reason, the ICC OTP, when deciding not to take action themselves,[[72]](#footnote-73) assists national jurisdictions in prosecuting individuals for international crimes, by sharing information with national authorities in the states where it has initiated investigations.[[73]](#footnote-74)

Therefore, one of the main challenges the ICC is facing is how to apply the individual criminal responsibility doctrines in the Rome Statute in such a way so as to successfully link the decisions of individuals on top of the hierarchy of a collective entity with the commission of specific international crimes by their subordinates. It is noted that, even though the international criminal law concepts and modes of responsibility discussed in this research are theoretically applicable even to the lowest managers of a corporation, the focus is upon the top company directors. These are in a better position to attract the attention of the ICC, as international criminal courts try to limit the prosecution of international crimes to the individuals most responsible for their commission.[[74]](#footnote-75) The ICC Prosecutor, in order to preserve the effectiveness of the ICC and to deal with the practical limitations regarding the cost of investigations and prosecution, concentrate their efforts in prosecuting the individuals who bear the greatest responsibility.[[75]](#footnote-76) The focus on a limited number of individuals becomes, therefore, ‘crucial to any prosecutorial policy’,[[76]](#footnote-77) where lower-level perpetrators are prosecuted only ‘where their conduct was particularly grave and has acquired extensive notoriety’.[[77]](#footnote-78) This means that lower-level directors can be found responsible for international crimes but the chances are that the top directors will bear the greatest responsibility and, thus, this research chooses to focus on them.

## Originality and impact of the research

This research, unlike the rest of the literature on this issue,[[78]](#footnote-79) focuses not on the corporation as a collective entity, but on the notion of individual criminal responsibility in the context of corporate criminality. In this direction, it does not follow the traditional understanding of collective criminality as the criminality of a state or a state-like entity. It, rather, approaches international crimes and the modes of responsibility established in international criminal law under the concept of disentangling collective criminality from the State. By doing so, it initially explains why the current interpretation of ICC Statute rules on individual criminal responsibility cannot successfully attribute criminal responsibility to company directors for international crimes committed in the context of corporate activities. More importantly, though, it opens a new interpretative road to the elements of the international crimes and the modes of responsibility established in the ICC Statute, based on their application to (non-state) collective entities *with the capacity to get involved in the commission of international crimes*. It analyses how the theory on the modes of perpetration, aiding and abetting and superior responsibility can be expanded in order to apply to company directors for the illegal activities of their corporation but also in terms of the criminal activities of their subsidiaries or supply chain corporations.

The findings of this research are of importance because, as it has already been established, corporate criminality has become a serious issue for the international community, and it will continue to be one in the future. In terms of literature, it expands the current scholarship on corporate violations of international law by providing the doctrines of attributing criminal responsibility to company directors at the international level. In terms of practice, it lays down the legal tools as to how the ICC Statute should be interpreted, in order for its rules to apply to company directors. It gives, thus the ability to the ICC to exercise its jurisprudence to the field of corporate criminality, something that the court is finding difficult to do so far.

In a broader context, this research aspires to contribute to the pressure put by the international community- including scholars, international organisations and non-governmental organisations- to multinational corporations to adjust their policies in order to respect human dignity. More specifically, it tries to increase the awareness of multinational corporations for the criminal responsibility of their directors in the course of corporate activities. In this direction, the shift from the responsibility of corporations as legal entities to the responsibility of the corporate executives can prove more efficient in changing corporate policy.

Relevant surveys show that, in the absence of personal responsibility, company directors are more prone to decide in favour of corporate involvement in criminal acts.[[79]](#footnote-80) The prospect of corporate responsibility is being calculated in a ‘cost v benefit’ evaluation and if the profits from the criminal act prevail the potential fine due to the corporate liability, corporate executives may choose crime commission.[[80]](#footnote-81) This decision towards criminal behaviour can become easier if one keeps in mind that directors come and go and their current position may be just a step to move their career further, so the possible liability stigma of this specific corporation in society is out of their concern, as long as it does not affect the corporate economically. Consequently, if the burden of responsibility moves to company directors, the current external (by the international community) pressure to the multinational corporations will be supplemented by an internal influence, the directors of the corporation themselves who, being aware of their potential international criminal responsibility, will start pushing the corporation to act according to humanitarian values.

1. Research questions

Having explained the rationale behind this research project, the basic research question which supports the whole research is this:

How can company directors be held criminally responsible for international crimes committed in the context of corporate activities under the ICC Statute?

To provide an answer to this question, several other questions are being considered:

What is the aim of international criminal law and why the latter is not limited to the protection against State or state-like entities’ activities?

How international crimes are being connected with the activities of non-state collective entities, in general, and corporations, in particular?

What is the role of the company directors in the decision-making process within the corporation and how do they affect the corporate activities?

How can the doctrines of primary and secondary responsibility under the ICC Statute be applied to company directors?

What is the nature of the superior responsibility doctrine and how is it to be applied to company directors?

## Methodology

The research is based on the analysis and evaluation of the international criminal law rules of the ICC Statute and their application to company directors for the crimes committed due to corporate activities. The initial aim is to identify the doctrinal inconsistencies in terms of the collective criminality element of international crimes, the modes of attributing criminal responsibility to the individual and the superior responsibility doctrine. These inconsistencies are employed to demonstrate the theoretical gaps in the relevant ICC rules, which obstruct their application to company directors. The final aim is to provide a new interpretation of these rules to assist the ICC in exercising its jurisdiction over corporate criminality cases.

In order to achieve these aims, the research employs doctrinal analysis as the most suitable methodology to answer the research questions.[[81]](#footnote-82) In general, doctrinal research ‘aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law’.[[82]](#footnote-83) It analyses the existing legislation and/or case law, with the prospect of developing norms, which are then used to solve the inconsistencies of the legal system and make it comprehensive, by re-interpreting its legal rules against these norms.

Thus, doctrinal analysis is not a mere description and systematisation of the current law. It incorporates, foremost, the evaluation of the legal rules discussed and highlights, through subtle elaborations and distinctions, a certain normativity, as the source of all these legal rules.[[83]](#footnote-84) By this process, doctrinal legal research contributes to ‘finding new perspectives that can contribute to improving the law’[[84]](#footnote-85) and furthering its application. The evaluation of the law depends on the researcher’s own approach on the scope of these legal rules and the role/aims of Jurisprudence in general and provides originality to his/her legal analysis. Therefore, doctrinal analysis cannot be neutral and value-free.[[85]](#footnote-86) On the contrary, the researcher ‘adopt[s] an integral point of view in order to see how different elements of the law fit together […][and to suggest] a new solution to a particular legal problem, a new way to interpret a particular statutory provision or court decision, a new way to evaluate a particular legal rule’.[[86]](#footnote-87) Regarding this research, the evaluation of the legal rules is based on a capacity-oriented approach towards non-state collective entities’ criminality, deriving from the principle of human dignity, as the aim of international criminal law.

Despite its highly theoretical analysis, doctrinal research has strong links with practice. The evaluation and re-interpretation of legal rules to fill the gaps of the existing law loses its importance if it is completed *in abstracto*, i.e. if it does not offer a solution to a specific practical issue. This means that doctrinal analysis should work as a guide to judicial case-solving by providing the judges with a plausible justification in order to make a decision.[[87]](#footnote-88) The re-interpretation of specific legal rules (the modes of responsibility in international criminal law-the ICC Statute), in order to facilitate their application against corporate leaders, is the aspiration of the present research.

Even though doctrinal researchers are reluctant to intergrade in their analysis rules from different fields of law and/or different legal systems, this research, besides the ICC Statute, discusses also relevant national statutes and case law of national courts. The reason for this choice is dual. First of all, it has to do with the fact that this research is in the field of international (criminal law). National law is accepted in order to interpret international rules because the latter have a certain level of abstraction by their creation.[[88]](#footnote-89) In term of this research, it is important to identify what sort of collective entity a corporation is, in the sense of its structure and the decision-making process in it, so as to be able to discuss the individual criminal responsibility of its directors under international criminal law.[[89]](#footnote-90) There are no international legal rules on corporate liability and corporate personality, so national law should be used instead. In this direction, English law has been chosen, as the access to it was easier than access to other jurisdictions. The second reason has to do with the belief that this research will be fuller and more creative if national law analogies with international criminal law are identified and an empirical approach to the legal matters discussed is provided.[[90]](#footnote-91)

## Research structure

After providing the background of the research, the discussing questions, the methodology and the impact upon literature, legal practice and society, the research is being structured as follows:

**Chapter 1** discusses the collective dimension of international criminality, bearing in mind the individualistic character of the international criminal responsibility attribution. It explains the importance of the organisational policy/common plan element in attaching criminal responsibility to the individual for the commission of international crimes and focuses on the involvement of non-state collective entities in international criminality. In this direction, it justifies the application of international criminal law to members of collective entities irrespectively of their state-like characteristics, by discussing human dignity as the aim of international criminal law. It finally explains why this approach is useful in interpreting the modes of responsibility in international criminal law in order to be applied against company directors.

**Chapter 2** discusses the structure of a corporation in order to establish under which circumstances its directors can be linked to international crimes committed in the course of the corporate activities.

This leads to **Chapter 3**, which analyses the theories of individual criminal responsibility before the ICC Statute came into force. This chapter provides an overview of the different doctrines developed prior-to-the ICC jurisprudence, from the International Military Tribunal in Nuremberg to the *ad hoc* criminal Tribunals for Yugoslavia and Rwanda. It focuses on the modes of participation of the individual to international crimes as a principal. It demonstrates their doctrinal deficiencies as far as individual criminal responsibility in the context of corporate activities is concerned and their inability to attribute criminal responsibility to the company directors.

**Chapter 4** focuses on the ICC rules on individual criminal responsibility and evaluates the responsibility of the perpetrator as constructed by scholars and the ICC judges, and as applied in the Court’s case law. It argues that, while the relevant perpetration rules link the individual responsibility to collective criminality without violating the principle of personal culpability -unlike its predecessors did- they are, nevertheless, too strictly construed to be effectively applied in the concept of corporate criminality. Consequently, the ‘perpetration through control over an organisation’ doctrine is re-evaluated, and a new interpretation is being proposed and subsequently applied in the company director’s responsibility scenario.

Leaving principal responsibility aside, the research then turns to modes of secondary responsibility. **Chapter 5** analyses the nature of secondary participation in the crime and explores how this theory is employed in the modes of responsibility established by the ICC Statute. It explains why the current international criminal law regarding aiding and abetting in the commission of an international crime is not only practically inapplicable but also violates criminal law and proposes an alternative theoretical framework. This framework is then applied in different scenarios of corporate assistance in the commission of international crimes by State or state-like perpetrators, demonstrating its effectiveness in attributing secondary responsibility to company directors.

Eventually, the research concludes with an analysis of the superior responsibility doctrine, being a theory of attributing individual criminal responsibility, which includes some unique characteristics. In **Chapter 6**, the much debatable nature of superior responsibility is discussed, against the concept of omission and the superior’s duty to prevent the commission of a crime by their subordinates or to punish them in the aftermath. Again, this research argues in favour of a new theoretical approach, taking into consideration the different types of omission and how they relate with the superior-subordinate relationship and the duties of the superiors in terms of their subordinates’ crimes. This theoretical framework is then being discussed in terms of an ‘extended’ corporate criminality, explaining how the parent corporation’s directors could be found responsible for the crimes committed by their subsidiary corporations, as well as under which circumstances the directors of a multinational corporation could be criminally responsible for the crimes of their supply chain corporations.

Chapter 1

# The nature of international criminal law: individual criminal responsibility and collective criminality by non-state actors including corporations

Introduction

This chapter identifies the theory underpinning the interpretation of the modes of criminal responsibility adopted in this research, in order to cover the commission of international crimes in the context of corporate activities. The first section discusses the nature of international criminal law as a branch of international law that attributes criminal responsibility to individuals for the crimes committed in a collective criminality context. The second section focuses on non-state actors’ involvement in the commission of international crimes, discussing the capacity-oriented approach adopted by the ICC case law. In this direction, the third section analyses the concept of human dignity, as the aim of international criminal law justifying the capacity-oriented approach. The last section explains the advantages of this approach in including corporate criminality within the modes of criminal responsibility contained in the ICC Statute.

## Individual criminal responsibility and collective criminality in international criminal law

The elementary principle of international criminal law is that criminal responsibility is attached to individuals rather than to collective entities. As stated by the IMT in the first criminal law trial at the international level ‘[c]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.[[91]](#footnote-92) In international criminal law, the individual is acknowledged as an international law subject who has rights and obligations emanating directly from rules of international law (e.g. the provisions of the ICC Statute).

Despite the individual criminal responsibility principle, international criminality incorporates, however, a collective aspect as well.[[92]](#footnote-93) To begin with, the victims of the international crimes are targeted not only due to their individual characteristics or status *per se* but also because of ‘those features that the individual shares with all, or very many others’,[[93]](#footnote-94) i.e. because they belong in a specific group. Most importantly, however, the perpetrators of international crimes are not just individuals acting in isolation, but they belong to a collective entity or organisation. [[94]](#footnote-95) As it has been pointed out, ‘instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state or, more loosely, in accordance with political objectives of a state or other entity’.[[95]](#footnote-96) As a result, the purpose of the international criminal law doctrines is to ‘provide the linking point between the abstractions of [collective] responsibility and the particularities of individual liability’.[[96]](#footnote-97)

The importance of linking the individual with collective criminality became clear to the drafters of the IMT Charter,[[97]](#footnote-98) which is the first modern international criminal law document. The idea was that the criminal behaviour of specific collective entities/ organisations could be depicted in terms of international criminal law through the criminal responsibility of their individual members. Thus, the IMT would declare certain Nazi organisations as criminal and the national courts, in the subsequent trials before them, would be entitled to convict specific individuals for the crimes committed by these organisations, as long as these individuals’ membership to the organisations could be proved.[[98]](#footnote-99)

The collective criminality theory adopted in Nuremberg has been controversial, as it is being explained in further details later in this research. [[99]](#footnote-100) Nevertheless, the idea of linking specific individuals with the crimes committed through the activities of collective entities has been the basis of all the doctrines of individual criminal responsibility developed by international criminal tribunals after the IMT. The *ad hoc* criminal Tribunals for Yugoslavia and Rwanda came up with the notion of Joint Criminal Enterprise, based on the Anglo-American criminal law tradition, and the ICC Statute adopted a rather continental approach towards the modes of responsibility, based on co-perpetration and control through an organisation. These doctrines aim to provide the necessary links between the individual and collective criminality maintaining, nevertheless, the principles of personal culpability and individual responsibility intact, as it will be further discussed in a following chapter.[[100]](#footnote-101)

All of these doctrines employ, in their own way, the concepts of (organisational) policy and common plan to commit an international crime, conceived by the collective entity. As argued by the *ad hoc* Tribunals and the ICC, the policy of the collective entity is revealed by the repetition of the common criminal plan, over a period of time, in a defined geographical area.[[101]](#footnote-102) It becomes clear, thus, that the term ‘policy’ is broader than ‘common plan’, as the latter forms part of the collective entity’s policy to commit international crimes. However, international criminal courts use them interchangeably in their case law and this research will follow the same pattern.

The Appeals Chamber in *Tadić* explained how this common plan of the collective entity leads to the commission of international crimes by specific individuals: ‘the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group are often vital in facilitating the commission of the offence in question’.[[102]](#footnote-103)

All international crimes incorporate the organisational policy element. More specifically, regarding genocide, the existence of a common plan establishes the required special genocidal intent. Both the ad hoc Tribunals, as well as the ICC, identify the *dolus specialis* of genocide as the desire of the perpetrator to commit the genocidal acts. However, this special genocidal intent needs to be realistic. Such an assumption derives from the basic criminal law principle according to which, criminal responsibility is raised, only when and if the criminal intent of the individual has some impact in the outside world.[[103]](#footnote-104) An individual is not to be criminally responsible for genocide when their acts cannot, under the logic of the reasonable man, materialise their genocidal intent and realistically destroy a group.[[104]](#footnote-105) The case of the *lone* *genocidaire* cannot fit the commission of the crime of genocide,[[105]](#footnote-106) because it is the case of a possibly disturbed personality[[106]](#footnote-107) who, driven by hatred towards a particular group and acting all by themselves, commits one of the acts described in Art. 6 of the ICC Statute towards members of the group. This person is, nevertheless, not capable of committing an actual genocide and for that he or she cannot be convicted for what has been characterised as the ‘crime of crimes’ to depict its severity.[[107]](#footnote-108)

A realistic genocide presupposes the existence of an organised plan by a collectivity possessing the mechanisms and the sources to carry out the group destruction.[[108]](#footnote-109) As a result, for the crime of genocide, the perpetrator, being a reasonable person, should be aware, when committing the *actus reus* of genocide, of such a genocidal plan, the materialisation of which they wish to contribute with their own acts. In the same vein, the *ad hoc* criminal Tribunals, when discussing the evidence for the commission of genocide, always identify the existence of a genocidal plan, as well as the defendants’ awareness of it.[[109]](#footnote-110) There is no need for the perpetrator to be aware of the genocidal plan in its full details, as long as he or she possesses knowledge of its ‘ultimate objective’.[[110]](#footnote-111) It is also not required for the perpetrator to know with certainty that the genocide plan will succeed, as mere anticipation of a realistic genocidal plan’s result should suffice.[[111]](#footnote-112)

The policy element is more obvious in crimes against humanity, as international criminal law requires their material elements to have taken place in the context of a widespread or systematic attack against a civilian population. As the *ad hoc* criminal Tribunals have explained, widespread refers to ‘the large scale of the attack’,[[112]](#footnote-113) while systematic describes ‘the organized nature of the attack’.[[113]](#footnote-114) Regarding war crimes, international criminal law recognises that isolated crimes can also constitute war crimes, which at first glance seems inconsistent with the collective criminality of international crimes. Nevertheless, even in the absence of common plan per se, the collective character of war crimes derives solely from its nexus to an armed conflict, which is a collective enterprise by states and armed groups. According to the ICTY Appeals Chamber in *Kunarac*, ‘[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment-the armed conflict- in which it is committed’.[[114]](#footnote-115)

1. Non-state actors’ involvement in international criminality

As it has been explained in the previous section, the collective nature of international crimes presupposes the existence of a common plan to commit them, conceived by a collective entity. Typically, this collective entity is the State,[[115]](#footnote-116) but it has been accepted that specific non-state collective entities can also become involved in the commission of international crimes.[[116]](#footnote-117) In order to establish the nature of the non-state collective entities that can get involved in the commission of international crimes, prominent international criminal law scholars have followed a state-centred approach. According to this, non-state organisations can commit international crimes due to the fact that they possess state-like characteristics, which means that international crimes have to always be linked to a *State or state-like organisation policy*. [[117]](#footnote-118)

Judge Kaul, in his dissenting opinion in the *Kenya Decision*, before the ICC Pre-Trial Chamber, has analysed this approach. According to his opinion, only ‘quasi-state’ organisations can form a policy to commit international crimes, that is organisations with the following characteristics: ‘(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale’. [[118]](#footnote-119) The ICTY case law has also included a control criterion, in order to identify a non-state collective entity’s involvement in international crimes. Referring to crimes against humanity, the ICTY in *Tadić* has argued that ‘the law […] has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a de jure state, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity’. [[119]](#footnote-120)

The ICC case law over the last few years has reassessed this element According to the Pre-Trial Chamber in *Katanga*, besides the State, ‘a policy may be made either by groups of persons who govern a specific territory *or* by *any organisation* with the *capability* to commit a widespread or systematic attack against a civilian population’.[[120]](#footnote-121) Similar was the conclusion of the Pre-Trial Chamber in the Bemba and the Authorisation of an Investigation in Cote d’ Ivoire cases.[[121]](#footnote-122) The majority of Pre-Trial Chamber in Authorisation of Investigation in Kenya case stated that ‘[w]hereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values’.[[122]](#footnote-123) In this vein, the judges added that ‘the associative element, and its inherently aggravating effect, could eventually be satisfied by “purely” private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by “territorial” entities or by private groups, given the latter's acquired capacity to infringe basic human values’.[[123]](#footnote-124)

Thus, the ICC has adopted a ‘capacity-oriented’[[124]](#footnote-125) approach regarding the organisations behind the commission of international crimes. The ICC judges have accepted that any organisation, which does not have any specific characteristics and does not even possess control over a territory, will be considered as a participant in international criminality, for the purposes of the ICC Statute, simply due to their actual capacity to commit the *actus reus* of international crimes. Such an approach can be further justified if one examines the aim of international criminal law.

International criminal law is a body of law that combines elements of criminal law and public international law. It has been defined as ‘the totality of international norms of penal nature which conjoin typical legal consequences of criminal law with a decisive conduct-namely the international crime-and as such can be applied directly’.[[125]](#footnote-126) As a consequence, the aim of international criminal law, in general, and the identity of international crimes, in particular, derive from the respective purposes of criminal law and public international law.

1. Human dignity as the aim of international criminal law

Criminal law prohibits wrongdoing (*Unrecht* in German legal theory), which is the outcome of deliberately and with no valid excuse infliction of harm to others.[[126]](#footnote-127) Crimes are wrongful acts or omissions that cause harm by violating the legal goods attached to the individual (*Rechtsgüter* in German legal theory, *legitimate interests* in English legal theory).[[127]](#footnote-128) Legal goods reflect basic human needs, ‘not only for food, drink and rest, but also for education and culture, as well as for various conditions essential for the development and exercise of our moral sensibility and conscience, and for the powers of reason, thought and judgment’.[[128]](#footnote-129) In this sense, the protection of the legal goods interests all the members of a community[[129]](#footnote-130) and this is why crimes are considered as ‘public wrongs’.[[130]](#footnote-131) The State, representing the whole of the community with its legal order, has a legitimate interest to punish the perpetrators and seek justice for the victims.[[131]](#footnote-132) Different states may recognise different legal goods subject to protection. Indeed, Ashworth and Horder argue that, in order to evaluate harm in a specific legal order, ‘we must remain conscious of the moral, cultural and political nature of the [legitimate] interests recognized in a particular system’.[[132]](#footnote-133)

Core crimes, however, violate fundamental human right such as life, liberty and security, physical and moral integrity, which are recognised as legal goods by all legal orders. This is because core crimes are value-oriented. They disclose the pre-existence of certain common and fundamental values, which are shared by all members of the community relating to human subsistence and existence. As a result, attacks on these values have been characterised as acts *mala in se*. They are not prohibited just because positive law says so, but they have an inherent ”evilness” in them, which humans wish to avoid, irrespectively of the existence of a certain legal provision against them.[[133]](#footnote-134) In this sense, criminal law has a natural law dimension.

Natural law understands man as a rational creature, using the law to protect values that are important to the whole of humanity[[134]](#footnote-135) and whose worth is ‘[….] a matter beyond political or moral debate- they exist […] “beyond ethics”’.[[135]](#footnote-136) These values reflect the basic interests of the rational man, i.e. to ensure survival, self-preservation and well-being.[[136]](#footnote-137) They also create a corresponding interest for security, because, as long as humans are vulnerable to attacks among them, survival, self-preservation and well-being cannot be effectively achieved.[[137]](#footnote-138) These values, which are ‘elementary truths concerning human beings, their natural environment and aims’ constitute the ‘minimum content of Natural Law’ presence in positive (criminal) law. [[138]](#footnote-139)

These shared common values can be summarised in the concept of human dignity, as defined by Kant, which is the source of all the fundamental human rights. According to Kant ‘a human being cannot be used merely as a means … but must always be used at the same time as an end’. [[139]](#footnote-140) Human dignity is a catholic, eternal concept intrinsic to all persons just because they are human beings. In this sense, human dignity is part of human nature, it has an ontological foundation. The carrier of human dignity -the human- belongs to a species which has specific physical and mental features; among others, ‘a characteristic form of embodiment’, ‘psychological capacities, such as perception, self-consciousness, and memory’, ‘rational capacities […] including evaluative considerations’, and the ability to ‘align[…] one’s judgments, emotions, and actions with those considerations’.[[140]](#footnote-141) The perception of human beings as rational creatures, possessing ‘the natural capacity to shape their own lives’ is central to the concept of human dignity.[[141]](#footnote-142)

From the above, it immediately becomes apparent that criminal law protects the human dignity of the individual. Firstly, because criminal behaviour treats the individual not as a person but as a mere object, a tool or an instrument[[142]](#footnote-143) (protection of the human dignity of the victim. Secondly, the offender is punished by criminal law only for acts they have consciously done (protection of the human dignity of the offender). The State should respect and protect, through criminal law, the human dignity of its citizens, as a value intrinsic to human beings. Thus, the State, as the law-maker, is not an absolute, above-the-law authority, but it is subjected to legal norms. As argued by Ambos, human dignity ‘conceives of the State as a *rational*, instead of national, State whose authority is based exclusively on the rule of law’.[[143]](#footnote-144)

The role of the State in respecting and protecting human dignity is transferred to the international law realm as well. Within the international legal system established by the UN Charter, [[144]](#footnote-145) it can be argued that the scope of modern international law is to promote international co-operation among states, through the establishment of various international institutions/s, in order to achieve international peace and security.[[145]](#footnote-146) Peace and security reflect the fundamental human needs for self-preservation and well-being, thus, they have the individual as their final addressee or beneficiary. By seeking to safeguard peace and security, international law is aiming to protect the human dignity of the individuals, as a value that ‘correspond(s) to the needs, hopes and fears of all human beings, and attempt(s) to cope with problems the solution of which may be decisive for the survival of entire humankind’. [[146]](#footnote-147) As argued by the ICTY in *Furundžija*, ‘[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed, in modern times it has become of such paramount importance as to permeate the whole body of international law’.[[147]](#footnote-148) For this reason, human dignity has been characterized as the ‘ultimate normative source of international law’.[[148]](#footnote-149)

It has been argued so far that both (national) criminal law and international law aim to protect human dignity. International criminal law has the same aim, as it is the ‘meeting of two worlds’, [[149]](#footnote-150) national and international law. Thus, it prosecutes individuals for their violation upon the human dignity principle, as national criminal law does with the further aim of maintaining peace and security at the international level.[[150]](#footnote-151) This becomes evident in relation to the ICC jurisprudence. The Preamble of the ICC Statute states that humanity has ‘common bonds’ and a ‘shared heritage’,[[151]](#footnote-152) which means that all human beings belong to the human race just because they were born humans. The purpose of the ICC is to protect human dignity and promote the unity of humanity by restoring justice in the international level for the ‘unimaginable atrocities’ against human beings, which ‘deeply shock the conscience of humanity’ and ‘threaten the peace, security and well-being of the world’.[[152]](#footnote-153) As a result, international crimes ‘concern [..]the international community as a whole’ and ‘must not go unpunished’.[[153]](#footnote-154) International criminal law is the criminal law of the international community and, as such, ‘transcend[s] the interest of any one State […],[because international crimes] affect the whole of mankind’.[[154]](#footnote-155)

As human dignity is such a catholic concept, international criminal law should protect it from any actor capable of violating it through the commission of international crimes. Under this approach, it goes against the aim of international criminal law to limit its application to states or non-state actors possessing specific (state-like) characteristics. Consequently, the capacity-oriented approach adopted by the ICC case law does not only facilitate the application of the ICC Statute rules, but it is also in conformity with the theoretical foundations of international criminal law.

1. Applying the ICC Statute to individuals belonging to non-state collective entities: the case of corporations

As discussed previously, international criminality involves non-state entities that operate ‘[…]outside state-structures and take very different forms. Thus, requiring a certain “formal” nature of such groups would arbitrarily restrict the scope [of international crimes]’.[[155]](#footnote-156) This is because these non-state collective entities have the required level of organisation and the means to harm the fundamental legal interests of the individual, presenting a threat to the catholic principle of human dignity. As a result, the international community has a legitimate interest in sanctioning their members by attributing to them the international rules of individual criminal responsibility. The example of the post-election violence in Kenya reveals how in ‘[…]fragmented political situations where the state is undermined by individuals seeking power’, by even using the corrupted state institutions for their own means, there can still be a process of ‘adoption of plans, resource allocation, effective coordination, and other measures of mobilization’ resulting in the commission of international crimes.[[156]](#footnote-157)

As it will be demonstrated throughout this research, corporations are one of the non-state organisations that can become involved in international criminality when doing business in states with a human rights’ abuse-friendly policy, in order to promote their own financial interests. However, due to the fact that they are not supposed to have a pre-defined structure and they operate through their own internal decision-making process, they do not always possess specific characteristics which could identify them as ‘quasi-states’. This means that, following the traditional approach of linking international crimes with the policy of a state or a state-like entity, there are limits to the attribution of criminal responsibility to specific individuals within the corporation. The ICC itself, even though accepting the capacity-oriented approach, has not yet used it as an interpretative tool regarding the modes of responsibility under the ICC Statute.

As it will be further discussed in this research, there are certain issues with the application of the modes of responsibility of the ICC Statute when they are being applied to non-state collective entities that do not possess specific state-like characteristics: the tight organisational structure of a state army; and/or the political (i.e. seizing of power) purposes behind the commission of international crimes. More specifically, the ‘perpetration through control over an organisation’ doctrine, which has been employed by the ICC in order to attribute perpetrator’s responsibility to the individual, has been developed having in mind the criminal behaviour of dictatorships, which are characterised mostly by a tight hierarchy. The ‘aiding and abetting with the purpose to facilitate the commission of the crime’ element of the secondary responsibility rules of the ICC Statute has been interpreted as requiring a (political) motivation to facilitate the commission of international crimes, in order for the state-like entity to gain power over a specific geographical area/a country. Additionally, the superior responsibility doctrine of the ICC Statute attaches criminal responsibility to the civilian superior, when the latter exercises effective control over the acts of their subordinates. Effective control has been interpreted as control over a specific act, which in turn presupposes the existence of a strict hierarchy, where superiors are in a position to give straightforward orders to their subordinates.[[157]](#footnote-158)

The corporation, nevertheless, is a non-state collective entity that most often does not operate under a tight structure, where the directors give specific orders to the physical perpetrators/aiders and abettors of the international crimes. As a consequence, they lack effective control over the criminal outcome in the sense of factual control/control over a specific act. On top of this, it cannot be claimed that the company directors have a specific purpose for the commission of international crimes, as they do not aim in gaining political power. In the case of corporate criminality, the directors’ involvement in international crimes is a ‘necessary evil’ in order for the corporation to succeed economically.

It becomes clear, then, that, in order to apply the ICC Statute rules against company directors, one has to approach them with a fresh mind, outside of the asphyxiating framework of state(-like) criminality. This research employs the capacity-oriented approach discussed previously as leverage, so as to expand the current understanding of the attribution of responsibility doctrines within the ICC jurisdiction against non-state collective entities, in general, and the corporation, in particular.[[158]](#footnote-159) Consequently, in Chapter 2, the corporate structure and decision-making process is being discussed, in order to analyse the concept of (directors’) control over the activities of the corporation. In chapters 3, 4, 5 and 6 the international criminal law doctrines on the modes of responsibility are being deconstructed, re-interpreted and, finally, applied in different scenarios of corporate involvement in the commission of international crimes.[[159]](#footnote-160)

It has to be noted, however, that the capacity-oriented approach does not, however, ignore the role of the State in international criminality. It is true that in the background of international crimes there is often a certain level of state involvement. Leaving aside the cases where the state has lost all power and is unable to intervene, the commission of international crimes by non-state collective entities becomes possible because the State accepted or tolerated their commission.[[160]](#footnote-161) In this direction, the ICJ has found Serbia and Montenegro responsible for failing to prevent genocide because, despite being aware of ‘a serious risk’ of genocide in Srebrenica and their ‘known influence’ over the Bosnian Serb militia, they showed indifference to the atrocities committed.[[161]](#footnote-162)In the introduction of this research, it has been explained how corporations can collaborate with the State in the commission of international crimes.

Nevertheless, in such circumstances, where it is the non-state actor who directly commits the international crimes, state policy should be approached as a contextual and not a legal element of the definition of international crimes. The difference between the two is that a legal element needs to be specifically proven on trial, in order for the commission of the international crime to be established, while the contextual element has a purely evidential function, in the sense that its presence in the evidence helps to better support the fulfilment of the legal elements of the crime and/or the defendant’s criminal responsibility for its commission. In this sense, the prosecution does not need to specifically prove the existence of a link between the plan of the non-state actors and the relevant state policy, in order to establish the commission of international crimes by the non-state actors. Chapters 3 and 4 of this research demonstrate the practical importance of this argument when specific modes of responsibility are applied in certain scenarios of corporate criminality.

Conclusion

In this chapter, it has been argued that, while the commission of international crimes requires the existence of a collective entity’s policy/common plan, the latter does not need to be the plan of a State or a state-like organisation. On the contrary, international criminal law should be applied against the members of any collective entity with the ability to commit international crimes. This capacity-oriented approach conforms with the aim of international criminal law, which is to protect human dignity, as the ultimate value of both (national) criminal and international law. Disentangling the policy/common plan element from the State provides international criminal law with the necessary flexibility to attribute individual criminal responsibility regarding the crimes of non-state entities that do not fit within the traditional concept of ‘quasi-states’. The corporation is one of these entities, and this research interprets the modes of responsibility in international criminal law in view of the capacity-oriented approach and applies them against the company directors.

# Chapter 2

# The relationship between the individual and the corporation in the context of corporate criminality

## Introduction

This chapter discusses the relationship between the individuals within the corporation and the corporation as a legal entity, in order to explain how criminal responsibility can be attributed to company directors when international crimes are committed in the course of corporate activities. As discussed in the previous chapter, genocide, crimes against humanity and war crimes are not similar to national law crimes, which are usually being committed for the personal interests of the individual perpetrator. On the contrary, in international criminal law, there is a strong link between the individual and the collective entity through which this individual becomes motivated and acts.

In national criminal law, there may be the situation where the corporate person committing a crime, e.g. fraud, does not represent the corporate will but commits it for their personal gain, in violation of their duties towards the corporation. In such a scenario, the corporation may be found liable, not for the illegal act itself, but for not having exercised due diligence in order to prevent its employees from committing crimes misusing the corporation’s activities for their own purposes. In terms of corporate involvement in international criminality, however, it would be indeed most unlikely for an individual to contribute to genocide, crimes against humanity or war crimes for their personal interest, without representing corporate will. For the commission of international crimes, the individual thinks and acts for and through the corporation and the corporation “thinks” and “acts” due to and through the individual. As a result, corporate liability for international crimes can lead to the criminal responsibility of the individual.

The first section of this chapter explores corporate personality under the realist and the nominalist theories and explains how it is linked with individual (tort and or criminal) liability within the corporation. In this direction, relevant English case law dealing with corporate liability is being discussed, both in tort and in criminal law. It is argued that, while both theories can be applied in tort law, only the nominalist theory is compatible with criminal law. The second section builds upon this approach and discusses the variations of the nominalist theory in order to identify the doctrine that best establishes the relationship between individual criminal responsibility and corporate liability. The identification liability doctrine, which traces the responsibility to the individuals in control of the corporate activities, is being proposed as the most suitable. Moving to the third section, the concept of corporate governance is being analysed, in order to identify the specific individuals within the corporation who are in control of the corporate activities and can be, thus, found criminally responsible for the corporate activities. In this regard, different notions of control are analysed, in order to present the most appropriate doctrine to apply in terms of the corporate governance scheme.

1. Identifying the links between the individual and the corporation: corporate liability and individual criminal responsibility

A legal discussion on the relationship between the individual and the corporation requires a discussion of the legal personality of corporations and its links to the legal personality of individuals. Since corporations and corporate activity started to play a dominant role in the national and international economic sphere, mostly from the 19th century and onwards, there has been a lot of scholarly debate on how to approach corporate personality. The different approaches derive from the peculiar identity of a corporation: on the one hand, corporations are collective structures depending on a group of individuals to finance and manage them, while, on the other hand, they are identified in their every-day business activities as independent bodies, distinct from their individual members. As a result, corporations have been characterised as ‘slippery subjects’,[[162]](#footnote-163) with Hart querying upon the circumstances where law refers to a collective entity as a plurality of individuals, or as a single unity, in analogy to the natural person.[[163]](#footnote-164) As a result, the different theories of corporate personality try to analyse this unique relationship between the individual and the corporate body, all of them being in favour of a separate corporate personality, based, though, on different perceptions of the individual-corporate body dipole.

National legal systems realised quite early the need to legally recognise the corporate personality because, in order for national law to be able to regulate the conduct of corporations, they had to be accepted as legal persons, with rights and duties separate from those of the natural persons being their members. In the UK case law, corporate legal personality has been recognised in the *Salomon* case, which remains until today the leading case on this issue. The Court held that ‘[a] company and the person or persons constituting its directing mind are two or more separate persons in law. From the date of incorporation, a limited company becomes a legal person with the rights and duties distinct from those of the members and shareholders. There is a corporate veil between them, though this might be lifted or pierced in an extraordinary case’.[[164]](#footnote-165)

Nevertheless, even though corporations are widely recognised as independent legal persons in national jurisdictions, the initial controversy remains. What is the relationship between the individual and the corporation, or, in other words, between individual personality and corporate personality? The answer to this question is, of course, important in terms of law because it identifies how responsibility can be attributed to the individual and/or the corporation for violations of the law in the realm of the corporate activities, depending on the obligations each of them has according to the law and the corporate statute.

Scholars have approached the relationship between the individual and the corporation through two main theoretical frameworks: the realist theory and the nominalist theory. The realist theory approaches the corporation as an entity distinct from the individuals within it, while the nominalist theory, in contrast, tries to identify the corporate entity through the will and acts of its individuals.

The relationship between the individual and the corporation falls out of the scope of the realist theory. The nature of a corporation as a collectivity of individuals does not create any effect on the corporate personality concept. The corporation itself is equalised with a (legal) person; it thus becomes an “individual” on its own.[[165]](#footnote-166) As a result, corporate liability does not run through individual responsibility. It is attached through the corporation by examining the corporate policies and how these can shape the “will” and “acts” of the corporation, as a legal person. Because the consciousness of the corporation is different from its members, the realistic theory claims that is also futile to identify individuals behind the corporate policies. Based on this perception, French, one of the main supporters of the realist corporate theory claims that ‘it will not always be just to blame a human being for a corporate moral or legal offence’.[[166]](#footnote-167) In terms of criminal law, the Australian and the Canadian Penal Codes were the first to include the notion of ‘corporate culture’, in order to discuss corporate policies and attribute criminal responsibility to corporate entities, identifying the will and acts of the corporation as distinct to those of the individuals within it. [[167]](#footnote-168)

The nominalist theory, on the other hand, identifies corporate liability through individual responsibility. The corporation has a legal personality, indeed, but it is an artificial one. Corporations are fictional legal persons, in contrast to the individuals who are natural legal persons. This approach maintains a strong link between the individual and the corporation, which is perceived, foremost, as a collectivity of individuals. It has its own rights and duties under law, and thus its own responsibilities, but, putting it under magnifying lenses, it is the individual acts of its “members” that determine what is macroscopically perceived as corporate will and acts.[[168]](#footnote-169) Corporations are being considered as ‘social constructions’[[169]](#footnote-170) and their identity is defined by the ‘decisions, actions or attitudes of particular individuals acting as agents of the corporation’.[[170]](#footnote-171) As a result, the corporation is both a legal person and an association of individuals. Its distinct legal personality means that the corporation can be responsible for law violations as an independent body[[171]](#footnote-172) but also that individuals within the corporation can be simultaneously responsible for the acts of the corporation, because they are an integral part of the corporate body.

Even though both of these approaches are consistent with the civil law doctrine, this is not the case with criminal law.[[172]](#footnote-173) In terms of criminal law, the liability of a corporation, based on the realist view of corporate personality, cannot be compatible with the main principles of criminal responsibility. As explained in Chapter 1, criminal law has, by its origin, an individualistic core. Criminal responsibility emerges due to the harm produced by specific acts (*actus reus*) when they are being committed under a specific state of mind (*mens rea*). This subjective approach to criminal law requires ‘voluntariness, intention, foresight, knowledge and belief concerning actions and their consequences’,[[173]](#footnote-174) which have been characterised as the ‘positive fault requirements’[[174]](#footnote-175) of criminal law. In this sense, the combination of criminal acts and criminal mind can only be found in natural persons, each of whom is individually responsible for their contribution to the crime.

Corporate policy, on the other hand, cannot be linked with the specific *actus reus* and *mens rea* of a certain crime in the same way as a natural person does. It is reflected in the decision-making process of the corporation, which results in collective decisions being taken, the latter determining the will and acts of the corporate body.[[175]](#footnote-176) The corporate policy may have been formed in different periods over time, by different individuals within the corporation, who may not even be part of the corporate personnel anymore. Corporate policy, without a link to the individual, cannot attach to the corporation a “unity of consciousness”,[[176]](#footnote-177) which is a pivotal aspect of criminal responsibility. Corporations do not have “real” intentionality, in the sense a natural person has it; they only have an “as-if”, metaphorical intentionality, where the corporate will is the product of ‘an intentional state [which] can be attributed truthfully to only a few [individuals]’.[[177]](#footnote-178) As Weigend describes it ‘this difference may well give the corporation’s “acts” a different quality from those of a natural person whose volition is linked to and part of a coherent personal history’.[[178]](#footnote-179)

The fictional will and acts of the corporation are the real will and acts of the individuals. As a result, corporate blameworthiness cannot stand on its own: it has to always reflect back to individual criminality, as the nominalist theory stands for. The criminal responsibility of the individual works as a “pipe”, through which the responsibility is being channelled from the individual to the corporate-collective entity. Corporate criminality occurs when acts ‘while carried out by an individual, [were] amplified in [their] impact throughout the corporate context in which [they] have been committed’.[[179]](#footnote-180) The latter is well-reflected by the nominalist theory.

1. Which individuals within the corporation?: the different nominalist theory approaches

It becomes clear from the above that, as far as criminal law is concerned, the nominalist theory applies, because it attributes the corporate behaviour to the individual(s) within the corporate infrastructure. Under this reading, the nominalist theory identifies corporate liability under the concept of derivative liability: the starting point is always the identification of individuals within the corporation, who are responsible for the illicit corporate acts. In this regard, three distinct derivative liability doctrines have been constructed: the identification liability doctrine; the vicarious liability doctrine; and the aggregative liability doctrine.

According to the identification liability doctrine, liability is identified -and then attached to the corporate entity- not in terms of any individual, but only regarding individuals who act as the “directing mind” of the corporation. In the UK, the leading case of identification liability in tort is *Tesco Supermarkets Ltd v Nattrass*.[[180]](#footnote-181) In this case, the Court has approached the directing mind concept as including only these high-level corporate individuals who were in a position to define the will and acts of the corporate body, excluding, thus, junior managers. The ‘directing mind and will’ of the corporation doctrine derives from a 1915 case where Viscount Haldane noted that ‘a corporation is an abstraction. It has no mind of its own any more than it has a body on its own; its active and directing will must consequently be sought in person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation’.[[181]](#footnote-182) The identification liability doctrine identifies the closest link between the individual and the corporation because it focuses on the acts and will not of just any individual inside the corporation but of these specific individuals having the power and the hierarchical status to create and implement the vital aspects of the corporate strategy.

In terms of English criminal law, in cases where the issue was whether the criminal responsibility of the individual can be attributed to the corporation, the courts have employed the directing mind and will doctrine. The Court in *Meridian Global Funds Management Asia Ltd v Securities Commission* held that by the rules of criminal law there is a need to identify whether the persons acting as the directing mind and will of the corporation had the required *mens rea* in order to commit the crime.[[182]](#footnote-183) Applying *Meridian*’s ruling, the Court of Appeal in *A-G’s Reference* argued that ‘the primary “directing mind and will” rule still applies’[[183]](#footnote-184), reaffirming the existence of the identification theory in English criminal case law.[[184]](#footnote-185) Thus, English courts, in order to discuss corporate personality and corporate responsibility, are looking within the corporation, for the acts and state of mind of specific (high level) individuals.[[185]](#footnote-186)

Deriving from the rationale of the identification liability doctrine in terms of the interrelation between the individual and the corporation, the vicarious liability doctrine has been established, followed mainly by the USA case law.[[186]](#footnote-187) This doctrine maintains the link between the individual and the corporation but in a looser bond. Every individual employee who can be identified as acting towards the corporation’s purposes attaches liability to it when they commit an unlawful act.

As a result, in jurisdictions that recognise strict corporate criminal responsibility, the corporation is found criminally responsible if it can be proven in court that it did not provide relevant directives to the personnel, to avoid them committing the specific offence. [[187]](#footnote-188) In simpler terms, the corporation is responsible because the perpetrator of the crime was their employee and it cannot prove that there were sufficient instructions towards this employee in order for them not to commit the offence. In terms of the relationship between the individual and the corporation, thus, there is no piercing of the corporate veil, because vicarious liability is not interested in identifying the individuals responsible for this lack of directives leading to the corporate crime.

The 2007 UK Corporate Manslaughter and Corporate Homicide (CMCH) Act applicable to England, Wales, Scotland and Northern Ireland adopts the vicarious liability approach, with some the identification liability doctrine characteristics.[[188]](#footnote-189) As a starting point, it links the fault of the corporation with the fault of the senior management, which is an identification liability doctrine element.[[189]](#footnote-190) In order to attribute responsibility to the corporate body, it has to be established that the corporation was at a gross breach of a relevant duty of care towards the victims.[[190]](#footnote-191) In turn, the gross breach of duty by the corporation is established by the way senior managers have organised the corporate activities. If the senior managers have played a substantial role in the gross breach, then the corporation can be held criminally responsible.[[191]](#footnote-192)

Nevertheless, the CMCH Act deals only with corporate criminality and does not focus on attributing criminal responsibility to the senior managers for corporate crimes.[[192]](#footnote-193) Thus, in overall, it adopts the vicarious liability doctrine. [[193]](#footnote-194) There is no need to prove that specific senior managers fulfilled the mental elements of the crime, for the corporation to be responsible, only that they breached a relevant duty of the corporation, by failing to comply with health and safety regulations. In this sense, the CMCH Act creates a peculiar legal framework for attributing responsibility to corporations. Criminal responsibility is, on the one hand, being attributed through the acts of the senior management, but, on the other hand, the senior managers’ *mens rea* is indifferent to the establishment of the corporate criminal liability.

Trying to reach a compromise between the tight link of identification liability and the remote one of vicarious liability, a third doctrine has been developed, that of aggregative liability. According to this doctrine, the will and acts of different individuals are being added together, in order to create a full liability for the corporation. In this sense, aggregative liability is a cumulative one, created by the various contributions of various individuals in different levels of the corporate structure.

Nevertheless, both the vicarious and the aggregative liability doctrines cannot be applied in criminal law. The vicarious liability doctrine presents certain benefits in civil law, as it makes the attribution of liability to the corporation easier, but, in terms of criminal law, it contradicts the criminal law theory. In the vicarious liability doctrine, there is no *mens rea* requirement. As acts of low-level staff cannot be an adequate indication of corporate policies, vicarious liability creates a strict form of criminal responsibility for the corporation. Corporate criminality is not the outcome of the will of the individual becoming the will of the corporation, because this specific individual cannot represent the mind of the corporation. There is no need to prove corporate intention or knowledge for the crime in order to create strict liability.

Regarding the aggregative liability doctrine, in criminal law liability cannot be created cumulatively by combining the different-not criminal by themselves- acts and state of mind of different individuals. As previously noted, criminal responsibility is tightly linked with specific acts that reflect the *actus reus* of the crime and a specific state of mind towards this *actus reus* that fulfils the *mens rea* requirement. Fragmented acts of different individuals cannot create a whole criminal *actus reus*, as fragmented mental states of different individuals cannot create a whole criminal *mens rea*. In this sense, the aggregative liability doctrine does not apply to modes of criminal responsibility that include the co-commission of the crime by more than one individual. In such modes of criminal responsibility, there is always the need for a common plan, which means that there needs to exist a whole *mens rea* to each of the individuals: each of them has to know and agree to the full common plan for their *mens rea* to be established.[[194]](#footnote-195)

As a result, in terms of corporate criminality, the will and acts of the corporation cannot be the combination of will and acts of various individuals. There is a need to identify specific individuals who, for the specific crime in question were in a position to create the corporate will and produce corporate acts. In terms of international criminal law, the corporation, as a fictional person, and specific individuals, as natural persons in control, are interrelated in terms of identifying the *mens rea* and *actus reus* of international crimes due to corporate activities. Nevertheless, rejecting aggregative liability in criminal law does not mean that it cannot be proved useful in terms of civil law. Civil law does not have the strong individualistic quality of criminal law, because it creates a tort, an attack to someone’s property rather than a crime, an attack to the human dignity of the victim.[[195]](#footnote-196) Consequently, civil responsibility can be a collective one: the aggregated actions of various individuals, none of whom was aware of their outcome, can by any means create compensatory liability for the corporation in civil law.[[196]](#footnote-197)

From the above analysis, it becomes clear that the identification liability doctrine can better capture the links between the individual and the corporation, as it discusses the relationship between the activities of the corporation and the acts and ‘guilty mind’ of individuals within it. [[197]](#footnote-198) This relationship is crucial in cases of commission of international crimes. Corporate criminality in international law reflects a conscious decision by specific individuals, who take this decision in order to benefit the corporation. These individuals can only be the highest executives of a corporation, who determine the activities of the corporation. The next step is to explore corporate governance further, to understand which individuals are the highest executives within a corporation and how they determine the corporation’s activities, by discussing the notion of control and delegation of power process in the corporate structure.

## Corporate governance: delegation of power and control exercise by the company directors

Having discussed the significance of the identification doctrine in attributing criminal responsibility to the individual within the context of corporate criminality, it is important to explain how the decision-making process works in a corporation and how the decisions of specific individuals can be identified with the will and acts of the corporate body. The two main groups of individuals involved in corporate decision-making are the shareholders and the directors of the corporation.

As a collective entity, the corporation consists of its members, who hold the corporate shares. In the modern corporation, shareholders are not only individuals but also other corporations. The role of the shareholders is mainly focused on the financial interests of the corporation and on specific procedural tasks. They have the right to be informed about the profits of the corporation and its future economic plans, to approve specific transactions,[[198]](#footnote-199) amend the articles of the company’s constitution,[[199]](#footnote-200) increase or reduce the share capital,[[200]](#footnote-201) appoint the directors etc. Only in exceptional circumstances, where the board of directors is unable to act or ceases to exist, the shareholders can obtain a power of management.[[201]](#footnote-202) Otherwise, they do not control the managerial decisions of the directors and their intervention is limited to their capacity to remove a director from their position[[202]](#footnote-203) if they feel that he or she is inadequate or has breached a duty to the corporation.

This division between shareholders and directors ceases to exist only in small private companies, where usually the shareholders and the directors are the same persons. Instead, in a large company, shareholders do not have an active role in corporate activities. The absence of effective shareholder control in the modern corporation has created dissenting arguments among scholars. Some have approached it as a necessary function, in order for the corporation to be able to promote its economic interest, while others consider it problematic, as it shifts all powers from the owners to the directors.[[203]](#footnote-204) Recently, a discussion has also started on how to further engage the shareholders with the activities of the corporations, to promote corporate social responsibility. In this vein, the EU Corporate Governance Framework[[204]](#footnote-205) and the UK Stewardship Code[[205]](#footnote-206) include provisions to encourage the engagement between investors and companies.

Consequently, all the important decisions regarding the activities of a corporation are taken by the company directors. Indeed, on top of the corporate structure, there is the board of directors, a narrow-defined group of individuals who play a key role in the company’s decision-making. The UK Corporate Governance Code defines the role of the company directors as setting the aims, goals, strategies of the corporation and reviewing the managers’ performance, as well as giving account for the corporation’s economic position to the shareholders. [[206]](#footnote-207) The board of directors typically consists of the Chairman, who is responsible for the effective running of the board, and the executive directors, who are the heads of the company's management team. Depending on the structure of each different corporation these directors can include the Chief Executive Officer (CEO), the Chief Operating Officer (COO) or/and the Managing Director. In some corporations there also exist “outside” directors, who possess some of the duties of the “inside” directors, but they do not, at the same time hold, the senior executive positions of the corporation. They are chosen in order to provide impartial opinions to the board of directors regarding corporate activities. [[207]](#footnote-208)

The company directors reflect the corporate mind as, upon their directives, the lower managers and the rest of the corporate personnel act. As a result, the company directors ensure, with their decisions, the general compliance of the corporation with the law.[[208]](#footnote-209) The corporate statute is a good source of information in order to identify which individuals’ decisions constitute the decisions of the company itself. Sometimes, though, there are directors in a corporation who, despite their title, do not get actively involved in the activities of the corporation. However, UK courts have ruled that there has to be at least one *de facto* director in a corporation, with the general responsibility to oversee the activities of the company.[[209]](#footnote-210) The *de facto* director does not need to be also a *de jure* director and, as a result, it is possible for a shareholder or a manager who is not an official member of the board of directors to act in a way that makes him a *de facto* director.[[210]](#footnote-211)

In terms of UK criminal law, the CMCH Act identifies the company directors as those who play “significant” role in the decision-making or the actual management of the whole or a “substantial” part of the corporate activities.[[211]](#footnote-212) By the combination of significant and substantial, it can be deduced that UK law adopts a restrictive approach to company directors that can be identified with the will and acts of the corporation. Nevertheless, as Lord Reid explained in *Tesco Supermarkets Ltd v Nattrass*, not only the board of directors but ‘perhaps other superior officers of a company [can] carry out the functions of management and speak and act as the company’.[[212]](#footnote-213) In *EI Ajou v Dollar Land Holdings plc & Anor*, it was held that ‘a company's directing mind and will may be found in different persons for different activities of the company’, and as a result, a non-executive director who ‘had the de facto management and control’ of the alleged corporate violation ‘does not preclude a finding that [he] was the company's directing mind and will in relation to some activities’.[[213]](#footnote-214) Moreover, as explained in the previous section, for the director to be found criminally responsible for the acts of the corporation, they should also possess the required mental element for the specific crime. Lord Hoffman, in *Meridian*, argued that attributing criminal responsibility to directors (and as a result to the corporation) ‘is a matter of interpretation or construction of the relevant substantive rule’,[[214]](#footnote-215) meaning that different crimes and different modes of participating to the same crime have different *mens rea*.

Thus, to identify the involvement of the directors in the activities of the corporation, there is a need to examine the mechanisms upon which acts can be attributed to them as to hold them responsible. In international law, attribution of conduct is traditionally related to the rules upon state responsibility. The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts-DASR[[215]](#footnote-216) attempt to legally frame situations where violations of international law have been committed by state agents, or by individuals related to the state. On a parallel route, the ILC Draft Articles on the Responsibility of International Organisations-DARIO[[216]](#footnote-217) deal with the responsibility of International Organisations for the unlawful acts of their organs or of national or multinational contingents placed at the disposal of the organisation.

Even though these rules are not directly applicable to corporations, they can still prove useful in delineating the attribution of conduct in terms of corporate governance. This is because the situations they cover are based on a similar concept to this being discussed in this chapter: a collective entity (the state or the international organisation) being involved in the commission of unlawful acts through the acts of individuals or organs affiliated to it. Consequently, for the purposes of this research, these rules are being examined having in mind the corporation as the collective entity, instead of the state or the international organisation. Applying the identification liability doctrine discussed in the previous section, when responsibility is attributed to the corporation for its involvement in the commission of international crimes, *de jure* or *de facto* company directors can be also found responsible in terms of criminal law because they determine corporate activities.

However, when/why a company director can be considered as representing the acts and will of the corporation, according to the identification liability doctrine? Article 8 DASR establishes that a State can be responsible for the illegal acts of individuals if the latter have acted on a) the instructions of, or b) under the direction or control of, that State. The first criterion is more straightforward and refers to individuals acting on specific, instructions of the State in carrying out the wrongful conduct.[[217]](#footnote-218) In the corporate scenario, a corporation can commit an international crime through the acts of the corporate personnel. In terms of the criminal responsibility of the company directors, the former could be found responsible for the crimes of corporate personnel when they have given precise instructions or direct orders as to their commission.[[218]](#footnote-219) As the US Military Tribunal held in *IG Farben*, ‘one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets’.[[219]](#footnote-220)

Regarding the notion of direction or control, however, there has not been a coherent approach in international case law. The ICJ has ruled that, for an entity to be responsible for the acts of another entity, the first should exercise “effective” control over the commission of the unlawful act. In the *Nicaragua* case, ICJ had to establish whether the USA could be held responsible for the international law violations committed by paramilitary forces. In abstract terms, the Court had to deal with the potential responsibility of an authority, not directly involved in the commission of the unlawful acts but having the power to make these unlawful acts happen, even though relatively removed from the crime scene. The ICJ argued that the effective control test requires that such an authority ‘directed or enforced’[[220]](#footnote-221) the perpetration of the unlawful acts requiring thus the exercise of a *factual* control over specific conduct.

The effective/factual control standard, reaffirmed by the ICJ in the *Bosnian Genocide* case,[[221]](#footnote-222) creates a strict link between the acts and will of the authority and the commission of the unlawful acts.[[222]](#footnote-223) The only way to attribute an act and hold a state responsible according to the effective control test is for the authority to have directly ordered or been in a position to prevent the commission of specific unlawful acts but refrained from doing so.[[223]](#footnote-224) The effective control criterion, as approached by the ICJ, has been also adopted by the ICL in DASR and DARIO.[[224]](#footnote-225)

It becomes evident from the above analysis that the notion of ‘effective control’, as it has been understood by the ICJ and the ILC, comes very close to the notion of “instructions”. Nevertheless, “instructions” are being treated as a different term from this of “control” in DASR. This leads to the conclusion that control has to be approached on a different basis than this of effective control. In terms of corporate crimes, this could prove very useful, because the effective control test outlined by the ICJ cannot grasp the full spectrum of the company director’s involvement in corporate criminality.

Indeed, providing instructions or direct orders upon the commission of specific acts is but one way of communicating corporate directives to the lower management and not the most usual, either. Modern corporations have a complicated structure, based on fragmentation and compartmentalisation, operating mainly through a delegation of power scheme.[[225]](#footnote-226) Delegation is defined as the process, where an authority conveys part of their power of decision to another entity. It becomes obvious that in such a process, the delegate is given a margin of discretion, to make decisions on its own. This is the difference between delegation and direction, as in the later the receiver of the directions does not decide on their own, but they are just responsible for the materialisation of the director’s decisions.

However, it is significant to note that during delegation, the authority still retains a certain level of control over the exercise of the delegated powers. The balance created between the delegating authority and the delegates means that the delegating authority can revoke this decision when they feel right to do so. Moreover, the delegation of power does not deprive the authority of the ability to exercise the power themselves, which practically means that the decisions of the delegating power will overcome the decisions of the delegate when in conflict.[[226]](#footnote-227)

In terms of corporate governance, the (board of) company directors delegate competence to the executive directors who delegate it then to the managers who act by themselves for the corporation, or delegate further to lower-level personnel for the latter to act.[[227]](#footnote-228) This compartmentalisation and division of labour are reflected in the constitution of each corporation, where the different managerial positions are being established. As a result, for the corporation to operate efficiently and smoothly, the corporate rules establish how power is being delegated throughout the corporate structure.[[228]](#footnote-229)

Technically, a delegation process exists also between shareholders and company directors. The shareholders delegate the management of the corporation to ‘a smaller group capable of relatively quick and continuous decision making’.[[229]](#footnote-230) Nevertheless, normally the company directors do not act as agents of the shareholders, they do not have any duties towards the shareholders and, respectively, the shareholders do not have any duty to supervise the company directors’ decisions.[[230]](#footnote-231) As already mentioned, the shareholders have no substantial control over the company’s directors and this is why, in a large corporation, there is always the risk that the managers ‘will act at their own interests, at the expense of the shareholders’[[231]](#footnote-232).

Most importantly, the delegator has a duty of due diligence over the exercise of the delegated authority, to ensure that they are being exercised ‘in an appropriate manner and to achieve its objectives’.[[232]](#footnote-233) According to the European Court of Justice, this relationship between the delegator and the delegate presupposes the transfer of ‘clearly defined executive powers, the use of which must be entirely subject to the supervision of the [delegating] [a]thority’.[[233]](#footnote-234) The Court concluded that when the choices of the delegator are being completely replaced by the choices of the delegate, then the delegation of powers is unlawful.[[234]](#footnote-235) In the same direction, it has been a consistent court argument in national case law, that delegation is not abdication.[[235]](#footnote-236)

In the corporate context, the duty of due diligence attributed to the company directors is justified by the fact that they may cede to their inferior the power to make decisions upon a specific situation, but they still keep the control over the delegates and the final result. Company directors are responsible for the will and acts of the corporate body, and through each of them the corporate responsibility is personified.[[236]](#footnote-237) Thus, they are expected to take the appropriate measures in order for their inferiors to properly reflect the corporate will and acts they -the directors- have decided upon.

In terms of civil law, the due diligence duty is owed to the corporation[[237]](#footnote-238) and the breach of such a duty gives the right to the corporation to sue a director. In the international realm, the UN Human Rights Council took the initiative to create a soft law document on the protection of human rights in the context of the corporate activities, where it has been established that business enterprises should carry out human rights due diligence ‘in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts’.[[238]](#footnote-239) However, the failure to exercise control can also create *criminal* responsibility to the company directors, if it is linked with the notion of omission to act in order to avoid the criminal outcome.[[239]](#footnote-240) Additionally, the due diligence duty can create criminal responsibility for dereliction of duty in the realm of the superior responsibility doctrine, which is specifically recognised in international criminal law and the ICC Statute.[[240]](#footnote-241)

In some situations, the delegation processes extend beyond the limits of the corporation, determining the activities of a subsidiary corporation. As a general rule, the parent corporation and the subsidiary are distinct entities, having separate legal personalities and their own, independent of each other, circle of activities.[[241]](#footnote-242) The directors of the subsidiary corporation have fiduciary obligations only towards the latter and they are obliged to act for the sole benefit of the subsidiary, even in situations where the economic interests of the subsidiary collide with those of the parent corporation. The subsidiary corporation is not an agent of its parent company.[[242]](#footnote-243) As a result, in terms of individual criminal responsibility, the directors of the parent corporation could not be found responsible for the acts of the subsidiary, as they do not have an actual saying on the subsidiary’s decisions.

In exceptional circumstances though, the subsidiary corporation operates as an extension of the parent corporation, which wholly controls it. In this situation, the directors of the parent corporation can delegate competencies to the directors of the subsidiary corporation, resulting in the subsidiary acting under the control of the parent corporation. In such a case, where the subsidiary acts as a façade of the mother corporation, the courts can create links of attribution of responsibility back to the parent corporation and its directors.[[243]](#footnote-244) This scenario has been explored by the US Military Tribunal in the *Krupp* case, where it was found that even though the different subsidiary corporations were functioning as different legal entities, Krupp, as the owner, and a small number of high-level executives of the parent corporation (Fried. Krupp A.G) were also the principal directors of the subsidiary corporations, which were acting under the control and management of the parent corporation.[[244]](#footnote-245)

If the effective control test is inadequate to grasp the delegation mechanism, there is a need to approach control under a more flexible approach. A new approach to the control requirement has been attempted by the European Court of Human Rights- ECtHR in the *Behrami and Saramati* case, where the notion of control has been particularly discussed in relation to the delegation of power.[[245]](#footnote-246) The Court had to decide whether the delegation of command from the UN to NATO incorporated a certain level of control, for the authority –the UN in this case- to become responsible for the unlawful acts of the NATO troops. The ECtHR held that the troops acted ‘on the basis of UN delegated and not direct command’[[246]](#footnote-247) and for this delegation of power to create responsibility, UN should ‘retain ultimate authority and control’[[247]](#footnote-248) over the exercise of the delegated powers.

The ECtHR referred to the ‘ultimate authority and control’ test in the *Al-Jedda* case before the Grand Chamber, as well.[[248]](#footnote-249) The Court argued that, in contrast with the *Behrami and Saramanti* case, the UN did not bear responsibility because they have not directed nor delegated their power to the UK, but they have only *authorised* the UK to undertake the mission. According to Sarooshi, authorisation means ‘conferring on an entity of the right to exercise a power it already possesses, but the exercise of which is conditional on the authorisation that triggers the competence of the entity to use the power’.[[249]](#footnote-250) On the other hand, from the definition of delegation, it becomes clear that an entity cannot delegate powers it does not possess in the first place. As there is a fine line between delegation and authorisation, the ECtHR concluded that the UN did not possess the power to run the mission themselves, but only the power to allow the state to exercise their own powers.[[250]](#footnote-251) As a result, the UN exercised neither effective control nor ultimate authority and control over the UK troops.[[251]](#footnote-252)

Despite the use of the overall authority and control test by the ECtHR in both *Behrami and Seramati* and *Al-Jedda*, the problem with it is its lack of definition.[[252]](#footnote-253) The ECtHR does not provide any explanation of the contents of the ultimate authority and control test and how it should be applied. In *Behrami and Saramati*, the Court tries to answer whether UN retained ‘ultimate authority and control so that operational command only was delegated’[[253]](#footnote-254), without offering any further explanation upon this issue. In *Al-Jedda*, the Court argued that the UN lacks any control whatsoever, and as a result, lacked ultimate control as well. Moreover, in this case, the Court blurs the content of the control requirement even more, by seeming to agree with the traditional approach of the effective control test, applying nevertheless the ultimate control test alongside with the former.[[254]](#footnote-255) This incoherent approach suggests that ECtHR does not have a clear approach on how to determine the ultimate control test.[[255]](#footnote-256)

The obscure content of the ultimate authority and control test has been highlighted also by national courts. In the *Al-Jedda* case before House of Lords, even though the Lords were careful not to contradict ECtHR’s approach regarding ultimate control[[256]](#footnote-257), Lord Brown has nonetheless pointed out that ‘[t]he precise meaning of the term “ultimate authority and control” I have found somewhat elusive’.[[257]](#footnote-258) The Dutch Court of Appeals, in *Nuhanovic*, on the other hand, clearly rejected the ultimate authority and control test in favour of the better-defined effective control test.[[258]](#footnote-259)

Another important problem with the ultimate control test is that, by its name, it seems to exclude the responsibility of the delegate for the unlawful conduct they committed. If the delegator has the ultimate control over the violation of international law, this means that the delegate has no control at all, and as a result bears no responsibility. As argued by Nollkaemper, ‘[i]t is more difficult to see that two different actors could both have “ultimate control”’.[[259]](#footnote-260) However, this scenario contradicts the delegation process, according to which the delegate not only is not an idle person, but they also exercise the delegated decision making power as their own, under the control of the delegate. In terms of criminal law, because both the delegator and the delegate are being involved in the commission of the international crime, they are both to be found criminally responsible. As it has been already been discussed in the introduction of this research, due to policy reasons, the ICC may refrain from prosecuting lower-level managers, but this does not, in principle, relieves them from criminal responsibility. By restraining this possibility, the ultimate authority and control test contradicts certain international criminal law modes of responsibility.[[260]](#footnote-261)

As a result, the ultimate authority and control test cannot be considered as the appropriate standard to apply in terms of corporate criminality. However, a third approach regarding the control of an authority over subordinates has been developed by the ICTY. The Appeals Chamber in *Tadić* dealt with the situation of control within an organisation, where the effective control requirement of the superiors over specific conduct of their inferiors was setting an ‘unrealistically high standard of proof’.[[261]](#footnote-262) Thus, the Court argued that effective control is ‘not persuasive’ in the case of an ‘organised or hierarchically structured group’.[[262]](#footnote-263) The decision continues by explaining that in such a group the individual does not act on its own, but for the benefit of the group,[[263]](#footnote-264) while the effective control test is useful only against ‘private individuals’ or ‘unorganized groups of individuals’.[[264]](#footnote-265) Instead, the Court established the notion of ‘overall control’ over the activities of such an organised non-state actor. This criterion does not limit itself to straightforward directions on the behalf of the authority, but accepts a ‘lower degree of control’,[[265]](#footnote-266) according to which, the coordination or planning of the overall organisations’ activities is adequate to create responsibility for the authority.[[266]](#footnote-267)

The overall control test refers to the general operational control of the activities. As a result, the authority does not need to give instructions or directions upon a specific course of action to the lowest level. Under the overall control test, there is still space for ‘autonomous choices of means and tactics [of the subordinates] while participating in a common strategy’[[267]](#footnote-268) along with the authority. Thus, the overall control test works well in the delegation process within a flexibly structured organisation, as the corporation is.[[268]](#footnote-269) Even though it has been used by the ICTY to identify the responsibility of an authority (the state) regarding the unlawful acts of an organisation (organised armed group), it can be used on the same logic to approach the responsibility of a company director for the acts of their subordinates within the same organised structure (the corporation).[[269]](#footnote-270) It allows for the company director to delegate power to lower managers, giving them the necessary space to take decisions according to their position, while still remaining under the overall control of the director, who provides the corporate directives. Moreover, the overall control test allows, in principle, for the responsibility of both the directors and the lower managers as it retains a certain level of autonomy of decision for the latter.[[270]](#footnote-271)

This section analysed the corporate structure, and the power-transferring processes within the corporation, in order to identify how *de jure* or *de facto* company directors determine the corporate activities. The directing and delegating processes taking place in the modern corporation have been discussed through the pro-rata application of international law notions of attributing responsibility to states and international organisations. It has been proposed that company directors exercise control of the corporation through a) their instructions/ direct orders to their personnel regarding the activities of the corporation and b) through the delegation of their powers to their subordinates, where the notion of overall control over the corporate activities applies.

## Conclusion

In this chapter, the links between the company directors and the corporate crimes have been identified, by analysing the relationship between the individual and the corporation. Corporate personality in relation to individual personality has been discussed under the comparison between the realist and the nominalist theories. Focusing on criminal law, the realist theory has been rejected, for not complying with the criminal law’s perception of responsibility attribution. Thus, the nominalist theory has been further explored, as it approaches corporate liability through *individual* responsibility.

The identification doctrine was conceived as the most appropriate to grasp the role of the individual in determining the corporate activities, justifying, thus, the attribution of individual criminal responsibility to the company directors. The role of these directors in representing the corporate mind and will has been analysed further, by exploring the corporate governance mechanisms. Through a *pro-rata* application of international law rules on attribution of responsibility to the state and international organisations, it has been proposed that company directors determine the activities of the corporation, because they delegate powers on the lower managers, but they still maintain overall control over the exercise of these powers.

# Chapter 3

# Attributing responsibility to the individual in the prior-ICC era: The development of the common plan model and its application to corporate criminality

## Introduction

As it has already been discussed in Chapter 1, international criminality is collective criminality, as the participants in international crimes are individuals acting through a collective entity or an organisation. This collective entity can be either a State (or a state-like entity) or a private organisation, such as a corporation, which is involved in the commission of international crimes due to a collaboration with the State or under the latter’s tolerance. How exactly a corporation can be involved in the commission of international crimes has been discussed in Chapter 2, alongside with the theories and mechanisms upon which the company directors determine the corporate activities. This chapter focuses on international criminal law, discussing how the IMT and the *ad hoc* criminal Tribunals have approached the individual’s participation in the commission of an international crime as a principal/(co)perpetrator. The aim is to explain why these approaches are not optimal to attribute criminal responsibility to company directors for the commission of international crimes in the context of the corporation’s activities.

The first section provides an analysis of the relationship between collective criminality and the attribution of individual responsibility in international criminal law, based on the common plan model. The rest of the chapter examines the different theories regarding the common plan model, developed by the IMT and the *ad hoc* international criminal Tribunals, in order to link specific individuals within the collective entity with the commission of an international crime. More specifically, the second section discusses the Nuremberg Trial’s precedent and explores how the IMT judges applied the common plan model in relation to individual criminal responsibility for the commission of international crimes. In the third section, the doctrine of JCE is discussed and assessed. This doctrine has been the first attempt of the post-Nuremberg international criminal justice to create a theoretical framework in order to harmonise perpetration, as a mode of principal criminal responsibility for the individual, with the challenges of collective criminality. The fourth section applies the JCE doctrine to corporate criminality and explains why it is theoretically unsatisfactory in attributing criminal responsibility to company directors.

## Individual participation to collective criminality: the common plan model

International criminal law has been always struggling to find the correct balance between the reality of collective criminality and the key criminal law principle of individual responsibility. Since Nuremberg, the various international criminal law doctrines developed a focus on how to properly attribute responsibility to the individual for the crimes committed through a hierarchical organisational structure. For this reason, the core of each of these doctrines has been the same: the existence of a common plan between the various participants in international crimes, conceived by individuals in leadership positions. As maintained by van der Wilt, the common plan theory is such a crucial precondition on establishing individual criminal responsibility in international law because it demonstrates that ‘by entering into a prior agreement, [the individuals] have proved to be psychologically capable and prepared to commit those crimes’.[[271]](#footnote-272)

The common plan model is necessary to grasp the involvement of *numerous physical perpetrators* in the commission of international crimes. In criminal law, it often happens that not all elements of the given offence are committed by a single individual, but from a group of individuals, united under a common plan. For example, if a group of individuals attacks a person and kills them, some of them may have held the victim and others may have beaten them, but they will all be found responsible for murder if they were acting under an agreement to kill this specific person. Most importantly, such a common plan links the offences of different individuals with the context of international criminality. International criminal law is the outcome of a group based -in contrast to an individualised- harm,[[272]](#footnote-273) as international crimes are being committed by individuals, not acting in isolation, but as part of a collective entity.

Such a collective entity is characterised by a certain level of organisation and hierarchical structure that gives the individuals within it the ability to conceive and execute international crimes. Isolated acts of e.g. killing committed by different individuals in different time frames are escalated to the magnitude of genocide or crimes against humanity when they are connected with an overall common plan- policy to commit these particular international crimes. Thus, besides physical perpetrators, the common plan model links with international crimes the *individuals* *in leadership positions*. These leaders are often remote from the crime scene but, by forming the common plan in the first place, they become pivotal contributors in the commission of the international crimes by the physical perpetrators. As van Sliedregt explains, ‘[t]hose behind the scene of the crime, pulling the strings [...] are perpetrators themselves, albeit not physical perpetrators’.[[273]](#footnote-274)

The general understanding of the modes of responsibility in national criminal law is that the greater the remoteness of an individual from the physical commission of the crime, the lesser the severity of their punishment, due to the loosening of the causal link between the acts of the individual and the criminal outcome.[[274]](#footnote-275) Due to the organised nature of collective criminality, however, this equation is reversed: ‘once an indirect perpetrator is defined as an “organisational leader”, the notion of mitigated punishment the further one is removed from the physical commission of the offence is replaced with the opposite intuition, i.e. enhanced punishment the higher up the organisational hierarchy and the further away from the direct commission of the offence’.[[275]](#footnote-276) This means that in the commission of crimes through an organisation, the organisational structure strengthens the causal link between the acts of the leaders and the criminal outcome, whatever their remoteness from the crime scene.[[276]](#footnote-277) Through the organisation, these leaders made the commission of the international crime possible, if one considers that disorganised crime will not, in general, be elevated to the category of international crimes.[[277]](#footnote-278)

To sum up, the theories of responsibility in international criminal law use the common plan model to link together all the different perpetrators having contributed in the commission of a single offence and, simultaneously, to link this plurality of individuals with the commission of the international crime.[[278]](#footnote-279) In simpler terms, the common plan model in the theories of responsibility is the centrepiece through which the actions of one individual are linked with the actions of another. As explained by Weigend, ‘[i]f the attribution [of criminal responsibility] starts from the collective act or the common criminal enterprise, it is not necessary to establish a direct connection between actors in the background and the individuals directly carrying out the offence, but it is sufficient to link both to the common enterprise’.[[279]](#footnote-280)

Such links are either horizontal or vertical. The various physical perpetrators of an offence are horizontally linked with each other and with the commission of an international crime, by participating in the relevant common plan. Moreover, they are vertically linked with the individuals at the leadership level, who conceived the details of the common plan and were able to trigger its materialisation through an organised structure. From the top to the bottom, the common plan is the joint which vertically links a leader of an organisation to the physical perpetrators and the commission of an international crime. At the same time, the common plan horizontally links such a leader with other leaders of the same or another organisation who have been co-constructors of the common plan.

Following the above analysis, it can be claimed that all the theories of participation in an international crime have a mutual mental requirement. In terms of the physical perpetrators, they require that the accused was at least aware of the existence of a common plan and had realised and accepted that, with their acts, they contribute to the materialisation of this common plan. In terms of the leaders, the knowledge element of their *mens rea* requirement is satisfied when each individual is aware that they co-ordinate with others on how to carry out the international crime.[[280]](#footnote-281) As the existence of a common plan reveals the existence of a plurality of perpetrators, their intent can be further characterised as a shared intent. This means that it is partly formed due to an expectation for co-operation among the participants in the common plan. Each of them intends that the common plan will be materialised because he also knows that the other co-participants have the same intent. Bratman explains that, when an act is committed due to a common plan, ‘each agent has an intention in favor of the efficacy of an intention of the other’.[[281]](#footnote-282)

In this regard, Ohlin argues that the common plan model, with its share intent element, creates, in fact, a “collective” criminal responsibility in international law, ‘upon which the more specific doctrinal differences [regarding individual criminal responsibility] are built’. [[282]](#footnote-283) However, the notion of collective responsibility is a dubious addition to criminal law theory as it is linked with vicarious liability.[[283]](#footnote-284) As explained in the previous chapter, vicarious liability is used in terms of attributing responsibility to individuals not engaging in wrongful acts by themselves but being related with the actual wrongdoers in a specific way, usually in a superior-subordinate relationship. The vicarious liability doctrine can prove very useful in tort law but is inconsistent with the principle of individual culpability and, as a result, becomes ‘morally indefensible’ in criminal law.[[284]](#footnote-285) Therefore, it seems more appropriate to keep referring to the collective nature of international crimes as ‘collective criminality’, instead of ‘collective responsibility’.[[285]](#footnote-286) The participation to a common plan creates *individual* responsibility which is, however, affected by the collective criminality background of international crimes.

In this section, it has been discussed how the collective criminality concept of international criminal law affects the participation of the individual in international crimes, though the common plan model. This model has been further analysed as incorporating knowledge of the plan element which shapes the required intent element in order to commit an international crime. Lastly, the nature of such intent has been explored, arguing in favour of a shared intent approach, which leads back to the ever-present collective criminality background of international criminal law. In the next sections, the prior-to-the-ICC theories of principal participation to an international crime will be presented and discussed, in order to highlight their doctrinal flaws in terms of attributing criminal responsibility to the individual and the company directors.

## Attributing criminal responsibility to the individual through the common plan model: The Nuremberg approach

The IMT Charter is the first modern international law treaty dealing with the main issue of international criminal law, i.e. how to connect specific individuals with the crimes committed as part of a collective plan.[[286]](#footnote-287) The Nuremberg Trial and the following national military tribunals’ trials were based on the principle of individual rather than collective responsibility in international law. Nevertheless, they had to take into account the fact that Nazi crimes were the product of a highly organised state apparatus and involved systematic planning.[[287]](#footnote-288) The basic concern was to restore justice by punishing the individuals responsible for the crimes of the Nazi regime, without, nevertheless, collectively condemn a whole nation.[[288]](#footnote-289) Under the influence of the US delegation in the drafting of the IMT Charter at the London conference of 1946, the links between individual responsibility and collective criminality were established though the notions of conspiracy and membership in a criminal organisation. Article 6 of the IMT Charter criminalises the planning, by specific individuals, of crimes against peace, as well as the involvement, in any way, of individuals in a common plan to commit war crimes and crimes against humanity. The IMT Charter did not differentiate between responsibility as a principal and responsibility as an accessory to the crime, so the proposed theories of attribution of criminal responsibility to the individual ended up being ‘all-inclusive’ modes of responsibility.

The wording of this article has been the product of various debates and compromises in the London conference, as the conspiracy doctrine was known to the Anglo-Saxon criminal law but not to continental criminal law systems.[[289]](#footnote-290) Due to the confusion created regarding the requirements of conspiracy, the IMT Charter failed to deal properly with collective criminality and individual criminal responsibility. Besides the lack of any definition of what constitutes conspiracy, Article 6 approaches it as a substantive, inchoate crime in terms of crimes against peace/aggressive war and as a form of participation to the substantive crime, in terms of war crimes and crimes against humanity.

Following the common plan model, conspiracy as an inchoate crime requires the existence of a common plan for launching a war of aggression. Due to the lack of definition of conspiracy in Article 6 of the IMT Charter, the IMT judges considered it necessary to construct the common plan requirement strictly. They, thus, posed certain limitations to the application of conspiracy as a substantive crime. They examined the contents of the common plan itself, asking for the existence of a ‘concrete’ plan, ‘not too far removed from the time of decision and of action’.[[290]](#footnote-291) Political affirmations or declarations of a party programme were not considered concrete enough to present a common plan, under the conspiracy requirements. In addition, they required for a substantial contribution to this common plan, for an individual to be found criminally responsible for conspiracy to accomplish an aggressive war.[[291]](#footnote-292) As a result, mere participation in the governmental cabinet or association with the regime’s leaders was not adequate to prove that the individual contributed substantially to the common plan.[[292]](#footnote-293) Moreover, the existence of many separate plans, rather than a sole conspiracy, has been established, with different participants in each of them.[[293]](#footnote-294) The judges proceeded by pinpointing how specific atrocities were committed under the existence of such common plans towards aggressive war and how the accused individuals substantially contributed to them.[[294]](#footnote-295)

The need to place the proper limitations to the application of the crime of conspiracy is traced to its very nature, which does not fit properly with criminal law theory. As an inchoate crime, conspiracy has a mental element but is rather short on the objective element. The participants in a conspiracy are found responsible only for conceiving the common plan to commit the crime, even if this crime never materialised in the end. Thus, conspiracy contradicts a fundamental criminal law doctrine, that mere knowledge of a criminal plan, without any impact to the outside world, does not reveal any will to commit a crime, and thus cannot lead to the existence of criminal intent.[[295]](#footnote-296) A criminal act, or at least the beginning of it, is always required for an outside observer to be able to experience the *mens rea* of the perpetrator. The “faulty” nature of conspiracy as an inchoate crime has been acknowledged by modern international criminal courts. The ICTY, even though relying heavily on their own-conceived theory based on the common plan doctrine, was very careful to refuse any resemblance with conspiracy and the lack of the objective element attached to it.[[296]](#footnote-297) The ICC departed even further, by avoiding using the common plan term at all, incorporating, nevertheless, its substance to the control theory its judges developed, as it will be discussed in Chapter 4.[[297]](#footnote-298)

In terms of war crimes and crimes against humanity, conspiracy was applied as a theory of participation in the execution of a common plan, for the attribution of individual criminal responsibility.[[298]](#footnote-299) On this account, conspiracy as a mode of attributing individual criminal responsibility has been connected with participation in a criminal organisation, as the common plan to commit an international crime have been conceived by individuals who were members of certain organisations. According to the IMT ‘[a] criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes.’[[299]](#footnote-300) According to the IMT Charter, the Court would be able to declare specific organisations as criminal with the defendants in the following national jurisdictions trials not being able to contest their criminal nature.[[300]](#footnote-301) As a result, an individual’s participation in a criminal organisation would work as a presumption of guilt for them, and the burden of proof was going to be reversed. Instead of the prosecutor trying to prove the guilt of the defendant, the defendant himself should try to prove their innocence. Such an outcome would nevertheless contradict the principle of presumption of innocence for each defendant before a criminal court, as a ‘fundamental principle of procedural fairness in the criminal law’.[[301]](#footnote-302)

For this reason, the IMT has been at pains to detach the participation in a criminal organisation from any hints of vicarious liability, by stating that mere membership in a criminal organisation is not enough to attach criminal responsibility to the individual.[[302]](#footnote-303) On the contrary, the IMT judges put limits to the attribution of individual criminal responsibility due to the membership in a criminal organisation by requiring the existence of the relevant *mens rea*. The accused should have known of the common plan or the criminal acts committed through the organisation under such a plan and, nevertheless, continued being members of the organisation. Such a behaviour, despite their knowledge of the organisation’s criminality, revealed their will for the commission of the international crimes through the organisation, and as a result, their intent for these crimes. In the cases before the national military tribunals, under Control Council Law No. 10, the judges have been also careful to establish the actual knowledge-and thus the intent- of the accused, rejecting the arguments that such knowledge could be inferred from the hierarchical position of the accused in the criminal organisation.[[303]](#footnote-304)

However, for an organisation itself to have been characterised as criminal, there was no need for its members to have actually committed an international crime. According to the IMT judgement, ‘[the organisation] must be formed or used in connection with the commission of crimes denounced by the Charter’.[[304]](#footnote-305) It was enough, thus, that the organisation has formed a criminal plan, for it to be characterised as criminal, without the organisation having proceeded in any acts to materialise the common plan[[305]](#footnote-306). As a result, an individual could have been found guilty due to their participation in the criminal organisation only by participating in the common plan, on the same terms as the inchoate crime of conspiracy.[[306]](#footnote-307) This outcome contradicts the principle of individual criminal responsibility and pushes towards collective responsibility and collective punishment- undermining the fairness of the criminal proceedings and giving rise to ‘victor’s justice’ arguments.[[307]](#footnote-308)

Thus, the IMT’s approach to the criminal responsibility of the individual as a member of a criminal organisation poses the same problems with conspiracy as an inchoate crime that the Court so meticulously tried to avoid. Even if a participant in a criminal organisation possessed the required *mens rea* for the international crimes to be committed, for them to be found criminally responsible there is the need that they also fulfilled the *actus reus* of the crime. As argued by Yanev, ‘conspiracy puts forward only one objective inquiry for imputing liability for the substantive crimes of a conspiracy: *viz.* it only asks whether the accused agreed to the criminal. The question whether he actually contributed to/participated in the furtherance of the conspiracy through any positive acts or omissions is […] legally irrelevant.’[[308]](#footnote-309) Nevertheless, if this individual had no contribution whatsoever in the commission of an international crime, then they could not be criminally responsible just for their criminal mind.[[309]](#footnote-310) Even if one considered their decision to remain members of the organisation -despite its criminal background- as an act of support towards this organisation to continue with their criminal schedule, such behaviour can only be accepted as aiding and abetting the commission of an international crime and not as commission *per se*.[[310]](#footnote-311)

## The application of the common plan model in the ICTY: the Joint Criminal Enterprise doctrine

During the Nuremberg trial, the common plan model was used in connection to the theories of conspiracy and participation in a criminal organisation. As explained, however, the IMT’s approach to the common plan model in order to attribute criminal responsibility to the individual has not been successful, as it creates major conflicts with criminal law theory. For this reason, the ICTY, the first international criminal tribunal to come to life after the IMT, from the very beginning disentangled in its case-law the common plan model from these modes of responsibility. The Appeals Chamber in the *Ojdanić* case made clear that ‘while mere agreement is sufficient in the case of conspiracy, the liability of a member [participating in a common enterprise] will depend on the commission of criminal acts in furtherance of that enterprise’[[311]](#footnote-312) and that the ICTY would not impose responsibility for mere membership in a criminal organisation. It would rather concern itself with modes of responsibility dealing with the individual’s *actual participation* in the commission of a crime as part of a common criminal plan.[[312]](#footnote-313)

By rejecting conspiracy and participation to a criminal organisation,[[313]](#footnote-314) the ICTY needed to figure out how to connect individuals -who are remote from the crime scene but they are, nevertheless, participating in a common criminal plan- a) with each other and b) with the actual commission of an international crime.[[314]](#footnote-315) In this regard, ICTY case law developed its own theory that of Joint Criminal Enterprise.[[315]](#footnote-316) In its judgment in *Tadić*, the Appeals Chamber explained that besides the traditional modes of responsibility explicitly set in Article 7 of the ICC Statute, *participation in a common plan for the commission of an international crime* can also create criminal responsibility for the individual. The Appeals Chamber approached JCE as a (new?) mode of participation in the commission of an international crime,[[316]](#footnote-317) which, nevertheless, attached to the individual the responsibility of a principal perpetrator/(co)perpetrator.[[317]](#footnote-318) Having said so, it has to be noted that the case-law of the Tribunal is not always clear on this matter. In *Krnojelac*, the Trial Chamber argued that the continental law distinction between a perpetrator and an accomplish is unfamiliar with the JCE concept, which derives from the common law tradition.[[318]](#footnote-319) In a separate opinion in *Odjanić*, Judge Hunt explained the common law understanding regarding the different levels of participation in crime by claiming that ‘it is unwise for this Tribunal to attempt to categorise different types of offenders in this way […]. The Appeals Chamber has made it clear elsewhere that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation’.[[319]](#footnote-320)

* + 1. The types of JCE

The ICTY discussed three variations of JCE. All of them are based to the same *mens rea*: the intent for the criminal plan to be materialised and the international crime to be committed.[[320]](#footnote-321) Their differences are placed in the *actus reus* requirement. In the first type of JCE (JCE I), which is the basic one, the participant in the common plan commits any act that promotes the common enterprise. Whether this act materialises the objective elements of the crime in question or it is just a secondary act which facilitates the commission of the objective elements of the international crime is immaterial for the attribution of individual criminal responsibility in the JCE theory.[[321]](#footnote-322)

The second type of JCE (JCE II) is, in fact, a variation of the first type, placed in the context of an organised system of mistreatment, such as a concentration camp. In this case, the individual’s intent to participate in the common plan is satisfied when the individual has knowledge of the crimes committed within the system and continues to perform their duties for the criminal institution’s proper function.[[322]](#footnote-323) However, the Court argued that the position of authority of the individual within the system is to be accepted as indicative of their knowledge of its criminal nature and their ‘active participation in the enforcement of a system of repression’.[[323]](#footnote-324) This argument is different from simply stating that the position of authority of the individual can be used as evidence to prove their actual participation in the commission of an international crime. Indeed, putting it the way it did, the Appeals Chamber seems to link the *mens rea* and *actus reus* of the crimes within the system of ill-treatment, not with actual knowledge or actual contribution but with inferred knowledge and contribution, due to the individuals’ hierarchical position.[[324]](#footnote-325) Such an approach contradicts criminal law theory as it results in transferring the burden of proof from the prosecutor to the defendant[[325]](#footnote-326) and in attributing criminal responsibility to the individual based not on their actual contribution to the crimes of the organisation but on their mere participation in a criminal organisation and their position of authority within it. [[326]](#footnote-327)

The third type of JCE (JCE III) is an extended form of JCE and it has been the most controversial of all three types of JCE. It consists, primarily, of a JCE I, meaning that it requires the contribution of the individual to the common criminal plan, with the intent to further its criminal outcome. On top of this, however, it attaches responsibility to the individual not only for their acts according to the common enterprise but also for any other acts, committed by other participants in the JCE, under the condition that the individual in question had become aware of the possibility of the commission of the extra crime and willingly accepted such a possibility. This awareness is established when the extra crime has been a reasonable and foreseeable outcome of the common plan[[327]](#footnote-328). As explained by the Appeals Chamber in *Vasiljević*, ‘[a]n example [of JCE III] is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians’.[[328]](#footnote-329)

Thus, in JCE III, some members of the JCE in its basic form commit criminal acts outside the criminal plan. However, the criminal responsibility for the additional crimes extends to all the members of the initial JCE if they were able to foresee their commission but they did not disentangle themselves from the original plan- accepting, thus, the commission of the additional crimes. The foreseeability is based on objective criteria: whether or not it was possible for a ‘man of reasonable prudence’ in the same position as the accused to realise that the commission of the extra crime was a possible outcome[[329]](#footnote-330) of the materialisation of the common plan.[[330]](#footnote-331) However, the Trial Chamber in *Krajisnik* distinguished between an objective and a subjective requirement and demanded their cumulative existence, in order to find the defendant responsible regarding JCE III. According to the Court, ‘[t]he objective element does not depend upon the accused’s state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE’s execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness’.[[331]](#footnote-332) This argument can lead to the conclusion that both an objective and a subjective requirement are needed in order to establish the awareness of the individual for the extra crime in JCE III.[[332]](#footnote-333)

Nevertheless, reading carefully the Court’s argument, it can be pointed out that it becomes unnecessary superfluous. To say that the resulting crime should be a natural and foreseeable consequence of the common plan materialisation does not mean anything by itself. To whom was it a natural and foreseeable consequence? A logical answer could be to an individual of a reasonable mind, not *in abstracto* though, but to the one who had the same information as the defendant had. To have in mind an all-knowing reasonable individual does not make any sense because it is not realistic for such an individual to have existed in the time the crime was committed. If the conclusion is that the extra crime was known to the reasonable person in the defendant’s situation, one can ask the vital question, is the defendant such an individual of a reasonable mind? If yes, then they must have known that the extra crime was possible to happen and become responsible for accepting it.

As a result, there can be no distinction between objectivity and subjectivity. The criterion is always an objective one, because we have to accept objectivity (aka the reasonable mind rule) as applied, not *in abstracto*, but in the specific circumstances of the accused. This seems to be the reasoning of the Appeals Chamber in *Brđanin* when it argued that ‘it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it *reasonably* foreseeable *to him* that the crime charged would be committed by other members of the joint criminal enterprise’.[[333]](#footnote-334)

* + 1. The problems with the JCE doctrine

As the previous analysis indicates, the main flaw of the JCE theory as a way of attributing criminal responsibility to the individual focuses on the requirements for participating in the common plan. An individual who commits the *actus reus* of a jointly planned crime is as much a participant to the JCE as an individual who provided him with the equipment to do so, even if the latter did not commit even a single act regarding the objective elements (*actus reus*) of the crime in question.[[334]](#footnote-335) This is because the pivotal aspect of JCE is to be found in the *mens rea* requirement of the participants, rather than the *actus reus*. All of them have to possess the intent for the criminal plan to materialise, irrespectively of their personal contribution to it. Ignoring the *actus reus* of the participant in the common plan, and relying solely on the *mens rea* requirement, the JCE theory contradicts a basic rule of criminal law theory: that culpability is personal and an individual should be found responsible only for their specific share to the commission of a crime.[[335]](#footnote-336) The principle of personal culpability ‘lies at the heart of the criminal law paradigm’.[[336]](#footnote-337) It means that an individual who committed the objective elements of the crime cannot bear the same level of responsibility with an individual who only assisted in the commission of the objective elements of the crime, even if they both have the same intent for its commission.[[337]](#footnote-338) As Mettraux notes, in applying the JCE theory, ‘rather secondary participants may be handed sentences disproportionate to their actual contribution to that enterprise’.[[338]](#footnote-339)

The conflict with the principle of personal culpability becomes more intense in the JCE III. In this extended form of JCE, the *actus reus* of the participant for the extra, foreseeable crime is not required at all.[[339]](#footnote-340) The individual becomes criminally responsible only due to their guilty mind for the extra crime to be committed, their *mens rea* being shaped by their ability to foresee this crime. Indeed, in JCE III the notion of knowledge is broader than the other two types because it is not limited in the knowledge that a crime will occur in the ordinary course of events, but extends to the knowledge that a crime may occur as a possible outcome. Thus, the *mens rea* of JCE III moves from intent of the second degree (*dolus indirectus* in continental/German criminal law) to recklessness (*dolus eventualis*).[[340]](#footnote-341) According to the ICTY Appeals Chamber in *Tadić*, ‘[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of [the extra crime] occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk’.[[341]](#footnote-342)

Such a loose *mens rea*, in combination with the absence of an *actus reus,* makes the application of JCE III even more disputed in terms of the individual responsibility principle. In fact, JCE III can result in attributing guilt by association or strict liability, as individuals who have no contribution to the *actus reus* of the committed crimes but acquire a minimum *mens rea* requirement of recklessness can be found responsible for each and every crime committed in furtherance of the common plan.[[342]](#footnote-343) Even if one argues that, on top of *mens rea*, the individual is found responsible under the JCE III because their acts were a pre-requisite for the commission of the extra crime, again this does not satisfy the missing *actus reus* element. For an act to become the *actus reus* of the crime, there is a need that this act is part of the objective elements of the crime. If it is not, then such an act, even if it leads to the commission of the objective elements of the crime can only be an act of assistance and, thus, corresponding to aiding and abetting rather than perpetration.[[343]](#footnote-344)

Remarkably, even the case law presented by the Court to support the JCE theory reveals, in fact, the failure of the ICTY to adhere to the individual responsibility principle.[[344]](#footnote-345) Among others, the Appels Chamber referred to post-Second World War military tribunals’ cases of mob violence, where a group of individuals attacked and killed the victims. These cases can be divided into two categories. In the first category, all the participants in the common plan had the same intent to commit the crime, a situation akin to JCE I. In the second category, it was not clear whether all the participants had the intent to commit the crime, but some of them might have acted with recklessness as far as the commission of the crime is concerned, a situation similar to JCE III.[[345]](#footnote-346)

In terms of the first category of case law, the Appeals Chamber argued that, even though it could not be identified which perpetrator exactly gave the fatal blow to the victim, they were all convicted for murder as co-perpetrators. According to the Court, these cases are examples where criminal law attributed the same responsibility to individuals, irrespectively of their contribution to the crime, based on the fact that they all possessed the same intent to commit it. [[346]](#footnote-347) However, if one examines the cases it becomes clear that, even though the accused did not commit the exact same acts, they indeed had the same amount of participation to the criminal outcome.

In the cases of mob violence, all the individuals involved commit part of the objective elements of the crime. The person who holds the victim has the same level of participation to the crime with the person who hits the victim because the former makes the protected legal good-in this case the life and the physical integrity of the victim- available to the criminal behaviour of the latter.[[347]](#footnote-348) In the same vein, if two people jointly attack and hit their victim and this victim dies, it is immaterial- and in any case unprovable- which exactly of the two perpetrators gave the fatal blow. Both of the attackers will be co-perpetrators of murder because they both had the same level of participation-they both committed part of the objective elements of the crime- and they both had the same intent. Thus, in all the cases discussed by the ICTY, the attribution of responsibility to the individuals acting in pursuant of a common plan is based both to their mental and their material contribution to the commission of the crime, and therefore do not support the JCE theory.

In the second category of cases examined by the Court, the Appeals Chamber in part contradicted their own arguments regarding the first case law category. Even though the *actus reus* in these cases is similar to the ones of the first category-collective attacks where it is not possible to identify who exactly did what exactly-, the Court does not provide the same argument, that different levels of participation lead to the same criminal responsibility for all the participants in the common plan. On the contrary, the Court chooses to ignore this previously made conclusion and seems to accept that all the accused had the same level of participation to the crimes. Under this assumption of the same amount of participation, the Court identifies the differentiation regarding the attribution of responsibility in the *mens rea* element. It can be concluded that the Court decided to proceed that way because they were at pains to support the argument that individuals possessing the intent to commit the crime and individuals possessing negligence to commit the crime have been equally responsible as co-perpetrators in the case-law of the military tribunals. To go along with their previous argument would have led to the conclusion that different *actus reus* together with different *mens rea* can create the same criminal responsibility for all the different individuals involved, a conclusion that would be highly controversial. As a result, the Court chose to leave aside their *actus reus* arguments and move to the *mens rea*, trying to show that, in criminal law, responsibility as a (co-) perpetrator can include not only intent but also recklessness.[[348]](#footnote-349)

In fact, such an argument is not without grounds, as in many national jurisdictions, an individual acting with recklessness or *dolus eventualis* is considered as a perpetrator to the committed crime. The ICTY would be right to use such case-law to support an argument that the JCE theory in its basic form (JCE I) incorporates not only intent, as a *mens rea* requirement, but also recklessness. However, attaching the recklessness case law to the JCE III, as the Court actually did, is incorrect. All that the post-Second World War case-law used by the Appeals Chamber did was to state that individuals having committed the *actus reus* of a specific crime can be criminally responsible for it if they were aware that this crime might occur and they have accepted such an outcome.[[349]](#footnote-350) Thus, the foreseeable crime was inextricably linked with the acts of these specific individuals, so that they possessed both the *actus reus* and the *mens rea* to commit the crime, in accordance with the principle of personal culpability. On the contrary, as it has already explained, JCE III attaches responsibility to an individual for the acts of (an)other individual(s), without the former having committed any part of the objective elements of this specific crime. It becomes obvious, that the case-law presented by the ICTY to support JCE III has, in fact, the opposite outcome: to stress out even further the shortcomings of this type of common enterprise participation.

## The application of the Joint Criminal Enterprise doctrine in the company director scenario: unsatisfactory attribution of individual criminal responsibility

As the commission of international crimes due to corporate activity can be placed into the realm of collective criminality,[[350]](#footnote-351) the JCE doctrine could theoretically be applied in order to identify the international criminal responsibility of company directors.

Let us say, for example, that a state is in the middle of an internal conflict with a paramilitary group that wants to take power because they think that the ethnical majority in the country, having also the parliamentary majority, mistreats the ethnic minorities living within its borders. In the peak of the conflict, among other unlawful acts, the state launches a campaign to forcefully remove the different local people of a large area from their land, as they are supporting the rebels. A corporation doing business in a remote part of this area, extracting natural resources, is being identified as a) helping the state army to gain access in this remote part; b) identifying the areas where locals live for the state army, as it is a wild uncharted area that the army has little knowledge of c) offering their special equipment, in order for the state army to enter the wild forest and demolish the local populations’ lodges, as well as their experienced personnel in order to operate this equipment; d) forcing the locals into corporate tracks and delivering them to concentration camps outside the target area, and e) offering food and shelter to the government’s soldiers in the corporation’s establishments in the targeted area. All these acts of corporate involvement in the forceful removal of the local population have been decided by the board of directors, which delegated their power further down the corporate hierarchy.

Following the case-law of the *ad hoc* criminal Tribunals in similar situations where international crimes have been committed by a collective entity during a conflict, the courts have chosen to examine the existence of a vast common plan that captures every act of every possible participant.[[351]](#footnote-352) The problem with this generic common plan is that it is difficult to identify how specific acts of specific individuals can be approached as furthering the common plan. This is understandable as, in practice, the participants to a common design of a large extend- due to which international crimes occur- do not usually discuss the full extent of their plan in its every detail. Moreover, according to the ICTY, in a JCE, it is possible that the common plan is not always criminal per se, but it is enough that its materialisation leads to the commission of international crimes.[[352]](#footnote-353)

It can be, thus, claimed that the ICTY follows the path of ‘elasticity’[[353]](#footnote-354) regarding the common plan element, as it abstains from putting ‘any limits on the prosecution’s discretion to define the scope of the enterprise’ and as a result, the relationship between ‘an individual’s potential criminal liability and the scope of the relevant enterprise’.[[354]](#footnote-355) The ICTY case law has accepted all kind of contributions as adequate for the application of the JCE theory. [[355]](#footnote-356) The Trial Chamber in *Kvočka*, for example, has underlined that ‘the precise threshold of participation in JCE has not been settled’.[[356]](#footnote-357) The only limit put by the ICTY is the rejection of guilt by association. In *Brđanin*, the Appeals Chamber contested the criticism that JCE theory entails guilt by association, by clarifying that the contribution of the individual to the common plan must ‘at least be […] significant’ for furthering the common plan and cannot be attributed to someone who provides, e.g. assistance to the culpable individual while this assistance is not directly linked to the criminal plan.[[357]](#footnote-358)

A not clearly defined common plan did not create a problem for the ICTY because, as explained in Chapter 1, the Court has approached the common plan element as part of a policy of a state-like collective entity. As such an entity presents a tight organisational structure operating under instructions/orders from the superiors, it may be not necessary to identify in strict details how the common plan has been conceived and now it has been communicated to the physical perpetrators. In the corporate context, however, the decision-making process in more abstract, as it has been explained in chapter 2, and a vast, not clearly defined common plan can compromise the doctrinal legitimacy of attributing the individual criminal responsibility principle against the company directors.

More specifically, in terms of the scenario presented here, should there be an agreement between the corporate executives and the government officials that the former will help to further the common plan? What if the corporate managers saw a chance of profit in this upheaval and offered their help without being asked to? Is this enough in order to be considered as co-perpetrators to international crimes? And if the common plan initially consists of a legitimate cause (restore peace and avoid a coup), for the corporate managers to be participants in the JCE, should they have knowledge of the certainty that a forceful removal is happening or of the possibility that it will happen?

Besides this, there are also the doctrinal shortcomings in the JCE theory, as they have already been discussed in a previous section of this chapter. There is the inadequacy of the JCE to clearly differentiate between the primary and the secondary contributors to the crime, in other words between perpetrators and accessories. Following the *ad hoc* Tribunals’ case law, all the company directors’ acts described above, i.e. a) helping -though the corporate personnel/equipment- the state militia to forcefully remove the locals and b) removing them themselves, could be identified as essential contributions to the state common plan. Thus, in terms of *actus reus*, the company directors should be punished as principals of the international crimes, regardless of the nature and amount of their contribution. The distinction in the level of responsibility, that is whether some of it can be characterised as aiding and abetting rather than commission, has to be made purely in the mental element requirement.[[358]](#footnote-359) As it will be further discussed in chapter 5, while in terms of JCE, principal perpetration requires intent as the acceptable *mens rea* level, secondary contribution to the commission of a crime is satisfied only with knowledge of the intent of the principal perpetrator. It will be argued, however, that this is an unreliable test to make such a distinction and that the difference between primary and secondary responsibility cannot be segregated from the *actus reus* element.

In addition to the above, there is still the significant doctrinal weakness of the JCE III, discussed in the previous section. To simplify things in the corporate scenario discussed here, let us accept that there is an agreement between the government and the corporate managers to forcefully remove the local population and that the corporate executives order or delegate the relevant power to their personnel to remove the population themselves, together with the soldiers. In this simplified version of the scenario, the managers are participants in the JCE, thus they are criminally responsible as principal perpetrators. What if, though, in the process of summoning up the local population to put them on trucks, some of the soldiers kill and rape some of its members? Is it doctrinally acceptable that the company directors are to be responsible for these crimes as well- based on JCE III- while they have not committed any part of their *actus reus* and they only had a *mens rea* of *dolus eventualis*, i.e. they knew of the possibility that they could happen (by someone else, not as part of their own contribution to the crime!) and accepted it?

What the corporate scenario analysis reveals is that JCE does not offer a satisfactory theoretical justification on the individual’s contribution to the crime, especially when it comes to non-state collective entities. For this reason, the ICC’s approach in terms of the relation between collective criminality and individual criminal responsibility in the international level seems more promising. In contrast with the ICTY’s more matter-of-fact approach, the ICC has tried to incorporate to common plan element of international criminality to a well-developed theoretical structure, the control over the criminal outcome theory. The elements of this theory will be discussed in the next chapter, alongside with suggestions on how it could be better identified and developed, having in mind the corporate criminality scenario.

## Conclusion

In this chapter, the theories of attributing responsibility to the individual for the commission of international crimes have been explored, from the rise of individual criminal responsibility in the international level after the Second World War to the *ad hoc* criminal Tribunals’ regime. It has been argued that the common element in these theories is the common plan model, in order to justify the responsibility of the individual as a principal in the context of collective criminality.

The theories of conspiracy and participation in a criminal organisation have been rejected by the modern *ad hoc* criminal Tribunals, as they come dangerously close to attributing vicarious responsibility to individuals with no actual participation in the commission of the crime. The ICTY and ICTR’s theory of JCE has been better framed, in order to avoid collective responsibility, but it, nevertheless, presents serious doctrinal flaws due to the vagueness of the common plan limits and its undue reliance on *the mens* rea against the *actus reus* requirement. These flaws render its application in order to attribute criminal responsibility to company directors highly problematic in terms of doctrine. In this sense, can control theory applied in the ICC case law be the proper doctrine? The following chapter will attempt to give an answer to this question.

# Chapter 4

# Perpetration through the theory of control in the ICC jurisdiction and its application to company directors

## Introduction

This chapter is the first of three chapters in total which focus exclusively on the modes of responsibility of the ICC Statute and their application against company directors. It discusses the Court’s approach to the responsibility of the perpetrator based on the theory of control over an act, another individual or an organisation. It explores the origins of this approach in the work of the German scholar Claus Roxin; it analyses how his control theory has applied in the ICC case law; it critically reflects upon this application in the context of collective criminality; and, finally, proposes a different understanding of control for the purposes of perpetration in Art. 25(3)(a) of the ICC Statute, which then applies to a corporate criminality scenario.

More specifically, in the first section of this chapter, the role of the control theory in identifying the principal participants to the international crimes is being discussed, together with the links between control theory and the common plan element in collective criminality. In the second section, the elements of the control theory applied by the ICC are clarified, based on Roxin’s approach. The third section discusses the critics to this approach by legal scholars but also by ICC judges, while the fourth section explores a modified control theory, which loosens the strict limitations of Roxin’s theory. Following this more flexible approach of control, the fifth section discusses its application on corporate criminality and explains why/how it provides a better doctrinal framework for the ICC to effectively attribute criminal responsibility to company directors.

1. Identifying the perpetrator under the theory of control in the ICC case law

It has been clear by now that, due to the collective nature of international crimes, the existence of a common plan is essential to attribute criminal responsibility to the individuals who have contributed to the commission of international crimes. However, doctrines -such as JCE- based on participation to a broadly defined common plan face the danger of overlooking the accused’s actual contribution to the criminal outcome, leading to vicarious liability. In order to avoid such an outcome, the ICC judges in the *Lubanga* case decided to discuss the individual’s participation to a collective crime by employing a theory of control over the criminal outcome, which has been endorsed by the Court’s case-law since then. [[359]](#footnote-360)

This control theory has been used by the ICC judges to identify the principals/perpetrators to international crimes, as opposing to secondary participants.[[360]](#footnote-361) In broad terms, what distinguishes perpetration from accessoryship is that the perpetrator has control over the final criminal outcome, making their contribution a *conditio sine qua* non for the crime commission,[[361]](#footnote-362) while the role of the accessory is limited in providing assistance to the perpetrator.[[362]](#footnote-363) According to the Court, control theory applies to all types of perpetration established in Art 25(3)(a) of the ICC Statute: in direct perpetration (commission of a crime in person), the individual has control over the criminal outcome because they physically carry the objective elements of the crime; in co-perpetration (commission of a crime jointly with another person) the group of individuals control the criminal outcome because each of them carries out part of the objective elements of the crime, and in indirect perpetration (commission of a crime through another person) the individual has control over the criminal outcome because they control the will of the physical perpetrator(s).[[363]](#footnote-364)

It is in terms of co-perpetration, that the ICC case law discusses the common plan element/collective criminality aspect together with control theory. Co-perpetrators are linked to the crime because they fulfil the objective elements of the crime after a relevant agreement among them, i.e. because they control the criminal outcome following a common plan which identifies the role of each of them to the crime commission.[[364]](#footnote-365) More specifically, when a plurality of individuals is involved in the commission of the crime, the responsibility of co-perpetrator is attached to each of them in terms of their co-ordinated contributions to the commission of an international crime.[[365]](#footnote-366) Each co-perpetrator’s direct control over the crime is based on their functional contribution to the crime: due to the division of labour among them, each co-perpetrator controls the criminal outcome because they are in a position to ‘frustrate the commission of the crime by not carrying out [their] task’.[[366]](#footnote-367)

However, in contrast to the ICTY case law, the *actus reus* the co-perpetrators have to fulfil in terms of the ICC caw law does not amount to just any contribution that furthers the criminal outcome. The Pre-Trial Chamber in *Lubanga* made clear that, to become a co-perpetrator, an individual acting under a common plan should commit part of the objective elements of the crime, as ‘the co-perpetrator’s act must be of sufficient weight and importance […][to justify] the necessary co-domination over the act’.[[367]](#footnote-368) Ultimately, the joint contributions of all the co-perpetrators should result in the ‘realisation of all the objective elements of the crime’.[[368]](#footnote-369) In terms of *mens rea*, the co-perpetrators should be aware of the existence of a common plan among them -in which common plan they are about to contribute as equal partners- and be aware that their personal contribution materialises in part the objective elements of the crime.[[369]](#footnote-370)

Nevertheless, the main reason behind the adoption of the control theory by the ICC judges has been the need to effectively discuss macro-criminality in international law. As it has become clear by now, macro-criminality is an essential element of international criminality and, as such, it has been very important for the international courts to effectively identify the criminal responsibility of specific individuals in this context. In this direction, the control theory does not simply adhere the classic concept of co-perpetration (a group of individuals, each of whom commits part of the actus reus of the crime, under a common plan) but, most importantly, it identifies the (joint) responsibility of individuals who, despite being remoted from the crime scene, have secured its commission. In order to achieve this, the ICC judges ascertained the control theory features having in mind the ‘commission through another person’ variant of perpetration in Art. 25(3)(a).[[370]](#footnote-371) However, the judges did not construct these features by themselves but they ‘copied’ them from a specific control theory: this developed by the German scholar Claus Roxin, who has discussed -in terms of German criminal law- the commission of a crime through control over the physical perpetrator or through control over a collective entity/organisation.

1. The elements of Roxin’s theory of control in the ICC case law
   1. Control over another person

According to the control theory developed by Roxin, an individual, who is in a position to control the will of those who carry out the objective elements of the crime (i.e. the physical perpetrators), is to be found responsible as perpetrator themselves, alongside with the physical perpetrators. Roxin referred to this type of perpetration as ‘indirect perpetration’ or ‘perpetration through another person’, to differentiate it from the direct perpetration of the physical perpetrator. He explained that the indirect perpetrator (*Hintermann*) uses the direct perpetrator (*Frontmann*) as a means through which the indirect perpetrator commits the crime.The direct perpetrator is a mere instrument, a tool that follows the orders of the indirect perpetrator.[[371]](#footnote-372)

The direct perpetrator has still direct control over their own acts (*Handlungsherrschaft*), but the indirect perpetrator obtains control over the will of the direct perpetrator (*Willensherrschaft*), by formulating the relevant plan and giving the instructions to the latter on how to commit the crime. [[372]](#footnote-373) Thus, Roxin characterises the indirect perpetrator as ‘the perpetrator behind the perpetrator’ (*Täter hinter dem Täter*). Because of the direct perpetrator keeping the control over their acts, they are to be held liable for the crime, alongside with the indirect perpetrator. In the realms of co-perpetration, the indirect perpetration theory takes the form of joint (indirect) perpetration.[[373]](#footnote-374) The objective and subjective elements of this mode of responsibility are, naturally, the same with (direct) co-perpetration, with the difference that the joint indirect perpetrators commit their planned crime through another person (the direct perpetrator).

Taking the lead from Roxin, the Pre-Trial Chamber in *Lubanga* argued that ‘principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime control or mastermind its commission because they decide whether and how the offence will be committed’.[[374]](#footnote-375) When these individuals form a common plan to commit a crime and then they instruct a person under their control to physically commit it, they can be found responsible as indirect co-perpetrators (joint commission through another person).[[375]](#footnote-376) The element of control towards the commission of the crime by the direct/physical perpetrator is satisfied when the indirect perpetrator “has the power to decide whether and how the crime will be committed”.[[376]](#footnote-377) The ICC also clarified that ‘article 25(3)(a) of the Statute militates in favour of the conclusion that this provision extends to the commission of a crime not only through an innocent agent (that is through another person who is not criminally responsible),[[377]](#footnote-378) but also through another person who is fully criminally responsible’.[[378]](#footnote-379)

The ICC understands the indirect perpetrator as a principal perpetrator to the crime because they control the materialisation of the crime.[[379]](#footnote-380) Treating the indirect perpetrator as a principal to the commission of the crime reveals a specific theoretical approach, characteristic of the criminal law doctrine in continental jurisdictions. It is the normative approach to international criminal responsibility, according to which, the individual most responsible for the commission of the crime shall be treated as a principal, even if they have not directly committed the crime themselves.A rather opposite approach is adopted by the common law jurisdictions. These jurisdictions base their understanding of criminal responsibility to the naturalistic/empirical model, according to which the principal to the crime is simply the one who directly performs the material elements of the crime. [[380]](#footnote-381) Thus, the commission of a crime turns out to be an exclusively physical concept.[[381]](#footnote-382) An individual, who only ‘intellectually’ contributes to the commission of the crime, i.e. by formulating the relevant plan, can only be a secondary participant to the physical commission of the crime.[[382]](#footnote-383)

1. Control over an organisation

Nevertheless, Roxin’s major contribution to the control theory followed by the ICC (and the most controversial as well) is placed to his discussion upon its application in the realm of a hierarchical organisation. This theoretical model is known as ‘indirect perpetration through control of a hierarchical organisation’ (*mittelbare Täterschaft durch die Kontrolle einer hierarchischen Organisation*; or *Organisationsherrschaft*).[[383]](#footnote-384) In this case, the indirect perpetrator holds a superior position in an organised power apparatus and has at their disposal various subordinates who follow their lead. As a result, the indirect perpetrator can accomplish the crime they have in mind by giving the orders for its realisation to their subordinates within the organisation.[[384]](#footnote-385) When giving an order, the indirect perpetrator does not need to know exactly who executes it, as long as they know that their orders will be followed.[[385]](#footnote-386) The application of the control over an organisation theory in the realm of international criminal law is a tool of major importance for an international court as ‘not only need indirect commission involving two or a limited number of persons be envisioned but so too must the commission of crimes by a larger number of persons, belonging to a same structure and acting collectively and systematically − in all likelihood, it is this latter type of criminality which will, more often than not, come before the Court [ICC] for determination’.[[386]](#footnote-387)

Based on this reasoning, Roxin codified the main points of his theory as such: a) the existence of a hierarchical and strictly structured organisation; b) the exchangeability of the direct/physical perpetrators and c) the organisations' detachedness from the law.[[387]](#footnote-388) The need for a tightly structured power apparatus secures, according to Roxin, that the leaders’ plan will be automatically followed by their subordinates.[[388]](#footnote-389) Such an outcome is further supported by the fact that the direct/physical perpetrators in a hierarchical organisation are anonymous executive organs, ‘cogs in a wheel’, in the sense that if one of them refuses to follow the superior’s orders, someone else will step in and proceed with their realisation.[[389]](#footnote-390) On top of these, the organisation’s nature as ‘criminal’ creates a lawless regime with it, making the subordinates obey their leaders without questions, for fear of reprisals if they refuse.

Following Roxin, the Pre-Trial Chamber in *Katanga and Chui* clarified that the indirect perpetrator’s control does not need to aim the physical perpetrator directly (control over a person), but it can expand also to control over an organisation.[[390]](#footnote-391) According to the Trial Chamber in *Katanga*, ‘the criterion of control must be construed as requiring that the indirect perpetrator use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed’.[[391]](#footnote-392) Thus, the leader of an organised apparatus can still control the commission of an international crime by the physical perpetrators, through the structure of the organisation, ‘within which the direct and indirect perpetrators operate and which enables the indirect perpetrators to secure the commission of the crimes’.[[392]](#footnote-393)

According to the ICC case law, the responsibility of a superior of an organised apparatus as the perpetrator behind the perpetrator is justified because their control over the organisation allows them to use their subordinates ‘as [..] anonymous, interchangeable figure[s] […] [acting as]mere gear[s] in the wheel of the machinery of power who can be replaced at any time’.[[393]](#footnote-394) This interchangeability of the physical perpetrators ‘places the intellectual author alongside the perpetrator at the heart of the events’, because it results in the criminal outcome emanating rather automatically from the will of the indirect perpetrator.[[394]](#footnote-395)

Building on Roxin’s theory on control over an organisation, the ICC Pre-Trial Chamber, in Katanga and Chui Confirmation of Charges also discussed the concept of indirect co-perpetration through an organisation. According to this, individuals collaborating under a common plan can become responsible as indirect perpetrators not only for the acts of the subordinates they personally control but also for the acts of the subordinates controlled by the other collaborators to a common plan.[[395]](#footnote-396) With this decision, the court argued that the theory of control over an organisation includes two situations: the first refers to individuals who exercise joint control over the same hierarchical organised entity; the second refers to individuals who form a common plan together but are in control of different organisations, and it is through these organisations’ combined acts that this common plan is going to materialise.

1. Addressing the concerns over Roxin’s theory of control: how should the ICC case law approach control in crime commission?

Roxin’s approach to control of the criminal outcome has created a strong opposition by national (German) criminal law scholars, and, consequently, the ICC’s adoption of it has created reactions in international criminal law. One of the main issues under dispute is the whether there is an actual need for the ‘control over another person’ concept in perpetration, as the traditional instigation mode of responsibility is already available in national criminal law. Instigation covers the situation where an individual asks/encourages a fully responsible person to commit a crime. Due to this encouragement, this individual develops a link to the criminal outcome, and his/her behaviour creates responsibility for their participation in the crime commission.

Following this approach, Weigend argues that ‘there is no good reason to hold the manager of a business enterprise with 10 employees responsible as a principal [based on Roxin’s control theory] for acts suggested by the manages and committed by one of the employees, while he would be a mere accessory [based on instigation] if he asked 10 of his close friends to commit the same offence’.[[396]](#footnote-397) It has to be noted, however, that, even though the concepts of instigation and perpetration through another person are very close to each other, they do not cover the exact same situation. In instigation, the individual simply encourages or influences the physical perpetrator to commit a crime. This means that the perpetrator is not opposing the idea of committing the crime, but for some reason, they hesitate or have not completely made their minds yet. In such a situation, the instigator gives them the final push in order to gain the courage/psychological support to finally commit the crime.[[397]](#footnote-398)

As a result, the instigator has no real power or control over the physical perpetrator. He/she is only capable of encouraging them without, being able to actually monitor/direct them.[[398]](#footnote-399) If the physical perpetrator, after the encouragement, changes their mind and do not commit the crime, the instigator cannot do anything about it. So, drawing from Weigend’s example, there is actually a difference between an individual asking their friends to commit a crime, where this individual’s power is limited to encouragement, and the same individual asking their employees –as their boss- to commit a crime. In the last situation, the employees were not personally thinking of committing the crime, they were asked to by a superior who has some kind of leverage upon them. Under this reasoning, the leverage an individual has upon another individual has to be discussed taking into account *the level of control* of the former upon the latter.[[399]](#footnote-400) Therefore, Roxin’s argument on the necessity of a control theory which explains how/why the ‘perpetrator behind the perpetrator’ imposes their will over fully responsible individuals is valid in principle, despite any further considerations on its merits.

Besides the critic in terms of doctrine, the endorsement of Roxin’s theory of control by the ICC case-law raised questions on the violation of the *nullum crimen sine lege*/legality principle in international criminal law. According to Judge van de Wyngaert, control theory cannot be included in Art 25(3)(a) of the ICC Statute as it does not reflect the ordinary meaning of its wording required by the Vienna Convention on Treaty Interpretation[[400]](#footnote-401). As a result, it violates Art. 22(2) which obliges the ICC judges to interpret the Rome Statute strictly and not teleologically.[[401]](#footnote-402)

However, Judge van den Wyngaert rests her argument mostly on Art. 21(1)(a) of the ICC Statute -which requires the Court to focus on the Rome Statute (and the Rules of Procedure and Evidence or the Elements of Crimes) when deciding on a case- overlooking the ability of the Court, when the ordinary meaning of the ICC rules is inadequate to provide a solution, to explore international and national law doctrines (Art 21(1)(b) and (c)).[[402]](#footnote-403) In order to justify this approach, she argues that, even though the ad hoc Tribunals, based on customary international law, and national criminal law have invented doctrines to deal with collective criminality (JCE, planning, conspiracy), these are deliberately excluded from the ICC Statute, as its drafters were not able to reach a compromise on them during the preparatory works.[[403]](#footnote-404) Following this reasoning, she concludes that Art. 25(3)(a) does not provide for collective criminality- as experienced in the international level, where planning and/or control could prove useful-, but just for the “traditional” concepts of perpetration and co-perpetration.[[404]](#footnote-405)

Nevertheless, this approach is not useful for international criminal law. The reality of international crimes is that they are collective crimes, and in order to provide meaningful judgements, the ICC judges need to apply the modes of responsibility in Art. 25(3)(a) accordingly. Due to the assorted origins of international criminal law-combining common and continental law principles- it would have been difficult to reach an agreement on specific issues and the drafters of the ICC Statute must have been aware of this. However, they provided the ICC judges with the ability to seek an appropriate interpretation of crimes and modes of responsibility (Art. 21(b)and(c)) which could help them effectively discuss international criminality, under the framework of the modes of responsibility stated in Art. 25(3), of course (legality principle of Art. 22(2)). Taking into account the shortcoming of conspiracy and JCE doctrines, it is possible that the ICC judges turned into another theoretical framework, this of control, to discuss the responsibility of specific individuals for a crime based on a common plan. Under this approach, control theory is not a new mode of responsibility, which is not included in the ICC Statute, but an interpretative method applied to the existing doctrines of Art 25(3)(a). Indeed, through the control theory, the traditional doctrines of (co) perpetration are adjusted to the concept of collective criminality in its international context.[[405]](#footnote-406)

It is interesting to mention that some of the ICC judges opposing the control theory in favour of the plain wording of Art 25(3)(a) have, nevertheless, proposed their own interpretive methods in order to complement the traditional perpetration concepts when it comes to international criminality. Judge Fulford, in his separate opinion in *Lubanga*, rejects the theory of control over a person, as a pathway to establish (joint) perpetration. Instead, he argues that the criterion to identify perpetration should simply be the existence of ‘an operative link between the individual’s contribution and the commission of the crime’.[[406]](#footnote-407) In this way, he continues, the ICC avoids the risk of ‘a hypothetical investigation as to how events might have unfolded without the accused’s involvement’.[[407]](#footnote-408) It can be argued, however, that Judge Fulford’s proposal complexes matters rather than simplifying them, as the ‘operative link’ test makes it difficult to distinguish between principal and secondary participants in the commission of a crime, a distinction that has nevertheless been established in Art. 25 of the ICC Statute. [[408]](#footnote-409)

Taking the lead from Judge Fulford, Judge van de Wyngaert presents her own interpretation of perpetration in Art. 25(3)(a).[[409]](#footnote-410) She suggests the ICC leaves aside the notion of control and instead identify (joint) perpetration by the individual’s ‘direct contribution’ to the actus reus of the crime[[410]](#footnote-411). What can be considered as a direct contribution is to be decided by the Court on a case-by-case condition, which can include not only the actual commission of the crime but also its planning by individuals who are remote from the crime scene.[[411]](#footnote-412)

As with Judge Fulford’s approach, however, the case by case direct contribution element creates uncertainties on its content. In this way, and despite judge van den Wyngaert’s intention,[[412]](#footnote-413) it is not very different from the current characterisation of principal contribution to the crime in the ICC case law, this of ‘essential’ contribution.[[413]](#footnote-414) As this term is indeed vague and requires clarification, the ICC case law determined its content using control theory: a contribution is considered essential -and thus the individual is a perpetrator- when they control the criminal outcome, either because they themselves materialise the actus reus, or they materialise it jointly with others, or they materialise it through others as an indirect perpetrator. In contrast with the difficulty in identifying the requirements of abstract terms like ‘essential’, ‘substantial’, ‘significant’ and even ‘direct’, when they stand by themselves, the advantage of the control theory is that its elements can be decided as a matter of doctrine and then applied in the context of specific cases.

It has to be noted, however, that, even if control is indeed accepted as a theory to identity perpetration in the ICC jurisdiction, the notion of control over an organisation requires further consideration. Art. 25(3)(a) refers to commission through another person, which is being interpreted using the notion of control over this person, but there is no provision on commission through an organisation. Taking into account, though, that international crimes are usually committed following a plan conceived within a collective entity, the application of the notion of control to the leaders of this entity-those who conceived the plan- is, in principle, not an unjustifiable and out-of-the-spirit of the individual criminal responsibility doctrines of the ICC Statute interpretation. The important consideration, however, is what is the level of control the ICC should accept, for the transition, from the actual wording of Art. 25(3)(a) -commission through another *person*- to the purposed-based interpretation of control over an *organisation*, to avoid reaching the point of changing the whole meaning of the provision.[[414]](#footnote-415)

The problem with the strict level of control the Court accepts so far is that, while the indirect perpetrator can dominate the will of one or a few individuals due to the personal relationship he/she has with them, it is questionable whether they can do it with their inferiors in a large organisation. This critic is, of course, not new. It has started at national level, in Germany, when Roxin applied his theory of control in the context of an organisation. The level of control he required and the way he identified domination has been considered unsuitable for the type of relationship a leader of an organisation develops with their subordinates.[[415]](#footnote-416) In terms of the ICC, judge van de Wyngaert has shown the same reluctance in moving from control over a person to control over an organisation, in terms of doctrine, even though she recognises that control of specific individuals within a collective entity can be an important evidential factor in identifying the criminal responsibility of the organisation’s leader(s).[[416]](#footnote-417)

The bottom line of this discussion, however, is the same whether it is about control over an individual or over an organisation: if we accept control as a theory to interpret perpetration in Art. 25(3)(a), this theory needs to respect the meaning/purpose of the legal rule while remaining effective in terms of collective criminality. In order to do so, it should satisfactorily explain the relationship between intellectual/indirect perpetrators and physical perpetrators, whether they all belong in a small group of people or in a large organisation. Under this rationale, the following section explores a different approach on the control the indirect perpetrator exercises over the physical perpetrator in the context of collective criminality, trying to avoid the rigidity of Roxin’s theory.

1. Domination over the will of the physical perpetration: A more flexible approach to control theory

It has been argued so far that the notion of control is essential when discussing participation in terms of collective criminality in international law. The problem with the current approach followed by the ICC is that, based on Roxin’s theory, the judges have accepted an extremely high threshold. As already discussed, Roxin’s theory is based upon the subordinates’ *automatic* compliance to the superiors’ orders.[[417]](#footnote-418) This presupposes an extremely tightly organised hierarchical structure, where no independent decisions are made by the direct perpetrators of the crime. In such an organisation, the superiors, in order to be criminally responsible as indirect perpetrators, need to effectively control the specific acts of their subordinates having led to the commission of the crime.[[418]](#footnote-419) Such an organisation possesses, thus, state-like characteristics, as discussed in Chapter 1 and is based on strict, factual control of the leaders towards the subordinates, as presented in Chapter 2. Even in this case, nevertheless, it has been argued that such a state-like organisation can only be of a specific type: as Osiel rightly points out, there are not many organisations of this type Roxin describes -except for, possibly, a military junta or, historically, the Nazi regime-, which can exercise such a complete level of authority over their subordinates.[[419]](#footnote-420)

Building on this argument, the doctrine of control over an organisation cannot be applied to situations of non-state collective criminality where the organisation involved has a more flexible internal structure. Corporations are an example of such organisations, as ‘in addition to having usually fewer members, […] their hierarchical structure is not as rigid as it can be in the armed forces, military police, intelligence services and certain organised armed groups and paramilitary groups’.[[420]](#footnote-421) The ICC has already faced this problem in Katanga and Chui, where the Pre-Trial Chamber insisted on applying the control over an organisation theory against the defendants.[[421]](#footnote-422) However, the paramilitary groups, these two were the leaders of, did not have the tight hierarchical structure of an authoritative bureaucracy, which rendered the application of Roxin’s theory highly problematic.[[422]](#footnote-423) It can be concluded that, as Roxin’s theory is situation-specific, it needs refinement to be applicable in the general context of collective criminality.

Having said so, it has to be reminded that, despite the shortcomings of Roxin’s theory, it is clear that the notion of control is important in international law when it comes to the activities of organised groups, either it refers to the responsibility of a state for the unlawful acts of specific individuals belonging to this group, or to the criminal responsibility of an individual for the crimes committed by the physical perpetrators belonging to a group. It is interesting to mention that when it comes to state responsibility for group unlawful activities, the ICJ has adopted a respectively strict approach, as the ICC with Roxin’s theory. This effective control approach has been already discussed in Chapter 2 and it requires a factual control over the activities of the organised group in order to attribute responsibility to a state for their unlawful acts. This approach has, however, already been criticised by the ICTY case law and by international law scholars as being too strict to be effective, except for a very limited number of cases.[[423]](#footnote-424) The more flexible approach of overall control has been proposed instead, to be applied in terms of state responsibility in international law.

Focusing on the overall control approach already discussed in Chapter 2, this research proposes that is should be also extended in international criminal law to discuss, not the responsibility of the State in this case, but the criminal responsibility of the individual. The ICC would have no difficulty in adopting this theory, because, in a final analysis, it does not contradict Roxin’s theory, but it rather interprets it more flexibly. Indeed, the key to Roxin’s theory is that the direct perpetrator/subordinate carries out the plan of the indirect perpetrator/superior and that the latter can rest assured that their plan is going to materialise. In other words, the fact that both the indirect and direct perpetrator operating within the organised power apparatus ensures that the instructions of the leader will be materialised by the inferior.[[424]](#footnote-425)

Thus, Art. 25(a) should be interpreted as incorporating a more flexible approach towards control than the traditional Roxin theory. This means that it is not necessary to include Roxin’s requirement of factual/ effective control over the subordinates.[[425]](#footnote-426) As argued by Jain, the control doctrine is just a metaphor, its core being that an individual occupies a position of authority that enables him to ‘perform activities ranging from formulating the criminal plan, deciding on the mode of its execution, setting up a framework to achieve the intended outcome and ordering subordinates to ensure its implementation’.[[426]](#footnote-427) In terms of a collective entity, it is enough that the individual possesses an overall control over the organisation, which gives them the capacity to effectively pass their will through the hierarchical structure, with the justifiable belief that it will be followed. Such a will does not need to be limited to direct orders/instruction to the subordinates to commit a crime. It should be enough that the individual in control sets a specific policy to be followed by the collective entity and then they delegate their power to lower-level individuals, for them to comply with this general policy as they think best.

It is to be noted that this flexible re-evaluation of the control theory in terms of perpetration through an organisation seems to have already taken place within the German criminal justice system. The first time Roxin’s control theory, developed in the 60s, has been applied by a German court was in the trial for the violation of human rights by the leadership of the German Democratic Republic in East Germany (*Deutsche Demokratische Republik-DDR*). In this case, the German Federal Court of Appeals (*Bundesgerichtshof)* argued that Roxin’s model could apply in terms of any (commercial) organisation.[[427]](#footnote-428) The German Federal Court of Appeals, with this decision, seems to approach the control theory in its essence rather than in its strict requirements, recognising that in a corporate organisation, individuals at the lower positions of the hierarchy have a certain level of autonomy exercising their duties, even though these duties are placed upon them by their directors. The Court argued that, because the indirect perpetrator in a corporation ‘uses conditions determined by the organizational structure, within which his contribution to the act *triggers regular processes*’, as a result, the direct perpetrator/employee is more unlike to react and disobey, showing an ‘unconditional willingness to carry out the crime’.[[428]](#footnote-429)

In this regard, the control theory applies also to situations where the individual decides not to give a specific order to their subordinates based on how to avoid a criminal outcome; or not to change a specific policy, which is reflected through the delegation process and leads to the commission of crimes. The latter remark is important because international criminal law accepts that crimes of active conduct can be also committed through an omission.[[429]](#footnote-430) Such ‘commission by omission’ is also linked to wilful blindness: the individual refrains from knowing too much over a dubious situation, to be able to deny responsibility in the event of a crime commission. [[430]](#footnote-431) Thus, an individual in control over a person/organisation can be responsible under Art 25(3)(a) of the ICC Statute not only through an ‘active’ act but also through an omission. A further analysis on omission responsibility in the ICC Statute will be provided on Chapter 6, where the ‘commission by omission’ concept of Art. 25 will be linked to the notion of superior responsibility in Art. 28 of the ICC Statute.

Moreover, the overall control approach provides a doctrinal solution to a paradox created by Roxin’s theory, where both the indirect and the physical perpetrator are fully responsible for the committed crime. However, understanding the direct perpetrator as an anonymous, mechanical commissioner, acting as the extension of the indirect perpetrator- as Roxin proposes- contradicts indirect perpetration doctrine itself. This type of perpetrator resembles more of an innocent agent, rather than a fully responsible perpetrator having control of their own acts.[[431]](#footnote-432) Thus, the fact that criminal responsibility is traced back to the indirect perpetrator, presupposes that the direct perpetrator cannot be criminally responsible himself, as their will is dominated by the indirect perpetrator. Conversely, if the direct perpetrator is criminally responsibly, the indirect perpetrator is shielded from responsibility as a perpetrator and can only be responsible as an instigator.[[432]](#footnote-433) However, as domination in overall control is understood under a more relaxed level of control, it is still possible for the physical perpetrator to possess the *mens rea* of the crime, together with the intellectual/indirect perpetrator. As it will be discussed in terms of the corporate criminality scenario in the next section, the physical perpetrator/employee is not out of choice to commit a crime, as a soldier in a paramilitary organisation may have been, but they still decide to proceed with the directives stemming from the board of directors of the corporation.

1. Perpetration in Art. 25(3)(a) of the ICC Statute through the revised control theory and its application to corporate criminality

The final section of this chapter attempts to discuss perpetration in Art. 25(3)(a), based on the revised theory of control developed in the previous section, and demonstrates its application against corporate leaders’ for the commission of crimes through their corporation’s activities. In order to do so, it focuses on perpetration through control over an organisation.

It is clear by now that the current approach to control in the ICC case law, based on Roxin’s theory is, at least, questionable. Until now, the Court avoided to explore a more liberal approach and it has been primarily concerned with identifying the existence of tight control and law detachedness in the relevant cases before it.[[433]](#footnote-434) Even so, the Trial Chamber in *Katanga* felt the need to point out that Roxin’s theory of a strict hierarchy and automated obedience is not ‘inconsistent with the very varied manifestations of modern-day group criminality wherever it arises. It cannot be reduced solely to bureaucracies akin to those of Third Reich Germany and which lie at the root of the theory’.[[434]](#footnote-435) However, the Court abstained from offering any persuasive argument on how Roxin’s theory could be effectively applied in such non-state organisations, contenting itself in adding that, if the control over an organisation theory cannot be applied, ‘the other forms of responsibility under article 25(3) of the Statute may apply’.[[435]](#footnote-436)

Based on this chapter’s arguments, the way to effectively apply control theory in any type of organisation, including the less strictly structured is to follow the overall control requirements. In terms of corporate criminality, the scenario can be similar to the one presented in the previous chapter: under the tolerance of a state, the board of directors of a corporation unanimously decides to remove local population, who is protesting against the activities of the corporation, outside of a specific area to extract its natural resources. They pass this directive to lower managers who, in order to implement this policy, order the corporate personnel responsible for the corporation’s security to destroy villages and forcibly remove their inhabitants outside of the designated area. Deportation or forcible transfer of population is a crime against humanity under Art. 7(d) of the ICC Statute.

Following the overall control over an organisation theory, the company directors can be responsible as (co)perpetrators in terms of Art. 25(3)(a) of the ICC Statute because they have created the relevant policy to secure unrestricted access to the area. They do not need to have strict control over the criminal outcome by ordering the security personnel themselves or being in contact with them during the act, but they can leave this to lower managers. These managers will then act according to the directives of the board of directors and will inform them, in the aftermath, of their efforts and their outcome. In other words, it is enough that the directors have the overall control over the criminal acts of their personnel, in the sense that, by being the highest executives within the corporation, they have the reasonable belief and expectation that their directives will be followed. As explained by Ambos, ‘control over an act by virtue of *Organisationsherrschaft* can only vest in those persons whose orders and instructions cannot be revoked or cancelled without any further ado, i.e. those, who, in this sense, can rule and control without any interference whatsoever’.[[436]](#footnote-437) This means that the company directors-indirect perpetrators would still control the direct/physical perpetrators, in terms of the ‘commission through another person’ provision of Art. 25(3)(a) of the ICC Statute (in its organisation variation), if they ‘contro[l] the sequence of events until the implementation of the crime’.[[437]](#footnote-438)

In this sense, there is no need for indirect perpetrator to expect their subordinates’/physical perpetrators’ blind compliance with their instructions because of fear or repression. Corporate staff can follow their directors’ lead because they feel that is their job to do so, and they are indifferent to anything else.[[438]](#footnote-439) Modifying the initial scenario slightly, let us say, that the state support more actively the corporation, by passing laws that make their conduct (the forcible removal of the population) legal. This means that in terms of this state’s internal legal order, the acts of the corporate executives will not be punishable. In such a situation, the directors of the corporation may be even more certain that their instructions will be followed by their subordinates. As Ambos explains, when an organisation collaborates with the state then it becomes a para-state and operates under a guise of legality.[[439]](#footnote-440) For this reason, this ‘state within a state’ seems even more powerful to its employees, who understand that it is meaningless to object to the corporate policy as long as it is backed up by the state apparatus.

Even in terms of omission, in the case of directors deliberately avoiding being informed about the exact acts of their personnel, to avoid responsibility for not intervening and stop the commission of the crime, Art. 25(3)(a) still covers this type of perpetration, as it has been already discussed in the previous section. It has to be noted that the responsibility of corporate directors for being ‘wilfully blind’ on the commission of crimes by their corporation has been discussed since the Nuremberg Trial regarding Walter Funk. Funk was the President of the *Reichsbank*, where the SS were sending gold and jewels taken from the inmates of the concentration camps. Funk argued that he could not have prevented the bank employees to proceed with these kinds of items, as he was not aware that *Reichsbank* was receiving them in the first place. However, the Court argued that ‘[…]he either knew what was being received or was deliberately closing his eyes to what was being done’[[440]](#footnote-441) and found him responsible for war crimes and crimes against humanity.

This discussion on the application of perpetration through control over an organisation to corporate criminality cannot be concluded without an observation on the indirect control over an organisation alternative the Katanga and Chui Pre-Trial Chamber implemented. While a court is not banned from combining two different doctrines that apply in its jurisdiction, this specific combination needs further clarification by the ICC’s case law, if it is to be generally adopted in its case law. This is because this doctrine has been tailored to the specific needs of the Katanga and Chui situation, without further consideration for its generic application.

Even though not fully supported by the facts in the Katanga and Chui case, as Chui was in a later stage acquitted of all the charges, [[441]](#footnote-442) one can accept that it is possible for two military leaders of two small paramilitary groups to form a tight plan, where each of them knew of the directives the other was going to give to their subordinates and agreed upon them.[[442]](#footnote-443) In this situation, it can be claimed that the causal link between each accused’s contribution to the crime (i.e. the forming of the plan) remained intact until the realisation of the criminal conduct by the other accused’s subordinates.

Nevertheless, the indirect co-perpetration theory cannot easily be applied in terms of large, highly compartmentalised organisations, as corporations are. Imagine the following scenario: two corporations have a common interest of forcibly remove the inhabitants of several villages in a specific area, in order to exploit its vast oil resources. Under the tolerance of the state, the senior managers of both corporations form a common plan and they delegate to their own staff to proceed in materialising it. Would it be feasible for the senior managers of corporation A to become criminally responsible for the criminal conduct committed by the subordinates of the senior managers of corporation B and vice versa? This would seem a very complex situation, because it would be difficult to claim that the leaders of corporation A exercised overall control over the subordinates of corporation B and the opposite, despite the existence of the common plan between them. Each corporation is a distinct entity with its own delegation of power mechanisms and its own operating system. As a result, it would seem that the causal link between superiors and subordinates’ contribution to the criminal outcome would be highly compromised.

## Conclusion

In this chapter, the limits of the control theory as it is currently applied by the ICC have been discussed, particularly in relation to the control over an organisation variant. In this direction, it has been argued that Roxin’s strict interpretation of control is not compatible with collective criminality, except when the latter stems from a very specific, state-like but also highly organised regime. Besides being case-specific, it is also questionable whether this type of control can be equally applied in terms of commission through another person –the literal wording of Art. 25(3)(a) of the ICC Statute- and its purpose based interpretative extension of commission though control over an organisation. For these reasons, a more flexible approach to the theory of control has been proposed, which allows the ICC to successfully identify perpetrators of collective crimes without being unnecessarily rigid. This theory, based on overall rather than effective control, has been further applied against company directors, in terms of the commission of international crimes through the activities of their corporation, to show its full potential in practice. In this direction, it has been also pointed out why the indirect co-perpetration concept currently deployed by the ICC requires further refinement if it is to be applied in relation to collective criminality in international law.

# Chapter 5

# Identifying the criminal responsibility of company directors as aiders and abettors in the ICC Statute

## Introduction

As it has been discussed in Chapter 2, company directors can be accessories to international crimes in many ways: they can sell to the perpetrators chemicals or other materials which they need in order to commit crimes; they can get involved in the illicit trade of minerals, supporting in this way financially the perpetrators of international crimes; and they can also offer to the perpetrators the corporations infrastructure, in order to facilitate the latter in the commission of the international crimes. This chapter analyses the modes of secondary liability in the ICC Statute, focusing on the aiding and abetting provisions of Art 25(3)(c) and the mental element requirements in Art. 30 of the ICC Statute. It constructs a theoretical framework in order to distinguish the aiders and abettors from the principal perpetrator and it then applies it in different scenarios of company directors’ involvement in international criminality as secondary participants.

The first section discusses the modes of secondary liability set in Art 25(3) of the ICC Statute, under the differential participation model of individual criminal responsibility, and analyses the *actus reus* of aiding and abetting, as the most applicable mode of secondary responsibility. The second section discusses the role of the mental element in identifying aiders and abettors and is split into two parts. Part (a) explains why the *mens rea* alone cannot be a feasible criterion for distinguishing the aiders and abettors, and analyses the mental element of intent in terms of the provisions of Art. 30 of the ICC Statute. Part (b) builds upon the approach to *mens rea* and intent adopted in part (a) and constructs a theory to identify aiders and abettors. The third section discusses this theory in terms of the ‘purpose to facilitate the commission of the crime’ requirement of aiding and abetting in Art. 25(3)(c) of the ICC Statute and applies it in the case of company directors, explaining under which circumstances they can be found responsible as aiders and abettors according to the ICC Statute.[[443]](#footnote-444)

## Secondary liability in Art. 25(3) of the ICC Statute and the *actus reus* of aiding and abetting the commission of a crime

By its structure, Art. 25 of the ICC Statute makes a clear distinction between principals and accessories to the crime commission. While para. (3)(a) discusses the criminal responsibility of the individual as perpetrator, paras 3(b), (c) and (d) distinguish among different types of secondary responsibility.[[444]](#footnote-445) This is a strong indication that the ICC Statute follows the so-called differential participation model, adopted by the majority of continental law systems.[[445]](#footnote-446) Under this model, there is a formal/doctrinal distinction among the various forms of participation in crime and, as a result, a hierarchy of blameworthiness, based on the defendants’ specific contribution to the crime.[[446]](#footnote-447)

This ‘systematic and normative gradation’[[447]](#footnote-448) of the modes of responsibility in Article 25(3) of the ICC Statute has been discussed by the Trial Chamber in *Lubanga*, where the Court argued that Article 25(3) establishes ‘the predominance of principal over secondary liability’ and that principal liability, in contrast with secondary liability ‘express[es] the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern’.[[448]](#footnote-449) Identifying the role specific individuals have undertaken in terms of the crime commission is very important in international criminal law, due to the collective nature of international criminality. As Vest argues, ‘due to the systemic nature and huge number of participants, such a differentiation indicating “at least the leading figure(s)” seems particularly needed with regard to international crimes’.[[449]](#footnote-450)

Having explained the context of secondary participation in Art. 25(3), the rest of the chapter will focus on aiding and abetting, which is the form of complicity the ICC will most probably utilise if there is ever a case of company directors indicted before it for secondary participation in an international crime. Indeed, aiding and abetting is the most applicable mode of secondary responsibility in the *ad hoc* Tribunals jurisprudence, while the ICC has only recently started to discuss it in its case law,[[450]](#footnote-451) which is mostly focused on perpetration at this point. In principle, there is a distinction between these two terms: aiding means practically assisting somebody, while abetting involves ‘facilitating the commission of a crime by being sympathetic thereto’.[[451]](#footnote-452) In practice, however, they have been used indistinguishably in the international criminal law jurisprudence.[[452]](#footnote-453) Thus, the *ad hoc* Tribunals have identified aiding and abetting as ‘acts specifically directed to assist, encourage or lend moral support’ to the perpetration of the crime.[[453]](#footnote-454) This definition also includes providing the means to the perpetrator to commit the crime.[[454]](#footnote-455)

Defining aiding and abetting as assistance in and facilitation of the commission of the crime reveals the existence of a relationship between principal and secondary liability.[[455]](#footnote-456) An aider/abettor participates in the crime not solely by their own acts, which may not be criminal per se, but through the acts of the perpetrator, which are criminal because they correspond to the *actus reus* of a crime. The criminal responsibility of the aider and abettor emanates from ‘borrowed criminality’, as ‘the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the perpetrator of the criminal enterprise’.[[456]](#footnote-457)

Thus, in aiding and abetting, the accomplice has not committed an autonomous crime themselves but has merely facilitated the criminal enterprise committed by another.[[457]](#footnote-458) As a result, the link between the acts of the aider and abettor and the criminal acts committed by the principal creates the criminal liability for both the primary and the secondary participants. Aiding and abetting is characterised as a form of derivative liability because it depends upon the commission of a crime by the perpetrator[[458]](#footnote-459)-to which the aider and abettor contributed- and, thus, upon the liability of the perpetrator.

Due to the derivative nature of aiding and abetting, the responsibility of an aider and abettor is constructed under the condition that the crime was indeed committed, or at least attempted.[[459]](#footnote-460) This remark is important because the ICC statute does not provide any relevant legal principle, and national jurisdictions –upon which the ICC jurisprudence can seek assistance,[[460]](#footnote-461) do not always arrive at the same conclusion. For example, if the ICC chooses to rely on common law on this matter, an aider and abettor in the English jurisprudence could be found liable for the mere fact that they intendedto facilitate the acts of the principal, and acted towards this direction, even though the principal did not use their help, in the end, to commit their crime.[[461]](#footnote-462) This approach contradicts, however, the derivative nature of aiding and abetting,[[462]](#footnote-463) as previously explained, and should not be adopted by the ICC.

Having said so, it is nevertheless important to clarify that derivative liability does not exclude personal culpability leading to individual criminal responsibility for the aider and abettor. This is because, if one analyses the concept of criminal responsibility, they will conclude that it consists of two elements: an unlawful act (or an act not unlawful per se but which facilitates another’s unlawful act) which is blameworthy and. renders the individual culpable. While the unlawful act can materialise through the contribution of many other individuals to form collective criminality, culpability is strictly personal.[[463]](#footnote-464) As a result, the criminal responsibility of the aider and abettor can be both derivative and individualised.[[464]](#footnote-465)

The nature of aiding and abetting as a derivative, yet still individualised, liability presupposes a causal relationship between the contributing acts of the aider and abettor and the commission of the crime.[[465]](#footnote-466) The rationale of this causal relationship is that, without the aider and abettor’s contribution, the crime would not have been committed *in the way it did*.[[466]](#footnote-467) Naturally, such an approach does not require the contribution of an aider and abettor to be a *conditio sine qua non* for the commission of the crime by the perpetrator[[467]](#footnote-468). Thus, it is important to note that the causal link requirement should not be misunderstood as entailing a “but-for” criterion. Unfortunately, some ICTY judgments seem to have done so, in claiming that ‘[p]roof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required’[[468]](#footnote-469) and perceiving causal effect as a *condition sine qua non*.[[469]](#footnote-470) However, as explained by Murmann, ‘one cannot determine causation by using the formula condition sine qua non (‘but-for’ test), because its operation requires actual, scientific knowledge about cause and effect, [thus this formula provides] only a pseudo-justification’.[[470]](#footnote-471) The ICC has also adopted this misconception in the *Bemba* case, where the pre-Trial Chamber failed to establish the relationship between causal effect and the crime commission, approaching causal link in a ‘but-for’ concept. [[471]](#footnote-472) As this argument of the Court was made in the context of superior responsibility and the link between the omission of the commander and the criminal acts of their subordinates, it will be further analysed in the next chapter.

So far, it has been argued that the causal link between the acts of the aider and abettor and the criminal outcome is an integral part of aiding and abetting, as a form of secondary liability. There is a need, consequently, to identify the quality/level of contribution that can create the required causal link to the crime. This is particularly important in terms of liability for neutral acts, as it is further explored later in this chapter, in terms of corporate aiding and abetting the commission of an international crime. As the pre-Trial Chamber in *Mbarushimana* argued, ‘[w]ithout some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes [to the commission of international crimes] could satisfy the elements of [secondary] liability for their infinitesimal contribution to the crimes committed”.[[472]](#footnote-473)

Following the ILC’s Draft Code of Crimes against the Peace and Security of Mankind-CPSM,[[473]](#footnote-474) the *ad hoc* criminal Tribunals have argued that these acts of contribution should have a direct and substantial effect to the commission of the crime [[474]](#footnote-475). In terms of the direct effect, the Trial Chamber in *Furundžija* explained that ‘the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. […]In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible […]’.[[475]](#footnote-476) Regarding the substantial effect requirement, the *ad hoc* Tribunals case law does not offer much clarification. The judges approach the substantial contribution requirement as a contribution affecting the commission of the crime,[[476]](#footnote-477) i.e. a causal link requirement.

The ICC case law does not provide any further explanation than that of the *ad hoc* Tribunals. The pre-Trial Chamber in *Blé Goudé* explained that aiding and abetting requires ‘that the person provides assistance to the commission of a crime’ without any reference to the level of this assistance, i.e. whether it is substantial or even indispensable.[[477]](#footnote-478) Similarly, the pre-Trial Chamber in *Ruto, Kosgey and Sang*, in discussing the level of contribution required by Art. 25(3)(d), avoided taking a particular position in terms of the aiding and abetting contribution of Art. 25(3)(c).[[478]](#footnote-479) Only the Pre Trial Chamber in *Mbarushimana* Confirmation of Charges argues that ‘while there is little jurisprudence at this time interpreting articles 25(3)(b) or (c) of the Statute, the application of analogous modes of liability at the *ad hoc* Tribunals suggests that a substantial contribution to the crime may be contemplated’.[[479]](#footnote-480) The judges offered no further analysis of “substantial” contribution, however.

It is submitted here that the identification of the causal link in terms of aiding and abetting should not be based upon a level of contribution measurement. Abstract requirements such as substantial or significant can never become completely normative and, consequently, they cannot offer legal certainty. This seems to also be the understanding of Judge Silvia Fernández de Gurmendi when argued that the contribution threshold of Art. 25(3)(d) is ‘better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution’.[[480]](#footnote-481) In order to do so, the harm and risk increase theories developed in German criminal law doctrine can prove useful.

According to Roxin, culpability and, thus, criminal responsibility of the accomplice attaches to them personally because the accessory themselves caused an independentattack/ independent harm on a protected legal good (independent regarding the attack/harm caused by the perpetrator).[[481]](#footnote-482) It is important to remind that, without the help of the accomplice, the crime would not have happened in the way it did. Thus, the final harm done to the protected legal good is a combination of the individual harms created by the various participants to the crime.[[482]](#footnote-483) In general, the harm theory provides a plausible justification for the criminal responsibility of an aider and abettor and it corresponds to the aims of (international) criminal law discussed in chapter 1. As the rationale of international criminal law is to protect human dignity from harm committed by any capable collective entity, it follows that the modes of responsibility should be identified exactly in terms of the amount of harm they cause to the protected legal goods. Each contributor to the international crime creates their own personal harm and all of them create the final harm of the criminal outcome.

The harm theory is elaborated further by the risk increase theory (*Risikoerhöhung*). This theory accepts that an accomplice, to be criminally responsible, must contribute to the harm towards the protected legal good caused by the criminal outcome. However, at the time of the accomplice’s acts taking place, this harm has not yet materialised. Thus, it is more doctrinally sound to argue that, at the moment of their contribution, the accomplice increases the risk that this crime is going to be committed. So, when the crime is indeed committed, it can be concluded that the risk taken by the accomplice contributed to the actualisation of the harm to the legal good by the acts of the perpetrator. As a result, this risk proves to be not a hypothetical one, as, for the accomplice’s responsibility to exist, the commission of the crime by the perpetrator must have taken place. As it has already been claimed, if the crime has not been committed, or at least attempted, then there can be no secondary responsibility for its commission.

The application of these theories specifically to aiding and abetting in the ICC Statute is this: if, after the commission of the international crime, it is evident that the aider and abettor’s conduct increased-at the moment of their acting- the risk that the international crime would be committed and, when the crime indeed have been committed, their conduct harmed the protected legal good, then their contribution is sufficient for a causal link to be established between their acts and the criminal outcome (*Risikorealisierung und kausale Risikosteigerung*).[[483]](#footnote-484) There is no need, thus, to employ open-ended notions such as “substantial” or “significant” contribution. The advantage of the *Risikoerhöhung* theory in identifying the causal link between the contribution of the aider and abettor and the criminal outcome is that the focus is on “palpable” elements –risk and harm evaluation towards an indeed committed criminal act- rather than on endless requests on how substantial ‘substantial contribution’ and how significant ‘significant facilitation’ to the crime should be.[[484]](#footnote-485)

To summarise, it has been argued that the ‘contribution to the commission of the crime’ element explains the nature of aiding and abetting as derivative liability and presupposes, thus, the existence of a causal link between the acts of the aider and abettor and the criminal outcome. This link has been further identified as a ‘risk increase’ at the time of the acts of aiding and abetting, which harmed the protected legal good when the crime was committed by the perpetrator. However, besides the aider’s and abettor’s acts and the establishment of a causal link to the crime, their *mens rea* is equally important to justify their criminal responsibility, as it will be analysed in the next section.

## The role of the *mens rea* element in identifying the responsibility of the aider and abettor in Article 25(3)(c) of the ICC Statute

In the first part of this section, the mental element of intent is discussed, in terms of the *mens rea* requirements of Art. 30 of the ICC Statute. This *mens rea* standard is then used in the second part to create a theoretical construction to discuss aiders and abettors in the ICC jurisprudence.

### The *mens rea* standard in Art. 30 of the ICC Statute

*Mens rea* is vital in identifying aiders and abettors to the crime, as distinct to the perpetrators of the crime. Traditionally, the distinction between perpetrators and aiders and abettors has been based on an intent vs knowledge approach. National courts have applied this approach by arguing that, while the perpetrator acts with *animus auctoris*, i.e. intending the offence as his own, the accomplice acts with *animus socii*, i.e. knowing and accepting the offence as the perpetrator’s offence and not their own.[[485]](#footnote-486) Similarly, in terms of international criminal justice, this distinction has been the main criterion in the *ad hoc* Tribunals to identify aiders and abettors. The *ad hoc* Tribunals case law distinguishes between intent and knowledge, arguing that, while the perpetrators to the crime have the intent to commit it, the accessories possess mere knowledge of its commission by the perpetrators. The ICTY, for example, has used the distinction between intent and knowledge to decide between perpetration and/or participation in a JCE, as a form of principal criminal responsibility, and aiding and abetting. The dominant view in the Tribunal’s case law is that the requisite mental element of aiding and abetting is knowledge while, regarding the *mens rea* of perpetration or JCE, “more is required”[[486]](#footnote-487), i.e. intent to commit the crime or further the common plan.[[487]](#footnote-488)

Such an intent v knowledge approach to identify aiding and abetting derives from the so-called subjective approach towards criminal liability. According to Ashworth, one of the main supporters of the subjective approach, an individual should be liable for their actions ‘qua chosen’. This means that, when they are involved in a crime, they are criminally responsible only for what they intended to do and not in accordance with what actually did or did not happen.[[488]](#footnote-489) It becomes evident that the subjective approach focuses solely on *mens rea* for the identification of secondary responsibility and fails to also consider the value of the *actus reus*. This is because, for subjectivists, culpability is based on morality and is the outcome of an immoral choice made by the individual to act in a specific way.[[489]](#footnote-490) Because of the individual making this immoral choice in the first place, it does not matter whether or how this choice has been materialized. The individual is to be found criminally responsible for their immorality alone.[[490]](#footnote-491)

In practice, focusing solely on *mens rea*, as the subjective approach maintains, can lead to unsatisfactory outcomes in terms of aiding and abetting responsibility. German case law provides a useful example since, until the 1960s, the German Federal Court of Justice (BGH) applied the subjective approach. Following this line, the BGH delivered a judgement in the 1962 *Stashinsky* case that was highly criticised by scholars. Stashinsky was a soviet secret agent who killed two politicians in West Germany. As he argued that he, personally, did not have the intent to kill them but was just following the orders of his superiors, the Court spotted an absence of *animus* *auctoris* and convicted him for aiding and abetting murder, even though he was the physical perpetrator of the crime. [[491]](#footnote-492)

On the other hand, following the subjective approach, an individual whose acts do not realise directly or indirectly the objective elements of a crime, but they just facilitate its commission, is considered nevertheless a perpetrator, if they are found to possess the required criminal intent for the criminal outcome. It is reminded here that, in the *ad hoc* Tribunals, when an individual has the *mens rea* to commit an international crime he is considered a participant to the JCE, i.e., a principal to the crime, irrespectively of the nature of their *actus reus*. This feature of the JCE theory, however, has been fiercely criticised as incompatible with the principles of personal culpability and individual criminal responsibility.[[492]](#footnote-493) The ICC itself criticised the subjective approach arguing that ‘[i]f the subjective approach were the basis for distinguishing between principals and accessories, those who know of the intent of a group of persons to commit a crime, and who then aim to further this criminal activity by intentionally contributing to its commission, should be considered principals rather than accessories to a crime’.[[493]](#footnote-494)

This chapter argues that the weakness of the subjective approach derives foremost from the observation that a distinction between intent and knowledge is not comprehensive in terms of doctrine. Indeed, it does not seem valid to contrast intent and knowledge, as knowledge always constitutes part of the intent in terms of *mens rea*. Intent/*dolus* is one of the subjective elements recognised in criminal law to attribute individual criminal responsibility (with recklessness/*dolus eventualis* and negligence being the others). In international criminal law, specific acts of the individuals constitute international crimes only when they are committed with intent, in contrast with negligence which also constitutes a basis for criminal responsibility in national jurisdictions. Intent consists of two components, the cognitive component (knowledge) and the volitional component (will), both of which need to be satisfied for an individual to be found responsible for a *dolus* crime.[[494]](#footnote-495)

In particular the different *mens rea* theories that apply in criminal law are these: a) direct intent/ first degree *dolus*, where the defendant knows that their act is going to materialize the criminal outcome, in the logical course of events, and they want/wish this to happen; b) indirect intent/ second degree *dolus*, where the defendant knows/is certain that their act is going to materialize the criminal outcome, in the ordinary course of events, and they accept this; c) recklessness/ *dolus eventualis*,[[495]](#footnote-496) where the defendant realises that it is possible that their act materializes the criminal outcome and they accept this possibility; d) advertent negligence, where the defendant realises that it is possible for their act to bring the criminal outcome but they discard such a possibility for no good reason (lack of volitional element); e) inadvertent negligence, where the defendant does not even realise the possibility that their acts will conclude to a crime commission, thus, he/she lacks both the volitional and the cognitive element.[[496]](#footnote-497)

It becomes obvious from the above that knowledge of a certainty or a possibility (the cognitive component) is always part of a *dolus* crime, and it is also part of the advertent negligence *mens rea*. The only type of *mens rea* which requires no knowledge at all is inadvertent negligence, and this is why it is the one which is controversial in criminal law theory. As it has been already discussed in Chapter 2, the lack of knowledge creates strict liability which contrasts personal culpability and the individual character of criminal responsibility.

In fact, the cognitive component identifies/determines the volitional component of intent. The will of the defendant is revealed when they know of a certainty or a possibility and they wish or accept that this certainty or possibility materialises. Following this logic, the wish or acceptance of the crime commission is perceived from the acts of the defendant. As argued in terms of English criminal law, ‘you cannot take the top of a man’s head and look into his mind and actually see what his intent was at any given moment. [...] You have to decide it by reference to what he did, what he said and all the circumstances of the case’.[[497]](#footnote-498) *Mens rea* is, hence, inextricably attached to *actus reus*.[[498]](#footnote-499)

Without the cognitive component and the link to the actus reus the former holds, the volitional element of intent cannot be adequately clarified. In everyday life, intent is explained as having a purpose, aim or goal to bring about the criminal outcome. However, if one looks closely to the terms of purpose, aim or goal, one understands that, in fact, they cannot give an accurate depiction of one’s thoughts and, therefore, they cannot be used for legal purposes.[[499]](#footnote-500) As one cannot be inside one other person’s mind, no one can really tell what was indeed their purpose, which resulted in the commission of the crime. In this sense, the volitional element, pursued *in abstracto*, comes very close to expectation or motive, both of which are, nevertheless, outside of the scope of criminal law.[[500]](#footnote-501) This is because the volitional element of intent, in order to create a ‘guilty mind’ for the criminal law purposes, has to be linked with an external factor, i.e. with an act, which the law considers criminal.

In international criminal law, it is remarkable that the *ad hoc* Tribunals, which have vastly related on the subjective approach and the distinction between intent and knowledge, have also recognised the ‘will through knowledge makes intent’ principle, looking at the actus reus in order to establish this intent, creating an inconsistency in their theoretical approach. The Trial Chamber in *Tadić* has argued that ‘[…]intent founded on *inherent knowledge, proved or inferred*, is required for a finding of guilt’,[[501]](#footnote-502) where knowledge is accompanied by a deliberate act directly affecting the commission of the crime.[[502]](#footnote-503) The Court concluded that, under this definition, intent is the required *mens rea* not only for perpetration but for aiding and abetting as well.[[503]](#footnote-504)

Following the logic of the *Tadić* Trial Chamber, the Trial Chamber in *Krstić* argued that Krstić’s knowledge of the consequences of his actions indicated his intent.[[504]](#footnote-505) Analysing this approach, the Appeals Chamber erred in understanding such an argument as a statement that knowledge alone is enough to satisfy intent. [[505]](#footnote-506) Knowledge by itself is not enough to trigger international criminal justice, because will is also needed. To attribute criminal responsibility as an aider and abettor for mere knowledge, without any link to their will and their acts would lead to liability without guilt, which violates human dignity and thus criminal law principles, as discussed in chapter 1.[[506]](#footnote-507) Such a will is inferred by the fact that it was Krstić’s decision to proceed with his acts, because or despite having this knowledge. This choice exactly shows Krstić’s criminal mind and therefore reveals his will for the purposes of international criminal law. In other words, the volitional element of intent is linked with the *actus reus* of the crime, through the cognitive element of knowledge. This is also the conclusion of the Trial Chamber in *Orić*, where it has been claimed that the *mens rea* of an aider and abettor “must contain a cognitive element of knowledge and a volition element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not”.[[507]](#footnote-508)

Outside the aiding and abetting concept, the understanding of knowledge as an integral part of intent and not *in abstracto* has been applied by the ICTY when establishing the *mens rea* of participation in a JCE. In terms of the JCE II, in particular, the intent element is satisfied when the individual has knowledge of the system’s criminal nature but, nevertheless, continues to support the system.[[508]](#footnote-509) Thus, JCE theory recognises that intent is in fact a combination of knowledge and will, the latter identified by the individual continuing with their contribution to the crime because or despite their knowledge of it. This means that the ICTY does not follow a unique theoretical framework in terms of *mens rea*, as its case law accepts that a) intent includes knowledge in terms of principal responsibility but b) intent and knowledge are two different concepts in terms of aiding and abetting (and the latter’s difference from/distinction to perpetration). On the bottom of this paradox, when the *mens rea* of perpetration is examined alone knowledge is part of intent, while when it is examined in relation to aiding and abetting intent suddenly comes out of the equation. It becomes clear that the failure to show consistency in the applicable law is a serious blow in the credibility of the ICTY and a gross violation of the principle of legality. [[509]](#footnote-510)

Understanding intent as ‘will through knowledge’, the wording of Art. 30 of the ICC Statute seems rather unclear. In using the words “intent” and “knowledge”, it refers back to the intent/knowledge distinction of the *ad hoc* criminal Tribunals, which creates a misunderstanding in terms of *mens rea*, as previously explained. Thus, a better construction of Art 30 should be that the crimes in the ICC Statute are committed with intent, i.e. with knowledge and will. Moreover, even the links with the *actus reus* unnecessary complicate matters. This is because, according to the wording of Art 30, the misleading impression is created that not all these material elements are committed with the same *mens rea*. In terms of conduct, intent is required; in terms of consequences, intent and knowledge are required; in terms of circumstances, only knowledge is sufficient (Art 30 (2)(a),(b), (3)). These distinctions are despite the general rule in Art 30 (1), which sets that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge, conjunctively. Due to these distinctions in the material elements, it has been argued that there are ‘different gradations’ of intent in the ICC Statute and that Art. 30 adopts an ‘element analysis’ approach, where ‘a separate (and likely different) mental element must be proven in relation to each material element of the crime’.[[510]](#footnote-511)

However, not all the material elements referred to in Art 30 are decisive in terms of attributing criminal responsibility. In every *mens rea* in criminal law, there are two levels. The first level refers to the act itself, the conduct. Thus, one has to be aware of their physical acts, in order to be responsible for them. This awareness refers to one’s understanding of performing a specific act in contrast, for example, with an insane person, who may not realise what they are doing. This first level is as Piragoff explains, ‘the basic consciousness or volition that is necessary to attribute to an action as being the product of the voluntary will of a person’.[[511]](#footnote-512) Awareness of the circumstances is included in this first level of *mens rea* as well. Depending on the crime, they are specific facts that one should be aware of, even though it is not required that they understand their meaning in terms of law.[[512]](#footnote-513) Regarding crimes against humanity, for example, knowledge of the circumstances refers to being aware of the existence of a widespread or systematic attack, without the need (of the defendant) to know the legal characterisation of the terms “widespread” and “systematic”.

As this first level, ‘awareness does not refer to a type of *dolus* but to an element present in all kinds of *dolus*, [that is] the unconditional will to act or decision to act’[[513]](#footnote-514), and it is not capable of creating culpability. A second level of *mens rea* is required, which is again linked to material elements and is the essential one in creating guilt. In terms of the intent *mens rea*, this level is established when one understands that their conscious acts are going to result in a criminal outcome, and they want/accept it. This is the required intent, intent regarding the consequences, which creates criminal responsibility and it consists of both knowledge and will. The conclusion is that the material element of each crime within the ICC Statute should be materialised with the *mens rea* of intent, which is, at the very bottom, fulfilled by the knowledge and will that a consequence will definitely, or in the ordinary course of events, occur. The legal notion of intent should not be identified with purpose, in its everyday use as aim or goal. Following this, it has to be noted that Art. 30 of the ICC Statute does not include the mere possibility that a consequence will happen, rejecting, thus, the application on a *dolus eventualis* standard.[[514]](#footnote-515)

Thus, a more accurate construction of Art. 30 of the ICC Statute could be like this:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with **will and knowledge** (instead of intent and knowledge).
2. For the purposes of this article, a person has intent where:

(b)[..]that person **means to cause that consequence because or despite being aware that it will occur (at least) in the ordinary course of events** (instead of means to cause that consequence or is aware that it will occur in the ordinary course of events)[[515]](#footnote-516)

1. […]‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. This paragraph sets the level of knowledge accepted by the ICC Statute, which is direct and indirect knowledge, leading to direct intent/intent of the first degree and indirect intent/intent of the second degree respectively. Possible knowledge is insufficient and thus dolus eventualis/recklessness[[516]](#footnote-517) is excluded as a *mens rea* standard in the ICC jurisdiction.[[517]](#footnote-518) Moreover, actual knowledge is required, in contrast to constructive knowledge, which means that the ICC Statute does not recognise negligence.

To sum up, the *mens rea* of an aider and abettor is fulfilled when they are aware that their conscious acts facilitate the commission of the crime and they proceed with the materialisation of these acts. This awareness of facilitation presupposes, of course, knowledge that a crime is going to be committed by the perpetrator because if one does not know that a crime is about to be committed, they cannot have the intent to facilitate it.[[518]](#footnote-519) This is a *mens rea* of intent because acting with knowledge of the consequences of the action reveals one’s will. Even though the aider/abettor has to be aware of the essential elements of the crime to be committed by the perpetrator,[[519]](#footnote-520) knowledge of the commission of a specific crime is not required.[[520]](#footnote-521)

In the second part of this section, a synthesis of the *actus reus* and *mens rea* approaches taken so far is attempted, in order to identify an aider and abettor in the ICC jurisprudence.

### Identifying the aider and abettor in the ICC Statute: The combined approach

As explained in section 2, aiding and abetting consists of assisting in the commission of a crime, thus a causal link between the acts of the aider and abettor and the acts of the perpetrator is required. Moreover, it has been argued above that *mens rea* cannot be approached on the basis of intent vs knowledge. On the contrary, the *mens rea* of intent is to be understood as will expressed in the outside world by the individual continuing with their acts despite or because of their knowledge of their criminality. Thus, *mens rea* cannot be approached in isolation from the *actus reus*.

Due to the derivative nature of secondary liability, the *mens rea* of the aider and abettor should cover the acts facilitating the commission of the crime by the perpetrator and, thus, foremost the causal link between the acts of the aider and abettor and the acts of the perpetrator (the criminal outcome). Consequently, it is suggested that, in order to identify an aider and abettor, one should look into the following elements: the relevant *actus reus* for aiding and abetting, an adequate causal link and the required *mens rea*.

Thus, in identifying an aider/abettor, one has to take into account both the objective and the subjective elements of the former’s unlawful behaviour. Indeed, according to Duff, we cannot base our judgments of one’s culpability on purely subjective criteria, but we need to use partly objective terms, that is acts, as an anchor.[[521]](#footnote-522) Moral judgements are to be rejected as the ultimate guide to establish culpability and criminal responsibility because ‘we cannot […] separate out a pure form of moral judgement, wholly independent of objective dimensions of actions, as an appropriate structure for our moral responses to each other-or as an appropriate basis for the criminal law’s responses to citizens who break the law’.[[522]](#footnote-523) Moreover, following the previous analysis, the objective approach should not rely on the distinction between intent and knowledge, but on identifying the required *mens rea*.

However, together with the ill-fitted subjective (intent v knowledge) approach, the ICC seems to also reject the objective approach, as its judges considered it to rely solely on acts to identify the participants to a crime.[[523]](#footnote-524) In fact, modern objectivists argue in favour not of a pure objectivity but for a combination of objectivity and subjectivity, a type of an ‘objective subjectivity’ theory one can say, as approached by Duff.[[524]](#footnote-525) In this sense, the control theory is accepted by the ICC as the ‘leading principle for distinguishing between principals and accessories’[[525]](#footnote-526) because it provides a synthesis of both objective and subjective components: the control element, which indicates the *Hintermann*’s mind (subjective factor), is at the same time ‘an objective factor [control over the *acts* of the *Frontmann*]on the basis of which one can distinguish (more culpable) individuals from accessories’.[[526]](#footnote-527)

Applying this ‘objective subjectivity’ approach to aiders and abettors leads to the following scheme: Aiding and abetting equates to contribution to the commission of a crime (**aider’s and abettor’s *actus reus* and causal link to the crime**) with intent as defined above, i.e. intent towards the criminal outcome or the perpetrator’s *actus reus* (**aider’s and abettor’s *mens rea* is covering the *actus reus* and the causal link**).

Following the analysis of the *mens rea* in the previous section, the *mens rea* of an aider and abettor cannot be simple knowledge of the commission of the crime by the perpetrator. On the contrary, the *mens rea* of the aider and abettor is this of intent, which is satisfied when the aider and abettor knows that their acts are contributing to the commission of the crime/they run a risk of harming the protected legal good and they do them because or despite this knowledge (will through knowledge).[[527]](#footnote-528)

More specifically, the application of Art. 30 of the ICC statute against an aider and abettor reveals that their intent is a two-level intent: At the first level, the aider and abettor is aware/conscious of their own act, meaning that they have an understanding of the act while they are doing it, thus there is an intentional act. This constitutes the knowledge part of the conduct required by Art. 30 of the ICC Statute. The second and vital level of intent is knowledge that the act facilitates the commission of the crime, coupled with a decision to proceed with the act anyway.[[528]](#footnote-529) This reveals the aider’s will to facilitate the commission of the crime, as ‘in the vast majority of cases, *the acts of the accused*, with the requisite *knowledge* that it assists the crime, will allow for no other reasonable inference than that the accused *intended to assist* the commission of the crime’.[[529]](#footnote-530) The intent to assist thus creates an intent for the final crime, committed by the perpetrator.[[530]](#footnote-531) If one wants to assist in the commission of a crime, this means that he is at least indifferent as to what final criminal outcome can be, which in criminal law is translated to indirect intent, as previously explained. This is the intent (intent to assist for the perpetrator to achieve the criminal outcome) that creates culpability for the aider and abettor and, as a result, renders them criminally responsible. It is reminded that actual (direct or indirect knowledge) rather than constructive knowledge is required, in terms of Art 30 of the ICC Statute. In consequence, if the accomplice possesses knowledge, it should be unsubstantial whether they acted because or despite this knowledge for their criminal will to be formed.[[531]](#footnote-532)

The theoretical analysis provided in this section suggests that both the perpetrator and the aider and abettor have the same final intent for the commission of the crime, but they understand that they contribute to it on a different level. Nevertheless, they do not “share” the same intent,[[532]](#footnote-533) they just “have” the same intent, or to phrase it better, they have identical intents. So, the distinction between a perpetrator and an aider and abettor derives from the difference in their *actus reus* and from the fact that they acknowledge this *actus reus* while choosing to continue with its materialisation, each from their own perspective.

In terms of practice, the ICC case law has not developed yet a clear normative approach of the distinction between perpetrators and accessories, nor how *mens rea* is to be understood in terms of Art 30 of the ICC Statute. All that the different Chambers have done so far is to limit their theoretical analysis on the mere statement that control theory provides the doctrinal tools in order to make such a distinction.[[533]](#footnote-534) In this sense, the ICC does not seem to fully appreciate how to approach intent in its construction as knowledge and will. According to Ambos, the Court approaches *mens rea* as ‘a purely naturalistic one, limiting [it] to the psychological state of mind of the perpetrator at the moment of the commission’,[[534]](#footnote-535) thus failing to make a proper distinction between principals and aiders and abettor. Following Fletcher’s explanation of this phenomenon in criminal law application, it seems that the ICC is ‘unaware of the theoretical distinction between a psychological and a normative concept of culpability (guilt), which is so essential for a modern and fair theory of criminal law’.[[535]](#footnote-536) Gil Gil adds that the lack of a coherent *mens rea* analysis, based on knowledge and ‘an unconditional will to act (*unbedingte Handungswille*)’ is ‘probably because sometimes [the ICC] is guided by some leading commentators of the Statute who in their understanding of *dolus* do not pay sufficient attention to the volitional element’.[[536]](#footnote-537)

Against this, a theory of ‘objective subjectivity’ has been constructed in this section, which presents a doctrinally sound method to identify aiding and abetting and to assist the ICC in its deliberation. In the next section, this theory is applied to the company directors as aiders and abettors to international crimes, under the ‘purpose of facilitating the commission of the crime’ clause of Art (25)(3)(c) of the ICC Statute.

## Company directors as aiders and abettors in the commission of an international crime: the ‘purpose of facilitating the commission of the crime’ requirement revised

As discussed in Chapter 2, company directors can be secondary participants in the commission of international crimes by providing material help to a country’s power mechanisms (state or state-like actors), in terms of equipment and the relevant personnel to use it; or by selling to them the means to commit these crimes. They can also make business by buying illegally obtained natural resources, such as diamonds. Following the analysis of the *actus reus* of aiding and abetting in this chapter, such types of involvement can trigger the prosecution of company directors as aiders and abettor to the international crimes under the ICC Statute.

However, the application of Art. 25(3)(c) to company directors has been traditionally approached as problematic, due to the incorporation in its text of an additional purpose element.[[537]](#footnote-538) According to Art. 25(3)(c), an individual who aids, abets or otherwise assists in the commission of a crime, including providing the means for its commission, shall be criminally responsible when they do so under the ‘purpose of facilitating the commission of the crime’. So far, this provision has not created problems to the ICC case law, as the ICC Statute has been applied so far to non-state entities with state-like characteristics. These entities have political motives behind the crime commission, so in this regard, they actually wish to facilitate their commission. Thus, in an aiding and abetting situation, the Court would not have felt compelled to discuss the interpretation of ‘the purpose to facilitate the commission of the crime’ clause.

The situation is different in terms of corporations. It has been argued that the goal of company directors, when they are involved in international criminality, is to increase the profits/minimise the losses of their company and, as a result, they can never have the purpose to facilitate the commission of genocide, crimes against humanity or war crimes.[[538]](#footnote-539) Such a claim is valid if one approaches the term purpose in its everyday use as meaning aim or goal. Under this approach, it has been argued that a voluntary act performed with the knowledge of facilitating the commission of an offence by the perpetrator did not of itself establish the *mens rea* of intent, necessary to ascertain the criminal responsibility of an aider and abettor. Such intent is determined only if the aider and abettor acted so that the perpetrator should commit the offence.[[539]](#footnote-540) Even though intent as desire is explicitly rejected by the supporters of this approach, the phrase ‘in order for the crime to happen’ tries indeed to explain the inner thoughts of the aider and abettor and thus, inevitably, understands purpose as aim.[[540]](#footnote-541)

However, as it has been shown in this chapter, purpose per se is not a legal term and it does not have any value in terms of international criminal law. It is not the individual’s inner wishes that create the legal *mens rea*, but their legal intent, which has the solid doctrinal definition of will evidenced in the outside world by acting because or despite the knowledge that such an act will facilitate the commission of a crime (will through knowledge). The *mens rea* applicable to the company directors is that of facilitating the commission of the crime with or despite the knowledge that their assistance will contribute to the commission of an international crime. For this reason, whether a company director wants to make a profit is irrelevant for the purposes of criminal responsibility attribution.

In this sense, the phrase ‘for the purpose of facilitating the commission of a crime’ seems out of place in the legal definition of aiding and abetting. As legal intent is not identified as purpose in its everyday use of aim, the only way of this clause maintaining its validity in a criminal law definition is for the term purpose to be interpreted as ‘intent of facilitating the commission of a crime’. As such, the phrase simply repeats and re-emphasises the *mens rea* provisions of Art. 30 of the ICC Statute. Under this approach, the ‘purpose of facilitating the commission of the crime’ requirement of Art. 25(3)(c) of the ICC Statute is not an additional requirement, justified only through the ‘unless otherwise provided’ clause of Art. 30,[[541]](#footnote-542) but it becomes an integral part of the aider and abettors *mens rea*, as their intent towards the criminal outcome is materialised through their “purpose” (i.e. intent) to facilitate its commission.[[542]](#footnote-543)

The incompatibility of this clause to the rest of Art 25(3)(c) has its roots in the drafting of the ICC Statute. This clause is an exact copy of section 2.06(3) of the US Model Penal Code and it has been used by American federal courts in identifying aiders and abettors. It is relevant to the distinction made in the US jurisdiction between accessories before the fact/crime and accessories who are present to the crime commission, under the logic that the physical remoteness of the former from the crime scene should be balanced with a higher *mens rea* requirement (intent/purpose rather than knowledge).[[543]](#footnote-544) Moreover, in some States, the jury is prevented from allocating different gradations of punishment to different levels of aiding and abetting, so-without the purpose clause- a defendant with a minor involvement prior the commission of the crime could potentially receive the same punishment with an aider and abettor with greater participation at the time of the crime commission.[[544]](#footnote-545)

There seems to be a policy reason behind the adoption of the purpose element in the US law, stemming from law morality issues. In this direction, the remoteness of the accessory from the crime scene justifies a less severe punishment than this of the accessory who is in proximity to the perpetrator/the crime commission.[[545]](#footnote-546) However, as it has been discussed in the previous chapter, remoteness and proximity to the crime scene are not the decisive factors in identifying the criminal responsibility of the individual. A person who is remote from the crime scene may be equally responsible as a person who is present on it, especially when it comes to serious crimes, and this principle applies not only in terms of principals but also in terms of secondary participants to the crime.[[546]](#footnote-547)

However, Art 25(3)(c) does not make a distinction in aiding and abetting based on physical remoteness and, according to Art. 78 of the ICC Statute, the judges are obliged to take into account the gravity of the crime when determining the sentence. Therefore, the US rationale of the ‘for the purpose of facilitating the commission of the crime’ clause does not apply to the ICC jurisdiction.

Moreover, even in the US jurisprudence, not all States follow the Model Penal Code’s approach towards the *mens rea* of intent,[[547]](#footnote-548) as it has been argued that understanding the latter as purpose creates doctrinal inconsistencies and makes the application of aiding and abetting almost impossible in practice.[[548]](#footnote-549) It is also important to note that the early drafts of the ICC Statute discussed by the plenipotentiaries before the adoption of the final document have identified the *mens rea* of an aider and abettor as ‘intent to facilitate the commission of the crime’, rather than “purpose”.[[549]](#footnote-550) At the end of the day, as noted by van Sliedregt, ‘[i]n practice, the purpose will be deduced from the acts of the accused’,[[550]](#footnote-551) so which is the difference from the legal concept of intent as discussed in this chapter?

To explore the application of the theoretical approach presented in this chapter regarding the ‘purpose of facilitating the commission of the crime’, the following case studies are posed:

1. A corporation based in the UK produces a chemical that is used by other corporations to create pesticides. The director of this corporation sells a large amount of this chemical to the Syrian government. The chemical is then used by the government in an attack against civilian populations affiliated to the rebels in the civil war taking place in the country. Hundreds of people die from asphyxiation. Is the company director responsible as an aider and abettor in international crimes according to Article 25(3)(c) of the ICC Statute? In a variated scenario, the directors of an ammunition corporation make a deal with a government to supply them with a specific type of weaponry for their armament programme. The state uses, then, these weapons to launch illegal attacks against their neighbour state, where many civilians are being killed.
2. A corporation is engaged in the diamond market, buying raw diamonds from Congo and re-selling them globally. The vast majority of the diamond mines in Congo are under the control of a rebel group which if fighting against the government in a civil war. The company directors have made a deal with the group’s leaders, for the latter to sell the diamonds exclusively to them, in exchange of providing the rebel group with the money they need to buy the ammunition to continue their fight. Having the necessary weaponry, the group massacres the local population, which is opposite to them. Can the company directors be found responsible as aiders and abettors in international crimes according to Article 25(3)(c) of the ICC Statute?
3. A corporation has invested in oil extraction in Sudan. The drilling facilities are in an area inhabited by a minority which is systematically mistreated by the government. This minority protest the drilling because it affects the local environment and changes dramatically their way of living. The government decides to intervene and forcibly remove this minority from the specific area. The company directors have delegated their power to lower-level executives, to provide to the government the corporation’s tracks in order to help the state’s army to forcibly remove the civilians from a specific area. On top of this, they offer the soldiers food and shelter in the remote area they are operating. Can the company directors be found responsible as aiders and abettors in international crimes according to Article 25(3)(c) of the ICC Statute?

The above scenarios are based on real situations, some of them having been discussed before national courts. The first scenario relates to the *Van Anraat* and *van Kouwenhoven* cases in the Netherlands. The second scenario has been drawn by the “blood” diamonds incidents in Sierra Leone, Liberia, Angola, DRC, Côte d’Ivoire and CAR that have concerned the international community since the 90s. The third scenario is constructed upon the *Presbyterian Church of Sudan v. Talisman Energy* lawsuit in the USA, where the Canadian corporation has been accused of aiding and abetting the Sudanese government in war crimes, crimes against humanity and genocide in South Sudan.[[551]](#footnote-552) Applying the ‘objective subjectivity’ theory in these scenarios, an aider and abettor contributes to the commission of the crime (*actus reus* and causal link to the crime) with intent towards the final criminal outcome, which consists of them being aware that their acts have a risk to harm the protected legal good and they continue with them because of or despite this knowledge (will through knowledge-*mens rea*).

Thus, the first question to ask is whether the company director indeed contributed to the commission of the crime, in order to establish the *actus reus* of aiding and abetting and the causal link to the crime. In terms of the first scenario, these specific chemicals/weapons the company director sold need to have been indeed used by the government in this specific illegal attack. In the second scenario, the corporation’s money needs to have been indeed used by the rebels to buy the guns that were used against the local population. In the third scenario, the corporation’s infrastructure should have been indeed used to forcibly remove the civilian population. Only then the risk of harm to the protected real interest will be transformed into real harm and will link the *actus reus* of the company director to the criminal outcome.

It is important to note here that the corporate acts included in the three scenarios are neutral acts: it is not illegal per se to sell and buy products nor to provide infrastructure and food to a country’s army. Even in terms of selling weapons, it is considered a legal corporate activity, in terms of allowing countries to safeguard themselves in the case of an illegal attack against them.[[552]](#footnote-553) What makes it illegal and, thus, triggers the criminal responsibility of the company directors is the fact that these acts have indeed facilitated the commission of international crimes.[[553]](#footnote-554) In this sense, providing food and shelter to the soldiers does not seem to create an adequate causal link to the commission of the crime because the risk of harming the protected legal good cannot be clearly defined in this case. Moreover, it has to be noted that, even though proving money to the perpetrators to commit a crime is an adequate causal element,[[554]](#footnote-555) it is one that is very difficult to prove:[[555]](#footnote-556) only in cases where the sole source of income of the rebel group is the money they are receiving for selling the diamonds to the specific corporation, it can be established that it was the corporation’s money that bought the guns used against the local population.[[556]](#footnote-557)

After identifying the causal link, the next and most important question is whether the company directors have the *mens rea* of an aider and abettor, which consists of a two-level intent, as it has been argued in the previous section. At a first level, the company directors’ *mens rea* is satisfied by the fact that they are aware /conscious of their acts (knowledge of the conduct). Thus, in the first scenario, there is a need of a conscious selling of the products, in the second scenario there is a need of a conscious buying of the diamonds and in the third scenario, there is a need of a conscious delegation on the part of the directors to the lower executives, followed by a conscious provision of the material help by these lower executives. Moreover, if one of the crimes committed by state or non-state actors’ amounts to crimes against humanity, the company directors need to be aware of the state policy to commit a crime against humanity (knowledge of the circumstances).

At second level-which is the one creating culpability-, the company directors should have, according to Art. 25(3)(c) of the ICC Statute, the ‘purpose of facilitating the commission of the international crime’. As already explained, if one understands intent as purpose, with purpose having the everyday meaning of aim, then it cannot be possible for the corporate executives to have the required second-level intent to commit the crimes. In all the scenarios, the aim of the company directors is to promote the interests of the corporations, rather than aiming per se to attach the local population. This was also the understanding of the US Supreme Court in the *Presbyterian Church v Talisman* case for denying all charges against the corporation. The judges concluded that ‘[…]applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone’ and that ‘no [… ]consensus exists for imposing liability on individuals who knowingly (but not purposefully) aid and abet a violation of international law’.[[557]](#footnote-558)

Applying this approach, the judges continued: ‘[the plaintiffs] wish to argue that Talisman's knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, is a sufficient basis from which to infer Talisman's illicit intent when it designated areas for exploration, upgraded airstrips or paid royalties.[…] Since, however, the proper test of liability is purpose (not knowledge), all this evidence of knowledge […] cuts against Talisman's liability’.[[558]](#footnote-559) Nevertheless, in this chapter, it has been argued that the legal term of intent is to be approached as ‘will through knowledge’ of the criminal outcome. The combination of knowledge and will regarding the consequences of the perpetrator’s acts constitutes the company directors’ intent (rather than using the word “purpose”) to facilitate the commission of the crime and, thus, their final intent for the criminal outcome. If the judges in Talisman followed this approach, they would have concluded that the corporation/the company directors had indeed the intent to facilitate the commission of the crimes by the Sudanese government, because they knew that the army was committed those crimes and they decided/ continued to provide aid.

Consequently, in order to be criminally responsible as aiders and abettors in the three scenarios presented here, the company directors need to know that their acts are helping the commission of the crime and they have accepted it, by proceeding with them anyway. Indirect knowledge suffices, so it is enough that they realise that their acts will facilitate the commission of an international crime in the ordinary course of events.[[559]](#footnote-560) It is reminded that the aider/abettor does not need to know the details of the crime in which their acts contribute, but it is adequate that they know that they are facilitating the commission of a crime in general.[[560]](#footnote-561) This knowledge can be evidenced by an evaluation of the information being available to the directors at the time of the business transaction or the provision of material help to the perpetrators. In the *Van Anraat* case, for example, the Dutch Court of Appeal corroborated the businessman’s knowledge (of the use of his company’s chemicals in unlawful attacks) based on Van Anraat’s telex messages revealing that he was aware of the situation in Iraq and that there was no textile industry in the country where his chemicals could be used for legitimate purposes, i.e. as an additive for textile paint.[[561]](#footnote-562)

Regarding the relation between the knowledge and the delegation of power to lower-level executives, it has been argued in Chapter 2 that effective control poses too high a standard in terms of delegation process that becomes inapplicable in practice. On the contrary, overall control has been accepted as an adequate standard. According to it, the company director does not need to have knowledge of the specific corporate acts pursued by the lower-level executives in terms of facilitating the commission of the international crimes. It is enough that they required that the corporate assistance is going to be given, leaving the details to their subordinates.

It transpires from the above analysis, that the company directors have the same intent with the perpetrators for the criminal outcome/the international crime to take place, but they serve this intent under a different *actus reus*: the state/non-state actors are the (direct or indirect) perpetrators, while the company directors are the aiders and abettors.[[562]](#footnote-563) The fact that the company directors do not have a goal to fulfil the *actus reus* of the crime per se, but they see the prospects of a higher profit when the crime is committed, has no impact on their criminal intent. The inner thoughts of the individual are theirs alone and they cannot be judged. Their impact in the outer world can, though, and it is under this prism that *mens rea*, as a legal notion, should be approached. Article’s 25(3)(c) clause of ‘purpose of facilitating’ should be understood as ‘intent of facilitating the commission of the crime’, with intent being perceived as will expressed by acting because of/despite the knowledge of the criminal outcome. Under this approach, the argument that Article’s 25(3)(c) ‘purpose of facilitating’ has the effect of ‘protecting individuals from liability where they facilitate the commission of a crime for illegitimate purposes or by virtue of their illegitimate activities’[[563]](#footnote-564) can be strongly challenged.

Having said so, it has to be noted that the knowledge standard of Art. 30 of the ICC Statute is still a high standard, providing significant evidentiary difficulties in terms of the criminal responsibility of company directors. The lowest level of knowledge accepted in the ICC jurisprudence is awareness that the crime will happen in the ordinary course of events. Mere suspicion of a criminal outcome, i.e. awareness of a possibility of the crime commission is not enough. Thus, the ICC Prosecutor needs to present very strong evidence to the Court, in order to prove that the company director had direct or indirect knowledge that their corporation’s acts are contributing to the commission of a crime. In terms of indirect assistance of selling or buying products, as is the case of the first two scenarios presented above, the Prosecutor’s task is very difficult, especially when the situation involves a large corporation with no presence in the country the criminal outcome took place. Even in the third scenario, where the corporation has its activities within the area of the crime and it is theoretically easier to prove that the company directors must have known about the imminent crime commission when the help was offered, it is difficult to prove that they have indeed delegated such power to their subordinates. A close look at the internal organisational processes of the corporation is needed, and some corporations might not have such a transparent operational system, or they could be reluctant to share it with the prosecution.

Nevertheless, the problems of obtaining evidence should not be compared with doctrinal problems caused by inconsistencies and weaknesses at the theoretical level. This chapter has demonstrated that the ‘objective subjectivity’ theory can overcome the shortcomings of the doctrines being used previously in the realms of international criminal justice and it can be a viable option in terms of the ICC Statute for the ICC jurisprudence to employ.

## Conclusion

The purpose of this chapter was to identify the criminal responsibility of company directors as aiders and abettors to international crimes. In order to do so, it provided the theoretical framework for aiding and abetting in the ICC Statute and then applied it in different case studies regarding company directors’ secondary involvement in international criminality. Based on the differential participation model of individual criminal responsibility, the *actus reus* of aiding and abetting in Art. 25(3)(c) has been analysed, arguing in favour of the derivative nature of aiding and abetting and the need of a causal link between the acts of the aider and abettor and the acts of the perpetrator. This link has been further identified as a contribution that increases the risk of harm to the protected legal good, with the harm approached not hypothetically but under the condition that, for the individual to be responsible as aider and abettor, the crime should have indeed been committed.

In terms of the mental element, it has been explained that the *mens rea* alone cannot be the sole identifying factor to distinguish aider and abettors from perpetrators. It has been argued that the intent v knowledge distinction is not doctrinally sound and that the *mens rea* of aiding and abetting is always that of intent. Taking into consideration the provisions of Art. 30 of the ICC Statute, intent has been understood as will though knowledge: an individual has the will to commit the crime when they understand that their acts will result in the criminal outcome and they continue with them because or despite this knowledge. This approach towards *mens rea* has been employed to construct a theory in identifying aiders and abettors, which combines the *actus reus* and *mens rea* element.

Thus, according to this ‘objective subjectivity’ approach, an individual is an aider and abettor when they contribute to the commission of the crime (*actus reus* and causal link) with intent (will through knowledge) towards this contribution and, as a result, with intent towards the final criminal outcome (*mens rea*). Based on this theoretical construction, it has been further explained that the intent of the aider and abettor is a two-level intent. The first level of intent corresponds to their conscious will to commit the acts, which nevertheless is not the intent necessary to constitute the criminal responsibility of aiding and abetting. This is the role of the second level of intent with covers their conscious knowledge that they contribute to the commission of the crime and, as a result, their conscious knowledge over the criminal outcome.

This theoretical construction of ‘objective subjectivity’ was then applied to company directors, on the basis of the ‘purpose to facilitate the commission of the crime’ *mens rea* requirement of Art. 25(3)(c) of the ICC Statute. The prevailing scholarly view that company directors cannot have the purpose to facilitate the commission of a crime but only the purpose to maintain the economic success of their corporation has been contested. It has been argued that the term “purpose” in this clause should not be approached as aim or goal, because it is then misunderstood as meaning motive, which is irrelevant for criminal law purposes. In this sense, it cannot provide a legal definition of intent and does not have a place in the text of Art. 25(3)(c) of the ICC Statute. Instead, it has been proposed that this phrase should be interpreted as ‘intent of facilitating the commission of the crime’, with intent approached as will though knowledge. According to this, it has been claimed that the company directors can indeed have the “purpose” to help the commission of the crime, irrespectively of their aim of profit. To test this approach in practice, three case studies have been developed, where the ‘objective subjectivity’ theory has been applied to demonstrate under which circumstances company directors can be found responsible for aiding and abetting the commission of an international crime in the ICC jurisprudence.

# Chapter 6

# Applying civilian superior responsibility of Art. 28(b) of the ICC Statute to company directors

## Introduction

This chapter discusses the doctrine of superior responsibility as formulated in the ICC Statute, focusing on the responsibility of the civilian superior, and applies it to company directors. Superior responsibility is a complicated concept because, first of all, it refers to omissions rather than actions and, secondly, it refers to omissions leading to the commission of a crime by others and not by the person who omits. As it is responsibility for an omission to prevent the crimes of the subordinates or to punish the latter for committing them, it has been characterised as indirect superior responsibility, in contrast with ordering the subordinates to commit a crime, which creates direct superior responsibility.[[564]](#footnote-565)

Focusing on omission theory in terms of superior responsibility is important because, depending on the omission type applicable, the criminal responsibility of the superior will differ. As is analysed in this chapter, inauthentic omission can lead to the individual being responsible as a participant to the crime committed. Predominantly, this will cover the situation where the individual purposefully refrains from acting themselves or -in case they control others- giving orders to subordinates against a crime commission (commission by omission of Art. 25(3)(a) of the ICC Statute). When the subordinates decide to commit a crime themselves, however, the purposeful omission of their superior to prevent them can also create a participant’s responsibility for the superior. This chapter suggests that, in such cases, if the subordinates are perpetrators, then the superior is a perpetrator as well; if the subordinates are aiders/abettors, the superior is a secondary participant themselves. On the other hand, authentic omission can render an individual who has a duty of care over the actions of others/the subordinates responsible as the perpetrator of a separate (different from the crime committed by the subordinates) crime of dereliction of duty. This chapter explores these two approaches under the superior responsibility rules of Art. 28 of the ICC Statute and establishes a theoretical framework on omissions of (civilian) superiors in international criminal law. It then discusses this framework in relation to the criminal responsibility of company directors regarding the international crimes committed in the course of corporate activities.

Therefore, the first section discusses the establishment of the superior responsibility doctrine in international criminal law and analyses the objective and subjective elements of civilian superior responsibility in Art. 28(b) of the ICC Statute. The second section explores further the nature of the superior responsibility doctrine in terms of individual criminal responsibility in order to provide a deeper understanding of the concept. The third section discusses the theory of omission in criminal law and distinguishes between two different types of omission, explaining how these differences affect criminal responsibility. The fourth section applies this theoretical framework to Art. 28 (b) of the ICC Statute and examines the civilian superior responsibility further, in terms of the causal link between the superior’s omissions and the crime committed by the subordinates, as well as the relevant duties of the superior towards their subordinates. The fifth section applies the theory developed in the previous sections to two different scenarios related to corporate criminality and identifies the criminal responsibility of the company directors, in terms of the criminal activities of subsidiary and supply chain corporations.

## Superior responsibility as a legal doctrine: Identifying the civilian superior in Art. 28 (b) of the ICC Statute

International law has incorporated the concept of responsible command in various legal provisions. As a matter of fact, laws on command responsibility can be traced back to the 15th century, even though this research focuses on the relevant developments of “modern” international law, that is from the 20th century onwards.[[565]](#footnote-566) Warfare was one of the first situations considered as seriously violating the principle of humanity, for obvious reasons, and it certainly remains one of the main humanity-endangering causes today. Establishing the responsibility of commanders in (international) law has been a crucial step towards the effective protection of the principle of human dignity in the international level.[[566]](#footnote-567) This is because commanders, from their position of superiority within the army, are required to act as guarantors of the law, ensuring that their subordinates comply with the humanistic principles included in the various legal rules applied in warfare. As a result, their failure to do so should create a certain legal responsibility.

In this sense, a commander should not only be responsible for themselves/their own actions but also for their subordinates’ actions. The 1907 Hague Conventions codifying the *ius in bello* required that armies should be commanded by a person responsible for their subordinates.[[567]](#footnote-568) This provision opened the way for military commanders to be held responsible for violations of the law committed by their subordinates under national jurisdictions, in terms of disciplinary actions within the army and/or criminal law. Moreover, after the First World War, there had been discussions for the creation of an international tribunal where superiors could have been put on trial for breaches of the laws and customs of war,[[568]](#footnote-569) even though no such tribunal was ever established. In contemporary international law, the 1979 Additional Protocol I (API) to the Geneva Conventions establishes the responsibility of a commander for their failure to prevent their subordinates from breaching humanitarian law.[[569]](#footnote-570)

Even though initially identified in the realm of armed conflict, the responsibility of a commander is ultimately the responsibility of a superior who does not correspond adequately to the demands of their position and, as a consequence, fails to safeguard the principle of human dignity. This means that superior responsibility can exist irrespectively of the existence of an armed conflict and it applies not only to military commanders but also to civilian superiors who find themselves in a position to endanger humanity. As such, superior responsibility is particularly useful when discussing the violation of the principle of human dignity through the commission of international crimes, due to ‘[t]he fundamental responsibilities which such superiors assume, and the potential for irreparable harm from a failure to properly fulfil those responsibilities’.[[570]](#footnote-571)

As it has already been shown, international crimes are collective crimes, being committed by individuals, but always linking back to the upper levels of the hierarchy, to individuals who are absent from the crime scene. As was said, criminality in the international level is the product of the activities of collective entities/organisations. These entities have a hierarchical with superiors and subordinates and plans are formed or decisions are made by individuals at the top echelons of the organisation, which are then executed by those at lower levels. This is particularly important in terms of superior responsibility since superiors are generally not physically involved in the commission of international crimes. The key function of the international criminal law doctrines is, thus, to efficiently link the acts and decisions of these superiors with the international crimes. Together with the ‘traditional’ –originated in national criminal law- modes of participation, i.e. perpetration and aiding/abetting, superior responsibility has been applied to international criminal law in order to assist identifying the links between the personal culpability of such high-level individuals and the ‘special organisational setting’[[571]](#footnote-572) of collective criminality.[[572]](#footnote-573)

The concept of superior responsibility emerged for the first time in the Nuremberg Trial, referring to both military commanders and political leaders. When discussing the evidence against the defendants, the Nuremberg IMT took into consideration their ability to become involved in the commission of international crimes as a result of their superior status. Thus, in terms of political leaders, the Court focused on their latter’s participation in the decision making meetings, as well as their orders in relation to the Third Reich’s policies on slave labour, persecution and extermination.[[573]](#footnote-574) The Nuremberg Judgment, however, does not refer to superior responsibility as a specific doctrine in order to identify the contribution of the defendants to the crimes. As explained in Chapter 5, the Nuremberg Judgment is not based on the differential participation model, so there is no mention of the specific modes of responsibility upon which the defendants were found guilty.[[574]](#footnote-575) In this sense, the defendants were found responsible for crimes committed by their conscious acts while being in a superior position, but there was no discussion upon their potential responsibility for a failure to supervise their subordinates properly.

On the other hand, the International Military Tribunal for the Far East (IMTFE) based its judgment on responsible superiors on a more extended legal basis than the IMT. The defendants were found responsible not only for participating in the crimes by their own acts or omissions but also for failing to prevent their subordinates from committing them.[[575]](#footnote-576) In terms of the charges against the military and civilian superiors/defendants, Count 54 referred to ‘ordering, authorizing and permitting the commission of Conventional War Crimes’, while Count 55 charged ‘failure to take adequate steps to secure the observance and prevent breaches of conventions and laws of war in respect of prisoners of war and civilian internees’.[[576]](#footnote-577) Consequently, it was the IMTFE judgment which made the distinction between a) direct superior responsibility, where the superior is the (intellectual) perpetrator of the crime by planning and ordering its commission; and b) indirect superior responsibility, where the superior is responsible for the failure to prevent the crime of others. The same distinction has been later acknowledged in the trials before the Control Council No 10 military tribunals. In the *High Command* case, for example, it has been established that ‘[criminal responsibility for the superior] can occur only where the act is directly traceable to him or [in the case of] his failure to properly supervise his subordinates’.[[577]](#footnote-578)

It was these trials that introduced ‘superior responsibility’ as a distinct doctrine in modern international criminal law: according to it, responsibility attaches to the superior, not because they ordered the commission of the crime, but because they failed to stop their subordinates, who committed the crime on their own account. As such, the superior responsibility doctrine appears in the Statutes of the *ad hoc* criminal Tribunals. It is characterised by the notion of control of an individual over another person, followed by the superior’s failure to prevent the subordinate’s crime. Thus, according to the case-law of the *ad hoc* criminal Tribunals, superior responsibility presupposes i) the existence of a superior-subordinate relationship; ii) that the superior knew or had reason to know that their subordinate was about to or had committed a crime; (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[[578]](#footnote-579)

The ICTY has concluded that the doctrine applies equally to military commanders and civilian superiors, rendering redundant the doctrinal distinction between military and civilian status. According to the Trial Chamber in *Musić et al.*, the superior responsibility doctrine ‘extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority’.[[579]](#footnote-580) Thus, the criminal responsibility of Karadžić, for example, was based on the fact that he was ‘the highest civilian and military authority in the RS [Republika Srpska]’, without further distinction between his functions, except for the purposes of evidence.[[580]](#footnote-581) Similarly, the ICTR Trial Chamber in *Kayishema and Ruzindana* held that superior responsibility in the ICTR Statute extends beyond military commanders, adopting the ICTY approach on this matter.[[581]](#footnote-582)

While the *ad hoc* criminal Tribunals did not make any doctrinal distinction between the responsibility of a military commander and a civilian superior, this is not the case with the ICC Statute. Art. 28 of the ICC Statute consists of two paragraphs: paragraph (a) refers to the responsibility of military commanders, while paragraph (b) sets specific requirements for the attribution of superior responsibility to a civilian. In terms of the latter, civilian superior responsibility is based on the following elements: i) the existence of a superior-subordinate relationship, where the superior exercises effective control over the subordinates; ii) the superior’s failure to prevent or repress the crimes of the subordinates or submit the matter to the competent authorities for investigation and prosecution; iii) the superior being aware that their subordinates were committing or about to commit such crimes. The following subsections analyse the elements of civilian superior responsibility in the ICC Statute, identifying their similarities and differences to military commanders and discussing whether there exists a doctrinal need to make such a distinction after all.

### The superior-subordinate relationship and the notion of effective control

Analysing the superior-subordinate relationship, the ICC has followed the *ad hoc* criminal Tribunals case law, where it has been established that *de jure* authority is not enough to create responsibility for the superior when their subordinates commit a crime.[[582]](#footnote-583) As stated by the ICC Trial Chamber in Bemba, the mere fact that an individual belongs to a chain of command, having a formal status above other individuals, is neither sufficient nor required in attributing superior responsibility.[[583]](#footnote-584) The superior must have a *de facto* control over the subordinates, meaning that the later should fall under the superior’s effective authority and control. [[584]](#footnote-585) Only in such case, the superior can be accused of failing to control their subordinates properly and, thus, be criminally responsible.[[585]](#footnote-586) When a superior, owing to the circumstances of the time, loses the ability to control their subordinates and to intervene in order to end their criminal behaviour, then holding the superior criminally responsible is a form of strict liability. As argued in Chapter 2 however, strict liability should not be accepted in criminal law, because culpability is personal and requires that the individual has the ability to choose whether to act unlawfully or not. Thus, Art. 28 attaches criminal responsibility to the superior only when they had the “real” or “actual” power to control their subordinates[[586]](#footnote-587) but they did not do so.[[587]](#footnote-588)

The effective control standard has been interpreted by the ICC as the possession of ‘material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities’[[588]](#footnote-589) and not as mere influence.[[589]](#footnote-590) However, the effective control term can create a certain level of confusion in international law, as not all international courts approach it with the same understanding. As discussed in Chapter 2, the ICJ understands effective control as requiring the exercise of a *factual* control over a specific conduct,[[590]](#footnote-591) which allows only for a strict application of the notion and cannot be compatible with the delegation process, which is often present in hierarchical structures. However, as argued in Chapter 3 in terms of control of the criminal outcome through an organisation, the key element for the attribution of criminal responsibility is not the exercise of a strict control -which allows the person in charge/indirect perpetrator to dominate every detail of the criminal outcome- but their capacity to ensure that their orders will be executed.

Correspondingly, for the purposes of superior responsibility under the ICC Statute, control does not need to be factual, in order to be “effective”. A superior can have the material abilities to prevent a crime being committed by their subordinates without being aware of every single detail of the specific conduct, i.e. without knowing the exact actions of the subordinates that resulted in the commission of the crime. Thus, it can be argued that the ICC’s ‘material ability to prevent or repress the commission of the crimes’ criterion can fit to the definition of overall control, as discussed in Chapter 2. To be found responsible, the superior has to maintain control over the activities of their subordinates in the sense of the general operational plan the superiors themselves have developed and the subordinates have to follow. [[591]](#footnote-592) In this direction, the ICC case law recognises that several generic factors are indicating the superior’s “effective” control, including ‘the capacity to ensure compliance with the orders issued’, none of which implies control over a specific act of the subordinates.[[592]](#footnote-593) So far, the ICC case law refers only to military commanders in terms of identifying control over the subordinates. However, as the effective control standard is the same in both paragraphs of Art. 28 of the ICC Statute, the material abilities definition applies to civilian superiors as well.

### The superior’s failure to prevent or repress the crimes of the subordinates and the distinction between military commanders and civilian superiors

Failure to prevent the crimes of the subordinates has been understood as taking place ‘at any stage prior to the commission of crimes and before it has actually been committed by the superior's forces’,[[593]](#footnote-594) while failure to submit the matter to the competent authorities is attached to the superior after the crime commission.[[594]](#footnote-595) Regarding the term “repress”, it is not clear if it falls within the category of preventing the crime or it refers to punishing the perpetrators after the crime has been committed. The pre- Trial Chamber in *Bemba*, has considered ‘repress’ as belonging to both categories, owing to the circumstances. The Court, based on Art. 86 of the Additional Protocol I and following the ICTY case law on the matter, held that the term “repress” refers to the responsibility of the superior ‘to stop ongoing crimes from continuing to be committed’,[[595]](#footnote-596) but also to the responsibility to punish the subordinate after the crime has been committed.[[596]](#footnote-597) Depending on the circumstances, when a superior lacks the ability to sanction their subordinates, the duty to punish transforms to ‘the duty to tak[e] active steps in order to ensure that the perpetrators are brought to justice’.[[597]](#footnote-598) As already mentioned, the case-law of the ICC has discussed superior responsibility only regarding military commanders. However, as Art. 28 uses the same language for both military and civilian superiors in terms of the *actus reus* of superior responsibility, it can be safely deduced that the existing ruling of the ICC on this matter is also applicable in the case of civilian superiors. Thus, the *actus reus* of civilian responsibility consists of either failure to prevent before the crime commission or failure to “punish” [[598]](#footnote-599) or report to the authorities after the crime commission.

Nonetheless, the ICC Statute does not offer any clarification on who exactly is a civilian superior, apart from Art. 28(b) wording of being applied to ‘superior and subordinate relationships not described in paragraph (a)’. Moreover, if one tries to reach a conclusion on what is the distinction between military commanders and civilian superiors, they will realise that no such distinction is necessary eventually. As already explained, the superior responsibility doctrine is based on the ability of an individual (the superior, irrespectively of whether they are being categorised as military or civilian superior) to control other individuals (their subordinates). According to the ICC Statute, the same level of control for both military commanders and civilian superiors is required, this of “effective authority and control” over their subordinates.[[599]](#footnote-600) Likewise, both paragraphs set the same *actus reus* in order to establish the failure to exercise this control. Thus, whether the superior failed in exercising effective control over the subordinates is, in the end, a matter of evidence, and it does not make any difference whether they are military commanders or civilians.

This is why the ICTR Appeals Chamber in *Bagilishema* argued that, while doctrinally the notion of control is the same, it does not mean that it may ‘necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander’[[600]](#footnote-601). As explained by the ICTY Trial Chamber in *Karadžić*, ‘An evaluation of effective control *is more a question of fact than of law* and requires consideration of factors that show “that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate”’.[[601]](#footnote-602) Similarly, the Appeals Chamber in *Orić* stated that whether the superior possessed the power to prevent their subordinates’ crime or punish them for its commission is ‘a matter of evidence, not of substantive law’.[[602]](#footnote-603) It is true that, due to the stricter hierarchical structure of militia, a commander would be more competent in controlling their troops rather than a civilian superior could control their employees,[[603]](#footnote-604) but this fact does not affect the doctrinal elements of superior responsibility.

It becomes apparent from the above analysis that, the control element and the subsequent *actus reus* being the same for both military commanders and civilian superiors in the ICC Statute, they should bear criminal responsibility on equal terms, when these elements are fulfilled. However, this is not the case in terms of Art. 28 of the ICC Statute. In contrast with the *ad hoc* criminal Tribunals and customary law as it is expressed by the Geneva Conventions, the ICC chooses –apparently for no good reason - to create a stricter *mens rea* standard for military commanders than for civilian superiors. Consequently, the ICC chambers are obliged to always make a distinction between these two categories in their case law, when there is in fact no doctrinal reason to do so.

In this regard, an entity-related approach has been proposed, according to which, the determining factor of the superior’s military or civilian role is to be found in the military or civilian nature of the subordinate units the superior effectively controls. As a result, ‘a unit, organization, or institution is considered a military entity for the purposes of Article 28(a) if its underlying purpose is to act or be deployed as a party to an armed conflict, and a military commander is a superior in such an entity. A non-military superior belongs to an entity, which does not share such rationale’.[[604]](#footnote-605) Unlike political leaders, whose role can be borderline between military and civilian superior in complex situations, company directors fall clearly within the civilian superior category for the purposes of the ICC Statute,[[605]](#footnote-606) so the distinguishing criteria between military commanders and civilian leaders are not further analysed in this chapter.

### The superior’s knowledge regarding their subordinates’ crimes

The impact of the ICC Statute’s distinction between military commanders and civilian superiors is placed in the *mens rea* element. Apart from actual knowledge,[[606]](#footnote-607) which applies for both civilian and military superiors, the civilian superior responsibility of Art 28(b) requires a higher mental element threshold in relation to paragraph (a). While the military commander can be found responsible for negligence, when ‘owing to the circumstances at the time, [they] *should have known* that the [subordinate] forces were committing or about to commit [international] crimes’,[[607]](#footnote-608) the civilian superior can be responsible only if ‘*consciously disregarded information* which clearly indicated, that the subordinates were committing or about to commit such crimes’.[[608]](#footnote-609) Such a requirement entails that the civilian superior’s attention has been drawn upon information indicating a significant risk that their subordinates were committing or were about to commit (an) international crime(s), but the civilian superior nevertheless abstained from acknowledging this piece of information.[[609]](#footnote-610)

In this sense, the ‘consciously disregarded information’ *mens rea* requirement refers to the common law doctrine of wilful blindness, discussed in Chapter 4, mentioned also as wilful/contrived/culpable ignorance or conscious avoidance.[[610]](#footnote-611) It is reminded that wilful blindness concerns the situation when an individual realises that there is a high risk of a crime being committed and they intentionally keeping themselves unaware of further details, in the hope of avoiding responsibility.[[611]](#footnote-612) However, criminal responsibility for wilful blindness is based on the principle that the conscious avoidance of knowledge should be accepted as actual knowledge[[612]](#footnote-613) because deniability of awareness which is self-generated should not allow an individual to escape criminal responsibility.[[613]](#footnote-614) Thus, ‘the doctrine of conscious avoidance allows a court to find that a defendant acted knowingly without proof of positive knowledge’.[[614]](#footnote-615)

It has been argued that wilful blindness is the equivalent of the continental law *dolus eventualis* standard.[[615]](#footnote-616) Nevertheless, this is not quite so. *Dolus eventualis* does not evaluate the level of probability of the criminal outcome, as wilful blindness does, but the individual’s attitude towards it. For example, a person has *dolus eventualis* for homicide when they have put a bomb in a house in order to destroy it, but they accept that if there are individuals within it, they will be killed. It does not matter whether there is a low or a high probability of the inhabitants of the house to be in it at the time of the bombing but only that the perpetrator accepted their death as the outcome of their acts. Still, wilful blindness comes very close to the common law standard of recklessness, because recklessness is being defined as awareness of a high probability that a crime will happen and acceptance of this probability.[[616]](#footnote-617) Thus, in terms of the level of knowledge, wilful blindness is in fact an intermediary step between positive knowledge and recklessness[[617]](#footnote-618) but approached as actual knowledge nonetheless.[[618]](#footnote-619) For this, the *mens rea* requirement of Art 28(b)(i) of the ICC Statute should be accepted as falling within the general *mens rea* threshold of Art. 30, as discusses in Chapter 5, which is intent of the first or the second degree.

This section has discussed the origins and rationale of the ‘responsible command’ concept providing the link to the international criminal law doctrine of superior responsibility. The *actus reus* and *mens rea* elements of superior responsibility have been analysed, focusing on the provisions of Art. 28(b) of the ICC Statute regarding civilian superiors. The next section will further explore the nature of superior responsibility in terms of individual criminal responsibility, so as to provide a deeper understanding of the concept.

## The nature of superior responsibility in international criminal law

It has already been explained that it was the IMTFE, which, for the first time, identified superior responsibility with a failure to prevent the crimes of the subordinates. Still, the IMTFE did not further clarify whether this failure to prevent the crime of the subordinates was a form of participation of the superior to the criminal outcome or a separate crime of dereliction of duty. This can be understood in terms of the general approach towards participation to the crime followed by the IMTFE, which -together with the IMT- adopts a unitary participation model, avoiding any doctrinal discussion on the modes of responsibility.

However, neither the Control Council No 10 tribunal’s, with their more elaborated approach towards the modes of participation, provide any further guidance upon this matter. Discussing superior responsibility in the *High Command* case, the Court concluded that ‘[t]here must be a personal dereliction. That can occur only where the act is directly traceable to [the superior] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part’.[[619]](#footnote-620) An act directly traceable to an individual falls within the category of participation to the crime, either through a principal or an accessorial mode of responsibility.[[620]](#footnote-621) Regarding the failure to prevent the crimes of the subordinates, however, the Court in the *High Command* case does not clarify if this is a responsibility for participation to the underlying crimes of the subordinates or if it constitutes a separate offence for the superior.[[621]](#footnote-622) There is an indication to the language of the judgement that supports the participation to the crime of the subordinates’ option: in terms of failure to prevent, the judges argued that it must be an ‘immoral disregard of the action of his subordinates amounting to acquiescence’.[[622]](#footnote-623) It can be, therefore, claimed that acquiescence to the crime of the subordinates creates a link between the superior’s omission and the criminal outcome, but the Court -following a semi-unitary approach as already discussed in Chapter 5- does not give further attention to this issue.

Correspondingly, Art.7(3) of the ICTY Statute and Art. 6(3) of the ICTR Statute, establishing the superior responsibility doctrine, do not explain whether the superior is considered participant to these crimes or he is rather liable for dereliction of their duties as a superior. Thus, the case-law of the *ad hoc* Tribunals has not been consistent on this matter. The Trial Chamber in *Halilović* understood superior responsibility as a separate form of responsibility when argued that ‘[…] for the acts of his subordinates’ as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act’.[[623]](#footnote-624) The judges characterised command responsibility as a *sui generis* form of liability[[624]](#footnote-625) requiring no causal link to the crimes of the subordinates, as ‘[i]f a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3)’.[[625]](#footnote-626)

Nevertheless, the Appeals Chamber in *Musić* followed the participation to the crime approach when argued that the superior ‘could be held responsible *for the commission of the crimes* if he failed to exercise such abilities of control’.[[626]](#footnote-627) As held by the Trial Chamber in *Orić*, ‘the modes of liability of instigation and aiding and abetting, with which the Accused is charged pursuant to Article 7(1) of the Statute, share a common feature with that of superior criminal responsibility pursuant to Article 7(3) of the Statute in that both are *accessory to principal crimes committed by other direct perpetrators*’. [[627]](#footnote-628) On the other hand, even having accepted superior responsibility as a mode of secondary responsibility, the ICTY case law does not explain the doctrinal difference between paragraphs (1) and (3) of Art. 7, stating simply that ‘where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements of both are met, a conviction should only be entered on the basis of Article 7(1) and the accused’s superior position should be considered as an aggravating factor in sentencing’.[[628]](#footnote-629) If the responsibility is merged, though, what is the purpose of having both paragraphs (1) and (3) in Art. 7 of the ICTY Statute? The conclusion is that, everything taken into consideration, the ICTY has failed to adopt a clear view on the notion of superior responsibility.

The ICTR is even vaguer in its argumentation regarding the nature of superior responsibility than the ICTY. The Trial Chamber in *Akayesu* simply maintains that “Articles 6(1) and 6(3) address distinct principles of criminal liability and should, therefore, be considered separately. Article 6(1) sets forth the basic principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), as it derives from military law, namely the principle of the liability of a commander for the acts of his subordinates or ‘command responsibility’”.[[629]](#footnote-630) There is no further clarification upon the nature of command responsibility, but by the contrasting it with the modes of responsibility in Art. 6(1) of the ICTR Statute, it can be argued that the Court approached it as a separate offence rather than a mode of participation to the underlying crime.[[630]](#footnote-631)

It becomes clear from the above analysis that there is no clarity regarding the nature of superior responsibility in the Nuremberg and Tokyo trials nor in the Control Council No 10 tribunals’ or the *ad hoc* criminal Tribunals’ case law. One would have expected that in the ICC jurisdiction, where a more detailed Statute in terms of the individual criminal responsibility doctrines applies, there would be a clearer picture. Nevertheless, even though determining the factual and mental elements of civilian superior responsibility in contrast to the elements of military commander, Art. 28(b) does not offer any indications over the nature of superior responsibility. It is not clear whether it is meant as a mode of responsibility for the civilian superior’s participation in the crimes committed by the subordinates or whether it is a *sui generis* liability. To reach a conclusion upon this, the following section analyses the concept of omission in criminal law and makes distinctions within it, based on the *mens rea* of the individual responsible for the omission. This theory will be later applied to Art. 28(b) of the ICC Statute.

## The theory of omission in criminal law and its implications in attributing criminal responsibility to the individual

It is easy to understand that the superior responsibility doctrine creates criminal responsibility for an omission, as the superior/individual fails to prevent the criminal activity of their subordinates or, if the crime has already been committed, fails to punish them or submit the matter to the competent authorities. While both common law and continental law jurisdictions recognise omission in terms of criminal law, it is the latter, which makes a clear doctrinal distinction of the different types of omission relevant to crimes. This is why the omission discussion in this section builds upon the relevant continental law definitions differentiating between two categories of omission: inauthentic omission and authentic omission. In this context, it will be argued that there are two categories of inauthentic omission, the direct and the indirect one, and that both of these categories are to be approached as participation to a substantive crime. On the other hand, it will be explained that authentic omission creates responsibility not for a substantive crime but for a special dereliction of duty crime.

### Inauthentic omission theory

As it has previously discussed,[[631]](#footnote-632) national criminal law accepts that an individual can contribute to the commission of crimes with an “active” *actus reus* such as killing, causing serious bodily or mental harm, torturing, forcibly transferring civilians,[[632]](#footnote-633) not only by physical acts but also by the lack of them, i.e. by omission. Indeed, a pure “naturalistic” distinction between act and omission based on bodily energy is irrelevant for law, which is ‘not just nature’ but is based primarily upon normative decisions.[[633]](#footnote-634) Moreover, approaching acts in the mechanical way of wilful bodily movements ignores the complex human interaction with their environment, which goes beyond physical actions. Thus, the concept of individual criminal responsibility is based upon the understanding that the individual commits crimes under their own will and not as a passive recipient of events. This means that conscious inaction, when it results to a certain criminal outcome in the outside world, is as much a product of human agency as is also an “active” act and, thus, should attach responsibility to the individual. As Fletcher points out, ‘[such a] humanistic approach towards understanding action requires that we abandon the idea of scientific *explanation* of action as the product of causal forces. The humanistic view stresses the way human beings understand other people to be acting when they do act. This difference is signalled in German as that between *verstehen* (understanding) and *erklaeren* (explaining)’.[[634]](#footnote-635)

Based on this understanding, continental law jurisdictions usually establish a provision in the general part of their criminal codes confirming that crimes of active conduct can be also committed by omission,[[635]](#footnote-636) while common law jurisdictions acknowledge this in their case law.[[636]](#footnote-637) In (continental) legal theory, this concept is analysed under the definition of improper/inauthentic omission (*unechtes Unterlassung* in German law) [[637]](#footnote-638). It is called like that because, as it accounts for an “active” contribution to the crime, it is rather a “disguised” act than a proper/authentic omission. In this sense, the inauthentic omission theory can be also applied to other than commission types of participation to the crime, for example aiding and abetting. Indeed, as inauthentic omission consists of the fulfilment of the *actus reus* of the crime or at least of facilitating its commission, it lays in fact in the realm of the modes of participation to the crime elements. Criminal responsibility is attached to the individual, not for their failure to act per se, but because this omission is accepted as an act which contributed to the criminal outcome.

Inauthentic omission can be either direct or indirect. In terms of the direct inauthentic omission, it is the failure to *act* which leads to the criminal outcome, i.e. the omission of a doctor to provide their patient with medication, resulting to the latter’s death; or the omission of the security guard to lock the door, assisting thus the perpetrators of theft. It becomes obvious, thus, that direct inauthentic omission can create criminal responsibility to the individual as a perpetrator but also as an aider and abettor. In contrast to the direct inauthentic omission, the indirect inauthentic omission is the failure to *prevent* the “active” acts of other individuals who contribute to the criminal outcome, as is, for example, the case of a commander who fails to stop their soldiers of killing war prisoners.

Inauthentic omission is justified as participation because it contributes to the commission of the crime. This means that, as is the case with all the modes of participation to the crime, there has to be a causal link between the omission and the criminal outcome. However, due to the lack of physical action, this causal link is not as clear as in the case of an “active” *actus reus*. In terms of the indirect inauthentic omission, this causal link is even more indistinct, as it is not the omission of the individual to act that leads to the commission of the crime, but the crime is committed by the “active” others under the individual’s omission to exercise control and prevent them. Consequently, in order to attribute responsibility to the individual for participation to the crime through inauthentic omission, it is necessary to identify the causal link between the failure to act or the failure to prevent the acts of others and the criminal outcome. [[638]](#footnote-639)

The theoretical framework to approach causality in relation to the criminal outcome has been already developed in Chapter 5, in terms of the harm and the risk increase theories. [[639]](#footnote-640) Following these, the acts of the individual need to create/increase the risk of harm to the protected legal good and the individual criminal responsibility emerges when this harm indeed materialises.[[640]](#footnote-641) Nevertheless, as omissions are lacking an “active” act, it is difficult to identify whether/how they endanger the protected legal good. Criminal law theory in both common and continental national jurisdictions, in order to clarify the rather tenuous inauthentic omission causal link has introduced a requirement of a duty to act against a criminal outcome. The explanation for such a requirement is that law cannot ask of an individual to act in order to end any wrongfulness they become aware of and, thus, their omissions to act towards a criminal outcome could be criminalised only when there is a specific legal duty, which bounds this particular individual. Naturally, such a duty should pre-exist the attribution of criminal responsibility, as there is no crime without a prior legal provision. As the common law eloquently expresses this argument, there is no good Samaritan law obliging the individual, because this would put a disproportionate burden on the society.[[641]](#footnote-642)

Nevertheless, the quest for a relevant duty to act in terms of crimes of inauthentic omission is highly problematic. As inauthentic omission is applicable to general/substantive crimes with an active *actus reus*, there are no specific criminal law rules which create a duty to act in relation to each of these crimes. Even in continental law, which is based on detailed statutes, the duties linked with commission by omission are not described in the penal code. They are rather extracted by the civil or commercial code or they are simply justified by the existence of special social relationships, such as the relationship between a parent and a child, for example. [[642]](#footnote-643) In common law, the same duties more or less are being developed by the courts, depending on the circumstances of the cases before them.[[643]](#footnote-644) As Fletcher points out, ‘[t]here is no Western legal system that exhaustively regulates, by statute, the situations that generate a duty that will, in breach, support the conviction for [e.g.] criminal homicide’.[[644]](#footnote-645)

Under this process, however, new duties to act can be extracted from other legal documents by the courts indefinitely, as new types of social relationships emerge. This approach contradicts the principle of legality, as there cannot by any crime without a previous *criminal* law which establishes the unlawfulness of a specific behaviour,[[645]](#footnote-646) which is certainly a problem for the highly dogmatic continental jurisprudence, but it also troubles common law scholars.[[646]](#footnote-647) In any case, it creates a problem for the ICC jurisdiction, as the ICC Statute seems to follow a continental law approach in terms of the legality principle, [[647]](#footnote-648) opting for an elaborate description of the *actus reus* and *mens rea* of international crimes in Articles 5-8 and 30, and a detailed account of the modes of responsibility in Art. 25, which is lacking from the Statutes of the *ad hoc* criminal Tribunals deriving mostly from the common law tradition.

Moreover, if inauthentic omission is accepted as contribution to the commission of the crime, then there is not a doctrinal necessity for the participant to have a certain legal duty compelling them not to contribute to the crime, as a perpetrator or an aider and abettor are criminally responsible irrespectively of whether they had a duty to protect the legal good they harmed or not. It can be argued, nonetheless, that law in general and criminal law, in particular, creates an ultimate duty upon individuals not to harm humanity and this is what makes the attribution of criminal responsibility justifiable.[[648]](#footnote-649) But this is a rather generic duty, providing in an abstract theoretical level the *raison d’ être* of individual criminal responsibility, applying in principle to both “active” acts and omissions, and it is not quite the same as the existence of specific legal duties under criminal law.

To sum up, the challenge of inauthentic omissions, in contrast with “active” acts is that they cannot have any visible appearance/demonstration in the outer world and that makes them a rather elusive concept, creating uncertainty in criminal law. In order to make them more evident, criminal law links them with specific legal duties, even though theoretically, there is no need for such a link.[[649]](#footnote-650) It is proposed here that, leaving aside the duty requirement, the causal link between the inauthentic omission and the underlying crime can be satisfied through the notion of control in combination with a specific *mens rea*.

When the individual is in a position to control the criminal outcome, then their failure of doing so creates a risk of harm to the protected legal good, or it increases an existing one. In terms of direct inauthentic omission, there is a control over the situation in general, while in indirect inauthentic omission there is control over the “active”/physical perpetrators. Moreover, the exercise of control should be linked to the *mens rea* of intent or at least advertent negligence. [[650]](#footnote-651) In order to be found responsible for participation to the crime via direct inauthentic omission, the individual should be aware of their ability to control the situation and either decided not to act accordingly (intent) [[651]](#footnote-652) or they unreasonably decided that the criminal outcome will not take place eventually (advertent negligence). Regarding indirect inauthentic omission, the *mens rea* of intent is obviously adequate: if the individual knows that others under his/her control will commit a crime and he/she decides not to stop them, i.e. when he/she intentionally omits to prevent them, then they should be criminally responsible. In terms of negligence, though, the conclusion may not be the same.

Applying the negligence theory in terms of the indirect inauthentic omission, when the individual does not even realise that the others under his/her control are committing a crime and this is why he/she fails to prevent them (inadvertent negligence), then to punish him/her as participant to the crime would fall under the category of vicarious liability, as a form of strict liability.[[652]](#footnote-653) As this form of liability contradicts the individual criminal responsibility doctrine, it should not be applied in terms of the substantial crimes (i.e. the crimes usually established in the general part of the penal code in national jurisdictions). [[653]](#footnote-654) Indeed, to punish someone *as a participant* *to a crime of others* he/she was not aware of, even in case he/she did a bad job in controlling the perpetrators properly at the first place, seems too harsh a punishment. In any case, it goes against the principle of leniency in favour of the accused modern criminal law applies in borderline situations.

As a result, indirect inauthentic omission cannot be justified under the *mens rea* of inadvertent negligence. The next step is to examine whether it can be justified in terms of advertent negligence. In this situation, the individual has suspicions that persons under his/her control may commit a crime, but he/she discards this possibility because they believe that it will not happen. Should the individual be responsible as a participant to the crime of the “active” perpetrators? It is argued that, in this case, the individual’s *mens rea* does not fully cover the causal link to the crime. The individual is in doubt of whether their omission creates a risk to the protected legal good because one cannot fully predict the behaviour of others when there is a simple suspicion about it, even if this suspicion is well-founded. Consequently, as is the case with inadvertent negligence, an individual cannot be a participant to the crime via an indirect inauthentic omission under the *mens rea* of advertent negligence.

The following examples are useful in order to clarify this argument. A walks on the street and sees B having a heart attack. A ignores B and continues their way without calling an ambulance. B dies due to the heart attack. In terms of *mens rea*, based on the theoretical construction developed in Chapter 5, A has an intent towards B’s death, because they are aware that by not helping them there is a risk that they will die and decide not to offer the help anyway. Nevertheless, there is no causal link between A’s omission and B’s death, because A does not have any control over the situation. Other people passing by could have also helped B and they have also omitted to do so. In this sense, the argument that individuals are not required to be superheroes and help everyone is indeed valid, otherwise, most of us would be responsible for participating in a crime commission sometime in our lives.[[654]](#footnote-655) In this case, inauthentic omission is not established.

However, a slightly different situation should also be examined. A and B are friends and A invites B to their house. While being there, B is choking with food. A realises that, but stands impassive in front of B, watching them die. In this scenario, as A’s house is their personal, protected from the social world space, it can be argued that A has control over the criminal outcome, i.e. whether B will die helpless or not. In this sense, A’s intentional omission not to call for help created a risk of harm for B’s life. Thus, A is responsible for B’s death, in the same way as if they choked B themselves, i.e. as a perpetrator. In this scenario, A’s conduct can be characterised as an inauthentic omission. It goes without saying, nevertheless, that even though the mode of responsibility is the same, it does not bear the same amount of blameworthiness to simply take advantage of a situation than actively kill someone, so A’s penalty in this scenario would be in the lowest margin of the intentional homicide range.[[655]](#footnote-656)

While the previous examples refer to direct inauthentic omission cases, the same theoretical approach applies also to indirect inauthentic omission. This is the case of a policeman, for example, who sees a citizen being killed in the street by other individuals but does not intervene to stop them. If it is accepted that the policeman had control over the perpetrators, in the sense that he/she, due to their status and equipment, had the power to oblige them to stop, then the former’s intentional refusal to do so increases the risk of harm for the life of the victim. Naturally, when many individuals share the control ability over the perpetrators, then each of them can be responsible for participation to the crime via indirect inauthentic omission, as criminal responsibility derives from personal culpability, irrespectively of the personal culpability of others for the same *actus reus*.

To sum up, regarding indirect inauthentic omission, where the responsibility of the individual is discussed in terms of their failure to prevent the crime of others, this individual could be responsible as a participant to the underlying crime only when they omitted with intent. Nevertheless, this does not mean that the individual who negligently fails to prevent others from committing a crime should be free of any responsibility. It means, however, that their responsibility should be discussed on a different legal basis, this of authentic omission.

### Authentic omission theory

Besides inauthentic omission, which is approached as participation to the commission of the crime, there is also another type of omission, the so-called proper or authentic omission (*echtes Unterlassung* in German law). There are specific crimes in national jurisdictions which can be committed only through an omission rather than a physical act.[[656]](#footnote-657) One example of such a crime is the omission to save an individual who is in danger when one can do it without danger for their own lives. In authentic omission, there is no causal link between the failure to act and the final result, e.g. the death of the random individual in the previous example. [[657]](#footnote-658) As such, the person who omits could not be responsible for participation in the crime of homicide, but some national jurisdictions have chosen to render them responsible anyway under a different theoretical basis.[[658]](#footnote-659)

As omission is not equated with commission in the authentic omission crimes (*echtes Unterlassungdelikte*), the criminal responsibility of the individual originates not from their participation to a crime, but solely from a dereliction of duty. In other words, each of the authentic omission crimes is based on the perception that the individual in question has a specific duty to act in a specific way- a duty that is generated by each authentic omission crime in particular-, but they do not fulfil this duty. The individual is then criminally responsible only for their failure to fulfil such a duty and not for the commission of a substantive crime. This conclusion is also reflected in terms of sentencing. While the penalty range for commission by omission is the same as this of the different types of participation to the crime, the sentences for a proper omission crime are by far less severe.[[659]](#footnote-660)

As authentic omissions constitute special crimes of failure of duty, the *mens rea* of negligence should be sufficient. This is because the rationale of the “duty to act” concept lays primarily on justifying individual criminal responsibility in cases where the person who omits was not even aware that this omission could lead to a criminal outcome (inadvertent negligence). It is precisely because of such a duty that the individual *is expected* to be aware of the relevant circumstances and to act accordingly (‘should have known’ standard). The contents of each duty vary, depending on the provisions of each authentic omission rule. As a general rule, though, in situations where the authentic omission is related to the crimes of others, these duties will reflect the specific relationship between the individual who omits and the perpetrators. In these situations, the individual who negligently failed to control the ‘active’ participants of the crime, cannot be responsible as a participant to the substantial crime themselves, but they can be found responsible for a dereliction of duty, as a special crime.

After providing the theoretical framework on inauthentic and authentic omission, the following section applies it to Art. 28(b) of the ICC Statute, in order to discuss the responsibility of the civilian superior regarding the crimes of their subordinates. This line of argumentation will be then applied in the case of company directors as civilian superiors.

## The omissions of the civilian superior: identifying the nature of individual criminal responsibility in Art. 28(b) of the ICC Statute

So far, the ICC case law has approached superior responsibility as a *sui generis* form of responsibility, distinct from the modes of responsibility described in Art. 25 of the ICC Statute.[[660]](#footnote-661) It has done so, however, without offering a valid justification, i.e. without explaining why this type of responsibility is different from the responsibility established in Art. 25. The Trial Chamber in *Bemba* has merely stated that, contrary to Art. 25, Art. 28 renders the superior responsible for the crimes of their subordinates, rather than their own crimes. Nevertheless, it added that the superior is eventually responsible for the underlying crimes, confirming the existence of a causal link to the crimes committed by the subordinates.[[661]](#footnote-662) Based on the elements of Art. 28 (b) of the ICC Statute and the omission theory discussed in the previous sections, this section offers a new approach towards the nature of superior responsibility in the ICC Statute. It does so by a) distinguishing between the failure to prevent the crimes of the subordinates and the failure to punish/refer the matter to the competent authorities, and b) making a further distinction between fulfilling the above active elements under the mental element of intent or under the mental element of negligence.

### Failure to prevent the crime of the subordinates

In order to decide whether the civilian superior’s *actus reus* of ‘preventing a crime the subordinates are about to commit’ constitutes an indirect inauthentic or an authentic omission, first of all, the existence of a causal link to the substantive crime should be examined. According to the previous section’s analysis, such a causal link is to be found in the notion of control and the superior’s *mens rea* regarding this control. Thus, the superior should be able to exercise effective control over their subordinates who commit the crime and they should have failed to do so. In addition, this failure should be intentional: the superior must have knowledge or, at least, be wilfully blind about the fact that their subordinates are committing a crime and they, nevertheless, decide not to do anything against it. If these two conditions exist, then the superior’s responsibility for failure to prevent the crimes of the subordinates corresponds to the inauthentic omission theory, as discussed in the previous section, and they should be responsible as participants to these underlying crimes of the subordinates.

The wording of Art. 28(b) of the ICC Statute is clear in this matter, as the responsibility of the civilian superior cannot be established without them being capable of exercising control over their subordinates. Moreover, it requires intent as a *conditio sine qua non* in order to attach criminal responsibility to the civilian superior, following the general *mens rea* standard of Art. 30.[[662]](#footnote-663) In this sense, the ICTY Trial Chamber’s argument in *Halilović* that “criminal negligence is not a basis of liability in the context of command responsibility”[[663]](#footnote-664) is valid when superior responsivity is approached under the indirect inauthentic omission theory.

The conclusion is that, as regards the prevention of the crime, the omission of Art. 28 is, alongside with “active” acts, another way of fulfilling the objective element of the different type of the modes of participation in Art. 25.[[664]](#footnote-665) The “superior failed to take all necessary and reasonable measures within his or her power to prevent [the] commission [of the crimes by their subordinates] clause of Art. 28(b)(iii), combined with the intent requirement of subparagraph (i) of the same Article, could as well be a subparagraph of Art. 25,[[665]](#footnote-666) *covering the situation where an individual capable of exercising control over others, intentionally fails to do so*.[[666]](#footnote-667)  The superior is responsible for the substantive underlying crime on the same level as the subordinates: if the subordinates are perpetrators, then he or she is a(n) (indirect) perpetrator too; if the subordinates are aiders and abettors to the crime committed by others, then he or she is an aider and abettor accordingly.[[667]](#footnote-668)

In this vein, it is reminded that the *actus reus* of the crimes in the ICC Statute can be fulfilled not only by an act but also by an omission.[[668]](#footnote-669) Having in mind Chapter’s 4 analysis of perpetration in Art. 25 of the ICC Statute, an individual can commit an international crime through a direct inauthentic omission, when they, for example, omit to give a specific order to their subordinates in order to avoid the criminal outcome.[[669]](#footnote-670) Similarly, an individual can facilitate the perpetrators of an international crime for the purposes of the ICC Statute, as discussed in Chapter 5, [[670]](#footnote-671) through an intentional direct inauthentic omission.[[671]](#footnote-672) This chapter argues that such an individual can also participate in the crime through an indirect inauthentic omission when they intentionally fail to prevent the persons under their control from committing it.

Ambos adopts a somewhat similar approach, with a different conclusion though. He also accepts that the failure to prevent the crime of the subordinates, when is accompanied by intent, constitutes an inauthentic omission and belongs to the modes of participation. However, he argues that Art 28 does not cover this inauthentic omission responsibility in the first place. He interprets the “failure to prevent the crimes of the subordinates” element as a failure to supervise, concluding, thus, that superior responsibility of Art. 28 is responsibility for dereliction of duty, i.e. failure to supervise subordinates and failure to report their crimes, and not participation to the underlying crime. [[672]](#footnote-673) Nevertheless, he does not explain the difference between failure to prevent a crime as a participant (Art. 25) and failure to prevent a crime as a dereliction of duty (Art. 28) in terms of the civilian superior, when the only acceptable *mens rea* in the ICC Statute is intent in both cases.

Nybondas, on the other hand, distinguishes between a superior who is merely negligent in their failure to prevent the crime of the subordinates and a superior who omits intentionally. In the first case, she correctly argues that the superior is responsible for a dereliction of duty, as one cannot negligently participate in a crime committed by others. Regarding the intentional omission, though, which is the case of the civilian superior of Art. 28(b) of the ICC Statute, she argues that ‘a form of sui generis participation’ to the crime is constituted. She characterises this type of criminal responsibility as an ‘aggravated command responsibility’, which ‘does not have to meet the requirements’ of Art. 25, without, nevertheless, offering any further explanation. [[673]](#footnote-674)

### Failure to punish the subordinates or refer their crimes to the competent authorities

So far, it has been established that the intentional omission to prevent the crime of the subordinates justifies the attribution of criminal responsibility to the superior as a participant to the crime. Regarding the failure to punish the subordinates, however, or the superior’s omission to submit the matter to the competent authorities, there is a different conclusion. As has been previously explained, this component of Art. 28(b)(iii) covers the situation where the superior learned about the crime(s) of the subordinates after the commission. One cannot be a participant to the commission of a crime they did not know of or were purposeful ignorant about in the first place, so the civilian superior cannot be considered as a perpetrator or an aider and abettor anymore. Thus, their criminal responsibility according to Art 28(b) should be based exclusively on their failure to fulfil a duty.[[674]](#footnote-675)

The content of this duty emanates from the existence of a superior-subordinate relationship, as established in Art. 28(b). In other words, it is incorporated into the very nature of the superior’s authority towards their subordinates.[[675]](#footnote-676) In this sense, the superior’s ability to control their subordinates is not relevant per se: the superior did not know about the crime as they were not diligent in exercising control, but this is not what creates their duty to punish their subordinates for committing it. This duty is based rather on the fact that, because of such control, a specific circumstantial relationship has been created between the individual who omits and the person who commits, i.e. a superior-subordinate relationship. Under this shift of focus, the English courts, for example, have recognised control as a ‘pro-duty factor’: due to the exercise of control, a specific relationship is established between two parties and it is this relationship that creates certain duties of the one towards the other. [[676]](#footnote-677)

Due to the superior-subordinate relationship, superiors are responsible for their subordinates and they need to be able to efficiently supervise them.[[677]](#footnote-678) In order to do so, they undertake a duty of due diligence.[[678]](#footnote-679) In terms of the after the commission of a crime provisions of Art. 28(b), this duty is identified as a duty to punish the subordinates when they violate the law or refer the matter to the authorities.[[679]](#footnote-680) It includes ‘at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities if the superior does not have the power to sanction himself’.[[680]](#footnote-681) In this regard, the *ad hoc* Tribunals have argued that the duty to punish should be approached in a broad sense when it refers to civilian superior, as they are not in a position to punish their subordinates in the same sense as a military commander can punish their soldiers. Thus, ‘[t]o require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities’.[[681]](#footnote-682) For this reason, the “punishment” capacity of civilian superiors will most often limit itself in referring the subordinates responsible for the commission of a crime to the relevant authorities, in order to initiate a criminal investigation.[[682]](#footnote-683) Company directors, for example, may possess some additional options in terms of “punishing”, which will be discussed in the last section of this chapter.

As it has explained in the previous section, authentic omissions constitute special crimes of omission, which are distinct from the substantive crimes found in the general part of a penal code. Thus, in the case of failure to punish the subordinates or refer their crimes to the competent authorities, Art. 28(b) of the ICC Statute establishes a special crime, distinct from the general international crimes set in Articles 5-8: this of ‘omission to act diligently’. As noted by Ambos, in this case ‘[t]he underlying crimes of the subordinates are neither an element of the offence nor a purely objective condition of the superior’s punishability. Rather, they constitute the point of reference of the superior’s failure’.[[683]](#footnote-684) The civilian superior is criminally responsible only for the authentic crime of omitting to stay informed about the acts of their subordinates or to punish the latter/ contact the authorities regarding the subordinates’ crime(s).[[684]](#footnote-685) It follows that, in this case, the superior’s sentence cannot be similar to this of the participants to the crime but much less instead.

In principle, the *mens rea* of inadvertent negligence would be sufficient: even if the superior did not know of the criminal act they were supposed to punish or report to the authorities, the existence of their duty creates a ‘should have known’ standard.[[685]](#footnote-686) The ICC Statute accepts negligence, as an exception to the intent *mens rea* standard of Art 30, regarding the military commander’s duty to punish their subordinates for the crimes they have committed (Art. 28(a)(ii)).[[686]](#footnote-687) However, as is the case with inauthentic omission, Art. 28(b)(i) requires intent and not mere negligence in terms of civilian superiors for their failure to fulfil their duty. Consequently, the civilian superior should be responsible for their omission to punish their subordinates or refer the issue to the competent authorities only when they know or choose not to know (wilful blindness) that the latter have committed the crimes, and decided not to do anything about it.

Thus, the duty to punish in terms of civilian superiors does not include an obligation to investigate possible crimes, as it is the case of the military commander who is responsible even if they should have known, but they did not.[[687]](#footnote-688) The civilian superior can be responsible only if they happened to have the relevant information, and not in case they did not actively investigate to obtain them. Nevertheless, under this approach, Art. 28(b) of the ICC Statute unjustifiably weakens the scope of application of the civilian superior’s duty of due diligence. If anything, the due diligence duty covers primarily the *mens rea* of negligence, as its main purpose is to render the individual responsible in cases they should have taken care of a situation more responsibly than they did. How is then the civilian superior expected to fulfil their due diligence duty if they are not required to actively search for relevant information (under reasonable circumstances)? [[688]](#footnote-689)

### Synopsis: Art. 28 (b) incorporates two different types of individual criminal responsibility

From the previous analysis, it becomes clear that Art. 28(b) of the ICC Statute is an umbrella provision. It incorporates two different types of individual criminal responsibility: the responsibility of a participant (perpetrator or aider/abettor) to the underlying offences of others; and responsibility for a special crime of a dereliction of duty. Approaching the superior responsibility doctrine as such responds to the “violation of the individual criminal responsibility base of international criminal law” criticism expressed by some scholars. Indeed, it has been argued that superior responsibility ‘surprises, because it partly neglects and reaches beyond the traditional concept of criminal liability and personal guilt, the well-accepted and acknowledged indispensable basis of criminal law and responsibility for centuries in all major legal systems in the world’.[[689]](#footnote-690) However, the two types of liability argued for in this section are in compliance with the international criminal law principles, of individual criminal responsibility and personal culpability. In terms of the intentional omission to prevent the crime, the individual/superior does not become responsible for the crimes of others/subordinates, but for their own participation in the criminal outcome. Regarding the omission to punish, the superior is responsible as a perpetrator of a distinct crime, that of a dereliction of duty. Thus, the principles of individual criminal responsibility and personal culpability remain intact. [[690]](#footnote-691)

This section has applied the general omission theory in the particular features of Art. 28(b) of the ICC Statute. The next session will apply Art. 28(b) of the ICC Statute in relation to the company directors’ role in the commission of international crimes.

## Applying Art. 28(b) to subsidiary corporations and supply chains: is there room for criminal responsibility of the parent/multinational corporation’s directors?

The corporation’s activities are the outcome of either the direct decisions of its directors or their failure to fulfil their relevant duties. According to the legal personality analysis in Chapter 2, for criminal law purposes, corporate liability can be approached only through individual responsibility. This is why, as is the case with the modes of responsibility discussed in the previous chapters, the superior responsibility doctrine is also applicable in order to identify the criminal responsibility of the company directors when the corporate activities contribute to the commission of international crimes.

However, as explained in this chapter, Art. 28(b) establishes the responsibility of a superior for their failure to prevent or punish the crimes that their subordinates committed on their own account. This is different from a superior ordering the perpetrators to commit a crime and this is why responsibility for an indirect inauthentic omission cannot rise within the same corporation. In contrast with soldiers who are more prone to commit international crimes under their own decision, the employees of a corporation act upon orders from the superiors. Thus, the employers of a corporation will not commit international crimes independently from the actions of their superiors. In this sense, only direct superior responsibility can be attributed to the directors of a corporation, when they order their subordinates to commit or aid and abet the commission of international crimes[[691]](#footnote-692) or when they themselves omit to give the proper orders to their employers, as discussed in a previous section regarding direct inauthentic omission.

Nevertheless, modern trade operates in an extremely complicated network.[[692]](#footnote-693) It is not only that the corporations have a complex internal structure themselves, but they also extend their business interests by establishing a number of subsidiary corporations, with their own corporate personality and management each. Moreover, multinational corporations collaborate with suppliers around the world, which are companies that are independent of the multinational corporation (i.e. not a subsidiary) and that are only linked with them through contracts. These suppliers provide the companies at the top of the supply chain with raw material and/or products under the brand of the multinational corporation. Therefore, there is the possibility of applying the superior responsibility doctrine of Art 28(b) to the context of the parent/multinational corporation and subsidiary/supply corporations’ relationship. As it will be revealed by the analysis of the scenarios discussed in this section, when the element of control and the subsequent superior-subordinate relationship between the parent and the subsidiary or between the corporation and their supplier is established, then there is room for rendering the company directors responsible for the acts of the subsidiary/the supplier.

This said, the first scenario is the following: A UK oil corporation establishes a subsidiary corporation in Nigeria. The subsidiary then collaborates with the Nigerian government in order to forcibly remove the local population from the drilling area. In order to do so, corporate personnel, together with the soldiers, destroy the local villages and force people into trucks. On top of these, the subsidiary corporation allows the government air force to land their helicopters in the corporation’s helipads to assist in the quick arrival of more soldiers to the area. Based on the analysis of such acts in Chapters 4 and 5, the subsidiary corporation’s directors can be found responsible as indirect (co)perpetrators or as aiders and abettors to crimes against humanity. The question is whether the directors of the parent corporation can be found criminally responsible for not preventing the crimes of the subordinates and what kind of responsibility could that be; moreover, whether they can be found responsible for omitting to report to the relevant authorities the subsidiary corporation’s involvement to the crimes if they learned about it after the commission of these crimes.

In terms of the indirect inauthentic omission theory discussed in previous sections, the exercise of control is the key point. As it has been explained in Chapter 2 though, in theory, the parent and the subsidiary corporation are two separate legal entities. In English courts, example, it has been established that ‘[u]nder the ordinary rules of law, a parent company and a subsidiary company, even a 100 per cent subsidiary company, are distinct legal entities, and in the absence of an agency contract between the two companies one cannot be said to be the agent of the other’.[[693]](#footnote-694) The subsidiary corporation is an independent legal person with their own interests, their own agenda and their own directors, who work solely for the purposes of the subsidiary. The directors of the parent corporation, even though their corporation is a member of the subsidiary corporation, do not have the authority to intervene in its decision-making process nor to determine the latter’s actions in favour of the interests of their own corporation. As a result, their omission to prevent the unlawful acts of the subsidiary corporation, even if it took place intentionally, cannot establish the necessary causal link to the criminal outcome and, thus, cannot render them responsible for it.

However, there have been cases where, even though in principle the law recognises the distinct legal personality of the parent and the subsidiary corporation, the courts have managed to impose liability to the parent corporation. They have argued that when the parent corporation has a *de facto* control over the subsidiary, usually in cases where the subsidiary is wholly owned by the parent corporation, the subsidiary is perceived as carrying on business as an agent of the parent corporation.[[694]](#footnote-695) This means that the decisions of the subsidiary’s directors are in fact controlled by the directors of the parent corporation. In the English case of *Prest v Petrodel Resources Ltd*, this process has been identified by Lord Sumption through the “concealment principle”. According to him, ‘[the concealment principle] […] is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases, the court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing’. [[695]](#footnote-696)

Thus, there are cases where the parent corporation’s directors exercise control over the subsidiary corporation’s activities. As discussed in Chapter 2, the type of control exercised by company directors is this of overall control. Such control allows the company director to delegate power to lower managers and still have the final saying over the corporate activities. This is because corporations operate under a general control system, where the delegates report their decisions and acts back to the company directors, who have the power of the final decision or consent. In such a system, the company directors have the capacity to restrain a specific corporate strategy because it leads to the commission of international crimes, without having detailed knowledge of every order given down the corporate structure by the senior managers to lower managers to employers who physically participate in the crime commission. Applying overall control in the parent/subsidiary scenario, the parent corporation’s directors do not have to control every single action of the subsidiary as long as they are able to control the “final” activity, i.e. the one linked to the commission of the international crime. As argued in a previous section of this chapter, such an overall control fits the effective control requirement of Art. 28(b) of the ICC Statute, as it is understood by the ICC case law as the material ability to prevent the subordinate’ crime.

Following this analysis, let us accept that in the given scenario, the parent corporation exercises effective control over the subsidiary. In such a situation, a causal link between the decisions of the parent corporation’s directors and the criminal acts of the subsidiary corporation is identified. The parent company directors were aware that their omission increased the risk of harm, while they were in control of the subsidiary, and they decided to proceed that way.[[696]](#footnote-697) Consequently, this causal link has to be covered by a *mens rea* of intent towards the criminal outcome. In this regard, Art. 28(b)(i) and (iii) conscious omission of the parent corporation’s directors to ‘take all necessary and reasonable measures within their power to prevent’ the international crimes committed by the subsidiary corporation can be considered as contribution to the underlying crime, creating criminal responsibility for them under the indirect inauthentic omission theory.

Based on this logic, residents of the Ogoni Region in Nigeria have filed a number of (tort) lawsuits in the US against Shell, accusing the corporation of aiding and abetting the Nigerian government’s human rights abuses, through their control over their subsidiary Shell Petroleum Development Company of Nigeria.[[697]](#footnote-698) The case of *Vedanta* before the UK Supreme Court is another example.[[698]](#footnote-699) Vedanta, a multinational corporation domiciled in the UK, is the parent corporation of Konkola Copper Mines plc (KCM), a public company incorporated in Zambia. KMC has been accused of discharging toxic emissions from their mining operations to the area’s water sources, seriously affecting the health and livelihood of the local population. In 2015, a group of Zambian citizens affected by the activities of KCM filed a lawsuit against KCM and Vedanta in England.[[699]](#footnote-700) The claimants argued that Vedanta, as the parent corporation and ultimate owner of KCM, exercised a ‘very high level of control and direction’ over the subsidiary, while the Supreme Court concluded that ‘materials published by Vedanta state that its ultimate control of KMC is not […] to be regarded as any less than it would be if wholly owned’.[[700]](#footnote-701) In terms of the level of control over the subsidiary, Lord Briggs, issuing the judgment, stated that the liability of the parent corporation can arise by laying down ‘group-wide policies and guidelines’ for the managers of the subsidiary to follow, especially when these policies are supplemented by ‘active steps, [such as] training, supervision and enforcement, to see that they are implemented by relevant subsidiaries’.[[701]](#footnote-702) Subsequently, the Supreme Court affirmed the admissibility of the case, allowing for its discussion on merits before English courts.[[702]](#footnote-703)

Regarding criminal law, French prosecutors have indicted, in 2018, the cement parent corporation Lafarge for complicity in war crimes and crimes against humanity for the financing aid they and their subsidiary corporation Lafarge Cement Syria (LCS) have provided to the Islamic State fighters. According to the European Centre for Constitutional and Human Rights, ‘[t]his is a worldwide premiere for a parent company to be indicted for complicity in crimes against humanity [and] the first time that a multinational parent company in France is indicted for the activities of one of its subsidiaries abroad’.[[703]](#footnote-704)

The major advantage of approaching the company directors’ failure to prevent the crimes of their subordinates as participation to the crime is that there is no need for a pre-existing duty to prevent the crime of the subordinates. This is important in terms of company directors because current international law does not impose any duties on company directors that could render them responsible for an international crime. As it has already explained in this chapter, the main issue with the application of superior responsibility to civilians -which has never been discussed by an international court since the establishment of the international criminal justice regime- is this of legality. Even if one accepts that the duties of military commanders with respect to the conduct of their subordinates set in Articles 87 of Protocol I of the Geneva Conventions create responsibility for them for an international crime,[[704]](#footnote-705) the same is not indisputable in terms of the civilian superiors. These duties are inextricably linked to the enforcement of humanitarian law. They, thus, apply to military commanders because they participate in the hostilities and, as a result, their omissions create certain outcomes which affect humanitarian law. For the same reasons these duties can also apply to civilians who operate as de facto military commanders, and this is the approach of both the ILC and the *ad hoc* Tribunals. [[705]](#footnote-706) They are not justified, nevertheless, in the case of a civilian superior in the sense of a company director, whose role has nothing to do with being a part in an armed conflict.

As a result, the duties of the company directors should have been established by a separate, other than the API, international law document referring to the full spectrum of corporate activities, from the delegation of power scheme within the corporation to their potential involvement to the decision-making processes in the subsidiary corporations or along their supply chain.[[706]](#footnote-707) Such a document does not exist in hard international law at the moment. In 2011, the UN released the ‘Guiding Principles on Business and Human Rights’ document, building upon the 2008 UN Human Rights Council initiation towards a ‘Protect, Respect and Remedy Framework and Guiding Principles’ document.[[707]](#footnote-708) Currently, both constitute soft law and cannot be used in creating criminal responsibility for the individual in terms of hard international law. In 2014, the UN Human Rights Council agreed to work upon drafting an international treaty to regulate the activities of multinational companies, which would (indirectly) impose international legal obligations to corporations and possibly to the individuals within the corporation.[[708]](#footnote-709) Although the most recent meeting of the working group took place in 2017, whether an international treaty will be eventually adopted is uncertain.[[709]](#footnote-710)

The approach towards indirect inauthentic omission adopted in this chapter surmounts such a dead-end outcome, as it does not require a ‘company directors’ duties’ instrument in order for Art. 28(b) of the ICC Statute to apply. This would take a considerable burden off the shoulders of the ICC judges and would make possible the application of the superior responsibility doctrine in terms of company directors’ contribution to the commission of international crimes. As such, it is a useful tool in the ICC’s mission to fight injustice and safeguard the principle of humanity in the context of ‘peace, security and well-being of the world’.[[710]](#footnote-711)

In addition, if the parent corporation’s directors have learned about the subsidiary’s crimes after their commission, they could still be responsible under Art. 28(b) of the ICC Statute. The subsidiary corporation operates as the agent of the parent corporation so there is a special relationship between them which could be characterised as a superior-subordinate relationship in terms of Art. 28(b) of the ICC Statute. Due to this relationship, the parent corporation has a duty of due diligence regarding the acts of the subordinate. This includes the duty to punish the latter for their illegal behaviour, with “punishment” being ‘case-specific’.[[711]](#footnote-712) In this case, besides requesting the local authorities to investigate, it could also include, the dismissal of some of the managerial staff of the subsidiary corporation. It is reminded that, in terms of *mens rea*, negligence is not enough: the parent corporation’s directors should be aware of or at least wilfully blind to the fact that the subsidiary has contributed to the international crime that has already been committed.

Moving to the second scenario, the focus is on the relations between a multinational corporation and its supply chain. In general, such a relationship lacks the element of control, while the multinational corporation cannot be characterized as a supply chain’s corporation superior. Indeed, it cannot be claimed that a corporation of the supply chain operates as an agent of the multinational corporation. The supplier is an independent company, with its own legal personality, which enters in an agreement with the multinational corporation in order to provide them with material or to produce specific products on behalf of the multinational corporation. Even if the multinational corporation directors have knowledge that the supplier corporation is going to commit or is already committing an international crime, their failure to intervene cannot render them participants to the crime. First of all, in terms of their legal contract, the multinational corporation directors do not have the power to decide on how the supplier company will do business, as ‘[c]ompanies in a supply chain typically determine carefully how risks are to be allocated between them’.[[712]](#footnote-713) Consequently, the directors of a parent corporation would normally not have the capacity to stop other corporations in their supply chain from committing a crime.[[713]](#footnote-714) Thus, there does not even exist a legal omission to act regarding the inaction of the multinational corporation’s directors in the first place, because this legal concept relies foremost on the ability of the individual to act against a criminal outcome.

Even if we accept that the multinational corporation was so powerful as being able to put pressure upon the supplier corporation to stop the illegal activity, the element of (*de facto*) overall control is not satisfied by the ability to pressure against a criminal outcome.[[714]](#footnote-715) There is no way to tell with relative certainty that if the multinational corporation’s directors chose to put pressure/intervene, then the supplier would comply and that the crime would not have happened (at least in the way it did happen). The supplier corporation executives may have decided that they could not afford to do business with this multinational anymore because their involvement in international crimes was the reason why they were able to sell their products cheap to the multinational corporation and still be able to make a profit. They may have taken the decision not to renew their contract and they may have started negotiations to sell their products to another multinational corporation, with more lenient ethics, while continuing participating in international crimes. Due to the lack of control, the required causal link that justifies participation in the underlying crime cannot be fulfilled. As a rule, the omission of the multinational corporation’s directors not to prevent the crime cannot contribute to the commission of this crime by the supplier corporation.

However, recently a very interesting development has taken place in the corporate world. The voluntary adoption of corporate social responsibility schemes is becoming more and more common among multinational corporations, to accommodate the increasing public/consumers’ pressure. According to these schemes, multinational corporations are declaring their desire to promote the application of specific standards not only within the corporation but also to their supply chain corporations.[[715]](#footnote-716) Even though in general “promoting” is not equivalent to “controlling”, some corporations have decided to introduce legal obligations to the network of corporations collaborating with them, supplemented by a monitoring system to ensure compliance.[[716]](#footnote-717) Thus, these voluntary commitments can support the existence of control over the supplier and the subsequent creation of a superior-subordinate relationship for the purposes of Art. 28(b) of the ICC Statute.

In this regard, there have indeed been cases where the multinational corporation, due to their corporate social responsibility initiative, exercised a de facto control over the supply chain corporations. The example of the KiK corporation is very enlightening on this matter. On 30 August 2016, a German court agreed to hear a compensation claim (based on tort law) of employers of the Ali Enterprises textile factory in Karachi (Pakistan) against the factory's main customer, the German clothing retailer KiK. Due to a fire in the Karachi factory on 11 September 2012, 260 people were killed and 32 were injured. The plaintiffs claimed that KiK had hired auditing companies to review safety and other working conditions at the factory on a regular basis and, while being aware of the possibility of a fire, they refrained from acting accordingly. Due to this omission, the plaintiffs argued that KiK was responsible to pay compensations to the survivors and the families of the victims.[[717]](#footnote-718) Even though concerning primarily the parent-subordinate corporation relationship, the Vedanta case discussed previously, is of some relevance in this scenario as well. Establishing the existence of a duty of care of Vedanta for the acts of KCM, the UK Supreme Court argued that such a duty can arise when the multinational corporation has voluntarily stated in published materials that they are safeguarding the operations of the corporation responsible for the illegal acts.[[718]](#footnote-719)

Incidents like these show that, following a corporate social responsibility scheme, multinational corporations voluntarily accept the exercising of control over a supply chain corporation’s conduct. This allows Art. 28(b) of the ICC Statute to be applied over the multinational corporation’s directors. It follows that if the company directors know that the supply chain corporation is committing crimes and they intentionally fail to prevent them, they can be responsible as participants to the underlying crimes. Moreover, moving the focus from the notion of control per se to the existence of a superior-subordinate relationship between the two corporations, the multinational corporation’s directors would have a certain duty of due diligence over the supply chain corporation’s conduct. Thus, if they learn about the crimes of the supply chain corporation only after they have already been committed, they have a duty to “punish”: in the corporate context this duty translates in a duty to terminate their contract with the supplier, when this is possible, and request to the local authorities to investigate the activities of the supplier linked to the commission of the international crimes. Their failure to do so would render them responsible for Art. 28 (b) special crime of dereliction of duty.[[719]](#footnote-720)

## Conclusion

In this chapter, it has been argued that Art. 28(b) of the ICC Statute includes in fact two types of criminal responsibility for the civilian superior. Regarding their intentional failure to prevent the crime of the subordinates, the indirect inauthentic omission theory applies: they are participants to the crime under one of the modes of principal or secondary responsibility established in Art. 25 of the ICC Statute. In this context, the notion of control is an important element in order to establish the causal link between the individual who omits and the criminal outcome of the “active” persons.

On the other hand, in terms of punishing the subordinates after the commission of the crime, the superior is not a participant to the crime, but their responsibility is limited to their failure to act in accordance with their due diligence duty, as established in Art. 28(b) of the ICC Statute. This is a separate, authentic omission crime, where the focus moves to the civilian superior/subordinate relationship emanating from the exercise of control. This theoretical framework has been then applied to the corporate criminality context, with the scenarios focusing on the criminal responsibility of company directors for the acts, not of their own corporation, but of one of their subsidiary corporations and of a corporation belonging to their supply chain. It has been demonstrated that, in certain situations, a corporation does exercise control over the subsidiary/the supplier, which consequently allows the application of Art. 28(b) of the ICC Statute against the company directors.

# Concluding Remarks

The starting point for this research has been the remark that, whereas international criminal responsibility is individual, international crimes are linked to collective criminality. However, international criminal law has not yet managed to reach the doctrinal sophistication required to deal with this dynamic successfully. The underlying reason for this is traced to the foundations of international criminal law. Indeed, the fundamental international criminal law norms have been established at the aftermath of the Second World War, in an effort of the international community to attribute responsibility to the individual for crimes they committed through the state apparatus. As a result, the elements of international crimes, as well as the modes of responsibility for the individual have been constructed having in mind the concept of state involvement in the commission of large-scale atrocities against human beings.

However, it is non-state actors, rather than states, international criminal law is preoccupied with nowadays. The majority of cases before the ICC involve defendants who were in leadership positions of certain paramilitary groups during a civil war. Despite this reality, both theory and practice keep trying to identify the links with the state, when discussing the elements of international crimes and the doctrinal approaches to attribute criminal responsibility to the individual. If one looks at the aim of international criminal law, though, they will realise that this quest is not necessary. As it has been discussed in Chapter 1, the aim of international criminal law is to protect the individual from the violation their human dignity, the latter being a fundamental interest of the international community as a whole.

Following the above reasoning, it becomes clear that international criminal law does not aim state or state-like entities’ actions alone, but it aims to prevent the members of any collective entity with the capacity to commit international crimes from doing so. Thus, genocide, crimes against humanity and war crimes do not require a state/state-like policy, but just a policy of a collective entity. In theory, the ICC seems to adopt such a capacity-oriented approach regarding the involvement of non-state collective entities in international criminality. Despite the critics from the minority opinion within the chambers themselves and from scholars, this approach is welcomed, as it comes in conformity with the normative core of international criminal law, which is identified in the principle of human dignity. Nevertheless, in practice, when applying and interpreting the specific modes of responsibility of the ICC Statute, the Court still identifies the non-state collective entities as possessing state-like characteristics. In this direction, it follows the precedent of the prior-to-ICC international courts, which have interpreted their own rules of participation to the crime having in mind collective entities with state-like characteristics.

Therefore, this research builds on the capacity-oriented approach and interprets the modes of responsibility doctrines considering their application to the members of a non-state collective entity. For the latter, the corporation has been chosen, as one of the non-state collective entities that have the capacity to commit international crimes, without always possessing state-like characteristics. Indeed, corporate involvement in international crimes is a major current issue at the international level and international law has not yet dealt with it. In general, corporations can become involved in international criminality by collaborating with the state in the commission of international crimes; by illegal trading of natural resources with paramilitary groups in control of a specific geographical area; by providing finance and equipment to the state in order to assist the latter in the commission of international crimes; by selling to the state the means to commit international crimes, e.g. poisonous gas.

Even though corporations have been treated in national jurisdictions as having a distinct personality from their members and their decision-makers, the contribution of the individual to the decisions and activities corporation has not been ignored. According to the nominalist theory, corporations are artificial legal persons, in contrast to the individuals within them, who are natural legal persons. The corporation is an association of individuals, who determine with their decisions and acts the corporate behaviour and activities. Corporate liability for violation of the law emanates from the responsibility of specific individuals within it, who shape the corporate decisions. Corporate liability is therefore derivative, based on the responsibility of the corporate individual.

The question is which individuals within the corporation can be linked to illegal acts of the corporation. Following the identification liability doctrine, these individuals should be the ‘directing minds’ of the corporation and not just any employee of the corporation. In terms of (international) criminal law, the identification liability doctrine corresponds to the *mens rea* requirement for the attribution of criminal responsibility to the individual. The individual is criminally responsible not on the mere fact of acting in a specific criminal way but also because they are doing so in awareness of the outcome of their acts. In the corporate structure, the individuals who are in the best position to fully comprehend the outcomes of the corporate activities are those who make the relevant decisions and create corporate policies and strategies. These individuals are the directors of the corporation, who determine its activities.

Nevertheless, the decision-making process within a corporation presents its own particularities. Company directors, even though formulating the corporate policy, do not have full control over the specific decisions taken by the different departments within the corporation in order to implement this policy. Instead, they delegate their power to lower managers and, as a result, do not have effective control over the criminal outcome. However, the effective control test poses an extremely high threshold when it comes to collective criminality, creating difficulties in attributing criminal responsibility to the individual. This issue has already been identified in terms of international criminal case law, with the ICTY arguing in favour of an overall control test. Overall control is satisfied when the company director has the general operational control of the activities, without knowing specific details on the decisions being taken by the lower managers. Approaching the delegation of power process within the corporation as a way for the company directors to exercise overall control over the criminal outcome provides the appropriate background to identify the specific links between the decisions of the company directors and the international crime, in terms of the modes of responsibility in international criminal law.

Since the establishment of international criminal law, there have been many attempts to link specific individuals to crimes that have been the product of collective activity. The various doctrines that have been applied by international tribunals are based in the existence of a common plan, which is conceived by individuals on top of the hierarchy of the collective entity and is being executed by their inferiors. IMT in the Nuremberg Trial employed the conspiracy doctrine, which -when used as a mode of responsibility rather than an inchoate crime- is a theory of an individual’s participation in the execution of a collective entity’s common plan. A such, it has been linked in the Nuremberg Trial to membership in a criminal organisation.

The conspiracy doctrine has been unsuccessful because it does not fully respect criminal law principles. In order to avoid attributing criminal responsibility to an individual just because they were a member to a criminal organisation, IMT required that this individual was in knowledge of the common plan and had the required *mens rea* for the commission of the international crime. Such an approach, however, focuses on the *mens rea*, ignoring the *actus reus* of the crime. Even when the individual knows and agrees with the common criminal plan, the fact that they do not fulfil the *actus reus* of the crime relieves them from criminal responsibility. By investigating only the *mens rea* and putting aside the *actus reus* element, the conspiracy doctrine, as applied by the IMT judges, failed to satisfy the (international) criminal law’s norms.

A similar defect characterises the *ad hoc* criminal Tribunals attempt to link an individual with the international-collective crime through the common criminal plan. In order to do so, ICTY and ICTR developed the JCE doctrine, based on the individual’s contribution to the materialisation of a common plan. The criticism has to do with the common plan itself. The *ad hoc* criminal Tribunals’ case law failed in clearly identifying the limits of the common plan nor the kind of contribution and in what way exactly the individual can be recognised as a participant to the JCE and, thus, criminally responsible. In practice, this can be explained by the fact that the ad hoc Tribunals had no reason to do so. As they approached the non-state entities responsible for the international crimes as possessing state-like characteristics, i.e. military structure and control over an area, they did not face any particular difficulties in terms of explaining the common plan construction.

However, as current cases of corporate involvement in international crimes show, company directors are participating in a vast common plan, initially constructed by -or at least involving- a state or certain paramilitary groups. Applying the JCE doctrine, it cannot become clear what is the extend of the company directors’ contribution to the common plan, as the common plan itself is not clearly identified. As the links between the company directors and crimes committed by their personnel are missing, the JCE doctrine cannot provide a normative justification for the attribution of individual criminal responsibility against these directors, in violation of the principle of legality.

Therefore, a doctrine that is based solely on the common plan element does not prove efficient in terms of attributing criminal responsibility for collective crimes. This seems to have been the understanding the ICC Statute drafters, who rejected the JCE doctrine and adopted the control theory, in order to link the common plan conceived by specific individuals on top of a hierarchy to the crimes committed by their subordinates. Based on the individual’s ability to control the criminal outcome, Art. 25 of the ICC Statute identifies the categories of primary responsibility for the commission of international crimes. An individual with direct control over the criminal outcome is a physical perpetrator. Individuals who share direct control are co-perpetrators. Individuals who have indirect control over the criminal outcome, because they are in a position to impose their will over the physical perpetrators, are considered (indirect/intellectual) perpetrators as well, alongside with the physical perpetrators.

In terms of international criminality, indirect perpetration can be further expanded in order to satisfactorily grasp the collective nature of international crimes. In this direction, the ICC chambers employed Roxin’s theory, who established how the indirect perpetration doctrine can be applied regarding the crimes committed through control over an organisation. As Roxin intended for his doctrine to be applied regarding the crimes of specific authoritative states, like the Third Reich or the DDR, he constructed it tightly. He required an organisation with a very strict hierarchy, the members of which receive direct orders from their leaders, which order they obey because they are afraid of their personal integrity if they refuse to do so. Following this analysis, the ‘control though an organisation’ theory cannot apply to non-state organisations with a more flexible internal structure, as the corporation is. The ICC has already faced this problem when applying the control theory on the leaders of specific paramilitary groups, which did possess some state-like characteristics, but not to the extent required by Roxin’s theory. In this situation, the Court decided to ignore the issue, by applying the ‘control through an organisation’ theory, nevertheless.

However, this research argues that the key element of the ‘control through an organisation’ theory is the position of authority of the leader, which enables them to successfully establish the organisation’s policy. More specifically, the ‘indirect perpetration through control over an organisation’ doctrine is based on the argument that the indirect perpetrator, who is on top of such a collective entity, does not need to know who executed it and in what way exactly, as long as they know that their orders will be followed. The ability of the organisation’s leader to ensure the implementation of their plan/policy is the crucial factor that makes them maintain control over the criminal outcome. The above remark opens the way for a looser interpretation of Roxin’s theory.

Regarding corporate criminality, the company directors, who create the corporate policy, have an overall control over the criminal outcome, based on the delegation of power process within the corporation. In this way, they can ensure that their directives will be followed, even though they are not aware of the specific details on how this is going to happen. If these directives include the commission of an international crime, then the company directors obtain control over the criminal outcome and can be criminally responsible under the ICC Statute as indirect perpetrators. Under this approach, the ‘indirect perpetration through control over an organisation’ doctrine adopted by the ICC can be successfully applied in terms of corporate criminality.

The differential model adopted by the ICC Statute regarding participation in crime means that, besides perpetration, secondary liability is established as well. In the differential participation model, in contrast to the unitary one, there is a doctrinal distinction between perpetrators and accomplishes, in order to grasp the different levels of contribution to the criminal outcome and, as a result, the different levels of culpability. Secondary liability is derivative in nature because it requires a causal link to the commission of the crime, i.e. to the acts of the perpetrator. This causal link can be identified by the risk and harm theories developed in continental/German jurisprudence. The acts of the accomplish increase the risk of harm to the protected legal good and they actually harm the latter when the criminal outcome takes place. This harm of the accomplished to the protected legal good is independent of the harm caused by the perpetrator. In other words, the crime would not have been committed the way it did, if it was not for the help of the accessory. This is why the culpability of the accomplish is personal and secondary liability remains individual, despite the fact that it is linked to primary liability.

Even though Art. 25 of the ICC Statute identifies the elements of aiding and abetting, as the main form of secondary liability, in much more details than the *ad hoc* criminal Tribunals’ statutes, nevertheless, the *mens rea* requirement remains unclear. The ambiguity traces back to the *ad hoc* criminal Tribunals’ case law on the difference between the *mens rea* of perpetration and aiding and abetting. In this direction, the *ad hoc* criminal Tribunals have argued that, while perpetration requires intent to commit the crime, aiding and abetting requires mere knowledge of the perpetrator’s *actus reus* and *mens rea*. However, such a distinction is incomprehensive, because knowledge is also part of the intent *mens rea*. The latter composes of a cognitive component (knowledge) and a volition component (will). The individual intents the criminal outcome when they are aware that their acts will lead to this and they decide to continue, because or despite this knowledge (intent of first or second degree). The *mens rea* of aiding and abetting is this of intent as well. The aider and abettor knows that the perpetrator will commit the crime (in the ordinary course of events) and they decide to help them, because or despite this knowledge.

This is why the wording of Art. 30 of the ICC Statute seems rather unfortunate. It requires that the *actus reus* of the international crimes under the ICC Statute are committed with intent and knowledge, while a more accurate wording should have been that they are committed (simply) with intent. Under this understanding, aiding and abetting is the contribution to the crime commission (causal link to the criminal outcome) with intent for this contribution (knowledge and will towards the acts of the perpetrator). The provisions of Art. 25(3) of the ICC Statute on aiding and abetting should be interpreted under this normative basis. Thus, aider’s and abettor’s assistance ‘for the purpose of facilitating the perpetrator’s commission of the crime’ is to be understood as assistance with the knowledge that this assistance facilitates the commission of the crime, followed by the will to so do, because or despite this knowledge. Therefore, the word ‘purpose’ does not have its everyday meaning of aim or goal, because these are irrelevant in terms of attributing criminal responsibility to the individual, but it has to be assimilated with the legal term of intent, in its ‘will through knowledge’ approach explained above.

The ICC case law has not yet dealt with this issue, because there has not been a practical need to do so. The non-state collective entities, whose leaders have been tried before the Court, have state-like characteristics, in the sense of their reason for existence being the acquisition of political and military power within a State. Therefore, they would have facilitated the commission of international crimes with the “required” purpose, as they would have approached their participation in the criminal outcome as the necessary mean to fulfil their political agenda.

However, the interpretation of ‘purpose of facilitating the commission of the crime’ proposed in this research opens the door to the application of the aiding and abetting provision of the ICC Statute to company directors. The main argument against such an application is that company directors provide aid to the commission of international crimes (by a state), not because they are aiming to the commission of these crimes per se, but because they want to gain specific (economical) benefits for their corporation. Following, however, this research’s proposed normative approach, the company directors have the required aiding and abetting *mens rea* of intent because they decide to assist the state, even though they realised that an international crime will be committed. The reason for doing so, i.e. their purpose of increasing the corporation’s profit or minimise the loss does not make any difference in criminal law. Under this reasoning, there is no doctrinal obstacle for the ICC to try company directors for aiding and abetting the commission of international crimes through the corporate activities, by deciding to provide the means to the (direct and indirect) perpetrators.

Besides primary and secondary responsibility, though, another doctrine should be discussed when it comes to the attribution of criminal responsibility to the individual at the international level. This is the superior responsibility doctrine, which has created significant controversies regarding its nature and application. The international tribunals so far have not followed a consistent approach on superior responsibility. In the *ad hoc* criminal Tribunals’ case law, some of the chambers argued that superior responsibility is a separate form of responsibility for the crime of dereliction of duty, while others have approached it as participation to the core international crimes under the Tribunals’ jurisdiction. The ICC Statute does not provide any directives to this issue, either. However, the answer to this question is important because the dereliction of duty crime should create a lower level of liability than the participation to the core international crimes of genocide, crimes against humanity and war crimes.

To draw a conclusion on this issue, this research discussed omission liability, as the normative principle of the superior responsibility doctrine. According to art. 28 of the ICC Statute, a superior who is in control of their subordinates is responsible for the criminal acts committed by them if he or she fails to exercise their authority in order to prevent them; or, following the commission of the crime, fails to punish the superiors and/or refer their crimes to the competent authorities. Indeed, criminal law accepts that the *actus reus* of a crime can be fulfilled not only through an act but also through an omission. Such an omission is, in fact, an ‘active’ contribution to the commission of the crime and it is, thus, characterised as inauthentic omission. Inauthentic omission can be further analysed to direct and indirect: in direct inauthentic omission, it is the failure to act that leads to the criminal outcome, while in indirect inauthentic omission it is the failure to prevent the acts of other individuals who contribute to the criminal outcome.

National jurisdictions link inauthentic omission with specific legal duties, in order to counterbalance the difficulty of identifying the causal link to the crime, due to the lack of an ‘active’ act. However, the theoretical approach proposed by this research makes the legal duty element unnecessary. This approach is based on the notion of control over the criminal outcome, which is a vital element in attributing criminal responsibility to the individual in the ICC jurisdiction. In terms of direct inauthentic omission, the failure of the individual to control a situation attaches criminal responsibility to them. In terms of indirect inauthentic omission, on the other hand, criminal responsibility is attached to the individual due to their failure to exercise control over the physical perpetrators of the crime.

The control element is further linked to the *mens rea* element. To be found responsible for participation to the crime via direct inauthentic omission, the individual should be aware of their ability to control the situation and either decided not to act/prevent the acts of the physical perpetrators (*mens rea* of intent) or they unreasonably decided that the criminal outcome will not happen eventually (advertent negligence). In indirect inauthentic omission, though, negligence is not enough. Attributing criminal responsibility to the individual as a participant to the crime when they do not even realise that others under their control are committing a crime (inadvertent negligence) amounts to vicarious/strict liability, which violates the criminal law principle of personal culpability. In addition, attributing individual criminal responsibility for participation in the crime, when the individual unreasonably believes that others under their control will not commit a crime (advertent negligence), seems too harsh. As one cannot fully predict the behaviour of others, they cannot be certain that their omission creates a risk to the protected legal good and, as a result, there is not a clearly identified causal link between their omission and the criminal outcome.

Nevertheless, the fact that an individual cannot be responsible for an indirect inauthentic omission by negligence does not mean that he is free of any responsibility. On the contrary, their responsibility needs to be discussed on a different legal basis, this of authentic omission. National jurisdictions establish specific crimes that can be committed only through an omission rather than an act. Thus, criminal responsibility attaches to the individual, not for participation in a crime, but for the commission of a separate dereliction of duty crime. In authentic omission crimes, the *mens rea* of negligence is enough because the rationale of establishing criminal responsibility for an individual failing in their duty to act is the fact that this individual is expected to show due diligence. The individual should have known of the relevant circumstances leading to the crime commission (inadvertent negligence) and have acted accordingly in order to prevent them.

Regarding the superior responsibility of the ICC Statute, the ICC case law has approached it as a crime *sui generis*, i.e. distinct from the modes of responsibility provided in Art. 25 of the ICC Statute. However, it does not assimilate superior responsibility to authentic omission, as the individual becomes responsible, not for a separate dereliction of duty crime, but for the underlying core crimes committed by their subordinates, as if the superior is a participant to these crimes. The confusion created by the ICC case law on this matter indicates that, under a more refined doctrinal analysis, Art. 28 incorporates, in fact, both types of omission.

Regarding civilian superior responsibility, which is the interest of this research, when the civilian superior knows that their subordinates will commit a crime and omits to prevent them, (indirect) inauthentic omission theory applies. In this situation, the superior is a participant to the international crime, because they are aware of its commission, and they nevertheless decide not to intervene and prevent it (*mens rea* of intent). Alongside with ‘active’ acts, such an omission is another way of fulfilling the *actus reus* of the modes of participation of Art. 25 of the ICC Statute, mainly perpetration and aiding and abetting. As a result, it is proposed that the clause of Art. 28 of the ICC Statute regarding the civilian superior’s intentional failure to prevent the crime of the subordinates belongs, as a matter of norm, to Art. 25, covering the situation where an individual capable of exercising control over others, intentionally fails to do so.

In terms of the civilian superior’s failure to punish the subordinates or refer the matter to the competent authorities, the authentic omission theory applies. This is because this provision of Art. 28 refers to situations where the superior finds out about the criminal behaviour of their subordinates after they have already committed the crime. One cannot be a participant to a crime they were not aware of, but they can be responsible for failing to fulfil a due diligence duty they have. Such a duty emanates from the superior-subordinate relationship, where the superior is responsible for their subordinates and they should be able to supervise them effectively.

While, regarding military superiors, Art. 28 of the ICC Statute requires for the full spectrum of this due diligence duty, i.e. an obligation to supervise the superiors in order not to commit a crime and an obligation to punish them if they do so, the due diligence duty of civilian superior is limited. As the *mens rea* of negligence (’should have known’ standard) does not suffice to attribute responsibility to the civilian superior, the latter does not have an obligation to actively supervise their subordinates so as not to commit a crime. Their due diligence duty is limited to the obligation of punishing the subordinates after the crime has been committed. Thus, this research argues that, when it comes to civilian superiors, the ICC statute unjustifiably weakens the attribution of criminal responsibility for a dereliction of duty, as it limits the due diligence duty of civilian superiors.

Nonetheless, the (civilian) superior responsibility doctrine can prove useful when it comes to the potential criminal responsibility of company directors for the crimes committed by their subsidiaries or their supply chain corporations. In principle, subsidiaries are distinct legal entities from their parent corporation and the latter is not liable for the legal violations of the former. There have been incidents, though, where the subsidiary corporation, in fact, operates under the control and directives of the parent corporation. In such situations, there is a close proximity between the parent and the subsidiary company, and the parent corporation directors are in a position to be informed about the illegal acts of the subsidiary and have the power to stop them if they wish. As a result, their conscious failure to do so fulfils the requirements of the indirect inauthentic omission theory and the participation to the core crime interpretation of Art. 28 of the ICC Statute, as analysed in this research. Moreover, when the subsidiary corporation operates as an agent of the parent corporation, a superior-subordinate relationship is established between them. The parent corporation’s directors obtain a due diligence duty and they can be found responsible for the dereliction of duty crime of Art. 28 of the ICC Statute, if they find out that the subsidiary has contributed to the commission of an international crime and they fail to implement specific measures against the subsidiary corporation and/or refer the matter to the competent authorities.

However, the lack of an obligation to supervise, as part of the due diligence duty of company directors, weakens the protection of Art. 28 significantly when it comes to corporate criminality. As it does not demand an active seek for knowledge, it allows the company directors to avoid criminal responsibility by creating a deficient delegation system in the first place, where the lower managers are deliberately not required to report back to the directors information on the illegal activities of the subsidiaries. In this situation, not even the wilful blindness safeguard can be employed, because the system in created as ‘faulty’ from the very beginning, when there does not yet exist any particular act of the subsidiary corporation the directors avoid knowing of.

The situation becomes more complicated when it comes to supply chain corporations. The supply chain corporations are businesses of their own and the multinational corporation’s directors do not have the right to intervene in how they operate. As the ICC case law has established, applying pressure on the physical perpetrators of the crime in order to persuade them not to commit it cannot fulfil the control requirement of superior responsibility, so the application of the latter is not justified. Thus, the directors of the multinational corporation cannot, in general, become responsible under the superior responsibility doctrine, as participants to the core international crime, due to the lack of the control element. Similarly, they cannot be responsible for the dereliction of duty crime of Art. 28, due to the lack of a due diligence duty, as there is not an established superior-subordinate relationship between the multinational corporation and its supply chain.

However, the recent corporate social responsibility schemes adopted by corporations can shed a different light on the situation. As a part of their social responsibility plan, some corporations have decided to implement specific standards as a pre-requisite to include another corporation in their supply chain network, accompanied by a monitoring system to ensure compliance. In such case, the corporation exercises *a de facto* control over its supply chain and establishes a superior-subordinate relationship with them. Therefore, the directors of the multinational corporation can be found responsible either as participants to the crime of a supply chain corporation, if they have knowledge about it but decide not to prevent it, or for a dereliction of duty crime, if they fail to implement measures against the supply chain corporation after the crime commission, due to the due diligence duties they undertake.

The main weakness of this argument is that it is based on a voluntary initiative. There is no hard law obligation for the corporations to establish a relevant corporate social responsibility scheme that will establish control over their supply chain corporations. Without this initiative, ‘the degree of integration [within the supply chain] […] will nearly always been absent. The businesses may (and often will) be fundamentally different from each other […] and the corporate governance of the entities [will not be] shared’.[[720]](#footnote-721) As a result, there is room for further research in the future, exploring the possibility of identifying corporate due diligence duties in hard international law. In terms of the theoretical background, it will discuss the responsibilities of non-state actors in international law and how/whether soft law obligations can be employed to interpret hard international law, in order to create positive legal obligations for non-state actors.

It is true that whether company directors will be responsible for participation in an international crime or for mere dereliction of duty will also depend on the ability of the ICC Prosecutor to evidentiary establish their knowledge upon the crimes. Having in mind the complicated structure of modern multinational corporations, the extended network of their subsidiaries and suppliers, and the fact that corporations do not always have a transparent delegation system in operation, this is a challenging task. This research has proved, however, that the ICC Statute can provide a solid doctrinal background for the Court to start discussing corporate criminality, a topic it seems to avoid so far. By initiating an investigation on company directors for the crimes committed during their corporations’ activities, the ICC Prosecutor will give a strong message, that the international community does not tolerate corporate criminality any longer, and that it will confront the recent accusations of concentrating only on cases involving ‘weak’ international players.

Bibliography

Ambos K, 'Tatherrschaft durch *W*illensherrschaft kraft organisatorischer Machtapparate: Eine kritische Bestandsaufnahme und weiterführende Ansätze' (1998) 145 Goltdammer’s Archiv fur Strafrecht 226

Ambos K, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Criminal Law Forum 1

Ambos K, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Duncker und Humblot 2002)

Ambos K, 'Superior Responsibility' in Cassese A and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press 2002)

Ambos K, 'Some Preliminary Reflections on the mens rea Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in Vohrah LC and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese, Brill/Kluwer Law International 2003)

Ambos K, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 Journal of International Criminal Justice

Ambos K, 'Joint criminal enterprise and command responsibility' (2007) 5 Journal of International Criminal Justice 159

Ambos K, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22 Leiden Journal of International Law 715

Ambos K, 'The Fujimori Judgment A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' (2011) 9 Journal of International Criminal Justice 137

Ambos K, 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293

Ambos K, *Treatise on International Criminal Law, Vol I: Foundations and General Part* (Oxford University Press 2013)

Ambos K, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles' (2015) 9 Criminal Law and Philosophy 301

Ambos K, 'Article 25: Individual criminal responsibility' in Triffterer O and Ambos K (eds), *The Rome Statute of the International Criminal Court : a commentary* (The Rome Statute of the International Criminal Court : a commentary, 3rd edn, C.H. Beck/Hart/Nomos 2016)

Arendt H, *Eichmann in Jerusalem : a report on the banality of evil* (rev edn, Penguin 2006)

Ashman I and Winstanley D, 'For or Against Corporate Identity? Personification and the Problem of Moral Agency' (2007) 76 Journal of Business Ethics 83

Ashworth A, 'Belief, Intent and Criminal Liability' in Eekelaar J and Bell J (eds), *Oxford Essays in Jurisprudence: 3rd series* (Oxford Essays in Jurisprudence: 3rd series, Oxford University Press 1987)

Ashworth A, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law ' (1987-1988) 19 Rutgers Law Journal

Ashworth A, 'Taking the Consequences' in Shute S and others (eds), *Action and value in criminal law* (Action and value in criminal law, Clarendon Press 1993)

Ashworth A and Horder J, *Principles of criminal law* (7th edn, Oxford University Press 2013)

Badar ME, *The concept of mens rea in international criminal law : the case for a unified approach* (Hart Publishing 2013)

Bantekas I, 'The contemporary law of superior responsibility' (1999) 93 American journal of international law 573

Bassiouni MC, *Crimes against humanity in international criminal law* (Kluwer Law International 1999)

Bassiouni MC, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005)

Beale S, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 The American Criminal Law Review 1481

Bergsmo M and Webb P, 'Innovations at the International Criminal Court: Bringing New Technologies into the Investigation and Prosecution of Core International Crimes’' in Radtke H and others (eds), *Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg* (Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg, Nomos 2007)

Berle AA and Means GC, *The Modern Corporation and Private Property* (2nd edn, Transaction Publishers 1991)

Boas G, Bischoff J and Reid N, *Forms of Responsibility in International Criminal Law* (International Criminal Law Practitioner Library vol I, Cambridge University Press 2009)

Bogdan A, 'Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia' (2006) 6 International Criminal Law Review 63

Bohoslavsky JP and Opgenhaffen V, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship ' (2010) 23 Health and Human Rights Journal

Bradshaw C, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) Journal of Environmental Law

Bratman M, *Faces of intention : selected essays on intention and agency* (Cambridge University Press 1999)

Buchan R, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?' (2012) 32 Legal Studies

Burchard C, 'Ancillary and Neutral Business Contributions to ‘Corporate–Political Core Crime’: Initial Enquiries Concerning the Rome Statute' (2010) 8 Journal of International Criminal Justice 919

Capps P, *Human dignity and the foundations of international law* (Hart 2009)

Cassese A, 'The proper limits of individual responsibility under the doctrine of joint criminal enterprise' (2007) 5 Journal of International Criminal Justice 109

Clapham A, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 899

Clark R, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Criminal Law Forum 291

Clough J, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 The Official Journal of the Society for the Reform of Criminal Law 267

Coco A, 'Instigation' in Hemptinne Jd and others (eds), *Modes of Liability in International Criminal Law*(Modes of Liability in International Criminal Law  Cambridge University Press 2019)

Cohen D, 'Beyond Nuremberg: Individual Responsibility for War Crimes' in Hesse C and Post R (eds), *Human rights in political transitions : Gettysburg to Bosnia* (Human rights in political transitions : Gettysburg to Bosnia, Zone Books 1999 )

Cryer R, 'General principles of liability in international criminal law' in McGoldrick D and others (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (The Permanent International Criminal Court: Legal and Policy Issues, Hart Publishing 2004)

Damas̆ka M, 'The Shadow Side of Command Responsibility' (2001) 49 The American Journal of Comparative Law 455

Danner AM and Martinez JS, 'Guilty Associations: Joint Criminal Enerprise, Command Responsibility and the Development of International Criminal Law' (2004) 93 California Law Review

Del Ponte C, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility' (2004) 2 Journal of International Criminal Justice 516

Dennis IH, 'The Mental Element for Accessories' in Smith P (ed) *Criminal Law: Essays in Honour of J C Smith* (Criminal Law: Essays in Honour of J C Smith, Butterworths 1987)

Di Filippo M, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19(3) European Journal of International Law 533

Direk ÖF, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the ‘Effective Control’ Standard' (2014) 61 Netherlands International Law Review 1

Duff A, *Intention, agency and criminal liability : philosophy of action and the criminal law* (Basil Blackwell 1990)

Duff A, 'Subjectivism, Objectivism and Criminal Attempts' in Simester AP and Smith ATH (eds), *Harm and Culpability* (Harm and Culpability, Clarendon Press 1996)

Duff A, 'Rule-Violations and Wrongdoings' in Shute S and Simester AP (eds), *Criminal law theory : doctrines of the general part* (Criminal law theory : doctrines of the general part, Oxford University Press 2002)

Duxbury N, *Patterns of American Jurisprudence* (Oxford University Press 1997)

Eldar S, 'Punishing Organized Crime Leaders for the Crimes of their Subordinates' (2010) 4 Criminal Law and Philosophy 183

Esser A, 'Individual criminal responsibility ' in Cassese A and others (eds), *The Rome Statute of the International Criminal Court: A Commentary, vol I* (The Rome Statute of the International Criminal Court: A Commentary, vol I, Oxford University Press 2002)

Ezeudu M-J, 'Revisiting corporate violations of human rights in Nigeria's Niger Delta region: canvassing the potential role of the International Criminal Court' (2011) 11 AHRLJ 23

Farrell N, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8 Journal of Inernational Criminal Justice 873

Feinberg J, *Harm to others*, vol 1 (Moral limits of the criminal law, Oxford University Press 1984)

Fichtelberg A, 'Conspiracy and International Criminal Justice' (2006) 17 Criminal Law Forum

Field S and Jones L, 'Five years on: the impact of the Corporate Manslaughter and Corporate Homicide Act 2007—plus ça change? ' (2003) 24 International Company and Commercial Law Review

Finnin S, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Brill 2012)

Fletcher GP, *Rethinking criminal law* (Little, Brown 1978)

Fletcher GP, *Basic concepts of criminal law* (Oxford University Press 1998)

Fletcher GP, *The Grammar of Criminal Law: American, Comparative, and International, Vol I: Foundations* (Oxford University Press 2007)

Foster N and Sule S, *German legal system and Laws* (4th edn, Oxford University Press 2010)

Freeman S, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 University of Pennsylvania Law Review 1455

French D, *Mayson, French & Ryan on company law* (Company law, 32nd edn, Oxford University Press 2015)

French PA, *The scope of morality* (Minneapolis: University of Minnesota Press 1979)

French PA, *Collective and corporate responsibility* (New York: Columbia University Press 1984)

Gallmetzer R, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8 Journal of International Criminal Justice 947

Gil Gil A, 'Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator' (2014) 14 International Criminal Law Review 82

Goodpaster KE and Matthews JB, 'Can a corporation have a conscience?' in Hogue Werhane P (ed) *Persons, rights and corporations* (Persons, rights and corporations, Prentice Hall 1985)

Goudkamp J, 'Duties of care between actors in supply chains' (2017) 4 Journal of Personal Injury Law

Green LC, 'Command Responsibility in International Humanitarian Law' (1995) 5 Transnational Law & Contemporary Problems

Greenawalt AKA, 'Rethinking Genocidal Intent: The Case for a Knowledge- Based Interpretation' (1999) 99 Columbia Law Review 2259

Haan V, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia' (2005) 5 International Criminal Law Review 167

Hall S, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 European Journal of International Law 269

Hansen TO, 'The policy requirement in crimes against humanity: Lessons from and for the case of Kenya' (2011) 43 The George Washington International Law Review 1

Harrison R, *Hobbes, Locke, and confusion's masterpiece : an examination of seventeenth-century political philosophy* (Cambridge University Press 2003)

Hart HLA, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983)

Hart HLA and Honoré T, *Causation in the law* (2nd edn, Clarendon Press 1985)

Hart HLA, Raz J and Bulloch PA, *The concept of law* (3rd edn, Oxford University Press 2012)

Heller KJ, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011)

Holmes R, 'Person, Role and Organization: some constructivist notes' in Hassard J and Pym D (eds), *The theory of philosophy of organizations: critical issues and new perspectives* (The theory of philosophy of organizations: critical issues and new perspectives, Oxon: Routledge 1993)

Huisman W and van Sliedregt E, 'Rogue Traders' (2010) 8 Journal of International Criminal Justice 803

Hörnle T and Kremnitzer M, 'Human dignity as a protected interest in criminal law' (2012) 44 Israel Law Review 143

Jackson M, *Complicity in international law* (Oxford Monographs in International Law, Oxford University Press 2015)

Jain N, 'The Control Theory of Perpetration in International Criminal Law' (2011) 12 Chicago Journal of International Law 159

Jain N, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart Publishing 2014)

Jessberger F, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 Journal of International Criminal Justice 783

Jessberger F and Geneuss J, 'On the application of a theory of indirect perpetration in Al Bashir: German doctrine at the Hague?' (2008) 6 Journal of International Criminal Justice 853

Kadish SH, 'A Theory of Complicity' in Gavison R (ed) *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (Issues in Contemporary Legal Philosophy: The Influence of HLA Hart, Clarendon Press 1987)

Kaeb C, 'The shifting sands of corporate liability under international criminal law' (2016) 49 The George Washington Law Review

Kant I, *The Metaphysics of Morals* (Cambridge University Press 1998)

Karsten N, 'Distinguishing Military and Non- military Superiors' (2009) 7 Journal of International Criminal Justice 983

Kelly MJ, *Prosecuting Corporations for Genocide* (Oxford University Press 2016)

Kershaw D, *Company law in context : text and materials* (2nd edn, Oxford University Press 2012)

Kirsch P, QC and Robinson D, 'Reaching Agreement at the Rome Conference' in Cassese A and others (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press 2002)

Kremnitzer M, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 Journal of International Criminal Justice 909

Kress C, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461

Kress C, 'On the Outer Limits of Crimes against Humanity: the Concept of Organization within the Policy Requirement: Some reflections on the March 2010 ICC Kenya Desicion' (2010) 23(4) Leiden Journal of International Law 855

Kyriakakis J, 'Australian Prosecution of Corporations for International Crimes' (2007) 5 Journal of International Criminal Justice 809

Kyriakakis J, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 International Law, Conflict of Laws 333

Larsen KM, 'Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test' (2008) 19 European Journal of International Law 509

Lee P and George RP, 'The Nature and Basis of Human Dignity' (2008) 21 Ratio Juris 173

Luban D, 'Contrived ignorance' (1999) 87 Georgetown Law Journal 957

Manacorda S and Meloni C, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?' (2011) 9 Journal of International Criminal Justice 159

Marshall SE and Duff RA, 'Criminalization and Sharing Wrongs' in Robinson PH and others (eds), *Criminal Law Conversations* (Criminal Law Conversations, Oxford University Press 2011)

May L, *Crimes against humanity : a normative account* (Cambridge University Press 2005)

May L, 'A Hobbesian Defense of International Criminal Law' (2014) 14 International Criminal Law Review 768

Meloni C, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press 2010)

Mettraux Gnl, *International crimes and the ad hoc tribunals* (Oxford University Press 2005)

Milanovic M, 'Al- Skeini and Al- Jedda in Strasbourg' (2012) 23(1) European journal of international law 121

Monroe J, 'Applying the responsible corporate officer and conscious avoidance doctrines in the context of the Abu Ghraib prison scandal' (2006) 91 Iowa Law Review 1367

Morgan G, *Images of organization* (Updated edn, Thousand Oaks : Sage Publications 2006)

Murmann U, 'Problems of Causation with Regard to ( Potential) Actions of Multiple Protagonists' (2014) 12 Journal of International Criminal Justice 283

Muños-Conde F and Olásolo H, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (2011) 9 Journal of International Criminal Justice 113

Nerlich V, 'Superior Responsibility under Article 28 ICC Statute: For What exactly is the superior held responsible?' (2007) 5 Journal of International Criminal Justice 665

Nerlich V, 'Core Crimes and Transnational Business Corporations' (2010 ) 8 Journal of International Criminal Justice 895

Neuner M, 'Superior Responsibility and the ICC Statute' in Carlizzi G and others (eds), *La Corte Penale Internazionale* (La Corte Penale Internazionale Vivarium 2003)

Nollkaemper A, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 Journal of International Criminal Justice 1143

Norrie A, '‘Simulacra of Morality’? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Duff A (ed) *Philosophy and the criminal law : principle and critique* (Philosophy and the criminal law : principle and critique, Cambridge University Press 1998)

Noto F, *Secondary liability in international criminal law : a study on aiding and abetting or otherwise assisting the Commission of International Crimes* (Dike 2013)

Nybondas ML, *Command responsibility and its applicability to civilian superiors* (T.M.C. Asser Press 2010)

Oehm F, 'Land Grabbing in Cambodia as a Crime Against Humanity - Approaches in International Criminal Law' (2015) 48 Verfassung und Recht in Uebersee 469

Ohlin JD, 'Joint Intentions to Commit International Crimes' (2011) 11 Chicago Journal of International Law 693

Ohlin JD, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 Leiden Journal of International Law 771

Ohlin JD, 'The One or the Many' (2015) 9 An International Journal for Philosophy of Crime, Criminal Law and Punishment 285

Ohlin JD, van Sliedregt E and Weigend T, 'Assessing the Control-Theory' (2013) 26 Leiden Journal of International Law 725

Olásolo H, *The criminal responsibility of senior political and military leaders as principals to international crimes* (Hart 2009)

Ormerod D and Laird K, *Smith and Hogan's criminal law* (14th edn, Oxford University Press 2015)

Osiel MJ, *The banality of good: Aligning incentives against mass atrocity* (2005)

Osiel MJ, *Making Sense of Mass Atrocity* (Cambridge University Press 2009)

Overy R, 'The Nuremberg trials: international law in the making' in Sands P (ed) *From Nuremberg to the Hague : the future of international criminal justice* (From Nuremberg to the Hague : the future of international criminal justice, Cambridge : Cambridge University Press 2003)

Palchetti P, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations' (2013) 95 International Review of the Red Cross 727

Parkinson JE, *Corporate power and responsibility : issues in the theory of company law* (Clarendon Press 1994)

Peczenik A, *Scientia juris : legal doctrine as knowledge of law and as a source of law*, vol 4 (A Treatise of Legal Philosophy and General Jurisprudence, Springer 2005)

Peters A, 'Membership in the Global Constitutional Community' in Jan and others (eds), (Oxford University Press 2009)

Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011)

Piragoff DK and Robinson D, 'Article 30: Mental element' in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 2nd edn, Beck/Hart/Nomos 2008)

Pomorski S, 'Conspiracy and Criminal Organisation' in Kudriavtsev GGaVN (ed) *The Nuremberg Trial and International Law* (The Nuremberg Trial and International Law, Martinus Nijhoff 1990)

Powles S, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' (2004) 2 Journal of International Criminal Justice

Rawls J, *Lectures on the history of moral philosophy* (Harvard University Press 2000)

Reggio A, 'Aiding and Abetting In International Criminal Law: The Responsibility of Corporate Agents And Businessmen For "Trading With The Enemy" of Mankind' (2005) 5 International Criminal Law Review

Rodenhäuser T, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden Journal of International Law 913

Roe MJ, *Strong managers, weak owners : the political roots of American corporate finance* (Princeton University Press 1994)

Roxin C, 'Straftaten im Rahmen organisatorischer Machtapparate' (1963) Goltdammer's Archiv für Strafrecht

Roxin C, *Täterschaft und Tatherrschaft* (De Gruyter 1963)

Roxin C, 'Crimes as Part of Organized Power Structures' (2011) 9 Journal of International Criminal Justice 193

Ryngaert C, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after Behrami' (2012) 45 Israel Law Review 151

Sappideen R, 'Ownership of the large corporation: why clothe the emperor?' (1997) 7 King's College Law Journal 27

Sari A, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151

Sarooshi D, *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers* (Oxford University Press 2000)

Schabas W, 'Darfur and the Odious Scourge: The Commission of Inquirys Findings on Genocide' (2005) 18 Leiden Journal of International Law 871

Schabas W, 'Crimes against humanity: the state plan or policy' in Sadat LN and Scharf MP (eds), *Theory and Practice of International Law, Essays in Honour of M Ch Bassiouni* (Theory and Practice of International Law, Essays in Honour of M Ch Bassiouni Martinus Nijhoff 2008)

Schabas W, 'State policy as an element of international crimes' (2008) 98 Journal of Criminal Law and Criminology 953

Schabas W, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009)

Schabas W, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2010)

Schumann H, 'Criminal Law' in Reimann M and Zekoll J (eds), *Introduction to German law* (Introduction to German law, 2nd edn, Kluwer Law International 2005)

Siems MM, 'Legal Originality' (2008) 28 Oxford Journal of Legal Studies 147

Simma B, *From bilateralism to community interest in international law: Collected Courses of the Hague Academy of International Law* (Brill-Nijhoff 1994)

Simpson G, 'Men and abstract entities: individual responsibility and collective guilt in international criminal law ' in Nollkaemper A and van der Wilt H (eds), *System criminality in international law* (System criminality in international law, Cambridge University Press 2009)

Singer JW, 'Normative Methods for Lawyers' (2009) 56 UCLA Law Review 899

Smith KJ, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991)

Smith SE, 'Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 International Criminal Law Review 331

Smits JM, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in van Gestel R and others (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Rethinking Legal Scholarship: A Transatlantic Dialogue, Cambridge University Press 2017)

Steele J, 'Doctrinal Approaches' in Halliday S (ed) *An Introduction to the Study of Law* (An Introduction to the Study of Law, W. Green 2012)

Steward JG, *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (Open Society Justice Initiative Publication 2010)

Sullivan GR, 'Intent, purpose and complicity' (1988) Criminal Law Review 641

Tallgren I, 'The Sensibility and Sense of International Criminal Law' (2002) 13 European Journal of International Law 561

Talmon S, 'THE RESPONSIBILITY OF OUTSIDE POWERS FOR ACTS OF SECESSIONIST ENTITIES' (2009) 58 International and Comparative Law Quarterly 493

Tams CJ, 'Individual States as Guardians of Community Interests' in Fastenrath U and others (eds), *From bilateralism to community interest essays in honour of Bruno Simma* (From bilateralism to community interest essays in honour of Bruno Simma, Oxford University Press 2011)

Tasioulas J, 'Human Dignity and the Foundation of Human rights' in McCrudden C (ed) *Understanding human dignity* (Understanding human dignity, Oxford University Press 2014)

Tomuschat C, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law* (Martinus Nijhoff 2001)

Triffterer O, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 Leiden Journal of International Law 399

Triffterer O, 'Command responsibility’ – crime sui generis or participation ‘as otherwise provided’ in Art. 28 Rome Statute' in Arnold J and others (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag* (Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag, C.H. Beck 2005)

Triffterer O and Arnold R, 'Article 28: Responsibility of commanders and other superiors' in Triffterer O and Ambos K (eds), *The Rome Statute of the International Criminal Court: A Commentary* (The Rome Statute of the International Criminal Court: A Commentary, 3rd edn, C. H. Beck/Hart/Nomos 2016)

Tsagourias N, 'Command Responsibility and the Principle of Individual Criminal Responsibility' in Eboe-Osuji C (ed) *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* (Protecting humanity: essays in international law and policy in honour of Navanethem Pillay, Brill 2010)

van der Vyver JD, 'International criminal law - mens rea - intent and guilty knowledge' (2010) 104 American journal of international law 241

van der Wilt H, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 Journal of International Criminal Justice 91

van der Wilt H, 'Joint Criminal Enterprise and Functional Perpetration' in Nollkaemper A and van der Wilt H (eds), *System Criminality in International Law* (System Criminality in International Law, Cambridge University Press 2009)

van Sliedregt E, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C. Asser Press 2004)

van Sliedregt E, 'Joint criminal enterprise as a pathway to convicting individuals for genocide' (2007) 5 Journal of International Criminal Justice 184

van Sliedregt E, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012)

van Sliedregt E, 'Perpetration and Participation' in Stahn C (ed) *The Law and Practice of the International Criminal Court* (The Law and Practice of the International Criminal Court, Oxford University Press 2015)

van Sliedregt E, 'International Criminal Law: Over-studied and Underachieving?' (2016) 29 Leiden Journal of International Law 1

van Sliedregt E and Popova A, 'Interpreting “for the purpose of facilitating” in Article 25(3)(c)?' (23 December 2014) <<https://cicj.org/2014/12/interpreting-for-the-purpose-of-facilitating-in-article-253c/> > accessed 16 May 2018

Velasquez MG, 'Why Corporations Are Not Morally Responsible for Anything They Do' (1983) 2 Business & Professional Ethics Journal 1

Velasquez MG, 'Debunking corporate moral responsibility' (2003) 13 Business Ethics Quarterly 531

Vest H, 'A Structure- Based Concept of Genocidal Intent' (2007) 5 Journal of International Criminal Justice 781

Vest H, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 Journal of International Criminal Justice 851

Vest H, 'Problems of Participation — Unitarian, Differentiated Approach, or Something Else?' (2014) 12 Journal of International Criminal Justice 295

Vetter GR, 'Command Responsibility of Non- Military Superiors in the International Criminal Court (ICC),' (2000) 25 Yale Journal of International Law

Vogel J, 'How to Determine Individual Criminal Respinsibility in Systemic Contexts: Twelve Models' in Policy ISoSDaHC (ed) *Proceedings of the XIVth International Congress on Social Defence: Social Defence and Criminal Law for the Protection of Coming Generations, in View of the New Risks* (Proceedings of the XIVth International Congress on Social Defence: Social Defence and Criminal Law for the Protection of Coming Generations, in View of the New Risks Lisbon, Portugal, 17-19 May 2002)

Vranken JB, 'Methodology in Legal Doctrinal Research: A Comment on Westerman' in van Hoecke M (ed) *Methodologies of legal research: what kind of method for what kind of discipline?* (Methodologies of legal research: what kind of method for what kind of discipline?, Hart 2011)

Weigend T, 'Societas delinquere non potest ? A german perspective' (2008) 6 Journal of International Criminal Justice 927

Weigend T, 'Perpetration through an Organization' (2011) 9 Journal of International Criminal Justice 91

Weigend T, 'Problems of Attribution in International Criminal Law' (2014) 12 Journal of International Criminal Justice 253

Wells C, *Corporations and criminal responsibility* (2nd edn, Oxford University Press 2001)

Wells C, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Corporate Criminal Liability: Emergence, Convergence, and Risk, Springer 2011)

Werle G, 'Individual Criminal Responsibility in Article 25 ICC Statute Symposium: The Principle of Individual Criminal Responsibility: A Conceptual Framework' (2007) 5 J Int'l Crim Just 953

Werle G, 'General Principles of International Criminal Law' in Cassese A (ed) *The Oxford companion to international criminal justice* (The Oxford companion to international criminal justice, Oxford University Press 2009)

Werle G and Burghardt B, 'The German Federal Supreme Court ( Bundesgerichtshof, BGH) on Indirect Perpetration: Introductory Note' (2011) 9 Journal of Interbational Criminal Justice 207

Werle G and Jessberger F, '' Unless otherwise provided': Article 30 of the ICC Statute and the mental element of crimes under international criminal law' (2005) 3 Journal of International Criminal Justice 35

Westerfield L, 'The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent ' (1980-1981) 51 Mississippi Law Journal

Woetzel RK, *The Nuremberg trials in international law* (Stevens 1960)

Wu T and Kang Y-S, 'Criminal Liability for the Actions of Subordinates -The Doctrine of Command Responsibility and Its Analogues in United States Law' (1997) 38 Harvard International Law Journal 272

Yanev L, 'A Janus-Faced Concept: Nuremberg’s Law on Conspiracy vis-a'-vis the Notion of Joint Criminal Enterprise' (2015) 26 Criminal Law Forum

1. Prosecutor v Omar Hassan Ahmad Al Bashir, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber I (4 March 2009), paras 123-124. [↑](#footnote-ref-2)
2. Art. 7 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010). [↑](#footnote-ref-3)
3. These collective entities can be states (international armed conflict) or state(s) against belligerent group(s) (non-international armed conflict). [↑](#footnote-ref-4)
4. See Prosecutor v Omar Hassan Ahmad Al Bashir, regarding the commission of genocide and crimes against humanity in Darfur; regarding Libya, the arrest warrant against Muammar Mohammed Abu Minyar Gaddafi was withdrawn, due to his death. [↑](#footnote-ref-5)
5. See Prosecutor v Thomas Lubanga Dyilo; Prosecutor v Germain Katanga, Prosecutor v Mathieu Ngudojolo Chui; Prosecutor v Bosco Ntaganda; Prosecutor v Dominic Ongwen; Prosecutor v Joseph Kony; Prosecutor v Jean-Pierre Bemba Gombo. [↑](#footnote-ref-6)
6. See, for example, Prosecutor v Katanga and Chui, *Decision on the Confirmation of Charges*, ICC-01/04-01/07-717, Pre-Trial Chamber I (14 October 2008), para. 396. [↑](#footnote-ref-7)
7. According to the Indictment, the accused “conceived, initiated and prepared detailed plans for the acquisition by it, with the aid of German military force, of the chemical industries of Austria, Czechoslovakia, Poland, Norway, France, Russia, and other countries”, *The IG Farben Trial: Trial of Carl Krauch and Twenty Two others*, United States Military Tribunal, Nuremberg (14 August 1947-29 July 1948), in Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission vol X (His Majesty's Stationery Office, London, 1949), 4. [↑](#footnote-ref-8)
8. According to the Indictment, the accused “participated in the enslavement and deportation to slave labour of the civilian population of territory under the belligerent occupation or otherwise controlled by Germany; the enslavement of concentration camp inmates, including Germans; and the use of prisoners of war in war operations and work having a direct relation to war operations. It was further alleged that enslaved persons were mistreated, terrorised, tortured and murdered”, ibid, 5. [↑](#footnote-ref-9)
9. Ibid, 4, 52. [↑](#footnote-ref-10)
10. As stated in the decision, ‘[i]n most instances the initiative [to commit the crimes] was Farben's’, with ‘the power of the military occupant [Nazi regime] [being] the ever-present threat’, Law Reports of Trials of War Criminals, vol X (1949), 50. For more details on the case, see Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 Journal of International Criminal Justice 783. [↑](#footnote-ref-11)
11. *Trial of Friedrich Flick and Five Others*, United States Military Tribunal, Nuremberg (20 April-22 December 1947) in Law Reports of Trials of War Criminals vol IX (1949), 3-4, 30. [↑](#footnote-ref-12)
12. *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, United States Military Tribunal, Nuremberg (17 November 1947-30 June 1948) in Law Reports of Trials of War Criminals, vol X (1949), 73-75. [↑](#footnote-ref-13)
13. *The Zyklon B Case: Trial of Bruno Tesch and two others*, British Military Court, Hamburg (1-8 March 1946) in Law Reports of Trials of War Criminals vol I (1947), 93, 102. [↑](#footnote-ref-14)
14. Ibid, 101. [↑](#footnote-ref-15)
15. *Doe I v Unocal*, US Court of Appeals 9th Cir. 395 F.3d 932 (2002), para. 940. [↑](#footnote-ref-16)
16. The statement of 21 March 2005 is available on *EarthRights International* *(ERI)* website, which was the co-counsel in the case <www.earthrights.org/legal/final-settlement-reached-doe-v-unocal> accessed 16 June 2017. [↑](#footnote-ref-17)
17. ‘In the 12 years to 2013 Cambodia had the world’s highest deforestation rate, in that time losing 1.5m hectares of forest to logging and land clearance, making it one of the countries with the highest deforestation rate in the world’, John Vidal, ‘”I could be arrested or killed”: the activists fighting to save Cambodia's forests,’ *The Guardian* (16 February 2017) [<www.theguardian.com/global-development-professionals-network/2017/feb/16/arrested-killed-activists-fighting-save-cambodias-forests-prey-lang](file:///C:\Users\Panagiota\Downloads\%3cwww.theguardian.com\global-development-professionals-network\2017\feb\16\arrested-killed-activists-fighting-save-cambodias-forests-prey-lang)> accessed 18 June 2017. [↑](#footnote-ref-18)
18. For a detailed analysis regarding the land grabbing policies of the Cambodian government, see Franziska Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity - Approaches in International Criminal Law' (2015) 48 Verfassung und Recht in Uebersee 469. [↑](#footnote-ref-19)
19. ‘Rubber Barons’, *Global Witness* (13 May 2013) <[www.globalwitness.org/en-gb/campaigns/land-deals/rubberbarons/](http://www.globalwitness.org/en-gb/campaigns/land-deals/rubberbarons/)> accessed 18 June 2017. After reports by NGO’s on the situation in Cambodia, Vietnam Rubber Group (VRG), has announced steps to reform how it does business in the country, see ‘Decision on the receiving and responding to feedback and petition and providing information to individuals and organisations on rubber development projects of VRG in Cambodia and Laos’ *Global Witness* (16 July 2014) <[www.globalwitness.org/en-gb/archive/vietnam-rubber-group-says-its-doors-are-now-open-people-affected-plantations-cambodia-and/](http://www.globalwitness.org/en-gb/archive/vietnam-rubber-group-says-its-doors-are-now-open-people-affected-plantations-cambodia-and/)> accessed 18 June 2017. [↑](#footnote-ref-20)
20. ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court- The Commission of Crimes Against Humanity in Cambodia July 2002 to Present’, *Global Diligence* (7 October 2014) <[www.globaldiligence.com/about-us/icc-cambodian-case-study/](http://www.globaldiligence.com/about-us/icc-cambodian-case-study/)> accessed 19 June 2017. [↑](#footnote-ref-21)
21. OTP ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016), para. 41. [↑](#footnote-ref-22)
22. According to *Global Policy Forum*, an independent policy organisation which monitors the work of the United Nations and scrutinizes global policymaking, conflict resources are ‘natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law’, <[www.globalpolicy.org/home/198-natural-resources/40124-definition-of-conflict-resources.html](http://www.globalpolicy.org/home/198-natural-resources/40124-definition-of-conflict-resources.html)> accessed 18 June 2017. [↑](#footnote-ref-23)
23. Further details in James G. Steward, *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (Open Society Justice Initiative Publication 2010), available at <https://ssrn.com/abstract=1875053>> accessed 19 June 2017. [↑](#footnote-ref-24)
24. It is estimated that around 500,000 people lost their lives during the civil war in Angola, ‘A Rough Trade: The Role of Companies and Governments in the Angolan Conflict’, *Global Witness* (1 December 1998), 3 <[www.globalwitness.org/en-gb/campaigns/conflict-diamonds/rough-trade/](http://www.globalwitness.org/en-gb/campaigns/conflict-diamonds/rough-trade/)> accessed 10 July 2017. [↑](#footnote-ref-25)
25. UNSC Res 1176 (24 June 1998) UN Doc S/RES/1176; Council Regulation (EC) 1705/1998 of 28 July 1998 [1998] OJ L 215. [↑](#footnote-ref-26)
26. ‘A Rough Trade: The Role of Companies and Governments in the Angolan Conflict’, *Global Witness,* 4. [↑](#footnote-ref-27)
27. <[www.kimberleyprocess.com/en/what-kp](http://www.kimberleyprocess.com/en/what-kp)> accessed 12 July 2017. [↑](#footnote-ref-28)
28. ‘Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo’ (‘UN Panel of Experts’) (23 October 2003) UN Doc S/2003/1027, paras 43-47; UN Panel of Experts (16 October 2002) S/2002/1146, paras 12-21; and UN Panel of Experts (12 December 2008) S/2008/773. [↑](#footnote-ref-29)
29. Dodd-Frank Wall Street Reform and Consumer Protection Act (21 July 2010) Pub.L. 111–203, H.R. 4173, Section 1502. Nevertheless, according to Reuters, as of 8 February 2017, “President Donald Trump is planning to issue a directive targeting a controversial Dodd-Frank rule that requires companies to disclose whether their products contain ‘conflict minerals’ from a war-torn part of Africa”, Sarah N. Lynch, Emily Stephenson, ‘White House plans directive targeting 'conflict minerals' rule: sources’, *Reuters* (8 February 2017) <[www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N?feedType=RSS&feedName=businessNews&utm\_source=Twitter&utm\_medium=Social&utm\_campaign=Feed%3A+reuters%2FbusinessNews+%28Business+News%29](http://www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N?feedType=RSS&feedName=businessNews&utm_source=Twitter&utm_medium=Social&utm_campaign=Feed%3A+reuters%2FbusinessNews+%28Business+News%29)> accessed 18 July 2017. [↑](#footnote-ref-30)
30. See the official website of the European Commission, <ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/> accessed 20 July 2017. [↑](#footnote-ref-31)
31. OECD ‘Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ 3rd ed. (April 2016). See also the Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’(21 March 2011), UN Doc A/HRC/17/31, endorsed by the Human Rights Council Res 17/4 (16 June 2011) A/HRC/RES/17/4. [↑](#footnote-ref-32)
32. ‘River of Gold: How the state lost out in an eastern Congo gold boom, while armed groups, a foreign mining company and provincial authorities pocketed millions’, *Global Witness* (5 July 2016) <[www.globalwitness.org/en-gb/campaigns/conflict-minerals/river-of-gold-drc/](http://www.globalwitness.org/en-gb/campaigns/conflict-minerals/river-of-gold-drc/)> accessed 20 July 2017. [↑](#footnote-ref-33)
33. Ibid. [↑](#footnote-ref-34)
34. For a detailed analysis of the corporation’s involvement in Darfur genocide see Michael J. Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press 2016), 110-160. [↑](#footnote-ref-35)
35. See Art.6 of the Rome Statute of the ICC. [↑](#footnote-ref-36)
36. There have been a number of lawsuits against the Royal Dutch Petroleum/Shell, Wiwa v. Royal Dutch Petroleum; Wiwa v. Anderson; Wiwa v. Shell Petroleum Development Company, filed by the Center for Constitutional Rights (CCR) and co-counselled by EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria, further details at <[ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus](https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus)>; <[ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al](https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al)> accessed 27 July 2017. [↑](#footnote-ref-37)
37. For an analysis of the crimes against Ogoni in the Niger Delta region by multinational corporations, including Shell, see Martin-Joe Ezeudu, 'Revisiting corporate violations of human rights in Nigeria's Niger Delta region: canvassing the potential role of the International Criminal Court' (2011) 11 AHRLJ 23. A similar case regarding crimes against humanity in the Niger Delta against Chevron, another oil company, has been dismissed by the US courts, *Bowoto v Chevron Corporation*, US Court of Appeals 9th Cir.621 F.3d 1116 (2010). [↑](#footnote-ref-38)
38. For a summary of the case, see the Center for Constitutional Rights website, <ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed 27 July 2017. [↑](#footnote-ref-39)
39. *The Presbyterian Church of Sudan et al. v Talisman Energy, Inc. et al*, US District Court for the Southern District of New York 244 F. Supp. 2d 289 (19 March 2003); *Presbyterian Church of Sudan v Talisman Energy, Inc.*, US District Court for the Southern District of New York 226 F.R.D. 456 (20 September 2005); *Presbyterian Church v Talisman Energy, Inc*., US Court of Appeals 2nd Cir 582 F.3d 244 (2009). [↑](#footnote-ref-40)
40. *Doe v Chiquita Brands International*, Class Action Complaint for Damages filed on 13 June 2007 before the US District Court of New Jersey. In 2014, the 11th Circuit Court of Appeals ruled that, despite the fact that Chiquita is a U.S. company that made decisions in the U.S. to finance the paramilitaries, in violation of U.S. criminal law, the victims’ claims under the federal Alien Tort Statute (ATS) lacked sufficient connection to the U.S. to be heard in U.S. courts. The US Supreme Court affirmed the decision, more details on the website of EarthRights International (ERI), the organisation which filed the lawsuit, <[www.earthrights.org/legal/doe-v-chiquita-brands-international](http://www.earthrights.org/legal/doe-v-chiquita-brands-international)> accessed 30 July 2017. [↑](#footnote-ref-41)
41. ‘Blood Timber: How Europe Helped Fund War In The Central African Republic, *Global Witness* (July 2015) <[www.globalwitness.org/en/campaigns/forests/bloodtimber/](http://www.globalwitness.org/en/campaigns/forests/bloodtimber/)> accessed 2 August 2017 [↑](#footnote-ref-42)
42. Queensway syndicate has a track record of opaque natural resources deals across sub-Saharan

    Africa, see ‘The Queensway syndicate and the Africa trade’, *The Economist* (13 August 2011) <[www.economist.com/node/21525847](http://www.economist.com/node/21525847)> accessed 2 August 2017. [↑](#footnote-ref-43)
43. ‘Financing A Parallel Government? The involvement of the secret police and military in

    Zimbabwe’s diamond, cotton and property sectors’, *Global Witness (*June 2012), 2 <[www.globalwitness.org/en-gb/campaigns/conflict-diamonds/zimbabwe/financing-parallel-government/](http://www.globalwitness.org/en-gb/campaigns/conflict-diamonds/zimbabwe/financing-parallel-government/)> accessed 2 August 2017. [↑](#footnote-ref-44)
44. Ibid. [↑](#footnote-ref-45)
45. More details at <[www.globalwitness.org/en/press-releases/dutch-court-makes-legal-history-sentencing-timber-baron-gus-kouwenhoven-19-years-war-crimes-and-arms-smuggling-during-liberian-civil-war/](http://www.globalwitness.org/en/press-releases/dutch-court-makes-legal-history-sentencing-timber-baron-gus-kouwenhoven-19-years-war-crimes-and-arms-smuggling-during-liberian-civil-war/)> accessed 4 August 2017. [↑](#footnote-ref-46)
46. *Judgement case against Frans van Anraat,* Court of Appeal The Hague, Three-judge section for criminal matters, LJN: BA4676, 2200050906 – 2 (9 May 2007), para 11.5. See also *Judgement case against Frans van Anraat* (Sentence) District Court of The Hague, Criminal Law Section, Three-Judge Division (23 December 2005). [↑](#footnote-ref-47)
47. Rowena Mason and Ewen MacAskill, ‘Saudis dropped British-made cluster bombs in Yemen, Fallon tells Commons’, *The Guardian* (20 December 2016) <[www.theguardian.com/world/2016/dec/19/saudis-dropped-british-cluster-bombs-in-yemen-fallon-tells-commons](http://www.theguardian.com/world/2016/dec/19/saudis-dropped-british-cluster-bombs-in-yemen-fallon-tells-commons)> accessed 3 August 2017. See also Hannah Bryce, Expert Comment: ‘As Arms Control Is Eroded, Civilians Suffer’, *Chatham House: The Royal Institute of International Affairs* (09 January 2017) <[www.chathamhouse.org/expert/comment/arms-control-eroded-civilians-suffer](http://www.chathamhouse.org/expert/comment/arms-control-eroded-civilians-suffer)> accessed 5 August 2017 [↑](#footnote-ref-48)
48. See Article 8(2)(a) of the Rome Statute of the International Criminal Court. [↑](#footnote-ref-49)
49. Further detains in Juan Pablo Bohoslavsky and Veerle Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship ' (2010) 23 Health and Human Rights Journal . [↑](#footnote-ref-50)
50. *In re South African Apartheid Litigation*, US District Court for the Southern District of New York 617 F.Supp.2d 228 (2009), para. 270. [↑](#footnote-ref-51)
51. ‘Rubber Barons: How Vietnamese Companies and International Financers Are Driving a Land Grabbing Crisis in Cambodia and Laos’, *Global Witness* (May 2013), 34 <[www.globalwitness.org/en/campaigns/land-deals/rubberbarons/](http://www.globalwitness.org/en/campaigns/land-deals/rubberbarons/)> accessed 10 August 2017 [↑](#footnote-ref-52)
52. *Saleh et al. V Titan et al.* (Petition for Writ of Certiorari) US Supreme Court (27 June 2011). More details about the case at the website of the Centre of Constitutional Rights, the organisation which filed the suit, <ccrjustice.org/home/what-we-do/our-cases/saleh-et-al-v-titan-et-al> accessed 12 August 2017. [↑](#footnote-ref-53)
53. Under a general definition, multinational corporations are those entities, which expand their activities in at least one country other than their home country, and, while their headquarters are in this home country, they have subsidiaries in several other countries. [↑](#footnote-ref-54)
54. UNHRC ‘Promotion and Protection of all Human Rights: Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ (7 April 2008) UN Doc A/HRC/8/5, 8. [↑](#footnote-ref-55)
55. See Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas' (2010) 8 Journal of International Criminal Justice 947, 949, explaining the challenges the national courts have to overcome in order to prosecute individuals for international crimes. [↑](#footnote-ref-56)
56. So far, very few cases have been brought before national courts against corporate executives for international crimes, see, for example, *The Public Prosecutor v Guus Kouwenhoven*, Gerechtshof 's-Hertogenbosch/'s-Hertogenbosch Court of Appeal, ECLI:NL:GHSHE:2017:1760 (21 April 2017) and

    *The Public Prosecutor v Frans van Anraat*, Gerechtshof 's-Gravenhage/The Hague Court of Appeal, LJN: BA6734 (9 May 2007), in the Netherlands. [↑](#footnote-ref-57)
57. See, for example, Sarah Field and Lucy Jones, 'Five years on: the impact of the Corporate Manslaughter and Corporate Homicide Act 2007—plus ça change? ' (2003) 24 International Company and Commercial Law Review . [↑](#footnote-ref-58)
58. Data provided by Thomson Reuters law firm on their website, <<https://uk.practicallaw.thomsonreuters.com/6-618-1015?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29>> accessed 10 August 2017. [↑](#footnote-ref-59)
59. Data provided by Thomson Reuters law firm on their website <<https://uk.practicallaw.thomsonreuters.com/2-618-1017?transitionType=Default&contextData=%28sc.Default%29&firstPage=true&bhcp=1>> accessed 10 August 2017. [↑](#footnote-ref-60)
60. See, for example, *Doe I v Unocal (2002)*; *Wiwa v. Royal Dutch Petroleum Co*., US Court of Appeals 226 F.3d 88 (2nd Circ. 2000), cert. denied, US Supreme Court 532 U.S. 941 (2001). [↑](#footnote-ref-61)
61. *Kiobel v Royal Dutch Petroleum Co*, US Supreme Court 569 U.S. 108 (2013). [↑](#footnote-ref-62)
62. *Kiobel v Royal Dutch Petroleum Co*, US Court of Appeals 621 F.3d 111 (2nd Circ. 2010). [↑](#footnote-ref-63)
63. *Kiobel v Royal Dutch Petroleum* (2013), Syllabus. In addition, the Court argued that there is a presumption against extraterritoriality thus, in order for the US jurisdiction to decide upon the acts of corporations abroad ‘the claims [should] touch and concern the territory of the United States […] with sufficient force’, ibid, 14. In June 2017, Esther Kiobel and three other women launched a civil case in the Netherlands accusing Shell for complicity in the killings of the Ogoni activists who contested Shell's operations in the Nigerian Delta, see <<https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>> accessed on 26 June 2018. [↑](#footnote-ref-64)
64. Cardona et al v Chiquita Brands International Inc / Chiquita Fresh North America LLC, US Court of Appeals 760 F.3d 1185 (11th circ. 24 July 2014); Cardona et al, v Chiquita Brands International Inc, US Supreme Court, 135 S. Ct. 1842 (20 April 2015). [↑](#footnote-ref-65)
65. For a discussion on the appropriate venue and *forum non conveniens* in English law based on the UK Supreme Court judgment in the Vedanta case, *see* the relevant commentary by Tara van Ho in (2020) 114 American Journal of International Law 110. [↑](#footnote-ref-66)
66. *See* *also* the ruling of the Court of Appeals in *AAA v Unilever Plc* [2018] EWCA Civ 1532. For a reflective analysis upon the outcome and future implications of the Vedanta case in English law, *see* Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) Journal of Environmental Law [↑](#footnote-ref-67)
67. See also James Goudkamp, 'Duties of care between actors in supply chains' (2017) 4 Journal of Personal Injury Law 205. [↑](#footnote-ref-68)
68. For an overview of the KiK case *see* ECCHR, KiK: Paying the Price for Clothing Production in South Asia, at <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/>, accessed 31 March 2020. [↑](#footnote-ref-69)
69. *See* the relevant study on behalf of the European Parliament, Policy Department for External Relations ‘Access to legal remedies for victims of corporate human rights abuses in third countries’, February 2019, at <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf>, accessed 31 March 2020. [↑](#footnote-ref-70)
70. See Morten Bergsmo and Philippa Webb, 'Innovations at the International Criminal Court: Bringing New Technologies into the Investigation and Prosecution of Core International Crimes’' in H. Radtke and others (eds), *Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg* (Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg, Nomos 2007). [↑](#footnote-ref-71)
71. Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas', 949. [↑](#footnote-ref-72)
72. See Art. 17 and 53 of the Rome Statute of the International Criminal Court. [↑](#footnote-ref-73)
73. OTP ‘Strategic plan 2016 – 2018’, 26. [↑](#footnote-ref-74)
74. Stephen Eliot Smith, 'Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 International Criminal Law Review 331, 338-340. [↑](#footnote-ref-75)
75. OTP ‘Policy Paper On Case Selection and Prioritisation’ (15 September 2016), para. 42. [↑](#footnote-ref-76)
76. Carla Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility' (2004) 2 Journal of International Criminal Justice 516, 516-519. [↑](#footnote-ref-77)
77. ICC, Office of the Prosecutor Strategic Plan 2016-2018, para. 36. [↑](#footnote-ref-78)
78. Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010 ) 8 Journal of International Criminal Justice 895; Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 Journal of International Criminal Justice 909; Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 International Law, Conflict of Laws 333; Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 899. [↑](#footnote-ref-79)
79. See Sara Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 The American Criminal Law Review 1481, 1485-1486. [↑](#footnote-ref-80)
80. Caroline Kaeb, 'The shifting sands of corporate liability under international criminal law' (2016) 49 The George Washington Law Review , 383. [↑](#footnote-ref-81)
81. See Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Rethinking Legal Scholarship: A Transatlantic Dialogue, Cambridge University Press 2017), 13: ‘The researcher who wishes to describe or legitimise the existing law, or wants to indicate which solution fits the system best, can make use of the doctrinal approach’. [↑](#footnote-ref-82)
82. ibid, 5. [↑](#footnote-ref-83)
83. Joseph William Singer, 'Normative Methods for Lawyers' (2009) 56 UCLA Law Review 899, 938. [↑](#footnote-ref-84)
84. Jan BM Vranken, 'Methodology in Legal Doctrinal Research: A Comment on Westerman' in Mark van Hoecke (ed), *Methodologies of legal research: what kind of method for what kind of discipline?* (Methodologies of legal research: what kind of method for what kind of discipline?, Hart 2011), 119. [↑](#footnote-ref-85)
85. See also Jenny Steele, 'Doctrinal Approaches' in Simon Halliday (ed), *An Introduction to the Study of Law* (An Introduction to the Study of Law, W. Green 2012), 9: ‘A familiar criticism of doctrinal method is that it purport to be “value free” Though the skills imparted to law students may not appear to emphasise substantive values, the idea that doctrinal lawyers actively purport to be “value free” is not supported by looking at the debates between academics’. [↑](#footnote-ref-86)
86. Mathias M. Siems, 'Legal Originality' (2008) 28 Oxford Journal of Legal Studies 147, 149. [↑](#footnote-ref-87)
87. See also, Aleksander Peczenik, *Scientia juris : legal doctrine as knowledge of law and as a source of law*, vol 4 (A Treatise of Legal Philosophy and General Jurisprudence, Springer 2005), 2. [↑](#footnote-ref-88)
88. Art. 38 of the Statute of the ICJ, for example, includes in the sources of international law the general principles of law recognised by civilized nations; and the judicial decisions of the various nations, as subsidiary means for the determination of rules of law. See also Art. 21(1)(c) of the Rome Statute of the International Criminal Court, regarding the applicable law. [↑](#footnote-ref-89)
89. As, for example, *Tesco Supermarkets v Nattrass* [1972] AC 153, introducing the notion of “directing mind” regarding the commission of a crime due to corporate activities. [↑](#footnote-ref-90)
90. See also the relevant discussion in Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', 14, where the author questions: ‘Would it not be more fertile to bring these norms coming from different lawgivers under one systematic heading and is this not where the more creative doctrinal work can be done?’. [↑](#footnote-ref-91)
91. Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 American Journal of International Law 172,para. 447. [↑](#footnote-ref-92)
92. As explained by van Sliedregt, ‘[o]ne could argue that the concept of individual criminal responsibility in both national and international law has a collective pedigree’, Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012), 19. [↑](#footnote-ref-93)
93. Larry May, *Crimes against humanity : a normative account* (Cambridge University Press 2005), 83. [↑](#footnote-ref-94)
94. See also Gerhard Werle, 'General Principles of International Criminal Law' in Antonio Cassese (ed), *The Oxford companion to international criminal justice* (The Oxford companion to international criminal justice, Oxford University Press 2009), 55: […][A]ll crimes under international law have one common characteristic, the so-called international element, which generally requires a context of systematic or large scale violence[…]. As a rule, a collective entity is responsible for this violence, typically a state’. [↑](#footnote-ref-95)
95. Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 European Journal of International Law 561, 575. [↑](#footnote-ref-96)
96. Gerry Simpson, 'Men and abstract entities: individual responsibility and collective guilt in international criminal law ' in Andre Nollkaemper and Harmen van der Wilt (eds), *System criminality in international law* (System criminality in international law, Cambridge University Press 2009), 72. [↑](#footnote-ref-97)
97. Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945). [↑](#footnote-ref-98)
98. Art. 9-11 of the IMT Charter. For a discussion of the ‘theory of collective criminality’ employed in the Nuremberg Judgment and the subsequent trial before military tribunals see van Sliedregt, *Individual Criminal Responsibility in International Law*, 23-36. [↑](#footnote-ref-99)
99. See Chapter 3 for the discussion of the common plan element in relation to Joint Criminal Enterprise. [↑](#footnote-ref-100)
100. See Chapter 4 for the discussion of the common plan element in terms of co-perpetration and perpetration through an organisation. [↑](#footnote-ref-101)
101. *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), para 87, quoting *Prosecutor v Blaskić* (Judgment), para 204. [↑](#footnote-ref-102)
102. *Prosecutor v Tadić* (Appeal Judgment), para. 191. [↑](#footnote-ref-103)
103. Further analysis on this concept in Chapter 5. [↑](#footnote-ref-104)
104. See, also, Claus Kress, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461, 472; Triffterer, Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such, 14 LJIL, 2001, 401-402. [↑](#footnote-ref-105)
105. See also the Dissenting Opinion of Vice-President, Judge Al-Khasawneh in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 2, para. 48: ‘[…] genocide is definitionally a complex crime in the sense that unlike homicide it takes time to achieve, requires repetitiveness, and is committed by many persons and organs acting in concert”. [↑](#footnote-ref-106)
106. See also William Schabas, 'Darfur and the Odious Scourge: The Commission of Inquirys Findings on Genocide' (2005) 18 Leiden Journal of International Law 871, 884. *Contra,* *Jelisić*, where the judges argued that it was ‘theoretically possible’ for genocide to be committed by an individual acting alone, because ‘the drafters of the [Genocide] Convention […] did not discount the possibility of a lone individual seeking to destroy a group as such’. The argument, nevertheless, continues by highlighting that it would be very difficult for an individual to commit genocide without the support of an organisation or a system. *Prosecutor v Jelisić* (Judgment) IT-95-10-T (14 December 1999), paras 100-101. [↑](#footnote-ref-107)
107. See William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009), 11. [↑](#footnote-ref-108)
108. Vest argues that “genocidal intent reveals a *systemic structure* not directly outlined in the wording of the provision on genocide”, Hans Vest, 'A Structure- Based Concept of Genocidal Intent' (2007) 5 Journal of International Criminal Justice 781, 785. [↑](#footnote-ref-109)
109. Prosecutor v Krstić, (Judgment), IT-98-33-T (2 August 2001), para 571,.The Darfur Report came to the same conclusion, para 491. However, there have been compelling arguments in favour of knowledge-based approach, according to which, the perpetrator shares the genocidal intent when they know about the realistic genocidal plan and, with their acts, deliberately contribute to it. Their motives for contributing, i.e. their desire to “further the genocide plan”, whether they are personal hate against the group or the prospect of profit, are irrelevant in terms of criminal law. [↑](#footnote-ref-110)
110. The International Law Commission on its draft Code of Crimes Against the Peace and Security of Mankind has commented that “The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide”, Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10 (1996), para. 10 of the Commentary on Article 17. [↑](#footnote-ref-111)
111. Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 Leiden Journal of International Law 399, 406. [↑](#footnote-ref-112)
112. *Prosecutor v Akayesu* (Judgment), para. 580; *Prosecutor v Ntakirutimana* (Judgment) ICTR-96-10 & ICTR-96-17-T (21 February 2003), para. 804; *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T, Trial Chamber I (7 June 2001), para. 77; *Prosecutor v Musema* (Judgment) ICTR-96-13-A, Trial Chamber I (27 January 2000), para. 204; *Prosecutor v Rutaganda* (Judgement) ICTR-96-3-T, Trial Chamber I (6 December 1999), para. 69. [↑](#footnote-ref-113)
113. *Prosecutor v Tadić* (Judgment) IT-94-1-T (7 May 1997), para. 648; *Prosecutor v Kordić and Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004), para. 94; *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004), para. 101; *Prosecutor v Kunarac et al* (Appeal Judgment) T-96-23&IT-96-23/1-A (12 June 2002), para. 121; *Prosecutor v Ntakirutimana* (Judgment), para. 804; *Prosecutor v Musema* (Judgment), para. 204; *Prosecutor v Rutaganda* (Judgement), para. 69; *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, Trial Chamber II (21 May 1999), para. 123; *Prosecutor v Akayesu* (Judgment), para. 580; *Prosecutor v Muvunyi* (Judgment) ICTR-2000-55A-T, Trial Chamber II (12 September 2006), para 512; *Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-T, Trial Chamber II (1 December 2003), para. 872; *Prosecutor v Muhimana* (Judgment) ICTR- 95-1B-T, Trial Chamber III (28 April 2005), para. 527. [↑](#footnote-ref-114)
114. *Prosecutor v Kunarac et al* (Appeal Judgment), para. 57. [↑](#footnote-ref-115)
115. David Cohen, 'Beyond Nuremberg: Individual Responsibility for War Crimes' in Carla Hesse and Robert Post (eds), *Human rights in political transitions : Gettysburg to Bosnia* (Human rights in political transitions : Gettysburg to Bosnia, Zone Books 1999 ), 53. [↑](#footnote-ref-116)
116. Tallgren, 'The Sensibility and Sense of International Criminal Law', 575. [↑](#footnote-ref-117)
117. M. Cherif Bassiouni, *Crimes against humanity in international criminal law* (Kluwer Law International 1999),, 275; William Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2010),, 152; William Schabas, 'Crimes against humanity: the state plan or policy' in L.N. Sadat and M.P. Scharf (eds), *Theory and Practice of International Law, Essays in Honour of M Ch Bassiouni* (Theory and Practice of International Law, Essays in Honour of M Ch Bassiouni Martinus Nijhoff 2008), 347-359; Schabas William Schabas, 'State policy as an element of international crimes' (2008) 98 Journal of Criminal Law and Criminology 953, 972-974; Claus Kress, 'On the Outer Limits of Crimes against Humanity: the Concept of Organization within the Policy Requirement: Some reflections on the March 2010 ICC Kenya Desicion' (2010) 23(4) Leiden Journal of International Law 855, 865-866. See also Darryl Robinson, ‘Essence of Crimes against Humanity Raised by Challenges at ICC’, in www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/ (27 September 2011), accessed on 29 March 2019, and the discussion that follows. See also the ICTY’s arguments in Limaj: ‘[d]ue to structural factors and organisational and military capabilities, an “attack directed against a civilian population” will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a “widespread” scale, or upon a “systematic” basis’*, Prosecutor v Limaj et al* (Judgment) para 191. [↑](#footnote-ref-118)
118. Dissenting Opinion of Judge Hans-Peter Kaul in *Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation of the Republic of Kenya), paras 44-53. [↑](#footnote-ref-119)
119. *Prosecutor v Tadic* (Judgment), para. 654. Similarly, *Prosecutor v Limaj et al* (Judgment), IT-03-66-T, Trial Chamber II (30 November 2005), para. 191; *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000), para. 205; *Prosecutor v Kupreškić et al* (Judgment), paras 552-555. [↑](#footnote-ref-120)
120. *Prosecutor v Katanga and Chui* Confirmation of Charges, para 396, emphasis added. [↑](#footnote-ref-121)
121. *Prosecutor v Bemba* Confirmation of Charges, para 81; Situation on the Republic of Cote d’ Ivoire, Authorisation of an Investigation in Cote d’ Ivoire, para 99. [↑](#footnote-ref-122)
122. *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), para. 90. [↑](#footnote-ref-123)
123. *Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation of the Republic of Kenya), para. 90, citing Marcello Di Filippo, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19(3) European Journal of International Law 533, 567. [↑](#footnote-ref-124)
124. Tilman Rodenhäuser, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden Journal of International Law 913, 920. [↑](#footnote-ref-125)
125. Kai Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* (Oxford University Press 2013), 55, citing Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (E. Albert, 1966), 34. [↑](#footnote-ref-126)
126. Andrew Ashworth and Jeremy Horder, *Principles of criminal law* (7th edn, Oxford University Press 2013),17; Joel Feinberg, *Harm to others*, vol 1 (Moral limits of the criminal law, Oxford University Press 1984), 215. [↑](#footnote-ref-127)
127. See also Kai Ambos, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles' (2015) 9 Criminal Law and Philosophy 301, 316. [↑](#footnote-ref-128)
128. John Rawls, *Lectures on the history of moral philosophy* (Harvard University Press 2000), 174. [↑](#footnote-ref-129)
129. See S. E. Marshall and R. A. Duff, 'Criminalization and Sharing Wrongs' in Paul H. Robinson, Stephen Garvey and Kimberly Kessler Ferzan (eds), *Criminal Law Conversations* (Criminal Law Conversations, Oxford University Press 2011), 235. [↑](#footnote-ref-130)
130. Antony Duff, 'Rule-Violations and Wrongdoings' in Stephen Shute and A. P. Simester (eds), *Criminal law theory : doctrines of the general part* (Criminal law theory : doctrines of the general part, Oxford University Press 2002), 53. [↑](#footnote-ref-131)
131. George P. Fletcher, *Basic concepts of criminal law* (Oxford University Press 1998), 2. [↑](#footnote-ref-132)
132. Ashworth and Horder, *Principles of criminal law*,28. [↑](#footnote-ref-133)
133. See also Fletcher, *Basic concepts of criminal law*, 78. [↑](#footnote-ref-134)
134. Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 European Journal of International Law 269, 278. [↑](#footnote-ref-135)
135. Patrick Capps, *Human dignity and the foundations of international law* (Hart 2009), 81, citing Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press 1997), 174. [↑](#footnote-ref-136)
136. See Ross Harrison, *Hobbes, Locke, and confusion's masterpiece : an examination of seventeenth-century political philosophy* (Cambridge University Press 2003), 64-67. [↑](#footnote-ref-137)
137. See also May, *Crimes against humanity : a normative account*, 30. [↑](#footnote-ref-138)
138. H. L. A. Hart, Joseph Raz and Penelope A. Bulloch, *The concept of law* (3rd edn, Oxford University Press 2012), 193. Similarly, in Larry May, 'A Hobbesian Defense of International Criminal Law' (2014) 14 International Criminal Law Review 768, 784: ‘[…][I]t seems to me that the Hobbesian, although non-standard Hobbesian, position on international relations I have been sketching blurs the distinction between *positivist* and *natural law* theories in significant ways and sets the stage for a moral minimalism that sees certain moral or natural law principles as counselling that States bind together in leagues for their mutual advantage and protection’, emphasis in the original. [↑](#footnote-ref-139)
139. Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1998), 462. [↑](#footnote-ref-140)
140. John Tasioulas, 'Human Dignity and the Foundation of Human rights' in Christopher McCrudden (ed), *Understanding human dignity* (Understanding human dignity, Oxford University Press 2014), 305. [↑](#footnote-ref-141)
141. See Patrick Lee and Robert P. George, 'The Nature and Basis of Human Dignity' (2008) 21 Ratio Juris 173, 187-190. [↑](#footnote-ref-142)
142. Tatjana Hörnle and Mordechai Kremnitzer, 'Human dignity as a protected interest in criminal law' (2012) 44 Israel Law Review 143, 146. [↑](#footnote-ref-143)
143. Kai Ambos, 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293, 305, emphasis in the original. [↑](#footnote-ref-144)
144. See Art. 1 of the Charter of the United Nations (24 October 1945) 1 UNTS XVI. [↑](#footnote-ref-145)
145. See Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law* (Martinus Nijhoff 2001), 59-60. [↑](#footnote-ref-146)
146. Bruno Simma, *From bilateralism to community interest in international law: Collected Courses of the Hague Academy of International Law* (Brill-Nijhoff 1994) 244. See also Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest essays in honour of Bruno Simma* (From bilateralism to community interest essays in honour of Bruno Simma, Oxford University Press 2011). [↑](#footnote-ref-147)
147. *Prosecutor v Furundžija* (Judgment) ICTY- 95-17/1 (10 December 1998), para. 183. [↑](#footnote-ref-148)
148. Anne Peters, 'Membership in the Global Constitutional Community' in Jan and others (eds), (Oxford University Press 2009), 155. [↑](#footnote-ref-149)
149. Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C. Asser Press 2004), 4 [↑](#footnote-ref-150)
150. See Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 55. Nevertheless, he argues not of a combined approach but that ‘one can take either a ‘security, peace, and human rights’-oriented approach, or a ‘criminal justice’-oriented approach, either of which may entail a paradoxical goal or purpose ambiguity of ICL’. See also, Ambos, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles' , 319. [↑](#footnote-ref-151)
151. Preamble of the Rome Statute of the International Criminal Court (17 July 1998). [↑](#footnote-ref-152)
152. Preamble of the Rome Statute of the International Criminal Court. [↑](#footnote-ref-153)
153. *Ibid*. [↑](#footnote-ref-154)
154. *Prosecutor v Tadic* (Appeal Judgment) IT-94-1-A (15 July 1999), para. 59. [↑](#footnote-ref-155)
155. Rodenhäuser, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity', 921. [↑](#footnote-ref-156)
156. Thomas Obel Hansen, 'The policy requirement in crimes against humanity: Lessons from and for the case of Kenya' (2011) 43 The George Washington International Law Review 1, 34-35. [↑](#footnote-ref-157)
157. Further discussion in Chapter 2. [↑](#footnote-ref-158)
158. Van Sliedregt has a similar scepticism regarding the current application of the international criminal law doctrines against non-state collective entities. Regarding the *Katanga and Chui* case before the ICC, she notes that ‘[t]he control theory […] was designed by Roxin to deal with crimes committed by a bureaucracy or any other highly organized entity (army).Its application, by reading it into the ICC provision on criminal responsibility (Art. 25(3)(a)), had been pushed by a number of scholars, experts in German criminal law. Applying it to the facts of the Katanga and Ngudjolo case was, however, problematic. Militia, attacking a village in the DRC and committing crimes in the course and the aftermath of the attack, could hardly qualify as a Nazi bureaucracy. The PTC, however, persisted in regarding it as such. […] At trial, the control theory did not stand. […] One cannot escape the impression that scholars pushing for this theory and judges applying it lost sight of the specific African context. The courtroom reality did not connect to the reality of the case; an African militia is not the same as a Nazi bureaucracy. For me, this case goes down in legal history as an example of over-theorizing; of *Dogmatik* gone wrong’. Elies van Sliedregt, 'International Criminal Law: Over-studied and Underachieving?' (2016) 29 Leiden Journal of International Law 1, 7. [↑](#footnote-ref-159)
159. Chapter 3 discusses how the concepts of individual criminal responsibility and collective criminality at the international level have been approached by the IMT, the post-Nuremberg military tribunals and the ad hoc criminal Tribunals. Chapters 4, 5 and 6 focus on the rules of the ICC Statute. [↑](#footnote-ref-160)
160. The ICC jurisdiction recognises this reality in the Elements of Crimes, supplementing Art. 7 of the ICC Statute: ‘[…] [s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack […]’. [↑](#footnote-ref-161)
161. ICJ, *Bosnia and Herzegovina v Serbia and Montenegro* (Application of the Convention on the Prevention and Punishment of the crime of genocide), 2007 ICJ 70, para. 438. See also Schabas, 'Darfur and the Odious Scourge: The Commission of Inquirys Findings on Genocide' , where the author discusses the finding of the report of the International Commission of Inquiry on Darfur, regarding the international responsibility of Sudan for tolerating and/or failing to prevent genocide, crimes against humanity and war crimes committed by the Janjaweed militia against the local population in Darfur. [↑](#footnote-ref-162)
162. Celia Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Corporate Criminal Liability: Emergence, Convergence, and Risk, Springer 2011), 92. [↑](#footnote-ref-163)
163. H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983), 56-57. [↑](#footnote-ref-164)
164. *Salomon v Salomon* *and Co Ltd* [1897] AC 22. [↑](#footnote-ref-165)
165. Further details in Kenneth E. Goodpaster and John B. Matthews, 'Can a corporation have a conscience?' in Patricia Hogue Werhane (ed), *Persons, rights and corporations* (Persons, rights and corporations, Prentice Hall 1985). [↑](#footnote-ref-166)
166. Peter A. French, *Collective and corporate responsibility* (New York: Columbia University Press 1984), xi. [↑](#footnote-ref-167)
167. See, for example, Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes' (2007) 5 Journal of International Criminal Justice 809. The critics against this approach outline the vagueness of the corporate culture term, which as a result make it difficult to identify with precision how this culture can be perceived as affecting or even representing the will and acts of the corporation, see, for example, Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 The Official Journal of the Society for the Reform of Criminal Law 267, 283. [↑](#footnote-ref-168)
168. Manuel G. Velasquez, 'Debunking corporate moral responsibility' (2003) 13 Business Ethics Quarterly 531, 542-543. [↑](#footnote-ref-169)
169. Roger Holmes, 'Person, Role and Organization: some constructivist notes' in John Hassard and Denis Pym (eds), *The theory of philosophy of organizations: critical issues and new perspectives* (The theory of philosophy of organizations: critical issues and new perspectives, Oxon: Routledge 1993), 198-218. [↑](#footnote-ref-170)
170. Ian Ashman and Diana Winstanley, 'For or Against Corporate Identity? Personification and the Problem of Moral Agency' (2007) 76 Journal of Business Ethics 83, at 86. [↑](#footnote-ref-171)
171. Whether the corporate responsibility is criminal or just civil is debatable, but this discussion falls out of the scope of this research. [↑](#footnote-ref-172)
172. It needs to be clarified here, that this research does not focus on the responsibility of corporations in civil law/torts, where there are compelling arguments that it should aim to the legal entity than the individual. Moreover, without ignoring the fact that many states have opted for introducing corporate (rather than directors’) responsibility to their national criminal law, this research follows the (minority) opinion that this is not according to criminal law principles. However, there has not been an attempt to fully analyse the national approaches to corporate criminal responsibility, as, in any case, international criminal law -which is the main focus of the research- does not recognise the criminal responsibility of legal entities. [↑](#footnote-ref-173)
173. Alan Norrie, '‘Simulacra of Morality’? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Antony Duff (ed), *Philosophy and the criminal law : principle and critique* (Philosophy and the criminal law : principle and critique, Cambridge University Press 1998), 119. [↑](#footnote-ref-174)
174. Ashworth and Horder, *Principles of criminal law*, 138 [↑](#footnote-ref-175)
175. French describes the decision structures of a corporation as conglomerate decisions transforming into conglomerate acts, Peter A. French, *The scope of morality* (Minneapolis: University of Minnesota Press 1979), 27 [↑](#footnote-ref-176)
176. In terms of corporate identity, it has been argued that the corporate entity, on its own, lacks individual qualities and should be seen as a projection of “real” individuals, further details in Ashman and Winstanley, 'For or Against Corporate Identity? Personification and the Problem of Moral Agency'; Morgan Gareth Morgan, *Images of organization* (Updated edn, Thousand Oaks : Sage Publications 2006). [↑](#footnote-ref-177)
177. Velasquez, 'Debunking corporate moral responsibility', 547. [↑](#footnote-ref-178)
178. Thomas Weigend, 'Societas delinquere non potest ? A german perspective' (2008) 6 Journal of International Criminal Justice 927, 937. [↑](#footnote-ref-179)
179. Kaeb, 'The shifting sands of corporate liability under international criminal law', 397. [↑](#footnote-ref-180)
180. *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153 (HL). [↑](#footnote-ref-181)
181. *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL), para. 713 [↑](#footnote-ref-182)
182. According to Lord Hoffmann, ‘[…] a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person “himself” as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself […] Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?’ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500 (PC), para. 507. See also *El Ajou v Dollar Land Holdings plc* [1994] B.C.C. 143 (AC). It has to be noted, though, that the main issue in *Meridian* and *El Ajou* was not individual criminal responsibility but whether the criminal responsibility of the individual can be attributed to the corporation. Nevertheless, interpreting the decisions through the identification liability doctrine applied by English courts, the judges established first the criminal liability of the corporate persons, after being satisfied that they a) were the mind and will of the corporation and b) had the required *mens rea*, and then moved on to explain that the individual criminal responsibility of these corporate persons becomes the criminal responsibility of the corporation. [↑](#footnote-ref-183)
183. *A-G’s Reference (No 2 of 1999)* [2000] 2BCLC 257, para. 268. [↑](#footnote-ref-184)
184. Similarly in *R v St Regis Paper Co Ltd* [2012] 1 Cr. App. R. 14 (AC), where the directing mind doctrine was also applied. [↑](#footnote-ref-185)
185. See also Derek French, *Mayson, French & Ryan on company law* (Company law, 32nd edn, Oxford University Press 2015), 198 [↑](#footnote-ref-186)
186. In USA case law this doctrine is addressed as the “respondeat superior” doctrine, see Celia Wells, *Corporations and criminal responsibility* (2nd edn, Oxford University Press 2001), 85. [↑](#footnote-ref-187)
187. This is the case with English law, where for specific health and safety offences the corporation is found criminally responsible not through the acts and intention of their employees, but because it failed to adopt the relevant regulations as a corporate policy, further details in Wells ibid, 101-103. [↑](#footnote-ref-188)
188. See also David Kershaw, *Company law in context : text and materials* (2nd edn, Oxford University Press 2012), 167: ‘[i]n relation to the rules of attribution the Act adopts an approach similar to but clearly less demanding than the “directing mind and will/identification doctrine approach”’. [↑](#footnote-ref-189)
189. Similarly, the Law Commission for England and Wales (‘LCEW’), in its draft bill on corporate killing, has argued that a corporation can be criminally responsible for causing the death of a person ‘notwithstanding that the immediate cause is the act or omission of an individual’, LCEW Draft of a Bill [1996] cl. 4(2)(b). [↑](#footnote-ref-190)
190. CMCH Act, s. 1(1). [↑](#footnote-ref-191)
191. CMCH Act, s. 1(3). [↑](#footnote-ref-192)
192. CMCH Act, s. 18. [↑](#footnote-ref-193)
193. English criminal case law recognises strict criminal liability for the corporation, deriving from tort law, see for example *R v British Steel plc* [1995] 1 WLR 1356 (AC); *Re Supply of Ready Mixed Concrete (No 2), Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 BCLC 613 (HL). [↑](#footnote-ref-194)
194. An exception to such a *mens rea* requirement is found to the third category of Joint Criminal Enterprise, a co-commission doctrine developed by the ICTY. As it will be discussed in Chapter 3, this is one of the main reasons that the Joint Criminal Enterprise doctrine has been criticised in theory and has been replaced in the ICC Statute by the co-perpetration doctrine. [↑](#footnote-ref-195)
195. Some jurisdictions though, like in England and the Wales, have blurred the lines between criminal and civil/administrative law, by incorporating administrative-natured regulations, such as health and safety regulations, to criminal law, creating a strict liability doctrine, see Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future', , 93. [↑](#footnote-ref-196)
196. Similarly, but from a philosophical rather than legal point of view, Velasquez argues that if moral responsibility cannot be tracked down to the individual level, a corporation can only have a compensatory liability, in order to pay the costs for the injury, further details in Manuel G. Velasquez, 'Why Corporations Are Not Morally Responsible for Anything They Do' (1983) 2 Business & Professional Ethics Journal 1. [↑](#footnote-ref-197)
197. During the work of Preparatory Committee on the Establishment of an International Criminal Court, the French delegation was strongly lobbying the inclusion of corporate criminal responsibility in the ICC Statute, which responsibility would have been based to the identification doctrine. More specifically, France argued that corporate responsibility could be linked with the individual criminal responsibility of a leading company director who controlled the corporate will and acts. The final proposal presented to the Working Group indeed included corporate criminal responsibility, but was rejected in the final document of the ICC Statute due to strong controversies on this issue among states, see ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, Art. 23, paras 5-6; UNGA ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court - Proceedings of the Preparatory Committee during March-April and August 1996’ (13 September 1996) UN Doc A/51/22, para 194. Further details in Philippe Kirsch, QC and Darryl Robinson, 'Reaching Agreement at the Rome Conference' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press 2002). [↑](#footnote-ref-198)
198. Regarding UK law, see Companies Act (CA) 2006, s 190 (4). [↑](#footnote-ref-199)
199. CA 2006, s 21. [↑](#footnote-ref-200)
200. CA 2006, ss 617-619, s 641. [↑](#footnote-ref-201)
201. In terms of English case law see, for example, *Foster v Foster* [1916] 1 Ch 532; Barron v Potter [1914] 1 Ch. 895 (CD). [↑](#footnote-ref-202)
202. See CA 2006, s 168 (1). [↑](#footnote-ref-203)
203. See the discussion in John E. Parkinson, *Corporate power and responsibility : issues in the theory of company law* (Clarendon Press 1994), 54-56. Similarly, Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (2nd edn, Transaction Publishers 1991); Mark J. Roe, *Strong managers, weak owners : the political roots of American corporate finance* (Princeton University Press 1994). On the contrary, Sappiddeen, adopting a holistic approach to corporate personality, argues that the distinction between ownership and control is plasmatic, as the sole owner of the corporation is the corporation themselves, Razeen Sappideen, 'Ownership of the large corporation: why clothe the emperor?' (1997) 7 King's College Law Journal 27. [↑](#footnote-ref-204)
204. *Green Paper on the EU Corporate Governance Framework* [2011], European Commission, COM(2011) 164 final. [↑](#footnote-ref-205)
205. First published in July 2010 and revised in September 2012 by UK Financial Reporting Council, as a soft law complementary to the UK Corporate Governance Code 2016. [↑](#footnote-ref-206)
206. UK Corporate Governance Code 2016, s. A.1 [↑](#footnote-ref-207)
207. While in the Anglo-Saxon model the board of directors can include both “inside”/senior manager directors and “outside” directors, the continental corporate model usually consists of two different bodies, the supervisory board and the management board. The management board consist of senior corporate managers and has authority for the day-to-day operations of the corporation, while the supervisory board is responsible for monitoring the executive board, serving as a counterweight to the management board’s powers. See, for example the research of the Berlin Initiative Group on Corporate Governance in Germany, *German Code of Corporate Governance (GCCG)* [6 June 2000]Berlin Initiative Group, available at the European Corporate Governance Institute’s website, <[www.ecgi.org/codes/all\_codes.php](http://www.ecgi.org/codes/all_codes.php)> accessed 25 July 2017. [↑](#footnote-ref-208)
208. *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States* [January 2002] On behalf of the European Commission, Internal Market Directorate General, Final Report & Annexes I-III, 44, <[www.ecgi.org/codes/documents/comparative\_study\_eu\_i\_to\_v\_en.pdf](http://www.ecgi.org/codes/documents/comparative_study_eu_i_to_v_en.pdf) > accessed 26 July 2017. [↑](#footnote-ref-209)
209. In terms of English law see, for example, *Re Brian D Pierson (Contractors) Ltd* [1999] B.C.C. 26 (CD); *Re Continental Assurance Co of London Plc* (*Singer v Beckett*) [2007] 2 B.C.L.C. 287 (CD), para. 399. [↑](#footnote-ref-210)
210. See also CA 2006, ss 154, 155. In terms of English case law see, for example, *Commissioners of HM Revenue and Customs v Holland* [2009] EWCA Civ 625 (AC), para. 93; *Secretary of State for Trade and Industry v Hollier* [2007] B.C.C. 11 (CD), para. 80. [↑](#footnote-ref-211)
211. CMCH Act, s. 1(4)(c) [↑](#footnote-ref-212)
212. *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153 (HL), para. 171 [↑](#footnote-ref-213)
213. *EI Ajou v Dollar Land Holdings plc & Anor*, [1994] B.C.C. 143 (AC), Nourse LJ, para 152; Rose LJ, para. 154; Hoffmann LJ para. 159. [↑](#footnote-ref-214)
214. *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500 (PC), para. 507. [↑](#footnote-ref-215)
215. ILC, ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10. [↑](#footnote-ref-216)
216. ILC, ‘Report of the International Law Commission on the Work of its 63rd Session’ (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10. [↑](#footnote-ref-217)
217. Commentary (1) on Art 8 of DASR. [↑](#footnote-ref-218)
218. Further analysis in Chapter 4. [↑](#footnote-ref-219)
219. Law Reports of Trials of War Criminals vol X (1949), 52. Similarly, in the *Krupp* case, the Court held that ‘it is essential to criminal liability on [the executive’s] part that he actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established, or where he is the actual present and efficient actor’, Law Reports of Trials of War Criminals vol X (1949), 150. [↑](#footnote-ref-220)
220. *Military and Paramilitary Activities in and Against Nicaragua* (Merits), para 115. [↑](#footnote-ref-221)
221. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment). [↑](#footnote-ref-222)
222. Ryngaert argues that due to its strict application, the effective control test creates a “proper” responsibility regime that locates responsibility with the actor who is in a position of control over wrongful acts giving rise to responsibility, Cedric Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after Behrami' (2012) 45 Israel Law Review 151, 154. [↑](#footnote-ref-223)
223. See also *Nuhanovic v Netherlands* (Appeal judgment) Gerechtshof's-Gravenhag/The Hague Court of Appeal, LJN:BR5388 (5 July 2011), para 5.9, where the Court adopted the effective control test of the ICJ in order to determine the responsibility of Netherlands in terms of a UN peacekeeping mission in Bosnia Herzegovina. For a detailed analysis of the case see André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 Journal of International Criminal Justice 1143. The Dutch Supreme Court affirmed the Appeal Chamber’s judgment, arguing that the effective control test is the one to be applied and that this test allows for dual attribution: it is possible for both the Netherlands and the UN to have effective control over the same wrongful conduct, *The State of the Netherlands v. Hasan Nuhanović* (Judgment), Supreme Court of The Netherlands, 12/03324 (6 September 2013), para. 3.11.2. [↑](#footnote-ref-224)
224. Commentary (para 4) on Art. 7 of DARIO identifies effective control as “factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organ’s disposal”. See also commentary (paras 4-5) on Art. 8 of DASR. [↑](#footnote-ref-225)
225. In terms of UK law, see ‘The Companies (Model Articles) Regulations 2008’, SI 2008/3229, Reg. 2, Sch. 1, Art 3; Reg. 4, Sch. 3, Art 3. [↑](#footnote-ref-226)
226. Dan Sarooshi, *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers* (Oxford University Press 2000), 7. [↑](#footnote-ref-227)
227. In English case law, see, for example, *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 B.C.L.C. 102 (QBD); *Smith v Butler* [2012] B.C.C. 645 (AC). [↑](#footnote-ref-228)
228. Further delegation is possible even in public law, when specific laws exists that expressly empower the delegate to delegate to another. This is the case with the German Constitution (*Grundgesetz*) which contains express provisions for the further delegation of powers. [↑](#footnote-ref-229)
229. Commission of the European Communities, 'Employee participation and company structure in the European Community' (1975) Bull Supp. 8/75, 16. [↑](#footnote-ref-230)
230. In English case law, see for example, *Gramophone and Typewriter Ltd v Stanley* [1908] 2 K.B. 89 (AC); *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 A.C. 187 (PC); *Hawkes v Cuddy* [2009] 2 B.C.L.C. 427 (AC). [↑](#footnote-ref-231)
231. Parkinson, *Corporate power and responsibility : issues in the theory of company law*, 52. [↑](#footnote-ref-232)
232. Sarooshi, *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers*, 163-164. In UK law, the duty of care is established in CA 2006, s. 174, according to which, the directors are expected to exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skill and experience that the director has. See also *Re Westmid Packing Services Ltd (No 2)* [1998] B.C.C. 836 (AC). [↑](#footnote-ref-233)
233. Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR I-135, 152. [↑](#footnote-ref-234)
234. Unlawful in terms of Article 3 of the Treaty establishing the European Coal and Steel Community (adopted 8 April 1951, entered into force 25 July 1952). [↑](#footnote-ref-235)
235. In terms of English law, see, for example, *Madoff Securities International Ltd (in liquidation) v Raven and others* [2013] EWHC 3147(Comm); All ER (D) 216 (Oct); *Secretary of State for Trade and Industry v Baker (No 5)* [2000] 1 B.C.L.C. 523 (AC), where it has been argued that directors have a duty of supervision regarding the exercise of their delegated powers. [↑](#footnote-ref-236)
236. Further analysis in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011). [↑](#footnote-ref-237)
237. CA 2006, s 170(1) [↑](#footnote-ref-238)
238. See the ‘Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31, Art. 17-21. Further analysis in Chapter 6. [↑](#footnote-ref-239)
239. Further details in Chapters 4-6. [↑](#footnote-ref-240)
240. Superior responsibility is discussed in Chapter 6. [↑](#footnote-ref-241)
241. In terms of English law, see, for example, *Adams v Cape Industries Plc* [1990] Ch. 433 (AC); *Appeal Commissioners v Bank of Nova Scottia* [2013] UKPC 19; [2013] All ER (D) 90 (Aug). [↑](#footnote-ref-242)
242. In English case law see, for example, Ebbw-Vale Urban District Council v South Wales Traffic Area Licensing Authority [1915] 2 K.B. 366. [↑](#footnote-ref-243)
243. Further details regarding the criminal responsibility of the parent corporation’s directors in international law in Chapter 6. [↑](#footnote-ref-244)
244. *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, Law Reports of Trials of War Criminals vol X (1949), 80. [↑](#footnote-ref-245)
245. *Behrami and Behrami v France, Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007). [↑](#footnote-ref-246)
246. Ibid, para. 128. [↑](#footnote-ref-247)
247. Ibid, para. 138. [↑](#footnote-ref-248)
248. *Al-Jedda v UK* ECHR 2011-IV 305. It has to be noted, however, that the judges refrained from making a distinction between effective control and overall authority and control and they simply used them cumulatively: ‘For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant’s detention was not, therefore, attributable to the United Nations’, para. 84. [↑](#footnote-ref-249)
249. Sarooshi, *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers*, 13. [↑](#footnote-ref-250)
250. *Al-Jedda v UK*, paras 78-82, analysing the relevant Security Council Resolutions. According to Buchan, in Al-Jedda case, ‘the Security Council did not delegate powers to the British forces, but instead authorised them to carry out functions that is could perform itself. To put it succinctly, in Behrami and Saramati KFOR formed a UN *run* mission. In Iraq the British forces formed a UN *authorised* mission’, Russell Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?' (2012) 32 Legal Studies , 294, italics in the original. [↑](#footnote-ref-251)
251. *Al-Jedda v UK*, para 84. The ECtHR reached the same conclusion as the UK Supreme Court, see *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62; [2014] A.C. 253. [↑](#footnote-ref-252)
252. See also Stefan Talmon, 'THE RESPONSIBILITY OF OUTSIDE POWERS FOR ACTS OF SECESSIONIST ENTITIES' (2009) 58 International and Comparative Law Quarterly 493, 497; Kjetil Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test' (2008) 19 European Journal of International Law 509, 521; Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151; The ILC considered ultimate control when deciding upon the final document of DARIO and explicitly rejected it, see ILC ‘Seventh report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur’ (27 Mar. 2009) UN Doc. A/CN.4/610, 10–12. [↑](#footnote-ref-253)
253. *Behrami and Behrami v France, Saramati v France, Germany and Norway*, para 57. [↑](#footnote-ref-254)
254. ‘It would appear […] that the test to be applied in order to establish attribution was that set out by the ILC in Article 5 of its Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct […]. For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant’s detention was not, therefore, attributable to the United Nations’, *Al-Jedda v UK*, para 84. [↑](#footnote-ref-255)
255. See also Ömer Faruk Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the ‘Effective Control’ Standard' (2014) 61 Netherlands International Law Review 1, 5. [↑](#footnote-ref-256)
256. Marko Milanovic, 'Al- Skeini and Al- Jedda in Strasbourg' (2012) 23(1) European journal of international law 121, 135 [↑](#footnote-ref-257)
257. *Nada v Switzerland*, para 148. In Al-Jedda, the Lords opinions varied significantly, with Lord Bingham, Baroness Hale and Lord Carswell being in favour of the effective control test, paras 21-22, 124,131. [↑](#footnote-ref-258)
258. *Nuhanovic v Netherlands* (Appeal judgment), para 5.8. [↑](#footnote-ref-259)
259. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', at 1153. See also Paolo Palchetti, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations' (2013) 95 International Review of the Red Cross 727, 739-741, discussing multiple attribution of conduct against the ultimate authority and control test. Similarly, Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?', 297. On the contrary, Larsen approaches exclusive control differently, arguing that it is a sine qua non condition for attributing responsibility to the authority, without excluding the responsibility of the delegate. Nevertheless, he also rejects the ultimate authority and control test for not requiring exclusive control, Larsen, 'Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test', 522. The ECtHR, in *Al Jedda* differentiated somewhat to *Behrami and Saramati*, leaving open the possibility of dual attribution to the UN and to the state, *Al-Jedda v UK,* para. 80. [↑](#footnote-ref-260)
260. For example, JCE, perpetration though another person. Further details in Chapters 3 and 4. [↑](#footnote-ref-261)
261. Antonio Cassese, ‘A judicial Massacre’ *The Guardian* (27 February 2007) <[www.theguardian.com/commentisfree/2007/feb/27/thejudicialmassacreofsrebr](http://www.theguardian.com/commentisfree/2007/feb/27/thejudicialmassacreofsrebr)> accessed 2 August 2017, criticising the ICJ’s decision on the *Bosnian Genocide* case, where the Court applied the effective control test. [↑](#footnote-ref-262)
262. *Prosecutor v Tadić* (Appeal Judgment), para. 115. [↑](#footnote-ref-263)
263. *Prosecutor v Tadić* (Judgment) ICTY-94-1-T (7 May 1997), para. 120. [↑](#footnote-ref-264)
264. Ibid, para. 115. [↑](#footnote-ref-265)
265. *Prosecutor v Tadić* (Appeal Judgment), paras 131, 137. [↑](#footnote-ref-266)
266. Ibid, para. 124. See also *Prosecutor v Kordić and Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001) at 115; *Prosecutor v Kordić and Čerkez* (Appeal Judgment) ICTY-95-14/2-A (17 December 2004), para. 361; *Prosecutor v Naletilić and Martinović* (Judgment) ICTY-98-34-T (31 March 2003), para. 198. [↑](#footnote-ref-267)
267. *Prosecutor v Mucić et al* (Appeal Judgment) ICTY-96-21-A (20 February 2001), para. 47. [↑](#footnote-ref-268)
268. See also Sarooshi, *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers*, 163, arguing that the proper test in terms of delegation and attribution of responsibility is the overall control test. [↑](#footnote-ref-269)
269. It is recalled that, in the *Bosnian Genocide* case, the ICJ has already accepted that different attribution criteria may apply to different situations, *Application of the Convention on the Prevention and Punishment of the Crime of* Genocide, paras 404-405. [↑](#footnote-ref-270)
270. Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?', 299-300. On the other hand, Larsen argues that overall control means exclusive direction and control over an operation, but, as it does not concern the specific unlawful conduct, it still allows for the responsibility of the delegate, if the latter exercises effective control over the specific conduct in question, Larsen, 'Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test', 516. [↑](#footnote-ref-271)
271. Harmen van der Wilt, 'Joint Criminal Enterprise and Functional Perpetration' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (System Criminality in International Law, Cambridge University Press 2009), 181. [↑](#footnote-ref-272)
272. See the relevant discussion in Chapter 1. [↑](#footnote-ref-273)
273. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* , 79. [↑](#footnote-ref-274)
274. George P. Fletcher, *Rethinking criminal law* (Little, Brown 1978), 636-637. [↑](#footnote-ref-275)
275. Shachar Eldar, 'Punishing Organized Crime Leaders for the Crimes of their Subordinates' (2010) 4 Criminal Law and Philosophy 183, 184-185. [↑](#footnote-ref-276)
276. Under this reasoning, the Jerusalem District Court in Eichmann argued that ‘the extend of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command’, *Attorney General v Adolf Eichmann* (Judgment) The District Course of Jerusalem, Criminal Case No. 40/61 (11 December 1961) available at the ICC Legal Tools-Database Record, <[www.legal-tools.org/en/browse/record/aceae7/](http://www.legal-tools.org/en/browse/record/aceae7/)> accessed 12 September 2017. [↑](#footnote-ref-277)
277. Hannah Arendt, *Eichmann in Jerusalem : a report on the banality of evil* (rev edn, Penguin 2006), 272. See also the discussion on international criminal law in Chapter 1, last section. [↑](#footnote-ref-278)
278. See also George P. Fletcher, ‘Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner in *Hamdan v. Rumsfeld*’, 2006 WL 53979. [↑](#footnote-ref-279)
279. Thomas Weigend, 'Problems of Attribution in International Criminal Law' (2014) 12 Journal of International Criminal Justice 253, 264-265. [↑](#footnote-ref-280)
280. The relationship between intent and knowledge and how it can affect the distinction between principal and accessorial contribution to the crime is further discussed in Chapter 5. [↑](#footnote-ref-281)
281. Michael Bratman, *Faces of intention : selected essays on intention and agency* (Cambridge University Press 1999), 117; Jens David Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11 Chicago Journal of International Law 693, 736. [↑](#footnote-ref-282)
282. Jens David Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 Leiden Journal of International Law 771, 126. [↑](#footnote-ref-283)
283. Cassese argues that ‘collective responsibility is no longer acceptable’, International Criminal Law, 137. [↑](#footnote-ref-284)
284. Fletcher, *Basic concepts of criminal law* , 191-193. [↑](#footnote-ref-285)
285. Ohlin argues that, in terms of collective responsibility in international criminal law, ‘individuals are vicariously responsible for the actions of their collectives if they have a joint intention to carry out an international crime’, Jens David Ohlin, 'The One or the Many' (2015) 9 An International Journal for Philosophy of Crime, Criminal Law and Punishment 285, 297. However, this is not the classic application of vicarious liability, which does not require *mens rea* or *actus reus* for attributing responsibility. A person is vicariously responsible when they have no contribution at all to the criminal offence, but the individual committed the offence has a specific relationship with them, they are, for example, their employee. [↑](#footnote-ref-286)
286. Similarly, the Tokyo Charter is based on the IMT Charter, Charter of the International Military Tribunal for the Far East (1946) TIAS 1589. [↑](#footnote-ref-287)
287. See ‘Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, 22 January 1945’, in ‘Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials’ (Washington, 1949), 4-5. [↑](#footnote-ref-288)
288. More details in Stanislaw Pomorski, 'Conspiracy and Criminal Organisation' in George Ginsburgs and V.N. Kudriavtsev (ed), *The Nuremberg Trial and International Law* (The Nuremberg Trial and International Law, Martinus Nijhoff 1990), 213-214. [↑](#footnote-ref-289)
289. The French and the Soviet Union delegations were the most reluctant to accept conspiracy, more details on this issue in the negotiations prior the drafting of the IMT Charter see Richard Overy, 'The Nuremberg trials: international law in the making' in Philippe Sands (ed), *From Nuremberg to the Hague : the future of international criminal justice* (From Nuremberg to the Hague : the future of international criminal justice, Cambridge : Cambridge University Press 2003), 19-20. [↑](#footnote-ref-290)
290. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para. 448. [↑](#footnote-ref-291)
291. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172. [↑](#footnote-ref-292)
292. See also Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart Publishing 2014), 24. [↑](#footnote-ref-293)
293. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para. 448. [↑](#footnote-ref-294)
294. Ibid, para. 482. In terms of the individual defendants see ibid paras 485-486 (Göring); paras 487-488 (Hess); paras 489-490 (Ribbentrop); paras 491-492 (Keitel); paras 495-496 (Rosenberg); paras 510-511 (Raeder); paras 515-516 (Jodl), para. 523 (von Neurath). [↑](#footnote-ref-295)
295. Further details upon this issue in Chapter 5. [↑](#footnote-ref-296)
296. *Prosecutor v Tadic* (Appeal), para. 186; *Prosecutor v Šainović et al* (Decision on Ojdanic’s Motion Challenging Jurisdiction-Joint Criminal Enterprise) ICTY-99-37-AR72, A Ch (21 May 2003), para. 26. [↑](#footnote-ref-297)
297. See *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, T Ch I (05 April 2012). [↑](#footnote-ref-298)
298. ‘In the opinion of the Tribunal [conspiracy to commit war crimes or crimes against humanity] do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan’, Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para. 449. [↑](#footnote-ref-299)
299. Ibid, 469. See also Art. 6 of the IMT Charter, where it is set that conspiracy to commit the international crimes included in the Charter will be punished when committed by the accused ‘as individuals or as members of organizations’. [↑](#footnote-ref-300)
300. Art. 9 and 10 of the IMT Charter. [↑](#footnote-ref-301)
301. Ashworth and Horder, *Principles of criminal law*, 71. [↑](#footnote-ref-302)
302. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para. 469. [↑](#footnote-ref-303)
303. See, for example, US v Pohl et al (Supplemental Judgment), Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (October 1946-April 1949) vol V, US Government Printing Office (Washington 1950), 1171. [↑](#footnote-ref-304)
304. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para. 469. [↑](#footnote-ref-305)
305. See also, Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011), 291. [↑](#footnote-ref-306)
306. Robert K. Woetzel, *The Nuremberg trials in international law* (Stevens 1960), 203. [↑](#footnote-ref-307)
307. See Aaron Fichtelberg, 'Conspiracy and International Criminal Justice' (2006) 17 Criminal Law Forum 149, 171. [↑](#footnote-ref-308)
308. Lachezar Yanev, 'A Janus-Faced Concept: Nuremberg’s Law on Conspiracy vis-a'-vis the Notion of Joint Criminal Enterprise' (2015) 26 Criminal Law Forum 450. [↑](#footnote-ref-309)
309. Osiel, discussing the application of participation to a conspiracy/criminal enterprise in terms of terrorist organisations, argues that this is a case of guilt by association: the members of the terrorist group may share a common purpose, but not all of them necessarily ‘know the existence, much less the particular activities’ of other members within the group, Mark J. Osiel, *The banality of good: Aligning incentives against mass atrocity* (2005), 1799. Nevertheless, many States nowadays, including EU Member States, criminalise conspiracy for the purpose of committing terrorist offences, see European Parliament Committee on Civil Liberties, Justice and Home Affairs, ‘EU and Member States’ policies and laws on persons suspected of terrorism-related crimes’, December 2017. In USA, statutes like the Alien Tort Act and the Foreign Corrupt Practices Act allow the domestic courts to discuss cases of corporations operating abroad for conspiracy with an oppressive regime in violating human rights, or for conspiracy in bribing foreign officials, see Craig Forcese, ‘ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act’, (2001) 26 The Yale Journal of International Law 487; Jack G. Kaikati et al, ‘The Price of International Business Morality: Twenty Years Under The Foreign Corrupt Practices Act’ (2000), 26 Journal of Business Ethics 213. [↑](#footnote-ref-310)
310. Further analysis of aiding and abetting in Chapter 5. [↑](#footnote-ref-311)
311. *Prosecutor v Milutinović et al* (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise), para. 23. [↑](#footnote-ref-312)
312. Ibid, paras 25-26. [↑](#footnote-ref-313)
313. As an exception, conspiracy to commit genocide forms an additional mode of responsibility established in Art. 4(3) of the ICTY Statute. [↑](#footnote-ref-314)
314. Van der Wilt explains that JCE ‘connects persons with distinct crimes and [...] portrait[s] the interaction between members of a group or organization, showing the dynamics of collective action without which[...]international crimes cannot be understood’, Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 Journal of International Criminal Justice 91, 92. [↑](#footnote-ref-315)
315. The ICTR also followed the JCE theory, see, for example, *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004); *Prosecutor v Seromba* (Judgment) ICTR-2001-661 (13 December 2006). [↑](#footnote-ref-316)
316. According to the Appeals Chamber, Art. 7(1) of the ICTY Statute ‘[d]oes not exclude those models of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable subject to certain conditions […]’, *Prosecutor v Tadic* (Appeal Judgment), para. 190. [↑](#footnote-ref-317)
317. *Prosecutor v Tadic* (Appeal Judgment), paras 192, 229; *Prosecutor v Krstić* (Judgment), paras 643-645; *Prosecutor v Krstić* (Appeal Judgment), paras 266-269; *Prosecutor v Kvočka et al* (Judgment) ICTY-98-30/1-T (2 November 2001), para. 284; *Prosecutor v Krnojelac* (Appeal Judgment) ICTY-97-25-A (17 September 2003), para. 73; *Prosecutor v Vasiljević* (Appeal Judgment) ICTY-98-32-A (25 February 2004), para. 95; *Prosecutor v Blaskić* (Appeal Judgment), para. 33; *Prosecutor v Milutinović et al* (Decision on Ojdanic’s Motion Challenging Jurisdiction-Joint Criminal Enterprise), paras 20, 31. [↑](#footnote-ref-318)
318. *Prosecutor v Krnojelac* (Trial Judgment) ICTY-97-25-T (15 March 2002), para. 77. Even the Appeals Chamber in *Tadic*, while generally referring to the JCE doctrine as commission/perpetration, in some point contradicts itself by calling it ‘a form of accomplice liability’, *Prosecutor v Tadic* (Appeal Judgment), para. 220. [↑](#footnote-ref-319)
319. *Prosecutor v Šainović et al* (Decision on Ojdanic’s Motion Challenging Jurisdiction-Joint Criminal Enterprise), Separate Opinion of Judge David Hunt, para. 31. [↑](#footnote-ref-320)
320. *Prosecutor v Tadic* (Appeal Judgment), para. 196. [↑](#footnote-ref-321)
321. According to the ICTY Appeals Chamber ‘the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators’, ibid. See also *Prosecutor v Vasiljevic* (Appeal Judgment), para. 97; *Prosecutor v Krnojelac* (Appeal Judgment), paras 83-84. [↑](#footnote-ref-322)
322. *Prosecutor v Tadic* (Appeal Judgment), para. 202; *Prosecutor v Vasiljevic* (Appeal Judgment), para. 98. [↑](#footnote-ref-323)
323. *Prosecutor v Tadic* (Appeal Judgment), para. 203. [↑](#footnote-ref-324)
324. See also *Prosecutor v Krnojelac* (Judgment), where the Trial Chamber claimed that ‘[m]any of the cases considered by the Tadic Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations, so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation. As such, those cases may not provide a firm basis for concentration or prison camp cases as a separate category’, para. 78. [↑](#footnote-ref-325)
325. Verena Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia' (2005) 5 International Criminal Law Review 167, at 190 [↑](#footnote-ref-326)
326. Similar, van Sliedregt argues that JCE II ‘violate[s] fundamental principles of criminal law such as the maxim “no culpability without personal fault”’,Elies van Sliedregt, 'Joint criminal enterprise as a pathway to convicting individuals for genocide' (2007) 5 Journal of International Criminal Justice 184, 188. [↑](#footnote-ref-327)
327. *Prosecutor v Tadic* (Appeal Judgment), paras 204 et seq. [↑](#footnote-ref-328)
328. *Prosecutor v Vasiljevic* (Appeal Judgment), para. 99. [↑](#footnote-ref-329)
329. While the majority of ICTY cases refer to possible outcome, the Trial Chamber in Krstić required that the defendant to have known that the criminal outcome was not simply possible but rather inevitable, posing thus a higher threshold, *Prosecutor v Krstić* (Judgment), paras 159, 616. The Appeals Chamber light-heartedly agreed on this, without further consideration on its implications, *Prosecutor v Krstić* (Appeal Judgment), para. 149. [↑](#footnote-ref-330)
330. *Prosecutor vs Kaing Guek Eav ‘Duch’*, 001/18-07-2007-ECCC/OCIJ, Pre-T Ch 02, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of JICJ on JCE doctrine’ (27 October 2008), paras 26-27. [↑](#footnote-ref-331)
331. *Prosecutor v Krajisnik* (Judgment) ICTY-00-39-T (27 September 2006), para. 882. [↑](#footnote-ref-332)
332. See Gideon Boas, James Bischoff and Natalie Reid, *Forms of Responsibility in International Criminal Law* (International Criminal Law Practitioner Library vol I, Cambridge University Press 2009), 73. [↑](#footnote-ref-333)
333. *Prosecutor v Brđanin* (Decision on Interlocutory Appeal) ICTY-99-36-A (19 March 2004), para. 5, emphasis added. Similarly, in *Prosecutor v Milosevic* (Decision on Motion for Judgment or Acquittal) ICTY-02-54-T, T Ch (16 June 2004), para. 290. [↑](#footnote-ref-334)
334. *Prosecutor v Krnojelac* (Trial Judgment), para. 82. As stated by Danner and Martinez, ‘the broader the JCE alleged, the more likely it is that the defendant can be found guilty of making some contribution to its ultimate purpose’, Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enerprise, Command Responsibility and the Development of International Criminal Law' (2004) 93 California Law Review , 136. [↑](#footnote-ref-335)
335. According to the Appeals Chamber in *Tadic*, ‘[t]he basic assumption must be that in international law as much as in national systems the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated (nulla poena sine culpa)’, *Prosecutor v Tadic* (Appeal Judgment), para. 186. [↑](#footnote-ref-336)
336. Danner and Martinez, 'Guilty Associations: Joint Criminal Enerprise, Command Responsibility and the Development of International Criminal Law', 134. [↑](#footnote-ref-337)
337. According to Ambos, criminal law doctrines should take into account ‘the distinction as to the weight of contribution, which must be more substantial in the case of co-perpetration’, Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 Journal of International Criminal Justice , 171. [↑](#footnote-ref-338)
338. Guénaël Mettraux, *International crimes and the ad hoc tribunals* (Oxford University Press 2005), 292. [↑](#footnote-ref-339)
339. JCE III has been linked with the infamous case of *Pinkerton vs US* 328 US 640 (1946), which created vicarious liability for individuals with no participation in the objective elements of the crime, see *Prosecutor vs Kaing Guek Eav ‘Duch’,* ‘Amicus Curiae Brief of Centre for Human Rights and Legal Pluralism, McGill University’, para. 33. [↑](#footnote-ref-340)
340. It has to be noted that the common law notion of recklessness does not fully correspond to the continental law notion of *dolus eventualis*, as it can also include the *mens rea* of negligence, see also the relevant discussion in Chapter 5. [↑](#footnote-ref-341)
341. *Prosecutor v Tadic* (Appeal Judgment), para. 204. [↑](#footnote-ref-342)
342. Danner and Martinez, 'Guilty Associations: Joint Criminal Enerprise, Command Responsibility and the Development of International Criminal Law', 137; Ambos, 'Joint Criminal Enterprise and Command Responsibility' , 174. [↑](#footnote-ref-343)
343. Ambos, 'Joint Criminal Enterprise and Command Responsibility' , 168-169. Further discussion on aiding and abetting in Chapter 5. It is noted that this argument is based on the perception of JCE as a mode of principal responsibility to the international crime. [↑](#footnote-ref-344)
344. Apart from the violation of the principle of culpability, it is also dubious whether the theory of JCE as a mode of individual criminal responsibility can be characterised as customary international law (violation of the principle of legality), see e.g. the analysis provided by Attila Bogdan, 'Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia' (2006) 6 International Criminal Law Review 63, 109-112, 115-120. [↑](#footnote-ref-345)
345. This conclusion is however disputed, as it is claimed that in both the main cases presented by the Court (*Essen Lynching*, *Borkum Island*), the accused did indeed possess the intent to kill their victims, see, for example, Steven Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' (2004) 2 Journal of International Criminal Justice , 616. [↑](#footnote-ref-346)
346. *Prosecutor v Tadic* (Appeal Judgment), paras 297-201. [↑](#footnote-ref-347)
347. See also Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Duncker und Humblot 2002), 548-549. [↑](#footnote-ref-348)
348. *Prosecutor v Tadic* (Appeal Judgment), paras 209, 213. [↑](#footnote-ref-349)
349. *The Essen Lynching Case-Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945) reprinted in Law Reports of Trials of War Criminals vol I (1947); *US v Kurt Goebell et al* (Borkum Island case), General Military Government Court, Case No 12-489 (Ludwigsburg, 6 February-21 March 1946) in Records of United States Army War Crimes Trials, US National Archive Microfilm Publications No 1103. [↑](#footnote-ref-350)
350. Further details in Chapter 2. [↑](#footnote-ref-351)
351. See, for example, *Prosecutor v Brđanin* (Judgment). [↑](#footnote-ref-352)
352. See, for example, *Prosecutor v Brđanin* (Judgement) ICTY-99-36-T (1 September 2004), para. 260: ‘[JCE includes] the existence of a common plan, design or purpose (‘common plan’) that amounts to or involves the commission of a crime provided for in the Statute’. Similarly, in *Prosecutor v Krnojelac* (Appeal Judgement), para. 31; *Prosecutor v Kvočka et al* (Appeal Judgement) ICTY-98-30/1-A (28 February 2005), para. 96; *Prosecutor v. Stakić* (Judgement) ICTY-97-24-A (22 May 2006), para. 64, *Prosecutor v Mrkšić et al* (Judgment) ICTY-95-13/1-T (27 September 2007), para. 545; *Prosecutor v. Brđanin* (Appeal Judgment) ICTY-99-36-A (3 April 2007), para. 364; *Prosecutor v Martić* (Judgment) ICTY-95-11-T (12 June 2007), para. 435. [↑](#footnote-ref-353)
353. Mark J. Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009), 74. [↑](#footnote-ref-354)
354. Danner and Martinez, 'Guilty Associations: Joint Criminal Enerprise, Command Responsibility and the Development of International Criminal Law', 134-135. [↑](#footnote-ref-355)
355. For example, Judge Shahabuddeen explained in *Vasiljevic*, that in terms of the JCE theory, ‘[a]ll the parties [in a JCE] are acting together to achieve an agreed result. In acting together, they are really acting as one. On this basis, the acts of each are the acts of all’, *Prosecutor v Vasiljevic* (Appeal Judgment) Dissenting Opinion of Judge Shahabuddeen, para. 31. [↑](#footnote-ref-356)
356. *Prosecutor v Kvočka et al* (Judgement), para. 289. An exception can be traced in Krnojelac, where the Appeals Chamber required that ‘a strict definition of the common purpose’ should be adopted and that the accused should be aware of the exact acts that formed the common criminal plan *Prosecutor v Krnojelac* (Appeal Judgment), paras 116-118. [↑](#footnote-ref-357)
357. *Prosecutor v Brđanin* (Appeal Judgment), paras 428, 430. See also *Prosecutor v Kvočka et al* (Judgment), para. 311; *Prosecutor v Kvočka et al* (Appeal Judgment), para. 97. [↑](#footnote-ref-358)
358. With the exception of acts that are clearly of little importance for the common plan, see Antonio Cassese, 'The proper limits of individual responsibility under the doctrine of joint criminal enterprise' (2007) 5 Journal of International Criminal Justice 109, 127-128. [↑](#footnote-ref-359)
359. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), ICC-01/04-01/06, Pre-Trial Chamber I (29 January 2007); *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC-01/04-01/06, Trial Chamber I (14 March 2012); *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), ICC-01/04-01/07, Pre- Trial Chamber I (30 September 2008); *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute), ICC-01/04-01/07, Trial Chamber II (7 March 2014). [↑](#footnote-ref-360)
360. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), paras 326 et seq. [↑](#footnote-ref-361)
361. Héctor Olásolo, *The criminal responsibility of senior political and military leaders as principals to international crimes* (Hart 2009), 266. [↑](#footnote-ref-362)
362. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para 330. The concept of aiding and abetting and its distinct characteristics in relation to perpetration is further analysed in Chapter 5. [↑](#footnote-ref-363)
363. ibid, para 330. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para. 332. [↑](#footnote-ref-364)
364. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para. 343; *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute), para. 33; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), ICC-01/05-01/08-424, Pre-Trial Chamber II (15 June 2009) para. 349; Prosecutor v Ruto et. al.. Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para 292; *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para 522; [↑](#footnote-ref-365)
365. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges),Ibid, para 326. [↑](#footnote-ref-366)
366. Ibid,para 342. [↑](#footnote-ref-367)
367. Neha Jain, 'The Control Theory of Perpetration in International Criminal Law' (2011) 12 Chicago Journal of International Law 159, 167. [↑](#footnote-ref-368)
368. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), paras 326, 328. See also *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges) paras522-523*.* This is an important difference with the JCE doctrine. As explained in the previous chapter, JCE does not offer a clear distinction on the level of an accused’s contribution to the crime. Even though the common plan should be directly linked with the commission of an international crime, the contribution of the individual does not need to be criminal per se. Any kind of contribution that can be characterised as ‘significant’ for the materialisation of the criminal enterprise can result in the characterisation of the accused as a member of the JCE under the principal responsibility of a (co-)perpetrator, see, for example, *Prosecutor v Krajisnik* (Appeal Judgement) ICTY-00-39-A (17 March 2009), para 218; *Prosecutor v Kvočka et al* (Appeal Judgement), para 99*; Prosecutor v Babić* (Judgment on Sentencing Appeal) ICTY-03-72-A (18 July 2005), para. 38; *Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004), para 466; *Prosecutor v Vasiljević* (Appeal Judgment), para. 100; *Prosecutor v Krnojelac* (Appeal Judgement), paras 31, 81; *Prosecutor v Tadić* (Appeal Judgment), para 227. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), paras 326, 328. [↑](#footnote-ref-369)
369. See also Jain, 'The Control Theory of Perpetration in International Criminal Law' , 169-170. [↑](#footnote-ref-370)
370. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para 339: In this regard, the Chamber notes that the most typical manifestation of the concept of control over the crime, which is the commission of a crime through another person, is expressly provided for in article 25(3)(a) of the Statute. [↑](#footnote-ref-371)
371. Claus Roxin, *Täterschaft und Tatherrschaft* (De Gruyter 1963), 143 et seq. [↑](#footnote-ref-372)
372. ibid, 143. [↑](#footnote-ref-373)
373. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para. 340. [↑](#footnote-ref-374)
374. Ibid, para. 330. [↑](#footnote-ref-375)
375. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), paras 573-581, *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute,) ICC-01/04-01/07, Trial Chamber II (7 March 2014), para. 1366. [↑](#footnote-ref-376)
376. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 518; *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), para 1396. See also Fletcher, *Rethinking criminal law* , 672-673; Claus Roxin, 'Crimes as Part of Organized Power Structures' (2011) 9 Journal of International Criminal Justice 193, 198-199. [↑](#footnote-ref-377)
377. In this scenario, the provision on ‘grounds for excluding criminal responsibility’ is applicable, see Kai Ambos, 'The Fujimori Judgment A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' (2011) 9 Journal of International Criminal Justice 137, 147; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* , 69-71; Kai Ambos, 'Joint criminal enterprise and command responsibility' (2007) 5 Journal of International Criminal Justice 159, 181-183; F. Jessberger and J. Geneuss, 'On the application of a theory of indirect perpetration in Al Bashir: German doctrine at the Hague?' (2008) 6 Journal of International Criminal Justice 853, 857, 860, 868; Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute Symposium: The Principle of Individual Criminal Responsibility: A Conceptual Framework' (2007) 5 J Int'l Crim Just 953, 964; Francisco Muños-Conde and Héctor Olásolo, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (2011) 9 Journal of International Criminal Justice 113, 114, 121-122; Fletcher, *Rethinking criminal law* , 665-666. [↑](#footnote-ref-378)
378. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para. 339, *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), paras 1398, 1402. [↑](#footnote-ref-379)
379. *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para. 332. [↑](#footnote-ref-380)
380. See Joahim Vogel, 'How to Determine Individual Criminal Respinsibility in Systemic Contexts: Twelve Models' in International Society of Social Defence and Humane Criminal Policy (ed), *Proceedings of the XIVth International Congress on Social Defence: Social Defence and Criminal Law for the Protection of Coming Generations, in View of the New Risks* (Proceedings of the XIVth International Congress on Social Defence: Social Defence and Criminal Law for the Protection of Coming Generations, in View of the New Risks Lisbon, Portugal, 17-19 May 2002) available at <[www.defensesociale.org/02/2002.pdf](http://www.defensesociale.org/02/2002.pdf)> accessed 10 October 2017. Vogel characterises the normative approach as the “top-down approach», focusing primarily on ‘those who have the “main responsibility”, e.g. directors, generals, political leaders and work your way down the ranks until you finish with the “small fish”’. On the other hand, the naturalistic approach is “bottom up approach”, because ‘[y]ou will start with the immediate actors, e.g. workers assembling a dangerous machine or soldiers shooting civilians; proceed to the middle level, e.g. construction managers or field officers; and finally reach the top level, e.g. the board of directors or the general staff’, 154-155. [↑](#footnote-ref-381)
381. Jens David Ohlin, Elies van Sliedregt and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 Leiden Journal of International Law 725, 741. [↑](#footnote-ref-382)
382. The differences in the distinction between perpetrators and accomplices in the civil and common law jurisdictions create further problems in the ICC legal regime. For example, while accepting the indirect perpetration mode as a mode of principal responsibility, the ICC Statute sets instigation (which is a form of intellectual participation to the commission of the crime) as a secondary mode of responsibility. For a further analysis see Chapter 54. [↑](#footnote-ref-383)
383. See Claus Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' (1963) Goltdammer's Archiv für Strafrecht . [↑](#footnote-ref-384)
384. Roxin, 'Crimes as Part of Organized Power Structures' , 204. [↑](#footnote-ref-385)
385. Roxin, *Täterschaft und Tatherrschaft* , 245. [↑](#footnote-ref-386)
386. *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), para. 1403. [↑](#footnote-ref-387)
387. Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' , 200. [↑](#footnote-ref-388)
388. Roxin, 'Crimes as Part of Organized Power Structures' , 198. [↑](#footnote-ref-389)
389. Ibid. [↑](#footnote-ref-390)
390. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), paras 500-518. [↑](#footnote-ref-391)
391. *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), para. 1411. [↑](#footnote-ref-392)
392. Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?' (2011) 9 Journal of International Criminal Justice 159, 164. [↑](#footnote-ref-393)
393. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 515, citing Claus Roxin, *Täterschaft und Tatherrschaft* (8th edn, De Gruyter, 2006), 245. [↑](#footnote-ref-394)
394. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), paras 516-517; See also *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), paras 1408-1410. [↑](#footnote-ref-395)
395. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), paras 560, 574-575. [↑](#footnote-ref-396)
396. Thomas Weigend, 'Perpetration through an Organization' (2011) 9 Journal of International Criminal Justice 91, 107. [↑](#footnote-ref-397)
397. The Oxford English Dictionary defines ‘instigate’ as 1. To spur, urge on; to stir up, stimulate, incite, goad (now mostly to something evil); 2. To bring about by incitement or persuasion; to stir up, foment, provoke, [www.oed.com/view/Entry/97071?redirectedFrom=instigate#eid](http://www.oed.com/view/Entry/97071?redirectedFrom=instigate#eid), last visited 9 March 2020. [↑](#footnote-ref-398)
398. Similarly, Jain argues that ‘[t]he relationship of the *Hintermann* and the act intermediary is […] very different from that of the instigator and the direct executor; the instigator must normally establish contact with the act executor and convince or persuade him to commit the offence. None of this applies to the *Hintermann* in *Organisationsherrschaft*, who can ensure the implementation of his orders on account of his control over the power apparatus, Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* , 135-136. See also Antonio Coco, 'Instigation' in Jérôme de Hemptinne and others (eds), *Modes of Liability in International Criminal Law*(Modes of Liability in International Criminal Law  Cambridge University Press 2019), 262 [↑](#footnote-ref-399)
399. Weigend, even though opposing, in principle, the control theory as developed by Roxin, draws the same conclusion, see Weigend, 'Perpetration through an Organization' , 109, 111. [↑](#footnote-ref-400)
400. ‘Concurring Opinion of Judge Christine van de Wyngaert’, in *Prosecutor v Chui* (Judgment pursuant to Article 74 of the Statute), 11-14. [↑](#footnote-ref-401)
401. Ibid, 18. [↑](#footnote-ref-402)
402. Ibid, 10, 17. [↑](#footnote-ref-403)
403. Ibid, 9, 15. [↑](#footnote-ref-404)
404. Ibid, 14. [↑](#footnote-ref-405)
405. Thus, the argument that control theory violates the principle of legality based on the fact that it has been only applied in very few national jurisdictions (influenced mainly from the German jurisdiction) do not seem viable, as it is not a new mode of responsibility but just a method of interpreting the modes of responsibility already set in the ICC Statute, see , for example, the arguments of Lachezar Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory' (2013) 13 International Criminal Law Review 789, 813-814. [↑](#footnote-ref-406)
406. ‘Separate and Dissenting Opinion of Judge Fulford’, in *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute), para. 15. [↑](#footnote-ref-407)
407. Ibid, para. 17. [↑](#footnote-ref-408)
408. For this reason, Judge van den Wyngaert rejects Judge Fulford’s arguments, maintaining that if someone has a causal link with the commission of a crime does not automatically mean that they are a perpetrator, as they may well be an accomplice, ‘Concurring Opinion of Judge Christine Van den Wyngaert’, in *Prosecutor v Chui* (Judgment pursuant to Article 74 of the Statute), para 43. [↑](#footnote-ref-409)
409. Ibid, 30. [↑](#footnote-ref-410)
410. Ibid, 44. [↑](#footnote-ref-411)
411. Ibid, 46-47. [↑](#footnote-ref-412)
412. ‘I also agree with Judge Pulford's criticism that the "essential contribution" requirement finds no support in the Statute and that it compels Chambers to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution’, ibid, 42. [↑](#footnote-ref-413)
413. *Prosecutor v Katanga and Chui* (Confirmation of Charges), para. 524-525; *Prosecutor v Lubanga* (Decision on the Confirmation of Charges), para 346; *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), para 305; *Prosecutor v Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), ICC-01/09-02, Pre-Trial Chamber II (23 January 2012), para 297. [↑](#footnote-ref-414)
414. According to the Vienna Convention on treaties interpretation, any interpretation of a treaty provision should reflect the true meaning of this specific rule and the purpose of the treaty as a whole, see United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 31. [↑](#footnote-ref-415)
415. Further details on the German critic in Weigend, 'Perpetration through an Organization' , 99-105. [↑](#footnote-ref-416)
416. ‘Concurring Opinion of Judge Christine van de Wyngaert, in *Prosecutor v Chui* (Judgment pursuant to Article 74 of the Statute), para 55. [↑](#footnote-ref-417)
417. Roxin, *Täterschaft und Tatherrschaft* , 245. [↑](#footnote-ref-418)
418. Roxin, 'Crimes as Part of Organized Power Structures' , 198-199, 203. See also Ambos, 'The Fujimori Judgment A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' , 151-153. [↑](#footnote-ref-419)
419. Osiel, *The banality of good: Aligning incentives against mass atrocity* , 1833-1837. [↑](#footnote-ref-420)
420. Olásolo, *The criminal responsibility of senior political and military leaders as principals to international crimes*, 286. [↑](#footnote-ref-421)
421. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 518. [↑](#footnote-ref-422)
422. See also Elies van Sliedregt, 'Perpetration and Participation' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (The Law and Practice of the International Criminal Court, Oxford University Press 2015), 514. The ICC Trial Chamber did not follow the Pre-Trial Chamber’s approach. Chui was acquitted for lack of evidence and Katanga was convicted, not for indirect perpetration through control over an organisation, but for contribution to a common criminal purpose under Art. 25(3)(d) of the ICC Statute, which is a lower level of contribution to the criminal outcome, see *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute). [↑](#footnote-ref-423)
423. *Prosecutor v Tadić* (Appeal Judgment); Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?'. [↑](#footnote-ref-424)
424. Similarly, Ambos argues that ‘in this situation of (indirect) perpetrator behind the (direct) perpetrator (Täter hinter dem Täter) the control of the former over the latter does not depend on his responsibility but on the power structure in which they operate’, Ambos, 'The Fujimori Judgment A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' , 147. [↑](#footnote-ref-425)
425. However, the ICC Trial Chamber in Katanga, following Roxin’s lead, insisted that ‘[p]ersons wielding control over the apparatus of power, therefore, are unquestionably those in the organisation who conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution. Ultimately only where they effectively wield their authority over the apparatus of power such that its members execute the material elements of the crimes may they be viewed as perpetrators. Otherwise put, only those persons who control, effectively and undisturbed, at least part of an apparatus of power may oversee the execution of a criminal activity’, *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute), para. 1412. [↑](#footnote-ref-426)
426. Jain, 'The Control Theory of Perpetration in International Criminal Law' , at 196. [↑](#footnote-ref-427)
427. *Prosecutor v Former Minister of National Defence Keßler and Others* (Judgment), German Federal Supreme Court (Bundesgerichtshof) (26 July 1994), translated in (2011) 9 Journal of International Criminal Justice 211; further details in Gerhard Werle and Boris Burghardt, 'The German Federal Supreme Court ( Bundesgerichtshof, BGH) on Indirect Perpetration: Introductory Note' (2011) 9 Journal of Interbational Criminal Justice 207. [↑](#footnote-ref-428)
428. *Prosecutor v Former Minister of National Defence Keßler and Others* (Judgment), 224-225, emphasis added. [↑](#footnote-ref-429)
429. *Prosecutor v Tadic* (Appeal Judgment), para. 188; *Prosecutor v Delalić* (Judgment), paras 1092-1096; *Prosecutor v Kordić and Čerkez* (Judgment), paras 375-376; *Prosecutor v Milutinović et al* (Judgment) ICTY-05-87-T (26 February 2009), para. 90; *Prosecutor v Popović et al* (Judgment) ICTY-05-88-T, T Ch II (10 June 2010), paras 1019-1020. [↑](#footnote-ref-430)
430. As argued by Lord Millet ‘[i]t is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilfulblindness" or (as American lawyers describe it) "contrived ignorance"’, *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12; [2002] 2 A.C. 164, para. 194. [↑](#footnote-ref-431)
431. This is the case where the individual commits the crime due to deception or the use of force by the indirect perpetrator. For a detailed discussion upon the different scenarios regarding an innocent agent, see Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* , 570-572. It is also noted that Art. 31 of the ICC Statute recognises duress as a ground for excluding individual criminal responsibility. [↑](#footnote-ref-432)
432. This reasoning is called the “autonomy principle” in criminal law, see Weigend, 'Perpetration through an Organization' , 96. [↑](#footnote-ref-433)
433. According to the pre-Trial Chamber in Katanga and Chui, Katanga ‘had de facto ultimate control over FRPI commanders, commanders who sought his orders for obtaining or distributing weapons, and ammunitions and was the person to whom other commanders reported’ and Chui ‘had de facto ultimate control over FNI commanders, commanders who sought his orders for obtaining or distributing weapons and ammunitions and was the person to whom other commanders reported’, *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 541. However, the actual ability of Katanga and Chui to exercise such a strict control upon their subordinates has been contested, see, for example, the relevant discussion van Sliedregt, 'Perpetration and Participation', [↑](#footnote-ref-434)
434. *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), para. 1410. [↑](#footnote-ref-435)
435. Ibid. [↑](#footnote-ref-436)
436. Ambos, 'The Fujimori Judgment A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' , 152. See also Jessberger and Geneuss, 'On the application of a theory of indirect perpetration in Al Bashir: German doctrine at the Hague?' , 861. [↑](#footnote-ref-437)
437. Jain, 'The Control Theory of Perpetration in International Criminal Law' Jain, 176-177. [↑](#footnote-ref-438)
438. To be fair, a large number of individuals in the corporate staff would not even realise their contribution to the criminal outcome and, of course, they could not be perceived as the indirect perpetrators. This has been also acknowledged by the ICC in Katanga, where the Trial Chamber claimed that ‘it cannot, however, be ruled out that persons not bearing criminal responsibility operate within an organisation. It therefore cannot be asserted that Roxin’s theory views all physical perpetrators as criminally responsible and it is quite possible that, within that organisation, certain persons who brought about the material elements of the crime may be absolved of all responsibility’, *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute), para. 1404. [↑](#footnote-ref-439)
439. Kai Ambos, 'Tatherrschaft durch *W*illensherrschaft kraft organisatorischer Machtapparate: Eine kritische Bestandsaufnahme und weiterführende Ansätze' (1998) 145 Goltdammer’s Archiv fur Strafrecht 226, 243; Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* , 609-611, discussing the concept of “*Rechtsgelöstheit*“ (Law detachment) in terms of the German Democratic Republic (*Deutsche Demokratische Republik-DDR*) regime. [↑](#footnote-ref-440)
440. Judgment of the Nuremberg International Military Tribunal 1946’ (1947) 41 American Journal of International Law 172, para 504. [↑](#footnote-ref-441)
441. *Prosecutor v Chui* (Judgment pursuant to Article 74 of the Statute); *Prosecutor v Chui* (Judgment on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”) ICC-01/04-02/12 A (7 April 2015). [↑](#footnote-ref-442)
442. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para 555. [↑](#footnote-ref-443)
443. In terms of language, it is noted that the terms ‘principal’ and ‘perpetrator’ are both used under the same meaning of primary participation to the crime, while the terms ‘accessory’ and ‘accomplice’ are both used under the same meaning of secondary participation to the crime. [↑](#footnote-ref-444)
444. More specifically, Art. 25(3) recognises three main types of secondary participants: individuals who order, solicit or induce the commission of a crime within the ICC Statute (Art 25(3)(b)); individuals who aid, abet or otherwise assist in the commission of such a crime, including providing the means for its commission (Art 25(3)(c)); and individuals who in any other way contribute to the commission of such a crime by a group of persons acting with a common purpose (Art 25(3)(d)). [↑](#footnote-ref-445)
445. See Kai Ambos, 'Article 25: Individual criminal responsibility' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court : a commentary* (The Rome Statute of the International Criminal Court : a commentary, 3rd edn, C.H. Beck/Hart/Nomos 2016), 745-746; Albin Esser, 'Individual criminal responsibility ' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, vol I* (The Rome Statute of the International Criminal Court: A Commentary, vol I, Oxford University Press 2002), 782, 787-788, 820; Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute Symposium: The Principle of Individual Criminal Responsibility: A Conceptual Framework' , 957; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* , 36, 39. [↑](#footnote-ref-446)
446. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute Symposium: The Principle of Individual Criminal Responsibility: A Conceptual Framework' , 957; Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Criminal Law Forum 1, 9; Esser, 'Individual criminal responsibility ', 782. This contrasts with the unitary perpetration model, where there is no doctrinal distinction between primary and secondary participants to a crime. On the contrary, all of the participants, irrespectively of their role and level of contribution are considered responsible as (co)perpetrators/principals, while the different level of contribution of each defendant reflects the lenience or the severity of their sentence, for further details see Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Brill 2012), 13. [↑](#footnote-ref-447)
447. Miles Jackson, *Complicity in international law* (Oxford Monographs in International Law, Oxford University Press 2015), 90. [↑](#footnote-ref-448)
448. *Prosecutor v Lubanga* (Judgement pursuant to Article 74 of the Statute), paras 998-999. [↑](#footnote-ref-449)
449. Vest Hans Vest, 'Problems of Participation — Unitarian, Differentiated Approach, or Something Else?' (2014) 12 Journal of International Criminal Justice 295, 302. See also Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* , 165. [↑](#footnote-ref-450)
450. *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges), para. 279. [↑](#footnote-ref-451)
451. *Prosecutor v Akayesu* (Judgment), para. 484. See also David Ormerod and Karl Laird, *Smith and Hogan's criminal law* (14th edn, Oxford University Press 2015), 215-217. [↑](#footnote-ref-452)
452. See, for example, *Prosecutor v Akayesu* (Judgment), para. 484. [↑](#footnote-ref-453)
453. *Prosecutor v Tadic* (Appeal Judgment), para. 229; *Prosecutor v Akayesu* (Judgment), para. 484; *Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) paras 530, 532. [↑](#footnote-ref-454)
454. *Prosecutor v Krstić* (Appeal Judgment), paras 137, 144; See also *Prosecutor v Kamuhanda* (Judgment), ICTR-95-54A-T, Trial Chamber II (22 January 2004); *Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T, Trial Chamber I (7 December 2007); *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-05-86-S, Trial Chamber III (17 November 2009). For post-Nuremberg cases regarding providing the means to commit a crime see *Trial of Friedrich Flick and Five Others*, in Law Reports of Trials of War Criminals vol IX (1949), para. 1217; *The Zyklon B Case: Trial of Bruno Tesch and two others*, in Law Reports of Trials of War Criminals vol I (1947), para. 94. [↑](#footnote-ref-455)
455. *Prosecutor v Akayesu* (Judgment), para. 527: ‘Since the accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implies the existence of a principal offence’. [↑](#footnote-ref-456)
456. *Prosecutor v Akayesu* (Judgment), para. 528. [↑](#footnote-ref-457)
457. Ibid, paras 528-529. [↑](#footnote-ref-458)
458. Esser, 'Individual criminal responsibility ', 783, 787-788, 795-796, 798, 802; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* , 64; Olásolo, *The criminal responsibility of senior political and military leaders as principals to international crimes*, 117; Fletcher, *Rethinking criminal law* , 636. [↑](#footnote-ref-459)
459. See also van Sliedregt, *Individual Criminal Responsibility in International Law* , 107. [↑](#footnote-ref-460)
460. See Art. 21(1)(c) of the Rome Statute. [↑](#footnote-ref-461)
461. As Jain explains regarding aiding in English law, ‘if D supplies a weapon to P for use during a bank robbery, which P ultimately does not use, D would still be liable as an aider’, Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* , 159. [↑](#footnote-ref-462)
462. This may be the outcome of the English criminal law lacking a strong doctrinal background which ensures consistency. According to Ashworth, ‘[…] the English law of complicity is replete with uncertainties and conflicts. It betrays the worst features of common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence’. Ashworth and Horder, *Principles of criminal law*, 450. [↑](#footnote-ref-463)
463. In German jurisprudence this argument is approached through the doctrine of “*limitierte Akzessorietät*”. For a further analysis of how this theory is applied in German law see Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* , 177-178. [↑](#footnote-ref-464)
464. See also Fletcher, *Basic concepts of criminal law* , 195, 200. [↑](#footnote-ref-465)
465. H. L. A. Hart and Tony Honoré, *Causation in the law* (2nd edn, Clarendon Press 1985), 388. [↑](#footnote-ref-466)
466. See, for example, *Prosecutor v Tadic* (Judgment), para. 688: ‘This is supported by the foregoing Nürnberg cases where, 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 in fact assumed. For example, if there had been no poison gas or gas chambers in the Zyklon B cases, mass exterminations would not have been carried out in the same manner’. See also Sanford H. Kadish, 'A Theory of Complicity' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (Issues in Contemporary Legal Philosophy: The Influence of HLA Hart, Clarendon Press 1987), 301, who, nevertheless, approaches the “would not have been committed the way it did” concept as a but-for criterion. [↑](#footnote-ref-467)
467. See, for example, *Prosecutor v Brdanin* (Appeal Judgment), para. 151; *Prosecutor v Furundžija* (Judgement), para. 233. The same principle also applies in common law jurisdictions the *ad hoc* Tribunals heavily rely upon, see, for example the English case of *R v Bryce* [2004] EWCA Crim 1231, para. 612, where it was argued that there is no “overwhelming supervening event” to break the chain of causation. *Contra*, *R v Luffman* [2008] EWCA Crim 1739. [↑](#footnote-ref-468)
468. *Prosecutor v Blaskic* (Judgement) ICTY-95-14-T (3 March 2000), paras 284-285, which has been also confirmed on appeal, *Prosecutor v Blaskic* (Appeal Judgment), para. 48. [↑](#footnote-ref-469)
469. See, for example, *Prosecutor v* *Furundžija* (Judgement), para. 233, where the Court links causal effect to *conditio sine qua non* and, thus, rejects it; See also *Prosecutor v Aleksovski* (Judgement) IT-95-14/1-T (25 June 1999), para. 61; *Prosecutor v Krnojelac* (Judgment), para. 88; *Prosecutor v Vasiljevic* (Judgment), para. 70. The *Aleksovski*, *Blaskić*, *Krnojelac* and *Vasiliević* cases rejecting the causal effect requirement are subsequent to the *Furundžija*, so it can be argued that they follow the same line of thought in perceiving causal effect as a *conditio sine qua non* requirement. [↑](#footnote-ref-470)
470. Uwe Murmann, 'Problems of Causation with Regard to ( Potential) Actions of Multiple Protagonists' (2014) 12 Journal of International Criminal Justice 283, 288. [↑](#footnote-ref-471)
471. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 425. Similarly in *Prosecutor v Hadzihasanović and Kubura* (Appeal Judgment) ICTY-01-47-A (22 April 2008), para. 31. [↑](#footnote-ref-472)
472. *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges), para. 277. [↑](#footnote-ref-473)
473. Art. 2(3)(d) of CPSM. The commentary following this article notes, under paragraph 11, that ‘[…]the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way’. [↑](#footnote-ref-474)
474. *Prosecutor v Tadić* (Judgment), paras 674, 688-692; *Prosecutor v Tadic* (Appeal Judgment), para. 229; *Prosecutor v Simić* (Appeal Judgment), para. 85; *Prosecutor v Mrksić and Sljivancanin* (Appeal Judgment) ICTY-95-13/1-A (5 May 2009), para. 81; *Prosecutor v Blaskić* (Appeal Judgment), para. 48, *Prosecutor v Vasiljevic* (Appeal Judgment), para. 102; *Prosecutor v Furundžija* (Judgment), para. 249. [↑](#footnote-ref-475)
475. *Prosecutor v Furundžija* (Judgment), para. 232. [↑](#footnote-ref-476)
476. *Prosecutor v Tadic* (Judgment), para. 688; Prosecutor v Đorđević (Judgment) IT-05-87/1-T, T Ch II (23 February 2011), para 1874. [↑](#footnote-ref-477)
477. *Prosecutor v Blé Goudé* (Decision on the confirmation of charges against Charles Blé Goudé) ICC-02/11-02/11, Pre-Trial Chamber I (11 December 2014), para. 167. [↑](#footnote-ref-478)
478. *Prosecutor v Ruto, Kosgey and Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), para. 354: ‘Even assuming, *arguendo*, that the contribution under subparagraph (c), for the mode of participation of aiding and abetting, should be "substantial", this does not mean that the required contribution under subparagraph (d) must be equally "substantial"’, emphasis in the original. [↑](#footnote-ref-479)
479. *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges), para. 279. [↑](#footnote-ref-480)
480. *Prosecutor v Mbarushimana* (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”), ‘Separate opinion of Judge Silvia Fernández de Gurmendi’, para. 12. [↑](#footnote-ref-481)
481. Roxin, *Täterschaft und Tatherrschaft* , 130-131. [↑](#footnote-ref-482)
482. In this sense, the present study rejects the approach that derivative theory a) contests the aiders’ and abettors’ personal harm over the protected legal good and b) argues that aiding and abetting is based solely on the harm caused by the perpetrator, as, for example, in Keith J. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991), 118. If the acts of the aider and abettor do not contribute to the final harm, then how personal culpability and, thus, individual criminal responsibility can be attached to the aider and abettor for a harmless act? See also Flavio Noto, *Secondary liability in international criminal law : a study on aiding and abetting or otherwise assisting the Commission of International Crimes* (Dike 2013), 16. [↑](#footnote-ref-483)
483. See Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* , 635: ‘Allgemein gilt nach dem oben Gesagten: Der Helfer muß die Gefahr oder das Risiko für das Rechtsgut durch seine Hilfeleistung erhöht haben (*Risikoerhöhung*), es muß sich gerade das von ihm geschaffene (erhöhte) Risiko realisiert haben (*Risikorealisierung* oder Modifikationskausalität) und seine Hilfeleistung muß rechtlich nicht billigenswert gewesen sein (*Risikomißbilligung*)‘, emphasis in the original. See also ibid, 663-664. [↑](#footnote-ref-484)
484. Based on the ILC comments on aiding and abetting, followed by the *ad hoc* criminal Tribunals, as already mentioned in the beginning of this section; ILC commentary on Art. 2(3)(d) of CPSM, para. (11): ‘[…]the accomplice must provide the kind of assistance which contributes directly and *substantially* to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some *significant* way’, emphasis added. [↑](#footnote-ref-485)
485. Nigel Foster and Satish Sule, *German legal system and Laws* (4th edn, Oxford University Press 2010), 330. [↑](#footnote-ref-486)
486. *Prosecutor v Tadic* (Appeal Judgment), para. 229; *Prosecutor v Delalić* (Judgment), para. 328; *Prosecutor v Furundžija* (Appeal Judgment), para. 245. [↑](#footnote-ref-487)
487. *Prosecutor v Mucić et al* (Judgment) ICTY-96-21-T (16 November 1998), para. 326; *Prosecutor v Furundžija* (Judgment), paras 236, 245, 249; *Prosecutor v Tadić* (Appeal Judgment), para. 229; *Prosecutor v Mpambara* (Judgment) ICTR-01-65-T (11 September 2006), para. 16; *Prosecutor v Muvunyi* (Judgment) ICTR-00-55A-T, Trial Chamber III (11 February 2010), para. 470; *Prosecutor v Muvunyi* (Appeal Judgment) ICTR-2000-55A-A (1 April 2011), para. 79. [↑](#footnote-ref-488)
488. Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law ' (1987-1988) 19 Rutgers Law Journal , 736; Andrew Ashworth, 'Belief, Intent and Criminal Liability' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: 3rd series* (Oxford Essays in Jurisprudence: 3rd series, Oxford University Press 1987), 7. [↑](#footnote-ref-489)
489. Andrew Ashworth, 'Taking the Consequences' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and value in criminal law* (Action and value in criminal law, Clarendon Press 1993), 113-117. [↑](#footnote-ref-490)
490. See also G. R. Sullivan, 'Intent, purpose and complicity' (1988) Criminal Law Review 641, 641: ‘Such a conclusion is congenial to those, such as the present writer, who would locate the essence of complicity not in the conduct of A but in A's attitude to the conduct of P. A's conduct becomes essentially evidence of his attitude to P's conduct, it being irrelevant that his conduct may lack any facilitative, let alone casual, impact on the commission of P's offence’. [↑](#footnote-ref-491)
491. Further details on this case in Heribert Schumann, 'Criminal Law' in Mathias Reimann and Joachim Zekoll (eds), *Introduction to German law* (Introduction to German law, 2nd edn, Kluwer Law International 2005), 406. [↑](#footnote-ref-492)
492. See Chapter 3. [↑](#footnote-ref-493)
493. *Prosecutor v Katanga* (Decision on the Confirmation of Charges), para 483; see also *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute), paras 329, 334-337. [↑](#footnote-ref-494)
494. Mohamed Elewa Badar, *The concept of mens rea in international criminal law : the case for a unified approach* (Hart Publishing 2013), 41, 387; Johan D. van der Vyver, 'International criminal law - mens rea - intent and guilty knowledge' (2010) 104 American journal of international law 241, 247; Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 267. [↑](#footnote-ref-495)
495. There is a slight difference between the common law concept of recklessness and the continental law concept of *dolus eventualis,* see footnote 74 of this chapter. [↑](#footnote-ref-496)
496. For a more detailed analysis of the different types on mens rea see van Sliedregt, *Individual Criminal Responsibility in International Law* , 40-42. [↑](#footnote-ref-497)
497. *R v Moloney* [1985] A.C. 905 (HL), Stephen Brown J, para. 915. [↑](#footnote-ref-498)
498. See also Antony Duff, *Intention, agency and criminal liability : philosophy of action and the criminal law* (Basil Blackwell 1990), at 67, where he argues that the mind of a perpetrator becomes criminal and, thus, triggers their criminal responsibility only if and because it is expressed to the outside world. [↑](#footnote-ref-499)
499. In accordance, Badar argues that ‘[...] in criminal law the word ‘intent’ or the adjective ‘intentionally’ have traditionally not been limited to the narrow definition of purpose, aim or design’, Badar, *The concept of mens rea in international criminal law : the case for a unified approach*, 387-388. [↑](#footnote-ref-500)
500. Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 268. [↑](#footnote-ref-501)
501. *Prosecutor v Tadic* (Judgment), paras 677, emphasis added. [↑](#footnote-ref-502)
502. Ibid, paras 677-678. [↑](#footnote-ref-503)
503. Ibid, para 689: ‘The Trial Chamber finds that aiding and abetting includes all acts of assistance by

     words or acts that lend encouragement or support, as long as the requisite intent is present’. This approach has been rejected by the Appeals Chamber, *Prosecutor v Tadic* (Appeal Judgment), para. 229 [↑](#footnote-ref-504)
504. *Prosecutor v Krstić* (Judgment), paras 622, 634, 644. [↑](#footnote-ref-505)
505. *Prosecutor v Krstić* (Appeal Judgment), para. 134. [↑](#footnote-ref-506)
506. Such an approach in vital to continental criminal law, which is mostly based upon German doctrines, where intent (*Vorsatz*) is a combination of an individual’s “*Wissen und Wollen*”- cognitive and volitional element. Thus, an individual is not a mere object but should ‘be recognised as a self-determined personality’ and be treated subsequently in law, including the finding of guilt on their part, see Schumann Schumann, 'Criminal Law', in Introduction to German Law, at 398 [↑](#footnote-ref-507)
507. *Prosecutor v Orić* (Judgment) ICTY-03-68-T, Trial Chamber II (30 June 2006), para. 299. Similarly in *Prosecutor v Aleksovski* (Judgment), para. 61; *Prosecutor v Kvocka et al* (Judgment), para. 255; See also *Prosecutor v Taylor* (Judgment), SCSL-03-01-T, Trial Chamber II (18 May 2012), para. 487. [↑](#footnote-ref-508)
508. See for example, *Prosecutor v Tadic* (Appeal Judgment), para. 202; *Prosecutor v Vasiljevic* (Appeal Judgment), para. 98. [↑](#footnote-ref-509)
509. As explained by Noto, ‘[…]the *ad hoc* tribunals have agreed on a knowledge-based *mens rea* for aiding and abetting, but […] Chambers have created a redundant schism between a cognitive-volitional knowledge standard and a knowledge only standard’, Noto, *Secondary liability in international criminal law : a study on aiding and abetting or otherwise assisting the Commission of International Crimes*, 114. [↑](#footnote-ref-510)
510. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court*, 151, 184. [↑](#footnote-ref-511)
511. Donald K. Piragoff and Darryl Robinson, 'Article 30: Mental element' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 2nd edn, Beck/Hart/Nomos 2008), 533. [↑](#footnote-ref-512)
512. See also Gerhard Werle and Florian Jessberger, '' Unless otherwise provided': Article 30 of the ICC Statute and the mental element of crimes under international criminal law' (2005) 3 Journal of International Criminal Justice 35, 42-43. [↑](#footnote-ref-513)
513. Alicia Gil Gil, 'Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator' (2014) 14 International Criminal Law Review 82, 107. [↑](#footnote-ref-514)
514. Even though the Pre-Trial Chamber in *Lubanga* had interpreted the intent requirements on Art 30 as including *dolus eventualis*, this argument was rejected by the *Lubanga* Trial Chamber, an argument that was also followed by the *Bemba* Pre-Trial Chamber. See, *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute), para. 1011; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), paras 364-369. *Contra*, Prosecutor v Katanga and Chui (Decision on the Confirmation of Charges), footnote 329. [↑](#footnote-ref-515)
515. Note also the inconsistency in Art. 30 between the phrases “intend and knowledge” (used conjunctively) of the general provision on Art. 30(1) and “means to cause that consequence or is aware that it will occur in the ordinary course of events” (used disjunctively) of Art. 30(2)(b). See also Roger Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Criminal Law Forum 291, 302. [↑](#footnote-ref-516)
516. The common law notion of recklessness is not identical to the continental law notion of *dolus eventualis*, though. Recklessness can include not only cases of *dolus eventualis* but also cases the continental law approaches in the realm of advertent negligence, see Badar, *The concept of mens rea in international criminal law : the case for a unified approach*, 54. [↑](#footnote-ref-517)
517. For a detailed analysis of direct intent, indirect intent and *dolus eventualis* see Schumann, 'Criminal Law', 392-394. [↑](#footnote-ref-518)
518. See also Ashworth and Horder, *Principles of criminal law* , 431-432. [↑](#footnote-ref-519)
519. *Prosecutor v Aleksovski* (Appeal Judgment) ICTY-95-14/1-A (24 March 2000), para. 162; *Prosecutor v Blagojević and Jokić* (Judgment) ICTY-02-60-T (17 January 2005), para. 727; *Prosecutor v Krnojelac* (Judgment), para. 90. [↑](#footnote-ref-520)
520. *Prosecutor v Limaj et al* (Judgment) ICTY-03-66-T, Trial Chamber II (30 November 2005), para. 518; *Prosecutor v Aleksovski* (Appeal Judgment), para. 162; *Prosecutor v Krnojelac* (Judgment), para. 90; *Prosecutor v Blaskić* (Appeal Judgement), para. 50, citing *Prosecutor v Blaskić* (Judgement), para. 287; *Prosecutor v Furundžija* (Judgement), para. 246; *Prosecutor v Brdanin* (Judgement), para. 272. [↑](#footnote-ref-521)
521. Antony Duff, 'Subjectivism, Objectivism and Criminal Attempts' in A. P. Simester and A. T. H. Smith (eds), *Harm and Culpability* (Harm and Culpability, Clarendon Press 1996), 20. See also the discussion of Eichmann’s criminal responsibility for the *Endlösung* (the Final Solution) in terms of the “*objektiv-subjektive Theorie*”, in Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* 552-555. [↑](#footnote-ref-522)
522. Duff, 'Subjectivism, Objectivism and Criminal Attempts', , 38-39. [↑](#footnote-ref-523)
523. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 482. [↑](#footnote-ref-524)
524. See Duff, 'Subjectivism, Objectivism and Criminal Attempts', . [↑](#footnote-ref-525)
525. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), para. 484. [↑](#footnote-ref-526)
526. van Sliedregt, *Individual Criminal Responsibility in International Law* , 82. [↑](#footnote-ref-527)
527. See also Elies van Sliedregt and Alexandra Popova, 'Interpreting “for the purpose of facilitating” in Article 25(3)(c)?' 23 December 2014) <https://cicj.org/2014/12/interpreting-for-the-purpose-of-facilitating-in-article-253c/ > accessed 16 May 2018: ‘We agree with Thomas Weigend that the actor’s will flows from his conduct: it is artificial to distinguish a person who knows that a certain consequence will follow his act and does it anyway, from one who intends the consequence. Knowledge thus equals intention’. [↑](#footnote-ref-528)
528. See also Piragoff and Robinson, 'Article 30: Mental element'. [↑](#footnote-ref-529)
529. *Prosecutor v Popović et al* (Judgment) ICTY-05-88-T, Trial Chamber II (10 June 2010), para. 1500. [↑](#footnote-ref-530)
530. Similarly in Noto, *Secondary liability in international criminal law : a study on aiding and abetting or otherwise assisting the Commission of International Crimes*, 122. [↑](#footnote-ref-531)
531. In terms of English law see *R v Mohan* [1976] Q.B. 1 (AC), para. 11: Since the perpetrator have decided to commit the crime, it is of ‘no matter whether the accused desired that consequence of his act or not’. See also *R v Moloney* [1985] A.C. 905 (HL), where it has been argued that intent is distinct from desire. [↑](#footnote-ref-532)
532. See also Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court*, 193. [↑](#footnote-ref-533)
533. See, for example, *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute); *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute); *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo). [↑](#footnote-ref-534)
534. Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22 Leiden Journal of International Law 715, 717. [↑](#footnote-ref-535)
535. See George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International, Vol I: Foundations* (Oxford University Press 2007). [↑](#footnote-ref-536)
536. Gil Gil, 'Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator', 98, 101. [↑](#footnote-ref-537)
537. Farrell, for example, argues that ‘under either interpretation of the purpose standard, it would be more difficult to prosecute corporate actors than would be the case if the standard was “knowing assistance” as applied by the ICTY, ICTR and SCSL’, Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8 Journal of Inernational Criminal Justice 873, 883. [↑](#footnote-ref-538)
538. Kai Ambos, 'Some Preliminary Reflections on the mens rea Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in Lal Chand Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese, Brill/Kluwer Law International 2003),23; Robert Cryer, 'General principles of liability in international criminal law' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (The Permanent International Criminal Court: Legal and Policy Issues, Hart Publishing 2004), 248; Christoph Burchard, 'Ancillary and Neutral Business Contributions to ‘Corporate–Political Core Crime’: Initial Enquiries Concerning the Rome Statute' (2010) 8 Journal of International Criminal Justice 919, 937-939. [↑](#footnote-ref-539)
539. The Trial Chamber in *Furundžija* seems to follow this approach: ‘To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture’, *Prosecutor v Furundžija* (Judgment), para. 252, emphasis in the original. [↑](#footnote-ref-540)
540. I. H. Dennis, 'The Mental Element for Accessories' in Peter Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (Criminal Law: Essays in Honour of J C Smith, Butterworths 1987), 54-55. [↑](#footnote-ref-541)
541. See Ambos, 'Article 25: Individual criminal responsibility', , 483. [↑](#footnote-ref-542)
542. Similarly, Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 Journal of International Criminal Justice 851, 862. [↑](#footnote-ref-543)
543. van Sliedregt and Popova, 'Interpreting “for the purpose of facilitating” in Article 25(3)(c)?'accessed 21/05/2019. [↑](#footnote-ref-544)
544. Noto, *Secondary liability in international criminal law : a study on aiding and abetting or otherwise assisting the Commission of International Crimes*, 186. [↑](#footnote-ref-545)
545. van Sliedregt, *Individual Criminal Responsibility in International Law* , 114. [↑](#footnote-ref-546)
546. See also *Backun v United States,* US Supreme Court 4th Cir. 112 F.2D 635 (10 June 1940)*,* where the US Supreme Court held that, in order for the defendants to be responsible as accessories before the crime, knowledge, rather than purpose, should suffice. Interesting, the judges based their judgment on the concept of morality, arguing that each citizen has a ‘moral obligation’ to prevent specific (serious) crimes, 637. [↑](#footnote-ref-547)
547. Alexander K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge- Based Interpretation' (1999) 99 Columbia Law Review 2259, 2268. [↑](#footnote-ref-548)
548. In accordance to this, many US courts have abandoned the purpose criterion and have returned to the knowledge test, see Louis Westerfield, 'The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent ' (1980-1981) 51 Mississippi Law Journal . See also the arguments in the ‘Amicus Curiae of International Law Scholars Philip Alston et al. in Support of Petitioners’ (30 April 2010) rejecting the purpose requirement in terms of aiding and abetting, in *Presbyterian Church of Sudan v Talisman Energy* (On Petition for Writ of Certiorari to The United States Court of Appeals for The Second Circuit) US Supreme Court, case No 09-1262, available at <<http://hrp.law.harvard.edu/wp-content/uploads/2013/07/talisman-amicus-final-filed-4-30-10.pdf>> accessed 20 May 2018. [↑](#footnote-ref-549)
549. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005), 194. [↑](#footnote-ref-550)
550. van Sliedregt, *Individual Criminal Responsibility in International Law* , 129. [↑](#footnote-ref-551)
551. For details upon the facts of these cases/incidents see Chapter 2. [↑](#footnote-ref-552)
552. See Article 2 of the UN Charter, where the principle of non-intervention is implied. [↑](#footnote-ref-553)
553. In the *Van Anraat* case, for example, (see chapter 2 for its analysis), the Court went at lengths to establish that the chemicals sold by Van Anraat to Iraq were indeed used by Saddam in the attacks against the Kurdish population, see Wim Huisman and Elies van Sliedregt, 'Rogue Traders' (2010) 8 Journal of International Criminal Justice 803, 809. [↑](#footnote-ref-554)
554. *Contra*, ibid, arguing that ‘the causational element is not broad enough to cover silent or beneficial complicity […] A lower causation standard might be appropriate for more detached forms of involvement that do not necessarily warrant a criminal justice response’, 827. [↑](#footnote-ref-555)
555. This is also the case of banks accused of providing money to authoritative regimes responsible for the commission of international crimes and helping them, thus, to remain in power. [↑](#footnote-ref-556)
556. However, in June 2018, *Lafarge*, a French cement corporation, has been charged by the French legal authorities for complicity in crimes against humanity. According to the indictment, *Lafarge* was financing, through middlemen, rebel armed groups in Syria, in order to maintain its business in the Jalabiya plant. In addition, eight of the corporation’s executives, including the former CEO Bruno Laffont, have been charged with financing a terrorist group over Lafarge's activities in Syria between 2011 and 2015, further details available at <[www.telegraph.co.uk/news/2018/06/28/french-firm-lafarge-charged-complicity-crimes-against-humanity/](http://www.telegraph.co.uk/news/2018/06/28/french-firm-lafarge-charged-complicity-crimes-against-humanity/)> accessed on 28 June 2018. [↑](#footnote-ref-557)
557. *Presbyterian Church v Talisman Energy*, US Court of Appeals 2nd Cir 582 F.3d 244, para 259, emphasis omitted. [↑](#footnote-ref-558)
558. Ibid, para. 262. [↑](#footnote-ref-559)
559. See also Andrea Andrea Reggio, 'Aiding and Abetting In International Criminal Law: The Responsibility of Corporate Agents And Businessmen For "Trading With The Enemy" of Mankind' (2005) 5 International Criminal Law Review , 692. [↑](#footnote-ref-560)
560. This is why gun manufactures cannot be considered as aiders and abettors in international crimes in the majority of the cases. Even if the specific guns they have sold have been used by a government to commit international crimes, the knowledge standard of aiding and abetting is not reached for the company directors. States buy ammunition for legitimate purposes in the realm of their national armament programme and it is usually not possible for company directors to know that they will be used in crimes against humanity in the ordinary course of events. [↑](#footnote-ref-561)
561. See Huisman and van Sliedregt, 'Rogue Traders', 809. [↑](#footnote-ref-562)
562. The situation could be different in terms of a corporation that offers military services to governments. If, for example corporate security personnel removes a local population themselves, then their *actus reus* is the same with the *actus reus* of the government’s army, thus the company directors will be responsible as indirect perpetrators, together with the government directors. [↑](#footnote-ref-563)
563. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court*, 201, emphasis omitted. [↑](#footnote-ref-564)
564. Commentary of the ILC on Art. 6 of the Draft Code of Crimes against the Peace and Security of Mankind 1996, para (1). [↑](#footnote-ref-565)
565. For a presentation of responsibility of superiors over their subordinates from the 1439 Charles VII of France’s Ordinance at Orleans to the Napoleonian wars of the 19th century, see L. C. Green, 'Command Responsibility in International Humanitarian Law' (1995) 5 Transnational Law & Contemporary Problems , 320-322. [↑](#footnote-ref-566)
566. See the relevant discussion in Chapter 1 regarding human dignity as the underlying principle of international law. [↑](#footnote-ref-567)
567. The IV Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 1 of the annexed rules of warfare. [↑](#footnote-ref-568)
568. According to the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established by the Preliminary Peace Conference of 1919 to report regarding the responsibility of members of the Central Powers (*Mittelmächte*) and the constitution of an international tribunal, “[t]here is little doubt that the ex-Kaiser and others in high authority were cognizant of and could at least mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air”, *Report Presented to the Preliminary Peace Conference*, 29 March 1919, 117. [↑](#footnote-ref-569)
569. Art 86 and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. [↑](#footnote-ref-570)
570. *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 172. [↑](#footnote-ref-571)
571. Mirjan Damas̆ka, 'The Shadow Side of Command Responsibility' (2001) 49 The American Journal of Comparative Law 455, 456. [↑](#footnote-ref-572)
572. See also *Prosecutor v* *Hadžihasanović* (Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility), IT-01-47-AR72, Appeals Chamber (16 July 2003), para. 16: ‘Command responsibility is the most effective method by which international criminal law can enforce responsible command’. [↑](#footnote-ref-573)
573. See, for example, the discussion upon the criminal responsibility of Joachim von Ribbentrop, Judgment of the Nuremberg International Military Tribunal 1946, paras 490-491, emphasis added. See also the Court’s findings regarding Hermann Göring’s acts as the Plenipotentiary for the Four-Year Plan on the recruitment and allocation of manpower and the Luftwaffe Commander-in-Chief, ibid, paras 486-487. [↑](#footnote-ref-574)
574. See Chapter 5. [↑](#footnote-ref-575)
575. Dohihara, for example, was responsible for his own omission to provide the food and medicine to the prisoner under his charge, which amounted to a war crime, Judgment of the International Military Tribunal for the Far East, Tokyo, 1946–1948, para. 49779. Commander-in-Chief Hata, however, was found responsible for war crimes because he was ‘in breach of his duty’: ‘[i]n 1938 and again from 1941 to 1944 *when Hata was in command of expeditionary forces in China atrocities were committed on a large scale by the troops under his command* and were and were spread over a long period of time. Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed”, Judgment of the International Military Tribunal for the Far East, para. 49784, emphasis added. [↑](#footnote-ref-576)
576. Judgment of the International Military Tribunal for the Far East, para. 49772. [↑](#footnote-ref-577)
577. *The United States of America vs. Wilhelm von Leeb et al*. (The High Command Trial), US Military Tribunal Nuremberg, Judgment of 27 October 1948, para. 542. [↑](#footnote-ref-578)
578. See, for example, *Prosecutor v Music et al* (Judgment), para. 346, confirmed on appeal; *Prosecutor v Musić et al* (Appeal Judgment), paras 189–98, 225–6, 238–9, 256, 263. The Trial Chamber in *Orić* added a further element: that the subordinate had indeed committed an international crime, *Prosecutor v Orić* (Judgment), para. 294; *Prosecutor v Nahimana et al* (Appeal Judgment), ICTR-99-52-A (28 November 2007), para. 865*; Prosecutor v Karemera et al* (Judgment) No. ICTR-98-44-T, Trial Chamber III (2 February 2012), para. 1493. [↑](#footnote-ref-579)
579. *Prosecutor v Musić* et al (Judgment), para. 356, confirmed on Appeal, *Prosecutor v Musić* et al (Appeal Judgment), paras 195-196. See also *Prosecutor v Aleksovski* (Appeal Judgment), para. 76. [↑](#footnote-ref-580)
580. *Prosecutor v Karadžić* (Judgment) IT-95-5/18-T (24 March 2016), paras 578, 3142. [↑](#footnote-ref-581)
581. *Prosecutor v Kayishema and Ruzindana* (Judgment), paras 213-216. Nevertheless, the Trial Chamber in *Akayesu* expressed its reservations regarding the application of the doctrine to civilian superiors, based on the fact that the control powers of a civilian superior may be limited, *Prosecutor v Akayesu* (Judgment), paras 490-491. Similarly, in *Prosecutor v Musema* (Judgment), para. 135. [↑](#footnote-ref-582)
582. *Prosecutor v Aleksovski* (Judgment), para. 76; *Prosecutor v Musić* et al (Judgment), para 370; *Prosecutor v Kordić and Čerkez* (Judgment), paras 369, 422; *Prosecutor v Musić et al.* (Appeal Judgment), para. 197; *Prosecutor v Hadžihasanović and Kubura* (Judgment), para. 78; *Prosecutor v Delić* (Judgment), IT-04-83-T, Trial Chamber I (15 September 2008), para. 60. [↑](#footnote-ref-583)
583. *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 189. [↑](#footnote-ref-584)
584. *Prosecutor v Musić et al* (Judgment), paras 370-371; *Prosecutor v Aleksovski* (Judgment), para. 76; *Prosecutor v Perišić* (Appeal Judgment), IT-04-81-A (28 February 2013), para. 87. [↑](#footnote-ref-585)
585. *Prosecutor v Blaskić* (Judgment), para 321, citing *U.S.A. v. Wilhelm von Leeb et al.* (High Command case), in Trials of War Criminals, Vol. XI, 543-544. [↑](#footnote-ref-586)
586. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 418: ‘In this respect, the Chamber takes note of the common position upheld by the *ad hoc* tribunals, according to which effective control must have existed at the time of the commission of the crime’. See also *Prosecutor v Kordić and Čerkez* (Judgment), para. 422; *Prosecutor v Musić* *et al* (Judgment), para. 370. [↑](#footnote-ref-587)
587. Art. 28 sets a different *mens rea* requirement for military commanders and civilian superiors, which will be further discussed later in this section. [↑](#footnote-ref-588)
588. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 415; *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 183. The ICC adopts the same standard as the *ad hoc* criminal Tribunals: ‘the possession of material abilities to prevent subordinate offences or to punish subordinate offenders’, see *Prosecutor v Musić et al.* (Appeal Judgment), para. 266; *Prosecutor v Karera* (Appeal Judgment), ICTR-01-74-A (2 February 2009), para. 564; *Prosecutor v Ntagerura* *et al* (Appeal Judgment), ICTR-99-46-A (7 July 2006), paras 341-342; *Prosecutor v Halilović* (Appeal Judgment), IT-01-48-A (16 October 2007), para. 59; *Prosecutor v Ntawukulilyayo* (Judgment and Sentence), ICTR-05-82-T (3 August 2010), para. 420. [↑](#footnote-ref-589)
589. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 415; Prosecutor v Bemba (Judgment pursuant to Article 74 of the Statute), para. 183. See also *Prosecutor v Musić et al* (Appeal Judgment), para. 266. *Contra*, *Government Commission at the General Military Government Tribunal in the French Occupation Zone in Germany v. Herman Roechling et al* (Indictment and judgement of the General Military Government Tribunal in the French Occupation Zone in Germany), Law Reports, Vol. XIV, para. 1092, where influence over the subordinates was judged sufficient to establish the criminal responsibility of the accused. [↑](#footnote-ref-590)
590. ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, para. 115. [↑](#footnote-ref-591)
591. See Chapter 2. [↑](#footnote-ref-592)
592. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 417; *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 188: ‘The Chamber takes the view that there are nonetheless several factors which may indicate the existence of a superior's position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment’. [↑](#footnote-ref-593)
593. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 437. [↑](#footnote-ref-594)
594. *Prosecutor v Strugar* (Judgement), IT-01-42-T (31 January 2005), para. 373; *Prosecutor v Hadžihasanović and Kubura* (Judgment), para. 125. [↑](#footnote-ref-595)
595. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 439. See also *Prosecutor v Halilović* (Judgment), para. 90: ‘the use of the term “repress” in Article 86(1) of Additional Protocol I indicates that the duty only attaches where the subordinate is on the point of committing an offence and from the moment of knowledge on the part of the superior’; *Prosecutor v Hadžihasanović and Kubura* (Judgment), para. 127: ‘[...] the duty to “suppress” is recognised by the case law and seems to be included in the duty to prevent, even though it arises while the unlawful act is in the process of being committed’. [↑](#footnote-ref-596)
596. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), paras 439-441. [↑](#footnote-ref-597)
597. Ibid, para. 442. [↑](#footnote-ref-598)
598. Brackets are used because the punishing abilities of a civilian superior are not to the same extend as the ones of a military commander. In this sense the “punishment” of a subordinate by a civilian superior can consist, for example, of the subordinate losing their jobs or being deprived of some months’ salaries. [↑](#footnote-ref-599)
599. Even though Art. 28(a) refers to “effective authority and control” or “effective command and control” in terms of military commanders and Art. 28(b) only to “effective authority and control” regarding civilian superiors, the Pre-Trial Chamber in *Bemba* has argued that ‘the Chamber considers that the additional words "command" and "authority" under the two expressions has no substantial effect on the required level or standard of "control"’, *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), paras 412-413. See also *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), paras 180-181. [↑](#footnote-ref-600)
600. *Prosecutor v Bagilishema* (Appeal Judgment), para. 52. [↑](#footnote-ref-601)
601. *Prosecutor v Karadžić* (Judgment), para. 580, emphasis added, citing *Prosecutor v Perišić* (Appeal Judgment), para. 87. [↑](#footnote-ref-602)
602. *Prosecutor v Orić* (Appeal Judgment), IT-03-68-A (3 July 2008), para. 20. See also *Prosecutor v Blaškić* (Appeal Judgment), para. 69; *Prosecutor v Musić* (Appeal Judgment), para. 252; *Prosecutor v Aleksovski* (Appeal Judgment), para. 76. [↑](#footnote-ref-603)
603. Nevertheless, the recent acquittal of *Bemba* by the ICC Appeals Chamber reveals the evidential difficulties in establishing effective control even in the case of military commanders: ‘the Appeals Chamber has identified [...] serious errors in the Trial Chamber’s assessment of whether Mr Bemba took all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution. [...] In light of the foregoing, the Appeals Chamber finds [...] that the Trial Chamber’s conclusion [...] was materially affected by the errors identified above’, *Prosecutor v Bemba* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”), ICC-01/05-01/08 A (8 June 2018), paras. 189-194. [↑](#footnote-ref-604)
604. Nora Karsten, 'Distinguishing Military and Non- military Superiors' (2009) 7 Journal of International Criminal Justice 983, 1002. [↑](#footnote-ref-605)
605. See the Introduction of the thesis for the analysis of corporate involvement in international criminality. [↑](#footnote-ref-606)
606. Besides direct evidence, actual knowledge can be also inferred by circumstantial evidence, but it cannot be presumed, see *Prosecutor v Blaškić* (Judgment), para. 307; *Prosecutor v Musić et al* (Judgment), paras 384-386; *Prosecutor v Aleksovski* (Judgment), para 80; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), paras 430-431. [↑](#footnote-ref-607)
607. Art 28(a)(i) of the Rome Statute of the International Criminal Court, emphasis added. [↑](#footnote-ref-608)
608. Art 28(b)(i) of the Rome Statute of the International Criminal Court, emphasis added. [↑](#footnote-ref-609)
609. Otto Triffterer and Roberta Arnold, 'Article 28: Responsibility of commanders and other superiors' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (The Rome Statute of the International Criminal Court: A Commentary, 3rd edn, C. H. Beck/Hart/Nomos 2016), 1102-1103. [↑](#footnote-ref-610)
610. *Contra* Neuner: ‘Consciously disregarded information is not the same as wilful blindness because the first shows volition for the crime while the other mere knowledge’, Matthias Neuner, 'Superior Responsibility and the ICC Statute' in G. Carlizzi and others (eds), *La Corte Penale Internazionale* (La Corte Penale Internazionale Vivarium 2003), 276. [↑](#footnote-ref-611)
611. In terms of English law, see for example *R. v Saik* [2007] 1 AC 18, para. 26: ‘The courts have adopted in appropriate circumstances […] an extended meaning of knowledge to include “wilfulblindness”. This includes shutting one's eyes to the obvious or deliberately refraining from making inquiries the results of which one does not care to have’. Similar in *R v Reid* [1992] RTR 341, para. 356; *Sweet v Parsley* [1969] 2 WLR 470, para. 140. Triffterer and Arnold explain in similar language the *mens rea* of the civilian superior in terms of Art. 28 (b)(i) of the ICC Statute, without using the common law term “wilful blindness” though, in Triffterer and Arnold, 'Article 28: Responsibility of commanders and other superiors', 1101-1102. [↑](#footnote-ref-612)
612. *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284, paras 288–289; *Westminster City Council v Croyalgrange Ltd* [1986] 1 WLR 674, para. 684 d–e; *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509, para 250; *R v Warner* [1969] 2 AC 256, paras 278, 279 g; *United States v Jewell*, 532 F.2d 697 (9th Cir. 1976). [↑](#footnote-ref-613)
613. David Luban, 'Contrived ignorance' (1999) 87 Georgetown Law Journal 957, 959; 970-971. [↑](#footnote-ref-614)
614. John Monroe, 'Applying the responsible corporate officer and conscious avoidance doctrines in the context of the Abu Ghraib prison scandal' (2006) 91 Iowa Law Review 1367, 1387. [↑](#footnote-ref-615)
615. See Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press 2010), 186. [↑](#footnote-ref-616)
616. This is one of the reasons why the notion of recklessness is not the exact equivalent of *dolus eventualis*. [↑](#footnote-ref-617)
617. Kai Ambos, 'Superior Responsibility' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press 2002), 870. [↑](#footnote-ref-618)
618. The US Model Penal Code for example establishes that awareness of the high probability of the fact amounts to knowledge, see §2.02(7) (Official Draft as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962): ‘Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist’. [↑](#footnote-ref-619)
619. *The United States of America v Wilhelm von Leeb et al.*, para. 542. [↑](#footnote-ref-620)
620. See Chapter 4 for perpetration and Chapter 5 for aiding and abetting. [↑](#footnote-ref-621)
621. Similar is the approach taken in the Hostages case, where the Court argued that “[t]hose responsible

     for such crimes by ordering or authorising their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent", without further clarification upon the criminal responsibility created by a failure to prevent the crimes of the subordinates, *The United States of America v Wilhelm List and Others* (The Hostages Trial), United States Military Tribunal, Nuremberg 8 July, 1947, to 19 February, 1948, para. 70. [↑](#footnote-ref-622)
622. *The United States of America vs. Wilhelm von Leeb et al.*, para 543. [↑](#footnote-ref-623)
623. *Prosecutor v Halilović* (Judgment), IT-01-48-T, Trial Chamber I (16 November 2005), para. 54. Similarly, in *Prosecutor v Krnojelac* (Appeal Judgment), para. 171: ‘It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control’. [↑](#footnote-ref-624)
624. Similarly, in *Prosecutor v Hadžihasanović and Kubura* (Judgment), IT-01-47-T (15 March 2006), paras 75, 2075. [↑](#footnote-ref-625)
625. *Prosecutor v Halilović* (Judgment), para. 78. [↑](#footnote-ref-626)
626. *Prosecutor v Musić* (Appeal Judgement), para. 198, emphasis added. See also *Prosecutor v Aleksovski* (Judgment), para. 67. Similarly in *Prosecutor v Blaškić* (Judgment), para. 322. [↑](#footnote-ref-627)
627. *Prosecutor v Orić* (Judgment), para 292, emphasis added. It is reminded, though, that in the semi unitary participation model followed by the ICTY the different modes of responsibility do not have the same doctrinal value as in the differential participation model. [↑](#footnote-ref-628)
628. *Prosecutor v Karadžić* (Judgment), para 591; *Prosecutor v Aleksovski* (Appeal Judgment), para. 183; *Prosecutor v Musić* (Appeal Judgment), para. 745; *Prosecutor v Blaškić* (Appeal Judgement), paras 91–92; See also *Prosecutor v Galić* (Appeal Judgment), IT-98-29-A (30 November 2006), para. 186; *Prosecutor v Kvočka et al* (Appeal Judgment), para. 104. [↑](#footnote-ref-629)
629. *Prosecutor v Akayesu* (Judgment), para. 471. [↑](#footnote-ref-630)
630. See also *Prosecutor v Kayishema and Ruzindana* (Judgment), para 210: ‘The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts’. [↑](#footnote-ref-631)
631. See Chapter 4. [↑](#footnote-ref-632)
632. See the *actus reus* of international crimes under the jurisdiction of the ICC, Art. 5-8 of the Rome Statute of the International Criminal Court. [↑](#footnote-ref-633)
633. Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 180-181. [↑](#footnote-ref-634)
634. Fletcher, *Basic concepts of criminal law* , 51, emphasis in the original. [↑](#footnote-ref-635)
635. Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 186. [↑](#footnote-ref-636)
636. Regarding English law see, for example, *R v Stone & Dobinson* (1977) QB 354; *R v Gibbins & Proctor* (1918) 13 Cr App Rep 134 [↑](#footnote-ref-637)
637. See Section 13 of the German Penal Code (Strafgesetzbuch, StGB). [↑](#footnote-ref-638)
638. See also Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What exactly is the superior held responsible?' (2007) 5 Journal of International Criminal Justice 665, 672-673. [↑](#footnote-ref-639)
639. Ambos also recognises that in commission by omission ‘[t]he important is the violation of the legal interest or the harm caused’, Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 181. [↑](#footnote-ref-640)
640. See Chapter 5, at. On the same direction the ICC Pre-Trial Chamber in *Bemba* argued that it is necessary ‘to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute’, without accepting, though, that there is a ‘direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates’, because the judges (wrongly) approached causal link as a but-for condition, *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para 425. [↑](#footnote-ref-641)
641. See, for example, Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 University of Pennsylvania Law Review 1455, 1456. [↑](#footnote-ref-642)
642. These kind of duties are called the duties of a guarantor in continental criminal law jurisdictions (*Garantenpflichten* in German law). A guarantor is a person who has the legal obligation to protect another individual because of a special legal relation or because they themselves have originated a source of danger and are, thus, required to protect others against it (*Garantenstellung, Schutz-/Obhutspflicht, Überwachungs-/Sicherungspflicht*), Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 183-184. [↑](#footnote-ref-643)
643. Ambos explains that in common law jurisdictions the duty to act is based in statute, contract, special status, voluntary assumption of care, previous dangerous act/creation of peril, ibid, 184. [↑](#footnote-ref-644)
644. Fletcher, *Basic concepts of criminal law* , 48. [↑](#footnote-ref-645)
645. See also Article 11(2) of the 1948 Universal Declaration of Human Rights: ‘[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed’, UN General Assembly, Universal Declaration of Human Rights, 217 A (III) (10 December 1948). Similar in Article 15 of the International Covenant on Civil and Political Rights: ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed’. [↑](#footnote-ref-646)
646. In terms of US law for example, Fletcher notes that ‘[t]he Model Penal Code provides that ‘liability for the commission of an offence may not be based on an omission…unless a duty to perform the omitted act is imposed by law’. “Law” in this context means case law. Not statutory law. Therefore, the punishment of commission by omission raises serious problems under the principle *nulla poena sine lege* [no punishment without a prior *statutory* prohibition]’, Fletcher, *Basic concepts of criminal law* , 48, emphasis in the original. [↑](#footnote-ref-647)
647. Art. 22(1) of the Rome Statute of the International Criminal Court: ‘A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’. [↑](#footnote-ref-648)
648. See Chapter 1 on the origins of (international) criminal law. [↑](#footnote-ref-649)
649. See Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 184: ‘While the philosophical or theoretical foundation of such a duty to act is arguably the most difficult and controversial issue of the whole general part of criminal law, it is widely accepted that it must exist in order to compensate for the act/omission distinction. Only then can the normative equivalence between the active causation of harm and the failure to prevent harm be justified and the latter amount to a punishable omission. Otherwise, in the absence of such a duty, mere inaction cannot even constitute a legally relevant omission’. [↑](#footnote-ref-650)
650. It is reminded here that negligence can be either a) advertent, where the individual realises that their conduct could lead to a crime but they believe that this will not happen in the end; or b) inadvertent, where the individual does not even realise that their conduct could lead to a criminal outcome. [↑](#footnote-ref-651)
651. According to Triffterer, ‘[i]ntentionally omitting an act presupposes that the person has the factual possibility and is aware that he can step out of his or her passivity and become active in a way demanded by the situation as the case may be’, Otto Triffterer, 'Command responsibility’ – crime sui generis or participation ‘as otherwise provided’ in Art. 28 Rome Statute' in Jörg Arnold and others (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag* (Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag, C.H. Beck 2005), 911. [↑](#footnote-ref-652)
652. See Chapter 2 on an analysis of vicarious and strict liability. [↑](#footnote-ref-653)
653. Whether inadvertent negligence should be an acceptable *mens rea* requirement for any substantial crime (irrespectively of it being an “active” act or omission crime), is an issue that has always concerned criminal law scholars, see, for example, Ashworth and Horder, *Principles of criminal law* , 182: ‘One reason for the opposition of many English text-writers to criminal liability by [inadvertent] negligence is that it derogates from the subjective principles [..] To have negligence as a standard of liability would […] move away from advertence as the foundation of criminal responsibility, and in doing so might show insufficient respect for the principle of autonomy’. [↑](#footnote-ref-654)
654. Some jurisdictions however have criminalised the individual’s failure to save an endangered person, when there is not risk for the life of the individual, as a crime of authentic omission. In this case, there is a special rule creating the relevant duty and attribute criminal responsibility to the individual for their failure to respect this duty (and not for the death of the endangered person). See, e.g. Art. 307 of the Greek Penal Code; Art. 223 French Code Pénal; section 323c German Strafgesetzbuch. [↑](#footnote-ref-655)
655. In this sense, “passive” rather than “active” commission works as a mitigating factor. [↑](#footnote-ref-656)
656. Further details in Kai Ambos, 'Omissions' in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice, Volume 1: Anglo-German Dialogues* (Cambridge University Press 2020), 20-21. [↑](#footnote-ref-657)
657. See the first example in the analysis of inauthentic omission in this chapter. [↑](#footnote-ref-658)
658. See, for example, Art. 307 of the Greek Penal Code on failure to save an individual whose life is in danger. [↑](#footnote-ref-659)
659. In the Greek Penal Code for example, failure to save an endangered person, which is an authentic crime of omission is charged with imprisonment of up to one year (Art. 307), while killing someone by omission (commission by omission), as an inauthentic crime of omission, bears the same penalty range as active killing, which is from 5 years to life imprisonment (Art. 14, 52(1), 299, 302). [↑](#footnote-ref-660)
660. *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), para. 405; *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 174. [↑](#footnote-ref-661)
661. *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), paras 173, 211-213. [↑](#footnote-ref-662)
662. Under such an understanding of indirect inauthentic omission, the military commander of Art 28(a) who has intent regarding the crimes of the subordinates will also be responsible as a participant to the crime. However, if the military commander has mere negligence, then their omission cannot be identified as “active” act in the sense of Art. 25 of the ICC Statute and, as a result, the military commander can be responsible only for failure to prevent the crime of the subordinates, as a distinct inauthentic omission crime separate to the international crimes described in Art 5-8 of the ICC Statute. [↑](#footnote-ref-663)
663. *Prosecutor v Halilović* (Judgment), para. 71. Similar in *Prosecutor v Blaškić* (Appeal Judgement), para. 63, citing *Prosecutor v* *Bagilishema*, (Judgment), ICTR-95-1A-A, 3 July 2002, paras 34-35. [↑](#footnote-ref-664)
664. Triffterer derives to the same conclusion, regarding, however, the whole Art. 28(b) and not just the prevention of the crime provision, Triffterer, 'Command responsibility’ – crime sui generis or participation ‘as otherwise provided’ in Art. 28 Rome Statute', , 904-905; 923: ‘Acts and omissions of superiors may trigger Article 25§3 litera a-e, as with regard to all natural persons fulfilling the requirements established there. But 28 provides, in addition, a well-balanced responsibility of superiors only for an unusual, but in practice rather frequent passive “involvement”. Such an “involvement” by a failure to control properly is a form of participation by abusing power through an omission and, therefore, ought to be prevented by all means, including criminal sanctions as ultima ratio’. Nerlich also admits that, regarding aiding and abetting, ‘knowledge superior responsibility before the fact and assistance in the commission of the crime of another person pursuant to Article 25(3)(c) ICCSt. have striking similarities’, Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What exactly is the superior held responsible?' , 673. [↑](#footnote-ref-665)
665. *Contra Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute): ‘[t]he plain text of Article 28 – ‘’[i]n addition to other grounds of criminal responsibility” – and its placement in Part 3 of the Statute indicate that Article 28 is intended to provide a distinct mode of liability from those found under Article 25.[…] Consequently, Article 28 must be viewed as a form of sui generis liability’, paras 173-174. [↑](#footnote-ref-666)
666. Similarly, Meloni argues that in case of an intentional failure to prevent ‘the superior can be held criminally responsible and punished for those crimes pursuant to general criminal law principles on attribution. In relation to these types of cases, in fact, Art. 28 does not extend liability for the crime committed by the subordinates beyond what would have already been punishable pursuant to the general rules of complicity and responsibility for omission’, Meloni, *Command Responsibility in International Criminal Law*, 197-198. However, she limits the responsibility of the superior in such a case to accomplice liability and excludes principal liability (in the form of indirect participation), at 198. [↑](#footnote-ref-667)
667. It could be possible, though, for their contribution through omission, rather than action, to be considered as a mitigating factor in terms of sentence. [↑](#footnote-ref-668)
668. *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), paras 287, 310, 357, 368, 529; *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute), paras 767, 786, 1627; *Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014), paras 145, 153. The ICC case law has not yet discussed aiding and abetting through omission, but the *ad hoc* Tribunals have repeatedly argued in their case law that assistance to the crime may be provided by either an act or by an omission, see *Prosecutor v Blagojević & Jokić* (Judgment), para. 726; *Prosecutor v Brđanin* (Judgment), para. 271; *Prosecutor v Vasiljević* (Judgment) para. 70; *Prosecutor v Rutaganira* (Judgment and Sentence), ICTR-95-1C-T (14 March 2005), paras 65-66; *Prosecutor v Rutaganda* (Judgment), para. 41. [↑](#footnote-ref-669)
669. See the analysis on commission through control over a person/organization in Chapter 4. [↑](#footnote-ref-670)
670. See the analysis of aiding and abetting in Art. 25(3)(c) of the ICC Statute in Chapter 5. [↑](#footnote-ref-671)
671. Furundžija, for example, has been convicted for aiding and abetting war crimes, as the Court accepted that his intentional omission to react to their fellow soldier’s raping of a detainee during interrogation acted as encouragement or moral support to the perpetrator, *Prosecutor v Furundžija* (Judgment), paras 273-274. [↑](#footnote-ref-672)
672. Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 231; Ambos, 'Superior Responsibility', 851. Similarly, Tsagourias argues that ‘Command responsibility is not responsibility for the crimes committed by the commander’s subordinates. Such an approach to responsibility would flout the principle of individual criminal responsibility by unwarrantedly attributing to the commander crimes in which he was not in any way involved. […] If, on the other hand, the commander participates in any way in the crimes committed by his subordinates, for example by ordering, aiding or abetting them, he will incur responsibility as a perpetrator or an accomplice. […] Instead, command responsibility is a distinct type of liability for omission. What is criminalised is the commander’s failure to prevent or punish crimes. […] The duty to punish and the duty to prevent are part and parcel of the duty to control subordinates, which part of the duty of responsible command […]’, Nicholas Tsagourias, 'Command Responsibility and the Principle of Individual Criminal Responsibility' in Chile Eboe-Osuji (ed), *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* (Protecting humanity: essays in international law and policy in honour of Navanethem Pillay, Brill 2010), 828-829. [↑](#footnote-ref-673)
673. Maria L. Nybondas, *Command responsibility and its applicability to civilian superiors* (T.M.C. Asser Press 2010), 136. However, she also argues that ‘command responsibility in cases of simultaneous applicability leads to its being subsumed under the individual criminal responsibility conviction [of Art. 25 of the ICC Statute]’, 155. [↑](#footnote-ref-674)
674. See also Meloni, *Command Responsibility in International Criminal Law*, 202-207; 221. [↑](#footnote-ref-675)
675. As explained by Wu and Kang, ‘[…]because military and civilian leaders are in a position of great public trust and responsibility, it is not unreasonable to impose some kind of legal duty on those who are in position to prevent atrocities. In this regard it should be remembered that military and civilian leaders voluntarily assume their positions and may therefore be presumed to have knowingly acquiesced to the duties under international law that are a corollary of such positions, From a regulatory standpoint, it is often a military or civil leader who is the only, or at least best-situated, person to prevent the commission of atrocities-society's last line of defense. Under this analysis, the burden of the duty must be placed where it will make a difference’, Timothy Wu and Yong-Sung Kang, 'Criminal Liability for the Actions of Subordinates -The Doctrine of Command Responsibility and Its Analogues in United States Law' (1997) 38 Harvard International Law Journal 272, 290. [↑](#footnote-ref-676)
676. See *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All E.R. 490, paras 38 and 48 (Lord Hoffmann and Lord Brown of Eaton-under-Heywood, respectively). [↑](#footnote-ref-677)
677. In this sense, the same evidence used to identify the control element of the individual’s/superior’s omission as participation to the crime (overall control approach) will be also used to identify efficient supervision in terms of the superior’s responsibility for dereliction of duty. In the latter case however, the focus is on the superior-subordinate relationship and its contents/effects rather than to the control element itself. [↑](#footnote-ref-678)
678. See also Wu and Kang, 'Criminal Liability for the Actions of Subordinates -The Doctrine of Command Responsibility and Its Analogues in United States Law', 291. [↑](#footnote-ref-679)
679. See also Ilias Bantekas, 'The contemporary law of superior responsibility' (1999) 93 American journal of international law 573, 590, 592-593. [↑](#footnote-ref-680)
680. *Prosecutor v Kordić and Čerkez* (Judgment), para 446. [↑](#footnote-ref-681)
681. *Prosecutor v Aleksovski* (Judgment), para 78. [↑](#footnote-ref-682)
682. *Prosecutor v Aleksovski* (Judgment), para 78; *Prosecutor v Blaškić* (Judgment), para. 302; *Prosecutor v Kvočka et al* (Judgment), para. 316; See also *Prosecutor v Kordić and Čerkez* (Judgment), para. 446: ‘Civilian superiors would be under similar obligations [to those of the military commanders], depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action’. [↑](#footnote-ref-683)
683. Ambos, 'Superior Responsibility', 851. [↑](#footnote-ref-684)
684. The Trial Chamber in Halilović recognised that ‘[t]he duty to punish is a separate form of liability, distinct from the failure to prevent[..]’, *Prosecutor v Halilović* (Judgment), para. 94. [↑](#footnote-ref-685)
685. According to Ambos, superior responsibility entails ‘*negligence* liability [to the superior] for *intentional* acts [of the subordinates]’, Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 231, emphasis in the original. [↑](#footnote-ref-686)
686. Besides responsibility for the negligent failure to fulfil the duty to punish after the crime commission, Art. 28(a) attributes responsibility to the commander also for their negligent failure to fulfil their duty to know (that their subordinates were about to commit a crime) before the crime commission. In fact, this is a case of strict liability, as the military commander is being punished in the absence of a *mens rea*, it can be perhaps justified though under the argument that the attribution of criminal responsibility refers to a special crime of a dereliction of duty and not to a (more severe) substantial crime. [↑](#footnote-ref-687)
687. See *Prosecutor v Halilović* (Judgment), para. 97. [↑](#footnote-ref-688)
688. Similarly, Vetter argues that ‘[g]iven that the ICC statue makes criminal only the most egregious of crimes, a weaker civilian command responsibility doctrine undercuts the court's goal of strong, individual deterrence. Individual accountability was the watershed development arising from the Nuremberg trials, and individual accountability is what will enable the ICC to meet its aspirations of deterring human rights abuses and vindicating the rule of law’, Greg R. Vetter, 'Command Responsibility of Non- Military Superiors in the International Criminal Court (ICC),' (2000) 25 Yale Journal of International Law , 94. [↑](#footnote-ref-689)
689. Triffterer and Arnold, 'Article 28: Responsibility of commanders and other superiors', , 1060. [↑](#footnote-ref-690)
690. *Contra* Ambos who argues that there are not two distinct types of responsibility for the superior, but the superior is simultaneously responsible for both participation and dereliction of duty: ‘[w]hile in structural terms the superior is to be blamed for his improper supervision, he is not only punished for this but also for the actual crimes of his subordinates. As a result, the concept creates on the one hand direct liability for the lack of supervision and on the other, indirect liability for the criminal acts of others (the subordinates) [..]’, Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* , 206. [↑](#footnote-ref-691)
691. For the links among ordering, control over a person/organisation, aiding/abetting and corporate policy and delegation of power see chapters 4 and 5. [↑](#footnote-ref-692)
692. See Chapter 2. [↑](#footnote-ref-693)
693. Cohen LJ, in *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366, para. 370; Similar in *Chandler v Cape plc* [2012] EWCA Civ 525.  [↑](#footnote-ref-694)
694. *Smith, Stone and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116. [↑](#footnote-ref-695)
695. *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, para. 484. See also *Adams v Cape Industries plc* [1990] BCLC 479; *Chandler v Cape plc* [2012] EWCA Civ 525.  [↑](#footnote-ref-696)
696. In a somewhat relevant example from English law, Lady Arden LJ in Chandler vs Cape Plc discussed the tort responsibility of the parent corporation when the latter had a ‘superior knowledge’ of the subsidiary corporation’s conduct and the parent corporation was aware that ‘the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection’*, Chandler v Cape Plc* [2012]EWCA Civ 525, para. 80. [↑](#footnote-ref-697)
697. *Wiwa v. Royal Dutch Petroleum*; *Wiwa v. Anderson*; *Wiwa v. Shell Petroleum Development Company*; *Kiobel v Royal Dutch Petroleum Co*. With the exception of Kiobel, where the US Supreme Court denied jurisdiction, Shell has agreed to a settlement with the plaintiffs. Further details on these cases in Chapter 2. [↑](#footnote-ref-698)
698. *Vedanta Resources plc v Lungowe* [2019] UKSC 20. [↑](#footnote-ref-699)
699. Ibid, paras 1-3. [↑](#footnote-ref-700)
700. Ibid, paras 2-3. [↑](#footnote-ref-701)
701. Ibid, paras 52-53. [↑](#footnote-ref-702)
702. Ibid, para. 102. [↑](#footnote-ref-703)
703. European Center for Constitutional and Human Rights (ECCHR), ‘Landmark Decision - Lafarge indicted for complicity in crimes against humanity’, available at www.ecchr.eu/nc/en/press-release/landmark-decision-in-lafarge-case-1/, accessed on 28 June 2018. [↑](#footnote-ref-704)
704. See the Commentary of the ILC on Art. 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, under para. (3). [↑](#footnote-ref-705)
705. ILC Commentary on Art. 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, under para (4). See also *Prosecutor v Musić et al* (Judgment), para. 378: ‘the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders’. Similar, in *Prosecutor v Akayesu* (Judgment), para. 492. [↑](#footnote-ref-706)
706. See Art. 21 of the Rome Statute of the International Criminal Court on the applicable law in the ICC jurisdiction. [↑](#footnote-ref-707)
707. Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc A/HRC/17/31 (21 March 2011) [↑](#footnote-ref-708)
708. UN Human Rights Council, Resolution 26/9-Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, adopted in 26 June 2014, A/HRC/RES/26/9 (14 July 2014). [↑](#footnote-ref-709)
709. UN Human Rights Council, Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/37/67 (24 January 2018). [↑](#footnote-ref-710)
710. Preamble of the Rome Statute of the International Criminal Court. [↑](#footnote-ref-711)
711. *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute), para. 188; *Prosecutor v Blaškić* (Appeal Judgment), para. 69; *Prosecutor v Milošević* (Appeal Judgment), IT-98-29/1-A (12 November 2009), para. 280. [↑](#footnote-ref-712)
712. Goudkamp, 'Duties of care between actors in supply chains', 208. [↑](#footnote-ref-713)
713. In tort law, there is generally no expectation of controlling the conduct of third parties nor preventing a person from suffering injury at the hands of a third party, unless there is a specific contractual provision, ibid, 205, 208. [↑](#footnote-ref-714)
714. See the analysis of the overall control notion this Chapter. [↑](#footnote-ref-715)
715. These corporate social responsibility schemes cover the subsidiary corporations as well. [↑](#footnote-ref-716)
716. See, for example, the Rio Tinto corporation ‘The way we work’ scheme, where it is stated that ‘[t]hrough appropriate contractual arrangements and procurement principles, consultants, agents, contractors and suppliers of Rio Tinto are equally expected to comply with ‘The way we work’ in all their dealings with or on behalf of the Group. […] We have an extensive set of standards and management systems in place aimed at ensuring ‘The way we work’ is properly implemented and complied with’, 7-8, available at www.riotinto.com/procurement/policies-and-documents-17814.aspx, accessed on 30 June 2018. See also para. 10 of ‘Rio Tinto London Limited-Purchase Order for the Supply of Goods-Terms and Conditions’ contract with suppliers, available at http://www.riotinto.com/procurement/policies-and-documents-17814.aspx, accessed 30 June 2018; para 21 of ‘Glaxosmithkline Terms and Conditions of Purchase (Goods and Services) UK’ contract with suppliers, available at https://supplier.gsk.com/irj/go/km/docs/pccshrcontent/procurement\_terms/gsk-uk-terms-and-conditions-goods-and-services.pdf, accessed on 30 June 2018; para. 13 of ‘General Terms & Conditions if Purchase of Goods of Unilever Supply Chain Company AG’ contract with suppliers, available at www.unilever.com/about/suppliers-centre/terms-and-conditions/, accessed on 30 June 2018. [↑](#footnote-ref-717)
717. European Centre for Constitutional and Human Rights (ECCHR), Case Report: Pakistan – cheap clothes, perilous conditions, available at www.ecchr.eu/en/case/paying-the-price-for-clothing-production-in-south-asia/, accessed on 28/06/2018. On 10 January 2019, the Regional Court in Dortmund dismissed the lawsuit, ruling that the statute of limitations had expired, European Centre for Constitutional and Human Rights (ECCHR), KiK: Paying The Price For Clothing Production In South Asia, available at www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/, accessed on 27 January 2019. [↑](#footnote-ref-718)
718. *Vedanta Resources Plc v Lungowe*, para. 53. It is to the noted, that the court argued for the existence of a duty of care even in cases the multinational corporation publicly declared that they are safeguarding human rights but in practice did not take any actions towards this direction. This means that the court acknowledges the rationale for establishing a duty of care, i.e. the need to protect against violations even in cases the managers of the corporation should have known about them, but in reality they did not because they have been negligent in applying the safeguards they have publicly disclosed. [↑](#footnote-ref-719)
719. It has to be noted, however, that traditionally (in terms of English law precedence at least), the courts do not easily accept the creation of a duty of care in the corporate context, even in cases where the (control-emanating) specific relationship between two actors has been established, see *Customs* *and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 AC 181; *Murphy v Brentwood* *DC* [1991] 1 AC 398 (HL). [↑](#footnote-ref-720)
720. Goudkamp, Duties of care between actors in supply chains, 207 [↑](#footnote-ref-721)