

PROSECUTING CORPORATE EXECUTIVES FOR WAR CRIMES IN SUDAN

MARK KLAMBERG*

Around the world, corporate behavior can have harmful impacts, transcending territorial boundaries and traditional commercial settings. Apparent corporate involvement in atrocities and human rights violations raises questions about liability. During the second Sudanese civil war (1983-2005), corporations from North America and Europe sought to exploit gas and oil resources in the conflict areas of southern Sudan. There have been various attempts to hold those corporations and their executives liable for alleged involvement in atrocities committed during that conflict. Among them is the recent indictment lodged in the district court of Stockholm against leading executives of Lundin Energy, a Swedish oil and gas company, for complicity in alleged war crimes in southern Sudan from 1999 to 2003. The case has prompted further litigation and scholarly discussion on a variety of related issues in Sweden and elsewhere, including the capacity to prosecute persons residing in other countries under universal jurisdiction, the role of government in authorizing prosecutions, complicity in international crimes, applicability of international humanitarian law, and the Swedish penal provision on war crimes. In exploring the Lundin case and relevant precedent regarding domestic criminalization of violations of international humanitarian law in a non-international armed conflict, this article argues that the district court does have jurisdiction in the Lundin case and that questions relating to complicity should be adjudicated pursuant to general principles of domestic criminal law.

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* Mark Klamberg is Professor of Public International Law, Stockholm University. He earned his law degree at Lund University, master in laws at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, LL.D. at Stockholm University and pursued a postdoctoral fellowship at the University of Oxford where he was member of the Senior Common Room at Christ Church. He has been an Associate Professor at Uppsala University and regularly contributes as a guest lecturer at the University of Edinburgh. I would like to thank Morten Bergsmo, Sally Longworth, Miriam Ingesson and Mikael Ekman for suggestions and views on the draft, and the editorial board of N.Y.U. Journal of International Law & Politics for their comments and revisions during the editorial process.

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I. INTRODUCTION

Given the significant and ubiquitous role they play in public life, corporations may in some contexts be involved in harmful activities that could even amount to war crimes, crimes against humanity, and genocide. Corporate responsibility and corporate accountability, concepts in the human rights law discourse, aim to promote compliance with relevant norms,¹ while domestic tort claims may provide a legal venue to determine the civil liability of entire corporate entities in such instances. However, as the International Military Tribunal in Nuremberg famously declared, “[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.”² As a contrast to civil disputes against corporations as legal entities, this

1. See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 195–99 (2006) (describing the evolution of corporate social responsibility as a norm of compliance and risk assessment).

2. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

article examines how corporate representatives (directors, officers, agents and employees) may be held individually criminally responsible for corporate complicity in war crimes. It focuses on *Prosecutor v. Ian Lundin and Alex Schneider* (hereinafter “*Lundin*”), an ongoing Swedish case concerning an indictment lodged in the district court of Stockholm against chairman of the board of Lundin Energy, Ian Lundin, and former CEO Alex Schneider for Lundin Energy’s complicity in alleged war crimes committed from 1999-2003 in southern Sudan (now South Sudan).³

This article considers legal issues raised by the prosecution, counsel for the defendants, expert opinions written at the request of the defense, and discussions held in the context of the *Lundin* case.⁴ Part II provides a factual background to the case itself, while Part III outlines how the principal of universal jurisdiction provides the basis for the *Lundin* prosecution. Part IV explores how application of this principle may be restricted by the requirement that cases relating to alleged crimes outside of Sweden be authorized by either the Government or the Prosecutor-General. Next, Part V explains the open-ended character of the international crimes provision applicable for the case, creating opportunities for a wide range

3. See generally Indictment, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14 (Swed.) (accusing Ian Lundin and Alex Schneider of assisting international crimes and providing background information to support this accusation).

4. *Id.*; Motion from Alexandre Schneider to Ministry of Justice, Justitiedepartementet BIRS [Ministry of Justice, Criminal Matters and International Judicial Cooperation Unit], 9 Feb. 2017, JuBC2018/00136/BRIS, p. 3 (Swed.); Motion from Ian Lundin to the Ministry of Justice, Justitiedepartementet BIRS [Ministry of Justice, Criminal Matters and International Judicial Cooperation Unit], 24 Sept. 2018, JuBC2018/00654-3/BIRS, pp. 2-3 (Swed.). See generally Ove Bring & Per Ole Tråskman, Expert Opinion (Dec. 19, 2014) (on file with author) (describing applicable standards of liability for participation in violations of international law); see also William A. Schabas, Expert Opinion on Universal Jurisdiction (Aug. 16, 2018) (on file with author) (explaining the restrictions surrounding universal jurisdiction in international law); Memorandum from Stefan Reimer, Medverkan i svensk och internationell straffrätt [Complicity in Swedish and International Criminal Law] (May 4, 2015). The Memorandum was presented at Stockholm University seminar and adjusted into Ds 2015:42 Ett särskilt tortyrbrott? [Government Ministry Inquiry: Torture as a Distinct Crime]. Reimer was a senior judge at Helsingborg District Court at the time. He is now a justice of the Supreme Court of Sweden.

of prosecutions. Part VI introduces and confronts the argument that violations of international humanitarian law during the relevant period of the case cannot be prosecuted in the context of a non-international armed conflict. Finally, Part VII concludes with a discussion of how agents may be held criminally complicit for corporate crimes.

II. OIL EXPLORATION DURING THE CIVIL WAR IN SOUTHERN SUDAN

The region that became South Sudan experienced two civil wars before gaining independence in 2011.⁵ The conflicts arose between the predominantly African, Christian, and animist South, seeking self-determination, and the predominantly Muslim Arab central government in the North.⁶ The root causes of the conflict trace back to governance structures established in the end of the 19th century, when the North increasingly monopolized access to economic activities, subjecting peripheral regions to pillage and slavery.⁷ Inequalities and tensions between the South and the North were further entrenched by uneven levels of investment in the economy, infrastructure, and social services during the colonial period.⁸ By the time Sudan gained independence in 1956, the governing elite had failed to establish a unified, national identity, and conflicts arose.⁹ The first civil war lasted from 1955 to 1972, and was followed by the second, from 1983 to 2005.¹⁰ Numerous cease-fires, agreements, and peace discussions occurred throughout the 1990s and early 2000s. The South fought

5. Øystein H. Rolandsen et al., *A Year of South Sudan's Third Civil War*, 18(1) INT'L AREA STUD. REV. 88, 88 (2015); see *History, South Sudan*, BRITANNICA, <https://www.britannica.com/place/South-Sudan/The-arts#ref300720> [<https://perma.cc/E8GG-WJDP>] (last visited Mar. 29, 2022) (detailing the history of South Sudan since the British conquest of the nineteenth century).

6. *History, South Sudan*, BRITANNICA, *supra* note 5.

7. Robert O. Matthews, Book Review, 60 INT'L J., Spring 2005, at 609 (reviewing DOUGLAS H. JOHNSON, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003)).

8. *Id.*

9. *Id.* at 608–10; for general reference see JOHN YOUNG, *THE FATE OF SUDAN: THE ORIGINS AND CONSEQUENCES OF A FLAWED PEACE PROCESS* 1–4, 17–78 (2012).

10. *History, South Sudan*, BRITANNICA, *supra* note 5; Rolandsen et al., *supra* note 5, at 88.

under the banner of the Sudanese People's Liberation Army (SPLA) and its associated political wing, the Sudan People's Liberation Movement (SPLM).¹¹ Unable to defeat the SPLA on its own, the Northern government armed and allied with militia forces.¹²

Sudan began exporting oil in 1999.¹³ The majority of the country's oil reserves are located in the south or in the north-south border region.¹⁴ Lundin Energy is an oil and gas company, stemming from the International Petroleum Corporation (IPC), founded 1981 by the Lundin Family.¹⁵ It is incorporated in Sweden and listed on the Stockholm Stock Exchange.¹⁶ What is now Lundin Energy has previously operated with a variety of different names and subsidiaries, including IPC, Sands Petroleum AB, Lundin Oil AB, and Lundin Petroleum AB.¹⁷ The company operated in southern Sudan through another subsidiary, Sudan Ltd. (also called IPC Sudan Ltd. and Lundin Sudan Ltd.), from 1997 to 2003.¹⁸ In 1997, Ian Lundin, acting as president of Sudan Ltd. and CEO of IPC, signed an agreement with the Sudanese government to explore for oil in an area called Block 5A, comprising approximately 30,000 square kilometers in southern Sudan.¹⁹ Schneider was present when the agreement was signed, and both men interacted with Sudanese authorities in various capacities between 1997 and 2003.²⁰ The *Lundin* prosecution

11. *History, South Sudan*, BRITANNICA, *supra* note 5; see also YOUNG, *supra* note 9, at 50–78 (describing the military operations and history of the SPLA more broadly).

12. *History, South Sudan*, BRITANNICA, *supra* note 5.

13. *Id.*

14. *Id.*

15. *History*, LUNDIN ENERGY, <https://www.lundin-energy.com/about-us/history/> (<https://perma.cc/96CY-EXWB>) (last visited Apr. 14, 2022).

16. *Id.*; *Lundin Energy*, LUNDIN GROUP, <https://thelundinggroup.com/lundin-group-of-companies/lundin-energy-ab/> [<https://perma.cc/S653-7UK8>] (last visited May 12, 2022).

17. *History*, LUNDIN ENERGY, *supra* note 15.

18. Indictment, Case No. B 11304-14, *supra* note 3, at 2–6.

19. *Id.* paras. 2, 4(a), 9(a), (d), (g)–(k).

20. *Id.* paras. 2, 4(b), 9(a)(e)–(h), (k); *Prosecution for Complicity in Grave War Crimes in Sudan*, ÅKLAGARMYNDIGHETEN [SWEDISH PROSECUTION AUTHORITY] (Nov. 11, 2021, 9:39 AM), <https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/> [<https://perma.cc/87HL-HSNX>] [hereinafter Swedish Prosecution Authority Press Release] (providing background on the parties' activities

claims that while as of 1997 the area comprising Block 5A had been relatively unimpacted by the second civil war, which had been ongoing on for several years, by 2003, it became one of the most heavily affected areas.²¹ In fact, from 1997 onwards, disputed control over future oil exploitation prospecting areas became a central feature of the conflict.²² In May 1999, the Sudanese Government initiated offensive military operations in and around to Block 5A in order to obtain control over areas for oil prospecting and create the necessary preconditions for Sudan Ltd.'s exploration.²³ This led to violence that, with short interruptions, persisted until Sudan Ltd. left the area in 2003.²⁴ During this period, on several occasions, Sudan Ltd. requested security assistance from the Sudanese government and military, allegedly aware that this would require control of Block 5A via military force.²⁵ The company entered into an agreement with the government to establish a road in the region, and at various points in time called on the government to direct the military and allied militias to take measures against the rebel forces, according the prosecution documents from the case.²⁶ The *Lundin* prosecution argues that the defendants were complicit in war crimes, in part because "they made these demands despite understanding, or, in any case being indifferent" to the fact that calls for security and action against rebel forces would likely result in government and allied forces carrying out violence using methods that violate in-

and the prosecutor's evidence in the case); "LUNDIN: SUDAN LEGAL CASE 1997-2003," <https://www.lundinsudanlegalcase.com/> [<https://perma.cc/D7EV-4N88>] (last visited Apr. 14, 2022).

21. See Indictment, Case No. B 11304-14, *supra* note 3, para. 6 (explaining how the military conflict progressed between 1997-2003); Swedish Prosecution Authority Press Release, *supra* note 20.

22. See Indictment, Case No. B 11304-14, *supra* note 3, para. 6 (highlighting that control of oil production became key to the Sudanese military's goals); Swedish Prosecution Authority Press Release, *supra* note 20.

23. Indictment, Case No. B 11304-14, *supra* note 3, para. 6; Swedish Prosecution Authority Press Release, *supra* note 20.

24. Indictment, Case No. B 11304-14, *supra* note 3, para. 6; Swedish Prosecution Authority Press Release, *supra* note 20.

25. Indictment, Case No. B 11304-14, *supra* note 3, para. 9(a); Swedish Prosecution Authority Press Release, *supra* note 20.

26. Indictment, Case No. B 11304-14, *supra* note 3, paras. 9(b), (e).

ternational humanitarian law.²⁷ The alleged war crimes committed by the Sudanese Government and allied militia—in which Lundin and Schneider are allegedly complicit—which are prohibited under international humanitarian law (IHL) (and therefore also under the domestic Swedish war crimes provision), include violations of the principle of distinction, principle of proportionality, killing civilians, destruction of civilian objects, unlawful confinement, pillage, and degrading treatment.²⁸ This article does not examine the factual bases for these allegations, because the defendants and their counsel raise more fundamental challenges to the prosecution’s case. They argue that the Swedish courts lack jurisdiction and the case in its entirety should be declared inadmissible, because no acts committed in the Sudanese civil war were criminalized as war crimes under Swedish law at the time of their commission and the prosecution is relying on the wrong standard in relation to modes of liability.²⁹ Further, while Lundin is a Swedish citizen, Schneider is Swiss, raising an additional jurisdictional challenge.³⁰

27. Swedish Prosecution Authority Press Release, *supra* note 20; *see generally* Indictment, Case No. B 11304-14, *supra* note 3, paras. 9(a)–(k) (examining events in which the defendant’s actions are implicated).

28. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 Customary International Humanitarian Law, at 3, 7, 25, 46, 182, 311, 315, 344 (2005) (enumerating principles of international humanitarian law, including: rules 1 and 7 (principle of distinction, protects both civilian population and civilian objects), rule 14 (principle of proportionality), rule 52 (pillaging), rule 89 (murder/killing civilians), rule 90 (degrading treatment), rule 99 (arbitrary detention/unlawful confinement)); BROTTSBALKEN [BRB] [CRIMINAL CODE] 22:6 (Swed.) (Swedish war crimes provision); Indictment, Case No. B 11304-14, *supra* note 3 (alleging that Lundin and Schneider are complicit in war crimes under Swedish law).

29. Motion from Alexandre Schneider to the Ministry of Justice, *supra* note 4 at 3; Motion from Ian Lundin to the Ministry of Justice, JuBC2018/00654-3/BRIS, *supra* note 4 at 2–3. *See generally* Ove Bring, Expert Opinion, (Feb. 6, 2015) (on file with author) (analyzing the prosecution’s argument in the investigation of events in Sudan and Ian Lundin and Alex Schneider’s role in these events between 1997-2003 under international and Swedish law); *see also* Motion from Alexandre Schneider, Stockholms Tingsrätt [TR] [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14, aktbil. 955 (Swed.) (calling for consideration of inadmissibility due to absence of universal jurisdiction).

30. Government Decision, Justitiedepartementet BIRS [Ministry of Justice, Criminal Matters and International Judicial Cooperation Unit], 18 Oct. 2018, JuBC2018/00462/BIRS (Swed.).

Lundin is not the first case to be brought outside of Sudan, charging corporate entities with international law violations for alleged involvement in the Sudanese Civil Wars. In 2001 the Presbyterian Church of Sudan filed a lawsuit in the Southern District of New York against a Canadian oil and gas producer, Talisman Energy, under the U.S. Alien Tort Claims Act, based on similar facts.³¹ The plaintiffs alleged that Talisman provided substantial assistance in the commission of war crimes and crimes against humanity in southern Sudan through several actions: (1) upgrading certain airstrips; (2) designating areas “south of the river” in Block 4 for oil exploration; (3) providing financial assistance to the government through the payment of royalties; (4) giving general logistical support to the Sudanese military; and (5) various other acts.³² Like in *Lundin*, domestic charges were levied outside Sudan against a western oil and gas company, operating in the same area of southern Sudan during the same period, with the agreement and protection of the Sudanese Government.³³ In fact, the two companies were closely acquainted: in 2001, Talisman Energy acquired Lundin Oil, excluding its assets in Sudan, which remained under the ownership of the Lundin family and controlled by Lundin Petroleum, a separate entity.³⁴ The District Court dismissed the claim against Talisman Energy in 2006, and the Court of Appeals for the Second Circuit dismissed the appeal in 2009.³⁵ The Court of Appeals held that

31. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (suing Talisman Energy and the Republic of Sudan for violations of human rights under the Alien Torts Statute on behalf of individuals who live on or near oil rich lands in Sudan and were injured in the region’s armed conflict).

32. *Id.* at 671–72.

33. *Id.* at 647, 650.

34. *History*, LUNDIN ENERGY, *supra* note 15; Prosecution Case File, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14, annex E2, aktbil. 555, p. 122 (Swed.) (filing LUNDIN PETROLEUM AB ÅRSREDOVISNING 2003 [LUNDIN PETROLEUM ANNUAL REPORT] at 30 (2003)); Prosecution Case File, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14, annex E2, aktbil. 556, p. 5 (Swed.) (filing INBJUDAN TILL TECKNING AV AKTIER I LUNDIN PETROLEUM AB (PUBL) SAMT ERHÅLLANDE AV OPTIONSRÄTTER [INVITATION TO SUBSCRIBE FOR SHARES IN LUNDIN PETROLEUM AB (PUBL) AND TO RECEIVE OPTION RIGHTS] 3 (2001)).

35. *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 678; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247–48 (2d Cir. 2009).

plaintiffs failed to establish that Talisman provided substantial assistance to the Sudanese government with the purpose of aiding its unlawful conduct.³⁶ On 4 October 2010, the Supreme Court declined to entertain an appeal.³⁷ Given this history, the *Lundin* case demonstrates how responsibility for similar corporate conduct in the same context may be pursued in a different domestic jurisdiction.

III. BRINGING CORPORATE OIL EXECUTIVES TO STOCKHOLM DISTRICT COURT

Pursuant to Swedish Criminal Code (known domestically as *Brottsbalken*, hereinafter *BrB*) Chapter 2, Section 3(2) and Section 5, a Swedish court may exercise jurisdiction over crimes committed outside of Sweden, applying domestic criminal law when the crimes in question were committed by a Swedish citizen or an alien domiciled in Sweden.³⁸ This approach is shared by many other countries, particularly for alleged war crimes.³⁹ *BrB* applies the concept of double criminality, which requires that the act under scrutiny be subject to criminal liability not only under Swedish law, but also in the domestic law of the country where it was committed.⁴⁰ At the same time, *BrB* also empowers Swedish courts to adjudicate violations of international law, regardless of the nationality of the perpetrator and the place where the act was committed.⁴¹ The provision is based on the universality principle,⁴² which

36. *Presbyterian Church of Sudan*, 582 F.3d at 247–48.

37. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 562 U.S. 946 (2010).

38. *BrB* 2:3(2), 5 (codifying the requirement known as the active nationality principle which is based on the premise that a state may prosecute its citizens for crimes regardless of where they have been committed). *BrB* Chapter 2 was amended 1 January 2022. The relevant provision before that date is Chapter 2, Section 3.

39. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 337 n.3 (2d ed. 2008) (listing examples of states exercising jurisdiction over war crimes and crimes against humanity committed abroad).

40. *BrB* 2:5; before 1 January 2022, this provision was found at *BrB* 2:3(2).

41. *BrB*, 2:3(6)(a); before 1 January 2022, this provision was found at *BrB* 2:3(6).

42. See generally LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2004) (outlining the principle of uni-

empowers any state to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, nationality of the perpetrator or of the victim, or the existence of double criminality.⁴³ The authority to prosecute in *Lundin* is derived from universal jurisdiction,⁴⁴ which is crucial because Schneider is neither a resident nor a citizen of Sweden. Lundin, meanwhile, is a Swedish citizen and, therefore, can be prosecuted under the active nationality principle.

As soon as the prosecution in *Lundin* submitted its indictment, Schneider challenged the Stockholm district court's jurisdiction.⁴⁵ The basis of the challenge was that Swedish courts cannot exercise universal jurisdiction for war crimes allegedly committed in a non-international armed conflict (NIAC) by a non-Swedish citizen who is not residing in Sweden. The challenge relies in part on a joint opinion written by Professors William Schabas and Guénaél Mettraux and an opinion by Professor Eric Bylander.⁴⁶ Schneider had to distinguish his case from prior cases before Swedish courts, where the prosecution relied on universal jurisdiction in relation to war crimes committed in a NIAC resulting in convictions.⁴⁷ Among them was

versal jurisdiction in international and municipal law). *See also* BrB 2:3(6) (codifying the principle of universal jurisdiction for certain crimes such as crimes against humanity and war crimes).

43. CASSESE, *supra* note 39, at 338, n.4.

44. Government Decision, . JuBC2018/00462/BIRS, *supra* note 30, at 1.

45. Motion from Alexandre Schneider, Stockholms TR, Case No. B 11304-14, *supra* note 29, at 1.

46. *Id.* para. 9; Motion, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14, annex 1, aktbil. 956, paras. 108-113 (Swed.); Motion, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, Case No. B 11304-14, annex 3, aktbil. 958, pp. 2-3, para. 4.3 (Swed.).

47. See the following cases involving the prosecution of war crimes committed in NIACs for examples of district courts exercising universal jurisdiction and this exercise being implicitly upheld by the courts of appeals: Stockholms Tingsrätt [TR] [Stockholm District Court], 20 June 2013, Case No. B 18271-11, p. 12, Svea Hovrätt [HovR] [Svea Court of Appeals], 19 June 2014, Case No. B 6659-13, pp. 2-3 (Swed.), Stockholms Tingsrätt [TR] [Stockholm District Court], 16 May 2016, Case No. B 12882-14, p. 16 (Swed.), Svea Hovrätt [HovR] [Svea Court of Appeals], 15 Feb. 2017, Case No. B 4951-16, pp. 3-4 (Swed.), Stockholms Tingsrätt [TR] [Stockholm District Court], 27 June 2018, Case No. B 13688-16, p. 11 (Swed.), Svea Hovrätt [HovR] [Svea Court of Appeals], 29 Apr. 2019, Case No. B 6814-18, pp. 2-4 (Swed.), Stockholms Tingsrätt [TR] [Stockholm District Court], 18 Dec. 2006, Case no. B 4084-04, p. 12 (Swed.), Stockholms Tingsrätt [TR] [Stockholm District Court], 20 Jan. 2012, Case No. B 5373-10, p. 46 (Swed.), Svea

Saeed, where the defendant was convicted of the war crime of humiliating or degrading treatment during his involvement in the conflict against IS/DAESH in Iraq.⁴⁸ The conviction was upheld by the Supreme Court of Sweden.⁴⁹ But unlike *Saeed*, *Schneider* is not a Swedish resident or citizen, a distinction *Schneider*'s defense pointed out.⁵⁰ The district court dismissed *Schneider*'s submission, relying on several sources to rule that it had jurisdiction.⁵¹ First, it made reference to statutory law, namely BrB Chapter 2, Section 3(6) which provides for universal jurisdiction for certain crimes, including war crimes.⁵² Next, it referenced rule 157 of the ICRC's study on customary

Hovrätt [HovR] [Svea Court of Appeals], Case No. B 1248-12, p. 3 (Swed.); Södertörns Tingsrätt [TR] [Södertörn District Court], 11 May 2016, Case No. B 2639-16, p. 41 (Swed.), Svea Hovrätt [HovR] [Svea Court of Appeals], 5 Aug. 2016, Case No. B 4770-16 (Swed.), Stockholms Tingsrätt [TR] [Stockholm District Court], 16 Feb. 2017, Case No. B 3787-16, p. 7 (Swed.) (referencing the government's decision to grant authorization to prosecute which was based on universal jurisdiction), Svea Hovrätt [HovR] [Svea Court of Appeals], 31 May 2017, Case No. B 2259-17 (Swed.), Södertörns Tingsrätt [TR] [Södertörn District Court], 25 Sept. 2017, Case No. B 11191-17 (Swed.) (implicitly exercising universal jurisdiction as dictated in the government's decision to grant authorization to prosecute), Blekinge Tingsrätt [TR] [Blekinge District Court], 6 Dec. 2016, Case No. B 569-16, (Swed.) (implicitly exercising universal jurisdiction as dictated in the government's decision to grant authorization to prosecute), Hovrätten över Skåne och Blekinge [HovR] [Scania and Blekinge Court of Appeals], 11 Apr. 2017, Case No. B 3187-16 (Swed.), and Government Decision, Justitiedepartementet BIRS [Ministry of Justice, Criminal Matters and International Judicial Cooperation Unit], 22 Dec. 2020, JuBC2020/00799/BIRS, item 390, p. 1 (Swed.) (relating to Stockholms Tingsrätt [TR] [Stockholm District Court], 23 Dec. 2020, Case No. B 15255-19 (Swed.)).

48. Örebro Tingsrätt [TR] [Örebro District Court], 19 Feb. 2019, Case B 6072-18 (Swed.) (using universal jurisdiction as basis for convictions); Göta Hovrätt [HovR] [Göta Court of Appeals], 24 Sept. 2019, Case B 939-19 (Swed.) (affirming implicitly the exercise of universal jurisdiction in the case);

49. Högsta Domstolen [HD] [Supreme Court], 5 May 2021, Case No. B 5595-19 (Swed.) (affirming implicitly the exercise of universal jurisdiction by upholding the conviction).

50. Motion from Alexandre Schneider, Stockholms TR, Case No. B 11304-14, *supra* note 29, paras. 2, 10.

51. Stockholms Tingsrätt [TR] [Stockholm District Court], 20 Dec. 2021, Case No. B 11304-14, pp. 3–6 (Swed.).

52. *See* BrB 2:3(6) (providing that certain international offenses, such as inciting genocide, are within Swedish courts' jurisdiction despite taking place extraterritorially).

international humanitarian law, published in 2005 (henceforth the ICRC 2005 Study) which states that “[s]tates have the right to vest universal jurisdiction in their national courts over war crimes.”⁵³ The 2005 ICRC Study, commenced in 1995, contains a survey of state practice and other sources in order to determine the content of customary international humanitarian law.⁵⁴ The 2005 ICRC study is important since the relevant Swedish statutory law on war crimes explicitly references customary international humanitarian law, and in doing so determines the scope of criminalized behavior under Swedish law.⁵⁵ The district court also relied on an assessment made by an expert inquiry commissioned by the Swedish government on the status of Customary International Law (CIL), and preparatory works drafted by the government preceding its 2014 amendment of a law on international crimes that authorizes the exercise of universal jurisdiction in relation to crimes committed in an NIAC.⁵⁶ Preparatory works like these are themselves a source of law in Sweden.⁵⁷ It also noted doctrinal comments made by Ove Bring, et al., that universal jurisdiction may be relied upon by a state in relation to persons residing outside its territory.⁵⁸ Finally, it took into accounts that the Swedish government had authorized prosecutions where it had considered, among other factors, potential conflicts of jurisdiction with other countries.⁵⁹ The “government” in this context refers to the national cabinet of ministers headed by

53. HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 604.

54. *See generally id.* (detailing modern principles of international humanitarian law).

55. BRB 22:6.

56. *See* Statens Offentliga Utredningar [SOU] 2010:72 Folkrätt i väpnad konflikt - svensk tolkning och tillämpning, p. 317 [government report series] (Swed.) (discussing general developments in customary international law in the context of NIACs); *see also* Proposition [Prop.] 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, pp. 2, 51, 71 [government bill] (Swed.) (explaining how Swedish and international law apply to war crimes and similar acts).

57. LAURA CARLSON, THE FUNDAMENTALS OF SWEDISH LAW 45–47 (2d ed. 2012).

58. OVE BRING ET AL., SVERIGE OCH FOLKRÄTTEN 304 (6th ed. 2020).

59. *See* Government Decision, Justitiedepartementet BIRS, JuBC2018/00462/BIRS, *supra* note 30 (deciding that Swedish courts have jurisdiction over Ian Lundin and Alex Schneiter’s alleged acts); Stockholms TR, Case No. B 11304-14, pp. 3–6.

the Prime Minister.⁶⁰ Notably, subject to the Swedish approach to separation of powers, the Prosecutor-General and all other prosecutors are independent from the government, meaning that the Minister of Justice is prohibited from instructing the Prosecutor-General, or any prosecutor, on whether to initiate or how to manage a case.⁶¹ This applies, *inter alia*, to prosecution of crimes committed within Swedish territory.⁶² The requirement for authorization of prosecution in relation crimes committed outside of Sweden represents an exception from this constitutional principle, in the sense that the government may become more involved than in typical domestic cases, a concept further discussed in Part IV.

Schneider appealed the jurisdictional issue, arguing that the district court had not considered the Schabas and Mettraux opinion cited in his initial challenge.⁶³ The Svea Court of Appeals accepted the district court's reasoning and dismissed the appeal.⁶⁴ The district court (and thus also the Court of Appeals) relied mainly on traditional Swedish sources of law, while ignoring the international case law invoked by Schneider as presented in the Schabas and Mettraux opinion, warranting some further discussion of the defendant's argument here.⁶⁵ In other words, the district court adopted a doctrinal approach, accepted by the Appeals Court, that restricted itself to traditional Swedish, internal sources of law, while omitting references to leading international and foreign precedents on the exercise of universal jurisdiction in a domestic context – namely, the *Lotus* case from the Permanent Court of International Justice (PCIJ), the *Eichmann* case from Israel, and the *Arrest Warrant case* at the International Court of Justice (ICJ).⁶⁶

60. REGERINGSFORMEN [RF] [CONSTITUTION] 6:1 (Swed.).

61. REGERINGSFORMEN [RF] [CONSTITUTION] 12:2 (Swed.).

62. See BRB 2:7–8 (explaining that the Prosecutor-General makes the authorization decision for offenses committed outside of Sweden).

63. Motion, Stockholms Tingsrätt [Stockholm District Court], 11 Jan. 2022, Case No. B 11304-14, aktbil 981, para. 6 (Swed.).

64. Svea Hovrätt [HR] [Svea Court of Appeals], 28 Jan. 2022, Case No. Ö 574-22, p. 2 (Swed.).

65. Stockholms TR, Case No. B 11304-14, pp. 3–6.

66. S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); CrimA 336/61 Attorney General v. Adolf Eichmann, (1962) (Isr.); Arrest Warrant of 11 April 2000 (Congo v. Belg.), Judgment, 2002 I.C.J. (Feb. 14).

The Schabas and Mettraux opinion builds in part on separate and dissenting opinions in the 2002 *Arrest Warrant* case at the ICJ. The case concerned an international arrest warrant issued by Belgian authorities, based on universal jurisdiction, against Abdoulaye Yerodia Ndombasi, Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC), for alleged war crimes and crimes against humanity in the DRC.⁶⁷ At the ICJ, the Democratic Republic of the Congo brought suit against Belgium, initially arguing that Belgium's reliance on universal jurisdiction was in conflict with international law, but later withdrew that claim.⁶⁸ As a result, the ICJ stated that the Court did not "rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts."⁶⁹ In the absence of a definitive ICJ opinion on universal jurisdiction, other historical precedents may appear useful. *Lotus*, a 1927 case at the PCIJ, emphasizes the need to distinguish between the exercise of enforcement (executive) jurisdiction on the one hand, and both prescriptive (legislative) jurisdiction and adjudicative (judicial) jurisdiction on the other.⁷⁰ It provides that international law leaves states "a wide measure of discretion" to extend the application of their laws through prescriptive and adjudicative jurisdiction, "which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."⁷¹ Further, the PCIJ asserted that "[r]estrictions upon the independence of states cannot therefore be presumed,"⁷² which means that what is not explicitly prohibited under public international law

67. Congo v. Belg., 2002 I.C.J. ¶¶ 1, 65, 67.

68. Congo v. Belg., 2002 I.C.J. ¶¶ 17, 42.

69. Congo v. Belg., 2002 I.C.J. ¶ 43.

70. Fr. v. Turk., 1927 P.C.I.J. at 18–19; Martin Ratcovich, *Extraterritorial Criminalisation and Non-intervention: Sweden's Criminal Measures against the Purchase of Sex Abroad*, 88 NORDIC J. INT'L L. 398, 411 (2019).

71. Fr. v. Turk., 1927 P.C.I.J. at 19. See references to the *Lotus* case in the dissenting opinion of Judge Van den Wyngaert in Congo v. Belg., 2002 I.C.J. ¶ 49.

72. Fr. v. Turk., 1927 P.C.I.J. at 18.

is permitted for states.⁷³ The Supreme Court of Israel explicitly referenced *Lotus* when it made a similar finding in *Eichmann*, stating that “every state may exercise a wide discretion as to the application of its laws and the jurisdiction of its courts in respect of acts committed outside the state; and that only insofar as it is possible to point to a specific rule prohibiting the exercise of this discretion—a rule agreed upon by international treaty—is a state prevented from exercising it.”⁷⁴ In comparison with the *Arrest Warrant case*, *Lotus* and *Eichmann* are arguably more persuasive, as each actually ruled on whether a domestic court could exercise jurisdiction on an extraterritorial basis, something absent in the *Arrest Warrant case*. A similar argument to that from *Lotus* and *Eichmann* can be made in *Lundin*, as the indictment initially involves the exercise of adjudicative jurisdiction, and if Swedish authorities seek to enforce the summons that would be an exercise of enforcement jurisdiction. Sweden would only violate international law if it seeks to enforce the summons on an extraterritorial basis without the consent of the state concerned. The upshot is that the Stockholm district court should be able to assert jurisdiction, declare the case admissible, and issue a summons to Schneider to appear, provided the consent of his host state (Switzerland), following the rationale given in the *Lotus* case and the *Eichmann* case.

IV. KEEPING POLITICS AWAY FROM THE PROSECUTION

Prosecution for a crime committed outside of Sweden requires authorization from the Prosecutor-General or the government (i.e., the national cabinet of ministers).⁷⁵ The Prosecutor-General is the head of the Swedish Prosecution Authority, a non-political appointee, with prosecutorial authority independent from other parts of the government.⁷⁶ The default approach is that the Prosecutor-General should authorize

73. BRING ET AL., *supra* note 58, at 106.

74. CrimA 336/61 Attorney General v. Adolf Eichmann, para. 9 (1962) (Isr.).

75. BRB 2:7–8. This provision amended the previous provision, BRB 2:5(2), and came into force 1 January 2022.

76. RÄTTEGANGSBALKEN [RB] [Code of Judicial Procedure] 7:1–5 (Swed.); *see also* 3, 21 §§ Förordning med instruktion för Åklagarmyndigheten (Svensk författningssamling [SFS] 2015:743) (Swed.) (providing instructions for the Prosecutor-General).

prosecutions for crimes committed outside of Sweden.⁷⁷ However, if the decision may affect Sweden's foreign and security policy, prosecution is dependent upon authorization by the national cabinet of ministers.⁷⁸ Since prosecutorial authorization in the Lundin case was given in 2018, it should also be noted that under the rules applicable before an amendment on January 1, 2022, the government also had to approve prosecutions based on extraterritorial jurisdiction when the defendant was a non-Swedish citizen, while the Prosecutor-General could directly authorize prosecutions against Swedish citizens.⁷⁹ All decisions by the national cabinet of ministers are adopted as a collective body.⁸⁰ The requirement of authorization indicates an intent to impose restrictions on prosecutions that extend beyond traditional domestic jurisdictions. The law, as amended on January 1, 2022 states that when considering whether to authorize a prosecution, the following factors are relevant: 1) if a prosecution in Sweden would be consistent with public international law, including on questions relating to immunity; 2) to what extent the criminality of the suspect is connected to Sweden; 3) whether investigatory or prosecutorial measures have been initiated or will be initiated in another state or by an international court; 4) the likelihood of efficient investigation and prosecution in Sweden; and 5) Sweden's foreign and security policy.⁸¹ The January amendments are to a large extent a codification of earlier practice, as described in preparatory works published by the government relating to earlier amendments on the law on international crimes.⁸²

77. BRB 2:8.

78. See BRB 2:8(4) (explaining that the Prosecutor-General must refer matters of national security and foreign policy to the government for authorization to prosecute).

79. BRB 2:5 (prior to amendment 1 January 2022); see Förordning med bemyndigande för riksåklagaren att förordna om väckande av åtal i vissa fall (Svensk författningssamling [SFS] 1993:1467) (Swed.) (repealed 2022) (authorizing the Prosecutor-General to prosecute crimes committed by Swedish citizens abroad).

80. REGERINGSFORMEN [RF] [CONSTITUTION] 7:2 (Swed.).

81. BRB 2:8(2), (4).

82. Prop. 2013/14:146, p. 56. Cf. Departementsserien [Ds] 2014:13 Åtalsförordnande enligt 2 kap. brottbalken, p. 27 [ministry publication series] (Swed.) ("[T]he determination shall be based on balance of interests where different circumstances relating to the case at hand shall be considered, for

While formal authorization to prosecute is a precondition for the proceedings, it is not part of the trial itself.⁸³ So the *Lundin* defendants not only challenged the jurisdiction of Swedish courts, but also attempted to persuade the Swedish government to withhold prosecutorial authorization.⁸⁴ The Prosecutor-General noted that while Lundin was a Swedish citizen, Schneider was not, and under the rules applicable at the time the question of authorization was transferred to the government (the national cabinet of ministers) for determination.⁸⁵ Schneider then requested that the government dismiss the application for prosecutorial authorization because granting it would violate customary international law.⁸⁶ In particular, Schneider highlighted the prosecution's reliance on the Swedish rules on aiding and abetting, which provide for a lower and thus more favorable threshold for conviction when compared to rules on aiding and abetting in customary international law. This would violate the rule of lenity, which requires that ambiguities in a criminal statute relating to prohibitions and penalties be resolved in favor of the defendant.⁸⁷ To bolster this argument, Schneider submitted an expert opinion by William Schabas which asserted that the prose-

example the gravity of the crime, the link to Sweden and, when crime are committed outside of Sweden, the interest of the State – where the crime was committed – to prosecute the case.”).

83. Miriam Ingesson & Alexandra Lily Kather, *The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad*, EJIL:TALK! (Nov. 13, 2018), <https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad> [https://perma.cc/J4TD-XY7D].

84. See Motion from Alexandre Schneider to the Ministry of Justice, JuBC2018/00136/BRIS, *supra* note 4 (arguing that the court lacks jurisdiction and should not grant prosecutorial authority); see also Motion from Ian Lundin to the Ministry of Justice, JuBC2018/00654-3/BIRS, *supra* note 4 (questioning whether the case meets the required elements for prosecution).

85. Government Decision, JuBC2018/00462/BIRS, *supra* note 30, at 2.

86. Motion from Alexandre Schneider to the Ministry of Justice, JuBC2018/00136/BRIS, *supra* note 4, at 2.

87. *Id.* (using the phrase *in dubio pro reo* which in this context corresponds to the rule of lenity). See PETER ASP, MAGNUS ULVÅNG & NILS JAREBORG, GRUNDEN [THE BASIS OF CRIMINAL LAW] 70 (2d ed. 2013) (discussing the principles of *in dubio mitius* and *in dubio pro reo* in reference to the rule of lenity); see also *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2009) (providing further context for the defendants' rule of lenity argument).

cution should be governed by international law on modes of liability, which Schneider took to mean that the alleged crimes did not constitute international crimes, and so Swedish courts could not exercise universal jurisdiction.⁸⁸

Lundin, meanwhile, presented partly different grounds for denying prosecutorial authorization. Lundin criticized the sources underlying the prosecutor's investigation, claimed that the company had conducted legitimate business operations and that the prosecutor had demonstrated no personal wrongdoing, and asserted that the prosecutor would be unable to investigate what had actually happened in Sudan.⁸⁹ Lundin also argued that an investigation and prosecution with an expansive interpretation and application of Swedish law on modes of liability would circumvent relevant rules in customary international law, and that the prosecution's serious accusations levied against Sudanese officials who lacked any means to defend themselves in Swedish proceedings would harm foreign relations.⁹⁰ In the end, the government authorized the prosecution without explicitly responding to Schneider and Lundin's arguments.⁹¹ That choice lends itself to an understanding of the case so far as embodying an unwillingness by the Swedish government to rule on substantive jurisdictional and international legal issues, in spite of the defendants' attempts to make it do so. Lundin in particular also pushed the government to consider the foreign-policy implications of its prosecutorial methods.⁹² At least publicly, the Swedish government remained unwilling to engage with these arguments.

88. Schabas, *supra* note 4, at 5–7, 25.

89. Motion from Ian Lundin to the Ministry of Justice, JuBC2018/00654-3/BIRS, *supra* note 4, at 2–6.

90. *Id.* at 2, 7.

91. See Government Decision, Justitiedepartementet BIRS, JuBC2018/00462/BIRS, *supra* note 30 (authorizing prosecution without discussion of the defendants' arguments).

92. See Dennis Martinsson & Mark Klamberg, *Jurisdiction and Immunities in Sweden When Investigating and Prosecuting International Crimes*, 66 SCANDINAVIAN STUD. L. 51, 73 (2020) (providing further discussion on the government's decision and Lundin's push for foreign policy considerations).

V. THE OPEN-ENDED CHARACTER OF THE WAR CRIMES PROVISION

War crimes are violations of international humanitarian law (IHL), also referred to as *jus in bello* (the law of war).⁹³ While IHL concerns state responsibility, international criminal law (ICL) relates to individual criminal responsibility.⁹⁴ As explained below, the scope of criminalized behavior in the relevant Swedish statutory provision on war crimes is dependent on IHL.⁹⁵ Thus, when examining whether the defendants in *Lundin* have been complicit in war crimes, the analysis must account for the content of IHL, determining to what extent IHL is applicable to a criminal prosecution.

Lundin and Schneiter have been indicted for committing a “gross crime against international law,” based on Chapter 22, Section 6 of the Criminal Code as it was formulated at the time of the alleged crimes.⁹⁶ Despite its apparently broad phrasing, Section 6 only covers war crimes, stating that infractions must be against “international humanitarian law.”⁹⁷ Crimes against humanity are therefore beyond the scope of the provision.⁹⁸ Though this provision was replaced by the International Crimes Act in 2014, the principle of legality, as codified in Swedish constitutional and statutory law, requires that prosecutions be based on criminal provisions applicable at the time of alleged commissions of crimes (here, applicable law in 1999-2003).⁹⁹ So the 2014 law is not applicable in the *Lundin* case, and instead the relevant provision governing *Lundin* is Chapter 22 Section 6 of BrB as worded before 1 July 2009, which provides the following:

93. CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 73 (2019).

94. See Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 (listing the International Criminal Court’s powers regarding individual criminal responsibility).

95. See BrB 22:6 (an open-ended definition with a non-exhaustive list of examples of criminalized acts).

96. Indictment, Case No. B 11304-14, *supra* note 3, at 14.

97. BrB 22:6 (in its wording prior to 9 July 2009).

98. Prop. 2013/14:146, p. 50.

99. Prop. 2013/14:146, pp. 59–63; Regeringsformen [RF] [CONSTITUTION] 2:10 (Swed.); see also 5 § Lag om införande av brottsbalken (Svensk författningssamling [SFS] 1964:163) (Swed.) (stating that no one can be charged if the act was not a crime at the time it was committed).

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for *crime against international law* to imprisonment for at most four years. Serious violations shall be understood to include, among other acts:

1. Use of any weapon prohibited by international law,
2. Misuse of the insignia of the United Nations or of insignia referred to in the Act on the Protection of Certain International Medical Insignia (Law 1953:771), parliamentary flags or other internationally recognised insignia, or the killing or injuring of an opponent by means of some other form of treacherous behaviour,
3. Attacks on civilians or on persons who are injured or disabled,
4. Initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property,
5. Initiating an attack against establishments or installations which enjoy special protection under international law,
6. Occasioning severe suffering to persons enjoying special protection under international law; coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians of their liberty in contravention of international law; and
7. Arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law in cases other than those described in points 1-6 above.¹⁰⁰

The provision seeks to specify some existing violations of international law, but also remains open-ended, taking into consideration new treaties and the evolution of customary international law.¹⁰¹ As indicated earlier, the *Lundin* prosecution

100. BrB 22:6 (in its wording prior to 9 July 2009).

101. See Iain Cameron, 'Swedish Investigations for Gross Human Rights Violations, Actual and Possible,' in FLORES JURIS ET LEGUM: FESTSKRIFT TILL NILS

argues both defendants are complicit – through their request to Sudanese Government for protection – in war crimes such as violations of the principle of distinction, principle of proportionality, killing civilians, destruction of civilian objects, unlawful confinement, pillage, and degrading treatment.¹⁰² These alleged acts are all prohibited under rules of customary international law in IHL and thus also under BrB 22 Section 6, regardless of how the armed conflict is characterized.¹⁰³

VI. CLOSING THE ACCOUNTABILITY GAP IN CIVIL WARS

War crimes can only be committed during an armed conflict.¹⁰⁴ The scope of criminalized behavior may depend on whether the conflict is characterized either as an international armed conflict (IAC) or a non-international armed conflict (NIAC).¹⁰⁵ This distinction is rooted in international humanitarian law, where key treaties, including the four Geneva Conventions (GC I-IV), promulgate rules, primarily proscribing certain conduct in IACs.¹⁰⁶ The treaty-based rules regarding NIACs, found in Common Article 3 of the Geneva Conventions (Common Article 3) and Additional Protocol II to the Geneva Conventions (Additional Protocol II), are far less substantial or common than those addressing IACs.¹⁰⁷

JAREBORG 123, 144 (Petter Asp, Carl Erik Herlitz & Lena Holmqvist eds., 2002) (explaining that the provision is non-exhaustive in reference to breaches of customary international law); *see also* Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT'L CRIM. L. REV. 395, 389–99 (2009) (discussing the provision's non-exhaustive nature). The phrase “allmänt erkänd grundsats” (generally recognised legal principles or tenets) is archaic Swedish. Prop. 1948:144 om strafflagstiftning för krigsmakten, p. 165 [government bill] (Swed) clarifies that this phrase refers to customary international law.

102. Indictment, Case No. B 11304-14., *supra* note 3.

103. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 3, 7, 25, 46, 182, 311, 315, 344 (enumerating principles of international humanitarian law, including: rules 1 and 7 (principle of distinction, protects both civilian population and civilian objects), rule 14 (principle of proportionality), rule 52 (pillage), rule 89 (murder/killing civilians), rule 90 (degrading treatment), rule 99 (arbitrary detention/unlawful confinement)).

104. STAHN, *supra* note 93, at 74.

105. *Id.* at 76–79.

106. *See id.* at 76–78 (providing a history of the distinction between IACs and NIACs).

107. *Id.*

The *Lundin* defendants have employed several legal consultants, including Swedish Professor Ove Bring, who in both an expert opinion submitted by the defendants and in later writings has argued that violations of IHL in NIACs, conducted at the time of the alleged crimes in *Lundin*, cannot be prosecuted as war crimes.¹⁰⁸ This section examines Bring's argument, clarifies its importance to the outcome of the case and outlines the counterargument that violations of IHL in NIACs at the time of the alleged crimes in *Lundin* can in fact be prosecuted as war crimes.

In *Lundin*, the prosecution characterizes the conflict as an NIAC: fought between state and non-state actors or between multiple non-state actors (and contrasted with IACs, where two or more states are involved).¹⁰⁹ This distinction is important because it determines the applicable law and thus also the scope of criminalized conduct,¹¹⁰ and the prosecution's characterization aligns with consistent descriptions of the conflict by scholars.¹¹¹

States parties to the four Geneva Conventions are obligated to provide effective penal sanctions and prosecute per-

108. Bring, *supra* note 29, at 2–3; *see also* Ove Bring, *Domstolarna saknar en hållbar och konsistent linje*, 86 ADVOKATEN: TIDSKRIFT FÖR SVERIGES ADVOKATSAMFUND, no. 7, 2020 [hereinafter Bring, 2020] (describing Sweden's inconsistent and incorrect approach to prosecuting war crimes committed in NIACs in the context of customary international law); Mark Klamberg, *Har svenska domstolar dömt fel i mål om krigsförbrytelser?*, 87 ADVOKATEN: TIDSKRIFT FÖR SVERIGES ADVOKATSAMFUND, no. 6, 2021 (responding to Bring's argument by arguing that to determine what customary international laws were binding on Sweden at a given time, researchers must analyze how a large number of states acted); Ove Bring, *Klambergs och min metod kan båda vara tillämpliga*, 87 ADVOKATEN: TIDSKRIFT FÖR SVERIGES ADVOKATSAMFUND, no. 7, 2021 [hereinafter Bring, 2021] (agreeing with Klamberg's argument that state action is relevant to determining applicable customary international law when the development of customary law is complete and arguing that state consent is relevant when the development of customary law is incomplete).

109. *See* Indictment, Case No. B 11304-14, *supra* note 3, para. 1 (stating that the conflict was between the Sudanese army and internal non-state groups).

110. CASSESE, *supra* note 39, at 81.

111. *See* Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 432–33 (2003) (discussing the complexity of the conflict in Sudan and the diversity of the groups participating in the conflict); *see also* Matthews, *supra* note 7, at 609–10 (2005) (discussing the multiple internal conflicts that made up the civil war).

sons who commit grave violations, or to extradite them to other states that are willing to bring them to trial.¹¹² Grave breaches are defined in the Geneva Conventions and form the core of what is often described more colloquially as war crimes.¹¹³ There is a significant difference between the number and scope of acts prohibited in treaty-based rules applicable to IACs, for which there are many, and those listed in NIACs, which number relatively few. The regime of penalties and extradition established by the Geneva Conventions only applies to IACs,¹¹⁴ while accountability mechanisms for war crimes committed in NIACs have gradually been developed by rules based on customary international law.¹¹⁵

Since customary international law is based on state practice that has evolved over time, there has been an ongoing debate over whether courts can exercise jurisdiction over war crimes in NIACs.¹¹⁶ In the ground-breaking 1995 *Tadic* decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that individuals could be held criminally liable for violations of international humanitarian law in a NIAC.¹¹⁷ But the debate over whether acts committed in NIACs may be sanctioned specifically as war

112. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49–50, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50–51, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention (III) relative to the Treatment of Prisoners of War art. 129–30, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 146–47, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

113. STAHN, *supra* note 93, at 76.

114. *See, e.g.*, GC I, *supra* note 112, art. 49–50; GC II, *supra* note 112, art. 50–51; GC III, *supra* note 112, art. 129–30; GC IV *supra* note 112, art. 146–47; AP I, *supra* note 112, art. 85.

115. HENCKAERTS & DOSWALD-BECK, *supra* note 28, at xxxiv–xxxv.

116. *See* STAHN, *supra* note 93, at 77–78 (describing the difficulties international tribunals faced when considering how the distinction between IACs and NIACs affects jurisdiction over war crimes).

117. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2 1995).

crimes was not fully resolved by *Tadic*. This was apparent in *Milankovic*, a 2022 judgment of the European Court of Human Rights which concerned the existence of command responsibility for war crimes committed by Milankovic's subordinates against persons of Serbian ethnicity in Croatian territory between August 1991 and June 1992 (an NIAC).¹¹⁸ While these cases almost exclusively related to events in the 1990s, there is now widespread agreement that customary international law now criminalizes contemporary violations of IHL in NIACs as well.¹¹⁹ *Lundin*, meanwhile, has resurrected the debate about whether persons can be held criminally liable for war crimes in a prior NIAC, since the indictments concern acts allegedly committed between 1999 and 2003. Bring's expert opinion, submitted by the defendants, argues that "serious violation," as described in BrB Chapter 22 Section 6, only criminalizes acts committed in IACs.¹²⁰ Bring also notes that the Swedish review of the 2005 ICRC study on customary international law was only completed by 2010, and argues that it was only then that Sweden accepted the relevant norms as part of customary international law.¹²¹ If accepted, this argument would not only prevent prosecution for war crimes in the *Lundin* case, but would also establish that prior convictions in Swedish courts relating to war crimes committed before 2010 were erroneous, and those convicted should now be acquitted.¹²² Further, if the argument gained traction beyond Sweden, it would have far reaching consequences. An alternative perspective posits that, though customary international law has evolved over time, the method of determining when customary norms become binding upon a state cannot be based on when that state accepted a particular practice, provided the norm is supported

118. *Milankovic v. Croatia*, App. No. 33351/20, ¶¶ 9–12 (Jan. 20, 2022), <https://hudoc.echr.coe.int/fre#%22tabview%22:%22document%22,%22itemid%22:%22001-215180%22> [https://perma.cc/DG2R-4TTM].

119. HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 551 (describing Rule 151, "Individuals are criminally responsible for war crimes they commit").

120. Bring, *supra* note 29, at 2–3. For further discussion of the applicability of BrB 22:6, see Bring, 2020, *supra* note 108; Klamberg, *supra* note 108; Bring, 2021, *supra* note 108.

121. Bring, 2020, *supra* note 108; HENCKAERTS & DOSWALD-BECK, *supra* note 28; SOU 2010:72, p. 317.

122. See, e.g., Stockholms TR, Case No. B 4084-04 (relating to crimes committed by the Swedish citizen Arklöv in Bosnia in July 1993).

by general state practice (*usus*) and most states treat it as binding (*opinio juris*).¹²³ Even states that have been silent during custom-building processes are bound by customary rules once they have been established according to this argument.¹²⁴ To determine at what point in time a specific customary rule was established as binding, one must examine general practice and *opinio juris* of states at that time.¹²⁵

This section identifies the point at which war crimes and other violations of the laws of war committed in NIACs were normatively criminalized under IHL, and therefore also in Swedish law. It does so by examining 1) general state practice as accounted for in the 2005 ICRC study and other relevant sources, taking into account the year when that practice became widespread; 2) the *opinio juris* of states, as articulated in the comments and observations received in 1993 from governments for the ILC Draft Code of Crimes against the Peace and Security of Mankind, 3) the findings of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, 4) contemporary legal scholarship, and 5) Swedish legislation and preparatory works. This will allow a more grounded assessment of when customary international law evolved to criminalize violations of IHL in a NIAC.

A. *State practice*

Among the earliest instances of state practice imposing criminal sanctions for war crimes committed in NIACs is the 1863 Lieber Code, the instructions President Lincoln gave to Union Forces during the American Civil War.¹²⁶ Paragraphs 44 and 47 of the Lieber Code contain provisions prohibiting and penalizing several crimes such as wanton destruction of property not commanded by an authorized officer, murder, pillage, robbery, and rape, among others.¹²⁷ The Lieber Code sought specifically to regulate civil wars, and makes multiple

123. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 21–25 (9th ed. 2019).

124. ALEXANDER ORAKHELASHVILI, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 33–35 (8th ed. 2019).

125. *Id.*

126. Lieber Code, General Orders No. 100 (effective Apr. 24, 1863) [hereinafter Lieber Code] <https://web.archive.org/web/20010407120840/http://www.civilwarhome.com/liebercode.htm>.

127. *Id.* paras. 44, 47.

references to the “common law of war.”¹²⁸ Jens David Ohlin explains that the reference to the “common law of war” served a double function: first, it was designed to apply in the American Civil War.¹²⁹ Second, it was designed to reflect the customs of war as derived from international law.¹³⁰ The Code posits that the ultimate source of authority is natural law.¹³¹ Ohlin describes the Code as the “functional surrogate to the international laws of war that applied in noninternational conflicts.”¹³² The Lieber Code provided inspiration for military manuals in the U.S. and beyond, beginning in the 1800s and progressing through the following century.¹³³

As described above, the ICRC concluded its study of customary international humanitarian law in 2005.¹³⁴ Rule 151 of the study provides that “[i]ndividuals are criminally responsible for war crimes they commit,” and the it explains that “[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”¹³⁵ The study notes that “[w]ith respect to non-international armed conflicts, significant developments took place from the early 1990s onwards.”¹³⁶ Considering that customary international law changes over time and that the alleged crimes in the *Lundin* case were committed from 1999-2003, before the cut-off date for collecting material

128. Jens David Ohlin, *The Common Law of War*, 58 WM. & MARY L. REV. 493, 498 (2016) (tracing the phrase “common law of war” to the Lieber Code); Lieber Code paras. 13, 19, 101, 103.

129. Ohlin, *supra* note 128, at 514.

130. *Id.*

131. Lieber Code para. 40.

132. Ohlin, *supra* note 128, at 516.

133. For example, see reference to the Lieber Code in DEP’T OF DEF. OFF. OF GEN. COUNS., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL at iii (2015). CASSESE, *supra* note 39, at 28–29; GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 444–45, para. 1153 (4th ed. 2020); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 264 (4th ed. 2019) (noting that humanitarian law customs have developed through military codes such as the Lieber Code).

134. See generally HENCKAERTS & DOSWALD-BECK, *supra* note 28 (detailing modern principles of international humanitarian law).

135. HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 551.

136. HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 552; YUDAN TAN, THE ROME STATUTE AS EVIDENCE OF CUSTOMARY INTERNATIONAL LAW 102 (2021) (explaining that ICRC accepted that war crimes applied in non-international armed conflict in 1996, but this was not widely accepted as customary law) .

in 2005 for the ICRC study, some caution is warranted in mechanically applying its final findings on rules (Volume I).¹³⁷ The ICRC study is a snapshot of the status of customary international law in 2005, but does not provide conclusions on which exact year a given rule of customary international law crystallized. Fortunately, the ICRC study is accompanied by an account of the sources it relies upon (Volume II, Parts 1 and 2), which may assist in determining when a particular rule gained the status of customary international law.¹³⁸ At the time that the study was conducted, many states had already adopted legislation criminalizing war crimes committed in NIACs.¹³⁹ In fact, some states had already done so prior to the 1990s, either explicitly or in more neutral terms.¹⁴⁰

Sweden is among the countries ICRC lists as already having adopted domestic legislation criminalizing war crimes in NIACs, which would seem to make discerning the crystallization date of the customary law a moot point. However, Bring argues that the ICRC study included Sweden and some other states without necessary proof of genuine intent to criminalize.¹⁴¹ Essentially, Bring asserts that the ICRC study makes a

137. See generally HENCKAERTS & DOSWALD-BECK, *supra* note 28 (detailing principles of international humanitarian law up to 2005).

138. See, e.g., INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, pt. 2, at 3611–853 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (detailing individual responsibility for war crimes under international law).

139. *Id.* at 3626–50 (describing national legislation adopted by many states criminalizing serious violations of international humanitarian law including violations committed during NIACs); HENCKAERTS & DOSWALD-BECK, *supra* note 28, at 553 n.12 (listing national legislation adopted by many states criminalizing serious violations of international humanitarian law including violations committed during NIACs).

140. SANDESH SIVAKUMARAN, LAW OF NON-INTERNATIONAL ARMED CONFLICT 490–92 (2012) (summarizing national legislation predating 1990 that explicitly criminalized war crimes in NIACs, such as sections 12–14 of the Act for the Enforcement of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 enacted by Thailand in 1955, Article 3 of the International Crimes (Tribunals) Act enacted by Bangladesh in 1973, and Article 282 of the Ethiopian Criminal Code of 1957, and national legislation that did the same using neutral terms, such as Article 83 of 1987 Law of Military Crimes Act of Mozambique, Article 8 of the Netherlands Criminal Law in Wartime Act of 1952, Article 109(1) of the 1957 Military Criminal Code of Switzerland, and Article 142 of the Criminal Code of the then Socialist Federal Republic of Yugoslavia adopted 1976).

141. Bring, 2021, *supra* note 108.

circular argument by first making reference to the open-ended definition of war crimes in Swedish law and other countries with similarly vague legislation, and using these vague inclusions determine that there is a concrete rule of customary international law. This finding is finally used to define the content of Swedish law.¹⁴²

Nevertheless, multiple preexisting cases arise from domestic jurisdictions where defendants have been convicted for war crimes committed in NIACs. They include the *Hesamuddin* case in the Supreme Court of the Netherlands, where the defendant was convicted as former head of the Afghan military intelligence service for involvement in torture in 1985-1989; the *van Anraat* case at the Hague, where the defendant was convicted for complicity in war crimes relating to events 1988 in the NIAC between Iraqi government troops and Kurdish resistance groups; *Arklöv*, a Swedish case addressing events in Bosnia 1993 where Croat armed forces detained Bosniaks in a prison camp; and the Swiss *Niyontze* case, addressing the 1994 Rwandan genocide.¹⁴³ Clearly, there is some precedent supporting the conclusion that violations of IHL in NIACs committed since the mid-1980s can be domestically prosecuted in countries where the NIAC did not occur. But the existence of this precedent does not definitively resolve the inquiry into whether domestic prosecution for NIAC violations of IHL is viewed by states themselves as binding (*opinio juris*).

B. *Opinio juris*

When the International Law Commission (ILC) presented its Draft Code of Crimes against the Peace and Security of Mankind in 1991, Article 22 of the draft concerned the concept of an “exceptionally serious war crime,” defined as

142. *Id.*

143. See HR 8 July 2008, NJ 2013, 07/10063 (E) (Neth.) (upholding convictions for torture and violations of the laws and customs of war committed during the civil war in Afghanistan). See also Rb. Hague 23 December 2005, 09/751003-04, section 10.4 (Neth.) [hereinafter *van Anraat*]. The Hague Court of Appeals upheld the conviction on complicity in war crimes in Hof Hague 9 mei 2007, 09/751003-04. See Stockholms TR, Case No. B 4084-04, p. 52 (applying international rules of humanitarian law to adjudicate war crimes charges); see also INT'L COMM. OF THE RED CROSS, *supra* note 138, at 3658, para. 234 (describing Tribunal militaire de cessation [Military Court of Cassation], 27 avril 2001 relating to events 1994 in Rwanda).

an “exceptionally serious violation of principles and rules of international law applicable in armed conflict.”¹⁴⁴ Notably, this definition does not distinguish between violations committed in an IAC or a NIAC.¹⁴⁵ The ILC clarified in its comment that the words “armed conflict” not only covered, “international armed conflicts within the meaning of Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions but also non-international armed conflicts covered by article 3 common to the four 1949 Geneva Conventions.”¹⁴⁶

States made comments following the ILC’s presentation, which are relevant here in establishing *opinio juris*. And while some states who participated in the discussion on the ILC draft code remained silent on Article 22, that silence may have indicated acceptance or tolerance of the ILC’s definition.¹⁴⁷ Australia noted some specific differences between the grave breaches regime and Article 22 of the draft, without challenging or mentioning that the distinction between IAC and NIAC was absent.¹⁴⁸ The UK and Switzerland made similar interventions.¹⁴⁹ The Netherlands argued that the provision should refer to “serious war crimes” – omitting the qualification “exceptionally,” and the U.S. voiced similar concerns.¹⁵⁰ The representative of the Netherlands also explicitly stated that the “article should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these circumstances. . . . it would obviate the need to decide

144. *Report of the Commission to the General Assembly on the work of its forty-third session*, 2 Y.B. Int’l L. Comm’n 107, pt. 2 U.N. Doc. A/CN.4/SER.A/1991/Add.1, at 105 [hereinafter Yrbk. ILC (1991)].

145. That is how the draft of Article 22 was originally understood even though not everybody agreed that this was *de lege lata* at that time. *See Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia, DDM/JUR/442b, 25 March 1993* in 2 AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 391, 392, para. 5 (Virginia Morris & Michael P. Scharf eds., 1995).

146. Yrbk. ILC (1991). *supra* note 144, at 105.

147. *See* ORAKHELASHVILI, *supra* note 124, at 33–35 (explaining that a state is bound by customary international law unless it is a persistent objector).

148. Documents of the forty-fifth session, 2 Y.B. Int’l L. Comm’n, pt. 2, UN Doc A/CN.4/SER.A/1993/Add.1 at 65, paras. 37–38.

149. *Id.* at 101–102, para. 27.

150. *Id.* at 87, 104.

whether a conflict in a given case was national or international. The commentary to the article should specify that this application widens the scope of existing law, since war crimes are not mentioned in Additional Protocol II to the Geneva Conventions.”¹⁵¹ However, the Netherlands also stated that “all the offences to be included in the Code are in any event punishable under existing treaties or customary law. . . . The crimes which the Netherlands Government would advocate for inclusion are already punishable under international law.”¹⁵²

Several other countries also mentioned draft Article 22 without expressing discontent.¹⁵³ Switzerland discussed the difference between grave breaches and other violations when stating that, “[i]n international humanitarian law there are now two categories of violations. On the one hand, there are ‘grave breaches’ which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 is consulted, and Article 85 of Additional Protocol I thereto, which also refers to Article 11 of the same Protocol): these are also called war crimes. On the other hand, there are all the other violations of international humanitarian law.”¹⁵⁴ Switzerland’s concern was that use of the term “exceptionally,” could mean that “war crimes not enumerated in this provision may, as a result of Article 22, be subject only to a relatively light penalty.”¹⁵⁵ Greece asked for clarifications in relation to draft Article 22 without being more specific while countries such as Belgium, Poland, and Sudan did not say anything at all about draft Article 22,¹⁵⁶ suggesting that they may have accepted or at least tolerated its inclusion.

The Dutch intervention is particularly interesting. On the one hand, their representative stated that war crimes can be committed in NIACs, and that crimes that they wanted included were already punishable under international law, but on the other, they argued that if the article is also applicable to NIACs it would obviate the need to distinguish between IACs and NIACs at all, widening the scope of existing law.¹⁵⁷ One

151. *Id.* at 87, para. 70.

152. *Id.* at 83, paras. 14–15.

153. *Id.* at 68, 91–93, 97.

154. *Id.* at 108, para. 14.

155. *Id.* at 108, para. 15.

156. *Id.* at 68–82, 93–97, 105–106.

157. *Id.* at 83, 87–88.

way to reconcile these statements is to conclude that though war crimes can be committed in NIACs, the scope of criminalized behavior in NIACs remains narrower than that in IACs, an approach that was later codified in article 8 of the Rome Statute. Overall, the statements made by states in the early 1990s suggest that they accepted that violations of IHL in NIACs could be prosecuted as war crimes.

C. Findings of *ad hoc* tribunals

Ad hoc tribunals often provide authoritative interpretations of the rules of customary international law.¹⁵⁸ War crimes were criminalized by the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute under the headings “Grave breaches of the Geneva Conventions of 1949” (Article 2) and “Violations of the laws or customs of war” (Article 3).¹⁵⁹ Theodor Meron has noted that at the adoption of the ICTY statute there was no opposition in the Security Council to treating violations of Common Article 3 and Additional Protocol II as bases for the individual criminal responsibility of the perpetrators.¹⁶⁰ The defendant in *Tadic* appeared in the very first case at the ICTY, where he challenged the tribunal’s jurisdiction over alleged violations of IHL in NIACs.¹⁶¹ He argued that “prohibitions [under customary international law] do not entail individual criminal responsibility when breaches are

158. *Cf.* Prosecutor v. Dyilo, ICC-01/04-01/06, Prosecution’s Submission on the Admissibility of Four Documents, ¶ 26 (Apr. 1, 2008) (noting that jurisprudence that is not binding may still satisfy legal principles); *see also* MARK KLAMBERG, EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS: CONFRONTING LEGAL GAPS AND THE RECONSTRUCTION OF DISPUTED EVENTS 35–43 (2013) (discussing the question of binding case law in international criminal tribunals).

159. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2, 3 (Sept. 2009) (compiling resolutions beginning with Resolution 827 which adopted the Statute in 1993 until Resolution 1877 which amended the Statute in 2009). *Cf.* Statute of the International Criminal Tribunal for Rwanda, art. 4 (Jan. 31, 2010) (compiling resolutions beginning with Resolution 955 which adopted the Statute in 1994 until Resolution 1901 which amended the Statute in 2009 and criminalizing violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II of 8 June 1977 under Article 4).

160. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 561 (1995).

161. *Tadic*, Case No. IT-94-1, ¶ 8.

committed in internal armed conflicts.”¹⁶² This raised a pivotal issue for the tribunal, since many of the alleged atrocities in forthcoming cases were committed in an NIAC.¹⁶³ The same issue was also present for ICTY’s sister tribunal, the International Criminal Tribunal for Rwanda (ICTR).¹⁶⁴ The Appeals Chamber in *Tadic* referred to the Nuremberg International Military Tribunal’s (IMT) reliance on customary international law, explaining that, “elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts”¹⁶⁵ and then concluding:

All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.¹⁶⁶

In *Tadic*, the ICTY also noted that United Nations Security Council (UNSC) resolutions from 1992 onward addressing violations of IHL in former Yugoslavia, Georgia, and Somalia did not distinguish between IACs and NIACs.¹⁶⁷ It found that war

162. *Id.* ¶ 128.

163. *See, e.g.*, Prosecutor v. Hadzihasanovic and Kubura, Case No. IT-01-47-T, Judgment, ¶¶ 12–25 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (concluding that there was an armed conflict); *see also* Prosecutor v. Kunarac et al., Case Nos. IT-96-23-T, IT-96-23/1-T, Judgment, ¶¶ 400, 567–69 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (noting that an armed conflict broke out in Foca).

164. This proposition is illustrated by and discussed in Prosecutor v. Akayesu, Case No. ICTR—96-4-T, Judgment, ¶¶ 9, 174, 599–610 (Sept. 2, 1998).

165. *Tadic*, Case No. IT-94-1, ¶ 130.

166. *Id.* ¶ 134; WERLE & JESSBERGER, *supra* note 133, at 457, para. 1186.

167. *Tadic*, Case No. IT-94-1, ¶¶ 74, 108, 114, 133 (“Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council.”). For more information regarding the resolutions addressed in the *Tadic* case, see the following: resolutions concerning Liberia including, S.C. Res. 788 (Nov. 19, 1992), S.C. Res. 972 (Jan. 13, 1995) and S.C. Res. 1001 (June 30, 1995), resolutions concerning Somalia such as S.C. Res. 794 (Dec. 3, 1992) and S.C. Res. 814 (Mar. 26, 1993), S.C. Res. 771 (Aug. 13, 1992) which addresses the

crimes, defined as “serious violations of the law and customs of war” in article 3 of the ICTY Statute, applied even in NIACs, but that the regime of “grave breaches,” as provided in article 2 of the ICTY Statute, did not.¹⁶⁸

Article 4 of the International Criminal Tribunal for Rwanda (ICTR) Statute similarly addressed violations of Common Article 3 and Additional Protocol II committed in a NIAC, including the murder, torture, and hostage-taking of civilians.¹⁶⁹ In the high-profile trial of Jean-Paul Akeyesu, a mayor involved in the killing of Tutsis during the genocide, the ICTR Trial Chamber quoted and followed the example of the *Tadic* case when it convicted Akayesu for serious violations of IHL in an NIAC.¹⁷⁰ In later cases, the ICTY trial chambers have tended to avoid explicitly categorizing conflicts they adjudicate as either an IAC or NIAC.¹⁷¹ Instead, they have typically found the requirement of “existence of an armed conflict” satisfied.¹⁷² As the ICJ explained in the 1986 case, *Military and Paramilitary Activities in and Against Nicaragua*, the rules in Common Article 3, “also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts,”¹⁷³ bolstering the argument that even

former Yugoslavia, and S.C. Res. 993 (May 12, 1995) which addresses Georgia.

168. *Tadic*, Case No. IT-94-1, ¶¶ 84, 89–93; see also Georges Abi-Saab, *The Concept of War Crimes*, in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORIAL OF LI HAOPEI 99, 116 (Sienho Yee & Wang Tieya eds., 2001) (discussing the ways the *Tadic* case contributed to the tendency in international law to favor criminalization).

169. Statute of the International Criminal Tribunal for Rwanda, art. 4 (Jan. 31, 2010).

170. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶¶ 611–15.

171. For examples of cases in which the ICTY did not explicitly categorize the conflicts in question as IACs or NIACs see Prosecutor v. Popovic et al., Case No. IT-05-88-T, Judgment, ¶¶ 744–46 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010), Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶ 22 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), Prosecutor v. Simic et al., Case No. IT-95-9, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003), Prosecutor v. Furund_ija, Case No. IT-95-17/1-T, Judgment, ¶¶ 59–60 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), and Prosecutor v. Halilovic, Case No. IT-01-48-T, Judgment, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

172. Rogier Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, 20 INT’L CRIM. L. REV. 595, 604 (2020).

173. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. Rep. 14., Judgment, ¶ 218 (June 27).

in the 1980s, and certainly by the 1990s, there was a perception that certain rules applied equally, regardless whether an armed conflict was categorized as international or non-international.

D. *Experts and scholarship*

Though expert commentary and scholarship are not binding sources of international law, they may still provide assistance in ascertaining the status of customary international law. As illustrated below, there was initial divergence among scholars and experts on the status of customary international law. In a commentary on the ICTY Statute, ICRC asserted that the concept of war crimes was limited to IACs.¹⁷⁴ Similarly, prior to the mid-1990s, the ICRC scholars and experts in general held the view that atrocities committed in internal conflicts could be breaches of domestic law or constitute crimes against humanity, but not war crimes.¹⁷⁵ However, in his own commentary on the *Lundin* case, Schabas argues that by 1997, it had become clear that international criminal liability did exist for war crimes perpetrated during a NIAC, as the *Tadic* case itself demonstrated.¹⁷⁶ He also explains that though at the Rome Conference a few states did object to the international criminalization of NIACs, their views were isolated.¹⁷⁷ Sandesh Sivakumaran argues, admittedly “[w]ith the benefit of hindsight, that there was no reason to interpret the [IHL] of [NIACs] in this manner.”¹⁷⁸ Even though Common Article 3 and Additional Protocol II are quiet as to whether violations of their rules are war crimes, this was no reason to question whether violations of IHL in NIACs could constitute war

174. ICRC, *supra* note 145, para 4; WERLE & JESSBERGER, *supra* note 133, at 456, para. 1183; *see also* CRYER ET AL., *supra* note 133, at 267.

175. William J. Fenrick, *The Prosecution of War Criminals in Canada*, 12 DALHOUSIE L. J. 256, 259 n.9 (1989); Rep. of the Comm. of Experts on Former Yugoslavia (1994), transmitted by Letter dated 27 May 1994 from Boutros Boutros-Ghali (U.N. Secretary-General) Established Pursuant to United Nations Security Council Resolution 780 (1992), Concerning Former Yugoslavia Addressed to the President of the Security Council, ¶¶ 42, 52–54, U.N. Doc. S/1994/674 (May 27, 1994).

176. Schabas, *supra* note 4, at 5; *Tadic*, Case No. IT-94-1, ¶ 134.

177. Schabas, *supra* note 4, at 5.

178. SIVAKUMARAN, *supra* note 140, at 476.

crimes.¹⁷⁹ He refers to the IMT in Nuremberg, which asserted that violations of certain provisions of the Hague Conventions gave rise to criminal responsibility despite a lack of explicit statements within the Conventions to that effect.¹⁸⁰ The ICTY Trial Chamber reasoned similarly in the *Celebici* case, which addressed war crimes committed by Bosnians and Croats against Serbs in the prison-camp in Celebici, Bosnia.¹⁸¹ Pictet wrote, in his commentary on the first Geneva Convention, that states should not only punish grave breaches, but “must [also] include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention.”¹⁸²

After the *Tadic* case, scholars began taking the view that serious violations of Common Article 3 and Additional Protocol II in NIACs were war crimes.¹⁸³ Meron, for example, argued in 1995 that, “common Article 3 and Protocol II impose important prohibitions on the behavior of participants in noninternational armed conflicts, be they governments, other authorities and groups, or individuals. The fact that these proscribed acts are considered nongrave rather than grave breaches concerns questions of discretionary versus obligatory prosecution or extradition, and for some commentators, universal jurisdiction, but not criminality.”¹⁸⁴ Sivakumaran took the same view: “[t]o argue that violation of the international humanitarian law of non-international armed conflict cannot give rise to criminal responsibility is to confuse criminality with jurisdiction and penalties.”¹⁸⁵ Concluding that war crimes may be committed in NIACs, Sivakumaran then asked which partic-

179. *Id.*

180. SIVAKUMARAN, *supra* note 140, p. 476 (citing 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253 (1947)).

181. Prosecutor v. Delalic et al. (*Celebici*), Case No. IT-96-21, Judgment, ¶ 308 (Int’l Crime. Trib. for the Former Yugoslavia Nov. 16, 1998).

182. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 368 (Jean S. Pictet ed., 1952).

183. TAN, *supra* note 136, at 102.

184. Meron, *supra* note 160, at 566. *See also* Delalic et al., Case No. IT-96-21, ¶ 308 (“While ‘grave breaches’ *must* be prosecuted and punished by all States, ‘other’ breaches of the Geneva Conventions *may* be so.”).

185. SIVAKUMARAN, *supra* note 140, at 476; *see also* Meron, *supra* note 160, at 561.

ular violations of IHL would amount to war crimes.¹⁸⁶ Sivakumaran describes three conceivable answers.¹⁸⁷ The first view is that advanced by the IMT: that all violations of international humanitarian law are war crimes.¹⁸⁸ The second holds that not all violations of IHL amount to war crimes, given that IHL contains some provisions that are highly technical in nature. Rather, all *serious* violations of international humanitarian law amount to war crimes. Relevant factors in assessing whether a violation is serious include the values protected by the norm and the gravity of the act.¹⁸⁹ Under the third view, for a violation of IHL to amount to a war crime, one must prove both the existence of the violated rule in international law and the parallel existence of a secondary rule, usually a customary one.¹⁹⁰ The ICTY adopted this approach.¹⁹¹ In conclusion, during the early 1990s, disagreement lingered among scholars and experts about whether violations of IHL in NIACs were criminalized. It appears as states in their practice and opinions moved somewhat faster than scholars.

E. *Swedish legislation, preparatory works, and case law*

The above review of state practice, *opinio juris*, case law, and scholarship suggest that violations of IHL in NIACs were criminalized in the early 1990s, maybe even earlier. How does that play out in the Swedish context? The text on the Chapter 22 Section 6 of the Swedish Criminal Code, in defining a “crime against international law,” does not immediately distinguish between IACs and NIACs.¹⁹² So instead, it is necessary to interpret the phrase “serious violation” in the context of the entire provision, taking into account the legislative history as explained in its preparatory works. When the terminology, “crime against international law,” was introduced during the reform of Swedish penal law in 1948, it included acts that would violate “generally recognised principles or tenets of in-

186. SIVAKUMARAN, *supra* note 140, at 477.

187. *Id.*

188. *Id.* at 477 (citing INTERNATIONAL MILITARY TRIBUNAL, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253 (1947)).

189. Tadic, Case No. IT-94-1, ¶ 94(iii); Meron, *supra* note 160, at 562.

190. Abi-Saab, *supra* note 168, at 112; SIVAKUMARAN, *supra* note 140, at 477.

191. Tadic, Case No. IT-94-1, ¶¶ 94, 143.

192. BrB 22:6 (in its wording prior to 9 July 2009).

ternational law,” (i.e. customary international law) and was not explicitly restricted to “serious” violations.¹⁹³ During consultations prior to adoption of the law (or “remissbehandling” in Swedish), the Office of the Chancellor of Justice and the National Association of Conscript Officers voiced the concern that the expression “or generally recognised principles or tenets of international law” was too vague.¹⁹⁴ However, that concern went largely unresolved at the time.¹⁹⁵

The provision, then titled Chapter 27 section 11 of the Penal Law, was amended in 1954 in response to adoption of the four Geneva Conventions in 1949 and Sweden’s accession to the conventions.¹⁹⁶ The preparatory works use the phrase “serious violations,” which connects to the terminology in the four Geneva Conventions, (“grave breaches”), although neither of these phrases were introduced into the Penal Law at the time.¹⁹⁷ This appears to have been a deliberate choice, as the Ministry’s expert group stated that “an expansion of the provision should also include the less serious violations.”¹⁹⁸ The Svea Court of Appeal, the Scania and Blekinge Court of Appeal and the Chief of Defense all criticized the proposal for this perceived deficiency.¹⁹⁹ When the Criminal Code was adopted in 1962 to replace and repeal the Penal Law, the same wording was used in its chapter 22, section 11 as had been used in chapter 27 section 11 of the Penal Law.²⁰⁰ The provision was amended in 1986, limiting the scope of crimes against international law to serious violations. The provision was also

193. Mark Klamberg, *The Evolution of Swedish Legislation on International Crimes*, 66 SCANDINAVIAN STUD. L. 206, 206 (2020).

194. Prop. 1948:144, *supra* note 101, pp. 163–67. See Mauro Zamboni, “Methods of Ex-Ante Evaluation in Legislation: The Swedish Model,” in GOALS AND METHODS OF EX-ANTE EVALUATION OF LEGISLATION 3, 3–31 (Kye-Hong Kim ed., 2019) (describing “remissbehandling,” the Swedish process of consultation prior to adoption of laws).

195. Klamberg, *supra* note 193, at 207.

196. *Treaties, States Parties and Commentaries*, INT’L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=se (last visited Feb. 21, 2021) (reporting that Sweden ratified the four Geneva Conventions on 28 December 1953).

197. Prop. 1953:142 om ändring i 1 och 27 kap. strafflagen m.m, pp. 15–16, 37 [government bill] (Swed.).

198. *Id.*

199. *Id.* at 20–22.

200. Prop. 1962:10 Förslag till brottsbalk, p. 57 [government bill] (Swed.).

moved to Chapter 22 Section 6 of the Criminal Code—the provision applicable in the *Lundin* case.²⁰¹

Examination of relevant preparatory works may help one understand the amendment's rationale and purpose. In 1979, when the Swedish government acceded to the two 1977 additional protocols to the Geneva Conventions, it noted that the open-ended design of the international crimes provision would cover violations of both protocols.²⁰² The 1983 Inquiry on Military Justice explained that with the adoption of Additional Protocol I, more than one hundred new provisions had been added. Together with other treaty obligations, this made the criminalized scope of the international crimes move beyond what was reasonable, considering the open-ended nature of the provision.²⁰³ In response, the Inquiry presented a draft proposal to amend the provision in 1983, with the purpose of distinguishing between the most severe and least severe violations.²⁰⁴ The latter were to be sanctioned by disciplinary measures.²⁰⁵ The new wording would primarily aim to cover the fourth Hague Convention (1907), the Geneva Conventions (1949), their Additional Protocol (1977), treaties relating to means warfare (weapons), and customary international law.²⁰⁶ The Government took the same approach in its bill, which was accepted by parliament.²⁰⁷ The aim appears to have been to distinguish between violations of different severity, and mention is made of excluding violations in NIACs.²⁰⁸ If legislators had wanted to restrict the scope of criminal behavior to the grave breaches regime, they would have excluded customary international law from the provision – but it was left in.²⁰⁹ As

201. Indictment, Case No. B 11304-14, *supra* note 3, at 14.

202. Prop. 1978/79:77 om godkännande av tilläggsprotokoll till Genèvekonventionerna 1949 angående skydd för krigets offer, p. 47 [government bill] (Swed.); Statens Offentliga Utredningar [SOU] 1983:2 Nytt militärt ansvarssystem, p. 113 [government report series] (Swed.); Statens Offentliga Utredningar [SOU] 1984:56 Folkkräten i krig, p. 253 [government report series] (Swed.).

203. SOU 1983:2, p. 114.

204. *Id.*

205. *Id.*

206. *Id.* at 116.

207. Prop. 1985/86:9 om lag om disciplinförseelser av krigsmän m.m, pp. 80–81 [government bill] (Swed.).

208. Cameron, *supra* note 101, at 144.

209. BrB 22:6 (in its wording prior to 1 July 2014).

Saab notes, grave breaches are a species of the larger *genus* of war crimes.²¹⁰

Arguably, the provision on crimes against international law covers this larger group. Of the nine completed trials in which indictments have included charges of crimes against international law as provided for in Criminal Code Chapter 22 Section 6, all have related to war crimes in NIACs.²¹¹ And while Bring and some others argue that violations in NIACs were not criminalized in Sweden as war crimes until 2010, of the five cases relating to events in the 1990s, in all of them judges have assumed that the convictions are premised upon Chapter 22, Section 6 of the Criminal Code, criminalizing violations of IHL in NIACs.²¹² Admittedly, only one of the judgments explicitly discusses the matter.²¹³ The district court in that case, *M.M.*, explained that it follows from the preparatory works that “an explicit limitation to grave breaches was never made,” and that “the design of the legislation which refers to “serious violations of the Swedish Criminal Code Chapter 22 Section 6 cannot be deemed to limit the applicability of the law to include only the grave breaches specified in the Geneva conventions.”²¹⁴

To summarize, scholarship, case law, and other material focuses primarily on events in former Yugoslavia, and whether violations in that conflict amounted to war crimes. Since there has been some discussion on the validity of the findings made

210. *Abi-Saab*, *supra* note 168, at 114.

211. Stockholms TR, Case No. B 4084-04, p. 52; Stockholms TR, Case No. B 5373-10, p. 8; Stockholms TR, Case No. B 18271-11, p. 36, para. 6; Stockholms TR, Case No. B 12882-14, p. 136; Stockholms TR, Case No. B 13688-16, pp. 41, 177; Södertörn TR, Case No. B 2639-16, p. 40; Göteborg Tingsrätt [TR] [Göteborg District Court], 14 Dec. 2015, Case No. B 9086-15, p. 30; Stockholms TR, Case No. B 3787-16, para. 12; Södertörn TR, Case No. B 11191-17, pp. 7–8.

212. Stockholms TR, Case No. B 4084-04, p. 52; Stockholms TR, Case No. B 5373-10, p. 46; Stockholms TR, Case No. B 18271-11, pp. 36–37; Stockholms TR, Case No. B 12882-14, p. 35–36, para. 3; Stockholms TR, Case No. B 13688-16, p. 176.

213. Inger Österdahl, *Folkrättsbrott i svenska domstolar: En våldsamt utveckling* [Violations of International Law in Swedish Courts: An Explosive Development], SVENSK JURISTTIDNING, 2020 at 175, <https://svjt.se/svjt/2020/170> (<https://perma.cc/5GBF-QDKK>) (last visited Apr. 3, 2022); Mark Klamberg & Anna Andersson, *Swedish Case Law on the Contextual Elements Relating to War Crimes*, 66 SCANDINAVIAN STUD. L. 217, 228–29 (2020).

214. Stockholms TR, Case No. B 5373-10, p. 53.

in the *Tadic* case, this section seeks to identify the point in time at which customary international law began to plausibly provide basis for criminal responsibility for violations of IHL.²¹⁵ While some might perceive *Tadic* as a paradigmatic shift, introducing a new rule that war crimes are criminalized in the context of NIACs, it must be emphasized that international tribunals and courts cannot create international law.²¹⁶ Rather than a sudden shift, the process of criminalizing war crimes in NIACs has been gradual, beginning with the Lieber code and advancing to the inclusion of CA3 in the four Geneva Conventions, the adoption of AP II, changes in national military manuals and domestic criminal legislation, resolutions by the UNSC, and case law (including *Hesamuddin, van Anraat*, and *Tadic*) relating to events in 1988 and 1992. Based on the material presented in the 2005 ICRC study, the comments made by states in 1993 on the ILC Draft Code of Crimes against the Peace and Security of Mankind, and observations and arguments made by Meron and Sivakumaran, it is apparent that state practice and *opinio juris* supports the notion that violations of IHL in NIACs were already criminalized by the early 1990s, if not earlier.

VII. LOWERING THE STANDARDS FOR COMPLICITY OF CORPORATIONS AND THEIR AGENTS

The complicity of corporations and their agents in violations of international law has triggered discussions about how to assign liability between the corporate entity and particular officers and executives.²¹⁷ While there are several conceivable alternatives when it comes to who can be prosecuted and how, in a Swedish context, the available avenue is to prosecute corporate agents. Questions of complicity must also be assessed pursuant to traditional principles under Swedish criminal law,

215. *Tadic*, Case No. IT-94-1, ¶ 134. *See, e.g.*, Stockholms TR, Case No. B 5373-10, p. 53 (contemplating the effect of customary international law on the development of international humanitarian law).

216. ORAKHELASHVILI, *supra* note 124, at 46–47 (explaining that the Statute of the International Court of Justice art. 38(1)(d) states that judicial decisions “are a subsidiary means for the determination of rules of law” as opposed to treaties, customary international law and general principles of law).

217. *See* CLAPHAM, *supra* note 1, at 195–99 (describing a legal framework that discerns between corporate social responsibility and corporate accountability).

rather than general principles under international criminal law.

A. *Corporate criminal liability*

The expanding role of corporations in public life provides a basis for growing demands that corporations should be held criminally liable for international crimes.²¹⁸ Corporations no longer operate in isolated compartments of society or in specific territories. Their influence is substantial and their behavior can have harmful impacts extending well beyond the traditional scope of corporate action.²¹⁹ Corporate involvement in mass atrocities was particularly evident during the Second World War.²²⁰ The Charter of the IMT – which governed the Nuremberg trials – introduced the idea that organizations, in addition to natural persons, could be prosecuted for international crimes, empowering the Tribunal to declare certain organizations criminal.²²¹ This meant individuals could be prosecuted for their membership in those organizations before national, military, or occupational courts.²²² The Tribunal declared the Leadership Corps of the Nazi party, the Ge-

218. See Michael A. McGregor, *Ending Corporate Impunity: How to Really Curb the Pillaging of Natural Resources*, 42 CASE W. RESV. J. INT'L LAW 469 (2009) (proposing an amendment to the jurisdiction of the International Criminal Court to include corporations); Larissa van den Herik, *Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 350, 350–68 (Carsten Stahn & Larissa van den Herik eds., 2010) (noting that social scientists increasingly view corporations as independently capable of guilt for crimes against humanity); James G. Stewart, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES 79 (2011) (discussing the growth of domestic prosecutions of corporate war crimes).

219. van den Herik, *supra* note 218, at 350.

220. See The Flick Trial, Case No. 48, U.N. War Crimes Comm., 9 L. REPS. OF TRIALS OF WAR CRIMINALS 1, 28 (1947) (finding criminal liability for participation in certain organizations); see also The Krupp Trial, Case No. 58, U.N. War Crimes Comm., 10 L. REPS. OF TRIALS OF WAR CRIMINALS 69, 172 (1948) (deciding that it was unsound to argue that “private individuals having no official position were exempt from responsibility” for the actions of their organization).

221. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 9, Aug. 8 1945, 82 U.N.T.S. 280 (establishing the Charter of the International Military Tribunal).

222. *Id.* art. 10.

stapo, the SD (Der Sicherheitsdienst des Reichsführer SS), and the SS (Schutzstaffeln) to be criminal organizations.²²³ But it did not classify any corporations as criminal.²²⁴ Later, in subsequent trials under Control Council Law No. 10, following the initial IMT, agents of corporations were tried, but the Tribunals did not try corporations themselves.²²⁵ The *IG Farben* judgment stated the following:

the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties . . . corporations act through individuals and, under the conception of personal individual guilt . . . the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.²²⁶

Nuremberg and its progeny concerned “public” rather than “private” organizations.²²⁷ The organizations declared criminal were dissolved, and the Tribunal did not impose any further penalties on those entities.²²⁸ But other jurisdictions took slightly different approaches.

The preparatory committee for the establishment of the International Criminal Court (ICC) envisaged, in Article 23(5) of its draft statute, that the Court should have jurisdiction over legal persons:

5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such

223. 1 INTERNATIONAL MILITARY TRIBUNAL, *supra* note 2, at 255–73.

224. See STAHN, *supra* note 93, at 120.

225. *Id.* at 121.

226. The I.G. Farben Trial, Case No. 57, U.N. War Crimes Comm., 10 L. REPS. OF TRIALS OF WAR CRIMINALS 1, 52 (1948).

227. See 1 INTERNATIONAL MILITARY TRIBUNAL, *supra* note 2, at 255–73 (deciding the criminality of public entities such as the Leadership Corps of the Nazi party, the Gestapo, the SD (Der Sicherheitsdienst des Reichsführer SS), and the SS (Schutzstaffeln)).

228. van den Herik, *supra* note 218, at 352.

legal persons or by their agencies or representatives.²²⁹

During the diplomatic conference establishing the Rome Statute, France submitted a proposal on criminal responsibility of individuals, but it was not included in definitive version of the Statute adopted on 18 July 1998.²³⁰ There has been some more recent openness to recognizing corporate criminal responsibility. In a European context, the Council of Europe and the EU have encouraged states to embrace the concept.²³¹ Common law States have been more open to embrace the concept of corporate criminal responsibility, while civil law states have remained hesitant.²³²

Several objections against corporate criminal responsibility relate to traditional understandings of blame and guilt.²³³ They include the argument that corporations are legal fictions and cannot act independently, since they have no will on their own and therefore cannot be blamed morally or punished.²³⁴ On the other hand, many legal systems recognize responsibility for acts conducted through other persons, and assert that concepts relating to blame and punishment are social constructs that can be reinterpreted.²³⁵

229. Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 23(5), A/CONF.183/2/Add.1 (Apr. 14, 1998).

230. U.N. Dipl. Conf. of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., Proposal Submitted by France, A/CONF.183/C.1/L.3 (June 16, 1998); van den Herik, *supra* note 218, at 353–54.

231. *See* Liability of Enterprises for Offences: Recommendation No. R (88) 18 Adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 (recommending measures for rendering enterprises liable for criminal offenses); *see also* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2008 O.J. (L328) art. 6 (requiring states to create criminal liability for legal persons); van den Herik, *supra* note 218, at 357.

232. van den Herik, *supra* note 218, at 363.

233. *Id.* at 362–64.

234. *Id.* at 363.

235. *Id.* at 364; STAHN, *supra* note 93, at 122 (describing how the Special Tribunal for Lebanon used Lebanese law to expand the scope of criminal liability to corporations).

The Swedish legal system does not provide for criminal responsibility for corporations.²³⁶ Given that the *Lundin* case primarily concerns individual criminal responsibility (and only to a much smaller extent civil liability), the following section analyzes modes of liability relevant to individual criminal responsibility.

B. *Individual criminal responsibility for corporate agents*

Neither international law nor Swedish domestic criminal law excludes individual criminal responsibility for corporate agents.²³⁷ If those agents engage in acts as direct perpetrators, they can directly be held accountable. However, more often, corporations and their agents are potentially involved indirectly in criminal activity, for example through financial and commercial interactions, delivering weapons to a conflict zone, providing food to a detention camp, or asking for protection and/or security from local groups.²³⁸ These acts are not by their nature criminal – European scholarship typically describes them as “neutral” acts of assistance, aiding, abetting, or co-perpetration.²³⁹ The question is whether such neutral acts of assistance are criminal. It is easy to determine that a neutral act is criminal when the assistance provided is explicitly prohibited – for example, if an arms dealer sells weapons in a conflict with an U.N. Security Council arms embargo.²⁴⁰ It is more difficult in cases where the act is *prima facie* lawful, for example providing food to a detention camp.²⁴¹ The ICC Pre-

236. ASP, ULVÅNG & JAREBORG, *supra* note 87, at 189.

237. See Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90 (making no mention of corporate responsibility); ASP, ULVÅNG & JAREBORG, *supra* note 87, at 189.

238. Kai Ambos, *Article 25 - Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1189, 1224 (Kai Ambos ed., 2022) [hereinafter Ambos, *Individual Criminal Responsibility*].

239. *Id.* (defining neutral acts as “contributions which are not *per se* criminal”); see Kai Ambos, *The ICC and Common Purpose - What Contribution is Required under Article 25(3)(d)?*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 592, 604 (Carsten Stahn ed., 2015) [hereinafter Ambos, *ICC and Common Purpose*] (providing examples of neutral acts of assistance).

240. See, e.g., S.C. Res. 2216 (Apr. 14, 2015) (discussing the criminality of transferring or selling arms in Yemen).

241. Ambos, *ICC and Common Purpose*, *supra* note 239, at 604.

Trial Chamber in *Mbarushimana*—which concerned alleged war crimes perpetrated 2009 in the DRC by the group *Forces Démocratiques pour la Liberation du Rwanda* (FLDR), originally from Rwanda – addressed this problem without using the phrase “neutral acts” when it discussed liability for providing assistance, and considered the hypothetical liability of landlords, grocers, utility providers, and more.²⁴² The Chamber was concerned that liability would become overextended if any contribution were held to be sufficient.²⁴³ It is possible to limit the scope of liability for aiding and abetting by introducing thresholds, for example, by specifying that act must involve a substantial contribution to the commission of the crime and that the aider and abettor must know that his or her acts will assist the principal in the commission of an offence.²⁴⁴ Knowledge and purpose are both part of the relevant subjective (*mens rea*) requirement.²⁴⁵ Moreover, that subjective requirement only applies here to the act of facilitation, not to the main crime itself.²⁴⁶ There is also ongoing debate about imposing “specific direction,” as a limitation of liability for aiding and abetting.²⁴⁷ The *Perišić* case at the ICTY has been at the center of this controversy. There the defendant, the Chief of the Yugoslav Army (VJ) General Staff was charged with aiding and abetting crimes in the Bosnian towns of Sarajevo and Srebrenica for his role in facilitating the provision of military and logistical assistance from the VJ to the Army of the Repub-

242. See Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 277 (Dec. 16, 2011) (discussing the quotidian acts that might be criminal with too low of a threshold for aiding and abetting liability, without describing them as “neutral.”).

243. *Id.*

244. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 674, 688–92 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997). See also Delalic et al., Case No. IT-96-21, ¶¶ 325–29 (describing limitations the Trial Chamber uses with regards to aiding and abetting liability); see also Furund_ija, Case No. IT-95-17/1, ¶¶ 190–249 (discussing potential limitations for aiding and abetting liability).

245. Ambos, *Individual Criminal Responsibility*, *supra* note 238, at 1225.

246. *Id.*

247. Antonio Coco & Tom Gal, *Losing Direction: The ICTY Appeals Chamber’s Controversial Approach to Aiding and Abetting in Perišić*, 12 J. INT’L CRIM. JUST. 345, 346 (2014) (“The issue [of specific direction] remains alive in the ICTY cases, and nothing precludes the possibility that specific direction might be revived by another bench”).

lika Srpska.²⁴⁸ The Appeals Chamber in that case used the specific direction test to distinguish “general assistance which could be used for both lawful and unlawful activities.”²⁴⁹ For conviction, the Appeals Chamber held that the prosecution must show a “direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators.”²⁵⁰ A year later, a different bench of the ICTY Appeals Chamber, in *Šainović et al.* – also relating to crimes committed in former Yugoslavia – rejected this standard and affirmed that specific direction is not an element of aiding and abetting in customary international law.²⁵¹ The debate remains inconclusive, Ambos, for example, argues that “specific direction may also be invoked to more precisely determine the relevant assistance or contribution in the context of the discussion about neutral acts.”²⁵²

C. *Domestic versus international rules on complicity and intent*

In situations of overlapping domestic and international liability, it remains unclear whether the general principles of criminal law of the country concerned should be applied or whether of international criminal courts should be considered when dealing with complicity and subjective requirements. This will prove important to the *Lundin* case, where the standards on complicity may differ between Swedish law and that applied by international criminal courts.²⁵³ Moreover, the general principles of Swedish criminal law provide a lower threshold on intent (reckless intent) for conviction than the standard applied by the ICC (indirect or direct intent).²⁵⁴ This di-

248. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 2–4 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

249. *Id.* ¶ 44.

250. *Id.*

251. Prosecutor v. Šainović et al, Case No. IT-05-87-A, Judgment, ¶ 1649 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

252. Kai Ambos, *Individual Criminal Responsibility*, *supra* note 238, p. 1222.

253. See Erik Svensson, *Participation in International Crime Pursuant to Swedish and International Criminal Law – Perpetration and Accomplice Liability*, 66 SCANDINAVIAN STUD. L. 80, 93–94 (2020) (“The rules on accomplice liability that have developed in international criminal law may be said to differ partly from the Swedish rules.”).

254. See Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2004 s. 176 (Swed.) (defining the standard of reckless intent); Ebba Lekvall & Dennis Martinsson, *The Mens Rea Element of Intent in the Context of International Crimi-*

vergency does not present an issue for acts committed since July 2014, when the new law on international crimes entered into force.²⁵⁵ There, the preparatory works explicitly provide that the general part of Swedish criminal law should be applied to cases on international crimes.²⁵⁶

But regarding acts committed before July 1, 2014, the debate is ongoing, in both Swedish scholarship and litigation in the *Lundin* case.²⁵⁷ This is due to the open-ended character of Chapter 22 Section 6 of the Criminal Code (prior to repeal in July 2014).²⁵⁸ As a comparison, the U.S. District Court for the Southern District of New York undertook in the *Talisman Energy* case to define the elements of liability for aiding and abetting under the Alien Torts Statute, concluding that they must be derived from international law.²⁵⁹ The U.S. Court of Appeals for the Second Circuit affirmed, holding that “to establish accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, inter alia, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct.”²⁶⁰

While the prosecution in the *Lundin* case relies on the comparatively lower Swedish requirement on intent (reckless

nal Trials in Sweden, 66 SCANDINAVIAN STUD. L. 99, 107, 111–15 (2020) (defining Swedish and ICC interpretations of intent); Prosecutor v. Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 362, 363 n.454 (June 15, 2009) (defining *dolus directus* and equating *dolus eventualis* to “reckless”); WERLE & JESSBERGER, *supra* note 133, para. 573 (explaining ICC interpretations of intent under the ICC Statute, art. 30(2)(b), (3)).

255. Lag om straff för vissa internationella brott [International Crimes Act] (Svensk författningssamling [SFS] 2014:406) (Swed.).

256. Statens Offentliga Utredningar [SOU] 2002:98 Straffansvar för internationella brott [Criminal Liability for International Crimes], pp. 321–22 [government report series] (Swed.); Prop. 2013/14:146, pp. 71, 212–13; Lekvall & Martinsson, *supra* note 254, at 117.

257. See Reimer, *supra* note 4 (analyzing responsibility for participation under Swedish and international law); see also Ingeson & Kather, *supra* note 83 (suggesting that Swedish judges face a considerable challenge in determining the applicable international law).

258. Cameron, *supra* note 101, at 144; Klamberg, *supra* note 101, at 398–99.

259. *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 668.

260. *Presbyterian Church of Sudan*, 582 F.3d at 244, 253.

intent), Schneiter has previously argued—submitting an expert opinion by Bring and Träskman—that the prosecutor should face a higher threshold (indirect or direct intent), as required by the Rome Statute and relevant case law from the ICC.²⁶¹ So in *Lundin*, the defendants make an argument that aligns with the holding of the U.S. Court of Appeals for the Second Circuit in the *Talisman Energy* case. In a similar vein, Schabas argues in the context of *Lundin* that in universal jurisdiction cases, international law governing complicity in international crimes must also be applied.²⁶² Preparatory works, case law, scholarship, and other sources do provide some guidance directly relevant to *Lundin*. The preparatory works preceding the 1954 amendment of the Swedish international crimes provision provide that, “according to the travaux préparatoires [to the 1949 Geneva Conventions] the domestic courts should in this regard apply general principles of criminal law,” and a footnote refers to a section of the “Final record of the diplomatic conference of Geneva of 1949.”²⁶³ The referenced section in the 1949 records reveals that there was no agreement among states on accomplice liability, attempt to commit a crime, duress, grounds for excluding criminal responsibility, or the obligation to obey orders. Instead, the

261. Compare Indictment, Case No. B 11304-14., *supra* note 3, para. 9(a) (“I.L. arrived at the decision intentionally. . .”) and Indictment, Case No. B 11304-14., *supra* note 3, paras. 9(b)–(k) (using similar language for both defendants) with Swedish Prosecution Authority Press Release, *supra* note 20 (“The company then requested from the Sudanese government that the military should now be made responsible for the security, knowing that this meant that the military would then need to take control of Block 5A via military force. What constitutes complicity in a criminal sense is that they made these demands despite understanding or, in any case being indifferent to the military and the militia carrying out the war in a way that was forbidden according to international humanitarian law.”). See Motion from Alexandre Schneiter to the Ministry of Justice, JuBC2018/00136/BRIS, *supra* note 4, at 3 (challenging the legal standards relied on by the prosecutor); see also Bring & Träskman, *supra* note 4, at 2–3 (noting that the interpretation of intent has evolved in international case law to reflect a higher threshold).

262. Schabas, *supra* note 5, at 7, 24.

263. Prop. 1953:142, p. 19 n.2. See also *id.* at 39 (addressing intent and negligence); *id.* at 53–54 (addressing grounds for excluding criminal responsibility).

records explicitly state that these issues were left for judges applying domestic law to address.²⁶⁴

It should also be emphasized that the Rome Statute is not a treaty containing legally obligating state parties to change or adapt domestic rules to protect certain rights in an analogous manner.²⁶⁵ Instead, it is a document regulating the work of the ICC.²⁶⁶ Even if one were to conclude that the open-ended character of the international crimes provision directs domestic courts to apply customary international law, the content of that law would be difficult to discern, especially in instances where the common law and continental European legal traditions may differ. Articles 25 and 30 of the Rome Statute do not by necessity reflect customary international law.²⁶⁷ And the Swedish case law on acts committed before 1 July 2014 is consistent: cases on international crimes in Swedish courts do not differ on perpetration from those that deal with ordinary crimes committed in a domestic Swedish setting.²⁶⁸ There is not yet any judgment before Swedish courts in which a person has been convicted of accomplice liability for an international crime. With reference to the preparatory works preceding the 1954 amendment, Erik Svensson argues that the rules on accomplice liability in the Rome Statute have not been incorporated into Swedish law.²⁶⁹ Swedish courts do not refer to the concept of intent as it exists and is defined in international

264. *Fourth Report Drawn up by the Special Committee of the Joint Committee, in 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, Section B, at 114–15 (1949).*

265. Klamberg, *supra* note 193, at 213; Lekvall & Martinsson, *supra* note 254, at 126; *see also* ANTONIO CASSESE & PAOLA GAETA, INTERNATIONAL CRIMINAL LAW 10 (3d ed. 2013) (“[T]he ICC Statute, far from constituting an ‘international criminal code’, only lays down the rules that the Court must apply when it exercises its jurisdiction over the crimes it is called to adjudicate.”).

266. *See* Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (“The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”); *see also id.* art. 10 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”).

267. Prop. 2013/14:146, pp. 71, 212; Lekvall & Martinsson, *supra* note 254, at 125.

268. Svensson, *supra* note 253, at 91.

269. *Id.* at 92, 95.

criminal law.²⁷⁰ One exception is the Svea Court of Appeal in the *Droubi* case, where the court found that the defendant acted with reckless intent, though they did not elaborate much on intent more generally.²⁷¹ Instead of explicitly stating the applicable standard for intent, the courts generally tend to move on to the next step, only discussing whether there is evidence that proves intent in a given case.²⁷²

D. *Complicity pursuant to the general part of Swedish law*

Having established that Swedish criminal law, rather than international law, is applicable when it comes to modes of liability and *mens rea*, the inquiry must turn to the content of relevant Swedish rules. Pursuant to Chapter 23 Section 4 of the Criminal Code, punishment is imposed, not only on the person who committed a criminal act, but also on anyone who aided or abetted them by advice or deed.²⁷³ Complicity can be committed intentionally or recklessly.²⁷⁴ Complicity by advice or deed, to amount to aiding or abetting, does not require proof of a significant contribution to the crime; acts of little or no consequence to the crime's success may suffice.²⁷⁵

Requirements are, therefore, set relatively low in Swedish law when it comes to the outer limits of aiding or abetting. For example, it is sufficient for accomplice liability (provided that other relevant conditions are present) if the alleged accomplice supported the perpetrator in the latter's intent to commit a given crime. There is no need to prove that it became "easier" for the perpetrator to commit the act in a physical sense.²⁷⁶

As explained by Ebba Lekvall and Dennis Martinsson, two types of *mens rea* exist in Swedish criminal law: intent and negligence.²⁷⁷ According to the Criminal Code, Chapter 1 Section 2(1), intent is the default form of *mens rea*, while negligence only applies if it is expressly endorsed as establishing liability

270. Lekvall & Martinsson, *supra* note 254, at 119.

271. Svea HovR, Case No. B 4770-16, pp. 7–8.

272. Lekvall & Martinsson, *supra* note 254, at 119–24.

273. BrB 23:4.

274. Svensson, *supra* note 253, at 93.

275. Ingesson & Kather, *supra* note 83.

276. Svensson, *supra* note 253, at 93.

277. Lekvall & Martinsson, *supra* note 254, at 104.

in a given provision.²⁷⁸ Swedish statutory law does not define intent. The different forms of intent and their meaning have instead been developed primarily through case law at the Swedish Supreme Court. Intent can be divided into three categories: direct intent, indirect intent, and reckless intent.²⁷⁹ The Swedish Supreme Court held in the so-called “HIV-case” – where a man infected with HIV was prosecuted for not having safe sex – that reckless intent is the lowest form of intent present in Swedish criminal law.²⁸⁰ In the so-called “motorcyclist stabber-case,” where a motorcyclist stabbed a pedestrian, the Supreme Court clarified the meaning and scope of reckless intent.²⁸¹ Reckless intent applies when the defendant perceives a high probability that a given result will occur (as a consequence of their conduct).²⁸² The Court has also clarified that reckless intent should be applied when the defendant otherwise assumed that a result would occur.²⁸³

To conclude, the general principles of Swedish criminal law, rather than international law, are applicable when ascertaining modes of liability and *mens rea*. If the *Lundin* court accepts this notion, it should be enough for the prosecution to prove that the defendants did support Sudanese perpetrator(s) in their intention to commit war crimes in southern Sudan.²⁸⁴ It is also enough to prove the defendants had reckless intent, i.e., that they perceived it was highly probable that a result would occur as a consequence of their conduct. The “result” in this case, in the context of the present case, does not need to amount to proving that the defendants intended that civilians be killed or civilian objects destroyed; it would arguably suffice to prove that 1) the defendants intended to make requests for protection and conclude an agreement between Sudan Ltd. (Lundin Oil) and the Sudanese Government, and

278. See BRB 1:2(1) (stating that acts are only offenses “when committed intentionally”).

279. Lekvall & Martinsson, *supra* note 254, at 104–108.

280. See NJA 2004 s. 176 (defining the lower level of intent, otherwise known as reckless intent).

281. Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2016 s. 763 paras.15–18 (Swed.).

282. *Id.* paras. 13, 15.

283. See Lekvall & Martinsson, *supra* note 254, at 107 (explaining the conclusions of NJA 2004 s. 176).

284. Indictment, *supra* note 3, para. 9 (asserting that the defendants’ activities contributed to war crimes).

2) the defendants perceived that there was a high probability that these requests and the agreement could lead to the commission of war crimes.²⁸⁵

VIII. CONCLUSION

The prospect of exacting accountability from corporations and their agents for war crimes and other international crimes is gaining traction.²⁸⁶ The *Lundin* case raises several questions which may have broad and far-reaching implications for criminal liability for corporate executives, as it tests the limits of universal jurisdiction, responsibility for violations in NIACs, and rules on complicity.

While previous universal jurisdiction cases in Sweden concerned persons residing in Sweden at the time of their indictment, the courts in the *Lundin* case have accepted that the principle may also grant jurisdiction over a corporate executive who resides in Switzerland for crimes allegedly committed in Sudan. If successful, the case may inspire similar prosecutions in other western countries. Statutes of limitations may offer little protection or be entirely unavailable for this category of crimes, opening the possibilities for investigations in events dating back decades against executives residing all over the world. While corporations may increasingly adopt more cautious approaches to doing business in conflict-ridden states, the long arm of the law may now prove to reach further back than once thought.

Lundin is also the latest in a long series of cases in which the scope of criminalization in NIACs is tested, in terms of both substance and time. Substantively, the prosecution must convince the judges that war crimes can be prosecuted beyond

285. See, e.g., Indictment, *supra* note 3, para. 9(g) (alleging that the defendants made requests and arrangements with the intent of prompting military involvement).

286. See, e.g., *van Anraat* (convicting van Anraat of complicity in violations of the laws and customs of war for supplying Saddam Hussein's government with lethal chemicals which were used against the Iranian military and the Kurdish population in northern Iraq); see also Cour de cassation (Cass.) (Supreme Court for Judicial Matters) crim., Sept. 7, 2021, Bull. crim., Nos. 19-87.031, 19-87.040, 19-87.367, 19-87.376, 19-87.662 (Fr.) (confirming the indictment of a French company for terrorist financing and quashing the decision to cancel the indictment of the company for complicity in crimes against humanity).

the grave breaches regime, and temporally, that it also applies to events in the 1990s. Taking into account state practice, *opinio juris*, case law from *ad hoc* tribunals, and case law from previous war crimes cases in Sweden, it appears that the acts alleged in *Lundin*, if proven, can and should be criminalized.

Finally, *Lundin* challenges the possibly flawed assumption that the more international law takes precedence above national law, the easier prosecutions of rights violations become. In Sweden at least, the opposite may be true when it comes to issues around complicity and intent. While the Rome Statute and the case law of the ICC impose a high threshold on the prosecution to prove intent, criminal law principles in domestic settings seem to offer lower thresholds to achieve convictions. So far, Swedish courts have applied domestic criminal law principles, but it remains to be seen if the trend continues in the *Lundin* case. The ultimate findings of the *Lundin* court in this regard are of paramount importance, not only to the victims of the conflict in southern Sudan, but also to all stakeholders with an interest in international law. Regardless of the outcome, this case will create important legal precedents and provide guidance for future cases.