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The International Criminal Court's Jurisdiction Over Incitement to Genocide in the Internet Era

Some special situations

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Tiivistelmä - Referat – Abstract

In this Master's thesis the aim is to examine what are the elements of direct and public incitement to genocide under the Rome Statute, and how have they been examined in international criminal jurisprudence, what is the territorial jurisdiction of the ICC in light of the recent rulings by the Court's PTCs and how can it be applied to incitement to genocide committed through the internet as well as can a social media platform's owner be considered responsible for incitement to genocide under the Rome Statute. The inspiration for this thesis arises from the role Facebook has had in the alleged crimes that have taken place in Myanmar and the Statutes failure to take into account crimes committed in the internet. The role social media has had in the violence against Rohingyas gives a graphic example of the impact such inciting material may have through the global outreach of social media platforms. The methodology used in the thesis is primarily doctrinal. However, the research questions are approached with the help of an article written by Michail Vagias concerning the jurisdiction of the ICC over core crimes committed through the internet. The article is discussed throughout the thesis.

The thesis begins with establishing the elements of direct and public incitement to genocide. With the help of the jurisprudence of *ad hoc* tribunals, this thesis puts together an exhaustive definition of the crime, gathering also the most contentious issues concerning the definition and nature of the crime. Next, the territorial jurisdiction of the Court is examined. In addition to reviewing the article by Vagias, this thesis examines in-depth two recent decision by the Court's PTCs that define the limits of the Court's territorial jurisdiction. Through an examination of the Court's territorial jurisdiction, the PTCs' recent decisions and relevant legal scholarship, this thesis will provide a refined version of Vagias' approach on the Court's jurisdiction over crimes committed online and the hypothetical situation he uses to illustrate the issue.

The crime of direct and public incitement to genocide can be considered a preliminary phase of the gravest crime known to mankind and thus has to be effectively prosecuted when appropriate. Because of the emergence of new technologies and the changes in its operational environment, the Court must, in addition to the actual perpetrator, consider the responsibility of those de facto providing the platform for incitement to genocide. Thus, this thesis also sets out to investigate under what circumstances a controlling owner of a social media platform can be 1. held criminally responsible under the Rome Statute for incitement to genocide taking place on the platform or 2. held responsible for aiding and abetting in incitement to genocide taking place on the platform. In addition to the Court's jurisdiction over natural persons acting on behalf of a company and over proper and improper omissions, this thesis discusses elements of commission by omission and aiding and abetting by omission as they are established in the jurisprudence of the ad hoc tribunals. This thesis will contribute by proposing that an executive could be held liable if the specific elements of omission, constructed from the jurisprudence of the ad hoc tribunals and recent legal scholarship, are fulfilled. In addition, this thesis will argue that the elements of commission by omission differ from the elements of aiding and abetting by omission. Further, this thesis discusses whether an executive of a social media platform is under the legal duty to prevent incitement to genocide from taking place according to international law.

Avainsanat – Nyckelord – Keywords

International criminal law – direct and public incitement to genocide – Rome Statute – International Criminal Court – territorial jurisdiction – cyberspace – criminal responsibility of a social media company owner

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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Abbreviations

[#]	Paragraph
AC	Appeals Chamber
CoE	Council of Europe
CEO	Chief Executive Officer
ECtHR	European Court of Human Rights
EOC	Elements of Crimes
EU	European Union
GA	General Assembly
ICC	International Criminal Court (also the Court)
ICCSt	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
NATO	The North Atlantic Treaty Organization
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber (also the Chamber)
TC	Trial Chamber
UN	United Nations
VCLT	Vienna Convention on the law of treaties

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1. Introduction

1.1. Incitement to genocide – from roadblocks to screens around the world

'It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how, in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed'.[1]

The world has faced unimaginable atrocities throughout its history and genocide, '*the crime of crimes*', is no exception.[2] However, it was not until the year 1948 that the crime of genocide was codified in the Convention on the Prevention and Punishment of the Crime of Genocide, making it an international crime. The convention was the result of the international community's wish for the atrocities of the Second World War to never happen again.[3] Along with other acts deemed genocide, direct and public incitement to genocide was included in Article III of the Convention as a punishable act of genocide. As Mr. Morozov from the Union of Soviet Socialist Republics states in the above-mentioned citation, incitement has played a significant part in the mass atrocities committed in, for example, the German Reich or Rwanda.

The issue was made apparent when the International Military Tribunal at Nuremberg tried two defendants, Julius Streicher (the editor of *Der Stürmer*) and Hans Fritzsche (head of the Radio Division of the German Propaganda Ministry), for acts that today would be considered incitement to genocide. The defendants were charged with inciting their anti-Semitic message, e.g. through written articles, speeches, radio broadcasts and falsified news. However, during the Nuremberg trials, the crime of genocide, and consequently incitement to said crime, did not exist as an international crime. Instead, the defendants faced charges for crimes against humanity.[4] In Rwanda, incitement to genocide was carried out in similar ways: for example, the perpetrators conducted public speeches to different sized audiences,

[1] A/C.6/SR.84 in Abtahi & Webb 2008, 1535. This quotation is taken from Mr. Morozov's (Union of Soviet Socialist Republics) statement from the Eighty-Fourth Meeting of the *Ad Hoc* Committee on Genocide, in relation to the discussion on deletion of incitement from the convention.
[2] Schabas 2009, 1.
[3] https://www.un.org/en/genocideprevention/genocide-convention.shtml, visited on 6.3.2021.
[4] Benesch 2008, 509-511.

disseminated written material, and hosted radio broadcasts inciting people to commit genocidal acts against Tutsis.[5]

Effective prosecution of incitement to genocide under the Rome Statute of the ICC is profoundly crucial. If incitement to genocide can be stopped, it may prevent an actual genocide from taking place or significantly lessen its scope. After all, as Benesch states, the prevention of the gravest crimes known to mankind is the main objective of international criminal law.[6] This difficult task is not helped by modern everyday technologies, such as the internet. Through the internet, a network of computers, mobile devices, satellites and other electronic devices share information and produce a global network accessible by countless people from anywhere in the world via an electronic device connected to the internet.[7] The commission of incitement to genocide through cyberspace[8] blurs the borders of states and the nature of the crime itself: genocide and its incitement have traditionally been crimes committed by the government of a specific state, usually within its own borders. However, if the medium used for incitement is cyberspace, it can easily reach a worldwide audience. This poses a new kind of issue for the Court's jurisdiction.

Social media has already been used to spread hate and incite violence. In September 2018, the UN Fact-Finding Mission in Myanmar concluded that Facebook has been a useful instrument in the spreading of hate and that its role in the discrimination and violence against the Rohingyas must be independently and thoroughly examined. Facebook's response has also been slow and ineffective.[9] Shortly after the Report of the fact-finding mission, the New York Times published an investigation that revealed a massive operation of anti-Rohingya propaganda conducted by Myanmar's military. As many as 700 military officials created false news and other publications and posts in order to incite hatred and violence towards the Rohingya Muslims in Myanmar.[10] The whole Rohingya population was *inter alia* portrayed as terrorists and violent extremists by the Tatmadaw officials on Facebook.[11] The UN Fact-Finding Mission also concluded that there is sufficient information to warrant the

[5] See e.g. ICTR-96-4; ICTR-96-14; ICTR-97-23; ICTR-97-32; ICTR-99-52.
[6] Benesch 2008, 488.
[7] Zekos 2012, 3.
[8] As Zekos writes, '*Cyberspace is a global communications medium. … The Internet takes the user to the separate place of cyberspace, and no one exists in cyberspace without an Internet account.*' See Zekos 2012 for a more detailed discussion. The term is used in this thesis interchangeably with "internet" to make the discussion about jurisdiction less complicated.
[9] A/HRC/39/64, [74].
[10] https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html, visited 12.5.2021.
[11] A/HRC/39/CRP.2, [1334].

investigation and prosecution of the military officials for genocide.[12] The report of the Fact-Finding Mission did not, however, hold Facebook criminally responsible.[13] The situation in Myanmar is now under investigation by the ICC[14] and the ICJ.[15]

As seen in Myanmar, social media provides a scary platform for hate speech and even incitement to genocide. More than a thousand posts similar to the following have been posted on Facebook targeting the Rohingyas in Myanmar: '*We must fight them the way Hitler did the Jews, damn kalars!*' and '*These non-human kalar dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people. We need to destroy their race.*'[16] The dehumanizing speech played a significant role in the acceleration of hostilities towards the Rohingyas.[17] The Court's provisions on territorial jurisdiction as well as incitement to genocide have not kept up with the times. The Rome Statute of the Court does not aid in interpreting the Court's jurisdiction over crimes committed in whole or in part in cyberspace or otherwise via internet since these were not considered during the drafting of the Statute.[18] While the Court must wait for such a case to appear before it in order to interpret the jurisdictional provisions of the Statute, the Office of the Prosecutor has already in 2015 emphasised the importance of such questions. In the OTP's Strategic Plan for the years 2016-2018, the OTP acknowledges that its investigations and prosecutions must adapt to the scientific and technological environment in which it operates.[19]

Inspired by these recent developments, this thesis examines the existing legal framework under the Rome Statute and other relevant legal sources, such as the jurisprudence of the *ad hoc* Tribunals, and its applicability to internet. Given the already established critical role of internet and social media in inciting genocide, an excursion is also made to the possible responsibility of a social media platform's owner for incitement to genocide taking place on the platform.

[12] A/HRC/39/64, [87].
[13] A/HRC/39/64, [90-94]. See accordingly Hakim 2020, 87.
[14] ICC-01/19.
[15] The Gambia v. Myanmar.
[16] Stecklow 2018.
[17] Hakim 2020, 86.
[18] Vagias 2016, 523.
[19] Strategic Plan 2016-2018, [62-64].

1.2. Research questions, methodology and approach

The methodology used in this thesis is primarily doctrinal. Doctrinal legal research analyses the relationship between rules and clarifies areas of difficulty[20] through analysis of case law and the arrangement and systematisation of legal propositions and rules governing a particular legal category.[21] This thesis seeks to analyse and systematise the existing legal rules concerning mainly the following legal questions: 1. what are the elements of direct and public incitement to genocide, and how have they been examined in international criminal jurisprudence, 2. what is the territorial jurisdiction of the Court in light of the recent rulings by the Court's PTCs and how can it be applied to incitement to genocide committed through the internet, and 3. can a social media platform's owner be considered responsible for incitement to genocide through omission or for aiding and abetting in the commission of incitement to genocide under the Rome Statute.

The research questions laid out above are approached with the help of an article by Michail Vagias. Where suitable, this thesis will include an analysis of the article and its hypothetical example in light of the discussion presented in the specific chapter. Chapter 3 provides an in-depth review of Vagias' approach as well as a refined approach to the Court's jurisdiction over incitement to genocide committed over the internet. The article and its hypothetical situation are introduced in the next subchapter.

1.2.1. The territorial jurisdiction of the ICC for core crimes committed through the internet according to Michail Vagias

The question of the territorial jurisdiction of the ICC over international crimes committed through the internet has already been discussed by Michail Vagias in his article '*The Territorial Jurisdiction of the ICC for Core Crimes Committed Through the Internet*'. The article was published on 22 October 2016 in the 21st volume of the Journal of Conflict & Security Law.[22] Vagias has also written a book in 2014 titled 'The Territorial Jurisdiction of the International Criminal Court'. The 2016 article builds on the discussion started in the book and focuses on the International Criminal Court's (ICC or the Court) jurisdiction over international crimes committed through the internet.

This article is an important addition to the academic discussion and scholarship examining the jurisdiction of the ICC, especially in the field of cyberspace-related crimes. The article

[20] Hutchinson & Duncan 2012, 101.
[21] Kharel 2018, 2-4.
[22] Vagias 2016, 523–540.

sets out to address the territorial jurisdiction of the ICC for core crimes committed through the internet and seeks to present the Court's possible ways of proceeding in future situations. Before assessing how the Court should proceed with situations such as incitement to genocide taking place online, the author reviews the relevant international and national legal sources. The goal is to find applicable rules to determine how many elements of a crime that is committed online must be committed on a State Party territory for the ICC to have jurisdiction. In order to demonstrate his approach, Vagias uses a hypothetical scenario, where incitement to genocide is committed online[23]: '*… a Russian national who incites the commission of genocide against ethnic Georgians in South Ossetia through his online blog. Considering that Russia is not party to the ICC Statute, the issue is whether the Court has territorial jurisdiction by virtue of the worldwide dissemination of such messages through the Internet.*'[24] Vagias further amplifies his example and states that the prolific blogger is situated in Moscow and incites individuals to commit genocide against Georgians in South Ossetia through comments in English published on a website hosted by a Russian server. The Prosecutor of the ICC then '*requests an arrest warrant against the blogger, who happens to be in the Netherlands, accusing him of the crime of incitement to commit genocide. To issue a warrant of arrest, the relevant Pre-Trial Chamber would need to assess whether the specific crime falls within the Court's territorial jurisdiction. Namely, the Court needs to ascertain to what extent online incitement has been committed on State Party territory to establish jurisdiction according to Article 12 ICCSt.*'[25]

In the article Vagias argues that the Court may exercise its jurisdiction over international crimes committed through the internet consistently with international law and the Rome Statute '*by localising the cyber-commission of a core crime in whole or in part within the territory of States Parties*.' Vagias states, however, that the Court could avoid extensive versions of territorial jurisdictions and instead pursue a detailed analysis of core crimes before applying territoriality.

It is mentioned in the hypothesis that Russia is not a State Party to the ICC Statute. To clarify the hypothesis, it is important to mention that Georgia is a State Party to the Statute. In the Pre-Trial Chamber I's 2016 decision on the Prosecutor's request for an authorisation of an investigation into the situation in Georgia, the Chamber concluded that South Ossetia is to

[23] Vagias 2016, 523.
[24] Vagias 2016, 524.
[25] Vagias 2016, 534.

be considered as part of Georgia since it is not generally considered an independent State.[26] This conclusion is taken as a presupposition to the hypothesis in terms of the upcoming analysis and discussion.

1.3. Contribution

When reviewing international criminal law literature, I found that a comprehensive systematisation of incitement to genocide under the Rome Statute is missing. Although some scholars have examined the elements of incitement to genocide, an extensive analysis and interpretation of the crime is lacking. With the help of the jurisprudence of *ad hoc* tribunals, the second chapter of this thesis puts together an exhaustive definition of the crime, gathering also the most contentious issues concerning the definition and nature of the crime. Such an analysis is also essential for the later parts of this thesis. Indeed, this thesis will argue that this analysis is also crucial for the Court and that the internet presents the interpretation of incitement to genocide with new challenges.

As discussed above, Vagias' article on the Court's territorial jurisdiction over core crimes committed through the internet was published already in 2016. Since then, the PTCs I and III have given their decisions on the limits of the Court's territorial jurisdiction concerning the situation in Myanmar and Bangladesh.[27] Although the situation in Myanmar and Bangladesh concerns alleged deportation, a cross-border crime by nature, the rules of interpretation provided by the PTCs are integral to the definition of the Court's territorial jurisdiction, for there is a lacuna in the Rome Statute concerning the Court's jurisdiction over international crimes committed online. For these reasons, the issues laid out are examined in depth in chapter 3. Through an examination of the Court's territorial jurisdiction, the PTCs' recent decisions and relevant legal scholarship, this thesis will provide a refined version of Vagias' approach on the Court's jurisdiction over crimes committed online and the hypothetical situation he uses to illustrate the issue. Because of the limited scope of this thesis, the approach is presented as the Prosecutor's line of argumentation, although some alternative approaches are also discussed.

In addition, the responsibility of a blog site or other social media platform's owner is discussed. The crime of direct and public incitement to genocide can be considered a preliminary phase of the gravest crime known to mankind and thus has to be effectively

[26] ICC-01/15, [6].
[27] ICC-01/19, ICC-RoC46(3)-01/18.

prosecuted when appropriate. Because of the emergence of new technologies and the changes in its operational environment, the Court must, in addition to the actual perpetrator, consider the responsibility of those *de facto* providing the platform for incitement to genocide. Thus, chapter 4 of this thesis sets out to investigate under what circumstances a controlling owner of a social media platform can be 1. held criminally responsible under the Rome Statute for incitement to genocide taking place on the platform or 2. held responsible for aiding and abetting in incitement to genocide taking place on the platform. Some scholarly articles discuss the responsibility of the social media companies for hate speech or incitement to genocide, but they do not discuss the criminal responsibility based on an omission.[28] This thesis will contribute by proposing that an executive could be held liable if the specific elements of omission, constructed from the jurisprudence of the *ad hoc* tribunals and recent legal scholarship, are fulfilled. This thesis argues that the elements of commission by omission differ from the elements of aiding and abetting by omission. Further, this thesis discusses whether an executive of a social media platform is under the legal duty to prevent incitement to genocide from taking place according to international law.

1.4. Outline

The first research question is examined in chapter 2. The chapter begins with establishing the inchoate[29] nature of direct and public incitement to genocide under Article 25(3)(e) of the Rome Statute, since it is important for the upcoming analysis. Thereafter the elements of direct and public incitement to genocide are assessed. The case law of IMT is briefly discussed before turning to the case law of the ICTR which provides the only direct precedent on incitement to genocide to date. For incitement to genocide to be punishable under the Rome Statute, it has to be both 'direct' and 'public' and the perpetrator must also fulfil the required mental element. Chapter 2 examines both 'direct' and 'public' elements of the crime as well as the required mental element separately.

Next, in order to answer the second research question, chapter 3 examines the territorial jurisdiction under Article 12 of the Rome Statute. First, the article written by Vagias and its legal framework are introduced. Later in the chapter the approach Vagias presents in the

[28] See e.g. Hakim 2020.

[29] Inchoate crime or offence is a crime that can be committed even though the actual crime is not completed, see Collins Dictionary of Law. S.v. "inchoate offence." Retrieved May 12 2021 from https://legal-dictionary.thefreedictionary.com/inchoate+offence. In terms of incitement to genocide, inchoateness refers to the fact that an actual genocide does not need to take place for a person to be convicted of incitement to genocide when such incitement has taken place.

article is reviewed and critiqued. However, before that two recent decisions by the Court's PTCs are examined in order to demonstrate the new rules of interpretation. Finally, the chapter provides a refined version of Vagias' approach which takes into account the presented critique and the recent decisions defining the limits of the Court's territorial jurisdiction.

Thereafter, chapter 4 concentrates on the third research question. Before the main discussion the chapter briefly establishes the Court's jurisdiction over natural persons acting on behalf of a company and over proper and improper omissions. Chapter 4 discusses the elements of commission by omission and aiding and abetting by omission as they are established in the jurisprudence of the *ad hoc* tribunals. These elements are used to construe the required conditions for an accused to be held criminally responsible for both commission by omission and aiding and abetting by omission under the Rome Statute. The constructions presented in the chapter are further discussed in light of the aforementioned hypothetical situation. Finally, the thesis concludes by summarising the discussion and findings of the thesis.

2. Incitement to genocide

2.1. Incitement to genocide – an inchoate crime?

The crime of incitement to genocide under the Rome Statute of the ICC entails a series of unanswered questions. Before assessing the elements of incitement to genocide under the Rome Statute, it is important to discuss whether the crime is inchoate[30]: does incitement to genocide require that an actual genocidal act takes place as a consequence of the incitement? Some of the most authoritative scholars have suggested that there must be a causal link between incitement to genocide and the main offence.[31] This thesis, however, argues the contrary. The matter is important to establish before further discussion since it is significant for the analysis throughout this thesis.

Article 5 of the Statute defines crimes within the jurisdiction of the Court, stating that the Court has jurisdiction in accordance with the Statute with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[32] Genocide is defined in the following provision, and for the purpose of the Statute, it means any of the following acts: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group. These acts must be committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.[33] Neither of these provisions, however, provide for incitement to genocide.

Incitement to genocide is included in Article 25. Titled '*Individual Criminal Responsibility*', the article lists the modes of liability, i.e. the ways in which a person can be held criminally responsible for the crimes provided for in the Rome Statute of the ICC. According to Article 25(3)(e), a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person, in respect of the crime of genocide, directly

[30] An inchoate crime or offence is a crime that can be committed even though the actual crime is not completed, see Collins Dictionary of Law. S.v. "inchoate offence." Retrieved 12.5.2021 from https://legal-dictionary.thefreedictionary.com/inchoate+offence. In terms of incitement to genocide, inchoateness refers to the fact that an actual genocide does not need to take place for a person to be convicted of incitement to genocide when such incitement has taken place.
[31] Ambos 2008, 764.
[32] ICCSt, Article 5.
[33] ICCSt, Article 6.

and publicly incites others to commit genocide.[34] This construction departs from the Genocide Convention and the statutes of both ICTR and ICTY, where direct and public incitement to commit genocide is listed as an act of genocide that shall be punishable.[35] The ICC Statute refers to incitement to genocide in a provision concerning modes of liability, which makes viable the argument that incitement to genocide is not a crime in itself and thus also requires a genocide to take place in order to become punishable.

The reason why incitement to genocide was not included in an actual provision listing punishable acts of genocide can be sought for in the *travaux préparatoires* of the Court. During the Rome negotiations, the issue seems not to have been whether incitement to commit genocide or other punishable acts of genocide are in fact inchoate crimes, but whether Article 25 (then Article 23) already covers these modes of participation, or if they would be more adequately dealt with in Part 3 of the Statute.[36] Ultimately, the drafters decided to omit the list of punishable acts of genocide and to trust that Article 25 adequately covers the different modes of participation constituting genocide.[37] The preparatory works offer little explanation, but they do suggest that this decision was made due to the general structure of the ICCSt. This conclusion is without a question supported by the preparatory works of the Genocide Convention and the jurisprudence of ICTR.

According to Article II(ii)(2) of the Draft Convention on the Crime of Genocide, direct and public incitement to any act of genocide is punishable whether the incitement is successful or not.[38] The ICTR cited the *travaux préparatoires* of the Genocide Convention in *Akayesu* and concluded that the crime of direct and public incitement to commit genocide can be punished even if the incitement was unsuccessful, i.e. that the crime is inchoate.[39] The judgement has since been endorsed by different chambers of the ICTR in multiple judgements.[40] The inchoate nature of incitement to genocide under the Rome Statute is also supported by many legal scholars.[41]

[34] ICCSt, Article 25(3)(e).
[35] See Genocide Convention, Article III; ICTRSt, Article 2; ICTYSt, Article 4.
[36] Part 3: "General Principles of Law", includes e.g. Article 25. See UN Doc. A/CONF.183/C.1/WGGP/L.4, 3; UN Doc. A/CONF.183/C.1/L.91, 2; UN Doc. A/CONF.183/C.1/SR.3, especially from page 4.
[37] Boas, Reid & Bischoff 2008, 199.
[38] UN. Doc E/447, 7.
[39] ICTR-96-4-T, [561-562], [555], [559].
[40] ICTR-96-13-T, [120], [193-194]; ICTR-98-44A-T, [855], [562]; ICTR-99-52-T, [1007-1017]; ICTR-99-52-A, [678]; ICTR-96-14-T, [431]; ICTR-96-3-T, [38].
[41] See e.g. Vagias 2016, 536; Mettraux 2005, 256; Schabas 2010, 438; Wilson 2015, 280; Schabas 2009, 325; Triffterer 2008, 760–61; Cassese et al. 2002, 803–05; Werle 2007, 956.

As Boas, Reid and Bischoff appositely note, the outcome of the Rome negotiations regarding Article 25 was a provision listing the different modes of individual criminal responsibility, which also awkwardly covers two inchoate crimes: attempt of and incitement to genocide.[42] In *Lubanga*, the Court acknowledged concerning Article 25(3) that '*it is submitted that sub-paragraph e) does not need to lead to the commission of genocide and that paragraph f) is about a specific form of commission, i.e. the attempt*'.[43] While the Court is yet to rule on the matter and the question remains unanswered, it would be at the very least surprising if the Court was to conclude the opposite. Consequently, for the purpose of this thesis, incitement to genocide is considered an inchoate crime. As the ICTR concluded in the *Media* case, a causal link between a genocide and the act of incitement is not required, but the incitement must have the potential to cause such effects.[44] The potential to cause genocidal acts is discussed further in Chapter 3.5.

2.2. Elements of direct and public incitement to genocide

This chapter assesses the elements of incitement to genocide. The crime has not been elaborated in the Statute or the Elements of Crimes, and since ICTR jurisprudence provides the only direct precedent for the interpretation of the crime, the Court would presumably turn to its jurisprudence more eagerly than with crimes such as genocide, whose elements have been elaborated in the Elements of Crimes.[45] The elements of 'direct' and 'public' will be discussed separately before turning to the mental element of the crime.

The horrendous crimes of World War II that were prosecuted in the IMT in Nuremberg started the international efforts to prevent genocide from taking place again. Although not prosecuted as incitement to genocide, two IMT cases provide an excellent starting point for the analysis of the elements of incitement to genocide. The cases of *Streicher* and *Fritzche* were charged with crimes against humanity since the crime was not yet known as incitement to genocide.[46]

Julius Streicher was the publisher of the anti-Semitic weekly newspaper *Der Stürmer* from 1923 to 1945 and was its editor until 1933.[47] According to the official documents, Streicher was widely known as '*Jew-Baiter Number One*'. In his speeches and articles, week after

[42] Boas, Reid & Bischoff 2008, 200.
[43] ICC-01/04-01/06-3121-Red, [462], note 860.
[44] ICTR-99-52-A, [678], [1015]; ICTR-99-52-T, [1015].
[45] Boas, Reid & Bischoff 2008, 204.
[46] Benesch 2008, 509.
[47] *Streicher* in Trial of the Major War Criminals Before the International Military Tribunal, 301.

week, month after month, for a total of 25 years, '*he infected the German mind with the virus of anti-Semitism*'. In 1935, each issue of *Der Stürmer* had a circulation of 600 000.[48] Twenty-three articles from the years between 1938 and 1941 were presented as evidence, each of which called for the extermination of the Jews '*root and branch*'.[49] Dehumanisation of Jews was typical to his writings, and he often referred to Jews as, for example, '*pest*', '*a parasite*' and '*disseminator of diseases who must be destroyed in the interest of mankind*'.[50] Even as the mass extermination was ongoing, Streicher continued to write and publish his propaganda.[51] The Tribunal concluded that Streicher's '*incitement to murder and extermination*' clearly constituted persecution on political and racial grounds, and he was convicted for crimes against humanity.[52]

Hans Fritzsche was best known as a radio commentator who in 1938 became head of the Home Press Division of the Ministry of Popular Englightement and Propaganda and was eventually made head of the Radio Division of the Propaganda Ministry and the Plenipotentiary for the Political Organization of the Greater German Radio.[53] During his time as the head of Home Press Division, Fritzsche supervised the publication of the German press of 2300 daily newspapers and instructed the press to highlight several themes, such as '*the Jewish problem*', '*the problem of living space*' or other Nazi propaganda.[54] He did not, however, have control over said propaganda but was subordinate to Dietrich, the Reich Press Chief and Goebbels.[55] Fritzsche was ultimately found not guilty. IMT ruled that although Fritzsche '*sometimes made strong statements of a propagandistic nature in his broadcasts*', he was not found to have intended to incite the German People to commit atrocities. His intention was stated to have been to arouse the popular sentiment in support of Hitler and the German war effort instead.[56]

These cases were repeatedly referred to by the ICTR in judgments concerning incitement to genocide. The impact of the Nuremberg trials was, however, greater than merely inspiring future international jurisprudence. The General Assembly of the UN discussed genocide and the importance of bringing the charter and jurisprudence of the IMT as international criminal

[48] *Streicher* in Trial of the Major War Criminals Before the International Military Tribunal, 302.
[49] *Ibid*, 302.
[50] *Ibid*, 302.
[51] *Ibid*, 303.
[52] *Ibid*, 304.
[53] *Fritzsche* in Trial of the Major War Criminals Before the International Military Tribunal, 336.
[54] *Ibid*, 336-337.
[55] *Ibid*, 336-337.
[56] *Ibid*, 338.

law already in 1946, right after the trials.[57] In December 1946, the General Assembly declared the punishment of genocide a matter of international concern and brought the drafting of the Genocide Convention to a start.[58] While resorting to the *ad hoc* tribunal's jurisprudence for the examination of the crimes' elements, this thesis acknowledges the impact the IMT cases have had on the more recent jurisprudence on incitement to genocide.

2.2.1. Direct incitement

As stated above, the Rome Statute or the Elements of Crimes do not help with the interpretation of the crime of incitement. Thus, according to Article 21 of the Statute, an excursion to, among other things, applicable treaties and the principles and rules of international law must be made.[59]

The *Ad Hoc* Committee Commentary on the Genocide Convention's articles defined direct incitement as a '*form of incitement whereby an individual invites or urges other individuals to commit genocide.*'[60] The Committee also concluded that hateful propaganda, which aims to create a state of mind favourable to the commission of genocide without actually inviting people to commit genocide, should not be included in the enumeration of punishable acts. The punishment of such propaganda was considered injurious to the free expression of opinion.[61] In 1996 the International Law Commission defined the direct element to require specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.[62]

The ICTR charged multiple Rwandan *génocidaires* with direct and public incitement to genocide. It examined the elements at length, and to this date it is the only jurisprudence to concern incitement to genocide. According to the ICTR, incitement qualifies as direct when it assumes a direct form and provokes another to engage in a criminal act. Vague or indirect suggestions do not constitute direct incitement.[63] However, incitement can be both implicit and explicit.[64] In Rwanda, Tutsis were often referred to as 'Inyenzi', meaning 'cockroach'.

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[57] GA RES 95(1), 1.
[58] GA RES 96(1), 189.
[59] ICCSt, Article 21.
[60] UN Doc. E/AC.25/W.1/Add.1, 1.
[61] UN Doc. E/AC.25/W.1/Add.1, 3.
[62] DCC, 22 [16].
[63] ICTR-96-4-T, [556-558], [561-562]; ICTR-05-88-T, [5149]; ICTR-99-52-A, [700], [711], [713]; ICTR-97-21-1, [44]; ICTR-01-72-T, [387]; ICTR-96-14-T, [431]; See Timmermann, Schabas in Behrens, Henham 2012, 156; Schabas 2009, 331-332.
[64] *Mugesera*, [90–95]; ICTR-72-1-T, [423].

The ICTR found the use of this expression to amount to 'direct' incitement.[65] In determining whether incitement occurred, the most important factor is the perception of the audience. An implicit message can constitute the direct element if the targeted audience immediately grasps the implication thereof.[66] The AC further established that the culture and nuances of the specific language should be examined in determining what constitutes direct and public incitement to commit genocide. Only the context-specific meaning of the words is relevant.[67]

The jurisprudence of the ICTR offers many examples of statements that constituted direct incitement to genocide, which may further clarify the requirement of directness. In the following statements the context-specific meaning of the words is accentuated. In *Bikindi* the Chamber found statements such as '*rise up and look everywhere possible*', not to '*spare anybody*' and killing the '*snakes*' to constitute a direct call to destroy the Tutsi ethnic group.[68] In *Niyitegeka* the Chamber concluded that rather vague statements, such as the call to '*work*', were understood by the audience as a call to kill the Tutsi.[69] In *Akayesu* the Chamber concluded that statements calling the population to '*unite and eliminate the sole enemy*' were construed by the population as a call to kill the Tutsi.[70] In *Mugesera* the phrase '*we will send you by the Nyabarongo*' was found to be a clear suggestion that the corpses of murdered Tutsis would be sent back to Ethiopia via the Nyabarongo river.[71] Another example of a rather implicit message is from *Kambanda*, where the phrase, '*you refuse to give your blood to your country and the dogs drink it for nothing*', was concluded to have constituted direct incitement.[72]

In conclusion, the incitement, veiled in a euphemism or not, must be a direct provocation to commit acts of genocide. The analysis of whether a certain message can be considered incitement to genocide or not relies quite heavily on the circumstances under which the message was uttered. As the ICTR noted, the most important question is whether the targeted audience of the message understood the implication or periphrasis. The incitement must have the potential to cause genocidal acts.[73] Especially in the era of the internet, the Court would

[65] ICTR-96-4-T, [556], [557], [90], [148]; ICTR-97-32-I, [44].
[66] ICTR-96-4-T, [557-558].
[67] ICTR-99-52-A, [700-701].
[68] ICTR-01-72-T, [423-424].
[69] ICTR-96-14-T, [433-436].
[70] ICTR-96-4-T, [709].
[71] *Mugesera*, [90-95].
[72] ICTR-97-23-S, [39(x)].
[73] ICTR-99-52-A, [678], [1015]; ICTR-99-52-T, [1015].

be facing a critical challenge in differentiating incitement to genocide from the growing mass of hate speech on the internet.

2.2.2. Public incitement

As some scholars have put it, defining the 'public' element of incitement can be less demanding[74] than defining the 'direct' element. Indeed, the preparatory works of the Genocide Convention from the year 1948, the International Law Commission's contribution to the matter in 1996 and the ICTR's jurisprudence support each other. However, the internet, and especially different social media outlets, will likely give rise to new questions of interpretation.

The *Ad Hoc* Committee Commentary on the Genocide Convention's articles defined incitement to be public when '*it is made in public speeches or in the press, through the radio, cinema or other ways of reaching the public*.' On the other hand, incitement in conversations, private meetings or messages is considered private.[75] In the International Law Commission's commentary to the Draft Code of Crimes against the Peace and Security of Mankind, the public element is defined to require the communication of a call for criminal action '*to a number of individuals in a public place or to members of the general public at large*'. It is further explained that such communication may be conducted in person in a public place or by technological means of mass communication.[76]

As previously established, the ICTR is the only international judicial body to charge the crime of incitement to genocide. Its interpretation of the elements is therefore significant and will be reviewed here. According to the ICTR, incitement is public *inter alia* when it is conducted through the public display of written material through any means of audiovisual communication or the mass media capable of reaching the general public at large.[77] The Trial Chambers in *Akayesu* and *Kajelileji* also cited the commentary on the articles of the Draft Code of Crimes and concluded that incitement could also be conducted through other means of technological mass communication.[78] The ICTR has also concluded that the incitement does not need to be addressed to a certain number of people or to be carried out through a specific medium in order to be public. However, both the number and the medium may

[74] Behrens & Henham 2013, 154.
[75] UN Doc. E/AC.25/W.1/Add.1, 2.
[76] DCC, 22 [16].
[77] ICTR-96-4-T, [555-556], [559]; ICTR-05-88-T, [515]; ICTR-01-72-T, [389]; ICTR-99-52-T, [1011-1015]; ICTR-98-44A-T, [851].
[78] DCC, p. 22. Cited by ICTR in ICTR-96-4-T, [556] and ICTR-98-44A-T, [851].

provide evidence in support of finding that the incitement was public.[79] The ICTR established in *Akayesu* that the public element should be viewed in the light of two factors: the location where the incitement occurred and whether the audience of the incitement was selected or limited.[80]

Whether conducted through means of mass communication or in person, the crucial elements of public incitement appear to be the place where the incitement occurred and whether it was selective or limited.[81] While it need not reach a certain size of audience, the incitement must be communicated to the public at large. In *Media*, the Appeals Chamber found that such incitement cannot constitute public incitement where the audience consisted of only the individuals manning roadblocks.[82] This judgment is consistent with the Trial Chamber's finding in *Akayesu* that incitement is public only if the audience of the incitement is not selected or limited.[83] Albeit the so called traditional ways of communicating incitement to genocide cannot be discarded, the internet provides a significantly more efficient way of communication. As discussed in the introduction, different social media outlets provide the average person with a way of sharing their thoughts to a wider audience than ever before. Although the intended audience of a social media profile is often limited, profiles are often structured so that anyone can view them. It is suggested that social media platforms are in fact public venues.[84] A demarcation between communication to the public at large and to a limited or selected audience will arguably require a further interpretation of the crime when it is committed online.

2.2.3. Mental element

According to Article 30 of the Rome Statute, unless otherwise provided, a person shall be criminally responsible for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.[85] Article 6 of the Statute specifically provides that the *actus reus*[86] of genocide must be committed with the intent to destroy a

[79] ICTR-00-55A-T, [503].
[80] ICTR-96-4-T, [556]; see accordingly ICTR-97-32-I, [17]; ICTR-96-14-T, [431]; ICTR-98-44A-T, [851]; ICTR-99-52-T, [1011].

[81] ICTR-96-4-T, [556].
[82] ICTR-99-52-A, [862].
[83] ICTR-96-4-T, [556]
[84] Burkell et al. 2014, 982.
[85] ICCSt, Article 30.

[86] "actus reus, n.". OED Online. March 2021. Oxford University Press. https://www-oed-com.libproxy.helsinki.fi/view/Entry/240268?redirectedFrom=actus+reus (accessed 12.5.2021). *Actus reus* is

protected group in whole or in part.[87] Thus, Article 6 provides for an additional *mens rea*[88] for genocide. The Elements of Crimes states that the elements of genocide, including the appropriate mental element, apply mutatis mutandis to all those whose criminal responsibility may fall under Articles 25 and 28 of the Statute.[89] However, elements of direct and public incitement to commit genocide were not explored during the drafting of the Elements of Crimes and are not mentioned in it.[90] This provides the Court with yet another question of interpretation concerning the elements of direct and public incitement to genocide.

According to Article 25(3)(e) of the Statute, a person shall be responsible and liable for punishment if that person directly and publicly incites others to commit genocide.[91] The provision does not require a special intent, and such intent cannot be derived from the Elements of Crimes either. This, as seen by Eser in a commentary to the Rome Statute, may denote that the inciter may not need a special intent (*dolus specialis*) other than that provided for in Article 30.[92] However, some scholars are eager to conclude that the crime of incitement to genocide under the Rome Statute requires the *dolus specialis* of genocide. For example, according to Vagias the mental element of incitement to genocide is double. Vagias argues that the act of incitement must be intentionaland that the inciter must also have the *dolus specialis* of genocide, that is, genocidal intent. The content of the incitement itself is used to deduce the perpetrator's intent.[93] Schabas and Timmermann share this opinion and state that it must be established that the inciter had the *dolus specialis* of genocide.[94] All of the above rest their claims on the jurisprudence of the ICTR. While I agree with the importance of the judgments of the ICTR in regard to the legal analysis possibly conducted by the Court, it must be stressed that the legal state of the mental element of incitement to genocide is unclear.

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defined as '*the action or conduct which constitutes a crime, as opposed to the intent or mental state of the accused*' in the Oxford English Dictionary.

[87] ICCSt, Article 6.

[88] "mens rea, n.". OED Online. March 2021. Oxford University Press. https://www-oed-com.libproxy.helsinki.fi/view/Entry/116511 (accessed 12.5.2021). *Mens rea* is defined as *'the particular state of mind required to make an action criminal*' in the Oxford English Dictionary.

[89] EOC, General Introduction, para. 8.

[90] Boas, Reid & Bischoff 2008, p. 204.

[91] ICCSt, Article 25(3)(e).

[92] Cassesse *et al.* 2002, p. 806.

[93] Vagias, 2016, 535-536.

[94] Timmermann and Schabas in Behrens & Henham 2013, 166.

Since the legal status remains unclear, it is necessary to examine the ICTR's jurisprudence on the *mens rea* of incitement to genocide. In *Akayesu,* the Trial Chamber concluded that the *mens rea* of direct and public incitement is the intent to directly prompt or provoke another to commit genocide. It includes the will to create by "*his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging*", which according to the Chamber presupposes that the inciter has genocidal intent himself.[95] Even though the incitement is not required to cause any effects, the fact that it did cause such effects is an evidence of the intention of the inciter and an indication on how the audience of the incitement understood the message.[96]

As established above, whether a conviction of direct and public incitement to genocide under the Rome Statute of the ICC requires that the perpetrator has genocidal intent himself or merely the intent and knowledge provided for in Article 30 is another open question of interpretation. It is arguably difficult to deduct a person's intent to incite genocide if it is not expressed publicly. The task at hand becomes even more difficult if the Court rules that incitement to genocide requires that the perpetrator had the *dolus specialis* of genocide and the message is covered by a euphemism on the perpetrator's Facebook page. The Trial Chamber in *Akayesu* seems to have avoided this pitfall by stating that the intent to provoke another to commit genocide '*implies that he who incites to commit genocide also has the specific intent to commit genocide*'.[97] The reasoning behind this interpretation is understandable: can a perpetrator intently incite others to commit genocide without himself having the intent to destroy, in whole or in part, the targeted group?

2.3. Summary

There are a few observations to be made concerning Vagias' article discussed in the introduction. In the fourth chapter of the article, Vagias returns to his hypothesis. In order to issue an arrest warrant against the blogger allegedly inciting individuals to commit genocide against Georgians in South Ossetia through comments in English published on a website hosted by a Russian server, the relevant Chamber would need to assess whether the specific crime falls within the Court's jurisdiction, i.e. to what extent the crime has to be committed

[95] ICTR-96-4-T, [560], [729]. See accordingly ICTR-99-52-A, [677]; ICTR-96-14-T, [431]; ICTR-97-32-I, [14].
[96] ICTR-99-52-A, [700]; ICTR-99-52-T, [1029].

[97] ICTR-96-4-T, [729]. See supra note 47: this judgment was later followed by other Chambers of the ICTR.

on State Party territory to establish jurisdiction.[98] The process would begin with establishing the elements of the crime of incitement to commit genocidebefore turning to Article 12(2)(a) of the Statute. Vagias further argues that the Court should first pursue '*a detailed analysis of core crimes*'.[99] Vagias does not, however, provide a detailed analysis of the elements of incitement to genocide. As discussed in previous chapters, Vagias even presents some legal questions as axioms even though this is not the case, although they are not.[100] Vagias is correct in suggesting the Court needs to establish the elements of core crimes in detail, but his contribution to the matter is lacking.[101]

To remedy this gap, this chapter has established the elements of incitement to genocide with the help of the most authoritative scholarship and international jurisprudence. To sum up some of the key factors of the direct element, the message must most importantly be a direct provocation to commit acts of genocide. As history shows, incitement is likely not to be explicit, and it may be difficult to demarcate incitement to genocide from other hate speech. The Court must also consider the message's potential to cause genocidal acts and exclude hateful messages that are not specific enough to even constitute incitement to genocide. In terms of the 'public' element, different aspects of social media platforms differentiate the issue quite largely from traditional media. The Court may benefit greatly from the jurisprudence of the *ad hoc* tribunals not only in establishing whether a certain message is public or not, but also in assessing the possible new questions of interpretation, e.g. concerning a chat group or other feature provided by social media platforms. For example, the jurisprudence of the *ad hoc* tribunals has already established that the crucial elements of public incitement are the place where the incitement occurred and whether it was selective or limited.[102] In terms of the example situation provided by Vagias, there are no example blog posts to review. For this reason, the application of the elements of incitement to genocide to the hypothetical case is not fruitful from the point of view of legal analysis. By referring to the discussion in the previous chapters, this thesis considers the blog posts of the example situation to constitute direct and public incitement to genocide.

[98] Vagias 2016, 534.
[99] Vagias 2016, 523.
[100] Vagias, 2016, 535-536. See chapter 2.2.3. on the *mens rea* of incitement to genocide.
[101] See Vagias 2016, 534-536.
[102] ICTR-96-4-T, [556].

3. Territorial Jurisdiction of the ICC

3.1. Jurisdictional scope of the Court

As the Court asserted in *Lubanga*, the jurisdiction of the Court is defined by the Statute and it has four different facets: jurisdiction *ratione materiae* (subject-matter jurisdiction), jurisdiction *ratione personae* (jurisdiction over persons), jurisdiction *ratione loci* (territorial jurisdiction) and jurisdiction *ratione temporis* (jurisdiction with respect to crimes committed after the entry into force of the Statute).[103] Incitement to genocide and its nature as an inchoate crime has been examined in chapter 2, and thus for the purpose of this thesis, the Court has subject-matter jurisdiction over incitement to genocide. The hypothesis introduced in chapter 1 also presupposes that the incitement to genocide is taking place after Georgia has ratified the Rome Statute, granting the Court with jurisdiction *ratione temporis*. The Court can exercise jurisdiction only over persons, which threshold is also met in terms of the underlying hypothesis of this thesis.[104]

Furthermore, in terms of the hypothesis introduced in chapter 1, the territorial jurisdiction of the Court is ambiguous. In this chapter, the jurisdiction *ratione loci* of the Court is discussed. Firstly, Article 12 of the Statute is reviewed. Secondly, the Court's Pre-Trial Chambers' recent rulings on the jurisdiction in the situation concerning Myanmar and Bangladesh are examined in greater detail. The purpose of these steps is to determine the limits of the Court's territorial jurisdiction: how little of a crime must be committed on the territory of a State Party for the Court to be able to exercise jurisdiction. The interpretations of the Chambers are then applied to the hypothetical situation introduced in chapter 1, followed by a discussion of the approach taken by Vagias' in 2016.

3.2. Preconditions to the exercise of jurisdiction

The jurisdiction of the Court was one of the most contentious issues during the Rome negotiations. There was a lot of dissent among the participating states, especially over jurisdictional issues, and the compromise that is Articles 12 and 13 of the Statute today was not reached until a vote at the end of the conference.[105] However, the title of Article 12,

[103] ICC-01/04-01/06-772, [21]. In [22] the Court further explains that the subject-matter jurisdiction is specified in Articles 5-8 of the Statute. Jurisdiction over persons is detailed in Articles 12 and 26, territorial jurisdiction in Articles 12 and 13(b) and jurisdiction *ratione temporis* is defined in Article 11.
[104] See chapter 1.2. and Vagias 2016.
[105] Kirsch – Holmes 1999, 2.

'*Preconditions to the exercise of jurisdiction*', was already included in the 1994 draft of the International Law Commission.[106]

> *Article 12: Preconditions to the exercise of jurisdiction*
>
> *1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
>
> *2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
>
> *(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
> *(b) The State of which the person accused of the crime is a national.*
>
> *3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.*[107]

Albeit most of the crimes under the jurisdiction of the Court fall within the scope of Article 12(2)(a), it is noteworthy that the territorial jurisdiction of the Court is extensive and even unlimited in relation to a Security Council referral.[108] However, universal jurisdiction is restricted to Security Council referrals only, and the jurisdictional rules laid out in the Statute do not express the newest or most expansive rules of jurisdiction formulated in international legal scholarship.[109] For example, the Rome Statute does not provide for objective territoriality or the principle of ubiquity, and since the establishment of the Court in 2002, scholars have tried to assess the jurisdictional scope of the Court in the absence of a judgment clarifying the boundaries of the Court's territorial jurisdiction.[110] Such a judgment is still yet to come, for the application and interpretation of the Court's territorial jurisdiction remained uncontroversial until the year 2018 when the OTP requested for a ruling on the jurisdiction

[106] Schabas 2016, 345.
[107] ICCSt, Article 12.
[108] Cassesse et al. 2002, 559.
[109] Vagias 2014, 2. Even though the expression of 'newest rules of jurisdiction' is used, that is not to say the likes of objective territoriality were in fact new. As Vagias writes, the Statute of the Court provides for the jurisdiction of the Court according to rules that have existed since the Peace of Westphalia, if not even before that.
[110] See e.g. Vagias 2012, 2014, 2016.

concerning the crime of deportation and its cross-boundary nature.[111] Pre-Trial Chamber I of the Court gave its decision concerning the request in September 2018.[112] Pre-Trial Chamber III has also examined the issue of jurisdiction laid out in the prosecutor's request in its Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in Bangladesh and Myanmar.[113] These decisions may pave the way for a modern application of the Court's jurisdiction. However, as the article written by Vagias in 2016 is the starting point of the discussion in this thesis, the framework described in the article is discussed next. Thereafter, the above-mentioned decisions of the Pre-Trial Chambers are examined.

3.3. The legal framework of the Court's territorial jurisdiction over core crimes committed through the internet according to Vagias

As was asserted earlier, the Rome Statute, the Elements of Crimes or Rules of Procedure and Evidence do not provide for qualified territoriality or ubiquity. This is also the observation Vagias builds his article upon.[114] The principle of ubiquity is, as some scholars have put it, the widest application of the qualified territoriality principle. According to the principle of ubiquity, a state can exercise its jurisdiction over a crime when at least one of its constituent elements occurs within the state's territory. The constituent elements can be either the criminal conduct itself (subjective territorial jurisdiction) or the result of the conduct (objective territorial principle).[115] At the time of writing the article, the Court had not made any clear statements on these issues. Vagias consequently resorts to Article 21(1)(a) of the Rome Statute and seeks an answer to the limits of the Court's territorial jurisdiction in the Vienna Convention on the Law of Treaties and the rules of customary law, treaty law and general principles of law.

The exhaustion of the aforementioned legal sources is followed by an excursion into key international legal instruments, such as the Council of Europe's Budapest Convention on Cybercrime, and finally the domestic legislation of the UK and US as well as the German *Töben* case and the French *Yahoo!* case. For the purpose of this thesis, it is important to note that neither customary law nor state practice explains what elements of a crime must be

[111] ICC-RoC46(3)-01/18-37, [63]: The Court further explained that the reason is that most of the situations and cases related to territorial jurisdiction have been geographically limited to the borders of a State Party to the Statute. For further discussion, see e.g. Vagias 2012, starting from p. 1.
[112] ICC-RoC46(3)-01/18.
[113] ICC-01/19.
[114] Vagias 2016, 525.
[115] Maillart 2018, 377.

committed on the territory of a state for that state to have jurisdiction. No consensus is found between the different international legal instruments, which is why different states have adopted different approaches to address cyber-criminality. Vagias concludes that the Court should follow the national courts' example. He states that national courts have established jurisdiction based on commission in part in the state of origin or of destination of activities occurring online. This interpretation of territorial jurisdiction demands a preceding analysis of the substantive crime and its dissection in parts or constituent elements on a crime-by-crime basis.[116]

3.4. ICC's Pre-Trial Chambers' decisions on the jurisdiction in the Situation in Bangladesh and Myanmar – Further interpretation of Article 12(2)(a)

3.4.1. Prosecution's Request for a Ruling on Jurisdiction and the Pre-Trial Chamber I's Decision on the Request

Concerning the Situation in the People's Republic of Bangladesh and the Republic of the Union of Myanmar, the Prosecution requested a ruling on jurisdiction under Article 19(3) of the Statute on the 9th of April 2018.[117] According to the provision, the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.[118] The prosecution's request seeks a ruling on the question of whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.[119] It is further argued that since August 2017 more than 670,000 Rohingya have been intentionally deported into Bangladesh across the international border. The prosecution admits that forceful acts relevant to the deportations occurred on the territory of Myanmar, a Non-Party State, but sustains '*that the Court may nonetheless exercise jurisdiction under Article 12(2)(a) of the Statute because an essential legal element of the crime — crossing an international border — occurred on the territory of a State which is a party to the Rome Statute (Bangladesh).*'[120] Accordingly, the prosecution avers that the requirement of '*the conduct in question*' in terms of Article 12(2)(a) means only that at least one legal element of an Article 5 crime must occur on the territory of a State Party.[121]

[116] Vagias 2016, 531.
[117] ICC-RoC46(3)-01/18-1.
[118] ICCSt, Article 19(3).
[119] ICC-RoC46(3)-01/18-1, [1].
[120] ICC-RoC46(3)-01/18-1, [2].
[121] ICC-RoC46(3)-01/18-1, [28].

Pre-Trial Chamber I gave its decision on the Prosecution's request on the 6th of September 2018. The fundamental question before the Chamber was the definition of the term 'conduct': how much of a crime (of the conduct in question) must occur on the territory of a State Party for the Court to have territorial jurisdiction. The Chamber concluded that acts of deportation initiated in a State not Party to the Statute and completed in a State Party to the Statute fall within the parameters of Article 12(2)(a) of the Rome Statute. Thus, according to the Chamber, the Court has jurisdiction over the alleged deportation. The Chamber further acknowledged, concerning other crimes within the jurisdiction of the Court, that if it were established '*that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to Article 12(2)(a) of the Statute.*'[122]

The Chamber based its findings on two main arguments. Firstly, a contextual interpretation of Article 12(2)(a), which takes into consideration relevant rules of international law. The Chamber is of the view that public international law permits the exercise of criminal jurisdiction by a State if at least one element of a crime or part of such a crime occurs on the State's territory.[123] The Chamber continues by referring to the PCIJ in the *Lotus* case, stating that '*the territoriality of criminal law … is not an absolute principle of international law and by no means coincides with territorial sovereignty*'.[124] The Chamber also assessed national constructions of criminal jurisdiction and concluded that both 'at least one legal element' and 'a part of a crime' find support in many States' jurisprudence or criminal law, as well as in the criminal jurisdictions of Bangladesh and Myanmar.[125]

Secondly, according to the Chamber, the interpretation of the Chamber is supported by the object and purpose of the Statute. The Chamber noted that Article 12(2)(a) is the outcome of the compromise reached by States at the Rome Conference. This compromise confers the Court '*jurisdiction over the most serious crimes of concern to the international community as a whole*' according to approaches to criminal jurisdiction '*that are firmly anchored in*

[122] ICC-RoC46(3)-01/18-37, [73-74].
[123] ICC-RoC46(3)-01/18-37, [65]. The Chamber refers to VCLT Article 31(3)(c) and Observations of Members of the Canadian Partnership for International Justice (ICC-RoC46(3)-01/18-25) [19]. In the Amicus Curiae, the Members of the Canadian Partnership for International Justice conclude that VCLT and the general rules of interpretation under Article 31 are the starting point in the analysis of the Rome Statute and that the VCLT '*prioritises a plain reading of the Statute's provisions in its context and in the light of its object and purpose*'.
[124] *S.S. Lotus*, 20, cited by Chamber in ICC-RoC46(3)-01/18-37 [66].
[125] ICC-RoC46(3)-01/18-37, [66-67].

international law and domestic legal systems'.[126] The Chamber continued to state the following:

> *Thus, the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to Article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute. It follows that a restrictive reading of Article 12(2)(a) of the Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such a crime was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose.*[127]

The Court further concluded that the transboundary nature of the crime of deportation further confirms this interpretation of Article 12(2)(a). In light of these arguments, the Court established that it is of the view that in the circumstances identified in the prosecution's request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.[128] As mentioned at the beginning of this chapter, the Chamber further stated that the Court may assert territorial jurisdiction if at least an element of 'another crime' within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party. The Chamber further confirms that its interpretation of Article 12(2)(a) of the Statute concerns all crimes within the jurisdiction of the Court.[129] Accordingly, this decision is significant concerning the main topic of this thesis.

The underlying question before the Chamber was '*what forms of territorial jurisdiction did State Parties intend to delegate to the Court*?'[130] The Chamber's interpretation of Article 12(2)(a) is expansive in a way, but at the same time necessary. It is the first time the ICC has stated that the Court would have jurisdiction if only one legal element of a crime or a part of such a crime within the jurisdiction of the Court occurs in a State Party. However, Guilfoyle argues that the Court's expansive approach is not necessarily what the member States agreed on. This is, according to Guilfoyle, supported by the non-binding Resolution 5 of the 16th Assembly of States Parties concerning the crime of aggression, which denotes that the States

[126] ICC-RoC46(3)-01/18-37, [69-70].
[127] *Ibid*, [70].
[128] *Ibid*, [71-73].
[129] *Ibid*, [74-79].
[130] Guilfoyle 2019, 4.

Parties were in favour of a narrow view of territorial jurisdiction.[131] This argument is nevertheless problematic. In light of the crime of deportation, a transboundary crime by nature, the approach of the PTC is similar to what national courts have done for a long time, even though this is a new development for the ICC.[132] Also, as the Chamber notes in the decision, the drafters of the Rome Statute intended to allow the Court the exercise its jurisdiction pursuant to Article 12(2)(a) of the Statute on the same basis that States Parties would assert jurisdiction under their legal systems.[133] A restricted reading of Article 12(2)(a) would also be contrary to the purpose of the Statute to put an end to impunity.[134] It took nearly 20 years for the Court to face a situation where a further interpretation of Article 12(2)(a) was considered necessary. In relation to core crimes committed through the internet, the Court is likely to face an issue of a whole new magnitude concerning its jurisdiction. By the time such a case is presented to the Court, it will be irretrievably late in interpreting the Statute's provisions considering cyberspace. This decision, however, paves the way for a further interpretation of the Article and the Court's territorial jurisdiction.

The Pre-Trial Chamber, consisting of judges Péter Kovács, Marc Perrin de Brichambaut and Reine Adélaïde Sophie Alapini-Gansou, was not unanimous in giving the decision. Judge Marc Perrin de Brichambaut gave a partly dissenting opinion, in which he states that the prosecutor's request for a ruling on jurisdiction under Article 19(3) comes at a '*highly unusual juncture*' and that he cannot agree with the majority's interpretation of Article 19(3). He also disagrees with the legal basis of entertaining the prosecutor's request based on Article 119(1) or *Kompetenz-Kompetenz*.[135] These procedural issues have also been the subject of a critique presented by some scholars. Albeit the procedural issues are not the focus of this thesis and thus not discussed further, it is noteworthy to point out that the critique presented is not completely misplaced. The Prosecutor requested for the ruling before an actual case or indication that the Office of the Prosecutor is intending an investigation, and the Court sought for a legal basis from the Articles of the Statute not mentioned in the actual request.[136]

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[131] Guilfoyle 2019, 4-7, referring to following wording of the Resolution: '*in the case of a State referral or propio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of*
a State Party that has not ratified or accepted these amendments.'
[132] Akhavan 2019, 341-342.
[133] ICC-RoC46(3)-01/18-37, [70], see accordingly Akhavan 2019, 342.
[134] ICCSt, Preamble.
[135] ICC-RoC46(3)-01/18-37-Anx, [1-4]. For further details see *et seq*.
[136] For further discussion see e.g. Akhavan 2019, 336-337; Hale & Rankin 2019.

3.4.2. Pre-Trial Chamber III's Decision Pursuant to Article 15 on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar

On 14 November 2019 PTC III of the ICC gave its Decision on the Authorisation of an Investigation in the Situation in Bangladesh/Myanmar. In the Decision, PTC III agreed with the interpretation of PTC I. The conclusion was reached by answering the question of '*whether the Court may exercise its jurisdiction over crimes that occurred partially on the territory of a State Party and partially on the territory of a non-State party.*' In order to answer this question, the Chamber had to ascertain the exact meaning of the term 'conduct' and whether Article 12(2)(a) requires that all conduct must take place in the territory of a State Party. [137]

After a thorough assessment of the meaning of the term "*conduct*",[138] the Chamber explained that the term is "*used in a factual sense, capturing the actus reus element underlying a crime subject to the jurisdiction ratione materiae of the Court*".[139] The Chamber noted that depending on the nature of the alleged crime the *actus reus* element of conduct may cover the consequences of such conduct as well.[140]

In assessing whether Article 12(2)(a) of the ICCSt requires that all the conduct takes place in the territory of a State Party, the Chamber concluded that if at least a part of the *actus reus* of the crime (a part of the conduct) takes place in the territory of a State Party, the Court may exercise territorial jurisdiction "*within the limits prescribed by customary international law*".[141] The limits are defined by the concepts of territorial jurisdiction developed in state practice. According to the PTC, there are five different principles: 1. the objective territoriality principle (territorial jurisdiction based on the completion of a crime in the State's territory if initiated abroad); 2. the subjective territoriality principle (territorial jurisdiction if the crime has been initiated in the State's territory but completed abroad); 3. the principle of ubiquity (territorial jurisdiction if the crime took place in whole or in part on a State's territory); 4. the constitutive element theory (territorial jurisdiction based on at least one constitutive element of the crime occurring on the territory of the State) and 5. the effects doctrine (territorial jurisdiction if the crime takes place outside the State territory but

[137] ICC-01/19-27, [45].
[138] *Ibid*, [46-49].
[139] *Ibid*, [49].
[140] *Ibid*, [50].
[141] *Ibid*, [54-61].

produces effects within the territory of the State).[142] The Chamber put together two conclusions from this: '*first, under customary international law, States are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside its territory, as long as there is a link with their territory. Second, States have a relatively wide margin of discretion to define the nature of this link.*'[143]

The Chamber further argued that even though Article 12(2)(a) does not specify under which circumstances the Court may exercise jurisdiction based on the territoriality principle, it would be wrong to conclude that the States intended to limit the Court's territorial jurisdiction to situations occurring solely on territories of States parties. As discussed in the previous chapter, Guilfoyle argued that the States did not wish to grant the Court such an expansive scope of territorial jurisdiction.[144] The Chamber, however, was of the view that the limitation included in article 15 *bis* (5)[145] concerning the crime of aggression only confirms that such a limitation does not apply to other provisions of the Statute. Thus, by not explicitly restricting their delegation of the territoriality principle, the States Parties must be inferred to have transferred to the court the same territorial jurisdiction as they have themselves under international law.[146] Guilfoyle's argument therefore appears to fall short. In the context of an international criminal tribunal created by treaty, the jurisdiction delegated to the tribunal by States Parties should include the restrictive doctrines that form the basis of domestic jurisdiction under international law, such as the principle of objective territoriality.[147] This supports the conclusion that the term 'conduct' includes both acts and omissions as well as the consequences and circumstances of a crime.[148] This theory, according to Members of the Canadian Partnership for International Justice, supports the Court's jurisdiction over nationals of non-Party States in cases such as the one before the Court in the situation concerning Myanmar and Bangladesh.[149]

The Chamber concluded that the wording of Article 12(2)(a) only requires that a part of the conduct (*actus reus* of the crime) must take place in the territory of a State Party, and no

[142] ICC-01/19-27, [56].

[143] ICC-01/19-27, [58].
[144] Guilfoyle 2019, 4-7. See 3.1.1.
[145] '*In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.*', see Article 15 *bis* of the ICCSt.
[146] ICC-01/19-27, [60].
[147] ICC-RoC46(3)-01/18-25, [21].
[148] ICC-RoC46(3)-01/18-25, [21].
[149] ICC-RoC46(3)-01/18-25, [22].

other limitations can be derived from the provision. Thus, *'provided that part of the actus reus takes place within the territory of a State Party, the Court may … exercise territorial jurisdiction within the limits prescribed by customary international law*.'[150] In doing so, the Chamber affirmed the propositions of the Pre-Trial Chamber I. Although not bound by the decisions made by the Pre-Trial Chambers, the Court is likely to follow these interpretations. Given the detailed interpretation of Article 12(2)(a) and the Court's territorial jurisdiction done by the PTCs', the Court should conclude accordingly.

3.5. Should the 'Gentle Touch' approach be less gentle?

3.5.1. The 'Gentle Touch' approach

This chapter discusses the effect the previously discussed decisions have on the Court's jurisdiction over incitement to genocide committed online. To provide a context for the discussion, the approach presented by Vagias is reviewed first.

Let us return to our hypothesis, where a blogger situated in Moscow is inciting individuals to commit genocide against Georgians in South Ossetia through comments in English published on a website hosted by a Russian server. The Court would have to determine whether the specific crime falls within the Court's territorial jurisdiction. Vagias argues that the Court should follow the domestic courts' approach and break down '*the crime charged in its constituent elements and localising any of them in the territory of a State Party'*.[151] In cyberspace, this means not only breaking down the elements of incitement to genocide but also how a specific communication on the internet becomes accessible. Vagias resorts to Oren Bigos' construction:

> *Geographically, the electronic communications described in the example occur in one or a combination of the location of (i) the content provider, (ii) the host server, (iii) the user's server and (iv) the user.'*[152]

This relatively technical approach seems reasonable at first, but it can become significantly more difficult when applied to a real-life situation. As Oren himself acknowledges, there may be multiple content providers, servers and users in multiple different locations, which makes the situation far more complex.[153] However, this is not the case in our hypothesis, and thus the approach is usable.

[150] ICC-01/19-27, [59-61].
[151] Vagias 2016, 540.
[152] Bigos 2005, 592.
[153] Bigos 2005, 592.

Vagias concludes that in his hypothesis the blog posts are communicated to the general public through the internet, which is a mean of mass communication, thus making the blog posts public.[154] However, the publication takes place only when the blog post is displayed, e.g. on a computer screen. This computer screen would position itself on Oren's construction in the place of the user. Thus, even if the other variables are not in a State Party territory, when the post is accessible and displayed in State Party territory, the ICC would have jurisdiction. Jurisdiction based on the act of display is, according to Vagias, validated by internet litigation on hate speech and by the fact that every single link on the aforementioned construction is indispensable. The existence of any of these links in State Party territory would defend the Court's territorial jurisdiction.[155] In other words, whenever a certain blog post or other communication is accessible in State Party territory, the ICC would have jurisdiction. With respect to the example situation, the Court would accordingly have jurisdiction over the blogger's incitement to genocide as far as the postings are accessible in some of the States Parties to the ICC Statute. Vagias also acknowledges that such a conclusion is dependent on how 'display' is understood. If 'display' means uploading a statement and maintaining a website in the territory of a State not Party to the ICCSt, the Court would not have territorial jurisdiction regardless of the visualisation of the incitement on the territory of a State Party.[156] Nonetheless, the article contains several problems concerning jurisdictional issues that are discussed next.

Firstly, Vagias proposes that the Court would be able to establish jurisdiction whenever a certain message inciting genocide is displayed on State Party territory.[157] It might be that Vagias himself understands the scarcities of this proposition since in his conclusion he seems to not explicitly endorse this construction. Vagias concludes that the Court should break down the crime charged in its constituent elements and localise any of them in the territory of a State Party. According to Vagias, this course of action would be founded upon the Court's negotiated framework, which would dispel accusations of adopting universal jurisdiction in disguise.[158] Although the Court is surely trustworthy in such a scenario, Vagias' previously presented approach is likely to unfoundedly broaden the jurisdictional scope of the ICC and speaks for the Court's universal jurisdiction. Unless specifically

[154] Vagias 2016, 536.
[155] *Ibid*, 537.
[156] *Ibid*, 537.
[157] *Ibid*, 537-538.
[158] *Ibid*, 540.

hidden, nearly all websites are accessible to anyone around the world with a working internet connection, and thus, for example, a certain blog post inciting genocide can be displayed in State Party territory, even if the post has no other link to the State Party.

Secondly, he acknowledges that some could argue that the Court may assert territorial jurisdiction '*only if the "targeted" audience of the communication was situated in State Party territory*'. Vagias states that the Court's jurisdiction does not depend on whether the incitement was intended to occur in a specific territory and that such a matter belongs to the merits of the case, as it is a question of proof of *actus reus* of the crime.[159] The same argument can be presented against the act of display as the basis for the Court's jurisdiction. Incitement must be both direct and public in order to constitute incitement to genocide under Article 25(3)(e) of the ICCSt. Similarly to uttering a speech in a public gathering, the display of an inciting message, e.g. on a computer screen, makes the incitement public. As Vagias acknowledges[160], it is thus an element of the *actus reus* of incitement to genocide. If the Prosecutor fails to prove that the incitement of the blogger in our hypothesis is public, it will cause the charge to fail and not immediately mean that the Court lacked territorial jurisdiction.

Thirdly, Vagias argues against the view that the Court should be able to assert jurisdiction only if the targeted audience of the incitement was situated in a State Party territory *inter alia* by referring to the inchoate nature of the crime: the geographical location of the genocide, if such exists, is therefore immaterial. Vagias also claims that it would be difficult to identify the targeted audience of the message: '*How can someone distinguish whether a blog post in English aims to incite in Ossetia, Georgia or London?*'[161] These arguments have their own shortcomings. Incitement to genocide is, as it was established in chapter 2, an inchoate crime. However, in *Media* the ICTR concluded that while no causal link between genocide or a genocidal act and the act of incitement is required, the incitement must have the potential to cause such effects.[162] The potential to cause genocidal acts is of the utmost importance to legitimately establish jurisdiction over incitement to genocide, especially when it is committed through the internet. A truly genocidal act most likely will not take place without any context, and messages inciting individuals to commit genocidal acts are arguably direct and perceivable only to individuals in a specific location or a specific context

[159] Vagias 2016, 538.
[160] Vagias 2016, 536-537.
[161] Vagias 2016, 539.
[162] ICTR-99-52-A, [678]; ICTR-99-52-T, [1015].

(a genocidal context).[163] If we look at the example Vagias himself created, it can be argued that distinguishing the target country of the incitement is not as difficult as Vagias claims. In the example, a Russian national '*incites the commission of genocide against ethnic Georgians in South Ossetia*'.[164] Blog posts inciting the genocide of ethnic Georgians in South Ossetia, regardless of the language they are written in, heavily indicate that the incitement is intended for the non-Georgian population of South Ossetia.

In the next chapter, this thesis will refine Vagias' approach by taking into consideration the critique presented above. The following chapter will try to provide the Office of the Prosecutor of the ICC and the Court with a line of argumentation in order to rule on the hypothetical situation discussed in the thesis.

3.5.2. The Court should have jurisdiction over the incitement to genocide in terms of the hypothetical situation

Before proceeding to the arguments on behalf of the Court's jurisdiction, it is useful to revisit the hypothetical situation that is at the centre of this thesis in more detail. The situation concerns a prolific blogger who is situated in Moscow. The blogger incites individuals to commit genocide against Georgians in South Ossetia through comments in English published on a website hosted by a Russian server. The Prosecutor of the ICC is requesting an arrest warrant against the blogger and accusing him of the crime of incitement to commit genocide. In order to issue a warrant of arrest, the relevant PTC needs to assess whether the specific crime falls within the Court's territorial jurisdiction. In other words, the Court needs to ascertain how much of the incitement to genocide has been committed on the territory of Georgia and whether it can assert territorial jurisdiction under Article 12 of the ICCSt.[165] In this chapter, a structure of argumentation is provided for the Prosecutor to establish her case that the Court has jurisdiction over said crime.

The main argument is that the Court has jurisdiction to prosecute the blogger since a substantial part of the crime of incitement to genocide takes place in Georgia, a State Party to the ICC. The Prosecution starts with assessing the Court's Chambers' recent jurisprudence on Article 12(2)(a) before turning to establish the location of the events in cyberspace and the facts of the situation before the Court.

[163] This is supported by the jurisprudence of ICTR, see e.g. ICTR-99-52-A, [700-701].
[164] Vagias 2016, 524.
[165] Vagias 2016, 534. See chapter 1.

Article 12(2)(a) of the ICCSt provides that the Court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred is a State Party.[166] Thus, the Court has jurisdiction when an element of a crime within the jurisdiction of the Court takes place in a State Party. The Chambers I and III have recently concluded that the Court may exercise jurisdiction pursuant to Article 12(2)(a) of the ICCSt if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.[167] After a thorough assessment of the meaning of the term "*conduct*",[168] the Chamber explained that the term is "*used in a factual sense, capturing the actus reus element underlying a crime subject to the jurisdiction ratione materiae of the Court*".[169] The Chamber noted that depending on the nature of the alleged crime the *actus reus* element of conduct may cover the consequences of such conduct as well.[170] The *actus reus* element, or conduct, of incitement to genocide encompasses the incitement to the commission of genocide when it is direct and public.[171]

In assessing whether Article 12(2)(a) of the ICCSt requires that all the conduct take place in the territory of a State Party, the Chamber concluded that if at least a part of the *actus reus* of the crime (a part of the conduct) takes place in the territory of a State Party, the Court may exercise territorial jurisdiction "*within the limits prescribed by customary international law*".[172] The limits are defined by the concepts of territorial jurisdiction developed in state practice. According to the PTC, there are five different principles, inter alia the objective territoriality principle (territorial jurisdiction based on the completion of a crime in the State's territory if initiated abroad), the principle of ubiquity (territorial jurisdiction if the crime took place in whole or in part on a State's territory) and the constitutive element theory (territorial jurisdiction based on at least one constitutive element of the crime occurring on the territory of the State).[173]

The Prosecution could resort to the arguments and interpretation presented by the Chambers and state that the Court may exercise jurisdiction pursuant to Article 12(2)(a) of the ICCSt if at least one element of a crime within the jurisdiction of the Court or part of such a crime

[166] ICCSt Article 12.
[167] ICC-RoC46(3)-01/18-37, [72]; ICC-01/19-27, [43].
[168] ICC-01/19-27, [46-49].
[169] ICC-01/19-27, [49].
[170] ICC-01/19-27, [50].
[171] ICTR-99-52-A, [677]. See chapter 2.2.
[172] ICC-01/19-27, [54-61].
[173] ICC-01/19-27, [56].

is committed on the territory of a State Party to the ICCSt. The Prosecution could further argue that the Court should follow the ruling of the PTC *in casu* since the situation before the Chambers and the one before the Court are largely similar. Whereas the alleged crimes in Myanmar take place in the physical world, the crimes *in casu* take place partly in cyberspace. Regardless, in both situations, the crimes are taking place partly in the territory of a State Party and partly in the territory of a non-State Party. Acceptance of jurisdiction would also be in line with the common State practice alleging jurisdiction in all cases where a substantial measure of the crime occurs within the jurisdiction of a State Party.[174]

The Prosecution could then move on to establish that given the nature of cyberspace, although the blogger's conduct took place in Moscow, a substantial part of the crime occurred in Georgia. Consequently, although the blogger was physically present in Moscow and is a Russian national, the Court has jurisdiction to prosecute him under Article 12 of the ICCSt.

Events occurring in "cyberspace" may appear borderless, but the constituent elements of cyberspace, the human and corporate actors and the computing and communications equipment through which a transaction is effected, all exist somewhere, in one or more physical locations and thus in one or more legal jurisdictions.[175] Accordingly, the major international instruments for crimes committed over cyberspace rely on territorial jurisdiction.[176] The Arab IT Offence Convention explicitly accepts jurisdiction when an offence is committed in whole or in part or was realized in the territory of a State Party.[177] The EU directives also provide for jurisdiction when an offence is committed in whole or in part on the territory of a Member State.[178]

Cyberspace comprises *inter alia* the physical level, i.e. the computers, and the content level, i.e. the data itself. This data, such as the blog posts inciting genocide, is produced by humans. Events occurring in cyberspace are deeply connected to and have consequences in real space. Cyberspace consists of information alone and thus websites, such as the one the blog posts

[174] ICC-RoC46(3)-01/18-1, [40].
[175] Bigos 2005, p. 590.
[176] CC, Article 22(1); CC AP, Article 4(1); Arab ITOC, Article 30(1)(a); DIRECTIVE 2013/40/EU, Article 12(1)(a); DIRECTIVE 2011/93/EU, Article 17(1)(a).
[177] Arab ITOC, Article 30(1)(a).
[178] DIRECTIVE 2013/40/EU, Article 12(1)(a); DIRECTIVE 2011/93/EU, Article 17(1)(a).

are published on, "*are not the result of servers and computer systems alone, but rather, they need another fundamental input: information*."[179]

To examine the location of an event in cyberspace, it is vital to understand how an exchange of information on the WWW works. For this purpose, the construction by Oren Bigos that Vagias cites in his article is used here:

> *First, content (web page) is created by a person (content-provider). From his own computer, the content-provider transmits and places (uploads) the web page in a storage area (website) of a computer (server) that runs server software and is operated by the content provider or a third party (host). A user connects to the internet (online) and, through client software (browser), requests and receives documents from remote servers.*[180]

Geographically, the example occurs in one or the combination of 1. the content-provider, 2. the host server, 3. the user's hardware and 4. the user.[181] Each of these links is indispensable for something to be accessible to the user on the internet. The corollary of a missing link is that the information can't be exchanged. Each link thus constructs a constitutive element of the exchange of information and advocates for the jurisdiction of the Court.[182] *In casu*, the content provider would be the blogger. He then transmits the post to the storage area, the website, which is hosted by servers in Russia. Users, the visitors of the website, then connect to the website with their own computers and other devices, e.g. in Georgia. Therefore, the indispensable events relating to the incitement are taking place in the combination of the following locations: 1. Russia, 2. Russia, 3. Georgia, 4. Georgia. Even in this simplified example, a substantial amount of the crime is thus taking place in Georgia, a State Party.

Relevant case law from domestic courts also advocates for the jurisdiction of the Court. The German Federal Court of Justice in *Töben* established that it had jurisdiction over the online publication since the statements were addressed to the German public and the website was accessible to German users. According to the Court of Justice, there was a substantial connection between Germany and the offence at hand, as the elements of the offence took place in Germany.[183] In the earlier *Yahoo!* case, the Tribunal de Grande Instance of France held that the crime was committed equally in the territory of France because the Nazi

[179] Zekos 2012, p. 14.
[180] Bigos 2005, p. 591.
[181] Bigos 2005, p. 592.
[182] Vagias 2016, p. 537.
[183] See *Töben*.

memorabilia was accessible to users in France and thus the damage was suffered in France. The French courts viewed that advertisement of the memorabilia was a necessary element of the offence, which occurred in French territory since it was accessible to French users.[184] Both courts relied on an element of the offence to have taken place on the territory of the State. The fact that the server in *Yahoo!* was located and maintained in the US and in *Töben* in Australia did not preclude the domestic courts' jurisdiction.[185] In addition, the High Court of Justice's Court of Appeal of England in *Sheppard & Whittle* concluded that England had jurisdiction when a substantial measure of the activities constituting the crime took place in England.[186]

The Prosecutor could argue that the posts are public in terms of Article 25(3)(e) of the Statute as they are accessible by people in Georgia through the display of the posts on their electronic devices. As the situation provided by Vagias does not include any details about the blog posts, this thesis contents itself with stating that the posts constitute direct incitement. However, in order to avoid accusations of implementing jurisdictional rules *de facto* constituting universal jurisdiction, the jurisdictional scope of the Court in this situation should be narrowed down with the requirement of 'direct'. *In casu* the blogger is inciting the genocide of ethnic Georgians residing in South Ossetia, meaning that the targeted audience of the inciting messages are other ethnic groups in the region of South Ossetia. This is also supported by the fact that there is already a situation under investigation by the ICC concerning Georgia. The focus of the investigation is alleged crimes against humanity and war crimes committed in the context of an international armed conflict, parties of which were Russia, Georgia and South Ossetia, thus providing a context of past brutalities within which the incitement could lead to genocidal acts.[187] It is submitted that incitement to genocide does not need to cause genocidal acts, but must have the potential to cause such effects.[188] The Prosecution sustains that the blog posts are direct in terms of Article 25(3)(e) since they bear potential consequences only in Georgia (as South Ossetia is considered a part of Georgia). The mere physical presence of the host server and the blogger in Russia cannot exonerate the blogger for crimes he has committed that are taking place also in Georgia. For

[184] *Yahoo! 22 May 2000*, [5]; *Yahoo! 20 November 2000*, [4].
[185] Hayashi in Focarelli 2008, p. 290, 294.
[186] *Sheppard & Whittle*, [21].

[187] See ICC-01/15.
[188] ICTR-99-52-A, [678], [1015]; ICTR-99-52-T, [1015].

these reasons the Prosecution would submit that the Court should have jurisdiction under Article 12(2)(a) to prosecute the blogger for incitement to genocide.

3.5.3. Alternative approaches

In addition to the construction presented in the previous chapter, there is an alternative way to approach the Court's jurisdiction in the example situation. As discussed earlier, the PTC III concluded that the Court may exercise territorial jurisdiction if at least a part of the *actus reus* of the crime takes place in the territory of a State Party within the limits prescribed by customary international law.[189] One of the accepted principles of territorial jurisdiction is the effects doctrine. According to the effects doctrine, the Court has territorial jurisdiction over the crime if it takes place outside the territory of a State Party, but produces effects within the territory of the State.[190] The effects doctrine originally stems from the PCIJ's famous *S.S. Lotus* decision, where the PCIJ formulated the principle of objective territoriality.[191] According to the decision, offences are to be regarded as having been committed in the national territory of a State even if the authors of the offence are at the moment of commission in the territory of another State, '*if one of the constituent elements of the offence, and more especially its effects, have taken place there*.'[192] According to Stockton and Golabek-Goldman, a nation must only demonstrate that the crime's consequences were detrimental and occurred within its territory. This would suffice for the nation to have jurisdiction.[193] The effects doctrine developed by a US Court in the field of antitrust law concluded that the intentional production of economic 'effects' within the United States was sufficient for the jurisdiction of the specific Court.[194]

Effects doctrine is also accepted in the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations. The Tallinn Manual 2.0 was prepared by international groups of experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence. The purpose of the Manual is to examine existing international law norms and assess the international law governing cyber operations in peacetime legal regimes. The Manual identifies 154 different rules governing cyber operations, one of which is the territorial jurisdiction over cybercrime. According to the Manual, a State may exercise

[189] ICC-01/19-27, [54-61].
[190] ICC-01/19-27, [56].
[191] Stockton & Golabek-Goldman 2014, 235-236.
[192] *S.S. Lotus*, 23.
[193] Stockton & Golabek-Goldman 2014, 236.
[194] See *US v. Aluminium Co. of America.*

territorial jurisdiction over *inter alia* cyber activities that have a substantial effect in its territory.[195] If the Court was to rule on the situation laid out in the example, it would be facing a novel issue. Due to the novelty of the situation, the Court could arguably benefit from taking into account emerging concepts such as the ones presented in the Tallinn Manual.

However, the proposition of basing the Court's jurisdiction over incitement to genocide on the effects doctrine can be criticised. This applies not only to the situation laid out in the example but also to incitement to genocide in general. Firstly, incitement to genocide is an inchoate or 'content' crime, which means that incitement to genocide is criminalised as such and it does not need to produce any result.[196] In other words, it does not need to have any effects. Thus, is it logical to argue that the Court's jurisdiction rests on the effects of incitement to genocide?

Secondly, as previously discussed in chapter 3.5.1, Vagias argues for the Court's jurisdiction over incitement to genocide in terms of the example situation based on the act of display.[197] Vagias also states[198] that if the Court considers the criminal conduct to be the uploading of a statement (the incitement to genocide) and maintaining a website in a State not Party to the Statute, the Court should apply the effects doctrine to establish territorial jurisdiction.[199] In terms of the example situation, the criminal conduct[200] of the blogger would consist of the uploading of the blog post to the website. The uploading is then considered to cause effects in Georgia, a State Party. The effects are the display of the blog posts on Georgian computer screens and other electronic devices. This approach is problematic for the same reason as the 'Gentle Touch Approach' by Vagias. Similarly to the Gentle Touch Approach, applying effects doctrine to incitement to genocide committed online would unfoundedly broaden the jurisdictional scope of the ICC and speak for the Court's universal jurisdiction. Even Vagias himself has stated that the effects doctrine and universal jurisdiction resemble each other, as they are both remotely connected to the actual crime and reach beyond territorial boundaries. The application of effects doctrine could be interpreted as a tool to rename universal

[195] Tallinn Manual 2.0, 55.
[196] See de Hemptinne 2019, 58 footnote 3.
[197] See 3.5.1, Vagias 2016, 537.
[198] By referring to Hayashi in Focarelli 2008.
[199] Vagias 2014, 157.
[200] According to Article 12(2)(a) the Court has territorial jurisdiction when *'the conduct in question*' occurs in State Party territory.

jurisdiction and to apply it indirectly in the ICC.[201] This course of action would be '*manifestly contrary to the intentions of the negotiators in light of universality's clear rejection in Rome*.'[202] If the effects doctrine was to be applied by the Court in relation to crimes committed over cyberspace, the Court would have practically limitless jurisdiction.[203] For these reasons this thesis does not support the application of effects doctrine concerning the example situation or crimes committed via cyberspace in general.

3.6. Conclusion

This chapter has discussed the possibility of the ICC to exercise jurisdiction over the hypothetical situation concerning a blogger inciting the genocide of ethnic Georgians in South-Ossetia. The crime has multiple novel elements concerning the application of the Court's jurisdiction. Firstly, the perpetrator is a national of a non-Party State and secondly, the perpetrator is physically present in the non-Party State at the time of committing the incitement. Thirdly, the crime is committed in cyberspace.

To assess this question this chapter examined the recent decisions of Pre-Trial Chambers I and III in the situation concerning Bangladesh and Myanmar. The decisions deal with the Court's jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. The decisions are relevant in terms of the hypothesis of this thesis because the question before the Chambers was in essence how much of a crime (of the conduct in question) must occur on the territory of a State Party for the Court to have territorial jurisdiction. The Chambers *inter alia* examined the Article 12(2)(a) and the term '*conduct*' in depth in addition to discussing the question of what forms of territorial jurisdiction the States Parties intended to delegate to the Court. Both Chambers concluded that the Court may exercise its jurisdiction if at least one element of the crime (or *'part of the actus reus*') occurred in State Party territory.

The decisions provided the thesis with a framework of the limits of the Court's jurisdiction *ratione loci,* the understanding of which is essential in order to establish the Court's jurisdiction in the example situation. This chapter proceeded to review Vagias' approach to jurisdiction in the example situation. After an assessment of Vagias' arguments, it was apparent that they contain multiple issues. Implementing Vagias' approach would be harmful to ICC's legitimacy since it is likely to unfoundedly broaden the scope of the Court's

[201] Vagias 2014, 168.
[202] Vagias 2014, 168.
[203] See 3.5.1.

jurisdiction. In addition, Vagias does not accept the argument that the Court could assert territorial jurisdiction only if the targeted audience of the message is situated in State Party territory, which arguably would preclude the claims of accepting universal jurisdiction. Vagias is of the opinion that the targeted audience of the message is immaterial in terms of jurisdiction.

This chapter then continued to provide a refined version of Vagias' approach to the Court's jurisdiction in the example situation. The chapter provided the OTP and the Court with arguments on behalf of the Court's jurisdiction in the matter. Most importantly, it based the Court's jurisdiction on the Pre-Trial Chambers' decision in the case concerning Myanmar and Bangladesh, thus resorting to the Court's own recent jurisprudence. It further examined Vagias' approach and established that the Court should indeed break the incitement down to different parts constituting the commission of the crime online. Although accepting that the act of display and the presence of the end user in a State Party speak for the jurisdiction of the Court, this chapter argues that the direct element of incitement to genocide should be used to narrow the jurisdictional scope over the crime when it is committed online. This would effectively dispel accusations of asserting universal jurisdiction, which the Court does not have, and allow the legitimate and sustainable exercising of territorial jurisdiction over cyber commission of incitement to genocide.

Finally, the possibility of utilizing the effects doctrine in the hypothetical situation was discussed. This solution appeared problematic for the same reasons as Vagias' approach. Once again, the Court could be argued to assert universal jurisdiction if display was considered to be an effect of the criminal conduct. The effects in terms of incitement to genocide committed online cannot, however, be anything else. As it was established in the beginning of chapter 2, the crime is inchoate and thus bears no effects or consequences. It would therefore be illogical to base the Court's jurisdiction on the effects of the crime when they are not an element of the crime.

4. Possibility of a social media platform's owner to be held responsible for incitement to genocide on the platform

4.1. Preliminary issues

The thesis has thus far concentrated on the elements of incitement to genocide under Article 25(3)(e) of the Rome Statute and the territorial jurisdiction of the Court under Article 12(2)(a) for said crime when it is committed online. This chapter steers the focus of this thesis towards the question of whether a social media platform's owner or CEO can be held responsible for incitement to genocide if he fails to prevent the incitement from taking place or to delete it in a timely manner.[204]

The importance of this question is explicit. As discussed previously in this thesis, the internet and social media entail new challenges for the Court. However, direct and public incitement to genocide can largely benefit from the worldwide platforms social media provides. The crime can be committed in a whole new operational environment that is controlled by new actors, and thus it may be relevant to discuss not only the responsibility of the primary perpetrator but also the responsibility of those making the perpetration of these crimes in such a scale possible. By punishing such actors when they have in fact committed criminal behaviour, the Court can possibly enhance the response of social media platforms to incitement to genocide. This is likely to prevent future crimes from taking place and is thus in accordance with the goals of international criminal justice. It can further be argued that by creating a construction to hold individuals acting on behalf of companies liable for the incitement to genocide they allow on their platform, these new problems caused by modern technologies can be more effectively solved. Such a criminalisation would arguably create a bigger incentive for the companies and their personnel to avoid international criminal responsibility and thus prevent incitement to genocide from taking place on their platform. As this chapter will present below, such a construction is in accordance with the Rome Statute and international criminal jurisprudence.

For the purpose of this chapter the example situation is further developed: a prolific blogger is inciting individuals to commit genocide against ethnic Georgians in South Ossetia through comments in English published on a website ('Platform'). The controlling owner and CEO ('CEO', 'Executive') does not take action to remove the criminal material from the Platform.

[204] For a discussion on the responsibilities of different actors within a company see Hakim 2020.

As the jurisdictional scope of the situation is discussed in chapter 3, the nationality of the CEO or the location of the Platform's servers or headquarters are not problematized in this analysis. The Executive is of Russian nationality. The upcoming analysis presupposes that the Court has jurisdiction over the incitement to genocide published on the Platform according to what was argued in chapter 3.

The Court does not have jurisdiction over companies as entities, as Article 25(1) of the Statute declares that the Court has jurisdiction only over natural persons. However, the international criminal liability of a natural person acting on behalf of a company is unequivocal. As Cassel writes, corporate executives have long been held criminally liable for committing human rights violations. This was established already at the Nuremberg trials.[205] The *Zyklon B* case from 1946 in British Military Court, which concerned the trial of Bruno Tesch and two others, provides a great example of an executive's complicity in war crimes. Bruno Tesch was the owner of a firm which arranged for the supply of poison gas. He and the two others were accused of having knowingly supplied poison gas used for killing humans in concentration camps.[206] Bruno Tesch was the sole owner of the company, which distributed different types of gas and equipment for disinfecting various buildings, such as S.S. concentration camps.[207] The prosecution stated that over time Tesch got to know that the gas they were providing to the concentration camps, Zyklon B, was being used to exterminate human beings. '*Having acquired this knowledge, they continued to arrange supplies of the gas to these customers in the S.S. in ever-increasing quantities*'.[208] The knowledge of the accused was evidenced by *inter alia* information provided by the company's employees.[209] The British Military Court ruled that by supplying the gas knowing that it was used for the extermination of human beings, Tesch had made himself complicit in that crime. Tesch was found guilty.[210]

Another preliminary issue that must be addressed before turning to the main topic of this chapter is whether the Court has jurisdiction over proper and improper omissions under Article 25 of the Rome Statute, even though it is not explicitly provided for in the provision. According to Article 25(3) of the Statute, a person shall be criminally responsible and liable

[205] Cassel 2008, 306. For further discussion on corporate and corporate actors' international criminal responsibility, see e.g. Van der Wilt 2013 and de Leeuw 2016.
[206] *Zyklon B,* 93.
[207] *Ibid*, 94.
[208] *Ibid*, 94.
[209] *Ibid*, 95.
[210] *Ibid*, 101-102.

for punishment for a crime within the jurisdiction of the Court if that person *inter alia* commits such a crime as an individual.[211] Omission is defined as a failure to act on a legal duty when the perpetrator had the ability to act according to this duty. An omission is proper when a provision of criminal law explicitly imposes a duty to act in a concrete situation. Improper omissions '*are failures to act that contravene duties imposed by bodies of law other than criminal law*'.[212] During the Rome negotiations, the issue whether the Court should have jurisdiction over omissions was ultimately left for the Court to rule on in the future.[213] Legal scholars have provided significant studies on the matter, and it remains an open question whether commission by omission has become customary international law or a general principle of international law.[214] However, some scholars have proposed that criminal liability for omissions can be qualified as a general principle of law.[215] According to Duttwiler, this is supported by the fact that almost all legal cultures include criminal liability for omissions.[216] This thesis argues that the Court does not only have jurisdiction over proper omissions, i.e. when such conduct is specifically addressed in the Rome Statute, but also over improper omissions, i.e. when such conduct is not specifically addressed in the Statute.

There is significant support in legal scholarship that Article 25 of the Rome Statute should be interpreted to include commission by omission.[217] The lack of a provision in the Statute on omission should not entail the conclusion that the negotiating Parties wished to rule out criminal liability in such instance.[218] It is noteworthy that the Statute does *de facto* criminalise omissions already, for instance the war crime of starvation of civilians.[219] According to Werle, the Statute criminalises commission by omission also when the omission equates to the active causation of the criminal result.[220]

Some scholars have submitted that such an interpretation would be against the principle of legality expressed in Article 22 of the Statute.[221] However, such an interpretation appears to

[211] Article 25(3), ICCSt.
[212] de Hemptinne 2019, 61-62.
[213] Lee 1999, 213.
[214] Berster 2010, 620. In addition to Berster 2010, see e.g. Duttwiler 2006, Werle 2007.
[215] Werle 2007, p. 966.
[216] Duttwiler 2006, p. 30 *et seq.*
[217] Werle 2007, 966.

[218] Werle & Jessberger 2014, 269.
[219] ICCSt Article 8(2)(b)(xxv); See de Hemptinne 2019, 61-62.
[220] Werle 2007, p. 966.

[221] See e.g. de Hemptinne 2019, 69 *et seq*.

be compatible with the principle of legality since, for example, Articles 20 and 22(1) of the ICCSt. and the EOC refer to "conduct", which, e.g. in the case of the war crime of starvation of civilians, must concern both acts and omissions.[222] Concerns about the principle of legality or *nullum crimen sine lege* in terms of Article 22 of the Statute appear to be indeed superfluous since the Pre-Trial Chambers I and II seem to have accepted this interpretation. In *Lubanga,* the PTC I repeatedly referred to '*actions or omissions*'.[223] In *Muthaura*, the PTC II went a step further by stating that '*there is nothing in the Statute that can be interpreted to exclude acts by omission from the purview of the Court, and it would be contrary to its object and purpose to interpret article 17(l)(d) of the Statute in a way which would reduce, as a matter of law, the subject-matter jurisdiction of the Court.*'[224] This view is arguably consistent with the jurisprudence of *ad hoc* tribunals. ICTY and ICTR have broadly established that the *actus reus* of a crime can be fulfilled by both concrete actions and omissions.[225] In *Blaskic*, the ICTY further established that an omission could constitute the *actus reus* of aiding and abetting.[226] For these reasons, this thesis presupposes that the Court has jurisdiction over proper and improper omissions under Article 25 of the Statute.

4.2. Possibility of an omission to lead to criminal liability under Article 25(3)(e) or Article 25(3)(c) of the Statute?

4.2.1. Elements of commission by omission under the Rome Statute

This chapter assesses the elements of commission by omission under the Rome Statute. First, the relevant international jurisprudence and legal scholarship is discussed. Then an excursion is made to the elements of aiding and abetting by omission according to the *ad hoc* tribunals in order to determine whether the elements between these two modes of liability differ.

There is a substantial amount of case law from the ICTY and ICTR where the Courts have examined the possibility of holding an accused criminally responsible for an omission as a principal perpetrator. In other words, when can a perpetrator be held criminally responsible for committing a crime because of an omission? The judgments find basis in Article 7(1) of

[222] ICCSt Articles 20, 22(1); EOC General Introduction, [2], [7(a)–(b)], [9]; See Ambos 2013, p. 190 and de Hemptinne 2019, p. 70.
[223] ICC-01/04-01/06-803-tEN, [351-355].

[224] ICC-01/09-02/11, [46].
[225] IT-96-21-T, [424], [494], [511]; IT-95-14/2-T, [229]; IT-95-14-T, [153]; IT-95-14-A, [670]; IT-96-21-T, [1123]; ICTR-97-23-S, [40]; IT-98-29-A, [175].
[226] IT-95-14-A, [47]; IT-95-14-T, [284]; ICTR-97-23-S, [40]; IT-95-13/1-T, [553]; IT-05-87-T, [90].

the ICTY Statute and Article 6(1) of the ICTR Statute. Article 7(1) of the ICTY Statute, concerning individual criminal liability, reads as follows:

> '*1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*'[227]

Article 6(1) of the ICTR Statute, also concerning individual criminal responsibility, is identical to the one in ICTY.[228] When compared to the Statute of the ICC, virtually the same provision is divided into multiple subsections of Article 25.[229]

By referring to Article 7(1) of the ICTY Statute, the Appeals Chamber in *Tadic* recalled that the provision covers firstly the physical perpetration of a crime by the offender and secondly the culpable omission of an act that was mandated by a rule of criminal law.[230] The ICTR added in *Semanza* that when not explicitly stated in the Statute or customary international law, international criminal liability should be ascribed only on the basis of intentional conduct.[231] This was stated by the ICTY in *Stakic* as well.[232] By citing, among other things, these judgments, the ICTR in *Ntagerura et al*. concluded that in order to hold an accused criminally responsible for an omission as a principal perpetrator, there are four elements that have to be fulfilled. Firstly, the accused must have had a duty to act mandated by a rule of criminal law. Secondly, the accused must have had the ability to act according to such rule. Thirdly, the accused has had to fail to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur. Finally, the failure to act must have resulted in the commission of the crime.[233]

This construction includes both uncontested and contested elements. Roth argues that it is not logical to contend that an omission results in the commission of the crime.[234] This argument is plausible already because, e.g. in the case of incitement to genocide, the results of the action (or omission) are irrelevant. Incitement to genocide and other 'content crimes' criminalise certain behaviour without a requirement of a specific result.[235] Roth proposes the

[227] ICTY Statute 7(1).
[228] See ICTR Statute 6(1).
[229] See Article 25 of the ICCSt. Modes of liability provided for in Articles 6(1) and 7(1) of the ICTR and ICTY Statute are found in e.g. Article 25(3)(a), 25(3)(b) and 25(3)(c) of the ICCSt.
[230] IT-94-1-A, [188].
[231] ICTR-97-20-T, [341].
[232] IT-97-24-T, [642] citing ICTR-95-1, [146].
[233] ICTR-99-46-T, [659].
[234] de Hemptinne 2019, 69.
[235] See de Hemptinne 2019, 58 footnote 3.

following list of conditions that have to be fulfilled for an omission to be qualified as commission by omission.

- *The accused must have a legal duty to act.*
- *The accused must have had the ability to act.*
- *The accused failed to act.*
- *The failure to act may be assimilated to the commission of a crime.*
- *The requisites concerning the mens rea of the specific offence and mode of participation are fulfilled.*[236]

The list is essentially similar to the one used by the ICTR. These conditions do not, however, require for the omission to have resulted in the commission of the crime. It also enlists the *mens rea* requirement. The proposed construction appears to be more suitable for the purpose of the Court for a few reasons. As noted above, the requirement that an omission should result in the commission of a crime could turn out to be problematic given the inchoate nature of some crimes. Thus, to assimilate the omission with the commission of a crime is a more logical solution.[237] This construction also finds support in the jurisprudence of the ICTY: in *Oric*, the Appeals Chamber concluded that the *actus reus* of commission by omission requires '*an elevated degree of concrete influence.*'[238] Also, in *Kambanda*, the ICTR found that both acts and omissions had constituted incitement to genocide and genocide.[239] The approach taken by the ICTR in *Ntagerura et al.* can thus be legitimately questioned in terms of the last element. In addition, the construction finds further support in the Draft Statute for the ICC. While this is not an argument for or against the merits of this construction, it is still noteworthy that during the drafting of the Statute a similar construction was proposed. According to the text of the Draft Statute:

> '*2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where: (a) the omission is specified in the definition of the crime under this Statute; or (b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of*

[236] de Hemptinne 2019, 69.
[237] For a more in depth discussion on the matter see de Hemptinne 2019, 73.
[238] IT-03-68-A, [41], citing IT-95-14-A, [664].
[239] ICTR-97-23-S, [40].

> *unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].*'[240]

In the Draft Statute the term used is '*corresponds*'.[241] Some delegations had concerns about including to the provision the expression requiring the creation of a particular risk or danger that subsequently leads to the commission of a crime.[242] Another question of debate was the source of the legal obligation under which the person had to be.[243]

However, the list of conditions presented by Roth does not differentiate between different modes of liability under Article 25 and claims to reproduce the elements '*as identified by international case law and the most authoritative literature*'.[244] However, the *ad hoc* Tribunals' jurisprudence, especially on aiding and abetting by omission, is not completely coherent, which may cause problems of interpretation when applied by the ICC.[245] The Court has already turned to the jurisprudence of the *ad hoc* Tribunals for the qualification of objective elements of aiding and abetting[246] and is likely to do so concerning aiding and abetting by omission as well. Thus, it is imperative that the Court considers the inconsistencies of the jurisprudence if it is to establish rules of customary international law based on the Tribunals' findings.[247] It is not within the scope of this thesis to thoroughly discuss the relevant literature, but it is necessary to examine the relevant case law of the ICTR and ICTY to determine if the elements listed by Roth are applicable to both modes of liability under review in this thesis: commission of incitement to genocide as a principal by omission, and aiding and abetting in incitement to genocide by aiding and abetting or providing the means.

4.2.2. Aiding and abetting by omission in international case law

In *Oric* the ICTY established that an omission may lead to individual criminal responsibility by aiding and abetting where there is a legal duty to act and the conduct meets the basic

[240] A/CONF.183/2/Add.1, 54-55.
[241] *Ibid*, 54-55. In comparison with *'results in the commission of a crime'* and '*may be assimilated with*'.
[242] *Ibid*, 55 footnote 15.
[243] *Ibid*, 55 footnote 14.
[244] de Hemptinne 2019, 69.
[245] Ingle 2016, 748.
[246] ICC-01/04-01/10-T-8-Red2-ENG, p. 10, lines 10-16; ICC-01/04-01/06-2842, [997].
[247] Ingle 2016, 748.

elements of aiding and abetting.[248] In *Sainovic* the Appeals Chamber of ICTY suggested that the failure to act has to assist, encourage or lend moral support to the perpetration of the crime. The accused must also have the ability to act.[249] Both the ICTR and ICTY have widely required that the contribution of the aider or abettor have a substantial effect in the commission of the crime.[250] According to the Appeals Chamber in *Oric*, in order to fulfil the *mens rea* of aiding and abetting by omission '*the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal.*'[251]

Thus far, according to the *ad hoc* tribunals, the following elements have been established: 1. There has to be a legal duty to act; 2. The conduct has to meet the basic elements of aiding and abetting; 3. The failure to act (or the omission) has to assist, encourage or lend moral support to the perpetration of the crime; 4. The accused must have had the ability to act; 5. The contribution of the aider or abettor must have a substantial effect in the commission of the crime; 6. The aider or abettor must know that the omission assists in the commission of the crime and must be aware of the essential elements of the crime. However, the Court has already established some elements of aiding and abetting in its jurisprudence. These are discussed next.

While discussing the objective elements of aiding and abetting, the Court has established that aiding and abetting under Article 25(3)(c) of the ICCSt does not require the meeting of any specific threshold.[252] The Court has since repeatedly established that the objective element of this mode of liability is met when the contribution merely has an effect on the commission of the offence.[253] In terms of the subjective element, *mens rea*, of aiding and abetting, the Court has established that the subjective elements require the assistance to be made with the purpose of facilitating the commission of the crime. As Article 30 of the

[248] IT-03-68-A, [43].
[249] IT-05-87-A, [1677].
[250] IT-94-1-T, [688–692]; IT-96-21-T, [325–329]; IT-98-34-T, [63]; IT-02-60-T, [726]; IT-96-21-A, [352]; IT-95-17/1-T, [226], [229], [231], [233–235]; IT-95-14/1-T, [61]; IT-94-1-A, [229]; IT-98-32-A, [102]; IT-95-14-A, [46], [48]; IT-99-36-T, [271]; ICTR-96-3-T, [43]; ICTR-96-13-T, [126]; ICTR-95-54A-T, [597]; ICTR-96-10 & ICTR96-17-T, [787]; SCSL-04-14-A, [73].
[251] IT-03-68-A, [43].
[252] ICC-01/05-01/13-1989-Red, [93].
[253] ICC-01/05-01/13-749, [35]; ICC-02/11-02/11-186, [167]; ICC-02/04-01/15-422-Red, [43]; ICC-01/12-01/15-84-Red, [26]; ICC-02/04-01/15-428, [29]; ICC-01/05-01/13-1989-Red, [93-94].

Statute requires a crime to be committed with intent and knowledge[254], an elevated subjective standard compared to the one set out in Article 30 is required.[255] The elevated threshold, of course, relates to the assistance, not the principal offence.[256] The Court further ascertained that the accessory must at least be aware that the principal's offence will occur in the ordinary course of events,[257] but the accessory does not need to know '*the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements.*'[258]

The ICC has also concluded that the assistance must have furthered, advanced or facilitated the commission of the crime, but the contribution need not be *conditio sine qua non* to the commission. The assistance must have had some causal effect in the commission of the crime.[259] It must also be noted that the ICTY has established that the assistance does not need to be criminal itself.[260]

Through the assessment of the international case law, this thesis concludes that the construction presented by Roth may be applicable to both commission by omission and aiding and abetting by omission under the Rome Statute.[261] It is not, however, detailed enough to function as a structure of elements that need to be established to convict someone for especially aiding and abetting by omission. By utilizing two different constructions for 1. commission of a crime as principal perpetrator by omission and 2. aiding and abetting in the commission of a crime by omission, the Court would be equipped with more practical tools of interpretation. Also, the requirement of '*assimilating*' the conduct with the commission of the crime is not applicable to aiding and abetting, even if committed by an

[254] Article 30 of the ICCSt:
'*1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge:*
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence
will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'
[255] ICC-01/05-01/13-749, [35]; ICC-02/11-02/11-186, [167]; ICC-02/04-01/15-422-Red, [43]; ICC-01/12-01/15-84-Red, [26]; ICC-02/04-01/15-428, [29]; ICC-01/05-01/13-1989-Red, [95].
[256] ICC-01/05-01/13-1989-Red, [97].
[257] *Ibid*, [98].
[258] *Ibid*, [98].
[259] *Ibid*, [94].
[260] IT-95-17/1-T, [243]; IT-05-87-A, [1663]; IT-02-60-A, [201-202].

[261] See chapter 4.2.1. and de Hemptinne 2019, 69.

omission. This thesis argues that by further analysis of the case law of international tribunals a more specific construction can be made for aiding and abetting by omission. For this reason, this thesis proposes the following construction that takes into account the relevant jurisprudence of the *ad hoc* tribunals and of the Court. An omission could lead to individual criminal responsibility by aiding and abetting when:

1. There is a legal duty to act;
2. The accused had the ability to act;
3. The failure to act furthered, advanced, or facilitated the commission of the crime;
4. The contribution of the aider or abettor (omission) had a causal effect on the commission of the crime;
5. The omission must be made with the purpose of facilitating the commission of the crime and with intent.[262] The offender does not, however, need to know the precise offence which was intended and which in the specific circumstances was committed, but to be aware of its essential elements.

Thus far this thesis has established the elements for both commission by omission as a principal perpetrator and aiding and abetting by omission. As the assessment of most of the elements belongs to the merits of the case, it is not within the scope of this thesis to analyse them. However, both constructions require that the accused has a legal duty to act and that the accused had the ability to act according to such duty. The source of the legal duty is among the most contentious issues concerning liability for omissions. In the following chapter this thesis aims to establish a legal duty to prevent incitement to genocide under international law. The discussion intersects also with the requirement of '*had the ability to act*'.

4.3. Source of the legal duty

Turning to our hypothesis, the underlying question is the responsibility of the Executive over the incitement to genocide taking place on his Platform. The first issue to address that concerns both modes of liability under review is the source of the legal duty to act. The source of the duty to act is one of the most contentious issues in scholarship concerning omissions.[263] In the jurisprudence of the *ad hoc* tribunals, there is no consensus on where the legal duty is to be derived from. Some judgments require a duty mandated by a rule of

[262] Intent in terms of Article 30(2)(b).
[263] See e.g. Berster 2010; de Hemptinne 2019, 58-81; Duttwiler 2006.

criminal law[264] and some a '*legal duty*' in general.[265] In *Mrksic* the Appeals Chamber accepted the Trial Chamber's interpretation that the accused was criminally responsible for a breach of a duty imposed by the laws and customs of war.[266] As previously noted, the jurisprudence of the *ad hoc* tribunals is inconsistent. In defining the source of the legal duty, scholars have concluded that improper omission does not require a rule of criminal law as the basis of the legal duty. Even domestic administrative, disciplinary and private law obligations have been accepted.[267] Another often proposed basis for the legal duty are norms of international humanitarian law, especially concerning crimes committed during an armed conflict. As Roth concludes, transforming treaty obligations into legal bases for individual responsibility can be criticised for two reasons. Such norms do not impose obligations upon individuals, and they may not be specific enough for a basis of individual criminal responsibility.[268]

In terms of genocide and our hypothesis, arguments for the basis of the legal duty can be made. This thesis does not, however, discuss the national legislation of Russia or other countries since the purpose is to determine whether an Executive who is a national of a non-State Party could be held criminally liable for incitement to genocide by omission under international law and specifically under the Rome Statute. As discussed in the introduction to this chapter, the Executive is of Russian nationality. Russia is a party to the Genocide Convention.[269] According to the Genocide Convention, the Contracting Parties confirm that genocide is a crime under international law and they undertake to prevent and punish it.[270] However, the General Assembly has declared genocide an international crime entailing national and international responsibility on the part of both individuals and States.[271] This '*duality of responsibility*' was later confirmed by the International Court of Justice in its 2007 judgment on the application of the Genocide Convention in *Bosnia and Herzegovina v. Serbia and Montenegro*.[272] The ICJ in fact stated that although the wording of the Genocide Convention imposes obligations on individuals not to commit direct and public

[264] ICTR-99-46-T, [659]; IT-94-1-A, [188].
[265] IT-95-14-A, [663]; IT-98-29-A, [175].
[266] IT-95-13/1-A, [151]. See IT-95-13/1-T, [668-669].

[267] de Hemptinne 2019, 71-72.
[268] de Hemptinne 2019, 70-71.
[269] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357.
[270] Genocide Convention, Article 1.
[271] A/RES/180 (II).
[272] *Bosnia and Herzegovina v. Serbia and Montenegro*, [163], [173-174].

incitement to genocide, States Parties to the Convention are subject to such obligations as well.[273] The Genocide Convention further provides that persons committing genocide or direct and public incitement to genocide in terms of Article III(c) shall be punished even if they are private individuals.[274]

It can thus be argued that the Genocide Convention imposes the individual with obligations to not commit genocide or other genocidal acts and to refrain from, for example, incitement to violence. Are these obligations specific enough or adequate as such to serve as the source of legal duty? The ICTY has previously accepted the laws and customs of war as the basis for the legal duty to act[275], and these treaties not only specifically state that they also concern individuals, but also impose the state with the obligation to criminalize acts enumerated in the treaties. The failure of a Contracting State (in our hypothesis, Russia) to adopt such legislation or to prevent genocide cannot create a safe haven for hate speech and incitement to genocide in which its citizens are not to be held accountable for such acts. This would be against the purpose of the Rome Statute.[276] Furthermore, the prohibition of genocide is *jus cogens* and customary international law,[277] and it applies *erga omnes*.[278] To conclude, in the words of ICTR in the *Media* case, '*the power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences*.'[279]

Concerning incitement to genocide, treaty obligations appear to impose obligations on individuals. These obligations are arguably specific enough to constitute individual criminal liability. This applies not only to the example situation of this thesis but also to such executives in general. Although the arguments presented in this chapter presuppose that the nation of the perpetrator is a party to the Genocide Convention, the *jus cogens* status[280] of the prohibition of genocide could arguably extend the scope of individual criminal liability for incitement to genocide.

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[273] *Bosnia and Herzegovina v. Serbia and Montenegro*, [174].
[274] Genocide Convention, Articles III, IV.
[275] IT-95-13/1-A, [151]. See IT-95-13/1-T, [668-669].
[276] See ICCSt, preamble.
[277] *Bosnia and Herzegovina v. Serbia and Montenegro,* [161-162]; ICJ Advisory Opinion 1951; A/CN.4/SER.A/2001/Add.1 (Part 2), 112-113; Gaeta 2009, 36.
[278] *Bosnia and Herzegovina v. Serbia and Montenegro,* [165]; ICJ Advisory Opinion 1951, 23; *Preliminary Objections Judgment*, [31]; Gaeta 2009, 36.
[279] ICTR-99-52-T, [945].
[280] *Bosnia and Herzegovina v. Serbia and Montenegro,* [161-162]; ICJ Advisory Opinion 1951; A/CN.4/SER.A/2001/Add.1 (Part 2), 112-113; Gaeta 2009, 36.

The role of companies providing news and other content on the internet has been considered in the jurisprudence of ECtHR, which the Court has cited numerous times in different situations.[281] In *Delfi AS v. Estonia*, concerning a news portal's liability for comments posted on an article on their webpage, the ECtHR held that the news portal could be held liable for a failure to delete without delay the comments inciting violence.[282] The applicant company was a professional publisher which '*operated one of the largest news portals in Estonia*'[283]. The ECtHR noted that the website of the news portal highlighted the number of comments on each article. Therefore, the articles with the most traffic and discussion '*must have been easily identifiable for the editors of the news portal*'. The specific article received 185 comments, which is well above average. Nevertheless, the comments inciting violence were deleted six weeks after they had been published.[284] The news portal had an automatic system that filters out and deletes inappropriate comments. The system, however, failed to identify the comments on this specific article, causing them to stay online for six weeks. The ECtHR did not find the automatic system alone to be satisfactory and found that the news company should have taken more efficient measures to delete the comments.[285]

The ECtHR has stated in *Sürek v. Turkey* that a media owner should not be exonerated from criminal liability for the content of letters submitted by readers of the newspaper since, as the owner, he had the '*power to shape the editorial relationship with the review.*'[286] The issue of internet content providers' liability was discussed also by the CoE, which stated that editorial control can be evidenced by the actor's own policy decisions on the content made available or promoted and that different levels of editorial control go along with different levels of editorial responsibility.[287] In a similar manner, the ICTR stated in *Media* that criminal liability for incitement to genocide does not concern only the writer of a certain message or the host of a radio program but that it is foremost editors who have generally been held responsible for the media they control.[288] While citing the judgment of *Sürek v. Turkey*, the ICTR held that editors and media owners can be equally responsible for the

[281] Manley 2016, 196-197, 209.
[282] *Delfi AS v. Estonia*, [162].
[283] *Ibid*, [62].
[284] *Ibid*, [152].
[285] *Ibid*, [153-156].
[286] *Sürek v. Turkey*, [63].

[287] CM/Rec(2011)7, Appendix, [30, 32]. Cited by ECtHR in *Delfi AS v. Estonia*, [46].
[288] ICTR-99-52-T, [1001].

messages since they have the editorial powers mentioned above.[289] The ICTR also suggested that re-circulating inciting material could renew the act of incitement.[290]

While traditional newspaper media and social media platforms definitely work differently, a social media platform surely uses 'editorial powers' by monitoring the content of the platform. In social media, the content monitoring is not done by the CEO, and large companies such as Facebook use artificial intelligence to detect hate speech and other content that violates their policies.[291] Can it be then legitimately argued that the Executive had the ability to act? Would a CEO of a large social media company be aware of specific content on the Platform? A CEO most likely is not aware of every daily situation or issue. However, even if the Executive is not informed by the content monitors or other personnel in the company, the Executive could be warned about the situation by external agents such as human rights groups or other public officials.[292] For example, in the situation concerning Facebook in Myanmar, there have been multiple interventions by public actors such as the UN and the US Congress.[293] In addition, the ECtHR found in *Delfi AS v. Estonia* that an automatic filtering and deletion system may not be sufficient to exclude a company's liability if it *de facto* does not preclude the posting of unlawful comments.[294] The ECtHR did not require that the company factually knew the contents of the comments. It emphasized the fact that '*the articles with the most lively exchanges must have been easily identifiable for the editors of the news portal*'.[295]

Concerning both committing incitement to genocide by omission and aiding and abetting by omission, the requirement of 'had the ability to act' seems to pertain to whether the Executive was aware of the incitement or not. The issue of knowledge is heavily connected to all the other objective requirements of both commission by omission and aiding and abetting by omission as well as the *mens rea* requirement. As previously concluded in this chapter, an Executive of a social media company appears to be under a legal duty to prevent incitement to genocide under international law. It is also clear according to the discussion in this chapter that when the Executive becomes aware of the incitement to genocide, effective action must

[289] ICTR-99-52-T, [1003].
[290] ICTR-99-52-T, [103]; See Behrens & Henham 2013, p. 152-153.

[291] Kahn 2020.
[292] Hakim 2020, 112-113.
[293] See e.g. *Facebook in Myanmar* 2018; Stecklow 2018.
[294] *Delfi AS v. Estonia*, [156].
[295] *Delfi AS v. Estonia*, [152].

be taken to intervene with the incitement in order to avoid possible criminal liability. Even automatic algorithms can be found insufficient if they have *de facto* failed in deleting incitement. According to international jurisprudence, the company and its Executive are utilizing editorial powers by monitoring the content on their platform. By utilizing such powers, the Executive is risking individual criminal liability if other elements of omission are fulfilled as well.

The Court and the international community as a whole must be very careful to impose individual criminal liability on the Executives of social media companies. The requirement '*has the ability to act*' plays a significant part in assessing whether an Executive could be held criminally liable. Without the Executive's true knowledge, it should not be plausible to accuse him of criminal behavior. On the other hand, without social media, incitement to genocide and other hateful speech would not pose such a massive threat of criminal behavior. It can thus be argued that social media platforms and their executives must be held responsible for providing the means to such incitement and incendiary content.[296]

4.5. Conclusion

This chapter has concentrated on the individual criminal liability of a social media platform's owner for incitement to genocide taking place on said platform. In order to discuss the issue, a brief assessment was made on whether the Court has jurisdiction over omissions and whether Executives working on behalf of a company can be held liable under international law. The legal scholarship and international jurisprudence advocating for the individual criminal liability of an Executive is consistent. It is not, however, completely coherent concerning the Court's jurisdiction over omissions. An examination of the jurisprudence of the Court and the *ad hoc* tribunals led to the conclusion that the Court has jurisdiction over omissions under Article 25 of the Rome Statute.

In assessing the elements of commission by omission and aiding and abetting by omission, this thesis found that the elements of these two crimes differ. A list of elements proposed by a legal scholar claims to take into account relevant jurisprudence and legal scholarship. It is also argued to apply to *inter alia* both commission by omission and aiding and abetting by omission. The list as such was found to be an improved version of the one applied by the ICTR, but it does not appear to be applicable to both forms of liability. For this reason, an

[296] Chow 2019, 1303.

alternative application was constructed. Finally, this chapter argued that these constructions should be applied separately.

The constructions discussed in the chapter share the elements of '*there has to be a legal duty to act*' and '*had the ability to act*'. The chapter further discussed whether there is a legal duty directly under international law to prevent incitement to genocide from taking place on a social media platform. The discussion intersects also with the other shared element. In terms of the hypothesis of this thesis, the Genocide Convention appears to impose on the Executive, or any other individual, the obligation to refrain from incitement to genocide. Although there have been some arguments against international treaties as the source of the legal duty, this chapter argued that the before mentioned treaties can be used as the source of the legal duty. In addition, the jurisprudence of the *ad hoc* tribunals and the ICJ support this interpretation. An excursion to the jurisprudence of the ECtHR was also made concerning the liability of news companies. It can be concluded that a company providing news and other material both online and as a newspaper can be held liable for the comments or writings of third persons. In terms of the Executive of such a company, individual criminal liability appears to be heavily connected to the knowledge of the Executive. When the Executive becomes aware of the inciting material, the decisions they make can be seen as the utilization of editorial powers, which has been used to construe the individual criminal liability of media owners in international criminal jurisprudence.

5. Conclusions

As stated in the introduction to this thesis, the effective prosecution of direct and public incitement to genocide under the Rome Statute of the ICC is crucial. The crime has played a significant part in dehumanizing the targets of genocide throughout history, and as the events of World War II and the Rwandan genocide show, if such incitement is not stopped it may cause a snowball effect making the prevention of the gravest crimes known to mankind impossible. Through its tendency to dehumanize the target, incitement to genocide poses a threat like no other. Through social media, incitement to genocide has a global audience, and bit by bit it may begin to break moral boundaries and start an irreversible course of action. If such action is not intervened in, it may spiral out of control into a genocide in full effect. The international community is facing a turning point in the global effort never to let genocide take place again.

In light of the acceleration of hostilities in Myanmar and the role of Facebook in the discrimination and violence against the Rohingyas, this thesis set out to discuss the following legal questions: 1. what are the elements of direct and public incitement to genocide, and how have they been examined in international criminal jurisprudence, 2. what is the territorial jurisdiction of the Court in light of the recent rulings by the Court's PTCs and how can it be applied to incitement to genocide committed through the internet, and 3. can a social media platform's owner be considered responsible for incitement to genocide through omission or for aiding and abetting in the commission of incitement to genocide under the Rome Statute. As this thesis has shown, these legal questions are heavily interlinked with each other.

The research questions were approached with the help of an article written by Michail Vagias in 2016. The article, titled '*The Territorial Jurisdiction of the ICC for Core Crimes Committed Through the Internet*', discussed the territorial jurisdiction of the ICC for core crimes committed through the internet. The article claims to present the Court with possibilities for future situations. It is safe to say that the article has thus far survived the test of time, albeit the Court's PTCs have since ruled on the limits of the Court's territorial jurisdiction. The article and its approach can, however, be questioned for multiple reasons. It does not actually apply the possible approach presented by Vagias to the hypothetical situation and merely contents with stating that the Court should first focus on a detailed analysis of core crimes. This analysis should then be followed by an educated application of

territoriality principles. Albeit the examination of the legal framework of the Court's territorial jurisdiction over core crimes committed through the internet is important, the analysis of the article appears to be rather superficial. The underlying question and the hypothetical situation discussed in the article are nevertheless critical. The influence of Facebook in the international crimes committed in Myanmar is distinct as social media provides an easily accessible platform with a global outreach for the spreading of incitement to genocide and other hateful material.

As this thesis has shown, the elements of direct and public incitement to genocide under 25(3)(e) of the Rome Statute entail multiple unanswered questions. For this reason, this thesis began with gathering the relevant discussion concerning the crime. Although issues such as the inchoate nature of the crime may seem unproblematic to some scholars, it is a question of interpretation of the utmost importance to the Court since it entirely defines the further interpretation of the crime. In addition, when faced with a criminal charge for incitement to genocide but not genocide, a defendant could argue that the Court has no jurisdiction over incitement to genocide when an actual genocide has not taken place. Albeit the legal scholarship and jurisprudence of the *ad hoc* tribunals together with the *travaux préparatoires* of the Court support the conclusion that direct and public incitement to genocide in terms of the Rome Statute is an inchoate crime, the Court is yet to establish the issue, which makes the above-mentioned questions relevant. The Court can be expected to rule accordingly, and by doing so it would clarify the awkward outcome of the Rome negotiations that is Article 25.

The 'direct' and 'public' elements of incitement to genocide have been interpreted broadly and mostly coherently by the *ad hoc* tribunals, but international criminal jurisprudence has yet to consider the influence of the internet. The Court will face challenges in differentiating incitement to genocide from the growing mass of hate speech circulating online. What amounts to 'direct' incitement is not as straightforward as it may have been before since the audience's understanding of the message can be harder to prove. It is, however, significant to note that the ICTR required the incitement to have the potential to cause genocidal acts.[297] This notion, if accepted by the Court, is useful in examining messages on the internet that can potentially be deemed incitement to genocide: a message certainly cannot be incitement to genocide if it cannot be considered direct in any context.

[297] ICTR-99-52-A, [678], [1015]; ICTR-99-52-T, [1015].

Defining the 'public' element of incitement to genocide has been considered less demanding than defining the 'direct' element.[298] The internet and social media may, however, change this state of affairs. Social media and other internet platforms provide a vast platform for the circulation of incitement to genocide. Social media platforms have already been suggested to be public venues[299], but there are also different nuances to be considered. For example, how should the Court consider a closed Facebook group in which posts are visible only to members of the group? If not password protected, the group can be joined by simply searching the group and joining it. Is incitement to genocide posted on the group's Facebook-wall selective and limited even though the posts are *de facto* accessible to anyone joining the group? This is only one example of the questions that may arise and be a topic for a future scholarly article. The application of the elements of incitement to genocide to a situation taking place online poses the Court with major challenges. There has been no detailed analysis of the crime in the analogic world, and if the Court is to interpret the crime with the added element of cyberspace, there are many questions to answer.

Differing from the 'traditional examples' of incitement to genocide, the question of jurisdiction over the crime when it is committed in cyberspace is heavily interlinked with the *actus reus* of the crime. In order to prevent the impunity of the gravest crimes known to mankind, the Court must come up with novel interpretations concerning novel situations. The Statute does not provide for the Court's territorial jurisdiction over crimes committed in whole or in part online, but the Court would break its determination to end impunity[300] if it was to preclude the exercise of jurisdiction over such crimes. The Chambers of the Court have already established that the Court may exercise its jurisdiction as long as a part of the *actus reus* of the crime occurred in State Party territory.[301] As Vagias proposes, the Court should break down the crime into its constituent parts and localise the cyber-commission of incitement to genocide in whole or in part within the territory of a State Party in order to establish jurisdiction.[302] However, in order not to exceed the limits of customary international law, the Court should assess the targeted audience of the incitement and establish jurisdiction only if the incitement is direct in terms of Article 25(3)(e) of the Statute in a State Party, and thus capable of causing genocidal acts in a State Party.

[298] See 2.2.2; Behrens & Henham 2013, 154.
[299] Burkell et al. 2014, 982.
[300] In terms of the Preamble in ICCSt.
[301] ICC-01/19-27, [54-61].
[302] See Vagias 2016.

As the example of Facebook's role in Myanmar shows, social media provides a platform for incitement to genocide. In addition to the jurisdictional issues that stem from the global outreach of social media, its use as a platform for incitement to genocide has proven to bear drastic consequences in the real world. As this thesis has established, the Court has jurisdiction over proper and improper omissions although it is not explicitly stated in the Statute. In addition, Executives working on behalf of a company can be held individually criminally liable under international law. If the material on social media platforms is not monitored and the inciting material detected and deleted, the Executives of social media platforms may risk individual criminal responsibility. By not acting in a sufficient manner, the Executive would be held liable for either incitement to genocide by omission or aiding and abetting in incitement to genocide by omission. Thus, under the Rome Statute, the criminal liability would fall under the Article 25(3)(c) or 25(3)(e), depending on the gravity of the omission of the Executive. The possibility of convicting an owner and/or CEO of a social media corporation, such as Facebook, for incitement to genocide may sound farfetched.[303] However, by establishing the required elements for commission by omission and aiding and abetting by omission according to what this thesis has argued, the Court would tackle the issue consistently with the Rome Statute and international criminal jurisprudence.

Furthermore, this thesis found that such an Executive can be argued to be under the legal duty to prevent incitement to genocide from taking place directly under international law. This legal duty arises from the Genocide Convention which, according to the ICJ, imposes obligations on both individuals and states not to commit direct and public incitement to genocide.[304] In addition, the General Assembly has declared genocide an international crime entailing national and international responsibility on the part of both individuals and States.[305] Thus, even if the contracting state has failed in its duty to criminalise incitement to genocide, directly under international law, an individual could be under the legal duty to not commit incitement to genocide and, in fact, be under the legal duty to prevent it.

As indicated by the emergence of instruments such as the Council of Europe's Budapest Convention on Cybercrime, the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations and relevant European Union regulation, the importance of addressing the

[303] For example, the role and problems of Facebook in Myanmar was only a minor issue in Zuckerberg's congressional testimony in 2018. See Stecklow 2018.
[304] *Bosnia and Herzegovina v. Serbia and Montenegro*, [163], [173-174].
[305] A/RES/180 (II).

questions arising from modern technologies and the internet is acknowledged within the international community. The fact that the Rome Statute does not take into account the possibility of committing core crimes through cyberspace is unfortunate and the result of a compromise reached in the Rome negotiations. On account of this, international legal scholarship must do its part in examining these questions and thus provide the Court with assistance in interpreting the core crimes in relation to cyberspace.

This thesis has discussed the cyber-commission of direct and public incitement to genocide under the Rome Statute and the Court's jurisdiction over the crime when the perpetrator is a national of a Non-party State and is physically located in such a State. In addition, this thesis discussed the possibility of holding an Executive of a social media platform criminally liable for incitement to genocide taking place on the platform. Although this thesis made significant findings concerning these research questions, the complexity of the legal issues discussed in especially chapters 3 and 4 made it possible to only scratch the surface. This thesis has provided a starting point for further examination of the applicability of the Rome Statute to commission of core crimes through the internet. A future study could, for example, investigate in more detail under what circumstances an omission of an online media company to detect and delete incitement to genocide from its platform could amount to individual criminal responsibility under the Rome Statute. Such a study would further examine the complex issues discussed in chapter 4, together with relevant jurisdictional issues.