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Three Potential Problems of Establishing Corporate Facilitation under the Rome Statute of the International Criminal Court

Abstract: This paper deals with potential complicity of corporate officials for facilitating gross international humanitarian and human rights law violations through their knowing assistance and encouragement. In particular, it focuses on the suitable test for determining complicity of relevant individuals within the corporate structure by utilizing Article 25(3)(c) of the Rome Statute of the International Criminal Court (ICC). This paper identifies three key issues relevant for examining corporate facilitation in light of this provision: profit-seeking motive, the existence of prior state approval, and a 'mixed' nature of assistance whereby supplies are directed towards criminal and legitimate aims alike.

Key words: corporate complicity; individual criminal responsibility; knowing assistance; Rome Statute of the ICC.

I. Introduction

The shifting nature of a global landscape ensures that the question of corporate complicity is gradually coming to the forefront of academic and policy-oriented discussions. There are a number of trends both in the legal sector and at the level of society that attest to the increasing demand for holding executive corporate officials accountable for the harms to which their respective enterprises contributed. Sociologically speaking, proliferation of online platforms allows for activism transcending state borders. It is no longer possible to

avoid enlightenment around certain themes such as the impact of corporate sector on climate change, resource exploitation in mineral rich areas of the world and human rights abuses resulting from profit-seeking activities of multinational companies.

One recent example of this enhanced focus on corporate complicity is the case of *Nestlé USA, Inc. v. Doe I* and *Cargill Inc. v. Doe I* argued before the US Supreme Court in December 2020.[1] The plaintiffs in this case are former child slaves trafficked from Mali and forced to work on cocoa plantations in Côte d'Ivoire. The plaintiffs argued that both Nestlé and Cargill – while being headquartered in the US - exert extensive control over cocoa plantations due to their dominant market position.[2] In addition to that, the plaintiffs argued that these companies provide the plantations with financial and technical assistance in order to benefit from cheap labour costs. This was done with the knowledge of plantations' reliance on child slavery.[3] The case is argued under the US Alien Tort Statute (ATS), which allows non-US citizens to claim damages in the US courts in some instances.[4] Despite some relatively recent developments limiting the application of this law exterritorialy, the position is not fully conclusive.[5] Thus, the questions to be resolved by the US Supreme Court in its expected ruling in June 2021 are (i) whether the judiciary has the authority to impose liability on corporations under the ATS and (ii) whether it is possible to bring an aiding and abetting claim under the ATS against a domestic corporation conducting general corporate activity in the US but having a weak or disputed link between such activity and the alleged harms that occurred abroad at the hands of unidentified actors.[6]

Another instance of engaging with corporate complicity at an international level is the communication to the International Criminal Court (ICC) filed by in late 2019 by a group of NGOs: the European Center for Constitutional and Human Rights (ECCHR),[7] Mwatana (Yemen),[8] Rete Disarmo (Italy),[9] Centre Delàs (Spain),[10] the Campaign Against Arms Trade

[1] For an overview see C. Moxley, 'Nestlé & Cargill v. Doe Series: Corporate Liability, Child Slavery, and the Chocolate Industry – A Preview of the Case', Just Security, 16 November 2020, available at https://www.justsecurity.org/73387/nestle-cargill-v-doe-series-corporate-liability-child-slavery-and-the-chocolate-industry-a-preview-of-the-case/, last accessed 27 December 2020.
[2] Ibid.
[3] Ibid, see also 9th U.S. Circuit Court of Appeals allowing the claims in *Nestlé USA, Inc. v. Doe I*, 9th Cir. Order and Amended Opinion, 23 October 2018, available at http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/05/17-55435.pdf, last accessed 27 December 2020.
[4] 28 U.S.C. § 1350.
[5] *Kiobel v Royal Dutch Petroleum* 2013 WL 1628935; *Morrison v National Australia Bank Ltd* 561 US 2010.
[6] *Nestlé USA, Inc. v. Doe I* Information sheet, available at https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/, last accessed 27 December 2020.
[7] https://www.ecchr.eu
[8] https://mwatana.org/en/

(UK)[11] and Amnesty International Secretariat[12] ('ECCHR Communication').[13] The ECCHR Communication alleges complicity of several European arms suppliers in war crimes committed by the United Arab Emirates/Saudi-led coalition. More specifically, the communication points out that fighter jets and other military equipment supplied by companies located on the territory of Germany, Italy, Spain, the UK and France were used in indiscriminate attacks against civilian objects since March 2015 which may have violated Articles 8(2)(c)(i), and 8(2)(e)(i), (ii), (iii), and (iv) of the Rome Statute of the ICC.[14] The ECCHR Communication to the ICC invokes the test for complicity under Articles 25(3)(c) with respect to corporate facilitation.[15] It alleges that corporate officials in Spain, Italy, France, Germany and the United Kingdom (signatories of the Rome Treaty of the ICC and the Arms Trade Treaty, or the 'ATT') are potentially complicit in these crimes committed in Yemen for knowingly and purposefully supplying weapons to the UAE/Saudi-led coalition.[16]

Finally, another significant avenue for developing the law on responsibility of corporate officials for complicity in gross human rights and humanitarian law violations is the evolution of the so-called 'soft law' on the matter. It is important to note that soft law is not binding under international law *stricto sensu*. That being said, it can provide for an important accountability mechanism by creating a yardstick for acceptable and non-acceptable conduct. It also serves as a basis for the development of hard law. The UN Guiding Principles on

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[9] https://www.disarmo.org
[10] http://www.centredelas.org/ca/
[11] https://caat.org.uk
[12] https://www.amnesty.org/en/who-we-are/
[13] Communication is not yet publicly available. For more information see https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/#case_case
[14] Article 8(2)(c)(i): 'Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'; Article 8(2)(e)(i): 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'; Article 8(2)(e)(ii): Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; Article 8(2)(e)(iii): 'Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'; Article 8(2)(e)(iv): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.'
[15] *See* ECCHR Website, https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/, last accessed 15 November 2020; *see also* Marina Aksenova and Linde Bryk, *Extraterritorial Obligations of Arms Exporting Corporations: New Communication to the ICC*, OPINIO JURIS (Jan. 14 2020). http://opiniojuris.org/2020/01/14/extraterritorial-obligations-of-arms-exporting-corporations-new-communication-to-the-icc/, last accessed 15 November 2020.
[16] Arms Trade Treaty, New York, 24 December 2014, United Nations Treaty Series, vol. 3013, No. 52373. https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf

Business and Human Rights adopted in 2012 (UNGPs) is an example of such soft law. They instruct corporations to avoid, prevent, and mitigate adverse human rights impacts that are directly linked to their business activities, and in that respect conduct human rights due diligence.[17]

Despite their non-binding nature, the UNGPs create a foundation for the increased recognition of corporate due diligence obligations in the area of human rights incumbent on companies. Moreover, the UNGPs also recognize that states have discretion to enact legislation with extraterritorial reach to rein in their corporations. The draft treaty on the human rights obligations of transnational corporations, currently elaborated by a Working Group of the Human Rights Council is a testament in this regard.[18] The Working Group is preparing a treaty that will translate some aspects of the UNGPs into hard law directed at states by prompting them to enact domestic legislation to ensure compliance of corporations with human rights law. It must be noted, however, that the treaty, as it stands now, will address states and is not likely to impose direct obligations on corporations. Thus, even if a treaty is enacted, the UNGPs will continue to ensure that companies, at the very least, risk high reputational costs for violating due diligence obligations in the area of human rights and international law.

Despite these developments, however, prosecutions let alone convictions of individuals acting out of their corporate capacity or corporations as such, for their potential complicity in international crimes, are rare even at the domestic level.[19] One field of law that can provide for some tools and inspiration in the area of corporate accountability is international criminal law. This field of law held a clear impetus towards holding corporate officials to account at the beginning of its evolution: a number of well-cited post-world War II cases evidenced the first attempts of international community to attribute criminal responsibility to individual industrialists knowingly engaged in the production of poisonous gas used to kill people in gas

[17] Office of the High Commissioner of Human Rights. (2012). *'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide'* HR/PUB/12/02, available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, last accessed 24 December 2020.

[18] Human Rights Commission. (2019). *'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Cooperation and other Business Enterprises', available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf, last accessed 24 December 2020.

[19] Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies, A report prepared for the Office of the UN High Commissioner for Human Rights Dr. Jennifer Zerk, 22 July 2013, available at https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, last accessed 1 November 2020, p. 92.

chambers or deploying forced labour in its enterprises.[20] There have been relatively few examples of prosecuting corporate officials in international criminal courts ever since. A notable exception is the trial of Alfred Musema – a tea plantation owner in Rwanda convicted by the International Criminal Tribunal for Rwanda for genocide and for extermination as a crime against humanity.[21] That being said, international criminal law appears to be an effective tool for holding corporate officials to account in present day circumstances.

This paper explores the possibility of transferring traditional criminal law concept of complicity to the sphere of corporate responsibility using the general framework of international criminal law and a more specific frame of the Rome Statute of the ICC. Complicity is a way in which someone engages in a prohibited conduct by knowingly contributing to a direct perpetrator.[22] This kind of engagement is very common for corporate entities, which through their activities, may facilitate gross human rights and humanitarian law violations. The field of international criminal justice has a lot to offer in this regard as it holds a richly developed body of law regulating modes of liability. In particular, there is a clear understanding of the specific requirements of the secondary modes of liability such as complicity. Discerning these requirements for the purpose of applying them to the actions of corporate officials presents three distinct challenges examined in this paper.

Firstly, companies rarely seek to cause harm rather their motivation is to extract profit or, at the very least, to avoid losses. This peculiarity bears on determining *mens rea* – or the culpable state of mind – of potential accomplices. Secondly, corporations frequently operate under a certain degree of authorization by states – both the state hosting the company's headquarters and the state receiving its activities, - thereby allowing for an overreliance by corporate officials on due diligence conducted by the relevant governmental agencies granting licenses and allowing company's operations. Finally, the nature of assistance is usually of a 'mixed' character, namely directed towards both lawful and unlawful activities. The former includes company's day-to-day operations in the countries affected by the gross human rights violations.

[20] Judgment, *Trial of Bruno Tesch and Two Others*, British Military Court, 1 8 March 1946, in LRTWC,Vol. I (1947), at 93 – 103; The *IG Farben* and *Krupp* Trials, United States Military Tribunal, 14 August 1947 29 July 1948 and 17 November 1947 30 June 1948, in Law Reports of the Trials of War Criminals (LRTWC), Vol. X (1949), at 72 – 85.
[21] *Prosecutor v. Musema,* Case No. ICTR-96-13-A, Appeals Judgment (Nov. 16, 2001).
[22] See eg. *Prosecutor v Furundžija*, ICTY Case No IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 246.

The following section of the paper outlines the nature of complicity and defines its legal parameters in the sphere of international criminal law. Section three then ponders the question as to whether the test for complicity accepted in international criminal law is applicable to the acts of assistance rendered by corporate officials. Finally, some conclusions are drawn at the end.

II. The limitations of corporate complicity in modern ICL

This subsection is dedicated to clarifying the meaning and contours of the concept of complicity of corporate officials discussed in this paper.

It needs to be stated upfront that international criminal law, as a general rule, does not recognize responsibility of legal persons. It is thus impossible to prosecute corporate entities in the field of international criminal law, which has developed in a peculiar fashion when it comes to the issue at hand. While it is true that a number of domestic jurisdictions – such as, for instance, Australia, Canada, Netherlands, United Kingdom, United States, South Africa and Norway – recognize corporate criminal responsibility,[23] international criminal law continued developing along individual responsibility track ever since the initial industrialists' trials. The statutes of the ad hoc tribunals did not contain provisions on corporate responsibility. The drafting of the Rome Statute of the ICC included discussions related to criminal responsibility of corporations. The French delegation suggested including criminal responsibility of corporations into the statute, but its proposal was rejected at a final conference that drew up the document.[24] It is therefore clear that the reference to 'persons' in Article 1 of the Rome Statute, which proclaims the establishment of the Court vested with 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern', refers solely to natural persons.[25]

Therefore, the Rome Statute of the ICC only contains provisions on modes of liability applicable to individuals. Two elaborate provisions – Articles 25 and 28 – provide for a number of legal tools to attach responsibility to natural persons, including those acting on behalf of corporations. There is, however, one regional instrument that allows for corporate

[23] Zerk, supra note X, p. 32.
[24] Proposal submitted by France, UN Doc. A/AC.249/1998/DP.14.
[25] UN DOC A/CONF.183/C.1/SR.1, para. 10, paras. 46 and 95, 101, 106. See also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn) (Oxford University Press, 2016), p. 63.

criminal responsibility: the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 27 June 2014 and now open for ratifications explicitly extends its jurisdiction to legal persons in Article 46(C).[26] One can speculate that relatively recent inclusion of the provision on corporate criminal responsibility in the Malabo Protocol attests to the future possibility of prosecution of the corporate entities within the field of international criminal justice in general.

Article 25(3) of the Rome Statute contains a list of participation forms, including subparagraph (b) ordering, soliciting or inducing; subparagraph (c) aiding, abetting or otherwise assisting in commission of a crime for the purpose of its facilitation; and subparagraph (d) contributing to a group acting with a common purpose.[27] All of these modalities are forms of complicity.[28] One may define complicity as a doctrine that attributes criminal responsibility to certain individuals who do not physically perpetrate the crime.[29] Thus, the essential *function* of this legal notion is to construct a link between the accomplice and the criminal act of another person.[30] This legal tool is indispensable because it is often the case that the harm occurs due to a concerted action of a number of parties with varying degrees of spatial and temporal proximity to the ensuing result. Some of the actors are involved in a direct way by perpetrating the crime, while others are contributing by virtue of providing culpable assistance or encouragement to the direct perpetrator.

The nature of assistance varies, making 'complicity' an umbrella term encompassing such actions as aiding and abetting, instigating, ordering, facilitating, soliciting, inducing and a number of other ways of possible engagement. Different domestic jurisdictions provide for a unique terminological landscape with respect to several forms of complicity, while always retaining the functional core of the concept.[31] It is due to its operative significance that complicity or its linguistic equivalents can be found in a variety of domestic jurisdictions

[26] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014 ('Malabo Protocol'), available at https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, last accessed 24 December 2020. See also E. Van Sliedregt, E. 'Regional Criminal Justice, Corporate Criminal Liability and the Need for Non-Doctrinal Research' in Aksenova et al (eds) Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law (Hart, 2019), pp. 219 et sq.
[27] Article 25(3) of the Rome Statute of the ICC.
[28] M. Aksenova, *Complicity in International Criminal Law* (Hart, 2016), pp. 133 et sq.
[29] Ibid p. 1.
[30] Ibid, pp. 1, 9; K Zweigert and H Koetz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon, 1998), p. 33.
[31] Aksenova, *supra* note 19, pp. 8 et. sq.

across the world and in international law.[32] The Rome Statute of the ICC is no exception in this regard.[33]

The discussion in the subsequent part of the paper will focus on one specific form of complicity enshrined in Article 25(3)(c) of the Rome Statute, which provides that

> "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person …[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[34]

This definition calls for the proof of three elements, namely the existence of some effect of a contribution on a crime (*actus reus*);[35] general awareness about the crimes committed by the principal (*mens rea* 1);[36] and purposive contribution to the crimes (*mens rea* 2).[37]

III. *Sui generis* test for corporate complicity?

a. Is motive relevant?

As mentioned above, the fault requirement (which is another name for *mens rea*) under Article 25(3)(c) is twofold. If we take the example of European supplies of weapons to the UAE/Saudi led coalition, it is possible to say that the general awareness element of *mens rea* can be demonstrated by showing some level of awareness of war crimes committed in Yemen and a purpose to facilitate these crimes. Practically speaking, the first element of general awareness is less problematic in light of a plethora of existing publicly available documents relating to the conflict. One may rightfully raise a question regarding the specificity of knowledge: do corporate officials need to know the exact war crime to be committed using their supplied equipment or is general awareness sufficient in this respect? The *Furundžija* Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in this regard that awareness of one of a number of crimes that will probably be committed is sufficient.[38] The general test of specificity of accessorial knowledge is therefore whether the

[32] Ibid, p. 47.
[33] Ibid, p. 137.
[34] Article 25(3)(c) of the Rome Statute of the ICC.
[35] Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, 19 October 2016 ('*Bemba et al. Judgment'),* paras. 93-94.
[36] Ibid. para. 97.
[37] Ibid.
[38] *Prosecutor v Furundžija*, ICTY Case No IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 246.

offence committed was within the contemplated range of offences. A concept of 'willful blindness' developed in *US vs Campbell* may also be helpful in approaching the first element of the fault requirement under Article 25(3)(c) to show awareness of the crimes for corporate officials in light of publicly available information.[39] The US Courts of Appeals 4th in *Campbell* referred to the situation in which 'a defendant deliberately closed her eyes to what would otherwise have been obvious to her. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.' Knowledge was therefore established by inference.[40]

The second element of the fault requirement, namely 'purpose to contribute' is arguably more difficult to prove with respect to the actions of corporate officials. Article 25(3)(c) of the Rome Statute definition of complicity calls for a 'purposeful contribution' and it differs from the test developed by the ad hoc tribunals requiring that the aider and abettor simply "knew (in the sense he was aware) that his own acts assisted the commission of the specific crime in question by the principal offender". [41] The wording of 'purposeful contribution' appears to have been borrowed by the Rome Statute drafters from Article 2.06(3) of the US Model Penal Code (MPC) demanding that an accomplice aids "with the purpose of facilitating the perpetrator's conduct." Interestingly, the MPC does not set out the standard for a minimal contribution to the crime implying that even a marginal contribution can qualify as complicity provided the 'purpose' requirement is met. This peculiarity balances out the conduct requirement (the effect of the assistance) and the enhanced fault requirement. It seems as if the early ICC case law on the matter follows the same balancing exercise between a lower conduct threshold and a higher threshold for the mental element.[42]

While it is true that shared intent is not needed as per *Bemba et al.* clarification by the ICC Trial Chamber,[43] it can still be evidentially challenging to prove a 'conscious choice' to contribute to the crime as opposed to just having mere awareness that one's contribution helps in some way.[44] It is important to note that 'purpose' requirement does not demand that facilitation of the crime needs to be the *sole* purpose of the actor; it is therefore possible that

[39] *U.S. v. Campbell*, 977 F.2d 854, available at https://www.casemine.com/judgement/us/5914bee7add7b049347aafe8, last accessed 15 November 2020.
[40] Ibid.
[41] *Prosecutor v. Mitar Vasiljevic*, Trial Judgment, 2002, para.71.
[42] *Bemba et al*. Judgment, para 93.
[43] Ibid, para. 97.
[44] the US Model Penal Code defines 'intention' as 'conscious choice'. See G. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998), p. 125.

an accomplice acts out of financial interests as their primary purpose. Seeking financial gain for corporations (as a motive or as an alternative purpose) can then factually attest to the existence of a mental state in which the actor voluntarily and consciously chooses to contribute. Not only there is awareness of the crimes - as is usually the case with corporations knowingly continuing their operations despite all the available information relating to gross human rights or humanitarian law violations - there is also usually a motive to seek financial gain, which is practically translated into the renewal of contracts with the parties on the ground that continue to be actively engaged in the conduct resulting in criminality. While the motive is generally irrelevant for the purposes of establishing *mens rea* in criminal law,[45] the specific case of corporate facilitation done with the aim of extracting financial gain or avoiding losses may lead to an obscuration of the general fault requirement for complicity. It is thus necessary to distinguish the two concepts and see how the motive may serve to support the existence of purpose to contribute.

b. State authorization or approval

Another challenging element of proving *mens rea* for purposeful facilitation under Article 25(3)(c) is the existence of prior state approval by virtue of various kinds of authorizations. There are many areas of commercial activity that demand state assent in some form. For instance, weapons trade is a highly regulated area of business pursuit, which requires the existence of licenses granting certain company the right to export military equipment. What are the rules for granting such licenses? Take, for instance, states mentioned in the ECCHR Communication as the 'hosts' of companies supplying weapons to the UAE/Saudi-led coalition – France, Italy, Spain, Germany and the UK. All of these states are all bound by international and regional agreements in the area of arms trade. These instruments give some indications with respect to the procedure of granting licenses to export weapons. It is instructive for the purposes of this paper to investigate some conditions for granting of such licenses by states as these conditions will eventually bear on the question of culpability of corporate officials acting on the basis of these authorisations.

The first significant document setting out these criteria is the Arms Trade Treaty (ATT) that came into force on 24 December 2014. At the moment of writing, 109 states ratified the

[45] S. Eldar, E. Laist, 'The Irrelevance of Motive and the Rule of Law', *New Criminal Law Review* 1 August 2017; 20 (3), 433–464,

treaty and 31 states signed but have not yet ratified it.[46] The ATT is the main legal document regulating international arms trade at a state level. It is the first comprehensive treaty addressing this issue of global concern. The ATT was initiated in 2006 by the UN General Assembly Resolution that recognized that the absence of common international standards for the transfer of conventional arms contributes to armed conflict, the displacement of people, crime and terrorism. This regulatory gap, in turn, undermined peace, reconciliation, safety, security, stability and sustainable social and economic development.[47] Identifying this pressing problem prompted the UN General Assembly to start the process of examining the feasibility of a thematical treaty. The process resulted in the adoption of the ATT on 2 April 2013.[48]

The main aspiration of the ATT as stipulated in Article 1 is to establish the highest possible common international standards for regulating international trade in conventional arms, which include combat aircrafts, missiles, large-caliber artillery systems, warships and other items.[49] There is also a subtler underlying rationale for the treaty, namely, to prevent the arms from falling into the 'wrong hands' and thereby to reduce human suffering. The ATT aims to accomplish the overarching goal of establishing a high standard for regulating arms trade by requiring exporting countries to carry out a thorough and comprehensive risk assessment before engaging in such activity. This evaluation procedure includes examining the risk of human rights violations in the country of destination,[50] the risk of diversion of the exported arms,[51] and the possible adverse impact on internal and regional stability.[52] In addition to that, and for the sake of transparency, the countries are obliged to report their arms exports and imports annually.[53]

Article 6 of the ATT deals specifically with authorizations of conventional arms transfers by the state. It captures a variety of possible scenarios, including a ban on authorizing transfers that would violate measures adopted by the UN Security Council under Chapter VII of the

[46] Information available at the official website of the ATT: https://thearmstradetreaty.org, last accessed 15 November 2020.
[47] UN Doc. A/RES/61/89, 6 December 2006.
[48] The UN General Assembly adopted the ATT on 2 April 2013 by 154 votes to 3, with 23 abstentions. See UN Doc. A/RES/67/234B, 11 June 2013.
[49] Article 2 ATT.
[50] Article 7 ATT.
[51] Article 11 ATT.
[52] Article 11(2) ATT.
[53] Article 13 ATT.

Charter of the United Nations, specifically arms embargoes.[54] The arms embargo has indeed been instated with respect to the situation in Yemen, however it only concerns transfers of weapons to the Houthi rebel groups but not the UAE/Saudi-led coalition.[55] The same article also prohibits supplies of arms in cases when such action 'would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.'[56] This norm appears to be more generic in its attempt to cover any activity that falls short of the obligations arising out of the ATT and other instruments relating to arms control, such as, for instance, Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention.[57]

Clause 3 of Article 6 of the ATT refers more specifically to the situation at hand: the ATT implies certain level of compliance with the norms of international humanitarian law as it provides in this provision that a State Party shall not authorize any transfer of conventional arms:

> '(…) if it has knowledge at the time of authorization that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Convention of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party'.

It is therefore mandatory in this situation to refuse to grant a license. It is noteworthy that Article 6(3) refers to express knowledge existing at the time of granting of the license that weapons would be used to commit crimes. The earlier draft of the same provision prohibited granting licenses 'for the purpose' of facilitating the commission of international crimes. This initial phrasing presumed an even higher threshold of *mens rea* for the supplying state. The original text was later updated to refer to 'knowledge' rather than 'purpose' due to the difficulty of demonstrating that a state supplies weapons intending the commission of international crimes.[58] Arguably, the same problem is posed by the requirement of 'purpose' contained in Article 25(3)(c) of the Rome Statute as it applies to the actions of corporate officials.

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[54] Article 6(1) ATT.
[55] UN Security Council Resolution 2216 (2015) (2006).
[56] Article 6(2) ATT.
[57] See Art. 2(1)(b) of the Council Common Position 2008/944/CFSP of 8 December 2008 stipulating an obligation to the same effect but listing specific treaties that may be subject to violations.
[58] S. Casey-Maslen et al (eds) *The Arms Trade Treaty: A Commentary* (Oxford University Press 2016), at 6.12-4.

Nonetheless, even the knowledge requirement that was ultimately adopted in the text of Article 6(3) is rather tricky when it comes to factual evidence - the degree and specificity of such knowledge remains to be defined on a case-by-case basis. One practical pitfall of such generalized definition of knowledge under Article 6(3) is that arms export licenses usually cover a range of products to be delivered over a course of months or even years. It may so happen that the recipient state can plausibly demonstrate that these supplies are to be used to pursue legitimate aims, such as enhancing state security. At the same time, it is possible that a certain portion of delivered weapons and ammunition would eventually be diverted to the commission of war crimes, crimes against humanity or genocide. Such a scenario poses a question regarding the degree of scrutiny and vigilance to be exercised by the granting authorities of the ATT State Party. A separate question is whether corporate officials are under an obligation to conduct an independent and case specific due diligence test with respect to each delivery even in the presence of a license authorizing supplies in general. The UN Guidelines for Business and Human Rights impose an obligation on business enterprises should carry out human rights due diligence.[59] The binding nature of these principles remains open to debate, however.[60]

The ATT provides for an additional safety net when it comes to the requisite knowledge of the granting State Party. Even if the authorities of the supplying state do not meet the standard for awareness described in Article 6(3), then they are still obligated under Article 7 ATT to assess the *potential* that the conventional arms could be used to commit or facilitate serious violation of international humanitarian law.[61] If, after conducting such an assessment and considering available mitigating measures, the exporting state party determines that there is an overriding risk of such consequences the exporting state party shall not authorize the export.[62] The ATT therefore requires quite a high level of inspection when it comes to authorizing weapons' exports as it includes both the knowledge of the actual crimes committed with the said weapons as well as the *risk* of their commission.

[59] Human Rights Council (HRC), *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 21 March 2011, Annex, available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf, para. 17, last accessed 15 November 2020.
[60] See for an extended discussion P. Thielbörger and T. Ackermann 'A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop', 24 *Ind. J. Global Legal Stud*. 43 (2017).
[61] Art. 7(1) ATT.
[62] Art. 7(3) ATT.

Prior to the entry into force of the ATT, the regulation of arms trade has been patchy. Among the key regional documents of binding nature are the 2008 European Union (EU) Council Common Position on arms export controls (EU Council Common Position)[63], which binds all five states under examination in the ECCHR Communication. The EU Council Common Position contains obligations similar to those enshrined in the ATT in that it requires the EU member states to assess the recipient country's attitude towards relevant principles established by instruments of international humanitarian law and deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.[64] Despite the similarity between the ATT and the EU Council Common Position, the latter document arguably contains an obligation of an even higher level of scrutiny of potential risks arising out of arms supplies as compared to the former in that the EU Council Common Position requires the risk of serious violations of international humanitarian law to be 'clear'. In contrast, the ATT uses the term 'overriding', which may point towards an enhanced level of the burden of proof in a latter document.[65]

Lastly, it should be mentioned that each member state referred to in the ECCHR Communication to the ICC adopted their own domestic rules for arms exports as framed by the obligations stemming from the EU Council Common Position and the ATT. These rules identify the specific competent authorities in each country are responsible for granting or rejecting arms export licenses and what additional conditions may apply beyond the common rules of the ATT and the EU Common Position. National implementation of international regulations of arms trade gave rise to significant differences among domestic licensing practices of the EU Member States.[66] Such disparity becomes especially apparent in relation to European arms exports to members of the UAE/Saudi-led coalition involved in the conflict in Yemen.[67] Diverse regulatory landscape - both at an international and national levels - results in fragmentation that in turn allows the governments excessive flexibility in complying with the rule prohibiting authorization of arms exports where there is a risk of

[63] Council Common Position 2008/944/CFSP of 8 December 2008, defining common rules governing the control of exports of military technology and equipment.
[64]Art. 2(2)(c) of the Council Common Position 2008/944/CFSP of 8 December 2008, defining common rules governing the control of exports of military technology and equipment.
[65] Ibid. *Cf.* Art. 7(3) ATT.
[66] C. Schliemann and L. Bryk, Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform, *Friedrich-Ebert Stiftung Study*, November 2019, http://library.fes.de/pdf-files/iez/15850.pdf, last accessed 15 November 2020.
[67] Ibid, p. 7.

their subsequent use for violations of international human rights or humanitarian law.[68] This regulatory divergence inevitably trickles down to the level of corporations supplying weapons to warring parties as it muddles the standard of responsibility both at the level of states and at the level of corporations.

One can conclude that the existence of a license granted by the state does not preclude the need to conduct corporate due diligence evaluation. The ATT provides for general guidelines on risk assessment by statates and the these guidance will be further clarified by the subsequent practice in applying the treaty. Yet the mere fact that a license has been granted by the state does not appear to create a blanket approval for the conduct of corporations in possession of such a license. Corporate supplies will raise questions of the specificity of knowledge and the direction of aid in each individual case of weapons' deliveries.

c. Direction of assistance

The final difficulty in applying the general test for complicity under Article 25(3)(c) of the Rome Statute is the 'mixed' nature of assistance provided by the corporation. How does one determine that the contribution was specifically directed towards gross human rights and humanitarian law violations?

Take, for instance, Nestle's potential contribution to forced child labour by permitting its subcontractors in Cote d'Ivoire to use children to work on plantations. The question of a weak or non-existent link between the alleged harms occurring abroad and general corporate activity in the US goes to the heart of one of the issues to be considered by the US Supreme Court in this case.[69] The question of the direction of aid is also relevant for the supplies of weapons to the UAE/Saudi-led coalition. If they were administered primarily to meet legitimate objectives and only a small fraction of the military equipment ended up being used in air raids in Yemen resulting in the loss of civilian life, is it plausible to argue that provided assistance had any effect on the perpetration of the specific crimes? This question has been explored to some extent in the context of the 'specific direction' discussion found in the ICTY jurisprudence.[70]

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[68] Ibid.

[69] *Nestlé USA, Inc. v. Doe I* Information sheet, available at https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/, last accessed 27 December 2020.

[70] See for an extended discussion, M. Aksenova, 'The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law', *Cambridge Journal of International and Comparative Law*, Vol. 4, issue 1 (2015), 88-107.

The ICTY's deep engagement with the issue of the direction of the supplied aid started with unexpected acquittals of defendants in the *Perišić*, *Stanišić*, and *Simatović* cases on the grounds of a lack of specific direction in their assistance towards specific offences.[71] More concretely, the ad hoc tribunal found that the traditional test—the provision of aid with the awareness that it would have a substantial effect on the crimes committed in the context of war - was insufficient to create individual criminal responsibility in situations where the accused's individual assistance was remote from the actions of principal perpetrators or when such assistance could have been used for both lawful and unlawful activities.[72] In these cases, the Chamber reasoned, the conduct element of aiding and abetting needs to be interpreted more restrictively so as to only refer to acts specifically directed towards criminality as opposed to the general war effort. It is thus necessary to establish 'a *direct link* between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators.'[73] On these grounds, the judges overturned Momčilo Perišić's conviction for aiding and abetting the Army of the Republika Srpska (VRS) in his capacity as Chief of the Yugoslav Army General Staff. The Appellate Chamber made this decision notwithstanding that Momčilo Perišić, as the most senior figure in the Yugoslav Army, knowingly provided logistical and personnel assistance to the VRS, which was then committing serious crimes in Sarajevo and Srebrenica.[74]

The response to this new and heightened interpretation of aiding and abetting followed quickly, as the *Šainović et al* appeal judgment rejected the novel requirement.[75] The defence team of Vinko Pandurević in *Popović et al.* nonetheless tried to subsequently revive this interpretation of aiding and abetting by arguing the defendant's lawful actions were not specifically directed towards the unlawful removal of civilians from their residence. The Appeals Chamber once again dismissed the claim maintaining that specific direction is not an element of aiding and abetting under customary international law.[76] It is thus fair to conclude

[71] *Prosecutor v Perišić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013); *Prosecutor v Stanišić and Simatović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-69-T, 30 May 2013). *Cf. Prosecutor v Taylor (Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No 03-1-A, 26 September 2013), para. 473.
[72] *Perišić,* paras. 44, 73.
[73] Ibid, para. 44.
[74] Ibid, paras. 44, 62, 68.
[75] *Prosecutor v Šainović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-05-87-A, 23 January 2014), para. 1649.
[76] *Prosecutor v Popović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88-A, 30 January 2015) paras. 1758, 1761, 1765.

that the requirement of specific direction, after its brief moment of fame, was ultimately rejected by the ICTY.

The ICC's take on this issue does not appear to be fully conclusive. With respect to assistance under Article 25(3)(c), the *Bemba et al.* Chamber held that contribution does not need to meet any particular threshold but must rather have causal connection to the crime.[77] The interpretation of causality given in this case is that "the assistance must have furthered, advanced or facilitated the commission of such offence."[78] This understanding of causality is somewhat elusive when it comes to any form of complicity as secondary liability entails responsibility for assisting another person presumed to have full autonomy to take decision to perpetrate the crime.[79] Thus, regardless of whether assistance is quantified in terms of being substantial or not, this interpretation does not definitely resolve the question of the direction of aid. The ICC Trial Chamber gave a hint, however, pointing to the elevated fault requirement under Article 25(3)(c) that filters out contributions not sufficiently linked to the crime.[80] This is a welcome observation as indeed lack of directness of the aid may be compensated by the enhanced scrutiny of the accused's mental state: generic assistance becomes culpable when there is knowledge about the crime as well as an understanding of the potential effects of the rendered help.[81]

To sum up, the ICC jurisprudence does not appear to embrace the requirement that supplied assistance needs to be directed specifically to criminal goals – the so-called 'generic' contributions, or assistance that can be used for criminal and non-criminal purposes alike, are accepted provided an accomplice possesses the requisite state of mind. More nuanced interpretation of the nature of assistance may, however, emerge in the context of corporate facilitation since it is a *sui generis* scenario, in which the primary motivation is profit-making. Generic assistance is a default mode of operation for most, if not all, companies potentially contributing to gross violations of international human rights and humanitarian law.

IV. Conclusion

[77] *Bemba Gombo et al* Decision, paras. 93-94.
[78] Ibid, para. 94.
[79] Aksenova, *supra* note 19, pp. 117 et sq.
[80] Ibid, para. 95.
[81] Aksenova, *supra* note 19, p. 162.

This paper examined the possibility of applying one of the forms of complicity under the Rome Statute of the ICC to the actions of corporate officials. More specifically, it looked at whether Article 25(3)(c) of the Rome Statute requires that corporate facilitation is specifically directed towards criminal results; whether the existence of a prior state approval of corporate activity in the region in question precludes culpability of corporate officials acting under the existing licenses; and, finally, whether profit-seeking motive has any relevance for establishing the necessary fault requirement under this provision.