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## Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen

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# Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen

Marina Aksenova<sup>†</sup>

*Abstract:* This article examines the question of corporate complicity within the framework of international criminal law and, more specifically, at the International Criminal Court (ICC). It does so by referencing a communication to the ICC filed by several non-governmental organizations, inviting the prosecutor to examine potential criminal responsibility of several European corporate officials who are knowingly supplying weapons to the United Arab Emirates/Saudi-led coalition currently engaged in a military offensive in Yemen. This submission raises an important legal question of whether the ICC's Rome Statute provides for the possibility to hold corporate officials accountable in cases of complicity in gross human rights and humanitarian law violations. This article purports to answer this question by scrutinizing two specific provisions of the Rome Statute: Article 25(3)(c), which discusses aiding and abetting for the purpose of facilitating the commission of a crime, and Article 25(3)(d), which criminalizes contributions to the commission of a crime by a group of persons acting with a common purpose.

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## INTRODUCTION

The Yemen crisis is the world's largest ongoing humanitarian disaster. Since 2015, the conflict has cost over two hundred thousand lives.<sup>1</sup> Over twenty million people are experiencing food insecurity, of which ten million are suffering from famine.<sup>2</sup> Most media attention is directed at the United Arab Emirates/Saudi coalition's (UAE/Saudi-led coalition) war crimes. Yet, European companies are arguably complicit as well.<sup>3</sup> Whether European company officials are complicit under the Rome Statute is another question entirely. This article explores the applicable test for complicity under the Rome Statute in the International Criminal Court (ICC), as applied against the European arms trade to the

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<sup>1</sup> *UN humanitarian office puts Yemen war dead at 233,000, mostly from 'indirect causes'*, UN NEWS (Dec. 1, 2020) <https://news.un.org/en/story/2020/12/1078972>.

<sup>2</sup> *Yemen*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/yemen#> (last visited Mar. 8, 2021).

<sup>3</sup> *Made in Europe Bombed in Yemen: How the ICC Could Tackle the Responsibility of Arms Exporters and Government Officials*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, [https://www.ecchr.eu/fileadmin/Fallbeschreibung/gen/CaseReport\\_ECCHR\\_Mwatana\\_Amnesty\\_CAAT\\_Delas\\_Rete.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibung/gen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf) (last visited Feb. 10, 2021) [hereinafter *Made in Europe*].

UAE/Saudi-led coalition war in Yemen. Complicity is a form of secondary liability that denotes responsibility to those not physically perpetrating crimes, but who provide necessary assistance, encouragement, or support.<sup>4</sup> The term “corporate complicity” encompasses both the responsibility of corporate entities and individuals acting on those entities’ behalf.

Briefly, the ICC is an international court situated in the Hague. It adjudicates questions of individual criminal responsibility for war crimes, crimes against humanity, genocide, and the crime of aggression.<sup>5</sup> It is the successor court to several ad hoc tribunals—including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—that operated in the 1990’s and built extensively on post-Nuremberg jurisprudence.<sup>6</sup> The ICC model is based on permanency and a quasi-universal scope of application. In contrast, its predecessors were limited temporally and to specific conflicts.<sup>7</sup> Not every state is a member of the ICC. Yet, its judgments and decisions have far-reaching effects due to its ability to set international law standards.<sup>8</sup>

Corporate complicity is deeply rooted in highly developed international criminal jurisprudence.<sup>9</sup> Post-Nuremberg case law and both ad hoc and hybrid tribunal judgments support a definition of aiding and abetting as “knowingly providing substantial assistance to the principal perpetrator of the offense.”<sup>10</sup> For instance, the *IG Farben* and *Krupp* Nuremberg trials and the *Zyklon B* case were among the international community’s first attempts at holding corporate officials accountable for

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<sup>4</sup> MARINA AKSENOVA, COMPPLICITY IN INTERNATIONAL CRIMINAL LAW 1 (2016).

<sup>5</sup> Rome Statute of the International Criminal Court art. 5 July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

<sup>6</sup> See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 1, 57–97 (1999).

<sup>7</sup> S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

<sup>8</sup> Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L., 331, 331–358 (2009).

<sup>9</sup> AKSENOVA, *supra* note 4.

<sup>10</sup> *Id.* at 6. By “hybrid tribunals” I mean international courts created in late 1990’s and early 2000’s following the ICTY and ICTR models but with active participation of domestic authorities, such as, for instance, the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia. See S.C. Res. 1315 (Aug. 14, 2000); see also The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Law”), NS/RKM/0801/12 as amended in 2004 by NS/RKM/1004/006.

their complicity in crimes committed during the Second World War.<sup>11</sup> Logically, the next step is to interpret the Rome Statute as a mechanism to hold corporate officials accountable for their complicity in perpetuating war crimes. The Rome Statute also recognizes various forms of secondary liability.<sup>12</sup> Two provisions are particularly relevant. The first is Article 25(3)(c), which establishes liability when the accused, “for the purpose of facilitating” the commission of a crime, “aids, abets or otherwise assists” in its commission.<sup>13</sup> Second is Article 25(3)(d),<sup>14</sup> which criminalizes knowingly contributing to the commission of a crime by a group acting with a common purpose.<sup>15</sup>

While it is clear that secondary liability has been thoroughly developed in international criminal law,<sup>16</sup> it appears that international courts have applied the complicity standard mostly towards political and military leaders’ conduct, rather than corporate officials’, except for the Nuremberg trials and related cases.<sup>17</sup> Only recently, non-governmental organizations (NGO) and private individuals have begun attempting to hold corporate officials accountable for gross human rights and humanitarian law violations as well.<sup>18</sup>

In 2019, a group of NGOs filed a communication—akin to a criminal complaint—with the ICC alleging that corporations were contributing to war crimes in Yemen.<sup>19</sup> The NGOs alleged that several

<sup>11</sup> U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals, Volume X, The I.G. Farben and Krupp Trials*, at 72–85 (1949), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-10.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf); Zyklon B Case, Trial of Bruno Tesch and Two Others, 1 *Law Reports of War Criminals* 93, 93–103 (British Military Court, Mar. 1–8, 1946). See Brief for International Law Scholars, Former Diplomats, and Practitioners as Amici Curiae Supporting Respondents, *Nestlé USA, Inc. v. John Doe I, et al.*, 140 S.Ct. 912 (2020) (No. 19-416), 2020 WL 6292571 at \*6 [hereinafter *Nestlé v. Doe Amici Brief*].

<sup>12</sup> *Nestlé v. Doe Amici Brief* at 15, n.6.

<sup>13</sup> Rome Statute art. 25(3)(c).

<sup>14</sup> Rome Statute art. 25(3)(d).

<sup>15</sup> *Nestlé v. Doe Amici Brief* at 15, n.6.

<sup>16</sup> See e.g., ALBIN ESER, *INDIVIDUAL CRIMINAL RESPONSIBILITY* 781–83 (Antonio Cassese et al. eds., 2002). See generally ELIES VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* (2003); GIDEON BOAS ET AL., *INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY INTERNATIONAL CRIMINAL PROCEDURE* (2011).

<sup>17</sup> See *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Judgment (Nov. 16, 2001).

<sup>18</sup> JENNIFER ZERK, *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* 90 (2013).

<sup>19</sup> *Made in Europe*, *supra* note 3. These NGOs are the European Center for Constitutional and Human Rights (ECCHR), Mwatana, Rete Disarmo, Centre Delàs, the

European arms suppliers were complicit in war crimes committed by the UAE/Saudi-led coalition.<sup>20</sup> More specifically, the communication highlights that German, Italian, Spanish, French, and British companies supplied the UAE/Saudi led coalition with fighter jets and other military equipment used indiscriminately in attacks against civilians since March 2015, which arguably violate Articles 8(2)(c)(i), and 8(2)(e)(i), (ii), (iii), and (iv) of the Rome Statute.<sup>21</sup>

It is important to note that current international criminal law developments concern individual liability, rather than corporate liability.<sup>22</sup> Despite several domestic jurisdictions permitting corporate criminal liability, international criminal law has continued to focus on individual criminal responsibility ever since the initial war tribunals after World War II.<sup>23</sup> Notably, a French proposal to include corporate criminal liability in the Rome Statute was denied when the document was memorialized in July 1998.<sup>24</sup> Article 1 of the Rome Statute established the International Criminal Court, vested with “the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”<sup>25</sup> The reference to “persons” in this provision stirred debate due to an unresolved concern about the Court’s jurisdiction over natural

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Campaign Against Arms Trade, and Amnesty International Secretariat. *See* ECCHR, MADE IN EUROPE, BOMBED IN YEMEN: HOW THE ICC COULD TACKLE THE RESPONSIBILITY OF ARMS EXPORTERS AND GOVERNMENT OFFICIALS (Feb. 2020), [https://www.ecchr.eu/filadmin/Fallbeschreibungen/CaseReport\\_ECCHR\\_Mwatana\\_Amnesty\\_CAAT\\_Delas\\_Re te.pdf](https://www.ecchr.eu/filadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Re te.pdf).

<sup>20</sup> *Id.*

<sup>21</sup> Rome Statute art. 8(2)(c)(i) (“Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”); art. 8(2)(e)(i) (“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”); art. 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”); art. 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”); art. 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”).

<sup>22</sup> Rome Statute art. 25(1) (establishing jurisdiction of the International Criminal Court over natural persons).

<sup>23</sup> U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals, Volume X, The I.G. Farben and Krupp Trials*, at 72–85 (1949), [https://www.loc.gov/frd/Military\\_Law/pdf/Law-Reports\\_Vol-10.pdf](https://www.loc.gov/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf); Zyklon B Case, Trial of Bruno Tesch and Two Others, 1 *Law Reports of War Criminals* 93, 93-103 (British Military Court, Mar. 1–8, 1946).

<sup>24</sup> Preparatory Comm. on the Establishment of an Int’l Crim. Court, Proposal Submitted by France, U.N. Doc. A/AC.249/1998/DP.14 (Apr. 2, 1998).

<sup>25</sup> Rome Statute art. 1.

persons or corporate entities—a question decided in favor of natural persons only—during the final conference in Rome.<sup>26</sup> This result was partially motivated by tradition: many states did not hold corporations criminally liable, as opposed to civil liability.<sup>27</sup> The Rome Statute’s complementarity principle, which requires member states to have compatible domestic criminal law with the Rome Statute, would have thus preempted the ICC from exerting jurisdiction over corporations.<sup>28</sup> Despite this apparent limitation, the Rome Statute contains two elaborate articles on modes of liability—Article 25 and Article 28—that accords prosecutors with the ability to attach responsibility to individuals, including those acting on corporations’ behalf.<sup>29</sup>

This article analyzes and expands upon corporate complicity in international criminal law through the Yemen case study; highlighted in a Communication from the ECCHR to the ICC about European arms dealers’ potential complicity in war crimes committed there. It engages with Articles 25(3)(c) and 25(3)(d) of the Rome Statute and demonstrates that, despite differences in wording, recent ICC case law points toward a general customary international law standard for aiding and abetting.<sup>30</sup> More importantly, this international law standard for complicity may be applicable to corporate officials’ conduct as well. The ICC plays a prominent role in creating customary international law. Although customs are listed as a source of law at the ICC in Article 21(1)(b) of the Rome Statute,<sup>31</sup> they play a lesser role at the Court than in ad hoc tribunals’ jurisprudence.<sup>32</sup> Instead of relying on customary international law, the ICC primarily depends on the Rome Statute, which has developed definitions of crimes and modes of liability. But this independence does not preclude the ICC from building on the ad hoc tribunals’ jurisprudence. The ad hoc tribunals’ law and the ICC’s law

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<sup>26</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records of U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Vol. I)*, U.N. Doc. A/CONF.183/C.1/SR.1 (Rome, June 15–July 17, 1998); see also WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 63 (Oxford Univ. Press 2d ed. 2016).

<sup>27</sup> David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT. L. J. 35, 38 (2016) <https://harvardilj.org/2016/07/corporate-liability-under-the-rome-statute/>

<sup>28</sup> *Id.*

<sup>29</sup> Rome Statute arts. 25, 28.

<sup>30</sup> See Manuel Ventura, *Aiding and Abetting*, in *MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW* 173, 190 (Jérôme de Hemptinne et al. eds., Cambridge Univ. Press, 2019) (arguing “[t]here is general consensus on the core requirements of aiding and abetting”).

<sup>31</sup> Rome Statute art. 21(1)(b).

<sup>32</sup> DAPO AKANDE, *SOURCES OF INTERNATIONAL CRIMINAL LAW: THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW* 50 (Oxford Univ. Press 2009).

diverge with respect to an accomplice's requisite mental state and contribution to the crime.<sup>33</sup> Nonetheless, the individual cases' factual analysis may yield similar conclusions regarding what elements must be satisfied in order to establish complicity.

The article proceeds as follows: Section I briefly explores the nature of complicity and its functional core. This Section elucidates the technical aspect of complicity and its purpose in criminal law. Sections II and III then discuss the scope of Article 25(3)(c) and Article 25(3)(d) of the Rome Statute and the elements implicit in their definitions. Section IV discusses the ECCHR Communication to the ICC. This document expressly invokes Article 25(3)(c) while claiming several European arms dealers were complicit in war crimes committed in Yemen.<sup>34</sup> The Communication does not engage directly with Article 25(3)(d), but this article speculates on the possibility of applying this distinct provision to the conduct of corporate officials. Finally, Section V examines likely objections to invoking these Articles to address corporate officials' responsibility, which may prevent the Communication from proceeding to the ICC's preliminary examination and investigation stage.

#### I. THE FUNCTION AND MEANING OF COMPLICITY

A working definition of complicity is necessary to understand the ICC's test for aiding and abetting criminal activity. Complicity attributes criminal responsibility to those who do not physically perpetrate the crime.<sup>35</sup> Thus, the essential function of this legal notion is to construct a link between the accomplice and the criminal act of another person.<sup>36</sup> This legal tool is indispensable because harm may result from concerted actions committed by any number of parties with varying degrees of spatial and temporal proximity to the ensuing result. Some actors may be directly involved by perpetrating the crime. Others may contribute by virtue of providing culpable assistance or encouragement to the direct perpetrator.<sup>37</sup>

The nature and extent of criminal contributors' assistance varies, making complicity an umbrella term that may encompass numerous actions. These actions include aiding and abetting, instigating,

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<sup>33</sup> AKSENOVA, *supra* note 4, at 81–176.

<sup>34</sup> *See Made in Europe*, *supra* note 3.

<sup>35</sup> AKSENOVA, *supra* note 4, at 1.

<sup>36</sup> *Id.* at 9; KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Oxford Univ. Press 3d ed. 1998).

<sup>37</sup> Marina Aksenova, *Nestlé & Cargill v. Doe Series: Toward a Harmonized Test for Complicity of Corporate Officials?*, JUST SECURITY (Nov. 30, 2020), <https://www.justsecurity.org/73608/nestle-cargill-v-doe-series-toward-a-harmonized-test-for-complicity-of-corporate-officials/>.

ordering, facilitating, soliciting, and/or inducing criminal activity.<sup>38</sup> Jurisdictions around the world have varying laws with respect to what constitutes complicity. Nonetheless, these differing laws retain the concept's functional core: attributing responsibility to parties other than the immediate physical perpetrator of the crime.<sup>39</sup> The complicity doctrine and its equivalent exist in a variety of jurisdictions across the world—at both the domestic and international levels—highlighting its operative significance.<sup>40</sup> The Rome Statute is no exception. Article 25(3) clearly invokes the concept of complicity, as it deems an individual responsible for a crime and liable for punishment if that person orders or induces the crime,<sup>41</sup> facilitates its commission,<sup>42</sup> or contributes to its commission in any other way.<sup>43</sup>

## II. ARTICLE 25(3)(C) TEST

Pursuant to Article 25(3)(c) of the Rome Statute:

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 crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.<sup>44</sup>

This formulation includes two distinct elements that must be established to prove secondary liability. They can be broken down into *actus reus*, or the conduct requirement, and *mens rea*, or the fault requirement. The conduct requirement and fault requirement are used in this article to avoid confusion with the *actus reus* and *mens rea* of an underlying offense that must be addressed separately.<sup>45</sup>

Under Article 25(3)(c), the conduct requirement consists of facilitating the commission of a crime in the form of aiding, abetting, and assisting in other ways.<sup>46</sup> The list of potential forms of assistance is thus open to interpretation based on each case's factual circumstances. Interestingly, the term “substantial,” which was added as a qualifier in

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<sup>38</sup> AKSENOVA, *supra* note 4, at 13.

<sup>39</sup> *See generally id.*

<sup>40</sup> *Id.* at 47.

<sup>41</sup> Rome Statute art. 25(3)(b).

<sup>42</sup> *Id.* art. 25(3)(c).

<sup>43</sup> *Id.* art. 25(3)(d).

<sup>44</sup> *Id.* art. 25(3)(c).

<sup>45</sup> *See id.* art. 25(4).

<sup>46</sup> AKSENOVA, *supra* note 4, at 154.



the ad hoc tribunals' jurisprudence,<sup>47</sup> is missing from the description of the nature of contribution in the Rome Statute.<sup>48</sup> The ICC's earlier jurisprudence expressly utilized substantial assistance, seemingly inferring the comparison of substantial assistance to the essential contribution required under Article 25(3)(a).<sup>49</sup> In contrast, more recent cases did not use the substantial contribution test.<sup>50</sup>

ICC Trial Chambers have disagreed over whether this requirement is implicit in the definition under Article 25(3)(c).<sup>51</sup> The most recent case to discuss this issue is *Bemba et al.*, where ICC Pre-Trial Chamber II expressly rejected the "substantial" qualifier. It found that no specific quantitative threshold is needed because of the causality requirement.<sup>52</sup> The causality requirement was a way for the *Bemba et al.* Chamber to explain that although the contribution need not be an essential part of the crime, it must have "furthered, advanced or facilitated the commission of such offence."<sup>53</sup> Therefore, the assistance must facilitate the offense in some capacity; if it does not, then it does not fall within Article 25(3)(c)'s ambit.<sup>54</sup> The *Bemba et al.* case dealt with Mr. Bembe Gombo's offenses against the administration of justice during his trial.<sup>55</sup>

While the Chamber correctly concluded that a quantitative assessment of contribution is not necessarily helpful when evaluating the nature of assistance, the judges' engagement with causality is somewhat confusing because causality, narrowly understood, refers to causing events directly, not through another person.<sup>56</sup> Given the general

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<sup>47</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 235 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>48</sup> SCHABAS, *supra* note 26, at 435–36.

<sup>49</sup> Rome Statute art. 25(3)(a) provides for responsibility of a person who "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." See Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 279 (Dec. 16, 2011) ("essential contribution" discussion).

<sup>50</sup> Prosecutor v. Bemba Gombo, ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, ¶ 35 (Nov. 11, 2014); Prosecutor v. Blé Goudé, ICC-02/11-02/11-186, Decision on the Confirmation of Charges, ¶ 167 (Dec. 12, 2014).

<sup>51</sup> See Mbarushimana, ICC-01/04-01/10, ¶ 279.

<sup>52</sup> Bemba Gombo, ICC-01/05-01/13, ¶ 35.

<sup>53</sup> See *id.* para. 18.

<sup>54</sup> *Id.*

<sup>55</sup> Prosecutor v. Bemba Gombo, ICC-01/05-01/13, Case Information Sheet (Sept. 2018), <https://www.icc-cpi.int/CaseInformationSheets/Bemba-et-alEng.pdf>.

<sup>56</sup> Michael Moore, *Causation in the Criminal Law*, in THE HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 169 (John Deigh & David Dolinko eds., Oxford Univ. Press 2011); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 334 (1985).

presumption in criminal law that a principal's actions are free and voluntary, it cannot be said that one who aids, abets, or otherwise contributes, also *caused* the principal's actions.<sup>57</sup> However, the Chamber correctly noted the need to establish a connection between the crime and the assistance rendered, such that the accessory's contribution must have an effect on the commission.<sup>58</sup> It is plausible that both the causality requirement and the substantial contribution requirement refer to the same legal problem of ascertaining this effect. Therefore, there is arguably no clear divergence on this point between ICC case law and ad hoc tribunals' jurisprudence.

The second element of secondary liability under Article 25(3)(c) is the fault requirement. This requirement can be broken down into the accomplice's (1) attitude towards assisting the principal perpetrator, which must be done purposefully, and (2) awareness of the ensuing harm.<sup>59</sup> "Purpose" in this provision is traditionally construed as a departure from the general standard of knowledge, which is accepted as a requisite element of aiding and abetting liability in the ad hoc tribunals' jurisprudence.<sup>60</sup> The *Bemba et al.* Trial Chamber clarified, however, that "purpose" as written in Article 25(3)(c) only refers to an accessory's facilitation of the offence, not the principal offence itself.<sup>61</sup> This implies that no shared intent between the accessory and the primary perpetrator is needed. For example, if the perpetrator intends to commit genocide against certain part of the population, the accomplice need not share this intention—it is sufficient that an accomplice provides assistance *knowing* about the intention of the perpetrator. In contrast, the ad hoc tribunals—the ICTY and the ICTR—require knowledge with respect to both facilitation and the ensuing offence.<sup>62</sup> There is therefore some divergence in the applicable standard of aiding and abetting in international law regarding the fault requirement. Nonetheless, the *Bemba et al.* Chamber's clarification that "purpose" only applies to the act of facilitation diminishes this difference.

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<sup>57</sup> Andrew Ashworth & Jeremy Horder, *PRINCIPLES OF CRIMINAL LAW* 24 (Oxford Univ. Press 7th ed. 2013).

<sup>58</sup> Bemba Gombo, ICC-01/05-01/13, ¶ 35.

<sup>59</sup> See Rome Statute art. 30(2) (outlining different elements of *mens rea*).

<sup>60</sup> Kirsten Bowman, *Commentary Rome Statute: Part 3*, CASE MATRIX NETWORK para. 270 (last updated June 30, 2016), <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>.

<sup>61</sup> Bemba Gombo, ICC-01/05-01/13, Judgment Pursuant to Article 74, ¶¶ 97–98 (indicating it is thus sufficient to intend to supply arms knowing these arms are used in the commission of crimes).

<sup>62</sup> See Prosecutor v. Vasiljević, Case No IT-98-32-T, Trial Judgment, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

### III. ARTICLE 25(3)(D) TEST

Pursuant to Article 25(3)(d) of the Rome Statute:

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.<sup>63</sup>

Accomplice liability under Article 25(3)(d) is still in its early stages of development.<sup>64</sup> The Rome Statute's drafters extensively discussed how to establish individual responsibility for group criminality, which proved to be a contentious topic.<sup>65</sup> Some delegations insisted on the notion of conspiracy enshrined in the Nuremberg Charter and the Tokyo Charter.<sup>66</sup> Other delegations questioned the compatibility of conspiracy with the principle of legality.<sup>67</sup> This is due to the fact that conspiracy attributes responsibility for an agreement to commit a crime as opposed to criminalizing conduct resulting in actual harm.<sup>68</sup> The resulting compromise led to the adoption of Article 25(3)(d), which was borrowed from the International Convention for the Suppression of Terrorist Bombings.<sup>69</sup> Because the original article's text was drafted in the context

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<sup>63</sup> Rome Statute art. 25(3)(d).

<sup>64</sup> See AKSENOVA, *supra* note 4, at 156–64 (discussing the evolution of mode of liability at the ICC).

<sup>65</sup> Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 78–88 (2007); Marjolein Cupido, *Group Acting with a Common Purpose*, in *MODES OF LIABILITY* 310 (Jérôme de Hemptinne et al. eds., Cambridge Univ. Press, 2019).

<sup>66</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(2)(a), Aug. 8, 1945, 82 U.N.T.S. 279. Charter of the International Military Tribunal for the Far East art. 5(2)(a), Jan. 19, 1946, T.I.A.S. 1589.

<sup>67</sup> Preparatory Comm. on the Establishment of an Int'l Crim. Court, Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Court, U.N. Doc. A/51/22, at 94–95 (1996).

<sup>68</sup> See AKSENOVA, *supra* note 4, at 37, 56–61.

<sup>69</sup> International Convention for the Suppression of Terrorist Bombings art. 2(3)(c), Dec. 15, 1997, 2149 U.N.T.S. 256.

of state responsibility,<sup>70</sup> it remains necessary to explore its application to individuals on a case-by-case basis. However, the existence of a group acting with a common purpose is a defining feature of Article 25(3)(d) liability. Proving this element evidentially may be problematic, but references to any meetings during which group members agree on the crucial aspects of the plan or to public statements in which group members express their intentions may assist in establishing the existence of this element.<sup>71</sup>

The crucial distinction between contributing to a group acting with a common purpose under Article 25(3)(d) and aiding and abetting under Article 25(3)(c) is that the latter provision deals with contribution to a specific crime, while the former covers contributions to a group performed when the contributor had knowledge of the group's intention to commit crimes. For instance, supplying ammunition to a local militia group known to be perpetrating war crimes in the area would be assisting a group, whereas providing a specific location for civilian executions would be assistance to the crime. Article 25(3)(d)'s emphasis is on the assistance provided to a group engaged in criminality; Article 25(3)(c) targets an individual facilitating an specific offence.<sup>72</sup> In addition, Article 25(3)(c) calls for a higher standard of fault, as it requires purposeful contribution to the crime. In contrast, Article 25(3)(d) applies the general standard of intent, which is defined as "mean[ing] to engage in the conduct."<sup>73</sup> Thus, intending to contribute to a group, while knowing that group's criminal intentions, sufficiently establishes Article 25(3)(d) accomplice liability. Pursuant to Article 25(3)(d)(ii), the contributor does not need an intent to assist with or contribute to a specific crime—they need only have knowledge of that crime.<sup>74</sup>

Article 25(3)(d) liability requires proof of the following elements: (1) a significant contribution, made with intention, to a group; (2) the existence of a group acting with a common purpose to commit crimes; and (3) the contributor's awareness of the group's intention to commit *the* crime,<sup>75</sup> or, alternatively, acting to further a group's criminal activities when they involve committing *a* specific crime.<sup>76</sup> Crucially, the alleged contributor must know the group's intentions. This

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<sup>70</sup> *Id.* arts. 4–6.

<sup>71</sup> Marjolein Cupido, *Group Acting with a Common Purpose*, in *MODES OF LIABILITY*, *supra* note 65, at 333.

<sup>72</sup> AKSENOVA, *supra* note 4, at 157 (discussing the group requirement of this mode of liability).

<sup>73</sup> Rome Statute art. 30(2)(a).

<sup>74</sup> *See* Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 289 (Dec. 16, 2011).

<sup>75</sup> *See* Rome Statute art. 25(3)(d)(ii).

<sup>76</sup> *See* Rome Statute art. 25(3)(d)(i).

knowledge must be specific enough to account for individual instances of criminality.<sup>77</sup> The knowledge requirement is distinct from 25(3)(c) liability that requires “purpose” to contribute to the crime. Alternatively, 25(3)(d) requires shared intent with the group members, while awareness of the group committing specific crimes is less instrumental.<sup>78</sup> Article 25(3)(d) therefore focuses on the defendant’s attitude towards group activity as opposed to their attitude towards the crime under 25(3)(c).<sup>79</sup> The following paragraphs will elaborate on each of the elements outlined above.

The first element, a significant contribution made with intention to a group, poses the same challenges as the substantial contribution qualifier adopted by the ad hoc tribunals under 25(3)(c). Finding a significant contribution requires quantifying a contribution’s extent, which is difficult. For instance, sending limited financial aid to a warring party, and this party later using the money to purchase uniforms and military vehicles would constitute a contribution to crimes later perpetrated by the party, but would this assistance qualify as significant enough to attract criminal responsibility? Measuring assistances’ effect on the crime requires both an in-depth exploration of causation and consideration of extenuating factors.<sup>80</sup> Therefore, what constitutes significant contributions has been left to judicial interpretation.

In *Prosecutor v. Germain Katanga*, the Trial Chamber purported to establish a formula for what “significant contribution” implies: a contribution must either affect the occurrence of the crime or the way in which it was committed.<sup>81</sup> The Trial Chamber confirmed the allegations that Germain Katanga – former leader of an armed group in Democratic Republic of the Congo (DRC) - facilitated the supply of weapons used by the local Ngiti militia in their attack on Bogoro in the DRC.<sup>82</sup> The judges concluded that Katanga’s contribution to the crimes committed in Bogoro was significant. Local Ngiti militia gained a military advantage after Katanga facilitated their arms trade, allowing the militia to carry out their attacks on civilians in Bogoro.<sup>83</sup> This finding demonstrates the importance of the *connection* between the contribution and the crime rather than a *specific type* of assistance.

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<sup>77</sup> SCHABAS, *supra* note 26, at 581.

<sup>78</sup> AKSENOVA, *supra* note 4, at 163.

<sup>79</sup> *Id.*

<sup>80</sup> See *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶¶ 276–77 (Dec. 16, 2011).

<sup>81</sup> *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1633 (Mar. 7, 2014).

<sup>82</sup> *Id.* ¶¶ 1147, 1671.

<sup>83</sup> *Id.* ¶¶ 1671, 1679; See also AKSENOVA, *supra* note 4, at 160.

Given the difference between formulation of intention in Articles 25(3)(c) and (d), intentional contribution to a group may in practice be easier to prove than purposeful contribution to the crime. Article 25(3)(d) only requires awareness that the group commits crimes,<sup>84</sup> rather than purposefully assisting in furthering specific criminal acts. Awareness can be evidenced by media and relevant governmental or non-governmental organizations' reports.<sup>85</sup> However, the differences between Articles 25(3)(c) and (d)'s fault requirements have not yet been assessed in an actual case.

The second element—existence of a group acting with a common purpose to commit crimes—requires the prosecution to prove (1) a group exists, and (2) that group has a common purpose. The *Katanga* Chamber clarified that a group's common purpose may be established spontaneously, and there is no requirement that it be arranged or formulated formally.<sup>86</sup> It may therefore be inferred from the group's concerted action.<sup>87</sup>

The third element, Article 25(3)(d) breaks down into two distinct subjunctive parts: (1) the contributor must have an awareness of the group's intention to commit the crime or (2) the contributor must act in furtherance of the group's general criminal activities.<sup>88</sup> If the contributor is aware of the group's intention to commit the crime, the prosecution must establish their knowledge for each crime the group intended to commit. Knowledge may be inferred from the relevant facts and circumstances.<sup>89</sup> If the contributor acts in furtherance of general criminal activities, the prosecution must prove the contributor's specific intent of "aiming to further the [group's] common purpose," but specific knowledge regarding a specific crime is unnecessary.<sup>90</sup>

#### IV. CASE STUDY: RESPONSIBILITY OF EUROPEAN ARMS DEALERS FOR CRIMES COMMITTED IN YEMEN?

The ECCHR Communication to the ICC invokes Articles 25(3)(c)'s and 25(3)(d)'s test for complicity with respect to corporate

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<sup>84</sup> Rome Statute art. 25(3)(d).

<sup>85</sup> See Rome Statute art. 25(3)(d).

<sup>86</sup> Prosecutor v. Germain Katanga, ICC-01/04-01/07 A3 A4 A5, Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 Entitled "Order for Reparations Pursuant to Article 75 of the Statute", ¶ 227 (Mar. 8, 2018).

<sup>87</sup> *Id.*

<sup>88</sup> Rome Statute art. 25(3)(d).

<sup>89</sup> Germain Katanga, ICC-01/04-01/07, ¶ 1633.

<sup>90</sup> *Id.* ¶ 1638.

facilitation.<sup>91</sup> It also alleges that corporate officials in Germany, Italy, Spain, France, and the United Kingdom (signatories of the Rome Treaty and the Arms Trade Treaty (ATT)) are complicit in humanitarian law violations in Yemen for knowingly and purposefully aiding the UAE/Saudi-led coalition in the commission of crimes therein.<sup>92</sup> The Rome Statute extends jurisdiction to states or territories where the conduct took place and to the states where the accused is a national.<sup>93</sup> It is therefore not an impediment in the present case that neither Saudi Arabia, the UAE, nor Yemen, have ratified the Rome Statute.

The war in Yemen started in 2014, when Houthi insurgents took control of Yemen's capital and largest city, Sana'a.<sup>94</sup> The Houthi insurgents overthrew the government of the Saudi-backed leader, President Abd Rabbu Mansour Hadi, and installed their own rule in large parts of the country.<sup>95</sup> This takeover prompted a coalition of Gulf states, led by Saudi Arabia, to launch a campaign of economic isolation and air strikes against the Houthi insurgents in 2015.<sup>96</sup> The Gulf states were given logistical and intelligence support from major world powers, including the United States.<sup>97</sup> Other countries, most notably, Germany, Italy, Spain, France, and the United Kingdom also supplied military equipment to the Saudi-led coalition.<sup>98</sup> The conflict's parties exacerbated what the United Nations referred to as the world's largest humanitarian catastrophe, with estimates of more than 200,000 people killed since 2015.<sup>99</sup>

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<sup>91</sup> See *Made in Europe*, *supra* note 3; see also Marina Aksenova & 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/>.

<sup>92</sup> See The Arms Trade Treaty, Dec. 24, 2014, 3013 U.N.T.S. 52373; *Made in Europe*, *supra* note 3.

<sup>93</sup> Rome Statute art. 12(2).

<sup>94</sup> *War in Yemen: Recent Developments*, COUNCIL ON FOREIGN RELATIONS: GLOBAL CONFLICT TRACKER <https://www.cfr.org/global-conflict-tracker/conflict/war-yemen> (last visited Oct. 20, 2020).

<sup>95</sup> See Kali Robinson, *Yemen's Tragedy: War, Stalemate, and Suffering*, COUNCIL ON FOREIGN RELATIONS (Feb. 5, 2021, 7:00 AM) <https://www.cfr.org/background/yemen-crisis>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *Made in Europe*, *supra* note 3 (the ECCHR Communication focuses, among others, on Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG).

<sup>99</sup> *Id.* See also *UN humanitarian office puts Yemen war dead at 233,000, mostly from 'indirect causes'*, UN NEWS (Dec. 1, 2020) <https://news.un.org/en/story/2020/12/1078972>.

### A. Applying Article 25(3)(c) to the Arms Traders' Actions

The ECCHR Communication revealed the difficulty in connecting corporate actions with their eventual criminal result under Article 25(3)(c)'s conduct requirement.<sup>100</sup> In these arms dealing cases, the most convincing evidence of that connection is showing the European supplied munitions found around crime scenes across Yemen. This is not an easy task from an evidentiary perspective considering collecting evidence on the ground after an aerial attack is challenging.<sup>101</sup>

However, there are alternative ways to establish the connection between the weapons suppliers and the crimes. For example, the weapons' supply chain paper trail, elucidating their final delivery destination, may be sufficient evidence. Additionally, a contributor's encouragement of criminal activity could also qualify as assistance affecting the crime. Their encouragement could be demonstrated by continuing to deliver weapons to the UAE/Saudi-led coalition. If a corporate official continues to authorize weapons supplies over an extended period, while simultaneously providing maintenance for the distributed equipment, this engagement may be used as evidence of encouragement or moral support. Moral encouragement qualifies as assistance.<sup>102</sup> Thus, even without evidence of complete weapons' supply chains, the connection between assistance and the crime(s) can still be proven. In proving encouragement, the element of continuity, as opposed to destination, is key.

The fault requirement contains two elements that can be demonstrated showing that the contributor (1) had some level of awareness of the war crimes committed in Yemen and (2) acted purposefully to facilitate these crimes.<sup>103</sup> The general awareness element is easier to prove, considering the plethora of publicly available documents related to the conflict.<sup>104</sup> Although, this element raises a question regarding the requisite specificity of awareness: do corporate officials need to know the exact crimes perpetrators committed using their supplied equipment, or is general awareness sufficient? The *Furundžija* Trial Chamber at the ICTY addressed this issue, holding that awareness regarding "one of a number of crimes that will probably be

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<sup>100</sup> See Aksenova & Bryk, *supra* note 91.

<sup>101</sup> See generally *Made in Europe*, *supra* note 3.

<sup>102</sup> See Paul H. Robinson, *A Brief Comparative Summary of American Criminal Law*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 577 (Markus Dubber & Kevin Heller ed., 2011).

<sup>103</sup> SCHABAS, *supra* note 26, at 576–78.

<sup>104</sup> See EU Parliament Resolution on the Situation in Yemen, No. 2018/2853 (RSP), Oct. 4, 2018.



committed” is sufficient.<sup>105</sup> Therefore, the general test of whether a contributor had the requisite specific accessorial knowledge is whether the offence committed was within the contemplated range of offences. In the situation of weapons’ supplying, the knowledge of war crimes directed against Yemeni civilians should suffice.

The fault requirement’s second element—acting with “purpose to contribute”—is arguably more difficult to prove with respect to corporate officials’ actions. While it is true that shared intent between the contributor and the physical perpetrator is not needed, as the *Bemba et al.* Chamber clarified,<sup>106</sup> it can still be evidentially challenging to prove an individual’s conscious choice to contribute to the crime as opposed to their mere awareness that their contribution will help in some way.<sup>107</sup> However, the “purpose to contribute” requirement does not demand that facilitating the crime must be the actor’s *sole* purpose. It is therefore possible that an accomplice may be primarily motivated to act out of financial interests and still be said to be acting with a “purpose to contribute.” Corporations seeking financial gain can demonstrate the existence of an actor’s mental state if they voluntarily and consciously choose to contribute. Corporations often knowingly continue their operations despite access to information that discusses gross human rights and/or humanitarian law violations, and they also typically renew contracts with parties who remain actively engaged in criminal conduct. Therefore, continuous renewals of weapons supply contracts with the UAE/Saudi-led coalition may be an indicator of the “purpose to contribute” element being satisfied. What is particularly relevant in this regard is the pattern of renewals, which can demonstrate the consistency of intention to keep up business activity despite possible humanitarian law implications.

### *B. Applying Article 25(3)(d) to Arms Traders’ Actions*

Applying Article 25(3)(d) to corporate officials’ actions in the context of arms trade aligns in some ways with the elements required by Article 25(3)(c), while also presenting unique challenges. First, an additional element must be established—the crimes must be committed by a group.<sup>108</sup> Therefore, the existence of such a group must be proven. Whether the attacks on Yemen by the UAE/Saudi-led coalition can be

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<sup>105</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 246 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

<sup>106</sup> See Prosecutor v. Bemba Gombo, ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, ¶¶ 35, 97–98 (Nov. 11, 2014).

<sup>107</sup> See GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, 125 (1998) (the Model Penal Code defines intention as a conscious choice).

<sup>108</sup> Rome Statute art. 25(3)(d).

conceptualized as a “a crime by a group” when the focus of its activity is portrayed as humanitarian intervention or general war efforts is an open question. The answer depends on how broadly the ICC interprets this criterion if the court ever examines this question or another comparable one.

Second, the assistance’s effect on the crime must be established. The Trial Chamber in *Katanga* stressed that significant contribution implies that an individual’s assistance has some effect on the crime’s commission. Therefore, it is fundamental that the contribution is connected to the crime, rather than merely the group’s general activities.<sup>109</sup> Conduct that is immaterial to the offence’s commission falls outside the scope of this provision.<sup>110</sup> It is arguably possible that corporate officials contributed to war crimes in Yemen by virtue of supplying weapons to the UAE/Saudi-led coalition. These officials’ ongoing engagement with actors in Yemen constitutes tacit encouragement of these actions. Another vital criterion for assessing contribution is the position of the person vis-à-vis the group the committing crimes. For example, public statements from corporate leaders to the media can help prove a contribution’s effect on the crime. If a company director speaks publicly about the company’s activities in the relevant region and mentions an entity or a group known to be responsible for implementing policies that have resulted in crimes on the ground, these statements can be taken as a proof of the corporation’s tacit encouragement of the group’s activities.

Third, proof of intentional contribution to a group must be established under the fault requirement. The test for intent under Article 25(3)(d) is arguably more lenient than the test under Article 25(3)(c). That is because 25(3)(d) is guided by the general standard contained in Article 30(2)(a) of the Rome Statute, which is defined as ‘meaning to engage.’<sup>111</sup> How this test would be applied in practical terms and whether a mere understanding that one’s conduct is instrumental to the group remains unsettled. Under the existing guidance of *Mbarushimana*, purposeful engagement must be coupled with at least a general awareness that the conduct in question has contributed to responsible group’s activity.<sup>112</sup> In the context of the Yemeni conflict, this would require proving that weapons’ suppliers intended to facilitate the activities of a coalition with the knowledge that crimes are being

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<sup>109</sup> Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1632 (Mar. 7, 2014).

<sup>110</sup> See *id.*

<sup>111</sup> SCHABAS, *supra* note 26, at 582.

<sup>112</sup> Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 288 (Dec. 16, 2011).

committed. The emphasis is on the attitude towards the group rather than the specific crimes committed by this group.

Finally, there are two subsections within Article 25(3)(d). Article 25(3)(d)(i) focuses on the specific intent aimed at furthering the group's criminal activity,<sup>113</sup> while Article 25(3)(d)(ii) requires knowledge of group's intention to commit specific crimes.<sup>114</sup> Thus, the first clause calls for a shared intent between the contributor and the group to commit a crime, while the second clause requires a contribution to the specific crime, meaning that clear links must be made to specific criminal incidents. Demonstrating responsibility under Subsection (ii) appears more plausible in the arms trading cases. Contribution may be proved under Article 25(3)(d)(ii) by furnishing documentary evidence of contractor-supplied ammunition found at the crime scene, for example, coupled with proof of the awareness by the companies' officials that these specific raids were ongoing. This exercise is similar to what would be undertaken to prove complicity under Article 25(3)(c). In contrast, arguing for corporate officials' complicity under Subsection (i) requires proof that an accomplice aimed to further the common purpose of the group, which may be more difficult to obtain or furnish in court.

#### V. COUNTERARGUMENTS: STATE AUTHORIZATIONS AND THE DIRECTION OF THE SUPPLIES

There are several possible objections that potential accomplices in the corporate sector may advance in response to accusations of liability for arms trading, with respect to both the fault and the conduct requirements. These concerns apply to both Article 25(3)(c) and Article 25(3)(d).

##### *A. State Authorization of Weapon Exportation*

One objection to the fault requirement concerns the requirement that states must authorize all weaponry exportation. The weapons market is a highly regulated business, and it requires licenses that grant certain companies the right to export military equipment.<sup>115</sup> States are also bound by two crucial international and regional instruments that outline the conditions they must abide by to allow weapons exports.<sup>116</sup> It is therefore important to establish the key criteria that must be considered

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<sup>113</sup> Rome Statute art. 25(3)(d)(i).

<sup>114</sup> Rome Statute art. 25(3)(d)(ii).

<sup>115</sup> CHRISTIAN SCHLIEMANN & LINDE BRYK, ARMS TRADE AND CORPORATE RESPONSIBILITY: LIABILITY, LITIGATION AND LEGISLATIVE REFORM 7 (2019).

<sup>116</sup> The Arms Trade Treaty, Dec. 24, 2014, 3013 U.N.T.S. 52373; Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, 2008 O.J. (L 335) 99.

when states grant authorizations and how these authorizations relate to business activity.

The first significant document setting out these criteria is the ATT, which came into force on December 24, 2014.<sup>117</sup> The ATT is a multilateral treaty that stipulates states' obligations when it comes to arms control. This legally binding document is, however, relevant to this discussion because state authorizations issued in compliance with the requirements of the ATT may be invoked by arms suppliers as a possible defense to culpability of corporate officials. It is therefore crucial to examine the conditions under which states grant such authorizations. The implication of this discussion is that state due diligence does not alleviate the need for corporate due diligence when it comes to arms supplies. The United Nations Guidelines for Business and Human Rights impose an obligation on how business enterprises should carry out human rights' due diligence,<sup>118</sup> however the extent to which these principles are binding remains open to debate.<sup>119</sup> Thus, corporate officials are still under an obligation to conduct independent and case-specific due diligence regarding each weapon delivery, even after they have been granted the general arms export license.

The ATT is the primary legal document regulating international arms trade at the state level,<sup>120</sup> and it is also the first comprehensive treaty addressing this issue of global concern.<sup>121</sup> When the treaty was written, it was ratified by 109 states; 31 additional states have signed the treaty but have not yet ratified it.<sup>122</sup> The ATT was initiated in 2006 by the United Nations General Assembly Resolution.<sup>123</sup> The Resolution recognized that the absence of common international standards for the transfer of conventional arms contributed to armed conflict, the displacement of people, crime, and terrorism.<sup>124</sup> This regulatory gap thus

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<sup>117</sup> *Id.*

<sup>118</sup> John Ruggie (Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises), *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework*, art. II.B.17, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

<sup>119</sup> See generally Pierre Thielbörger & Tobias 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).

<sup>120</sup> See generally Peter Woolcott, *Arms Trade Treaty*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (April 2, 2013), <https://legal.un.org/avl/ha/att/att.html> (explaining the historical background and procedural history of the Arms Trade Treaty).

<sup>121</sup> *Id.*

<sup>122</sup> ARMS TRADE TREATY, <https://thearmstradetreaty.org> (last visited Nov. 15, 2020) (showing current number of signatories).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

undermined peace, reconciliation, safety, security, stability, and sustainable social and economic development on a global scale.<sup>125</sup> Identifying this pressing problem prompted the United Nations General Assembly to start the process of examining the feasibility of a thematic treaty.<sup>126</sup> The process resulted in the ATT's adoption on April 2, 2013.<sup>127</sup>

The United States, the world's top weapons supplier, initially signed the treaty but revoked its binding effect in 2019.<sup>128</sup> The ATT was therefore never legally binding on the United States because it never went through the ratification process, which is required to activate the treaty domestically. Nonetheless, other large exporters of arms, including France, Germany, Spain, the United Kingdom, and Italy, have signed and ratified the ATT.<sup>129</sup> According to data gathered by the Stockholm International Peace Research Institute, the world's fifteen largest arms companies as of 2019 were all headquartered in one of these states.<sup>130</sup> Nationals from each of these five countries are thus under scrutiny in the NGOs' Communication. By ratifying the ATT, these states have shown their intention to subject their nationals to international review.

The ATT's primary purpose is to establish the highest possible common standards for regulating international trade in conventional arms, which includes combat aircrafts, missiles, large-caliber artillery systems, warships, and other items.<sup>131</sup> However, there is also another, subtler, underlying rationale for the treaty: to prevent arms from falling into the wrong hands and thereby to reduce human suffering.<sup>132</sup> The ATT aims to accomplish its goal of establishing high standards for regulating arms trade by requiring exporting countries to carry out a thorough and

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<sup>125</sup> See G.A. Res. 61/89 U.N. Doc. A/61/89 (Dec. 6, 2006).

<sup>126</sup> Woolcott, *supra* note 120.

<sup>127</sup> See G.A. Res. 67/234 (June 11, 2013) (the UN General Assembly adopted the ATT on 2 April 2013 by 154 votes to 3, with 23 abstentions).

<sup>128</sup> David Brown, *Trump says U.S. 'will never ratify' arms trade treaty*, POLITICO (April 26, 2019), <https://www.politico.com/story/2019/04/26/trump-arms-trade-treaty-1385303>.

<sup>129</sup> See *Treaty Status*, ARMS TRADE TREATY, <https://thearmstradetreaty.org/treaty-status.html?templateId=209883> (last visited Mar. 1, 2021) (includes the list of signatories and ratification information).

<sup>130</sup> Lucie Béraud-Sudreau et al., *Mapping the International Presence of the World's Largest Arms Companies*, 2020/12 SIPRI INSIGHTS ON PEACE AND SECURITY 1, 5 (2020), [https://sipri.org/sites/default/files/2020-12/sipriinsight2012\\_mapping\\_the\\_international\\_presence\\_of\\_the\\_worlds\\_largest\\_arms\\_companies.pdf](https://sipri.org/sites/default/files/2020-12/sipriinsight2012_mapping_the_international_presence_of_the_worlds_largest_arms_companies.pdf).

<sup>131</sup> See The Arms Trade Treaty art. 2, Dec. 24, 2014, 3013 U.N.T.S. 52373 (listing the types of conventional arms falling under treaty's scope).

<sup>132</sup> See *About the Arms Trade Treaty (ATT): Why it Is Groundbreaking?*, CONTROL ARMS, <https://controlarms.org/att/>.

comprehensive risk assessment before engaging in trade.<sup>133</sup> This evaluation procedure includes examining the risk of human rights violations in the destination country,<sup>134</sup> the risk of diversion of the exported arms,<sup>135</sup> and the possible adverse impact on internal and regional stability.<sup>136</sup> Additionally, countries are obligated to report their arms exports and imports annually.<sup>137</sup>

Article 6 of the ATT deals specifically with conventional arms transfer authorizations by the state. It covers a variety of possible scenarios, including a ban on authorizing transfers that violate Chapter VII of the United Nations Charter,<sup>138</sup> created by the United Nations Security Council, and specifically, arms embargoes.<sup>139</sup> An arms embargo has been instated in connection to the conflict in Yemen; however, the embargo only concerns the weapons transfers to the Houthi rebel groups—not the UAE/Saudi-led coalition.<sup>140</sup> Article 6 also prohibits the supply of arms when such action would violate the state’s relevant international obligations under international agreements to which it is a party, such as those relating to the transfer of, or illicit trafficking in, conventional arms.<sup>141</sup> This norm attempts to cover any activity that falls short of the ATT’s specific obligations. It also tries covering activity from other instruments relating to arms control, such as the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention, or the Chemical Weapons Convention.<sup>142</sup>

Article 6, Clause 3 of the ATT refers more specifically to the Yemen crisis. In this provision, which prohibits authorizations of any transfer of arms in there is knowledge that arms would be used to commit war crimes, crimes against humanity or genocide, the ATT implies a certain level of compliance with international humanitarian law norms.<sup>143</sup> It is therefore mandatory to refuse an authorization license in

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<sup>133</sup> See The Arms Trade Treaty art. 7, Dec. 24, 2014, 3013 U.N.T.S. 52373.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* art. 11.

<sup>136</sup> See *id.* art. 11(2).

<sup>137</sup> See *id.* art. 13.

<sup>138</sup> U.N. Charter arts. 39–51.

<sup>139</sup> See The Arms Trade Treaty art. 6(1), Dec. 24, 2014, 3013 U.N.T.S. 52373.

<sup>140</sup> S.C. Res. 2216, paras. 14–17 (Apr. 14, 2015).

<sup>141</sup> See The Arms Trade Treaty art. 6(2), Dec. 24, 2014, 3013 U.N.T.S. 52373.

<sup>142</sup> See Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, art. 2(1)(b), 2008 O.J. (L 335) 99 (stipulating an obligation to the same effect but listing specific treaties that may be subject to violations).

<sup>143</sup> See The Arms Trade Treaty art. 6(3), Dec. 24, 2014, 3013 U.N.T.S. 52373 (“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”).

cases when weapons are used to commit war crimes, crimes against humanity, or genocide. Notably, Article 6(3) requires having express knowledge that the weapons will be used to commit crimes at the time the license is granted.<sup>144</sup> An earlier draft of this same provision prohibited granting licenses “for the purpose” of facilitating the commission of international crimes.<sup>145</sup> This initial phrasing required an even higher threshold of the fault requirement for the supplying state. The original text was updated to reference *knowledge* rather than *purpose* due to the difficulty in demonstrating that a state supplies weapons to intentionally facilitate the commission of international crimes.<sup>146</sup> Arguably, the same problem is posed by the requirement of purpose contained in Article 25(3)(c) as it applies to the actions of corporate officials.

The knowledge requirement that was ultimately adopted in Article 6(3)’s text remains tricky to prove when it comes to presenting factual evidence. The degree and specificity of such knowledge remains to be defined on a case-by-case basis by the judicial bodies applying or interpreting the ATT in the future. One practical pitfall of this generalized definition of knowledge is that arms export licenses usually cover a range of products to be delivered over a course of months or even years. The resulting lack of specificity in licenses may allow the recipient state to plausibly argue that the supplies it sends are to be used to pursue legitimate aims, such as enhancing state security. At the same time, it could also be argued that a certain portion of the delivered weapons and ammunition might eventually be diverted toward the commission of war crimes, crimes against humanity, or genocide over this period of time. It is thus difficult for the ATT state party authorities to exercise the proper degree of scrutiny and vigilance when granting export licenses, as there are multiple factual scenarios that could result. Obligations under the ATT raise many issues related to states’ potential responsibility and state officials granting licenses with the knowledge of potential violations. These issues, however, lie outside the scope of this article that deals with responsibility of corporate officials.

The ATT provides an additional safety net concerning the requisite knowledge of the granting state party.<sup>147</sup> Even if the authorities of the supplying state do not meet the standard for awareness given under Article 6(3), Article 7 requires that the authorities still assess the *potential* consequences and/or serious violations of international

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<sup>144</sup> *Id.*

<sup>145</sup> STUART CASEY-MASLEN ET AL., THE ARMS TRADE TREATY: A COMMENTARY ¶¶ 6.12–4 (2016).

<sup>146</sup> *Id.*

<sup>147</sup> See The Arms Trade Treaty art. 7, Dec. 24, 2014, 3013 U.N.T.S. 52373.

humanitarian law that the conventional arms could be used to commit.<sup>148</sup> If, after conducting such an assessment and considering available mitigating measures, the exporting state party determine that there is an overriding risk of consequences, they may not authorize the export.<sup>149</sup> The ATT therefore requires a high level of inspection prior to authorizing weapons' exports, because it includes both the investigating any knowledge of actual crimes being committed with said weapons as well as assessing the *risk* of the commission of these crimes.

Before the ATT was entered into force, arms trade regulation was patchy, as there were minimal guidelines even in force. The 2008 European Union Council Common Position on arms export controls (E.U. Council Common Position)<sup>150</sup> and the 2006 Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials were among the only binding regional documents available prior to the ATT.<sup>151</sup> There were other regional guidelines for controlling arms transfers, such as the 2005 Central American Integration System Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material,<sup>152</sup> the 2005 Best Practice Guidelines for the implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons,<sup>153</sup> and the 2000 Organization for Security and Co-operation in Europe (OSCE) Document on Small Arms

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<sup>148</sup> *Id.* art. 7(1).

<sup>149</sup> *Id.* art. 7(3).

<sup>150</sup> See Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, 2008 O.J. (L 335) 99 (defining common rules governing the control of military technology and equipment exports).

<sup>151</sup> See Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition, Parts and Components that Can Be Used for Their Manufacture, Repair and Assembly, Apr. 30, 2010, <http://disarmament.un.org/treaties/t/kinshasa/text> (regional treaty regulating arms transfers).

<sup>152</sup> Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material*, U.N. Doc. A/CONF.192/2006/RC/WP.6 (June 30, 2006).

<sup>153</sup> See Francis K. Sang, Executive Secretary, Regional Centre on Small Arms and Light Weapons, Address to the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects (June 29, 2006) <https://www.un.org/events/smallarms2006/pdf/arms060629regioncent-eng.pdf>.



and Light Weapons,<sup>154</sup> among others,<sup>155</sup> but none of these guidelines were binding on the parties.

All five states under examination in the NGOs' Communication to the ICC are bound by the E.U. Council Common Position.<sup>156</sup> The E.U. Council Common Position contains obligations that are similar to those enshrined in the ATT. It requires that European Union member states assess the recipient country's attitude towards relevant principles of international humanitarian law and deny the country's 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 international humanitarian law violations.<sup>157</sup> Despite the similarities between the ATT and the E.U. Council Common Position, the latter arguably contains a more stringent obligation to assess and closely scrutinize potential risks arising out of arms supplies than the ATT. The E.U. Council Common Position requires the risk of serious violations of international humanitarian law to be "clear," while the ATT refers to an "overriding" risk, arguably pointing towards a more flexible approach.<sup>158</sup>

Lastly, it is important to address the domestic regulation of arms trade: each member state referred to in the NGOs' Communication to the ICC has adopted their own national laws for arms exports based upon the obligations stemming from the E.U. Council Common Position and the ATT.<sup>159</sup> These laws identify the specific competent authorities in each country who are responsible for granting or rejecting arms export licenses and what additional conditions may apply beyond the provisions of the ATT and the E.U. Common Position.<sup>160</sup> National implementation of international arms trade regulations has given rise to significant differences among domestic licensing practices of the European Union Member States.<sup>161</sup> The European arms exports to members of the

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<sup>154</sup> Organization for Security and Co-operation in Europe, *OSCE Document on Small Arms and Light Weapons*, FSC.DOC/1/00/Rev.1 (Nov. 24, 2000).

<sup>155</sup> Organization of American States [OAS], *Amendments to the Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition – Broker Regulations*, Inter-American Drug Abuse Control Commission, Thirty-Fourth Regular Session, CICAD/doc1271/03 (Nov. 13, 2003).

<sup>156</sup> See Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, art. 1, 2008 O.J. (L 335) 99.

<sup>157</sup> Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, art. 2(2)(c), 2008 O.J. (L 335) 99.

<sup>158</sup> *Id.*; see also The Arms Trade Treaty art. 7(3), Dec. 24, 2014, 3013 U.N.T.S. 52373.

<sup>159</sup> *Id.*

<sup>160</sup> See The Export Control Act 2002, c. 28 (UK); Export Control Order 2008, SI 2008/3231 (UK) (legal framework for United Kingdom export controls).

<sup>161</sup> CHRISTIAN SCHLIEHMANN & LINDE BRYK, *ARMS TRADE AND CORPORATE RESPONSIBILITY: LIABILITY, LITIGATION AND LEGISLATIVE REFORM* 7 (2019).

UAE/Saudi-led coalition involved in the conflict in Yemen has made this disparity especially apparent.<sup>162</sup> Thus, a diverse regulatory landscape exists in the arms trade at both the international and national European level. These disparities and gaps in regulation between states thus result in excessive flexibility in how governments comply with the rules that prohibit arms exports authorization when there is a risk of international human rights or humanitarian law violations.<sup>163</sup> As corporations continue to supply weapons to warring parties, it is evident that this regulatory divergence has trickled down and now muddles the standard of responsibility for not only state actors, but for corporate actors as well. This is so because the existence of state authorizations has direct impact on the ability of corporations to conduct their activities and justify continuation of their supplies.

### *B. Specific Direction of Supplied Aid*

A second possible objection that corporate officials could raise relates to aid supplied to the UAE/Saudi-led coalition. If the weapons' deliveries are administered primarily to meet legitimate objectives, and only a small fraction of the military equipment ends up being used in air raids in Yemen that result in the loss of civilian life, is it plausible to argue that the assistance had no effect on the perpetration of the specific crimes? The ICTY jurisprudence has addressed this issue to some extent, through the concept of "specific direction."<sup>164</sup> The ICTY rejected this additional criterion, although it may still be revived in ICC jurisprudence. The main reason the issue was raised in the ICTY initially was to address the problem of "distant aid," namely situations where there is a large temporal or spatial gap between the assistance and the ultimate harm. It is precisely the situation with arms supplies. It is therefore plausible that questions related to aids' direction might arise in the context of corporate responsibility in general and arms supplies in particular.

The ICTY's discussion of the "specific direction" of supplied aid began in 2013, in *Prosecutor v. Perišić* and *Prosecutor v. Stanišić and Simatović*.<sup>165</sup> In both cases, the defendants were acquitted on the

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<sup>162</sup> *Id.* at 7.

<sup>163</sup> *Id.*

<sup>164</sup> See Marina Aksenova, *The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law*, 4 CAMBRIDGE J. INT'L COMP. L. 88, 88–107 (2015).

<sup>165</sup> *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgement on Appeal (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013); *Prosecutor v. Stanišić*, Case No. IT-03-69-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013); see also *Prosecutor v. Taylor*, Case No. 03-1-A, Judgement on Appeal, ¶ 473 (Special Court of Sierra Leone Sept. 26, 2013).

grounds that their assistance with the specific offences at issue lacked specific direction.<sup>166</sup> More concretely, the *Perišić* Appeals Chamber found that the traditional test, which provides that aid given with the awareness that it would have a substantial effect on crimes committed in the context of war, was insufficient to create individual criminal responsibility in situations where the accused's assistance was remote from the principal perpetrators' actions.<sup>167</sup> The Chamber reasoned that, in these cases, the conduct element of aiding and abetting must be interpreted more restrictively so that it only refers to acts directed at criminal behavior, rather than towards the general war effort.<sup>168</sup> The Chamber went on to explain that it is necessary to establish "a *direct link* between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators."<sup>169</sup> The judges subsequently 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.<sup>170</sup> The Appellate Chamber made this decision notwithstanding the fact that Momčilo Perišić, as the most senior figure in the Yugoslav Army, knowingly provided logistical and personnel assistance to the VRS, which was committing serious crimes in Sarajevo and Srebrenica.<sup>171</sup>

Other chambers responded to this new and heightened interpretation of aiding and abetting quickly. In 2014, the Appeals Chamber rejected the novel requirement of specific direction in *Prosecutor v. Šainović et al.*<sup>172</sup> However, one year later, in *Prosecutor v. Popović et al.*, Vinko Pandurević's defense team nonetheless attempted to revive the *Perišić* interpretation of aiding and abetting.<sup>173</sup> The defense argued that the defendant's lawful actions were not specifically directed towards the unlawful removal of civilians from their residences.<sup>174</sup> The Appeals Chamber once again dismissed this claim, maintaining that specific direction is not an element of aiding and abetting under customary international law.<sup>175</sup> After a brief moment of fame, the requirement of specific direction was conclusively rejected by the ICTY.

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<sup>166</sup> Perišić, Case No. IT-04-81-A, ¶ 122; Stanišić, Case No. IT-03-69-T, ¶ 2362.

<sup>167</sup> Perišić, Case No. IT-04-81-A, ¶¶ 44, 73.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* ¶ 44 (emphasis added).

<sup>170</sup> *Id.* ¶ 122.

<sup>171</sup> *Id.* ¶¶ 62, 68.

<sup>172</sup> *Prosecutor v. Šainović*, Case No. IT-05-87-A, Judgement on Appeal, ¶ 1649 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

<sup>173</sup> *Prosecutor v. Popović*, Case No. IT-05-88-A, Judgment on Appeal, ¶¶ 1758, 1761, 1765 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 30, 2015).

<sup>174</sup> *Id.* ¶ 1761.

<sup>175</sup> *Id.* ¶ 1765.

The ICTY caveat for specific direction of aid or assistance can therefore not be used as a possible counterargument by the suppliers of weapons to UAE/Saudi-led coalition.

While the ICTY has spoken definitively, the ICC does not appear to have conclusively addressed this issue. It is important to ascertain whether the ICC may adopt the requirement of the specific direction in its future jurisprudence. When discussing *assistance* under Article 25(3)(c), the *Bemba et al.* Chamber held that a person's contribution does not need to meet any particular threshold, but instead must have causal connection to the crime.<sup>176</sup> The interpretation of causality given is that "the assistance must have furthered, advanced, or facilitated the commission of such offence."<sup>177</sup> As discussed above, this understanding of causality is somewhat elusive when it comes to any form of complicity. Secondary liability entails responsibility for assisting another person who is presumed to have full autonomy over making the decision to perpetrate the crime.<sup>178</sup> Thus, regardless of whether assistance is quantified in terms of substantiality, this interpretation of causality does not definitely resolve the question of the direction of aid. However, the ICC Trial Chamber did hint towards the direction the Court is leaning by pointing to the elevated fault requirement under Article 25(3)(c), which filters out contributions not sufficiently linked to the crime.<sup>179</sup> This is a welcome observation. A lack of directness for the aid may be met with 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.<sup>180</sup>

Article 25(3)(d) poses a similar challenge with respect to the level of necessary contribution and its direction. Arguably, the direction of the aid becomes even more important if assistance to the group is discussed. There is an additional level of detachment between the act of facilitation and the eventual crime. In the early *Mbarushimana* decision, the majority of judges held that a contribution to the commission of the crime by a group acting with a common purpose must be at least "significant."<sup>181</sup> When deciding on the appropriate threshold, the Chamber drew its inspiration from the ad hoc tribunals decisions

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<sup>176</sup> Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, ¶¶ 93–94 (Nov. 11, 2014).

<sup>177</sup> *Id.* ¶ 94.

<sup>178</sup> AKSENOVA, *supra* note 4, at 1.

<sup>179</sup> Gombo, Case No. ICC-01/05-01/13, ¶ 95.

<sup>180</sup> AKSENOVA, *supra* note 4, at 162.

<sup>181</sup> Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (Dec. 16, 2011).

regarding the joint criminal enterprise.<sup>182</sup> In the later *Katanga* judgment, the ICC Trial Chamber established a formula for assessing a significant contribution.<sup>183</sup> However, in both *Mbarushimana* and *Katanga*, the judges added that the assessment must be done on a case-by-case basis, taking into account such factors as sustained participation after learning about a group's criminality, efforts made to prevent criminal activity, and the role of the accused vis-à-vis the crimes.<sup>184</sup>

In practical terms, the *Katanga* majority found that Germain Katanga, the defendant, made a significant contribution to crimes committed in the Bogoro region of the Democratic Republic of Congo when he supplied arms to the local militia.<sup>185</sup> Katanga's logistical support allowed local militia to gain military advantage and carry out its plan to attack the civilian population.<sup>186</sup> Judge van den Wyngaert dissented on this point, arguing that Katanga's aid could have been used for criminal and non-criminal aims alike.<sup>187</sup> She maintained that while it is possible that a group within the meaning of Article 25(3)(d) may simultaneously have criminal and non-criminal purposes, the criminal component must be an inherent part of the common plan.<sup>188</sup> Consequently, an accomplice must be at least aware that they are contributing to the *criminal* activities of the group.<sup>189</sup> This narrower interpretation in the dissenting opinion arguably aligns somewhat with the ICTY's 'specific direction' interpretation of aiding and abetting. The interpretation could therefore possibly be invoked by arms suppliers as a potential defense to a claim that they are complicit in assisting the UAE/Saudi-led coalition in Yemen in the commission of crimes resulting from aerial campaigns under Article 25(3)(d). It may be difficult, if not impossible, to prove that the weapons delivered by the corporations under scrutiny were indeed distributed to the coalition specifically with the aim of furthering their criminal activities.

In sum, the ICC jurisprudence does not appear to embrace the requirement that supplied assistance must be directed specifically toward criminal goals. A more nuanced interpretation of the assistance's nature in the context of corporate facilitation may emerge in future cases, since

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<sup>182</sup> See AKSENOVA, *supra* note 4, at 159–60.

<sup>183</sup> Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1633 (Mar. 7, 2014).

<sup>184</sup> See *Mbarushimana*, ICC-01/04-01/10, ¶ 283. See also Germain Katanga ICC-01/04-01/07, ¶ 634.

<sup>185</sup> Germain Katanga ICC-01/04-01/07, ¶¶ 1671, 1679.

<sup>186</sup> *Id.*

<sup>187</sup> Prosecutor v. Germain Katanga, ICC-01/04-01/07, Minority Opinion of Judge van den Wyngaert, ¶ 287 (Mar. 7, 2014).

<sup>188</sup> *Id.* ¶ 286.

<sup>189</sup> *Id.*

it is a *sui generis* scenario where the primary motivation is profit-making. Generic assistance is thus the default defense for most, if not all, companies who are potentially contributing to gross violations of international human rights and humanitarian law.

#### CONCLUSION

This article explored potential corporate officials' complicity under the Rome Statute. This discussion is particularly timely given an increased global focus on corporate involvement in gross human rights and humanitarian law violations. Understanding the appropriate standard for holding corporate executives accountable is helpful for the development of international law that can address modern challenges.

The analysis has shown that while some divergence can be identified between the ad hoc tribunals' test of knowingly providing a substantial contribution and the ICC's test of a purposeful contribution, there exists a clear thread harmonizing these two conceptualizations. First, both interpretations identify the concept of complicity as a mode of liability to attribute responsibility to those who do not directly perpetrate the crime. Second, the conduct requirement of a contribution that has some effect on the crime is comparable in both definitions. One could even argue that the absence of the quantitative substantial qualifier in the ICC's interpretation is somewhat balanced by the enhanced fault requirement of 'purpose'. Third, in practical terms, a conscious choice to contribute, or 'facilitating for the purpose of commission,' may be established based on the same factual evidence as knowingly contributing to the crime. The pattern of continued assistance may be key in this regard. Article 25(3)(d) of the Rome Statute poses unique challenges as it also requires the existence of a group acting with a common purpose to be proven. As discussed, this element has only been addressed on a case-by-case basis, and it remains to be seen how the ICC will approach the problem of corporate assistance provided to a group in situations when such help can be used for criminal and non-criminal aims alike.

Important questions remain unresolved regarding the standard of corporate complicity within the ambit of international criminal law. It is fair to say that, despite certain deviations in the legal test for complicity between ad hoc tribunal and ICC jurisprudence, the recent filing by the ECCHR and other non-governmental organizations demonstrates the possibility of refining this test as it pertains to corporate officials' actions.