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Developing a Standard of Corporate Complicity in Gross Human Rights Violations

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Mexico's Civil Litigation Against US Gun Manufacturers and Dealers for Cartel Violence: Developing a Standard of Corporate Complicity in Gross Human Rights Violations

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In the ongoing civil suits in *Mexico v Smith & Wesson & others* and *Mexico v Diamondback Shooting Sports Inc. et al*, the Mexican government has brought claims against US gun manufacturers in Massachusetts and gun dealers in Arizona for extraterritorial harms suffered by the Mexican State in the context of cartel violence. The US district court judge recently dismissed the *Smith & Wesson* lawsuit and the government of Mexico announced it plans to appeal. The crux of Mexico's theory of legal liability is that the defendant gun companies are supplying weapons they know are destined to be immediately trafficked

across the border for illicit use in cartel violence. Mexico is thus claiming damages resulting from the facilitation of unlawful trafficking of weapons. This litigation is pioneering in that it seeks to clarify legal standards for holding business enterprises responsible for facilitating severe harm in a transnational setting.

On a broader view, *Mexico v Smith & Wesson & others* and *Mexico v Diamondback Shooting Sports Inc. et al.* represent a broader trend of engaging the concept of complicity in developing legal standards for corporate accountability. In Mexico's claims, doctrines of complicity in the form of facilitation are being deployed to show the connection between, on the one hand, the activities of gun makers and dealers, and on the other, the eventual crimes committed with those guns in Mexico and resultant harm to the Mexican state. While complicity is traditionally a criminal law concept, some jurisprudence appears to regard it as providing standards for holding corporate actors accountable in civil and criminal law cases alike.

This blog post examines Mexico's position in both sets of litigation, focusing specifically on the standard of complicity. We also briefly touch upon the (jurisdictional) reasons for dismissal in *Smith & Wesson*. Despite significant hurdles, we argue that Mexico's innovative action contributes to a momentum in developing the standard for corporate accountability for aiding and abetting gross human rights violations. The nature of this momentum is best seen in conjunction with concurrent developments in corporate accountability discussed in the last section. In particular, international criminal law, with its rich body of jurisprudence related to aiding and abetting liability, supports the refining of the standard for corporate complicity.

Background to the Litigation

There can be no doubt that the social issue underlying Mexico's claim – the massive proliferation of small arms amongst the drug cartels – is both a Mexican and an American problem. In Mexico, which has strict gun ownership laws, there is only one gun store that issues fewer than 50 permits per year. Nonetheless, at least 350,000 people were murdered and more than 72,000 are still missing since the government deployed the military in the 'war on drugs' in 2006, the effects of narco-trafficking carrying a huge public health cost. Although the exact proportions of weapons' origins is debatable, it is clear that the majority of traced guns on Mexican streets are from the US. Meanwhile, drug cartels flood the US streets with cocaine, heroin, fentanyl, methamphetamine, and other illicit narcotics, the majority of drugs entering the US from Mexico, and which Americans consume to the tune of over \$150 million annually. It is not difficult to see that the proliferation of American guns on Mexico's streets is also an American problem, its 'blow-back' effect fanning the flames of US illicit drug dealing.

But while Washington spends vast sums on partnering with Mexico on security and counter-narcotics, little appears to have been achieved in stemming the flow of US-made weapons into Mexico, which could, in-turn, dampen the 'blow-back' of the drug trade into the US. Nonetheless, the claims in *Mexico v Smith & Wesson & others* and *Mexico v Diamondback*

Shooting Sports Inc. et al do not seek to address the US problem – they are rooted solely in harms caused on Mexican soil. Indeed, Mexico is at pains to point out that it is not attempting to challenge gun ownership laws in the US and that it recognises American sovereignty to determine US social policy reflecting a balance between ‘the financial interests of the gun industry and the rights of victims within its jurisdiction’ (para. 20 of the *Smith & Wesson* complaint).

Overview of Mexico’s Action

Mexico filed its first civil action in *Mexico v Smith & Wesson & others* on 4 August 2021 before a Massachusetts District Court. The action targeted arms producers: (1) Smith & Wesson Brands, Inc., (2) Barrett Firearms Manufacturing, Inc., (3) Beretta U.S.A. Corp., (4) Beretta Holdings P.A., (5) Century International Arms, Inc., (6) Colt’s Manufacturing Company LLC, (7) Glock, Inc., (8) Glock GES. M.B.H., and (9) Sturm, Ruger & Co., Inc.

Mexico argued, *inter alia*, that the defendant gun manufacturers have been ‘causing massive damage by actively facilitating the unlawful trafficking of their guns to drug cartels and other criminals in Mexico’. Mexico is therefore submitting that the defendants aid and abet crimes committed by the cartels with trafficked weapons. The claim regarded this in terms of a substantial contribution to the cartel crimes, since ‘[a]most all guns recovered at crime scenes in Mexico—70% to 90% of them—were trafficked from the US’ (para. 1 of the complaint). According to Mexico, the defendants knowingly aid and abet these crimes, since it is abundantly clear to them that their business practices involve fuelling the illicit traffic of weapons. In the words of Mexico’s claim, the ‘Defendants’ willfully blind and standardless distribution practices aid and abet the killing and maiming of children, judges, journalists, police, and ordinary citizens throughout Mexico’ (para. 15 of the complaint). Interestingly, Mexico’s first claim was filed under tort law, but it invoked standards also common to criminal law, such as aiding and abetting.

It is peculiar that the joint response of the Defendant manufacturers asserts that they could not be held responsible in circumstances where it is not abundantly clear how their merchandise is used by the end consumer. The argument is that, for instance, Budweiser – a beer company – cannot be held responsible even if it knows that some of its products will be sold unlawfully to minors (p. 20 joint response). This consideration underpins the general reasoning of business owners that they cannot be held responsible for contributing to criminality when their products may be utilized for both lawful and unlawful activities. The International Criminal Tribunal for the Former Yugoslavia (ICTY) examined the problem of these so-called neutral contributions in *Šainović et al* when it ultimately held that it is not necessary for securing convictions that the aid is specifically directed towards a criminal purpose (para. 1649).

Judge Saylor dismissed Mexico's first claim in *Mexico v Smith & Wesson & others* on 30 September 2022 on the grounds that it is precluded by the US Protection of Lawful Commerce in Arms Act (PLCAA) (see p. 3 of the dismissal order). This law grants federally licensed firearms manufacturers and dealers broad immunity against lawsuits claiming harms resulting from the 'criminal or unlawful' misuse of guns by a third party. Judge Saylor further held that exceptions under PLCAA do not apply to Mexico's first claim. For instance, an exception for negligence only applies to dealers and not gun manufacturers (see p. 29 of the dismissal order). The judge did not rule, however, on whether the term 'criminal or unlawful' refers only to the US state and federal law or also to foreign law. Mexico argued its case under both sets of laws and insisted that PLCAA does not apply in an extraterritorial fashion when the claims are made under foreign law. The first claim failed on this jurisdictional basis and is subject to Mexico's impending appeal.

Mexico's second claim – filed before the District Court of Arizona on 10 October 2022 in and *Mexico v Diamondback Shooting Sports Inc. et al.* – targets dealers, alleging responsibility of five Arizona gun shops for selling military-style weapons and ammunition to drug cartels in Mexico through reckless and unlawful business practices (para. 1 of the claim). The allegation is that the defendants choose to sell guns in a reckless manner, despite the existence of virtual certainty that these weapons help in causing cartel violence across the border. Just like the first claim, Mexico's second claim is civil in nature but is filed under the Racketeer Influenced and Corrupt Organizations Act ('RICO') (paras. 12, 179 of the claim).

Civil RICO claims in the US are an alternative to criminal prosecutions under the same statute. Naturally, civil RICO includes some elements and standards from the field of criminal law as it seeks compensation for the harm arising out of organized crime and related criminal patterns. For instance, civil claims under RICO require plaintiffs to prove the existence of a 'proximate cause' – or a direct causal relationship between the plaintiff's injury and the defendant's RICO violations. This standard of causation is typical for criminal law cases, which require a direct connection between *actus reus* – or conduct – and the resulting harm when it comes to perpetration of a crime. It is important to note, however, that complicity in criminal law – as a distinct form of engaging in a crime – is often regarded as lying outside of the standard of causation where it involves assisting the actions or omissions by another person, who is presumed to have autonomy. It is thus problematic to say that one person 'causes' another one to act.

Mexico's second claim may raise dealers' objections relating to Mexico's failure to show proximate cause because the injury can be considered too indirect, remote, and derivative. If one relies on international criminal law standards, however, there is clarification when it comes to the effect of assistance on the crime. Aiding and abetting under customary international law does not require a direct causal link between the action of an accomplice and the ultimate harm. The *Furundžija* Trial Chamber at the ICTY elaborated on the effect of assistance, holding that the acts of the accomplice need not 'bear a causal relationship to, or

be a *conditio sine qua non* for, those of the principal' (para. 223). This pronouncement is aligned with the philosophical underpinning of complicity mentioned in the previous paragraph.

Momentum in Strategic Litigation

The Mexico claim should be seen in the broader context of several recent developments in the area of corporate accountability for international and transnational crimes. On 7 September 2021, the French *Cour de Cassation* held in the *Lafarge* case that a lower court wrongly cancelled the indictment alleging Lafarge's complicity in crimes committed by a number of armed groups in Syria, including the Islamic State (para. 6). The *Cour de Cassation* held that knowingly transferring millions of dollars to an organization whose sole purpose is criminal is sufficient to meet the requirements for corporate complicity (para. 59(2)). This pronouncement is widely seen as promoting corporate accountability since it confirmed 'knowledge' (and not 'intent') as a threshold for *mens rea* – or culpability – when it comes to criminal complicity. This finding is in line with customary international law on aiding and abetting and probably the Rome Statute. It also makes sense with respect to corporate entities that often contribute knowingly (but much less frequently, intentionally) to criminality because of the nature of their *raison d'être*.

Other recent developments can be seen in the momentous Shell litigation in the Netherlands, and a recent attempt to hold heads of arms corporations accountable in their individual capacities for complicity in war crimes. The European Centre for Constitutional and Human Rights (ECCHR) together with a group of other NGOs submitted a communication to the Office of the Prosecutor of the International Criminal Court (ICC) urging for the opening of a preliminary examination into the conduct of several European companies, based in the UK, Spain, Italy, Germany, and France, that supply weapons to the Saudi/UAE-led coalition. This has spawned satellite litigation in some of those national jurisdictions. The ICC determination is still pending.

Finally, Sweden is currently pursuing a case concerning the activity of an oil corporation – Lundin Energy – charged with aiding and abetting international war crimes in Sudan between 1997- 2003. In 1997, when Sudan was at the height of a brutal civil war, the company signed a contract with the government to explore oil in the southern regions; and it is alleged that this led to the forced displacement of nearly 200,000 people, as well as uncountable cases of rape, torture and abduction. On 11 November 2021, the Swedish Prosecutor announced criminal charges against the company's chairman and director alleging complicity in war crimes under the principle of universal jurisdiction as provided for in Chapter 2, Section 3(6) of the Swedish Penal Code.

These recent developments in the area of corporate accountability have focused on complicit assistance, namely aiding and abetting human rights and humanitarian law violations, rather than the (less common) situation where a company engages in the direct perpetration of

such violations. It is in relation to such complicit assistance that the standards that are applied by US courts to the transboundary harm in Mexico's claims will provide insights for the ongoing discussion relating to the desirable standard for corporate complicity.

Thus, the lawsuits, brought under national US laws, emerge from, and contribute to, broader international trends in the judicial enforcement of corporate accountability for human rights violations. These trends include the recognition – under international criminal law – that individual business persons may be held directly responsible under international law for their roles in the rare circumstances in which they contribute to atrocity crimes.