Individual Criminal Liability for Arms Exports under the ICC Statute

A Case Study of Arms Exports from Europe to Saudi-led Coalition Members Used in the War in Yemen

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Abstract

Cases against corporate managers for their involvement in international crimes are rare. Still, legal precedent from the Nuremberg trials and more recent cases in national jurisdictions shows that corporate officers of arms manufacturing companies may be liable under international criminal law (ICL) when exported arms are used for the commission of war crimes. This article examines the circumstances under which corporate officers responsible for weapons exports can be criminally liable as accomplices to war crimes under Article 25(3)(c) of the Statute of the International Criminal Court (ICC). To corroborate our analysis, we use the case study of European arms exports to members of the Saudi-led coalition in Yemen. There is evidence that this coalition has been committing war crimes in Yemen since 2015. Despite factual difficulties and legal complexities such as the mens rea standard of Article 25(3)(c) ICC Statute, we argue that corporate officers involved in arms exports may be individually liable, depending on their contribution to the commission of war crimes; their knowledge and awareness of the consequences of the provision of arms due to the abundance of information in the public domain; and the international standards for corporate human rights due diligence that apply to their specific business activities.

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1. Introduction

The Nuremberg trials are widely considered to have established individual criminal liability under international criminal law (ICL).[1] The Nuremberg prosecutors not only focused on individual contributions to the Nazi regime's crimes, but tried to expose the systematic collaboration between different actors and sectors in German society. These efforts meant doctors, lawyers, foreign ministry bureaucrats and key industrialists were brought to trial in subsequent Nuremberg proceedings. While relatively few international criminal justice cases since the 1940s have involved corporate actors, the experiences of Nuremberg show that economic actors, along with military leaders, must be held to account in order to capture the full range of crimes committed in an armed conflict.

A business sector that warrants special attention with respect to ICL is the arms trade industry. This article will analyse whether the provision of aiding and abetting under Article 25(3)(c) of the Statute of the International Criminal Court (ICC) provides a basis for prosecuting corporate officers for exporting arms that are subsequently used in the commission of international crimes. Since the ICC Statute does not foresee the criminal liability of corporations as such, but only provides for the liability of individuals or of individuals as members of organizations, we will not go into corporate criminal liability for international crimes. The question of corporate officer liability within the arms sector is especially interesting because of the destructive nature of the products at issue. The fine line between 'legitimate' arms trading for profit and criminal behaviour must be drawn carefully, given that, even in 'legitimate' sales, arms exporters have full knowledge of the potentially devastating consequences of their decision to export.[2] There is arguably a great deal at stake in answering the question of whether arms executives may be held liable as aiders and abettors under Article 25(3)(c) of the ICC Statute. If the statute does not provide a basis for criminal liability, it arguably fails to meet enforcement challenges of the globalized economy, which can facilitate and profit from disastrous conflicts that entail widespread violations of international criminal law.[3]

For the purposes of this analysis, once we establish the relevant legal principles for corporate officer liability under Article 25(3)(c) ICC Statute, we will apply them to a case study of arms exports by European arms manufacturers to Saudi Arabia and other members of the military coalition involved in the

1 K.C. Priemel and A. Stiller, 'Wo Nürnberg liegt. Zur historischen Verortung der Nürnberger Militärtribunale', in K.C. Priemel and A. Stiller (eds), *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung* (HIS Verlagsges mbH, 2013) 9–64.

2 M. Saage-Maaß, 'The Merowe Dam Project – When Does the Coin Flip from Legal Business Activity to Criminal Behavior? Reflections on the Concept of Guarantor's Liability in the Context of Transnational Business Activities', 4 *Criminal Law Forum* (2018) 603–616.

3 W. Kaleck and M. Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes', 8 *Journal of International Criminal Justice (JICJ)* (2010) 699–724.

armed conflict in Yemen (the 'Saudi-led Coalition' or 'Coalition'). Despite abundant documentation and public evidence of violations of international humanitarian law committed by the Saudi-led Coalition since 2015, arms exports from Europe to Coalition members continue. The situation in Yemen is by no means the only relevant case study for our analysis. Arms are exported routinely to regimes that may use them for internal repression or other acts that constitute violations of international humanitarian law. However, the public outcry in response to the crimes committed in Yemen, the abundance of documentation of these violations and the sheer amount of European exports make this a compelling case study for our purposes.

2. Corporate Accountability and the Nuremberg Trials — Ideological Foundations

Given the major role Germany's industry had played in German rearmament leading up to the Second World War and the subsequent war effort, the Allies sought to try the German industrial leadership in an 'economic case' before the International Military Tribunal for Nuremberg (IMT).[4] Since the Charter of the IMT and subsequent military tribunals did not contemplate the criminal liability of corporations as such, charges were restricted to individuals operating in their corporate capacities.[5] By the time the economic case was to be tried at the IMT, the political landscape had changed and the political will for an economic case had weakened.[6] Ultimately, Gustav Krupp, representing Krupp AG (Germany's principal arms manufacturer), was the only German industrialist indicted by the IMT, and due to poor health he never stood trial.[7]

Despite these setbacks at the IMT, industrialists were eventually tried in the subsequent Nuremberg trials before military tribunals. The United States tribunals were strongly influenced by the US's political agenda and Cold War strategy in Europe.[8] In these proceedings, prosecutors faced the challenge of

4 The committee headed by Justice Jackson, who was the chief prosecutor for the United States at the Nuremberg trials, saw to the charge of the 'common plan and conspiracy', of which the economic case was to be a key part. See T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (paperback edition, 2013, Alfred A. Knopf Inc., 1992), at 80, and Justice Jackson Report to the President on Atrocities and War Crimes, dated 7 June 1945, Part III, at 21, available online at https://www.loc.gov/rr/frd/Military.Law/pdf/jackson-rpt-military-trials.pdf (visited 12 August 2019)

5 Art. 6 Charter of the International Military Tribunal.

6 Especially in the US, where the more business-oriented Truman had succeeded Roosevelt as President G. Baars, 'Captialism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII', in K.J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 163–193, at 171.

7 The decision to indict Gustav Krupp as the sole defendant in the IMT proceedings on Krupp was a serious blunder, given that his son Alfried Krupp had been the sole owner of the company since 1943. Baars, *supra* note 6, at 172.

8 See e.g. F. Jeßberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial', 8 *JICJ* (2010) 783–802; K.C. Priemel, 'Tradition

demonstrating how economic elites of the Nazi state had collaborated and facilitated the regime's crimes, while making them 'appear different as compared to functionally comparable groups in other western industrialized societies …'.[9] This distinction was particularly vexing in relation to arms manufacturers: If producing arms for Nazi Germany constituted criminal behaviour, the US arms industry could be implicated as well.[10] An exchange between the Head of the US War Crimes Division of the US War Department and IG Farben prosecutor DuBois highlights this: 'I personally do not want to discourage you, but a lot of people in this Department are scared stiff of pinning a war plot on these men. There's no law by which we can force industrialists to make war equipment for us right now. A few American manufactures were Farben stooges. And those who weren't can say, "Hell if participating in a rearmament program is criminal, we want no part of it."'[11]

One of the key Nuremberg cases addressing the arms trade was the trial of Alfried Krupp, who had been the sole owner of Krupp AG since 1943. Although he was not included in the IMT indictment, he was tried in one of the subsequent Nuremberg tribunals. In the case, the prosecutor argued that Krupp had supported and approved the aims of the Third Reich programme and placed Krupp AG's resources at its service. By producing arms, Krupp provided indispensable assistance to the preparation of Germany's aggressive wars.[12]

The Tribunal eventually acquitted Alfried Krupp and the other defendants of these charges, finding that the prosecution did not prove the accused had taken actual part in or conspired with the German government in the planning and waging of wars, or had actual knowledge of these particular plans.[13] However, the Tribunal did not fully disregard the possibility of liability for providing arms. It did 'not hold that industrialists as such could not under any circumstances be found guilty upon such charges'.[14] In the *Zyklon B* case before the British Military Tribunal, two of the three defendants were found guilty of war crimes for supplying poisonous gas to the *Schutzstaffel* (SS) between 1941 and 1945 while knowing that this gas was used in concentration camps to

und Notstand. Interpretations- und Konfrontationslinien im Krupp Fall', in Priemel and Tiller (eds), *supra* note 1, 434–464. The US saw a strong Germany as necessary to create a buffer between the US and the USSR. See Baars, *supra* note 6, at 174. In that respect, former prosecutor Dubois had noted: 'I believe it is fair to say that since 1945 the principal factor behind our foreign policy, like the motivation of the Farben judgment, has been the fear of Communism.' E. DuBois, Jr., *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* (The Beacon Press, 1952), at 357.

9 Jeßberger, *supra* note 8, at 799.

10 DuBois, *supra* note 8, at 21 and 22.

11 *Ibid.*, at 21 and 22.

12 *The IG Farben and Krupp Trials*, United States Military Tribunal, 14 August 1947–29 July 1948 and 17 November 1947–30 June 1948, in Law Reports of the Trials of War Criminals (LRTWC), Vol. X (1949), at 72.

13 *Ibid.*, at 84.

14 *Ibid.*, at 85.

exterminate detainees.[15] According to the prosecutor 'by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder'.[16]

Thus, despite political headwinds, the IMT and subsequent Nuremberg trials established that corporate officers, including those of arms manufacturing companies, could be criminally liable as accessories to international crimes when acting in a corporate capacity. The question of liability hinged on whether the corporate officers had knowledge that their products would be used for the commission of international crimes. The failure to try Gustav or Alfried Krupp before the IMT and Cold War geopolitical concerns arguably dampened the impact of these precedents in subsequent ICL trials. Nevertheless, these cases continue to influence legal discourse on corporate accountability under ICL.

3. Arms Exports — Legal Framework and Application to the Yemen Case

The narrative of 'legitimate' business activity, first articulated at the IMT, continues to influence the popular understanding of the potential criminality of commercial acts. Most relevant proceedings after Nuremberg have focused on individual businessmen who traded arms in violation of arms embargoes.[17] In contrast, the executives of multinational corporations that receive licences for their arms exports and supply the largest portion of arms worldwide have avoided prosecution, even when their exports have contributed to violations of international criminal law. Is there a legal justification for distinguishing the criminal liability of individual businesspersons who trade in arms in violation of embargoes from that of managers of large multinational corporations who export arms that are authorized by governments but nevertheless contribute to violations of international criminal law? Based on precedent from Nuremberg and our analysis below, we argue that there is no legal justification to distinguish the criminal liability of these two kinds of actors. Most recently, there are two prosecutions ongoing in Europe against former corporate officers at the executive level of multinational companies Lafarge and Lundin Oil, which may indicate a shift in prosecutorial conceptions and strategies and strengthen the authors' argument.[18]

15 Judgment, *Trial of Bruno Tesch and Two Others*, British Military Court, 1–8 March 1946, in LRTWC, Vol. I (1947), at 93–103.

16 *Ibid.*, at 101.

17 For more details and references to the *Van Anraat* and the *Kouwenhoven* cases see below.

18 C. Tixeire, 'Can the Lafarge case be a game changer? French multinational company indicted for international crimes in Syria', Business & Human Rights Centre Blog, available online at https://www.business-humanrights.org/en/can-the-lafarge-case-be-a-game-changer-french-multinational-company-indicted-for-international-crimes-in-syria (visited 29 April 2019) and for more information see: https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/ (visited 29 April 2019); M. Saage-Maaß and

A. Arms Export Control Regulation

To evaluate the potential criminal liability of arms sellers who export pursuant to authorization from their domestic governments, it is important to understand the legal framework under which arms exports are authorized. We will first describe this legal framework in relation to EU member states, and subsequently apply it to exports from European arms manufacturers to members of the Saudi-led Coalition.

To export conventional arms,[19] European arms manufacturers must obtain a licence from relevant domestic authorities. Licences may only be granted if they are consistent with domestic laws as well as the provisions of the EU Council Common Position 2008/944/CFSP of 8 December 2008 (EU Common Position) and the Arms Trade Treaty (ATT).[20] The EU Common Position is binding on EU member states and sets minimum standards under which they must assess arms export licence applications. The EU Common Position requires that arms exports be denied, 'where there is a clear risk [that arms] might be used in the commission of serious violations of international humanitarian law'.[21] Similarly, Article 6(3) of the ATT requires that exports be denied if the relevant domestic government bodies have knowledge that, 'at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions 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'.[22] Even where the export is not prohibited under Article 6, Article 7(1) of the ATT requires EU member states to assess the potential that the conventional arms proposed for export could be used to '(i) commit or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law; …'. According to Article 7(3) of the ATT, states may not authorize arms exports if their relevant authorities determine there is an overriding risk of any of the negative consequences mentioned under Article 7(1). Furthermore, Article 7(7) anticipates reassessments of authorization decisions if conditions in export markets change.

C. Tixeire, 'Kriegsökonomien und die Verwicklung transnationaler Unternehmen in Völkerstraftaten – Der Fall Lafarge/Syrien', in *Kritische Justiz* (2019), March 2019, at 70–75; M. Ingeson and A.L. Kather, 'The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad', EJIL: Talk! Blog of the European Journal of International Law, 18 November 2018, available online at https://www.ejiltalk.org/author/akather/ (visited 29 April 2019).

19 The terms 'conventional weapons' or 'conventional arms' generally refer to a weapon which is neither nuclear, biological, nor chemical. *DOD Dictionary of Military and Associated Terms* (US Department of Defense, 2005), available online at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf (visited 29 April 2019).

20 Provisions of the EU Common Position are often transposed into national legislation.

21 Art. 2 criterion (2)(c) EU Common Position.

22 Art. 6 (3) ATT.

This implies that States can revoke or suspend export licences.[23] In many cases, domestic laws contemplate such a possibility either by including a duty or a process to suspend or revoke previously authorized licences.

B. The Case Study of Yemen

To apply the legal framework of arms export controls to the case of Yemen, it is important to understand the armed conflict in Yemen, the involvement of the Saudi-led Coalition in the conflict and the nature and extent of arms exports from Europe to the Saudi-led Coalition members.

1. The Yemen Conflict and the Coalition's Military Campaign

In March 2015, under the lead of Saudi Arabia and the UAE, a military coalition of states intervened in the armed conflict in Yemen. Over the past four years, the Saudi-led Coalition has imposed a naval and aerial blockade,[24] and has executed airstrikes on civilian infrastructure in Yemen that have led to a humanitarian crisis on an unprecedented level. The UN Panel of Experts on Yemen, the Group of Eminent Experts on Yemen, and NGOs have widely documented potential violations of international humanitarian law committed by the Saudi-led Coalition.[25] For instance, the 2016 UN Panel of Experts' report described incidents including attacks against camps for internally displaced persons and refugees, civilian gatherings and civilian objects such as medical facilities, schools, mosques, markets and other essential civilian infrastructure.[26] In some instances, the UN Panel of Experts and the Group of Eminent

23 Art. 7(7) of the ATT stipulates: 'If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.'

24 Human Rights Watch (HRW), *Yemen: Coalition Blocking Desperately Needed Fuel*, 10 May 2015, available online at https://www.hrw.org/news/2015/05/10/yemen-coalition-blocking-desperately-needed-fuel (visited 26 June 2019).

25 The UN Panel of Experts on Yemen was established by the UN Security Council Committee pursuant to UNSC Resolution 2140 (2014) and 2216 (2015) to provide information for the potential designation of individuals and entities who may be engaged in acts that threaten the peace, security and stability of Yemen, to gather information on sanction measures, and to provide information on individuals subjected to these sanctions. The Group of Eminent Experts on Yemen was established on 29 September 2017 by Human Rights Council resolution A/HRC/Res/36/31. Further, see *Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140*, UN doc. S/2016/73, 26 January 2016, §§ 137, 140, at 39 (hereafter '*UN Panel of Experts Report 2016*'); UN Group of Eminent Experts on Yemen, *Situation of human rights in Yemen, including violations and abuses since September 2014*, A/HRC/39-43, 17 August 2018, at 14, 38 and 41 (hereafter '*Group of Eminent Experts Report*'). See also HRW, *Hiding behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen*, 24 August 2018, available online at https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful (visited 26 June 2019).

26 *UN Panel of Experts Report* 2016, *supra* note 25, at 35, 152–166,

Experts on Yemen concluded that the documented violations may even amount to war crimes.[27]

2. *Europe's Arms Exports to Coalition Members*

Between 2015 and 2019 a substantial share of arms exports to Saudi Arabia and other Coalition members came from European countries.[28] Arms exports from Europe included fighter jets, bombs, naval mines and frigates. The Royal Saudi Air Force, for example, uses European-made Tornado and Eurofighter Typhoon jets for air warfare in Yemen.[29] On several occasions, remnants of guided bombs produced by European manufacturers were found in Yemen.[30] Two examples of European arms exports to Coalition members are elaborated below, but these examples are by no means exhaustive.

(a) Rheinmetall

Bombs are essential for the Coalition's aerial campaign. In Yemen, remnants of bombs produced by RWM Italia SpA, among other companies, have been found.[31] RWM Italia SpA, based in Italy, is a subsidiary of Rheinmetall AG, a large multinational company based in Germany that specializes in the

27 *Final report of the Panel of Experts on Yemen*, UN doc. S/2017/81, 31 January 2017, § 127, at 52 and *Group of Eminent Experts Report*, *supra* note 25, at 15, 38 and 41.

28 The Royal Saudi Air Force (RSAF) possesses at least 87 Tornado fighter jets, and 72 Typhoon fighter jets of European origin, making up almost half of the entire fleet of planes with capacity to attack. See: http://www.arabaviation.com/en-us/airpower/royalsaudiairforce.aspx (visited 26 June 2019).

29 These aircrafts were purchased by Saudi Arabia in 2007 together with a support programme of air and ground crew training, maintenance facilities, technical support, spares and repairs, and aircraft capability upgrades, and delivered between 2012 and 2017. Campaign Against Arms Trade (CAAT)/D. Wearing, '*A Shameful Relationship. UK Complicity in Saudi State Violence*', April 2016, available online at https://www.caat.org.uk/campaigns/stop-arming-saudi/a-shameful-relationship.pdf (visited 12 August 2019), at 22 and BAE Systems, *Annual Report 2017* (visited 12 August 2019), at 50.

30 J. Merrill, *UK firms linked to alleged war crimes tout weapons in UAE*, 23 February 2017 21:14 UTC, available online at https://www.middleeasteye.net/news/uk-firms-linked-alleged-war-crimes-tout-weapons-uae (visited 16 July 2019); ECCHR, *Case Report. European Responsibility for War Crimes in Yemen – Complicity of Italian Subsidiary of German Arms Manufacturer and of Italian Arms Export Authority: The deadly incident of 8 October 2016*, available online at https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_Yemen_Italy_Arms_ECCHR_Mwatana_ReteDisarmo_20180418.pdf (visited 16 July 2019).

31 In Italy investigations are ongoing by the prosecutor in Rome into the criminal liability of the management of Italian arms company RWM Italia SpA, a subsidiary of Rheinmetall AG, and Italian government officials who authorized the licences for the arms export to Saudi Arabia. The criminal complaint was filed by Mwatana for Human Rights (Yemen based), Rete Disarmo (Italy based) and ECCHR. For more information on the case see: https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/ (visited 16 July 2019).

automotive and defence sectors. The Rheinmetall Group has 149 subsidiaries[32] and generated sales of €3,221 million euro in its Defence division in 2018.[33] Based on German export licensing practices over the past years, it is unlikely that Rheinmetall would have been able to obtain a licence to export bombs to Saudi Arabia or the UAE from Germany. Nevertheless, Rheinmetall has managed to export through its Italian and South African subsidiaries, where the respective authorities granted export licences to Coalition members.

(b) The Eurofighter Typhoon Consortium

Currently, 72 Eurofighter typhoons make up the largest part of the Royal Saudi Air Force's fleet and reportedly are being used in the war in Yemen to carry out Coalition airstrikes.[34]

The Eurofighter Typhoon project is an example of the complex structure of the European defense sector, which consists of multinational companies, elaborate networks of subsidiaries, and joint, multinational projects that include investment, subsidies, and other support from European governments. For example, the Eurofighter is produced through a four-state consortium. Each of the four partner nations (Germany, Spain, Italy, and the UK) participates in the project through a 'government pillar' (e.g., a ministry) and an 'industry pillar' (e.g., an arms manufacturer). The four countries also jointly established the NATO Eurofighter and Tornado Management Agency, which 'acts as the single point of contact for customers and governments'.[35] The industry side of the programme is organized through Eurofighter Jagdflugzeug GmbH, a project management corporation that 'co-ordinates the design, production and upgrade of the Eurofighter Typhoon aircraft'.[36] Eurofighter Jagdflugzeug GmbH is owned by the four national industry pillars: BAE Systems (UK) (33%), Airbus GE (Germany) (33%), Airbus SP (Spain) (13%), and Leonardo (Italy) (21%).[37] Each consortium member is responsible for the production of several components of the fighter jet. For example, BAE produces the front fuselage, foreplanes, windscreen and canopy, and performs

32 According to its 2019 annual report, Rheinmetall has 149 fully consolidated subsidiaries, meaning that for 149 companies Rheinmetall AG has a majority of the voting rights and as such can directly or indirectly exert influence. Rheinmetall *Annual report 2018*, available online at https://ir.rheinmetall.com/websites/rheinmetall/English/3030/financial-reports.html, (visited 29 April 2019), at 149.

33 Rheinmetall Group, *Rheinmetall Group's Annual Figures 2018*, available at https://ir.rheinmetall.com/websites/rheinmetall/English/2010/annual-figures.html (visited 29 April 2019).

34 These aircraft were purchased by Saudi Arabia in 2007 together with a support programme of air and ground crew training, maintenance facilities, technical support, spares and repairs, and aircraft capability upgrades, and delivered between 2012 and 2017. See CAAT/Wearing, *supra* note 29 and BAE Systems, *Annual Report 2017*, *supra* note 29.

35 Eurofighter Typhoon, About us, available online at https://www.eurofighter.com/about-us (visited 14 August 2019).

36 *Ibid.*

37 *Ibid.*

assembly.[38] Altogether, over 400 European companies take part in the Eurofighter Typhoon programme.

3. Assessment

Based on the abundance of media reports and documentation compiled by NGOs and UN bodies of alleged violations of international humanitarian law by the Saudi-led Coalition, it can be argued that there has been a clear risk that arms exported to members of the Coalition since March 2015 might be used to commit violations of international humanitarian law. In addition, many EU member states' parliaments as well as the European Parliament have scrutinized government decisions to grant licences for exports to Coalition members.[39] Based on the above, the decisions to grant these licences are arguably unlawful. Nevertheless, several EU member states including the UK, France, Italy and Spain have continued to grant export licences to Coalition members until very recently.[40]

Although there are strong arguments that government officials involved in the licensing process bear criminal responsibility,[41] we focus here on the question of corporate officer complicity under the ICC statute. For companies exporting under arguably unlawful licences, the key question is whether an export authorization from the government impacts the legal assessment of the complicity of corporate officers under the ICC Statute. A second question relevant to this case study is whether corporate officers in the arms industry have additional obligations due to the nature of their products and the sector in which they operate.

4. Arms Exports: Aiding and Abetting under Article 25(3)(c) of the ICC Statute?

The ICC Statute defines several modes of secondary liability, but 'aiding and abetting' as described in Article 25(3)(c) of the ICC Statute is most relevant to

38 BAE Systems, Thyphoon Century for the UK, available online at https://www.baesystems.com/en/article/typhoon-century-for-uk *(visited 14 August 2019)*.

39 See for example *European Parliament Resolution of 25 February 2016 on the humanitarian situation in Yemen*, 2016/2515(RSP); *European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP*, 017/2029(INI), at G and 22, *European Parliament resolution of 4 October 2018 on the situation in Yemen*, 2018/2853(RSP)), at S.

40 In Belgium and the UK, decisions to grant licences for arms exports to Saudi Arabia have been challenged. Belgian courts ultimately cancelled six licences, and UK courts issued a referral to the UK government to reassess the decision to grant licences. Conseil d'État, *Section du Contentieux Administrativ. XVe Chambre, n° 244.804*, judgment of 14 June 2019 and Court of Appeal, Civil Division, *The Queen (on the application of Campaign against arms trade and The Secretary of State for International Trade*, Case No. T3/2017/2079, judgment of 20 June 2019.

41 The complicity of government officials involved in the licencing process was argued in a criminal complaint filed in Italy in April 2018 and is currently under investigation. See *supra* note at 31.

our analysis here.[42] Since ICC jurisprudence on Article 25(3)(c) is scarce, complementary jurisprudence from the ad hoc tribunals and two exemplary cases from courts in The Netherlands help clarify the nature and reach of the 'aiding and abetting' mode of secondary criminal liability.

A. Actus reus — *(Substantial) Contribution*

The *actus reus* standard in Article 25(3)(c) of the ICC Statute is worded in broad terms. According to the ICC Trial Chamber in *Bemba*, the standard captures both tangible and intangible assistance, and therefore a wide range of acts that heighten the risk of the commission of a crime.[43] In *Lubanga*, the Trial Chamber defined the contribution threshold for Article 25(3)(a) in terms of the distinction between a principal actor and an accessorial actor. Specifically, the Trial Chamber suggested that, 'If accessories must have had "a substantial effect on the commission of the crime" to be held liable, then co-perpetrators must have had … more than a substantial effect.'[44] However, the Trial Chamber in *Bemba* held that the contribution under Article 25(3)(c) 'does not require the meeting of any specific threshold' or specific qualitative elements.[45] Under this standard, criminal assistance does not need to contribute 'substantially' to the commission of the crime; effect on the crime should suffice.[46]

1. (Substantial) Contribution and Case Law on the Provision of Arms

There are several cases in which individuals responsible for trading arms and equipment to parties engaged in armed conflict have been held criminally liable when the weapons in question were used to commit international crimes. For example, the International Criminal Tribunal for Rwanda (ICTR) confirmed in *Kamuhanda* that the distribution of weapons would constitute an act falling under the conduct element of aiding and abetting.[47] In that case, the Appeals Chamber held, '[E]ven if the weapons that were distributed by the Appellant had not been used at all, their mere distribution amounts to psychological assistance, as it was an act of encouragement that contributed

42 Art. 25(3)(c) ICCSt.: 'In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: … For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

43 Judgment pursuant to Article 74 of the Statute, *Bemba Gombo et al.* (ICC-01/05-01/13), Trial Chamber VII, 19 October 2016 (hereafter '*Bemba* Trial Judgment 2016'), at §§ 88 and 89.

44 Judgment, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, at § 997.

45 *Ibid.*, at § 93.

46 M. Aksenova, *Complicity in International Criminal Law* (Hart Publishing, 2016), at 155.

47 Judgment, *Kamuhanda*, (ICTR-99-54-TCII), Trial Chamber II, 22 January 2004. It must be noted that the conviction was overturned on appeal, as there was no evidence that the weapons were used at all. Judgment, *Kamuhanda* (ICTR-99-54A), Appeals Chamber, 19 September 2005 (hereafter '*Kamuhanda* Appeal Judgment 2005'), at §§ 67, 68.

substantially to the massacre, thus amounting to abetting if not aiding.'[48] The idea that delivered arms, even if unused, can constitute the *actus reus* of aiding and abetting can be seen as a particular instance of aiding and abetting without tangible assistance.[49] In *Taylor*, the Special Court for Sierra Leone (SCSL) found that providing 'arms and ammunition, military personnel, operational support, moral support and ongoing guidance' constituted aiding and abetting.[50] In *Taylor*, the prosecution was able to prove certain arms had been delivered within a particular timeframe in violation of arms embargoes, and that without such deliveries, rebel forces in Sierra Leone could not have committed certain crimes.[51] Nevertheless, in *Taylor*, there was no evidence that a specific weapon provided on a specific date was used to perpetrate a specific crime.[52]

In The Netherlands, Dutch businessperson Frans Van Anraat was found guilty of aiding and abetting the commission of war crimes by providing chemicals to Saddam Hussein's regime in Iraq for the production of poison gas.[53] The Dutch courts found that Van Anraat supplied 38% of Iraq's Thiodiglycol from 1980 to 1988, and held that in doing so he 'played an important part by supplying the precursor Thiodiglycol to the Iraqi regime for the production of mustard gas'.[54] Further, between 1984 and 1988 Van Anraat was the sole supplier of the chemical to Iraq. Hussein's regime subsequently used the mustard gas in attacks against Kurdish civilians and the Iranian military, injuring thousands of people. Importantly, the Dutch Court of Appeals noted that if the chemicals also had been supplied from the UK during those same years, it

48 *Kamuhanda* Appeal Judgment 2005, *ibid.*, at § 384.

49 The *Furundžija* Judgment at § 383 followed the Judgment in *Schonfeld*, which elaborated on the idea of aiding and abetting without tangible assistance. 'It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.' *Trial of Franz Schonfeld and Nine Others*, British Military Court, 11–26 June 1946, in LRTWC, Vol. XI (1949), at 64, 70.

50 Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012. The quote comes from C.C. Jalloh and S. Meisenberg, *The Law Reports of the Special Court for Sierra Leone: Vol III: Prosecutor v. Charles Ghankay Taylor (The Taylor Case)* (Martinus Nijhoff Publishers 2015), at § 1857.

51 Judgment, *Taylor* (SCSL-03-01-A), Appeals Chamber (hereafter '*Taylor* Appeal Judgment'), at §§ 313–315.

52 This position arguably extends beyond the arms trade according to the ICC Trial Chamber in *Bemba*. *Bemba* Trial Judgment 2016, *supra* note 43, at § 90.

53 *Public Prosecutor v. Van Anraat*, The Hague Court of Appeal, judgment of 9 May 2007, ECLI:NL:GHSGR:2007:BA4676 (hereafter the '*Van Anraat* Judgment 2007') 13, at 11.10 and 11.12. The verdict was upheld by the Dutch Supreme Court, judgment of 30 June 2009, ECLI:NL:HR:2009:BG4822 (hereafter '*Van Anraat* Judgment 2009'; Comments: H. van der Wilt, 'Genocide *v.* War Crimes in the *Van Anraat* Appeal', in 6 *JICJ* (2008) 557–567; Ryngaert, 'Dutch Court of Appeal holds businessman liable for complicity in war crimes', Blog van het Utrecht Centre for Accountability and Liability Law, 10 May 2017, available online at http://blog.ucall.nl/index.php/2017/05/dutch-court-of-appeal-holds-businessman-liable-for-complicity-in-war-crimes/ (visited 1 August 2018).

54 *Van Anraat* Judgment 2007, *ibid.*, at 12.5, confirmed by *Van Anraat* Judgment 2009, *ibid.*, at 6.3.

would 'not impair the qualification of "important" regarding [Van Anraat's] part in this matter'.[55]

Similarly, in *Kouwenhoven*, the Dutch Supreme Court convicted Dutch businessperson Guus Kouwenhoven for complicity in war crimes by providing weapons to the President of Liberia, Charles Taylor, during the civil war in Sierra Leone.[56] As to *actus reus*, the Court of Appeals found that Kouwenhoven made an essential contribution to the violations committed by the RUF rebel forces. By supplying weapons and ammunition, he enabled the regime to continue its deadly armed attacks on civilians.[57]

Based on the *actus reus* standard set out in *Bemba*, and supportive jurisprudence in *Taylor*, *Kamuhanda*, *Kouwenhoven* and *Van Anraat*, the supply of arms to parties engaged in armed conflict can form a substantial contribution to the commission of international crimes. Under *Bemba* and *Taylor*, evidence that a specific supplied weapon was used to commit a specific crime is not required.[58]

B. Mens rea — *'for the Purpose of Facilitating'*

Article 25(3)(c) of the ICC Statute states that an individual must act 'for the purpose of facilitating' a crime in order to be exposed to secondary liability. The scope of this *mens rea* is debated since the wording in the ICC Statute differs from that in the ad hoc tribunals' statutes. Currently, the only ICC jurisprudence that deals with the mental component of Article 25(3)(c) is *Bemba*. In *Bemba*, the Trial Chamber seemed to reject the lower *mens rea* standard of the ad hoc tribunals, where a knowledge standard suffices,[59] and instead held that unlike other international instruments, Article 25(3)(c) expressly sets forth a specific 'purpose' requirement for criminal assistance. Accordingly, one could argue that the *Bemba* Trial Chamber introduced a higher subjective mental element for assisting parties under Article 25(3)(c), requiring that the accessory lend his or her assistance with the aim of facilitating the principal

55 *Van Anraat* Judgment 2009, *ibid.*

56 *Public Prosecutor v. Kouwenhoven*, Court of Appeal's-Hertogenbosch, judgment of 21 April 2017, ECLI:NL:GHSHE:2017:1760 (hereafter '*Kouwenhoven* Appeal Judgment 2017') and Supreme Court, judgment of 18 December 2018, ECLI:NL:PHR:2018:1394 (hereafter '*Kouwenhoven* Supreme Court Judgment 2018').

57 *Ibid.*, at Q. For an analysis of the case see: G. Sluiter and S.S.M. Yau, 'Aiding and Abetting and Causation in the Commission of International Crimes – The Cases of Dutch Businessmen Van Anraat and Kouwenhoven', in N.H.B. Jorgensen (ed.), *International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, forthcoming), available at SSRN: https://ssrn.com/abstract=3362307 (visited 12 July 2019); J.G. Stewart, 'The Historical Importance of the Kouwenhoven Trial', James G Stewart Blog, available online at http://jamesg-stewart.com/the-historical-importance-of-the-kouwenhoven-trial/ (visited 12 July 2019).

58 *Bemba* Trial Judgment, *supra* note 43, at § 90.

59 *Ibid.*, § 97. In relation to the ad hoc tribunals see, E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), at 121 and Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999 (hereafter '*Tadić* Appeal Judgment'), at § 229 and Judgment, *Kunarac* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, 22 February 2001, at § 392.

offence.[60] However, *Bemba* does not address international crimes, but instead an offence against the administration of justice. Thus, it arguably has limited relevance as precedent for interpreting the mental requirements of Article 25(3)(c) for defendants charged with assisting the commission of international crimes such as war crimes.

In the absence of further ICC jurisprudence, scholars have debated how the term 'for the purposes of facilitating' should be interpreted. Most authors interpret the element to constitute a higher *mens rea* for aiding and abetting, a 'specific intent',[61] while others argue for interpretations (typically involving a lower standard) that are consistent with the ad hoc tribunals' jurisprudence on aiding and abetting and with customary international law.[62] Draft texts of the ICC Statute had provided for a lower test, and the Official Records do not provide clarification.[63] The current wording seems to have been influenced by the US Model Penal Code, which accords accomplice liability to a person who acts with the purpose of promoting or facilitating.[64] This would imply 'a specific subjective requirement stricter than mere knowledge'.[65] However, the purpose requirement only refers to the act of facilitation, not to the main crime.[66]

It will be up to the ICC to determine how Article 25(3)(c) will be interpreted. However, we would argue that an interpretation of Article 25(3)(c) in line with Article 30 of the ICC Statute is appropriate, as the latter reflects the applicable standard under customary international law.[67] According to Article 30(2), 'a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; and (b) in relation to the consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'. In the case of an aider and abettor, this means that it would

60 *Bemba* Trial Judgment, *supra* note 43, at § 98. The Trial Chamber also clarified that the elevated subjective standard only relates to the accessory's facilitation and not the principal offence. As a consequence only awareness regarding the commission of the principal offence is required.

61 W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016), at 578; K. Ambos, 'Article 25(3)(c)', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the ICC* (3rd edn, Hart Publishing, 2016), at 1009, and Aksenova, *supra* note 46, at 155.

62 See e.g. Judge Scheindlin, *In re South African Apartheid*, S.D. NY, judgement of 8 April 2009, 49–53; K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot GmbH, 2004), at 18, 640; for an objective interpretation see A. Heyer, 'Corporate Complicity under International Criminal Law', 6 *Human Rights & International Legal Discourse* (2012)14–55, at 14; C. Plomp, 'Aiding and Abetting', 30 *Utrecht Journal of International and European Law* (2014) 4–29, at 14; J.G. Stewart, 'An Important New Orthodoxy on Complicity in the ICC Statute?', James G Stewart Blog, 21 January 2015, available online at http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/ (last visited 29 April 2019); van Sliedregt, *supra* note 59, at 128 and 129.

63 van Sliedregt, *supra* note 59, at 129 and Schabas, *supra* note 61, at 578.

64 S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers, 2012), at 39, and Ambos, *supra* note 61, at 1009.

65 Ambos, *supra* note 61, at 1009.

66 *Ibid.*, at 1010.

67 *Tadić* Appeal Judgment, *supra* note 59, at § 229.

be necessary to prove that she acted with the intent and knowledge set out in Article 30, 'unless otherwise provided'.[68] An accessory's intent has two objects: (i) the accessory's participation and (ii) the principal's crime. As to the question of the accessory's intent to the principal crime, an interpretation of Article 25(3)(c) in light of Article 30 implies that it suffices if the accessory is aware that the principal crime will be perpetrated in the ordinary course of events.

In addition, to depart from customary international law, interpreting Article 25(3)(c) to require an aider and abettor to possess the direct intent to facilitate the principal crime would create an impunity gap. Specifically, it would create obstacles to establishing *mens rea* with regard to those who provide means for committing international crimes by acting in their corporate capacities.[69] Under this stricter mental requirement, those who provide assistance and know that such assistance is virtually certain to aid in the commission of international crimes would be exempted from liability merely because they do not 'desire' its commission, but assist with some other objective in mind (for example, corporate profit).[70]

1. Mens rea *and Case Law on the Provision of Arms*

For the relevant *mens rea* standard in cases involving the provision of arms, we again need to resort to the ad hoc tribunals and Dutch cases.

Case law from the ad hoc tribunals has established that an aider and abettor must know that her acts assist in the commission of the specific crime of the perpetrator of the main crime.[71] For example, in *Taylor*, the Appeals Chamber found that the *mens rea* standard was met because Taylor knew of the RUF's operational strategy and their intent to commit crimes. Further, he had specific and concrete information that made him aware of the essential elements of the crimes being committed.[72] Additionally, the Trial Chamber found that Taylor's own testimony as well as general public knowledge generated by UN, media and NGO reports constituted evidence of Taylor's knowledge of the RUFs.[73]

68 K. Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General* (Oxford University Press, 2013), at 288. The 'unless otherwise provided' would for example apply in the case of genocide where special intent is required.

69 Similar conclusion: J.G. Stewart, Complicity in Business and Human Rights, *ASIL Proceedings*, 2015, available online on SSRN: https://ssrn.com/abstract=2676192 (visited 12 July 2019); J.G. Stewart, 'Complicity', in M. Dubber and T. Hörnle (eds), *Oxford Criminal Law Handbook* (Oxford University Press, 2014) at 65; E. van Sliedregt, *Individual Criminal Responsibility under International Law* (Oxford University Press, 2012), at 129.

70 E. van Sliedregt and A. Popova, 'Interpreting "for the purpose of facilitating" in Article 25(3)(c)?' James G Stewart Blog, 22 December 2014, available online at http://jamesgstewart.com/author/elies-and-alex/ (visited 29 April 2019).

71 van Sliedregt, *supra* note 59, at 121.

72 *Taylor* Appeal Judgment, *supra* note 51, at § 445.

73 *Ibid.*, at § 538.

In *Van Anraat*, the Dutch Court of Appeal, using a *dolus eventualis* standard for the mental element, found that the defendant knew that the chemicals he provided to the Iraqi regime would be used for the production of poison or mustard gas in Iraq.[74] Based on testimony from one of Van Anraat's trading partners and Van Anraat himself, the Court of Appeal found that he knew that the final destination of the shipment was Iraq. However, Van Anraat had denied that he knew that his supplies were suitable for the production of mustard gas. Nevertheless, based on evidence that showed that his supplies were suitable, and witness testimonies indicating that Van Anraat was aware that the amounts he exported could be used for the production of chemical weapons, the court of Appeals concluded that Van Anraat knew that the chemicals he supplied would serve for the production of mustard gas in Iraq.[75]

The Dutch Court of Appeals also used the *dolus eventualis* standard to determine *mens rea* in *Kouwenhoven*.[76] In that case, the Court of Appeal found that the defendant had the necessary knowledge to establish *mens rea* based on his own statements and the fact that national and international media were reporting on atrocities committed in the relevant regions of Liberia at the time. The defendant had stated that he followed the media. The Court found that since the defendant had major financial interests in Liberia and lived there most of the time, it was nearly impossible that local events and national and international media reports about the armed conflict and the atrocities would have escaped his attention.[77] Furthermore, the Court of Appeal found that he deliberately provided an essential contribution to the violations.[78]

As *Van Anraat*, *Kouwenhoven* and *Taylor* show, domestic courts and tribunals have relied on several sources to establish awareness of defendants in cases involving the supply of arms to conflict parties. Since knowledge can be established through direct and indirect or circumstantial evidence, objective facts can be used to infer the subjective mental state of the suspect.[79] Even when defendants deny having had requisite knowledge, courts have allowed constructive knowledge to be inferred.[80] The Trial Chamber in *Popović* noted that, '… in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists a crime, will allow for no other reasonable inference than that

74 *Van Anraat* Judgment 2009, *supra* note 53, at 11.12.

75 *Ibid.*, at 11.10, 11.11, 11.12.

76 *Kouwenhoven* Appeal Judgment, *supra* note 56, 1760, at L.2.3

77 *Ibid.*, at L.2.4.

78 *Ibid.*, at Q.

79 See the *IG Farben* Judgment, *supra* note 12, at 1187; Judgment, *Trial of the Major War Criminals Before the International Military Tribunal*, International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946 in *Trial of the Major War Criminals Before the International Military Tribunal* (1947), Vol. 1, at 305–306; Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, at §§ 675–676 and 689; Judgment, *Akayesu*, (ICTR-96-4-T), Trial Chamber, 2 September 1998, at § 548; and Judgment, *Aleksovski*, (IT-95-14/1-T), Trial Chamber, 25 June 1999, at § 65.

80 Judgment, *Limaj* (IT-03-66-T), Trial Chamber II, 30 November 2005, § 518; see also Judgment, *Fofana and Kondewa*,(SCSL-04-14-T), Trial Chamber I, 7 August 2007, at § 231; Similar reasoning: W.A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *International Review of the Red Cross* (2001) 439, at 450–451.

the accused intended to assist the commission of an offence'.[81] Dutch Courts used national and worldwide media scans and reports on the atrocities as evidence to infer the defendant's awareness. In *Taylor*, the court referred to UN and NGO reports to infer awareness.

2. *Arms Exports under Government Authorizations and Corporate Officers' Responsibilities*

A unique feature of the 'legitimized' arms trade is that it typically involves express authorization from the supplier's home government. This raises the question whether such an arms export authorization or licence negates a corporate officer's awareness that the exported weapons would contribute to the principal actor's crimes. Arms companies consider themselves to have no responsibility for how purchasers use their products. For example, Chairperson Sir Roger Carr of UK defence company BAE stated in 2018, 'It is a matter of fact we're not involved in any part of prosecuting, planning or executing the war. We are a defence company. We are not an aggressive company. We don't conduct wars.'[82] Similarly, during a 2018 shareholder meeting, Rheinmetall AG's CEO responded to a question from a representative of a Yemeni civil society organization, 'We do not account for the customer's use of our products. …. We cannot assume responsibility for the utilization of our military equipment.'[83] Despite these assertions by corporate officers of major European arms manufacturers, the following points show that arms companies and their officers cannot use licences as shields against secondary criminal liability.

(a) Heightened standards due to the nature of the products

During the initial stages of negotiations for arms exports, international standards such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) oblige arms manufacturers to make a human rights risk assessment for proposed transactions. According to these international standards,

81 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, § 1500; *Public Prosecutor v. Van Anraat*, District Court of The Hague, 23 December 2005, § 11.16; Schabas, *supra* note 61, at 579.

82 'Britains Hidden Wars', *Channel 4*, available online at https://www.channel4.com/press/news/britains-hidden-war-channel-4-dispatches (visited 14 August 2019).

83 As noted down by a representative of an NGO present during the 2018 shareholders meeting. Similarly, Sir Roger Carr of BAE insists: 'We are not involved in the prosecution of war'. Referring to the 'clear line' that exists between the sale of arms and the use of arms, Carr claimed that BAE's work is 'in the maintenance and support, and the supply of equipment' but 'the use of that equipment is for others'. A. Smith, 'We went to an arms company AGM. Here's how they justify profiting from war', Red Pepper blog, 16 May 2018, available online at https://www.redpepper.org.uk/we-went-to-an-arms-company-agm-heres-how-they-justify-profiting-from-war/ (visited 14 August 2019).

companies have the responsibility to respect all internationally recognized human rights. Consequently, they ought to 'avoid causing or contributing to adverse human rights impacts … and address such impacts when they occur',[84] and to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.[85] Corporate officers therefore need to carry out a thorough assessment of all potential human rights risks associated with a proposed arms deal. Further, the arms company is required to revisit its risk assessment routinely throughout the life of a project. These standards require company officers to be well informed of the conflict situations in which their clients are involved and in which arms delivered over a period of several years may be used. In doing so, human rights due diligence enables corporate officers to identify and act upon risks and to ensure they do not knowingly contribute to human rights abuses, or knowingly reap benefits from such abuses.[86]

Corporate officers for arms exporters face additional and higher standards of diligence because of the inherently dangerous nature of their products in the context of armed conflicts. The International Commission of the Red Cross (ICRC) notes specifically in relation to the trade in arms that, apart from the fact that International Humanitarian Law is binding on both state and non-state actors,[87] 'armed conflicts feed on the availability of weapons. Business enterprises involved in the manufacture and trade of weapons consequently face unique challenges linked to their impact on the way conflicts are fought. Business enterprises … may indeed play a part in exacerbating violations of international humanitarian law.'[88] The ICRC also states that an arms trader that 'knowingly supplies weapons to end-users who use them to violate international humanitarian law' risks legal liability.[89] The Dutch Court of Appeal makes the same point in the *Van Anraat* case: 'People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that—if they do not exercise increased vigilance—they can become involved in most serious criminal offences.'[90]

84 *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, UN doc. A/HRC/17/31, 16 June 2011, principle 13.

85 *Ibid.*

86 *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'*, UN doc. A/HRC/8/16, 15 May 2008, § 71.

87 ICRC, *Business and International Humanitarian Law, an Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, 11 September 2006, available online at https://www.icrc.org/en/publication/0882-business-and-international-humanitarian-law-introduction-rights-and-obligations (visited 12 August 2019), at 14.

88 *Ibid.*, at 25.

89 *Ibid.*, at 25.

90 *Van Anraat* Judgment 2009, *supra* note 53, at 16.

(b) No duty to export

Given these duties of care imposed upon corporate officers in the arms industry, such officers cannot simply claim that government licences absolve them from knowing about or observing the use of the weapons they produce and sell. After all, corporate officers drive the licensing process, not governments. After signing an export contract, an arms company can still decide not to apply for a licence if its diligence shows that a future export might be used in the commission of crimes. Civil law obligations cannot excuse the contribution to a crime. Also, a licence only creates an opportunity to export; it does not create an obligation. Even if corporate officers request and receive an export licence the company officer can still decide not to export the arms.[91] A licence only provides the company officers with the opportunity to export. Furthermore, licences are often granted for exports over a period of several years. During such a period the circumstances of the arms importer may change. As noted above, corporate officers are obliged to revisit their human rights risk assessments for ongoing projects and modify their business decisions accordingly. An arms exporter cannot 'hide' behind a multi-year licence while knowing that the arms recipient's circumstances have changed since the licence was granted in ways that warrant a freeze on exports.

3. *The Case Study Applied — Criminal Liability of European Arms Companies' Officers for Exports to the Saudi-led Coalition Used in Yemen*

Our proposed reading of Article 25(3)(c) of the ICC Statute as consistent with Article 30, customary international law, and several precedents provides strong grounds for establishing secondary liability for corporate officers of European arms manufacturers as aiders and abettors of international crimes in Yemen. In order to make out such a charge, the following elements must be established:

(1) the export of the arms facilitates the commission of the underlying crimes by the Saudi-led Coalition pursuant to Article 25(3)(c) (objective element);
(2) the arms exporter *intends to export the arms* (first subjective element); and
(3) the arms exporter *is aware* that exporting the arms, in the ordinary course of events, brings about the commission of war crimes by the Coalition (second subjective element).

As a specific example, we will focus on a European company exporting bombs to a Coalition member that are then used by Coalition forces in Yemen. The first question is whether the *actus reus* standard could be met based on such exports. The principal alleged crimes are violations of international humanitarian law by the Saudi-led Coalition (for example, an airstrike on a

91 As mentioned before, courts in Belgium and the UK found that government decisions to licence arms exports to Saudi Arabia were unlawful. See Conseil d'État, *supra* note 40 and Court of Appeal, *supra* note 40.

hospital). Under Article 8(2)(e)(ii) and 8(2)(e)(iv) of the ICC Statute, the targeting of a hospital may constitute a war crime. In the example of a hospital bomb strike, even though it may not be possible to prove that Coalition forces used an imported bomb (instead of an alternatively sourced bomb) for the specific strike, corporate officers that arranged the export of substantial numbers of the relevant bomb type can meet the *actus reus* threshold as set out in *Bemba*.[92] The arms exports constitute tangible assistance that heightens the risk of the commission of a crime as they provide the very means of warfare. At a minimum, these arms give psychological assurance that the bombs needed for the war strategy are available.[93]

The second question is then whether the *mens rea* standard can be met. This question can be split into two distinct inquiries: (i) whether the company officer intended to assist in the principal crime, which may be deduced from knowledge that the assistance is in fact contributing to a specific crime; and (ii) whether the company officer is aware that exporting the arms, in the ordinary course of events, would bring about the commission of war crimes by the Saudi-led Coalition. Taking into account the abundance of documentation on the Coalition's use of aerial bombs in Yemen and international media reports on the Coalition's alleged war crimes, prosecutors could construe the arms company executive's knowledge that the bomb exports could contribute to the commission of the crime, and that in the ordinary course of events such exports would bring about the commission of the crime. While the extent of the company officer's knowledge and awareness might not match that of Charles Taylor, it would arguably be on par with the knowledge and awareness of Van Anraat and Kouwenhoven. As noted above, the Dutch courts deemed such knowledge sufficient to establish *mens rea* for arms exporters.

5. Conclusion: Aiding and Abetting Standard of the ICC Statute May Capture the Role of Corporate Officers Involved in Arms Exports

The post-World War II cases make clear that corporate officers may be exposed to secondary liability for international crimes if the officer's behaviour supports other principal actors' in their violations of international criminal law. This is especially true within the arms trade. Since the arms trade is widely considered a legal business activity, the crucial question is, when does the coin flip from legitimate business activity to criminally relevant behaviour?

Article 25(3)(c) of the ICC Statute gives the parameters to determine criminal assistance to the commission of international crimes. In the context of European arms exports to members of the Saudi-led Coalition in Yemen, it is possible to argue that based on the *Bemba*, *Taylor* and *Kamuhanda* judgments,

92 *Bemba* Trial Judgment 2016, *supra* note 43, at §§ 88 and 89.
93 *Kamuhanda* Appeal Judgment 2005, *supra* note 47, at § 384.

by supplying relevant arms like guided bombs to Coalition members that are being used to commit war crimes in Yemen, the *actus reus* standard under Article 25(3)(c) of the ICC statute could be met, even though it is not possible in all cases to prove that specific, exported weapons were used to commit specific crimes. Furthermore, depending on the interpretation of the *mens rea* requirement of Article 25(3)(c) of the ICC Statute, it could be argued that officers of arms trading companies meet this *mens rea* standard through their export decisions. First, the weapons exports facilitate the commission of the underlying crimes pursuant to Article 25(3)(c), as arms deliveries increased the risk that the Coalition would commit crimes in Yemen. Secondly, the arms dealer's intent to export arms is quite evident under the profit motive. An intent to assist the main perpetrators' crimes may be deduced from the knowledge that the assistance is in fact enabling the commission of certain crimes or at least contributing to certain crimes. The latter could be argued due to the abundance of information on the Coalition's warfare practices and war crimes committed in Yemen, as well as the arms exporters' understanding of the legal framework under which they act. Thirdly, due to the nature and use of weapons of war, heightened vigilance can be demanded from arms manufactures. Company officers are under the obligations of the UNGPs and OECD Guidelines to conduct a thorough human rights risk assessment of their business activities, which include an understanding of international humanitarian law and the human rights record of their business partners and clients. Assuming that arms companies act in conformity with these responsibilities and standards it is very likely that the responsible corporate officers were aware of the crimes committed in Yemen when exporting arms. As such it could be argued that they were aware that exporting the arms, in the ordinary course of events, would bring about the commission of war crimes by the Coalition.

The complexity of modern corporate production and corporate structure still makes it difficult to pinpoint responsibility and as such individual criminal liability of company managers. As argued here, a lenient interpretation by the ICC of Article 25(3)(c) is needed to capture acts committed by individuals in their corporate capacities that assist in the commission of international crimes. Without a lenient interpretation, courts will widen the corporate impunity gap. Our proposed approach is also in line with existing soft law obligations for companies under the UNGPs to perform human rights risks assessments of all their activities and to mitigate potential harms. Looking at the complex structure of the EU consortia that are building aircraft and bombs used in the Saudi-led Coalition's air campaign in Yemen, it is striking how these companies and joint projects touch on several jurisdictions. This poses the question of how in practice prosecution could take place. Given how pressing the issue is, the ICC could be a compelling avenue to investigate and adjudicate these complex cases.