



HELLENIC REPUBLIC

**National and Kapodistrian
University of Athens**

EST. 1837

LAW SCHOOL

LL.M. in International & European Legal Studies

LL.M. Course: European and International Criminal Law

Academic Year: 2021-2022

DISSERTATION

of Racheal Wanyana

Registration Number: 7340022102006

**ARMS TRADE AND WAR CRIMES: CRIMINAL
RESPONSIBILITY OF ARMS SUPPLIERS AS A FORM OF
EXPRESSIVE JUSTICE AND DETERRENCE.**

Examination Board:

Georgios Triantafyllou, Associate Professor (Supervisor)

Ioannis (Yannis) P. Androulakis, Assistant Professor.

Athanasia, Dionysopoulou, Assistant Professor.

Athens, October, 2022.

Copyright © 2022 [Racheal Wanyana, Oct, 2022]

All rights reserved.

Copying, storing and distributing this dissertation, in whole or in part, for commercial purposes is prohibited. Reprinting, storing and distributing for non-profit, educational or research purposes is permitted, provided that the source is mentioned and that the present message is retained.

The opinions and positions argued in this paper only express the author and should not be considered as representing the official positions of the National and Kapodistrian University of Athens.

Dedication.

This thesis is dedicated to my dearest mother, Florence Bamutiire Wabuze Akiiki N'aloongo, who even in silent resting remains a source of immeasurable strength, wisdom and motivation.

Abstract.

An array of individual and collective rights protected by international human rights and humanitarian law are impacted by irresponsible (but legal) arms transfers, every day. While several domestic and international arms trade regulations have been adopted to mitigate irresponsible arms sales, the pre-emptive nature, limited legal substance, and ineffective enforcement of these regulations has left a significant accountability gap in the arms industry¹. This has enabled unchecked flow of weapons and facilitated atrocities across the world with impunity.²

This thesis posits that in the prevailing context of low accountability, International criminal law, on the basis of principles of accomplice liability, is a viable tool for the regulation of arms trade and provision of justice for victims of war crimes caused by irresponsible arms trade. The thesis draws on the legal precedent from the Nuremberg trials, and other past and ongoing cases in international and national jurisdictions to demonstrate that corporate officers, sole-trading shipping agents and arms brokers may be criminally liable if - and where - it is established that they transferred arms in deliberate disregard of the fact that war crimes were being committed with the arms they supplied. The thesis analyses the mens rea and actus reus (standard of causation) in cases of complicity in war crimes, addressing the question of what the degree of causation should be for aiding and abetting liability of arms suppliers whose weapons have assisted in the commission of war crimes.

The thesis suggests that criminal liability of corporate officers and arms suppliers is imperative to capture the full range of war crimes committed in armed conflicts, ensure accountability and break the cycle of irresponsible arms exports.

¹

² Leigh, R. The Case for Prosecuting Arms Traffickers in the International Criminal Court. (2018, August 2). Cardozo Law Review. <https://cardozolawreview.com/the-case-for-prosecuting-arms-traffickers-in-the-international-criminal-court/>

Contents

Dedication.	3
<i>Abstract.</i>	4
Glossary.	6
<i>Acronyms and Abbreviations</i>	7
I. Introduction.	8
1. War Crimes.	9
1.1. War crimes under the Rome Statute.	9
1.2. Elements of a war crime.	12
1.2.1. Existence of an Armed conflict	12
1.2.2. Nexus between crime and conflict	13
1.2.3. The perpetrator	14
1.2.4. The victim or object of the crime	15
2. Arms Trade and War Crimes.	16
2.1. International Arms Trade Regulatory Landscape.	17
2.1.2. International Arms Export Control Agreements.	19
2.1.3. EU Arms Trade Regulatory Framework.	20
2.1.4. Arms embargoes.	22
2.1.5. Business and human rights.	23
2.1.6. Interim conclusion.	24
3. Individual Criminal Liability for Arms Transfer.	24
3.1. Liability before the Ad Hoc Tribunals	24
3.2. Liability in Domestic Jurisdictions.	26
3.3. Criminal Liability under the ICC Statute.	30
a. <i>Aiding and abetting</i>	30
b. <i>Cooperation.</i>	33
4. Conclusion	35
Annex:	45
Annex 1: List of ongoing and past arms trade cases:	45

Glossary.

Actus reus: *Actus reus* is a criminal act that was the result of voluntary bodily movement. This describes a physical activity that harms another person or damages property. Anything from a physical assault or murder to the destruction of public property would qualify as an *actus reus*. Omission, as an act of criminal negligence, is another form of *actus reus*. It lies on the opposite side of the spectrum from assault or murder and involves not taking an action that would have prevented injury to another person.

Arms brokers: These are intermediaries who create the commercial and logistical arrangements necessary to transfer weapons and munitions. ‘Arms brokers’ is used interchangeably with ‘arms suppliers.’

Conditio sine qua non: The literal translation is an indispensable or essential ingredient or condition, without which something could not have happened or existed.

Dolus eventualis: Intent in the form of legal intention, which is present when the perpetrator objectively foresees the possibility of his act causing death and persists regardless of the consequences.

Expressive Justice: In the context of this thesis, expressive justice means harnessing the power of international criminal law to promote a culture or international norm of accountability in arms trade.

Mens rea: *Mens Rea* is the mental element of a person's intention to commit a crime; or knowledge that one's action (or lack of action) would cause a crime to be committed. It is considered a necessary element of criminal offences.

Nullum crimen sine lege: *Nullum crimen sine lege* is the principle in criminal law and international criminal law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before he/she performed the act.

Responsible Arms conduct: principled behavior of arms suppliers aimed at ensuring that arms and munitions are not sold, exported or transferred to human rights violators and perpetrators of international crime.

Weapons: “Weapons” is taken as synonymous with “arms” and for the limited purposes of the present discussion the terms extend to ammunitions and military equipment.

Acronyms and Abbreviations

AECA	Arms Export Control Act
AP	Additional Protocol
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
ATT	Arms Trade Treaty
GC	Geneva Conventions
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949
GCIII	Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949
GCIV	Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998
ICL	International Criminal Law

ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
OECD	Organisation for Economic Co-operation and Development
SCSL	The Special Court for Sierra Leone
UN	United Nations
UNSC	United Nations Security Council

I. Introduction.

The Nuremberg trials are widely credited to have established individual criminal liability under international criminal law (ICL).³ During the trials, the prosecutors focused on more than the crimes of individual members of the Nazi regime. They also tried to unearth the correlative roles of different actors and sectors in the commission of those crimes. As a result, doctors, lawyers, foreign ministry bureaucrats and key industrialists whose actions facilitated war crimes were as well brought to trial.⁴ While few international criminal justice cases have involved such a wide range of actors since the 1940s, the experiences of Nuremberg illustrate to us that it is legally feasible to hold arms dealers accountable for war crimes perpetrated with the weapons they supply.

This thesis therefore sets out to examine the circumstances under which corporate officers, sole-trading shipping agents and brokers responsible for weapons exports can be held criminally responsible as accomplices to war crimes perpetrated with the arms they provide, as a form of expressive justice and deterrence.

The first chapter of the thesis unpacks the concept of war crimes and the elements required to establish these crimes to assess the scope of ICL and its viability to successfully investigate

³ Nuremberg Judgment, reproduced (1947) 41 AJIL 172 at 218; von Leeb XII LRTWC 1 at 86–92.

⁴ Linde Bryk and Miriam Saage-Maa 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

and prosecute arms traders. The second chapter appraises the regulatory framework applicable to international arms trade. It briefly explores the criminalisation of arms transfer conduct under key legal regimes including; domestic laws and regulations; International treaties and agreements; Arms embargoes; and the evolving business and human rights standards in the arms trade. The chapter also highlights the limitations of the existing legal regime on arms trade, to inform the discussion about the potential role and necessity of International criminal law and the ICC in regulating arms trade.

Chapter three focuses on the *mens rea* and *actus reus* (the standard of causation), in the context of arms traders and suppliers who contribute to war crimes. Cases from domestic and international jurisdictions are analysed to address the question of what degree of causation should be adopted for aiding and abetting liability war crimes in cases of irresponsible arms transfers. The chapter further analyses Article 25(3)(d)(ii) of the Rome Statute, which is about ‘knowingly contributing to the commission or attempted commission of a crime by a group acting with a common purpose’ to establish a standard for prosecution of arms traders and brokers. Summarily, the analysis in Chapter 3 contends that the existing legal precedent and interpretation accorded to Article 25(3)(d)(ii) of the Rome Statute present the potential to determine the hard arms transfer cases at the outer boundaries of complicit conduct under the Statute.

1. War Crimes.

1.1. War crimes under the Rome Statute.

A war crime is a serious violation of the laws and customs applicable in armed conflicts, giving rise to individual criminal responsibility under international law.⁵ National laws have long provided for prosecution of war crimes.⁶ The **Lieber Code**⁷, for example, promulgated during the American Civil War, for example, recognised criminal liability of individuals for human rights violations during the war.⁸ It is however the Nuremberg Charter of 1945⁹ which is credited for having given form to the international law of war crimes. **Article 6(b)** of the Charter defined war crimes to include:

⁵ Cryer, R., Robinson, D., & Vasiliev, S. (2019). *An Introduction to International Criminal Law and Procedure* (4th ed.). Cambridge: Cambridge University Press. doi:10.1017/9781108680455

⁶ Timothy L. H. McCormack, ‘From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime’ in Timothy L. H. McCormack and Gerry. J. Simpson (eds.), *The Law of War Crimes* (The Hague, 1997); Leslie Green, *The Contemporary Law of Armed Conflict* (Manchester, 2000) 286–90

⁷ The Lieber Code is sometimes referred to as the first modern codification of the laws of war (Humanitarian Law, International). Promulgated at the height of the American Civil War (1861–65), it proposed a set of rules to govern the conduct of hostilities by the United States armies (‘Union’ or ‘North’) against the Confederate States of America (‘Confederacy’ or ‘South’).

⁸ Instructions for the Government Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

⁹ D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, 1988, pp.912-919.

'Violations of the laws or customs of war, including but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'

The scope of war crimes adopted in the Nuremberg Tribunal gave rise to individual criminal responsibility under customary law.¹⁰

Following the Nuremberg Charter, the four Geneva Conventions of 1949 introduced 'grave breach' provisions, expressly recognising certain violations as crimes subject to universal jurisdiction.¹¹ Additional Protocol I to those Conventions (AP I), adopted in 1977, introduced additional 'grave breaches', although not all of these have attained recognition as customary law.¹² The ICTY Statute also included grave breaches of the Geneva Conventions (**Article 2 of the ICTY Statute**) as well as violations of other laws or customs of war, featuring an open-ended list with five examples.¹³ In addition, the ICTR Statute, designed to deal with an internal armed conflict, included serious violations of common **Article 3** and **Additional Protocol II** of 1977 (AP II), featuring an open-ended list with eight examples.¹⁴

The ICC Statute which was adopted in 1998 complemented all these regimes as it contains the longest and most comprehensive list of war crimes of any of the tribunal statutes. Unlike previous lists, the list in **Article 8** of the statute is exhaustive and consistent with criminal law principles, particularly the principle *nullum crimen sine lege*.¹⁵ The ICC Statute contains an extensive list of fifty offences, including grave breaches of the Geneva Conventions, serious violations of **common Article 3** and other serious violations drawn from various sources. It classifies these offences into four key categories of war crimes:

- i. **Grave breaches under the four 1949 Geneva Conventions (GC).**¹⁶ These are prohibited acts, which are serious violations of international humanitarian law,

¹⁰ Nuremberg Judgment, reproduced (1947) 41 AJIL 172 at 218; von Leeb XII LRTWC 1 at 86–92

¹¹ Art. 49 GC I, Art. 51 GC II, Art. 130 GC III, Art. 147 GC IV. See ch. 3 for a discussion of whether these provisions confer universal jurisdiction strictly so called.

¹² Art. 85 AP I. But see the study of customary law undertaken under ICRC auspices: Henckaerts & Doswald-Beck, ICRC Customary Law

¹³ Art. 3 ICTY Statute. The list included use of poisonous weapons or weapons calculated to cause unnecessary suffering; wanton destruction; attack of undefended places; seizure or destruction of historic monuments, works of art, or institutions dedicated to certain purposes; and plunder.

¹⁴ Art. 4 ICTR Statute. The list included murder, cruel treatment, torture, mutilation, collective punishments, hostage taking, terrorism, outrages on dignity, including rape, enforced prostitution and indecent assault, pillage and passing sentences without proper trial.

¹⁵ Hamilton, T. (2020). Arms Transfer Complicity Under the Rome Statute. In N. Jørgensen (Ed.), *The International Criminal Responsibility of War's Funders and Profiteers* (pp. 148-186).

¹⁶ The Statute merely repeats the definitions contained in the four Geneva Conventions (arts 50 GC I, 51 GC II, 130 GC HP and 147 GC IV4).

including; wilful killing, torture, inhuman treatment, hostage taking or extensive destruction and appropriation of property. Grave breaches must be committed in the context of an international armed conflict, and against persons or property protected under the Geneva Conventions. The Geneva Conventions obligates all state parties to enact legislation necessary to prosecute persons committing, or ordering the commission of any of these grave breaches, to search for such persons and to bring them, regardless of their nationality, before their own courts. Alternatively, states may hand such persons over for trial to another High Contracting Party.¹⁷

- ii. The second category of war crimes covers other serious violations of the laws and customs applicable in international armed conflicts. These crimes are derived from various sources and reproduce to a large extent rules from: the 1907 Hague Convention, which recognised that the right of belligerents to adopt means of injuring the enemy is not unlimited, and laid down provisions on the means and methods of warfare that are now recognised as customary law; to the 1977 Protocol I Additional to the Geneva Conventions;¹⁸ the 1899 Hague Declaration (IV) concerning Expanding Bullets, and the 1925 so called Geneva Gas Protocol.¹⁹
- iii. The third category introduces serious violations of **Article 3** common to the Geneva Conventions which applies to non-international armed conflicts. Common article 3 includes a prohibition of acts such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.
- iv. The last category covers other serious violations of the laws and customs applicable in armed conflicts not of an international character. These crimes are derived from various sources, including the 1907 Hague Regulations and Additional Protocol II to the Geneva Conventions.²⁰

It is worth noting that unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act can constitute a war crime. For an

¹⁷ Knut, D. (2003). War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes. In: H. Fischer/ C. Krell/ S. R. Liider (eds), *International and National Prosecution of Crimes Under International Law: Current Developments*. (pp. 334 -406)

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva 8 June 1977

¹⁹ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 17 June 1925.

²⁰ See, for example, *Hamdan v. Rumsfeld* 126 S ct 2749 (2006) (re Art. 75 API); *Strugar ICTY A. Ch. 22.11.2002* para. 9 (re Arts. 51 and 52 AP I); Meron, *Customary Law*, 62–78.

act or omission to be determined as a war crime, however, it should be established that; the conduct took place in the context of and was associated with an international armed conflict (nexus requirement); the perpetrator was aware of factual circumstances that established the existence of an armed conflict; the victim was such person as is protected under one or more of the Geneva Conventions of 1949; and the perpetrator was aware of the factual circumstances that established that protected status.²¹

These elements as explicated in the section below are central to this paper's analysis that posits arms suppliers as abettors of war crimes.

1.2. Elements of a war crime.

1.2.1. Existence of an Armed conflict

Existence of armed conflict is an essential element for any war crime. It is the insecure and volatile situation of armed conflict that gives rise to international jurisdiction over a crime.²² In the case of internal conflict, a certain threshold of intensity and organisation must be met in order to distinguish armed conflict from mere internal disturbances and riots, while in the case of State-to-State conflict, any resort to force involving military forces amounts to armed conflict.²³ Some authorities however indicate that a certain level of intensity is needed for such force to consist of a war crime.²⁴

It is worth to note that the concept of armed conflict, according to **Article 2 of the GC I and Article 6 of the GC IV**, includes not only the application of force between armed forces, but also an invasion that meets no resistance,²⁵ aerial bombing, or an unauthorised border crossing by armed forces. Also, the state of armed conflict does not end with each particular ceasefire; rather, it continues until the 'general close of military operations',²⁶ as such, the state of armed conflict also applies during occupation, that is to say, when territory is placed under the authority of a hostile army.²⁷

²¹ Cryer, R., Robinson, D., & Vasiliev, S. (2019). War Crimes. In *An Introduction to International Criminal Law and Procedure* (pp. 259-296).

²² Ibid, 22

²³ Ibid, 22

²⁴ Tribunal jurisprudence requires 'protracted' violence for internal conflict but not for State-to-State conflict: Tadic' ICTY A. Ch. 2.10.1995 para. 70. According to the ICRC commentary on the Geneva Conventions, the concept of armed conflict includes 'any difference arising between two States and leading to the intervention of members of the armed forces': Pictet, Commentary to I Geneva Convention 20.

²⁵ Art. 2 GC I. 78 Art. 6 GC IV.

²⁶ Tadic' ICTY A. Ch. 2.10.1995 para. 70. In addition, '[u]ntil that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under control of a party, whether or not actual combat takes place there'.

²⁷ g. Art. 52 Hague Regulations; Art. 6 GC IV; ICC Elements, footnote 34; Naletilic' ICTY T. Ch. I 31.03.2003 paras. 214-17

1.2.2. Nexus between crime and conflict

In addition to presence of an armed conflict, it was established in *Prosecutor v Semanza* that for an act or omission to constitute a war crime, such conduct must be closely linked to an armed conflict,²⁸ or committed ‘in the context of and associated with’ an armed conflict.²⁹ The term ‘*in the context of*’ has been defined to mean that the conduct thus must have occurred during an armed conflict and on a territory in which there is an armed conflict.³⁰ And, ‘*associated with*’ has been interpreted to refer to the specific nexus between the conduct of the perpetrator and the conflict, and matches the ICTY requirement that the conduct be ‘closely related to’ the conflict.³¹

In *Prosecutor v Tadić*, the ICTY noted that the prohibited act needs neither be committed in the course of fighting nor inside the area of actual combat. What is essential is that the ‘crimes were closely related to the hostilities, and there exists a **functional relationship** between the prohibited conduct and the armed conflict’.³²

It is however essential to point out that not all criminal activity on a territory experiencing armed conflict amounts to a war crime. For example, if a person kills a neighbour purely out of jealousy or because of a private dispute over land, and this happens to occur during an armed conflict, that is not a war crime.³³ In the *Kunarac judgment*, the ICTY Appeals Chamber provided a helpful elaboration of this test, focusing on whether the existence of conflict played a substantial part in the perpetrator’s ability to commit a crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.³⁴ Hence, it is sufficient that the perpetrator acted in furtherance of or under the guise of the armed conflict.³⁵ In assessing these questions, one may take into account inter alia the following factors: the status of perpetrator (for example combatant); the status of the victim (for example non-combatant, member of opposing party); whether the act serves a goal of a military campaign;

²⁸ *Prosecutor v Semanza* [Judgment] ICTR-97-20-A [20 May 2005] para. 369).

²⁹ ICC Elements Art. 8(2)(a)-1. The test was referenced by the ICTR in *Kayishema* ICTR T.Ch. II 21.05.1999

³⁰ Knut Dormann, Eve La Haye and Herman von Hebel, ‘War Crimes’ in Lee, ‘Elements and Rules, 120–1.

³¹ *Tadić* ICTY A. Ch. 02.10.1995 para. 70. While some nexus is needed, the crime need not be committed during combat, nor need it be part of a policy or practice or in the interests of a party to the conflict: *Tadić* ICTY T. Ch. II 07.05.1997 paras. 572–3.

³² Interlocutory Appeal Decision para. 70; *Prosecutor v Tadić* [Opinion and Judgment] ICTY-94-1 [7 May 1997] para. 573.

³³ Knut Dormann, ‘Elements of War Crimes under the Rome Statute of the International Criminal Court (Cambridge, 2003) 19–20.

³⁴ *Kunarac* ICTY A. Ch. 12.06.2002 para. 58.

³⁵ *Ibid*, 35

and whether it was committed in the context of perpetrator's official duties.³⁶ The perpetrator must also be aware of the factual circumstances that established the existence of an armed conflict.³⁷

These factors form the fundamental distinction between ordinary offences under domestic law, such as murder, and the qualification of war crimes, such as the killing of a prisoner of war.³⁸ At the same time, the nexus requirement distinguishes war crimes from other international crimes.³⁹

1.2.3. The perpetrator

Another key question to consider in determining a war crime is '*who is the perpetrator?*' **Articles 49, 50, 129, and 146 of the four Geneva Conventions (1949)** require Member States to prosecute and punish **all** 'persons' who commit grave breaches. This means that perpetrators of war crimes are not limited to only members of armed forces or groups and their leaders. While the fact that a perpetrator is a member of an armed force may help to establish the nexus to armed conflict, it is not a requirement in proving a war crime.⁴⁰ The conduct of civilians can also be a war crime even if it is not imputable to a party to the conflict, provided that the nexus requirement is met.⁴¹

In the *Delalic Case*, the ICTY noted that 'it is not necessary that the perpetrator be part of the armed forces, or be entitled to combatant status in terms of the Geneva Conventions to be capable of committing war crimes during international armed conflict.'⁴²

A critical component in determining if an individual is a perpetrator of a war crime is whether they have/had some awareness of the armed conflict. The Appeals Chamber in *Kordic*⁴³ indicated that the knowledge of the accused of the fact of armed conflict was indeed relevant.⁴³ Some national jurisprudence,⁴⁴ as well as the ICC Elements of Crimes,⁴⁵ have also indicated that a person cannot be convicted as a 'war criminal' unless he or she has the necessary awareness of the factual circumstances that make the conduct a war crime. The final element

³⁶ Kunarac ICTY A. Ch. 12.06.2002 para. 59; Rutaganda ICTR A. Ch. 26.05.2003 para. 569

³⁷ Introduction Art. 8 Elements of Crimes

³⁸ Cottier in Triffterer [2008] 293

³⁹ Ambos [2014] 141

⁴⁰ Akayesu ICTR A. Ch. 01.06.2001 paras. 444–5.

⁴¹ Essen Lynching Trial, I LRTWC 88; Tesch (The Zyklon B Case) I LRTWC 93.

⁴² Prosecutor v Delalić et al (Celebići Case Appeal Judgment) IT-96–21-A [20 February 2001] para. 325

⁴³ Kordic ICTY A. Ch. 17.12.2004 para. 311: 'The nullum crimen sine lege principle does not require that an accused knew the specific legal definition of each element of a crime he committed. It suffices that he was aware of the factual circumstances, e.g. that a foreign state was involved in the armed conflict.' Interestingly, this test is more onerous than that in the ICC Elements, where knowledge of the international character of the conflict is not required: ICC Elements, Introduction to war crimes, para. 3.

⁴⁴ This is the approach taken by the Supreme Court of Canada in R v. Finta [1994] 1 SCR 701 at 820

⁴⁵ Dormann, La Haye and von Hebel, 'War Crimes' in Lee, 'Elements and Rules, 121–3.

for each war crime therefore requires that the perpetrator was ‘aware of factual circumstances that established the existence of an armed conflict’.⁴⁶ Precisely, no legal evaluation by the perpetrator is required to prove awareness either of the existence of the conflict or its character as international or internal.⁴⁷ There is also no requirement of awareness of the factual circumstances establishing the character of the conflict as international or internal.⁴⁸ Only implicit (in the terms ‘took place in the context of and was associated with’) sufficient awareness of the factual circumstances that established the existence of an armed conflict is required to render one a perpetrator.⁴⁹

1.2.4. The victim or object of the crime

The definitions of many war crimes include certain criteria with respect to the victim (or object) of the crime. For example, for grave breaches of the Geneva Conventions, the crime must affect ‘protected persons or objects’.⁵⁰ Protected persons include civilians, prisoners of war and combatants who are no longer able to fight because they are sick, wounded or shipwrecked.⁵¹ Similarly, **common Article 3** protects ‘persons no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or other cause’.

These restrictions are necessary because some acts, such as wilful killing, are not a crime when committed against a combatant. Other war crimes specify a particular victim or object of the crime (for example civilian population, civilian objects, persons involved in humanitarian assistance, undefended towns, etc.).⁵² Some war crimes also regulate battlefield conduct, to reduce unnecessary suffering of combatants, and hence even combatants are protected as victims of the crime. Some of the most important protections for civilians arise in **GC IV**, which protects persons ‘who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.⁵³138

Over the years, this provision has been widened to also include persons detained by, and abused by, persons of another ethnic group, that is to say, a different party to the conflict, even when of the same nationality. In the *Tadic’ decision*, the ICTY Appeals Chamber chose to

⁴⁶ ICC Elements Art. 8(2)(a)(i), element 5

⁴⁷ ICC Elements, Introduction to War Crimes, para. 3.

⁴⁸ Ibid, 47

⁴⁹ Ibid, 47

⁵⁰ Art. 147 GC IV, Art. 8(2)(a) ICC Statute, Art. 2 ICTY Statute.

⁵¹ Arts. 12 and 13 GC I, Arts. 12 and 13 GC II, Art. 4 GC III, Art. 4 GC IV.

⁵² Art. 8(2)(b)(i)–(v) ICC Statute.

⁵³ Art. 8(2)(b)(vi), (vii), (xi), (xii), (xvii)–(xx)

look at the substance of the relations rather than formalities and held that the crucial test is allegiance, and ethnicity rather than nationality may become the ground of allegiance.⁵⁴

2. Arms Trade and War Crimes.

A broad array of individual and collective human rights protected by international law are impacted by irresponsible arms transfers every day. Some of the most recent examples of the impact of irresponsible export in arms are apparent is the ongoing war in Yemen. Since the launch of Operation Decisive Storm in 2015⁵⁵, several countries, under the leadership of Saudi Arabia, have been waging war in Yemen to restore the exiled President Hadi to power (Saudi-led coalition).⁵⁶ Over these years, airstrikes, *a de facto* naval and aerial blockade and attacks on civilians and civilian infrastructure in Yemen have led to a humanitarian crisis on an unprecedented scale.⁵⁷

Reports by the UN and NGOs indicate that certain coalition airstrikes potentially constitute violations of international humanitarian law.⁵⁸ For instance, the 2016 UN Panel of Experts report on Yemen contained incidents including attacks against camps for internally displaced persons and refugees, civilian gatherings and civilian objects – medical facilities, schools, mosques, markets and other essential civilian infrastructure.⁵⁹ The latest 2018 UN Panel of Expert report on Yemen similarly concluded that there have been widespread violations of international humanitarian law as the coalition airstrikes “continued to disproportionately affect civilians and civilian infrastructure.”⁶⁰ As of June 2018, the coalition airstrikes were reported to be responsible for at least 4,300 deaths.⁶¹

Regardless of these facts, countries in the Middle East, which form part of the Saudi-led coalition fighting the war in Yemen, are among the top recipients of global arms exports.⁶² Also, despite increasing assurances by the arms exporters that the export of weapons to third

⁵⁴ Tadic´ ICTY A. Ch. 2.10.1995 para. 166.

⁵⁵ Christian, S. & Linde, B. Arms Trade And Corporate Responsibility; Liability, Litigation and Legislative Reform, (November 2019).

⁵⁶ Ibid, 56

⁵⁷ Ibid, 56

⁵⁸ UN Security Council of Experts on Yemen, Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140 (2016), UN DOC S/2016/73 at 35, 152–166

⁵⁹ UN Security Council of Experts on Yemen, Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140 (2016), UN DOC S/2016/73 at 35, 152–166.

⁶⁰ Final report of the Panel of Experts on Yemen, Final report of the Panel of Experts on Yemen, UN Doc. S/2019/83, p. 4.

⁶¹ UN Human Rights Council, »Situation of Human Rights in Yemen, including Violations and Abuses since September 2014«, Report of the United Nations High Commissioner for Human Rights (17 August 2018) at 3 (annex IV).

⁶² SIPRI, Trends in International Arms Transfers, p. 6.

states would be more restrictive,⁶³ licenses have been granted for exports to countries where, for instance, the employment of child soldiers is well documented,⁶⁴ and violence against women and girl is widespread.⁶⁵

Generally, while arms transfer conduct is criminalised to some extent by a number of instruments and mechanisms at the international and domestic level, on grounds related to the usage of the weapons in atrocity, in practice, there is often a lack of effective enforcement and punishment.⁶⁶ This has partly contributed to an environment where ammunitions flow unchecked, facilitating mass atrocities with impunity, despite the existence of international and domestic arms trade regulations.

This chapter therefore appraises the legal framework regulating international arms trade, to establish the gaps and opportunities for strengthening accountability a complementary apparatus such as ICL.

2.1. International Arms Trade Regulatory Landscape.

The export of arms and military equipment is regulated by a number of legal norms at the international and national levels. These regulatory regimes exert varying degrees of coercive influence over individual behaviour through criminal and non-criminal sanctions, as well as non-binding voluntary standards with the aim of moderating arms transfer conduct, as explicated below:

2.1.1. Domestic Arms Export Laws.

International Human and people's rights are secured under a series of international treaties, including but not limited to; the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and seven other principal human rights treaties as well as the optional protocols. Each of these treaties directly or indirectly places obligations on its State Parties not only to respect human rights by desisting from deploying arms for human rights violations, but also to protect persons within their jurisdiction from such harms caused by third parties, including business enterprises.⁶⁷

⁶³ Grundsätze der Bundesregierung für die Ausfuhrgenehmigung spolitik bei der Lieferung von kleinen und leichten Waffen, dazuge höriger Munition und entsprechender Herstellungsausrüstung, May 2015.

⁶⁴ C. Steinmetz (2017), Deutsche Rüstungsexporte und Kindersoldaten – Kleinwaffen in Kinderhänden, February 2017

⁶⁵ ECCHR & WILPF Submission to CEDAW

⁶⁶ Ibid, 16

⁶⁷ See, for example, UN Human Rights Committee, General Comment 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add. 13; 'UN Guiding Principles on Business and Human Rights', endorsed by UN Human Rights Council Resolution 17/4 (2011), Part I, 'the State Duty to Protect Human Rights'.

States are also obliged to criminalise, investigate and prosecute serious violations and abuses amounting to crimes against international law, including IHRL or IHL.⁶⁸

These International legal obligations are typically implemented and enforced through domestic laws and procedures. In their respective national legal systems, therefore, States are supposed to regulate the arms transfer conduct of legal and natural persons by addressing the manufacture, export, import, transportation, insurance, financing, ownership, stockpiling and use of weapons.⁶⁹ Some states have put in place such domestic frameworks aimed to control irresponsible arms transfers.

The United States was the first nation to specifically regulate arms transfer activities.¹⁰¹ The Arms Export Control Act (AECA) gives the President the power to control import and export of munitions and services generally.⁷⁰ However, the 1996 Brokering Amendment to the AECA extends control to all arms transfers involving an individual subject to U.S. jurisdiction.⁷¹ This Amendment recognised that the United States could not control arms deals conducted by U.S. citizens outside the United States, or by foreigners, and thus requires all U.S. nationals, regardless of where they live, and all foreign nationals living in the United States, to have a license to broker weapons.⁷² Provision of these Licenses is also conditioned on human rights, foreign policy, and national security considerations.

In Germany, the German War Weapons Control Act, *Kriegswaffenkontrollgesetz* (KrWaffKontrG) and the *Außenwirtschaftsgesetz* provide a framework for arms export control. According to §6(3) KrWaffKontrG a license “shall not be granted when there is the risk that the arms will be used for activities endangering international peace or when there is reason to believe that the license would infringe Germany’s existing public international law obligations.”⁷³ In its submission to the Arms Trade Treaty Baseline Assessment Project, Germany also outlined that the preservation of human rights is of particular importance for every export decision, irrespective of the envisaged recipient country. Military equipment exports are therefore not supposed to be approved where there is sufficient suspicion of misuse

⁶⁸ See UN Economic and Social Council (2005), ‘UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity’, E/CN.4/2005/102/add.1, 8 February, principle B: ‘As used in these principles, the phrase “serious crimes under international law” encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalise, such as torture, enforced disappearance, extrajudicial execution, and slavery’

⁶⁹ Michael Bothe and Thilo Marauhn, ‘The Arms Trade: Comparative Aspects of Law’ (1993) 26(1) *Revue Belge De Droit International* 20-26, 25.

⁷⁰ 22 U.S.C. §§ 2751–2799

⁷¹ *Id.* § 2778.

⁷² 22 U.S.C. § 2778(b).

⁷³ *Ibid.*, 56

of the military equipment for internal repression or other ongoing and systematic violations of human rights.⁷⁴

In the Netherlands, arms exports are regulated by the **Strategic Goods Decree of 2008**, which requires licences to respect international obligations.⁷⁵ Export licences are issued in accordance with the General Custom Act (Awd), which ‘serve[s] the purpose of fulfilling obligations arising from’ the ATT, and ‘binding EU legal acts’ such as the EU Common Position.⁷⁶

In other jurisdictions, such as the UK, some evidence has been noted of national courts sanctioning exports on the basis of risks that weapons will be used to commit international crimes. In *R (Campaign Against Arms Trade) v The Secretary of State For International Trade*⁷⁷, the UK Court of Appeal held that there was a legal obligation (as a matter of rationality) to make a systematic assessment of past possible violations, not necessarily in every case but, where possible, before deciding whether there is a clear risk of future serious violations. The case concerned the lawfulness of the Secretary of State’s decision not to suspend, but rather to continue to grant licences for the export of arms and military equipment to Saudi Arabia, despite a strong body of evidence indicating that the coalition conducting military operations in Yemen has committed serious violations of international law, particularly IHL.

These domestic regulations notwithstanding, punitive criminal penalties for breaching export regulations remain the exception rather than the rule in most national contexts. Major practical difficulties are particularly evident in ensuring that the true end-user of a shipment of weapons is reflected on the documentation used to satisfy export requirements.⁷⁸

2.1.2. International Arms Export Control Agreements.

At the international level, the Arms Trade Treaty was the first multilateral agreement to impose binding obligations to regulate arms transfers.⁷⁹ The Treaty imputes upon States Parties the responsibility of implementing these obligations under domestic law.

⁷⁴ The Impact of Germany’s Arms Transfers on Women, Germany’s Extraterritorial Obligations under CEDAW, Joint Shadow Report to CEDAW Committee, 66th Session by WILPF and ECCHR, p. 4

⁷⁵ Ministry of Justice (Netherlands) (2008), ‘Decree of 24 June 2008 containing rules with regard to the import, export and transit of dual-use goods and military goods (Strategic Goods Decree)’, arts 11 and 18)

⁷⁶ Government of the Netherlands, ‘Legislation, treaties and international agreements on the export of strategic goods’ (<https://www.government.nl/topics/export-controls-of-strategic-goods/laws-and-rules-on-the-export-of-strategic-goods>)

⁷⁷ *R (Campaign Against Arms Trade) v The Secretary of State For International Trade* [2019] EWCA Civ 1020.

⁷⁸ See Andrew Tan (Ed.) *The Global Arms Trade: A Handbook* (Routledge, 2014).

⁷⁹ Arms Trade Treaty (adopted 2 April 2013, opened for signature 3 June 2013, entered into force 24 December 2014) 3012 UNTS.

Article 6(3) of the treaty also expressly incorporates respect for human rights and international humanitarian law as a precondition for international trade in arms. The provision prohibits any transfer of conventional arms when the State Party has knowledge, at the time of authorization, that the arms would be used in, among other things, the commission of grave breaches of the Geneva Convention of 1949, attacks civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.⁸⁰

Article 7 prohibits exports where there is an ‘overriding risk’ of the arms being used to commit or facilitate an international crime. It stipulates that the exporting State must “assess in an objective and non-discriminatory way the potential” that the arms:

- a) would contribute to or undermine peace and security;
- b) could be used to: (i) commit or facilitate a serious violation of international humanitarian law; and (ii) commit or facilitate a serious violation of international human rights law.

If, after conducting this assessment and considering the available mitigating measures the State Party determines that there is an overriding risk of such negative consequences, the State Party is obligated not to authorise the export.⁸¹ **Article 7(4)** of the Arms Trade Treaty further requires that the exporting State Party assess the risk of the exported goods being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women or children.

However, despite **Article 5(2)** requiring States Parties to establish ‘national control systems’, and **Article 14** necessitating ‘appropriate measures to enforce national laws and regulations’, the Treaty does not specify that States must enforce individual breaches of the **Article 6 and 7** with criminal sanctions. Criminal sanctions would act as a form of indirect regulation of individual behaviour that may influence the arms transfer conduct of State officials.

2.1.3. EU Arms Trade Regulatory Framework.

At the level of the European Union, Council Common Position 2008/944/CFSP of 8 December 2008 outlines the common rules governing control of exports of military technology and equipment (EU Common Position), and sets minimum standards which should be complied with for the restriction and management of transfers of military technology and equipment.⁸² The EU Common Position is binding for all Member States, obligating them to ensure that

⁸⁰ Article 6.3 Arms Treaty

⁸¹ Article 7.3 of the Arms Trade Treaty.

⁸² Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *OJ L 335*, 13.12.2008, p. 99–103

their national policies conform with it and assess arms export license applications against its eight criteria.⁸³

Criterion 2 of the position deals with respect for human rights in the country of final destination, as well as respect by that country of international humanitarian law. It provides that “having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

- a) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- b) exercise special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe; and
- c) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.”

The EU Common Position is complemented by a User’s Guide, which sets out recommendations intended to guide the interpretation and implementation of the EU Common Position.⁸⁴ The User’s Guide advises Member States to ask the following questions to assess the risk of serious violations of international humanitarian law:

- (i) Have violations been committed by any actor for which the State is responsible (including the armed forces)?
- (ii) Has the recipient country failed to take action to prevent and suppress violations committed by its nationals or to investigate violations allegedly committed by its nationals?
- (iii) Where the answer to these questions is negative, strong indications speak against the granting of a license.

Most notably, criterion 5 asserts that consideration of defence and security interests “cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability.”

Unfortunately, despite a higher level of concreteness, the User’s Guide remains a recommendation and until today the EU Common Position, taken together with the User’s

⁸³ Article 15 EU Treaty until the changes made by the Treaty of Lisbon.

⁸⁴ Council of the European Union, COARM 172 CFSP/PESC 393

Guide, has not been effective in guaranteeing consistent licensing decisions among Member States of the European Union.

2.1.4. Arms embargoes.

Arms embargoes are targeted sanctions issued during conflicts and humanitarian crises.⁸⁵ An arms embargo restricts the weapons trade as applied to a particular recipient.⁸⁶ Embargoes can be imposed by states and by international entities, such as the United Nations and the European Union⁸⁷ with the aim of preventing weapons from reaching known human rights violators.⁸⁸ According to Chapter VII of the UN Charter, the UNSC may impose an embargo on the basis of the Council's assessment of risks that arms will be used to commit an international crime.⁸⁹

Arms embargoes have however had little success at stemming the global trade in weapons to volatile contexts.⁹⁰ Nearly every arms embargo has been “systemically violated.”⁹¹ And, even in the relatively rare circumstances where UNSC embargoes have been imposed with no member of the Council exercising veto powers, there has been almost no criminal law enforcement for the breach of such embargoes.⁹² This is in part because there are no mechanisms in international law specifically dedicated to arms embargo enforcement⁹³ This means that criminalization and enforcement can only take place at a national level, of which States have been politically reluctant to advance in these respects.⁹⁴

Similarly, the timeline it takes to create compliance mechanisms after an embargo is enacted, an inability to track embargo implementation, the lucrative incentives to breach embargoes,

⁸⁵ Elizabeth Kirkham & Catherine Flew, Briefing 17: *Biting The Bullet, Strengthening Embargoes And Enhancing human security* 9 (2003).

⁸⁶ *Biting The Bullet, Strengthening Embargoes And Enhancing Human Security* 9 (2003).

⁸⁷ Leigh, R. The Case for Prosecuting Arms Traffickers in the International Criminal Court. (2018, August 2). Cardozo Law Review. <https://cardozolawreview.com/the-case-for-prosecuting-arms-traffickers-in-the-international-criminal-court/>

⁸⁸ G.A. Res. 55/255, U.N. Doc. A/RES/55/255, at 2 (June 8, 2001).

⁸⁹ Carina Staibano, ‘Trends in UN Sanctions’ in Carina Staibano and Peter Wallenstein (Eds) *International Sanctions: Between Wars and Words* (Routledge, 2005) 35.

⁹⁰ *Putting Teeth In The Tiger: Improving The Effectiveness Of Arms Embargoes*, at xiii (Michael Brzoska & George A. Lopez eds., 2009)

⁹¹ Some researchers have concluded that while “UN embargoes may increase the cost and difficulty of arms acquisition,” at the end of the day, “most actors in conflicts experience little difficulty in sourcing arms from the international market-place.” Neil Cooper, *What’s the Point of Arms Transfer Controls?*, 27 *CONTEMP. SECURITY POL’Y* 118, 119–20 (2006). Viktor Bout was especially skilled at breaking the U.N.’s arms embargoes. See FARAH & BRAUN, *supra* note 11, at 76–77. U.N. investigations in Rwanda, Angola, Sierra Leone, and the Democratic Republic of the Congo have unearthed the extent to which arms intermediaries deliberately violate arms embargoes without repercussions. Austin, *supra* note 55, at 204–05.

⁹² *Ibid*, 88

⁹³ *Indictment, United States v. Bout*, 860 F. Supp. 2d 303 (S.D.N.Y. 2012) (No. 08 CR 365 (SAS)), 2008 WL 8141434, 1

⁹⁴ Katharine Orlovsky, ‘International Criminal Law: Towards New Solutions in The Fight Against Illegal Arms Brokers’ (2006) 29 *Hastings International and Comparative Law Review* 343, 377

the slim chances of being caught in breach, and the minimal consequences for those who are caught in breach, all contribute to the ineffectiveness of arms embargoes.⁹⁵

All these factors taken into consideration mean that while the current international system of arms embargoes holds a capacity to indirectly criminalise arms transfer conduct, the scope of liability for individual breaches is unclear and the mechanisms for enforcement are limited.

2.1.5. Business and human rights.

In recent years, there has been an increasing tendency to subject (transnational) companies to human rights responsibilities, as a complement to States' obligations, to ensure respect for human rights in their business relationships.⁹⁶ A steadily evolving set of non-binding business standards deem corporations socially irresponsible if they transfer arms that facilitate atrocity.

In 2011, the United Nations Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).⁹⁷ The UNGPs are based on three pillars; Pillar I deals with the State duty to protect human rights; pillar II contains principles regulating the corporate responsibility to respect human rights and pillar III provides principles related to access to remedy for corporate human rights abuses. This framework, therefore, not only requires the acceptance of corporate responsibilities, but also provides insights on what is expected from states regarding regulation of business activities and access to remedy for corporate human rights abuses in the arms sector.

Other proclamations such as the OECD Guidelines for Multinational Enterprises, the UN Sub-Commission Norms on Business and Human Rights, and the Voluntary Principles on Security & Human Rights are non-criminal in nature, also exert a degree of coercive effect on individuals' commercial actions. Though they do not directly criminalise arms transfer conduct, these compacts of industry standards constitute broadly-agreed benchmarks for what is considered acceptable within the 'ordinary course of business' for certain business communities.

⁹⁵ Theresa A. DiPerna, Small Arms and Light Weapons: Complicity "with a View" Toward Extended State Responsibility, 20 FLA. J. INT'L L. 25, 37–38 (2008).

⁹⁶Hamilton, T. Arms Transfers under Article 25(3)(d)(ii) of the Rome Statute. (2019, August 5).

⁹⁷ UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5.

These standards may be relevant for assessing criminal *mens rea*, by providing indicators as to whether an individual knew that a particular transfer of arms was unacceptable by the prevailing acceptable practices of the day.

2.1.6. Interim conclusion.

Despite the variety of tools at the disposal of advocates to support arms control efforts, attempts to control the conduct of corporate officers and arms brokers have proven insufficient.⁹⁸ The fact that arms exports are still largely be used to commit war crimes, murder and enforced disappearances proves that the regulatory framework is deficient, therefore necessitating a complementary apparatus like ICL.

3. Individual Criminal Liability for Arms Transfer.

3.1. Liability before the Ad Hoc Tribunals

The direct criminal responsibility of individuals who profit from facilitating war has a long history in ICL doctrine. Established during the Nuremberg trials, the concept of individual criminal liability has been applied by several *ad hoc* tribunals, from the International Criminal Tribunal for Rwanda (ICTR), to the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for the former Yugoslavia (ICTY) (*ad hoc* tribunals). In particular, the tribunals have been consistent in applying the liability theory of ‘*aiding and abetting*’ to answer the question of whether individuals could be held criminally liable for the provision of arms and weapons to conflict parties.

Aiding and abetting is an ICL doctrine related to the guilt of someone who encourages, incites or facilitates another person in the commission of a crime. Aiding and abetting includes a conduct element—*actus reus*, and mental state—*mens rea*.⁹⁹ The *actus reus* for aiding and abetting requires practical assistance, encouragement, or support that substantially affects perpetration of the crime.¹⁰⁰ The *mens rea*, on the other hand, is knowledge that these acts assist in the commission of the offense. Aiding and abetting, therefore, contains an objective condition (providing assistance or support that substantially impacts the crime), and a subjective component (knowledge that actions assist in the commission of the crime).¹⁰¹

In regards to the *actus reus* in arms trade and war crimes cases, some of the *ad hoc* tribunals have determined that aiding and abetting consists of ‘*acts directed to assist, encourage or lend*

⁹⁸ Colby Goodman, Oxfam Briefing Paper 156, Beyond Viktor Bout: Why The United States Needs An Arms Trade Treaty 8 (2011). A

⁹⁹ Prosecutor v. Furundzija, Case No. ICTY IT-95-17/1, Judgment, 249 (Dec. 10, 1998).

¹⁰⁰ Rome Statute, art. 21.

¹⁰¹ Sanikidze, Z. (2012). The Level of ‘Contribution’ Required Under Article 25 (3) (D) of the Rome Statute of the International Criminal Court. *Revue internationale de droit pénal*, 83, 221-232. <https://doi.org/10.3917/ridp.831.0221>

moral support to the perpetration of a crime'. As such, there does not need to be a causal link, a *conditio sine qua non* relationship, between the assistance and the commission of the crime.¹⁰² The assistance only needs to *make a difference* to the acts of the perpetrator – it must have a 'substantial effect' on the commission of the crime. In *Furundžija*, the Trial Chamber of the ICTY concluded that the 'substantial effect' standard reflects customary international law.¹⁰³

This position was upheld in the *Kamuhanda* case where the Trial Chamber held that supplying weapons to militia by members of the interim government constituted an act falling under the conduct element of aiding and abetting.¹⁰⁴ The Appeals Chamber noted that even if the weapons that were distributed had not been used at all, the mere act of supplying them amounted to psychological assistance, which the tribunal considered to be man act of encouragement, contributing substantially to the massacre, thus amounting to abetting and aiding.¹⁰⁵

In *Prosecutor vs. Charles Ghankay Taylor*¹⁰⁶, the SCSL ruled that providing '*arms and ammunition, military personnel, operational support, moral support and ongoing guidance*' constituted aiding and abetting.¹⁰⁷ In this case, the prosecution went to lengths to prove that without the delivery of certain arms within a certain timeframe, the rebel forces in Sierra Leone could not have committed the crimes with only the supplies that were already available locally.¹⁰⁸ And even when there was no evidence in all instances that a specific weapon provided on a specific date had been used in a specific incident, this did not prevent the Pre-Trial Chamber from finding in certain instances that the material provided by Taylor was used in the commission of crimes.¹⁰⁹

For the *mens rea* requirement, the ICTR and ICTY held that the aider and/or abettor must have *knowledge that their act will assist the perpetrator in the commission of the actual crime*.¹¹⁰ They do not need to know the precise crime that is intended or committed, but must be aware of the essential elements of the crime.¹¹¹ In this regard, if the arms supplier is aware

¹⁰² Ibid, 102

¹⁰³ Prosecutor v Furundžija, (IT-95-17/1), Trial Chamber, 10 December 1998, § 234.

¹⁰⁴ Judgment, Prosecutor v Kamuhanda, (ICTR-99-54-TCII), Trial Chamber II, 22 January 2004. The conviction was overturned on appeal, as there was no evidence that the weapons were used. Judgment, Prosecutor v Kamuhanda, (ICTR-99-54A), Appeals Chamber, 19 September 2005, §§ 67, 68.

¹⁰⁵ Ibid, 105

¹⁰⁶ Judgment, Prosecutor v Charles Ghankay Taylor, (SCSL-03-01-T), Trial Chamber II, 18 May 2012, at 6907-6915.

¹⁰⁷ C.C. Jalloh & S.Meisenberg (2015), The Law Reports of the Special Court for Sierra Leone: Vol III: *Prosecutor v Charles Ghankay Taylor* (the Taylor Case). Martinus Nijhoff Publishers, at 1857

¹⁰⁸ Judgment, Prosecutor v Charles Ghankay Taylor (SCSL-03-01-A), Appeals Chamber, §§ 313–315

¹⁰⁹ Judgment, Prosecutor v Charles Ghankay Taylor, (SCSL-03-01-T), Trial Chamber II, 18 May 2012, § 5628. See also, §§ 5549, 5551, 5558 – 5560, 5591, 5593, 5564, 5565, 5743, 5745, 5842.

¹¹⁰ Judgment, Prosecutor v Tadić, (IT-94-1-A), Appeals Chamber, 15 July 1999, § 229

¹¹¹ Judgment, *Prosecutor v Tadić*, Appeals Chamber, 15 July 1999, § 229

of crimes that will potentially be committed by the arms which they provide, and one of these is committed, they can then be deemed to have intended to aid the commission of that crime.¹¹² This conclusion can however only be made upon assessment of all relevant circumstances including direct and indirect or circumstantial evidence.¹¹³

In the case of *Taylor*, where it was established that he (Taylor) *knew* that his acts would facilitate the commission of war crimes, both the Trial Chamber and the Appeals Chamber ruled that the *mens rea* standard was met. The Trial chamber considered the fact that Taylor knew of the Revolutionary United Front's operational strategy, their intention to commit crimes and was aware the essential elements of the crimes in light of specific and concrete information.¹¹⁴ As a consequence, Taylor was convicted of aiding and abetting the commission of several war crimes by, among other things, providing arms and ammunition, which, together with additional forms of criminal responsibility, resulted in a sentence of 50 years imprisonment.¹¹⁵

These standards developed by the *ad hoc* tribunals, while they brought about some accountability, have been called into question by the International Criminal Court jurisprudence, as will be discussed in-depth, below (section 3.3). These criticisms notwithstanding, the rulings by the *Ad hoc* tribunal provided essential precedent which forms persuasive authority upon which the ICC could build to hold individual arms suppliers responsible for aiding war crimes.

3.2. Liability in Domestic Jurisdictions.

At the national level, some States, through their domestic courts, have prosecuted and convicted arms traders for complicity, aiding and abetting war crimes. In the Netherlands, a Dutch Court of Appeal found *Frans Van Anraat*¹¹⁶ guilty of aiding and abetting the commission of war crimes for having sold large quantities of raw materials that are used in the production of mustard gas to the Iraqi government during the Iran–Iraq war. The mustard gas was used by Saddam Hussein in subsequent attacks against three Kurdish villages in Iraq and five villages in Iran, resulting in numerous deadly casualties and severe bodily harm.¹¹⁷ In

¹¹² Sliedregt (2012), Individual Criminal Responsibility in International Law, at 121.

¹¹³ Judgment, Prosecutor v Popović et al, (IT-05-88-T), Trial Chamber, 10 June 2010, § 1500.

¹¹⁴ Judgment, *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-A), Appeals Chamber, at 445

¹¹⁵ *Ibid*, 115

¹¹⁶ Public Prosecutor v Van Anraat, The Hague Court of Appeal, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676, at 13. (hereafter the 'Van Anraat 2007 Judgment'), § 11.10 and 11.12. The verdict was upheld by the Dutch Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822.

¹¹⁷ BBC, 1988: Thousands die in Halabja gas attack. http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid_4304000/4304853.stm

2005, Van Anraat was sentenced by a national Dutch Court to 15 years in prison for aiding and abetting war crimes.¹¹⁸

In setting out the applicable standard for aiding and abetting war crimes, the Court of Appeal in *Van Anraat* applied the *dolus eventualis* concept,¹¹⁹ a threshold lower than direct intent¹²⁰ to test the mental element (*mens rea*) required for the offence of aiding and abetting war crimes.¹²¹ The *Dolus eventualis* principle was described in *Prosecutor v Kouwenhoven* as the ‘aider knowingly exposing himself to the probable chance that there would be a particular consequence.’ To determine whether he exposed himself to this chance, it is required that he be aware of the significant probability that the consequence will occur, and that he consciously accepted that probability at the time of the actions.¹²² As such, it is sufficient if the accused subjectively foresaw the possibility of his act aiding war crimes, even as a secondary consequence.

On the question of what the degree of causation should be for aiding and abetting in war crimes, the court indicated that the question is whether the accused has contributed to the attacks as charged in the indictment.¹²³ The Court emphasised next that the assistance need not be indispensable or adequate; merely facilitating suffices. It noted: it is ‘*sufficient when the assistance offered by the accessory has indeed promoted the offence or has made it easier to commit that offence*’.¹²⁴ The Dutch Court of Appeals affirmed this decision of the court of first instance, holding that Van Anraat knew that the chemicals he supplied would be used for the production of poison or mustard gas in Iraq. The Court of Appeal also indicated that ‘*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*’.¹²⁵ The decision of the Court of Appeal was reaffirmed by the Dutch Supreme Court in 2009.

From the judgement delivered by the Dutch Court courts, it can be concluded that actual use of the aider and abettor’s weapons or munition in the attacks as charged in the indictment is

¹¹⁸ Public Prosecutor v Van Anraat, LJN: AX6406, decision 23 December 2005. Van Anraat was acquitted of the charges in relation to genocide

¹¹⁹ *Dolus eventualis*, conditional intent, is a lower threshold than direct intent.

¹²⁰ Direct intent; whereby an individual seeks a particular consequence to occur and commits a crime in order to achieve it.

¹²¹ See H.G. van der Wilt (2008), Genocide v War Crimes in the Van Anraat Appeal, in: *Journal of International Criminal Justice* 6, 557–56

¹²² *Ibid*, 153

¹²³ Court of Appeal of The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA6734, para. 12.4

¹²⁴ Van Anraat Judgment 2007, § 12.4.

¹²⁵ Van Anraat Appeal Judgment, *supra* note 20, §16.

not strictly required, as long as in the relevant period the munitions or weapons were delivered by the accused amounted to an essential contribution to the war programme as a whole.

In another Dutch case, *Guus Kouwenhoven*, a business man, was prosecuted and convicted for complicity, aiding and abetting in war crimes for amongst others, delivering weapons to Charles Taylor, making staff and transport available for the armed conflict, and allowing company premises to be used as a meeting place for Taylor's armed forces during the civil war in Sierra Leone.¹²⁶ The Court of Appeal held that the assistance provided Kouwenhoven was instrumental to the commission of several war crimes, including murders and rapes, in the villages of Guéckédou (Guinea), Voinjama and Kolahun (Liberia), in the years 2000, 2001 and 2002.¹²⁷ The Court further noted that ruled that *Kouwenhoven* made an essential contribution to the war crimes because, through the supply of weapons, he enabled the regime to continue their armed attacks on defenceless civilians, inflicting death and destruction for a number of years.

As to his *mens rea*, the Court of Appeal took into account the large amount of media reporting as of the start of the conflict in which the atrocities committed were discussed. Kouwenhoven was therefore sentenced to 19 years of imprisonment for aiding and abetting war crimes in Sierra Leone.

The application of the *dolus eventualis* standard by the Dutch courts in these two cases, and the requirement that it suffices that the *assistance promoted the offence, or essentially contributed to the commission of the crime*, set a solid precedent which enables the prosecution of arms traders who knowingly provide arms and munitions to warring parties.

It is important to note however that while domestic courts have set substantive precedents in prosecuting individuals who abet and aid war crimes through illicit export of arms, the courts have been reluctant to hold accountable arms traders who legally supply arms and munitions that are used in the commission of war crimes due to 'lack of jurisdiction'.

In Germany, two recent cases of *Heckler & Koch and Sig Sauer*, which involved the criminal liability of employees both German small arms manufacturers, the judges were reluctant to examine whether the delivery of weapons aided the commission of war crimes in Mexico as they considered this to go beyond the actions dealt with in the criminal proceedings in Germany.¹²⁸ In both cases, the weapons exported and used to commit atrocities were licensed by the German Government. In the Heckler case, investigations against the government

¹²⁶ Kouwenhoven Appeal Judgment and Supreme Court, 18 December 2018, ECLI:NL:PHR:2018:1394.

¹²⁷ Court of Appeal of The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068, para. 9.17.

¹²⁸ A detailed description is provided by Jürgen Grässlin, Daniel Harrich and Danuta Harrich-Zandberg, *Netzwerk des Todes*, 2015, pp. 137– 146.

officials responsible for providing arms licenses were shelved by the District Attorney's office only one month after the charges were pressed.¹²⁹

Experience from these cases shows that in cases where the weapons used in war crimes are supplied under the approval of government officials, an uphill task for the applicants or claimants is proving that a public official responsible for approving an arms trade licence acted in violation of considerable margin of discretion in granting a particular licence.

In 2018, *Mwatana for Human Rights and others*,¹³⁰ jointly filed a complaint to the Public Prosecutor's Office in Rome, asking it to investigate the corporate managers of RWM Italia S.p.A. (a subsidiary of the German company Rheinmetall AG), a company that manufactures arms and military equipment, and officials of the UAMA¹³¹, the competent national authority that granted RWM Italia licences to export arms to Saudi Arabia and the UAE. The complaint concerned the export of arms to members of the Saudi-led coalition. The complaint requested the Italian investigate and prosecute the government officials for an alleged abuse of power, and both the government officials and managers in Italy for their complicity through gross negligence in murder and personal injury.

However, because Italy has not transposed the wording of the Rome Statute into its Penal Code, an investigation into complicity in war crimes could not be demanded.¹³² Therefore, after more than a year and a half of investigations, the Italian public prosecutor's office decided to request a dismissal of the case.¹³³

As already mentioned, many cases involving arms suppliers who legally export arms that are eventually used in commission of war crimes have had a similar outcome in domestic courts. It can therefore be concluded that in order to enable prosecutions of arms suppliers acting in their corporate capacity for the war crimes they facilitate, the *mens rea* standard of *dolus eventualis* or of recklessness needs to be applied. Standards higher than this can only present unreasonable obstacles to holding these actors to account, paving way for irresponsible arms conduct.

¹²⁹ Jürgen Grässlin and María-Eugenia L. Valencia, The Illegal Mexico-Deal – The Export of Thousands of G36 Assault rifles by Heckler & Koch into Mexican Regions of Conflict (from 2006 to 2009) <https://rib-stardust.jimdo.com/english/cases/mexico-lv-eng/>

¹³⁰ ECCHR Case Report, available at https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf.

¹³¹ UAMA (Unit for the Authorizations of Armament Materials)

¹³² Christian, S & Linde, B Arms Trade And Corporate Responsibility; Liability, Litigation and Legislative Reform, FES, (November, 2019).

¹³³ Landgericht Stuttgart, judgment of 21.02.2019, Az: 13 KLS 143 Js 38100/10.

3.3. Criminal Liability under the ICC Statute.

a. Aiding and abetting

Article 25(3)(c) of the Rome Statute establishes the principle of complicit assistance, which presents a potential avenue for the liability of an arms suppliers who aid, abet or assist in commission or attempted commission of war crimes. The Article provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(c) '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;'

The practical significance of this provision in actual proceedings has however been limited by strict court interpretation of the 'purpose' requirement under the Article.

In the *Mbarushimana* Confirmation Decision, the Pre-Trial Chamber held that:

*'...unlike the jurisprudence of the ad hoc tribunals, Article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article. Unless the requisite superior-subordinate relationship exists to charge responsibility under Article 28 of the Statute, 25(3)(d) liability is the only other way a person can be held criminally responsible for acting merely with knowledge of the criminal intentions of others.'*¹³⁴

The purposive requirement established by the courts makes prosecuting those who sell arms or other war material which is used for war crimes quite difficult.¹³⁵ The legal hurdles presented by the strict interpretation of **Article 25(3)(c)** are however allayed by **Article 25(3)(d)**.

The *mens rea* of Article 25(3)(d) is less stringent than the mental requirement of 'purpose' under Article 25(3)(c).¹³⁶ Article 25(3)(d) provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (d) *In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.*

¹³⁴ Mbarushimana (Confirmation Decision) ICC-01/04-01/10 (16 December 2011) para. 274 [Emphasis added].

¹³⁵ Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP, 2010, 2nd Edition).

¹³⁶ See Kai Ambos, 'The ICC and Common Purpose: What Contribution is Required Under Article 25(3)(d)?' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015) 595-596; A

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.

This Article presents several modes of liability including conspiracy, membership of a criminal group or organisation, and liability by conspiracy or joint criminal enterprise.

According to Tomas, the key elements established by Article 25(3)(d) include:¹³⁷

- a) A crime within the jurisdiction of the Court was attempted or committed;
- b) The crime was committed or attempted by a group of persons acting with a common purpose;
- c) The accused contributed to the commission of the crime in ‘any other way’;
- d) The contribution was intentional¹³⁸; and
- e) The contribution was made either:
 - (i) with the aim of furthering the criminal activity or criminal purpose of the group;¹³⁹ or
 - (ii) in the knowledge of the intention of the group to commit the crime. The distinctiveness of the mental states in Article 25(3)(d)(i) and
 - (iii) suggests that each should be interpreted as a discrete mode of liability, in the sense that the two subsections describe fundamentally different states of mind in which the Article 25(3)(d) contribution was made.

In regard to these components, a commercial arms trader may be liable for ‘*knowingly contributing*’ to an international crime without having ‘*intentionally furthered*’ the crime.

A second essential element of Article 25(3)(d) concerns the requirement that an individual contributes to a crime committed or attempted by ‘*a group of persons acting with a common purpose*’. The rationale laid down by this provision encapsulates the conduct of non-group members, such as arms traders, who knowingly make external contributions of assistance to

¹³⁷ Mbarushimana Confirmation Decision, paras 268-289; Katanga (Trial Judgment) ICC-01/04-01/07-3436 (7 March 2014) para. 1620

¹³⁸ The contributor must ‘(i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons (...)’. Mbarushimana Confirmation Decision, para. 288; Katanga Trial Judgment, para. 1639..

¹³⁹ Kevin, H. ‘The Rome Statute in Comparative Perspective’ in Kevin Heller and Markus Dubber (Eds) *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2010) 26. 59

principal perpetrator group, thus, extending criminality to contributions from outside the group as these may otherwise remain exempt from punishment.¹⁴⁰

This provision however also applies to members of the principal perpetrator group.¹⁴¹ In *Gbagbo and Blé Goudé*, the Prosecutor reasoned that *'[t]o confine application of Article 25(3)(d) to outsiders to the group who contribute to the commission of crimes would unduly circumscribe its reach, in contravention of a plain reading of the provision'*.¹⁴²

Another key component of Article 25(3)(d) which is of significance to prosecution of arms suppliers is the reference on the *nature of the required contribution*. The Article asserts that a person shall be criminally liable if they *'in any other way contribute'* to the commission or attempted commission of a crime. This section of the Article accordingly covers all arms transfer contributions. The Pre-Trial Chamber I in the *Mbarushimana* Confirmation Decision however imposed a quantitative threshold that the contribution should be at least *'significant'*. The Pre-Trial Chamber I held that a person must make a significant contribution to the crimes committed or attempted in order to establish responsibility under Article 25(3)(d) of the Rome Statute.¹⁴³

This position has however been overtaken by new judgements. In the relatively recent ICC Confirmation Decisions *in Al Mahdi and Ongwen*,¹⁴⁴ the court held that it is unnecessary for the contribution under Article 25(3)(d) to be *'significant'* or reach a certain minimum degree. Similarly, in the *Katanga case*, the Trial Chamber's held that contribution *'will be considered significant where it had a bearing on the occurrence of the crime and/or the manner of its commission'*.¹⁴⁵ A contribution that is too causally remote would therefore be one that cannot be said to have *'had a bearing on'* the commission of the crime. The Trial Chamber in *Katanga* further noted that; *'in international criminal law the prime focus of investigations and prosecutions is those who, whilst physically, structurally or causally remote from the physical perpetrators of the crimes, indirectly committed them or facilitated their commission by virtue of the position they held, however remote.'*¹⁴⁶

¹⁴⁰ Nina H.B. Jørgensen (Ed.) *International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, forthcoming 2020).

¹⁴¹ *Mbarushimana* Confirmation Decision, para. 275; *Katanga* Trial Judgment, para. 1631.

¹⁴² *Gbagbo and Blé Goudé* (Prosecution Filing) ICC-02/11-01/15-1207-Anx1 (8 November 2018) ('*Gbagbo and Blé Goudé* Prosecution Response to No Case to Answer') para. 1979.

¹⁴³ *Mbarushimana* Confirmation Decision, paras 268-289

¹⁴⁴ *Al Mahdi* Confirmation Decision, para. 27; *Ongwen* Confirmation Decision, para. 44.

¹⁴⁵ *Katanga* Trial Judgment, paras 1632-1633. The Trial Chamber added some ambiguity with the contingent finding: *'the Chamber wishes to lay stress on a contribution which may influence the commission of the crime'*. Emphasis added.

¹⁴⁶ *Katanga* Trial Judgment, para. 1636. Emphasis added.

This holding has significant ramifications for arms transfer conduct that usually takes place at a physical and hierarchical distance from the direct perpetrators who carry-out the crimes, since there will often be little or no evidence that a particular gun or piece of ammunition was used in the perpetration of a specific incident of violence.¹⁴⁷

b. Cooperation.

Another principle of criminal liability applicable to holding arms traders and brokers individually criminally responsible for their actions under the ICC statute is co-perpetration. The **Lubanga** Trial Chamber explained that co-perpetration is a doctrine of mutual attribution: *‘[It is not necessary that] the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.’*¹⁴⁸ The principle of co-operation establishes legal grounds for the court to hold arms suppliers/traders liable, who are intimately involved in the commission of war crimes, but do not physically perform the crime’s objective elements.¹⁴⁹

The *actus reus* requirements for co-perpetration are the existence of a common plan between participants,¹⁵⁰ and that the defendant was an essential contributor, who exercised joint control as a result of his or her ability to contribute and/or prevent the crime by not performing.¹⁵¹ An arms supplier can therefore be considered as a co-perpetrator if it is established that the war crime in question could have been frustrated, had they not delivered the munition used in carrying such crime out.

Under the ICC Statute, the principle of cooperation is drawn from the ‘*common purpose group*’ expression in Article 25(3)(d) which is to the effect that one may be guilty of a crime through the mutual attribution of their respective acts. It follows that the contributor’s conduct is not required to be *directly causal* of the crime.¹⁵² The implications of the provision for the arms trade are particularly important when the interchangeable nature of weapons and ammunition is considered.¹⁵³ In cases of war crimes, it is often difficult to establish that a particular gun or piece of ammunition was actually used to carry out a particular criminal incident, and that therefore, a particular arms dealer was a direct cause of the criminal outcome. Unlike in domestic criminal justice systems where forensic firearm examination and DNA evidence is

¹⁴⁷ Hamilton, T. Arms Transfers under Article 25(3)(d)(ii) of the Rome Statute. (2019, August 5).

¹⁴⁸ Lubanga (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012) para. 994.

¹⁴⁹ Van Schaack, supra note 272, at 230.

¹⁵⁰ Katanga & Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, 522–25.

¹⁵¹ Lubanga, Case No. ICC 01/04-01/06, 343–45; Ohlin, supra note 273, at 723; see also Katanga & Chui, Case No. ICC-01/04-01/07, 522–25.

¹⁵² Hamilton, T. Arms Transfers under Article 25(3)(d)(ii) of the Rome Statute. (2019, August 5).

¹⁵³ Ibid, 153

possible, international criminal tribunals often deal with unstable conflict environments and frequently lack access to evidence to identify the use of a particular weapon.¹⁵⁴

Even when such evidence exists, an arms supplier may argue the impossibility of establishing that their weapons were used in specific criminal incidents, or that another dealer would have stepped-in to provide the weapons had they not done so, or that their piece of weaponry or ammunition was interchangeable with any other available piece.¹⁵⁵ The Defence in the Katanga case, for example, argued that the arms transfer conduct of the accused was relevant not relevant to crimes of rape and sexual slavery:

*Even if the Chamber finds that there is sufficient evidence that Katanga distributed weapons that were used to kill civilians in Bogoro, he can still not be held liable for any of the allegations of rape and sexual slavery. Nor can he be held liable for pillage, destruction or the use of child soldiers. The Prosecutor must prove that he made a direct contribution to the crimes. In the event that the Chamber finds that Katanga's alleged role in the distribution of weapons constituted a direct contribution to the crimes committed by a group of persons acting with a common purpose, this cannot extend to any crimes which did not involve bullets.*¹⁵⁶

While Katanga was acquitted of rape and sexual slavery, the Chamber found him guilty, as accessory, of the crime against humanity of murder and the war crimes of destruction of property and pillaging. The trial bench held that the contribution under Article 25(3)(d) may be connected to either the material elements of the crimes, for instance taking the form of provision of resources such as weapons, or involve encouragement.¹⁵⁷ As such, the mere willingness of a contributor to sell a gun to a perpetrator may encourage the commission of a crime, and this counts for contribution.¹⁵⁸

In many cases, Courts moved away from requiring proof of a direct causal nexus made-out by evidence of the use of a particular weapon in a particular incident, and instead required a contribution 'to the commission or attempted commission of the crime'.¹⁵⁹ With this threshold, criminal liability is determined on the basis of the assistive nature of the arms supply in the carrying out of the group's activities in the perpetration of a war crime. It is irrelevant if a particular gun was used to carry out any one particular incident of violence amongst those that

¹⁵⁴ See Conflict Armament Research, *Weapon Supplies into South Sudan's Civil War: Regional ReTransfers and International Intermediaries* (November 2018) Accessed at: <http://www.conflictarm.com/reports/weapon-supplies-into-south-sudans-civil-war>

¹⁵⁵ *Ibid*, 153

¹⁵⁶ Katanga First Defence Observations on Article 25(3)(d) para. 88

¹⁵⁷ Katanga Trial Judgment, para. 1635. See also Mbarushimana Confirmation Decision, para. 267.

¹⁵⁸ Recognised by the UK Supreme Court in the joint criminal enterprise case of *R v Jogee* [2016] UKSC 8 (18 February 2016) para. 10.

¹⁵⁹ *Ibid*, 153

comprise the crime. The interchangeable nature of arms supplies does not therefore not outset liability under Article 25(3)(d)(ii).

Even if Katanga was acquitted of sexual violence, the concept of co-operation presents a window of opportunity for accountability for war crimes which might not be committed with a ‘gun’, and are often more likely to be ignored. Indeed, the ICC has often been criticised for its weak track record in providing justice to victims of sexual violence in conflict. The doctrine of co-operation implies that the mere supply of weapons which alter the conflict climate, may contribute to the commission of rape and sex slavery, as the weapons supplied contribute to producing a ‘coercive environment’ that is taken advantage of to perpetrate war time rape.¹⁶⁰

The *mens rea* requirement for cooperation is that the contribution is ‘*made in the knowledge of the intention of the group to commit the crime*’, and that the accused intends for the crime to occur, or is aware of the risk that the principal will commit the crime, and accepts or consents to this risk.¹⁶¹ The Trial Chamber in Katanga found that the contributor must know that the group ‘means to cause [the criminal consequence of the crime] or is aware that it will occur in the ordinary course of events’.¹⁶² The Chamber further asserted that the contributor’s knowledge should be inferred from relevant facts and circumstances.¹⁶³ As such, an arms supplier who is knowledgeable of the intent of the perpetrator of a war crime, but is indifferent to the potential significance of the weapons they provide in the commission of the crime, going ahead to provide the weapons, may be held liable for war crimes committed with such weapons under the doctrine of cooperation.

4. Conclusion

The notion of individual criminal responsibility for war crimes has significantly developed since the Nuremberg trials. There is now a wealth of legal precedent at the domestic and international level broadening the jurisprudence on criminal liability of those aiding and abetting war crimes by providing arms. This rich precedent is supplemented by a growing legal and policy framework, specifically the ATT and Rome Statute which criminalise a broad range of arms transfer conduct that might be assistive in the commission of war crimes. This progress notwithstanding, gaps in both the prosecution of arms conduct at the national level, as well as within interpretation of the legal framework persist, posing a challenge for the prosecution of arms suppliers.

¹⁶⁰ Bemba (Trial Judgment) ICC-01/05-01/08-3343 (21 March 2016) para. 102, (iii).

¹⁶¹ Lubanga, Case No. ICC-01/04-01/06, 331; Ohlin, *supra* note 273, at 723

¹⁶² Katanga Trial Judgment, paras 774-777, 1641.

¹⁶³ Katanga Trial Judgment, para. 1642.

While domestic courts have tried many cases involving arms suppliers who illegally export arms that are eventually used in commission of war crimes, there is still a hesitancy towards pronouncing themselves in cases where arms licence were provided by government for transfer of weapons used in human rights violations. This has left a corporate accountability gap that leaves the contribution of arms suppliers to war crimes unabated. In the cases tried in Germany, in particular the *Heckler & Koch case*, the proceedings were restricted to criminal liability for violations of export control laws. Criminal liability in the form of aiding and abetting the crimes committed with the illegally exported weapons was not part of the proceedings, even where the risk of their use was recognised during the licensing procedure. Due to the limited scope of the proceedings, the victims of the war crimes committed with the exported weapons were excluded, denying them any compensation. The same outcome was witnessed in Italy where a similar case was dismissed for lack of jurisdiction in the national court.

The high standard set for prosecution of individuals for complicity in war crimes is also a big impediment for national courts to hold arms suppliers to account. To strengthen accountability, the *mens rea* standard of *dolus eventualis* or of recklessness needs to be applied.

In relation to prosecutions under the Rome Statute, a broader interpretation of Article 25(3)(c) is necessary in line with the customary international law standard used by the *ad hoc* tribunals. Otherwise, relevant actions committed in a corporate capacity will not be covered. The cases covered in this thesis show that the defence industry regularly hides behind government authorisations, negating their own responsibility to carry out a risk assessment and take into account relevant information on the end-user before engaging in exports. Criminal courts are, however, not bound by the administrative decisions carried out by the licensing authorities. Instead, an independent analysis of corporate officers' criminal conduct is warranted and the international and national standards on businesses' human rights responsibilities may help to concretize what is expected of companies in that regard. A lenient and more coherent interpretation of this article is therefore needed to effectively capture acts committed by arms traders and suppliers that assist in the commission of international crimes. Without such leniency, the courts stand to widen the impunity gap in arms trade.

Bibliography:

Treaties and Agreements:

Arms Trade Treaty, 2nd April 2013, OXIO 253 United Nations (UN)

Charter of the [Nuremberg] International Military Tribunal (8 August 1945) 82 UNTS 284.

Charter of the International Military Tribunal for the Far East (19 January 1946) 4 Bevens 20.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1920) 14 AJIL 95.

Convention on the Rights of the Child, September 2, 1990.

Declaration on the Elimination of Violence against Women, December 20, 1993.

International Covenant on Civil and Political Rights, ICRC, December 19, 1976.

Hague Convention respecting the Laws and Customs of War on Land and its Annex:

Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277.

Hague Convention with Respect to the Laws and Customs of War by Land and its Regulations respecting the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) (1898–99) 187 CTS 429.

Rome Statute Of The International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II).

Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

Geneva Convention relative to the Treatment of Prisoners of War (adopted 12

August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III)

Case Law

British Military Court, Trial of Bruno Tesch and Two Others, Case N° 9, 1–8 March 1946.

Court of Appeal, Civil Division, Case N° T3/2017/2079, 20 June 2019.

Court of Appeal, Public Prosecutor v. Kouwenhoven, Case N° ECLI:NL:GHSHE:2017:1760, 21 April 2017.

District Court of The Hague, Public Prosecutor v. Van Anraat, Case N° 9/751003-04, 23 December 2005.

High Court of Justice, Queen's Bench Division, Case N° EWHC 1726, 10 July 2017.

ICC, Prosecutor vs Jean-Pierre Bemba Gombo, Case N° ICC-01/05-01/08, 08 June 2018.

ICC, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009.

ICTY, Prosecutor v. Furundžija, Case N° IT-95-17/1, 10 December 1998.

ICTY, Prosecutor v. Simić, Case N° IT-95-9-A, Appeals Chamber, 28 November 2006.

ICTY, Prosecutor v. Blaškić, Case N° IT-95-14, Appeals Chamber, 29 July 2004.

ICTR, Prosecutor v. Kamuhanda, Case N° ICTR-99-54-TCII, 22 January 2004.

ICTR, Prosecutor v. Kamuhanda, Case N° ICTR-99-54A, Appeals Chamber, 19 September 2005.

ICTY, Prosecutor v. Tadić, Case N° IT-94-1-A, Appeals Chamber, 15 July 1999.

ICTY, Prosecutor v. Kunarac et. al., Case N° IT-96-23 & 23/1, 22 February 2001.

ICTY, Prosecutor v. Blagojević and Jokić, Case N° IT-02-60, Appeals Chamber, 9 May 2007.

ICTY, Prosecutor v. Vasiljević, Case N° IT-98-32, Appeals Chamber, 25 February 2004.

ICTY, Prosecutor v. Šainović et. al., Case N° IT-05.87, Appeals Chamber, 23 January 2014.

ICTY, Prosecutor v. Popović et. al., Case N° IT-05-88-T, 10 June 2010.

International Military Tribunal, Indictment against Goering, Hess, von Ribbentrop, Ley, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Funk, Schacht, Krupp von Bohlen und Halbach, Doenitz, Raeder, Von Schirach, Sauckel, Jodl, Bormann, Von Papen, Seyss-Inquart, Speer, Von Neurath, and Fritzsche, et al., Nuremberg Trials (Vol I).

EWCA, R (Campaign Against the Arms Trade) v Secretary of State for Business, Innovation and Skills [2019] EWCA Civ 1020.

SCSL, Prosecutor v. Charles G. Taylor, Case N° SCSL-03-01-T, 18 May 2012.

SCSL, Prosecutor v. Charles G. Taylor, Case N° SCSL-03-01-A, Appeals Chamber, 26 September 2013.

Supreme Court of the Netherlands, Case N° ECLI:NL:HR:2009:BG4822, 30 June 2009.

Supreme Court of the Netherlands, Case N° ECLI:NL:PHR:2018:1394, 18 December 2018.

The Hague Court of Appeal, Public Prosecutor v Van Anraat, Case N° ECLI:NL:GHSGR:2007:BA4676, 9 May 2007.

Tribunal Administratif de Paris, Case N° 1807203/6-2, 8 July 2019.

UN Documents

UN Human Rights Council (2011): Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, Final Report of the Special Representative John Ruggie of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, March 2011.

UN Human Rights Council (2007): Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations, John Ruggie, Business and Human Rights: mapping international standards of responsibility and accountability for corporate acts, UN DOC A/HRC/4/35, February 2007.

UN Human Rights Council (2011): Resolution on Human rights and transnational corporations and other business enterprises adopted by the UNHRC, No. 17/4, June 2011.

UN Human Rights Council (2014): Situation of Human Rights in Yemen, including Violations and Abuses since September 2014, Report of the United Nations High Commissioner for Human Right, August 2018.

UN Human Rights Office of the High Commissioner (2011): United Nations Guiding Principles on Business and Human Rights, Commentary, 2011.

UN Security Council of Experts on Yemen (2016): Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140, UN DOC S/2016/73, January 2016.

UN Security Council of Experts on Yemen (2019): Final report of the Panel of Experts on Yemen pursuant Security Council Resolution 2140, UN DOC S/2019/83, January 2019.

UN War Crimes Commission (1949): Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, London, 1949.

UN Working Group on Business Human Rights (2018): Report to General Assembly, 26 July 2018.

Books and Other Independent Publications

Amnesty International (2011): Our Right to Know: Transparent Reporting under an Arms Trade Treaty, 13 June 2011, ACT 30/116/2011, available at: <https://www.refworld.org/docid/4e084e802.html>.

ACAT France (2016): Plainte pour complicité de crimes de guerre à gaza contre l'entreprise française exxelia technologies, June 2016, <https://www.acatfrance.fr/communique-de-presse/plainte-pour-complicite-decrimes-de-guerre-a-gaza-contre-lentreprise-francaise-exxelia-technologies>.

Allied Forces (1945): Charter of the International Military Tribunal, August 1945, https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.2_Charter%20of%20IMT%201945.pdf.

Amnesty International (2019): Outsourcing Responsibility – Human Rights Policies in the Defence Sector, September 2019.

Belgian Government (2017): Belgian National Action Plan on Business & Human Rights, June 2017, https://www.duurzameontwikkeling.be/sites/default/files/content/be_nap_bhr_brochure_en.pdf.

Bryk, Linde and Miriam Saage-Maas (2019): Individual Criminal Liability under the ICC Statute for Arms Exports: A Case Study of Arms Exports from Europe to Saudi-led coalition Members Used in the War in Yemen, in Journal of International Criminal Justice (JICJ), 18 October 2019.

Christian, S & Linde, B: Arms Trade And Corporate Responsibility; Liability, Litigation and Legislative Reform, FES, (November, 2019).

Committee on the Rights of the Child (2008): Consideration of reports submitted by states parties under article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict – Concluding observations: Germany, February 2008, UN DOC CRC/C/OPA/DEU/CO/1.

Committee on the Rights of the Child (2014): Consideration of reports submitted by states parties under article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict – Concluding observations: German, February 2014, UN DOC CRC/C/DEU/CO/3-4.

Committee against Torture (2019): Committee against Torture examines the situation in Germany, April 2019
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24537&LangID=E>,

Committee on the Elimination of Discrimination against Women (2017): Concluding observations on the combined seventh and eighth periodic reports of Germany, UN DOC CEDAW/C/DEU/CO/7-8, March 2017.

Committee on the Rights of the Child (2014): Concluding Observations on the combined third and fourth periodic reports of Germany, UN DOC CRC/C/DEU/CO/3-4, February 2014.

Council of the European Union (2008): Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, December 2008

Council of the European Union (2015): User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, COARM 172 CFSP/PESC 393, July 2015.

Cryer, R., Robinson, D., & Vasiliev, S. (2019): *An Introduction to International Criminal Law and Procedure* (4th ed.). Cambridge: Cambridge University Press. doi:10.1017/9781108680455

ECCHR (2018): Case Report – European Responsibility for War Crimes in Yemen – Complicity of Italian Subsidiary of German Arms Manufacturer and of Italian Arms Export Authority, April 2018, <https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen>.

ECCHR & WILPF (2011): Alternative report on the implementation of the UN Convention on the Elimination of Discrimination against Women (CEDAW), January 2011.

ECCHR & WILPF (2017): The Impact of Germany's Arms Transfers on Women, Germany's Extraterritorial Obligations under CEDAW, Joint Shadow Report to CEDAW Committee, 66th Session by WILPF and ECCHR, January 2017.

Hamilton, T. (2015, December 5): Regulating the arms trade - The potential of international criminal law. https://www.researchgate.net/publication/290989659_Regulating_the_Arms_Trade_-_The_Potential_of_International_Criminal_Law_International_Crimes_Database_Pub_Dec_2015

Human Rights Watch (2019): Hiding behind the Coalition, August 2018, <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>.

Hummel, Tassilo and Madeline Chambers (2019): German government extends arms export moratorium for Saudi Arabia, Reuters, September 2019, <https://in.reuters.com/article/germany-arms-saudi-ban/german-government-extends-arms-export-moratorium-for-saudi-arabia-idINKBN1W31OX>.

Jalloh, Charles Chernor and Simon Meisenberg (2015): The Law Reports of the Special Court for Sierra Leone, Vol III: Prosecutor v. Charles Ghankay Taylor, May 2016.

Jeßberger, Florian (2010): On the Origins of Individual Criminal Responsibility under International Law for Business Activity. IG Farben on trial.

Merat, Arron (2019): Arms supplier BAE denies it has any responsibility to investigate Yemen atrocities, June 2019, <https://www.independent.co.uk/news/uk/home-news/bae-arms-supplier-yemen-shareholders-saudi-coalition-uk-a8967791.html>.

OECD (2011): OECD Guidelines for Multinational Enterprises <http://mneguidelines.oecd.org/guidelines/>.

OECD (2019): OECD Due Diligence Guidance for Responsible Business Conduct OECD Publishing, <https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm>.

Sands, Philippe, Andrew Clapham and Blinne Ní Ghrálaigh (2015): The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen, Legal Opinion, December 2015.

Schabas, William (2001): Enforcing International Humanitarian Law: Catching the Accomplices, in International Review of the Red Cross, June 2001, https://www.icrc.org/en/doc/assets/files/other/439-460_schabas.

Schabas, William (2016): The International Criminal Court, A Commentary on the Rome Statute 2nd edn., Oxford, September 2016.

Scheffer, David J. (2010): Amicus curiae in support of issuance of a writ of certiorari in relation to Presbyterian Church of Sudan et al v Talisman Energy, Inc, No.09-1262, Supreme Court of the United States, May 2010, www.justsecurity.org/wp-content/uploads/2016/09/Amicus-briefDavid-Scheffer-aiding-and-abetting-Rome-Statute.pdf.

SIPRI (2019): Arms Transfers Database – Methodology, <https://sipri.org/databases/armstransfers/background>.

SIPRI (2019): Arms Transfers Database, Exported TIV table for Germany 2014-2018, <http://armstrade.sipri.org/armstrade/page/values.php>.

Sluiter, G. (2019, March 29): Aiding and Abetting and Causation in the Commission of International Crimes: The Cases of Dutch Businessmen Van Anraat and Kouwenhoven. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3362307

Wezeman, Pieter D., Aude Fleurant, Alexandra Kuimova, Nan Tian and Siemon T. Wezeman (2019): Trends in International Arms Transfers 2018 – SIPRI Fact Sheet, March 2019, https://www.sipri.org/sites/default/files/2019-03/fs_1903_at_2018.pdf.

United Kingdom Government (2016): Good Business, Implementing the UN Guiding Principles on Business and Human Rights, May 2016.

Annex:

Annex 1: List of ongoing and past arms trade cases¹⁶⁴:

Case	Jurisdiction	Legal standing
<p>Country: France</p> <p>Parties: <i>Action Sécurité Éthique Républicaine (ASER) v. Premier ministre de France</i></p> <p>Court: Cour Administrative d'Appel de Paris,</p> <p>Date and previous instances:</p> <p>Case N°. 19PA02929, Ordonnance of 26 September 2019;</p> <p>First instance: Tribunal Administratif de Paris, <i>Case N° 1807203/6-2</i></p> <p>(8 July 2019)</p>	<ul style="list-style-type: none">- Lower court accepted its jurisdiction - Court of Appeal denied jurisdiction as the licensing decision is inherently linked to foreign policy	

¹⁶⁴ Christian, S & Linde, B Arms Trade And Corporate Responsibility; Liability, Litigation and Legislative Reform, FES, (November, 2019).

<p>Country: United Kingdom</p> <p>Parties: <i>Campaign against Arms Trade (CAAT) v. Secretary for International Trade</i></p> <p>Court: Court of Appeal, civil division</p> <p>Date and previous instances:</p> <p>Decided on 20 June 2019;</p> <p>First instance, High Court of Justice, Queen’s Bench Division (10 July 2017)</p>		<p>– Court affirmed legal standing of the NGO</p>
<p>Country: Belgium</p> <p>Parties: <i>Ligue des droits de l’Homme et Coordination nationale d’action pour la paix et la démocratie v. Région wallone</i></p> <p>Court: Conseil d’État, section du contentieux administratif; <i>Case N° 242.029</i></p> <p>Date and previous instances:</p> <p>decided on 29 June 2018; previous decisions on 24 November 2017, 06 March 2018, 14 June 2019</p>		<p>– Court affirmed legal standing of the NGO</p>
<p>Country: The Netherlands</p> <p>Parties: <i>NJCM, PAX and Stop Wapenhandel v. Staat der Nederlanden</i></p> <p>Court: Court of Appeal of Amsterdam</p> <p><i>Case N° ECLI:NL:GHAMS:2017:165</i></p> <p>Date and previous instances:</p> <p>decided on 24 January 2017;</p> <p>District Court of Noord Holland (26 August</p>		<p>– Legal standing was denied as the NGO was not directly affected by the license</p>

<p>2016) Case 2: decided on 17 October 2017; previously District Court of Noord Holland (20 April 2017)</p>		
<p>Country: Spain</p> <p>Parties:</p> <p>Case 1: <i>Asociacion de Familiares de Presos y Detenidos Saharauis et al. v. Ministerio de Industria, Comercio y Turismo</i>;</p> <p>Case 2: <i>Justicia de Pau v. la Subsecretaría de Estado de Industria, Turismo y Comercio</i>,</p> <p>Court: Case 1: Sala de lo Contencioso-Administrativo Madrid;</p> <p><i>Case N° 03440/2010</i></p> <p><i>Case 2: Tribunal Superior de Justicia Madrid, Case N° 00369/2010</i></p> <p>Date and previous instances:</p> <p>Case 1: decided on 13 March 2013</p> <p>Case 2: decided on 31 March 2010</p>	<p>—</p>	<ul style="list-style-type: none"> - Legal standing was denied as the associations filing the complaint were not found to be ‘interested parties’ under the applicable Spanish law - The court denied the notion of defending human rights as an adequate interest within the meaning of Spanish law
<p>Country: Germany</p> <p>Parties: Faisal bin Ali Jaber and others</p> <p>v. the Federal Republic of Germany</p> <p>Court:</p>		<ul style="list-style-type: none"> - Plaintiff has to be directly affected to have legal standing - Plaintiff can

<p>German Higher Administrative Court for the State of North Rhine- Westphalia</p> <p><i>Case N° 4 A 1361/15</i></p> <p>Date and previous instances:</p> <p>decided on 19 March 2019; previously VG Köln (27 May 2015)</p>		<p>rely on his fundamental rights to argue his affectedness</p>
---	--	---