UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Caspar Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court' (2014) 30(79) Utrecht Journal of International and European Law 4, DOI: http://dx.doi.org/10.5334/ujiel.cl

RESEARCH ARTICLE

Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court

Caspar Plomp[1]

[1] Graduate Institute of International and Development Studies, Switzerland
casparplomp@outlook.com

While no business leaders have yet been charged before the International Criminal Court (ICC), such future proceedings will typically be conducted with reference to the accessorial mode of liability of aiding and abetting, under Article 25(3)(c) of the Rome Statute of the ICC. There exist diverse and competing interpretations of Article 25(3)(c). This paper aims to advocate the creation of a dominant interpretation of Article 25(3)(c) and, consequently, to the clarification of the potential responsibility of business leaders who aid or abet crimes under the jurisdiction of the Rome Statute, in two ways. First, it asks whether Article 25(3)(c) can be interpreted in harmony with the dominant practice on aiding and abetting in international criminal law generally. Second, it presents a case study on the provision of arms by the Russian corporation Rosoboronexport to the Syrian government, which is likely to have committed crimes against humanity since March 2011 and war crimes since mid-2012. The theoretical conclusions are applied to a discussion on the potential criminal responsibility of the Director General of Rosoboronexport for aiding and abetting the commission of international crimes by high-level Syrian officials.

Keywords: International criminal law; aiding and abetting; Rome Statute of the International Criminal Court; Article 25(3)(c); business leaders; arms trade; Syria; Rosoboronexport

> 'We just send them to Syria. Ask the Syrians where they put them.'
> - Anatoly P. Isaikin, Director General of Rosoboronexport[1]

I. Introduction

A. The international legal separation of justice and economics

Following the Second World War, international criminal law was expanded, ostensibly, to ensure that the greatest criminals would be held accountable for their actions. However, it has been argued that international criminal law 'was used, contrary to early indications, to *conceal* rather than address the economic causes and imperialist nature of the war, so as to enable the continuation or rehabilitation of trade relations' (emphasis in original).[2] In spite of 'telling exceptions',[3] war crime trials and other post-conflict institutions such as truth and reconciliation commissions are inclined to overlook the involvement of businesses and other economic actors in armed conflict, as well as of economic crimes such as extensive corruption and tax evasion.[4] Indeed, 'the responsibility of corporations or their staff for their involvement

[1] AE Kramer, 'Russia Sending Missile Systems to Shield Syria' *The New York Times* (New York, 15 June 2012) <http://www.nytimes.com/2012/06/16/world/europe/russia-sending-air-and-sea-defenses-to-syria.html?_r=0> accessed 16 March 2014.

[2] G Baars, 'Law(yers) congealing capitalism: On the (im)possibility of restraining business in conflict through international criminal law' (PhD dissertation, University College London 2012) 3.

[3] One such notable exception is war crimes against property. The Rome Statute includes, in this regard, the destruction, appropriation, seizure and pillage of property; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 8(2)(a).

[4] J Kyriakakis, 'Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War' in L May and A Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP 2012).

in international crimes has hitherto been at most of marginal interest in international prosecution efforts (…)'.[5]

B. Landmark cases in international criminal law involving business leaders

This is not to say, however, that international criminal law has been entirely negligent of the economic aspects of armed conflict. To illustrate this, this paper only mentions some of the most important trials in international criminal law in which business leaders were tried.

It has long been uncontroversial that international crimes often involve a wide range of actors. The International Military Tribunal (IMT) in Nuremberg stressed that the Nazi regime, in its commission of large-scale crimes, had relied on the complicity of many:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.[6]

After the Judgment of the IMT, '[i]n the burst of international law building that took place within the peace agendas of states after World War II', several of the subsequent trials conducted in Nuremberg under Control Council Law No 10 included charges against business leaders.[7] Three of these trials, conducted before American military courts, have come to be known as the *Industrialists Trials*. In the *Trial of Carl Krauch and Twenty-Two Others*,[8] also known as *IG Farben*, 13 of 24 high-level members of IG Farben, a German conglomerate of chemical firms, were found guilty of enslavement, plunder or both.[9] All were acquitted of the charges of crimes against peace and conspiracy to commit crimes. Although four of the accused had participated in the rearmament of Germany, the fact that they were not military experts meant that they could not have known that they were aiding Germany in preparing for an aggressive war and consequently lacked the required mental element.[10] The Judgment's sole remark on economic offences as war crimes only refers to the relevant sections of the *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, also known as *Krupp*.[11] This Judgment significantly developed international criminal law on war crimes against property and also treated forced employment of foreign civilians and concentration camp inmates. Six of the accused were found guilty of plunder and spoliation and all but one were convicted for the employment of 'prisoners of war, foreign civilians and concentration camp inmates under inhuman conditions in work connected with the conduct of war (…)'.[12] In the *Trial of Friedrich Flick and Five Others*, also known as *Flick*, three of the six accused, all of whom held leading positions in a conglomerate of industrial firms, were convicted of the war crimes of the use of slave labour and employment of prisoners of war, spoliation of public and private property in occupied territories and/or financial support and membership of the SS.[13] Although the Tribunal did not specify the relevant mode of liability of every accused, it did conclude that when combined with the required knowledge, one's financial assistance to the SS, a criminal organisation, rendered one 'if not a principal, certainly an accessory to such crimes'.[14]

Thus, the *Industrialists Trials* reveal that '[b]usinesses could not avert prosecution solely because a dictator conceived of the plan to violate international law and the businesses played no role in the initial planning'.[15] Similarly, in *Trial of Bruno Tesch and Two Others*, also known as *Zyklon B*, Bruno Tesch, who was the owner of a poison gas firm, Karl Weinbacher and Joachim Drosihn were accused of the war crime of 'having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be

---

[5] F Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity' (2010) 8 J Int'l Crim Just 783, 801.

[6] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 223.

[7] Kyriakakis (n 4) 115.

[8] *Trial of Carl Krauch and Twenty-Two Others* (1948), X L Rep Trials War Crim 1.

[9] A Cassese and others, *International Criminal Law: Cases and Commentary* (OUP 2011) 248.

[10] *Trial of Carl Krauch and Twenty-Two Others* (n 8) 36-7.

[11] *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others* (1948), X L Rep Trials War Crim 69.

[12] ibid 70.

[13] *Trial of Friedrich Flick and Five Others* (1947), IX L Rep Trials War Crim 1.

[14] ibid 29.

[15] MD Byrne, 'When in Rome: Aiding and Abetting in *Wang Xiaoning v Yahoo'* (2008-2009) 34 Brook J Int'l L 151, 177.

used'.[16] Tesch and Weinbacher were convicted and sentenced to death, while Drosihn was acquitted. *Zyklon B* was decided on the principle that civilians who are accessories to war have themselves committed war crimes.[17] Thus, these cases show 'a symbiotic relationship between big business and a criminal regime which could not have survived without the former's unfaltering support'.[18]

C. Business leaders, the International Criminal Court and aiding and abetting

On 1 July 2002, the Rome Statute of the International Criminal Court (ICC), the first permanent court 'to exercise its jurisdiction over persons for the most serious crimes of international concern,' entered into force.[19] As of March 2014, no cases have been brought before the ICC that involved persons charged for acts they had committed in their capacity as business leaders. This supports the observation that 'the legal framework for holding corporations and their individual agents criminally responsible at the international level is poorly developed and, even more so, poorly enforced'.[20] Against this background, the aim of this article is to provide some thoughts on the ways in which business leaders may be held accountable before the ICC.

Although business leaders do commit international crimes directly and intentionally, for example by enslavement or pillaging, this is quite rare,[21] and '[i]n most cases (...) corporations are only complicit in the crimes by aiding or abetting crimes committed by governments or paramilitary groups'.[22] This paper supposes that future cases before the ICC involving business leaders will typically be made with reference to the accessorial liability mode of aiding and abetting under Article 25(3)(c) of the Rome Statute.[23] Per Article 25(3)(c), individual criminal responsibility arises when a person '[f]or the purpose of facilitating the commission of [a crime under the jurisdiction of the Court], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.[24] Interpretations of this Article, as well as its relation to other parts of the Rome Statute, are diverse and competing. The question of how business leaders might be found responsible for their actions before the ICC is closely connected to the question of the preferable interpretation of Article 25(3)(c). Thus, the paper aims to articulate the *actus reus* (or material element) as well as the *mens rea* (or mental element) required by Article 25(3)(c) by examining to what extent these elements can be harmonised with existent case law, drawn predominantly from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

D. Case study

The paper then proceeds with a case study, in which its interpretation of Article 25(3)(c) is applied to a case of possible accessorial liability for provisions of armaments, including defence systems and missiles, by the Russian State-owned corporation Rosoboronexport to the government of the Syrian Arab Republic (Syria). The choice of this case study is not arbitrary; 'there is little literature that thoroughly explores the relationship between these competing definitions [of aiding and abetting] in light of the intricacies of the global trade in weaponry'.[25] The paper draws on reports by the United Nations' Commission of Inquiry on Syria, which allege that the Syrian government has been committing crimes against humanity since March 2011 and war crimes since mid-2012. It considers possible evidence of the assistance by Rosoboronexport to the commission of these crimes. It asks whether the Director General of Rosoboronexport, Anatoly P. Isaikin,[26] could *prima facie* be held individually criminally responsible for aiding and abetting these crimes under Article 25(3)(c) by providing weapons to Syria.

---

[16] *Trial of Bruno Tesch and Two Others* (1946), I L Rep Trials War Crim 93.
[17] ibid 103.
[18] H van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese JIL 43, 52.
[19] Rome Statute (n 3) art 1.
[20] OK Fauchald and J Stigen, 'Corporate Responsibility before International Institutions' (2009) 40 Geo Wash Int'l L Rev 1025, 1035.
[21] Van der Wilt, 'Corporate Criminal Responsibility' (n 18) 64.
[22] Fauchald and Stigen (n 20) 1034.
[23] Business leaders could also incur individual criminal responsibility under other accessorial modes of liability provided for in the Rome Statute. For a discussion on business leaders and Article 25(3)(d) see H Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 JICJ 851, 864-65.
[24] Rome Statute (n 3) art 25(3)(c).
[25] JG Stewart, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 JICJ 313, 323.
[26] An alternative spelling is Anatoly P Isaykin.

II. The Theory of Aiding and Abetting

A. Introduction

Typically, in contrast to crimes committed under domestic law, a finding of individual criminal responsibility for an international crime relies on the examination of 'a multi-perpetrator setting',[27] in which acts have been performed 'in a collective context and systematic manner'[28] and in which the culpability of an individual 'is not always readily apparent'.[29] In view of the potential impossibility and insufficiency of '[isolating] the conduct of the accused from the wider criminal context,' this gives rise to the desirability of holding criminally accountable not only the principal perpetrators but also those who, by being accessorial to the crimes committed by the principals, are derivatively liable for those crimes.[30] While proof is required that a crime has been committed, accomplice liability may arise also when the principal perpetrator has not been convicted, prosecuted or even identified,[31] or when it would be impossible to try the principal offender.[32]

The system of different modes of liability in the Rome Statute indicates that there are different degrees of individual criminal responsibility.[33] Under Article 30, individual criminal responsibility arises only in the presence of *actus reus* (Articles 5, 6, 7 and 8) and *mens rea* (Article 30).[34] The way in which these requirements are satisfied determine the appropriate mode of liability specified in Article 25. Aiding and abetting or otherwise assisting, per Article 25(3)(c), is 'the subsidiary form of participation' in the Rome Statute.[35]

Aiding and abetting is generally recognised as a category of accomplice liability in international criminal law. It is expressly included in the Statutes of the ICTR and ICTY: both stipulate that individual criminal responsibility arises if '[a] person (…) planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' under the jurisdiction of the respective Statutes.[36] The Rome Statute construction of liability differs from this phrasing in that it contains six sub-subclauses (Article 25(3)(a) to (f)) that specify the various modes of liability with their own qualifications. The relevant provisions of Article 25 read as follows:

> Article 25
> Individual criminal responsibility
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (…)
> (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.[37]

When compared with the statutory language of the *ad hoc* Tribunals, the Rome Statute version of aiding and abetting includes a number of novelties, such as the phrases 'for the purpose of facilitating', 'otherwise assists', 'attempted' and 'including providing the means', as well as the requirement in Article 30 that all modes of liability must satisfy the *mens rea* requirements specified therein. Debates on these novelties have not reached uniform conclusions. The following discussion therefore examines whether Article 25(3)(c) may be interpreted consistently with the dominant practices of international tribunals. This question is important as the Court should in the first place rely on its own Statute and should only draw on external

---

[27] S Wirth, 'Committing liability in international criminal law' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 329.

[28] K Ambos, 'Article 25: Individual Criminal Responsibility' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Nomos Verlagsgesellschaft 2008) 477.

[29] ibid.

[30] Wirth (n 27) 329.

[31] KAA Khan, R Dixon, Archbold, *International Criminal Courts: Practice, Procedure and Evidence* (Sweet & Maxwell 2009) 865; *Prosecutor v Brđanin* (Appeal Judgment) IT-99-36-A, A Ch (3 April 2007) 355.

[32] WA Schabas, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 Int'l Rev Red Cross 439, 447; *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998) 530.

[33] G Werle, *Principals of International Criminal Law* (TMC Asser Press 2009) 279.

[34] Rome Statute (n 3) art 30.

[35] Ambos (n 28) 477.

[36] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (last amended 7 July 2009) art 7(1); Statute for the International Criminal Tribunal for Rwanda (last amended 16 December 2009) art 6(1).

[37] Rome Statute (n 3) art 25.

case law 'on clear methodological grounds';[38] this means that if it fits the Court, customary principles that have 'developed over a significant period of time' may contribute to the practice of the ICC.[39] The following sections therefore examine whether the judgments of the Nuremberg Trials, the ICTY and ICTR point in the direction of applicable norms of customary international law that could provide guidance to the ICC.

Before that, however, attention must briefly be paid to what has been identified as reluctance to use ICTY or ICTR cases at the ICC, or interpret them as indicating international norms.[40] Two main reasons can be identified. First, the ICTY and ICTR are *ad hoc* tribunals with geographically limited and temporary jurisdiction; second, at the time of their creation, their jurisprudence 'had not necessarily been accepted or verified by the international community'.[41] However, in response to the first concern, these limitations of jurisdiction do not mean that similar situations cannot be reproduced and mirrored in the jurisdiction of the ICC; rather the contrary is the case. Therefore, these limitations should not preclude examinations of the ways in which the case law of the *ad hoc* Tribunals may aid the ICC. As to the second objection, the non-acceptance or non-verification by the international community of the Tribunals at the time of their creation is immaterial to the weight of the Tribunals' development of international criminal law. Additionally, reliance by the ICC on the Tribunals' precedents could support 'the construction of a coherent system of international criminal law', avoid its fragmentation and strengthen the still weak institutions of international criminal justice.[42]

III. The Actus Reus

A. Introduction

Although the terms aiding and abetting are often used together and interchangeably, in the *Akayesu* Trial Judgment the ICTR discarded this appearance of synonymity by stating that aiding and abetting 'are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto.'[43] Nevertheless, a finding of either of the two suffices for liability to attach. Competing interpretations exist as to the *actus reus* and *mens rea* of aiding and abetting. Because the Rome Statute lacks an explicit threshold for *actus reus*, it is important to consider the relevant judgments of the *ad hoc* Tribunals in this regard. The following discussion focuses on five particularly influential judgments: the *Furundžija* Trial Judgment,[44] the *Tadić* Trial and Appeal Judgments,[45] the *Perišić* Appeal Judgment and the *Šainović et al* Appeal Judgment.[46] *Furundžija* set forth an interpretation of aiding and abetting that has been followed by subsequent judgments,[47] while the last four have been vital in the recent controversy over the notion of specific direction.

The Rome Statute's lack of an *actus reus* threshold contrasts with its earlier draft version, the International Law Commission (ILC)'s Draft Code of Crimes against the Peace and Security of Mankind of 1996, under which aiding and abetting must be done 'directly and substantially.'[48] Thus, even for 'the weakest form of complicity,'[49] the aider and abettor must have a direct and substantial effect on the commission of the crime by the principal perpetrator. It has been suggested that, in the light of the ILC Draft Code, the absence of an *actus reus* threshold in the Rome Statute 'may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague'.[50] Cryer *et al*, moreover, have argued that the absence is 'probably not of much great practical importance',[51] but provide no justification for this argument. However, it is desirable to enforce some standard; employing no *actus reus* threshold at all could

[38] V Nerlich, 'The status of ICTY and ICTR precedent in proceedings before the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 325.

[39] S Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61 Int'l & Comp LQ 325, 354.

[40] AJ Sebok, 'Taking Tort Law Seriously in the Alien Tort Statute' (2007-2008) 33 Brook J Int'l L 871, 883.

[41] ibid.

[42] Nerlich (n 38) 324.

[43] *Prosecutor v Akayesu* (Judgment) (n 32) 484.

[44] *Prosecutor v Furundžija* (Trial Judgment) ICTY-95-17/1-T, T Ch II (10 December 1998).

[45] *Prosecutor v Tadić* (Trial Judgment) ICTY-94-1-T, T Ch II (7 May 1997); *Prosecutor v Tadić* (Appeal Judgment) ICTY-94-1-A, A Ch (15 July 1999).

[46] *Prosecutor v Perišić* (Appeal Judgment) IT-04-81-A, A Ch (28 February 2013); *Prosecutor v Šainović et al* (Appeal Judgment) IT-05-87-A, A Ch (23 January 2014).

[47] S Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers 2012) 74; *Prosecutor v Perišić* (Appeal Judgment) (n 46) 28.

[48] International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind* (1996) art 2(3)(d).

[49] Ambos (n 28) 481.

[50] Schabas, 'Enforcing international humanitarian law' (n 32) 448.

[51] R Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2011) 377.

enable the prosecution of the person who supplies an international criminal with coffee each morning if the *mens rea* requirement was somehow met. Although for the purpose of determining liability 'no business activity, regardless of how ordinary or "neutral" it seems to be',[52] can in principle be excluded from consideration, it would be beyond the purpose of the ICC to try those who are not responsible 'for the most serious crimes of international concern'.[53] That the ICC is only concerned with the most serious crimes merits the existence of a threshold for the *actus reus* of aiding and abetting. The *Furundžija* Trial Judgment, indeed, followed the ILC's Commentary that 'participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way',[54] adding that this phrase and the 'directly and substantially' requirement of Article 2(3)(d) of the Draft Code 'clearly exclude any marginal participation.'[55]

B. Substantiality, directness and specific direction

If it is accepted that not any act may constitute the *actus reus* of aiding and abetting, it must be asked where the threshold lies. The ICTY in the *Furundžija* Trial Judgment held that the ILC Draft Code 'is an authoritative international instrument' that either evidences custom, sheds light on developing or unclear custom or at the very least elucidates the views of the most qualified publicists.[56] Thus, the Draft Code was considered evidence of international law with implicit reference to Article 38(1) of the Statute of the International Court of Justice.[57] The ILC requirement of substantiality has indeed gained authority as a 'standard set by previous jurisdiction'.[58]

The ILC's requirement that aiding and abetting must not only be 'substantial' but also 'direct' is more controversial.[59] Notably, the *Furundžija* Trial Judgment characterises this latter requirement as 'misleading' because 'it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.'[60] Rather, the ICTY held that the *actus reus* requires 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.'[61] This definition has subsequently been used in a large number of cases before the ICTY and ICTR.[62]

The *Furundžija* definition is significant because it allows the *actus reus* of aiding and abetting to be non-tangible; 'action which decisively encourages the perpetrator is sufficient to amount to assistance'.[63] Thus, material assistance need not actually be granted; 'willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator.'[64] In the case of tangible assistance, however, such awareness is not required; 'indeed, the principal may not even know about the accomplice's contribution.'[65] If a particular willingness to provide assistance (abetting) does not materialise into objective help (aiding), the willingness may nonetheless give rise to criminal liability. It thus makes sense to treat aiding and abetting together, as constituting one mode of liability.

Eight months after the *Furundžija* Trial Judgment, the ICTY provided a description of the *actus reus* of aiding and abetting in the *Tadić* Appeal Judgment that would come to fuel controversy:

> The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.) and this support has a substantial effect upon the perpetration of the crime.[66]

---

[52] Vest (n 23) 852.
[53] Rome Statute (n 3) art 1; Finnin, *Elements of Accessorial Modes of Liability* (n 47) 137.
[54] ILC, Report of the Commission to the General Assembly on the work of its 48th Session (1996) A/CN.4/SER.A/1996/Add.l (Part 2) 21.
[55] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 231.
[56] ibid 227.
[57] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) art 38(1).
[58] Finnin, *Elements of Accessorial Modes of Liability* (n 47) 125.
[59] ILC, *Draft Code* (n 48) art 2(3)(d).
[60] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 232.
[61] ibid 235.
[62] For a list, see: Finnin, *Elements of Accessorial Modes of Liability* (n 47) 74.
[63] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 230.
[64] ibid.
[65] *Prosecutor v Tadić* (Appeal Judgment) (n 45) 229 ii.
[66] ibid 229 iii.

The *Tadić* Appeal Judgment followed the *Furundžija* definition by requiring a substantial but not a direct effect, but ostensibly narrowed the previously set standard by adding that the act must be *specifically directed* to assist, encourage or lend moral support. Specific direction 'establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.'[67] This notion has subsequently been followed by 'many subsequent [ICTY] and ICTR appeal judgements,' either explicitly or implicitly.[68] However, in the *Mrkšić and Šljivančanin* Appeal Judgment specific direction was dismissed as 'not an essential ingredient'.[69] The ICTY reaffirmed the *Mrkšić and Šljivančanin* position in the *Blagojević and Jokić* Appeal Judgment (in which specific direction was characterised as an implicit requirement at most)[70] and the *Lukić and Lukić* Appeal Judgment.[71] The Tribunal reverted to the notion of specific direction as a separate, explicit requirement in the 2013 *Perišić* Appeal Judgment.[72] Here, it rejected *Mrkšić and Šljivančanin*, holding that this deviation did not amount to the careful consideration necessary to depart from a previous decision because, among other reasons, *Mrkšić and Šljivančanin* only cited one case in its support, which confirmed that specific direction *is* a requisite element.[73] The *Perišić* decision was subsequently criticised for its approach to specific direction, however, by the recent Appeal Judgments in *Šainović et al* by the ICTY and *Taylor* by the Special Court for Sierra Leone (SCSL),[74] *inter alia* because the *Tadić* delineation of aiding and abetting had been made obiter[75] and was not supported on any statutory or customary international law[76] or State practice[77] grounds. The balance may therefore be leaning towards not requiring specific direction.

What does a substantial contribution as the standard for the *actus reus* of aiding and abetting mean more specifically? The material connection between the act of the aider and abettor and the crime committed by the principal perpetrator has been said to encompass three distinct aspects, each of which may be characterised by a particular gradation of substantiality: geographical, temporal and causal connections.[78] These are examined in turn.

C. Geographical connection

Whatever the exact threshold of *actus reus*, the geographical connection in the accessorial object does not pose any geographical limits.[79] The ICTY and ICTR have consistently stated that the conduct of the aider and abettor may be geographically unconnected to the crime.[80] At the same time, one's presence at the scene of a crime *per se* may suffice for a finding of individual criminal responsibility; in *United States v Hans Altfuldisch et al*, it was held that officials, guards or employees of the Concentration Camp Mauthausen must, by their control of or presence in the Camp, have known of the criminal offences carried out within it.[81] The ICTY in the *Furundžija* Trial Judgment relied on the *Synagogue* and *Pig-Cart Parade* cases to hold that the scope of this 'approving spectator scenario' is restricted by the requirement that one's presence on the scene of the crime may constitute the *actus reus* only when combined with a certain authority.[82] In the characterisation of the 'approving spectator' concept, the ICTY departed from the *Altfuldisch* approach. In the latter, the American General Military Government Court had held that from presence in the Camp knowledge could be deduced that, in combination with the 'criminal nature' of 'the circumstances, conditions, and the very nature' of the Camp, formed the basis for the finding of guilt of the officials, guards and

---

[67] *Prosecutor v Perišić* (Appeal Judgment) (n 46) 37.
[68] ibid 28.
[69] *Prosecutor v Mrkšić and Šljivančanin* (Appeal Judgment) IT-95-13/1-A, A Ch (5 May 2009) 159.
[70] *Prosecutor v Blagojević and Jokić* (Appeal Judgment) IT-02-60-A, A Ch (9 May 2007) 189.
[71] *Prosecutor v Lukić and Lukić* (Appeal Judgment) IT-98-32/1-A, A Ch (4 December 2012) 424.
[72] *Prosecutor v Perišić* (Appeal Judgment) (n 46) 32-36.
[73] ibid 33.
[74] *Prosecutor v Šainović et al* (Appeal Judgment) (n 46) 1617-1625, 1650; *Prosecutor v Taylor* (Appeal Judgment) SCSL-03-01-A, A Ch (26 September 2013) 471-481.
[75] *Prosecutor v Šainović et al* (Appeal Judgment) (n 46) 1623; *Prosecutor v Taylor* (Appeal Judgment) (n 74) 478.
[76] *Prosecutor v Šainović et al* (Appeal Judgment) (n 46) 1626-42; *Prosecutor v Taylor* (Appeal Judgment) (n 74) 473-4.
[77] *Prosecutor v Šainović et al* (Appeal Judgment) (n 46) 1643-45; *Prosecutor v Taylor* (Appeal Judgment) (n 74) 474.
[78] Finnin, *Elements of Accessorial Modes of Liability* (n 47) 82.
[79] *Prosecutor v Perišić* (Appeal Judgment) (n 46) 39.
[80] For a list of cases, see Finnin, *Elements of Accessorial Modes of Liability* (n 47) 83.
[81] *United States v Hans Altfuldisch et al* (1947), Deputy Judge Advocate's Office, 7708 War Crimes Group, Review and Recommendations of the Deputy Judge Advocate for War Crimes, Case No 000.50.5 4.
[82] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 209.

employees.[83] Rather than taking presence as the *mens rea*, however, the ICTY in *Furundžija* concluded that presence, when combined with authority, may amount to the *actus reus*, rendering one a 'supporter'.[84]

However, as established in *Tadić*, there need not exist any geographical connection between the act of the accessory and that of the principal perpetrator. Here, the ICTY stated that 'direct contribution does not necessarily require the participation in the physical commission of the illegal act.'[85]

D. Temporal connection

It is uncontroversial that the act of the aider and abettor may occur at any time before or during the commission of the crime by the principal perpetrator. However, it is more disputed whether assistance that gives rise to accomplice liability could have taken place following the act of the crime.

On the one hand, following the ILC's conclusion that aiding and abetting may occur after the fact if a person had agreed with the principal perpetrator to aid and abet the latter's crime,[86] Ambos stresses that 'an "attributory" nexus (...) between the main offence and the act of assistance' is required for aiding and abetting and that therefore an *ex post facto* link would usually consist of a prior common agreement.[87] In this view, the *actus reus* of aiding and abetting may only occur after the fact if the *mens rea* existed prior to the commission of the crime. The ICTY in the *Furundžija* and *Haradinaj* Trial Judgments held that aiding and abetting *ex post facto* is possible if the principal perpetrator commits a crime knowing that he will receive assistance during or after the commission.[88]

On the other, it has also been suggested that the absence of an explicit provision in the Rome Statute enabling the prosecution of a person for aiding and abetting *ex post facto* means that this is not possible before the ICC.[89]

A better view may be that, since the Rome Statute is silent on the question of complicity *ex post facto* and other sources of law do not point towards a uniform answer, 'the ICC can find support for almost any legal position adopted.'[90] While it might be too much to categorically exclude the possibility of aiding and abetting *ex post facto*, it is likely that the amount of such cases would be limited, in any case, if the ICC follows the customary requirement that the *actus reus* must have a substantial effect.[91]

E. Causal connection

Assuming that there may be different gradations of causation, it is uncontroversial that a causal connection between the act of the aider and abettor and that of the principal perpetrator in the strong sense of a *conditio sine qua non* is not required.[92] It is more disputed, however, whether some weaker sense of a causal connection is required.

Article 25(3)(c) of the Rome Statute could be read as including a rather low causality requirement, as it concerns aiding and abetting the principal's 'commission *or* (...) *attempted commission*' of a crime (emphasis added).[93] If one favours the inclusion of a causality requirement, this might consist of causing the mere attempt of a commission, even if it is an unsuccessful one. However, there is nothing in the Rome Statute to suggest that a causal connection is necessary. Limited support for a causality requirement could be inferred from the Statute's definition of the necessary *mens rea* attached to a consequence. As individual criminal responsibility in a case of aiding and abetting only arises through the accessorial object, i.e. on the condition of the existence of a link to a principal perpetrator and a principal act, the act of the aider and abettor must typically give rise to a consequence (rather than mere conduct, per Article 30(2)(a)), from which accessorial liability derives. Article 30(2)(b) of the Rome Statute reads as follows: '[i]n relation to a consequence, that person means to *cause* that consequence or is aware that it will occur in the ordinary course of events'

---

[83] *United States v Hans Altfuldisch et al* (n 81) 4, 17-8.
[84] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 209.
[85] *Prosecutor v Tadić* (Trial Judgment) (n 45) 679.
[86] ILC, 'Yearbook of the International Law Commission 1996' (n 54) (volume I) 40, (volume II part 2) 21.
[87] Ambos (n 28) 491-92.
[88] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 230; *Prosecutor v Haradinaj et al* (Trial Judgment) ICTY-04-84-T, T Ch I (3 April 2008) 145.
[89] Finnin, *Elements of Accessorial Modes of Liability* (n 47) 88.
[90] ibid.
[91] ibid 89.
[92] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 209; Vest (n 23) 857; Ambos (n 28) 483; M Ewela Badar, 'Participation in Crimes in the Jurisprudence of the ICTY and ICTR' in WA Schabas and N Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 251.
[93] Rome Statute (n 3) art 25(3)(c).

(emphasis added).[94] While causation is thus included in the Rome Statute, meaning to cause a consequence or awareness of the likely occurrence of that consequence as a *mens rea* requirement does not lead to an *actus reus* requirement of the objective causation of a consequence.

The absence of a causality requirement from Article 25(3)(c) has been regarded as a failure.[95] In the light of the *ad hoc* Tribunals' cases, however, this conclusion is not obvious. Ambos cites the *Tadić* Trial Judgment in favour of the view that the aider and abettor's act 'must – in one way or another – have a causal relationship with the result.'[96] However, the given paragraph in *Tadić* actually states that the act must only be 'a contribution that in fact has an effect on the commission of the crime.'[97] In any case, the importance that the Tribunal attached to this threshold might be questioned,[98] as it also held that 'aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.'[99] Moreover, in the *Furundžija* Trial Judgment a causality requirement was rejected as an implication of the ILC's term 'direct,' which the Tribunal considered misleading.[100] Thus, because there does not exist any substantial support for upholding a causality requirement, the better interpretation would be that it is not required.

F. Conclusion

Customary international law does not require a geographical link between the act of the aider and abettor and that of the principal perpetrator. There exists some support for the notion of *ex post facto* aiding and abetting. As to causality, the *actus reus* need not be a *conditio sine qua non*; rather, 'the Tribunals have required that the conduct of the aider and abettor have *some* effect on the commission of the crime by the principal perpetrator' (emphasis in original).[101] The inherent ambiguity of formulations such as *some* or *substantial* is not necessarily a weakness; the exact threshold cannot be captured in an abstract theory, but 'only on a case by case basis taking into account modern theories of attribution.'[102] The ICC's mandate, limited to the most serious crimes of concern to the international community as a whole, should be read as endorsing the consistent requirement before the *ad hoc* Tribunals of some *actus reus* threshold for aiding and abetting.

IV. The Mens Rea

A. Introduction

In ICTY and ICTR cases, the *mens rea* required for aiding and abetting is twofold. The aider and abettor must know, first, that his actions assist the principal perpetrator and, second, he must be aware of the essential elements of the crime.[103] Awareness of the precise crime is unnecessary.[104] More specifically, recklessness is sufficient. According to the *Tadić* Trial Judgment, mere reckless indifference may constitute knowledge.[105] *Tadić* followed the *Trial of Gustav Becker, Wilhelm Weber and 18 Others*, which stated that the War Crimes Commission had decided 'in numerous instances' that not only intent but also reckless indifference may suffice.[106] Schabas, too, holds that in customary international law recklessness is enough for the establishment of guilt of an accomplice to a war crime or a crime against humanity.[107]

In their joint separate opinion in the *Perišić* Appeal Judgment, Judges Meron and Agius considered that the specific direction component may not only be an element of the *actus reus* of aiding and abetting, but also of the *mens rea*. Whether a person specifically intended to assist in the commission of a crime could be incorporated into the *mens rea* question.[108] However, in light of the unequivocal rejections in *Taylor* and

---

[94] ibid art 30(2)(b).
[95] Sebok (n 40) 884.
[96] Ambos (n 28) 481.
[97] *Prosecutor v Tadić* (Trial Judgment) (n 45) 688.
[98] Ambos (n 28) 481.
[99] *Prosecutor v Tadić* (Trial Judgment) (n 45) 689.
[100] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 232.
[101] Finnin, *Elements of Accessorial Modes of Liability* (n 47) 127.
[102] Ambos (n 28) 482.
[103] *Prosecutor v Orić* (Appeal Judgment) IT-03-68-A, A Ch (3 July 2008) 43; *Prosecutor v Mrkšić and Šljivančanin* (Appeal Judgment) (n 69) 146; *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A, A Ch (28 November 2007) 482; *Prosecutor v Krnojelac* (Appeal Judgment) IT-97-25-A, A Ch (17 September 2003) 51.
[104] I Bantekas, *International Criminal Law* (4th ed, Hart Publishing 2010) 69.
[105] *Prosecutor v Tadić* (Trial Judgment) (n 45) 687.
[106] *Trial of Gustav Becker, Wilhelm Weber and 18 Others* (Judgment) (1947), VII L Rep Trials War Crim 67 71.
[107] Schabas, 'Enforcing international humanitarian law' (n 32) 446.
[108] *Prosecutor v Perišić* (Appeal Judgment) (n 46), Joint separate opinion of Judges Theodor Meron and Carmel Agius 3.

Šainović et al of specific direction as a requirement of aiding and abetting, including for the *mens rea*, the place for specific direction in future *mens rea* discussions may be limited.[109]

B. Article 30 and aiding and abetting

In the Rome Statute, the ways in which the *mens rea* of aiding and abetting is constructed depend not only on Article 25(3)(c) but also on Article 30, the first paragraph of which determines that intent and knowledge must accompany the *actus reus*. The full text of Article 30 is as follows:

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.[110]

In demanding intent and knowledge, Article 30 *prima facie* departs from the customary standard described above. Rather than allowing reckless indifference, the phrase 'means to cause that consequence' requires *dolus directus*, or 'a desire for the occurrence of consequences.'[111] Likewise, Cryer *et al* argue that the *mens rea* requirement of intent 'will certainly make prosecuting those who sell arms or other war *matériel* which is used for international crimes difficult to prosecute' [sic].[112] According to them, even if knowledge is established, it will be problematic to prove that the intent of the accused is not merely to make profit but indeed to facilitate the commission of a crime.[113]

According to Schabas, Article 30 could be particularly problematic for Article 25(3)(c) when the terms aiding and abetting are separated. They can be distinguished on the basis of the purposive *mens rea* of Article 25(3)(c).[114] With abetting, as the provision of moral support, purpose will be inferred from the speech or expression of the abettor, whereas in the case of aiding or otherwise assisting the requirement of purpose 'becomes more vital', because such tangible acts may be committed without the necessary *mens rea* and thus require additional proof for the *mens era*.[115]

However, Article 30(2)(b) does not require as high a *mens rea* threshold as suggested by Piragoff and Robinson and Cryer *et al*. The Rome Statute allows for a construction of the *mens rea* of aiding and abetting that may require not much more proof than under customary international law; on the one hand, mere recklessness is probably excluded, but on the other hand neither Article 30 nor Article 25(3)(c) actually requires one to mean to cause a consequence. It should be noted that Article 30(2)(b)(second alternative), which defines intent as '[awareness] that [a consequence] will occur in the ordinary course of events', is *verbatim* the same as the definition of knowledge in relation to a consequence per Article 30(3)(second alternative). This situation means that 'it would be a waste of the Court's and the Prosecution's resources to ever require' a very high volitional element rather than awareness.[116] Thus, generally, awareness suffices for a finding of individual criminal responsibility with respect to a crime defined as a consequence. Due to the addition 'in

[109] *Prosecutor v Taylor* (Appeal Judgment) (n 74) [486]; *Prosecutor v Šainović et al* (Appeal Judgment) (n 46) 1649.
[110] Rome Statute (n 3) art 30.
[111] DK Piragoff and D Robinson, 'Article 30: Mental Element' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008) 860.
[112] Cryer and others (n 51) 377.
[113] ibid.
[114] WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 436.
[115] ibid.
[116] Finnin, *Elements of Accessorial Modes of Liability* (n 47) 191.

the ordinary course of events', Article 30 is stricter than the customary standard of recklessness. Rather, the cognitive element, in contrast to the *ad hoc* Tribunals' standard, requires knowledge of said probability.

Nevertheless, it has been argued that 'most legal scholars' hold that under the Rome Statute the aider and abettor possesses the same intent as the principal perpetrator.[117] Vest cites Ambos's commentary on Article 25 in his favour, but Ambos, in the given paragraph,[118] does not discuss aiding and abetting but rather another mode of liability. Vest also cites Werle's *Principles of International Criminal Law*, but Werle actually holds that '[i]t is sufficient if the person assisting was aware of the essential elements of the crime'.[119] Furthermore, the *Furundžija* Trial Judgment held that custom does not require the aider and abettor to share the *mens rea* of the principal perpetrator, but merely to have knowledge that his acts assist the principal.[120] It is not clear, then, that the view that the aider and abettor must share the principal's mental state is held by most legal scholars; the consensus appears to favour the opposite position.

C. 'For the purpose of facilitating': the notion of an additional element

A potential counterargument to the idea of 'intent as awareness' is the notion that Article 25(3)(c) necessitates a *mens rea additional to* intent and knowledge as provided in Article 30(2) and (3) for aiding and abetting.[121] This argument is enabled by the first words of Article 30(1): '*[u]nless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime (…)' (emphasis added).[122] The phrase 'unless otherwise provided' imposes either less stringent, more stringent or additional requirements.[123] While the difference between the latter two categories is not abundantly clear, Finnin suggests that a distinction may be drawn on the basis of suggestions that more stringent requirements are linked to the *actus reus*, while additional requirements are not; indeed, additional requirements do not at all refer to the *actus reus*.[124] Although without justification, Finnin qualifies the phrase '[f]or the purpose of facilitating' in Article 25(3)(c) as an example of requirements additional to intent and knowledge.[125] Following this interpretation of '[f]or the purpose of facilitating' would require one to specify the consequences of classifying this phrase as an additional element. Because Article 30 does not contain any provisions that regulate the content of such additional elements, Finnin argues, the Court would be allowed to consider sources of customary international law that provide clarity on this.[126]

However, the idea of an additional *mens rea* requirement as the purpose of facilitating a crime, exclusive to aiding and abetting, may come with profound practical difficulties. Because accessorial liability in general is concerned with those who lack such involvement as to fulfil the role of the principal perpetrator, the accessorial object is most properly understood in relation to a *consequence* which facilitates the commission of a crime, rather than *conduct per se*, i.e. conduct that would render one a principal perpetrator. If the accessorial object typically is a consequence, intent in accessorial liability must be established on the basis of Article 30(2)(b) ('[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'). This means that for a finding of aiding and abetting Article 30 already requires that a person either possessed awareness that his conduct would ordinarily lead to the commission of a crime under the jurisdiction of the Court or meant to cause the crime. Crucially, it should be asked if the additional *mens rea* requirement of *purposefully facilitating* a crime would, in practice, meaningfully differ from the intent requirement of *meaning to cause* a consequence, so that separate pieces of evidence either fulfil the Article 30 requirement or the additional requirement exclusive to aiding and abetting. This question becomes especially prominent in the light of the phrase '[f]or the purposes of this article,' which restricts the content of Article 30(2) and (3) to Article 30; thus, '[f]or the purpose of facilitating' cannot be interpreted with the help of Article 30.

It might be an impracticable or fruitless exercise to aim to uphold the notion of a requirement additional to intent and knowledge, because the Court, if it endeavoured to find a real difference between a person's purposeful facilitation and meaning to cause a consequence, would plausibly find it hard to interpret facts

[117] Vest (n 23) 861.
[118] Ambos (n 28) 760.
[119] Werle (n 33) 183-4.
[120] *Prosecutor v Furundžija* (Trial Judgment) (n 44) 236.
[121] Finnin, 'Mental Elements' (n 39) 356-7.
[122] Rome Statute (n 3) art 30(1).
[123] Finnin, 'Mental Elements' (n 39) 354.
[124] ibid 355-6.
[125] ibid 357.
[126] ibid.

as evidencing one of the two, but not the other. Importantly, the cognitive standard is already raised by the formula 'aware that it will occur in the ordinary course of events.' Any element additional to the two standards of Article 30(2)(b), however defined exactly, could render Article 25(3)(c) unworkable. Thus, the words '[u]nless otherwise provided' of Article 30(1) should, on practical grounds, not be interpreted as demanding an additional subjective requirement in the form of '[f]or the purpose of facilitating'.

In addition to these practical concerns, another argument, although admittedly more speculative, may be raised. It has been suggested with respect to some of the definitions of crimes in the Rome Statute, which require the *actus reus* to be 'intentional' or to be committed 'intentionally', that these additions are 'likely superfluous, given the general rule in article 30.'[127] During the negotiations on the Rome Statute, 'intention(ally)' was only added to the definitions of certain crimes to underline the impossibility of committing the *actus reus* non-intentionally.[128] It could be speculated that the formula 'for the purpose of facilitating' in Article 25(3)(c) was added likewise to stress that aiding and abetting can only give rise to individual criminal responsibility if the intent requirement of Article 30 has been satisfied.

If not as an additional *mens rea* requirement, how should '[f]or the purpose of facilitating' be interpreted? There exists considerable disagreement over this question; '[s]ome scholars believe that it imposes an intent requirement, while others believe that it leaves the traditional knowledge requirement intact', or argue that the Rome Statute is not clear on the *mens rea* of aiding and abetting.[129] Still others hold that 'for the purpose of facilitating' has no basis in customary international law.[130] Nevertheless, it might be argued that the phrase does not go meaningfully beyond the relevant provisions of Article 30. The expression 'for the purpose of facilitating' was taken from the US Model Penal Code, which accords accomplice liability to a person who acts 'with the purpose of promoting or facilitating.'[131] This would imply 'a specific subjective requirement stricter than mere knowledge.'[132] However, the qualification of awareness in Article 30(2)(b) (second alternative) as 'in the ordinary course of events' already imposes a stricter requirement than mere recklessness; thus, '[f]or the purpose of facilitating' in Article 25(3)(c) may not effectively increase the standard set by Article 30(2)(b).

D. Conclusion

Thus, it is possible and desirable to interpret Article 25(3)(c) as not requiring a *mens rea* additional to, or other than what is stipulated in Article 30. Rather, '[f]or the purpose of facilitating' necessitates a *mens rea* that is higher than mere recklessness, which is incompatible with the precedents set by the *ad hoc* Tribunals. If it is asked, nonetheless, how this new standard should be specified, it is in the interest of the predictability of the law that it be considered that the definition of awareness in Article 30(2)(b) already departs from the customary standard of recklessness. Therefore, rather than interpreting '[f]or the purpose of facilitating' as demanding direct intent, which would entail a very high volitional element, the better interpretation would be the lower standard of oblique intent (in common law terminology) or direct intent (or *dolus directus*) in the second degree (in civil law terminology). These gradations of intent share the requirement that 'the perpetrator foresees *as a certainty* or *as highly probable* that certain consequences will flow from his or her conduct', even if that person acts indifferently with respect to such consequences (emphases in original).[133] Thus, if the preferable interpretation of '[f]or the purpose of facilitating' is that it asks more than recklessness but should not maximally depart from custom, it should be read as demanding oblique intent. In this sense, it would not add anything to the Rome Statute's definitions of intent or knowledge in relation to a consequence.

V. Case Study

A. Introduction

As part of the revolutionary protests across the Arab world, demonstrations commenced in Syria in March 2011 that rapidly turned violent and descended into a full-scale civil war that, as of March 2014, is still ongoing. According to the United Nation's latest estimate, published on 27 July 2013, 100,000 deaths had

[127] Piragoff and Robinson (n 111) 855.
[128] ibid.
[129] Sebok (n 40) 884.
[130] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 315-6.
[131] Model Penal Code (American Law Institute, 1985) art 2.06(3)(a); Ambos (n 28) 483; Vest (n 23) 861.
[132] Ambos (n 28) 483.
[133] Finnin, 'Mental Elements' (n 39) 332.

been recorded since March 2011, as well as two million refugees and four million internally displaced persons.[134] The Syrian Observatory for Human Rights estimated the number of deaths related to the war to be 146,065 on 13 March 2014.[135] While reporting and fact-finding missions have been hindered because the government has tried to minimise reporting from the country, there have been many claims of violations of international law. The following provides an overview of the claim that the Syrian government has committed crimes against humanity and war crimes.[136] It also presents suggestions that the Russian state-owned corporation Rosoboronexport has been assisting the Syrian government herein by means of the provision of a variety of arms.

B. The situation in Syria

On 14 January 2013, 57 States sent a letter to the President of the United Nations Security Council (UNSC), requesting the Council to refer the situation in Syria as of March 2011 to the ICC, 'without exceptions and irrespective of the alleged perpetrators.'[137] The letter also referred to the Commission of Inquiry on the Syrian Arab Republic (CoI), which had been established in August 2011[138] by the Human Rights Council to investigate international crimes and violations of human rights law committed in Syria since March 2011 and to identify perpetrators.[139] The CoI has expressed fears that crimes against humanity have been committed since March 2011 since the publication of its first report in November 2011.[140] In February 2012, the CoI stated that the commission of 'widespread, systematic and gross human rights violations, amounting to crimes against humanity' by the governmental forces was occurring 'with the apparent knowledge and consent of the highest levels of the State.'[141] It also noted that, despite the State's primary responsibility to investigate, prosecute and punish crimes committed in Syria, 'a culture of impunity' precluded these measures and it suggested that '[i]nternational justice mechanisms could be used to support and complement national efforts' for reconciliation and accountability.[142] In its third report of 16 August 2012, the CoI importantly stated that the conflict had passed the threshold of a non-international armed conflict, which allowed it to conclude that it had 'found reasonable grounds to believe' that the government as well as non-State forces had committed crimes against humanity as well as 'war crimes and gross violations of international human rights law and international humanitarian law'. [143] The CoI has repeatedly affirmed that the situation should be referred to the ICC.[144]

Against this background, this paper will examine whether the Director General of Rosoboronexport may be *prima facie* criminally responsible for his company's assistance to the commission of international crimes in Syria.

C. Rosoboronexport's involvement in Syria

One of the world's major arms companies and part of the Russian Technologies State Corporation, the Open Joint Stock Company Rosoboronexport (Rosoboronexport) 'is the sole Russian state intermediary agency responsible for import/export of the full range of defence and dual-use end products, technologies and

---

[134] UN News Centre, 'Talks on chemical weapons probe "productive" – UN and Syria jointly say' <http://www.un.org/apps/news/story.asp?NewsID=45510#.Uy8jA4WYXiA> accessed 23 March 2014.

[135] Syrian Observatory for Human Rights, 'ةيروسلا تروثلا قاقالطنا ذنم اوضقافلأ 146 نم رثكأ' <http://syriahr.com/index.php?option=com_news&nid=16470&Itemid=2&task=displaynews#.UyN044WYXiD> accessed 23 March 2014.

[136] In doing so, this paper aims to remain neutral towards claims that other actors have also committed international crimes.

[137] Letter from the Permanent Mission of Switzerland to the United Nations to Mohammad Masood Khan, President of the Security Council for the month of January 2013 (14 January 2013) <http://www.news.admin.ch/NSBSubscriber/message/attachments/29290.pdf> accessed 24 March 2014.

[138] Office of the High Commissioner for Human Rights, 'Independent International Commission of Inquiry on the Syrian Arab Republic' <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> accessed 23 March 2014.

[139] United Nations Human Rights Council, Resolution S-17/1 (2011) UN Doc A/HRC/S-17/1.

[140] UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1 1, 20.

[141] UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 22.

[142] ibid.

[143] UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50 1.

[144] ibid 48; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (5 February 2013) UN Doc A/HRC/22/59 127; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (12 February 2014) UN Doc A/HRC/25/65 25.

services.'[145] Rosoboronexport has been an open joint stock company since 1 July 2011,[146] whose sole stockholder is the Russian Federation.[147] The company has been accused of violating international laws by delivering and agreeing to deliver arms to the Syrian government after the start of the latter's commission of international crimes.[148] Since 2007, Rosoboronexport has virtually been the sole Russian arms exporter and 78% of Syria's imports of major conventional weapons have come from Russia.[149] The company itself claims to account for more than 80% of arms exports from Russia.[150] According to the Stockholm International Peace Research Institute (SIPRI), a variety of arms was transferred in the period 2011-2013 from Russia to Syria. These have been included here in Appendix A. For the present discussion, the SIPRI data are suboptimal because many of the data are uncertain and because they concern arms deals and transfers concluded between Russia and Syria, not Rosoboronexport and Syria. Nonetheless, Rosoboronexport's status as the sole State intermediary for the export of Russian arms[151] suggests its involvement in the Russian-Syrian arms deals.

This involvement has been confirmed by the Director General of Rosoboronexport, Anatoly P. Isaikin. In June 2012 *The New York Times* reported that Mr Isaikin 'openly discussed' the delivery by Rosoboronexport to Syria of Pantsyr-S1 and Bastion-P missile systems and Buk-M2 anti-aircraft missiles.[152] In January 2014, Mr Isaikin noted that continued unrest in Syria and other countries in the Middle East and North Africa had contributed to Rosoboronexport's 2013 arms sells and that shipments of arms to Syria were ongoing.[153]

D. The actus reus of Mr Isaikin

In order to determine the potential criminal responsibility arising out of Rosoboronexport's arms deals with Syria, the role of Mr Isaikin is now examined. Mr Isaikin was appointed Director General of Rosoboronexport by Presidential Decree No 1574 on 23 November 2007.[154] Unfortunately, there is a serious lack of information on the structure of the company and Mr Isaikin's effective influence; Rosoboronexport 'remains an opaque entity closed-in on itself'[155] and 'tops the ranks of Russia's least transparent economic entities.'[156] Nevertheless, according to *The New York Times*, Mr Isaikin is 'a powerful figure in Russia's military industry'.[157] While more detailed information is required to draw any definitive conclusions, it appears that Mr Isaikin should have possessed at least significant influence (if not control) over the arms transfers to Syria listed in Appendix A, all of the deliveries of which followed his appointment as Director General. *Prima facie*, this would amount to a significant contribution to the commission of international crimes.

Russian government spokespersons have asserted that the arms provided to Syria are defensive in nature and have not been used against the opposition or the Syrian population in general.[158] The question of the verity of this statement requires on-the-ground research that is presently unavailable. However, it may be immaterial for the present discussion; even if the arms provided have not been used against anyone, the deliveries might nonetheless qualify as abetting the international crimes committed by the Syrian government. A finding of abetting under Article 25(3)(c) of the Rome Statute does not require evidence that the arms provided were actually used. The Court could rely, in this regard, on the *Kamuhanda* case, in which the Appeals Chamber of the ICTR held the following:

---

145 Open Joint Stock Company Rosoboronexport (Rosoboronexport), 'Rosoboronexport · Status' <http://roe.ru/roe/eng_status.html> accessed 16 March 2014.

146 ibid.

147 Federal Service for Military-Technical Cooperation, 'Press Release' (5 October 2011) <http://www.fsvts.gov.ru/materialsf/66A5E3C6232F007344257920004A3192.html> accessed 16 March 2014.

148 K Roth, 'Letter to Rosoboronexport on Syrian Weapons Supplies' *Human Rights Watch* (6 April 2012) <http://www.hrw.org/node/107677> accessed 16 March 2014.

149 ibid.

150 Rosoboronexport, 'Rosoboronexport · Status' (n 145).

151 ibid.

152 Kramer (n 1).

153 RIA Novosti, 'Russian Arms Exporter Sold $13.2Bln in 2013' (27 January 2014) <http://en.ria.ru/military_news/20140127/186951155/Russian-Arms-Exporter-Sold-132Bln-in-2013.html> accessed 16 March 2014.

154 Rosoboronexport, 'Rosoboronexport · Director General' <http://roe.ru/roe/eng_gd.html> accessed 16 March 2014; Decree of the President of the Russian Federation, 'On the General Director of Federal State Unitary Enterprise Rosoboronexport' No 1574 (26 November 2007).

155 L-M Clouet, 'Rosoboronexport, Spearhead of the Russian Arms Industry' (2007) Russie.NEI.Visions No 22, 6.

156 A Kassianova, 'Enter Rosoboronexport' (2006) PONARS Policy Memo No 406, 2.

157 Kramer (n 1).

158 Kramer (n 1); RIA Novosti, 'Russia's Rosoboronexport to Continue Arms Supplies to Syria' (12 June 2012) <http://en.ria.ru/military_news/20120612/173985454.html> accessed 16 March 2014.

> (…) [E]ven if the weapons that were distributed by the Appellant had not been used at all, their mere distribution amounts to psychological assistance, as it was an act of encouragement that contributed substantially to the massacre, thus amounting to abetting if not aiding.[159]

That the distribution amounted to encouragement that substantially contributed to the massacre at Gikomero Parish Compound was determined in the context of a statement made by the appellant to some of the persons who were about to commit the massacre,[160] in the circumstance of 'the close temporal and geographical context of the massacre at Gikomero Parish Compound.'[161] The ICTR thus found that the distribution of weapons was a physically and psychologically substantial contribution to the massacre.[162] The idea that delivered arms, even if unused, can constitute the *actus reus* of aiding and abetting can be seen as a particular instance of aiding and abetting without tangible assistance. Significantly, in this regard, the *Furundžija* Trial Judgment followed the Judgment in *Schonfeld*, which elaborated on the idea of aiding and abetting without tangible assistance:

> It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.[163]

That granting additional confidence to the principal perpetrator can amount to aiding and abetting may have inspired the ruling in *Kamuhanda* on the provision *per se* of arms. Thus, even if none of the arms provided by Rosoboronexport to Syria were actually used for the commission of international crimes, Mr Isaikin's role in the provision of arms may pass the threshold of significant assistance and thus amount to aiding and abetting – or, if one were to separate the terms, abetting specifically. Likewise, if (presently unavailable) evidence were to establish that the Syrian government *has* used Rosoboronexport's arms, on some significant rather than merely incidental scale, then the *ad hoc* Tribunals' *actus reus* standard for aiding (rather than abetting) the crimes committed in Syria would have been met. But these observations could be irrelevant before the ICC, as its Statute does not bind the Court to any *actus reus* standard for aiding and abetting.

E. The mens rea of Mr Isaikin

The phrase '[f]or the purpose of facilitating' in Article 25(3)(c) introduces a subjective *mens rea* threshold[164] that consequently excludes the question of what the aider and abettor should have known and focuses on what he actually knew at the time of the commission of the *actus reus*.[165] Because the evidentiary subjective threshold is substantially higher than the objective threshold and several questions cannot be answered at present,[166] the following does not purport to authoritatively describe the *mens rea* of Mr Isaikin. Rather, it asks whether a *prima facie* case can be made that he fulfilled the *mens rea* requirement for aiding and abetting under the Rome Statute.

---

159 *Prosecutor v Kamuhanda* (Appeal Judgment) ICTR-99-54A-A, A Ch (19 September 2005) 384.

160 The Judgment states that '[t]he Accused told those present that he would bring 'equipment' for them to start ?,g [sic] that they should distribute those weapons and ?…g [sic] that he would return to see if they had begun the killings, or so that the killings could start.' ibid 383.

161 ibid.

162 ibid.

163 *Trial of Franz Schonfeld and Nine Others* (1946), XI L Rep Trials War Crim 64, 70.

164 Ambos (n 28) 483.

165 JL Hood, 'What is Reasonable Cause to Believe?: The *Mens Rea* Required for Conviction Under 21 U.S.C. § 841' (2009-2010) 30 Pace L Rev 1360, 1362.

166 One question that cannot presently be adequately addressed, for example, is that of the possible relief, under Article 33 of the Rome Statute, of Mr Isaikin's individual criminal responsibility if he aided and abetted pursuant to superior orders. According to such an argument, Mr Isaikin, even in his capacity as Director General of Rosoboronexport, could be relieved of individual criminal responsibility because his company, in executing contracts signed between Russia and Syria, has been merely carrying out orders imposed on it by the Federal Service for Military-Technical Cooperation, over which the President of the Russian Federation presides. In addition to this legal obligation to carry out orders, a relief of superior orders under Article 33 requires that the person did not know that the order, which may not have been manifestly unlawful, was unlawful. At present, there is insufficient evidence available to decide on this question.

In August 2011, referring to Rosoboronexport's arms deliveries to Syria, Mr Isaikin reportedly stated that '[a]s long as no sanctions have been declared yet and as long as there have been no instructions and directives from the government, we are obliged to comply with our contractual obligations, which we are doing now.'[167] Similarly, in February 2012 *The New York Times* reported that Mr Isaikin said 'that absent any new directive from the Kremlin, business with the Assad government would continue as before.'[168] He stated that '[w]e understand the situation has become aggravated in Syria,' but that, without a UNSC or other decision, 'our cooperation with Syria — the military-technical cooperation — remains quite active and dynamic.'[169] *Prima facie*, at least since August 2011 Mr Isaikin has been aware of the fact that Rosoboronexport's arms were being delivered to Syria while the human rights crisis in the country was deteriorating.

More specifically, Mr Isaikin's *mens rea* may qualify *prima facie* as oblique intent or direct intent in the second degree. Referring to, in the *New York Times*' terms, Rosoboronexport's provisions of 'advanced defensive missile systems to Syria that could be used to shoot down airplanes or sink ships if the United States or other nations try to intervene to halt the country's spiral of violence',[170] Mr Isaikin stated in June 2012:

> I would like to say these mechanisms are really a good means of defence, a reliable defence against attacks from the air or sea. This is not a threat, but whoever is planning an attack should think about this.[171]

Mr Isaikin's *mens rea* may be one of oblique intent, which requires the awareness of the certainty or high probability that certain consequences will flow from one's actions. His statement that 'whoever is planning an attack should think about' Rosoboronexport's provision of defence systems and missiles indicates his awareness of the consequences of such deliveries, namely a contribution to the maintenance of the Syrian crisis. It cannot presently be stated with certainty, however, that Mr Isaikin has been aware that Rosoboronexport's arms transfers have with certainty or high probability aided and abetted the commission of war crimes and crimes against humanity by Syria.

In an effort to elicit responses from Mr Isaikin and the Russian Federation to the above discussion, the author of the present paper sent letters to Mr Isaikin and the Russian embassy in the Netherlands. The letters have been included as Appendices B and C to this paper. Upon submission of this paper, neither had been answered.

F. The complementarity principle

The possibility to examine the *prima facie* individual criminal responsibility of Mr Isaikin under the Rome Statute is conditional on the satisfaction of, *inter alia*, the complementarity principle contained in Article 1 of the Statute. This principle establishes that the Court complements rather than replaces national criminal jurisdiction. Under Article 17(1)(a) a case is inadmissible where it 'is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.[172]

It appears that Syria and Russia have jurisdiction over the involvement of Mr Isaikin and Rosoboronexport in assisting the commission of international crimes. Syria possesses territorial jurisdiction over the alleged crimes, since the crimes to which the CoI has referred have unequivocally been committed on Syrian territory; Russia may have jurisdiction under the nationality principle, because Mr Isaikin is a Russian citizen.[173]

---

[167] Interfax-AVN, 'Russia & CIS Defense Industry Weekly' (17 August 2011).

[168] DM Herszenhorn, 'For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep' *The New York Times* (18 February 2012) <http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html> accessed 24 March 2014.

[169] ibid.

[170] ibid.

[171] Kramer (n 1).

[172] Rome Statute (n 3) art 17(1)(a).

[173] The nationality principle is recognised by Russian domestic law; Criminal Code of the Russian Federation No 63-FZ of 13 June 1996 (last amended 1 March 2012) art 12(1). Aside from the traditional principles of jurisdiction, Mr Isaikin could also be prosecuted under the header of universal jurisdiction, perhaps the most disputed principle of jurisdiction. One of the most obvious options for a prosecution of an alleged violation of the law of nations on the basis of universal jurisdiction has been to take the case under the Alien Tort Statute (ATS). However, the US Supreme Court in *Kiobel* held that the ATS applies only to violations of the law of nations committed within the territory of the United States. Thus, it appears that the ATS can no longer be used to invoke universal jurisdiction; *Kiobel et al v Royal Dutch Petroleum Co et al*, 569 US __ (2013).

Both States have ratified the four 1949 Geneva Conventions, which have been violated.[174] Under these Conventions, High Contracting Parties must enact the necessary legislation to effectively punish grave breaches of these Conventions.[175] States are also obliged to search for and prosecute or extradite persons alleged to have committed or to have ordered to be committed grave breaches.[176] The ICTY in the *Tadić* Trial Judgment determined that it also had jurisdiction over grave breaches in non-international armed conflicts; although the grave breaches regime over which Article 2 of its Statute grants the Tribunal jurisdiction applies only to international armed conflicts, the Tribunal considered that Article 3, which allows it to prosecute violations of 'the laws or customs of war', was of a general, residual nature and included the rules contained in Article 3 common to the Geneva Conventions on non-international armed conflicts.[177] And while the cited provisions only explicitly concern persons who have committed or who have ordered grave breaches of the Geneva Conventions to be committed, several individuals have been convicted for aiding and abetting such breaches.[178] Thus, both Syria and Russia, among other High Contracting Parties, must prosecute Mr Isaikin for having allegedly aided and abetted grave breaches of the 1949 Geneva Conventions. That there is no indication that any domestic proceedings have been initiated, however, confirms the CoI's contention that 'the ICC *is the appropriate institution for the fight against impunity in Syria*' (emphasis in original).[179]

In this case, none of the other obstructions to admissibility in Article 17(1) apply. With reference to Article 17(1)(b), there is no indication that any State with jurisdiction has been investigating the situation in Syria for the purpose of the possible initiation of proceedings against Mr Isaikin. Neither is there any indication that he has already been convicted for Rosoboronexport's involvement in Syria; the *ne bis in idem* principle in Article 17(1)(c) and Article 20 is thus respected. And, lastly, the possibility that Mr Isaikin is complicit in the commission of crimes against humanity and war crimes, when considered against the background of the severity of the Syrian civil war, strongly suggests that the case is of sufficient gravity to be admitted to the Court, per Article 17(1)(d).

G. Conclusion

More evidence is needed to decisively determine Mr Isaikin's *actus reus* and *mens rea*. Nevertheless, on the basis of the *Kamuhanda* Judgment it may be argued, *prima facie*, that the *actus reus* threshold developed by the *ad hoc* Tribunals has been met. Because the Rome Statute has no *actus reus* threshold for aiding and abetting, Mr Isaikin could theoretically be prosecuted before the ICC for his public comments or Rosoboronexport's delivery of only a small portion of the Russian-Syrian arms deals. However, this would not befit the mandate of the ICC, which is concerned only with 'the most serious crimes of concern to the international community as a whole.'[180] The better option would be to demand that for a finding of criminal responsibility Mr Isaikin has significantly and with oblique intent contributed to the commission of crimes under the jurisdiction of the Court.

VI. Conclusion

A. Summary

In the light of the tendency in international criminal law to marginalise attention for economic contributions to violations of international law, this paper has aimed to provide some thoughts on the ways in which business leaders may be held accountable before the ICC. It has argued that, because the liability of business leaders would most likely consist of aiding and abetting, the requirements of Article 25(3)(c) would have

---

[174] UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (5 February 2013) (n 144) 86; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2012) (n 143) 77.

[175] 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 art 49; 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 art 50; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949, entered into force 21 October 1950) 75 UNTS 135 art 129; 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 art 146.

[176] ibid.

[177] *Prosecutor v Tadić* (Trial Judgment) (n 45) 559.

[178] For example, see: *Prosecutor v Furundžija* (Trial Judgment) (n 44); *Prosecutor v Akayesu* (Trial Judgment) (n 32); *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T, T Ch II (1 September 2004).

[179] UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (5 February 2013) (n 144) 127.

[180] Rome Statute (n 3) art 1.

to be met. Given that the mandate of the ICC is restricted to prosecuting only the most serious crimes of concern to the international community as a whole, it would be apt that the Court uphold the customary standard that the aider and abettor's assistance to the principal perpetrator must have been significant or substantial. Nevertheless, the *actus reus* of the aider and abettor may be entirely geographically disconnected from that of the principal perpetrator and there exists (albeit very limited) support for the notion of *ex post facto* aiding and abetting under the Rome Statute. The *mens rea* for aiding and abetting under Article 25(3)(c) and Article 30(2)(b) should be interpreted as demanding oblique intent, which heightens the *ad hoc* Tribunals' standard of recklessness. With the available facts concerning the involvement of Rosoboronexport and its Director General Anatoly P. Isaikin in the international crimes committed by Syria, the increased *mens rea* standard considerably hardens the making of a case against Mr Isaikin. Prima facie, the customary *actus reus* standard appears to have been met.

B. Politics in international criminal law

Ultimately, the capacity of international criminal law, at the ICC and elsewhere, to hold business leaders responsible for their assistance to perpetrators of international crimes is a political question. In the case of Rosoboronexport's arms deals with Syria, the initiation of proceedings is unlikely; the fact that neither Russia nor Syria has ratified the Rome Statute means that the ICC lacks both personal and territorial jurisdiction, either of which is necessary as a precondition for the exercise of the Court's jurisdiction in the cases of a referral of the situation by a State Party under Article 13(a) and the Prosecutor's *proprio motu* initiation of investigations under Article 13(c). These conditions and the implausibility of a 'self-referral' by either State practically preclude the triggering of the Court's jurisdiction by Article 13(a) and (c) of the Rome Statute. A referral of the situation to the Prosecutor by the UNSC under Article 13(b), likewise, is also implausible, given Russia's veto powers in the Council.

International criminal law tends to negate the contributions of businesses and other economic actors to armed conflict.[181] A notable call[182] in 2003 for efforts to change this tendency by the then Prosecutor of the ICC Luis Moreno Ocampo has not (yet) yielded any significant results. Referring to certain African, European and Middle Eastern companies that were allegedly involved in gold mining, the illegal exploitation of oil and the arms trade in the Democratic Republic of the Congo, Moreno Ocampo affirmed that 'investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed.'[183] Nevertheless, this call has not materialised in the prosecution of any business leader in any of the cases currently before the ICC. Future investigation must, where appropriate, also consider the role of business leaders in the commission of crimes. As Stewart writes,

> (…) [P]recluding the prosecution of businesses or their representatives would be regrettable because they play a vital role in sustaining violence. Moreover, commercial actors are more easily apprehended and generally appear more likely to be deterred by the threat of criminal sanction than armed groups.[184]

If neither domestic jurisdictions nor the ICC could ensure criminal accountability for international crimes committed in Syria since March 2011, however, another option would be to establish an *ad hoc* tribunal with the appropriate jurisdiction. Such a tribunal could be established by the UNSC, as was done with the ICTY and ICTR, or could also possess a more hybrid character, with both international and national laws, judges and funding, as has been the case with the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Panels of the Dili District Court and the Special Tribunal for Lebanon. However, because of the power and willingness of Russia and China to block UNSC decisions on Syria, the establishment of an *ad hoc* tribunal by the UNSC may be unlikely. Likewise, the construction of a hybrid court would be hampered by the hostility of the al-Assad government to any form of foreign intervention in the country barring by its allies.

---

[181] Baars (n 2) 3; Kyriakakis (n 4) 113-14; Jessberger (n 5) 801; Fauchald and Stigen (n 20) 1035.

[182] L Moreno Ocampo, 'Communications Received by the Office of the Prosecutor of the ICC' *International Criminal Court: The Prosecutor* (The Hague, 16 July 2003) <http://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july__english1.pdf> accessed 17 March 2014.

[183] ibid.

[184] Stewart (n 25) 317.

C. Future prospects: corporate liability before the ICC?

One notion that would alter the prospects of the ICC's capacity to tackle economic contributions to international crimes is the introduction of corporate criminal liability, which would complement rather than exclude individual criminal responsibility. At least four arguments speak in favour of this proposition. First, corporations are often much more potent and able to commit international crimes than separate individuals.[185] Second, corporate criminal liability would ensure that business leaders cannot hide behind the structure of their company, which is sometimes specifically designed to avoid any form of criminal liability.[186] Third, it would stimulate 'the adoption of better standards, more responsible corporate behaviour and deterrence from future misconduct.'[187] Fourth, corporate criminal liability would come with such forms of punishment as fines and, in rare cases, corporate dissolution, that could be more effective in halting the corporation's malicious conduct than imprisonment of individual actors.[188] However, it has also been suggested that economic sanctions 'might appear totally inadequate compared to the harm caused by international crimes' and that other forms of punishment, particularly adverse publicity, would be more effective deterrents.[189] Additionally, the inherent limits to criminal liability may not always be respected when corporate criminal liability is used wherever the conventional alley of individual responsibility provides no satisfaction.[190] There is also currently insufficient State support to provide any international tribunal criminal jurisdiction over legal persons.[191] Still, the potential of corporate criminal liability and the limited support it enjoys[192] merit a short examination of how corporate liability at the ICC could be envisioned.

During the Rome Diplomatic Conference for an International Criminal Court, whose conclusion marked the adoption of the Rome Statute, a proposal by the French delegation advocated the inclusion of criminal liability for legal persons in the Statute. The proposal was turned down, even though 'in a number of aspects it [was] uncommonly modest and restrictive': for example, as a *sine qua non* of corporate liability it requires that a natural person be convicted too.[193] That person, according to the French proposal, must have been in a position of control in the corporation, on behalf of and with the explicit consent of which that person acted. One may think, in this regard, of those convicted in the *Zyklon B* and *Industrialists* cases, who 'were the heads, hearts and hands of their companies and had full powers to steer their course'.[194] It has been suggested that, if corporate liability were to be included in the Rome Statute, several requirements should be added to those stated in the French proposal; it would also be relevant whether the crimes occurred 'in the daily course of the corporation's activities,' and whether the corporation made commercial profit from these crimes.[195] Together, these requirements would ensure the individual criminal responsibility of the business leader and the attribution of the *actus reus* and *mens rea* of the business leader to the corporation.

However, corporate criminal liability suffers from conceptual difficulties. The following discussion only focuses on one of them: the question of the *mens rea* of a corporation. The French proposal stipulated that for a corporation to incur criminal liability, the convicted individual person must have acted on behalf of and with the explicit consent of the corporation. Thus, the corporation must have consented to, or at least accepted, the *actus reus* of the convicted individual.[196] Given that meaningful consent or acceptance presupposes a certain degree of power, however, consent and acceptance can generally only be granted by business leaders (individually or collectively). In this way, the *mentes reae* of corporations and their leaders would coincide; if the same or similar *acti rei* are alleged, then this would lead to the risk that a conviction of a

---

185 Van der Wilt (n 18) 73.

186 Nora Gotzmann, 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute' (2008) 1 QLSR 1, 43.

187 ibid.

188 ibid 44.

189 Fauchald and Stigen (n 20) 1042.

190 M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 JICJ 909, 911.

191 Fauchald and Stigen (n 20) 1041.

192 ILC, 'Report of the International Law Commission on the work of its fiftieth session, Official Records of the General Assembly, Fifty-third session, Supplement No 10' (20 April - 12 June and 27 July - 14 August 1998) UN Doc A/53/10 77; JG Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) Corporate Social Responsibility Initiative Working Paper No 38, 17 <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf> accessed 19 March 2014.

193 Van der Wilt (n 18) 46-48.

194 ibid 69.

195 ibid 66-68.

196 ibid 70.

business leader almost automatically entails a simultaneous conviction of the business itself. The distinction between the natural person of the business leader and the legal person of the business would be blurred. The introduction of corporate liability in the Rome Statute would require, as a precondition, that the question of this distinction as well as other issues[197] be overcome.

D. The Arms Trade Treaty

Notwithstanding the desirability of using international criminal law as an instrument to hold business leaders accountable for their involvement in international crimes and to work towards preventing such crimes, other products of international law-making may also serve these purposes. Particularly significant in the case of arms provisions is the Arms Trade Treaty, which was adopted by the United Nations General Assembly on 2 April 2013.[198] Article 6(3) of the Treaty prohibits the authorisation by a State Party of any transfer of conventional weapons, ammunitions/munitions and parts and components:

> (…) [I]f it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[199]

In addition, if the export is not prohibited under Article 6, State Parties must nonetheless assess, prior to authorisation of the export, whether the arms could be used to commit or facilitate, *inter alia*, serious violations of international humanitarian law and international human rights law.[200] The Treaty allows for the settlement of disputes relating to its interpretation or application by judicial settlement and arbitration, among other means.[201] Thus, upon entry into force the Treaty will have the potential to significantly restrain the contributions of the global arms trade to violations of international law.

E. Towards responsibility

Even with a fully functioning Arms Trade Treaty, of course, businesses and other economic actors will continue to fuel and commit violations of international law. If anything, in 2014 there is more, not less verity in Cassese's 1986 observation that, in spite of the sizeable economic and political power of many corporations, their global operations and interactions with States, including in arbitration, States are reluctant to place a corresponding degree of international legal responsibility on corporations.[202] In addition to the existence of the Arms Trade Treaty and a limited number of international criminal law cases involving business leaders, some soft law instruments are now in place that address human rights obligations of corporations.[203] Nevertheless, the project of international law continues to be largely incapable of holding economic actors accountable for their contributions to armed conflict and human rights violations. It is time for this to change.

Author information

Candidate MA International Law (2015) at the Graduate Institute of International and Development Studies, Switzerland. BA Liberal Arts & Sciences (2013) at Leiden University College The Hague. The author would like to thank Joe Powderly, Dan Saxon, Alinta Geling, Sanne Nusselder, Bob van Meijeren, Pieter Wezeman and the Editorial Board of the Utrecht Journal of International and European Law.

---

[197] It would also have to be asked, for example, *how* the above requirements relating to the corporate actus reus and mens rea would be integrated into the Rome Statute. In addition to the necessary modification of Article 25(1) on the restriction of the Statute's jurisdiction to natural persons, it would have to be considered that if corporate liability, like the liability of business leaders, would typically consist of aiding and abetting, then the conditions of Article 25(3)(c) would have to be met, including the oblique intent standard of '[f]or the purpose of facilitating.' This would require a higher mens rea standard than the explicit consent or acceptance requirement suggested by Van der Wilt. Alternatively, a separate and novel clause specifically addressing corporate liability could be included.

[198] Arms Trade Treaty (adopted 2 April 2013, open for signature 3 June 2013) UN Doc A/RES/67/234.

[199] ibid art 6(3).

[200] ibid art 7(1).

[201] ibid art 19.

[202] A Cassese, *International Law in a Divided World* (OUP 1986) 103.

[203] Notable among these are the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Appendices

Appendix A

List of transfers of major conventional weapons from the Russian Federation to Syria in the period 2011-2013[204]

Number ordered	Designation	Description	Year of order	Years of deliveries	Number delivered	Comments
36	96K9 Pantsyr-S1	Mobile AD system	2006	2008-2013	36	Part of $400-730 million deal; number could be up to 50.
8	9K40 Buk/ SA-17	SAM system	2007	2010-2013	8	
12	S-125 Pechora-2M	SAM system	2007	2011-2013	12	$200 million deal; Syrian SA-3 SAM systems rebuilt to Pechora M2 version.
72	Yakhont/ SS-N-26	Anti-ship missile	2007	2010-2011	72	Bastion (SS-C-5) coastal defence system.
100	KAB-500/1500	Guided bomb	2010	2012-2013	100	
700	9M311/ SA-19 Grison	SAM	2006	2008-2013	700	Part of $400 million deal; for Pantsyr AD systems.
160	9M317/ SA-17 Grizzly	SAM	2007	2010-2013	160	
2	K-300P Bastion-P	Coast defence system	2007	2010-2011	2	

Appendix B: Letter to Mr Isaikin

Stamkartstraat 217
2521 EL
Den Haag
The Netherlands

Mr Anatoly P. Isaikin
Rosoboronexport State Corporation
27, Stromynka Street
Moscow
107076
Russian Federation

2 May 2013

Dear Mr Isaikin,

Herewith I would like to bring to your attention that, in your capacity as the Director General of Rosoboronexport, you may be individually criminally responsible for aiding and abetting the commission of crimes in the Syrian Arab Republic potentially under the jurisdiction of the International Criminal Court (ICC) in The Hague, The Netherlands.

There are several suggestions that your company has been assisting the commission of war crimes and crimes against humanity by the Government of the Syrian Arab Republic since March 2011. According to the Arms Transfers Database of the Stockholm International Peace Research Institute, several contracts were or are in force that provide for the transfers of conventional weapons from the Russian Federation to the Syrian Arab Republic in the period 2011-2013. These transfers are listed in the annex to this letter. Given

[204] Stockholm International Peace Research Institute Arms Transfers Database, 'Transfers of major conventional weapons: sorted by supplier. Deals with deliveries or orders made for year range 2011 to 2013' accessed 23 March 2014.

Rosoboronexport's status as "the sole Russian State intermediary agency responsible for import/export of the full range of defense and dual-use end products, technologies and services,"[205]and your public statements regarding the delivery of weapons by Rosoboronexport to Syria,[206] it appears likely that your company has indeed been transferring armaments to the Government of Syria, in spite of the human rights tragedy and civil war that have been devastating the country since March 2011.

Indeed, according to the United Nations' independent international commission of inquiry on the Syrian Arab Republic (COI), the Syrian Government has been committing crimes against humanity since March 2011 and war crimes since the summer months of 2012. Under the Rome Statute of the ICC, the Court has jurisdiction with respect to, inter alia, crimes against humanity and war crimes. The deliveries of arms by Rosoboronexport to Syria, as well as your comments relating to these deliveries, may constitute evidence of your aiding and abetting the crimes committed by the Government of the Syrian Arab Republic. Per Article 25(3)(c) of the Rome Statute, aiding and abetting crimes under the jurisdiction of the Court gives rise to individual criminal responsibility.

On the basis of these facts I have developed a prima facie case against you and Rosoboronexport, and I will be sharing this research with NGOs and other interested parties.

Given the severity of the human rights crisis in the Syrian Arab Republic and of the refugee crisis in the wider region I urge you to immediately halt all arms transfers of Rosoboronexport to the Syrian Arab Republic, so that your company may cease any and all involvement it may have in these tragedies. I would appreciate a response from you concerning your potential criminal liability for your company's involvement in the commission of international crimes in Syria.

Yours sincerely,

Caspar Plomp

Appendix C

Letter to the Russian Embassy in the Netherlands

Stamkartstraat 217
2521 EL
Den Haag

H.E. Mr Roman Kolodkin
Embassy of the Russian Federation in the Kingdom of the Netherlands
Andries Bickerweg 2
2517 JP
Den Haag

2 May 2013

Dear Mr Kolodkin,

Herewith I would like to bring to your attention that Mr Anatoly P. Isaikin, the Director General of Rosoboronexport, of which the Russian Federation is the sole stakeholder, may be individually criminally responsible for aiding and abetting the commission of crimes in the Syrian Arab Republic potentially under the jurisdiction of the International Criminal Court (ICC) in The Hague, The Netherlands.

There are several suggestions that Rosoboronexport has been assisting the commission of war crimes and crimes against humanity by the Government of the Syrian Arab Republic since March 2011. According to the Arms Transfers Database of the Stockholm International Peace Research Institute, several contracts were or are in force that provide for the transfers of conventional weapons from the Russian Federation to the Syrian Arab Republic in the period 2011-2013. These transfers are listed in the annex to this letter. Given Rosoboronexport's status as "the sole Russian State intermediary agency responsible for import/export of the full range of defense and dual-use end products, technologies and services,"[207]and Mr Isaikin's public

[205] Open Joint Stock Company Rosoboronexport, 'Rosoboronexport · Status' <http://roe.ru/roe/eng_status.html> accessed 2 April 2013.

[206] AE Kramer, 'Russia Sending Missile Systems to Shield Syria' (*The New York Times*, 15 June 2012) <http://www.nytimes.com/2012/06/16/world/europe/russia-sending-air-and-sea-defenses-to-syria.html?_r=0> accessed 2 April 2013; Interfax-AVN, 'Russia & CIS Defense Industry Weekly' (17 August 2011); David M Herszenhorn, 'For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep' *The New York Times* (18 February 2012) <http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html> accessed 2 April 2013.

[207] Open Joint Stock Company Rosoboronexport, 'Rosoboronexport · Status' <http://roe.ru/roe/eng_status.html> accessed 2 April 2013.

statements regarding the delivery of weapons by Rosoboronexport to Syria,[208] it appears likely that his company has indeed been transferring armaments to the Government of Syria, in spite of the human rights tragedy and civil war that have been devastating the country since March 2011.

Indeed, according to the United Nations' independent international commission of inquiry on the Syrian Arab Republic (COI), the Syrian Government has been committing crimes against humanity since March 2011 and war crimes since the summer months of 2012. Under the Rome Statute of the ICC, the Court has jurisdiction with respect to, inter alia, crimes against humanity and war crimes. The deliveries of arms by Rosoboronexport to Syria, as well as Mr Isaikin's comments relating to these deliveries, may constitute evidence of his aiding and abetting the crimes committed by the Government of the Syrian Arab Republic. Per Article 25(3)(c) of the Rome Statute, aiding and abetting crimes under the jurisdiction of the Court gives rise to individual criminal responsibility.

On the basis of these facts I have developed a prima facie case against Mr Isaikin and Rosoboronexport, and I will be sharing this research with NGOs and other interested parties.

Bearing in mind the severity of the human rights crisis in the Syrian Arab Republic and of the refugee crisis in the wider region, I would like to ask whether you are aware of the fact that Rosoboronexport has been transferring arms to the Syrian Arab Republic, and what the Russian Federation is doing with regard to the potential criminal liability of Mr Isaikin for Rosoboronexport's involvement in the commission of international crimes in the Syrian Arab Republic.

Yours sincerely,

Caspar Plomp

[208] AE Kramer, 'Russia Sending Missile Systems to Shield Syria' (*The New York Times*, 15 June 2012) <http://www.nytimes.com/2012/06/16/world/europe/russia-sending-air-and-sea-defenses-to-syria.html?_r=0> accessed 2 April 2013; Interfax-AVN, 'Russia & CIS Defense Industry Weekly' (17 August 2011); David M. Herszenhorn, 'For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep' *The New York Times* (18 February 2012) <http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html> accessed 2 April 2013.

Bibliography

Ambos K, 'Article 25: Individual Criminal Responsibility' in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed, Nomos Verlagsgesellschaft 2008)

Baars G, 'Law(yers) congealing capitalism: On the (im)possibility of restraining business in conflict through international criminal law' (PhD dissertation, University College London 2012)

Badar M E, 'Participation in Crimes in the Jurisprudence of the ICTY and ICTR' in Schabas W A and Bernaz N (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011)

Bantekas I, *International Criminal Law* (4th ed, Hart Publishing 2010)

Byrne M D, 'When in Rome: Aiding and Abetting in *Wang Xiaoning v Yahoo*' (2008-2009) 34 Brook J Int'l L 151

Cassese A, *International Law in a Divided World* (OUP 1986)

Cassese A, Acquaviva G, Fan M and Whiting A, *International Criminal Law: Cases and Commentary* (OUP 2011)

Clouet L-M, 'Rosoboronexport, Spearhead of the Russian Arms Industry' (2007) Russie.NEI.Visions No 22

Cryer R, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) DOI: http://dx.doi.org/10.1017/CBO9780511494161

Cryer R and Friman H and Robinson D and Wilmshurst E, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2011) DOI: http://dx.doi.org/10.1017/CBO9780511760808

Fauchald O K and Stigen J, 'Corporate Responsibility before International Institutions' (2009) 40 Geo Wash Int'l L Rev 1025

Federal Service for Military-Technical Cooperation, 'Press Release' (5 October 2011) <http://www.fsvts.gov.ru/materialsf/66A5E3C6232F007344257920004A3192.html> accessed 16 March 2014

Finnin S, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers 2012)

Finnin S, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61 Int'l & Comp LQ 325 DOI: http://dx.doi.org/10.1017/S0020589312000152

Gotzmann N, 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute' (2008) 1 QLSR 1

Herszenhorn D M, 'For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep' *The New York Times* (18 February 2012) <http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html> accessed 24 March 2014

Hood J L, 'What is Reasonable Cause to Believe?: The Mens Rea Required for Conviction Under 21 U.S.C. § 841' (2009-2010) 30 Pace L Rev 1360

Interfax-AVN, 'Russia & CIS Defense Industry Weekly' (17 August 2011)

Jessberger F, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity' (2010) 8 J Int'l Crim Just 783 DOI: http://dx.doi.org/10.1093/jicj/mqq038

Kassianova A, 'Enter Rosoboronexport' (2006) PONARS Policy Memo No 406

Khan K A A, Dixon R, Archbold, *International Criminal Courts: Practice, Procedure and Evidence* (Sweet & Maxwell 2009)

Kramer A E, 'Russia Sending Missile Systems to Shield Syria' *The New York Times* (New York, 15 June 2012) <http://www.nytimes.com/2012/06/16/world/europe/russia-sending-air-and-sea-defenses-to-syria.html?_r=0> accessed 16 March 2014

Kremnitzer M, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 JICJ 909

Kyriakakis J, 'Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War' in May L and Forcehimes A (eds), *Morality, Jus Post Bellum, and International Law* (CUP 2012) DOI: http://dx.doi.org/10.1017/CBO9781139161916.006

Letter from the Permanent Mission of Switzerland to the United Nations to Mohammad Masood Khan, President of the Security Council for the month of January 2013 (14 January 2013) <http://www.news.admin.ch/NSBSubscriber/message/attachments/29290.pdf> accessed 24 March 2014

Moreno Ocampo L, 'Communications Received by the Office of the Prosecutor of the ICC' *International Criminal Court: The Prosecutor* (The Hague, 16 July 2003) <http://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july__english1.pdf> accessed 17 March 2014

Nerlich V, 'The status of ICTY and ICTR precedent in proceedings before the ICC' in Stahn C and Sluiter G (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009)

Office of the High Commissioner for Human Rights, 'Independent International Commission of Inquiry on the Syrian Arab Republic' <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> accessed 23 March 2014

Open Joint Stock Company Rosoboronexport, 'Rosoboronexport · Status' <http://roe.ru/roe/eng_status.html> accessed 16 March 2014

Piragoff D K and Robinson D, 'Article 30: Mental Element' in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008)

RIA Novosti, 'Russian Arms Exporter Sold $13.2Bln in 2013' (27 January 2014) <http://en.ria.ru/military_news/20140127/186951155/Russian-Arms-Exporter-Sold-132Bln-in-2013.html> accessed 16 March 2014

Roth K, 'Letter to Rosoboronexport on Syrian Weapons Supplies' *Human Rights Watch* (6 April 2012) <http://www.hrw.org/node/107677> accessed 16 March 2014

Ruggie J G, 'Business and Human Rights: The Evolving International Agenda' (2007) Corporate Social Responsibility Initiative Working Paper No 38 <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf> accessed 19 March 2014

Schabas W A, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 Int'l Rev Red Cross 439

Schabas W A, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) DOI: http://dx.doi.org/10.1093/law/9780199560738.001.0001

Sebok A J, 'Taking Tort Law Seriously in the Alien Tort Statute' (2007-2008) 33 Brook J Int'l L 871

Stewart J G, 'Atrocity, Commerce and Accountability: The International Criminal Liability of Corporate Actors' (2010) 8 JICJ 313

Stockholm International Peace Research Institute Arms Transfers Database, 'Transfers of major conventional weapons: sorted by supplier. Deals with deliveries or orders made for year range 2011 to 2013' accessed 23 March 2014

Syrian Observatory for Human Rights, 'أكثر من 146 ألفاً ذنم اوضق قالطنا قروثلا لسريةي' <http://syriahr.com/index.php?option=com_news&nid=16470&Itemid=2&task=displaynews#.UyN044WYXiD> accessed 23 March 2014

United Nations News Centre, 'Talks on chemical weapons probe "productive" – UN and Syria jointly say' <http://www.un.org/apps/news/story.asp?NewsID=45510#.Uy8jA4WYXiA> accessed 23 March 2014

Vest H, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 JICJ 851 DOI: http://dx.doi.org/10.1093/jicj/mqq032

Werle G, *Principals of International Criminal Law* (TMC Asser Press 2009) DOI: http://dx.doi.org/10.1007/978-90-6704-559-9

Wilt H van der, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese JIL 43 DOI: http://dx.doi.org/10.1093/chinesejil/jmt010

Wirth S, 'Committing liability in international criminal law' in Stahn C and Sluiter G (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009)

How to cite this article: Caspar Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court' (2014) 30(79) Utrecht Journal of International and European Law 4, DOI: http://dx.doi.org/10.5334/ujiel.cl

Submitted: 29 July 2014 **Accepted:** 10 August 2014 **Published:** 19 August 2014

]u[*Utrecht Journal of International and European Law* is a peer-reviewed open access journal published by Ubiquity Press.

OPEN ACCESS