Business Operations in Armed Conflicts

An analysis of the criminal responsibilities of business executives operating in high-risk contexts

Emuesiri Sarah Akpere

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Supervisor: Nobou Hayashi
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CHAPTER 1

1.1. INTRODUCTION

The involvement of multinational corporations, international traders, transporters, processors, and retailers has a crucial significance in high-risk context\(^1\) as there is a wide range of commercial activities that can make economic actor criminally responsible for gross violations of international humanitarian law and human rights: this includes sale of weaponry, pillaging or commercial transactions unrelated to war. Allowing companies and their managers to shield themselves is harmful to the development of international law. Despite the fact that international criminal law does not foresee the criminal responsibility of legal entities\(^2\), international criminal law does envisage the criminal responsibility of individuals, including those in charge of largescale commercial activities.

This thesis examines the manner in which international law regulates complicity of business executives (in their capacity as company directors/officials) managing firms within the context of an armed conflict. Complicity is a subset of culpability that connects an accomplice to a primary actor's crime. This thesis examines the framework for evaluating complicity standards and suggests alternatives to normative prosecution of company leaders. I demonstrate that international criminal law regulates individual involvement in a comprehensive manner, employing the theories of incitement and aiding and abetting to inculpate complicit actors in international crimes, and these theories are differentiated by the extent of involvement in unlawful complicitious activity, a threshold of knowledge of the fault needed of the accomplice, and a connection requirement

\(^1\) This includes armed conflicts of international and non-international character
between the accomplice's activities and the principal’s wrong. Similarly, it investigates the evolution of the concept of complicity in customary criminal law via tribunals and hybrid courts. It examines the evolution of complicity in light of social media, war sponsorship, and profit-motivated support provided to governments.

1.1. Research Question

This thesis seeks to answer the following question “Does the continuous operation of companies within an armed conflict amount to complicity for their executives under the Rome Statute? if not, what are the criminal responsibilities of business executives operating in high risk contexts?”,

1.2. Background and Significance to International Operational Law

Russian forces invaded Ukraine, with already catastrophic repercussions for civilians. Due to this blatant breach of UN Charter Article 2(4), many countries have placed sanctions on Russia. Despite the fact that these sanctions prohibit trade\(^3\) and freeze the assets, not all companies (even from countries that placed sanctions on Russia) have ceased to trade, invest, or collaborate with Russia. However corporations are not always the chief perpetrators of international crimes, and only natural persons\(^4\) not legal persons, can be held legally responsible before the International Criminal Court. However, their corporate-commercial operations can provide needed funding for the commission of offenses. The current debate gaining traction is whether company executives

\(^3\) Under the ‘Trading with the Enemy Act’ in force in the United Kingdom, United States America, Germany, France
\(^4\) Art 25 (1) ‘The Court shall have jurisdiction over natural persons pursuant to this Statute’ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 1 April 2023].
would be tried for secondary liability, that is, complicity or assisting and abetting in the conduct of crimes by others, is an issue that is currently being debated, particularly in Sweden in the aftermath of the Lundin Oil case. Similarly, in the wake of the war the Ukrainian government has commenced a War and Sanctions project, aimed at identifying corporations abetting the war via revenue and foreign directors in Russian companies alleged to be complicit.

1.3. Structure

Chapter one introduces the problems associated with corporate operations in high-risk contexts, the reasons for its timely significance in international operational law. Chapter two delves into the doctrine of complicity, it examines the notions of complicity and provisions of with the highest risk of criminal culpability for business executives. Chapter three, applies the relevant provisions of the international law to the current Russian-Ukrainian war, and Chapter four examines the gaps domestic law fills in Sweden and Nigeria in capturing criminal responsibilities of accomplices. Finally, it suggests the creation of an ad-hoc tribunal for Ukraine circumvent the difficult mens rea threshold provided by the Rome Statute thereby capturing criminal responsibilities of business executives, particularly those sanctioned by Ukrainian government.

5 Prosecutor v. Ian Lundin and Alex Schneiter, for Lundin Energy’s complicity in alleged war crimes committed from 1999-2003 in southern Sudan (now South Sudan) violating Swedish Criminal Code, chapter 2 Section 3(6)(a), known domestically as Brottsbalken
6 The main database of sanctions that were imposed after Russia’s attack on Ukraine, available at https://sanctions.nazk.gov.ua/en/, accessed 10/5/2023
CHAPTER 2

"The point is, there is no feasible excuse for what we are, for what we have made of ourselves. We have chosen to put profits before people, money before morality, dividends before decency, fanaticism before fairness, and our own trivial comforts before the unspeakable agonies of others."\(^8\)

2. COMPLICITY IN INTERNATIONAL CRIMINAL LAW

In the context of international crimes, the concept of individual responsibility expanded to encompass not only individuals who directly committed war crimes or crimes against humanity, but also those who were involved in an indirect manner. This broader understanding recognized that perpetrators of such crimes could include individuals who played a role in an indirect fashion\(^9\) through ‘complicitious’ acts such as aiding\(^10\), abetting, planning, instigating\(^11\). Inciting\(^12\), will be discussed in later sections of this thesis, as an inchoate offence that can occur in relation to genocide\(^13\). Complicity was arguably developed from the draft of the International Law

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\(^8\) Iain Banks, *Complicity*, Abacus, New York (1993)


\(^10\) See Krstic (IT-98-33), Appeals Chamber, 19 April 2004, (hereinafter 'Krstid Appeals Judgment'), p. 141, where the Appeal Chamber of the ICTY clarified the mental elements of aiding and abetting to include "that the accused provided practical assistance, encouragement, or moral support to the commission of the crime, the aider need not possess the same degree of mens rea as the principal perpetrator, but only to be aware of the perpetrator’s intent.", and the accused the assistance rendered by the accused need not be indispensable to the commission of the crime. See also, Prosecutor v. Tadic (IT-94-I-T), Trial Judgement, 7 May 1997, para 689

\(^11\) See Judgment, Kordic (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 25-28 and Judgment, Mpambara (ICTR-O1-65-T), Trial Chamber, 11 September 2006, §§ 18-20, for elements of these modes

\(^12\) International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, UN Doc S/RES/827 (1993), [1993], hereinafter referred to as 'ICTY' (Art. 4(3)(b), (c) and (d)) and International Criminal Tribunal for Rwanda (ICTR) Statute, UN Doc S/RES/955 (1994), [1994], hereinafter referred to as 'ICTR' (Art. 2(3)(b), (c) and (d)) Statutes, while the Rome Statute (n.4.) Art 25 provides the requisite conditions for incitement, that is, directly and publicly

\(^13\)See C. de Than and F. Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003), at 8-9 which states: 'These are offences designed to cover situations when a full criminal offence has not yet been committed but was suggested (incitement), agreed to (conspiracy) or begun but not completed (attempt)'. 
Commission in the first part of the mandate and its adoption of the Nuremberg principles – occurred in 1950. Principle VII read as follows:

*Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI* is a crime under international law.

The second mandate was to draft a code of offenses against humanity's peace and security, explicitly defining the place to be given to the principles. The initial draft lacked a definition of complicity, but provided that Article 2 of the code listed acts that were offences against the peace and security of mankind, and subheading 13 of this Article listed conspiracy, complicity, direct incitement, and attempt to commit any of the offences defined in the preceding paragraphs of the Article as acts constituting offences against the peace and security of mankind. Complicity was thus considered as a substantive offense with no additional clarification on its content. Following this short coming, the Special Rapporteur of the ILC identified the gap in international criminal law in attributing responsibility for the crimes committed by a plurality persons. Based on the work of the special rapporteur the 1991 Draft Code provided for the first time a definition of complicity as “aiding, abetting or providing the means for the commission of a crime against the peace and security of mankind.”

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14 Adopted by the International Law Commission at its second session, in 1950, Yearbook of the International Law Commission, 1950, vol. II.
15 Principle VI provides that that planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, as well as participation in a common plan or conspiracy for the accomplishment of any of these acts constitute crimes against peace.
16 Ibid n.2
18 Fourth report on the draft code of offences against the peace and security of mankind ('Fourth Report'), by Mr. Doudou Thiam, Special Rapporteur, UN Doc A/CN.4/398
It is noteworthy to that in examining complicity as a doctrine, its allegations pervasive such as the complicity indictment of Facebook in inciting the Rohingya genocide\textsuperscript{20}, Thermo Fisher Scientific has equally alleged of complicity in "selling DNA sequencers to the Xinjiang Public Security Bureau" used in testing and surveillance of the Uyghurs and other Muslim minorities in China\textsuperscript{21}. Lafarge executives were charged of complicity before the Cour de Cassation and pleaded guilty to providing material support to ISIS\textsuperscript{22}, Lundin Energy executives with complicity in Sudan war crimes\textsuperscript{23}. These allegations reveal that one must be complicit in one element in order to be complicit in another. If the offense does not occur, the accomplice has nothing to be held accountable for and this is the core of complicity.

2.1. NOTIONS OF COMPLICITY.

Since its inception, International Criminal Law struggled with the problem of attributing responsibility for mass atrocities. The key challenges are the enormity of the crimes committed, the collective character of criminal activity that involves numerous individuals at many levels of hierarchy, and the realistic organogram involved in international crime commission. The two notions – Unitary\textsuperscript{24} and Differential, evolved as a result of these challenges in common law and

\textsuperscript{20} "Doe v. Meta Platforms" (2021), Historical and Topical Legal Documents. 2594.
\textsuperscript{22} The European Center for Constitutional and Human Rights and Sherpa, and Ors v. Lafarge SA, 2021 Cour de Cassation Appeal No 19-87.367 Criminal Chamber – Section Bench, 7 September 2021. The court held, inter alia, para 81-82 ‘knowingly paying a sum of several million dollars to an organization whose purpose is purely criminal is sufficient to be considered complicity by aiding and abetting. Secondly, it is irrelevant whether the accomplice was acting with a view to pursuing a commercial activity, something which relates to motive rather than intent.’
\textsuperscript{24} United States of America v. Alstötter et al. (‘Justice trial’), 1948, 6 L.R.T.W.C. 1, at 62, being a perfect example
civil law states. The Unitary model of perpetra
tions does systematically distinguishes be
tween principals and accessories to a crime\textsuperscript{25}, and any participant regardless of substantial contribution to the offence is deemed to have committed the crime\textsuperscript{26}. On the other hand, the differential model “requires connecting the liability of accomplices to the conduct of the principal perpetrator”\textsuperscript{27}, it implies accessor
ial dependence of the accomplice on the principal act of the perpetrator\textsuperscript{28}, and liability is dependent on level of contribution. Aksenova\textsuperscript{29} opines that the unitary model provides greater flexibility in determining the causation standard, as any level of contribution to the crime establishes a connection, she analyses the uniqueness of this model that the liability of each participant in the crime is independent and not derived from another party's actions. Unlike the differential model, where the accomplice’s conduct is derived from the conduct of the principal. This is in tandem with Kulz’s\textsuperscript{30} proposition that the basis for accomplice’s responsibility should not be the harm caused but the harm intended, this allows for the possibility of an expanded concept of complicity-causation, often referred to as "subjective" causation, where the focus lies on the accomplice's internal understanding of the potential harm and the actions taken to advance their own objectives\textsuperscript{31}.


\textsuperscript{26} U. Sieber, ‘Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, A Comparative Analysis’, Expert Opinion by the Max Planck Institute for Foreign and International Criminal Law as Commissioned by the ICTY (Freiburg, 2006), p. 13

\textsuperscript{27} Ibid, n. 22, M. Aksenova, p. 76

\textsuperscript{28} Ibid, M. n. 22, Aksenova, p. 90


\textsuperscript{31} Ibid, C. Kutz, p.157
Furthermore, in the general perusal of the notion of complicity, it is important to note that attribution of criminal liability in international criminal law is different from what obtains within domestic legislations: while in the latter a well-established criminal outcome of individual conduct is punished, international criminal law creates criminal liability for acts committed in a collective manner; as a result, the individual’s own contribution to the offence is not always lucid. As Aksenova\(^{32}\) illustrates, owing to the broad range of factual scenarios that arise in international crimes, the individuals facing charges can vary widely, ranging from local business owners to current or former state leaders. International criminal law primarily targets organized and large-scale criminal activities, often resulting in greater geographical distances between the accomplice and the harm caused compared to typical domestic legal scenarios\(^{33}\). This unique characteristic allows for extensive analysis of the accused's mental state through inference and encourages creative application of traditional legal theories. The diverse interpretations of the same legal concept lead to significantly different outcomes in each case, with potential consequences ranging from life imprisonment to acquittal\(^{34}\). The following section will explore different criteria under the law utilized to establish individual culpability.

2.2. COMPLICITY UNDER THE ROME STATUTE

In the Preamble of the Rome Statute\(^ {35}\), State Parties have affirmed their determination to “put an end to impunity for the perpetrators of these [international] crimes and thus to contribute to the prevention of such crimes”, this mirrors the provisions of the Draft Code of Crimes\(^ {36}\)

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\(^{32}\) Ibid, n.22, Aksenova
\(^{33}\) Ibid, n.22, M. Aksenova, p. 122-128
\(^{34}\) Ibid, n.22, M. Aksenova, p. 212
\(^{35}\) Ibid, n.9, Preamble, Rome Statute.
Art 25 (3)\textsuperscript{37}, the foundation of criminal responsibility provides, inter alia,

\begin{quote}
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:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission\textsuperscript{38} of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose\textsuperscript{39}. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;
\end{quote}

\textsuperscript{37} The wording of Article 15(b) in the Statute of the Iraqi Special Tribunal mirrors that of the article 25 (3).

\textsuperscript{38} Emphasis mine

\textsuperscript{39} Emphasis mine
In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Art 25(3)(a) favours the concepts of direct and indirect co-perpetration by means of control over crime in attaching responsibility to the accused who is geographically and/or temporally removed from the offence. This is theory of control over crime, rooted in German legal system, it expands the scope of principal liability beyond the individuals who physically carry out the offense. It encompasses individuals who, despite not directly committing the offense, exert a certain level of control over its commission. This control is absent in accessorial modes of liability contained in Art 25(b), (c) and equally absent in expansions of attribution implied in (d) and (e).

The aforementioned provisions when read in cohort with Article 30, which provides the general mental requirement creates two categories of culpability: dolus directus in the first degree, which refers to direct intent, and dolus directus in the second degree, which entails awareness that the crime will highly likely result from the accused's actions or omissions. For the purpose of this thesis, due attention will be paid to Art. 25 (3)(c), Art 25 (3)(d) and Art 25(3)(e) in the investigation of conducts likely to create liability in complicity

2.2.1. Art 25(3)(c)

41 Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 A 5, Appeals Chamber Judgment on the appeal of MrThomas Lubanga Dyilo against his conviction, i December2014 (Lubanga Appeal Judgment), para. 462, the judges in upholding the judgements of the lower courts held, inter alia, that the lower courts rightly relied on "control over crime" theory for distinguishing those who have committed the offence and those who have contributed to the crimes of others.
43 Ibid, n.9, Rome Statute
In accordance with this Statute, the forms of assistance to the commission of a crime are envisaged includes: - to aid, abet or otherwise assist. Aksenova\textsuperscript{44} opines that the qualifier ‘otherwise’ indicates that the list of possible forms of assistance are numerous\textsuperscript{45}, including all assistance rendered by words, acts, encouragement, support, or presence actual or constructive. Andrea\textsuperscript{46} argues that within the context of this provision aiding-abetting are two different concepts, he states that while in aiding knowledge is not enough, the intention of helping the commission of the crime being must exist. In the latter, it is made clear that "knowledge of the intention" of the group is sufficient and that "the aim of furthering the criminal activity or criminal purpose of the group" is not always required\textsuperscript{47}. Similarly, the contribution does not need to be tangible\textsuperscript{48} or indispensable\textsuperscript{49}. Ambos\textsuperscript{50} states that aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Thus, the only limiting element is the "substantial effect" requirement. Aksenova’s argues the contrary, opining that though Article 25(3)(c) does not require the assistance to contribute substantially to the commission of a crime\textsuperscript{51}, scarce case law indicate that the ICC has cautiously adopted the ‘substantial contribution’ standard of the ad hoc tribunals. In sum, one must consider the level outcome attributable to the contribution of the aider and abettor. The act or omission should normatively increase the risk of an offence, thereby violating a law already in existence. In sum, the act or omission should increase the risk of the substantive.

\textsuperscript{44} M.Aksenova, (n.25) p. 103
\textsuperscript{45} Ibid
\textsuperscript{46} K.Ambos,(n.25) p. 17
\textsuperscript{48} Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, Trial Chamber, 6 Dec. 1999, para. 43
\textsuperscript{50} K. Ambos, (n, 25) p.18
\textsuperscript{51} M.Aksenova (n.25) p. 104
‘For the purpose of facilitating the commission of such a crime’, creates an additional mental requirement to Art. 30. It requires a specific subjective requirement stricter than mere knowledge\(^{52}\), however, a direct and substantial assistance is not necessary and that the act of assistance need not be a *conditio sine qua non* of the crime\(^{53}\). Furthermore, the mere presence of an individual, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility\(^{54}\).

2.2.2. Art 25(3)(d)\(^{55}\)

This provision introduces the notorious common purpose requirement, by creating a wider range of liabilities for offences and attempts. It creates possibilities for liability in conspiracy and planning. Aksenova\(^{56}\) opines that despite the popularity of planning as a form of criminal responsibility in international criminal law, neither planning nor conspiracy were included in the Rome Statute, paving the way to the novel category of criminal participation - ‘contribution to the commission of a crime’. This provision prima facie, criminalizes the conduct of a person who *in any other way* contributes to the commission or attempted commission of a crime in question. This raises questions on ‘the true meaning of “any other way” level of contribution’\(^{57}\). To answer this,

\(^{52}\) Ibid, n.20, Eser 801


\(^{54}\) Ibid, para 209.


\(^{56}\) Ibid, n.16, M.Aksenova,p.105.

reversion must be made to the decision of the court in the Katanga case\textsuperscript{58}, and the laid down metrics for assessing the meaning of ‘any other way’. Firstly, ‘liability accrues for contribution “in any other way” to a crime within the jurisdiction of the Court’\textsuperscript{59}, excluding conducts that do not amount to aiding or abetting the commission of a crime within the meaning of article 25(3)(c)\textsuperscript{60}. Secondly, a person who stands charged pursuant to article 25(3)(d) will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute\textsuperscript{61}. Furthermore, the accused must make a significant contribution to ‘the commission of the crime; - the contribution was intentional; and - the accused’s contribution was made in the knowledge of the intention of the group to commit the crime’\textsuperscript{62}. These requirements are the actus reus, nexus and cause. Where is bestowed with jurisdiction and these requirements are met cumulatively, for the purpose of Article 25 (3) (d) it may be qualified as a “contribution” that generates individual criminal responsibility for the crime in question\textsuperscript{63}. Mere membership of a group does not amount to the common purpose\textsuperscript{64}. The Katanga case in examining the intentionality held that the intentionality prescribed by article 25(3)(d) of the Statute as applying only to the conduct which constitutes the contribution and not to the activity, purpose or criminal intention and It need not be proven, therefore, that the accused shared the group’s intention to commit the crime\textsuperscript{65}. Lastly, the Chamber held that ‘Intentional contribution’ must “be made with the aim of furthering the criminal activity or criminal purpose of the group” or “be made in the knowledge of

\textsuperscript{58} The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009
\textsuperscript{59} Ibid, para 1616.
\textsuperscript{60} Ibid
\textsuperscript{61} Ibid, para 1618
\textsuperscript{62} Ibid para 1620.
\textsuperscript{63} Z. Sanikidze (n.56) p. 231
\textsuperscript{64} Katanga case (n.57) para 1631
\textsuperscript{65} Ibid, para 1638
the intention of the group to commit the crime”\(^66\). The accused’s knowledge of the intention of the group delimited to the provision of Article 30(3) of the Statute, that is, the accused must be aware that the intention existed when engaging in the conduct which constituted contribution\(^67\) in other to incur liability. In assessing the mental requirement, the chamber in Katanga case concluded that ‘Germain Katanga, in his capacity as President of the Ngiti militia of Walendu-Bindi collectivité, knew that a military attack against Bogoro was being prepared and that the weapons supplies were intended for that battle. He also knew that the methods of warfare generally deployed in Ituri, and in Walendu-Bindi specifically, by all of the armed groups entailed acts of violence against the civilian population. More specifically, he knew that Ngiti combatants from Walendu-Bindi had already violently attacked the civilian population and were driven by an ideology inimical to the Hema and that certain commanders of that militia had already fought in Nyakunde in September 2002. Accordingly, the Chamber must find that Germain Katanga knew that the attack on Bogoro would proceed as it did and that the Ngiti militia would commit the crimes of murder, attack against civilians, destruction of property and pillaging\(^68\), and found that ‘establish beyond reasonable doubt that Germain Katanga’s intentional contribution to the crimes of murder (as a war crime and as a crime against humanity), attack against civilians, destruction of property and pillaging (as war crimes) was significant and made in the knowledge of the intention of the group to commit the crimes’\(^69\).

In her minority opinion on the evaluation of Katanga’s men res, Judge van den Wyngaert stated that there was absence of direct evidence linking Katanga to the crimes and not just reconcuring

\(^66\) Ibid, para 1640  
\(^67\) Ibid, para 1641  
\(^68\) Ibid, para 1689  
\(^69\) Ibid, para 1691
Bogoro, or that he shared anti-Hema ideology\textsuperscript{70}. Aksenova argues that the analysis of Katanga’s mental state is of Dolus Eventualis and akin to that the assessment of Lubanga’s fault\textsuperscript{71}, that is ‘residual form of accessory liability, which makes it possible to criminalize those contributions that cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting’\textsuperscript{72}. As Werle puts it, this is a “catch-all provision” that applies to indirect forms of participation not covered by any other mode of responsibility provided under subparagraphs (a) to (c) of Article 25 (3)\textsuperscript{73}, by examining the shared intent of those considered to be perpetrators\textsuperscript{74}.

2.3. Complicity under customary criminal law

Though there has been opportunity for the advancement, there have been few opportunities after Nuremberg for international courts to develop the laws concerning the aiding and abetting of mass atrocities and the liability of corporate officials. The ICTY\textsuperscript{75} and the ICTR\textsuperscript{76} -the chamber held that complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes\textsuperscript{77}- both convicted individuals for genocide by accomplice liability, however none directly involved

\textsuperscript{70} Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, Minority opinion of Judge van den Wyngaert to Judgment Pursuant to Article 74 of the Statute, 7 March 2014, para 304
\textsuperscript{71} Aksenova (n.25), p.112
\textsuperscript{72} Prosecutor v. Thomas Lubanga Dyiko, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para 329
\textsuperscript{74} Prosecutor v. Thomas Lubanga Dyiko, Pre-trial, para 337
\textsuperscript{75} Prosecutor v Krnojelac (Judgment) ICTY Trial Chamber II, IT-97-25-T, 15 March 2002 at [127]
\textsuperscript{76} Prosecutor v Akayesu (Judgment) ICTR Trial Chamber I, ICTR-96-4-T, 2 September 1998 at [684]
\textsuperscript{77} Prosecutor v Akayesu, ibid, p. 536
corporate actors. To understand, the governance of complicity in, the following provisions have formed the foundation

The SCSL, provides thus

*A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.*

The STL, provides

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

Statute of International Criminal Tribunal for Rwanda (ICTR)

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78 Hannah Reid, 'The Zyklon B Legacy and the Case for Investigating Arms Dealers Responsible for International Crimes in Myanmar' (2020) 18 NZJPIL 29.
79 Special Court for Sierra Leone Act | [2002] | SCSL | 1 | Article 6(1)
80 Special Court Lebanon | [2002] | ATL | 1 | Article 3(1)
81 Art 3(1)
82 ICTR (n.2) Art 6(1)
A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime

Article 7(1) ICTY Statute\textsuperscript{83}:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime

Article 29 of the ECCC Law\textsuperscript{84}:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

In contrast to the Rome Statute, the modes of participation are not defined under customary international law. In addition, the application is secondary\textsuperscript{85}. Liability is assessed on a case basis, and Aksenova identified broad categories into which this complicity analysis falls under customary law

i. Instigating- This is any form of encouragement, actions or omissions by the accused that had effect on the perpetrator to commit the alleged offence. On the causal requirement, the chamber in the Oric case\textsuperscript{86} were of the view that the effects the

\textsuperscript{83} ICTY (n.2) Art.7(1)
\textsuperscript{84} The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (‘ECCC Law’), Reach Kram NS/RKM/0801/12 as amended in 2004 by NS/RKM/0801/12 as amended in 2004 by NS/RKM/1001/12.
\textsuperscript{85} Rome Statute, Art 21
\textsuperscript{86} Prosecutor v Orić, ICTY Case No IT-03-68-T, Trial Judgment, 30 June 2006, para 274
voluntary acts by other individuals was not caused primarily by an instigator, for
criminal responsibility to arise, ‘a substantial one (contributing factor is required), it
need not necessarily have direct effect, as prompting another to commit a crime can
also be procured by means of an intermediary’. The fault arises from the deliberate
intent of the accused to goad the commission of the crime. The Trial Chamber in Orić
opined that intention has two components: a cognitive element of knowledge and a
volitional element of acceptance87. In elaborating these principles Aksenova clarifies
that ‘The first element is present when the accused is aware of the influencing effect of
his actions on the principal perpetrator and is aware of, and agrees to, the intentional
completion of the principal crime. The second volitional element of intent is met when
the instigator accepts the occurrence of the crime with the knowledge the commission
of the crime will more likely than not result from his conduct.’88

ii. Aiding and abetting – the trial chamber in Oric case89, equally distinguished this from
instigation. Holding that though persuasion by an instigator may contribute to the
resolve of the principal to commit a crime, reassurance or moral support in cases when
the principal offender has definitely decided to commit a crime ‘may merely, though
still, qualify as aiding and abetting’90. The aider provides practical assistance that has
substantial impact on the commission of the crime91. In Tadic the chamber92, the term
‘substantial contribution’ was defined to mean contributions with effect on the
commission of the crime, it is argued that the contribution equally be direct, that is the

87 Ibid, para 279
88 Ibid, para 279, Aksenova (n.25), p.101,
89 Ibid, para 274
90 Ibid, para 271
91 Prosecutor v Furundžija, ICTY Case No IT-95-17/1-T, Trial Judgment, 10 December 1998, paras 223-224
92 Tadić Trial Judgment (n 9) para 688.
‘specific direction’93, however in the Taylor case94 the SCSL rejected the requirement of specific direction, ‘concluding that the definition of the actus reus of aiding and abetting under customary international law is established by the substantial effect on the crimes, not the particular manner in which such assistance is provide’95. The appeal chamber ‘found the acts of the accused to have a substantial effect on the commission of the crime, thereby establishing a sufficient causal link. It therefore saw no reason to depart from the settled principles of law and introduce the novel element of the specific direction in the definition’96

The requirement that there must be direct nexus between the contribution and the crime creates a multitude of problems. First, how does one ascertain what conducts are criminal or merely in furtherance of war efforts? what foundational conditions in operational law that turns war support or sponsorship into crimes? what conducts are required of business executives who continue to operate in high-risk context? In an attempt to answer the aforementioned questions, this thesis will be applying existent international law to current allegations of complicity against business executives.

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93 ILC Commentary to the Draft Code 1996,(n. 2), para 11
94 Prosecutor v. Taylor, SCSL-03-1-A, Appeal Judgment, 26 September 2013 (‘Taylor Appeal Judgment’), para 486
95 Ibid, para 475
96 Aksenova (n.22) p100
CHAPTER 3

“[c]rimes against international law are committed by men, not by abstract entities...”

3.1. Issues - business role in armed conflict

Businesses, in their normative profit-motivated interest continue to further operations in conflict affected areas, this chapter examines how business executives are being complicit.

3.1.1. Social media and Incitement to Commit Genocide

Despite its numerous benefits, social media has become one of the key tools in inciting crimes. Hakim\(^9\)\(^8\) opines that the direct and public incitement to commit genocide is a crime and an actor may be complicit in the direct and public incitement to commit genocide via aiding and abetting liability or, as is more likely, common purpose liability\(^9\)\(^9\). However, incitement as a crime is an issue that raises a lot of concerns. Firstly, Incitement is considered an inchoate crime\(^10\), and not a mode of liability\(^10\)\(^1\). Thomas Davies argues the Rome Statute "makes a crucial departure from earlier instruments with respect to genocide" and "denies incitement the status of an independent


\(^{98}\) Neema Hakim, 'How Social Media Companies Could Be Complicit in Incitement to Genocide' (2020) 21 Chi J Int'l L 83, p. 106

\(^{99}\) ibid

\(^{100}\) See W.K. Timmerman, Incitement in International Criminal Law, 88 INT'L R. RED CROSS 823, 846 (2006)

\(^{101}\) Mark Klamberg editor of the Commentary on the Law of the International Criminal Court (CLICC) takes the position that incitement to genocide is a crime under the Rome Statute not a mode of liability, he states that ‘Article 25(3) (e) of the ICC Statute criminalises direct and public incitement of others to commit genocide. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the ICTY and ICTR Statutes. Genocide is the only international crime to which public incitement has been criminalised. The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof’
crime, and instead presents it as a type of individual criminal responsibility for genocide.”  

Secondly, as complicity does not generally attach to inchoate crimes, some contend a person cannot be complicit in inciting genocide. However, the ICTR Appeals Chamber provided that a defendant can be complicit in direct and public incitement to commit genocide, notwithstanding its character as an inchoate crime, but nonetheless proceeded with a complicity in incitement analysis. Specifically, the Chamber held:

As an inchoate crime, direct and public incitement to commit genocide is completed as soon as the discourse is uttered or published, even though the effects of incitement may extend in time, and is punishable even if no act of genocide has resulted therefrom. Accordingly, in order for Kanyabashi to be found responsible for aiding and abetting direct and public incitement to commit genocide, it would have to be established that he substantially contributed to Kambanda's and Sindikubwabo's inciting speeches themselves and not, as the Prosecution suggests, to the effects of their incitements by "reiterat[ing] and reinforce[ing] their message."

Considering the degree of culpability, those complicit in incitement may be less of a prosecutorial than those who actively commit genocide, this differs in relation to social media companies due

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103 See, for example, Jens David Ohlin, Attempt, Conspiracy, and Incitement to Commit Genocide, Cornell.I. FAC. PUB. 173, 184 (2009), http://perma.cc/R5YY-2MU. The ICTR Trial Chamber suggested as much in Akayesu, that only complicity in the completed offence of genocide was intended for punishment and not complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the eyes of some states, too vague to be punishable under the Convention
105 Ibid p. 3345
106 Ibid n. 98, Hakim p.107
to their profound influence over the dissemination of information today. In applying these principles to social media companies, Hakim opines that the novel requirements for incitement via social media includes four ingredients. Firstly, the incitement must be intentional. Secondly, it must be public and it must be direct. Finally, the defendant must have the specific intent to cause genocide.

Firstly, on the mental threshold of intentionality. The concept behind the use of social media is not one of recklessness, or accidents. Post made on social media, all this being equal are deliberate particularly such posts are genocidal. Secondly, social media, unless otherwise configured, is a means of mass communication thus establishing the public nature of such incitement. It entails the extensive distribution of knowledge to external audiences and is thus completely public. Certain social networking applications are exempt. For example, utilizing social media for private communications is unlikely to be public. Similarly, if a social media user has adjusted their privacy preferences such that the incitement is only visible to a small number of people, the post may not meet the public requirement. With respect to Myanmar, a 2018 report by the U.N. Independent International Fact-Finding Mission on Myanmar (IIFMM) revealed as follows:

The nature, scale and organization of the operations suggest a level of preplanning and design by the Tatmadaw leadership that was consistent with the vision of the Commander-in-Chief, Senior General Min Aung Hlaing, who stated in a Facebook post on 2 September 2018, at the height of the

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107 Ibid
108 Hakim (n.89), p110
109 See CLICC, supra note 3, at 272 (noting that an incitement is public where a "technological means of mass communication" is deployed)
operations, that “the Bengali problem was a long standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.

Thirdly, it must be a direct statement. In as much as it need not be a vague statement, it also need not be explicit. In the Media Case, where conventional media was utilized, emphasized the systematic nature of the incitements in those cases. However, Social media encourages the direct incitements, and due to anonymity it provides, the inciter is more likely to deeply dehumanize. Unlike traditional media, it employs algorithms that are likely to magnify feeds customized to individual predispositions, whatever they may be. Such algorithms may exacerbate existing social conflicts within a country. In Myanmar, the IIFFMM found that Tatmadaw officials used Facebook to execute a systematic campaign to dehumanize the Rohingya. Officials actively promoted the narrative that the Rohingya did not exist in Myanmar. Officials reinforced the
"narrative of the whole Rohingya population being 'terrorists' and inherently violent."\textsuperscript{115} The IIFFMM concluded thus

\begin{quote}
The role of social media is significant. Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet. Although improved in recent months, the response of Facebook has been slow and ineffective\textsuperscript{116}.
\end{quote}

Even if these statements only implicitly dehumanized the Rohingya, the IIFFMM produced evidence that the audience potentially understood the posts as calls for genocide, citing user comments on Tatmadaw posts. While these occurred, the executives of Meta Inc., being fully aware promoted the Tatmadaw’s post\textsuperscript{117}, there by assisting in the incitement. Hakim\textsuperscript{118} opines that the CEO, the manager, and the content directors are the chief aiders. This hurdles to surount in establishing that a CEO based in North American deliberately assisted in a Genocide are numerous. Creating a direct causal link between the incitement and the CEO is problematic, the CEO can however be liable in recklessness and failure to carry out due diligence given the region was high risk. The content manger, on the other hand, has unhindered access to the posts made in furtherance of the incitement to commit genocide. However, in applying the Zykon’s test, the content manger was not the person responsible for granting Myanmar access to the platform, hence he lacked effective control of the company to issue directive if this magnitude. As the Court acknowledged in that Zyklon’s case\textsuperscript{119} on attribution, low rank in the corporate hierarchy provides some degree

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} Ibid, para 25., The IIFFMM, also found that that "most of the Myanmar authorities' posts and communications [directly fed] the narratives of illegal immigration and Islamic threat." Para 33.
\item \textsuperscript{116} Ibid, para 74.
\item \textsuperscript{117} Doe case, (n.2),
\item \textsuperscript{118} Hakim (n.89) p.110
\item \textsuperscript{119} The Zyklon B Case, Case No. 9, 1 Law Reports of Trials of War Criminals 93, 102 (British Military Court, Hamburg, Germany Mar. 1-8 1946), http://perma.cc/GU9K-GLH6 Accessed 23/5/2023
\end{itemize}
\end{footnotesize}
of immunity with respect to complicity when the assistance rendered stems from business dealings involving more senior executives.

3.1.2. ‘Trading with the enemy’

Trading with the enemy remains a matter of domestic law, though it recognized under international law. The common law doctrine of trading with the enemy has been described as follows

“any commercial, financial or other intercourse with, or for the benefit of, an enemy or a person acting on behalf of, an enemy”\textsuperscript{120},

It also states that ‘anybody of persons (whether corporate or un-incorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,’\textsuperscript{121}. The implication of this is that during an armed conflict, any economic transaction with the enemy is forbidden\textsuperscript{122}. This concept is of relevance as most armed conflicts are the product of economic agitations. Competition for economic resources leading to conflicts is a prevalent issue particularly in Third World Countries\textsuperscript{123}. These nations often lack an effective and transparent government that can responsibly exploit natural resources for the benefit of their citizens.

\textsuperscript{120} The Trading with the Enemy Act 1917, 40 Stat. 411, codified at 12 U.S.C. § 95 and 50 U.S.C., Trading with the Enemy Act. 1941;\textsuperscript{170} in France, by a decree of September 27, 1914; in Germany, by an ordinance of September 30, 1914, Trading with the Enemy Act 1933, c 41 (UK), s.1, this Act further provides in s. 1 (2), the activities that amount to trade, including

‘supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy territory, or
(ii)paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or
(iii)performed any obligation to, or discharged any obligation of, an enemy, whether the obligation was undertaken before or after the commencement of this Act; or

\textsuperscript{121} Ibid, s.2


\textsuperscript{123} Security Council resolution 1306 (2000) [on the situation in Sierra Leone], S/RES/1306., the security council highlighted ‘its concern at the role played by the illicit trade in diamonds in fueling the conflict in Sierra Leone, and at reports that such diamonds transit neighboring countries, including the territory of Liberia’
Additionally, they may lack the strength and authority to counter armed groups that seek personal gain from controlling these resources, hence a fertile breeding ground for numerous international crimes. Generally, buying, selling and other commercial transactions are not criminal, however one must analyse what situations commercial transactions where conflict minerals will potentially lead to criminal liability under International law. To determine what business conduct amounts to complicity, one must examine the nature of the transactions, and its contribution to a military purpose. International criminal law relies largely on the substantial contribution theory. However, a "substantial contribution" is indeed a very indeterminate concept and it is useful to identify relevant proximate causes\textsuperscript{124}, the reverse is the case under domestic legislations\textsuperscript{125}.

3.1.3. Private Military Securities

The use of Private Military and Security Companies, hereinafter referred to as PMSCs, has become increasingly common and unfortunately it is “less regulated than the cheese industry”\textsuperscript{126}. However, PMSCs do not operate in complete legal vacuum\textsuperscript{127}, they are subject of IHL like all other actors. There are several accompanying problems to effective regulation of PMSCs, firstly international law is void of lex specialis designed to regulate them. The application of IHL is bedeviled by a plethora of ambiguities and enforcement problems\textsuperscript{128}. Secondly, there is a substantial application of regulations specifically drafted for mercenaries\textsuperscript{129}. Finally, the prosecution of PMSCs operating

\textsuperscript{124} As demonstrated in Lafarge case (n.22) paras 81-84
\textsuperscript{125} Andrea Reggio, (n. 19), pp.668-669
\textsuperscript{127} S Percy, \textquote{Regulating the Private Security Industry} (International Institute for Strategic Studies, 2006). argues that there is an erroneous belief that regulatory gaps in the private security industry exist only in international law. Percy asserts that private military and security companies are also subject to international humanitarian law. (p. 41).
\textsuperscript{129} This includes Art.47 of the first protocol to the Geneva convention of 1977, the Convention for the Elimination of Mercenarism in Africa of 1985, the United Nation International Convention Against Recruitment, Use, Financing, and Training of Mercenaries 2001, provides for requirements PMSCs can easily surmount. See. L Cameron and V
in weak states\textsuperscript{130} would require an ad hoc international convention and monitoring body. The full scope of PMSCs will not be addressed in this thesis, save the criminal responsibility of their managers who are not in the theatre.

i. Criminal Responsibility of PMSCs executives for complicity

PMSCs are the most relevant in international crimes as they are involved in operational activities\textsuperscript{131} in high-risk context\textsuperscript{132}, and can be direct perpetrators of war crimes, crimes against humanity and genocide as the rules do not distinguish whether an individual acts in personal capacity or as an agent of a company, all crimes apply regardless\textsuperscript{133}. This raises the question whether an indirect form of superior liability exist between the managers and low –ranked officers for crimes committed in combat, to answer this reference must be made to similar cases where civilians holding managerial positions in businesses were criminally liable for failure to act on the crimes committed by their subordinates. In Nahimana’s case\textsuperscript{134}, the ICTR held that the accused exercised de facto control over subordinate employees, and could prevent or punish discourse fueling incitement. The Montreux Document on good practices in armed conflict recognizes that the doctrine of command responsibility applies to directors and managers of PMSCs\textsuperscript{135}. Analysis of whether the whether manager have de facto control to give operational instructions that may give

\begin{thebibliography}{99}
\bibitem{States} States unable to enforce domestic legislations
\bibitem{Ibid} Ibid (n.20) p. 582
\bibitem{Nahimana} Nahimana’ case, paras 803-822
\end{thebibliography}
rise to criminal responsibilities varies from case to case basis, the ability of the manager to ‘prevnt and punish for war crimes’¹³⁶ and capacity of the subordinates to carry out instructions in conformity with IHL.

3.1.4. Omissions

Generally, there is a duty to act where the act is imposed by the law or there is an existing fiduciary or contractual relationship or a person created the other person's peril. In situations without a specific legal duty to act an increased obligation under international humanitarian law exist, which places a greater emphasis on the protection of individuals and imposes a variety of responsibilities that necessitate proactive measures. Acts of complitious omission includes silent complicity. Silent complicity may appear as the least significant form of complicity simply because it does not involve an active contribution by the corporation to a specific wrongdoing. Wettstein argues that for a corporation to become silently complicit four conditions must be fulfilled: voluntariness, connection to the grave human rights violation, power to significantly influence the perpetrator, and a certain social or political status¹³⁷. Similarly, there may be willful blindness by the company – as evident with most companies still operating in Russia presently- in cases of gross human rights violations, it would be difficult to deny knowledge of them. A plethora of companies often claim complete ignorance, in Public Prosecutor v. Frans Cornelis Adrianus van Anraat¹³⁸, Frans Cornelis Adrianus van Anraat was a Dutch businessman who, from 1984 until 1988, purchased large quantities of the chemical thioglycol from the United States and Japan. This chemical was then sold, through a number of different companies located in different countries, to Saddam Hussein’s

government of Iraq. After 1984, Van Anraat was the government’s sole supplier of the chemical. The chemical was a key component in the manufacture of mustard gas and was in fact used for this purpose by Saddam Hussein’s government who then proceeded to employ the gas in attacks against Iranian military and civilians in the Iran-Iraq war and against the Kurdish population in northern Iraq. The effect was devastating, thousands of individuals were killed and many thousands more were injured with long-term effects including blindness and cancer. The accused was acquitted of the charge of complicity to genocide because the judges concluded that evidence submitted did not establish with sufficient degree of certainty that prior Van Anraat knew that the chemical would be used for the destruction of the Kurdish population. With regard to the charge of complicity in war crimes, Van Anraat argued, inter alia, that he did not know that the gas he supplied to Saddam Hussein would be used for the production of chemical weapons. The District Court of The Hague held that the evidence established that the quantities of the gas as supplied by the defendant could only serve for the production of mustard gas and not for use in the textile industry as argued by the defendant. Van Anraat was thus found guilty of complicity in war crimes. The district court also granted compensation to fifteen victims. On appeal, the court increased Anraat’s sentence to seventeen years imprisonment, without compensation to the victims. Inaction is a form of complicity, it is insufficient that business executives opt to avoid conflict, but must take active steps in prevention and punishment to avoid complicity.

3.2. Complicity by business executives in Russia – Ukrainian War

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After the World war, possibility of demanding accountability from corporations and their agents for war crimes and other international crimes is gained traction. The Industrialist cases were the first to address the criminal liabilities of business men in international crimes. In Zyklon case\textsuperscript{140} where Zyklon B is a Prussic acid (Hydrogen Cyanide) and a cautionary eye irritant was German concentration camps during WWII as a key ingredient in the murder of civilians. Bruno Tesch, was the owner of the firm Tesch & Stebenow. His co-defendants Karl Weinbacher and Joachim Drosihn were employees of the company. The company specialised in the Zyklon B gas which the company sold to the Nazi Schutzstaffel during WWII. The prosecution charged the three defendants with the war crime of supplying poison gas used for the extermination on allied nationals in concentration camps. Arguing that the defendants must have been aware that the quantity of gas purchased by the Nazi was too large for mere pest control within the camps\textsuperscript{141} The court\textsuperscript{142} examined the complicity of German industrialists in the murder of interned allied civilians by means of poison gas, stating that the prosecution must prove that ‘Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings’\textsuperscript{143}. The Zyklon B Case placed the onus of the uses to which a company’s product are put on the executives. In carrying out their business must have had knowledge of the true uses to effectively carry out those duties, this is what Reid\textsuperscript{144} calls the Zyklon test. In applying this analogy

\begin{footnotes}
\footnote{140}{United Kingdom v. Tesch et al. (‘Zyklon B Case’), (1947) 1 L.R.T.W.C. 93 (British Military Court), at 93-101}
\footnote{141}{Specifically charged for ‘violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used’: Zyklon B Case, ibid at p. 93.}
\footnote{142}{Ibid 101, the Judge Advocate discussed a "deliberate avoidance" or "conscious avoidance" principle. For explanation see, Hannah Reid, \textit{The Zyklon B Legacy and the Case for Investigating Arms Dealers Responsible for International Crimes in Myanmar} (2020) 18 NZPIL 29, p.37}
\footnote{143}{Ibid, p.101}
\footnote{144}{Ibid, n.57, Reid p.36}
\end{footnotes}
to current companies, one must consider the overt manner companies continue to do business in armed conflict regardless of sanctions. Firstly, this test will be applied in the following categories

i. Multi-use products
ii. Material support

3.2.1. Multi-use products

These are products supplied in Russia, and cannot be directly used in armed conflicts, however the operation of these companies put the employees at risk and continuous operations inevitably implies abiding with Russian laws, including use of company property in military efforts. In Lafarge case, the core of the prosecution’s case included the risk to the employees, and payment of funds that ensured operation of the company in Syria. This equally extends to seamlessly harmless companies as P&G, and Mondelez, the famous makers of Oreos. Thirteen directors at Mondelez were recently added to the War and Sanctions list for operating three factories in Russia: ‘the Bolshevik factory (produces Yubileynoe, OREO, Mishka Barny, and TUC crackers), the Pokrov factory (produces Alpen Gold, Vozdushny, Milka, and Picnic bars), the factory in Bolshoi Novgorod (produces Dirol chewing gum and Halls candies)’ despite announcing its intentions to stop business with Russia, the CEO gave directives ‘to promote its products in retail chains and bring new products to the market’. The CEO Dirk Van de Put justifies Mondelez’s continued corporations in Russia via the defense of ‘essential’ food in there by generating 1352.9

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145 Ibid, n.15, para 8
146 P&G (Procter & Gamble)- international war sponsor on the Ukrainian government’s project - War and Sanctions list, Available at https://sanctions.nazk.gov.ua/en/boycott/14/ Accessed 20/5/2023
149 Ibid
million dollars in revenue\textsuperscript{150}. One would disagree that the production of chocolate bars and cookies are essential to the civilian population in an armed conflict. Though proving that revenue generated from the sale of groceries funded the alleged aggression against Ukraine is farfetched, as difficulties would arise from establishing the nexus between the revenue generated and the activities amounting to war crimes committed. Notwithstanding this hurdle, corporate executives currently operating in Russia may be liable for complicity in war crimes of inhumane treatment due to their abidance by the Mobilization Law\textsuperscript{151}. The accompanying legislation on mobilization - known as Article 9 of Federal Law\textsuperscript{152} No. 31-FZ - mandates all organizations, including international companies, to conduct military registration of the staff if at least one of the employees is liable for military service. It provides thus

\begin{quote}
Section iii. Obligations of Organizations and Citizens in the Field of Mobilization Preparation and Mobilization

Article 9 Obligations of organizations, organizations are obliged:

1) to organize and conduct activities to ensure their mobilization readiness;

2) create mobilization bodies or appoint employees performing the functions of mobilization bodies (hereinafter referred to as mobilization workers);

3) develop mobilization plans within their powers;

4) to carry out activities for the preparation of production in order to fulfill mobilization tasks (orders) during the period of mobilization and in wartime;

5) carry out mobilization tasks (orders) in accordance with the concluded agreements (contracts) in order to ensure mobilization training and mobilization;
\end{quote}


\textsuperscript{151} Official Publication of Legal Acts, Decree of the President of the Russian Federation of September 21, 2022 No. 647 "On the announcement of partial mobilization in the Russian Federation" Available at http://publication.pravo.gov.ru/Document/View/0001202209210001 . This legislation is currently amended to cover wider range of individuals by the Russian lower parliament, the bill passed third reading

\textsuperscript{152} President of Russia, Federal Law No. 31-FZ, Available at http://kremlin.ru/acts/bank/10602/page/2
They must also assist with delivering the summons to their employees, ensure the delivery of equipment to assembly points or military units, and provide buildings, communications, land plots, transport and other material means as well as information. The implication of this is that corporate executives cannot plead ignorance or lack of awareness, as they are the engine oil that keeps the war running.

3.2.2. Material Support

Companies continue to provide material support in the ongoing Russian-Ukrainian war, including supply of products overtly geared towards the furtherance of war efforts. Shahed Aviation Industries Research Center, Success Aviation Services FZC and i-Jet Global DMCC are Iranian companies currently listed as ‘international sponsor of war’\textsuperscript{153} for the production and supply of Unmanned Aerial Vehicles (UAVs), which Russia has used in devastating attacks against civilian infrastructure in Ukraine. It is well established doctrine of state responsibility that states can be held responsible if they knowingly assist another State in breaking international law\textsuperscript{154}. This raises questions on translating this responsibility by analogy to individuals business executives, Hamilton\textsuperscript{155} argues that criminal responsibilities of business executives could arise under customary law as an accomplice with an actus reus of a substantial contribution to the commission,


\textsuperscript{154} International Law Commission, 'Articles on State Responsibility' (adopted 9 August 2001, UN Doc A/RES/56/83) UN GAOR 56th Session Supp No 10, vol II, 43, Art 16

a mens rea of knowledge of the intentions of the perpetrators to carry out the crime. The same measure applies at the ICC pursuant to the ‘catch-all’ mode of liability in Article 25(3)(d)(ii).

Applying the Zyklon’s test, the directors of the Iranian corporations making the Shahed and Qods drones would be liable for complicity in war crimes if the prosecution establishes that ‘(i) these suppliers appear to know full-well that the drones, while lawful per se, are being used in violations of international humanitarian law\textsuperscript{156}, (ii) that Iranian companies contributed substantially to war crimes under Article 8(2) of the Rome Statute\textsuperscript{157} by supplying low-cost drones primarily used in aerial attacks. This is the poster-child example of individual contributions with a lucid nexus to unlawful Russian attacks, it creates an actus reus of criminal responsibility, as well as high likelihood of requisite awareness.\textsuperscript{158}

3.3. Defenses

i. Essentiality

A number of foreign companies executives currently operating in Russia have hid under the cloak of essentiality, by open-sourced information\textsuperscript{159} guidelines are provided to ensure the goods are essential and can be locally sourced. The Geneva conventions\textsuperscript{160} provides that food shall not be the object of attack, one implies that this includes the supply chain and general access to food\textsuperscript{161}.

\textsuperscript{157} Ibid, n.2
\textsuperscript{158} Ibid, n.62.
\textsuperscript{160} Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, Article 52.
However, for this defense to succeed, the good or service must be unavailable locally, hence the need for foreign entities.

ii. Russian Bureaucracy

Another defence is the difficulty in stopping business operations in Russia. Estrin and Meyer\textsuperscript{162} opines that the interdependence of global operations difficulty in finding buyers for corporations and barriers to exit, such as the mandatory approval by the Russian federation of all agreements for the sale of assets. Foreign companies can sell assets only with the approval of the Russian Ministry of Finance, and corporations in "strategic" sectors, including oil and banking, need the signature of President V. Putin. Though business executives are advised to make exist plans and policies, finding the door out of Russia is difficult\textsuperscript{163}

\textsuperscript{162} Saul Estrin and Klaus E Meyer, 'Why it's so difficult for companies to leave Russia' (March 28, 2023) LSE Business Review Available at https://blogs.lse.ac.uk/businessreview/2023/03/28/why-its-so-difficult-for-companies-to-leave-russia/ Accessed 23/05/2023
\textsuperscript{163} Ibid
Chapter 4

Prosecution of business executives under Domestic jurisdictions

General principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime to the extent of their inconsistencies\textsuperscript{164}, this is a secondary source of law in the ICC. The Rome Statute is, ‘the role of the ‘general principles of law’ under Article 21(1)(c) is to be a subsidiary source of law when a gap exists in international law\textsuperscript{165}. It is important that the general principles are a mixture of a variety of legal systems, considering the divergence of practices in both civil and common law states\textsuperscript{166}. However, no domestic legal system has solidly grasped the doctrine of complicity\textsuperscript{167}, Dubber argues. He criticized the use of a comparison technique in the context of complicity in particular. After studying the notion of complicity in German and American law in depth, he proposed that national legal systems serve only as a guidepost for the development of the concept of accomplice culpability in international criminal law. This is due to the necessity to find a balance between a larger view of accomplice culpability suggested by the gravity of the crimes implicated and a more restricted view of complicity based on legality concerns\textsuperscript{168}. By consequently, the law of complicity veers dangerously close to punishing for status rather than action, character rather than behavior, and criminal purpose rather than criminal deed,

\textsuperscript{165} Aksenova, Marina. \textit{Complicity in International Criminal Law.} (n.25), p. 129
\textsuperscript{166} The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 534, where the Chamber held that ‘The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely "aid and abet, counsel and procure", mirror those conducts characterized under Civil Law as "l'aide et l'assistance, la fourniture des moyens".'
\textsuperscript{168} M. Dubber, at 1001
straining the legality principle to its breaking point - and maybe beyond. These difficulties are amplified in international criminal law, when the desire to punish corresponds to the severity of the injury\textsuperscript{169}.

Nigeria utilizes two criminal codes, first the Nigerian Criminal Code. Secondly the Penal Code, enacted based on the provisions of Sharia Law. Pursuant to Criminal Code\textsuperscript{170} applicable in the Southern States of Nigeria there are four different classes of offenders.

\textbf{7. Principal offenders}

\textit{When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it-}

\begin{enumerate}
\item every person who actually does the act or makes the omission which constitutes the offence;
\item every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
\item every person who aids another person in committing the offence;
\item any person who counsels or procures any other person to commit the offence.
\end{enumerate}

\begin{quote}
\textit{In the fourth case, he may be charged either with himself committing the offence or with counselling or procuring its commission.}
\end{quote}

\begin{footnotesize}
\textsuperscript{169} Ibid
\textsuperscript{170} Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria 2004, s.7
\end{footnotesize}
A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, that act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

Literal interpretation of this section highlights an adaptation of the unitary model, there is no differentiation of principal and accessories in punitive considerations, neither does abetting nor accessorial liability exist. This creates a difficulty in establishing an hierarchy in offense, unless the aider goes beyond the agreed scope of the crime, and makes the process of establishing criminal responsibilities of business executives cumbersome. This is distinct from the clear provisions of the Swedish Penal Code that Under the provisions of this Code, responsibility for a certain conduct is attributed not only to the individual who committed the act, but also everyone who encouraged it via advise or action.

Each accomplice is assessed according to the intent or the negligence attributable to them. Responsibility provided for the acts of an agent, debtor

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171 This is in accordance with the principle of equal punishment,
172 R v Morris, (1966) 2 Q. B. 110
173 The Swedish Code (SFS), Brottsbalken (BrB) (1962) 700, Chapter 23
or other person in a special position is also assigned to anyone who was an accomplice to the act of such a person.\textsuperscript{174}

This differentiates the mode of liabilities, and creates divergence in determination of the mens rea for acts committed after 2014 - the Swedish Act on criminal responsibility for genocide, crimes against humanity and war crimes\textsuperscript{175} solves this dichotomy- forms the basis of the Lundin Oil case\textsuperscript{176}. In Sudan, the most of the oil blocks are in South Sudan, a region plagued with armed conflicts from 1983. Lundin Energy operated in southern Sudan through another subsidiary, Sudan Ltd (also called IPC Sudan Ltd and Lundin Sudan Ltd), from 1997 to 2003. The indictment brought by the prosecutor claims that, as of 1997 the area comprising Block 5A was one of the worst affected areas. In 1997 onwards, disputed control over future oil exploitation prospecting areas became a central feature of the conflict. In May 1999, the Sudanese Government initiated offensive military operations in and around to Block 5A in order to obtain control over areas for oil prospecting and create the necessary preconditions for Sudan Ltd’s exploration. This led to violence that, with short interruptions, persisted until Sudan Ltd left the area in 2003. During this period, on several occasions Sudan Ltd. requested security assistance from the Sudanese government and military, allegedly aware that this would require control of Block 5A via military force. The company entered into an agreement with the government to establish a road in the region, and at various point of time called on the government to direct the military and allied militias to take measures against the rebel forces, according the prosecution documents from the case. The prosecution argues that the defendants were complicit in war crimes in part because they made these demands despite understanding, or being willfully blind to the fact that calls for

\textsuperscript{174} Ibid, S.4
\textsuperscript{175} Act on criminal responsibility for genocide, crimes against humanity and war crimes, SFS 2014:406
\textsuperscript{176} Prosecutor v. Ian Lundin and Alex Schneiter
security and action against rebel forces would likely result in government and allied forces carrying out violence using methods that violate international humanitarian law. Prosecutor Petersson argues that what constitutes complicity in a criminal sense is that they made these demands despite understanding or, in any case being indifferent to the military and the militia carrying out the war in a way that was forbidden according to international humanitarian law.

The issues for consideration include the varying threshold of intent under the Rome Statute, and under Swedish Penal Code since the standards on complicity may differ between Swedish law (reckless intent) and that applied by international criminal courts (direct and indirect intent), however this does not bar the jurisdiction of the Swedish court, the Rome Statute does not obligate states to synchronize their domestic laws with its provisions.

The likely outcome of this case, on the basis of Swedish jurisdiction, the prosecution need not prove the mental requirements under Articles 25(3) (c) (d) of the Rome Statute, that the crime was for the facilitation of the commission of a crime or in furtherance of a common purpose, it suffices to prove that the defendants intended to submit requests for protection by entering into an agreement between Sudan Ltd (Lundin Oil) and the Sudanese Government and that the defendants believed that these requests made, and agreement may lead to the commission of war crimes. This proposition is in tandem with the judgement of the French cour de cassation in the Lafarge case, eight top executives of the French-Swiss Holcim group and of its subsidiary Lafarge Cement Syria charged with Complicity in crimes against humanity, inter alia. The succinct facts of the case were

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178 ibid


that Lafarge owned and ran a cement factory in Syria, in the area of Jalabiya were several armed
groups operated. The company allegedly entered into negotiations with ISIS to purchase oil and
‘pozzolan’ (a material used to make concrete) from 2012-2015 amounting to at least EUR
13’000’000, according to the judicial inquiry\textsuperscript{182}. The company also obtained official ISIS passes
for crossing checkpoints in order to maintain its production in the area, thereby risking the lives of
its employees, who suffered kidnappings and extortion, and violating a number of basic labor
rights\textsuperscript{183}.

\textsuperscript{182} Ibid, para 8
\textsuperscript{183} Ibid para 11
Chapter 5

5.1. Conclusion

The investigation into the extent business executives conducting business operations can be considered liable for complicity under international criminal law raises two perspectives. Firstly, every civilian contributing to gross violations of international law will be liable pursuant to the Rome Statute coverage of natural persons. The difficulty in establishing complicity of business executives emanates from the procedural obstacle of establishing individual substantial contribution amidst numerous perpetrators. The ICC has not convicted any business executive, either because of the rigors of determining the higher mental elements contained in Articles 25 (3)(c), (d), or the fact that national jurisdictions are fast advancing to regulate the conduct of corporations and their executives incorporated by them. In the current Russian aggression against Ukraine, the use of ‘the digitalization of war’\textsuperscript{184}, the reputational and operational risk companies face when they continue operations amidst high risk context, have created the necessary foundation for successful suits. Secondly, in considering the procedural law, the criminal responsibilities of business executives, though within the purview of the ICC –will be very difficult to succeed. In light of this, this thesis suggests the creation of a hybrid court, specifically adapted to address directors of companies acting in defiance of sanctions as law is made for man, and not vice versa.

\textsuperscript{184} Events are published real time and evidence is preserved
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