



## QUESTIONS AND ANSWERS \_\_\_\_\_

### **Accountability for alleged war crimes in Yemen – European arms exporters’ responsibility is a case for the International Criminal Court**

In a historic step, on 11 December 2019, the European Center for Constitutional and Human Rights ([ECCHR](#)) and [Mwatana for Human Rights](#) from Yemen along with its partner organizations – the International Secretariat of [Amnesty International](#), the Campaign Against Arms Trade ([CAAT](#)) based in the United Kingdom, Centre d’Estudis per la Pau J.M. Delàs ([Centre Delàs](#)) from Spain, and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa ([O.P.A.L.](#)) from Italy – submitted a Communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) on the [situation in Yemen](#).

The Communication calls on the ICC to investigate whether arms companies and government ministers and officials, by authorizing and exporting arms to members of the military coalition led by Saudi Arabia and the United Arab Emirates (UAE), have contributed to serious violations of international humanitarian law in Yemen that may amount to war crimes. The Communication argues that the economic and political actors involved in the arms trade potentially bear criminal responsibility.

**Bringing European economic and political actors before the ICC to investigate their potential involvement in alleged war crimes committed by the coalition in Yemen is a new avenue in the quest for justice. This ground-breaking Communication to the ICC challenges the role that European economic and political actors play in Yemen. Arms exports to coalition members fuel the armed conflict in Yemen, and should be stopped.**

## **1) What is this case about?**

Communications to the ICC against corporate actors are rare, let alone investigations into their activities. This Communication asks the ICC to investigate European corporate actors' responsibility, arms delivery to parties to the Yemen conflict, and contribution to the commission of alleged international crimes. The conflict in Yemen is a landmark example of how company executives and government officials could potentially be abetting international crimes committed by and in other states.

War-torn Yemen suffers from what the UN calls the biggest humanitarian crisis of our time, with the loss of civilian lives approaching 100,000. All parties to the conflict have repeatedly violated human rights and international humanitarian law, and contribute to this humanitarian disaster.

The civilian population in Yemen has been subjected to thousands of airstrikes, often indiscriminate and disproportionate, by the Saudi Arabia/UAE-led military coalition. The coalition became involved in the conflict in March 2015 and initially included Saudi Arabia, UAE, Bahrain, Kuwait, Egypt, Jordan, Morocco, Sudan and Qatar.

Despite the reported serious human rights and international humanitarian law violations, numerous European companies such as Italy, Germany, the UK, Spain and France have continued to arm coalition members. Particularly Saudi Arabia and the UAE have been supplied with weapons, ammunition and logistical support. European companies – and indirectly European states – have profited from these arms exports to the Coalition.

## **2) What is the aim in this case?**

Exporting arms, even if authorized by export licenses, is not a neutral business transaction. Through arms exports, company executives and government officials can fuel armed conflicts and can even be complicit in war crimes. This issue has been not yet been adequately addressed by law enforcement on the national level, international tribunals, or the ICC.

ECCHR, Mwatana and its partner organizations call on the Office of the Prosecutor to investigate transnational companies' legal responsibility for supplying weapons, ammunition and logistical support to a military coalition that has regularly committed serious violations of international humanitarian law in Yemen.

It is time to investigate the potential criminal responsibility of arms manufacturer executives. By seeking an investigation into European companies' executives, this Communication aims to hold powerful actors involved in the arms trade to account.

## **3) Why is it important to hold transnational arms companies to account?**

Corporate executives like to portray their actions as politically and legally neutral. But by selling surveillance technologies to repressive regimes or buying raw materials from conflict zones, corporate actors can facilitate the persecution of government critics, fan the flames of war, and in some cases, aid and abet war crimes.

The International Military Tribunal at Nuremberg and the subsequent Nuremberg trials show how international law can help challenge this. When grave crimes are committed, it is not just political and military leaders who belong in court. Corporate executives and managers' role in dictatorships and wars can and must be subject to investigation.

The arms trade has been much neglected in discussions around corporate human rights responsibilities under the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises. The Communication outlines how the arms industry must consider their marketed products and services' adverse human rights and humanitarian impact. The responsibilities under the UNGPs and OECD Guidelines effectively place a duty of care on corporate actors when they enter arms deals with parties involved in conflict.

#### **4) Do export licenses exempt companies from criminal liability?**

A state's failure to enforce relevant arms export control laws does not exempt companies from their responsibility to respect human rights and international humanitarian law.

First, a decision by government officials to grant an export license may in itself – under certain circumstances – constitute aiding and abetting war crimes. Second, the fact that a license is given does not free corporate actors from their obligation to assess the risk of the arms delivered being used to commit international crimes. Third, a license does not put a company under a duty to export. The license offers the company the opportunity to export, but also leaves the possibility *not* to export. According to the UNGPs, the companies' responsibility to respect human rights “exists over and above compliance with national laws and regulations protecting human rights,”<sup>1</sup> as these responsibilities constitute a global standard of expected conduct applicable to all businesses and in all situations.<sup>2</sup> The UNGPs also highlight that “questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties.”<sup>3</sup>

#### **5) What is the meaning and purpose of a Communication to the International Criminal Court?**

The ICC has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and starting in July 2018, the crime of aggression.

A Communication to the Office of the Prosecutor (OTP) brings a potential crime to its attention. It is an opportunity to present an assessment of facts that may amount to one or multiple crimes under the Rome Statute. It is the OTP's task to determine if the allegations have sufficient factual and legal grounds.

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1 UNGP Principle 11, Commentary.

2 Rachel Davis (Fn 1041 of submission).

3 UNGP Principle 17, Commentary.

Before any formal investigation is opened, the OTP will carry out a preliminary examination. The Court will then consider if there is a reasonable basis to proceed with an investigation, and if the case appears to fall within the jurisdiction of the Court. If so, it will authorize the commencement of an investigation.

## **6) How can corporations be held accountable under the Rome Statute of the International Criminal Court?**

The ICC in The Hague is a permanent international criminal court. The court deals with what are known as “core crimes” under international criminal law: genocide, crimes against humanity, war crimes, and beginning in July 2018, the crime of aggression. The ICC’s jurisdiction is far-reaching but not universal. The ICC can only act if: the accused is a national of a state party, the incident(s) occurred on the territory of a state party, or if a non-state party accepts the court’s jurisdiction in relation to a specific crime or situation. One hundred and twenty two countries are parties to the Rome Statute.<sup>4</sup>

According to the Rome Statute, the ICC has jurisdiction over natural persons. No article provides the ICC with jurisdiction over corporations. However, the ICC has jurisdiction over individuals acting in their corporate capacity, such as managers or executives.

## **7) For what alleged crime(s) does the Communication request an investigation?**

The Communication requests that the OTP investigates corporate executives and government officials’ potential complicity in 26 airstrikes on residential buildings, schools, hospitals, a museum, and world heritage sites. They may amount to war crimes under Articles 8(2)(c)(i), 8(2)(e)(i), (ii), (iii) and (iv) of the Rome Statute, namely intentionally directing attacks against the civilian population, and buildings dedicated to education, art, historic monuments, hospitals and places where the sick and wounded are collected.

## **8) Whom does the Communication target?**

The Communication addresses supply of arms by several manufacturing companies in Europe to members of the Saudi Arabia/UAE-led military coalition.

It focusses on the companies involved in producing Eurofighter Typhoon military aircraft, the Tornado and Mirage aircraft, and refueling planes, as well as the subsequent exports of spare parts and maintenance to keep these aircraft operational over the course of the conflict.

The Communication asks the OTP to investigate: Airbus Defence and Space S.A. (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (UK), Leonardo S.p.A. (Italy), and Dassault Aviation S.A. (France).

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<sup>4</sup> Full list available here: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)

In addition, the Communication analyses the companies' role in producing guided bombs, bombs and targeting pods used by the military aircraft. It points at the exports of MK 80 series bombs, Paveway IV guided bombs, and Storm Shadow and Brimstone Missiles, all evidenced to have been used in the conflict. The companies involved are: Raytheon Systems Ltd. (UK), MBDA France S.A.S. (France), MBDA UK Ltd. (UK), Rheinmetall AG (Germany) through its subsidiary RWM Italia S.p.A. (Italy), and Thales (France).

Some of these arms – as evidenced in the Communication – have been used in airstrikes in Yemen that may amount to war crimes. Other exported arms have allegedly contributed to the Coalition's capacity to carry out such airstrikes.

Therefore, this Communication requests the OTP to investigate the individual criminal responsibility of some of these companies' high-level executives. In addition, it asks the OTP to investigate the responsibility of government officials who authorized the exports of arms or related parts and components produced by the respective European companies.

## **9) What information does the Communication provide?**

The 350-page Communication details four types of information. First, evidence of 26 airstrikes that may amount to war crimes. This is substantiated by evidence gathered by Mwatana for Human Rights through on-the-ground research in Yemen, including visits to attack sites, and testimony from women and men who witnessed and were harmed by Coalition airstrikes on civilians, civilian houses, cultural property, hospitals and schools. Photographic evidence taken by Mwatana and satellite imagery, as well as a large number of public documents and reports were also used as sources.

Second, the Communication provides an in-depth overview of arms exports from the respective countries to Saudi Arabia and the UAE. This is substantiated by information obtained by ECCHR's partners through previous Freedom of Information Requests or other research. Furthermore, government reporting and other public documents are used.

Third, it details the companies' structures, governance and corporate social responsibility policies.

Lastly, the Communication discusses the applicable legal framework, questions of jurisdiction, admissibility, gravity and modes of liability. It then applies this to the factual framework, concluding that an investigation by the OTP is warranted.

## **10) Which organizations were involved in the Communication?**

The Communication was submitted by the Berlin-based European Center for Constitutional and Human Rights (ECCHR), Mwatana for Human Rights from Yemen, the International Secretariat of Amnesty International, the Campaign Against Arms Trade (CAAT) based in the United Kingdom, Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs) from Spain, and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.) from Italy.

ECCHR drafted the Communication with support of and based on information gathered by Mwatana and the other partner organizations.

## **11) How did Mwatana for Human Rights contribute to the Communication?**

Mwatana for Human Rights is an independent Yemeni organization involved in defending human rights through field research, writing reports and gathering other forms of documentation of violations by all sides to the current conflict in Yemen. It gives victims of human rights violations legal support and assistance, and advocates for better compliance with international law at local and international levels, as well as justice, accountability and redress for crimes committed in Yemen.

Mwatana's field researchers investigate incidents of international human rights law and international humanitarian law violations. They take witness testimonies, collect photographs and videos, and scrutinize and study pieces of evidence to analyse attacks in accordance with local and international laws.

Since 2017, ECCHR has cooperated with Mwatana in strategizing different legal avenues and means to address the crimes in Yemen and to hold accountable those who fuel the armed conflict.

For the Communication Mwatana provided advice on the legal strategy and approach and particularly, input on the background of the conflict in Yemen as well as on the pattern of warfare outlined.

Most of the incident sites described in the Communication were visited and documented by Mwatana's field researchers. They interviewed witnesses and victims, took photos of the destruction caused and arms used. Mwatana's documentation of the incidents in Yemen is key to this Communication.

## **12) What was ECCHR's role?**

ECCHR has long explored the arms trade topic. It has worked on the role of European companies and government officials in the conflict in Yemen since 2015.

ECCHR has also filed other criminal complaints against Europe-based corporations for their alleged complicity in crimes committed in the context of repressive regimes or in conflict areas, such as the [Lafarge/Syria case](#).

## **13) What can be achieved by submitting this Communication to the International Criminal Court?**

A communication to the ICC presents the opportunity to report an assessment of facts that may amount to one or multiple crimes under the Rome Statute to the Office of the Prosecutor (OTP). It is the OTP's task to determine whether the suspect is guilty of these crimes.

The OTP must open an investigation to achieve accountability for any crimes committed by the Coalition in Yemen, and investigate the role corporate executives may have played in enabling the commission of any such crimes.

The potential outcome of submitting a Communication to the ICC is the opening of a preliminary investigation into the situation in Yemen. It could also result in the exercise of positive complementarity by the OTP by encouraging national investigations into arms exports that may have contributed to the commission of alleged crimes in Yemen.

In addition, national prosecutors could start to investigate arms exports to Coalition members by arms manufacturing companies incorporated in their jurisdictions.

#### **14) Why did ECCHR, Mwatana and its partners choose this avenue?**

Investigating the crimes alleged in the Communication at a domestic level is complicated due to the transnational character of the corporations involved, their complex structures, the overall opaqueness of data on arms exports, a lack of willingness and ability to investigate companies, and the fact that the main crimes are alleged to have been committed in Yemen. Currently, there are no national investigations into this matter, resulting in a lack of prosecutions in European domestic jurisdictions.

Pursuing accountability for Yemen would not only represent a step towards closing this corporate impunity gap, but would also provide the OTP with a sound basis to investigate important actors' role in the war in Yemen. The European dimension, and potential complicity, in serious violations in Yemen that may amount to international crimes needs deserves more attention, including criminal investigations.

Moreover, the Communication might serve as a model and inspire other civil society organizations that are confronted with alleged crimes committed in their countries through the use of foreign arms, and that would like to file criminal complaints on similar grounds.

Using a criminal law route can contribute to the ongoing public law challenge against arms export licenses. The Communication shows that the question of the legality of arms exports to Saudi Arabia and the UAE is not only one of public law. When making the wrong decisions on arms exports, government officials as well as corporate actors may also be criminally liable. This strengthens the importance of licensing decisions, as those who grant them must also consider aspects of international criminal law.

#### **15) What other legal means and avenues are possible to tackle corporate responsibility in alleged war crimes (in Yemen)?**

It is possible to file national criminal complaints that ask domestic authorities to investigate their jurisdictions' arms exports. For example, ECCHR, Mwatana for Human Rights and [Rete Disarmo](#) (Italy) filed a criminal complaint in April 2018 with the public prosecutor in Rome, asking for an investigation into arms exports by RWM Italia, a Rheinmetall subsidiary, to Saudi Arabia and their use in the Yemen war.

Under the Rome Statute, a case is not admissible before the ICC if it is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution.

## 16) Has ECCHR filed other Communications to the International Criminal Court?

Prior to submitting the Communication on arms exports to Saudi Arabia, the UAE and its coalition partners to the OTP, ECCHR filed several other communications.

In January 2014, ECCHR asked the ICC to open investigations into the role and [responsibility of British military officials in Iraq](#). The communication documented 85 cases and provided evidence of the widespread and systematic abuse of hundreds of detainees by UK armed forces personnel. In May 2014, the OTP reacted and re-opened a preliminary examination. After two follow-up communications by ECCHR, in 2017 the OTP confirmed that there is a reasonable basis to believe that members of UK forces committed war crimes in Iraq – including wilful killing/murder, torture and inhuman/cruel treatment. ECCHR is currently pushing for a decision following a third submission in July 2019.

ECCHR is also taking on [grave human rights violations in Colombia](#) before the ICC. Together with its Colombian partner organizations, ECCHR is calling on the ICC to take action in regard to violence against trade unionists and human rights defenders, as well as on sexualized violence against women in the armed conflict in Colombia.

ECCHR has appeared as an expert before the ICC in two amici curiae briefs. The first concerned the court's jurisdiction over crimes allegedly committed by Myanmar against the Rohingya, with a particular focus on sexual and gender-based crimes. The second addressed the court's jurisdiction to investigate international crimes committed in Afghanistan, with a special focus on the US torture program.

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