

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

### **Accountability for alleged war crimes in Yemen – the responsibility of European arms exporters is a case for the ICC**

In a historic step, on 11 December 2019, the European Center for Constitutional and Human Rights (ECCHR) along with its partner organisations – 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.) – submitted a communication ('the 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, through authorizing and exporting arms to members of the Saudi/UAE-led coalition, have been contributing 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. With this ground-breaking Communication to the ICC, ECCHR and its partners are challenging 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 the responsibility of European corporate actors' and their delivery of arms to parties to the Yemen conflict as a contribution to the commission of alleged international crimes. The conflict in Yemen is a landmark example of how company officers as well as government officials could potentially be acting as abettors to international crimes committed by and in other states.

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

Much of the damage done to the civilian population in Yemen is a result of thousands of air strikes, often indiscriminate and disproportionate, by forces of the military coalition (the 'Coalition') led by Saudi Arabia and the United Arab Emirates (UAE). The Coalition became involved in the conflict in March 2015 and was initially of Saudi Arabia, UAE, Bahrain, Kuwait, Egypt, Jordan, Morocco, Sudan and Qatar.

Despite the reported serious human rights and international humanitarian law violations, numerous companies from European countries 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 of ECCHR's work on this case?**

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

ECCHR and its partner organizations call on the OPT to investigate the legal responsibility of transnational companies for supplying weapons, ammunition and logistical support to a Coalition that has committed serious violations of international humanitarian law in Yemen on a regular basis:

It is time that the potential criminal responsibility of officers from the arms manufacturing companies is investigated. By seeking an investigation into European company officers this Communication is seeking to hold to account powerful actors involved in the arms trade.

## **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, even aid and abet war crimes.

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

Also, 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. ECCHR outlines in the Communication how especially the arms trade industry must consider the adverse human rights and humanitarian impact of their marketed products and services. These responsibilities under the UNGPs and OECD Guidelines effectively place a duty of care on corporate officials when entering into arms deals with parties involved in conflicts.

#### **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 of government officials to grant an export license in itself may – under certain circumstances - constitute aiding and abetting war crimes. Second, the fact that a license is given does not free company officials from the obligation to assess the risk of the arms delivered to be used in the commission of international crimes. Third, by receiving a license the company is not under a duty to export. It 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 from July 2018 over the crime of aggression.

A Communication to the OTP brings a potential crime to its attention. It provides the possibility to present an assessment of facts that may amount to a crime or multiple crimes under the Rome Statute. It is the task of the OTP to determine if the allegations have sufficient factual and legal grounds.

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 – as of July 2018 – also 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 jurisdiction of the court in relation to a specific crime or situation.

According to the Rome Statute the ICC has jurisdiction over natural persons. There is no article that provides the ICC with jurisdiction over corporations. However, the ICC has jurisdiction over individuals acting in their corporate capacity such as managers or executive directors.

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

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<sup>1</sup> UNGP Principle 11, Commentary.

<sup>2</sup> Rachel Davis (Fn 1041 of submission)

<sup>3</sup> UNGP Principle 17, Commentary.

This Communication requests an investigation by the OTP into the potential complicity of corporate officers and government officials in [26] incidents of airstrikes on residential buildings, schools, hospitals, a museum and world heritage sites which may amount to war crimes under articles 8(2)(c)(i), and 8(2)(e)(i), (ii), (iii) and (iv) of the Rome Statute, namely intentionally directing attacks against the civilian population and against buildings dedicated to education, art, historic monuments, hospitals and places where the sick and wounded are collected

## **8) Who is the target of this Communication?**

This Communication addresses the supply of arms by several arms manufacturing companies in Europe to members of the Coalition.

ECCHR and its partners are focusing on the companies involved in the production of Eurofighter Typhoon military aircrafts, the Tornado aircraft, the Mirage aircraft, and refueling planes, as well as the subsequent exports of spare parts and maintenance to keep these aircrafts operational during the course of the conflict.

The companies which the OTP is asked to investigate are: 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).

In addition the Communication analyses the role of companies producing guided bombs, bombs and targeting pods used by the military aircrafts. It points at the exports of MK80-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 arms exported 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 the high level officials of these companies. In addition, it asks the OTP to investigate the responsibility of the government officials who authorized these arms exports for the respective European companies which have produced these arms or related parts and components.

## **9) What information is the Communication based on?**

The over 35000-page Communication, first details [26] airstrikes that may amount to war crimes. This is substantiated by evidence gathered by Mwatana for Human Rights through its on-the-ground research in Yemen including visits to the sites of attacks and collection of testimonies from women and men who witnessed and were harmed by Coalition airstrikes in Yemen on civilians, on civilian houses, cultural property, hospitals and schools. In addition to these testimonies, photographic evidence and satellite imagery, as well as a large number of public documents and reports, have been used as sources.

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

Third, the corporate structure, corporate governance and corporate social responsibility policies of the companies discussed are detailed.

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

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

The Communication is submitted by 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 including its legal reasoning, based on the information gathered by itself and its partner organizations.

## **11) What role does Mwatana for Human Rights play?**

Mwatana for Human Rights is an independent Yemeni organization, based in Yemen, involved in defending human rights, through field research, the publication of reports and other forms of documentations on violations by all sides to the current conflict, as well as through legal support and assistance to the victims of human rights violations, and advocacy at the local and international levels for better compliance with international law, and accountability and redress for past wrongs.

Mwatana's field researchers conduct field visits to research incidents of violations of international human rights law and international humanitarian law. 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.

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

## **12) What is the role of ECCHR?**

ECCHR has long been exploring the topic of arms trade. For three years it has been working on the role of European companies and government officials in the conflict in Yemen.

ECCHR has 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 possibility to report to the OTP an assessment of facts that may amount to a crime or multiple crimes under the Rome Statute. It is the task of the OTP to determine whether or not the suspect is guilty of these crimes.

An investigation must be opened by the OTP in order to achieve accountability for any crimes committed by the Coalition in Yemen and to investigate the role corporate officers may have played in enabling the commission of any such crimes.

The potential outcome of submitting a Communication to the ICC is that it could lead to open 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 use a Communication to the ICC as an 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, the 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 is a lack of national investigation into this matter and a resulting lack of prosecution in the domestic jurisdictions in Europe.

Pursuing accountability efforts 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 the role of important actors in the war in Yemen. The European dimension and potential complicity in serious violations in Yemen that may amount to international crimes needs more attention and is deserving of criminal investigations.

Moreover, the Communication might serve as a model and inspiration for other civil society organizations that are confronted with alleged crimes committed in their countries through the use of foreign produced arms and who 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 licences. 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, both government officials as well as corporate actors may be also criminally liable. This claim strengthens the importance of licensing decisions, as they must also consider international criminal law aspects.

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

It is possible to file criminal complaints in the national jurisdictions requesting domestic authorities to investigate the arms exports undertaken from their jurisdiction. For example in Italy, ECCHR, Mwatana for Human Rights (Yemen) and Rete Disarmo (Italy) filed a criminal complaint in April 2018 with the prosecutor in Rome for an investigation into arms exports by RWM Italia to Saudi Arabia and their use in the Yemen war.

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

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

Prior to submitting the Communication on arms exports to Saudi Arabia, the United Arab Emirates and its coalition partners to the OTP, ECCHR has filed several others:

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 currently pushes for a decision following another July 2019 submission.

ECCHR is also tackling 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 appeared before the ICC as expert with two amici curiae briefs. The first one 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 expert submission addressed the jurisdiction of the Court to investigate international crimes committed in Afghanistan, with a special focus on the US torture program.



**As of December 2019**

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| **legation against the named companies and relevant company directors listed here.** I would remove this sentence.