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NEUTRAL BUSINESS ASSISTANCE AND THE LIMITS OF COMPLICITY UNDER INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Business transactions between corporations and actors involved in grave human rights violations present significant challenges for the assessment of corporate criminal liability. This is particularly evident in cases of "neutral business assistance," which refer to business conduct that appears legitimate on the surface and falls within day-to-day business operations but nonetheless contributes to the crime. An example of neutral business assistance is selling generic goods (for example, computer technology) legally at market rates, without the explicit intent to aid criminal activity, that increases the perpetrator's capacity to carry out human rights violations. In such cases, discerning the point at which a legitimate business transaction becomes a wrongful act of complicity remains a complex and unresolved issue in international criminal law.

The doctrinal requirement for the wrongful act of complicity is that the assistance provided must have a "substantial effect" on the commission of the crime. Traditionally, this assessment has been grounded in a narrow factual analysis that primarily emphasizes the gravity of harm resulting from aiding and abetting. This one-dimensional approach to wrongfulness, however, oversimplifies the ethical complexities of criminal liability. It overlooks broader normative considerations and the positive societal impact of human cooperation. This article challenges the prevailing harm-based paradigm and introduces a more nuanced methodology to assess the wrongfulness of aiding and abetting across various contexts. To do

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so, the article embraces a broader perspective on the "substantial effect" criterion, one that takes into account the crucial normative dimension of balancing the harmful effects of aiding and abetting with their corresponding social benefits. As a result, the article outlines a refined theory of the actus reus of complicity that enables a more holistic evaluation of accomplices' conduct.

I. INTRODUCTION

Corporations across the globe regularly engage in business transactions with states and non-state actors accused of severe human rights violations, some of which amount to international crimes. Corporate conduct of this nature has deep historical roots, including in Nazi Germany, where businesses were directly implicated in atrocities.[1] Regrettably, this trend persists and continues to be associated with some of the most brutal conflicts globally.[2]

In recent years, the significance of corporate liability in international crimes has garnered increasing attention in academic discourse,[3] and national civil litigation has made notable strides in holding corporations accountable

1. In Nazi Germany, corporations supplied poisonous gas for extermination, sought slave labor for their factories, participated in the deportation and mistreatment of enslaved people, donated funds to support criminal organizations, and profited from the plunder of property in occupied Europe. *See* Int'l Comm'n of Jurists, *Facing the Facts and Charting a Legal Path*, 1 REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 1 (2008); Marina Aksenova, *Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen*, 30 WASH. INT'L L.J. 255, 256–57 (2021).

2. *See* Christoph Burchard, *Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime": Initial Enquiries Concerning the Rome Statute*, 8 J. INT'L CRIM. JUST. 919, 925 (2010); Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind*, 5 INT'L CRIM. L. REV. 623, 623–24 (2005); Florian Jessberger & Julia Geneuss, *Introduction to Symposium*, 8 J. INT'L CRIM. JUST. 695, 695 (2010); EUR. CTR. FOR CONST. & HUM. RTS., MADE IN EUROPE, BOMBED IN YEMEN: HOW THE ICC COULD TACKLE THE RESPONSIBILITY OF ARMS EXPORTERS AND GOVERNMENT OFFICIALS, at 2, www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf.

3. *See generally* Jessberger & Geneuss, *supra* note 2 (describing a special journal issue dedicated to the topic of transnational business and international criminal law); *see also* Kai Ambos, *International Economic Criminal Law: Criminal Responsibility Under International Law*, 29 CRIM. L.F. 499 (2018); Larissa van den Herik, *Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 350 (Carsten Stahn & Larissa van den Herik eds., 2010); Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841 (2009); Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955 (2008).

for their involvement in human rights violations.[4] Criminal liability of corporations for international crimes, however, remains a tantalizingly elusive target despite first being floated in the 1950s.[5] At the international level, the scope of criminal responsibility revolves exclusively around individuals, leaving the issue of corporate liability largely unaddressed.[6]

Criminally relevant corporate conduct is often described as *enabling*, *exacerbating*, or *facilitating* the commission of severe human rights abuses.[7] However, applying criminal law's regulatory framework to such situations presents a unique set of challenges and is fraught with various ambiguities.[8] While the academic community has made headway in resolving some contentious points, whether *neutral business assistance* constitutes criminal complicity remains a critical question.

Neutral business assistance refers to corporate conduct that arises from ordinary day-to-day commercial transactions and is not specifically directed toward the commission of crimes.[9] An example of neutral business assistance is the lawful sale of weapons at standard market rates without explicit intent to support criminal activities. On their face, such actions may not appear to implicate business officials driven primarily by profit motives, as engaging in routine business with morally compromised actors is typically not considered illegal.[10] However, discerning the point at which an ordinary business transaction becomes a wrongful act of complicity remains a complex and unresolved issue.[11]

Complicity as a legal doctrine has a rich history in both domestic and international criminal law as a mechanism to assign culpability to those who

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4. *See* Wolfgang Kaleck & Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. INT'L CRIM. JUST. 699, 701 (2010).

5. *See* Carsten Stahn, *Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RSRV. J. INT'L L. 91, 100 (2018).

6. *See* Thomas Weigend, *Societas delinquere non potest? A German perspective*, 6 J. INT'L CRIM. JUST. 927 (2008); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

7. Int'l Comm'n of Jurists, *supra* note 1, at 9.

8. *See* Ambos, *supra* note 3, at 549–59.

9. For a comprehensive definition of neutral business assistance, see *infra* Part II.B.

10. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 268–69 (S.D.N.Y. 2009) ("[T]he sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor.").

11. *See* Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability*, 50 TEX. INT'L L.J. 403, 405 (2015); Kaleck & Saage-Maaß, *supra* note 4, at 720 ("The challenge in concrete individual cases is nonetheless to determine when neutral business activities—such as providing goods or funds—have actually turned into legally relevant behaviour per se. In cases that concern neutral business actions a line must be drawn between the morally condemnable behaviour of 'doing business with a bad actor' and criminally relevant contributions to another entity's international crimes.").

aid and abet the commission of crimes.[12] According to customary international law, accomplices bear responsibility when they *knowingly contribute* to the perpetration of international crimes.[13] This liability is structured on two foundational elements: the actus reus (the contribution itself) and the mens rea (the knowledge of contributing).[14] Despite their fundamental roles, these elements are often subject to confusion and varied interpretations in both practice and academic discourse.[15] Much scholarly discussion has been invested in determining the appropriate mens rea, coalescing into the so-called "knowledge vs. intent" debate.[16] The discourse now seems to have converged to a consensus favoring the knowledge approach, suggesting that an accomplice may be held accountable for complicity simply if they are aware that their assistance contributes to a criminal act.[17]

The actus reus criterion remains controversial.[18] While it is understood that not all contributions to a crime are inherently wrong and it is not necessary for the accomplice's contribution to be a *sine qua non* or "but for" cause of the crime,[19] the minimum level of involvement that warrants complicity is unclear.[20] The law dictates that assistance must have had a "substantial" or

12. MARINA AKSENOVA, COMPLICITY IN INTERNATIONAL CRIMINAL LAW 54–55 (2016).

13. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶¶ 353–485 (Special Ct. for Sierra Leone Sept. 26, 2013), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf.

14. *See* Nikola R. Hajdin, *Responsibility of Private Individuals for Complicity in a War of Aggression*, 116 AM. J. INT'L L. 788, 789 (2022).

15. Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1595 (2019) ("Courts have persistently found the varied standards for aiding and abetting liability under international law deeply confusing. That confusion has, in turn, led to inconsistent decisions by the courts.").

16. For an explanation of this debate, see *infra* Part II.B.

17. *See* Miles Jackson, *Virtuous Accomplices in International Criminal Law*, 68 INT'L COMP. L.Q. 817, 821–22 (2019); Angela Walker, *The Hidden Flaw in* Kiobel*: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting Is Knowledge*, 10 NW. J. INT'L HUM. RTS. 119, 121 (2011); Twitter, Inc. v. Taamneh, 598 U.S. 471, 495 (2023) ("a defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism"); Doe v. Cisco Sys., 73 F.4th 700, 729 (9th Cir. 2023) ("A growing body of relevant material supports the universality and specificity of the knowledge standard for aiding and abetting liability under customary international law."). *See also infra* Part II.A.

18. Hathaway et al., *supra* note 15, at 1610–11; James G. Stewart, *Complicity*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 534, 549–50 (Markus Dirk Dubber & Tatjana Hörnle eds., 2014).

19. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 357 (1985).

20. *See* Joachim Vogel, *How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models*, *in* CAHIERS DE DÉFENSE SOCIALE 151, 160 (2002) (explaining that the "real problem is to define the 'minimum threshold' of participation and responsibility, in particular in systemic contexts. Is a person who simply passes on an order to commit an

"significant" impact on the crime,[21] but this standard is evaluated on a case-by-case basis because there is no guiding framework that specifies the types of conduct that are tied closely enough to the crime to be considered complicit.[22] This ambiguity has led to a belief that neutral business assistance does not meet the threshold for complicity unless the provided means were specifically designed or explicitly intended to facilitate the crime's commission.[23] Hence, the prevailing view remains that corporate conduct amounts to complicity only when the aim of the business transaction is to supply the means by which international crimes are perpetrated.[24]

This article challenges the existing understanding of corporate criminal liability in international criminal law and proposes an enhanced methodological framework for assessing the wrongfulness of complicity. As will be shown, the minimum level of participation that reaches the level of a substantial effect is *in fact* very low, with even seemingly trivial assistance typically qualifying as aiding and abetting.[25] However, assessing wrongfulness of complicity based solely on the factual aspects of the conduct (the gravity of harm induced by aiding and abetting) oversimplifies the ethical complexities of criminal liability.[26] Work of this kind demands a comprehensive normative appreciation of the accomplice's conduct that considers both its positive and negative impacts within the broader societal context.

This normative assessment is particularly prudent in cases of neutral business assistance, where human cooperation normally holds great societal value despite its detrimental consequences. Regrettably, courts have largely overlooked this important dimension and have primarily relied on the severity of harm induced by the business transactions as the sole determinant of a substantial effect. Recognizing the conceptual limitations of a one-dimensional

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offence responsible and participant? What about a person who is engaged in per se legitimate, usual business which, as a matter of fact, furthers criminality, e.g. sells certain chemical substances to a potential terrorist organisation? And which degree of authority is necessary to trigger liability in systemic contexts – is the truck driver who knowingly brings innocent victims to a concentration camp (co-) responsible for the atrocities committed there?").

21. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶ 401 (Special Ct. for Sierra Leone Sept. 26, 2013); Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (Dec. 16, 2011).

22. Manuel Ventura, *Aiding and Abetting*, *in* MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW 173, 206 (Jérôme de Hemptinne, Robert Roth, & Elies van Sliedregt eds., 2019).

23. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1090, 1096 (C.D. Cal. 2010) ("ordinary commercial transaction[s], without more, do not violate international law.").

24. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 259 (S.D.N.Y. 2009); Twitter, Inc. v. Taamneh, 598 U.S. 471, 500 (2023) (requiring "a strong showing of assistance and scienter" to consider a conduct an act of aiding and abetting).

25. *See infra* Parts III.D and IV.A.

26. Wrongfulness, within the context of criminal law, refers to conduct that violates a prohibitory norm or a legal prohibition. It signifies that the act in question is morally and legally unjustifiable. *See* Nikola R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, 51 GA. J. INT'L & COMPAR. L. 1, 35 (2022).

factual assessment, some courts suggested an additional wrongfulness criterion of assistance being "specifically directed" toward facilitating the crime. This proposition's conceptual flaws quickly became apparent, leading to its rejection in international criminal law.[27]

This article presents a refined theory of the actus reus of complicity. Part II provides an in-depth overview of the complicity framework in international crimes, with a specific focus on the issues surrounding corporate criminal liability for neutral business assistance. Building on this foundation, Part III draws upon insights from the comparative criminal law literature to examine the conceptual boundaries of the "contribution" requirement in aiding and abetting, considering both its factual and normative dimensions. The factual dimension is based on causation and risk analysis, while the normative assessment entails a delicate balancing act between two competing sets of values—the deleterious effects of aiding and abetting versus the social benefits of such forms of human cooperation. Ultimately, Part III proposes a methodological framework for assessing the wrongfulness of complicity. Moving forward, Part IV addresses the conceptual confusion surrounding the terms "substantial," "significant," and "any contribution," three terms that are often used in international criminal law to delineate the minimal threshold of participation required for complicity. Part IV highlights the exceptionally low factual threshold of complicity and adds further nuances to the proposed framework for evaluating putative complicit conduct. Subsequently, Part IV examines three distinct scenarios of neutral business assistance: providing dangerous materials, supplying generic goods and services, and engaging in ongoing business cooperation. For each scenario, the societal benefits of human cooperation are carefully weighed against the potential harmful effects in normative arguments to determine the dominant factor. Finally, Part V brings the discussion to a close by summarizing the key findings and emphasizing the significance of this article in advancing the understanding of corporate criminal liability.

II. CORPORATE COMPLICITY IN INTERNATIONAL CRIMES

A. *Complicity under International Criminal Law*

Complicity plays a crucial role in the landscape of international criminal justice, which addresses complex cases of systemic violence and widespread human rights abuses. International crimes typically involve collaborative efforts among many individuals, although only some of them carry out heinous acts.[28] In these cases, ensuring the accountability of not only the

27. *See infra* Part IV.A.

28. André Nollkaemper, *Introduction*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 1, 16 (André Nollkaemper & Harmen van der Wilt eds., 2009); Elies van Sliedregt, *The Curious Case of International Criminal Liability*, 10 J. INT'L CRIM. JUST. 1171, 1174

direct perpetrators, but also those who contributed to the overall criminal endeavor, is imperative to prevent any evasion of justice.[29]

The concept of complicity has long been integral to customary international law,[30] a position cemented with the adoption of the Rome Statute of the International Criminal Court ("Rome Statute").[31] This landmark legal document introduced the first statutory provisions specifically addressing aiding and abetting in the realm of international criminal law. Articles 25(3)(b)–(d) of the Rome Statute enumerate a variety of prohibited actions, including but not limited to ordering, soliciting, inducing, aiding, abetting, and otherwise assisting in the commission of a crime.[32] They all fit into two primary paradigms: the provision of assistance (aiding) to the perpetrator committing the crime and the act of influencing (abetting) the perpetrator's decision to carry out the crime.[33]

In customary international law, aiding and abetting are defined as providing "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[34] These two modes of complicity, while closely linked, have distinct qualitative identities. David Luban encapsulates this distinction effectively: "Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. That's abetting. Supervisors provide assistance and resources. That's aiding."[35] Similarly, the International Criminal Court ("ICC") defines aiding as the "provision of practical or material assistance"[36] and

(2012); Nikola R. Hajdin, Individual Responsibility for the Crime of Aggression 22 (2021) (Ph.D. dissertation, Stockholm University) (on file with author).

29. Embracing this approach aligns international criminal justice with its core objectives of combating impunity and promoting accountability for the most serious crimes through the prosecution of aiding and abetting. *See* Hathaway et al., *supra* note 15, at 1597.

30. Brief of Int'l L. Scholars, Former Diplomats, & Pracs. as Amici Curiae Supporting Respondents, Nestlé USA, Inc. v. Doe, 593 U.S. 1 (2020) (Nos. 19-416 & 19-453), www.supremecourt.gov/DocketPDF/19/19-416/158399/20201021145537418_19-416%20-%20453%20BSAC%20International%20Law%20Scholars.pdf.

31. Rome Statute of the Int'l Crim. Ct., 17 July 1998, 2187 U.N.T.S. 90 art. 25 [hereinafter Rome Statute].

32. These provisions emerged from a compromise among states during the negotiation of the Rome Statute. *See* Kai Ambos, *The ICC and Common Purpose: What Contribution Is Required Under Article 25(3)(d)?*, *in* THE LAW AND PRACTICE OF THE ICC: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS 592, 592–93 (Carsten Stahn ed., 2015).

33. *See* Kadish, *supra* note 19, at 342. In German law, incitement and aiding and abetting are addressed separately. Incitement, as defined in StGB § 26, pertains to the act of persuading or inducing someone to commit a crime. By contrast, aiding and abetting, which is covered under StGB § 27, encompasses both material (physical) and psychological support provided to another person in the commission of a crime.

34. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

35. David Luban, *Contrived Ignorance*, 87 GEO. L. REV. 957, 964 (1999).

36. Prosecutor v. Bemba, ICC-01/05-01/13-1989, Trial Chamber VII Judgment, ¶ 88 (Oct. 19, 2016) ("[T]he term 'aid' overlaps with the term 'otherwise assists' within the meaning of Article 25(3)(c) of the Statute.").

abetting as the "moral or psychological assistance" offered to the principal perpetrator.[37] This latter category may manifest as encouragement or even sympathy toward the commission of the offense. In certain situations, the support or encouragement provided does not have to be expressed explicitly. In fact, even the mere presence of an individual at the scene of a crime or in its vicinity as a "silent spectator" can be interpreted as an implicit approval or encouragement of the criminal act.[38]

Not all forms of aiding and abetting that affect the crime ultimately result in complicity. The structure of complicity rules needs to take into account the broader interests of justice by balancing the potential societal benefits of human cooperation against the detrimental effects of aiding and abetting unlawful activities.[39] This is the core claim of this article. In other words, there may be situations in which assistance or influence, despite initially appearing harmful, ultimately reduces the overall harm.[40] For instance, if a state provides to another state intelligence that enables the commission of various international crimes, this action might appear harmful at first glance. However, if this same intelligence ultimately leads to the dismantling of a dangerous terrorist group posing significant threats to national security, the net effect could arguably be beneficial.[41] It is therefore important to consider such complexities and potentialities when assessing the moral and legal nuances of aiding and abetting.

That said, the scope of complicity rules is primarily determined by the interplay of two legal concepts: actus reus and mens rea.[42] The former refers to the "conduct" or "physical" aspects of the offense, while the latter addresses the "fault" or "mental" elements involved.[43] Put differently, actus reus pertains to the action taken, and mens rea concerns the mindset or intent behind the action.

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37. *Id.* ¶ 89.

38. Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Chamber I Judgement, ¶ 87 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999) ("By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment.").

39. *Cf.* Marko Milanović, *Intelligence Sharing in Multinational Military Operations and Complicity Under International Law*, 97 INT'L L. STUD. 1269, 1274 (2021) ("Any complicity rule must delineate between those interactions between legal or natural persons that should be deemed as wrongful or harmful and those that are not (and may indeed be socially beneficial). The design of a complicity rule is, therefore, fundamentally about striking a fair balance. A very narrow rule may enable too many socially harmful interactions between two persons, while a very broad one may inhibit useful cooperation too much.").

40. For further elaboration on this point, see *infra* Part III.

41. *See* Milanović, *supra* note 39, at 1390–91.

42. *See* Nikola R. Hajdin, *The Actus Reus of the Crime of Aggression*, 34 LEIDEN J. INT'L L. 489, 490 (2021).

43. *See* ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 83 (7th ed. 2013).

Among scholars, a great deal of attention has been given to determining the appropriate mens rea standard for complicity, leading to what is commonly known as the "knowledge vs. intent" debate.[44] Under the knowledge approach, an accomplice can be held culpable if they are aware that their assistance or involvement is contributing to the principal wrongdoing.[45] The emphasis is on understanding and appreciating the relevant circumstances in which an accomplice's assistance may contribute to a crime. Accordingly, an accomplice can be blamed for a crime if they are aware of the essential elements of the crime that their support will facilitate, even if they do not share the perpetrator's specific intent.[46]

On the other hand, the intent approach stipulates that accomplices must act with the express purpose of facilitating the commission of the crime.[47] The interpretation of "purpose" in this context is crucial, as it often serves as the deciding factor in determining the boundaries of complicity.[48] If "purpose" is tied strictly to the commission of the crime, any assistance not explicitly aimed at facilitating the crime falls outside the scope of complicity.[49] However, if "purpose" pertains to the act of criminal facilitation itself—an action deemed as aiding and abetting—then awareness of the essential elements of one or multiple potential crimes resulting from their intended support is sufficient for complicity.[50]

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44. *See* Kirsten J. Fisher, *Purpose-based or Knowledge-based Intention for Collective Wrongdoing in International Criminal Law?*, 10 INT'L J.L. CONTEXT 163 (2014).

45. Jackson, *supra* note 17, at 821.

46. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

47. *See* Rome Statute, *supra* note 31, art. 25(3)(c) (stating that an accomplice bears responsibility and can be subject to punishment if "[f]or the purpose of facilitating the commission of the crime," they aid, abet, or otherwise assist in the commission or attempted commission of a crime, including providing the necessary means for its execution.).

48. Sabine Michalowski, *The Mens Rea Standard for Corporate Aiding and Abetting Liability – Conclusions from International Criminal Law*, 18 UCLA J. INT'L L. & FOREIGN AFFS. 237, 239–40 (2014) (stressing the importance of determining the mens rea for the future prosecutions of corporative conduct).

49. *See* Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 764–65 (2010).

50. Thomas Weigend argues powerfully for this approach. *See* Thomas Weigend, *How to Interpret Complicity in the ICC Statute*, JAMES G. STEWART BLOG (Dec. 15, 2014), http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute ("[T]he assistant's purpose thus is not the crime but the facilitation. This means that the assistant's objective must be to facilitate the act of the main perpetrator; but her will need not encompass the result of the perpetrator's conduct. For example, if an arms trader sells weapons to a dictator, he will be punishable only if he does so with the purpose of facilitating the dictator's use of armed force; but the fact that the armed force will be used against unarmed civilians and will therefore constitute a crime against humanity need not be the arms dealer's 'purpose.'").

The debate between the knowledge and intent approaches in customary international law has largely been settled in favor of knowledge.[51] Nonetheless, the intent camp remains persistent. In the United States, federal courts initially applied the knowledge standard in tort cases concerning corporate involvement in international crimes,[52] but later shifted toward the intent standard.[53] While the ad hoc international criminal tribunals predominantly adhered to the knowledge standard,[54] the ICC embraced the intent approach as stipulated in Article 25(3)(c) of the Rome Statute, albeit without a clear explanation of its exact interpretation.[55] The ICC, however, applies the knowledge approach in a separate complicity provision—Article 25(3)(d)(ii) of the Rome Statute—that implicates those who aid and abet a group committing a crime.[56]

All this being said, there are reasons to believe that the mens rea standard for complicity in international criminal law should not present significant barriers when attributing blame in instances of corporate complicity. Large-scale atrocities, such as persistent and severe human rights violations, are seldom planned in secrecy. In this globally interconnected era, the potential criminal intent of business associates can frequently be discerned from a range of sources. This includes publicly available data, reports compiled by

51. *See* Jackson, *supra* note 17, at 821; Brief of Int'l L. Scholars, Former Diplomats, & Pracs. as Amici Curiae Supporting Respondents, Nestlé USA, Inc. v. Doe, 593 U.S. 1 (2020) (Nos. 19-416 & 19-453), at 16 ("After examining state practice backed by *opinio juris*, nearly all international tribunals have held that complicity liability exists under customary international law when accomplices knowingly provide substantial assistance to the principal offence."); Michalowski, *supra* note 48, at 272.

52. Doe I v. Unocal Corp., 395 F.3d 932, 956 (9th Cir. 2002) (referring to "the *mens rea* requirement of aiding and abetting as we define it today, i.e., actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime.").

53. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009) ("[A] claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses."); Aziz v. Alcolac, Inc., 658 F.3d 388, 399–400 (4th Cir. 2011); *see also* Hathaway et al., *supra* note 15, at 1595–96 ("The circuit split has led many to predict the issue will only be resolved when the U.S. Supreme Court finally weighs in.").

54. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶¶ 436, 471–81, 483–86 (Special Ct. for Sierra Leone Sept. 26, 2013); Prosecutor v. Šainović, Case No. IT-05-87-A, Appeal Judgment, ¶¶ 1617–51, 1772 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-A, Appeal Judgment, ¶¶ 104–107 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 9, 2015).

55. Rome Statute, *supra* note 31, art. 25(3)(c) ("For the purpose of facilitating the commission of such a crime, [the accomplice] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."); *see* Prosecutor v. Bemba, ICC-01/05-01/13-1989, Trial Chamber VII Judgment, at 51–52, 416–30 (Oct. 19, 2016).

56. Rome Statute, *supra* note 31, art. 25(3)(d)(ii) (referring to the assistance to the group made in the knowledge of the group's criminal intention); *see also* Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 78–79 (2007).

non-governmental organizations, and a wide range of media publications.[57] A corporation that continues to trade with states or non-state actors implicated in international crimes essentially signals its indifference or, at worst, tacit approval of these offenses.

The debate between knowledge and intent has dominated discussions concerning the scope of complicity, while the parameters of the conduct element, or actus reus, have received less attention and remain less clearly defined. Specifically, there is ambiguity concerning the nature of the nexus, or connection, between aiding and abetting and the principal offense.[58] As per customary international law, aiding and abetting must be shown to have had a "substantial effect" on the crime.[59] At the ICC, however, this requirement is open to interpretation.[60] Interestingly, the ICC is unequivocal that the actus reus in Article 25(3)(d)—pertaining to contributions made to a criminal organization—must have a "significant effect" on the crime.[61] Yet, the precise meanings of "substantial" and "significant" in this context are murky, raising questions about whether there is a substantive difference between them.[62]

Demarcating the line between socially acceptable conduct and condemnable acts of complicity is the most important issue in assigning responsibility in cases of neutral business assistance in international crimes.[63] This critical issue will be the focus of the remainder of this article. At the heart

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57. *See* Int'l Comm'n of Jurists, *Criminal Law and International Crimes*, *in* 2 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 41 (2008), http://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf.

58. MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW 42–46 (2015).

59. *See* Prosecutor v. Taylor, Appeal Judgment, ¶ 401; Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Simić, Case No. IT-95-9-A, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006).

60. *See* Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶ 43 (Mar. 23, 2016) ("It is nowhere required, contrary to the Defence argument . . . that the assistance be 'substantial' or anyhow qualified other than by the required specific intent to facilitate the commission of the crime (as opposed to a requirement of sharing the intent of the perpetrators).").

61. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶¶ 1620, 1632 (Mar. 7, 2014); Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (Dec. 16, 2011).

62. Stewart, *supra* note 18, at 549–50; Hathaway et al., *supra* note 15, at 1611 ("Even though it is widely used, the precise contours of the 'substantial effect' test for actus reus remain unsettled."); Jackson, *supra* note 17, at 825; Ines Peterson, *Open Questions Regarding Aiding and Abetting Liability in International Criminal Law: A Case Study of ICTY and ICTR Jurisprudence*, 16 INT'L CRIM. L. REV. 565, 572 (2016); Marjolein Cupido, *Group Acting with a Common Purpose*, *in* MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW, *supra* note 22, at 309, 316.

63. As James Stewart aptly illustrates in the example of the serial murderer's grandmother, setting the bar for culpability too low can lead to far-fetched and implausible assignments of guilt. *See* Stewart, *supra* note 18, at 549. Such cases risk diluting the concept of accomplice liability to a point where it inhibits normal social interaction and undermines liberal values.

of the matter lies the task of determining the minimum level of involvement that meets a pragmatic legal criterion for a "substantial," "significant," or "material" (as it is sometimes denoted) contribution. On one end of the spectrum, an accomplice's contribution need not be a condition *sine qua non* of the crime—a level of involvement traditionally demanded for direct perpetration.[64] Conversely, participation that is "marginal" or "irrelevant" should not fall within the ambit of aiding and abetting.[65] To provide a comprehensive and judicious exploration of the actus reus aspect of complicity, this article lays out the fundamental normative structure that forms the basis of the prohibited conduct of aiding and abetting. However, before discussing the normative arguments that define the boundaries of complicity, it is crucial to clarify a few conceptual aspects of the notion of neutral business assistance.

B. *Neutral Business Assistance*

The prosecution of corporate complicity in international crimes originated in the first international trials following World War II. The Nuremberg Military Tribunal ("NMT") set important precedents, highlighting the critical role that business conduct played in reinforcing and enabling the Nazi war effort.[66] Corporate executives were held accountable for financing criminal efforts, supplying the means for civilian executions, engaging in looting, supporting deportation, and employing forced labor.[67] Following these trials, the international community began exploring the possibility of prosecuting corporate entities on an international scale.[68] This concept, however, did not fully take root, and as a result, the paradigm of individual accountability of corporate officials persists in international criminal law.[69]

Corporations, of course, exist only as abstract entities. They are legal constructs endowed with certain rights and responsibilities.[70] Much like states, corporations act and make decisions through individual human beings. Consequently, liability for corporate conduct can extend from the actions of

64. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 257–58 (S.D.N.Y. 2009) ("An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another.").

65. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 231 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

66. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, http://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-IV/2011525364_NT_war-criminals_Vol-IV.pdf; Jessberger & Geneuss, *supra* note 2, at 695.

67. Reggio, *supra* note 2, at 631–32.

68. Stahn, *supra* note 5, at 99–100.

69. William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. RED CROSS 439, 453 (2001).

70. For a critique of "corporate personhood," see Martin Kusch, *The Metaphysics and Politics of Corporate Personhood*, 79 ERKENNTNIS 1587 (2014).

its officers, and conversely, a corporate officer can bear responsibility for actions undertaken in the name of the corporation.[71]

The principles of how conduct is attributed in the realm of corporate responsibility are complex and introduce unique conceptual challenges. These complexities, while vital, are beyond the scope of this article.[72] For the purposes of this discussion, it is reasonable to assume that actions taken by corporate officers equate to actions of the corporation itself. The generic term "corporate conduct" will thus be used to refer to business activities that contribute to the commission of international crimes.

Broadly speaking, corporate involvement in international crimes can occur through both illegitimate and legitimate channels. When a corporation illegitimately collaborates with a morally compromised business partner, the support provided is often presumed to have an explicit intention to facilitate the commission of a crime, thereby making such actions a strong basis for alleging complicity.[73] Conversely, business involvement in the crimes can also happen through legitimate means by providing products or services to perpetrators as part of ordinary commercial transactions. In scholarly discussions, this type of involvement is referred to as "neutral business assistance."[74] This term encompasses essentially any business conduct that seems legitimate on the surface and falls within the realm of standard business operations—that is, activities that a company carries out on a routine basis in compliance with the laws of the jurisdiction it operates within.[75] Thus, for instance, selling weapons at a market rate without explicit intent to aid criminal activity is an archetypal case of neutral business assistance, even if these weapons are subsequently used in the commission of crimes.

Neutral business assistance can be characterized by two key aspects: its motivation and its mode of operation. The motivation behind neutral business

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71. *See* Weigend, *supra* note 6, at 927.

72. On attribution of responsibility to corporate officials and corporations, see Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility Under International Law*, 8 J. INT'L CRIM. JUST. 851 (2010); Norman Farrell, *Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals*, 8 J. INT'L CRIM. JUST. 873 (2010).

73. *See* Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1099 (C.D. Cal. 2010) (providing examples of financing unrelated to commercial purpose).

74. The concept of prima facie "neutral" contributions, as understood in German criminal legal theory, refers to actions that may not inherently pose a specific social harm or unacceptable danger to protected legal interests. In fact, such contributions may be deemed necessary for maintaining the unhindered flow of goods and commodities in global markets and may even receive approval from the international community. *See* Burchard, *supra* note 2, at 921; Ambos, *supra* note 3, at 500; Kaleck & Saage-Maaß, *supra* note 4, at 720–21; Vest, *supra* note 72, at 863; Farrell, *supra* note 72, at 879–80; Beth Van Schaack, *The Provision of Means: Dual Use Goods & Corporate Liability*, JUST SECURITY (Mar. 30, 2015), http://www.justsecurity.org/21629/provision-means-dual-goods-corporate-liability (explaining that neutral contributions may include "items that are not inherently unlawful but that can be used to violate international law.").

75. Kai Ambos, *Complicity in War Crimes Through (Legal) Arms Supplies*, EJIL:TALK! (Jan. 20, 2020), http://www.ejiltalk.org/complicity-in-war-crimes-through-legal-arms-supplies.

assistance is not to actively support or encourage criminal activities but rather to engage in standard business practices aimed at maximizing profits. The mode of operation refers to how the business assistance is provided—through regular, everyday business processes and channels. This means the business conducts its assistance as part of its typical day-to-day activities without deviating from its usual operations or making special efforts—such as customizing products—to aid any illegal activity.

Neutral business assistance is sometimes conflated with "dual-use assistance," which generally refers to the use of aid provided to states or non-state entities for both illicit and lawful purposes.[76] It is, however, important to differentiate these two types of assistance. Dual-use assistance does not inherently define the legitimacy of the transactions involved; it can occur through both illegitimate and legitimate channels. By contrast, neutral business assistance refers specifically to business activities that appear lawful on the surface and are part of ordinary business operations but may be utilized for single or dual purposes.

Despite the potential implications for corporate conduct, there is a noticeable reluctance across domestic legal systems to criminalize neutral business assistance.[77] There are two main reasons for this hesitation. The first relates to the assister's lack of shared intent or solidarity with the perpetrator.[78] The second is the absence of an explicit legal duty requiring business entities to cease their regular operations.[79] The rationale may be summarized as follows: if the perpetrator commits a crime using the business's assistance, the business representative (individual or entity) is not complicit because their actions did not exceed their normal commercial conduct. This perception shifts if the

76. *See also* Van Schaack, *supra* note 74; Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 BELG. REV. INT'L L. 370, 376 (1996) ("In our times the density of communication between States, the mutual cooperation and interdependence is so highly developed and is rapidly growing every day that any financial trans-action or many commercial or political activities can be used as assistance for the one or other activity of a State. Many resources and equipment's are of dual use, may be used for peaceful or military purposes. It is extremely difficult to guarantee that they cannot be used for unlawful purposes."); Milanović, *supra* note 39, at 1390–91.

77. *See* James G. Stewart, The Accomplice Liability of Arms Vendors: A Conceptual Defense (August 2022) (unpublished manuscript) (on file with author).

78. In Germany, for example, the courts have adopted a mixed subjective-objective approach to neutral business assistance cases, stating that neutral acts can only give rise to complicity liability when the accused acted in solidarity with the perpetrator, making the perpetrator's objectives their own. Solidarity exists when the aider knows their support will be used to further the perpetrator's crime. Additionally, solidarity can be established when the perpetrator shows a clear inclination to commit a crime, and the aider expects and assists in this criminal conduct. *See* Marjolein Cupido, *Causation in International Crimes Cases: (Re)Conceptualizing the Causal Linkage*, 32 CRIM. L.F. 1 (2021), 28–29.

79. *See* R. A. Duff, "*Can I Help You?" Accessorial Liability and the Intention to Assist*, 10 LEGAL STUD. 165, 178 (1990).

business's assistance is explicitly tailored to accommodate the needs of the perpetrator and facilitate the crime.[80]

If the law demands that the assistance be specifically designed and intended to aid the crime to be deemed complicit, then all ordinary business transactions are invariably absolved from criminal liability.[81] This is not, however, a requirement in international criminal law, which adheres to the knowledge standard as the minimum mens rea for complicity.[82] Nor does international criminal law recognize justification for absolving liability merely on the grounds that the assistance provided was part of ordinary business transactions.[83] Accordingly, the actual challenge in assessing complicity in cases of neutral business assistance is determining the so-called "causation continuum," that is, establishing the necessary links between the corporation's conduct and the crime committed.[84]

This difficulty is compounded by ongoing debates on the concept of causation in the law of complicity.[85] These debates have led to structural uncertainties and the conceptual separation of types of assistance into categories of "dangerous" versus "non-dangerous" neutral assistance.[86] The

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80. Alexander K.A. Greenawalt, *Foreign Assistance Complicity*, 54 COLUM. J. TRANSNAT'L L. 531, 564–65 (2016).

81. Thomas Weigend provides the following illustrative example of how such a law would be applied:

> If, for example, an arms trader sells weapons to a dictator at their regular price and under regular conditions, he would not be an assistant to crimes against humanity even if he is aware that such crimes will be committed using these weapons. But if the trader sells the weapons at a higher price because of an existing embargo, or if he sells weapons that have been specifically designed for killing civilians, he would be liable because this particular deal has been accommodated to serve the specific "purpose" of committing the crime.

Weigend, *supra* note 50.

82. *See supra* note 17 and accompanying text.

83. Ambos, *supra* note 32, at 604; Jackson, *supra* note 17, at 832. *See* Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeal Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007) ("[T]o the extent specific direction forms an implicit part of the actus reus of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused."). *See also* Prosecutor v. Popović, Case No. IT-05-88-A, Appeal Judgement, ¶ 1615 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

84. *See* Int'l Comm'n of Jurists, *supra* note 1, at 13; Burchard, *supra* note 2, at 923 (arguing that the so-called "causation continuum" has multiple sub-dimensions, including the phenomenological dimension, which looks at direct, indirect, and ancillary involvement of business actors. The normative dimension assesses whether the business contribution is socially injurious or neutral, and the geographical dimension considers whether the contribution originates from within the conflict jurisdiction or operates across national borders.).

85. *See infra* Part III.B.

86. *See* Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT'L L. 43, 68 (2013).

category of "dangerous" assistance is considered more directly linked to potential crimes and thus raises fewer issues in the attribution of criminal responsibility.[87] By comparison, the provision of "non-dangerous" assistance—such as money or technology—presents more complex challenges for establishing complicity.

This complexity is clearly illustrated by a 2009 opinion from the United States District Court for the Southern District of New York, in which the court highlights the stronger causal connection to the principal crime when goods specifically designed for harmful purposes are provided:

> Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans. Training in a precise criminal use only further supports the importance of this link. Therefore, in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law.[88]

When the assistance (of a neutral character) provided is fungible or is not directly used in the commission of a crime but contributes to the general capacity of the perpetrator by generating revenue or supporting infrastructure, the challenge of establishing the necessary causal connections comes to the fore.[89] Christoph Burchard, for example, argues that while delivering nuclear material directly to a rebel group clearly has a criminal relation, the same cannot be said for monetary donations to a criminal organization, as money can be used for various purposes unrelated to criminal activity.[90] Harmen van der Wilt suggests that providing poisonous gas or weapons is more closely connected to complicity, especially when there is a documented history of human rights abuses by business partners. Conversely, he argues that

87. Corporate involvement in international crimes is clear when a company's actions directly facilitate the commission of human rights abuses by the principal perpetrator. For instance, this could occur when a company provides information leading to the arrest of a worker involved in union activism or when an armed group utilizes vehicles or aircraft supplied by a company to carry out attacks on civilians. Another example is when a company hires and financially supports a government or private security force known for human rights violations to suppress local protests. *See* Int'l Comm'n of Jurists, *supra* note 1, at 13.

88. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258–59 (S.D.N.Y. 2009).

89. Int'l Comm'n of Jurists, *supra* note 1, at 13–14. *See* Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. INT'L CRIM. JUST. 803, 826–27 (2010) (arguing that the provision of non-dangerous assistance is a difficult candidate for complicity).

90. Burchard, *supra* note 2, at 923.

providing funding to the perpetrator is not intimately connected with the commission of crimes.[91]

Federal courts in the United States have frequently addressed this matter in civil cases filed under the Alien Tort Claim Statute ("ATS") against corporations for their involvement in international crimes.[92] To date, these cases represent the most comprehensive and influential jurisprudence on corporate criminal complicity in the world.[93] The courts have applied international criminal law to inform the appropriate complicity liability standards,[94] and they have been particularly cautious in ascribing responsibility in situations where the provision of goods or services was not specifically directed to facilitate the crime.[95] Thus, for example, if a corporation financially supports a government that uses the funds to procure weapons for targeting and displacing civilians, the corporation would be culpable only if those payments were specifically intended for criminal purposes.[96] In analyzing the ATS case law, Sabine Michalowski concludes that "[a] corporation could, for example escape liability by selling only commercial, but not military vehicles to a regime, with the knowledge or even intent that human rights violators use these vehicles to commit gross human rights violations."[97]

Non-dangerous materials, such as computer equipment, money, information, or logistical support, are indeed fungible and typically not the direct physical means of commission. They are characterized as being loosely connected to the criminal wrongdoing.[98] Nonetheless, it is incorrect to suggest, as United States federal courts have, that the provision of fungible and prima facie legitimate goods and services "without more"—such as

91. Van der Wilt, *supra* note 86, at 68.

92. 28 U.S.C. § 1350.

93. Michalowski, *supra* note 11, at 12, 406.

94. *See* Khulumani v. Nat. Bank Ltd., 504 F.3d 254, 2703–71 (2d Cir. 2007).

95. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1096 (C.D. Cal. 2010) ("[A] plaintiff must allege something more than ordinary commercial transactions in order to state a claim for aiding and abetting human rights violations. . . . [A] plaintiff must allege that the defendant's conduct had a substantial effect on the principal's criminal act. Mere assistance to the principal is insufficient.").

96. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 676 (S.D.N.Y. 2006) (The defendant was acquitted because the plaintiffs did not provide enough evidence to support the claim that they provided assistance that was specifically directed toward the commission of crimes.).

97. Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451, 469 (2012).

98. Marjolein Cupido, Mark J. Hornman & Wim Huisman, *Holding Businessmen Criminally Liable for International Crimes: Lessons from the Netherlands on How to Address Remote Involvement*, *in* ACCOUNTABILITY, INTERNATIONAL BUSINESS OPERATIONS, AND THE LAW 170, 171 (Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, Francois Kristen & Lucas Roorda eds., 2019).

specific intention toward the commission of a crime—falls short of complicity.[99] The consequences of the provision of fungible goods or services for human rights violations can be equally severe as or even greater than those in cases involving the provision of weapons. By drawing a distinction between different types of goods or services based on the nature of the sales and treating some conduct as inherently more complicit than others, the law would create an arbitrary distinction that fails to account for the potential harm caused by the provision of any form of assistance in the commission of human rights violations. This distinction undermines the principle of equal treatment before the law and is inherently unjustifiable.[100]

This article posits that understanding corporate complicity in international crimes requires a nuanced assessment of the divergent interests at play. On the one hand, corporations relentlessly pursuing profits at the expense of human rights obligations can indeed enable, exacerbate, or facilitate the commission of international crimes.[101] On the other hand, corporations play a significant role in society that extends beyond profit generation. Their contributions span job creation, the provision of goods and services, economic growth stimulation, and, in some cases, corporate social responsibility programs aimed at community development, education, health, and environmental sustainability.

Only by thoroughly and equally considering both these factors can we develop a more informed strategy for addressing the issue of corporate complicity in international crimes. Part III lays the foundation for a theoretical framework to facilitate the assessment of wrongfulness in complicity, which is then further developed in Part IV. Part IV specifically focuses on considerations in international crimes.

III. CONCERNING CONTRIBUTION IN COMPLICITY

Complicity entails responsibility for participating in someone else's crime. It is "a particular way of contributing to [the principal's] wrongdoing," as Miles Jackson has put it.[102] The notion "particular" in this context implies that not all forms of participation in the crime result in complicity; rather, complicity is limited to those forms that have a particular *bearing* on the crime itself.[103]

99. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1085 (C.D. Cal. 2010) (explaining that "merely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law.").

100. *See* Michalowski, *supra* note 97, at 469.

101. Int'l Comm'n of Jurists, *supra* note 1, at 9.

102. JACKSON, *supra* note 58, at 11.

103. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 231 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (stating that marginal participation does not entail complicity).

In comparative criminal law, the actus reus requirement for complicity is often formulated as a contribution with a "substantial effect" on the crime.[104] This notion is assessed through a gravity threshold, which involves the factual evaluation of the degree to which the accomplice's contribution influenced the overall outcome of the crime.[105] The gravity-based approach to wrongfulness emphasizes the causal link (in the empirical sense) between the accomplice and the crime.[106] However, relying solely on establishing factual connections overlooks a crucial normative dimension of criminal liability that takes into account the broader societal implications and potential social benefits of human cooperation.

This part challenges the narrow interpretation of the "substantial effect" requirement in determining complicity. Through an examination of municipal and international cases, as well as scholarly writings, this part emphasizes the importance of both *factual* connections between the individual and the crime and *normative* considerations of the accused's conduct. Adopting a broader perspective on wrongfulness, one that considers the potential social benefits and moral dimensions of complicity, allows the development of a more nuanced understanding of criminal complicity. This approach, which is particularly prudent in cases of neutral business assistance, recognizes the need to strike a balance between accountability for participation in a crime and acknowledgment of the complexities of human cooperation and its potential positive contributions to society.

A. *Prohibited Contribution*

First, let us distinguish between prohibition and wrongfulness in complicity. Providing assistance and support to others is normally a positive and desirable form of human interaction. Complicity rules prohibit assistance when it contributes to the commission of a crime, *regardless of the degree of its impact*. In this vein, aiding and abetting the perpetrator is *always* prohibited, but perhaps not wrongful. Assistance becomes wrongful in a situation where (prohibited) aiding and abetting lacks justification.[107] To explain further this concept of wrongfulness, a deeper understanding of the nature of complicity is needed.

It is now well accepted that accomplices derive responsibility from the wrong committed by the principal.[108] This notion creates an asymmetrical

104. *See* Stewart, *supra* note 18, at 549.

105. While both perpetrators and accomplices contribute to the realization of the crime, it is generally acknowledged that the former's contribution is *more* substantial on average. For instance, placing a gun in the perpetrator's hands is seen as having a lesser impact on the crime than physically pulling the trigger. *See* Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 423 (2007).

106. For an explanation of causation in complicity, see *infra* Part III.B.

107. Hajdin, *supra* note 26, at 35 ("Wrongfulness is a violation of the prohibitory norm without justification.").

108. *See* Kadish, *supra* note 19, at 337–42; Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433 (2008); Stewart, *supra*

relationship based on dependency: principals can be found guilty even without any assistance or encouragement, while accomplice liability depends on the commission of the principal's wrong. This dynamic imposed by the derivative nature of complicity sometimes results in normatively unsatisfactory outcomes. As James G. Stewart explains:

> [T]he derivative nature of complicity dictates that even the most nefarious would-be accessory, who does everything in her power to facilitate someone else's crime, is complicit in nothing if a perpetrator does not act wrongfully. No crime, no complicity. So, if X sends a crowbar to her friend Y in prison in order for Y to use it to break out of prison, there is nothing to be responsible for if Y dies before ever receiving the crowbar.[109]

The principal wrong is typically described in the definition of crimes. For example, in the United States, the crime of murder is defined as "the unlawful killing of a human being with malice aforethought."[110] The principal wrong in murder is therefore the act of killing or causing death.[111]

Regarding the wrong in aiding and abetting, there are two competing schools of thought.[112] In one approach, the principal's wrong is imputed to the accomplice, and the culpability of the accomplice is equivalent to that of the principal.[113] Thus, assisting or encouraging murder is viewed as equivalent to committing the act itself. This imputational approach, which is dominant in the United States, England, and Wales, disregards the separate identities of principals and accomplices.[114] Conversely, non-imputational

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note 18, at 543–46; Matthew Dyson, *The Contribution of Complicity*, 86 J. CRIM. L. 389, 403 (2022); Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, J. INT'L CRIM. JUST. 977, 979 (2007).

109. Stewart, *supra* note 18, at 544.

110. 18 U.S.C. §1111.

111. For John Gardner, killing is a form of direct, "refined" as he would say, causation:

> Killing is not merely causing death, and causing death, in turn, is not merely acting with fatal consequences. In saying this I am not relying on the idea that to be a killer one must have a mens rea of some kind, or be at fault. I am assuming that it is possible to be an accidental and faultless killer. What I mean is that killing is causally different from merely causing death and that causing death, in turn, is causally different from occasioning death. Roughly: killing is causing death other than by making a causal contribution to a killing by someone else . . . . Causing death is a causally refined way of causally contributing to death.

John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 134–35.

112. *See* JACKSON, *supra* note 58, at 17–22.

113. Dressler, *supra* note 108, at 433.

114. In the countries that espouse the imputational approach to complicity, the distinction between principals and accomplices is relevant only in the doctrine. *See* ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 70–71 (2012); JACKSON, *supra* note 58, at 22–23.

complicity rules assign blame to accomplices for their own conduct.[115] In Germany, for instance, aiders and abettors are regarded as accomplices, not murderers.[116] By adopting the non-imputational approach, the law emphasizes the individual culpability of each person involved in the commission of a crime.[117]

The non-imputational perspective appears to be adopted in international criminal law as well. In *Prosecutor v. Germain Katanga*, the ICC's Trial Chamber II held that the Rome Statute embraces a differentiated model of participation that clearly distinguishes between principals and accomplices.[118] Perpetrators "commit" the crime and incur principal responsibility, while accessories are "solely connected" to the commission of another person's crime and thus incur accessorial responsibility.[119] This approach has faced criticism in the literature,[120] including recent objections from two judges at the ICC.[121]

Be that as it may, when assessing the actual wrongfulness of aiding and abetting, whether an accomplice is responsible for their own conduct or for the principal's wrong is immaterial. The wrong of complicity—derived from

115. In the law of state responsibility, complicity rules are non-imputational. *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, art. 16 (2001) ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible *for doing so* . . . .") (emphasis added); *see also* Milanović, *supra* note 39, at 1275.

116. *See* Strafgesetzbuch [StGB] [Penal Code] §§ 26-27 (Ger.).

117. This approach aligns with the fundamental principle of holding individuals accountable for their own actions and avoiding the indiscriminate attribution of criminal responsibility. *See* Gardner, *supra* note 111, at 136; JACKSON, *supra* note 58, at 20.

118. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶ 1382 (Mar. 7, 2014).

119. *Id.* ¶¶ 1383–84.

120. *See* James Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 204 (2012). Stewart argues that in the realm of international criminal law, there should be no fundamental distinction between accomplices and perpetrators. He proposes that treating accomplices as a subset of perpetrators is a more appropriate approach. According to Stewart, there is no inherent moral difference between perpetration and aiding and abetting. Even if there is a moral distinction, he suggests that it should be addressed during the sentencing stage rather than at the attribution of responsibility. By advocating for the elimination of the distinction between accomplices and perpetrators, Stewart aims to streamline the framework of responsibility in international criminal law. He argues that perpetrators and accomplices should be held accountable for their actions in a comparable manner. This perspective challenges the traditional notion that accomplices bear less moral culpability than perpetrators. Furthermore, Stewart suggests that differentiating between perpetrators and accomplices primarily during the sentencing stage can address any potential moral nuances that arise. By considering the specific circumstances and individual culpability, the sentencing process can account for any variations in blameworthiness between those directly responsible for the crime and those who assisted or encouraged its commission. Overall, Stewart's proposition seeks to simplify the framework of responsibility in international criminal law by treating accomplices as a subset of perpetrators and minimizing the distinction between the two. *See generally* Stewart, *supra*.

121. *See* Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Anx2, Concurring Opinion of Judge Morrison, ¶ 10 (Mar. 30, 2021); Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Anx5, Partial Concurring Opinion of Judge Eboe-Osuji, ¶¶ 29–33 (Mar. 30, 2021).

the principal's wrong—is predicated on the accomplice's violation of a prohibitory norm without justification.[122] The prohibitory norm of complicity is the prohibition of assistance that aids and abets wrongdoing.[123] The prohibitory norm, therefore, squarely demands that the act of assistance or encouragement be *successful*, meaning that the accomplice's contribution must have an *effect* on the commission of the crime regardless of the gravity of such an effect. As John Gardner puts it:

> I am complicit . . . because my assistance actually assists and my encouragement actually encourages. A failed attempt at assistance or encouragement is just that. It may still be wrongful, but it is not complicity, just as a failed attempt at murder is not murder. It is a failed attempt because it has no effect, no impact, on the principal.[124]

In the English-speaking world, the requirement for success was introduced by Sanford H. Kadish, who argued that an ineffective or unsuccessful contribution cannot serve as a basis for complicity.[125] According to Kadish, a successful contribution is one that could have influenced the principal's actions: "by 'could have contributed,' I mean that without the influence or aid, it is possible that the principal would not have acted as he did."[126] It is worth noting that while aiding may constitute complicity even if the principal is unaware of it,[127] abetting always requires the accomplice's efforts to reach the principal's mind.[128] In other words, an effective abettor must convey their support to the perpetrator.[129]

To sum up, aiding and abetting with *any* effect on the crime is prohibited under the rules of complicity. A separate issue is one of wrongfulness, the assessment of which implies considerations of the justificatory grounds. The gravity of the accomplice's contribution is therefore relevant only in the wrongfulness assessment, to counter the potential justificatory grounds. Before we

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122. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 582 (Oxford Univ. Press 2000); Hajdin, *supra* note 28, at 47–51.

123. *See* Hathaway et al., *supra* note 15, at 1597.

124. Gardner, *supra* note 111, at 137.

125. *See* Kadish, *supra* note 19, at 357–61.

126. *Id.* at 359.

127. The logic of increasing the risk of the crime attracts complicity even in such cases. *See infra* Part III.C.

128. *See* Ventura, *supra* note 22, at 188.

129. Sanford H. Kadish provides an illustrative example of this idea:

> [I]f an individual shouts encouragement to another to attack a third person and the attacker is deaf or otherwise unaware of the encouragement, the putative accomplice could hardly be held liable for the assault as a secondary party. He might be held for the independent crime of incitement or solicitation, which by definition does not require success of the inciter's efforts. But he is not liable for the assault because his contribution could not possibly have been effective.

Kadish, *supra* note 19, at 358–59.

delve into the wrongfulness assessment further, let us first explore the mechanisms through which we establish the existence of the effect on the crime.

B. *Causal Contribution*

To establish complicity, the orthodoxy suggests that it is necessary to demonstrate that aiding and abetting has a substantial effect on the commission of the crime. How can the occurrence of such an effect be determined? The most common approach explains the objective relationship between the individual and the crime is through the concept of causation (or causality). In the paradigm of causation, the definition of effect is straightforward: effective or successful aiding and abetting causes the commission of the crime. This section defends this assertion. Part III.C explores the possibility of "causeless complicity."[130]

Causation, in its abstract sense, refers to the capacity to influence and alter the occurrence of an event.[131] In criminal law, causation is a fundamental element of criminal responsibility.[132] Perpetrators are typically held responsible if their conduct is considered a *sine qua non*, a necessary condition for the existence of the crime. In other words, "but for" the perpetrator's actions the prohibited social harm would not have occurred.[133] Accomplices participate in the principal's wrongdoing, and while their contribution may be (and often is) necessary for the existence of the crime,[134] it is not an essential requirement for complicity itself.[135]

In paradigmatic cases of complicity, aiding and abetting alters the properties of the principal's wrongdoing. Consider, for example, a scenario where an accomplice provides the means for the commission of a crime: *D2* gives a

130. Kutz coined the term "causeless complicity," which challenges the notion that accomplice liability always requires a causal relationship with the principal's wrongdoing. According to this perspective, one can be considered an accomplice to a crime without directly contributing to the criminal act of the principal. This is because acts of aid and encouragement that underpin accomplice liability often occur in complex contexts where the causal analysis is unclear. *See* Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289 (2007).

131. *See id.* at 290.

132. Some authors go so far as to say that causation is a "central ingredient" for establishing criminal liability. *See* Carl-Friedrich Stuckenberg, *Causation*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW, *supra* note 18, at 468, 470.

133. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 99 (1985); *see also* Cupido, *supra* note 78, at 7; JOHANNES KEILER, ACTUS REUS AND PARTICIPATION IN EUROPEAN CRIMINAL LAW 130 (2013).

134. The concept of "but for" causation is often invoked to determine the role of the accomplice in the principal's crime. "But for" causation refers to the idea that, without the assistance or contribution of the accomplice, the crime would not have been committed or would not have unfolded in the same way. For example, in a scenario where an individual lends a gun to someone who subsequently uses it to commit murder, the "but for" causation test asks whether the murder would have occurred if the individual had not lent the gun. *See, e.g.*, Stuckenberg, *supra* note 132, at 474.

135. Kadish, *supra* note 19, at 357.

gun to *D1*, who then uses it to shoot and kill *V*. Without the provision of the gun, the subsequent events would have unfolded differently. *D2*'s involvement, therefore, changes the properties of *D1*'s wrongdoing and causally contributes to the commission of the crime (*V*'s death). Some authors argue that if there is sufficient evidence to demonstrate that *D1* would have still killed *V* even without *D2*'s assistance, *D2* can still be held responsible as an accomplice, although not based on causation per se, as her contribution was not strictly necessary for the crime to occur.[136]

Counterfactual dependence is often used as a plausible criterion for assessing causation.[137] Causation, however, encompasses more than mere counterfactual dependence. It entails a transitive, asymmetric, and temporally ordered relationship between cause and result.[138] Even under a narrow approach to causality that focuses solely on counterfactual dependence, *D2*'s contribution would still be considered a necessary condition for the actual occurrence of the crime. In an alternative crime involving *V*'s death, for example, the strangling of *V* by *D1*, *D2*'s assistance may be unnecessary. In the present scenario, however, *D1* utilized the gun provided by *D2*, which was indispensable for the commission of *that specific crime*.[139]

The paradigm of causal complicity faces a significant challenge from the doctrine of intervening causes.[140] According to this concept, causal chains can span numerous events but are interrupted when an intervening cause comes into play. Critics argue that it cannot be claimed that aiding and abetting causes the perpetrator to commit the crime, as the perpetrator is typically regarded as an intervening cause.[141] As a free agent, the perpetrator retains the ability to act independently, unaffected by external influences.

In his influential 1985 article, Kadish embraces the doctrine of intervening cause and posits that accomplices' wrongs are noncausal because they are causally interrupted by the responsible human agent.[142] Kadish asserts that the doctrine of complicity functions similarly to causation in principal responsibility, as both determine when an individual is accountable for a subsequent event or the unlawful actions of another.[143]

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136. *See* Dressler, *supra* note 108, at 435–36.

137. *See* Dressler, *supra* note 133.

138. Moore, *supra* note 105, at 404.

139. Kutz, *supra* note 130, at 294.

140. *See* Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827, 839–46 (2000). For a review of domestic case law on intervening causes, see Antje du Bois-Pedain, *Novus Actus and Beyond: Attributing Causal Responsibility in the Criminal Courts*, 80 CAMBRIDGE L.J. 61 (2021).

141. *See* H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 388 (2d ed. 1985). The perpetrator may be an intervening cause if she acquires the properties of a responsible agent, that is, if she acts freely and voluntary without coercion. *See* Moore, *supra* note 140, at 839–46; Stewart, *supra* note 18, at 546–47.

142. Kadish, *supra* note 19, at 361.

143. *See id.* at 356.

Gardner, however, strongly challenges this position and contends that every criminally relevant contribution is inherently causal, as there can be no individual responsibility if an actor does not bring about the wrong to the world.[144] In response to the objection of intervening cause, Gardner adopts the concept of the transitivity of causality: if *A* causes *B* and *B* causes *C*, then it follows that *A* causes *C*.[145] In line with this, Gardner introduces what he terms "Gardner's Transitivity Axiom," which posits that if *A* makes a causal contribution to *B* and *B* makes a causal contribution to *C*, then *A* makes a causal contribution to *C*.[146] In this understanding of contribution, every participant in the crime is seen as causing harm in proportion, akin to "equation causation."[147] Analogizing the participation in the criminal wrong, accomplices help perpetrators "by making a difference to the difference that principals make."[148]

In this sense, both perpetrators and accomplices causally contribute to the substantive crime. The accomplice's contribution, although indirect, remains a causal factor in the chain of events leading to the harm.[149] As Gardner posits, when an individual pays a hitman to kill an enemy, it is a direct consequence of their actions that the hitman carries out the killing, resulting in the death of the enemy. This causal relationship between the accomplice's act of procurement and the subsequent actions of the hitman does not diminish the responsibility of the hitman as a responsible agent—it presupposes it.[150] The unfolding of events, characterized by action and reaction, antecedent and consequent, provides a straightforward causal explanation of how the harm materializes. Causation in law underscores that even if there are intervening factors between the initial act and the ultimate harm, the causal connection remains valid.[151]

C. *Contribution that Raises the Risk of the Crime*

The causal paradigm of complicity necessitates that the accomplice's effect on the crime changes the properties of the principal wrongdoing.[152]

144. Gardner, *supra* note 111, at 133.

145. *See* David Lewis, *Causation*, 70 J. PHIL. 556, 563 (1974).

146. *See* John Gardner, *Moore on Complicity and Causality*, 156 U. PA. L. REV. 432, 437 (2007).

147. *See* Thomas Weigend, *LJIL Symposium: Thomas Weigend Comments on James Stewart's "The End of 'Modes of Liability' for International Crimes"*, OPINIO JURIS (Mar. 12, 2022), http://opiniojuris.org/2012/03/22/ljil-weigend-comments ("[T]he equation causation = contribution.").

148. Gardner, *supra* note 111, at 128.

149. *See* JACKSON, *supra* note 58, at 43.

150. Gardner, *supra* note 111, at 137.

151. Moore, *supra* note 105, at 423 ("We should thus say plainly that one way to be an accomplice is by causing the harm through the actions of another. Substantially aiding another to cause some harm is to substantially cause that harm oneself, whatever the pretensions of the intervening causation fiction.").

152. Gardner, *supra* note 146, at 443.

There are strong merits to the idea of emphasizing causation as a fundamental requirement for any form of liability in criminal law.[153] Despite its conceptual intricacies,[154] causation remains a coherent and straightforward concept that establishes a link between the actor and the prohibited social harm.[155] It serves as a powerful mechanism to ensure that responsibility is personal and individualized. In criminal law, causation forms the basis for determining the defendant's moral culpability and justifying punishment.[156] Joshua Dressler aptly warns that interpreting complicity outside the realm of causal wrongdoing necessitates either rejecting the interconnected values of personal accountability and causation, finding a solid foundation to distinguish the legal accountability of accomplices from other doctrines in criminal law, or even reforming the principles governing accomplice liability.[157]

That said, proving causation in cases of complicity can present significant challenges. This holds true especially in cases where the assistance remains unused and held in reserve—a scenario particularly relevant to corporate complicity in international crimes. Consider, for example, a small arms dealer who sells weapons to a well-supplied state or non-state actor involved in systemic human rights violations. Applying the principle of causation too rigidly, the arms dealer would be complicit *only* if the weapons are eventually used in the commission of the crimes. If the weapons remain unused and are not exposed to the perpetrator, the putative accomplice does not have a causal impact on the principal's wrongdoing.[158] Adhering strictly to the causation principle would lead to the exoneration of the arms dealer.[159]

While the causation paradigm requires that the accomplice's contribution must made an evident difference in the unfolding of the crime,[160] a paradigm of risk-based complicity presents an alternative to the strict causal standard. Under such an approach, an accomplice may be held responsible merely for *increasing the risk* of the crime, without necessarily altering the properties of the principal's wrongdoing.[161]

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153. The moral significance of causation is transparent. *See* DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 178 (2020).

154. *See, e.g.*, Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Jane Stapleton, *Law, Causation and Common Sense*, 8 OXFORD J. LEGAL STUD. 111 (1988).

155. Dressler, *supra* note 133, at 103.

156. Dressler, *supra* note 108, at 436.

157. Dressler, *supra* note 133, at 108.

158. Kutz, *supra* note 130, at 295, 297.

159. *See* James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189, 1198 (2012) ("[B]y insisting on a causal link between proscribed harm and actions of an accused, international criminal justice offers only a minimalist intrusion into the liberty of risky but otherwise socially desirable practices — causation ensures that Bout is free to sell weapons to Angolans, except where they cause atrocities.").

160. ROBINSON, *supra* note 153, at 182.

161. Increasing the risk (or probability) of the crime is a well-established alternative paradigm for complicity liability. *See* Moore, *supra* note 105, at 437; Kai Ambos, *Article 25—Individual*

Comparative criminal law offers numerous examples of risk-based complicity. Christopher Kutz describes a New Zealand case where an accomplice overheard plans for a burglary and assumed the role of a lookout without notifying the perpetrators.[162] He stood in front of the targeted store during the burglary, without the perpetrators being aware of his presence or his assistance. Although he did not visibly affect the commission of the crime, he was convicted as an accomplice. His assistance was preemptive, meaning it was unnecessary and remained unused during the crime. Nevertheless, his involvement increased the likelihood of success. Had the police arrived, he could have alerted the perpetrators.[163] In other words, while he ultimately was not a cause, he was still complicit in the commission of the crime because he increased the probability of success.

In a famous United States case, *State ex rel. Attorney General v. Tally*,[164] the defendant, Judge John Tally, stopped a warning telegram that could have saved the victim R. C. Ross. The principal perpetrators, the Skelton brothers, were en route to the town of Stevenson to kill Ross, who had sought refuge there.[165] Judge Tally found that a warning telegram had been sent to Ross and instructed the operator in Stevenson not to pass on the message.[166] The Skelton brothers eventually murdered Ross.[167] The court held Tally responsible for complicity in murder, even though Tally's assistance facilitated a result that could have transpired even without his involvement.[168] By actively impeding Ross's chance of receiving a warning, Tally effectively raised the probability of the crime and therefore bore culpability for complicity.[169]

In a Dutch case involving international crimes, businessman Guus Kouwenhoven was convicted of aiding and abetting without evidence that he made a causal (mechanistic) difference in the crimes.[170] Kouwenhoven, as the

Criminal Responsibility, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 979, 1008–09 (Otto Triffterer & Kai Ambos eds., 2d ed. 2016); ROBINSON, *supra* note 153, at 182–85; Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 32 (1996); Kutz, *supra* note 130, at 298; Goran Sluiter & Sean Shun Ming Yau, *Aiding and Abetting and Causation in the Commission of International Crimes: The Cases of Dutch Businessmen van Anraat and Kouwenhoven*, *in* THE INTERNATIONAL CRIMINAL RESPONSIBILITY OF WAR'S FUNDERS AND PROFITEERS 304, 326 (Nina H. B. Jørgensen ed., 2020); Cupido, *supra* note 78, at 11.

162. Kutz, *supra* note 130, at 295.

163. *Id.* at 295–296.

164. State *ex rel.* Attorney General v. Tally, 15 So. 722 (Ala. 1894).

165. *Id.* at 725–26.

166. *Id.* at 728, 734.

167. *Id.* at 725.

168. *Id.* at 738–41.

169. *See* Moore, *supra* note 105, at 432–40.

170. For a commentary and observations on the case, see Huisman & Van Sliedregt, *supra* note 89, at 810–15; Larissa van den Herik, *The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia*, 9 INT'L CRIM. L. REV. 211 (2009).

president of a large timber company, supplied raw materials and weapons to former Liberian President Charles Taylor, who was responsible for large-scale atrocities in Liberia.[171] The Dutch Court of Appeals held that Kouwenhoven, by providing weapons and means to the Liberian armed forces, "exposed himself to the significant probability that war crimes and/or crimes against humanity would be committed by third parties."[172] Although the causal connection between the provision of means and the actual harm was not established, the court found Kouwenhoven guilty of complicity based on raising the risk of the crime.[173]

These cases demonstrate that the accomplice's effect on the crime can be established through a risk-based complicity paradigm. Thus, providing a gun to a known killer is *prohibited* in and of itself, as it heightens the probability of the crime, even if the gun itself was never used in the commission of the offense.[174] However, this action is not necessarily wrongful if, for example, the social benefits of protecting this kind of conduct override the harmful effect of aiding and abetting.

D. *Wrongful Contribution*

To summarize the discussion thus far, any effective aiding and abetting of the perpetrator is always prohibited. The effect of the accomplice on (or contribution to) the commission of the crime manifests itself either by altering the properties of the principal's wrongdoing or by increasing the risk of the crime.

The prevailing orthodoxy in legal thinking acknowledges the potential risks associated with holding individuals accountable for complicity in situations where their involvement is minimal or inconsequential to the occurrence of the crime.[175] Such an approach could inadvertently stifle ordinary human interactions and give rise to an unwarranted expansion of criminal liability.[176] Recognizing these concerns, some legal systems have sought to establish a threshold requirement—known as the "substantial effect" on the crime—for distinguishing between acceptable societal interactions and wrongful acts that warrant criminal complicity.[177] Accordingly, not all forms of aiding and abetting are inherently wrongful—only those with a *substantial effect* on the

171. *See* Hof's-Hertogenbosch 21 april 2017, NJFS 2017, 153 m.nt. Ryngaert (/Kouwenhoven) ECLI:NL:GHSHE:2017:1760 (Neth.).

172. *Id.* § L.2.5.

173. Sluiter & Yau, *supra* note 161, at 323–24.

174. In risk-based complicity scenarios, the accomplice's contribution is characterized by its potential effect rather than being the immediate cause of the crime. *See* Kutz, *supra* note 130, at 297; Gardner, *supra* note 111, at 139.

175. *See* Stewart, *supra* note 18, at 549.

176. The concept of complicity necessitates a delicate equilibrium between preventing wrongful conduct and preserving the principles of culpability and justice. *See* JACKSON, *supra* note 58, at 45; Milanović, *supra* note 39, at 1274.

177. KEITH J. M. SMITH, A TREATISE ON COMPLICITY 86–88 (1991); JACKSON, *supra* note 58, at 45; Stewart, *supra* note 18, at 549.

commission of the crime. However, despite the broad consensus on the significance of the substantial effect requirement, the precise criteria and parameters for determining what qualifies as a substantial effect remain subject to debate and interpretation.

To begin with, the act of aiding and abetting must be effective or successful,[178] meaning that it brings about a tangible change in the properties of the crime or increases the risk associated with its commission.[179] Even minor contributions that have a "micro" effect on the crime could be sufficient to meet the minimum threshold for complicity.[180] Comparative criminal law provides numerous examples illustrating this principle. In *State v. Duran*, for instance, an accomplice was convicted for simply holding the perpetrator's baby while the perpetrator committed larceny.[181] Similarly, in *United States v. Ortega*, the defendant was found guilty as an accomplice for merely pointing out a bag containing drugs.[182] George P. Fletcher cites a German case in which the accomplice was found guilty of lending his smock to the perpetrator so that the latter would not get dirty during the commission of the crime (beating).[183]

One particularly famous case in England, *Wilcox v. Jeffery*,[184] further supports the idea that minor contributions may constitute complicity. In that case, the defendant attended a concert given by a saxophonist who did not have the right to work in England. Although the artist was the principal in violation of the law, the mere presence and payment of the defendant, Wilcox, were considered acts of encouragement and led to Wilcox's conviction for complicity in the wrongdoing.[185]

In international criminal law, complicity extends even further to include the mere presence of individuals at the scene of the crime. Ad hoc tribunals have developed the doctrine of the "silent spectator," which criminalizes the conduct of observers who have a certain degree of authority or control over the perpetrators.[186] For instance, a military officer who witnesses soldiers engaging in pillaging and rape without taking any action to prevent these acts can be held responsible for complicity. Similarly, a prison warden who is aware of the mistreatment of prisoners and fails to object or take corrective measures can be held accountable for aiding and abetting. In both cases, the individual's

178. *See* Gardner, *supra* note 111, at 140.

179. *See supra* Parts III.B and III.C.

180. Moore, *supra* note 105, at 424; Dressler, *supra* note 108, at 431–32 (emphasis added).

181. New Mexico v. Duran, 86 N.M. 594, 526 P.2d 188 (N.M. Ct. App. 1974).

182. United States v. Ortega, 44 F.3d 505 (7th Cir. 1995).

183. FLETCHER, *supra* note 122, at 677–78 (citing Judgment of May 10, 1883, 8 RGSt. 267).

184. Wilcox v. Jeffery [1951]1 All E.R. 464 (1951).

185. *Id.* at 466.

186. Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeal Judgement, ¶¶ 273, 277 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Orić, Case No. IT-03-68-A, Appeal Judgment, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008).

presence and failure to intervene send a message of tacit support and encouragement, thus contributing substantially to the crimes committed.[187]

Not every contribution to the commission of the crime will meet the gravity threshold required for complicity. While the intensity requirement for complicity is relatively low, it still serves an important role in filtering out marginal participation for which punishing aiders and abettors would go against the principles of culpability and the interests of justice.[188] For example, if a series of wrongdoings occur during a public event, it would not be reasonable to hold every spectator criminally responsible.[189] Mere presence alone is not enough; there needs to be some additional level of involvement or authority over the perpetrators.[190] In the case of Wilcox, his act of purchasing a ticket demonstrated a direct contribution, whereas a prison warden's responsibility stems from the warden's authority over the perpetrators.[191]

The assessment of the intensity threshold in cases of complicity is always contextual and relies on several factors, including the seriousness of the principal's wrongdoing to which it is intimately connected. Crucially, however, when assessing putative complicit conduct, the intensity of the harmful impact that aiding and abetting has on the crime primarily serves to counterbalance the potential social benefits of human cooperation. This evaluation incorporates the normative assessment of aiding and abetting.

Up to this point, the discussion of causation has focused on its role as a property of mechanistic actions in examining the physical causes and establishing a factual connection between the individual's conduct and the resulting crime.[192] This form of causation, often referred to as "empirical causation"[193] or "cause in fact,"[194] connects the individual conduct with the criminal result in terms of cause and effect.[195] There is, however, another way of understanding causation in the context of the law: "normative,"[196] "legal,"[197] or "proximate

187. Prosecutor v. Aleksovski, Trial Chamber I Judgement, ¶ 87 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).

188. Ambos, *supra* note 32, at 602–03.

189. Most attendees in the crowd are typically passive observers with no direct involvement in the wrongdoing. Although they might seem to encourage the crime, assigning blame to all of them would not serve the interests of justice.

190. Dressler, *supra* note 108, at 432 n.22 ("Presence at the scene of a crime, even with the requisite mens rea, supposedly does not constitute complicity, but little more is needed.").

191. *See* Ventura, *supra* note 22, at 186.

192. The minimalist requirement is the "but for" or *sine qua non* test that manifests in necessary conditions for the occurrence of an event. *See supra* Part III.B.

193. Cupido, *supra* note 78, at 6–7.

194. Michael Moore, *Causation in the Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 Edition), http://plato.stanford.edu/archives/win2019/entries/causation-law.

195. *See* Andrew Simester, *Causation in (Criminal) Law*, 133 L.Q. REV. 416, 416 (2017).

196. *See id.* at 416–17.

197. *See* Stewart, *supra* note 159, at 1203.

causation."[198] According to Michael S. Moore, this concept of normative causation lacks a precise definition, leaving only bromides:

> [A] proximate cause cannot be *remote* from its putative effect; it must be a *direct cause* of the effect; it must not involve such *abnormality* of causal route that is *freakish*; it cannot be of harms that were *unforeseeable* to the actor; its connection to the harm cannot be *coincidental*; it must make the harm *more probable*; etc.[199]

In essence, normative causation goes beyond the mere factual assessment of cause and effect and takes into account various normative and policy considerations.[200] It seeks to determine the extent to which an individual can be deemed legally responsible for the resulting harm, considering factors such as foreseeability, proximity, and the overall fairness and justice of assigning complicity in a particular case.[201] By incorporating normative causation into the understanding of causality under the law, the legal implications of an individual's actions can be more clearly assessed, and the appropriate level of responsibility for their contribution to a crime can be determined. This broader perspective recognizes that aiding and abetting is not solely a matter of factual connection, but also encompasses normative considerations that align with the principles of culpability and the interests of justice.[202]

While normative causation has its limitations and raises conceptual uncertainties, it is a valuable tool for capturing the moral nuances of complicity in criminal law. It helps filter out irrelevant causal contributions and addresses the shortcomings of strict "cause-in-fact" approaches, particularly when dealing with responsibilities based on omissions.[203]

The concept of normative causation also supports Gardner's argument that all complicity is causal. In the example of the small arms dealer, even in the absence of proof that the weapons were used in the crime, there is a way to argue that the arms seller causally contributed to the *overall incidence of wrongdoing*: "[f]or there is a sense in which, even when the assistance or encouragement furnished to a wrongdoer is unnecessary, it does (in spite of appearances) make a difference to the overall incidence of wrongdoing, a

198. Moore, *supra* note 194.

199. *Id.*

200. Ambos, *supra* note 32, at 603 ("[W]hat is required for criminal responsibility to ensue—and this is particularly relevant in this context [of complicity]—is a certain normative relationship or nexus between the alleged contributing conduct and the criminal result, a relationship that in any case goes beyond a purely naturalistic causal nexus.").

201. *Cf.* Stewart, *supra* note 159, at 1204.

202. *See* Ambos, *supra* note 32, at 602–03.

203. *See* ROBINSON, *supra* note 153, at 179 ("On the normative conception, we compare what happened to the situation that would have existed had the person met her duty. If I am obliged to guard prisoners and I do not do so, the normative conception has no difficulty recognizing that my failure to guard may facilitate their escape.").

difference that warrants attention in the accomplice's practical reasoning."[204] Of course, this proposition raises conceptual uncertainties and questions regarding the extent of the overall incidence of wrongdoing and the boundaries of criminal responsibility in general. Exploring further these complexities is beyond the scope of this article.

Having said that, it is crucial to recognize the significance of the normative assessment in providing a broader perspective on the relationship between aiding and abetting and the principal's wrong.[205] It prompts us to question why certain acts, such as providing goods and services to an oppressive government, are not generally considered wrongful under the law,[206] while others with seemingly less impact on a crime, such as attending a prohibited art performance, are unequivocally condemned.[207] Empirical causation and risk analysis offer a framework for analyzing the factual aspect of aiding and abetting, primarily for assessing the impact of the contribution on the crime.[208] However, it is the normative perspective that ultimately distinguishes between wrongful and justified forms of participation in a crime.

The concept of wrongfulness denotes the violation of a prohibitory norm in the criminal code *without justification*.[209] It is therefore essential to take into account the presence or absence of justificatory grounds when assessing wrongfulness, which involves carefully evaluating competing prohibitory and permissive norms.[210] In this context, if an action is deemed justified, the permissive norm prevails and the actor's conduct is considered socially acceptable, even if it entails certain harmful effects. On the contrary, if an action is deemed wrongful, the harmful effects resulting from it are *substantial* in that they outweigh any justificatory grounds that may have been present.

I therefore submit that "substantial effect" in the context of complicity connotes *wrongful* aiding and abetting. Aiding and abetting that is not substantial is justified, even if it procures severe harmful consequences. Put differently, "substantial" in the context of complicity refers to a contribution that is more harmful than virtuous.

Once we accept this, it becomes clear that distinguishing between trivial and non-trivial contributions is not the true challenge in delineating the

204. Gardner, *supra* note 111, at 138.

205. In criminal law, which is deeply rooted in moral values and seeks to justify the criminalization of certain behaviors, understanding the normative connections is crucial in the process of attribution of criminal responsibility.

206. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 269–70 (S.D.N.Y. 2009). For a discussion, see *infra* Part IV.C.

207. Wilcox v. Jeffery [1951] 1 All E.R. 464, 466 (1951).

208. *Any* contribution that brings about changes in the nature of the principal's wrong or increases the risk of the crime is prohibited by the complicity rules. *See supra* Parts III.B and III.C.

209. *Cf.* FLETCHER, *supra* note 122, at 472. An archetypical example of justification is self-defense. *See* Jens Ohlin, *Excuses and Justifications*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 318, 318 (Antonio Cassese ed., 2009).

210. *See* Hajdin, *supra* note 28, at 49–50.

boundaries of complicity. Both types of contributions can be substantial effects on the crime depending on the specific circumstances of the crime.[211] The crux of the matter is balancing the competing interests and determining which prevails in each case.

This balancing exercise is rooted in making normative connections and is inherently guided by moral intuitions about right and wrong.[212] Consider, for example, the provision of humanitarian aid to a state engaged in aggression against another state. On a scale from one to ten, each instance of assistance increases the gravity of the aggression by two points. Despite this serious harmful effect, the broader international community may tolerate and even encourage such assistance if the benefits of preserving the well-being of the aggressor's population are deemed to outweigh the interests of imposing hardships and loss of life by withholding the provision of food and humanitarian aid.[213] In such a situation, the prohibited assistance is justified on the grounds of necessity.[214]

In summary, this part has established that the accomplice's impact on a crime is evaluated through a causation or risk-based paradigm. The low gravity threshold for participation in complicity, as evidenced by comparative and international criminal law practices, implies that the determination of wrongfulness mainly depends on a normative assessment that weighs the harmful consequences of aiding and abetting against the societal benefits resulting from human cooperation. If the harmful consequences are greater than benefits, the effect of aiding and abetting to the crime is substantial. Part IV builds on this framework and further enhances the methodology for evaluating corporate involvement in international crimes.

211. Dressler, *supra* note 108, at 432.

212. *See* Milanović, *supra* note 39, at 1311 (in the context of ascribing culpability).

213. *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOLUME I: FOUNDATIONS AND GENERAL PART 411–12 (2d ed. 2021) (arguing that justified conduct balances competing interests in favor of the superior interest). For additional context on this dilemma from international humanitarian law, compare Jean-Marie Henckaerts & Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 193 (Int'l Comm. Red Cross ed., 2005) (defining Rule 55, which states that the provision of humanitarian aid in armed conflict must be "impartial in character and conducted without any adverse distinction, subject to their right of control") with Daniel Warner, *The Politics of the Political/Humanitarian Divide*, 81 INT'L REV. RED CROSS 109, 117 (Mar. 1999) (noting that the question of whether humanitarian aid should be given to "populations which are either supporting aggressors or which are unable to keep aid from aggressors" is an operational question faced by the International Committee of the Red Cross that is intimately tied to political realities).

214. *See* Stewart, *supra* note 18, at 540.

IV. WRONGFUL AND JUSTIFIED NEUTRAL BUSINESS ASSISTANCE

A. *Assessing the Wrongfulness of Complicity in International Criminal Law: "Substantial," "Significant," or "Any Contribution"?*

Similar to municipal criminal law, customary rules of international criminal law stipulate that aiding and abetting requires a substantial contribution to the crime.[215] This requirement was first introduced in the International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind.[216] In the commentary accompanying the draft, the Commission further elucidated that, in addition to providing assistance, certain additional elements must be present for an act of aiding and abetting to be deemed substantial:

> [T]he accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.[217]

While the substantial effect requirement has been consistently applied across ad hoc tribunals, the ICC has yet to establish a definitive position on whether this constitutes a requirement for aiding and abetting under the Rome Statute.[218] Initially, the ICC assumed that the substantial requirement could be inferred, even though it is not explicitly mentioned in the Rome Statute.[219] Later, however, the court interpreted the Rome Statute's provision on aiding and abetting as not requiring any threshold of contribution.[220]

By contrast, the ICC is clear that Article 25(3)(d) of the Rome Statute, which encompasses complicity through contributions "in any other way,"

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215. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶ 401 (Special Ct. for Sierra Leone Sept. 26, 2013).

216. *See* Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10, chapter II.D.1, art.2(d) (1996).

217. *Id.* at 21.

218. *See* Ventura, *supra* note 22, at 181.

219. Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 279 (Dec. 16, 2011) ("substantial contribution to the crime may be contemplated"); *see also* Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Trial Chamber I Judgment, ¶ 997 (Apr. 5, 2012) ("If accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.").

220. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-422, Decision on the Confirmation of Charges, ¶ 43 (Mar. 23, 2016); Prosecutor v. Al Mahdi, ICC-01/12-01/15-84, Decision on the Confirmation of Charges, ¶ 26 (Mar. 24, 2016).

explicitly requires a "significant effect" on the crime.[221] This standard was adopted from the joint criminal enterprise doctrine of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[222] In *Katanga*, ICC Trial Chamber II outlined the basic parameters of a significant contribution:

> By significant contribution, the Chamber wishes to lay stress on a contribution which may influence the commission of the crime. Conduct inconsequential and immaterial to the commission of the crime cannot, therefore, be considered sufficient and constitute a contribution within the meaning of article 25(3)(d) of the Statute . . . . The contribution will be considered significant where it had a bearing on the occurrence of the crime and/or the manner of its commission.[223]

Accordingly, contributions that are classified as "inconsequential" or "immaterial" do not meet the minimum level of involvement necessary to be considered participation in the crime, whereas those that are "significant" with a bearing on the principal's wrong are viewed as sufficient involvement.[224] This distinction, however, does not clearly define the actus reus of complicity. Furthermore, additional clarification from existing case law remains elusive. Instead of relying on guiding principles, the practice of international criminal tribunals has relied on a "case-by-case assessment" as a framework for addressing this issue, recognizing the wide range of ways in which assistance can manifest in reality.[225]

Given the infinite possibilities, even providing an exhaustive list of prohibited conduct of aiding and abetting would not lead to a complete understanding the requirement for contribution.[226] Developing a methodology grounded in a clear set of principles is essential for allowing a nuanced evaluation of each case based on its specific circumstances. This is the task we will now pursue.

To explore the complexities of the conduct requirement in complicity, let us examine a case of neutral business assistance that brings the conceptual uncertainties of substantial contribution to the forefront. Consider the following

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221. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶ 1632 (Mar. 7, 2014); Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶¶ 276–77, 282–83.

222. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Trial Judgement, ¶ 309 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (The ICTY defines significant participation in the crime as an act or omission that enhances the efficiency or effectiveness of the criminal enterprise. This includes actions that contribute to the smooth operation and continuity of the system and allow it to function efficiently and without disruption.).

223. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶¶ 1632–33.

224. *Id.* ¶ 1632.

225. *See, e.g.*, Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶ 391 (Special Ct. for Sierra Leone Sept. 26, 2013).

226. *See* Ventura, *supra* note 22, at 206.

scenario:[227] Corporation *D2* engages in ordinary business transactions by selling products and services to *D1* (a state or non-state actor). Subsequently, *D1*'s officials commit international crimes. *D2*'s intention (induced by its business representatives) is solely to increase profit margins and not to further *D1*'s criminal activities. However, *D2* is aware of *D1*'s officials engaging in or preparing to commit international crimes, and there is an acknowledgment that the products and services provided by *D2* may have some relevance to *D1*'s criminal efforts. For the sake of the argument, let us assume that the mens rea requirement of complicity is satisfied in this scenario.

We turn the focus to the actus reus element. Recall that in the context of neutral business assistance, a distinction is often made in the literature and practice between dangerous and less dangerous materials as the objects of transactions.[228] Dangerous materials are items that have direct roles in the commission of crimes, such as weapons, poisonous gas, or military equipment. Less dangerous materials encompass items with a more indirect impact, such as computer equipment, information, or money.[229]

Consider now four variations of the scenario:

1. *D2* provides dangerous materials (e.g., weapons or military equipment) to D1 that are explicitly used in the commission of crimes.
2. *D2* provides non-dangerous materials (e.g., generic goods or services) to *D1* that enhance the logistical capabilities of the perpetrators, making them more efficient in the commission of crimes.
3. *D2* provides dangerous materials (e.g., weapons or military equipment) to *D1* that remain unused, or there is no clear evidence showing that the dangerous materials were used in the commission of crimes.
4. *D2* provides non-dangerous materials (e.g., generic goods or services) to *D1* that enhance the logistical capabilities of the perpetrators, but there is no clear evidence that this assistance made the perpetrators more efficient in the commission of crimes.

The fact that the business transaction was consummated through ordinary business channels does not automatically absolve the offender from complicity under international criminal law.[230] Regrettably, however, the case

227. The logic of the argument draws inspiration from Milanović's analysis of the mens rea requirement in the context of state responsibility. *See* Milanović, *supra* note 39, at 1308–16.

228. *See* Van der Wilt, *supra* note 86.

229. *See supra* Part II.B.

230. *See* Ambos, *supra* note 32, at 604; Jackson, *supra* note 17, at 832; Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeal Judgment, ¶ 189 (Int'l Crim. Trib. for the Former

law of international tribunals offers limited guidance on where to draw the demarcation line between legitimate cooperation and prohibited acts of complicity in the scenarios of neutral business assistance.[231] Clearly, to qualify as aiding and abetting, the conduct must have a bearing or effect on the commission of the crime. But what counts as "substantial" remains uncertain within the presented scenario.

The underlying principles and competing normative considerations that apply to the assessment of the wrongfulness of complicity in municipal criminal law are also relevant in the context of international criminal law.[232] *First* and foremost, the contribution must be successful to qualify as an act of complicity. This means that the accomplice must effectively aid and abet the perpetrator, rather than attempting to do so and failing.[233] For an act to be considered as aiding and abetting, there must be an action that is normatively recognized as aiding and abetting and attributable to the accomplice. In this vein, the assistance (aiding) must be made available to the perpetrator, either with or without their knowledge,[234] while the act of abetting must have an impact on the perpetrator's state of mind.[235]

Second, the existence of the effect on the crime can be established through either a causation or risk paradigm.[236] Causation affects the occurrence of the crime by altering the properties of the principal's wrongful act.[237] Scenario 1 above—where dangerous materials are provided to the perpetrator and directly used in the commission of the crimes—is a paradigm example of causal complicity. A separate issue is one of causal remoteness, particularly in situations where the assistance remains in reserve or where there is no evidence that the

Yugoslavia May 9, 2007). *See also* Prosecutor v. Popović, Case No. IT-05-88-A, Appeal Judgment, ¶ 1615 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

231. *See* Ventura, *supra* note 22, at 206–07; Michalowski, *supra* note 11, at 405.

232. *See* Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 565 (2002) (arguing that the international criminal justice system derives justification of its norms from domestic systems).

233. Failed attempts at aiding and abetting have no bearing or effect on the commission of the crime. *See* Gardner, *supra* note 111, at 137.

234. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶ 229(ii) (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeal Judgment, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004).

235. *See* Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeal Judgment, ¶ 277 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Trial Judgment, ¶ 36 (Int'l Crim. Trib. for Rwanda June 7, 2001); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Judgment, ¶ 389 (Int'l Crim. Trib. for Rwanda May 15, 2003); Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Appeal Judgment, ¶ 374 (Int'l Crim. Trib. for Rwanda July 7, 2006).

236. *See supra* Parts III.B and III.C.

237. In this framework, the accomplice's contribution does not necessarily have to be a condition *sine qua non* for the crime to occur. *See* Prosecutor v. Blé Goudé, ICC-02/11-02/11, Decision on the Confirmation of Charges, ¶ 167 (Dec. 11, 2014).

provided material aid has been utilized in the commission of the crime.[238] An illustrative example is the conviction of the small arms dealer Kouwenhoven despite a lack of concrete evidence linking his weapons to the actual commission of the crimes.[239] Kouwenhoven's contribution was still deemed to have an effect on the underlying offenses because the provision of weapons alone increased the risk of the crime.[240] By providing the perpetrator with dangerous materials, the probability of the crime was heightened, regardless of whether those means were ultimately used. Similarly, increasing the logistical capabilities of the perpetrator represents a clear case of risk augmentation. Therefore, in all four scenarios presented above, the assistance provided is successful; in other words, it has an effect on the crime.

Third, the degree of the effect on the crime must be of sufficient gravity to align with the principle of personal culpability and justify prosecution.[241] In the realm of international criminal law, this degree is notoriously low.[242] The case law of ad hoc tribunals demonstrates that the substantial effect standard encompasses both trivial and marginal contributions.[243] Ines Peterson provides examples such as employing individuals, providing necessary equipment, and overseeing payments to soldiers who ultimately committed international crimes.[244] In *Prosecutor v. Taylor*, the Special Court for Sierra Leone ("SCSL") Appeals Chamber also offers instructive examples of complicit contributions that are considered substantial: providing weapons, ammunition, vehicles, and fuel; standing guard; transporting perpetrators to crime sites; establishing roadblocks; escorting victims to crime sites; falsely encouraging victims to seek refuge at an execution site; providing financial support to an organization committing crimes; expelling tenants; dismissing employees; denying victims refuge; identifying a victim as a member of the targeted group; and various acts and conduct of senior officials.[245] These acts and conduct include signing decrees; attending meetings and issuing reports; allowing troops to be used to assist and commit crimes; demanding slave labor; issuing directives; drafting laws; endorsing official decisions to disarm victim groups; collaborating with law enforcement agencies to maintain unlawful arrests and detention; deliberately withholding adequate medical care in detention facilities; making speeches encouraging crimes; implementing media campaigns to incite hatred;

238. *See, e.g.*, MODEL PENAL CODE § 2.03(2) (AM. L. INST. 1985) (imposing, for crimes which require purposeful or knowing conduct, a requirement that the result is "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.").

239. Van den Herik, *supra* note 170, at 223–24.

240. Cupido et al., *supra* note 98, at 176–77; Sluiter & Yau, *supra* note 161, at 324.

241. *See* Ambos, *supra* note 32, at 602–03.

242. Ambos, *supra* note 3, at 549–50.

243. A similar standard is observed in domestic criminal law. *See supra* Part III.D.

244. Peterson, *supra* note 62, at 570.

245. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶ 369 (Special Ct. for Sierra Leone Sept. 26, 2013).

being an approving spectator at the scene of a crime; and performing tasks such as burying bodies, cremating bodies, or conserving looted property.[246] Even the professional roles of an accountant, architect, or dentist can have a substantial effect on the commission of crimes, as can the roles of prosecutors, judges, and religious officials.[247]

Although the threshold for the gravity requirement is very low, not every contribution to the crime justifies prosecution.[248] For instance, merely being present at a meeting where criminal plans are discussed can be seen as a form of participation in the crime, but it is normatively distinct from active planning. Only the latter constitutes complicity.[249] In the first three scenarios presented, the gravity threshold is likely to be met because the acts of assistance directly contribute to the commission or raise the risk of crimes. However, in the fourth scenario, where there is no clear evidence indicating that the provision of generic goods or services enhanced the efficiency of the perpetrators, the assessment of the gravity threshold must be approached cautiously. It requires careful consideration of the specific circumstances, such as (but not limited to) the quantity of goods provided and the gravity of the principal's wrongdoing.[250]

Fourth, and consequently, the trichotomy between "substantial," "significant," and "any contribution" in international criminal law is inherently confusing, redundant, and misleading. The term "substantial" has long been recognized as a customary standard for aiding and abetting.[251] The term "significant" was set out by the ICC in its interpretation of the minimum requirement for contribution under Article 25(3)(d).[252] The ICC proposed the term "any contribution" to encompass the actus reus of traditional forms of aiding and abetting.[253]

The unclear definitions and inconsistent usage of these terms in ICC case law only exacerbate the confusion. For instance, in *Prosecutor v.*

246. *Id.*

247. *Id*.

248. According to the Rome Statute, the contribution to the crime must be of a *sufficient gravity* to justify investigation and prosecution. Rome Statute, *supra* note 31, arts. 17(1)(d), 53(1)(b)–(c), and (2)(b)–(c).

249. *See, e.g.*, Prosecutor v. Fofana, Case No. SC-SL-04-14-A, Appeal Judgment, ¶ 102 (Special Ct. for Sierra Leone May 28, 2008) (holding that mere presence without participation does not constitute aiding and abetting).

250. It should be borne in mind that the gravity requirement primarily serves the critical function of balancing the justificatory grounds of the accomplice's conduct. This is further explored in the subsequent discussion.

251. Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶ 401 (Special Ct. for Sierra Leone Sept. 26, 2013).

252. *See* Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, ¶ 1632 (Mar. 7, 2014); Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶¶ 276–77, 282–83 (Dec. 16, 2011).

253. Prosecutor v. Ongwen, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 43 (Mar. 23, 2016).

Mbarushimana, the ICC Pre-Trial Chamber I made an unsupported assertion that control over the crime is assumed through one's participation and decreases as the different modes of criminal liability under Article 25(3) are considered from point (a) to (d).[254] Building upon this reasoning, the ICC Pre-Trial Chamber II held in *Prosecutor v. Ruto* that "significant" is of a lesser degree than "substantial."[255] This line of reasoning raises serious concerns due to its lack of explanation and logical consistency.

Pre-Trial Chamber I failed to provide a clear and substantiated explanation of how control over the crime is assumed through an individual's participation. Control implies the ability to direct or influence the commission of the crime, but the Chamber did not elucidate how mere participation by aiding and abetting automatically leads to the assumption of control. Pre-Trial Chamber II's assertion that control decreases as the modes of liability progress from point (a) to (d) under Article 25(3) is also problematic. The Chamber did not provide a convincing rationale or basis for this claim. In reality, the level of control exerted over a crime cannot be accurately determined solely on the basis of the category of liability. Holding a victim while they are being subjected to violence, for example, still involves a significant degree of control over the crime.

This arbitrary distinction between different modes of liability does not align with a logical understanding of control and further contributes to the confusion surrounding the various contribution thresholds. Overall, the unsupported reasoning presented by the ICC Pre-Trial Chambers I and II adds to the complexities of already intricate concepts within international criminal law. This undermines the proper understanding and application of the different contribution thresholds, creating confusion and inconsistency in the assessment of complicity in international criminal law.

The superfluous nature of the proposed trichotomy becomes apparent when examining relevant practice, which consistently demonstrates a notably low threshold for the criterion of substantial contribution—sometimes considered to be the highest of the three. Consider the only two cases from ad hoc tribunals in which defendants were acquitted because their contributions were not deemed to have a substantial effect on the crime.[256] Vlatko Kupreškić was accused of aiding and abetting an attack against the Muslim population in the village of Ahmići by unloading weapons from his car.[257] The ICTY Appeals Chamber did not consider his contribution to have had a substantial effect on

254. Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 279. *See also* Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 957 (2007) (suggesting that there is a value hierarchy underlying the modes of participation in the Rome Statute).

255. Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges, ¶ 354 (Feb. 4, 2012).

256. Peterson, *supra* note 62, at 569.

257. *See* Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeal Judgment, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

the commission of the crimes.[258] Similarly, in *Prosecutor v. Milutinović*, the defendant Vladimir Lazarević, who, as the Commander of the Priština Corps, was responsible for the forcible transfer of Kosovo Albanians, was initially found guilty of complicity in war crimes.[259] On appeal, the ICTY Appeals Chamber acquitted Lazarević, reasoning that as a low-ranking commander, his failure to investigate and punish the crimes could not be deemed to have had a substantial effect on the commission of international crimes.[260]

The substantiality of Kupreškić's and Lazarević's contributions in these cases is a matter of interpretation. Their contributions were considered not "substantial," but were they "significant"? As with the term "substantial,"[261] what may be deemed "significant" to some may not hold the same weight for others. Kupreškić's and Lazarević's contributions could certainly be categorized as "any," but even if this was the appropriate standard, this categorization alone would not reflect the underlying considerations of the wrongfulness of complicity, which demand weighing in on justificatory grounds. This is why the trichotomy of "substantial," "significant," and "any contributions" is misleading and ultimately pales into insignificance.

The trichotomy also diverts attention from the primary considerations surrounding the gravity requirement, which principally serves to balance the social interests involved in aiding and abetting. As Judge de Gurmendi articulated in her Separate Opinion in *Mbarushimana*:

> Depending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes by this group. In my view the real issue is that of the so-called "neutral" contributions. This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution.[262]

The determination of the minimum objective requirement for aiding and abetting should align with the principle of culpability and, at the ICC, with the intensity threshold outlined in Articles 17(1)(d), 53(1)(b–c), and 53(2)(b–c) of

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258. *See id.* ¶ 277.

259. *See* Case No. IT-05-87-T, Trial Judgment Vol. 3, ¶¶ 925, 930 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) ("Lazarević knew that his failure to take adequate measures to secure the proper investigation of serious crimes committed by the [Yugoslav army] enabled the forces to continue their campaign of terror, violence, and displacement.").

260. Prosecutor v. Šainović, Case No. IT-05-87-A, Appeal Judgment, ¶¶ 1681–82, 1772 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

261. Prosecutor v. Fofana, Case No. SC-SL-04-14-A, Appeal Judgment, ¶ 97 (Special Ct. for Sierra Leone May 28, 2008) (In this case, the court found that providing arms, ammunition, and vehicles that were used in the commission of international crimes did not amount to the substantial contribution standard).

262. Prosecutor v. Mbarushimana, ICC-01/04-01/10 OA-4, Separate Opinion of Judge Fernández de Gurmendi, ¶ 12 (May 30, 2012).

the Rome Statute.[263] On the basis of a survey of comparative and international criminal case law,[264] it can be concluded that the threshold for the required degree of participation in the commission of a crime is *in fact* very low, and in most cases, this threshold is satisfied even if the contribution has a minimal or "micro" effect on the crime.

Fifth, due to the low threshold of participation required for complicity, the assessment of whether a specific contribution constitutes a wrongful act of complicity or a justified act of human cooperation ultimately relies on a normative evaluation.[265] This evaluation considers equally the harmful effects that may arise as a result of the contribution and the positive social benefits of human cooperation.[266] Only by weighing these factors can a just determination of the moral and legal character of the contribution be achieved, thereby allowing an understanding of the ethical implications and societal impact of corporate involvement in international crimes. Engaging in business with a bad actor is permissible but *only in cases where the significant social benefits derived from the cooperation outweigh the harmful effects on the commission of the crime*.[267] Blanket bans on all connections with the perpetrator would essentially treat them as less than human, which runs contrary to the underlying goals of the criminal justice system.[268]

Scenario 1 above, involving the provision of means for the commission of the crime, presents a prominent case for complicity. The social interests of human cooperation, such as the free flow of commodities,[269] are unlikely to outweigh the added harm of dealing in arms and other dangerous goods that

263. *See* Ambos, *supra* note 161, at 1011.

264. *See supra* Part III.D.

265. Ambos, *supra* note 32, at 603 ("[W]hat is required for criminal responsibility to ensue—and this is particularly relevant in this context—is *a certain normative relationship or nexus between the alleged contributing conduct and the criminal result*, a relationship that in any case goes beyond a purely naturalistic causal nexus.") (emphasis added); Prosecutor v. Mbarushimana, Separate Opinion of Judge Fernández de Gurmendi, ¶ 12.

266. It is important to recognize that in every case of complicity, the aider and abettor subtracts a certain portion of harm, thereby promoting certain social interests. Even a gun merchant can be seen as subtracting harm by potentially preventing arms sales by less scrupulous competitors. *See* Gardner, *supra* note 111, at 139 ("One justifies one's own arms dealing by pointing to the arms dealing of others thereby avoided only if one deals in arms in order to avoid arms dealing by others.").

267. *Cf.* AMBOS, *supra* note 213, at 411–12 (arguing that justified conduct balances competing interests in favor of the superior interest).

268. Ambos, *supra* note 32, at 606 ("[C]riminal conduct should be limited to a significant deviation from standard social or commercial behavior in order to capture really wrongful and blameworthy conduct…conduct that violates specific prohibitions (conduct norms) cannot be considered 'socially desirable and legitimate' and this qualifies, if all other requirements are met, as criminally relevant assistance.").

269. *See* Burchard, *supra* note 2, at 921 n.6.

directly contribute to the commission of crimes. In this context, the detrimental effects of aiding and abetting are difficult to justify.[270]

Scenarios 2 and 3 involve situations where the accomplice's contribution, although not directly providing means for the commission of the crime as in Scenario 1, still has an effect on the crime.[271] In Scenario 2, the accomplice provides non-dangerous materials or assistance that increases the logistical capabilities of the perpetrators, making them more efficient in the commission of crimes. In Scenario 3, the accomplice provides dangerous materials that directly increase the probability of the crime. These actions are justified if the assistance is determined to be of minimal significance in the larger context of international crime or if the social benefits derived from this type of conduct outweigh the harmful effects of the aiding and abetting in question. Examples of social benefits in aiding and abetting could include facilitating the free flow of commodities in globalized markets, providing humanitarian aid that enhances the well-being of the perpetrator's community, or contributing to efforts that promote stability and peace in conflict-affected regions.[272]

In Scenario 4, it should be presumed that the social benefits derived from the business transaction outweigh any potential contribution to the commission of a crime. This presumption arises from the inherent non-dangerous nature of generic goods or services regularly provided by the company coupled with the lack of clear evidence indicating that the specific transaction itself directly enhances the perpetrator's efficiency in committing the crime. Crucially, however, it is important for the corporation to be aware of the potency of its assistance and to cease providing goods or services if it becomes evident that such support significantly enhances the perpetrator's ability to carry out atrocities. By maintaining vigilance and taking appropriate action, corporations can avoid complicity and uphold ethical responsibilities in grave human rights abuses.

Sixth and finally, adopting a comprehensive view of complicity—one that takes into account both the factual and normative dimensions of aiding and abetting—makes any additional requirements for assessing wrongfulness unnecessary. Judge Van den Wyngaert, in her minority opinion in *Katanga*, considered the potential incorporation of the "specific direction" standard in cases of neutral business assistance as a safeguard for the principle of culpability, given the already low requirements of actus reus and mens rea for complicity.[273] In ATS cases, United States federal courts have taken a similar

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270. Although challenging, a case of justification can still be made in situations involving the provision of dangerous goods and materials. *See infra* Part IV.B.

271. *See supra* Parts III.C and III.D.

272. For further development of the concept of social benefits, see *infra* Part IV.C.

273. Prosecutor v. Katanga, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Wyngaert, ¶ 287 (Mar. 7, 2014) ("I do consider that, when assessing the significance of someone's contribution, there are good reasons for analysing whether someone's assistance is specifically directed to the criminal or non-criminal part of a group's activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e. contributions

approach.[274] The "specific direction" standard has an interesting history in ad hoc tribunals. In 2011, the ICTY Appeals Chamber acquitted Momčilo Perišić, a Serbian general who held a prominent position in the Armed Forces of Yugoslavia. The court concluded that his assistance to the Army of Republika Srpska, which was implicated in international crimes, was not specifically intended to facilitate the commission of those crimes.[275] The defense argued that Perišić's assistance was aimed at the legitimate general war effort rather than criminal purposes.[276] The Appeals Chamber acknowledged that the Army of the Republika Srpska was not a criminal organization per se, but an army engaged in warfare. Providing general assistance to an organization whose primary objective is not the commission of crimes, even if certain actions may be characterized as criminal, is not inherently illegal.[277]

This case of dual-use assistance exemplifies the complexities involved in distinguishing legal aid from criminal complicity.[278] Perišić's contribution encompassed both furthering the legitimate war effort and aiding the commission of international crimes. In response, the ICTY Appeals Chamber introduced the "specific direction" standard to determine complicity. The court emphasized that in most cases, the provision of general assistance that could be used for lawful and unlawful activities would not alone be sufficient to establish complicity.[279] Instead, evidence demonstrating a direct link between the aid provided by the accused individual and the specific crimes committed by the principal perpetrators was deemed necessary for a conviction of aiding and abetting.[280] The conduct of an accomplice must have had a substantial effect on the commission of the crime and, the court argued, requires a close link with the principal wrongdoing: "[A]ssistance must be 'specifically'—rather than 'in some way'—directed towards relevant crimes."[281] This standard became particularly significant in cases where the accused was more removed from the actual crime scene.[282] Later, the SCSL Appeals Chamber rejected this requirement in *Taylor*, asserting that it did not form part of customary

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that, by their nature, could equally have contributed to a legitimate purpose – are criminal or not. The need for such a distinguishing element is especially acute in the context of article 25(3)(d) [of the Rome Statute], where both the mens rea and the actus reus thresholds are extremely low.").

274. *See* Presbyterian Church of Sudan v. Talisman Energy, 453 F. Supp. 2d 633, 672 (S.D.N.Y. 2006).

275. Prosecutor v. Perišić, Case No. IT-04-81, Appeals Judgment, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

276. *Id.* ¶ 20.

277. *Id.* ¶ 53.

278. *See* Van Schaack, *supra* note 74.

279. Prosecutor v. Perišić, Case No. IT-04-81, Appeals Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

280. *Id.*

281. *Id.* ¶ 27.

282. *Id.* ¶ 39.

international law.[283] Eventually, the ICTY itself abandoned the specific direction standard and instead focused on the requirement that the accomplice's conduct must have a substantial contribution to the principal wrong.[284]

While incorporating standards such as "specific direction" may have some merits in assessing the wrongfulness of complicity in systemic crimes, the proposed doctrinal structure presented here argues against the inclusion of such additional requirements. Instead, the proposed framework emphasizes an approach that combines factual analysis with a normative account of aiding and abetting. By integrating these elements, a thorough evaluation of the accomplice's contribution and its moral implications can be achieved, providing a robust methodology for assessing complicity. This approach aligns with the core principles of criminal law, ensuring a comprehensive understanding of the accomplice's involvement and its ethical ramifications.[285]

B. *The Provision of Dangerous Materials Through Legitimate Channels*

Although the gravity threshold for complicity is low in international criminal law, the harm resulting from aiding and abetting must carry enough significance to outweigh the social benefits arising from transactional exchanges. This ultimately normative assessment is influenced by practical, moral, and political considerations that shape the understanding of what is right and wrong in a given context.[286] While conceptual clarifications have their limitations, it is important to continue exploring and shedding light on theoretical uncertainties. The remainder of this article will explore the application of the proposed methodology to cases involving neutral business assistance in international crimes.

There are three typical scenarios of neutral business assistance: the provision of dangerous materials, the provision of generic goods or services, and assistance given in the course of continuing business cooperation. The first is the least contested. In this scenario, the goods are specifically designed for the direct commission of the crime.[287] These materials often include weapons and military equipment, which are described as "dangerous," "less innocent," or "killing agents" due to their limited range of application and perceived causal proximity to the occurrence of harm.[288]

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283. *See* Prosecutor v. Taylor, Case No. SC-SL-03-01-A, Appeal Judgment, ¶¶ 474-75 (Special Ct. for Sierra Leone Sept. 26, 2013).

284. Prosecutor v. Šainović, Case No. IT-05-87-A, Appeal Judgment, ¶¶ 1650, 1772 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

285. *See* AMBOS, *supra* note 213, at 142–54 (explaining the core principles of criminal law).

286. *See* Nicola Lacey, *A Clear Concept of Intention: Elusive or Illusory?*, 56 MOD. L. REV. 621, 626 (1993) (arguing that disagreements about the application of criminal law concepts arise from practical, moral, and political issues).

287. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009).

288. *See* Van der Wilt, *supra* note 86, at 68; *S. African Apartheid Litig.*, 617 F. Supp. 2d at 258.

A notable historical case is the distribution of the highly poisonous gas hydrogen cyanide, known as Zyklon B, by the company Testa during World War II.[289] Originally intended for the legitimate purpose of exterminating lice and vermin in concentration camps, Zyklon B eventually became instrumental in the mass murder of inmates.[290] In this case, the business leaders of Testa faced charges of complicity for contributing to the commission of large-scale atrocities. The defendants argued that they were unaware of the intended use of the gas for murder, asserting that its provision was *specifically directed* toward the (legitimate) purpose of exterminating vermin.[291] The court held that the defendants' knowledge of the gas's potency and their awareness that it would be used in criminal activities made them accessories before the fact to the murders committed with Zyklon B.[292] Ultimately, Bruno Tesch, the owner of Testa, and his deputy, Karl Weinbacher, were found guilty of complicity and sentenced to death by hanging.[293]

The provision of dangerous materials often presents an easy case of complicity in scenarios of neutral business assistance when the reputation of the business partner is questionable.[294] Another intriguing case is that of Dutch businessman Frans Van Anraat, who was charged with complicity in genocide and war crimes.[295] Van Anraat supplied the Iraqi regime under Saddam Hussein with significant quantities of thiodiglycol ("TDG"), a chemical used in the production of mustard gas deployed against the Kurdish population and in the war against Iran. While TDG itself is not inherently illegal and is commonly used as a textile additive,[296] the Dutch Appeals Court recognized that the substantial amount of gas supplied by Van Anraat (over 1,100 tons) could only serve the purpose of producing mustard gas.[297] The court determined that it was inconceivable that TDG was being used as a textile additive in Iraq during the 1980s, as no factories equipped for textile paint or printing ink production were found

289. U.N. War Crimes Comm'n, *The Zyklon B Case*, 1 L. REP. TRIALS OF WAR CRIMINALS 93 (1947), http://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-1/Law-Reports_Vol-1.pdf.

290. *Id.* at 94.

291. *Id.* at 96–97.

292. *Id.* at 101–02.

293. *Id.* at 102.

294. *See* Van der Wilt, *supra* note 86, at 68; Michalowski, *supra* note 97, at 469 ("[T]he inherent quality of the goods could be relevant for determining the mental state of the defendants, as the illegitimate use might be more obvious to the corporation where the good has inherently harmful qualities.").

295. Rb.'s-Gravenhage 23 december 2005, NJFS 2006, 89 m.nt. (/Van Anraat) (Neth.)ECLI:NL:RBSGR:AU8685; Hof's-Gravenhag 9 mei 2007, m.nt.(/Van Anraat) (Neth.), ECLI:NL:GHSGR:2007:BA4676.

296. *See* Cupido et al., *supra* note 98, at 175.

297. ECLI:NL:GHSGR:2007:BA4676, ¶ 11.10.

in the country.[298] Consequently, Van Anraat was found guilty of complicity in war crimes, but acquitted of genocide.[299]

The Dutch Appeals Court clarified that the actus reus requirement of complicity does not necessitate the assistance to be indispensable or make "an adequate causal contribution" to the crime.[300] Rather, it is sufficient if the assistance offered by the accomplice promotes or facilitates the offense in some way.[301] Considering the significant quantities of TDG supplied by Van Anraat, the court determined that his contribution went beyond "neutral" and played a significant role in the Iraqi chemical weapon program, leading to his conviction for complicity in war crimes.[302]

Dealing arms through legitimate channels falls within the same category of cases involving the provision of dangerous materials. The fact that dangerous goods were sold through regular business commerce and compliance with national licensing requirements, does not absolve corporate officials of their responsibility in international criminal law.[303] Weapons can be used in the commission of crimes. Even if they remain in reserve, or in cases where there is no evidence of the direct use of the provided materials, their provision alone increases the probability of the crime occurring, which satisfies the minimum threshold for complicity.[304]

A challenging aspect of the provision of dangerous materials through legitimate business channels is the ethical dilemma that arises when such assistance may seem like the right thing to do despite its obvious harmful effects.[305] Chiara Lepora and Robert E. Goodin argue that there may be circumstances where contributing to international crimes could be justifiable due to the overall context in which the assistance takes place.[306] Their argument is that

298. *Id.*

299. On the grounds for acquittal for genocide in the Van Anraat case, see Harmen G. van der Wilt, *Genocide v. War Crimes in the* Van Anraat *Appeal*, 6 J. INT'L CRIM. JUST. 557 (2008).

300. ECLI:NL:GHSGR:2007:BA4676, ¶ 12.4.

301. *Id.*

302. *Id*. ¶ 12.5.

303. Ambos, *supra* note 32, at 604. Jackson, *supra* note 17, at 832. *See* Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeal Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007). *See also* Prosecutor v. Popović, Case No. IT-05-88-A, Appeal Judgment, ¶ 1615 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

304. *See supra* Part III.C.

305. Jackson, *supra* note 17, at 818. *See also* David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613 (2021) (exploring the moral dilemma faced by government lawyers and public officials when they find themselves working for a government whose policies they morally oppose. The dilemma involves deciding whether to continue in their roles, potentially becoming complicit in supporting evil policies, or quitting and disassociating themselves from those actions. Staying in the job may allow them opportunities to mitigate the harmful policies and uphold the rule of law, but it also risks normalization of or desensitization to the wrongdoing.).

306. *See* Chiara Lepora & Robert E. Goodin, *Grading Complicity in Rwandan Refugee Camps*, 28 J. APPLIED PHIL. 259, 267–68 (2011).

contributing to the principal wrongdoing might sometimes be the best course of action if it can actually improve a dire situation.[307] The moral premise of this proposition is that it is preferable to actively engage and work toward making those situations better rather than remaining passive. For example, supplying military assistance to a state fighting off aggression may (and probably will) lead to the commission of international crimes by that state.[308]

A pertinent example of this dilemma is the commercial support provided by the United States and the United Kingdom to the Saudi-led military operations in Yemen, ostensibly to combat terrorism, which resulted in significant civilian casualties and infrastructure destruction.[309] The wrongfulness of such assistance depends on a balance between the harmful effects and the promoted social benefits. In this case, the harm caused by the provision of assistance, including the loss of over 150,000 human lives and the destruction of vital infrastructure such as hospitals and schools, clearly outweighs any potential utilitarian justifications for the assistance.[310] While grounds for justifications are plenty, such as countering terrorism, advancing national security, or pursuing foreign policy objectives, it is crucial for states and corporations to recognize and accept that providing assistance that contributes to grave human rights violations on a large scale is unlikely to be of greater good for the broader society.[311] In such situations, if a state or corporation persists in providing neutral business assistance based on some utilitarian calculus, it is their responsibility to acknowledge the consequences of their actions and accept the legal repercussions for their complicity in international crimes.[312]

C. *The Provision of Generic Goods or Services*

Generic goods and services refer to commodities that are not specifically customized for individual customers but have a standardized nature and are offered to a wide range of customers. The issue of "causation continuum" looms large in cases of neutral business assistance involving the provision of

307. *Id.* at 269–70.

308. *See, e.g.*, Kasmira Jefford, *Prisoners of War Tortured by Both Russia and Ukraine, UN Probe Shows*, GENEVA SOLUTIONS (Nov. 24, 2022), http://genevasolutions.news/human-rights/prisoners-of-war-tortured-by-both-russia-and-ukraine-un-probe-shows.

309. Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), http://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen.

310. *See The War on Yemen's Civilians*, CAMPAIGN AGAINST ARMS TRADE (Aug. 25, 2023), http://caat.org.uk/homepage/stop-arming-saudi-arabia/the-war-on-yemens-civilians.

311. *See* Milanović, *supra* note 39, at 1390–91; *CAAT's Legal Challenge*, CAMPAIGN AGAINST ARMS TRADE (Jan. 24, 2023), http://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge.

312. *See* Milanović, *supra* note 39, at 1391.

these goods or services.[313] Contrary to popular belief, the challenge of attributing complicity in non-dangerous assistance cases does not arise from a lack of causal "proximity"[314] or some kind of "causal indirectness,"[315] nor from the fact that the provision occurs within the context of ordinary commercial transactions.[316] As explained previously, the accomplice may set in motion a causal chain that spans various events in space and time before its effect materializes in the criminal result, alters the properties of the wrongdoing,[317] or increases the risk of the crime.[318]

The fact that the business exchange took place through ordinary business transactions is not on its own an exculpatory ground in international criminal law.[319] Moreover, differentiating between generic goods and services and "dangerous" assistance, such as poisonous gas, based solely on the nature of assistance and asserting that the former is less significant than the latter—as the United States federal courts have in the past[320]—simply lacks principled legal reasoning.[321] The wrongfulness of neutral business assistance is

313. Int'l Comm'n of Jurists, *supra* note 1, at 28 ("Sometimes, even though the provision of goods or services may be an integral factor in a chain of causation, criminal and civil courts may hesitate to find a company in this situation legally accountable, because the misuse of their generic goods or services is considered to be beyond their control."); Burchard, *supra* note 2, at 923; *see also supra* note 84 and accompanying text.

314. *See* Kaleck & Saage-Maaß, *supra* note 4, at 721 ("[T]here must be a connection between the company or its employees and the principal perpetrator of the international crime or the victim of the abuses either because of geographic propinquity, or because of the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned.").

315. Int'l Comm'n of Jurists, *supra* note 57, at 37 ("[T]he more indirect the assistance of the company is to the crime, the more difficult it will be to establish that the company officials knew that this assistance was being provided. A company official may not ordinarily be criminally responsible if he sold legitimate and generic goods to a government that then used the goods to help it accomplish a criminal act.").

316. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1090 (C.D. Cal. 2010) ("ordinary commercial transaction[s], without more, do not violate international law.").

317. *See supra* Part III.B.

318. *See supra* Part III.C.

319. Ambos, *supra* note 32, at 604; Jackson, *supra* note 17, at 832. *See* Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeal Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

320. *E.g.*, *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258 ("The distinction between these two cases is the quality of the assistance provided to the primary violator. Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed.").

321. As Norman Farrell puts it:

> [T]he provision of [dangerous] goods bore a closer causal connection to the principle crime than the provision of loans, but it is a different question whether the provision of weapons would necessarily be a more substantial contribution than the provision of raw materials or the provision of funds. That is an evidentiary issue. Though the supply of poison gas may be more directly linked to the crime in terms of causation, there does not seem to be any principled legal reason to preclude contributions such

primarily contingent upon the evaluation of the social interests advanced through such cooperation and the normative determination of whether these interests possess sufficient value to justify the violation of the prohibitory norm of the criminal code, that is, aiding and abetting the perpetrator.[322]

That said, certain forms of assistance inherently bring robust social benefits and are considered highly valuable in the broader context of society. These forms of assistance provide essential support for the well-being of individuals and communities and are presumed to be legitimate even if they enhance the recipient's effort in committing serious human rights violations.[323] For instance, providing food to a population affected by conflict or natural disasters is crucial for their survival and humanitarian well-being. Similarly, delivering medical aid, gas, and other supplies to areas with limited healthcare infrastructure can save lives and alleviate suffering.[324]

Different sets of issues arise when considering the provision of generic goods or services that are not vital for the perpetrator's well-being. This includes the provision of information, technology, training, civil vehicles, fuel, money, and the construction of airstrips, among others. These fungible materials and services—widely considered legitimate forms of assistance—enhance the logistical capabilities of the perpetrator, but the courts are often reluctant to regard them as complicity.[325]

In *In re South African Apartheid Litigation*, the United States District Court for the Southern District of New York addressed this issue.[326] The case revolved around allegations against several transnational corporations that they provided technology, vehicles, and funding to the South African apartheid regime, which was responsible for gross human rights violations

> as funds, which may substantially contribute, but with more links, in the causal chain between the assistance and the crime. The *mens rea* requirement—whether mere knowledge or something greater—will in either case link the acts of assistance to the crimes in the mind of the accused, and the less causally direct assistance may have a greater effect on the ability of the principal to carry out the crime. Moreover, this 'directness' requirement could be relatively easily and deliberately circumvented by those who knowingly or purposively assist in crimes.

Farrell, *supra* note 72, at 891.

322. *See supra* Part IV.A.

323. Michalowski, *supra* note 11 ("There might also be perfectly legitimate reasons for supplying governments, even those with the worst human rights records, with certain goods and services, such as to enable them to carry out governmental tasks that clearly benefit the population, like building schools.").

324. In a domestic context, Jackson provides the example of a doctor providing contraception to an underage girl with the knowledge that it may contribute to an offense of sexual intercourse with a minor. The doctor's conduct is justified under the law of England and Wales, as the provision aims to prioritize the well-being and protection of the child. *See* Jackson, *supra* note 17, at 828.

325. *See* Int'l Comm'n of Jurists, *supra* note 57, at 37 ("A company official may not ordinarily be criminally responsible if he sold legitimate and generic goods to a government that then used the goods to help it accomplish a criminal act.").

326. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 268–69 (S.D.N.Y. 2009).

amounting to international crimes.[327] The court's ruling established that engaging in business with a known violator of international law does not automatically constitute a criminal act.[328]

The court's distinction between dangerous materials and fungible goods provides an intriguing perspective on the assessment of complicity. According to the court's reasoning, only the provision of specialized military vehicles and customized computerized systems that directly facilitate the commission of crimes had a close causal connection and, therefore, constituted a substantial contribution amounting to complicity.[329] By contrast, the provision of generic cars, trucks, and computers, which enhanced the logistical capabilities of the perpetrator but were not the direct means of carrying out the crimes, was considered to have a less substantial effect on the commission of the crimes. While these goods and services contributed to the overall functioning and efficiency of the perpetrator's operations, they were not the primary means by which the crimes were carried out, and thus providing them fell short of complicity.[330]

Similarly, in the case of *Du Daobin v. Cisco Systems*, the United States District Court for the District of Maryland examined the defendant's contribution and its substantial connection to the commission of crimes.[331] The plaintiffs alleged that the defendant, the United States-based company Cisco Systems, had developed the Chinese "Golden Shield Project."[332] The Golden Shield Project is a security architecture used by Chinese authorities for illegal surveillance, resulting in various violations of human rights.[333] The court determined that the defendant's contribution did not have a substantial effect on the crimes, as there was only limited evidence that the Cisco technology had actually been utilized in the commission of the crimes.[334]

The reasoning of the United States federal district courts reflects a narrow understanding of complicity. The rules of complicity are not designed to solely prohibit the direct means of commission. The provision of goods or services can still constitute complicity even if they remain unused or have no

327. *See* Michalowski, *supra* note 97, at 461–64.

328. *E.g.*, *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 257 ("It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal."); *see also* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005).

329. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 258, 264, 268.

330. *Id.* at 267–69.

331. Du Daobin v. Cisco Systems, Inc., 2 F. Supp. 3d 717 (D. Md. 2014).

332. Beth Van Schaack, *China's Golden Shield: Is Cisco Systems Complicit?*, THE CTR. FOR INTERNET & SOC'Y (Mar. 24, 2015), http://cyberlaw.stanford.edu/blog/2015/03/china's-golden-shield-cisco-systems-complicit.

333. *The Great Firewall of China: Background*, TORFOX (June 1, 2011), http://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/FreedomOfInformationChina/the-great-firewall-of-china-background/index.html.

334. *Du Daobin*, 2 F. Supp. 3d at 729.

direct causal effect on the crime in the empirical sense.[335] When establishing factual links, the focus is on the contribution's impact on the overall incidence of the crime.[336] The *In re South African Apartheid Litigation* court placed excessive emphasis on the concept of "causal remoteness" as the determining factor for wrongfulness.

However, as demonstrated above, the principle of individual responsibility in criminal law does not hinge solely on proximate contribution to a crime. It extends beyond the immediate causal factors to encompass the responsibility of individuals who contribute to the commission by raising the risk of the crime.[337] International criminal law, in particular, strives to equate the blameworthiness of individuals who may never have been present at the scene of the crimes with the blameworthiness of those who physically carried out the acts.[338] It would therefore be no less than arbitrary to argue that "remote" contributions, such as financial support, are less significant to the commission of the crime than the direct means of commission, such as providing weapons.[339]

This is not to suggest that the United States federal district courts should have arrived at different conclusions. Rather, the main point is that in instances of neutral business assistance, the assessment of wrongfulness in complicity ultimately revolves around the normative evaluation of whether the harmful effects of aiding and abetting outweigh the social benefits derived from commercial transactions. In the provision of generic goods or services, there is a presumption of legitimacy due to the involvement of regular business practices that comply with national licensing requirements for production and export. However, the adjudicating body must explain whether the provision of generic goods and services results in a net subtraction of harm or if it contributes more harm than it mitigates. Regrettably, this is where the courts have fallen short in their analysis, as they have failed to apply such a nuanced methodology and adequately consider the overall impact of assistance on the underlying crimes.

The case law surrounding the provision of funds in relation to complicity in international crimes has been particularly convoluted. The confusion can be traced back to the NMT, where *United States v. Flick* first introduced the notion that knowingly providing financial support to criminal activities makes one an accessory to those crimes.[340] In *Flick*, defendants Friedrich

335. *See supra* Part III.C.

336. *See supra* Part III.D.

337. *See supra* Part III.C.

338. The most recent development in this respect is the ICC's "control over the crime theory," which offers a theoretical framework for establishing a connection between the "masterminds" who are removed from the actual crime scenes and the physical perpetrators of the atrocities. For a concise overview and critique of this idea, see Elies van Sliedregt, *The ICC Ntaganda Appeals Judgment: The End of Indirect Co-perpetration?*, JUST SECURITY (May 14, 2021), http://www.justsecurity.org/76136/the-icc-ntaganda-appeals-judgment-the-end-of-indirect-co-perpetration.

339. I thank James G. Stewart for this point.

340. United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERGG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1217 (Nuremberg Military

Flick and Otto Steinbrinck were found guilty of complicity in war crimes and crimes against humanity for their financing of the Schutzstaffel ("SS").[341] Their defense argued that the funds were intended for cultural purposes.[342] The court held that the monetary donations were so substantial that it was unconceivable that all of it went to cultural endeavors:

> A hundred thousand Reichsmarks even to a wealthy man was not then a trifling but a substantial contribution. Ten times that sum annually was placed in the hands of Himmler, the Reich Leader SS, for his personal use . . . . It is a strain upon credulity to believe that he needed or spent annually a million Reichsmarks solely for cultural purposes.[343]

In a later case, however, known as *Ministries*, the NMT reversed its previous position and held that financing international crimes is not prohibited under the complicity rules if it is part of ordinary business transactions.[344] One of the defendants in the Ministries case was Karl Rasche, a banker, member of the executive board of the Dresdner bank, and member of Heinrich Himmler's Circle of Friends.[345] The court acquitted Rasche despite evidence that he provided substantial loans to Himmler and various SS enterprises. The court's reasoning deserves careful consideration:

> The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did. The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose . . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral

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Tribs. 1949), http://www.loc.gov/item/2011525364_NT_war-criminals_Vol-VI ("One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes").

341. *Id.* at 1221–22.

342. *Id.* at 1218–19.

343. *Id.* at 1220.

344. United States v. Von Weizsäcker, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 622 (Nuremberg Military Tribs. 1950), http://www.loc.gov/item/2011525364_NT_war-criminals_Vol-XIV.

345. *Id.* at 621.

> standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.[346]

Both Rasche and Flick were aware of the criminal activities of the SS and provided financial support, but only Flick was convicted of aiding and abetting. Rasche was a banker, and lending money as part of his regular business activities. Flick's donation went beyond his ordinary commercial transactions.

Building on this reasoning, the United States District Court for the Central District of California held in *Doe v. Nestlé* that normal business transactions "without more" do not amount to complicity.[347] Funding a terrorist organization, for instance, is not criminal if the bank does not take any "extra step" to the normal commercial activity.[348] Similarly, the court in *In re South African Apartheid Litigation* did not consider funding to be an act of complicity, basing its reasoning on the fungible nature of money.[349] Both conclusions are, however, wrong.

As has been repeated several times in this article, modern international criminal law does not consider the mere fact that assistance is provided through ordinary business transactions to be an exculpatory ground.[350] Additionally, the fungibility criterion, as put forth in the *In re South African Apartheid Litigation*, is arbitrary when claiming that providing assistance that can serve various purposes cannot be an act of complicity. Money, in particular, has the potential to significantly increase the risk of the commission of crimes by enhancing the logistical capabilities of the perpetrator.[351] This is particularly relevant in cases where funding is provided to organizations that engage in pervasive criminal activities, as even a small donation can substantially raise the risk of crime.[352] In the risk-based analysis of complicity, it is not necessary to establish a direct factual (causal) connection between the money and the specific commission of

346. *Id.* at 622.

347. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1090 (C.D. Cal. 2010).

348. *Id.* at 1099.

349. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009).

350. *See also* Michalowski, *supra* note 97, at 490 (arguing that in the context of financing terrorism, ordinary business transactions do not exculpate the donator).

351. For a similar argument, see Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a 'Killing Agent'*, 8 J. INT'L CRIM. JUST. 829, 835 (2010) ("The criterion of 'inherent quality' seem to ignore the very definition of money as a good that acts as a medium of exchange in transactions, a unit of account, and a store of value. Money allows its holder to do something by virtue of its *purchasing power*.").

352. *E.g.*, Goldberg v. UBS AG, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) ("[I]t is clear that proximate cause may be established by a showing only that defendant provided material support to, or collected funds for a terrorist organization which brought about plaintiffs' injuries."). *See* Michalowski, *supra* note 97, at 492–93.

the crime to determine the effect on the crime.[353] Financing the perpetrator is, therefore, straightforward aiding and abetting.[354]

Crucially, however, not every monetary donation, even to an organization responsible for widespread human rights violations, is inherently wrongful. The assessment of wrongfulness in cases involving the provision of funds requires a careful consideration of the specific circumstances and the impact of financial assistance on the commission of crimes. Factors such as the size of the loan and its utilization by the recipient play a role in determining the gravity of the assistance. If a financial loan does not reach the minimum threshold of gravity, prosecuting the provider may go against the interests of justice. Additionally, there may be instances where the beneficiary can justify the use of the funds by demonstrating that they were used to advance the well-being of the perpetrator or address urgent humanitarian needs. Therefore, a comprehensive analysis of the specific circumstances and the balance between social benefits and harmful effects is necessary to assess the wrongfulness of providing generic goods or services, including financial assistance.

D. *Continuing Business Cooperation*

The era of globalization and the growing engagement of multinational corporations in commercial partnerships with states and non-state actors in developing countries have given rise to new circumstances relevant to cases of neutral business assistance. Since the 1980s, corporations have increasingly relocated their production to and sourced cheap raw materials from low-wage economies around the world.[355] To ensure the smooth flow of goods, these companies have established ongoing business cooperation with their suppliers, which, on the surface, appears legitimate. While this trend has brought economic opportunities and increased activity in impoverished nations, it has also led to heightened competition for resources, which, in turn, has been linked to some of the most violent conflicts in modern history.[356] As a result, corporations have faced numerous allegations of aiding and abetting international crimes in these complex contexts.[357]

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353. *See supra* Part III.C.

354. *See* Michalowski, *supra* note 97, at 516 ("A loan can make an important contribution to a gross human rights violation whether or not the money lent to the regime is directly used to finance this violation. It might, for example, indirectly facilitate the violation by adding to the financial resources of the regime or by providing a stabilizing effect on the political position of the regime.").

355. *See* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 478 (2017); Michael Posner, *The Ukraine Crisis: How Corporations Should Respond to Russia's Invasion*, FORBES (Mar. 10, 2022), http://www.forbes.com/sites/michaelposner/2022/03/10/the-ukraine-crisis-how-corporations-should-respond-to-russias-invasion/?sh=6b1082b14829.

356. *See* Reggio, *supra* note 2, at 623–24.

357. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446–47 (2001).

Consider the following scenario: Corporation *D1* employs slave labor to extract gold and silver, with numerous public accusations linking *D1* to grave human rights violations.[358] Corporation *D2*, based in another country, purchases the precious metals despite knowing that they were acquired through the commission of international crimes. In addition, *D2* provides logistical support to *D1* to maintain a successful supply chain partnership, including supplying clothing and farming materials to alleviate the poor working conditions of *D1*'s workers.

Given *D1*'s direct responsibility for international crimes, the question of whether *D2* can be considered complicit in *D1*'s actions arises. This is due to *D2*'s purchase of illegally obtained products and their ongoing business cooperation, which includes providing logistical assistance that clearly benefits the well-being of the workers. It should be noted that establishing the required mens rea (which is assumed here) for *D2*'s complicity presents a significant evidentiary challenge for the prosecution.[359] That said, the main focus here is on the actus reus element and whether *D2*'s conduct is considered wrongful.

In a similar scenario, the United States District Court for the Central District of California addressed the question of complicity in the case of *Doe v. Nestlé* and provided a negative answer.[360] The case involved allegations that the corporations Nestlé and Cargill aided and abetted the use of child slavery in cocoa harvesting in Côte D'Ivoire. Children between the ages of ten and fourteen were abducted from Mali and subjected to slavery on cocoa farms.[361] Nestlé and Cargill were charged with aiding and abetting child slavery for their involvement in establishing a long-term business partnership with Ivorian farmers, from whom they consistently purchased cocoa at low market prices. In addition to the cocoa purchases, the corporations were accused of providing financial support for cocoa homesteads; offering logistical assistance such as farming supplies, technical support, and training to the farmers; and failing to use their economic influence to prevent the perpetration of these crimes. The court determined that none of these acts had a substantial effect on the specific wrongful acts committed by the Ivorian farmers.[362]

358. Any form of enslavement falls into a category of crimes against humanity. See Rome Statute, *supra* note 31, art. 7(c). For a comment on this provision, *see* Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883, 940–46 (2003).

359. Van der Wilt, *supra* note 86, at 75 (arguing that in cases of buying diamonds that are acquired in the course of the commission of international crimes, the most difficult issue will be to prove the necessary knowledge requirement of the buying companies). *See also* Ratner, *supra* note 357, at 528.

360. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1100–01 (C.D. Cal. 2010).

361. For the background of the case, *see* Terry Collingsworth, *Nestlé & Cargill v. Doe Series: Meet the "John Does" – The Children Enslaved in Nestlé & Cargill's Supply Chain*, JUST SECURITY (Dec. 21, 2020), http://www.justsecurity.org/73959/nestlé-cargill-v-doe-series-meet-the-john-does-the-children-enslaved-in-nestlé-cargills-supply-chain.

362. *Nestlé*, 748 F. Supp. 2d 1057 at 1109–10.

The court ruled that the financial assistance, in and of itself, was not *specifically directed* toward the commission of crimes and therefore did not constitute an act of complicity.[363] The previous section explains why this conclusion is erroneous. Before addressing the other charges of providing logistical assistance and failure to exercise economic leverage, it is crucial to consider first the temporal aspect of supply chain business relationships.

The act of buying illegally obtained products, occurring *after the fact*, is not typically recognized as a form of complicity in international law.[364] Instead, it is often treated as a separate crime under national legislation.[365] A distinct concept, however, is the notion of ex post facto aiding and abetting, which is recognized as a form of criminal liability in international criminal law.[366] Ex post facto aiding and abetting refers to a scenario where assistance is offered before or during the commission of a crime with the intention of providing support afterward. In such cases, this form of assistance can serve to encourage or morally support the perpetrator, exerting a substantial influence on the commission of the crime.[367]

Manuel Ventura gives an example of promising refuge after a murder before the action of killing takes place.[368] In such cases, the effect on the crime is not the aid that comes after the fact but rather the *encouragement* provided by the offer of ex post facto assistance. Drawing an analogy to the pattern of continuing business cooperation, abetting the crime exists when the buyer clearly communicates to the seller that they will purchase illegitimately acquired products. Thus, facilitating an enduring partnership and nurturing smooth commercial exchange, which may involve advancing the partners' well-being, can speak to the effect on the crime and potentially constitute ex post facto aiding and abetting.[369]

In *Doe v. Nestlé*, the court rejected the claim that Nestlé and Cargill encouraged the commission of international crimes by the Ivorian farmers. The court argued that the failure to exercise economic leverage on the market to halt the commission of crimes by the Ivorian farmers, let alone the long-term

363. *Id.* at 1100.

364. Ventura, *supra* note 22, at 229; JACKSON, *supra* note 58, at 74.

365. *See* FLETCHER, *supra* note 122, at 645–46.

366. Ventura, *supra* note 22, at 229.

367. Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Trial Judgement, ¶ 712 (Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014).

368. *See* Ventura, *supra* note 22, at 229 n.381.

369. Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, ¶ 731 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) ("It is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime."). An agreement, however, is not necessary as long as the principal perpetrator was aware of the *ex post facto* aid; *see* Ventura, *supra* note 22, at 232.

exclusive business partnership established to procure the supply chain, cannot constitute aiding and abetting.[370]

Appraising a similar set of facts, Steven R. Ratner reached the opposite conclusion. Looking at the cases of corporations buying diamonds from the Revolutionary United Front ("RUF"), which was responsible for numerous heinous atrocities during Sierra Leone's civil war, Ratner argued the following: "As to whether purchasing of diamonds constitutes material assistance to the group rising to the level of aiding and abetting, one can lean in favor of a positive answer as it seems that the RUF depended heavily upon the diamonds as a source of income."[371] Moreover, the International Commission of Jurists acknowledged the significant impact that encouragement stemming from long-term supply chain business partnerships can have on the subsequent commission of crimes.[372]

According to the methodology proposed in this article, the continuous purchasing from and provision of generic goods and services to the perpetrator presents a compelling case of aiding and abetting. The low gravity threshold for complicity means that even a promise of a single purchase of illegally obtained materials can fulfill the actus reus of ex post facto aiding and abetting.[373] Making the perpetrator aware that their criminal actions will be rewarded through continuous business cooperation is a textbook example of encouraging criminal conduct.[374] The colossal concern here, which was overlooked by the court in *Doe v. Nestlé*, is whether the benefits derived from the ongoing business cooperation with a perpetrator outweigh the harmful effects on child slavery.

Furthermore, the court in *Doe v. Nestlé* concluded that the provision of generic goods and services, such as money and logistical assistance, as part of ordinary business transactions cannot be deemed to have a substantial effect on the commission of the crimes.[375] The court emphasized that these actions were not specifically directed toward the perpetration of slavery, forced labor, or other illicit acts by the Ivorian farmers.[376] The defendants were primarily engaged in general assistance related to crop production and labor practices without any direct involvement in the specific criminal acts. The court stated the following:

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370. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1109–10 (C.D. Cal. 2010).

371. Ratner, *supra* note 357, at 529.

372. Int'l Comm'n of Jurists, *supra* note 57, at 41 ("Demanding a low price from suppliers (especially when the supplier is in a weak bargaining position and therefore more likely to be compelled to accept the price), while knowing from the economics of the deal that the supplier will have to use criminal employment practices, such as slavery, to satisfy the demand, may also be enough to show knowing encouragement. It would also have to be shown that the company knew it was encouraging the criminal activity through purchasing goods.").

373. *See supra* Part IV.A.

374. *See* SARAH FINNIN, ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLE 25(3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 89 (2012).

375. *Nestlé*, 748 F. Supp. 2d at 1109–10.

376. *Id.* at 1101.

> Plaintiffs do not allege, for example, that Defendants provided the guns and whips that were used to threaten and intimidate the Plaintiffs, or that Defendants provided the locks that were used to prevent Plaintiffs from leaving their respective farms, or that Defendants provided training to the Ivorian farmers about how to use guns and whips, or how to compress a group of children into a small windowless room without beds, or how to deprive children of food or water, or how to psychologically abuse and threaten them. That is the type of conduct that gives rise to aiding and abetting liability under international law conduct that has a substantial effect on a particular criminal act.[377]

By insisting on a specific direction requirement, the *Nestlé* court failed to recognize that the inherent risk of the crime increases through the continuous provision of generic goods and services. This represents a fundamental flaw in the court's analysis. *What may be considered legitimate assistance in a single commercial transaction can become wrongful in the context of a lasting supply chain relationship.*

The cumulative effect of the ongoing provision of generic goods and services can encourage the perpetrator to persist in the commission of wrongdoing, thus significantly impacting the crime. If each individual action of Nestlé and Cargill (such as providing farming supplies, clothes, and training assistance) is taken in isolation, it may be difficult to determine that the harmful effects outweigh the improved well-being of the child laborers on the plantations. However, when viewed in the broader context of continuing business cooperation, the ongoing purchase of illegally extracted cocoa, combined with the provision of generic goods and services, makes a compelling case of aiding and abetting international crimes through supply chain relationships. The court's failure to consider this broader context ultimately undermines its analysis and highlights the need for a more comprehensive understanding of the impact of continuous business cooperation on the commission of crimes.

V. CONCLUSION

The increasing attention to corporate liability as a means to address grave human rights violations necessitates a coherent theory of criminal complicity to effectively tackle the complex challenges posed by business transactions with morally compromised actors. This article contributes to this endeavor by offering a refined methodology for assessing the wrongfulness of complicity. Such an assessment is likely to be particularly relevant in cases of "neutral business assistance," or ordinary commercial transactions that increase the perpetrator's capacity to carry out human rights violations, because of the ethical complexities that are often involved in such cases.

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377. *Id.*

The proposed methodology has two pillars. The first pillar involves a factual examination of the effect that the putative complicit conduct has on the commission of the crime. The second pillar is a normative assessment of the broader impact that the putative complicit conduct has on society at large. Because the threshold for complicity is relatively low,[378] the decision on wrongfulness ultimately depends on a normative appreciation that the harmful effects of the accomplice's conduct outweigh its positive societal impacts. This is how "substantial effect" requirement of complicity should be interpreted: a contribution that is more harmful than virtuous.

378. *See supra* Part IV.A.