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## **Arms Trafficking: Aiding and Abetting Core Crimes**

### **1. Introduction**

Although the practice of international criminal law focuses on the main perpetrators of core crimes, aiding and abetting the commission of such core crimes is not irrelevant or purely theoretical, as it can be seen from the case law of international tribunals. The provision of arms for the commission of core crimes or even arms trafficking for the purpose of committing core crimes is one of the traditional and typical forms of aiding and abetting.

Arms trafficking or providing arms for the commission of core crimes has also already been established in the case law of international tribunals as a possible form of aiding and abetting, as well as in national criminal procedures. Among national procedures, the Dutch cases of *Frans Van Anraat* and *Guus Van Kouwenhoven*<sup>1</sup> and the American prosecution of *Victor Bout* should be

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<sup>1</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 459; Chatham House, *Business and International Crime*. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2FIlp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2FIlp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), pp. 2 and 5; Boivin, *Complicity and beyond* (2005), p. 484; International commission of jurists, *Report of the International commission of jurists expert legal panel on corporate complicity in international crimes* (2008), p. 9; Burke and Persi, *Remedies and reparations* (2014), p. 583.

mentioned at the very least.<sup>2</sup> From the international case law, the post-Second World War cases of *I.G. Farben* and *Zyklon B* could be emphasised.

This article discusses arms trafficking as a form of aiding and abetting the commission of core crimes. The article opens with the analysis of aiding and abetting as a form of complicity to core crimes in the international criminal law. The elements and bounds of aiding and abetting are discussed in detail from the viewpoint of its regulation in the Rome Statute<sup>3</sup> and the existing case law of the International Criminal Court (ICC) as the first permanent international criminal tribunal, because they also apply in cases when arms trafficking is considered as aiding and abetting core crimes.

In its subsequent chapter, the article discusses the regulation of arms trafficking in international and European law, which both try to gradually develop a set of primary rules, defining legal arms trafficking based on the necessary state authorisation in order to prevent arms trafficking for the commission of core crimes and enable the prosecution of illegal arms trafficking.

On the basis of such a framework for legal arms trafficking, the international criminal law regulates illegal arms trafficking as international crimes and as complicity to core crimes.

Consequently, the following chapter of this article first analyses illegal arms trafficking as an international crime, defined as such in international agreements under which state parties have the duty to implement the definition of such a crime into their national law. Secondly, the article discusses arms trafficking as complicity in core crimes, which could be prosecuted on both the national and the international level.<sup>4</sup> Arms trafficking as complicity in core crimes is discussed again from the viewpoint of the regulation in the Rome Statute and the ICC case law.

Last but not least, arms trafficking is also discussed from the viewpoint of the Slovene law. Firstly, the article presents the regulation of legal arms trafficking in Slovene legislation and secondly, it discusses illegal arms trafficking as a crime according to Slovene legislation, including certain selected legal issues in substantive criminal law regarding aiding and abetting core crimes via arms trafficking.

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<sup>2</sup> Misol, Weapons and war crimes. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 11.

<sup>3</sup> The Rome Statute of the International Criminal Court, Official Gazette of the Republic of Slovenia, MP, Nos. 29/2001 and 17/2013.

<sup>4</sup> For more information regarding the difference between international and core crimes, see Ambrož et al., *MEDNARODNO KAZENSKO PRAVO* (2012), p. 149.

## 2. Aiding and abetting in the Rome Statute

Complicity in crimes under the jurisdiction of the ICC is regulated in a much more systematic, consistent and general manner than in any other statute of international or hybrid criminal courts. Article 25 of the Rome Statute therefore regulates all classic forms of complicity, which could be found in civil law systems, including perpetration, co-perpetration, indirect perpetration, solicitation, and aiding and abetting.<sup>5</sup> It also includes another form of complicity, which is atypical for civil law systems, i.e. contributing to a crime by a group of persons acting with a common purpose,<sup>6</sup> as well as a *lex specialis* form of complicity, which refers to direct and public incitement of others to commit genocide. In addition, other forms of complicity, such as the responsibility of commanders and other superiors,<sup>7</sup> could also be found in the Rome Statute as well as in its predecessors.

The legal basis for a differentiated concept of complicity can therefore be found in the Rome Statute and the degree of participation of the convicted person in crime should be taken into consideration when determining the sentence.<sup>8</sup> Accordingly, it could be argued that the Rome Statute accepted the pluralistic concept of complicity and the restrictive comprehension of the perpetration of a crime, accompanied by various forms of complicity.<sup>9</sup>

On the other hand, there are no general answers in the Rome Statute to the question whether complicity is considered dependent on the acts of principal perpetrators and whether the theory of the accessory nature of complicity has been incorporated into the Rome Statute. The provision on solicitation to a crime clearly states that a person shall be criminally responsible for a crime within the jurisdiction of the ICC, if that person orders, solicits or induces the commission of such a crime, *which in fact occurs or is attempted*.<sup>10</sup> This means that the punishment of solicitation depends on the attempt of a commission of a core crime (successful solicitation) at the very least. On the contrary, unsuccessful solicitation is clearly not punishable.<sup>11</sup> Similarly, a provision on aiding and abetting states that an aider and abettor “for the purpose of facilitating the

<sup>5</sup> Article 25 of the Rome Statute. Ambrož et al., *MEDNARODNO KAZENSKO PRAVO* (2012), p. 109.

<sup>6</sup> *Ibidem*, p. 115.

<sup>7</sup> Article 28 of the Rome Statute.

<sup>8</sup> Alignment c, paragraph 1 of rule 145 of the Rules of procedure and evidence.

<sup>9</sup> *THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (2002), p. 782.

<sup>10</sup> Alignment b, paragraph 3 of Article 25 of the Rome Statute.

<sup>11</sup> Ambrož et al., *MEDNARODNO KAZENSKO PRAVO* (2012), p. 116; *THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (2002), pp. 795 and 798; *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (2008), p. 746.

commission of such a crime, aids, abets or otherwise assists in *its commission or its attempted commission*, including providing the means for its commission”.<sup>12</sup> This could be interpreted in a way that at least an attempt of a crime should be achieved by such facilitation.<sup>13</sup> Furthermore, it is not necessary for the perpetrator to be identified, convicted or criminally responsible for the crime in question. These arguments support the thesis that the theory of limited accessory liability has been applied, as in the framework of the case law of the International Court for Former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>14</sup>

However, no similar limitation could be found in the provisions on the contribution to the commission or attempted commission of such a crime by a group of persons acting with a common purpose, or on incitement to genocide. *A contrario*, these forms of complicity do not depend on at least an attempt of a core crime<sup>15</sup> and on the acts of the principal perpetrator. Unsuccessful solicitation is therefore not punishable, whereas unsuccessful incitement to genocide is, even though incitement is a less intense form of complicity than solicitation.<sup>16</sup>

The definition of aiding and abetting is more elaborate in the Rome Statute than in previous statutes. A person shall therefore be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Similarly to the Statutes of the ICTY and the ICTR, the Rome Statute does not define any temporal or territorial limits to aiding and abetting,<sup>17</sup> but recognises assistance to a crime in psychological as well in physical form, and especially emphasises providing the means for the commission of a crime.<sup>18</sup> In addition, a certain causal link should exist between the act of aiding and abetting and crime; the aider and abettor must at least facilitate or stimulate the execution of a core crime, but his or her act is not a *conditio sine qua non* for the commission of that crime.<sup>19</sup>

In terms of subjective elements of aiding and abetting, there is a prevalent opinion in theory that solely the aider and abettor's awareness that he or she

<sup>12</sup> Alignment d, paragraph 3 of Article 25 of the Rome Statute.

<sup>13</sup> THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2002), p. 798; Schabas, THE INTERNATIONAL CRIMINAL COURT (2010), p. 431.

<sup>14</sup> *Ibidem*, p. 432.

<sup>15</sup> Ambrož et al., MEDNARODNO KAZENSKO PRAVO (2012), pp. 119 and 120.

<sup>16</sup> *Ibidem*, p. 116.

<sup>17</sup> THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2002), p. 798.

<sup>18</sup> *Ibidem*, p. 798.

<sup>19</sup> *Ibidem*, p. 799; Schabas, THE INTERNATIONAL CRIMINAL COURT (2010), p. 431.

is contributing to a commission of a crime does not suffice. The volition must also exist; the aider and abettor must possess intent to contribute to the commission of a crime.<sup>20</sup>

Contrary to the case law of the ICTY and the ICTR, the Rome Statute is clear: there must be the aider and abettor's intent to facilitate the commission of a core crime, to aid, abet or otherwise assist in its commission or at least its attempt. The Cassese Commentary (similarly to the *Orić* decision adopted by the ICTY<sup>21</sup>)<sup>22</sup> even refers to the double intent requirement, which is typical of certain civil law systems. Accordingly, the prevailing opinion that could be found in theory refers to the fact that the definition of aiding and abetting in the Rome Statute requires softer objective criteria than those applied in the case law of the ICTY and the ICTR, according to which almost any contribution to a core crime could be considered as an act of aiding and abetting, whereas subjective elements, especially the aider and abettor's intent to facilitate the commission of a crime, to aid, abet or otherwise assist in its commission or its attempted commission, ought to be defined in a stricter manner.<sup>23</sup>

With regard to aiding and abetting, the case law of the ICC has only started to develop. So far, the Office of the Prosecutor of the ICC has mostly focused on the following forms of complicity: co-perpetration, indirect perpetration and contributing to a crime by a group of persons acting with a common purpose. There are only few cases dealing with aiding and abetting a crime within the jurisdiction of the ICC. This is not surprising, considering that the Rome Statute established a permanent institution with the power to exercise its jurisdiction over persons for the *most serious crimes* of international concern.<sup>24</sup> In addition, the Strategic Plan (2012–2015) focuses firstly on the prosecution of high-level perpetrators.<sup>25</sup> This also implies the application of more intense forms of complicity than aiding and abetting. However, aiding and abetting could be found in a very interesting case of *Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,*

<sup>20</sup> THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2002), p. 800; COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2008), p. 760.

<sup>21</sup> *Prosecutor v. Orić*, Judgement, IT-03-68-T, 30 June 2006, par. 268.

<sup>22</sup> THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2002), p. 800.

<sup>23</sup> *Ibidem*, p. 801; COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2008), p. 760.

<sup>24</sup> Article 1 of the Rome Statute.

<sup>25</sup> Office of the prosecutor, Strategic plan 2012–2015. URL: [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf).

*Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.*<sup>26</sup> This case does not deal with core crimes falling under the jurisdiction of the ICC, but with crimes against the administration of justice,<sup>27</sup> particularly with alleged influence on witness testimony in the *Jean-Pierre Bemba Gombo* case.<sup>28</sup>

Three of the accused involved in this case were charged as accomplices (aiders and abettors) in the act of presenting evidence that they knew was false or forged and in corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence. When issuing the arrest warrant, a single judge was therefore convinced that there were reasonable grounds to believe they had aided and abetted by physical assistance to alleged crimes by receiving money for witnesses, coaching the witnesses, acting as an intermediary in the transmission of Bemba's instructions to members of his family, etc.<sup>29</sup> Considering the nature of the alleged crimes, there is, of course, no allegation regarding the procuring of arms in the act of aiding and abetting in this case. There is also no in-depth analysis on aiding and abetting, although this is the first case of aiding and abetting in the ICC case law.

The subsequent decision on the confirmation of charges was slightly more detailed with respect to aiding and abetting, and allowed certain conclusions to be drawn. With regard to the crime, i.e. giving false testimony when under the obligation to tell the truth, the pre-trial chamber stated that "any third person may be prosecuted as an accessory under Article 25(3)(b)-(d) of the Statute, provided that the witness's testimony was objectively false. This applies irrespective of whether the Prosecutor has presented charges against the witness as a direct perpetrator of the offence pursuant to Article 25(3)(a) of the Statute."<sup>30</sup> In my opinion, this implies that an accomplice could only be held responsible if the crime, to which he or she contributed, was in fact committed by the principal perpetrator. This confirms the theory of the accessory nature of complicity. It would also be helpful to further clarify the accessory nature of complicity, since

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<sup>26</sup> *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.

<sup>27</sup> Article 70 of the Rome Statute.

<sup>28</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

<sup>29</sup> *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, arrest warrant, 20 November 2013, par. 17, 18, 19.

<sup>30</sup> *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, decision on confirmation of charges, 11 November 2014, par. 29.

the provision in Article 25 of the Rome Statute is not completely clear. More specifically, the theory of limited accessory liability was applied, since the main perpetrator must not be held criminally responsible or even prosecuted.

Certain conclusions could also be made concerning the elements of aiding and abetting. For example, the pre-trial chamber demanded that the accomplice's contribution had an effect on the commission of the crime.<sup>31</sup> This was also substantiated by the analysis of factual findings regarding each aider and abettor's contribution to the crimes.<sup>32</sup> It confirms the position of the Rome Statute, as well as that the ICTY and the ICTR, that there should be a certain causal link between the accomplice's act and the crime in question.

Another important demand of the pre-trial chamber was that the accomplice's contribution should have been made with the purpose of facilitating the commission of a crime.<sup>33</sup> Furthermore, in connection to the factual findings of each aider and abettor's acts, the pre-trial chamber drew a conclusion stating that the aider and abettor had known about the steps taken for the commission of the charged crimes and that he had intended to contribute to their commission.<sup>34</sup> This confirms the already clear position of the Rome Statute, i.e. that an aider and abettor must perform the act of aiding and abetting *for the purpose of facilitating the commission of a crime* and that what is required is not only the accomplice's awareness of his or her contribution, but also his or her volition to commit the act of aiding and abetting. The debate on the (non)existence of the specific direction element, which is otherwise very lively in the case of the ICTY and ICTR, is thus closed down, at least for the case of the Rome Statute.<sup>35</sup>

Certain hints regarding complicity could also be found in other cases. For example, the degree of participation of the convicted person in crime (the form of complicity) was taken into consideration when determining sentences in the *Lubanga*<sup>36</sup> and *Katanga* cases.<sup>37</sup> This would imply the pluralistic conception of complicity. However, the trial chamber in the *Katanga* case in particular emphasised that "despite the fact that Article 25 of the Rome Statute defines and enumerates various forms of complicity and, in this sense, the proposed distinction between the responsibility of the perpetrator and the accomplice, it does not in

<sup>31</sup> *Ibidem*, par. 35.

<sup>32</sup> *Ibidem*, par. 73–96.

<sup>33</sup> *Ibidem*, par. 35.

<sup>34</sup> For example *ibidem*, par. 84.

<sup>35</sup> See for example Heller, Why the ICTY's specifically directed requirement is justified?. URL: <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/>.

<sup>36</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, sentencing judgment, 10 July 2012, par. 53.

<sup>37</sup> *Prosecutor v. Germaine Katanga*, ICC-01/04-01/07, sentencing judgment, 23 May 2014, par. 61.

no way introduce a hierarchy of guilt nor does it enact, even implicitly, a scale of sentence for it. The degree of participation and intention of the convicted must be evaluated in concrete, depending on factual and legal findings in a sentencing judgment.<sup>38</sup> Other factual findings of the trial chamber also show that one should consider not only the formal form of complicity, but accomplice's actual participation and his or her position.

Further regulation of aiding and abetting in the Rome Statute still has to be tested by the case law of the ICC, but its (scarce) case law confirms there are substantial requirements regarding the subjective elements of aiding and abetting, and less important requirements regarding its objective elements, which should also be considered with arms trafficking.

### 3. Arms trafficking in international and European law

The regulation of arms trafficking could be discussed at three levels, i.e. the primary regulation of international arms trafficking, arms trafficking as an international crime and arms trafficking as a core crime. These three aspects are presented in the following chapters, which begin with a discussion on the regulation of international arms trafficking in international law that has gradually set up primary legal rules<sup>39</sup> and offered the definition of legal (international) arms trafficking.

Generally speaking, the system of controlled arms trafficking was first set up with the Wassenaar arrangement on export controls for conventional arms and dual-use goods and technologies in 1995.<sup>40</sup> It introduced a soft approach; the decision on arms trafficking remains within the discretion of a state,<sup>41</sup> however, the Agreement proposes the introduction of a system of national control of arms export, as well as a report system between states and regular meetings.<sup>42</sup> Furthermore, the Charter of the United Nations (UN Charter)<sup>43</sup> requires its member states to respect and impose sanctions, which are imposed by the Security Council on the basis of a resolution adopted in line with Chapter 7 of the Charter, including embargo on arms trafficking. However, this only restricts arms trafficking with states under embargo.<sup>44</sup>

<sup>38</sup> *Ibidem*.

<sup>39</sup> Pavčnik, TEORIJA PRAVA (2011), p. 93.

<sup>40</sup> Bellal, Arms transfers and international human rights law (2014), p. 462.

<sup>41</sup> *Ibidem*, p. 464.

<sup>42</sup> *Ibidem*, p. 464.

<sup>43</sup> The United Nations, Charter of the United Nations (1945).

<sup>44</sup> Boivin, Complicity and beyond (2005), p. 478.

A global mechanism for controlling arms trafficking, i.e. the Arms Trade Treaty (ATT),<sup>45</sup> has only recently been truly enforced. This treaty requires each state party to establish and maintain a national control system to regulate arms export, including requiring authorisation of arms transfer<sup>46</sup> in every case involving the export of certain categories of conventional weapons;<sup>47</sup> regulate arms brokering;<sup>48</sup> keep records;<sup>49</sup> report about measures undertaken;<sup>50</sup> take appropriate measures to enforce national laws and regulations that implement the provisions of the ATT,<sup>51</sup> etc. The latter obligation does not explicitly mention criminal law measures, however, they could be necessary in order to fully implement the ATT provisions.

The ATT defines the system of “legal” arms trade. Any arms trade contradicting the ATT provisions is considered illegal arms trade according to its global definition.<sup>52</sup>

Every transfer of listed conventional weapons requires state authorisation. However, the ATT stipulates grounds on which a state party shall not authorise any transfer of conventional arms. The following grounds are particularly relevant in relation to the case at hand: knowledge of the state party at the time of authorisation that arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.<sup>53</sup>

If the export is not prohibited, each exporting state party should make an objective and non-discriminatory assessment prior to the authorisation of the

<sup>45</sup> The treaty entered into force on 24 December 2014. Slovenia signed and ratified it on 2 April 2014. See also Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16 and Casey-Maslen, *Existing and future weapons and weapons systems* (2014), p. 602.

<sup>46</sup> The activities of the international trade comprise export, import, transit, trans-shipment and brokering. Paragraph 2 of Article 2 of the ATT.

<sup>47</sup> Paragraph 1 of Article 2 of the ATT: battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, small arms and light weapons. To a certain (less strict) extent, the ATT also covers the export of parts and components. Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16.

<sup>48</sup> Article 10 of the ATT.

<sup>49</sup> Article 12 of the ATT.

<sup>50</sup> Article 13 of the ATT.

<sup>51</sup> Article 14 of the ATT.

<sup>52</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 460.

<sup>53</sup> Paragraph 3 of Article 6 of the ATT; 6/3 Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16; Bellal, *Arms transfers and international human rights law* (2014), p. 466.

export and taking into account all relevant factors. It must assess the risk that the arms could be used for certain illegal purposes, including the risk that the arms could be used to commit or facilitate a serious violation of international humanitarian law or a serious violation of international human rights law.<sup>54</sup> If there is an overriding risk of any of the negative consequences of arms trafficking, export should not be authorised.<sup>55</sup>

A similar transition from soft to hard regulation could also be observed in the law of the European Union (hereinafter EU), starting with the 1998 EU Code of conduct on arms exports.<sup>56</sup> This Code also introduced seven criteria, which should be assessed at the stage of issuing an authorisation for arms export. Accordingly, an export authorisation should, for example, be refused if the arms export contradicted international obligations, if there is a clear risk that the proposed export might be used for internal repression or for the act of aggression.<sup>57</sup> However, the Code was politically binding only for the EU member states.<sup>58</sup>

The situation changed with the adoption of the EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering,<sup>59</sup> which explicitly demanded that a licence or written authorisation for brokering activities should be obtained from the competent authorities of the member state, where these activities take place and, where required by national legislation, where the broker is resident or established. Member states should assess applications for a licence or written authorisation for a specific brokering transaction against the provisions of the EU Code of conduct on arms exports<sup>60</sup> – the aforementioned criteria from the EU Code of conduct on arms exports have thus

<sup>54</sup> Points i and ii, alignment b, paragraph 1 of Article 7 of the ATT.

<sup>55</sup> Paragraphs 1, 2 and 3 of Article 7 of the ATT; Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16; Boivin, *Complicity and beyond* (2005), p. 494.

<sup>56</sup> EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *Official Journal of the European Union*, L 156, 25 June 2003. See Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16; Bellal, *Arms transfers and international human rights law* (2014), p. 460; Boivin, *Complicity and beyond* (2005), p. 486.

<sup>57</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 460; Boivin, *Complicity and beyond* (2005), p. 487.

<sup>58</sup> *Ibidem*, p. 486.

<sup>59</sup> EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *Official Journal of the European Union*, L 156/79, 25 June 2003. See also Boivin, *Complicity and beyond* (2005), p. 486 and 490.

<sup>60</sup> Article 3 of the EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering. Furthermore, member states may also require brokers to obtain an additional written authorisation to act as brokers, as well as establish a register of arms brokers

became legally, and not only politically, binding.<sup>61</sup> Even more importantly, each member state should establish adequate sanctions, including criminal sanctions, in order to ensure that controls of arms brokering are effectively enforced.<sup>62</sup> This is the first time that a criminal law regulation of arms trafficking was called for in the EU law. It could also be interpreted that illegal arms trafficking should be defined as a crime, notwithstanding its vague legal basis and the lack of explicit definition of the crime.

A similar approach was taken by the Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.<sup>63</sup> This legal act again requires member states to issue an export authorisation only after carefully assessing all circumstances, on the basis of reliable prior knowledge of end use in the country of final destination, which will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination.<sup>64</sup> Again, certain criteria for such assessments are directly connected to core crimes, such as a clear risk that the military technology or equipment might be used for internal repression or in the commission of serious violations of international humanitarian law, or that it would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.<sup>65</sup> Special caution and vigilance in issuing authorisation should be exercised in relation to countries, where serious violations of human rights have been established by the competent bodies of the UN, by the EU or by the Council of Europe.<sup>66</sup> Once again, there is no explicit demand for the implementation of criminal law measures, however, member states should ensure that their national legislation enables them to control

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(Article 4 of EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering).

<sup>61</sup> Boivin, *Complicity and beyond* (2005), p. 490.

<sup>62</sup> Article 6 of the EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering.

<sup>63</sup> Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L 335, 13 December 2008.

<sup>64</sup> Article 5 of the Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. See Bellal, *Arms transfers and international human rights law* (2014), p. 461.

<sup>65</sup> Article 2 of the Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

<sup>66</sup> *Ibidem*.

the export of the listed technology and equipment<sup>67</sup> and, if necessary, this also includes criminal law measures.<sup>68</sup>

The subsequent Council Regulation No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items<sup>69</sup> similarly demands member state's authorisation for export and brokering activities in connection to dual-use items.<sup>70</sup>

Accordingly, there are certain universal and regional mechanisms, which introduce a system of controlled arms trafficking based on a prior state's authorisation and thorough the assessment of certain risks. The EU system is binding for all EU member states, including Slovenia. However, any universal mechanism is treaty-based and a state is only required to introduce it if it signs and ratifies such a treaty, such as the ATT. At this level of arms trafficking regulation, the goal could therefore be to increase the number of the ATT state signatories in order to introduce a universal system of control over arms trafficking, which should have a strong preventive effect. In an ideal scenario, every transaction would thus require a state authorisation and there would be no oasis enabling arms trafficking without such a state authorisation. Any arms trafficking in contradiction with this system would be considered illegal. Within the EU, this has been achieved through the EU legal system, according to which the EU common positions and regulations are binding for member states.

#### 4. Arms trafficking in international criminal law

After establishing a fully universal definition of legal arms trafficking according to the ATT,<sup>71</sup> which would hopefully be achieved soon, another issue arises, i.e. is illegal arms trafficking (arms trafficking without the required authorisation) considered an international crime and are there any guidelines

<sup>67</sup> Article 12 of the Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

<sup>68</sup> Case C-176/03 *Commission of the European Communities v. Council of the European Union*, par. 38.

<sup>69</sup> Council Regulation No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the European Union, L 134/1, 25 May 2009.

<sup>70</sup> Dual-use items include items, including software and technology, which can be used for both civil and military purposes, and all goods, which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices. See Article 2 of Council Regulation No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

<sup>71</sup> The regional definition of legal arms trafficking was drafted in the EU law.

regarding the definition of such a crime. Realistically, it is impossible to expect that every state would implement the ATT system or that every state and arms broker would respect such a system and that there would be no under-the-table transactions.

Apart from the aforementioned EU legal acts, which explicitly or implicitly demand criminal law measures,<sup>72</sup> another global international act should be specially mentioned. i.e. the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime (hereinafter the UN Protocol).<sup>73</sup> According to the Protocol, each state party should adopt legislative and other measures necessary to establish as crimes illicit manufacturing<sup>74</sup> and illicit trafficking of firearms, their parts and components and ammunition, and falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by the protocol, when committed intentionally, including attempt and complicity to these crimes.<sup>75</sup> Accordingly, the definition of illegal arms trafficking is of utmost importance. It is defined as the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one state party to that of another state party, *if any one of the state parties concerned does not authorise it in accordance with the terms of the UN Protocol* or if the firearms are not marked in accordance with the Protocol. This confirms my position that the absence of a required state authorisation for arms trafficking is a crime. Moreover, according to the UN Protocol, it is an international crime.

The problem is, however, that the UN Protocol is only relevant for the prevention, investigation and prosecution of the aforementioned crimes, where these are transnational in nature and involve an organised criminal group<sup>76</sup> in ac-

<sup>72</sup> Such as the EU Council common position 2003/468/CFSP of 23 June 2003 on the control of arms brokering from 2003.

<sup>73</sup> Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime, Official Gazette of the Republic of Slovenia, MP, No. 15/04. Slovenia ratified it on 21 May 2004 and it entered into force on 3 July 2005.

<sup>74</sup> Illegal manufacturing is the manufacturing or assembly of firearms, their parts and components or ammunition: (i) From parts and components illicitly trafficked; (ii) Without a licence or authorisation from a competent authority of the State Party where the manufacture or assembly takes place; or (iii) Without marking the firearms at the time of manufacture, in accordance with the UN Protocol. Licensing or authorisation of the manufacture of parts and components shall be in accordance with domestic law.

<sup>75</sup> Article 5 of the UN Protocol. See also Boivin, *Complicity and beyond* (2005), p. 485 and 486.

<sup>76</sup> Article 4 of the UN Protocol.

cordance with the UN Convention against transnational organised crime, which the UN Protocol also supplements. With 112 state parties, the UN Protocol is also the least ratified of the three protocols to the UN Convention against transnational organised crime. Nevertheless, I believe it still represents a tremendous improvement.

The third step in my analysis of arms trafficking and the central issue of this paper refers to the following question: Could arms trafficking be considered a core crime and under which conditions?

Due to the well-established definitions of core crimes of genocide, crimes against humanity and war crimes (and aggression), arms trafficking cannot normally be considered as the perpetration of core crimes.<sup>77</sup> However, arms trafficking could be seen as complicity in core crimes,<sup>78</sup> especially in the form of aiding and abetting the commission of core crimes.

The legal basis for such an interpretation could also be found in the Rome Statute.<sup>79</sup> The Rome Statute, as well as its three predecessors, include aiding and abetting to core crimes, which could also be interpreted as procuring the means, such as weapons, instruments or any other means, used to commit a core crime.<sup>80</sup> Even though the Statutes of the ICTY and the ICTR only include general provisions on aiding and abetting, and the case law provides an explicit

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<sup>77</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 456. Neither does the ATT demand implementation of illegal arms trafficking as crimes.

<sup>78</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 457; International commission of jurists, *Report of the International Commission of Jurists Expert Legal panel on corporate complicity in international crimes* (2008), p. 37; Boivin, *Complicity and beyond* (2005), p. 481; Misol, *Weapons and war crimes*. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 8.

<sup>79</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 457; Boivin, *Complicity and beyond* (2005), p. 481; Misol, *Weapons and war crimes*. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 8; International commission of jurists, *Report of the International Commission of Jurists Expert Legal panel on corporate complicity in international crimes* (2008), p. 37.

<sup>80</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 458; Boivin, *Complicity and beyond* (2005), p. 482; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, trial judgment, 2 September 1998, par. 533; *Prosecutor v. Michel Bagaragaza*, ICTR-05-86-S, sentencing judgment, 17 November 2009, par. 25, 27; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, trial judgment, 21 February 2003 par. 720; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, appeals judgment, 13 December 2004.

legal basis for it,<sup>81</sup> the Rome Statute explicitly refers to providing the means for the commission of core crimes as a form of aiding and abetting core crimes.<sup>82</sup>

There has also been some case law created by the ICTY and the ICTR on this specific topic, but no case law has been formed by the ICC yet. Nevertheless, two important cases from the post Second World War era,<sup>83</sup> namely the I.G. Farben<sup>84</sup> and Zyklon B<sup>85</sup> cases, should be mentioned. Both cases dealt with supplying poisonous gas (Zyklon B) for the extermination of inmates in concentration camps.

I.G. Farben was a German chemical firm, which partly owned Degesch, a trademark holder of Zyklon B, the poisonous gas used at the extermination camps. Carl Krauch, chairman of the supervisory board, and 22 other defendants were charged, among others, with war crimes and crimes against humanity for using poisonous gas supplied by I.G. Farben in the extermination of inmates of concentration camps.<sup>86</sup> The United States Military Tribunal decided that despite the fact that “the proof was convincing that large quantities of Zyklon B had been supplied by the Degesch to the S.S. and that it was actually used in the mass extermination of inmates of concentration camps, including Auschwitz, neither the volume of production, nor the fact that large quantities were destined to concentration camps was in itself sufficient to impute criminal responsibility, as it was established by the evidence that there existed a great demand

<sup>81</sup> Boivin, *Complicity and beyond* (2005), p. 483; Misol, *Weapons and war crimes*. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 10; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, trial judgment, 2 September 1998, par. 533; *Prosecutor v. Michel Bagaragaza*, ICTR-05-86-S, sentencing judgment, 17 November 2009, par. 25 and *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, trial judgment, 21 February 2003 par. 720.

<sup>82</sup> Article 25 of the Rome Statute; Boivin, *Complicity and beyond* (2005), p. 483; Bellal, *Arms transfers and international human rights law* (2014), p. 485; Graff, *Corporate war criminals and the international criminal court* (2004), p. 26.

<sup>83</sup> Similar cases involving industrialists could also include von Krupp, Flick and Funk. See Chatham House, *Business and international crime*. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usq=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaaiusZiJC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usq=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaaiusZiJC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), p. 1; Graff, *Corporate war criminals and the international criminal court* (2004), p. 26; Steinhardt, *Weapons and the human rights responsibilities of multinational corporations* (2014), p. 527.

<sup>84</sup> The United Nations war crimes commission, *Law reports of trials of war criminals*, volume X (1949), p. 1.

<sup>85</sup> The United Nations war crimes commission, *Law reports of trials of war criminals*, volume I (1947), p. 93.

<sup>86</sup> The United Nations war crimes commission, *Law reports of trials of war criminals*, volume X (1949), p. 23.

for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, were confined in congested quarters lacking adequate sanitary facilities.”<sup>87</sup> Defendants were acquitted of this charge, because “dr. Peters from DeGESCH *negated the assumption that any of the accused had had any knowledge that an improper use was being made of Zyklon B.*”<sup>88</sup> The ground for a non-guilty verdict was therefore the lack of awareness of the indicted aiders and abettors that the gas they supplied was used for the extermination of inmates in concentration camps.<sup>89</sup>

The opposite conclusion was reached in the Zyklon B case, which was tried at the British Military Court in Hamburg. Bruno Tesch,<sup>90</sup> Karl Weinbacher<sup>91</sup> and Joachim Drosihn<sup>92</sup> were again prosecuted for supplying poisonous gas (Zyklon B) used for the extermination of allied nationals interned in concentration camps, knowing that the gas was to be used in the perpetration of a war crime. This time, Tesch and Weinbacher were convicted<sup>93</sup> because they knew for which purpose the gas had been used and continued to supply it.<sup>94</sup> In both cases, therefore, the awareness of the aider and abettor regarding his contribution to the commission of core crimes was required.

The majority of modern case law on this subject originates from the case law of the ICTR, for example the *Elizaphan and Gérard Ntakirutimana*,<sup>95</sup> *Jean Paul Akayesu*,<sup>96</sup> *Michel Bagaragaza*<sup>97</sup> and *Laurent Semanza* cases.<sup>98</sup>

<sup>87</sup> *Ibidem*, p. 24.

<sup>88</sup> *Ibidem*.

<sup>89</sup> See Chatham House, Business and international crime. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2FIlp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaiausZiJC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2FIlp230206.doc&ei=-8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaiausZiJC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), p. 1; International commission of jurists, Report of the International commission of jurists expert legal panel on corporate complicity in international crimes (2008), p. 14. Similar position can be found in the United Nations war crimes commission, Law reports of trials of war criminals, volume X (1949), p. 25 in relation to supplying drugs for medical experiments in concentration camps.

<sup>90</sup> Owner of the company.

<sup>91</sup> Procurator and Tesch's second in command.

<sup>92</sup> The firm's first gassing technician.

<sup>93</sup> Drosihn was acquitted.

<sup>94</sup> The United Nations war crimes commission, Law reports of trials of war criminals, volume I (1947), p. 94.

<sup>95</sup> *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17.

<sup>96</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4.

<sup>97</sup> *Prosecutor v. Michel Bagaragaza*, ICTR-05-86.

<sup>98</sup> *Prosecutor v. Laurent Semanza*, ICTR-97-20.

The general rules on aiding and abetting and its elements should also be applied in case of arms trafficking. In all of the aforementioned cases, the defendants were convicted of providing, selling or procuring arms, ammunitions and other means to armed groups, which participated in armed conflicts and whose members committed core crimes. The objective element of their complicity or practical assistance to the commission of core crimes therefore involved providing arms, ammunitions and other means. However, the case law required that such practical assistance (the acts and overall conduct of the accused, not each individual act) must have had a substantial effect on the commission of core crimes<sup>99</sup> from the indictment.<sup>100</sup> It was not necessary for the defendant to be the exclusive provider of arms<sup>101</sup> or be based in a state where the core crimes are committed.<sup>102</sup> The substantial effect requirement did, however, offered the defence team a window of opportunity to exclude the responsibility for aiding and abetting by proving that the arms supplied by the defendants were in low quantities, that there were additional suppliers, etc.<sup>103</sup>

Furthermore, according to the case law of the ICTY and the ICTR, the provision of arms used for commission of core crimes alone does not suffice for imposing criminal liability upon an aider and abettor to core crimes. In fact, the aider and abettor must be aware that the arms supplied by him or her would be used for such purpose. He or she must therefore possess such knowledge<sup>104</sup> and also be aware of the intent of the direct perpetrator.<sup>105</sup>

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<sup>99</sup> Misol, Weapons and war crimes. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 9; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, trial judgment, 2 September 1998, par. 533; *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, trial judgment, 15 May 2003, par. 393.

<sup>100</sup> *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, appeals judgment, 13 December 2004, par. 530.

<sup>101</sup> *Prosecutor v. Momčilo Perišić*, IT-04-81-T, 6 September 2011, par. 1601.

<sup>102</sup> Misol, Weapons and war crimes. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 9.

<sup>103</sup> See, for example, *Prosecutor v. Charles Taylor*, SCSL-03-01-T, 18 May 2012.

<sup>104</sup> Bellal, Arms transfers and international human rights law (2014), p. 458; Boivin, Complicity and beyond (2005), p. 482; Misol, Weapons and war crimes. URL: <https://www.hrw.org/legacy/wr2k4/download/13.pdf>, p. 10; International commission of jurists, Report of the International commission of jurists expert legal panel on corporate complicity in international crimes (2008), p. 41; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, trial judgment, 2 September 1998, par. 537; *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, trial judgment, 15 May 2003, par. 395; the United Nations war crimes commission, Law reports of trials of war criminals, volume I (1947), p. 93, 94 and 101; the United Nations war crimes commission, Law reports of trials of war criminals, volume X (1949), p. 24 and 25; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, appeals judgment, 13 December 2004, par. 530.

<sup>105</sup> *Ibidem*, par. 537.

According to the regulation of aiding and abetting in the Rome Statute, the ICC should also consider the provision of arms as an act of aiding and abetting to the commission of core crimes. However, contrary to the case law of the ICTY and the ICTR, there is no substantial effect requirement.<sup>106</sup> In the Rome Statute, the objective element is therefore defined in a less strict manner, while any supplying of arms used for the commission of core crimes should suffice from the objective point of view.<sup>107</sup>

The problem for the ICC prosecution lies in the subjective element, which is defined more strictly than in the prevalent case law of the ICTY and the ICTR: arms must be supplied not only with the knowledge that they would be used for the commission of core crimes listed in the Rome Statute, but *for the purpose of facilitating the commission of such a crime*. This includes the intent to commit the crime with supplied arms (volition element),<sup>108</sup> which would most likely be very difficult to prove,<sup>109</sup> especially in case of *dolus coloratus* and particularly because arms brokers usually run their business for monetary gain, and not with other intentions, and provide arms to anyone who would pay their price.<sup>110</sup>

However, I believe it is appropriate to assume that what is required is not only the aider and abettor's knowledge, but also his or her volition to commit a

<sup>106</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 458; Chatham House, *Business and international crime*. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), p. 5; Boivin, *Complicity and beyond* (2005), p. 483.

<sup>107</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 458; Chatham House, *Business and international crime*. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), p. 5; Boivin, *Complicity and beyond* (2005), p. 483.

<sup>108</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 458; Boivin, *Complicity and beyond* (2005), p. 483; Chatham House, *Business and international crime*. URL: [http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0\\_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s](http://www.google.si/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fchathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffilp230206.doc&ei=8XIVMSpGtPkav2XgvgC&usg=AFQjCNE1TIVPnP7CvqW0yW5RTM-Sr5R0_A&sig2=MaaiusZijC7nyyHqZ3s2iw&bvm=bv.85970519,d.d2s), p. 5.

<sup>109</sup> Bellal, *Arms transfers and international human rights law* (2014), p. 458.

<sup>110</sup> Similarly to the case of mercenaries, accused of committing core crimes, including genocide, who usually defend themselves by stating that their motive is monetary and that they offer their services to anybody who would hire them, and not for any other motives. See, for example, *Prosecutor v. Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja*, X-KR-10/893-1, trial judgment, 15 February 2013. URL: <http://www.sudbih.gov.ba/index.php?opcija=predmeti&id=316&jezik=e>.

crime. According to the UN Protocol, illegal arms trafficking is an international crime and, as such, subject to national jurisdiction. However, arms trafficking as a form of complicity, or, in other words, aiding and abetting to core crimes, should be limited only to those cases where the supplied arms were used for committing such crimes with the arms broker's intent towards such use.

## 5. Arms trafficking in Slovene law

All three levels of arms trafficking regulation, i.e. the regulation of legal arms trafficking, arms trafficking as a crime and arms trafficking as aiding and abetting core crimes, could also be found in Slovene law.

### 5.1. *The regulation of arms trafficking in Slovene law*

The Slovene Firearms Act-1<sup>111</sup> regulates arms trafficking<sup>112</sup> in accordance<sup>113</sup> with international and European obligations. Arms trafficking may only be performed by legal entities and entrepreneurs in line with conditions stipulated in the Firearms Act-1 and on the basis of a special authorisation granted by Ministry of the Interior.<sup>114</sup> The import, export or transit of arms across Slovene state borders are regulated separately. Again, these activities may only be performed on the basis of a special authorisation granted by the Ministry of the Interior and a preliminary opinion issued by the ministries of foreign affairs and defence.<sup>115</sup> The Rules implementing the Firearms Act<sup>116</sup> further regulate arms trafficking, including the transit of arms inside the EU,<sup>117</sup> and transit, import, export and arms trafficking across the EU borders.<sup>118</sup> Accordingly, state authorisation is required in all cases.<sup>119</sup>

The Firearms Act-1 also regulates relevant misdemeanours, including the misdemeanours committed by legal entities and entrepreneurs, who commence

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<sup>111</sup> Official Gazette of the Republic of Slovenia, Nos. 23/05 – official consolidated version and 85/09.

<sup>112</sup> Article 35 of the Firearms Act-1.

<sup>113</sup> Sancin, *Pogodba o trgovanju z orožjem – zaščita prebivalstva pred političnoekonomskimi interesi* (2013), p. 16.

<sup>114</sup> Articles 36, 37, 38 and 39 of the Firearms Act-1.

<sup>115</sup> Article 71e of the Firearms Act-1.

<sup>116</sup> Official Gazette of the Republic of Slovenia, Nos. 40/05, 82/07, 63/10 and 52/13.

<sup>117</sup> Chapter 9 of the Rules implementing the Firearms Act.

<sup>118</sup> Chapter 10 of the Rules implementing the Firearms Act.

<sup>119</sup> Articles 37-46 of the Rules implementing the Firearms Act.

arms trafficking activities without the required authorisation, perform import, export or transit of arms across state borders without the authorisation of the Ministry of the Interior, transport arms through border crossings not specified in the authorisation, or fail to report such arms to border control, etc.<sup>120</sup> Accordingly, violations of the Firearms Act-1 are firstly defined as misdemeanours in the Slovene legal system.

## 5.2. Arms trafficking in Slovene criminal law

However, certain violations of the Firearms Act-1 are considered a crime according to the Criminal Code-1.<sup>121</sup> There are three crimes that should be mentioned<sup>122</sup> in this respect. Firstly, the intentional manufacture and acquisition of weapons and instruments intended for the commission of crime (Art. 306 of the Criminal Code-1).<sup>123</sup>

The intentional illegal manufacture of and trade in weapons or explosive materials (Art. 307 of the Criminal Code-1)<sup>124</sup> represents a *lex specialis* and is, therefore, a more suitable crime. Here, Slovenia implemented its obligations arising from international agreements and its EU membership.<sup>125</sup> Currently, this crime primarily covers anyone, who unlawfully assembles, manufactures, offers, sells, barter, delivers, imports, exports, enters or takes out of the country firearms, chemical, biological or nuclear weapons, ammunition or explosive materials or military weapons and equipment, which individuals, legal persons and entrepreneurs are prohibited or restricted from trading, purchase or possess, or whoever intermediates therein or unlawfully acquires or keeps such weapons, ammunition or explosive materials, except for the firearms for which a weapons certificate may be issued.<sup>126</sup>

If the crime involves a large quantity of or very valuable or dangerous firearms, ammunition, explosive substances or other means of combat, or if it poses a threat, or if the act has been committed within a criminal association, it represents an aggravated crime.<sup>127</sup>

<sup>120</sup> Articles 82 and 83 of the Firearms Act-1.

<sup>121</sup> Official Gazette of the Republic of Slovenia, No. 50/12 – official consolidated version.

<sup>122</sup> All three crimes also invoke criminal liability of legal entities. See Ministrstvo za pravosodje, Predlog Kazenskega zakonika 1-B (2011), p. 181.

<sup>123</sup> Paragraph 1 of Article 306 of the Criminal Code-1.

<sup>124</sup> Article 307 of the Criminal Code-1.

<sup>125</sup> Ministrstvo za pravosodje, Predlog Kazenskega zakonika 1-B (2011), p. 36 and 186.

<sup>126</sup> Paragraph 1 of article 307 of Criminal Code-1.

<sup>127</sup> Paragraph 2 of Article 307 of the Criminal Code-1.

On the other hand, if the crime involves an individual firearm or a small quantity of ammunition for such a firearm, or if the perpetrator, with the purpose to illegally sell, acquires or keeps firearms or ammunition for which a weapon certificate may be issued or if he keeps them in a large quantity or high value, this is a case of a privileged crime.<sup>128</sup> The same applies to a person who falsifies, or destroys, removes, or changes without authorisation marks on firearms.<sup>129</sup>

Last but not least, a crime is also committed by anyone, who unlawfully manufactures, acquires, offers, sells, barter, sends, delivers, imports, exports, enters or takes out of the country composite or spare parts of firearms, ammunition, explosive materials, explosive devices and explosive weapons, or military weapons and military equipment, a substance, ingredients, software or technology, of which he is aware to be used for the manufacture or operation of the items referred to, and keeps them for such a purpose or intermediates therein.<sup>130</sup>

Another crime should be mentioned at this stage: violation of restrictive measures (Art. 374a of the Criminal Code-1),<sup>131</sup> which was introduced by the latest amendment to the Criminal Code-1B.<sup>132</sup> The aforementioned crime is committed when whoever, in contravention with the restrictions laid down in regulations imposing restrictive measures that are adopted pursuant to legal acts and decisions taken by international organisations, or with restrictions that, in accordance with the legal provisions of international organisations in the Republic of Slovenia directly apply, intentionally offers, sells, remits, transfers, trades, delivers, imports, exports, enters or takes out of the country goods, technology, money or property, or whoever intermediates therein, or enables access to such goods, technology, money or property or to benefits thereof, or fails to provide access thereto, or whoever unlawfully acquires or keeps such goods, technology, money or property thus gaining a substantial property benefit, shall be sentenced to between six months and five years in prison.<sup>133</sup> This crime should enable an effective implementation of the EU and UN measures<sup>134</sup> and could for example cover arms trafficking in contravention of the UN or EU embargo.

The violation of restrictive measures represents a *lex generalis* crime in comparison to the crime of illegal manufacture of and trade in weapons or explosive materials. If a perpetrator commits an act, which has the elements of both, *lex*

<sup>128</sup> Paragraph 3 of Article 307 of the Criminal Code-1.

<sup>129</sup> Paragraph 4 of Article 307 of the Criminal Code-1.

<sup>130</sup> Paragraph 5 of Article 307 of the Criminal Code-1.

<sup>131</sup> Article 374a of the Criminal Code-1.

<sup>132</sup> Official Gazette of the Republic of Slovenia, No. 91/2011.

<sup>133</sup> Paragraphs 1 and 2 of article 374a of the Criminal Code-1.

<sup>134</sup> Ministrstvo za pravosodje, Predlog Kazenskega zakonika 1-B (2011), p. 180.

*generalis* and *lex specialis*, he or she should only be held responsible for the *lex specialis* crime<sup>135</sup> - in this case, for the crime of illegal manufacture of and trade in weapons or explosive materials.<sup>136</sup> However, these two crimes still fail to cover the potential purpose and use of arms, i.e. the commission of core crimes, which were trafficked illegally.

Criminal liability for core crimes committed by means of illegal arms trafficking could be established on the basis of the Criminal Code-1, namely by combining the rules on core crimes and complicity in crime.

Slovenia adopted appropriate definitions of core crimes in the Criminal Code-1 of 2008 by implementing the definitions of core crimes from the Rome Statute, whereas the amended Criminal Code-1B also implemented the amendment to the Rome Statute regarding aggression and war crimes in non-international armed conflicts agreed in Kampala.<sup>137</sup>

The Slovene Criminal Code-1 also includes provisions on complicity in crime. As in international criminal law, aiding and abetting would be the most relevant one for the present case. Accordingly, any person, who intentionally supports another person in the commission of a crime, shall be punished. Support in the commission of a crime is deemed to be constituted mainly by the following: counselling or instructing the perpetrator on how to carry out the crime; *providing the perpetrator with instruments of crime* or removing the obstacles for committing a crime; *a priori* promises to conceal the perpetrator's crime or any traces thereof; instruments of the crime or objects gained through the committing of crime.<sup>138</sup> As in the Rome Statute, the provision of instruments of crime is explicitly listed as a form of aiding and abetting and the provision of arms and arms trafficking could, therefore, be considered as aiding and abetting to crimes, including core crimes.

As in international law, there are certain elements of aiding and abetting, which have to be proved. Firstly, trafficking in arms and, consequently, the provision of arms should represent an objective contribution to the commission of core crimes. It may not be deemed a *conditio sine qua non*, but it still should represent an important contribution that facilitates the commission of core crimes.<sup>139</sup> The subjective element is much more delicate and difficult to prove. The Slovene Criminal Code-1 sets even higher standards than the Rome Statute.

<sup>135</sup> Bavcon et al., KAZENSKO PRAVO (2013), p. 205.

<sup>136</sup> Ministrstvo za pravosodje, Predlog Kazenskega zakonika 1-B (2011), p. 181. The same applies to the crime of terrorism (Art. 108).

<sup>137</sup> Ministrstvo za pravosodje, Predlog Kazenskega zakonika 1-B (2011).

<sup>138</sup> Article 38 of the Criminal Code-1.

<sup>139</sup> Bavcon et al., KAZENSKO PRAVO (2013), p. 335.

In fact, the double intent of the aider and abettor is required, i.e. his or her intent to commit the crime and to contribute to the crime.<sup>140</sup> Therefore, it would be required to prove the arms broker's intent to commit the core crime and his or her aiding and abetting, otherwise he or she could not be held criminally responsible for complicity in core crimes, but perhaps only for "ordinary" crimes, i.e. dealing with illegal arms trafficking and other aforementioned crimes.

The possibility of criminal liability for aiding and abetting core crimes through arms trafficking opens up numerous interesting legal issues, such as the relationship between the complicity in core crimes on one hand and the responsibility of a perpetrator of "ordinary" crimes regulated in Articles 306, 307 and 374.a of the Criminal Code-1 on the other. Illegal arms trafficking could, in fact, also be considered as aiding and abetting core crimes committed by arms trafficked in an illegal manner. The following question thus requires an answer: Would the arms broker be held responsible only for one crime or for both, i.e. aiding and abetting core crime and "ordinary" crimes from Articles 306 or 307?

In Slovene theoretical discussions and case law, Article 306 (manufacture and acquisition of weapons and instruments intended for the commission of crime) is referred to as a typical preparatory crime (*delictum sui generis*).<sup>141</sup> Once the arms are used for the (attempted) commission of a core crime, the perpetrator is criminally responsible only for aiding and abetting core crime (fictitious merger of offences).<sup>142</sup> The essence of crime regulated in Article 306 basically lies in the intentional aiding and abetting crime.

In my opinion, the same conclusion cannot be applied to the relationship between Article 307 (illegal manufacture of and trade in weapons or explosive materials) and aiding and abetting core crimes. In this instance, the arms broker, who provides arms for the commission of core crimes, should be criminally responsible for both, i.e. for committing illegal manufacture of and trade in weapons or explosive materials and for aiding and abetting the commission of core crimes (real merger of offences).<sup>143</sup> The unlawfulness of the crime from Article 307 lies in the violation of rules on lawful arms trafficking and manufacturing. The arms broker not only contributes to the commission of core crimes, but also violates the regulation of arms trafficking. Thereby, he or she not only attacks the legal value of humanity, but also its legal order and peace. This is why the perpetrator should, in my opinion, be held responsible for both crimes.

<sup>140</sup> *Ibidem*; Ambrož, STORILSTVO IN UDELEŽBA PRI KAZNIVEM DEJANJU, 2015, p. 199.

<sup>141</sup> Bavcon et al., KAZENSKO PRAVO (2013), p. 308.

<sup>142</sup> *Ibidem*.

<sup>143</sup> *Ibidem*, p. 204.

The time and place of aiding and abetting core crimes is another interesting legal issue. This is especially relevant in relation to the statute of limitation. In fact, there is no statute of limitation for the criminal prosecution and implementation of a sentence for core crimes. The question is whether this also applies to aiding and abetting core crimes. The previous Criminal Code<sup>144</sup> and the Criminal Code-1 of 2008 were silent on the matter.<sup>145</sup> However, the amended Criminal Code-1B of 2011 introduced a new Article 36.a, which states: “The provisions of this Code that are applicable to the perpetrator shall also apply to an accomplice who solicits or supports a crime, unless otherwise provided by the law.”<sup>146</sup> This also applies to the rules of the general part, including the rules on the place and time of commission (or complicity) of a crime and the statute of limitation.<sup>147</sup> Although this article enables different interpretations,<sup>148</sup> they all lead to the conclusion that the rules regarding the absence of the statute of limitations also apply to aiding and abetting core crimes.

There is another interesting question that also needs to be tackled: Would the unlawfulness of a crime be excluded, if arms trafficking was approved by the (Slovene) state according to the Firearms Act-1? In terms of Article 306 such a fact seems to be irrelevant considering the definition of this crime. On the other hand, Article 307 covers the unlawful manufacturing of and trafficking in arms. It includes a blanket definition<sup>149</sup> of a crime and thereby refers to the Firearms Act-1 and other relevant regulations. The absence of unlawfulness (state authorisation) would therefore negate the unlawfulness of the perpetrator’s act. Article 374a of the Criminal Code-1 explicitly includes the violation of “restrictions laid down in regulations imposing restrictive measures that are adopted pursuant to legal acts and decisions taken by international organisations, or restrictions that, in accordance with the legal provisions of international organisations in the Republic of Slovenia directly apply.”<sup>150</sup> Again, if there is no violation of such restrictions, the perpetrator’s act is not unlawful, but state authorisation itself would, in my opinion, not exclude the act’s unlawfulness and would itself violate international restrictions. As for the aiding and abetting core crimes, the

<sup>144</sup> Official Gazette of the Republic of Slovenia, No. 95/04 – official consolidated version.

<sup>145</sup> Ambrož, STORILSTVO IN UDELEŽBA PRI KAZNIVEM DEJANJU, 2015, p. 140; Korošec, *Krajevna in časovna veljavnost slovenskega kazenskega prava za obravnavo udeležb* (2014), p. 22.

<sup>146</sup> Bavcon et al., *KAZENSKO PRAVO* (2013), p. 320.

<sup>147</sup> Ministrstvo za pravosodje, *Predlog Kazenskega zakonika 1-B* (2011), p. 104.

<sup>148</sup> Ambrož, STORILSTVO IN UDELEŽBA PRI KAZNIVEM DEJANJU, 2015, p. 141; Korošec, *Krajevna in časovna veljavnost slovenskega kazenskega prava za obravnavo udeležb* (2014), p. 22.

<sup>149</sup> Deisinger, *KAZENSKI ZAKONIK S KOMENTARJEM* (2002), p. 764.

<sup>150</sup> Article 374a of the Criminal Code-1.

state authorisation for arms trafficking does not play any role in relation to the unlawfulness of the aider and abettor's act.

The Slovene criminal law therefore considers both illegal arms trafficking as well as aiding and abetting core crimes as a crime thus enabling their prosecution.

## 6. Conclusion

The regulation concerning arms trafficking at universal and regional level first shows a developing set of primary rules with respect to the performance of legal arms trafficking and the need for obtaining prior state authorisation, which may be found in instruments, such as the Arms Trade Treaty or numerous EU legal acts. These rules primarily aim to prevent illegal arms trafficking, but also serve as grounds for the next step, i.e. the definition of illegal arms trafficking. Generally speaking, illegal arms trafficking is considered a violation of the universal, regional or national systems of legal arms trafficking, especially arms trafficking without a state authorisation. The international community should therefore strive to increase the number states signatories of the ATT and strengthen the Treaty's implementation in order to introduce a universal system of control over arms trafficking, which should have a strong preventive effect. That way, every transaction would ideally require a state authorisation and there would be no oasis enabling arms trafficking without such an authorisation. Any arms trafficking in contradiction to this system would be considered illegal. Within the EU, this was achieved through the EU legal system, according to which the EU common positions and regulations are binding upon member states. The question is, however, whether this is a realistic goal due to enormous economic gains generated by arms trafficking.<sup>151</sup>

The next step thus requires the definition of illegal arms trafficking as an international crime that would be enshrined as such in an international agreement, which has to be transposed into national legislations of its states signatories. The UN Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition is the core international agreement suitable for achieving this goal. Another step further would therefore require an increase in the number of its states signatories and the strengthening of the fulfilment of their obligations arising from the Protocol, including the

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<sup>151</sup> See, for example, Bellal, *Arms transfers and international human rights law* (2014), p. 448.

definition of illegal arms trafficking as a crime in their national legislations and its prosecution in practice.

The final step would require that arms trafficking be considered as aiding and abetting core crimes. The Rome Statute, statutes of other international tribunals and their case law recognise aiding and abetting as a form of complicity, which could also cover arms trafficking. However, the problem for the prosecution usually lies in the subjective element of aiding and abetting. The Rome Statute, for example, is pretty clear: the prosecution must prove the aider and abettor's intent to facilitate the commission of a core crime, to aid, abet or otherwise assist in its commission or at least its attempt. This includes the intent to commit the crime with supplied arms, which would most likely be very difficult to prove, especially because arms brokers usually run their business for monetary gain, and not with other intentions, and provide arms to anyone, who would pay their price.

However, I believe it is appropriate to assume that what is required is not only the aider and abettor's knowledge of the crime, but also his or her volition to commit the crime. According to the UN Protocol, illegal arms trafficking is an international crime and, as such, subject to national jurisdiction. However, arms trafficking as a form of complicity or, in other words, aiding and abetting core crimes, should only be limited to cases where the supplied arms were used for committing such crimes with the arms broker's intent to use them in this manner.

Slovene legislation includes all three levels of arms trafficking regulation, i.e. primary rules on the performance of legal arms trafficking and secondary rules, which define arms trafficking as a crime and even as complicity to a core crime. Such legislation follows the agreed international and EU obligations and should enable effective prosecution, especially considering the fact there is no statute of limitation either for complicity in core crimes or for their commission.

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## Trgovanje z orožjem kot oblika pomoči pri mednarodnem hudodelstvu

### *Povzetek*

Čeprav se praksa mednarodnega kazenskega prava osredotoča na glavne storilce mednarodnih hudodelstev, tudi pomoč pri izvršitvi mednarodnih hudodelstev ni zanemarjena oblika udeležbe in ni zgolj teoretično vprašanje. To je razvidno tudi iz dosedanje sodne prakse mednarodnih kazenskih sodišč. Ena izmed tradicionalnih in tipičnih oblik pomoči pri izvršitvi mednarodnega hudodelstva je tudi dajanje sredstev za izvršitev le-tega na razpolago, najpogosteje orožja. Kot podobliko te vrste pomoči lahko štejemo tudi trgovanje z orožjem, s katerim so pozneje izvršena mednarodna hudodelstva.

Trgovanje z orožjem ali splošneje zagotavljanje orožja za izvršitev mednarodnih hudodelstev se je v sodni praksi mednarodnih kazenskih sodišč že uveljavilo kot morebitna oblika pomoči pri mednarodnih hudodelstvih. Omeniti velja že dokaj stara primera I.G. Farben ter Zyklon B, ki sta ju obravnavali vojaški sodišči v zavezniških okupacijskih conah povojne Nemčije. Tudi v nacionalnih sistemih je že mogoče naleteti podobne postopke, naj omenim le kazenska postopka na Nizozemskem zoper trgovca z orožjem Fransa Van Anraata in Guusa Van Kouwenhovna. V Združenih državah Amerike pa so obsodili na primer vzhodnoevropskega trgovca z orožjem Victorja Bouta. Sodna praksa torej potrjuje dojemanje, da je trgovanje z orožjem mogoče šteti za udeležbo pri mednarodnem hudodelstvu, izvršenem s takim orožjem.

Članek zato najprej analizira pomoč kot obliko udeležbe pri mednarodnem hudodelstvu, in sicer z vidika njegove ureditve v Rimskem statutu ter v nastajajoči sodni praksi Mednarodnega kazenskega sodišča (MKS) kot prvega stalnega mednarodnega kazenskega sodišča. Obravnava elemente pomoči z vidika njegovih meja, saj splošna pravila o udeležbi in še posebej pomoči pri izvršitvi mednarodnega hudodelstva veljajo tudi v primeru zagotavljanja sredstev oziroma orožja za izvršitev mednarodnega hudodelstva, kot tudi v primeru trgovanja z orožjem.

V tem delu ugotavljam, da Rimski statut pozna različne oblike udeležbe pri mednarodnem hudodelstvu, vključno s pomočjo, in da določba o pomoči – drugače kot statuti drugih mednarodnih kazenskih sodišč – izrecno vključuje tudi zagotavljanje sredstev za izvršitev mednarodnega hudodelstva. MKS torej ima izrecno pravno podlago za uporabo pomoči pri mednarodnem hudodelstvu v primeru trgovanja z orožjem. Rimski statut in sicer še redka sodna praksa MKS o pomoči pri mednarodnem hudodelstvu govorita o subjektivno-objek-

tivni opredelitvi pomoči, pri kateri so subjektivne zahteve postavljene dokaj visoko, saj Rimski statut zahteva, da ima pomagač naklep glede pomoči in da s svojim prispevkom pripomore k izvršitvi mednarodnega hudodelstva. Po drugi strani so po večinskem mnenju zahteve glede objektivnega prispevka pomagača nižje kot v dosedanji sodni praksi ter ureditvi mednarodnega kazenskega prava. Predvsem subjektivni kriterij torej postavi pred tožilstvo precej težko nalogo dokazati namen pomagača, da olajša izvršitev mednarodnega hudodelstva.

Drug del članka obravnava ureditev trgovanja z orožjem v mednarodnem in evropskem pravu. V obeh pravnih sistemih lahko najdemo postopen prehod od mehke do zavezujoče ureditve sistema, znotraj katerega se za mednarodno trgovanje z orožjem praviloma zahteva predhodna odobritev države izvoznice, ki pa odobritev v določenih, praviloma podobnih primerih ne sme izdati. Med temi razlogi lahko najdemo tudi take, ki so tesno povezani z mednarodnimi hudodelstvi, na primer tveganje, da bo orožje uporabljeno za izvršitev mednarodnih hudodelstev, za notranjo represijo, za podaljševanje oboroženega spopada, kršitev embarga itd. V vsakem primeru pa naj bi država izvoznica naredila tehtno oceno tveganja. Na univerzalni ravni velja tako omeniti Pogodbo o trgovini z orožjem. Čim širša ratifikacija te pogodbe bi pomenila zmanjšanje možnosti, da bi bile posamezne države oaza za trgovce z orožjem, s tem ko ne bi zahtevale državnega soglasja za trgovino z orožjem. Tako univerzalna kot tudi evropska ureditev naj bi tako postopoma na čim bolj univerzalni ali vsaj regionalni ravni ustanovila (idealno vodotesen) sistem primarnih pravil, ki bi določala, kakšno je zakonito trgovanje z orožjem, posledično pa tudi, kakšno je nezakonito trgovanje z orožjem. Ta primarna pravila naj bi delovala preventivno in preprečevala izvrševanje mednarodnih hudodelstev s trgovanjem z orožjem, hkrati pa predstavljajo tudi podlago za opredelitev nezakonitega trgovanja z orožjem kot kaznivega dejanja in s tem podlago za kazenskih pregon takih kaznivih dejanj. Vprašati pa se je treba, v kolikšni meri je ta cilj dosegljiv, glede na ogromen finančni izplen trgovine z orožjem.

Članek zato v nadaljevanju obravnava trgovanje z orožjem kot mednarodno pogodbeno kaznivo dejanje, torej kot kaznivo dejanje, katerega zakonski znaki so opredeljeni v določeni mednarodni pogodbi in ki ga mora država pogodbenica pogodbe implementirati v notranjo zakonodajo ter ga kot kaznivo dejanje tudi kazensko preganjati. Zaenkrat je mogoče najti en izrecen pravni vir, ki zahteva inkriminacijo nezakonitega trgovanja z orožjem, in sicer Protokol proti nezakoniti proizvodnji in trgovanju s strelnim orožjem, njegovimi sestavnimi deli in strelivom h Konvenciji Organizacije združenih narodov proti mednarodnemu organiziranemu kriminalu. Ta protokol opredeljuje nezakonito trgovanje z orožjem kot uvoz, izvoz, pridobitev, prodajo, dostavo, premik ali prevoz strelnega

orožja, njegovih sestavnih delov in streliva z ozemlja države pogodbenice, čez njeno ozemlje ali na ozemlje druge države pogodbenice, če ga katera koli od teh držav pogodbenic ni dovolila v skladu z določili protokola ali če strelno orožje ni označeno v skladu z zahtevami protokola. Ta protokol ima sicer najmanj držav pogodbenic izmed vseh treh protokol Konvencije proti mednarodnemu organiziranemu kriminalu, a jih je še vedno 113. V tem delu bi zato lahko bil cilj, da ta protokol podpiše in ratificira čim več držav pogodbenic, ki nezakonito trgovanje z orožjem dojemajo kot kaznivo dejanje in ga kot tako tudi preganjajo.

Naslednje poglavje članka obravnava trgovanje z orožjem kot udeležbo pri mednarodnih hudodelstvih z vidika ureditve Rimskega statuta. Mednarodno hudodelstvo (genocid, hudodelstvo zoper človečnost, vojno hudodelstvo, agresija) se od mednarodnega pogodbenega kaznivega dejanja razlikuje v tem, da je inkriminirano, pa tudi kazensko preganjano tako na nacionalni kot tudi na mednarodni ravni, pred mednarodnimi kazenskimi sodišči. Kot je bilo že omenjeno, bo največja težava pri kazenskem pregonu trgovca z orožjem pred MKS kot pomagača pri mednarodnem hudodelstvu visoko postavljen subjektivni element pomoči. Tožilstvo bo namreč moralo dokazati, da je imel trgovec z orožjem naklep, da se z orožjem, ki ga je prodal, izvršijo mednarodna hudodelstva, ki so bila s tem orožjem pozneje dejansko vsaj poskušana. Še posebej bo to problematično ali nemogoče zato, ker trgovci z orožjem to dejavnost praviloma opravljajo zaradi finančnih interesov in prodajajo orožje praktično komer koli, ki bo zanj plačal postavljeno ceno, ne pa zaradi etničnih, političnih, verskih itd. interesov. Podoben problem se pojavlja pri dokazovanju (genocidnega) namena najetih vojaških plačancev.

Po mojem mnenju je zahteva Rimskega statuta po naklepu trgovca z orožjem/pomagača glede olajšanja izvršitve mednarodnega hudodelstva primerna, če želimo trgovca z orožjem obsoditi za udeležbo pri mednarodnem hudodelstvu. Glede na nizko postavljene zahteve Rimskega statuta glede količine objektivnega prispevka pomagača bi lahko ob odsotnosti subjektivne zahteve skoraj vsakemu trgovcu z orožjem, katerega orožje je bilo uporabljeno za izvršitev mednarodnega hudodelstva, pripisali udeležbo pri mednarodnem hudodelstvu. Kadar voljnega elementa do pomoči ni mogoče dokazati, pregon za udeležbo pri mednarodnem hudodelstvu na nacionalni ali mednarodni ravni sicer ni mogoč, je pa še vedno mogoč kazenski pregon v nacionalnih sistemih za samo nezakonito trgovanje z orožjem, vsaj v tistih, ki so ratificirali in implementirali omenjeni Protokol proti nezakoniti proizvodnji in trgovanju s strelnim orožjem, njegovimi sestavnimi deli in strelivom, kadar so izpolnjeni zakonski znaki kaznivega dejanja. Zato je še toliko bolj pomembno, da države implementirajo sistem

nadzora trgovanja z orožjem, pa tudi opredelitev kaznivega dejanja nezakonitega trgovanja z orožjem.

Ne nazadnje pa je tematika trgovanja z orožjem kot oblike pomoči pri mednarodnem hudodelstvu obravnavana tudi z vidika slovenske ureditve. Najprej v tem okviru obravnavam Zakon o orožju-1, ki je usklajen z mednarodnimi obveznostmi Slovenije in ki določa primarna pravna pravila, po katerih mora potekati trgovanje z orožjem znotraj Slovenije, pa tudi znotraj Evropske unije ali čez njene meje. Zakon o orožju-1 ureja tudi sekundarna pravna pravila, in sicer prekrške kot kršitve določenih določb zakona.

V slovenskem pravnem redu pa je tudi nezakonito trgovanje z orožjem kaznivo dejanje. Slovenija je namreč ratificirala tako Protokol proti nezakoniti proizvodnji in trgovanju s strelnim orožjem, njegovimi sestavnimi deli in strelivom kot tudi Pogodbo o trgovini z orožjem, posamezne zahteve na tem področju pa za slovensko državo izhajajo tudi že iz članstva Slovenije v Evropski uniji. Slovenski Kazenski zakonik-1 tako pozna tri relevantna kazniva dejanja: izdelovanje in pridobivanje orožja in pripomočkov, namenjenih za kaznivo dejanje (306. člen), *lex specialis* nedovoljena proizvodnja in promet orožja ali eksploziva (307. člen) ter *lex generalis* kršitev omejevalnih ukrepov (374.a člen). Vsa ta kazniva dejanja pa še ne pokrivajo trgovanja z orožjem kot udeležbe pri mednarodnem hudodelstvu. Slovenski Kazenski zakonik-1 tako pozna ustrezne definicije mednarodnih hudodelstev iz Rimskega statuta, pa tudi ureditev pomoči pri kaznivem dejanju, ki velja tudi v primeru trgovanja z orožjem za izvršitev mednarodnega hudodelstva. Tako kot Rimski statut tudi Kazenski zakonik-1 celo izrecno omenja zagotavljanje sredstev za izvršitev kaznivega dejanja kot obliko pomoči in kot pri Rimskem statutu bo tudi tukaj največji problem za dokazovanje kazenske odgovornosti trgovca z orožjem pomenil subjektivni element pomoči. Kazenski zakonik-1 celo strožje kot Rimski statut zahteva dvojni naklep pomagača: glede kaznivega dejanja in glede pomoči. V nasprotnem primeru ostaja še vedno možnost kazenske odgovornosti za omenjena »navadna« kazniva dejanja.