AIDING AND ABETTING IN INTERNATIONAL CRIMINAL LAW

Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto†

To achieve justice for violations of international law such as genocide, torture, crimes against humanity, and war crimes, it is essential to address complicity for international crimes. Beginning in the 1990s, there was a proliferation of international and hybrid criminal tribunals, which sought to hold perpetrators of these crimes accountable and, in turn, generated an explosion of international criminal law jurisprudence. Nonetheless, the contours of aiding and abetting liability in international criminal law remain contested. Courts—both domestic and international—have long struggled to identify the proper legal standard for holding actors liable for aiding and abetting even the most serious violations of international law. That confusion has, in turn, produced inconsistent decisions. In the United States, for example, it has resulted in a circuit split, leading many to predict the issue will only be resolved by the U.S. Supreme Court.

This Article aims to provide context and clarity in this area of international law. It explains and categorizes the existing jurisprudence on aiding and abetting, based on a comprehensive survey of every case decided by an international or hybrid criminal tribunal since Nuremberg. It argues that the search by U.S. courts for a single standard for aiding and abetting liability under international law when deciding cases arising under the Alien Tort Statute misunderstands the nature of the aiding and abetting jurisprudence—and, indeed, misunderstands the structure of international criminal law more generally. It explains that differentiated standards for aiding and abetting liability are often a result of purposive and functional pluralism. Put simply, different standards may be appropriate for different contexts. What appears to be a dis-

† Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; J.D., Yale Law School (2018); J.D., Yale Law School (2019); J.D., Yale Law School (2019); Associate, Debevoise & Plimpton LLP and J.D., Yale Law School (2018), respectively. Our deepest thanks to Brian Finucane, Chimène Keitner, David Scheffer, Scott Shapiro, Paul Strauch, Beatrice Walton, Zoe Weinberg, and Gideon Yaffe for their valuable input on earlier drafts of this Article. Any views or opinions expressed in this Article are personal to the authors and do not express the views of any institutions with which they are affiliated or their clients.

continuous and contradictory jurisprudence is, in fact, a set of calibrated standards that are often responsive to the particular context at hand. The Article concludes with recommendations for strengthening and enabling this functional pluralism in order to strengthen and enable international justice.

INTRODUCTION 1594
I. AIDING AND ABETTING LIABILITY IN INTERNATIONAL CRIMINAL LAW 1600
A. Emergence of Aiding and Abetting Liability ... 1601
B. Fragmentation of Aiding and Abetting Standards 1606
1. *Actus Reus* 1609
2. *Mens Rea* 1613
a. *Knowledge* 1614
b. *Purpose* 1615
c. Intent 1616
II. THE CASE FOR FUNCTIONAL PLURALISM 1617
A. Functional Differences Across Tribunals 1620
1. *Ad Hoc Tribunals* 1621
2. *Hybrid Tribunals* 1623
3. *International Criminal Court* 1625
B. Custom and Functional Pluralism 1627
C. Ending the Fruitless Search for Unity: Case of the Alien Tort Statute 1630
III. HOW TO STRENGTHEN AND ENABLE FUNCTIONAL PLURALISM 1634
CONCLUSION 1640

INTRODUCTION

In the summer of 1999, Sudanese air forces armed with "payloads of death and displacement" bombed United Nations relief sites, clinics, churches, and civilian residences.[1] Thanks to foreign sovereign immunity, the Sudanese government and its agents were immune from suit in foreign courts.[2] But the victims learned that the airstrips and fuel used by the Sudanese warplanes had been provided by the Canadian oil corporation, Talisman Energy, and in 2001, they brought suit against the corporation in the United States under the Alien

---

1 CAN. MINISTRY OF FOREIGN AFFAIRS, HUMAN SECURITY IN SUDAN: THE REPORT OF A CANADIAN ASSESSMENT MISSION 16 (2000); HUMAN RIGHTS WATCH, SUDAN, OIL, AND HUMAN RIGHTS 6 (2003), https://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf [https://perma.cc/3VV5-GSZM].

2 Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 342 n.42 (S.D.N.Y. 2003).

Tort Statute.[3] The victims accused Talisman Energy of aiding and abetting the Sudanese government's commission of genocide, war crimes, and crimes against humanity.[4]

They lost.[5] The District Court for the Southern District of New York and the Second Circuit Court of Appeals both found that Talisman Energy had *knowingly* aided the Sudanese military in its prolonged campaign of death and destruction.[6] But that was not enough. The courts refused to hold Talisman Energy liable because they concluded that an aider or abettor of an international crime must act with the "*purpose* [of facilitating the commission of the underlying crime] rather than *knowledge* alone."[7]

The case was only one in a series of cases in which U.S. courts have struggled to identify the proper legal standard for holding actors liable for aiding and abetting the most serious violations of international law. 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.[8] While the Fourth Circuit has agreed with the Second Circuit that an aider or abettor must act with *purpose*,[9] the Eleventh and D.C. Circuits have held that *knowledge* alone is sufficient to establish liability.[10] This circuit split has led many to predict the issue

---

3 28 U.S.C. § 1350 (2012); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009).

4 *Presbyterian Church of Sudan*, 582 F.3d at 247, 251.

5 *Id.* at 263.

6 *Id.* at 265.

7 *Id.* at 259 (emphasis added).

8 *See generally* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008) (detailing confusion and uncertainty among federal courts in determining standards for complicity in ATS cases). Another possibility is that the courts are not confused, but are cherry-picking among the cases to support the result they wish to reach. If so, then the inconsistent decisions are not a result of confusion, but of intentional misuse of precedent. Either way, the argument here holds: courts should recognize that different international and hybrid tribunals serve different purposes and those different purposes lead to different standards for aiding and abetting.

9 Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) ("[W]e agree with the Second Circuit that a purpose standard alone has gained 'the requisite acceptance among civilized nations for application in an action under the ATS.'").

10 *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (determining that aiding and abetting only requires knowledge, based on customary international law); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1159 (11th Cir. 2005) (finding that the defendant's knowledge that he was "assisting in wrongful activity" was sufficient to establish that he aided and abetted the victim's killing).

will only be resolved when the U.S. Supreme Court finally weighs in.[11]

This Article aims to provide much-needed context and clarity in this area of international law. It shows that the search by U.S. courts for a single standard for aiding and abetting liability within customary international law misunderstands the nature of aiding and abetting jurisprudence in international law and, indeed, misunderstands the structure of international criminal law as a general matter.

This issue is deeply important not simply because of the U.S. circuit split. Since ancient times, prohibitions against complicity have been used to hold actors responsible for "aiding and abetting" wrongful acts committed by others.[12] Today, liability for complicity is common to all mature legal systems. Prohibitions against aiding and abetting internationally wrongful acts are commonplace in every specialized area of international law, including international humanitarian law, transboundary tort law, and international human rights law.[13]

---

11 *See, e.g.*, David Scheffer, *The Impact of the War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law*, *in* CORPORATE SOCIAL RESPONSIBILITY?: HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY 152, 165 (Charlotte Walker-Said & John D. Kelly eds., 2015) ("In the future, the Supreme Court may be asked to resolve the circuit split within the federal circuits."); 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) ("While subject matter jurisdiction is currently the issue before the Supreme Court, the *mens rea* standard follows on its heels as the next most pressing ATS issue.").

12 Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994).

13 A form of secondary liability exists in the international law of state responsibility as well. Article 16 of the Draft Article on State Responsibility provides, "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 if:

> (a) that State does so with *knowledge* of the circumstances of the internationally wrongful act; and
> (b) the act would be *internationally wrongful* if committed by that State.

Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 16, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 65 (2001) (emphasis added). The Commentary to these Articles provides several examples of actions that would give rise to aiding and assisting liability: "knowingly providing an essential facility or financing the activity in question;" "providing means for the closing of an international waterway;" "facilitating the abduction of persons on foreign soil;" "assisting in the destruction of property belonging to nationals of a third country." *Id.* at 66. The Commentary further provides that allowing another state to launch attacks from state territory can constitute aid and assistance. *Id.* Some jurists have sought to bridge the concept of "aiding and abetting" in international criminal law with that of "aiding and assisting" in the law of state responsibility. This Article assumes a sharp distinction between the two concepts, however. Namely,

It is essential, too, to the possibility of criminal liability in the ICC.[14]

Addressing complicity through aiding and abetting liability attends to the goals of justice. It ensures that all actors that contribute to the commission of a wrongful act are held accountable, and it deters complicity in future international crimes. Further, as a practical matter, addressing complicity is a key avenue for seeking justice amidst jurisdictional and other obstacles to holding direct perpetrators responsible for violations of international law—be they states, powerful individuals, or nonstate entities. For these reasons, getting the law of aiding and abetting "right" is necessary for proper international legal accountability.

These questions may be newly pressing, but they are not new. In international criminal law, some form of aiding and abetting liability has been recognized since the first recognition of the general principle of individual criminal responsibility. The emergence of international criminal law in the aftermath of the Second World War and the proliferation of international criminal tribunals elevated the importance of complicity in international criminal law.[15] Still, the exact contours of secondary liability in international criminal law remain contested.[16]

---

the law of individual responsibility diverges from the law of state responsibility on the need for a subjective or "mental element" captured in the mens rea prong and a *de minimis* concern with questions of attribution. Although this Article focuses solely on the "aiding and abetting" context, many of the conclusions that emerge here apply equally well to "aiding and assisting" context.

14 The issue was central to the ICC's investigation of potential war crimes and crimes against humanity by U.S. nationals in Afghanistan. *Preliminary Examination: Afghanistan*, INT'L CRIM. CT., https://www.icc-cpi.int/Afghanistan [https://perma.cc/N9AK-AHWN] (last visited Feb. 18, 2019). That investigation has since been rejected by the Pre-Trial Chamber. Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-33, Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), https://www.justsecurity.org/wp-content/uploads/2019/04/international-criminal-court-afghanistan.pdf [https://perma.cc/VK86-J9AW] (last visited Apr. 12, 2019).

15 *See* MARINA AKSENOVA, COMPLICITY IN INTERNATIONAL CRIMINAL LAW 53–80 (2016).

16 *See generally* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304 (2008) (discussing the debate over the definition of "aiding and abetting"); Janine Natalya Clark, *'Specific Direction' and the Fragmentation of International Jurisprudence on Aiding and Abetting:* Perišić *and Beyond*, 15 INT'L CRIM. L. REV. 411 (2015) (discussing fragmentation in aiding and abetting liability jurisprudence); Teddy Nemeroff, *Untying the* Khulumani *Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After* Sosa, 40 COLUM. HUM. RTS. L. REV. 231 (2008) (discussing confusion in addressing aiding and abetting liability under the Alien Tort Statute); Leila Nadya Sadat, *Can the ICTY* Šainović *and* Perišić Cases Be Recon-

This Article examines how different conceptions of aiding and abetting liability have taken root in international, hybrid, and domestic tribunals. It counsels in favor of clarity but against seeking uniformity where it does not—and should not—exist. It explains that differentiated standards for aiding and abetting liability are often a result of *functional pluralism*. Put simply, different standards may be appropriate to different contexts. Laying out the rich tapestry of international criminal law makes clearer the varied roles of aiding and abetting liability. This Article aims to show that what appears to be a discontinuous and contradictory jurisprudence is, in fact, a set of calibrated standards that are often responsive to the particular context at hand.[17]

Part I of this Article describes the current state of aiding and abetting liability in international criminal law. This description is informed by a comprehensive survey of every case decided by an international or hybrid criminal tribunal since Nuremberg (summarized in the Appendix). It begins by situating aiding and abetting jurisprudence against the backdrop of the progressive development of international criminal law in the late twentieth century. Part I then turns to the different standards of aiding and abetting liability that exist under international criminal law today. This Part aims not only to provide a landscape of the relevant standards, but also to clarify the areas of ambiguity and fragmentation. It shows that within the actus reus element of aiding and abetting liability, tribunals have diverged over the need for assistance to be *specifically directed* at the principal's crime and over the requirement that the assistance have a *substantial effect* on its commission. The mens rea element is even more fragmented, with courts taking divergent approaches to whether the aider or abettor must render her assistance with the *knowledge*, *in-*

---

ciled?, 108 AM. J. INT'L L. 475, 478 (2014) (discussing the "jurisprudential debate between the two differently constituted appeals chambers" of the ICTY).

17 This Article touches on two larger debates taking place within international legal scholarship. The first relates to patterns of fragmentation, pluralism, and harmonization among standards in international law. Scholars have waged these debates on both descriptive and normative terms in disparate areas of international law, such as international criminal law, or questions of attribution in the law of state responsibility. These comparative debates also raise issues of continuity, calibration, and change in international law. A second debate relates to complicity in other settings, such as aiding and assisting in the law of state responsibility or individual liability for war crimes or crimes against humanity in recent military operations (see, for example, the ICC's ongoing investigation in Afghanistan). Both debates lurk in the background of this Article, but in the interest of a focused discussion, they are not treated rigorously.

tent, or *purpose* of facilitating the principal's crime. Part I ends with an examination of what customary international law identifies as the standard for complicity, with the caveat that as doctrinal consistency crumbles, custom declines in importance in international criminal law.

Part II explains how and why fragmentation in aiding and abetting came to pass. The answer is twofold. On the one hand, the process of negotiating international instruments has sometimes produced standards that are best understood as a negotiated compromise. In particular, the laborious drafting and negotiation process of the Rome Statute of the International Criminal Court sought to harmonize various approaches to criminal law across the civil and common law systems. Further, states were wary of creating any future liability for their own personnel and officials. These competing interests produced a standard that departed from the previously prevailing aiding and abetting standards, resulting in significant confusion. But it would be a mistake to assume that all the differences are haphazard. The existing state of fragmentation largely reflects functional differences among the international criminal tribunals. Fragmentation, in other words, is not necessarily a problem that needs to be fixed. Instead, it is important to situate the different aiding and abetting standards in context, to determine if the different standards are responsive to different functional purposes. This Part also examines the consequences of forced harmonization in the context of the Alien Tort Statute (ATS). It argues that judges should appreciate the pluralistic nature of aiding and abetting standards in international law when selecting the appropriate standard.

Part III contends that the varied aiding and abetting standards often exemplify the functional pluralism of international criminal law. This argument pays particular attention to the special case of the Rome Statute as a functionally distinctive international tribunal. Yes, the aiding and abetting standard in the Rome Statute is the result of a negotiating process that produced nonstandard terminology. But beneath the surface, the negotiators were motivated by a particular view of the functional role of the International Criminal Court. As a result, understanding the Rome Statute as an effort to codify customary international law at the time it was drafted is a mistake. And looking to the standard articulated in the Statute as indicative of the proper standard for aiding and abetting in international criminal law more generally—as some U.S. courts have done—is a mistake. This Part concludes by arguing that this

problem of forced harmonization is not limited to the aiding and abetting context, but is true more generally in international criminal law. In the process, it offers a normative justification for functional pluralism, as opposed to forced harmonization.

Finally, the Article concludes by offering recommendations for reconciling functional pluralism with the need to operationalize a standard for aiding and abetting liability. What is problematic is not the existence of different aiding and abetting standards per se, but rather the lack of consistency in the definition and interpretation of specific terms. This Part examines several ways in which a common terminology could be developed and codified.[18] It argues for the codification and progressive development of international criminal law, particularly with respect to the relevant mens rea terminology, to enable, rather than eliminate, pluralism.

I
AIDING AND ABETTING LIABILITY IN INTERNATIONAL CRIMINAL LAW

This Part surveys how aiding and abetting liability has developed since the end of the Second World War. It examines the jurisdictional statutes and practice of international and hybrid criminal tribunals and how they define actus reus and mens rea, the constituent elements of criminal liability, for aiding and abetting. It begins with the emergence of aiding and abetting liability in modern international criminal law at Nuremberg. It describes the attempts to expressly spell out the actus reus and mens rea prongs of accomplice liability by the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR), established in 1993 and 1994, respectively—and the tribunals and courts that followed. Because the standards were not codified in their statutes, these tribunals developed standards from the bench. This Part explains and describes the fragmentation that resulted.

---

18 Some international criminal law scholars have proposed developing a "general part" for international criminal law, while others have questioned key premises behind such an undertaking. *Compare* Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT'L CRIM. JUST. 660, 661 (2006) ("The necessity for a GP is generally recognized."), *with* Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1064 (2011) (proposing a "pluralistic account of substantive international criminal law").

A. Emergence of Aiding and Abetting Liability

After the Second World War, the international community recognized that it was not enough to hold accountable only those who directly committed criminal acts. Other modes of responsibility were required to impose liability on those who were responsible for, but did not directly commit, international crimes.[19] The key question was not whether there would be aiding and abetting liability, but how to operationalize it. What thresholds or standards should be used when trying an alleged aider or abettor?

In answering this question, the progenitors of modern international criminal law looked first to the jurisprudence of complicity in domestic criminal law. The first international criminal tribunals adapted the aiding and abetting liability standards that had developed in domestic law and "transplanted [them] to the realm of international criminal law."[20] Yet, this effort to transplant domestic law standards was far from a simple fix, for there were substantial differences between domestic criminal law standards—both within and across individual domestic legal systems.[21]

Although there is some history to accomplice liability in international law—for instance, the Fourth Hague Convention on Respecting the Laws and Customs of War on Land (1907) provided an elementary form of aiding and abetting liability—the development began in earnest with the work of the International Military Tribunals after the Second World War.[22] The Charters of the Nuremberg and Tokyo Tribunals specifically assigned individual responsibility to "accomplices participating

---

19 By way of contrast with domestic criminal law, Marina Aksenova explains: "Because international criminal law targets organized, large-scale offending, the distance between the accomplice and the harm is usually greater when compared to the regular domestic law situations." AKSENOVA, *supra* note 15, at 2.

20 Elies van Sliedregt, *The Curious Case of International Criminal Liability*, 10 J. INT'L CRIM. JUST. 1171, 1174 (2012).

21 *See* AKSENOVA, *supra* note 15, at 76 ("The drafters of the Nuremberg Charter came from different legal and political cultures. The need to compromise shaped not only the language of the constituent documents, but also the charges against the accused and the final judgments."); Solis Horwitz, *The Tokyo Trial*, 28 INT'L CONCILIATION 475, 540 (1950).

22 *See* Convention Respecting the Laws and Customs of War on Land (Hague IV) art. 1, 19, 43, Oct. 18, 1907, 36 Stat. 2277; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 182 (2d ed. 2005) ("The notion was clearly set out that a military commander is criminally liable as an aider and abetter, if he tolerated—that is, failed to stop or repress the commission of war crimes by his subordinates."). The Supreme Court relied, in part, on the Fourth Hague Convention to find superior liability in *In re Yamashita*, 327 U.S. 1, 15–16 (1946). *See* CASSESE, *supra*, 183–84.

in the formulation or execution of a common plan or conspiracy to commit [a crime defined in the Charter]."[23] As Judge Katzmann of the U.S. Second Circuit has observed, the term "accomplices" in the International Military Tribunal Charter should be understood as imposing liability upon aiders and abettors.[24] Commentators disagree about whether accomplice liability in the Charter pertains specifically to accomplices in a "common plan or conspiracy" or generalizes to aiding and abetting an individual internationally criminally wrongful act. Regardless, it is clear that the postwar operationalization of criminal responsibility in international law included at least some form of aiding and abetting liability.

The Charters of the Nuremberg and Tokyo Tribunals were not alone in providing for aiding and abetting liability. Control Council Law No. 10, which authorized the subsequent Nuremberg military trials, provided that a person was "deemed to have committed a crime . . . if he was (a) a principal or (b) an accessory to the commission of any such crime, or ordered or abetted the same."[25] In 1948, the *Trial of Otto Ohlendorf and Others (Einsatzgruppen)*, a military tribunal convened under Control Council Law No. 10, required that the assistance rendered must have a *substantial effect* on the principal's crime.[26] To establish mens rea, it required mere "knowledge," rather than the more stringent mens rea standard of "intent."[27] The same standard for accessory liability—knowing provision of substantial assistance—was used to both convict and acquit defendants in *United States v. Flick*, *United States v. Von Weizsaecker (The Ministries Case)*, the German case of *LG Hechingen*, the *Trial of Franz Schonfeld and Nine Others*, and *United States v. Krauch (I.G. Farben)*.[28]

---

23 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, 630 n.24 (2005).

24 Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 272 (2d Cir. 2007) (Katzmann, J., concurring).

25 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. II, § 2.

26 *"The Einsatzgruppen Case," in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 526 (1948).

27 *Id.* at 572.

28 Landgericht Hechingen [LG Hechingen] [District Court of Hechingen] (Kls 23/47) June 28, 1947, 1 Justiz und NS-Verbrechen [JuNSV] 471 (Lfd. Nr. 022), 2008, *translated in Modes of Participation in Crimes Against Humanity*, 7 J. INT'L CRIM. JUST. 131 (2009); *Trial of Schonfeld and Nine Others, British Military Court, Essen, June 11th–26th, 1946*, *in* 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 64, 66–67 (1949); *United States v. Flick*, *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1187 (1949);

During this period, other international instruments continued to develop aiding and abetting liability under international criminal law. For instance, the 1948 Convention on the Prevention and Suppression of Genocide criminalized "complicity in genocide."[29] In the 1950 Nuremberg Principles, the newly-formed International Law Commission stated that complicity was a crime per se under international law.[30] And the International Law Commission's 1954 Draft Code of Crimes against the Peace and Security of Mankind listed "complicity" as an offence, but did not clarify its precise meaning.[31]

At this point, international criminal law largely fell into a state of dormancy, in no small part due to the Cold War. But in 1981, the U.N. General Assembly adopted Resolution 36/106 (1981), which urged the International Law Commission to resume work on the Draft Code of Offences against the Peace and Security of Mankind.[32] The International Law Commission, under the helm of Special Rapporteur Doudou Thiam, took up this charge.[33] In its thirty-fifth session in 1983, the Commission agreed that the draft code should include an introduction restating the general principles of criminal law, including the role of complicity.[34] The 1991 Draft Code stated, in Article 3(2), that "[a]n individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and liable to punishment."[35] The International Law Commission did not define the standards for aiding and abetting liability but instead simply

---

United States v. Krauch (The I.G. Farben Case), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081 (1949); *United States v. von Weizsaecker (The Ministries Case)*, *in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1008 (1949).

29 Convention on the Prevention and Punishment of the Crime of Genocide art. III(e), Dec. 9, 1948, 78 U.N.T.S. 277, 280.

30 Int'l Law Comm'n, Principles of Int'l Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VII, Rep. of the Int'l Law Comm'n on the Work of Its Second Session, U.N. Doc. A/1316 (1950).

31 Int'l Law Comm'n, Draft Code of Offences against the Peace and Security of Mankind, art. 2(13)(iii), Rep. on the Work of Its Sixth Session, U.N. Doc. A/2693 (1954).

32 G.A. Res. 36/106, ¶ 1 (Dec. 10, 1981).

33 Int'l Law Comm'n, Rep. of the Int'l Law Comm'n on the Work of Its Thirty-Fifth Session, U.N. Doc. A/38/10 (1983).

34 *Id.*

35 *Summary Records of the 2236th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SR.2236.

noted that "complicity . . . was a legal term with equivalent meaning in most legal systems."[36]

During the next two decades, international aiding and abetting jurisprudence fragmented amidst a proliferation of draft codes, statutes, and judgments of international and hybrid criminal tribunals. In 1993 and 1994, the United Nations Security Council established the ICTY and ICTR.[37] This period saw the first attempts to expressly spell out the mens rea and actus reus prongs of accomplice liability. This was at least partly because the statutes of previous international criminal tribunals did not establish "aiding and abetting" as a *separate* basis for individual criminal responsibility. If they had, the statutes would have specified separate mens rea and actus reus standards for primary and secondary liability. Instead, the almost-identically worded statutes of the ICTY and ICTR—and the hybrid tribunals that followed, namely, the Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia—simply stated that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."[38] Because neither the ICTY nor the ICTR statutes included a substantive mens rea or actus reus requirement, the Trial and Appellate Chambers of the ICTY developed aiding and abetting standards from the bench. In the process, as the following section explains, their jurisprudence diverged from prevailing aiding and abetting standards.

The International Law Commission issued a new version of the Draft Code of Crimes against the Peace and Security of

---

36 *Id.* at 188.

37 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda).

38 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); Statute of the International Tribunal for Rwanda, art. 6(1), S.C. Res. 955, Annex (Nov. 8, 1994); Statute of the Special Court for Sierra Leone art. 6(1), Jan. 16, 2002, 2178 U.N.T.S. 137, 195; *see also* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29, Oct. 27, 2004, ECCC Doc. No. NS/RKM/1004/006 ("Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in . . . this law shall be individually responsible for the crime.").

Mankind in 1996.[39] In this newest iteration, the Commission concluded that "[a]n individual shall be responsible for a crime set out in articles 17, 18, 19 or 20 if that individual . . . *knowingly* aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime, including providing the means for its commission."[40] The official commentary to this provision traces the evolution of the principle of individual criminal responsibility across history, finding that Article 2(3)(d) is

> consistent with the Charter of the Nuremberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (e)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1).[41]

This was the first time that an effort at documenting and harmonizing aiding and abetting liability in international criminal law had waded into the territory of defining the proper actus reus and mens rea.

The subsequent adoption of the Rome Statute establishing the International Criminal Court in 1998 represented the most ambitious effort to legislate aiding and abetting liability under international criminal law to date. However, the Rome Statute also marked the greatest divergence from the various aiding and abetting standards developed in previous years. The Statute contained a mens rea requirement of "purpose,"[42] in contrast to the "knowledge" standard developed by the ad hoc tribunals and the 1996 Draft Code of Crimes against Peace and Security of Mankind. Further complicating the picture, the series of hybrid tribunals that emerged in the late 1990s and 2000s modified both the subjective and objective elements of accessory liability. The next section explains the divergent standards produced by the modern international and hybrid criminal tribunals—standards that these tribunals continue to apply today.

---

39 Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3)(d), Rep. of the Int'l Law Comm'n on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

40 *Id.* (emphasis added).

41 *Id.* at 21. The Commentary further notes that "[t]his principle is also consistent with the Nürnberg Principles (Principle VII) and the 1954 draft Code (art. 2, para. 13 (iii))." *Id.*

42 As is discussed in greater length in Part III, the precise meaning of "purpose" is a matter of substantial disagreement among scholars and uncertainty in the jurisprudence of the Court to date. *See* Rome Statute art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

B. Fragmentation of Aiding and Abetting Standards

The ad hoc tribunals, hybrid tribunals, and permanent International Criminal Court (ICC) all have their own aiding and abetting liability standards. These standards are rarely specified in the jurisdictional statutes. The statutes of the ICTY and ICTR, as well as the Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia, only briefly stipulate that, "[A] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in . . . the present Statute, shall be individually responsible for the crime."[43] Similarly, the Special Tribunal for Lebanon Statute provides only general guidance, stating, "A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person . . . participated as accomplice . . . [in] the crime set forth in article 2 of this Statute."[44] Therefore, jurisprudence, rather than incipient statutes, is the key source for understanding aiding and abetting liability for these tribunals.

The Statute of the International Criminal Court, by contrast, specifically defines aiding and abetting liability. Article 25(3)(c) of the Rome Statute creates liability where the accused person, "[f]or 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."[45] This provision involves several innovations—including the addition of the phrase "purpose of facilitating"—that diverge from the jurisprudentially developed standard of the ad hoc and hybrid tribunals, and have led to subsequent interpretative debates.

Every tribunal requires two elements of criminal liability for aiding and abetting: an act or omission that assists or abets the commission of a principal crime (the actus reus component); and a specified state of mind with respect to one's effect

---

43 Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7(1); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6(1); Statute of the Special Court for Sierra Leone, art. 6(1); *see also* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *supra* note 38, art. 29 ("Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in . . . this law shall be individually responsible for the crime.").

44 Special Tribunal for Lebanon Statute, S.C. Res. 1757, Attachment art. 3(1)(a) (May 20, 2007).

45 Rome Statute art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

on the underlying crime (the mens rea component). But within the international and hybrid courts the standards applied to define those two elements range widely, particularly with regard to mens rea.

Among international and hybrid criminal tribunals, interpretations of aiding and abetting liability differ in two key respects. First, the tribunals have different actus reus standards. The ad hoc tribunals, as well as the Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia, all require that the alleged act of aiding or abetting has a "substantial effect" on the commission of the principal crime.[46] Meanwhile, the ICC and Special Tribunal for Lebanon both set a lower bar.

Second, the tribunals embrace different mens rea requirements. The ICTY, ICTR, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia only require that aider or abettors have "knowledge" that their act will assist the commission of the underlying crime. In contrast, the ICC requires that the aider and abettor have the "purpose" of facilitating the commission of the underlying crime.[47] The Special Tribunal for Lebanon goes even further than the ICC, expressly requiring that the aider or abettor must "intend" to assist the principal perpetrator in the commission of an underlying crime.[48] But it is important to note that, in doing so, the hybrid tribunal is adopting standards used in Lebanese domestic criminal law, not international law.

This fragmentation in aiding and abetting standards among international and hybrid criminal tribunals has resulted in substantial confusion for scholars and courts. Sometimes, this confusion even extends to the tribunals themselves. For instance, until recently, the ICTY fluctuated for more than a decade between adopting and rejecting the "specific direction" actus reus requirement for aiding and abetting liability. The inconsistent precedents in the opinions of ICTY judges might merely reflect the process of judge-created law and unstable precedents. Today, however, the standards for aiding and

---

46 *See, e.g.*, Prosecutor v. Blaškić, IT-95-14-A, Appeals Judgment, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Rukundo, ICTR-2001-70-A, Appeal Judgment, ¶ 52 (Oct. 20, 2010); Prosecutor v. Taylor, Case No. SCSL-03-01-T-1283, Trial Judgment, ¶ 482 (Apr. 26, 2012); Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010).

47 *See* Rome Statute art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

48 Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 221 (Feb. 16, 2011).

abetting are relatively settled within the various tribunals, even though they diverge in certain respects from one another.

Table 1, below, provides a simplified roadmap of the actus reus and mens rea elements of aiding and abetting liability developed by major international, ad hoc, and hybrid criminal tribunals. While it provides clarity, the table is merely a snapshot; it is not meant to suggest that these standards are static. A comprehensive summary of all of the modern international and hybrid tribunals' aiding and abetting cases that underlie this table and the summary that follows, is provided in the Appendix. A closer look at the opinions from each judicial institution reflects a more nuanced and meandering evolution of aiding and abetting jurisprudence. For example, even where relatively settled terminology for aiding and abetting standards has developed over time, the precise contours of these terms can be interpreted inconsistently even within tribunals. The following section discusses the differences among the tribunals and explains why they emerged, while highlighting subtle, yet persistent intracourt confusion.

TABLE 1: AIDING AND ABETTING STANDARDS BY INTERNATIONAL CRIMINAL JURISDICTION

Tribunal	**Actus Reus Standard**	**Mens Rea Standard**
ICTY	Acts specifically directed to assist that have a *substantial effect* on the principal crime	*Knowledge* that the acts assist the commission of the principal crime
ICTR	Acts specifically directed to assist that have a *substantial effect* on the principal crime	*Knowledge* that the acts assist the commission of the principal crime
SPECIAL COURT FOR SIERRA LEONE	Assistance with a *substantial effect* on the principal crime	*Knowledge* that the acts assist the commission of the principal crime
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	Assistance with a *substantial effect* on the principal crime	*Knowledge* that the acts assist the commission of the principal crime
ICC	Assistance with *an effect* on the principal crime	*Purpose* to facilitate the commission of the principal crime
SPECIAL TRIBUNAL FOR LEBANON	Contributes to the commission of the principal crime in one of many enumerated ways; *no requirement of substantial effect*	*Intent* to assist the principal crime and knowledge of that perpetrator's intent

1. *Actus Reus*

The major international and hybrid criminal tribunals share several similarities in how they approach the actus reus

for aiding and abetting. For example, the act—or omission[49]—of aiding and abetting may take place before, during, or after the principal crime.[50] Additionally, the tribunals generally recognize that the act of aiding is legally distinct from abetting. Aiding involves helping the principal perpetrator to commit a crime, whereas abetting involves facilitating or instigating the commission of the principal crime. As the ICC has helpfully clarified, with reference to the case law of the ad hoc tribunals, "[T]he notion of 'abet' describes the moral or psychological assistance of the accessory to the principal perpetrator, taking the form of encouragement of or even sympathy for the commission of the particular offense."[51] Conversely, "aiding implies the provision of practical or material assistance" to the principal perpetrator.[52]

Yet despite these baseline similarities, there is fragmentation in the development of an actus reus standard of aiding and abetting liability, particularly in the requirement of "substantial effect."[53] The ad hoc tribunals, as well as the Special Court

---

49 The failure to act—i.e., omission—may fulfill the actus reus requirement. In the *Oric* case, for example, the ICTY Appeals Chamber clarified that "omission proper may lead to individual criminal responsibility under Article 7(1) of the [ICTY] Statute where there is a legal duty to act." While there is no clear, detailed standard for a conviction for omission in aiding and abetting, the Appeals Chamber continued, "at a minimum, the offender's conduct would have to meet the [other] basic elements of aiding and abetting." Prosecutor v. Orić, Case No. IT-03-68-A, Appeals Judgment, ¶ 43 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008) (citing Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeals Judgment, ¶ 274 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Ntagerura, ICTR-99-46-A, Appeals Judgment, ¶¶ 659, 660 (Feb. 25, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 663 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004)).

50 *See* Prosecutor v. Popovic, Case No. IT-05-88-A, Appeals Judgment, ¶ 1783 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Appeals Judgment, ¶ 81 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Kalimanzira, ICTR-05-88-A, Appeals Judgment, n.238 (Oct. 20, 2010); Nahimana v Prosecutor, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 482 (Nov. 28, 2007); Prosecutor v. Bemba (Bemba Case), Case No. ICC-01/05-01/13, ¶ 96 (Oct. 19, 2016); Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision in the Applicable Law: Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 219 (Feb. 16, 2011).

51 Bemba Case, Case No. ICC-01/05-01/13, ¶ 89 (Oct. 19, 2016).

52 *Id.* ¶ 88.

53 Another noteworthy area of fragmentation in the actus reus standard relates to the "specific direction" element, which stipulates that the alleged act or omission of aiding and abetting must be "specifically directed" to assist the underlying crimes of the principal perpetrator. This element emerged in the jurisprudence of the ICTY—starting with the seminal case *Prosecutor v. Tadić*—but has

for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia, require that the alleged acts or omissions have a "substantial effect on the perpetration of [a] crime" provided for in the Statute.[54] In contrast, the ICC requires only assistance with "an effect"; the Special Tribunal for Lebanon, in accordance with Lebanese domestic criminal law, also does not require a substantial effect.[55]

Even though it is widely used, the precise contours of the "substantial effect" test for actus reus remain unsettled.[56] The ICTR Trial Chamber in *Furundžija* explained that "any marginal participation" would not meet the substantiality requirement.[57] On the other hand, the ICTR Appeals Chamber in *Nyiramasuhuko* stated that the substantial effect requirement need not involve the finding of a causal relationship in the sense of a *condition sine que non*.[58] Notably, failure to meet the "substantial effect" requirement has rarely been a basis for acquittal. The ad hoc tribunals have acquitted persons for the lack of "substantial effect" in only two cases to date.[59]

---

since been rejected by every international criminal tribunal, including the ICTY itself in 2014. Because the specific direction requirement appears to have been decisively rejected by the courts, it is only mentioned in passing in this Article. For an analysis of the now-widespread rejection of the specific direction element, see James G. Stewart, *Judicial Rejection of "Specific Direction" is Widespread*, JAMESGSTEWART.COM (Dec. 23, 2015), http://jamesgstewart.com/judicial-rejection-of-specific-direction-is-widespread/ [https://perma.cc/A8P6-TEQ9].

54 *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Rukundo, Case No. ICTR-2001-70-A, Appeals Judgment, ¶ 52 (Oct. 20, 2010); Prosecutor v. Taylor, Case No. SCSL-03-01-T-1283, Trial Judgment, ¶ 482 (Apr. 26, 2012); Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010).

55 *See* Bemba Case, Case No. ICC-01/05-01/13, ¶ 90 (Oct. 19, 2016); Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 219–20 (Feb. 16, 2011).

56 *See, e.g.*, Ntawukulilyayo v. Prosecutor, Case No. ICTR-05-82-A, Appeals Judgment, ¶ 214 (Dec. 14, 2011) ("Whether a particular contribution qualifies as 'substantial' is a 'fact-based inquiry,' and need not 'serve as condition precedent for the commission of the crime.'" (citations omitted)); *see* 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, 568 (2016).

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

58 *See* Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-A, Appeals Judgment, ¶ 2083 (Dec. 14, 2015).

59 *See* Peterson, *supra* note 56, at 569. In *Kupreškić*, the ICTY Appeals Chamber acquitted Kupreškić, who had been convicted of assisting an attack against Muslim civilians by unloading weapons from a car, due to insufficient evidence that the same weapons were used in and thus substantially contributed to the subsequent attack. *See* Prosecutor v. Kupreškić, Case No. IT-95-16-A,

The ICC and the Special Tribunal for Lebanon do not require "substantial effect" to establish aiding and abetting liability (though the Lebanese tribunal is clear that it applies domestic, not international, law on the matter). The ICC Rome Statute includes a weak actus reus element for aiding and abetting that does not require "substantial" assistance,[60] diverging from the jurisprudence of the ad hoc tribunals, as well as the provisions stipulated by the International Law Commission's 1996 Draft Code.[61] Before the ICC ruled on the appropriate actus reus requirement for aiding and abetting liability, scholars debated whether the Statute truly excluded the standard "substantial effect" requirement.[62] In 2016, however, the ICC settled the issue when it handed down two decisions that rejected the substantial effect requirement.[63] The Special Tri-

---

Appeals Judgment, ¶ 277 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001). In *Sainović*, the ICTY Appeals Chamber acquitted Lazarević, who had been convicted of assisting crimes committed by the Priština Corps of the Army of Yugoslavia (VJ) by failing to take adequate measures to secure proper investigations, because the alleged crimes were perpetrated pursuant to a JCE excluding Lazarević, i.e., his failure to act could not have had a substantial effect on the subsequent commission of the principal crimes. *See* Prosecutor v. Sainović, Case No. IT-05-87-A, Appeals Judgment, ¶¶ 1676, 1679–82 with further references (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

60 Article 25(3)(c) reads:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . . (c) 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.

See Rome Statute, art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

61 *See* ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 127 (2012); *see also* Int'l Law Comm'n, Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *supra* note 39, art. 2(3) (1996) ("An individual shall be responsible for a crime . . . if that individual . . . (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.").

62 For instance, the practitioner Sarah Finnin urged the ICC to follow the "substantial effect" test applied at the ad hoc tribunals. SARAH FINNIN, ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLE 25(3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 147 (2012). Conversely, Professor Kai Ambos suggested that "the word 'facilitating' confirms that a direct and substantial assistance is not necessary and that the act of assistance need not be a *conditio sine qua non* of the crime." Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 757 (Otto Triffterer ed., 2d ed. 2008).

63 In *Bemba*, while the Trial Chamber of the ICC held that the act of assistance must have "an effect on the commission of the offence," it did not adopt the substantial effect test developed by the ICTY and ICTR. Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 72 of the Statute, ¶ 90 (Oct. 19, 2016). The Trial Chamber explained, "[A]rticle 25(3)(c) of the Statute does not require the meeting of any specific threshold. The plain wording of

bunal for Lebanon stipulates a standard for the actus reus component drawn from domestic law. That law outlines a variety of types of assistance or contribution to the principal crime that would lead an accomplice to be guilty of a felony or misdemeanor. The list does not specifically require that the assistance have a "substantial effect."[64] There is therefore a split between the ICC and Special Tribunal for Lebanon, on the one hand, and the ad hoc tribunals, the Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia, on the other, in their treatment of the actus reus requirement.

2. *Mens Rea*

Mens rea encompasses the mental state required to establish criminal liability. The concept of mens rea developed in the Anglo-American criminal tradition in response to a moral philosophy that individuals with an "innocent mindset" should not be found guilty of crimes.[65] Prior to the development of the legal concept of mens rea, one could be found guilty of a crime based solely on physical conduct (the actus reus element). All of the international and hybrid tribunals surveyed in this Article require a mens rea element to establish aiding and abetting liability. Yet the differences among them are pronounced. The tribunals embrace three different mens rea standards: knowl-

---

the statutory provision does not suggest the existence of a minimum threshold." *Id.* ¶ 93. The Trial Chamber in *Bemba* did acknowledge that two differently constituted ICC tribunals had construed Article 25(3)(c) as requiring a substantial effect element. *Id.* ¶¶ 91–92. However, those tribunals only tangentially discussed the requisite effect of assistance: The Pre-Trial Chamber I in *Mbarushimana* declined to fully consider the aiding and abetting charges due to insufficient evidence of the principal crime. The Chamber merely reflected in dicta that "a substantial contribution to the crime *may* be contemplated." Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 279 (Dec. 16, 2011) (emphasis added). The Trial Chamber I in *Lubanga* did imply that substantiality was required, but it only discussed aiding and abetting liability in order to provide context for the distinct liability of coperpetrators. In other words, the Chamber in that case was not purporting to enumerate a more broadly applicable standard. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction, ¶ 468 (Dec. 1, 2014). Similarly, in *Al Mahdi*, the Pre-Trial Chamber expressly reaffirmed that the act of assistance need not be "'substantial' or anyhow qualified other than by the required [mens rea] to facilitate the commission of the crime." Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Decision on the Confirmation of Charges, ¶ 26 (Mar. 24, 2016).

64 *See* Lebanese Criminal Code, art. 219, https://www.stl-tsl.org/sites/default/files/documents/legal-documents/relevant-lebanese-law/CHATC-150903-2_OAR_T_EN.pdf [https://perma.cc/29KD-CJ2D].

65 Paul T. Robertson, *Mens Rea*, THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1–5 (2014).

edge, purpose, and intent. This section outlines the current state of the jurisprudence.

a. *Knowledge*

The ad hoc tribunals, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia have developed a relatively low mens rea threshold.[66] According to these tribunals, knowledge that one's conduct assists the commission of the principal crime is sufficient to fulfill the requisite mens rea for aiding and abetting.[67] Such knowledge may be actual or constructive,[68] and may be inferred from the perpetrator's broader awareness,[69] as well as "the relevant circum-

---

66 In *Khieu*, the Extraordinary Chambers in the Courts of Cambodia Appeals Chamber adopted a very narrow interpretation of the aiding and abetting liability standard, diverging from its preceding judgment in *Kaing* and the jurisprudence of the ad hoc tribunals. While this Article treats *Khieu* as an outlier, the fragmentation within the Extraordinary Chambers in the Courts of Cambodia undoubtedly deserves greater attention elsewhere. *See* Prosecutor v. Khieu, Case No. 002/19-09-2007-ECCC/SC, Appeals Judgment, ¶ 789 (Nov. 23, 2016); Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶ 535 (July 26, 2010).

67 *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1, Appeals Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("[K]nowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."); Prosecutor v. Karera, Case No. ICTR-01-74-A, Appeals Judgment, ¶ 321 (Feb. 2, 2009) (same); Prosecutor v. Ngirabatware, Case No. MICT-12-29-A, Appeals Judgment, ¶ 158 (Dec. 18, 2014) ("[K]nowledge of the actual commission of the crime is not required . . . where an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime[.]"); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Judgment, ¶ 487 (Apr. 26, 2012) ("[T]he Accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime or underlying offense"); *see also* ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 191 (2015) ("For its part, however, the Appeals Chamber of the SCSL consistently relaxed this requirement by demanding that the aider and abettor either knew or 'was aware of the substantial likelihood' that his or her acts would assist in the commission of the crime." (citations omitted)).

68 *See, e.g.*, Prosecutor v. Lukić, Case No. IT-98-32/1-T, Trial Judgment, ¶ 900 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) ("The mens rea may be inferred from the circumstances"); Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, ¶ 659 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (acknowledging that knowledge may be "either actual or constructive"). According to one commentator, "[s]imilar statements of the law were subsequently repeated in almost all the cases dealing with crimes against humanity, without any effort ever having been made to define the exact meaning of 'constructive knowledge.'" Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, U. MIAMI INT'L & COMP. L. REV. 57, 67–68 (2005) (footnote omitted).

69 Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶¶ 162–64 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

stances."[70] For the purposes of liability, the aider and abettor must also be aware of the "essential elements of the crime ultimately committed by the principal."[71]

For those tribunals that apply the knowledge standard for mens rea, the aider and abettor need not share the principal perpetrator's intent.[72] A higher mens rea standard may be required, however, when the underlying crime is a specific intent crime—that is, a crime requiring intent to commit an abuse with a specific purpose.[73] For example, in order for a perpetrator to be held liable for aiding and abetting the crime of persecution, the perpetrator must "be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the [principal] perpetrators."[74] Generally speaking, however, the aider and abettor need only know that his or her conduct assists the commission of a crime. Indeed, in practice, the ad hoc tribunals' purported requirement of "knowledge" is sometimes treated as something closer to a more lenient "recklessness" standard.[75] For example, the ICTY recognized in *Prosecutor v. Brdanin* that mere awareness of the risk that a number of different crimes might be committed constitutes sufficient mens rea even if the individual had no knowledge of the actual commission of one of those crimes.[76]

b. *Purpose*

The ICC's Rome Statute establishes a heightened mens rea requirement for aiding and abetting liability—"purpose." Article 25(3)(c) of the Statute states:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person. . . . [f]or the *purpose* of facilitating the commission of such a crime, aids, abets or

---

70 Prosecutor v. Lukić, Case No. IT-98-32/1-T, Trial Judgment, ¶ 902 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009).

71 *Id.*

72 *Id.*; *see* Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

73 *See* Robertson, *supra* note 65.

74 Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Judgment, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003).

75 *See* James G. Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 192–94 (2012).

76 Prosecutor v. Brdanin, Case No. IT-99–36-T, Trial Judgment, ¶ 272 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2014); *see also* Prosecutor v. Ngirabatware, Case No. MICT-12-29-A, Appeals Judgment, ¶ 158 (Dec. 18, 2014) ("[W]here an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.").

> otherwise assists in its commission or its attempted commission, including providing the means for its commission.[77]

This standard is distinct from the "knowledge" standard used by the ad hoc tribunals, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia.[78]

The Rome Statute does not expressly define the term "purpose." This is surprising considering that the more general mens rea provision of the Rome Statute, Article 30, provides definitions for two mens rea terms applicable to criminal liability under the statute "[u]nless otherwise provided": "intent" and "knowledge."[79] As discussed in more detail in Part III, there has been significant doctrinal confusion as to the relationship between the "purpose" standard articulated for aiding and abetting liability in Article 25(3)(c) and the "intent" and "knowledge" standards separately outlined in Article 30.

Unfortunately, because there is limited ICC jurisprudence on aiding and abetting liability under the Statute, it may be too early to clarify the precise contours of the "purpose" element. But the ICC has made clear that "purpose" is distinct from "knowledge." As the ICC Trial Chamber explained in *Prosecutor v. Bemba*,

> ["Purpose"] introduces a higher subjective mental element and means that the accessory must have lent his or her assistance with the aim of facilitating the offence. It is not sufficient that the accessory merely knows that his or her conduct will assist the principal perpetrator in the commission of the offence.[80]

Hence, the Rome Statute's "purpose" standard establishes a higher mens rea bar than the more common "knowledge" standard.

c. *Intent*

The Special Tribunal for Lebanon stipulates yet another mens rea standard, based on domestic law. Although the Tribunal's statute does not specify a mens rea standard for aiding

---

77 Rome Statute art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

78 Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 281 (Dec. 16, 2011).

79 *See* Rome Statute art. 30, July 17, 1998, 2187 U.N.T.S. 90. (emphasis added).

80 Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 74 of the Statute, ¶ 97 (Oct. 19, 2016); *see also* Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 281 (Dec. 16, 2011) (confirming that "purpose" is the requisite mens rea standard under the Rome Statute).

and abetting liability, the Tribunal clarified in a 2000 decision that it would adopt the standard stipulated in the Lebanese Criminal Code: "(i) knowledge of the intent of the perpetrator to commit a crime; and (ii) intent to assist the perpetrator in his commission of the crime."[81] The Tribunal's conflict of laws doctrine requires that whenever domestic and international laws conflict, it must apply the narrower standard. In this case, the domestic mens rea standard for aiding and abetting liability was more stringent than the "knowledge" standard common in international criminal law.[82] Some scholars predict, however, that the Special Tribunal for Lebanon could gravitate towards a broader standard in response to jurisprudential developments at the ICTY and Special Court for Sierra Leone.[83]

II
THE CASE FOR FUNCTIONAL PLURALISM

The picture of current jurisprudence just provided might lead some to conclude that the international law of aiding and abetting is fragmented and incoherent and that international lawyers should dedicate themselves to pressing toward uniform standards. But these differences are better understood, we argue, as the result of functional differences that justify different standards. International criminal law plays different roles in different contexts. International and hybrid tribunals, draft codes, and domestic statutory hooks for prosecuting international crimes all evolved to meet very different needs. In short, international criminal law is not needlessly fractured; it is pluralistic, and properly so.

To call international criminal law pluralistic is to acknowledge both its origin and its function. International criminal law emerged out of centuries-old domestic criminal law traditions

---

81 Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 220 (Feb. 16, 2011) (citations omitted).

82 *Id.* ¶ 228.

83 Philippa Webb, *Individual Criminal Responsibility*, *in* THE SPECIAL TRIBUNAL FOR LEBANON: LAW AND PRACTICE 96–97 (Amal Alamuddin, Nidal N. Jurdi & David Tolbert eds., 2014).

through legal transplantation,[84] adaptation,[85] and synthesis.[86] Its role is complementary and adaptive, filling in gaps to stamp out the worst crimes. It is therefore, by nature and necessity, pluralistic. But that pluralism has not always been neat or simple. Judge Patricia Wald observed that, although numerous international tribunals have "flown the flag of customary law, many new doctrines have grown up and many new fact situations have been accommodated under old labels and rubrics."[87] This has made the task of identifying customary international criminal law particularly challenging.

This Part uses the lens of functional pluralism to explain the departures in aiding and abetting standards, particularly those found in the Rome Statute, as departures *from* custom rather than departures *of* custom. Beginning with the Rome Statute and then briefly examining other examples of pluralism, this Part thus distinguishes between evolutions and aberrations in international criminal law.

This Article not only argues that this approach is descriptively the best way to understand the existing jurisprudence; it also argues that there is normative value in the functional pluralism. In this respect, we join those who have concluded that sometimes "the search for consistency and uniformity in [international criminal law] is misguided."[88] Some scholars have

---

84 *See, e.g.*, Cassandra Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 39–67 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) (describing the "comparative law notion of legal transplants" as a "useful analytical tool").

85 *See, e.g.*, John D. Jackson & Yassin M. Brunger, *Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW, *supra* note 84, 156, 168 (describing the "dynamic" and "interaction" process of adaptation in which "the practices that evolve do so in a manner that takes account of the international environment and may be different from those that are associated with a particular domestic tradition").

86 *See, e.g.*, Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291, 334 (2001) (referring to the "arduous task of comparative criminal law synthesis" in the process of drafting international criminal law statutes).

87 Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT'L & COMP. L. REV. 15, 26–27 (2007).

88 Greenawalt, *supra* note 18, at 1064; *see also* William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 965 (2004) ("[A]n emerging international legal pluralism can be highly beneficial."). Professor Kevin John Heller goes so far as to argue that fragmentation is inherent to international criminal law, making any extrapolation of customary international law and general principles precarious. In a book proposal, Heller writes, "In the context of international criminal law, however, the 'correct' interpretation of the formal

argued for harmonization through "judicial globalization," whereby judges are assumed to act as "fellow professionals in a profession that transcends national borders."[89] To be sure, there are good arguments in favor of harmonization in the law. In particular, harmonization can make the law clearer and easier to discern. It also contributes to greater legitimacy and often to greater justice for different courts to apply similar standards for the same crime. But the search for uniformity is also at times problematic. Given the different notions of criminal responsibility among distinct legal traditions and the functional differences between international tribunals, the search for a single unified aiding and abetting standard is neither likely to succeed nor advisable.

Whatever the strengths and weaknesses of judge-led harmonization in the abstract, in practice it has not yet proven effective in the area of aiding and abetting liability. Viewing the law through the lens of functional pluralism suggests that this failure to fully harmonize across the tribunals could be for the best. Pluralism captures two characteristics of international criminal law that would be lost if there were perfect and uniform harmonization. First, pluralism enables different jurisdictions prosecuting international crimes to pursue different ends and to play different functional roles. Second, pluralism appropriately captures the ways in which international criminal law is a hybrid of domestic and supranational functions of criminal justice.

---

sources of international law—treaties, custom, general principles—has always been deeply contested." Kevin Jon Heller, *A Genealogy of International Criminal Law* 3 (May 11, 2012), http://opiniojuris.org/2012/05/22/new-book-project-a-genealogy-of-international-criminal-law/genealogy-of-icl-book-proposal-final [https://perma.cc/PE64-PPUW]. Keller cites a number of examples, including the Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia, which rejected former ad hoc tribunals' insistence that joint criminal enterprise existed under customary international law. Keller argues, "These examples of methodological conflict could be multiplied indefinitely." *Id.* He concludes that the history of international criminal tribunals fails to "exhibit a coherent and defensible methodology concerning the internationalization process." *Id.* Rather, "there has always been a fundamental tension in the methodology of international criminal law, one that has significantly undermined the field's legitimacy." *Id.*

89 The most persuasive account is Jenny S. Martinez, *Towards an International Judicial System*, STANFORD L. REV. 429, 466–67 (2003). *See also* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 93–94 (2002); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000); Wald, *supa* note 87, at 27 ("The Tribunals have looked to each other's work and the new ICC has adopted in written form what its drafters considered the best rulings and practices of the earlier courts.").

This Part begins by laying out the functional differences across tribunals, to show how the different aiding and abetting standards fit the functional roles of the different tribunals. It then examines the relationship between customary international law and pluralism. It concludes by showing how understanding the pluralistic nature of international criminal law can help resolve the confusion that has plagued U.S. courts in cases brought under the Alien Tort Statute.

A. Functional Differences Across Tribunals

The differences in aiding and abetting standards across international and hybrid tribunals are often a reflection of the different functional roles of the tribunals. The ad hoc tribunals and hybrid tribunals were created in response to historically unprecedented atrocities in the countries concerned. In the ad hoc tribunals, faced with the immediacy of serious crimes in Yugoslavia and Rwanda, and with the sanction of the UN Security Council Resolutions, state sovereignty was not an obstacle to the prosecution of international crimes.[90] The hybrid tribunals, on the other hand, were each set up with unique combinations of international and domestic criminal law, depending on the atrocities being redressed. Finally, the ICC was created to be a court of last resort when all other options for prosecuting the most serious crimes had failed. Concerned that their own citizens could be brought before the ICC, states made the ICC complementary with national jurisdictions and placed restrictions on the authority of the prosecutor.[91] The ICC, it was decided, would try only those cases which had "sufficient gravity."[92] It is not surprising, then, that the drafters of the Rome Statute adopted a higher mens rea standard than other international tribunals.[93]

The sui generis "purpose" standard for mens rea in the Rome Statute is largely the result of negotiating compromises.

---

90 CASSESE, *supra* note 22, at 455 ("The conflicts which erupted in, amongst other places the former Yugoslavia and Rwanda and the atrocities they engendered served to rekindle the sense of outrage felt at the closing stage of the Second World War. By way of response, the UN Security Council, pursuant to its power to decide on measures necessary to maintain or restore international peace and security under Chapter VII of the UN Charter, set up two ad hoc tribunals: in 1993, by resolution 827 (1993), the International Criminal Tribunal for the former Yugoslavia (ICTY), and in 1994, by resolution 955 (1994), the International Criminal Tribunal for Rwanda (ICTR).").

91 Rome Statute art. 1, July 17, 1998, 2187 U.N.T.S. 90.

92 Rome Statute art. 17, July 17, 1998, 2187 U.N.T.S. 90.

93 Telephone Interview with David J. Scheffer, Former U.S. Ambassador-at-Large for War Crimes Issues (Oct. 12, 2017).

But other differences in the aiding and abetting standard across the ad hoc tribunals, hybrid tribunals, and the ICC are likely the result of functional differences between these tribunals, including the decision to adopt a heightened standard altogether. Indeed, some commentators have suggested that jurists at the ICC should not even look to the ICTY and ICTR for jurisprudential guidance because of fundamental differences in the respective courts' functions.[94] This section considers the purpose of each set of international criminal tribunals—the ad hoc tribunals, hybrid tribunals, and the ICC—and explores how differences in the tribunals' aiding and abetting standards can be explained at least in part by these functional differences.

1. *Ad Hoc Tribunals*

The ICTY Statute was adopted by the United Nations Security Council to provide criminal jurisdiction over horrific abuses that occurred in the former Yugoslavia in the early 1990s.[95] The Security Council requested a report from the Secretary General on ways to establish a criminal tribunal and ensure accountability.[96] Within 100 days, the Security Council adopted the Secretary General's draft report without a single change.[97] Because the tribunal was established pursuant to a Chapter VII Resolution under the UN Charter, the consent of affected state parties was not required.[98] Security Council Resolution 827, which established the ICTY in May 1993, marked the creation of the first tribunal under Chapter VII.[99] Notably,

94 *See, e.g.*, Volker Nerlich, *The Status of ICTY and ICTR Precedent in Proceedings Before the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 325 (Carsten Stahn & Göran Sluiter eds., 2009) ("[O]ne must warn against ingenious reliance on the case law of the ICTY and ICTR"); Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871, 883 (2008) ("While most agree on the standards generally applied by tribunals in Rwanda and the former Yugoslavia, a number of scholars and judges have questioned whether these courts should be relied upon as a meaningful source of international law.").

95 *See* 20 *Years of International Justice*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/content/20-years-international-justice [https://perma.cc/4HYN-2YSH] (last visited Nov. 30, 2017).

96 Larry D. Johnson, *Ten Years Later: Reflections on the Drafting*, 2 J. INT'L CRIM. JUST. 368, 369 (2004).

97 *Id.* at 376.

98 *See* Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440, 444 (1999) ("While the Croatian Government and the Muslims and Croats in Bosnia and Herzegovina called for and supported the establishment of the Tribunal, the Federal Republic of Yugoslavia and Bosnian Serbs opposed it.").

99 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993).

because the Security Council lacked power to "legislate" new international law, the Secretariat could only include in its draft those provisions that were "beyond any doubt part of customary international law."[100] The drafters "explicitly declined to make it a self-contained criminal code."[101] As one legal officer involved in the drafting process recounted: "[I]t was thought prudent, in spite of temptation, not to use the occasion to advocate 'progressive' interpretations, clarifications or additions, but rather to stick as much as possible to what was incontrovertibly customary international law."[102] Any further elaboration of the elements of crimes under its statute would be left to judicial discretion.[103] As a result, the tribunal did not have a statutory aiding and abetting standard. Rather, the court was left to establish the standard through its jurisprudence.[104]

The ICTR was the next tribunal created under the aegis of the UN Charter's Chapter VII, pursuant to Resolution 955 adopted in November 1994.[105] The ICTR Statute differed slightly from the ICTY Statute. According to the Secretary-General's account, the Security Council

> elected to take a more expansive approach to the choice of applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included . . . international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime.[106]

Still, as with the ICTY, the statute of the ICTR offered minimal guidance as to aiding and abetting liability.

Both ad hoc tribunals were established to provide accountability for a specific set of events. In both cases, the tribunals could step in and take over judicial proceedings from the do-

---

100 Johnson, *supra* note 96, at 370.

101 Fausto Pocar, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, http://legal.un.org/avl/pdf/ha/icty/icty_e.pdf [https://perma.cc/25R7-QA7M] (last visited Nov. 30, 2017).

102 Johnson, *supra* note 96, at 370.

103 *See* Pocar, *supra* note 101.

104 "In interpreting aiding and abetting in international law, the Trial Chambers in *Tadić* and *Furundzija* relied upon case law produced by the post-Nuremberg war crimes trials." SLIEDREGT, *supra* note 61, at 121 (citing Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, ¶¶ 675–86 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 190–249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998)).

105 Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex (Nov. 8, 1994).

106 Johnson, *supra* note 96, at 370 (citation omitted).

mestic courts. While the ICTY and ICTR technically wield concurrent jurisdiction with national jurisdictions, their prosecutors have the authority to issue orders for deferral to the competence of the respective tribunal.[107] As one scholar explained: "The purpose of primacy [was] to ensure that minimum standards of impartial adjudication [would] be met in cases of great international concern."[108]

The structures of both ad hoc tribunals emphasize the role of dynamic judicial interpretation. For example, the tribunals' expansive powers to amend the Rules of Procedure and Evidence as needed demonstrate a unique degree of judicial authority.[109] This flexibility is "something that sets [the ad hoc tribunals] aside from other criminal jurisdictions, including the ICC."[110] As former Senior Legal Officer at the ICTY Gideon Boas explained, one justification for this dynamism and flexibility in the development of the rules is that "the judges of the court are often in the best position to understand the needs of the institution whilst considering the balancing of the various issues in play."[111] This discretion was necessary because the international tribunals were considered the only viable forum to hold the perpetrators of international crimes accountable. The judges of the ICTY and ICTR could reasonably assume that those individuals they did not find accountable might very well escape accountability altogether.

2. *Hybrid Tribunals*

Hybrid tribunals are criminal courts with features of both international and domestic jurisdictions. For example, the UN set up the Special Court for Sierra Leone in 2002 pursuant to a request by the government of Sierra Leone for "a special court" to address the serious crimes committed during the country's

---

107 Rep. of the S.C., ¶ 89, U.N. Doc. A/49/342, S/1994/1007 (1994).

108 Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 387 (1998).

109 *See* ICTY Rules of Procedure and Evidence, Rule 6, U.N. Doc. IT/32/Rev. 49 (2013) (as amended); ICTR Rules of Procedure and Evidence, Rule 6, U.N. Doc. ITR/3/Rev.1 (2000) (as amended).

110 Gideon Boas, *Comparing the ICTY and the ICC: Some Procedural and Substantive Issues*, 2000 NETH. INT'L L. REV. 267, 268.

111 *Id.* at 275. Boas continued: "The dynamism and flexibility of the development of the Rules of the ICTY reflects a healthy process of concern for the rights of the accused and a desire to expedite proceedings before the International Tribunal." *Id.* at 276.

civil war.[112] Negotiations between the United Nations and Sierra Leone on the structure and mandate of the court resulted in the world's first "hybrid" criminal tribunal.[113] Soon thereafter, several other tribunals followed suit. In 2003, the UN General Assembly signed an agreement with Cambodia to establish the Extraordinary Chambers in the Courts of Cambodia, a hybrid tribunal to try leaders of the Khmer Rouge.[114] Following the February 2005 attack in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri and twenty-two others, Lebanon asked the UN to establish a hybrid tribunal.[115] The Statute of the Special Tribunal for Lebanon entered into force in June 2007.

Each hybrid tribunal drew on different bodies of law in developing their applicable law, and that in turn shaped the contours of their respective aiding and abetting standards. In particular, the precise combination of international and domestic legal components varied across the tribunals. For this reason, the hybrid tribunals should be approached with caution by those seeking to discover customary international criminal law.

The Extraordinary Chambers in the Courts of Cambodia, for example, was based on Cambodian law—which was in turn based on French law—and invoked international law only to fill in the gaps. In spite of the international characteristics of the Extraordinary Chambers, it drew upon evidentiary standards that were consistent with Cambodian domestic law.[116] As a procedural matter, the international judges of the Extraordinary Chambers were intended to constitute only a minority of the judges.[117] This may explain the fluctuation in the relevant case law from an aiding and abetting standard that reflects the international norm to a standard that aligns with Cambodian domestic criminal law.

---

112 SPECIAL COURT FOR SIERRA LEONE, http://www.rscsl.org/ [https://perma.cc/2YXA-56Y4] (last visited Nov. 29, 2017) (Center Column under "The Special Court for Sierra Leone: Its History and Jurisprudence").

113 *Id.*

114 *About ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, https://www.eccc.gov.kh/en/about-eccc [https://perma.cc/H7TQ-GJRH] (last visited Feb. 28, 2019).

115 *Factsheet: The Special Tribunal for Lebanon*, UN NEWS, http://www.un.org/News/dh/infocus/Lebanon/ST_Fact_sheet_Eng.pdf [https://perma.cc/R57T-VVW8].

116 *See* Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶ 35 (July 26, 2010).

117 Cesare P.R. Romano, *Mixed Criminal Tribunals*, *in* 7 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 312, ¶¶ 40–41, 44 (Rüdiger Wolfrum ed. 2012).

By contrast, the Special Tribunal for Lebanon does not apply any substantive international criminal law. In its seminal *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, the Tribunal's Appeals Chamber clarified that, pursuant to its statute, a conflict between Lebanese and international criminal law is to be resolved by applying "the law that would lead to a result most favorable to the rights of the accused."[118] When the Tribunal discovered a conflict between the aiding and abetting standards of the Lebanese Criminal Code and international criminal law, it applied the Lebanese standard because it was, on the whole, more stringent and, as a result, more protective of the rights of the accused.[119] The Special Tribunal for Lebanon thus applies the standards enumerated in Article 219 of the Lebanese Criminal Code.[120]

The Special Court for Sierra Leone prosecutes crimes under both international and domestic law.[121] The Court, which comprises a majority of international judges, draws heavily on international jurisprudence in defining its aiding and abetting standard.

3. *International Criminal Court*

As a "court of last resort," the ICC is only authorized to exercise its mandate over "the gravest crimes of concern to the international community."[122] Under the principle of complementarity, the Court lacks primary jurisdiction to adjudicate crimes. If member states are genuinely able and willing to perform their own investigations and prosecutions, the Court

---

118 Prosecutor v. Ayyash, Case No. STL-11-01/I, ¶ 211 (Feb. 16, 2011).

119 *Id.* ¶¶ 211, 264.

120 Lebanese Criminal Code, art. 219, as amended by art. 11 of Legislative Decree No. 112 of Sept. 16, 1983 ("1. Anyone who issues instructions for its commission, even if such instructions did not facilitate the act; 2. Anyone who hardens the perpetrator's resolve by any means; 3. Anyone who, for material or moral gain, accepts the perpetrator's proposal to commit the offence; 4. Anyone who aids or abets the perpetrator in acts that are preparatory to the offence; 5. Anyone who, having so agreed with the perpetrator or an accomplice before commission of the offence, helped to eliminate the traces, to conceal or dispose of items resulting therefrom, or to shield one or more of the participants from justice; 6. Anyone who, having knowledge of the criminal conduct of offenders responsible for highway robbery or acts of violence against state security, public safety, persons or property, provides them with food, shelter, a refuge or a meeting place.")

121 Romano, *supra* note 117, ¶¶ 49–51.

122 *About*, INT'L CRIM. COURT, https://www.icc-cpi.int/about [https://perma.cc/8WSM-C74Z] (last visited Nov. 29, 2017).

may not intervene.[123] Because the ICC wields complementary jurisdiction and only addresses the most serious crimes, it makes sense that the requisite elements of liability are more stringent—and hence narrower—than those of the ad hoc and hybrid tribunals that exercise primary jurisdiction.

During the 1994 negotiations of the Draft Statute for an International Criminal Court by the International Law Commission, some "cautioned against placing too much emphasis on [the Statute and Rules of the ICTY] in light of the essential differences between the two institutions."[124] Adriaan Boss, former Chairman of the Preparatory Committee on the Establishment of the ICC, wrote, "in the Ad Hoc Committee a clear preference was expressed to confine the jurisdiction *ratione materiae* to a limited number of core crimes."[125] He explained at the time that "[t]he idea of the Court is inspired by the desire to prevent serious crimes from going unpunished, be it by the national judiciary or by the Court."[126] Modern commentators have also noted that ICC judges should not look to the ad hoc tribunals for guidance because of their functional differences.[127]

Due to its stringent mens rea standard for aiding and abetting, even with a weaker actus reus requirement, the ICC standard as a whole is not weak. Indeed, one might even argue that the ad hoc tribunals' actus reus requirement (assistance with a substantial effect) was merely transplanted in the Rome Statute's mens rea requirement, in the form of the "purpose" standard, which is stricter than the knowledge standard of the ad hoc and hybrid tribunals. This stringent mens rea standard functions as an implicit causation requirement.[128] In the 2016

---

123 *See* Rome Statute arts. 1, 17, July 17, 1998, 2187 U.N.T.S. 90.

124 Adriaan Bos, *The Experience of the Preparatory Committee*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 23 (Mauro Politi & Giuseppe Nesi eds., 2001); *see also* Int'l Law Comm'n, Rep. of the Int'l Law Comm'n on the Work of its Forty-Sixth Session, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] 2(2) Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1994/Add.1 ("[O]ther members cautioned against placing too much emphasis on those instruments in the light of the essential differences between the two institutions.").

125 Bos, *supra* note 124, at 24.

126 *Id.* at 26.

127 *See, e.g.*, Nerlich, *supra* note 94, at 325 ("[O]ne must warn against ingenious reliance on the case law of the ICTY and ICTR."); Sebok, *supra* note 94, at 883 ("While most agree on the standards generally applied by tribunals in Rwanda and the former Yugoslavia, a number of scholars and judgeshave questioned whether these courts should be relied upon as a meaningful source of international law.").

128 Elies van Sliedregt agrees that the causation requirement for aiding and abetting "is typically an element that is developed in case law." VAN SLIEDREGT,

Bemba and *Al Mahdi* cases, for example, the ICC read a causal component into Article 25(3)(c), requiring that the accessorial act must materially assist the commission of the crime.[129] In *Bemba*, the Trial Chamber VII clarified: "The Chamber holds that even though the contribution of the accessory need not be *conditio sine qua non* to the commission of the principal offence, the assistance must have furthered, advanced or facilitated the commission of such offence."[130] The heightened "purpose" standard of the ICC Statute effectively makes up for the more lax actus reus requirement.[131]

This section argued that functional pluralism is a fundamental reason for fragmentation. Each criminal tribunal was founded for distinct purposes, which have influenced their aiding and abetting standards. The remainder of this Article will consider the consequences of this explanation for future interpretations of aiding and abetting liability at the ICC, across customary international law, and in U.S. domestic courts.

B. Custom and Functional Pluralism

It is not uncommon for scholars to declare that custom is waning in importance as a source of international criminal

---

supra note 61, at 128; *see also* FINNIN, *supra* note 62, at 123–24 ("[M]ost commentators agree that such a requirement is implicit in the Statute"); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 144–45 (2d ed. 2009) (explaining that a causation requirement "implicitly . . . arises out of Article 30 of the ICC Statute").

129 Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Decision on the Confirmation of Charges, ¶ 26 (Mar. 24, 2016) ("[I]n essence, what is required for this form of responsibility is that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime. It is not required 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)." (internal quotations and citations omitted)).

130 Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 74 of the Statute, ¶ 94 (Oct. 19, 2016).

131 Similarly, several scholars and judges have asserted that the specific direction element should be assessed in the context of a mens rea analysis instead. *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-A, Appeal Judgment, ¶ 4 (Feb. 28, 2013) (Theodor Meron and Carmel Agius, Joint Separate Opinion) ("[W]ere we setting out the elements of aiding and abetting outside the context of the Tribunal's past jurisprudence, we would consider categorising specific direction as an element of *mens rea*."); Susanne J. Haugen, *"Specific Direction" in Perišić and Taylor* 35 (Nov. 25, 2014) (unpublished master thesis, University of Oslo) (on file with author) ("If the requirement of 'specific direction' is to be accepted and applied as a necessary and essential element of the actus reus of aiding and abetting liability, it has been argued that the requirement would be more appropriately placed in the mens rea of aiding and abetting liability.").

law.[132] The perceived decline of custom is both a cause and a consequence of fragmentation. It is a *cause* of fragmentation because tribunals sometimes disclaim responsibility for either applying or helping to create custom, while referring selectively to the jurisprudence of other tribunals as persuasive authority. At the same time, the apparent decline in custom may be a *consequence* of fragmentation. Describing the now-standard understanding of customary international law, the ICJ held in *Gulf of Maine* that "customary international law . . . comprises a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice and not by deduction from preconceived ideas."[133] Fragmentation complicates the inductive exercise by making it harder to convincingly establish the shared *opinio juris* of States.

But it is a mistake—both as a methodological matter and in light of customary international law's continued importance in domestic and international courts—to assume that custom and differences across tribunals are incompatible. A tribunal may depart from the customary law standard for any number of reasons. The fact that different standards apply across different tribunals is not necessarily evidence that custom has failed to congeal.

There are many possible reasons that different legal standards emerge for international crimes. One is the vagaries of negotiations. For example, the Rome Statute adopted its distinct mens rea standard of "purpose" in significant part because of disagreements during negotiations between states with distinct criminal legal traditions. The Rome Statute was the first international instrument to include a general provision on the mental state element required for criminal culpability under international criminal law.[134] Introducing specific mens

---

132 *See, e.g.*, Larissa van den Herik, *The Decline of Customary International Law as a Source of International Criminal Law*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 230–31 (Curtis A. Bradley ed., 2016).

133 Delimination of Maritime Boundary in Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, 299, ¶ 111 (Oct. 12).

134 FINNIN, *supra* note 62, at 149 ("The Nuremberg and Tokyo Charters contained no such provision, nor did Control Council Law No. 10. The Statutes of the Tribunals did not contain such a provision, nor did the various Draft Codes prepared by the ILC. This omission was not repeated with the Rome Statute, which includes a specific provision (Article 30) on the mental element required for crimes within the ICC's jurisdiction. This makes Article 30 the first of its kind."). An early draft of the Rome Statute initially left out the mens rea element, intending the Court to develop a standard through its jurisprudence. However, an Ad Hoc Committee of the U.N. General Assembly found that the Rome Statute should at least address the mental element in the final treaty on the basis of the

rea language required a consensus among delegates from completely different legal backgrounds. This hodgepodge of backgrounds was further complicated by the defensive interests of each state; whereas a like-minded group of middle-income and developing countries favored a strong, independent court, the permanent members of the Security Council, *inter alia*, emphasized the importance of adequately circumscribing the eventual court's powers.[135] The latter group of states undoubtedly sought to mitigate the potential liability of their own personnel in future armed conflicts.[136] Still, no single member state dominated the negotiations. Instead, the piecemeal appeasement of disparate legal traditions resulted in a framework filled with ambiguities that jurists have been left to reconcile. The negotiating history of the Rome Statute suggests that the addition of "purpose" was meant to represent a compromise between knowledge- and intent-based standards.[137] But the term chosen to convey this compromise standard—"purpose"—was both novel to international criminal jurisprudence and not defined in the Statute,[138] leaving the project of defining the term to the ICC judges.

Equally important—and less appreciated—is the explanation that the different standards are the result of the distinct functions of the different tribunals. Even the "purpose" standard in the Statute, which is a heightened mens rea standard,

---

principle of legality. The principle of legality is embodied by the Latin phrase *nullum crimen sine lege, nulla poena sine lege*, which means that there shall be no crime nor punishment without expression in law. *See* Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291, 296 (2001).

135 *See* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L LAW 2, 4 (1999).

136 *See id.*

137 Maria Kelt & Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 12, 22 (Roy S. Lee ed., 2001) (arguing that Article 30 "necessarily consisted of compromises between different concepts or norms from various legal systems"); Helmut Satzger, *German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes Against International Law*, 2 INT'L CRIM. L. REV. 261, 269 (2002) (describing Article 30 as "quite clearly a compromise between continental and Anglo-American criminal law, which leaves lawyers from both sides with difficulties"); *see also* Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy S. Lee ed., 1999); David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 355 (2011) (describing "purpose" as "an acceptable compromise phrase").

138 *See* Rome Statute art. 30, July 17, 1998, 2187 U.N.T.S. 90 (emphasis added).

reflects the unique institutional characteristics and functions of the ICC as a court of last resort. Understanding this second reason for fragmentation in the aiding and abetting jurisprudence is key to charting a path forward. If the different standards are simply the product of bad coordination or negotiating exigencies that produced poorly considered differences, then the international community should seek greater uniformity. If, however, the different standards serve different functional purposes, then accommodating pluralism is essential to a well-functioning international criminal law system.

C. Ending the Fruitless Search for Unity: Case of the Alien Tort Statute

While this Article has focused primarily on the standard of aiding and abetting liability under *criminal* law, many national courts stipulate *civil* liability for the commission of international crimes. The U.S. Alien Tort Statute (ATS), for example, allows foreign citizens to file civil suits against the perpetrators of certain violations of the law of nations.[139] But U.S. courts—confused by the case law described in this Article—have adopted wildly different views of the appropriate aiding and abetting standard for international criminal law. The Supreme Court has acknowledged the existence of aiding and abetting liability under the ATS—in a footnote in *Sosa*[140]—but it did not describe the appropriate substantive standard. Subsequently, the Courts of Appeal for the Second,[141] Fifth,[142] Ninth,[143] Eleventh,[144] and D.C.[145] Circuits all held that the ATS encompasses aiding and abetting liability. These courts disagree sharply on the precise contours of the aiding and abetting liability standard. They also disagree on the appropriate source of the standard—whether the standard of aiding and abetting

---

139 *See* 28 U.S.C. § 1350 (2018).

140 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

141 Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007); *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005).

142 Carmichael v. United Tech. Corp., 835 F.2d 109, 113–14 (5th Cir. 1988).

143 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 749 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013).

144 Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005).

145 Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

liability should come from federal common law or international criminal law.

When U.S. courts look to the aiding and abetting liability standard developed under international criminal law for guidance, they are left to navigate the fragmented and sometimes confused jurisprudence of the international tribunals. Inconsistent and uneven domestic jurisprudence has inevitably arisen as a result. Some U.S. courts have relied on the jurisprudence of the ad hoc and hybrid tribunals and adopted the "specific direction"[146] and "substantial effect"[147] actus reus requirements, as well as the "knowledge" mens rea standard.[148] Others have relied instead on the ICC's jurisprudence, holding that "purpose" is necessary to establish mens rea for aiding and abetting liability under the ATS (rather than the more common "knowledge" standard).[149] Recognizing disagreement among the international tribunals, some U.S. courts have attempted to draw a line in the sand without offering clear explanations for their choices.[150] Other U.S. judges simply ignored the fragmentation.[151]

The Second Circuit's ruling in *Khulumani v. Barclay National Bank, Ltd.*[152] illustrates the doctrinal confusion and disagreement among U.S. judges. In *Khulumani*, three groups of plaintiffs brought ten claims, including under the ATS, against fifty major multinational banks and corporations that had operated in South Africa during the apartheid. The court's *per*

---

146 Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010), *rev'd and vacated sub nom.* Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

147 Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); *see also* Shan v. China Constr. Bank Corp., No. 09–8566, 2010 WL 2595095, at *5 (S.D.N.Y. June 28, 2010) (setting out the actus reus requirement as necessitating "substantial effect").

148 *Presbyterian Church of Sudan*, 582 F.3d at 259 (adopting Judge Katzmann's formulation); *Khulumani,* 504 F.3d at 277 (Katzmann, J., concurring); *see also Khulumani,* 504 F.3d at 332–33 (Korman, J., concurring in relevant part).

149 *Presbyterian Church of Sudan*, 582 F.3d at 259; *Khulumani,* 504 F.3d at 277 (Katzmann, J., concurring).

150 *Nestle, S.A.*, 748 F. Supp. 2d at 1083 ("To the extent that the International Criminal Tribunals for the former Yugoslavia and Rwanda have occasionally adopted a less stringent standard, *see, e.g., Mrksic,* at ¶ 159; *Furundzija,* 38 I.L.M. 317 at ¶ 249, the Court believes that the standard articulated in *Blagojevic, Ntagerura, Blaskic,* and *Vasiljevic* best reflects the relevant caselaw discussed *infra.*").

151 *See, e.g.*, Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002) (applying the ICTY's actus reus and mens rea requirements, as developed in the ICTY Statute and elaborated in *Furundzija*)

152 *Khulumani*, 504 F.3d at 254.

curiam opinion failed to provide a common theory of aiding and abetting liability. In fact, each of the three judges in *Khulumani* filed separate opinions. In his concurrence, Judge Katzmann concluded that aiding and abetting liability was permissible under the ATS, and that the requisite mens rea element was purpose, not knowledge, pursuant to the Rome Statute.[153] In a separate opinion concurring in part and dissenting in part, Judge Korman endorsed Judge Katzmann's standard, but suggested that Judge Katzmann failed to apply it properly.[154] Judge Hall contended that the aiding and abetting liability standard should not draw from international law at all; rather, the standard should draw from domestic law—in particular, the Restatement (Second) of Torts.[155]

Judge Katzmann's *Khulumani* concurrence demonstrates the mistaken search for a single, unified standard for international aiding and abetting liability. After considering the jurisprudence of the Nuremberg Tribunals, the ad hoc tribunals, and the ICC, Judge Katzmann ultimately adopted the ICC's mens rea standard of "purpose." Judge Katzmann's dicta regarding the relationship between the ICC's and ad hoc tribunals' standards seeks to reconcile the manifest differences between their approaches in favor of a single standard. Judge Katzmann writes: "[T]he Rome Statute's *mens rea* standard is entirely consistent with the application of accomplice liability under the sources of international law discussed."[156] He clarifies: "My research has revealed no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts with the purpose of facilitating that violation."[157] Though accurate, this statement is misleading. Judge Katzmann assumes a single unitary standard for aiding and abetting liability—"purpose"—exists under customary international law because the mental state is sufficient to establish liability in all jurisdictions. This assumption neglects unique reasons the ICC adopted a more stringent mens rea standard than any other international criminal tribunal.

---

153 *Khulumani*, 504 F.3d at 275–77 (Katzmann, J., concurring). It is worth noting, however, that Judge Katzmann also adopted the ad hoc tribunals' "substantial effect" requirement due to the ICC's silence on the actus reus component. *Id.* at 277.

154 *See id.* at 330–33.

155 *Id.* at 287–88 (Hall, J., concurring).

156 *Id.* at 276 (Katzmann, J., concurring).

157 *Id.* at 276–77.

Judge Katzmann acknowledged that "the opinions of the ICTY and ICTR provide evidence of the state of customary international law."[158] However, he chose to forego the ad hoc tribunals' standard because it was not "sufficiently well-established and universally recognized to trigger jurisdiction for a tort suit under the AT[S], particularly in light of the higher standard articulated in the Rome Statute."[159] Moreover, he asserted that the "completely distinct factual contexts and . . . alternate theories of liability" create "limitations on the extent to which we may rely on the decisions of the ICTY and ICTR."[160] By contrast, Judge Katzmann explained his decision to rely on the Rome Statute as based in part on its broad adoption: "the [Rome] Statute has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world"[161] and thus reflects "an authoritative expression of the legal views of a great number of States."[162]

Judge Katzmann's reliance on the Rome Statute does not account for the distinctive aim of the Rome Statute. For instance, the drafters at Rome purposely chose "to retain . . . narrow focus on criminal liability of natural persons only," leaving "civil damages for both natural and juridicial persons out of the discussion and the court's jurisdiction."[163] Professor David Scheffer clarified in an amicus brief that the omission of civil liability from the Rome Statute should not indicate a rejection of such liability in other contexts:[164] "There is a meaningful difference between civil and criminal liability in the history of the Rome Statute negotiations, in Alien Tort Statute precedent, and in international law."[165] Unfortunately, Judge Katzmann's approach to establishing the aiding and abetting standard did not acknowledge that there could be good reasons for maintaining distinct and divergent standards for aiding and abetting liability in different contexts.

---

158 *Id.* at 278.
159 *Id.* at 279.
160 *Id.* at 278.
161 *Id.* at 276.
162 *Id.* (citing Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 227 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
163 Brief for David J. Scheffer as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491), 2011 WL 6813576, at 8–9).
164 *Id.*
165 *Id.* at 7.

Judge Katzmann is not alone; a large contingent of U.S. judges have leaned on the ICC's interpretation.[166] As Professor Scheffer noted in his amicus brief in the *South African Apartheid* cases, this trend unfortunately ignores that "more authentic guidance is found in federal common law, which for cases of this character is informed by customary international law, that has been unquestionably shaped by the rich body of jurisprudence delivered by the [ad hoc and hybrid tribunals], particularly in recent years."[167]

If judges were to recognize that there are differences in the case law driven by the different tribunals' functional roles, they would know that they ought not look to the Rome Statute as evidence of customary international law. Rather, judges should recognize that the Rome Statute does not embody current customary international law simply because it is the last statute written. The Rome Statute is better understood as adopting a particular standard appropriate to its unique role as an international court of last resort, thus representing a departure *from* custom rather than an evolution *of* custom.

III
HOW TO STRENGTHEN AND ENABLE FUNCTIONAL PLURALISM

That this Article recognizes the value of functional pluralism does not mean that it sees no room for improvement. Quite the opposite: this Article recognizes that many of the differences in the standards used by courts to assess aiding and abetting liability are driven by functional differences, but not all are. The absence of clear, shared terminology means that even when statute drafters or tribunals seek to craft a standard for functional purposes, the failure to use terms that are well understood can cause confusion and, in some cases, lead courts to misinterpret the authors' intent. Indeed, the profusion of aiding and abetting standards—and accompanying jurisdictional interpretations—has resulted in substantial confusion over the appropriate definitions of the mens rea re-

166 *See* Ryan S. Lincoln, *To Proceed with Caution?: Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 612–14 (2010) (explaining the potential reasons for the inconsistent weight given by U.S. judges to different sources of international law in ATS cases).

167 Brief for David J. Scheffer as Amicus Curiae in Support of Appellants, Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015) (No. 14-4104), 2015 WL 1140810, at *12–13 (citing Brief for David J. Scheffer as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, Presbyterian Church of Sudan v. Talisman Energy, Inc., 562 U.S. 946 (2010) (No. 09-1262), 2010 WL 2032487, at *26–27).

quirements for aiding and abetting liability. In order to remedy this confusion, this Article recommends the codification of mens rea terminology to eliminate the friction of translating standards across jurisdictions and to ensure courts appropriately interpret aiding and abetting standards.[168]

Classic approaches to mens rea have traditionally taken two forms: the "elements" approach, which breaks down a crime into its constituent parts (conduct, results, and circumstances), and the "offense" approach, which generally assigns a single mens rea state to the entire crime.[169] Criminal law scholars have largely rejected the "offense" approach. The drafters of the Rome Statute followed suit, defining the mens rea state for every element of a crime.[170]

The drafters of the Rome Statute apparently modeled Article 30's mens rea terminology on the definitions used by the U.S. Model Penal Code.[171] Table 2 below illustrates this point by contrasting the definitions of mens rea states provided in the Rome Statute with corresponding definitions in the American Law Institute's Model Penal Code.

---

168 Codification may have "a *declarative effect* on existing customary rules, a *crystallizing effect* for customary rules still lacking in practice, or the *generative effect* of a new customary rule by virtue of the new direction taken by State practice as a consequence." ORIOL CASANOVAS, UNITY AND PLURALISM IN PUBLIC INTERNATIONAL LAW 38 (2001) (emphases in original).

169 Ted Sampsell-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457, 1461 (2013).

170 *See* Rome Statute art. 30(2)(b), July 17, 1998, 2187 U.N.T.S. 90.

171 FINNIN, *supra* note 62, at 201; *see also id.* at 161, n.56 ("This follows the approach of the US Model Code, which recognizes 'conduct,' 'result[s] of conduct' and 'attendant circumstances' as the possible elements of a crime: see Model Penal Code § 2.02."); MODEL PENAL CODE § 2.06(2) (AM. LAW INST. 1985).

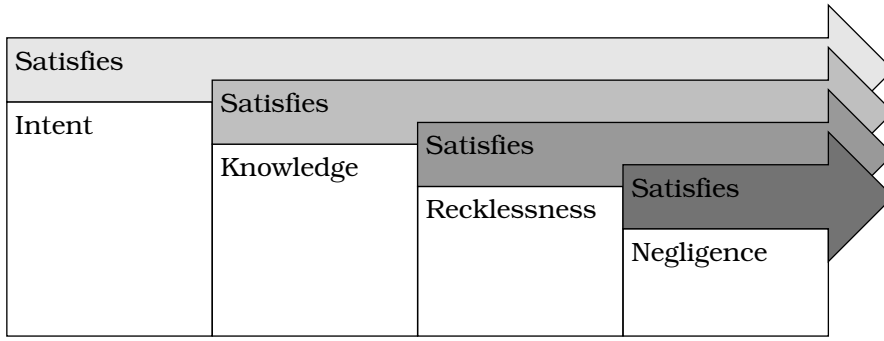
TABLE 2: MATERIAL ELEMENTS AND MENS REA STANDARDS UNDER THE ICC AND U.S. MODEL PENAL CODE

Element	**Mens Rea Standard**	**ICC**	**MPC**
Conduct	Intent	"[The] person means to engage in the conduct . . . ."	"[I]t is his conscious object to engage in conduct of that nature . . . ."
Consequence	Intent	"[The] person means to cause that consequence **or is aware that it will occur in the ordinary course of events."**	"[I]t is his conscious object . . . to cause such a result . . . ."
	Knowledge	"[A]wareness that . . . a consequence will occur in the ordinary course of events."	"[H]e is aware that it is practically certain that his conduct will cause such a result."
Circumstance	Knowledge	"[A]wareness that a circumstance exists . . . ."	"[H]e is aware . . . that such circumstances exist . . . ."

However, the definitional approaches of the MPC and ICC diverge in a critical respect: the Rome Statute's definition of "intent" in Article 30(2)(b) is overinclusive with regard to the consequence element of the crime. The mens rea structure of the Model Penal Code presents a tiered structure, where the more stringent standards of mens rea satisfy the lesser standards. For example, if the accused has intent to commit a crime, then she also satisfies the lesser mens rea standards of knowledge, recklessness, and negligence. Article 30(2)(b) of the Rome Statute essentially inverts this structure. Because intent exists whenever a "person means to cause that consequence *or*

is aware that it will occur in the ordinary course of events,"[172] any person that satisfies the knowledge standard under Article 30's definition will also satisfy the intent standard. And any person who satisfies the intent standard will also satisfy the knowledge standard. The Rome Statute's use of the disjunctive connector ("or") undermines any meaningful distinction between these two mental elements. In contrast, under the U.S. Model Penal Code, intent satisfies knowledge, but not the other way around.

FIGURE 1: US MODEL PENAL CODE ELEMENTS



The imprecision in the drafting of the Rome Statute contributes to the confusion over the correct interpretation of the mens rea standard for aiding and abetting. In *Bemba*, the ICC said that the "purpose" threshold was equivalent to "intent" as articulated in Article 30.[173] However, it remains unclear whether the ICC intended to distinguish this standard from "knowledge" altogether.[174] Here, the overlap in the Rome Statute's definitions of "intent" and "knowledge" introduces confusion. Based on the statutory text of Article 30(2)(b), the term "intent" incorporates the "knowledge" threshold. Consequently, the term "purpose" could conceivably be interpreted consistent with the "knowledge" threshold as well. No case

172 Rome Statute art. 30(2)(b), July 17, 1998, 2187 U.N.T.S. 90 (emphasis added). The real issue with the definition here is that it seems like the ICC includes the definition of knowledge within the definition of intent. Finnin suggests that "both intent and knowledge" must be proven for every crime, but not for every material element of the crime. *See* FINNIN, *supra* note 62, at 162.

173 Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Trial Judgment Pursuant to Article 74 of the Statute, ¶ 97 (Oct. 19, 2016).

174 *Id.* ¶ 92 ("Pre-Trial Chamber II in the Confirmation Decision stipulated that the 'accessory's contribution has an effect on the commission of the offence and is made *with the purpose* of facilitating such commission.' Equally, Pre-Trial Chamber I in *Blé Goudé* stated that 'the person provides assistance to the commission of a crime and that, in engaging in this conduct, *he or she intends* to facilitate the commission of the crime.'" (emphasis added and footnote omitted)).

before the court has yet clarified whether the term "purpose" is distinct from "knowledge."[175] Nor has any case addressed the overlap between "intent" and "knowledge" in the Rome Statute.

Defining mens rea terminology is essential to the operation of criminal law in general, and international criminal law specifically. However, the attempt made by the drafters of the Rome Statute fell short. Its provisions were inconsistent with accepted tenants of criminal law and have opened the door to persistent confusion about the appropriate scope of both of its defined terms—"intent" and "knowledge."

The goal of the drafters of the Rome Statute was the right one. Establishing consistent and uniform definitions of mens rea terminology is essential to the healthy functioning of international criminal law. But while the efforts undertaken in the Rome Statute were laudable, they were incomplete (the Rome Statute does not define important mens rea terms like recklessness or negligence because they were beyond the scope of the statute), defective (confusion over the appropriate definition of intent), and narrow (only applicable to the ICC).

This Article argues for two solutions. First, mens rea terminology should be codified to inform future developments in international criminal law. Second, the ICC must provide additional clarification of the scope of "purpose" adopted in Article 25(3)(c) and address the ambiguity in the Rome Statute's definition of "intent" in Article 30.

A similar move toward codification of mens rea terminology helped the United States domestic legal system achieve more interpretational consistency across jurisdictions. Scholars have recognized the codification of mens rea terms as the "most significant innovation" of the Model Penal Code, which was developed by the American Law Institute.[176] Prior to the development of the Model Penal Code, "the common law of mens rea was fundamentally incoherent and had been a constant source of confusion for courts."[177] Though the Model Penal Code has not been adopted wholesale in any U.S. jurisdiction, the codification of mens rea terms has brought substantial clarity to U.S. criminal law.

Codification of mens rea terms could serve a similar role in international criminal law. The International Law Commission (ILC) is one possible international body that could be appropriate to undertake this project. The United Nations established

---

175 Keitner, *supra* note 8, at 88.
176 Sampsell-Jones, *supra* note 169, at 1457.
177 *Id.*

the ILC in 1948 for the purpose of "encouraging the progressive development of international law and its codification."[178] The ILC finds its origins in Article 13, paragraph 1 of the Charter of the United Nations and was broadly supported by the governments involved in drafting the Charter.[179] Article 15 of the Statute of the International Law Commission defines codification as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice precedent and doctrine" and progressive development as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."[180] The Commission is practiced in the field of international criminal law, having formulated the Nuremberg principles, as well as prepared the draft statute for the International Criminal Court and the draft Code of Crimes against Peace and Security of Mankind.[181]

In selecting future substantive topics of law to explore, the Commission measures the topic against the following criteria:

> (i) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (ii) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (iii) the topic should be concrete and feasible for progressive development and codification; and (iv) the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[182]

Addressing the mental element of international criminal law satisfies these criteria and would constitute an appropriate project for the International Law Commission.

The codification of mens rea standards would have several benefits. It would assist judges siting on international criminal tribunals and encourage greater fidelity to the underlying tribunal statute. It would also allow domestic courts to import international criminal law into their own statutes, like the ATS, with more clarity. Finally, the codification of mens rea terms

---

178 1 THE WORK OF THE INTERNATIONAL LAW COMMISSION 5 (8th ed. 2012) [hereinafter WORK OF THE ILC] (quoting UN Charter art. 13, ¶ 1(a)).

179 *Id.* at 4.

180 Statute of the International Law Commission art. 15, Nov. 21, 1947, G.A. Res. 174 (II).

181 WORK OF THE ILC, *supra* note 178, at 8.

182 *Id.* at 45.

would enable future international criminal tribunals to adopt mens rea terms for their various criminal law standards with a greater degree of confidence. Flexibility in the adoption of mens rea standards can be a useful tool to regulate divergent crimes and unique jurisdictional requirements across international courts. However, it is necessary to clarify the appropriate scope of these respective mens rea terms in order to retain interpretational rigor and consistency.

Codification of mens rea terms would remove confusion without forcing uniformity. It would give courts (and drafters of any future statutes) a set of shared terms on which they could draw. They would still have an array of different standards available to them, but those different standards would have clear meanings—so when one was used, its purpose would be clear to all involved. In this way, codification could enhance and rationalize the functional pluralism in the international law of aiding and abetting and in international criminal law more generally.

CONCLUSION

Aiding and abetting liability is of central importance to any effective criminal justice system. It enables courts to hold accountable individuals who were not direct perpetrators of the crime, but who nevertheless assisted the principal perpetrator in its commission. Within the international context, aiding and abetting liability is particularly significant because international violations—such as major human rights abuses, war crimes, and crimes against humanity—are frequently perpetrated with the assistance of third-party accomplices. The crimes committed in Nazi Germany are poignant reminders of this fact. The Nuremberg Tribunal prosecuted the heads of several German corporations—including those found to have supplied poison gasses ultimately used in concentration camps—under theories of accomplice liability.[183] In recent years, corporations that have aided and assisted states in committing genocide, crimes against humanity, and torture have been subject to suit for their role enabling those crimes. However, confusion over the elements of aiding and abetting liability have perplexed courts and perhaps contributed to the

---

183 *See* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 954–1201 (1951); *The Zyklon B. Case, Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1st–8th March, 1946 in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947).

failure to bring aiders and abettors of international crimes to justice.

This Article surveyed the fragmented legal standards for aiding and abetting—and their consequences—across international, hybrid, and domestic courts. Even within the various international and hybrid criminal tribunals, the precise contours of the aiding and abetting standard remain unclear. The actus reus and mens rea requirements for aiding and abetting have shifted not only across tribunals, but also within the jurisprudence of the various tribunals. At the ICC, imprecision in the drafting of the Rome Statute has led to substantial confusion over the appropriate mens rea state required to establish aiding and abetting complicity. The lack of a unitary standard has also contributed to confusion in U.S. domestic courts, where some judges have mistakenly searched for an elusive unitary aiding and abetting standard in international criminal law.

The scope of aiding and abetting liability can have acute, real-world consequences. A high threshold for liability may underassign liability, whereas a low threshold may overassign liability. Undercriminalization allows perpetrators of international crimes to go unpunished, whereas overcriminalization subjects individuals and other non-state actors to unjust punishment. The existing state of fragmentation has exacerbated the likelihood that judges will implement a standard for liability in either extreme.

This Article argues that what at first appears as irrational fragmentation is, in many cases, functional differences between tribunals in their legal standards. The distinct roles of different tribunals sometimes demand different standards for complicity liability. This Article argues for understanding and embracing this functional pluralism. It encourages courts and lawyers to refrain from eliminating this pluralism in a misguided search for unity, and to instead enable and encourage functional pluralism through a project of codification. Doing so could eliminate confusion, enable and encourage appropriate functional differences, and thereby better serve international justice.