NOTES

CRISIS AND COMPLICITY: AN ANALYSIS OF U.S. SUPPORT FOR SAUDI COALITION AIRSTRIKES UNDER THE LAW OF AIDING AND ABETTING (ALLEGED) WAR CRIMES

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ABSTRACT

The humanitarian toll produced by the conflict in Yemen is well-documented. So, too, is the steadfast U.S. support for Saudi Arabia, the leader of a coalition whose airstrikes have caused enough civilian casualties to be scrutinized by the U.N. for potential war crimes. As the parties negotiate a political resolution, attention may—and should—quickly turn toward ensuring accountability for internationally unlawful crimes. This Note examines the mode of liability under international criminal law known as aiding and abetting. After a discussion of its elements, it turns to an analysis of whether U.S. government personnel could be held liable for aiding and abetting the principal war crimes committed by the Saudi coalition—assuming that such crimes have been committed. It then scrutinizes how the U.S. has previously dealt with the problem of its assistance being used for internationally unlawful purposes and suggests mitigation measures to eliminate its complicity in future crises.

I. INTRODUCTION 450
II. THE DEVELOPMENT OF AIDING AND ABETTING LIABILITY IN INTERNATIONAL CRIMINAL LAW 454
A. *The* Actus Reus*: "Substantial Effect"* 456
B. *The Rise and Fall of the "Specific Direction" Requirement* . . . 458
C. *The* Mens Rea*: Knowledge* 464
III. APPLICATION OF AIDING AND ABETTING LIABILITY TO THE ARMED CONFLICT IN YEMEN 468
A. *Examining Current Complicity* 469

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1. Applying the *Actus Reus*: U.S. Support for Saudi Coalition Airstrikes 469
2. Applying the *Mens Rea*: U.S. Knowledge of Saudi Coalition War Crimes. 472
3. Taking Stock: the United States Has Probably Aided and Abetted Saudi War Crimes 476
B. *Averting Future Complicity* 478
1. The 1994 OLC Opinion as a Framework for Addressing Future Crises 478
2. When to Re-Examine the Presumption of Foreign Lawful Activity: Known Practices and Reliable Assurances 480
IV. A Proposed Mitigation Measure to Avert Future U.S. Complicity. 483
V. Conclusion 487

I. Introduction

The conflict in Yemen has produced a humanitarian catastrophe of the highest magnitude. More than 91,000 fatalities have been reported since international intervention began in March 2015[1] and more than 1.2 million cases of suspected or confirmed cholera have been reported since April 2017.[2] Amidst a widespread famine, more than twenty million Yemenis are in need of basic humanitarian assistance, such as food and water, out of a prewar population of twenty-eight million.[3] In late 2018, the United Nations brokered peace talks between the Saudi-backed Yemeni government and the Houthi rebels,[4] and the parties agreed to a cease-fire for the port city of Hodeidah and made plans to discuss a long-term political framework.[5]

1. Press Release, Armed Conflict Location & Event Data Project, Yemen War Death Toll Exceeds 90,000 According to New ACLED Data for 2015 (June 18, 2019), https://www.acleddata.com/2019/06/18/press-release-yemen-war-death-toll-exceeds-90000-according-to-new-acled-data-for-2015/ [hereinafter ACLED Press Release].

2. Sadeq Al-Wesabi, *Yemen: As Cholera Surges Again, UN and Partners Double Down on Vaccination Efforts*, U.N. News (Oct. 2, 2018), https://news.un.org/en/story/2018/10/1022062.

3. Alex Ward, *The Pentagon Doesn't Know if US-Made Bombs Killed Kids in Yemen*, Vox (Aug. 9, 2018), https://www.vox.com/2018/8/9/17671386/yemen-airstrikes-saudi-arabia-coalition-pentagon.

4. Faisal Edroos, *All You Need to Know About the Yemen Peace Talks*, Al-Jazeera (Dec. 3, 2018), https://www.aljazeera.com/indepth/features/yemen-peace-talks-181202101535422.html.

5. Patrick Wintour & Bethan McKernan, *Yemen: Ceasefire Agreed for Port City of Hodeidah*, Guardian (Dec. 13, 2018), https://www.theguardian.com/world/2018/dec/13/yemen-ceasefire-agreed-for-vital-port-city-of-hodeidah.

But even if a political breakthrough is achieved, the Saudi coalition's actions throughout the conflict will undoubtedly be the focus of intense international scrutiny. Over 8,000 civilians have been directly targeted and killed by Saudi coalition airstrikes since 2015, according to the Armed Conflict Location & Event Data Project, and this figure accounts for roughly sixty-seven percent of all reported civilian fatalities in Yemen over the last four and a half years.[6] In August 2018, the coalition struck a school bus in northern Yemen carrying students on a recreational trip, which killed fifty-one people—including forty children.[7] Reports following the strike strongly suggested that the bomb dropped on this bus was manufactured by Lockheed Martin and approved for export by the U.S. State Department in 2015, during the Obama Administration.[8] Later that month, a U.N. panel of experts announced that it had reasonable grounds to believe that the Saudi coalition had committed war crimes and other violations of international humanitarian law (IHL) in Yemen.[9]

Spurred by the murder of Saudi dissident journalist Jamal Khashoggi, the U.S. Senate voted to end U.S. military assistance to Saudi Arabia's war in Yemen in December 2018.[10] However, the U.S. House of Representatives blocked passage of a bill ending support.[11] While the United States did announce that it would halt aerial refueling of coalition aircraft,[12] President Trump stated that he had no intention of cancelling an agreement with Saudi Arabia for the purchase of U.S.-

6. ACLED Press Release, *supra* note 1.

7. Salma Abdelaziz, Alla Eshchenko & Joe Sterling, *Saudi-Led Coalition Admits 'Mistakes' Made in Deadly Bus Attack in Yemen*, CNN (Sept. 2, 2018), https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html.

8. Julian Borger, *US Supplied Bomb that Killed 40 Children on Yemen School Bus*, GUARDIAN (Aug. 19, 2018), https://www.theguardian.com/world/2018/aug/19/us-supplied-bomb-that-killed-40-children-school-bus-yemen.

9. *See* United Nations High Commissioner for Human Rights, *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, ¶ 108, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018) [hereinafter UNHRC Yemen Report].

10. Julie Hirschfield Davis & Eric Schmitt, *Senate Votes to End Aid for Yemen over Khashoggi Killing and Saudis' War Aims*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/politics/yemen-saudi-war-pompeo-mattis.html.

11. Conor Finnegan, *House Blocks Bill to End Support for Saudi Coalition in Yemen as UK Yields Diplomatic Progress*, ABC NEWS (Nov. 15, 2018), https://abcnews.go.com/Politics/house-blocks-bill-end-support-saudi-coalition-yemen/story?id=59208707.

12. Phil Stewart, *U.S. Halting Refueling of Saudi-Led Coalition Aircraft in Yemen's War*, REUTERS (Nov. 9, 2018), https://www.reuters.com/article/us-usa-yemen-refueling/u-s-halting-refueling-of-saudi-led-coalition-aircraft-in-yemens-war-idUSKCN1NE2LJ.

made arms worth $110 billion.[13] Subsequent bipartisan efforts to block arms sales in 2019 were vetoed by President Trump.[14]

Given the allegations of war crimes, the continuation of U.S. support to the coalition raises important and challenging questions regarding its complicity in such crimes. War crimes are meticulously defined and proscribed by international humanitarian law.[15] And while the United States is not directly accused of such crimes, a form of individual criminal liability known as "aiding and abetting" has developed under international criminal law. Aiding and abetting liability was first formulated during the trials of the international military tribunals (IMT) following the Second World War. A number of international courts—such as the ad hoc tribunals created to address the atrocities in the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone—continued its development, creating a rich body of case law from which legal scholars can glean specific elements. Aiding and abetting liability also made its way into Article 25 of the Rome Statute of the International Criminal Court (ICC).[16]

Predictably, international courts agree on some elements of this mode of liability while disagreeing on others. This Note identifies where consensus exists and analyzes whether U.S. government personnel (USG personnel) could feasibly be found to have aided and abetted war crimes committed by the Saudi coalition. Such analysis is important given the reported existence of a legal memorandum written in 2016

13. Amanda Macias, *Saudi Arabia Is the Top US Weapons Buyer — But It Doesn't Spend as Much as Trump Boasts*, CNBC (Oct. 15, 2018), https://www.cnbc.com/2018/10/15/saudi-arabia-top-us-weapons-buyer-but-doesnt-spend-as-much-as-trump-boasts.html.

14. Michael Shear & Catie Edmondson, *Trump Vetoes Bipartisan Resolutions Blocking Arms Sales to Gulf Nations*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/us/politics/trump-veto-arms-saudi-arabia.html.

15. At the core of international humanitarian law are the four Geneva Conventions of 1949, ratified by most countries. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions]. The United States has ratified all four of the 1949 Conventions. It also ratified Protocol III of the Convention, concluded in 2005 (adding the "red crystal" to the list of emblems that are used to identify neutral humanitarian aid workers). It has signed but not ratified Protocol I (providing for further restrictions on the treatment of "protected persons") and Protocol II (further clarifying the fundamentals of "humane treatment"), both concluded in 1977.

16. *See* Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

by an attorney in the State Department's Office of the Legal Adviser examining possible U.S. complicity as an aider and abettor for alleged war crimes committed by the Saudi coalition.[17] Congress has requested this memorandum, but the State Department has declined to divulge its contents.[18]

The second half of this Note provides concrete recommendations on how the United States can modify its support to the Saudi coalition to prevent further liability as an aider and abettor. While the United States has recently pressed for a cessation of hostilities, the conflict and humanitarian toll will continue until a permanent political solution can be reached.[19] Drawing on a 1994 opinion by the Office of Legal Counsel (OLC) at the U.S. Department of Justice—which addressed a situation that is strikingly similar to the one at issue here—this Note suggests mitigation measures the United States could undertake to avoid future complicity.[20] The OLC opinion was written with the U.S. federal aider and abettor statute in mind, but it is relevant for analyzing the problem of U.S. complicity as an aider and abettor under international law.[21]

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17. Oona Hathaway, *The Missing State Department Memo on US Officials' Possible Aiding and Abetting Saudi War Crimes*, JUST SECURITY (July 24, 2019), https://www.justsecurity.org/65041/the-missing-state-department-memo-on-us-officials-possible-aiding-and-abetting-saudi-war-crimes/; *see also* Warren Strobel & Jonathan Landay, *Exclusive: As Saudis Bombed Yemen, U.S. Worried About Legal Blowback*, REUTERS (Oct. 10, 2016), https://www.reuters.com/article/us-usa-saudi-yemen/exclusive-as-saudis-bombed-yemen-u-s-worried-about-legal-blowback-idUSKCN12A0BQ (reporting on emails and documents, obtained by Reuters under the Freedom of Information Act, in which USG personnel discuss potential legal exposure if the Saudi coalition continues killing innocent civilians via airstrikes).

18. Letter from Ted W. Lieu, U.S. Congressman, to Mike Pompeo, U.S. Sec'y of State (Oct. 10, 2018), https://lieu.house.gov/sites/lieu.house.gov/files/2018-10-10%20REP%20Ted%20Lieu%20letter%20to%20SEC%20Pompeo%20on%20Yemen.pdf; Letter from Mary Elizabeth Taylor, Assistant Sec'y, Bureau of Legislative Affairs, to Ted W. Lieu, U.S. Congressman (Nov. 21, 2018), https://lieu.house.gov/sites/lieu.house.gov/files/2018-11-21%20RESPONSE%20REP%20Ted%20Lieu%20letter%20to%20SEC%20Pompeo%20on%20Yemen.pdf.

19. Robert Burns & Matthew Lee, *At Turning Point, U.S. Urges Yemen Cease-Fire, Political Talks*, ASSOCIATED PRESS (Oct. 31, 2018), https://www.apnews.com/a91c29ebd6cb4175bab93a05f4ef6bce.

20. Ryan Goodman first noted the applicability of this OLC opinion to the US's support of the Saudi coalition. *See* Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess U.S. and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/.

21. *See* Oona Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 41–51 (2019) (explaining that USG personnel are unlikely to be found liable in a domestic prosecution for aiding and abetting violations of the War Crimes Act given the difficulty of establishing the requisite *mens rea*).

There are two assumptions which this Note makes in its analysis. First, this Note assumes that war crimes were, in fact, committed. However, any domestic or international court would have to make this determination based on a careful analysis of the facts and the law. Second, this Note assumes that an international criminal tribunal would have jurisdiction over the matter, bearing in mind that neither the United States, Saudi Arabia, nor Yemen are parties to the Rome Statute, and a U.N. Security Council referral to the ICC under its Chapter VII authority is highly unlikely.[22] Thus, this Note's assumption of jurisdiction is only for the purpose of undertaking a substantive analysis of aiding and abetting liability. Finally, it is worth making two additional clarifications. The first is that aiding and abetting is a form of individual criminal liability and should not be confused with the body of international law dealing with state responsibility for internationally wrongful acts, which is addressed by the International Law Commission's (ILC) Articles on State Responsibility. Second, this Note does not address possible immunities for USG personnel.

II. The Development of Aiding and Abetting Liability in International Criminal Law

In international criminal law, aiding and abetting is a form of accessorial liability in which the accused is alleged to have facilitated the commission—or, at the very least, the attempted commission—of crimes by others (i.e. the principal actors).[23] After explaining the space which aiding and abetting occupies as a mode of liability in international criminal law, this section will discuss the development and solidification of its elements.

Aiding and abetting is distinguished from joint criminal enterprise (JCE), a form of commission which attracts criminal liability as a principle.[24] There are three separate variants of JCE, but all three share the same *actus reus*: a plurality of persons, the existence of a common criminal design, and participation by the accused in that common design.[25] JCE requires the accused to have rendered a significant contribution to the relevant crime, whereas aiding and abetting requires a substantial contribution, and the latter has been treated by some judges at the ad

22. *See* Rome Statute, *supra* note 16, art. 13.

23. Manuel Ventura, *Chapter 7: Aiding and Abetting*, *in* Modes of Liability in International Criminal Law ¶ 2 (Jerome de Hemptinne et al. eds., Cambridge Univ. Press 2019).

24. *Id.* ¶ 6

25. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

hoc tribunals as a higher threshold.[26] With respect to the *mens rea*, "basic" JCE, or JCE I, members are required to share the intent to commit the relevant crime; JCE II members are required to have knowledge of a common concerted system of ill-treatment of detainees and must have an intent to further that system; and JCE III requires an intent to commit the crime, foreseeability to the accused that a different crime than the one agreed upon by the group might be committed, and willingness of the accused to continue their participation despite the risk of that different crime occurring.[27]

By contrast, the *mens rea* for aiding and abetting is knowledge of assisting the commission of a specific crime committed by the principal, and the accused need not share the intent of the principal.[28] Thus, if the accused only has knowledge that their assistance is helping a single person commit a crime, they may only be held liable for aiding and abetting that crime, even if the principal perpetrator is part of a wider criminal enterprise.[29] Aiding and abetting liability also differs from JCE in that "no proof is required of the existence of a common concerted plan."[30] Consequently, aiding and abetting does not require a plurality of persons; a single individual can aid and abet the crimes committed by the principals.[31]

Aiding and abetting also stands in contrast to co-perpetration, another form of individual criminal liability under international criminal law. Co-perpetration is like JCE in requiring a plurality of persons as well as a common plan.[32] However, co-perpetration requires that each

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26. Ventura, *supra* note 23, ¶ 9*; see also* Prosecutor v. Tadić , Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (explaining that the acts of the alleged aider and abettor must have "a substantial effect upon the perpetration of the crime" and, by contrast, the acts of the JCE participant must "in some way [be] directed to the furthering of the common plan or purpose"). *But see* Kai Ambos, *The ICC and JCE: What Contribution Is Required under Article 25(3)(d)?*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS 592, 599–600 (Carsten Stahn ed., 2015) (questioning this distinction and explaining that ad hoc tribunal jurisprudence has consistently used the word "significant" to define what it means for particular acts to be "substantial").

27. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

28. *Id.* ¶ 229.

29. Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

30. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

31. Ventura, *supra* note 23, ¶ 9.

32. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 343 (Jan. 29, 2007).

individual provide an essential contribution to the commission of the crime.[33] In practical terms, this means that each participant has the power to frustrate the commission of the crime by not performing their assigned duties.[34] Aiding and abetting does not require a contribution of this kind: the aider and abettor merely provides assistance to those who control the commission of the crime.[35] This is why co-perpetration results in criminal liability as a principal whereas aiding and abetting results in an accessorial mode of criminal liability.[36]

A. *The* Actus Reus*: "Substantial Effect"*

The *actus reus* for aiding and abetting is an act which has a "substantial effect" upon the perpetration of the principal crime. Its development began with the prosecutions of Nazi war criminals and their accomplices in the immediate aftermath of World War II. In the case of *Zyklon B*, three defendants were charged before a British military tribunal with knowingly supplying poison gas to the Waffen-SS for use in concentration camp exterminations.[37] The defendants worked for a firm that supplied gas that contained the dangerous poison Zyklon B, intended for the extermination of vermin.[38] The firm's gassing technician claimed innocence under the rationale that he had no knowledge that this poisonous gas was being used by the SS to exterminate human beings.[39] Writing for the court, the Judge Advocate centered the inquiry on whether, given the technician's subordinate position, he was "in a position either to influence the transfer of gas to Auschwitz or to prevent it."[40] If the technician was not in a position to influence or prevent the transfer, then his knowledge of the use to which the gas was being put could not make him guilty.[41] The Judge Advocate acquitted the technician under this reasoning.

In the *Einsatzgruppen* case, heard before a U.S. military tribunal sitting at Nuremberg, all but one of the accused were SS officers charged

33. *Id.* ¶¶ 346–48.

34. *See id.* ¶ 347 ("[O]nly those to whom essential tasks have been assigned—and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks—can be said to have joint control over the crime.").

35. Ventura, *supra* note 23, ¶ 10.

36. *Id.*

37. The Zyklon B Case: Trial of Bruno Tesch and Two Others, Case No. 9, 1 Law Reps. of Trials of War Crims. 93, 93–103 (British Mil. Ct. Hamburg, 1946).

38. *Id.* at 94.

39. *Id.* at 97.

40. *Id.* at 102.

41. *Id.*

with war crimes and crimes against humanity.[42] One of the defendants, Klingelhoefer, held a variety of roles, including as an interpreter. He was found guilty because "in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found."[43] By contrast, the same court held that the low rank of Ruehl, another officer, did not place him in "a position where his lack of objection in any way contributed to the success of any executive operation."[44]

From these cases, an element of aiding and abetting took shape: that liability hinges upon the effect that an accomplice's act or omission had on the success of the principal crime. This principle later crystallized into the *actus reus*: the aider and abettor acted—or failed to act—in a way which had a substantial effect upon the perpetration of the principal crime.[45] The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) fully articulated this requirement in *Furundžija*, finding that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[46]

The question of whether an aider and abettor's assistance meets the "substantial effect" threshold requires a fact-specific, case-by-case inquiry.[47] For instance, the ICTY Trial Chamber in *Furundžija* found that "presence, when combined with authority, can constitute . . . the *actus reus* of the offence [sic]."[48] It was alluding to *Akayesu*, a case before the International Criminal Tribunal for Rwanda (ICTR) in which the mayor of a commune was accused of aiding and abetting acts of sexual violence.[49] The ICTR found that, under Article 6(1) of its founding statute—which codified aiding and abetting as a form of individual

42. United States v. Otto Ohlendorf, 4 Trials of War Crims. Before the Nuernberg Mil. Tribunals 509–87 (1951).

43. *Id.* at 569.

44. *Id.* at 581.

45. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)

46. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

47. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

48. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 209 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

49. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 12 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

criminal liability—the defendant aided and abetted acts of sexual violence "by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises . . . which, by virtue of his authority, sent a clear signal of tolerance for sexual violence."[50] However, this is merely one example, and there is no requirement that the aider and abettor possess a certain level of authority or power before aiding and abetting liability can be found.[51] Further, when there are multiple acts at issue, there is no need to prove that each one individually constituted substantial assistance in order to satisfy the *actus reus*. It is enough that such acts, when viewed cumulatively, substantially contribute to the crime.[52]

With regard to aiding and abetting by omission cases, the defendant must have a legal duty to act in the circumstances.[53] They also must have the means to fulfill this legal duty before liability can be incurred.[54] The ICTY has found that the *actus reus* is satisfied in omission cases if the principal crimes would have been substantially less likely to have occurred had the aider and abettor fulfilled their legal duty to act.[55]

In sum, two important principles emerged from the case law of the post-World War II military tribunals and the ad hoc tribunals established in the 1990s. First, the *actus reus* of aiding and abetting is assistance or support which has a substantial effect upon the perpetration of the principal crime. Second, liability can be incurred for both acts and omissions, and the substantial effect inquiry will be guided by a fact-specific analysis that examines the aider and abettor's actions—or failure to act—in relation to the principal crime.

B. *The Rise and Fall of the "Specific Direction" Requirement*

The ICTY and SCSL have both held, after a thorough assessment of state practice and caselaw, that the "specific direction" requirement is not grounded in customary international law. These tribunals were

50. *Id.* ¶ 694.

51. *See* Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Judgment, ¶ 195 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

52. *See* Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A, Judgment, ¶¶ 71–72 (Int'l Crim. Trib. for Rwanda Sept. 19, 2005) (finding that the *actus reus* of aiding and abetting had been established on the basis of multiple acts).

53. Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgment, ¶ 274 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

54. Prosecutor v. Sainović et. al., Case No. IT-05-87-A, Judgment, ¶ 1677 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

55. *Id.* ¶¶ 1679, 1682.

analyzing the dilemma posed by the following scenario: one individual provides support to another that is intended for lawful purposes (for instance, military assistance provided for self-defense), and the latter uses such support to commit an international crime (for instance, a war crime). Imposing liability on the first individual would significantly broaden the scope of aiding and abetting liability, whereas exculpating the first individual would significantly narrow its scope.

In 1999, the ICTY Appeals Chamber addressed this issue in *Tadić*. It held that an accomplice's support must not only have a substantial effect upon the perpetration of the crime, but must be "*specifically directed* to assist, encourage, or lend moral support to the perpetration."[56] Many subsequent ICTY and ICTR appeal judgments explicitly referred to "specific direction" when enumerating the elements of aiding and abetting, often repeating the *Tadić* language verbatim.[57] At the same time, a collection of other ICTY and ICTR appeal judgments did *not* include specific direction anywhere in their aiding and abetting analysis.[58] The ICTY Appeals Chamber in *Perišić* did adopt specific

56. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added).

57. *See* Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007) (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime"); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 102(i) (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004) (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime"); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation marks omitted); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime") (internal quotation marks omitted); *see also* Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 74 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010) (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime") (internal quotation marks omitted); Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 79 (Int'l Crim. Trib. for Rwanda Aug. 29, 2008) (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime"); Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶ 139 (Int'l Crim. Trib. for Rwanda Mar. 12, 2008) (stating that "the *actus reus* for aiding and abetting extermination as a crime against humanity comprises of acts specifically directed to assist, encourage, or lend moral support to the perpetration of this crime").

58. *See* Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, ¶ 352 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (defining aiding and abetting as "all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by

direction, adding that this element constitutes the *actus reus*, rather than the *mens rea*, of aiding and abetting.[59] It noted that specific direction may be self-evident when the acts in question are geographically or otherwise proximate to the crimes of the principal perpetrators.[60] However, when the accused aider and abettor is remote from the crimes of the principal perpetrators, explicit consideration of specific direction is necessary.[61]

Under the specific direction requirement, the provision of general assistance which could be used for both lawful and unlawful purposes would not be sufficient, on its own, to prove that such assistance was specifically directed to the crimes of the principal perpetrators.[62] Instead, evidence would need to be introduced establishing a direct link between the support provided by the accused aider and abettor and the crimes committed by the principal perpetrators.[63] Thus, the specific direction requirement significantly narrows the scope of liability in aiding and abetting cases by exculpating individuals who provide support which could be used for a variety of purposes.

This requirement was rejected by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) in 2013. In *Prosecutor v. Taylor*, the court held that aiding and abetting liability is established by assistance which has a substantial effect upon the crime, not by the particular manner in which such assistance was provided.[64] Its rationale was that the ICTY Appeals Chamber in *Perišić* did not hold that the specific direction requirement was a part of customary international law, and that the ICTY was merely applying internally binding precedent.[65] Accordingly, it held that the specific direction requirement was not an

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the requisite *mens rea*") (internal quotation marks omitted); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) (finding that the *actus reus* of aiding and abetting consists of "acts or omissions [which] assist, encourage or lend moral support to the principal perpetrator of the crime and this support must have a substantial effect upon the perpetration of the crime"); Karera v. Prosecutor, Case No. ICTR-01-74-A, Judgment, ¶ 321 (Int'l Crim. Trib. for Rwanda Feb. 2, 2009) (finding that the *actus reus* of aiding and abetting consists of "acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime").

59. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

60. *Id.* ¶ 38.

61. *Id.* ¶ 39.

62. *Id.* ¶ 44.

63. *Id.*

64. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 482 (Special Ct. for Sierra Leone Sept. 26, 2013).

65. *Id.* ¶ 476.

element of aiding and abetting liability under customary international law.[66] To support its conclusion, the court provided an in-depth analysis of IMT caselaw, the definition of aiding and abetting in the 1996 International Law Committee's Draft Code of Crimes Against the Peace and Security of Mankind, the practice of domestic jurisdictions on aiding and abetting, ICTY jurisprudence, and Article 25(3)(c) of the Rome Statute.[67]

Reconciling the conflicting positions of the ICTY and the SCSL on specific direction requires an examination of the statutes that established these two tribunals and their place in the international legal regime. The ICTY was established by the United Nations Security Council acting under its Chapter VII authority.[68] A Security Council endorsement gave this tribunal prominent stature under Article 25 of the U.N. Charter, which requires U.N. member states to "accept and carry out the decisions of the Security Council in accordance with the present Charter."[69] Further, unlike the IMTs formed after the Second World War, this tribunal could draw on a widely-accepted body of law that defined and criminalized international crimes such as genocide and war crimes.[70]

However, the ICTY's mandate was premised on the principle—integral to international criminal law—of *nullum crimen sine lege*, which posits that a defendant should not face criminal punishment for

66. *Id.* ¶ 481.

67. *See id.* ¶¶ 417–37. The International Law Commission (ILC) was established by the United Nations General Assembly in 1947 to fulfill its charter-based mandate of undertaking studies that encourage the development and codification of international law. *See* U.N. Charter art. 13. It consists of experts on international law, including governmental legal advisers, elected by the General Assembly. Article 2(3)(d) of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind establishes individual criminal responsibility for any individual who "[k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime" and the commentary to this article explains that the accomplice "must knowingly provide assistance to the perpetrator of the crime." Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, art. 2, commentary to art. 2, ¶ 11, U.N. Doc. A/51/10 (1996). While the General Assembly never formally adopted the Draft Code, it did pass a resolution expressing its "appreciation" for its completion and drew the attention of states participating in the Preparatory Committee on the Establishment of an International Criminal Court to the "relevance of the draft Code to their work." G.A. Res. 51/160, ¶ 2 (Jan. 30, 1997).

68. *See* S.C. Res.827, preamble (May 25, 1993) (determining that this situation continues to constitute a threat to international peace and security).

69. U.N. Charter art. 25.

70. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *see also* Geneva Conventions, *supra* note 15.

conduct which did not constitute a crime at the time such conduct occurred.[71] For this reason, the United Nations Secretary-General, in a 1993 report to the Security Council on the ICTY, emphasized that "the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[72] Thus, critics of the SCSL's decision to reject specific direction have pointed out that the specific direction requirement need not be based in customary international law, since it was meant to narrow the scope of liability for aiding and abetting as a means of complying with the *nullum crimen sine lege* requirement.[73] In other words, by narrowing the scope of aiding and abetting liability through the specific direction requirement, the ICTY ensured that it only prosecuted defendants for crimes which had widespread acceptance as customary international law. Consequently, proponents of the specific direction requirement believe it is better viewed as a means of narrowing the scope of liability to ensure compliance with this principle, rather than as a specific element of aiding and abetting.[74] In fact, both proponents and critics of the requirement acknowledge that it likely does not have the widespread adherence necessary to be considered part of customary international law.[75]

If specific direction is not based in customary international law but is instead meant to ensure compliance with the principle of *nullem crimen sine lege*, the question is what to make of the SCSL's *Taylor* decision

71. *See* Rome Statute, *supra* note 16, art. 22.

72. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993).

73. *See* Kevin Jon Heller, *The SCSL's Incoherent—and Selective—Analysis of Custom*, OPINIO JURIS (Sept. 27, 2013), http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/ (explaining that the specific direction requirement "does not *expand* criminal liability beyond custom; it *narrows* it").

74. *See id.* (explaining that whether tribunals should adopt the specific direction requirement "is a question for criminal law theory—what elemental structure does the normative foundations of aiding and abetting require").

75. *See id.* ("To be clear, I am *not* arguing that aiding and abetting under customary international law requires specific direction. I strongly doubt that it does."); *see also* James Stewart, *"Specific Direction" Is Unprecedented: Results from Two Empirical Studies*, BLOG OF THE EURO. J. OF INT'L L. (Sept. 4, 2013), https://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/ (finding that the specific direction requirement has no basis in customary international law after a comprehensive survey of aiding and abetting incidents in the history of international criminal law and academic scholarship on aiding and abetting at national, international, and theoretical levels).

rejecting this principle outright. The SCSL was founded by an agreement between the government of Sierra Leone and the United Nations.[76] The Security Council declared that the SCSL would be an "independent special court" and requested that the Secretary-General negotiate an agreement for its creation with the government of Sierra Leone.[77] It was not established pursuant to the Council's Chapter VII authority, and its decisions do not carry the legally binding effect conferred by Article 25 of the U.N. Charter. In the SCSL's founding statute, Article 20(3) provides that the judges of the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."[78] But in rejecting the specific direction requirement, the SCSL overruled a principle that had made its way into the jurisprudence of both the ICTY and ICTR.

While it would seem, then, that the ICTY's holding on specific direction should be seen as authoritative, the tribunal has changed its view in recent years. In *Sainović et. al.*, the ICTY Appeals Chamber unequivocally rejected specific direction as a requirement of aiding and abetting liability, finding that it actually conflicted with prevailing ICTY jurisprudence and customary international law.[79] Similar to the SCSL in *Taylor*, the court justified its conclusion through its own analysis of IMT caselaw, domestic law on aiding and abetting, the 1996 ILC Draft Code of Crimes, and the Rome Statute of the ICC.[80]

In conclusion, the holdings of the ICTY and SCSL that specific direction is not grounded in customary international law stand on solid ground given their meticulous survey of state practice and the legal landscape. The ICTY's conclusion carries particular weight given its establishment under Chapter VII of the U.N. Security Council. However, these tribunals never explain *why* the specific direction requirement needs a customary foundation, since it does not *expand* criminal liability beyond customary foundations but instead *narrows* it. Thus, specific direction is best analyzed as a policy matter relating to the elemental structure best suited for aiding and abetting liability. Any future international criminal tribunal may very well find sound policy

76. *See* Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145 ("[h]aving been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000") [hereinafter SCSL Founding Statute].

77. S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

78. SCSL Founding Statute, *supra* note 76, art. 20.

79. *See* Prosecutor v. Sainović et. al., Case No. IT-05-87-A, Judgment, ¶ 1650 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

80. *Id.* ¶¶ 1627–1648.

reasons for its use, such as addressing situations where assistance is given to an organization that engages in lawful as well as unlawful activities.[81] Prosecutors at such a tribunal may also wish to adopt this policy as a means of prioritizing those who actually had the explicit purpose of aiding and abetting the principal perpetrator in their actions. Finally, specific direction would preclude any argument by a defendant that an aiding and abetting prosecution runs afoul of *nullum crimen sine lege*, since it is narrowing the scope of a form of individual liability that is already well-established in international criminal law.

C. *The* Mens Rea*: Knowledge*

The *mens rea* for aiding and abetting is knowledge rather than intent. The aider and abettor must have knowledge that their acts assist the commission of a specific crime committed by the principal perpetrator.[82] They need not know the precise crime intended and committed by the principal perpetrator so long as they were aware "of the essential elements of the crime which was ultimately committed."[83] When the aider and abettor's conduct could have assisted the commission of multiple crimes, one must prove they were aware that one of a number of crimes would probably be committed, and one of those crimes was in fact committed.[84] The aider and abettor need not share the *mens rea* of the principal perpetrator,[85] and they need not have acted for the purpose of assisting the commission of the underlying crime.[86]

The SCSL Appeals Chamber concurred with the ICTY and ICTR in finding that the *mens rea* is knowledge rather than intent.[87] It also

81. *See* Ventura, *supra* note 23, ¶ 44.

82. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

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

84. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

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

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

87. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 413–37 (Special Ct. for Sierra Leone Sept. 26, 2013). Notably, the Chief Prosecutor at the Office of U.S. Military Commissions cited this aspect of the Taylor decision when arguing for a knowledge *mens rea* for aiding and abetting under customary international law in the trial of Khalid Shaikh Mohammad. *See* Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016) (explaining that the U.S.

adopted an alternative recklessness *mens rea* standard, which would impose liability when the accused is "aware of the substantial likelihood" that their acts would assist the commission of a crime.[88] However, the SCSL is the only ad hoc tribunal to have adopted such a standard, and it offers no basis for a recklessness *mens rea* in customary international law.[89]

The Rome Statute of the International Criminal Court uses terminology for the aiding and abetting *mens rea* which seems to differ from this standard. Article 25(2) first establishes individual criminal responsibility for any person who commits a crime within the jurisdiction of the Court.[90] Article 25(3)(c) then provides that aiding and abetting liability arises when the accused acts "[f]or the purpose of facilitating the commission of such a crime."[91] However, this language appears to be the product of diplomatic compromise rather than an announcement of a new legal standard. David Scheffer, Ambassador-at-Large for War Crimes Issues during the Clinton Administration and lead U.S. negotiator at the Rome Conference for an International Criminal Court, posited that "the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and. . .is not a statement of customary international law."[92] Scheffer reasons that adopting an intent *mens rea* would eliminate the distinction between aiders and abettors and co-

government's supplemental filing in that case "drew extensively from the 2013 appellate decision of the international criminal tribunal in the prosecution of Charles Taylor"); *see also* United States v. Mohammad, Case No. AE 120B, Government Motion to Make Minor Conforming Changes to the Charge Sheet, 4 (Mil. Comm'n Trial Judiciary Oct. 18, 2013), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE120B(Gov%20Sup)).pdf (Mark Martins, the Chief Prosecutor at the Office of U.S. Military Commissions, arguing that "[t]he knowledge required is simply a knowing participation that the acts would assist the commission of a crime" and that "[a] conscious desire or willingness to achieve the criminal result is not required"). However, Article III courts are divided on this matter. *See* cases cited *infra* note 92.

88. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 438 (Spec. Ct. for Sierra Leone Sept. 26, 2013) (internal quotation marks omitted).

89. *See* Heller, *supra* note 73, ¶ 414 (critiquing the SCSL's adoption of a recklessness standard and noting that "[e]very post-WWII case cited by the *Taylor* AC against the specific-direction requirement adopts knowledge, not recklessness, as the *mens rea* for aiding and abetting" and that the SCSL "does not cite *anything* other than its own jurisprudence" in defense of a recklessness standard). *See also* Ventura, *supra* note 23, ¶ 98 (noting that the case law of the ad hoc tribunals has recognized that "knowledge is the applicable mental state for aiding and abetting liability" and that "[o]nly the SCSL has expressed a different view").

90. Rome Statute, *supra* note 16, art. 25(2).

91. *Id.* art. 25(3)(c).

92. Brief of David J. Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari at 5, 13, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2010) (No. 09-1262). In Talisman, the Second Circuit analyzed aiding and abetting liability for purposes of the Alien Tort Statute (ATS), which

perpetrators.[93] The word "purpose" in Article 25(3)(c) should therefore be read as implying the obvious point that an aider and abettor purposely acts in a manner that has the consequence of facilitating the commission of the underlying crime.[94] To bolster this line of reasoning, Scheffer argues that the *mens rea* for aiding and abetting is actually discerned when Article 25(3)(c) is viewed in tandem with Article 30, which prescribes the *mens rea* for all crimes within the jurisdiction of the Court "[u]nless otherwise provided."[95] Article 30(2)(b) defines intent in two distinct ways: "[i]n relation to a consequence, that person means to cause that consequence *or* is aware that it will occur in the ordinary course of events."[96] According to Scheffer, the negotiators at Rome "did not relegate aiding and abetting to the first prong of this formulation" because the intent of the aider and abettor is logically found in their awareness that the consequence will occur "in the ordinary course of events."[97] As Scheffer points out, he is not alone in viewing Article 25(3)(c) this way: Donald Piragoff, lead Canadian negotiator on general principles of international criminal law in the years leading up to the Rome Conference, has stated that under Article 30(2)(b), intent for

permits a litigant to sue in U.S. courts for violations of international law which have definite content and acceptance among civilized nations equivalent to the historical paradigms familiar when the ATS was enacted in the 18th century. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). The Talisman court held that, for ATS purposes, only a purpose *mens rea* for aiding and abetting had the requisite international acceptance. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009). The D.C. Circuit Court of Appeals, on the other hand, agreed with Scheffer's assessment of the Rome Statute as unrepresentative of custom and found that the *mens rea* for aiding and abetting is knowledge under customary international law. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 32–39 (D.C. Cir. 2011). The Fourth Circuit subsequently addressed this split in Aziz v. Alcolac, Inc., holding that custom is merely one source of international law and that the Rome Statute provides more definite and accepted content for ATS purposes. *See* Aziz v. Alcolac, Inc., 658 F.3d 388, 398–401 (4th Cir. 2011). This circuit split remains unresolved until the US Supreme Court weighs in on the appropriate *mens rea* for aiding and abetting liability under the ATS.

93. *See* Scheffer, *supra* note 92, at 16. One might reasonably infer that the drafters of the Rome Statute did not mean to eliminate this distinction because co-perpetrator liability already exists in Article 25(3)(a), which imposes liability on a person who commits a crime within the jurisdiction of the Court "as an individual, jointly with another or through another person." Rome Statute, *supra* note 16, art. 25(3)(a). Thus, eliminating the distinction between an aider and abettor and a co-perpetrator would render Article 25(3)(c) largely superfluous.

94. Scheffer, *supra* note 92, at 19.

95. *See* Rome Statute, *supra* note 16, art. 30.

96. *Id.* art. 30(2)(b) (emphasis added).

97. *See* Scheffer, *supra* note 92, at 18–19.

aiding and abetting may be satisfied "by an awareness that a consequence will occur in the ordinary course of events."[98]

However, the ICC's treatment of Article 25(3)(c) suggests that it does not see eye-to-eye with Scheffer and Piragoff. The Court has separated the *mens rea* inquiry into two components: the aider and abettor's *mens rea* in relation to the principal offense and their *mens rea* in relation to their own conduct as an accessory.[99] When analyzing the principal offense *mens rea*, the Court made reference to Article 30(2)(b) and found that the accused must simply be aware that the principal perpetrator's offense will occur "in the ordinary course of events."[100] But when analyzing the accessorial *mens rea*, the Court held that "the accessory must have lent his or her assistance with the aim of facilitating the offence."[101] In other words, it is insufficient that the accessory "merely knows that his or her conduct will assist the principal perpetrator in the commission of the offence."[102] By stratifying the *mens rea* inquiry in this fashion, the ICC adhered to the ad hoc tribunal standard of requiring a knowledge *mens rea* for the principal offense while imposing a heightened intent *mens rea* for the aider and abettor's conduct as an accessory.[103] But this distinction may be more important in theory than in practice. As Manuel Ventura points out, the ICTY has previously held that in the vast majority of cases, an aider and abettor's knowledge that their acts assist the commission of a principal crime "will allow for no other reasonable inference than that the accused intended to assist the commission of an offence."[104]

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98. Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 855 (Otto Triffterer ed., 2d ed. 2008). Canadian agreement in this context is not inconsequential because Canada was a member and chair of the "like-minded caucus" at the Rome Conference for the Negotiation of an International Criminal Court. Members of this geographically heterogeneous caucus held views on the conception of the Court that were diametrically opposed with those held by the permanent members of the U.N. Security Council, such as the United States. Thus, given their divergent views on other matters, the shared U.S.-Canadian interpretation of Article 25(3)(c) is significant. For further discussion of the impact this caucus had on negotiations in Rome, *see* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 18–19 (2017).

99. Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13, Judgment, ¶ 97 (Oct. 19, 2016).

100. *Id.* ¶ 98.

101. *Id.* ¶ 97.

102. *Id.*

103. For an excellent discussion of why this two-pronged standard actually provides clarity rather than ambiguity, see Ventura, *supra* note 23, ¶¶ 79–80.

104. *See id.* ¶ 81; *see also* Prosecutor v. Popovic et al., Case No. IT-05-88-T, Judgment, ¶ 1500 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010) ("The Trial Chamber notes that in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists a crime,

In sum, the ICTY, ICTR, and SCSL define knowledge as the *mens rea* for aiding and abetting. The text of the Rome Statute does not clearly adopt this standard, and the ICC has previously held that intent is the appropriate *mens rea* in relation to the aider and abettor's conduct as an accessory. This interpretation is at odds with the views of U.S. and Canadian negotiators, who believe the word "purpose" in Article 25(3)(c) is best viewed in tandem with the "ordinary course of events language" in Article 30(2)(b). A case before the ICC in which Article 25(3)(c) is more directly implicated would help clarify disagreement over its interpretation. Nonetheless, Scheffer's amicus brief makes clear that the Rome Statute was by no means a codification of customary international law in every respect. A more authoritative ICC holding on the *mens rea* for aiding and abetting should thus not be automatically accepted as indicative of customary international law.[105] Any future international tribunal confronting the *mens rea* of aiding and abetting liability should analyze any ICC decision on this matter against the backdrop of well-established jurisprudence by the ad hoc tribunals and the SCSL establishing knowledge as the appropriate *mens rea*.

III. Application of Aiding and Abetting Liability to the Armed Conflict in Yemen

The foregoing analysis demonstrates that aiding and abetting liability has three distinct and undisputed elements: first, that a principal committed an international crime; second, that the aider and abettor provided assistance which had a substantial effect upon the perpetration of that principal crime; and third, that the aider and abettor had knowledge that such assistance would assist the commission of the principal crime. Any international court presiding over a case which implicates USG personnel in the war crimes committed by the Saudi coalition is likely to analyze aiding and abetting liability using these three elements. However, for purposes of this Note, the first element is assumed, and the second and third elements will take up the focus of this section.

will allow for no other reasonable inference than that the accused intended to assist the commission of an offence [sic].").

105. It is possible that the ICC could make a more definitive holding based on "applicable treaties and the principles and rules of international law," which the Court is mandated to apply "[i]n the second place" if an answer cannot be gleaned from the Rome Statute, the Rome Statute's Elements of Crimes, or the ICC's Rules of Procedure and Evidence. *See* Rome Statute, *supra* note 16, art. 21. The "principles and rules of international law" would presumably include ICTY, ICTR, and SCSL case law on the aiding and abetting *mens rea*, and this would synchronize such a holding with customary international law.

A. *Examining Current Complicity*

1. Applying the *Actus Reus*: U.S. Support for Saudi Coalition Airstrikes

The substantial effect element, as applied to U.S. military aid to Saudi Arabia, is the first part of this analysis. The issue to be resolved is: does U.S. military aid to Saudi Arabia have a substantial effect upon the perpetration of Saudi Arabia's war crimes?

To answer that question, a look at the volume and nature of U.S. assistance is necessary. From 2013 to 2017, the United States accounted for sixty-one percent of Saudi Arabia's share of arms imports.[106] Saudi Arabia was the world's second largest arms importer during this time period, and its imports had increased by 225% compared to the previous four-year period.[107] The Obama Administration reportedly offered more than $115 billion in arms-sales offers to Saudi Arabia, which included air-to-ground missiles, small arms and ammunition, and attack helicopters.[108] The Trump Administration announced its own $110 billion arms deal with Saudi Arabia, which included tanks, fighter jets, and combat ships.[109] However, as of October 2018, Saudi Arabia had only followed through on $14.5 billion in purchases.[110] Nonetheless, these arms deals demonstrate just how dependent Saudi Arabia is on the United States for its military objectives, and just how willing the United States is to accommodate those objectives. Further, the United States provides day-to-day assistance to the coalition: American mechanics service Saudi F-15 warplanes and carry out repairs on the ground,[111] and until recently, the United States provided mid-air refueling to coalition warplanes.[112] In fact, a spokeswoman for the

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106. Pieter D. Wezeman et al., *Trends in International Arms Transfers, 2017*, SIPRI FACT SHEET 6 (Mar. 2018), https://www.sipri.org/sites/default/files/2018-03/fssipri_at2017_0.pdf.

107. *Id.* at 11.

108. Yara Bayoumy, *Obama Administration Arms Sales Offers to Saudi Top $115 Billion: Report*, REUTERS (Sept. 7, 2016), https://www.reuters.com/article/us-usa-saudi-security/obama-administration-arms-sales-offers-to-saudi-top-115-billion-report-idUSKCN11D2JQ.

109. Jeremy Diamond & Zachary Cohen, *Trump Signs Kushner-Negotiated $100B Saudi Arms Deal*, CNN (May 20, 2017), https://www.cnn.com/2017/05/19/politics/jared-kushner-saudi-arms-deal-lockheed-martin/index.html.

110. Jeremy Diamond & Barbara Starr, *Trump's $110 Billion Saudi Arms Deal Has Only Earned $14.5 Billion So Far*, CNN (Oct. 13, 2018), https://www.cnn.com/2018/10/12/politics/trump-khashoggi-saudi-arabia-arms-deal-sanctions/index.html.

111. Declan Walsh & Eric Schmitt, *Arms Sales to Saudis Leave American Fingerprints on Yemen's Carnage*, N.Y. TIMES (Dec. 25, 2018), https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html.

112. *See* Stewart, *supra* note 12.

U.S. Air Force Central Command announced that the United States had transferred more than eighty-eight million pounds of fuel to more than 2,800 aircraft refueling operations between January and mid-March 2018.[113]

It is clear that this weaponry and technical assistance is being put to use by the Saudi coalition in Yemen. Between March 2015 and December 2016, Human Rights Watch found U.S.-supplied weapons at the site of twenty-three internationally unlawful coalition airstrikes.[114] Human Rights Watch also found that U.S.-produced weapons had been used in two of the war's deadliest incidents: an attack on a market which killed at least ninety-seven civilians in March 2016[115] and an attack on a crowded funeral ceremony in October 2016 which killed at least 100 people and wounded more than 500, including children.[116] The U.N. Panel of Experts also documented numerous air strikes committed with U.S.-manufactured Mark 80 series bombs and U.S.-produced "Paveway" guidance units in 2017.[117] Finally, a recent investigative report found U.S.-manufactured bombs at the scene of a number of air-strikes which killed or wounded civilians since the conflict began in 2015.[118]

The volume of U.S.-provided weaponry and Saudi Arabia's willingness to use such weaponry in Yemen makes reasonable the inference that this assistance has had a substantial effect upon the perpetration of the potential war crimes documented by the United Nations. The details of the 2018 report by the U.N. Panel of Experts support this inference: the report found that coalition airstrikes "have caused most of

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113. Oriana Pawlyk, *General Argues to Continue Refueling Saudi Planes in Yemen Fight*, MILITARY.COM (Mar. 13, 2018), https://www.military.com/daily-news/2018/03/13/general-argues-continue-refueling-saudi-planes-yemen-fight.html.

114. *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, HUM. RTS. WATCH (Dec. 8, 2016), https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes ("internationally unlawful" in this context meaning airstrikes which targeted or disproportionately affected civilians, *see supra* note 106).

115. *Yemen: US Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016), https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike.

116. *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH (Oct. 13, 2016), https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime.

117. Letter from the Panel of Experts on Yemen mandated by Security Council resolution 2342 (2017) to the President of the S.C. (Jan. 26, 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/N1800513.pdf (documenting at least six incidences of Mark 80 series bombs and "Paveway" guidance units being used to target civilians in "Table 5").

118. Nima Elbagir, Salma Abdelaziz & Laura Smith-Spark, *Made in America — Shrapnel Found in Yemen Ties US Bombs to String of Civilian Deaths over Course of Bloody Civil War*, CNN (Sept. 18, 2018), https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/.

the documented civilian casualties" throughout the conflict in Yemen.[119] It also noted that the high civilian toll "raises serious concerns as to the nature and effectiveness of any precautionary measures adopted" and that the practice of conducting "double strikes" which affect first responders raises serious questions about the coalition's adherence to the principles of distinction and proportionality.[120] Clearly, this report on potential war crimes implicates the type of military assistance—bombs, guidance units, and air-to-ground missiles—which the United States has provided en masse to Saudi Arabia over the last decade.[121]

While it would seem that such assistance easily qualifies as having a substantial effect upon the principal crime, U.S. officials deny that they track whether the coalition jets which they refuel carry out airstrikes which kill civilians, and whether such strikes use American-made bombs.[122] However, given the aforementioned reports on U.S.-manufactured bombs found at the scenes of airstrikes resulting in civilian casualties, it is reasonable to infer that USG personnel are aware that such strikes are conducted with U.S.-provided assistance. Any international tribunal assessing aiding and abetting liability would obviously need to make a specific factual determination on this matter. But reports that the Saudis possess a database which tracks the details of every airstrike—including the warplane, the target, and the munitions which were used—make it conceivable that a tribunal could locate such information.[123]

Finally, it should be noted that the specific direction requirement, while seemingly defunct as an element of aiding and abetting liability,

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119. UNHRC Yemen Report, *supra* note 9, ¶ 28.

120. *Id.* ¶ 38. Distinction and proportionality are core principles of international humanitarian law. They proscribe, respectively, attacks which do not distinguish between civilian persons and military combatants—a party to a conflict may only direct attacks against the latter—and attacks which would cause loss of civilian life—or injury to civilians—and/or damage to civilian objects that would be excessive in relation to the expected military advantage. *See What Are the Main IHL Rules Governing Hostilities?* INT'L COMMITTEE OF THE RED CROSS BLOG (Aug. 8, 2017), https://blogs.icrc.org/ilot/2017/08/13/main-ihl-rules-governing-hostilities/ [hereinafter *IHL Rules Governing Hostilities*].

121. It has been reported that officials from the United Arab Emirates have tortured Al-Qaeda in the Arabian Peninsula (AQAP) suspects, and that U.S. officials have directly participated in the interrogations. *See* Maggie Michael, *In Yemen's Secret Prisons, UAE Tortures and US Interrogates*, ASSOCIATED PRESS (June 22, 2017), https://www.apnews.com/4925f7f0fa654853bd6f2f57174179fe. U.S. involvement in this context is beyond the scope of this Note, which focuses on the airstrikes committed by the Saudi coalition. However, for an analysis of the implications of U.S. involvement for domestic aiding and abetting purposes, see Hathaway et al., *supra* note 21, at 41–42.

122. *See* Walsh & Schmitt, *supra* note 111.

123. *Id.*

would be vitally consequential in this context. The United States has engaged in lawful arms sales with Saudi Arabia, and these weapons are capable of being used in compliance with international law—in self-defense, for instance, as permitted by Article 51 of the U.N. Charter.[124] This requirement could exculpate the United States because there is no evidence that the United States has specifically directed its military equipment to assist the perpetration of Saudi Arabia's war crimes.[125] While it remains to be seen how future international criminal tribunals will treat this requirement, its revival would provide a strong defense for USG personnel in the *actus reus* analysis.

2. Applying the *Mens Rea*: U.S. Knowledge of Saudi Coalition War Crimes

The next inquiry is whether the United States provides military assistance to Saudi Arabia with knowledge that such acts assist in the commission of war crimes. Before examining whether such knowledge exists, it is important to contextualize how a knowledge *mens rea* sets a much lower bar than a purpose *mens rea*.

In a March 2017 statement before the Senate Armed Services Committee, General Joseph Votel, the Commander of U.S. Central Command (CENTCOM), testified that the United States is providing "limited assistance" to the Saudi coalition to "help protect their territorial integrity and sovereign borders."[126] This was framed as a response to the seizure of Saudi Arabian border outposts by Houthi rebels and Houthi missile strikes, which have caused casualties deep into Saudi Arabian territory.[127] He also testified that the primary American focus in Yemen is protecting the U.S. homeland from violent extremist organizations (VEO) operating within the country and ensuring

124. *See* U.N. Charter art. 51.

125. Marko Milanovic has noted the intuitive appeal of the specific direction requirement in this context: it seems logical to separate those who provide general assistance to a conflict—with knowledge that international crimes are being committed—from those who specifically direct their assistance to the commission of such crimes. But he also notes the fallacy of exculpating those who provide assistance to a group that engages in a deliberate and systematic policy of internationally unlawful crimes simply because such assistance is not specifically directed. *See* Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perišić*, EJIL: TALK! (Mar. 11, 2013), https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/.

126. *Hearing to Receive Testimony on United States Central Command and United States Africa Command Before the S. Comm. on Armed Services*, 115th Cong. 29–30 (2017) (preparing statement of General Joseph L. Votel, Commander, U.S. Central Command) [hereinafter Testimony of General Votel].

127. *Id.* at 30.

freedom of navigation and commerce through the Red Sea and the Bab al Mandeb Strait.[128] If aiding and abetting liability had a purpose *mens rea*, such motivations would be significant because they are all grounded in established norms of international law—for instance, Article 2(4) of the U.N. Charter prohibiting the use of force against the territorial integrity of another state, or the freedom of navigation on the high seas enshrined in Article 87(a) of the United Nations Convention on the Law of the Sea.[129] In other words, the United States could genuinely deny that it had the purpose of assisting the commission of war crimes.

However, purpose plays no role in the *mens rea* analysis. It is therefore necessary to focus not on what the United States *intends* when it provides military assistance to Saudi Arabia, but whether the United States *knows* that such assistance is being used in the commission of war crimes. More recent testimony by General Votel before the Senate Armed Services Committee in March of 2018 provides information which is relevant to determining whether such knowledge exists. At that hearing, Senator Elizabeth Warren asked General Votel whether the United States is aware of the extent of its complicity, focusing on whether CENTCOM tracks "where a U.S.- refueled aircraft is going, what targets it strikes and the results of the mission."[130] General Votel replied: "Senator, we do not."[131] Senator Warren then asked whether CENTCOM is generally "able to tell whether U.S. fuel or U.S. munitions were used" in airstrikes which lead to civilian casualties.[132] General Votel replied: "Senator, I do not believe we are."[133] This exchange raises a vitally important question in the analysis: can willful ignorance exculpate a defendant from the knowledge requirement of aiding and abetting liability?

This question was addressed in *United States v. Giovanetti*, a Seventh Circuit case which held that a defendant could not escape responsibility under the federal aider and abettor statute through "a deliberate effort

128. *Id.*

129. U.N. Charter art. 2, ¶ 4; United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 (in force on Nov. 16, 1994).

130. *Hearing to Receive Testimony on United States Central Command and United States Africa Command in Review of the Defense Authorization Request for Fiscal Year 2019 and the Future Years Defense Program Before the S. Comm. on Armed Services*, 115th Cong. 45 (2018) (statement of Sen. Elizabeth Warren).

131. *Id.*

132. *Id.*

133. *Id.*

to avoid guilty knowledge" of the principal actor's intentions.[134] In other words, someone who suspected that his actions were furthering illegal activity and took deliberate steps to ensure that suspicion was never confirmed, "far from showing that he was not an aider and abettor . . . would show that he was."[135] While the *mens rea* under the federal aider and abettor statute is much more nuanced and may very well be higher than mere knowledge,[136] this holding is important because it shows the view of an Article III court that willful ignorance cannot be used as a shield against the knowledge prong of aiding and abetting liability.[137]

An international court has yet to address this specific question, but the SCSL Trial Chamber in *Prosecutor v. Taylor* addressed the question of whether a defendant's knowledge for aiding and abetting purposes can be generally inferred by their contributions to the principal crime.[138] Two rebel groups, the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF), had briefly taken control of Sierra Leone in a military coup and conducted a campaign of terror against the civilian population there.[139] Charles Taylor, President of Liberia from 1997 to 2003, was charged with aiding and abetting the atrocities committed by the AFRC/RUF, which included crimes against humanity, violations of Article 3 Common to the Geneva Conventions (Common Article 3) and Additional Protocol II, and the

134. *See* United States v. Giovanetti, 919 F.2d 1223, 1229 (7th Cir. 1990).

135. *Id.*

136. *See* Hathaway et al., *supra* note 21, at 48 (explaining that the term "willfully" in 18 U.S.C. § 2(b) (1951) has been interpreted in three different ways by federal courts). For a discussion of the complicated and controversial history of the aiding and abetting *mens rea* (and complicity *mens rea* generally) under U.S. domestic law, see Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131 (2015).

137. Statements from a former State Department official indicate that this ignorance is, indeed, willful. *See* Walsh & Schmitt, *supra* note 111 (Larry Lewis, who worked as a State Department adviser on civilian harm with the Saudi coalition from 2015 to 2017, admits that "American liaison officers had access to a database that detailed every airstrike: warplane, target, munitions used, and a brief description of the attack" and that such data was readily accessible and could "easily be used to pinpoint the role of American warplanes and bombs in any single strike"); Declan Walsh, *Saudi Warplanes, Most Made in America, Still Bomb Civilians in Yemen*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/world/middleeast/saudi-yemen-airstrikes-civilians.html (providing a video interview with Larry Lewis, who posits that the Saudi coalition made an Excel spreadsheet with details about every airstrike, including the intended target and the weapons used, and that the U.S. had access to this spreadsheet) [hereinafter Statements of Larry Lewis].

138. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 487 (May 18, 2012).

139. *Id.* ¶ 46.

conscription of child soldiers.[140] The prosecution alleged that Taylor had provided "strategic instruction" and "arms and ammunition" to the AFRC/RUF alliance, and that he had knowledge that his conduct would substantially assist the group in committing atrocities.[141]

In analyzing whether Taylor had such knowledge, the Trial Chamber noted that he was "evasive in his testimony as to what and when he knew about the crimes being committed in Sierra Leone."[142] But it found that Taylor "knew of the AFRC/RUF's operational strategy and intent to commit crimes from the clear and consistent information he received," which included extensive media coverage of the group's atrocities in Sierra Leone and the daily briefings from his national security advisor about the situation.[143] It also took note of Taylor's admission that anyone supporting the AFRC/RUF in 1998 would be supporting a group engaged in a campaign of atrocities against Sierra Leonean civilians.[144] The Appeals Chamber affirmed this finding, holding that, based on the "totality of the evidence," it could reach a "reasonable conclusion" that Taylor knew of the crimes being committed by the AFRC/RUF.[145]

Taylor established a precedent for an international court to infer knowledge based on the information generally available to the alleged aider and abettor. Importantly, neither the Trial Chamber nor the Appeals Chamber of the SCSL required that Taylor have knowledge of the specific ways in which his support furthered the AFRC/RUF's atrocities. Consequently, an international court could cite *Taylor* to argue that, despite General Votel's testimony regarding U.S. ignorance of its complicity in war crimes, such knowledge can be broadly inferred based on the extensive media coverage of the atrocities in Yemen and non-public information concerning these atrocities in the possession of USG personnel.

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140. *Id.* ¶ 12.

141. *Id.* ¶ 6902.

142. *Id.* ¶ 6882.

143. *See id.* ¶¶ 6879–6886.

144. *Id.* ¶ 6884; *see also* Transcript of Oral Argument at 32, 395, Prosecutor v. Taylor, Case No. SCSL-03-01-T (Spec. Ct. for Sierra Leone Nov. 25, 2009), http://www.rscsl.org/Documents/Transcripts/Taylor/25November2009.pdf (when asked whether anyone supporting the AFRC/RUF in April 1998 would be supporting a group engaged in a campaign of atrocities against the civilian population, Taylor responding that "[w]ell, to an extent you could say yes, anybody that would supply would be doing it against the civilians, yes").

145. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 540 (Spec. Ct. for Sierra Leone Sept. 26, 2013).

In light of *Giovanetti* and *Taylor*, General Votel's testimony should not be construed as shielding the United States from the *mens rea* requirement of aiding and abetting liability. *Giovanetti* shows that, for domestic aiding and abetting purposes, a defendant's willful ignorance of their contributions to the principal crime cannot serve as a defense which exculpates them from the knowledge *mens rea*. *Taylor* shows that international courts will not accept at face value a defendant's denial of knowledge that their actions have contributed to the commission of the principal crimes. Instead, they will holistically scrutinize the information that was available to a defendant and make a determination on knowledge after such careful analysis. More importantly, a defendant need not have knowledge of the specific ways in which their support furthered the commission of the principal crimes. It is enough that a defendant have general knowledge that supporting a particular individual or entity would further the commission of atrocities.

3. Taking Stock: the United States Has Probably Aided and Abetted Saudi War Crimes

It is clear that the United States has provided military and tactical assistance which an international court could reasonably find has had a substantial effect on the commission of the principal war crimes committed by the Saudi coalition. An international court could also reasonably find that USG personnel had knowledge that their actions contributed to the commission of such crimes. Thus, the three undisputed elements of aiding and abetting liability could very well be found: the principal offenses of war crimes were committed by the Saudi coalition; U.S. military assistance had a substantial effect on the perpetration of those crimes; and USG personnel had knowledge that their assistance contributed to such crimes.

The strongest defense which the United States could invoke is that the provision of mere logistics and ammunition is insufficient to establish, beyond a reasonable doubt, that it contributed as an aider and abettor to the commission of specific acts. It could cite another SCSL case in support of this argument: *Prosecutor v. Fofana & Kondewa*—commonly known as "the CDF case" after the Civil Defense Forces (CDF) who engaged the AFRC/RUF in combat and committed the atrocities at issue.[146] The two defendants in that case occupied senior positions in the CDF and frequently directed and monitored military

146. *See* Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment, ¶¶ 8–16 (May 28, 2008).

operations.[147] Fofana was regarded as second-in-command and provided subordinate commanders with logistical support, which included arms and ammunition.[148] They were charged with crimes against humanity, violations of Common Article 3 and Additional Protocol II of the Geneva Conventions, and the conscription of child soldiers.[149] Aiding and abetting was one of the modes of liability charged by the Prosecutor in the indictment.[150] However, the SCSL Appeals Chamber held that Fofana's provision of arms and ammunition was "not sufficient to establish beyond reasonable doubt that he contributed as an aider and abetter [sic] to the commission of specific criminal acts."[151] Consequently, it upheld the Trial Chamber's decision to find him not liable for aiding and abetting the commission of the crimes at issue.[152]

However, it should be noted that the CDF Trial Chamber followed the specific direction requirement for the *actus reus* of aiding and abetting.[153] It is therefore no surprise that the provision of arms and ammunition by one individual to another was found insufficient to constitute the *actus reus*. The provision of arms and ammunitions by a commander to his subordinates is not *per se* unlawful, and the specific direction requirement necessitates a more direct link between the assistance provided by the former and the acts of the latter. In CDF, the Trial Chamber noted that Fofana was several steps removed from the atrocities that occurred in combat: he instructed the Director of Logistics on the types of arms and ammunition to make available for the frontline, rather than providing them himself,[154] and he was never seen on the battlefield or even with a gun.[155] This attenuation prevented the Prosecution from showing that Fofana specifically directed such military assistance to the perpetration of the atrocities at issue. The United States provides weapons to Saudi Arabia directly and without any intermediaries, so reliance on this case would be difficult before an international court, even if the specific direction requirement still prevailed.

147. *Id.* ¶ 16.

148. *Id.*

149. *Id.* ¶ 12.

150. *Id.* ¶ 16.

151. *Id.* ¶ 102.

152. *Id.* ¶ 103.

153. *See* Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 229 (Aug. 2, 2007) ("The Chamber is of the opinion that the *actus reus* of aiding and abetting requires that the Accused carries out an act specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . .").

154. *Id.* ¶ 342.

155. *Id.* ¶ 343.

A defense of this sort would fare much better at the ICC. As discussed above, the *mens rea* requirement for aiding and abetting liability under the Rome Statute is more ambiguous but appears to require some element of intent on the part of the aider and abettor. However, given that neither the United States, Saudi Arabia, nor Yemen are states party to the Rome Statute, the only feasible way that the situation in Yemen could come before the ICC is through a Chapter VII referral by the United Nations Security Council, or by a self-referral by Yemen under Article 12(3) of the Rome Statute.[156] The United States is highly unlikely to refer a situation to the ICC in which it is so deeply implicated, and an Article 12(3) referral is not likely to occur in the foreseeable future given the continuing political turbulence in Yemen.

While U.S. complicity in Saudi Arabia's war crimes as an aider and abettor seems likely, it is far from certain that an international court will come to this conclusion—if one ever does examine the issue. This Note holistically analyzed the elements of this mode of liability and the general nature of U.S. support for Saudi Arabia. An international court trying an individual defendant under this mode of liability would need to zero in on a specific act which constitutes a war crime by Saudi Arabia under customary international law or under its mandate, a specific act or omission by the alleged aider and abettor which had a substantial effect on the commission of the principal offense, and knowledge by that individual that their assistance assists the commission of war crimes. Such a finding would be far from easy, but such is the legal nature of international courts hearing cases on international crimes.

B. *Averting Future Complicity*

1. The 1994 OLC Opinion as a Framework for Addressing Future Crises

The United States can and should formulate a legal strategy to halt military and tactical assistance when a recipient engages in atrocities which violate domestic legal statutes and customary international law. In fact, past stock-taking efforts have produced concrete policy recommendations that remain relevant today. Their application to the current Saudi coalition airstrike campaign in Yemen demonstrates their potential efficacy for removing the United States from future contributions to humanitarian crises.

156. *See* Rome Statute, *supra* note 16, arts. 12–13.

In the early 1990s, there were two transnational pandemics which had elicited a globally unified response: the drug trade and terrorism. At that time, the United States had already ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention), which criminalized the hijacking and sabotaging of civil airliners.[157] It implemented the Montreal Convention in its domestic law by enacting the Aircraft Sabotage Act in 1984.[158] 18 U.S.C. § 32(b)(2) was enacted as part of that legislation, and it criminalizes willfully "destroy[ing] a civil aircraft registered in a country other than the United States while such aircraft is in service or caus[ing] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight."[159] After examining the legislative history and congressional objectives of the statute, a 1994 OLC opinion concluded that it applies to foreign governmental actors shooting down foreign-registered civil aircraft.[160]

This interpretation directly implicated the shootdown policies of Colombia and Peru: both governments had used weapons against civil aircraft suspected of transporting drugs in the 1990s.[161] As part of its counter-narcotics program, the United States provided flight tracking information and other forms of technical assistance to both countries "for the purpose of enabling them to locate and intercept aircraft suspected of engaging in illegal drug trafficking."[162] The OLC was consequently tasked with analyzing whether USG personnel who furnished assistance to these aerial interdiction programs could be found to have violated the Aerial Sabotage Act under the federal aider and abettor statute.[163]

After analyzing the potential for USG personnel complicity, the OLC turned to the legal implications of an assurance by the recipient country that it would not use U.S.-provided aid for the conduct proscribed by the Aircraft Sabotage Act. It also analyzed the legal implications of agreements between the United States and a recipient of counter-narcotics assistance on the use of U.S.-provided aid if the latter refused to renounce its shootdown policy. This analysis is important because,

157. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 10 I.L.M. 1151.

158. Aircraft Sabotage Act, Pub. L. No. 98-473, 98 Stat. 1837, 2187–90 (1984).

159. 18 U.S.C. § 32(b)(2) (2006).

160. U.S. Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 153–54 (1994) [hereinafter OLC opinion].

161. *Id.* at 148.

162. *Id.*

163. *Id.* at 149.

while the U.S. federal aider and abettor statute requires more than mere knowledge as the *mens rea*,[164] the OLC analyzed the effect that assurances by the recipient country would have on USG personnel knowledge of the principal crimes for aiding and abetting purposes.[165] Thus, if translated to the current provision of U.S. assistance to Saudi Arabia and the conflict in Yemen, such analysis provides important guidance on USG personnel knowledge of the principal war crimes at issue under international law. In so doing, it helps discern the point at which U.S. complicity begins and U.S. contributions to the foreign recipient's unlawful activity should end.

2. When to Re-Examine the Presumption of Foreign Lawful Activity: Known Practices and Reliable Assurances

In analyzing USG personnel knowledge of Peru and Colombia's shoot-down activities for domestic aiding and abetting purposes, the OLC opinion provides useful guidance which applies more broadly to international aiding and abetting liability. Before liability can be established under the federal aider and abettor statute in the United States, the defendant must know about the unlawful activity of the principal perpetrator.[166] According to the OLC, such knowledge can be inferred from the circumstances.[167] However, the memo makes clear that much depends on the publicly stated objectives of the recipient state and whether they have a history of using U.S.-provided assistance for unlawful purposes.

The OLC noted, as a general matter, that in the absence of "some serious reason to think otherwise," the United States is entitled to "assume that the governments of other nations will abide by their international commitments. . .and customary international law."[168] Because there is a presumption that recipient states will use U.S.-provided assistance for internationally lawful purposes, the United States has no affirmative obligation "to attempt to determine whether another government has an as-yet unrevealed intention to misuse USG assistance" in an unlawful way.[169]

164. *See* Sarch, *supra* note 136.

165. OLC opinion, *supra* note 160, at 156–57.

166. The OLC opinion cited *United States v. Zafiro* in positing that there are three elements to domestic aiding and abetting liability: first, the defendant must have knowledge of the illegal activity that is being aided and abetted; second, they must have a desire to help that activity succeed; and third, there must be some act of helping. *See* United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991).

167. OLC opinion, *supra* note 160, at 157 ("We believe that the United States is equally on notice about Peru's *de facto* shootdown policy on the basis of the incidents that have occurred.").

168. *Id.* at 156.

169. *Id.*

Thus, if a foreign country with no "announced policy" or "known practice" of unlawful shootdowns did use USG-provided counter-narcotics assistance in carrying out a shootdown, that act would create no liability for the prior acts of USG personnel.[170] However, such an act would likely "require a reevaluation of USG assistance to that country" and might require "changes in that assistance."[171]

The same analysis applies if the recipient government gives a reliable assurance that it will not use U.S.-provided assistance for unlawful purposes.[172] The OLC found that such an assurance would "clearly negate the knowledge element of aiding and abetting" because acceptance of that assurance would constitute a good-faith belief by USG personnel that the foreign government was engaged in no criminal activity.[173] But, again, if it subsequently became apparent that this belief was mistaken, it would be necessary for the United States to reevaluate the legal status of USG personnel assistance.[174]

If applied to the situation in Yemen, the OLC knowledge analysis does little to exculpate USG personnel from the knowledge prong of aiding and abetting liability under international law. The OLC memo makes clear that the United States was initially entitled to the presumption that the provision of military assistance to Saudi Arabia was being used for internationally lawful purposes. However, the well-publicized civilian casualties resulting from Saudi coalition airstrikes would undoubtedly fall into the category of constituting "some serious reason to think" that such assistance is not being used for lawful purposes.[175] Given the frequency of such reports in the daily headlines, it is reasonable to characterize the targeting of civilians by the Saudi coalition's airstrikes as constituting a known practice. And while Saudi Arabia has previously offered assurances that it would exercise greater caution to avoid civilian casualties,[176] news reports make clear that such casualties have continued to the present day.[177]

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170. *Id.*

171. *Id.* at 157.

172. *Id.* at 159.

173. *Id.*

174. *Id.*

175. *Id.* at 156.

176. In July 2017, the Saudi Foreign Minister wrote a letter to U.S. Secretary of State Mike Pompeo promising greater caution to avoid civilian casualties in air campaigns. *See* Eric Schmitt, *Saudi Arabia Tries to Ease Concerns over Civilian Deaths in Yemen*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/world/middleeast/saudi-arabia-arms-training-yemen.html.

177. *See* Faisal Edroos, *November Yemen's 'Deadliest Month' in Two Years: ACLED Report*, AL-JAZEERA (Dec. 11, 2018), https://www.aljazeera.com/news/2018/12/november-yemen-deadliest-month-years-acled-report-181211104015986.html.

It is therefore clear that the United States has long been unable to presume that its assistance to Saudi Arabia is lawful and its reliance on Saudi Arabia's assurance of civilian casualty avoidance cannot be said to constitute a good-faith belief that Saudi Arabia is not engaged in unlawful activities. The OLC opinion clearly dictates that, in this scenario, the United States must seriously reevaluate the legality of its assistance. News reports indicate that, after civilian casualties in Yemen began to make headlines, the United States conducted such a reevaluation in light of its IHL commitments, and that it has done so periodically throughout the conflict.[178] In fact, Congress forced the matter in July 2018 by inserting Section 1290 into the 2019 National Defense Authorization Act (NDAA), which requires the President to certify—within 30 days after signing the NDAA and every six months thereafter—that the Saudi coalition was making an effort to reduce civilian casualties and facilitate humanitarian assistance.[179]

However, news reports make clear that continued U.S. support for Saudi Arabia may be based more on economic self-interest than a genuine belief that efforts are being taken to reduce civilian casualties: after U.S. Secretary of State Mike Pompeo certified in September 2018 that Saudi Arabia had undertaken demonstrable actions to reduce the risk of harms to civilians in compliance with Section 1290,[180] a leaked internal memo obtained by the *Wall Street Journal* indicated that this decision was made over the objection of many area-specialists at the State Department who urged non-certification due to a lack of progress in mitigating civilian casualties.[181] Congress shared this assessment: seven U.S. Senators authored a bipartisan letter to Secretary Pompeo expressing skepticism that "a certification that [Saudi Arabia and the United Arab Emirates] have undertaken demonstrable actions to reduce the harm to civilians is warranted" when "civilian deaths and casualties due

178. *See* Strobel & Landay, *supra* note 17.

179. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1290, 132 Stat. 1636, 2048 (2018). In signing the NDAA, President Trump included a signing statement objecting to Section 1290 because it potentially conflicted with his "exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs." *See Statement by President Donald J. Trump on H.R.5515*, THE WHITE HOUSE (Aug. 13, 2018), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-5515/.

180. Press Statement, Michael R. Pompeo, Sec'y of State, Certification to Congress on Actions of Saudi Arabia and UAE in Yemen Under the NDAA (Sept. 12, 2018), https://www.state.gov/secretary/remarks/2018/09/285861.html.

181. Dion Nissenbaum, *Top U.S. Diplomat Backed Continuing Support for Saudi War in Yemen over Objections of Staff*, WALL STREET J. (Sept. 20, 2018), https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200.

to coalition airstrikes have increased dramatically in recent months."[182] The leaked memo therefore may suggest an ulterior motive: the State Department's Bureau of Legislative Affairs allegedly pushed for re-certification because failure to certify would negatively impact pending arms transfers with Saudi Arabia.[183] While the State Department refused to comment on the leak, the reported existence of the internal memo raises the question of whether the United States has undertaken a serious reevaluation of its assistance to Saudi Arabia as envisioned by the OLC in its 1994 memo.[184]

In conclusion, the 1994 OLC opinion suggests that the United States may presume, before any information indicating otherwise, that its assistance is being used by the recipient country for internationally lawful purposes. So, too, does a reliable assurance from the recipient country about its intent to use U.S. assistance for solely lawful purposes. According to the OLC memo, we cannot infer U.S. knowledge, for aiding and abetting purposes, of any international crimes committed while this presumption exists. However, given Saudi Arabia's well-documented track record of disregard for civilians in its Yemen airstrikes, the United States no longer has the luxury of this presumption and the OLC memo recommends that it seriously re-evaluate the legality of its assistance in such a scenario. While the OLC memo did not specifically prescribe the point at which assistance must be halted in the face of continued non-compliance by the recipient, it is reasonable to presume that it believed such a point exists—after all, a legal re-evaluation would be meaningless if corrective action were completely foreclosed. Section 1290 of the NDAA has forced such a re-evaluation to take place, and leaked memos, along with Congressional skepticism, suggest that the United States has made a conscious decision to continue its support with full knowledge that civilian casualties will continue to occur.

IV. A Proposed Mitigation Measure to Avert Future U.S. Complicity

The OLC opinion discussed what it considered to be the more "problematic case" posed by a foreign government refusing to renounce its unlawful practices but giving assurances that it would not use USG personnel-supplied assistance in carrying out such unlawful activities.[185] In

182. Letter from U.S. Sens., to Mike Pompeo, U.S. Sec'y of State (Oct. 10, 2018), https://www.murphy.senate.gov/newsroom/press-releases/murphy-young-shaheen-colleagues-write-bipartisan-letter-to-pompeo-questioning-yemen-certification.

183. *See* Nissenbaum, *supra* note 181.

184. *Id.*

185. *See* OLC opinion, *supra* note 160, at 160.

the case of a foreign government accepting U.S. assistance but declining to use such assistance for unlawful purposes—in other words, turning to non-U.S. sources for its unlawful activities—the OLC opinion noted that "[a] bare assurance to that effect, without more, would be insufficient to remove the risk of contravening" the federal aiding and abetting statute.[186] The rationale given in the memo was that such an assurance would not be credible in the context of U.S. counternarcotics assistance to Colombia and Peru because the use of USG personnel-supplied information was too widespread, the commingling of U.S. government and foreign government information was too entrenched, and the temptation of the foreign government's operation officers to use such information anyway was too great.[187]

However, the OLC opined that there were four conditions under which such assurances would be sufficiently reliable to permit the United States to continue to provide assistance to a foreign country's anti-narcotics program even if that country refused to renounce its shootdown policy.[188] First, the United States and the foreign country should agree that U.S. assistance would solely be used for lawful purposes—in the OLC opinion context, in the execution of a ground-based antinarcotics program, and for purposes of this Note, in the execution of IHL-compliant military operations in Yemen.[189] Second, the two should agree to establish mechanisms by which the United States could obtain detailed and specific information as to how its assistance was being used and thus be able "to identify at an operational level any instances of non-compliance with the agreement."[190] Third, the agreement should stipulate that if any incident occurred in which the foreign government engaged in an internationally unlawful activity—in the OLC opinion context this meant that foreign government agents had fired on a civil aircraft in violation of the Montreal Convention—USG personnel would be able to ascertain whether U.S.-provided assistance

186. *Id.*

187. *Id.*

188. For purposes of this Note, it is of no importance that Saudi Arabia does not have an official policy of targeting civilians. It is exceedingly rare for a government to have an official policy which violates treaty-based or customary international law, and the OLC opinion recognizes this fact by using "announced policy" and "known practice" in tandem. *See id.* at 156, 160 ("Therefore, if a foreign nation with no *announced policy* or *known practice* of unlawful shootdowns did in fact use USG aid in carrying out a shootdown, that event would create no liability for the prior acts of USG personnel.") (emphasis added).

189. *Id.* at 160.

190. *Id.*

had been used in that instance.[191] Fourth, the agreement should provide for the termination of U.S.-provided assistance in the event of material non-compliance.[192] The OLC found that an agreement with such safeguards would "insulate USG personnel from liability in the event the foreign government destroyed a civil aircraft."[193]

Applying these criteria to the U.S.-Saudi military relationship, it is clear that the first condition is the most easily satisfied by mere lip-service.[194] The United States and Saudi Arabia have always justified their military relationship on the basis of internationally lawful rationales.[195] As to the second and third conditions requiring mechanisms for ascertaining the use of USG personnel-provided assistance for lawful and unlawful purposes, news reports indicate that the United States is fully capable of accessing Saudi databases that contain detailed information on the airstrikes it conducts, and ascertaining whether its munitions or technical assistance was used to kill or injure innocent civilians.[196]

The key, then, is the feasibility of the fourth requirement, that USG personnel-supplied assistance be terminated in the event of material non-compliance. Defining material non-compliance in this context may be difficult, but the Vienna Convention on the Law of Treaties may provide helpful guidance in its definition of material breach. It defines the material breach of a treaty as the "violation of a provision essential to the accomplishment of the object or purpose of the treaty."[197] Given that the Saudi coalition's airstrikes most directly implicate the core IHL principles of distinction and proportionality, material non-compliance should be analyzed in the context of the Geneva Conventions.[198]

Thus, in order to come into compliance with the OLC opinion, the United States should craft an agreement with Saudi Arabia providing that military assistance will cease if coalition airstrikes cause enough

191. *Id.*

192. *Id.*

193. *Id.*

194. For instance, a foreign government may pay tribute to the lawful purposes for which the U.S. intends the assistance to be used without doing so in practice. *See Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen*, HUM. RTS. WATCH 1 (2018), https://www.hrw.org/sites/default/files/report_pdf/yemen0818_web2.pdf (positing that the Joint Incidents Assessment Team, an investigative mechanism established by the Saudi coalition to investigate reports of civilian casualties in Yemen, has failed to produce credible and impartial investigations into coalition laws-of-war violations).

195. *See* Testimony of General Votel, *supra* note 126.

196. *See* Statements of Larry Lewis, *supra* note 137.

197. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331.

198. *See IHL Rules Governing Hostilities*, *supra* note 120; *see also* UNHRC Yemen Report, *supra* note 9, ¶ 38.

civilian casualties to hinder Common Article 3's object of protecting persons not participating in hostilities in situations of non-international armed conflict.[199] This provision would give the United States the most leverage because U.S. diplomatic pressure alone has proved insufficient to change the nature of the Saudi coalition's airstrikes in Yemen.[200] It would also more closely align U.S. policy with the recent landmark decision of the Court of Appeal of England and Wales, which held that the Secretary of State for International Trade of the United Kingdom (U.K.) is obligated to consider past violations of IHL by the recipient country when deciding whether there is a "clear risk"—under Criterion 2(c) of the United Kingdom's Consolidated EU and National Arms Export Licensing Criteria—that military materiel will be used to commit serious violations of IHL.[201]

In sum, a credible threat to terminate assistance in the event of material Common Article 3 non-compliance could give the United States the leverage it needs to force Saudi Arabia into greater IHL compliance.[202] It would provide the stick that is needed to accompany the

199. Common Article 3 applies to situations of non-international armed conflicts. A conflict is classified as non-international when one of the parties is an organized armed group over which no State exercises control. *See How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L COMMITTEE OF THE RED CROSS (Mar. 2008), https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf. There are several non-state armed groups operating in Yemen that have formed fluid and shifting alliances. *See Non-International Armed Conflicts in Yemen*, THE RULE OF L. IN ARMED CONFLICT, http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse4accord (last visited Jan. 18, 2020). Common Article 3 is therefore relevant to the conflict in Yemen because the ICRC has opined that when one or more foreign states intervene in a non-international armed conflict on the side of the government (and against a non-state armed group), the armed conflict retains its non-international character. *See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Force in the Field. Geneva*, INT'L COMMITTEE OF THE RED CROSS ¶¶ 402–05 (Aug. 12, 1949), https://ihl-databases.icrc.org/ihl/full/GCI-commentaryIntroduction.

200. *See* Michelle Nichols, *U.N. Experts Warn Saud-Led Coalition Allies over War Crimes in Yemen*, REUTERS (Jan. 29, 2017), https://www.reuters.com/article/us-yemen-security-un-idUSKBN15D0SB (quoting a State Department official urging "all sides to take steps to prevent harm to civilians").

201. Campaign Against Arms Trade v. Sec'y of State for Int'l Trade and Others [2019] EWCA (Civ) 1020, [138] (Eng.) ("The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced.").

202. The OLC opinion went further, finding that, in the absence of the four conditions described above, "USG agencies and personnel may not provide information . . . or other USG assistance . . . to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking." *See* OLC opinion, *supra* note 160, at 162. But this reasonable foreseeability standard is the product of the specific situation which the OLC addressed: U.S. assistance to foreign countries which actually announced their intention to shoot

carrot of U.S. arms deals for billions of dollars' worth of weapons and military assistance.

V. Conclusion

Aiding and abetting, as a matter of prosecutorial preference, is not as powerful a tool for accountability under international criminal law as other modes of liability because the defendant is charged only as an accessory. The ICC Prosecutor—and the prosecutor at any future ad hoc tribunal or international court—would prefer trying defendants as co-perpetrators or as members of a joint criminal enterprise. This might explain why the specific direction requirement is defunct: if prosecutors must resort to aiding and abetting as the mode of liability, they want to be sure of obtaining a conviction, and the specific direction requirement greatly narrows the scope of liability. It also might explain why the aiding and abetting *mens rea* has solidified as knowledge, rather than purpose, despite a residual purpose *mens rea* potentially existing in Article 25(3)(c) of the Rome Statute.

A plausible argument could be made that aiding and abetting liability should contain a purpose *mens rea* and the specific direction requirement when used as the mode of liability before an international court. It makes logical sense to ensure that criminal defendants are only convicted when they have the purpose of providing assistance in order to facilitate the commission of the atrocities at issue. Heightening the prosecutorial bar for conviction might eliminate the perception that aiding and abetting is used as a "fallback" strategy when the prosecution is unable to convict under any other mode of liability. Under this rationale, accountability for the war crimes committed in Yemen should come through an adjudication of the actions of personnel in the Saudi coalition who are most responsible for the airstrikes. This would allow a future prosecutor to try defendants as co-perpetrators or members of a joint criminal enterprise, thereby achieving convictions under principal forms of liability, which carry greater sentences.

However, accepting this argument would mean exculpating USG personnel from liability for the international crimes which have been committed in Yemen. This Note has sought to prove that exculpation in this context would do the United States a major disservice. The OLC

down civil aircraft in direct violation of the Montreal Convention. U.S. assistance to Saudi Arabia presents a more complicated case because the latter does not have an announced policy of violating the rules of armed conflict. The OLC recognized this distinction, noting that the Montreal Convention "does not appear to apply to acts of armed forces that are otherwise governed by the laws of armed conflict." *See id.* at 163.

opinion demonstrates that the United States has previously grappled with the moral dilemma of otherwise-lawful assistance being used by the recipient country for internationally unlawful purposes. In fact, the OLC developed a framework for assessing the potential for U.S. assistance being used for such unlawful purposes and re-evaluating the legality of such assistance when necessary. After the first two prescribed steps of assessment and re-evaluation comes an implicitly prescribed third: corrective action to eliminate U.S. complicity. Such action may entail a drawback or re-adjustment of U.S. assistance, or, in extreme cases of material non-compliance—this Note posits the Saudi coalition's actions in Yemen to be such an extreme case—a complete termination of assistance.

A revival of a purpose *mens rea* and the specific direction requirement would therefore be detrimental to the implementation of that framework in factual scenarios like the one studied herein. The United States would never re-evaluate its aid to foreign countries because it would be assured that liability would be unlikely to attach if an international court had to find that it specifically directed its aid to the commission of the atrocities at issue and shared the criminal purpose of the principal perpetrators. In order to avert future contributions to humanitarian crises, the legal perils of complicity must be the impetus for corrective action in the provision of U.S. assistance.