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Foreign Assistance Complicity

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Articles

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When does a government's provision of assistance to foreign armed groups cross the line from legitimate foreign policy to criminal aiding and abetting of those who use the aid to commit atrocities? The question presents one of the most difficult dilemmas in criminal justice, one that has deep normative implications and has provoked sharp splits among the U.S. federal courts and international tribunals that have faced it.

In 2013, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) sent shockwaves through international legal circles when it acquitted former Yugoslav Army chief Momčilo Perišić of aiding and abetting atrocities in Bosnia and Herzegovina during the early 1990s. Influenced perhaps by contemporary examples such as U.S. support for Syrian rebels, the Tribunal ruled that "neutral" support to armed groups engaged in combat activities could not give rise to criminal responsibility absent evidence that the support was "specifically directed" toward the group's unlawful activities. The aftermath of the ruling has produced widespread

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criticism, but little clarity on how the law should draw the line between legitimate foreign assistance on the one hand and criminal complicity on the other. Domestic legal systems take different approaches to complicity, and even at the international level the law depends very much on which tribunal—and even which particular judge—happens to be deciding a case.

In this Article, I contribute to the debate over the foreign assistance cases by questioning two of its key premises. First, I challenge the pervasive assumption that the resolution of these cases can and should be determined by recourse to the kind of precedential analysis that has dominated judicial consideration of international aiding and abetting cases. As a descriptive matter, the case law is mistaken to maintain that the historical precedents reveal a consistent approach to aiding and abetting that evidences settled principles of customary international law. As a prescriptive matter, international tribunals' reliance on precedent—however well-founded—is no substitute for the kind of normative analysis that is necessary to secure adequate protections against injustice.

Second, I contest the assumption that the resolution of individual foreign assistance cases turns on the particular doctrinal choices that have divided judges and commentators. Analysis of the competing approaches to aiding and abetting reveals that there is less at stake in the choice of elements than is commonly supposed, because each approach leaves room for substantial flexibility in interpretation and application. Moreover, the most plausible understandings are also the least determinate, suggesting that the resolution of the foreign assistance cases must inevitably rely on complex moral judgments that resist easy encapsulation in the legal elements that have traditionally served to police the boundaries of criminal responsibility.

The combined effect of these insights reveals an indeterminacy that is both inevitable and familiar to crim-

inal law. I conclude by considering how courts might manage this indeterminacy in a way that renders the assignment of criminal responsibility sufficiently predictable while also maintaining a normatively meaningful distinction between guilt and innocence.

INTRODUCTION

For the past several years, the U.S. government—alongside other states—has provided assistance, including non-lethal aid, military training, and arms, to the Free Syrian Army (FSA) and other moderate rebels engaged in conflict with both the Syrian government and, more recently, with extremist rebel groups such as the Islamic State in Iraq and Syria (ISIS).[1] During this same period, the world has watched in horror as forces affiliated with the Syrian government have committed widespread atrocities, including torture, extra-judicial killings, attacks on civilians, and the deployment of chemical weapons.[2] The crimes of ISIS, moreover, have been headline news for the past two years.[3] Human rights monitors have also documented, on a lesser scale, crimes committed by FSA-affiliated groups, including summary executions and the recruitment of child soldiers.[4]

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1. *See, e.g.*, Michael D. Shear et al., *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES, Oct. 9, 2015, at A1 (reporting abandonment of the U.S. effort to train a new rebel force in Syria and establishment of a new Defense Department program to provide assistance directly to rebel groups "who would sign a pledge to fight the Islamic State group, receive some instruction on human rights, [and] review the law of armed conflict"); Julian E. Barnes, *U.S. to Begin Deploying Troops to Aid Syrian Rebel Training*, WALL ST. J. (Jan. 16, 2015), http://www.wsj.com/articles/u-s-sending-400-troops-to-train-moderate-syrian-opposition-1421393093 (detailing U.S. efforts to train and equip moderate Syrian rebels to fight ISIS); Steven Lee Myers, *U.S. Joins Effort to Equip and Pay Rebels in Syria*, N.Y. TIMES, Apr. 2, 2012, at A1 (reporting humanitarian and logistical aid to Syrian rebels provided by the United States and other countries); Jay Solomon & Nour Malas, *U.S. Bolsters Ties to Fighters in Syria*, WALL ST. J. (June 13, 2012), http://www.wsj.com/articles/SB10001424052702303410404577464763551149048 (reporting CIA training of the FSA).

2. *See, e.g.*, Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014) [hereinafter 8th Report of Commission of Inquiry on Syria]; *"No One's Left": Summary Executions by Syrian Forces in Al-Bayda and Baniyas*, HUM. RTS. WATCH (Sept. 13, 2013), https://perma.cc/PJK2-Q38A; *Attacks on Gouta: Analysis of Alleged Use of Chemical Weapons in Syria*, HUM. RTS. WATCH (Sept. 2013), https://perma.cc/3BCJ-BS2T; *Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians*, HUM. RTS. WATCH (Apr. 2013), https://perma.cc/B4XJ-2W9G; *In Cold Blood: Summary Executions by Syrian Security Forces and Pro-Government Militias*, HUM. RTS. WATCH (Apr. 2012), https://perma.cc/ZXB5-JUDE.

3. *See, e.g.*, Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Rule of Terror: Living Under ISIS in Syria (Nov. 14, 2014), http://www.refworld.org/pdfid/5469b2e14.pdf; 8th Report of Commission of Inquiry on Syria, *supra* note 2.

4. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 8, 13, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014) [hereinafter 7th Report of Commission of Inquiry on Syria] (documenting instances of summary executions perpetrated by FSA-affiliated groups as well as the recruitment of child soldiers by several

Suppose that the U.S. officials involved in providing this assistance are aware that some of the aid—however well intended—will unavoidably find itself directed toward criminal activity. Is that knowledge sufficient to hold the officials criminally responsible for aiding and abetting the crimes facilitated by their assistance?

I imagine that most readers will resist that conclusion. Explaining why can be a complicated matter. The question of when assistance to governments and armed groups becomes prohibited aiding and abetting has vexed both domestic and international courts in recent years. In the United States, the federal courts have confronted the scope of aiding and abetting liability in the context of claims arising against multinational corporations that allegedly aided and abetted human rights abuses by various governments in violation of the Alien Tort Statute (ATS).[5] Although ATS claims involve tort actions rather than criminal prosecutions,[6] the federal courts have commonly looked to international criminal law sources for the applicable standards of liability.[7]

FSA-affiliated groups); Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 2, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) (noting that "[t]he violations and abuses committed by anti-Government armed groups did not, however, reach the intensity and scale of those committed by Government forces and affiliated militia"); *Maybe We Live and Maybe We Die: Recruitment and Use of Children by Armed Groups in Syria*, HUM. RTS. WATCH (June 22, 2014), http://www.hrw.org/reports/2014/06/22/maybe-we-live-and-maybe-we-die (documenting recruitment and use of children by various Syrian armed groups, including the FSA).

5. *See, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (alleging that Exxon aided and abetted human rights abuses in Indonesia); Aziz v. Alcolac, Inc., 658 F.3d 388, 389 (4th Cir. 2011) (submitting claims "alleging that Defendant Alcolac, Inc., a chemical manufacturer, sold thiodiglycol ('TDG') to Saddam Hussein's Iraqi regime, which then used it to manufacture mustard gas to attack Kurdish enclaves in northern Iraq during the late 1980s"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009) (confronting claims that defendant Talisman Energy, Inc. "aided and abetted or conspired with the Government to advance those abuses that facilitated the development of Sudanese oil concessions by Talisman affiliates"); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007) (bringing claims against "approximately fifty corporate defendants" alleging that "these defendants actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as 'apartheid,' which restricted the majority black African population in all areas of life while providing benefits for the minority white population").

6. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

7. *See Doe VIII*, 654 F.3d at 39 ("[W]e hold that aiding and abetting liability is available under the ATS because it involves a norm established by customary international law and that the *mens rea* and *actus reus* requirements are those established by the ICTY, the ICTR, and the Nuremberg tribunals, whose opinions constitute expressions of customary

These sources date to the World War II era, when a variety of tribunals prosecuted individuals as accomplices to war crimes under international law. Among other notable cases, a British military tribunal convicted two executives of a company that supplied the poison gas used by the Schutzstaffel (SS) in the Auschwitz gas chambers,[8] and a U.S. military tribunal convicted two German industrialists for making large donations to a fund that financed the SS.[9]

More recently, in 2013, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) sent shockwaves through international legal circles when it acquitted Momčilo Perišić of aiding and abetting atrocities in Bosnia and Herzegovina during the early 1990s.[10] Two years before, the ICTY Trial Chamber had sentenced Perišić to twenty-seven years in prison for his contribution to these crimes.[11] As the top military officer in the Yugoslav Army headquartered in Belgrade, Serbia, the accused had used his position to provide critical support to Bosnian Serb separatist forces—the Army of Republika Srpska (VRS)—which engaged in "systematic and widespread sniping and shelling of civilians"[12] in the besieged city of Sarajevo and massacred thousands of Bosnian Muslim civilians following the takeover of Srebrenica in 1995. The Trial Chamber ruling emphasized the many ways in which the accused had "repeatedly exercised his authority to provide logistic and personnel assistance that made it possible for the VRS to wage a war that he knew encompassed systematic crimes against Muslim civil-

international law."); *Aziz*, 658 F.3d at 398 ("[W]e agree that *Sosa* [*v. Alvarez-Machain*, 542 U.S. 692 (2004)] guides courts to international law to determine the standard for imposing accessorial liability."); *Presbyterian Church of Sudan*, 582 F.3d at 257 ("We agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability.").

8. *Case No. 9, The Zyklon B Case, Trial of Bruno Tesch and Two Others*, *in* 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 102 (1947) [hereinafter *The Zyklon B Case*].

9. 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: "*THE FLICK CASE*" 1222–23 (1952) [hereinafter *The Flick Case*] ("One who knowingly by his influence and money contributes to the support [of an organization which on a large scale is responsible for war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.").

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

11. *See* Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011).

12. *Id.* ¶ 1590.

ians."[13] These efforts included the "provision of weapons and ammunition, technical experts, training, medical support, fuel and operational support,"[14] the payment of VRS salaries, and the transfer of over 7,000 Yugoslav Army officers to the VRS.[15] Indeed, as the Trial Chamber found, the Bosnian Serb leaders "were clearly aware that their war depended on assistance from [the Yugoslav Army]."[16]

For the Appeals Chamber that acquitted Perišić, however, none of these considerations had decisive importance. The VRS was not merely a criminal organization but was also a fighting force engaged in legitimate combat activities, and "a reasonable interpretation of the record is that [Yugoslav Army] aid facilitated by Perišić was directed towards the VRS's general war effort rather than VRS crimes."[17] Relying on language from an earlier Appeals Chamber judgment, the Tribunal ruled that providers of remote assistance such as Perišić's could not be convicted absent proof that they "specifically directed" that aid toward criminal activities.[18] The fact that Perišić might knowingly have undertaken actions that he knew would substantially facilitate atrocities in Bosnia was therefore immaterial.

The ruling provoked strong reactions on multiple fronts. At the methodological level, the judgment has focused attention on the difficult and contested process by which courts have determined the content of international criminal law. As has traditionally been the case with international criminal tribunals, the ICTY Statute prohibits aiding and abetting without specifying the elements required to establish this form of culpability.[19] Accordingly, the ICTY has instead

13. *Id.* ¶ 1621.

14. *Id.* ¶ 1594.

15. *Id.* ¶¶ 1607–19.

16. *Id.* ¶ 1598.

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

18. *Id.* ¶ 73.

19. The ICTY's Statute merely provides as follows: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in . . . the present Statute, shall be individually responsible for the crime." S.C. Res. 1877, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7 (July 7, 2009) [hereinafter ICTY Statute]; *see also* S.C. Res. 995, Statute of the International Criminal Tribunal for Rwanda, art. 6(1) (Aug. 14, 2002) [hereinafter ICTR Statute] (same); Statute of the Special Court for Sierra Leone art. 6(1), Apr. 12, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute] (same); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), as amended by NS/RKM/1004/006 (Oct. 27, 2004), art. 29 [hereinafter ECCC Statute] ("Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article

purported to apply rules of accomplice liability derived from uncodified customary international law and discovered primarily through consulting the case law of international criminal tribunals.[20] Substantial attention has focused on whether the *Perišić* requirement of specific direction is consistent with these precedents or whether the Trial Chamber was instead correct to view responsibility in terms of the accused's knowing and substantial contribution to crime.[21]

The aftermath of *Perišić* reflects continued disagreement on these matters, with the standards of accomplice liability depending very much on which tribunal—and which particular judge—happens to decide the case. A September 2013 judgment of the Appeals Chamber of the Special Court for Sierra Leone (SCSL) upheld the

3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime."); S.C. Res. 1757, annex, Statute of the Special Tribunal for Lebanon, art. 2(b)(1)(a) (Mar. 29, 2006) [hereinafter STL Statute] ("A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person . . . [c]ommitted, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute . . . ."); London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Charter] ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."); Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. II(2), Dec. 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946) [hereinafter Control Council Law No. 10] ("Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.").

20. *See infra* Part I.

21. *See generally* Antonio Coco & Tom Gal, *Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in* Perišić, 12 J. INT'L CRIM. JUST. 345 (2014); Manuel J. Ventura, *Farewell "Specific Direction": Aiding and Abetting War Crimes and Crimes Against Humanity in* Perišić*,* Taylor*,* Šainović et al.*, and US Alien Tort Statute Jurisprudence*, *in* THE WAR REPORT: ARMED CONFLICT IN 2013, at 511, 512 (Stuart Casey-Maslen ed., 2015) ("When one scratches below the surface, it becomes apparent that there was simply no proper legal basis in *Perišić* for requiring specific direction in the *actus reus* of aiding and abetting."); Leila Nadya Sadat, *Can the ICTY* Šainović *and* Perišić *Cases Be Reconciled?*, 108 AM. J. INT'L L. 475 (2014); James Stewart, *Specific Direction is Unprecedented: Results from Two Empirical Studies*, EJIL: TALK! (Sept. 4, 2013), http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies [hereinafter Stewart, *Unprecedented*] (arguing that "Case-Law in International Criminal Law Does Not Support 'Specific Direction'").

conviction of former Liberian President Charles Taylor for aiding and abetting crimes committed by the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) in Sierra Leone.[22] The conviction rested on a similar theory to the prosecution's case in *Perišić*—Taylor had provided critical support to these forces in the form of weapons, supplies, and operational support[23]—and the Appeals Chamber expressly rejected the *Perišić* specific direction standard. The judgment also went farther than the ICTY case law in maintaining that, in the absence of proof that the accused had intentionally or knowingly assisted a crime, aiding and abetting could be established based on a form of recklessness.[24] Since then, two differently composed ICTY Appeals Chambers have twice repudiated the specific direction standard,[25] most recently in December 2015 when a divided panel reversed a Trial Chamber judgment that had applied *Perišić* to acquit two Serbian security officials accused of aiding and abetting crimes committed in Bosnia and Croatia by paramilitary units that the defendants had worked to establish, finance, train, and otherwise support.[26] With no formal mechanism—such as en banc review—for resolving the split, these judgments have left the ICTY with a conflicted jurisprudence.[27] The Statute of the International Criminal Court (ICC), meanwhile, includes a complicity provision (as of yet untested) that appears to enforce a stricter, purpose-based version of complicity that arguably resembles the *Perišić* ap-

22. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment (Sept. 26, 2013).

23. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 6907–53 (May 18, 2012).

24. *Taylor*, Case No. SCSL-03-01-A, ¶ 438 (holding *dolus eventualis* satisfies the mental requirements for aiding and abetting). On *dolus eventualis*, see *infra* note 71 and accompanying text.

25. *See* Prosecutor v. Stanišić, Case No. IT-03-69-A, Judgment, ¶¶ 103–08 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 9, 2015); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶¶ 1649–51 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

26. *Stanišić*, Case No. IT-03-69-A, ¶¶ 103–08. The allegations against the accused are detailed in the Trial Chamber's Judgment. *See generally* Prosecutor v. Stanišić, Case No. IT-03-69-T, Judgment, Volume II of II, ¶¶ 1287–2354 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013). The Appeals Chamber further ordered a re-trial of the accused. *Stanišić*, Case No. IT-03-69-A, ¶ 127.

27. On the institutional problems associated with this split, see Marko Milanovic, *The Self-Fragmentation of the ICTY Appeals Chamber*, EJIL: TALK! (Jan. 23, 2014), http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber; Sash Jayawardane & Charlotte Divin, *The* Gotovina*,* Perišić *and* Šainović *Appeal Judgments: Implications for International Criminal Justice Mechanisms*, HAGUE INST. GLOBAL JUST. (Sept. 2014), http://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/PB13-Gotovina-Perisic-Sainovic-Appeal-Judgments.pdf.

proach.[28] Yet, elsewhere, the same statute indicates that a broader knowledge-based standard applies in cases involving aid to criminal enterprises.[29] In the United States, the ATS case law mirrors this divide among the international tribunals, with the precedents split on whether the requisite mens rea is purpose[30] or knowledge[31] and with litigation pending on the impact, if any, of the specific direction standard.[32]

As a normative matter, the debate surrounding *Perišić* has raised some of the most important and difficult questions concerning the appropriate boundaries of criminal law. Critics of the judgment have worried that its strict approach provides a manual for officials on how to support atrocities without fear of criminal responsibility. As Marko Milanovic has argued, for example, the acquittal on aiding and abetting:

> [E]ssentially boils down to the conclusion that it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing that they are engaging in mass atrocities, so long as that leader is remote from the actual operations and is not so thoroughly stupid to leave a smok-

28. *See* Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] ("In accordance with this Statute, a person shall be criminally responsible and liable for punishment of a crime within the jurisdiction of the Court if that person . . . [f]or the *purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing means for its commission.") (emphasis added).

29. *Id.* at art. 25(3)(d) (assigning criminal responsibility to one who "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" where the contribution is "intentional" and, *inter alia*, "made in the knowledge of the intention of the group to commit the crime").

30. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) ("Thus, applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.").

31. *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011) ("Accordingly, we hold that aiding and abetting liability is available under the ATS because it involves a norm established by customary international law and that the *mens rea* and *actus reus* requirements are those established by the ICTY, the ICTR, and the Nuremberg tribunals, whose opinions constitute expressions of customary international law.").

32. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1026–27 (9th Cir. 2014) ("remand[ing] to the district court with instructions to allow plaintiffs to amend their complaint in light of *Perisic* and *Taylor*, both of which were decided after the complaint in this case was dismissed and this appeal had been filed").

ing gun behind him.[33]

On the other hand, there are also concerns about the boundaries of an international complicity doctrine that is not restrained by something like a specific direction standard. Kevin Jon Heller has argued that:

> In the absence of the specific-direction requirement, the [ICTY's] expansive *mens rea* of aiding and abetting puts individuals who interact with organizations engaged in both lawful and unlawful acts in an impossible position. If they are aware of the unlawful acts, they cannot provide the organization with any assistance that might end up facilitating them—even if they do not intend to facilitate those acts, and even if they do everything in their power to prevent their facilitation.[34]

The contemporary geopolitical implications of this slippery slope have figured especially prominently in the complicity debate. Several commentators have raised the aforementioned question of how criminal law should view assistance to the Syrian rebels.[35] And during the closing arguments of Perišić's trial proceedings, Judge Bakone Justice Moloto (the sole dissenter from the original conviction) grilled the prosecution on whether its theory of aiding and abet-

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33. Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EJIL: TALK! (Mar. 11, 2013), http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic; *see also* Kenneth Roth, Opinion, *A Tribunal's Legal Stumble*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html ("[The ICTY] has suddenly established a precedent that, unless changed, could cripple future efforts to prosecute senior officials responsible for human rights crimes.").

34. Kevin Jon Heller, *Why the ICTY's "Specifically Directed" Requirement Is Justified*, OPINIO JURIS (June 2, 2013), http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified.

35. *See, e.g.*, *id.* ("Unless they avoid reading every major newspaper in the world, both the British government and the CIA are fully aware that rebel groups in Syria are engaged in both lawful and unlawful activities. As a result, insofar as the British government and the CIA nevertheless provide those groups with weapons, they are legally responsible for aiding and abetting any international crimes that their assistance ends up facilitating—even if they do everything in their power to assist only lawful rebel actions."); Milanovic, *supra* note 33 ("Consider, for example, the current situation in Syria, where a number of foreign governments are providing various types of support to either the Syrian regime or (more likely) the opposition, while knowing quite well that both sides have engaged in crimes against international law and that the aid that they are giving is contributing or is likely to contribute to the commission of these crimes. Are these foreign leaders thereby culpable as aiders and abettors? The Appeals Chamber is surely correct that there should be a difference between contributions to the war effort as such and to the commission of specific crimes.").

ting would have the effect of inculpating all the NATO commanders engaged in the Afghanistan war based on their awareness of crimes committed by some participants against detainees.[36]

In sum, then, the problem of assistance to armed groups (arising in what I loosely refer to as the "foreign assistance cases") raises deep methodological and normative challenges that have divided courts and commenters. This Article contributes to the debate on aiding and abetting by challenging two assumptions that have pervaded discussion of the issue.

First, I dispute the widespread judicial assumption that the resolution of these cases can and should be determined by recourse to the kind of precedential analysis that has dominated judicial consideration of aiding and abetting cases arising under international law. As a descriptive matter, the case law mistakenly maintains that the historical precedents reveal a consistent approach to aiding and abetting that evidences settled principles of customary international law. As a prescriptive matter, the tribunals' reliance on precedent—however well-founded—is no substitute for the kind of normative analysis that is necessary to secure adequate protections against injustice.

Second, I challenge the assumption that the resolution of foreign assistance cases turns on the particular doctrinal choices that have divided judges and commentators. Instead, the most critical issues surrounding the reach of complicity have less to do with the identification of legal elements themselves than with their interpreta-

36. *See* Prosecutor v. Perišić, Case No. IT-04-81-T, Transcript, 14660 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 28, 2011) ("[T]he point I'm asking simply is because the armies, the commanders of the remaining NATO countries that are participating in Afghanistan are aware of the fact that crimes have been committed, crimes against humanity have been committed, and yet those commanders are still continuing to participate in that war, are they then guilty of those crimes that are being committed?"). The suspicion that the Appeals judgment was motivated by considerations of this sort also provided a source of political intrigue at the Tribunal itself. In a June 2013 e-mail subsequently leaked to the press, ICTY Judge Frederik Harhoff speculated that the acquittal of Perišić and also, several months before, of Croatian general Ante Gotovina indicated "that the military establishment in leading states (such as USA and Israel) felt that the courts in practice were getting too close to the military commanders' responsibilities." *See* E-mail from Frederik Harhoff, Judge, Int'l. Crim. Trib. for the Former Yugoslavia, to Various Contacts (June 6, 2013) (on file with author). Judge Harhoff further singled out ICTY President Theodor Meron for special criticism, asking whether "any American or Israeli officials ever exerted pressure on the American presiding judge . . . to ensure a change of direction?" *Id.* As a consequence of this correspondence, Judge Harhoff was later disqualified from the case against Vojislav Šešelj shortly before the judgment in that trial was scheduled for release. *See* Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Judge Harhoff Disqualified from Šešelj Case (Aug. 29, 2013), http://www.icty.org/sid/11357.

tion. For example, the difference between the ICTY's knowledge-based approach to aiding and abetting and the ICC's apparently purposive approach is less consequential than the interpretive choices available under both approaches. These interpretive choices are especially complex because the moral considerations underlying the reach of criminal liability are themselves complex. Indeed, a principal difficulty presented by the foreign assistance cases lies in the way that they demand moral judgments that transcend easy encapsulation in the straightforward legal elements that have traditionally served to police the boundaries of criminal responsibility.

In combination, these insights reveal that foreign assistance cases are clouded by an indeterminacy that is both inevitable and familiar to criminal law. The challenge for international criminal law is to manage this indeterminacy in a way that renders the assignment of criminal responsibility sufficiently predictable while also maintaining a normatively meaningful distinction between guilt and innocence.

My discussion proceeds in five parts. Part I advances several critiques of the case-law methodology that tribunals have employed to identify the putative customary international law of complicity. I argue (1) that the World War II-era cases upon which modern tribunals have relied provide poor evidence of the existence of customary elements of aiding and abetting; (2) that even if taken as evidence of custom, these cases are by turns insufficiently consistent and insufficiently clear to evidence a settled understanding of aiding and abetting; and (3) that various normative considerations, including the age of these cases, their participation in a criminal legal system that embraced more sweeping principles of culpability than those recognized today, and the need to ensure adequate protections against over-criminalization, render the tribunals' case-law methodology a poor substitute for the kind of normative analysis that the tribunals have declined thus far to explicitly undertake.

Parts II through IV engage these normative dimensions of the foreign assistance cases through an appraisal of the legal elements that have played the central role in judicial and scholarly efforts to fix the boundaries of complicity. I argue that there is less at stake in the choice of legal elements than is commonly supposed, because the competing approaches to aiding and abetting each leave room for substantial interpretive flexibility. Moreover, the most plausible interpretations of these elements are also the least determinate, suggesting that the resolutions of the foreign assistance cases must inevitably rely on moral judgments that resist easy encapsulation. Part II evaluates the purposive approach to complicity endorsed by the Model Penal Code, by Article 25(3)(c) of the Rome Statute, and by much of

the U.S. ATS case law. Part III turns to the much-debated specific direction standard applied in *Perišić*. Part IV considers the actus reus requirement of substantial assistance that plays a particularly important role under approaches that require neither purpose nor specific direction.

Part V acknowledges the problematic indeterminacy arising from the kind of moral judgment that, I argue, is intrinsic to aiding and abetting determinations and suggests ways for the law to manage—without eliminating—this indeterminacy. I then conclude.

I. THE UNBEARABLE LIGHTNESS OF PRECEDENT

A reader of the international tribunal case law might be forgiven for thinking that identifying and applying standards of accomplice liability is a relatively straightforward matter. In the absence of adequate statutory guidance, judges have looked to uncodified rules of customary international law to determine important doctrinal questions. With respect to aiding and abetting in particular, the case law embraces the assumption both that this is the right approach and that customary international law does indeed supply the requisite answers. Hence, the courts have generally refrained from engaging in a normative analysis aimed at determining the most just approach toward aiding and abetting. The exercise, instead, is to discover and apply the existing answers already established by custom.

International criminal tribunals have consistently treated prior precedents of international criminal judgments as the best evidence of custom. This, for example, is the approach evidenced in the ICTY's landmark *Furundžija* case, which marks one of the first international convictions for aiding and abetting since World War II.[37]

37. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 193 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) ("Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials . . . . It therefore becomes necessary to examine the case law."). The case of *Prosecutor v. Tadić*, also at the ICTY, marked the first aiding and abetting conviction since World War II. An ICTY Trial Chamber convicted the accused on several counts of aiding and abetting war crimes and crimes against humanity. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 726, 730, 735, 738 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). As in *Furundžija*, the Trial Chamber drew extensively from the World War II-era case law. *Id.* ¶¶ 661–92. The defense did not appeal the Trial Chamber's legal findings regarding the law of aiding and abetting, but the Appeals Chamber nevertheless, without citation, laid out elements of aiding and abetting consistent with those that the *Furundžija* Trial Chamber would later identify, albeit also including the much debated reference to acts "specifically directed to . . . crime." Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

The accused, a military commander of a special unit of Bosnian Croat forces, was found guilty of having aided and abetted the rape of a detainee by his presence at the scene of the crime and his continued participation in the victim's interrogation.[38] In support of this finding, the Trial Chamber consulted a number of World War II-era precedents, including the judgment of the International Military Tribunal (IMT) at Nuremberg, the judgments of the Nuremberg Military Tribunals established in the U.S. zone of occupied Germany pursuant to Control Council Law No. 10, and the judgments of various other military tribunals established by the Allied states and the postwar German government.[39] Based on this review, the *Furundžija* Trial Chamber made several findings regarding the customary law of aiding and abetting liability. It ruled, for instance, that the aider or abettor's contribution to the underlying crime must be substantial, but need not play a causal role in the completion of the offense and, depending on the circumstances, could take the form of the accused's presence at the scene of the crime.[40] Moreover, the aider and abettor need not act with a purpose to facilitate the criminal offense: it is enough that the accused acted in the knowledge that he was substantially assisting the crime.[41]

Likewise, the *Perišić* and *Šainović* judgments both made significant use of these same precedents. In *Perišić,* the ICTY Appeals Chamber invoked the World War II case law in support of its own prior dictum in *Tadić* that liability for aiding and abetting requires proof of assistance "specifically directed" toward criminal activity.[42] In *Šainović*, by contrast, the Appeals Chamber declined to follow this portion of the *Perišić* judgment principally on the ground that its analysis of the same World War II cases found no support for a specific direction requirement.[43] And, having reached that conclusion, the *Šainović* judgment evidenced no attempt to consider whether principles of justice might require a specific direction requirement in

38. *Furundžija*, Case No. IT-95-17/1-T, ¶¶ 274–75.

39. *Id.* ¶¶ 193–226, 236–41.

40. *Id.* ¶¶ 232–35.

41. *Id.* ¶ 249 ("The *mens rea* required is the knowledge that these acts assist the commission of the offence.").

42. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (citing *The Zyklon B Case* for the proposition that "the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators").

43. Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶¶ 1627–42 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

the kinds of foreign assistance cases exemplified by *Perišić*. Other international criminal tribunals, along with several ATS precedents, have likewise relied on these precedents (either directly or by reference to ICTY case law) to determine the elements of aiding and abetting liability.[44]

In this Part, I challenge the view that standards of accomplice liability can or should be determined in the manner that these judgments have assumed. My claim is both descriptive and prescriptive. As a descriptive matter, it is mistaken to believe that consultation of the prior case law reveals a customary international law of accomplice liability that is sufficient to ground international convictions without further analysis regarding the appropriate scope of aiding and abetting liability. As a normative matter, moreover, the methodology adopted by the tribunals is ill-suited toward securing a just approach to criminal responsibility.

A. The Custom of Nuremberg

At the outset, there are several reasons for skepticism that the World War II-era judgments could have benefited from settled customary elements of accomplice liability. Establishing a norm of customary international law requires widespread state practice accompanied by a sense of legal obligation (*opinio juris*).[45] Yet different legal systems embrace different approaches to accomplice liability in their own domestic law.[46] Can one really expect that, by the time the

44. *See, e.g.*, Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment, ¶ 186 (June 1, 2001) (citing to ICTY precedents); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 403–27 (Sept. 26, 2013) (surveying the World War II-era cases).

45. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute] (specifying that the International Court of Justice shall apply, *inter alia*, "international custom, as evidence of a general practice accepted as law"); Michael Wood (Special Rapporteur), Int'l Law Comm'n, Second Rep. on Identification of Customary International Law, U.N. Doc. A/CN.4/672, ¶ 20 (May 22, 2014) ("'Customary international law' means those rules of international law that derive from and reflect a general practice accepted as law."); *id.* ¶ 52 ("[F]or a rule of general customary international law to emerge or be identified the practice need not be unanimous (universal); but, it must be extensive or, in other words, sufficiently widespread.") (internal quotations and citations omitted); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1986) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

46. *See, e.g.*, *Šainović*, Case No. IT-05-87-A, ¶ 1644 ("As a common basis, for aiding and abetting liability to arise, national legislation and the jurisprudence of domestic courts require the provision of assistance or support which facilitates the commission of a crime.

victorious Allies established the first international criminal tribunals in history, the international community had already reached widespread agreement on special, common rules of accomplice liability for these international crimes? The implausibility of this suggestion is underscored by the fact that consideration of the Nuremberg era remains dominated by discussion of retroactivity: neither crimes against humanity nor aggression—both prosecuted by the original IMTs and various military tribunals—had a history as offenses that were punishable under international law.[47] Quite clearly, the Allied commitment to prosecution was not one to be deterred by positivist anxieties about insufficient authority in existing law.

The reported judgments from this era confirm the broad extent to which convictions relied more on judicial creativity than established law to resolve the fine points of individual accountability. Take, for example, the *Schonfeld* case,[48] which is one of several decided by the British Military Courts to receive prominent attention in the recent cases.[49] The Court convicted four members of the German

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However, national jurisdictions conceptualise the link between the acts of assistance and the crime in the context of *actus reus* and the required degree of *mens rea* in various different ways in accordance with principles in their respective legal systems."); *Taylor*, Case No. SCSL-03-01-A, ¶¶ 429–30 (stating that "the reliance by the Defence on examples of domestic jurisdictions requiring or applying a 'purpose' standard to an accused's mental state regarding the consequence of his acts or conduct is misplaced," and that "[t]he Appeals Chamber equally identifies a number of States that explicitly provide that an accused's knowledge of the consequence of his acts or conduct is culpable mens rea for aiding and abetting liability").

47. *See, e.g.*, Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 832 (2006) ("The list of offences under the jurisdiction of the IMT was also denounced as having no solid foundation in international law. The Statute of the IMT provided, in the first place, for crimes against peace and, in particular, criminalized war of aggression (Article 6(a))."). Particular criticism has focused on the prosecution of aggression, labeled "crimes against peace." In its final judgment, the Nuremberg IMT famously pronounced that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice." *Judgment*, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 219 (1947) [hereinafter *United States v. Göring et al.*]. The judgment also invoked the 1928 Kellogg-Briand Pact to counter the claim that accountability for crimes against peace entailed ex post facto punishment. *See id.* at 219–20. As Tomuschat notes, "This reasoning was far from convincing. It is one thing to declare war unlawful with regard to inter-state relationships, but a totally different thing to acknowledge it as an offence entailing individual criminal responsibility." Tomuschat, *supra*, at 833.

48. *See generally Case No. 66, Trial of Franz Schonfeld and Nine Others*, *in* 11 UNITED NATIONS WAR CRIMES COMMISSION LAW REPORTS OF TRIALS OF WAR CRIMINALS 64 (1949) [hereinafter *Schonfeld*].

49. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 200–02 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Šainović*, Case No. IT-05-87-A, ¶ 1629.

Security Police for their alleged role in the 1944 killing of three downed Allied airmen who had taken refuge in a private residence in the Dutch town of Tilburg.[50] Like other British cases, *Schonfeld* did not produce a reasoned judgment, but the U.N. War Crimes Commission (UNWCC) report of the case quotes from the Judge Advocate's instructions to the Tribunal, including his "set[ting] out the law relating to accessories, and aiders and abettors."[51] The report reveals no attempt to ground this law in international legal sources. The legal standards are simply announced, and the UNWCC report confirms that the Judge Advocate drew upon principles of English law.[52] For this reason, the ICTY's *Furundžija* judgment distinguishes the British Military Court cases from other Nuremberg-era precedents, cautioning that "unless otherwise provided, the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue."[53]

Although the *Furundžija* Trial Chamber correctly identifies *Schonfeld*'s apparent failure to apply international standards of accomplice liability, it draws the wrong lesson from that failure. As the UNWCC report reflects, the resort to domestic law was evidently a gap-filling measure reflecting international law's own failure to provide sufficient guidance on crucial doctrinal matters. The intention "was not to try the accused for offences against English law but simply to amplify and define the charge against them" considering both "the present state of vagueness prevailing in many branches of the law of nations," and "the fact that there are no binding precedents in International Law."[54] Hence, the commentary concludes, "such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law."[55] Contrary to the ICTY's assumption, the British cases do indeed provide strong evidence regarding customary international law: they evi-

50. *Schonfeld*, *supra* note 48, at 64–67.

51. *See id.* at 69.

52. *See id.* at 69–70 (quoting the Judge Advocate's summary of "the law relating to accessories, and aiders and abettors"); *id.* at 72–73 (discussing the Judge Advocate's reliance on English law).

53. *Furundžija*, Case No. IT-95-17/1-T, ¶ 196. The *Furundžija* Trial Chamber did, nevertheless, rely on the British judgments, reasoning that "there is sufficient similarity between the law applied in the British cases and [other cases] under Control Council Law No. 10 for these cases to merit consideration." *Id.*

54. *Schonfeld*, *supra* note 48, at 72.

55. *Id.*

dence the law's general silence on the elements of aiding and abetting.

Perhaps the most remarkable aspect of the *Schonfeld* case is that the Judge Advocate went so far as to summarize the elements. Other cases—including the judgments delivered in U.S. occupied areas, which the *Furundžija* Chamber treats as more reliable—do not go so far. The judicial practice evidenced by these judgments is simply to apply summarily stated legal standards without providing any basis of authority whatsoever or even a basic summary of the applicable elements. For instance, in the *Flick* case, two defendants were convicted for contributing large sums to the financing of the SS with knowledge of the group's criminal activities.[56] Noting the SS's role in the mass extermination of Jews, among other crimes, the Tribunal reasoned that "[a]n organization which on a large scale is responsible for such crimes can be nothing else than criminal," and that "[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes."[57] Yet nowhere does the Tribunal identify the source of these "settled legal principles." Reaching a seemingly opposite conclusion, the IMT found it equally obvious in the *Ministries* case that a banker responsible for loaning large sums of money to various criminal SS enterprises was not on that basis responsible as a participant in those crimes despite his knowledge of the uses to which his assistance was being put.[58] That determination likewise fails to cite any underlying law. Nor, indeed, do any of the other World War II-era precedents cited by the international criminal tribunals provide evidence of any customary basis for aiding and abetting rules under international law. The inescapable conclusion is that the judges in these cases simply assessed the defendants' culpability based on the criminal law principles with which the judges happened to be familiar, or based on their own intuitive judgments about what justice required.

The idea, then, that the World War II-era cases applied preestablished customary rules is far-fetched. But perhaps the defense of these cases must proceed in a different manner. Perhaps their claim to customary legitimacy derives from events in subsequent

56. *The Flick Case*, *supra* note 9, at 23–24, 1216–23.

57. *Id.* at 1217.

58. *See generally* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: "*THE MINISTRIES CASE*" 621–22 (1949–1953) [hereinafter *The Ministries Case*] (finding defendant Karl Rasche not guilty of war crimes and crimes against humanity on the basis of these bank loans). Rasche was, however, convicted on another count unrelated to these loans. *See id.* at 772–84.

years, from the international community's post hoc approval of the Nuremberg moment. Indeed, the notion that international law has at some level ratified at least some of these cases is uncontroversial. This approval began early, even as the World War II cases were still being decided. In 1946, during its very first session and only weeks after the Nuremberg IMT had delivered its final judgment, the U.N. General Assembly unanimously passed a resolution "affirm[ing] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" and directing the Assembly's codification committee to treat the codification of those principles "as a matter of primary importance."[59] The next year, the U.N. General Assembly directed the newly established International Law Commission (ILC) to undertake this codification effort, leading the ILC to produce, in 1950, a list of seven "Nuremberg Principles,"[60] and, in 1954, a nonbinding Draft Code of Crimes Against the Peace and Security of Mankind.[61] The Nuremberg legacy has seen further affirmation in recent decades with the establishment of various additional tribunals charged with prosecuting international offenses.

Taken together, these and other developments provide strong support for the view that many principles of international criminal law have entered into customary international law, and indeed the prohibitions against genocide, crimes against humanity, and war crimes are often cited as examples of *jus cogens* obligations from which no derogation is permitted.[62] But it would be implausible to maintain that this ratification entailed the acceptance of every doctrinal detail appearing in the case reports of the World War II-era judgments. The ILC's Nuremberg Principles, for instance, operate at a much higher level of generality, identifying crimes that are punishable under international law and stating certain core principles of liability, such as the fact that international crimes incur individual responsibility and that neither official capacity nor superior orders

59. G.A. Res. 95 (Dec. 11, 1946).

60. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, U.N. Doc. A/1316 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 374, ¶ 97, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

61. *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/2693 (1954), *reprinted in* [1954] 2 Y.B. Int'l L. Comm'n 149, U.N. Doc. A/CN.4/SER.A/1954/Add.1 [hereinafter ILC, 1954 Draft Code].

62. *See, e.g.*, M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROB. 63, 68 (1996) ("The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.").

supply a defense. The seventh and final principle deals with accomplice liability. It states, "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law," but says nothing about the forms and elements of complicity.[63]

The ILC's 1954 Draft Code likewise fails to identify the elements of complicity,[64] although a later draft produced in 1996 does specify that an individual "shall be responsible for a crime [listed in the Draft Code] if that individual . . . [k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission."[65] Several judgments have cited this provision, alongside the World War II-era case law, as evidence of a customary standard,[66] but the accompanying ILC commentary does not purport to identify rules of customary international law.[67] Moreover, when only two years later 120 states approved the final text of the Rome Statute of the ICC, they agreed upon a different aiding and abetting standard than the one endorsed by the ILC.[68]

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63. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 60, at 377. Even with respect to these core principles, moreover, the ILC declined to opine on whether they formed part of international law. *See id.* at 378.

64. ILC, 1954 Draft Code, *supra* note 61, at art. 2(12)(iv) (defining as "offences against the peace and security of mankind" those "[a]cts which constitute . . . [c]omplicity in the commission of any of the offences defined in the preceding paragraphs of this article").

65. *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 18, art. 2(3)(d), U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) [hereinafter ILC, 1996 Draft Code].

66. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 187 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1647 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 428 (Sept. 26, 2013).

67. Instead, it specifies that:

> The principle of individual criminal responsibility for complicity in the commission of a crime set forth in subparagraph (*d*) is consistent with the Charter of the Nürnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (*e*)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1). This principle is also consistent with the Nürnberg Principles (Principle VII) and the 1954 draft Code (art. 2, para. 13 (iii)).

ILC, 1996 Draft Code, *supra* note 65, at 21.

68. *See infra* note 118 and accompanying text; *Furundžija*, Case No. IT-95-17/1-T, ¶ 227 ("[T]he Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.").

A more plausible account of the Nuremberg legacy would acknowledge that a core of international criminal law has entered into customary international law, but that, from the very beginning, the system has necessarily relied on judicial discretion to elaborate many of the rules necessary to assign criminal liability.

B. Inconsistent Precedents

A separate problem has to do with the internal coherence of the World War II-era cases. That is, even if one treats those cases as unproblematic evidence of customary international law, they nevertheless fail, on their terms, to provide a lucid and consistent account of accomplice liability.[69]

1. Mens Rea

Take, for instance, the mental element of complicity. A number of World War II-era decisions appear to support the ICTY's conclusion that knowledge of one's contribution to an offense satisfies the mental element required for conviction. But closer scrutiny of these decisions reveals a more complicated picture. In some cases, the judges simply applied the complicity standards operative in their own respective legal systems. This is the case, for instance, with a

69. That the World War II-era cases have proven inconsistent on some points of law is uncontroversial. For instance, in *Prosecutor v. Erdemović*, a plurality of the ICTY Appeals Chamber found the cases to be conflicted on whether duress could ever afford a complete defense to murder as a war crime or crime against humanity. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) ("In light of the above discussion, it is our considered view that no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. The post-World War Two military tribunals did not establish such a rule. We do not think that the decisions of these tribunals or those of other national courts and military tribunals constitute consistent and uniform state practice underpinned by *opinio juris sive necessitatis*."). Accordingly, when the Tribunal rejected the accused's duress defense, it did so on policy grounds rather than on the basis of a pre-existing customary rule. *Id.* ¶ 88 ("After the above survey of authorities in the different systems of law and exploration of the various policy considerations which we must bear in mind, we take the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined."). With respect to complicity, however, recent case law has provided a somewhat-misleading sense of precedential consensus.

pair of French military tribunal cases cited in *Šainović*, which applied a French Penal Code provision assigning culpability to "[t]hose who knowingly have aided or assisted the perpetrator."[70] And in the *Pig-Cart Parade* case, decided by the German Supreme Court in the British occupied zone, the Court applied the broader approach familiar to German law according to which *dolus eventualis*—roughly analogous to the common law concept of recklessness—satisfies the mental element of complicity.[71] On the other hand, the Judge Advocate's instructions in the aforementioned *Schonfeld* case appear to endorse the more purposive approach to complicity that is familiar to common law systems.[72]

In some cases, moreover, judicial statements about mens rea are clouded by uncertainty regarding what form of accomplice liability is involved. *Schonfeld* itself provides a good example of this phenomenon. The Judge Advocate provided instructions not only on aiding and abetting liability but also on so-called common design liability. This latter mode of liability is a form of enterprise liability,

70. *Trial of Franz Holstein and Twenty-Three Others*, *in* 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 22, 33 (1949). *See generally Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace During the Occupation, and Six Others*, *in* 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 23 (1948).

71. Strafsenat, Urteil vom 14 Dezember 1948 gegen L. und andere, StS 37/48 (*Pig-Cart Parade Case*), *in* 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFS FÜR DIE BRITISCHE ZONE IN STRAFSACHEN 229–34 (1949). On *dolus eventualis*, see Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977, 992–93 (2007) (noting that *dolus eventualis* has a "subjective aspect[] which requires indifference toward, or perhaps even acceptance of, the chance that a proscribed result might occur," and an "objective aspect . . . which requires the creation of a risk not rising to the level of virtual certainty," and further concluding that "[n]o matter how one looks at *dolus eventualis,* it is clear that it is not knowledge, or *dolus indirectus,* even though it may not quite be recklessness either").

72. Take for example, the Judge Advocate's discussion of the aider and abettor who is present at the scene of the crime—and is thus punishable as a "principal in the second degree" under the traditional common law rule. *Schonfeld*, *supra* note 48, at 70. The instructions provide that "if he is outside the house, watching, *to prevent* a surprise, or the like, whilst his companions are in the house committing a felony, such a constructive presence is sufficient to make him a principal in the second degree . . . but he must be near enough to give assistance." *Id.* (emphasis added). The instructions further clarify that:

> It is not necessary . . . to prove that the party actually aided in the commission of the offence; if he watched for his companions *in order to* prevent surprise, or remained at a convenient distance *in order to favour* their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was *calculated* to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.

Id. (emphasis added). As such, the ICTY's *Furundžija* judgment may have been too quick in its assessment that *Schonfeld* endorses knowledge-based aiding and abetting. *Furundžija*, Case No. IT-95-17/1-T, ¶ 239.

permitting the conviction of those who did not aid or abet the murder of the airmen so long as those murders were in furtherance of a common criminal design in which the accused participated.[73]

This type of accomplice liability is well-known to the U.S. legal system, where the federal courts and many states follow the so-called *Pinkerton* approach, pursuant to which parties to a conspiracy can be convicted as accomplices for all foreseeable crimes committed by their co-conspirators in furtherance of the conspiracy.[74] In an influential precedent, the ICTY Appeals Chamber likewise recognized that an accused's participation in a so-called "joint criminal enterprise" (JCE) renders the accused responsible for all foreseeable crimes within the Tribunal's jurisdiction that are committed in furtherance of the JCE.[75] As described by the Judge Advocate in *Schonfeld*, common design liability involves a combination of purpose and knowledge. The common design itself must reflect an illegal purpose, but individual participants may be convicted based on their knowing participation in that design.[76]

The UNWCC report of *Schonfeld* does not indicate which theory of accomplice liability provided the basis of decision for the various convicted accomplices. A similar ambiguity also complicates the consideration of other cases that did produce reasoned judgments. For instance, the *Einsatzgruppen* case, one of the Control Council Law No. 10 prosecutions heard by a U.S. military tribunal in Nuremberg, focused on leaders of SS paramilitary units responsible for mass killings in German occupied territories.[77] The *Furundžija*

73. *Schonfeld*, *supra* note 48, at 68 ("In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.").

74. Pinkerton v. United States, 328 U.S. 640, 647–48 (1946).

75. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 188–93 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). The ICTR, the SCSL, and the STL have also embraced this doctrine as well.

76. *Schonfeld*, *supra* note 48, at 68 ("You will therefore ask yourselves the question: What was the object of this assembly in or about Diepenstraat 49? Was it an assembly to commit murder, or was it an assembly to effect arrests? If the former, did the members of the assembly know the purpose for which they were there, and if the purpose was the crime of murder, did they participate in the design to murder?"). Notably, the ICTY's *Tadić* judgment adopts a narrower approach to enterprise liability, one that requires members of the common plan to share the group's criminal purpose. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

77. *See generally The Einsatzgruppen Case—Opinion and Judgment*, *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 411 (1949–1953)

judgment relies on *Einsatzgruppen* for the point that "knowledge, rather than intent, was held to be the requisite mental element,"[78] yet the relevant portions of the *Einsatzgruppen* judgment suggest that the Tribunal was not relying on aiding and abetting principles but instead applying special rules of liability applicable to participants in a common criminal design. For instance, with respect to defendant Fendler, the Tribunal emphasizes that the defendant "knew that executions were taking place," while doing nothing to stop them.[79] The Tribunal reaches this conclusion after noting the prosecution's argument that, while Fendler never conducted an execution, "it is maintained that he was part of an organization committed to an extermination program."[80] Yet the Tribunal's emphasis on Fendler's high rank and his guilt by omission suggest yet a third theory of responsibility, one rooted in a commander's special responsibility to control his subordinates. The Tribunal notes that as "the second-highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected."[81]

These reflections appear to reflect the Tribunal's reliance—evident in both *Einsatzgruppen* and other Nuremberg Military Tribunal judgments—on a provision of Control Council Law No. 10 authorizing the conviction of those who "took a consenting part" (TCP) in a war crime or crime against humanity.[82] Heller explains that "the tribunals considered TCP either to be another name for participating in a criminal enterprise or—more interestingly—as a *sui generis* mode of participation in a crime similar to, but not equivalent with command responsibility."[83] By contrast, "The tribunals . . . addressed abetting solely in the context of enterprise liability, considering defendants who had executed a criminal enterprise to have abetted it."[84]

There are, however, at least two cases in which judges from

[hereinafter *The Einsatzgruppen Case*].

78. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 237 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

79. *See The Einsatzgruppen Case*, *supra* note 77, at 572.

80. *Id.* at 571.

81. *Id.* at 572.

82. Control Council Law No. 10, *supra* note 19, at art. II(2); KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 259 (2011).

83. HELLER, *supra* note 82, at 259–60.

84. *Id.* at 287.

common law legal systems do appear to endorse a knowledge-based approach to aiding and abetting. In the *Zyklon B* case, a British Military Court convicted two executives of a firm that supplied poison gas to extermination camps.[85] The Judge Advocate instructed that conviction could rest on a finding that "the accused knew that the gas was to be used for the purpose of killing human beings," even if the accused did not share this criminal purpose.[86] Likewise, in *Flick*, one of the Nuremberg Military Tribunal cases, the Tribunal convicted two of the accused on charges of having contributed funds used to support the SS. As I have already noted, the Tribunal reasoned in that case, "One who knowingly by his influence and money contributes to the support [of an organization which on a large scale is responsible for war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes."[87] Even these cases, however, are potentially distinguishable on the grounds that they involve aiding and abetting *of* a criminal enterprise: the defendants were convicted of providing assistance to the SS, which the Nuremberg IMT had already determined to be a criminal organization.[88]

2. Substantiality of Assistance

The precedents also tell a mixed story regarding the actus reus of complicity. The modern ad hoc tribunals have invoked World War II-era cases to support the rule that the aider and abettor's actions must provide assistance that has a substantial effect on the principal's crimes.[89] Yet many of the passages cited in these judgments do not straightforwardly address the substantiality of assistance, and some appear instead to stand for the more modest proposition that the aider and abettor must merely assist the offense in some way.[90] Nor,

85. *The Zyklon B Case*, *supra* note 8, at 93–103.

86. *Id.* at 101.

87. *The Flick Case*, *supra* note 9, at 1217.

88. *See infra* notes 179–81 and accompanying text.

89. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 218–26 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1642 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) ("The criteria employed in these cases were rather whether the defendants substantially and knowingly contributed to relevant crimes.").

90. For the citations, *see infra* notes 179–81 and accompanying text. For the passages, see, for example, *The Einsatzgruppen Case*, *supra* note 77, at 569 (noting with respect to the accused Klingelhoefer, that even if his only function had been to act as an interpreter "it would not exonerate him from guilt because in locating, evaluating and turning over lists of

indeed, is it clear in all cases that the convicted accomplice did in fact substantially assist the offense. For instance, in the *Rohde* case, a British tribunal convicted a prisoner at the Natzweiler-Struthof concentration camp for the murder by lethal injection of four British prisoners where the accused's sole apparent role was to work the oven used to cremate the victims' bodies post-execution.[91] Although one can readily think of cases where disposal of a body substantially assists a crime by helping to conceal the offense from the authorities, conceptualizing cremation as a form of aiding and abetting is far more tenuous in a case like *Rohde* where the authorities themselves have undertaken the execution and there is no imperative to conceal. The quotations from the Judge Advocate's instructions provided in the brief case report give no attention to this question.

3. Specific Direction

Finally, the World War II-era precedents also provide less guidance on the divisive question of specific direction than the recent case law would suggest. The judgments rejecting this standard correctly observe that none of the early cases mention specific direction as an element of aiding and abetting,[92] yet the vast majority of these

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Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found"); *id.* at 572 ("As the second highest ranking officer in the Kommando, [Fendler's] views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected."); *id.* at 585 ("Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment."); *The Zyklon B Case*, *supra* note 8, at 102 (reporting the Judge Advocate's instructions that the accused Drosihn's responsibility turns on "whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty"); *Modes of Participation in Crimes Against Humanity, The Hechingen and Haigerloch Case*, 7 J. INT'L CRIM. JUST. 131, 131–48 (2009); *Furundžija*, Case No. IT-95-17/1-T, ¶ 225 n.250 (quoting *The Hechingen Case*, which states that "[i]t is irrelevant that if a single accused or all of them had refused to co-operate, the search would have been carried out by the other accused or by somebody else").

91. *Case No. 31, Trial of Werner Rohde and Eight Others*, *in* 5 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 54, 54–56 (1948).

92. *Šainović*, Case No. IT-05-87-A, ¶¶ 1627–42; Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 474 (Sept. 26, 2013) ("The Appeals Chamber has independently reviewed the post-Second World War jurisprudence, and is satisfied that those cases did not require an actus reus element of 'specific direction' in addition to proof that the accused's acts and conduct had a substantial effect on the commission of the crimes."). Note, however, that the ILC's 1996 Draft Code does specify that the aider or abettor must

cases do not raise the problem—encountered in *Perišić*—of generalized or so-called "neutral" assistance provided to a recipient who uses it for both legitimate and illegitimate purposes.

Again, however, *Zyklon B* and *Flick* appear to be exceptions. In the former case, the accused argued, *inter alia*, that they had supplied insecticide to the SS for the legitimate purpose of delousing buildings.[93] The Judge Advocate instructed that the Tribunal could convict based on a finding "that the accused knew that the gas was to be used for the purpose of killing human beings."[94] Even here, the instructions do not distinguish between a scenario in which the accused knew that all of the gas was to be used for killing human beings, and one in which the accused knew that only some or much of it was to be so used. Nevertheless, it would be odd to summarize the issues in this way if the law demanded an exclusively criminal purpose.[95]

In the *Flick* case, moreover, the Tribunal did acknowledge the probability that not all the accused's financial donations to the personal use of SS commander Heinrich Himmler went to illegitimate ends. The judgment finds it "reasonably clear" that a portion of the funds "were used purely for cultural purposes," but nevertheless justifies the conviction of Flick and Steinbrinck on the grounds that they could not "reasonably believe" that their contributions were used "solely for cultural purposes."[96] The Tribunal further expressed "no doubt" that "some of this money" was used in support of criminal ac-

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"directly and substantially" assist the principal's crime, but it does not elucidate what is meant by the word "directly." *See* ILC, 1996 Draft Code, *supra* note 65 and accompanying text.

93. *The Zyklon B Case*, *supra* note 8, at 94 ("The prosecuting Counsel, in his opening address, stated that Dr. Bruno Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories. In the first place, it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps. Secondly, it provided, where required, expert technicians to carry out these gassing operations. Lastly, Dr. Tesch and Dr. Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The predominant importance of these gassing operations in war-time lay in their value in the extermination of lice.").

94. *Id.* at 101.

95. The ICTY Appeals Chamber's discussion of specific direction in the *Perišić* case includes a footnote citing evidence in *Zyklon B* that evidence "that defendants arranged for S.S. units to be trained in using this gas to kill humans in confined spaces." Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 n.115 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

96. *The Flick Case*, *supra* note 9, at 1220.

tivity.[97] Given its broadest reading, this language conveys a breathtakingly broad view of criminal liability according to which a donor is criminally liable for a mere negligent failure to realize that some portion of a financial contribution will be directed by the recipient toward criminal ends. Yet other passages caution against such a broad reading. I have previously quoted language indicating that the Tribunal was focused only on knowing assistance of crimes.[98] Hence, perhaps what the judgment really means to say is that defendants must have known, and hence did know, of the uses to which their contributions were put. Moreover, the Tribunal also took the position that any use of the accused's contributions for legitimate cultural activities was likely insignificant during the wartime period.[99]

But the *Zyklon B* and *Flick* cases are also noteworthy on account of the fact that they deal with assistance to the SS, an entity that the IMT had determined to be a criminal organization.[100] This fact plays a central role in the reasoning of *Flick*, as the Tribunal determined it to be "clear from the evidence that [Flick and Steinbrinck] gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas."[101] In the *Zyklon B* case, the accused directly supplied the SS with insecticide.[102]

For this reason, Heller has argued that *Zyklon B* is compatible with *Perišić*. In particular, he notes that "*the SS was not an organization that was engaged in lawful and unlawful activities*. On the contrary, *all* of the SS's activities were unlawful, which is precisely why the IMT specifically deemed it a criminal organization."[103] As I explore below, there are some complications with this argument—in particular the IMT's assessment of the SS as a criminal organization

97. *Id.*

98. *See supra* note 87 and accompanying text.

99. *The Flick Case*, *supra* note 9, at 1220 ("But during the war and particularly after the beginning of the Russian campaign we cannot believe that there was much cultural activity in Germany.").

100. *See supra* note 88 and accompanying text.

101. *The Flick Case*, *supra* note 9, at 1221.

102. *The Zyklon B Case*, *supra* note 8, at 98 (noting defense counsel's acknowledgment that "supplies of Zyklon B to the S.S. were large").

103. Kevin Jon Heller, *The Specific-Direction Requirement Would Not Have Acquitted the Zyklon-B Defendants*, OPINIO JURIS (Aug. 19, 2013), http://opiniojuris.org/2013/08/19/no-specific-direction-would-not-have-acquitted-the-zyklon-b-defendants/ (emphasis in original).

does not appear to have rested on a negative finding that the SS refrained from all criminal activity (and indeed any such finding would have been mistaken)[104]—but nevertheless this argument suggests a way to read both the *Zyklon B* and *Flick* cases that is broadly consistent with *Perišić*'s specific direction requirement. The outcome of *Zyklon B* does not offend specific direction, because any support for a criminal enterprise such as the SS was necessarily illegitimate, whereas the narrowest reading of *Flick* supports, at best, a de minimis exception to the specific direction requirement in cases where an insignificant portion of assistance is directed toward legitimate ends.

C. Normative Concerns

There are, finally, several compelling normative reasons to exercise caution when relying upon the World War II-era cases. First of all, the age of the decisions should give pause. The dearth of precedents during the Cold War years raises concerns that modern international criminal law has become overly dependent upon what is now seventy-year-old criminal law, ignoring intervening reforms at the domestic level. According to the practice set by the ICTY in *Tadić*, international tribunals may rely on national legal standards, but only after meeting a high threshold: national criminal law can provide a source of international law "under the doctrine of the general principles of law recognised by the nations of the world," but for it to play this role "it would be necessary to show that most, if not all, countries adopt the same notion . . . . More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach."[105]

Second, there is the problem of "victor's justice." The World War II era saw the Allies invoke international criminal law for the exclusive purpose of prosecuting crimes committed on behalf of the defeated Axis powers, raising concerns that these judgments do not reflect the same commitment to protecting the accused as would have accompanied an evenhanded approach that held both winners and losers to the same legal standards.[106]

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104. *See infra* notes 176–79 and accompanying text.

105. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 225 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

106. The *Furundžija* judgment exemplifies this danger when it remarks with respect to the *Rohde* case that "In the case of one of the accused, assistance *ex post facto* was found to be sufficient for criminal responsibility. As this was not the position under English law, the inference is warranted that the court applied a different law to these international crimes." Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 204 (Int'l Crim. Trib. for the

And whether or not the World War II-era judgments reflect actual judicial bias, they do embrace a more expansive approach to criminal liability than that which prevails today. For instance, the knowledge-based form of enterprise liability endorsed in *Einsatzgruppen* and many other cases is broader than the modern JCE doctrine, according to which the accused must share the criminal purpose of the enterprise.[107] The IMTs embraced an analogue to command responsibility, which extends more broadly than does the contemporary command responsibility doctrine.[108] But most dramatic of all is the prohibition—enshrined in the statutes of the Nuremberg and Tokyo IMTs, as well Control Council Law No. 10—of mere membership in a "criminal organization."[109] Although the judgment of the IMT at Nuremberg narrowed the prohibition to cover only those members who were both aware of the organization's criminal purposes or acts and had joined voluntarily, even this reduced liability—which requires no contribution toward or endorsement of the organization's crimes—extends the reach of international criminal law far beyond what contemporary international legal practice has embraced.[110]

This aspect of the World War II-era case law should give pause to contemporary jurists confronting other forms of liability, such as aiding and abetting, that do remain part of contemporary international criminal law. Indeed, it is predictable that a legal regime

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Former Yugoslavia Dec. 10, 1998). In context, the statement appears to treat this divergence from English law as evidence that the British Military Court applied a special rule of international law, one that enhances the case's authority as an authentic international legal precedent rather than simply a national law precedent. Yet, one might be equally tempted to conclude that this divergence simply reflected the judges' willingness to dispense with national law protections that proved inexpedient.

107. *See Tadić*, Case No. IT-94-1-A, ¶ 220.

108. *See* HELLER, *supra* note 82, at 259.

109. London Charter, *supra* note 19, at art. 10 ("In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."); Control Council Law No. 10, *supra* note 19, at art. II (recognizing "as a crime . . . [m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal").

110. *United States v. Göring et al.*, *supra* note 47, at 256 ("Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.").

committed to the punishment of mere membership in an organization would—and indeed, should—also take a broad view of accomplice liability. It would seem incongruous for the *Flick* judgment to conclude that defendant Flick's membership in the SS was grounds for punishment but that his and defendant Steinbrinck's substantial contributions to a fund administered by the SS's Reichsleader were not. If anything, the financial contributions would appear to reflect greater blameworthiness on account of the tangible assistance they offered the SS's crimes. But this observation does not speak to the question of whether, and when, such contributions should give rise to criminal liability in a legal regime—such as the contemporary international criminal justice system—that rejects membership as a basis of prosecution.

Finally, the nature of criminal justice demands special caution when precedents are invoked to defeat arguments to restrain the scope of criminal liability. Punishment involves a deprivation of individual liberty, and the adjudication of particular cases always risks an application of established law that leads to injustices neither foreseen nor intended by the general rule. As George Fletcher has recognized, the prohibition on retroactive punishment should not "preclude the judicial recognition of new claims of excuse and justification."[111] That concern applies with special force to international criminal law, where the international legal system affords no ready legislative fix for statutory deficiencies. Amending the rules of liability imposed by the Rome Statute of the ICC, for instance, requires ratification by seven-eighths of the treaty's 124 States Parties.[112] And to establish new rules of customary law requires widespread practice among states.[113] Accordingly, international criminal tribunals are to a large extent dependent on judges to adopt interpretive strategies and to exercise their available discretion in a manner that prevents injustice. The idea that important protections for the accused not recognized in the World War II-era case law must await this level of widespread agreement is indefensible.

None of this is to argue that precedents are irrelevant to the field of international criminal law. To the contrary, resort to precedential authority can play an important role in promoting legality values such as ensuring fair notice and reducing the risk of arbitrary judicial action. Likewise, it can provide an especially compelling ar-

111. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 569–70 (1978). For similar reasons, Heller has argued that the specific direction requirement does not violate the legality principle despite its lack of a customary basis. *See* Heller, *supra* note 103.

112. Rome Statute, *supra* note 28, at art. 121(4).

113. *See supra* note 45 and accompanying text.

gument against expanding criminal responsibility beyond previously established boundaries. But the reliance on World War II-era precedents cannot serve as a substitute for normative analysis, especially regarding the limits of criminal responsibility. The next Part turns to these normative considerations.

II. PURPOSE

There are many ways to contribute to a crime without becoming criminally responsible. Consider the hypothetical example of parents who learn that their daughter, an adult university student studying computer science, is engaged in illegal computer hacking. The parents express their strong disapproval but nevertheless continue to financially support their child by paying for tuition, living expenses, and basic necessities. Or, even more implausibly, imagine that the parents are not providing this assistance but nevertheless contributed to the crime more distantly by deciding to procreate while knowing full well that, in the normal course of events, their child will, at some point in her life, do something that violates criminal law.[114] In both of these examples one can accurately describe the parents as making a contribution, even a knowing contribution, to their daughter's criminal offenses, yet no just system of law would treat them as culpable participants in the child's crime.

It is the task of complicity law to distinguish between those contributions to crime that are punishable and those that are not, and also—in many legal systems—to distinguish between varying degrees of criminal guilt.[115] As the debate over specific direction reveals, different legal systems and different international criminal tri-

114. James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189, 1208 (2012) (noting that such examples "extend causation beyond the point of plausibility"); MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 301 (2014) (noting with respect to the case of People v. Kibbe, 35 N.Y.2d 407 (1974), that "if the owner of the tavern in Rochester where victim and offenders met would not have opened his establishment, or if [the perpetrator's] parents had chosen not to have children, the incident would not have occurred as it did . . . [b]ut causal antecedents of this kind hardly are sufficient to attribute criminal responsibility").

115. In international legal circles, significant debate has focused on how to grade the culpability of the blameworthy. For instance, the ICTY's JCE approach labels all contributing members of a criminal enterprise as principal perpetrators in the foreseeable crimes committed in furtherance of the enterprise. By contrast, the ICC's "control theory" approach to co-perpetration treats as principal perpetrators only those who have made "essential contributions" to the enterprise. Non-essential contributors must be prosecuted, if at all, as accomplices.

bunals have taken a range of approaches on these questions. In the remainder of this Article, I consider and evaluate how these different approaches impact the scope of liability in foreign assistance cases like *Perišić*.

I begin by considering the purposive approach to aiding and abetting, which seeks to prevent the overextension of criminal responsibility through a narrow mens rea requirement. In the United States, for example, the influential Model Penal Code provides, "A person is an accomplice of another person in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it."[116] The codes and case law of several other common law jurisdictions include similar language,[117] as does the Rome Statute, which assigns criminal responsibility to one who, "For the purpose of facilitating the commission of [a crime within the Court's jurisdiction], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."[118]

Anthony Duff has justified the commitment to purpose-based complicity by reference to a political libertarianism that informs the common law's general reluctance to punish people for mere omissions.[119] On this view, the store clerk who sells screwdrivers to paying customers is merely going about her usual business and need not interrupt this ordinary course of conduct when approached by a paying customer who announces his intention to use the screwdriver in a burglary. To require otherwise, argues Duff, would be to impose an affirmative obligation on citizens to prevent crimes, an obligation at odds with the common law's traditional rejection of a general duty to rescue.[120] A line is crossed, however, when the clerk actively aims to

116. MODEL PENAL CODE § 2.06(3) (AM. LAW INST. 1962).

117. In *Šainović*, the ICTY Appeals Chamber cited the examples of Australia, Canada, Ghana, Israel, and England. *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1645 nn.5417–18 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

118. Rome Statute, *supra* note 28, at art. 25(3)(c); *see also* Sarah Finnin & Nema Milaninia, *Putting "Purpose" in Context*, JAMES G. STEWART (Dec. 7, 2014), http://jamesgstewart.com/putting-purpose-in-context ("Article 25(3)(c) echoes the approach originally developed by the American Law Institute in its Model Penal Code ('MPC'), which requires that an accomplice act 'with the purpose of promoting or facilitating the commission of the offense.'").

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

120. *Id.* at 178 ("Those who favour the latter option can argue that it accords with other central features of English criminal law, in particular with the principle that omissions or failures to prevent harm can found criminal liability only if the agent has a special duty of

further the customer's criminal designs, for example by advising on which particular screwdriver is best suited to accomplish the intended burglary or instructing on how exactly to employ the tool.[121] The clerk has now acted with an affirmative purpose to aid the offender and may be punished accordingly.

As a prima facie matter, Duff's account provides a compelling defense of the purposive approach, at least to the extent that one shares Duff's concern about punishing omissions. Other prominent scholars have voiced similar cautions about a knowledge-based aiding and abetting[122] and the commentary to the Model Penal Code defends its purposive standard along similar lines.[123] But the adequacy of this account—and its implications for particular cases—depends very much on how the requirement is understood. What exactly does it mean to act purposefully, and to which elements of the principal offender's offense must the accomplice's purpose extend?

At common law and in early criminal codes, the answer to this question was shrouded in ambiguity both because the law relied on the ambiguous concept of "intent," which lacked a settled meaning, and because of a tendency to identify mens rea in general terms without always specifying the mental requirements for each individual element of an offense.[124] A major contribution of the Model Penal

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care as to that harm or its victim.").

121. Duff makes this point in the context of a gun sale, noting that "[t]o ascribe an intention to assist P's commission of an offence to D, we would need to show that the sale was not simply a normal commercial transaction: that, for instance, D helped P to select an appropriate gun for his purposes, or charged him a special price." *Id.* at 172.

122. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 373 (2d ed. 1961) ("The seller of an ordinary marketable commodity is not his buyer's keeper in criminal law unless he is specifically made so by statute."); FLETCHER, *supra* note 111, at 676 ("From the standpoint of the supplier, the problem of refusing services to known criminals closely resembles the problem of intervening to prevent impending harm. The grocery store, the gas station, the physician, the answering service all provide routine services. Does the businessperson have a duty to make an exception just because he or she knows that the purchaser is engaged in illegal activity?"). *But see generally* Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997) (defending accomplice liability based on recklessness).

123. MODEL PENAL CODE § 2.06 cmt. at 315–16 (AM. LAW INST. 1962) ("A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of a crime. . . . An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. . . . Such cases can be multiplied indefinitely; they have given courts much difficulty when they have been brought, whether as prosecutions for conspiracy or for the substantive offense involved.").

124. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983)

Code was to introduce greater precision on these points, but as I discuss below, it failed in critical ways to clarify the mens rea applicable to accomplice liability.[125] Moreover, individual U.S. states continue to follow a range of approaches to accomplice liability.[126]

A. Purpose as to All Elements

Under the strictest interpretation, culpability for aiding and abetting would require an accomplice to fully embrace all elements of the principal offender's crime, "positively to desire," in James Stewart's words, "the criminal outcome her assistance helps to bring into the world."[127] This view comports with how the Model Penal Code generally defines purposeful conduct on the part of a principal

("American criminal law has advanced significantly towards providing . . . precision, clarity, and rationality, owing in large part to the Model Penal Code. The common law and older codes often defined an offense to require only a single mental state. Under this 'offense analysis,' one spoke of intentional offenses, reckless offenses, and negligent offenses. The general culpability provisions of the Model Penal Code, in contrast, recognize that a single offense definition may require a different culpable state of mind for each objective element of the offense."). Reflecting these ambiguities, English case law, for example, has divided on whether accomplices must actually desire to promote the criminal acts of principal perpetrators. *See* Duff, *supra* note 119, at 165–66 (observing that "[a]iding and abetting requires an 'intention' to assist the commission of the relevant offence" and surveying the split between, on the one hand, English cases holding that an accomplice has "that intention just so long as she acts in a way which she *knows* will facilitate the commission of the offence," and, on the other hand, Scottish cases and some English cases, finding that intention requires more than mere knowledge); NEHA JAIN, PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW: INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES 161 (2014) ("There is controversy over whether [an accessory] must possess a mental attitude with respect to the offence going beyond mere awareness and actually intend the offence to occur . . . [and] [t]he bulk of English authorities support the conclusion that D's knowledge that his act will assist is sufficient."). In the United States, by contrast, the majority position is that purpose, rather than knowledge, is required. *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 637 n.100 (1984) ("The defendant must have either a purpose to assist or encourage or, in some jurisdictions, simply have knowledge of the fact that he is assisting or encouraging. The majority of United States codes require purposeful or intentional assistance.").

125. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 335 (2007) ("In its zeal to clarify the law, the Model Penal Code even excised the words 'intent' and 'intention' from its terminology, concepts that in spite (or perhaps partly because) of their ambiguity had assumed a central place in the criminal law of the United States, as well as of many other countries.").

126. *See generally* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237 (2008).

127. James G. Stewart, *Complicity*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 534, 551 (Markus D. Dubber & Tatjana Hörnle eds., 2014) [hereinafter Stewart, *Complicity*].

offender who "acts purposely with respect to a material element of an offense when[,] . . . if the element involves the nature of his conduct or a result thereof, it is his conscious object to *engage* in conduct of that nature or to cause such a result."[128]

The obvious attraction of this approach lies in its protection against over-criminalization. Imagine, for example, that Perišić had disbursed arms to Bosnian Serb forces with precise instructions that tied the procurement of continued aid to the continued perpetration of atrocities. In such a case, the dilemmas of "specific direction" disappear. That Perišić might have known or even desired that the beneficiaries of his assistance would devote a portion of this support to legitimate combat functions is hardly relevant. By working to promote these atrocities, Perišić made them his own, reducing the need for further doctrinal protections against an overly expansive accomplice liability.

This is not to say, however, that a strict purpose requirement avoids all risk of over-criminalization. Consider the citizen that complies with her general legal duty to pay taxes in the knowledge that a portion of the revenue will end up supporting government corruption. Imagine that the taxpayer happens to endorse this corruption and finds it to be a decisive reason to avoid tax evasion. Or imagine a variation on *Perišić*, in which a government official is responsible for overseeing an otherwise-permissible foreign aid program. The official knows that a small portion of the assistance will find its way to recipients who perpetrate atrocities, and the official has volunteered for this work precisely because he wants to support these atrocities. Nevertheless, the official undertakes his work in a neutral matter, performing his duties exactly as he might if he did not embrace this purpose. As these admittedly fanciful examples illustrate, even a strict mens rea requirement may be insufficient—without other legal protections—to ground criminal responsibility in cases of minor or attenuated contributions to criminal activity.

Nevertheless, the far more substantial problem with this strict approach is that it is under-inclusive, leading to well-known arbitrary distinctions between accomplices and principal perpetrators. Stewart gives the example of a person who, acting without justification, throws a grenade into a passing car, knowing to a virtual certainty that the explosion will kill someone inside.[129] The grenade explosion

128. MODEL PENAL CODE § 2.02(2)(a)–(a)(i) (AM. LAW INST. 1962) (emphasis added). The Code further provides that the offender acts purposely with respect to background facts, or so-called "attendant circumstances," if "he is aware of their existence or he believes or hopes that they exist." MODEL PENAL CODE § 2.02(2)(a)(ii) (AM. LAW INST. 1962).

129. Stewart, *Complicity*, *supra* note 127, at 556.

does indeed kill the car's occupants and the perpetrator (whom I will name Sid) is guilty of murder.[130] Whether or not Sid acted with the express purpose to kill is irrelevant. It might be, for example, that the car's driver has just taken an embarrassing photograph that Sid wants to destroy, and that it is all the same to him whether or not any of the car's occupants survive the explosion. This non-homicidal purpose fails to exonerate in light of Sid's awareness that his actions were virtually certain to result in death. Indeed, even something less than virtual certainty will be sufficient to support a homicide conviction—if not for murder, then for a lower grade of homicide.

Suppose, now, that Sid is assisted by an accomplice, Nancy, who passes him the grenade after pulling the pin. Suppose, moreover, that Nancy knows full well what Sid intends to do, but is personally indifferent regarding whether or not Sid plans to throw the grenade into the passing vehicle or, instead, into a nearby pond where it will safely explode without risk to human life. What reason is there, in a case like this, to convict Sid of murder on the ground that he was aware of the certain consequences of his action, but to absolve his accomplice, Nancy, on the ground that her identical knowledge does not amount to a purpose to take human life?

Different versions of this scenario—both hypothetical and real-life—have played a prominent role in scholarly and judicial criticism of the strictly purposive approach.[131] Notably, this scenario does not benefit from the rationale commonly invoked to defend a purpose requirement. Handing a live grenade to a would-be murder-

130. This result follows from the common law requirement of malice aforethought, see, for example, Regina v. Serné, 16 Cox. Crim. Cas. 311 (1887), *reprinted in* AUGUSTIN DERBY, CASES ON CRIMINAL LAW 342 (1917) ("The definition [of murder] is unlawful homicide with malice aforethought; and the words malice aforethought are technical. . . . [One] meaning is, an act done with the knowledge that the act will probably cause the death of some person.") and from the Model Penal Code's approach to homicide, see MODEL PENAL CODE § 210.2 (AM. LAW INST. 1962) (providing, *inter alia*, that "criminal homicide constitutes murder when . . . it is committed purposely or knowingly").

131. Glanville Williams, for instance, cites a similar example in support of the proposition that the mens rea required to prosecute aiders and abettors may sometimes be looser than for principal perpetrators. *See* WILLIAMS, *supra* note 122, at 394 ("It seems that even where a crime requires intention on the part of the perpetrator, intention need not be proved against a secondary party if he knowingly involves himself in the affair. Thus: D is about to kill P, and requests E to hand him a weapon with which to do it; E hands him the weapon, not because he wishes P to die, but because he always likes to oblige D. E is clearly a party to the murder if he knows of D's intention. In this respect, the mental element required for secondary parties is more widely defined than the mental element required for the perpetrator."); *see, e.g.*, United States v. Fountain, 768 F.2d 790 (7th Cir. 1985) (rejecting the purposive approach to complicity in the case of an inmate who provided the knife to a fellow inmate, which was used to murder a guard).

er has little to do with selling everyday products in the ordinary course of business. Nor is it intuitive to describe culpability of such an accomplice as a form of guilt by omission. Accordingly, to the extent that the "ordinary conduct of business" argument provides a persuasive reason to reject some kinds of knowledge-based complicity, this argument does not cover all cases.

B. The Conduct/Result Distinction

This arbitrary under-inclusiveness provides a compelling reason to reject the strictest version of the purposive approach. Indeed, that is what jurisdictions that embrace a purpose requirment have done. In some instances, the elements of aiding and abetting are supplemented by other, more expansive forms of liability that either formally expand accomplice liability[132] or have the practical effect of doing so.[133] But even putting those examples aside, the commitment to intentional complicity itself has taken a more nuanced form, one resting on a distinction between the perpetrator's criminal actions and the results of those actions. What is critical under this approach is

132. For instance, many jurisdictions apply the so-called *Pinkerton* rule, which treats co-conspirators as accomplices to all crimes committed in furtherance of the conspiracy, including foreseeable offenses outside the common plan. *See* Pinkerton v. United States, 328 U.S. 640 (1946). Some jurisdictions follow a similar rule for aiders and abettors outside the context of conspiracy, holding them responsible for the "probable and natural consequences" of their assistance, including crimes not intended by the accomplice. *See* People v. Luparello, 187 Cal. App. 3d 410 (1986). Although both doctrines require the accomplice to embrace some sort of criminal intent, they operate to hold accomplices responsible for crimes outside the scope of their intended assistance.

133. New York state, for example, supplements its rules of accessorial liability by codifying the offense of criminal facilitation, which prohibits the aiding of a crime by one "believing it probable he is rendering aid." N.Y. PENAL LAW, § 115. Although criminal facilitation is a distinct offense rather than a form of participation in another offense, the effect is to penalize certain non-purposeful forms of criminal assistance. At the federal level, well known facilitation offenses include the crime of material support to terrorism (18 U.S.C.A. § 2339B) and money laundering (18 U.S.C.A. §§ 1956–57). When applicable, these statutes assign liability even more broadly than New York's facilitation offense in that they require neither a purposeful contribution to crime nor an actual contribution to crime. For instance, it is a crime to "knowingly provide[] material support or resources to a foreign terrorist organization," irrespective of whether that support assists the criminal activities of the organization. 18 U.S.C.A. § 2339B; *see* Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010) (interpreting 18 U.S.C.A. § 2339B to prohibit training "on how to use humanitarian and international law to peacefully resolve disputes"). With respect to money laundering, it is a criminal offense to knowingly engage in certain transactions involving money from an illegal source regardless of whether the transaction itself helps to assist or conceal the underlying illegal activity. 18 U.S.C.A. § 1957.

that the accomplice purposefully assists the perpetrator's criminal conduct. So long as the accomplice does so, she may be held responsible for the completed crime even if she does not have as her conscious object the realization of any prohibited harm.

Consider the following scenario: Jill is driving her car at excessive speeds through a crowded city street, paying no attention to the traffic signs. Jack is in the passenger seat, constantly encouraging her to drive faster. Both exhibit extreme recklessness regarding the risk that Jill will fatally injure someone, as she indeed does when the car strikes a pedestrian. On account of her recklessness, Jill is convicted of manslaughter. Is Jack also guilty as an accomplice to manslaughter? Under the strict purposive approach, the answer is no. Jack had no purpose to aid homicide and is therefore not responsible for the devastating fruits of the behavior he encouraged. But Jack did act with a purpose to encourage Jill's culpable behavior, the reckless driving itself, and—just like Jill—he has exhibited extreme recklessness regarding the fatal result that transpired. Courts in the United States and England have convicted accomplices under these circumstances.[134] The operative fact is that Jack purposefully encouraged Jill's criminal conduct (her high-speed driving) while possessing the same mens rea regarding the potential loss of human life (recklessness) that the law finds sufficient to convict Jill as a principal perpetrator.

The Model Penal Code reaches the same result; it specifies, "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."[135] Hence, jurisdictions that have adopted the Code language on complicity would also convict Jack under the above-described circumstances.

This distinction has special importance for the ICC, whose Statute tracks the Model Penal Code in providing for the punishment

134. LUIS E. CHIESA, SUBSTANTIVE CRIMINAL LAW: CASES, COMMENTS AND COMPARATIVE MATERIALS 314 (2014) ("[M]any—if not most—American jurisdictions hold that an actor may be held liable as an accomplice to an unintentional offense such as involuntary manslaughter. Properly understood, this does not dispense with the traditional requirement that the accomplice purposefully encourage the commission of the crime. Rather, it clarifies that the accomplice need only purposefully assist, facilitate, or encourage the *conduct* that gives rise to the offense."); WILLIAMS, *supra* note 122, at 361–62 ("[I]f two riders or drivers encourage each other to go fast, each is responsible for a negligent killing by the other.").

135. MODEL PENAL CODE § 2.06(4) (AM. LAW INST. 1985).

of those who provide assistance "[f]or the purpose of facilitating the commission" of a crime.[136] Unlike the Code, however, the Rome Statute does not define the word "purpose," nor does it specify how much of the underlying offense must fall within the accomplice's purpose or otherwise endorse the Model Penal Code's conduct/result distinction. But the Statute's debt to the Model Penal Code's purposive language provides a powerful argument that the Rome Statute likewise embraces that framework.[137] A recent online symposium hosted by Stewart indicates that this interpretation of the Rome Statute has gained substantial currency among international criminal law scholars.[138]

What, however, are the implications of this framework for the foreign assistance cases? The answer is not entirely clear. There is, it appears, instability in the conduct/result distinction itself.[139] Take, for example, the case of Nancy, the grenade-passing accomplice. Nancy's assistance is clearly purposive in the sense that she acted with the object of facilitating Sid's request for the grenade. However, as hypothesized, Nancy did not act with a deliberate purpose to assist Sid's throwing of the grenade into the car itself: she is merely aware of Sid's lethal plan. If one treats Sid's procuring of the grenade as part of his criminal conduct, then the conduct/result distinction will support Nancy's conviction. After all, Nancy acted with a purpose to facilitate that portion of Sid's conduct. If, on the other hand, one treats only Sid's throwing of the grenade as the relevant act for purposes of his murder conviction, then Nancy's help to Sid in procuring the grenade is insufficient for accomplice liability.

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136. *See* Rome Statute, *supra* note 28, at art. 25(3)(c).

137. *See* Adil Ahmad Haque, *The U.S. Model Penal Code's Significance for Complicity in the ICC Statute: An American View*, JAMES G. STEWART (Dec. 13, 2014), http://jamesgstewart.com/the-u-s-model-penal-codes-significance-for-complicity-in-the-icc-statute-an-american-view (adopting this view).

138. *See* James G. Stewart, *An Important New Orthodoxy on Complicity in the ICC Statute?*, JAMES G. STEWART (Jan. 21, 2015), http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/#comments (identifying support for an "important new orthodox interpretation of complicity in the ICC Statute" that rests on the conduct/result distinction). *But see* Kevin Jon Heller, Comment to *An Important New Orthodoxy on Complicity in the ICC Statute?*, JAMES G. STEWART (Jan. 24, 2015, 6:44 PM), http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/#comments (arguing that a soldier who hands to a fellow solider a weapon used to execute civilians is not guilty of purposeful aiding and abetting under the Rome Statute absent evidence that the alleged accomplice intended to facilitate the shooting of the victims).

139. *See* Robinson & Grall, *supra* note 124, at 706 ("A major defect of the Model Penal Code is its failure to define adequately the three kinds of objective elements of an offense—that is, to distinguish conduct, circumstance, and result elements.").

The latter scenario is problematic because it preserves the arbitrary distinction according to which the virtual certainty of death convicts Sid but not Nancy. The former scenario—which treats Sid's procuring of the grenade as part of his criminal conduct—produces the more satisfying disposition of Nancy's guilt. It also provides some support for the view that government officials who intentionally provide material assistance to the perpetrators of mass atrocities can also be held accountable, even under a purpose standard, based on their knowledge of how the recipients plan to use that assistance. In particular, it could support the conviction of defendants like Taylor and Perišić on the ground that they purposefully aided the procuring of support by recipients who planned to use that support toward illicit ends.

The problem with going down this line, however, is that it threatens to render the purposive approach near meaningless because it will produce convictions in the "ordinary course of business" cases the Model Penal Code standard was ostensibly designed to exclude.[140] Consider again the hardware store clerk who sells a screwdriver to a customer who has announced his plan to use the tool in a burglary. The clerk treats the burglar like any other customer, yet the same interpretive maneuvers that enable Nancy's conviction for murder will also enable the clerk's conviction for burglary. Just like Nancy, the clerk has purposefully aided the perpetrator's attempt to procure a tool that the clerk knows the perpetrator intends to use to commit a crime. This application nearly eliminates the distinction between purposive aiding and abetting and knowledge-based aiding and abetting.

Ultimately, then, the conduct/result distinction does less work than one might suppose. Given the pliability involved in determining the scope of the offender's conduct, distinctions between these different scenarios must ultimately rely on other criteria. Perhaps the conduct/result distinction simply serves to mask underlying value judgments about the appropriate reach of criminal law. One can say that Nancy has purposely aided Sid's crime, and that the screwdriver-selling shopkeeper has not purposely aided burglary, but really what one is doing is making a determination that the clerk has engaged in morally appropriate behavior that conforms with community norms while Nancy has not.

140. *See supra* note 123 and accompanying text.

C. Ordinary Course of Business

If the conduct/result distinction fails to adequately limit the purposive approach, might some other principle provide a more reliable guide? One option is to take seriously the oft-cited concern about interrupting the ordinary course of business and to explicitly consider whether or not the alleged assistance merely takes the form of an ordinary course of business, or what German criminal theorists describe as "neutral acts."[141] If it does, then the actor has not purposely aided a crime.[142] On the other hand, an actor who goes out of his way to provide assistance to the principal, thereby deviating from an ordinary course of business, is criminally responsible under the purposive approach.

Duff gives the example of a hardware store clerk who breaks the ordinary course of business by not only selling a tool to a would-be burglar, but by advising on which particular tools are best suited to the burglar's criminal intentions. Even in that case, as Duff points out, one need not assume that the clerk is rooting for his customer's success: "[The] shopkeeper who advises a customer that this screwdriver or this weed-killer will best serve his criminal purpose intends, and tries, to assist his crime, even if her reason for acting thus is not to ensure that the crime is committed, but simply to make a profit."[143]

Perhaps one could explain the case of Sid and Nancy in similar terms. There is nothing normal—at least not among civilians in peacetime—about handing a grenade over to a would-be killer. To demand that Nancy act otherwise does not offend any legitimate liberty interest in the way that punishing the screwdriver-selling clerk might. This rationale only goes so far, however, and it has less clear implications for the foreign assistance cases. In the first place, there is the question of what counts as an ordinary course of business. Are government officials directing the provision of military aid to armed groups in other countries merely conducting an ordinary course of business that renders them unaccountable for how they know their

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141. *See* JAIN, *supra* note 124, at 194.

142. For precedents reasoning along these lines, see, for example, Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1089–90, 1091, 1094–96 (C.D. Cal. 2010); *id.* at 1090 ("Regardless of whether the holdings are categorized as turning on the defendant's *actus reus* or the *mens rea,* the ultimate conclusion is clear: ordinary commercial transaction[s], without more, do not violate international law."); *The Ministries Case*, *supra* note 58, at 622 ("Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.").

143. Duff, *supra* note 119, at 170.

assistance will be used? Perhaps, but framing the matter in this way is not especially illuminating. After all, there is little analogy between this case and that of the store clerk who sells general goods to anonymous paying customers. Decisions regarding the distribution of military support are quite particularized, involving judgments regarding the specific goals to be served by providing particular support to particular recipients. Taylor's support for the RUF and AFRC, like Perišić's support for the VRS, hinged on his endorsement of at least some of the group's goals and activities.[144] In cases where the donor knows that the recipient plans to use the assistance to commit international crimes, perhaps it makes sense to hold the donor to a more demanding standard of responsibility.

Yet viewing the issue in this way fails to capture what makes these cases so difficult. The central problem remains that in some situations the pursuit of legitimate and desirable goals demands the provision of assistance that will unavoidably contribute in some way to crime. Consideration of these cases requires a moral judgment that is not reducible to the assessment of whether or not the conduct in question reflects an ordinary course of business.

Furthermore, some very compelling cases for conviction will involve what can reasonably be described as an ordinary course of business. Consider the *Zyklon B* scenario of the distributor who supplies insecticide to Nazi extermination camps. It may well be that this supply requires no conscious deviation from the firm's general business practice of selling its product to willing customers.[145] Yet, that fact would seem to count for quite little once the firm's business has come to focus primarily on the supply of lethal gas for use in mass murder.

The acquittal of Karl Rasche in the *Ministries* case is also troubling in this respect, because it highlights the risk that an ordinary course of business rationale will unduly privilege business activ-

144. *See supra* note 23 and accompanying text.

145. Arguing along these lines, Sabine Michalowski critiques the attempt of the court in *Doe v. Nestle* to distinguish the non-culpable bank loans in *Ministries* from the culpable behavior in *Zyklon B* on the ground that *Zyklon B* did not involve ordinary commercial practices. *See generally* Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451 (2012). As Michalowski notes:

> [I]t is not obvious why the Court identified the *Zyklon B* case as one in which the business person acted in a "non-commercial, non-mutually-beneficial manner." Tesch produced and sold poisonous gas and provided training regarding its use for killing concentration camp inmates, which he did as a profitable business transaction. The fact that these are clearly reprehensible actions does not deprive them of their commercial nature.

Id. at 479.

ities that are morally indistinguishable from other culpable behavior. Can it really be that making large personal donations to the SS—as in *Flick*—is grounds for conviction, but that arranging large bank loans to the SS—as in *Ministries*—is not?[146] One might argue that these judgments are irreconcilable, but it remains noteworthy that the reasoning in *Ministries* relies on course-of-business considerations that do not as readily apply to personal financial contributions.[147]

One may also deny that the provision of insecticide or bank loans under the circumstances in *Zyklon B* and *Ministries* constitutes an ordinary course of business, but doing so simply confirms how this assessment itself depends upon a prior determination of blameworthiness. As with the conduct/result distinction, then, the "ordinary course of business" rationale does little to resolve the moral dilemmas of the foreign assistance cases.

D. Imputed Purpose

Thus far, my discussion has assumed knowledge of an actor's mental state. In the real world, of course, matters are more complicated. Fact finders are not mind readers, and they often must reach judgments about an actor's mental state based on circumstantial evidence rather than unambiguous statements of intent. In defense of its purposive approach, for instance, the Model Penal Code Commentary argues that "often, if not usually, aid rendered with guilty knowledge

146. This is in fact how the District Court in *Doe v. Nestle* distinguished those cases. *Doe*, 748 F. Supp. 2d at 1089–90, 1094–96; *see also* Michalowski, *supra* note 145, at 478–79 ("It is equally unclear to what extent the difference in outcomes in *Flick* and *Rasche* rests on the fact that Flick was accused of making personal financial contributions to Himmler in order to secure political favors, whereas Rasche was accused of making a commercial loan on behalf of Dresdner Bank. For the court in *Doe v. Nestle,* this was indeed the decisive difference between the two cases.").

147. *The Ministries Case, supra* note 58*,* at 622 ("A bank sells money or credit in the same manner as the merchandiser of any other commodity."). In *Talisman Energy*, the Second Circuit concluded from this acquittal that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct," Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009), but the IMT did not adopt so blanket an approach. Instead it focused on a narrower issue: "The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law?" *The Ministries Case, supra* note 58, at 622. Note that Rasche was also charged on account of his personal contributions to the same Himmler-administered fund that was at issue in *Flick*. The Tribunal also acquitted Rasche on this count, but its reasoning here did not conflict with the legal standard adopted in *Flick*. Unlike in the latter judgment, the *Ministries* found no evidence that the defendant knew for what the funds were being used. *Id.* at 854–55.

implies purpose since it has no other motivation."[148] In *Perišić*, the ICTY Appeals Chamber likewise emphasized the potential importance of circumstantial evidence, observing that "evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes."[149] Although the quoted language deals expressly with proof of specific direction, it applies equally to proof of purpose.

On one level statements such as these merely reflect the reality that fact finding often rests on circumstantial evidence, but they also highlight the possibility that actual culpability assessments may not adhere as rigorously to the specified legal elements as the law would appear to demand. In the case of Sid and Nancy, for instance, the approach outlined in the Model Penal Code Commentary could invite a guilty determination on the grounds that, Nancy's own account of her motivations notwithstanding, her conduct so dramatically deviated from community standards of morality that she must have acted with a criminal purpose. Hence, her "guilty knowledge implies purpose" and has "no other motivation."[150] By contrast, in a case like that of the merchant who merely sells a screwdriver, a fact finder will be less likely to impute a criminal purpose. Although formally it is the purposive mens rea requirement that must decide these cases, in reality the fact finding relies on broader moral judgments of the defendant's behavior.

III. SPECIFIC DIRECTION

The framework adopted by the ICTY in the *Perišić* Appeals judgment does not require a purposeful contribution to crime. It allows conviction for aiding and abetting based on the accomplice's knowing contribution to the principal offender.[151] However, it protects against over-criminalization by demanding that the accomplice's actus reus takes the form of assistance that is "specifically directed" toward the offense.[152] In particular, the *Perišić* Appeals

148. MODEL PENAL CODE § 2.06, cmt. at 316 (AM. LAW INST. 1985).

149. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

150. MODEL PENAL CODE § 2.06, cmt. at 316 (AM. LAW INST. 1985).

151. *Perišić*, Case No. IT-04-81-A, ¶ 37 n.99 ("These other elements of aiding and abetting liability are substantial contribution, knowledge that aid provided assists in the commission of relevant crimes, and awareness of the essential elements of these crimes.").

152. *Id.* ¶ 73.

Chamber emphasized the necessity of expressly considering specific direction in cases where the "aider and abettor is remote from relevant crimes" and, therefore, "evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction."[153]

This approach has elicited widespread—albeit not universal—criticism.[154] Not least among the objections is the apparent novelty of the ICTY's approach. A much-cited study concludes that there is virtually no support in other international case law, comparative criminal law, or academic literature for the proposition that "specific direction" is or should be an element of aiding and abetting.[155]

To some extent, however, the debate may have more to do with semantics than substance. The idea of specific direction may be something already implicit in the idea of aiding and abetting; for example, there is a difference between actually assisting criminal behavior, on the one hand, and, on the other hand, engaging in more general activities that somewhere along the line will have the effect of remotely assisting an offender's culpable conduct. This directionality concept could explain why no culpability attaches to the parents whose only assistance to their child's crime lies in their having brought the child into existence and their having fulfilled their general parental obligations to provide food, education, a loving home, and so on.[156] There is an obvious, literal sense in which the parental act of procreation makes a critical and necessary contribution to any crimes committed by the child, but society does not define that conduct as a contribution to crime. By contrast, when Nancy passes a live grenade to Sid knowing what Sid intends to do with it, the assistance is both specific and direct, regardless of whether Nancy is rooting for Sid's success.[157]

The evidence from the ICTY's seminal *Tadić* Appeals judgment—which introduced the language of specific direction into the

153. *Id.* ¶ 39. On this basis, the Tribunal distinguished "previous appeal judgements [that] have not conducted extensive analyses of specific direction." *Id.* ¶ 38. It explained that in those cases:

> The lack of such discussion may be explained by the fact that prior convictions for aiding and abetting entered or affirmed by the Appeals Chamber involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of principal perpetrators. Where such proximity is present, specific direction may be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution.

Id.

154. *See supra* notes 21, 33 and accompanying text.

155. *See* Stewart, *Unprecedented*, *supra* note 21.

156. *See supra* note 114 and accompanying text.

157. *See supra* notes 124–27 and accompanying text.

international criminal jurisprudence—suggests a distinction along these lines.[158] The language makes its appearance in a passage distinguishing the culpability involved in aiding and abetting from that resulting from participation in a JCE, where liability can be established based on general contributions to the shared criminal enterprise rather than by proof of contributions to particular crimes committed by the enterprise. To convict a JCE member, the Tribunal explains, "it is sufficient for the participant to perform acts that *in some way* are directed to the furthering of the common plan or purpose," whereas "[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."[159] Whatever the precise meaning of the words "specifically directed," few would dispute that criminal prohibitions against aiding and abetting are generally concerned with behavior that has both a more specific and a more direct relationship to crime than the JCE approach contemplates.

There are also cognate areas of law that make a similar distinction, for instance the international humanitarian law rules for determining permissible targets. It is permissible to attack only "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[160] This standard clearly permits the bombing of an armaments factory on account of the direct contribution that armaments make to military action.[161] On the other hand, attacks on the general agricultural system relied upon by the general population are prohibited.[162] Likewise, civilians themselves may not be targeted "unless and for such time as they take a direct part in hostilities."[163] Taking such a direct part need not involve firing a weap-

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

159. *Id.* ¶ 229(iii) (emphasis added).

160. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52 ¶ 2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

161. *See* ICTY, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 37 (June 13, 2000), http://www.icty.org/x/file/Press/nato061300.pdf ("Everyone will agree that a munitions factory is a military objective and an unoccupied church is a civilian object.").

162. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 522 (2010).

163. Additional Protocol I*, supra* note 160, at art. 51 ¶ 3.

on. Were Sid a soldier engaged in combat on the battlefield, it would be permissible to target Nancy, a civilian, as she handed him a grenade, or as she fueled his tank. The civilian café owner who brewed Sid's morning coffee is off-limits however, no matter how much Sid's fearsome combat skills depend on regular caffeination.[164]

The most important question, then, is not whether some concept of specific direction appropriately resides in the definition of aiding and abetting. Rather, the question is what role that concept plays. In this Part, I consider several possibilities. This analysis yields a similar conclusion to my examination of purpose. While the strictest interpretations of specific direction produce morally arbitrary results, the more plausible interpretations provide less clear guidance.

A. Specific Direction as Purpose

One option is that the specific direction standard is simply another way of describing the purposive approach to complicity. As a linguistic matter, the *Tadić* Appeals Chamber's reference to assistance "directed" toward atrocities connotes intentionality, and this understanding comports with Judge Arlette Ramaroson's concurring opinion in *Perišić*, which argues that specific direction is best understood as an aspect of mens rea.[165] This would be an odd result given the ICTY's consistent finding, including in *Perišić* itself, that knowledge rather than purpose is the requisite mens rea.[166] However, this apparent contradiction may find resolution in the conduct/result distinction: an accomplice who specifically directs assistance to the perpetrator's murderous conduct may be held responsible even if the accomplice does not act with the conscious object of bringing about the death of any human being.[167]

Although the *Perišić* plurality opinion treats specific direction as an actus reus requirement, it too emphasizes an important connection to mens rea by suggesting that specific direction can be established circumstantially by proof of a criminal purpose.[168] Under this

164. *See* NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 31–36 (May 2009), http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (distinguishing between civilians and members of organized armed groups).

165. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, Opinion Séparée du Juge Ramaroson sur la Question de la *Visée Spécifique* Dans La Complicité Par Aide et Encouragment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 28, 2013).

166. *See id.*

167. *See supra* Part II.B.

168. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 48 (Int'l Crim. Trib. for

approach, in other words, the accused's criminal purpose will usually be sufficient, but not always necessary, to prove specific direction.

In either event, to the extent that a purposive mens rea can establish specific direction—whether as a necessary or merely sufficient condition—then the interpretive questions relating to purpose will apply.

B. Specific Direction as Exclusive Direction

Another option is that specific direction involves an accomplice providing assistance whose sole effect is to further criminal conduct. This interpretation finds particular support in the *Perišić* Appeals Chamber's analysis, which emphasized, "[I]n most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators."[169] The Chamber further reflected, "In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary."[170] With respect to the Bosnian Serb forces whom Perišić assisted, the Chamber emphasized that the "VRS undertook, *inter alia*, lawful combat activities and was not a purely criminal organisation."[171] On this view, the critical issue is the anticipated uses of the assistance. Aid that the accused knows will be used for purely criminal purposes is specifically directed toward crime. General aid that

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the Former Yugoslavia Sept. 28, 2013) ("[T]he Appeals Chamber acknowledges that specific direction may involve considerations that are closely related to questions of *mens rea*. Indeed, as discussed below, evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes.") (emphasis omitted). The Tribunal does not equate purpose with specific direction in so many words, but as Heller has noted:

> It is difficult to imagine more powerful circumstantial evidence that the defendant specifically directed his assistance toward an organization's unlawful activities than proof that the defendant specifically intended his assistance to facilitate that organization's unlawful activities. Can anyone honestly imagine a tribunal acquitting, say, a military officer who provided soldiers with weapons intending them to be used to execute civilians simply because the soldiers could have used the weapons to hunt game, as well?

Heller, *supra* note 103.

169. *Perišić*, Case No. IT-04-81-A, ¶ 44.

170. *Id.*

171. *Id.* ¶ 69.

will only later be divided between criminal and non-criminal purposes is not.

Among the various possible interpretations of the ICTY's specific direction language, this approach has rightfully elicited the most criticism. As Stewart has observed, this interpretation could even justify acquittal in the *Zyklon B* case.[172] After all, "officers of the company were actually supplying Zyklon B to the S.S. for two uses: (a) to exterminate insects and germs within labor and concentration camps (a massive sanitary problem); and (b) to gas Jews."[173] To appreciate the power of this critique, consider how this problem disappears if the supplier can tell, based on the shipping label, which batches of gas are to be used for homicide and which for insecticide. In that case, the supplier's culpability rests on his knowledge of the specific direction of each shipment. Yet to hold the supplier responsible only on that basis seems arbitrary.

There are a few possible responses to this critique in defense of an exclusive direction requirement. One is that the critique confuses ends and means. The *Zyklon B* conviction is justifiable because even the delousing activities were conducted in support of a concentration camp system that lacked any legitimate or legal purpose. Perhaps the portion of gas used for delousing is not a contribution that, on its own, should be punishable, but neither does it divert the specific criminal direction of the aid. Another response argues that assistance to a criminal organization such as the SS must be treated as per se specifically directed to crime, irrespective of how the organization puts that assistance to use. A third response—less applicable to *Zyklon B* than to some other problematic scenarios—is that the law must draw a line between legitimate and criminal behavior in a way less restrictive to prosecution than what the *Perišić* Appeals Chamber suggested. For reasons I will now explore, these responses fail, both individually and cumulatively, to salvage the exclusive direction concept.

1. Ends and Means

Framing delousing as a means to an unlawful end may justify the result in *Zyklon B* itself, but doing so fails to address the central flaw in the exclusive direction approach. Consider the example of a

172. *See* James Stewart, Comment to Kevin Jon Heller, *More Misdirection on Specific Direction*, OPINIO JURIS (Aug. 17, 2013, 3:13 PM), http://opiniojuris.org/2013/08/13/yet-more-specific-direction-misdirection.

173. *Id.*

German industrialist who aids and abets SS crimes by donating large sums to the organization. The industrialist is also an arts patron and separately donates to various cultural endeavors. Assume that SS donations render the donor criminally responsible for SS crimes. Can he avoid criminal responsibility by directing his combined donations to a special fund—such as the Himmler fund confronted in the *Flick* case—that is known to support both the SS and, in good faith, the arts?[174] Even if the majority of the fund is used for arts patronage, the donation is difficult to justify: after all, the industrialist has the choice to support the arts directly without providing any help to the SS. Yet pursuant to *Perišić*, the donation appears permissible on the ground that the fund is used for both legitimate (arts patronage) and criminal (SS support) endeavors.

Perhaps this example proves too much. As I have hypothesized, the bundling of support is entirely avoidable. Given that support for the arts is so readily separable from support for the SS, perhaps the bundling should not count against specific direction. But the matter may not be so straightforward. It may be, for example, that the industrialist has elected to defer entirely to the fund administrator regarding the allocation of donations. The administrator is free, according to her own determination of what will benefit the homeland, to donate as much or as little to the SS, the arts, or to any other cause. Yet it remains odd to conclude that the industrialist only becomes liable when he knows that 100% of the funds—as opposed to say 95%—are to be directed to the SS.

Or imagine, alternately, that there is no feasible way to support a non-criminal cause without directing funds to the SS. Imagine that the SS donates 5% of its budget to a program supporting war orphans of its deceased members. Because the SS itself controls the relevant information—who the orphans are, where they live, what help they need, etc.—there is no feasible way to help these orphans without donating funds to the general use of the SS. If the industrialist knows that 95% of the donation will provide critical support to atrocities in circumstances that would otherwise render the donor criminally liable, the non-criminal direction of this 5% hardly provides a convincing reason to exculpate the industrialist.[175]

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174. *See supra* note 56 and accompanying text.

175. For an argument along similar lines, see Ventura, *supra* note 21, at 526 ("[O]ne might argue that isolated incidents of lawful behaviour during conflict should not be used to mask a group otherwise characterized by criminality. That is a fair point. But, if true, the question inevitably becomes how many lawful actions must such a group carry out in order to properly qualify as a mixed organization (and thus engage specific direction)? 10 per cent, 15 per cent, or 25 per cent of their military actions? Even if you could pin an accurate

2. Criminal and Non-Criminal Organizations

Another response focuses on the Nuremberg IMT's assessment that the SS was a criminal organization. Heller has defended the *Zyklon B* result along these lines, arguing that "*all* of the SS's activities were unlawful, which is precisely why the IMT specifically deemed it a criminal organization."[176] There is some support for this view in the *Perišić* Appeals judgment, which "underscores that the VRS was participating in lawful combat activities and was not a purely criminal organization."[177]

However, so framed, the criminal-organization concept itself appears to do no work. If it is truly the case that an organization is engaged solely in unlawful activities, then assistance to that organization cannot be justified on the particular ground that such assistance is directed to both lawful and unlawful activities.[178] But this point does nothing to address the aforementioned problem of assistance to an organization that principally concerns itself with unlawful activities while it also independently conducts lawful or even desirable ac-

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(or even approximate) number, one would have to 'capture' every single one of an army's military operations, then assess which of these were lawful and which unlawful so as to determine whether such a group is mixed or not.").

176. Heller, *supra* note 103. Kai Ambos has advanced a similar approach, noting the distinction between "a pure extermination camp ('pure' criminal enterprise) and a mixed camp (mixed criminal enterprise) where other (labour) activities also existed and the detainees had a realistic chance of survival, i.e. their death was only a 'side effect' of the inhumane conditions of the camp and the forced labour." *See* Kai Ambos, *The ICC and Common Purpose: What Contribution is Required under Article 25(3)(d)?*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 592, 607 (Carsten Stahn ed., 2015). He argues that:

> In the former case, criminal responsibility for external or indirect contributions, i.e. taking place from outside the camp, which do not directly relate to the destructive purpose of the camp (such as the delivery of potassium cyanide does), depends on the knowledge of the supplier: if he is aware of the criminal purpose of the concentration camp and therefore of the criminal impact of his contribution, he incurs criminal responsibility. In the case of contributions to a 'mixed' enterprise, criminal responsibility is predicated on the proof of an identifiable individual contribution to concrete crimes.

Id.

177. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

178. As Ventura notes, wholly criminal organizations are unlikely to exist in the real world. *See* Ventura, *supra* note 21, at 526 ("[I]n a real-life armed conflict the existence of a wholly 'criminal organization' is extremely unlikely. The central point is this: as soon as a group carries out at least *some* actions—however small in number—that are consistent with IHL, even in a vast and endless sea of criminality, then such a group should fall into the category of the VRS in *Perišić*; that is, a mixed organization . . . .").

tivities. Does the SS cease to become a criminal organization if it donates to war orphans?

Notably, the Nuremberg IMT did not rule that all of the SS's activities were unlawful. Instead, the Tribunal determined that the SS, along with the other entities it deemed to be criminal, was used for "criminal purposes."[179] In particular, it found, "The SS was utilized for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program and the mistreatment and murder of prisoners of war."[180] The language focuses on the unlawful purposes the SS did serve, but does not address the potentially countervailing impact of any lawful activities the SS might have simultaneously conducted. It does not address the fact, for example, that the Waffen SS, which the judgment treats as part of the SS criminal organization, also engaged in the kinds of ordinary combat activities that the *Perišić* Appeals Chamber deemed to be legitimate.[181] In the *Flick* case, moreover, the presiding IMT convicted two defendants on the basis of contributing large sums to a fund that they knew would partly support the SS.[182]

A more defensible approach would maintain that direct assistance to a criminal enterprise that significantly facilitates crimes should satisfy the specific direction requirement regardless of whether the recipient enterprise engages in solely criminal activities. In other words, assistance specifically directed to a criminal enterprise could substitute for assistance specifically directed to particular crimes. This approach finds some support in contemporary international law. Although neither the ICC nor any of the contemporary tribunals criminalize membership in criminal organizations, they have continued to apply special rules of culpability where criminal enterprises are involved.[183] The Rome Statute, in particular, appears to establish a broader aiding and abetting standard where assistance to criminal enterprises is concerned. Whereas Article 25(3)(b)'s general aiding and abetting provision includes purposive language, Article 25(3)(d) indicates a looser standard where assistance to criminal enterprises is concerned.[184] The latter provision provides for the pun-

179. *United States v. Göring et al.*, *supra* note 47, at 276.

180. *Id.* at 273.

181. *See id*. On the SS's combat activities, see generally GEORGE H. STEIN, THE WAFFEN SS: HITLER'S ELITE GUARD AT WAR, 1939–45 (1966).

182. *See supra* note 56 and accompanying text.

183. *See supra* notes 145–46 and accompanying text.

184. *Compare* Rome Statute, *supra* note 28, at art. 25(3)(b) ("Orders, solicits or induces

ishment of a person who "contributes to the commission or attempted commission of [a crime within the Court's jurisdiction] by a group of persons acting with a common purpose"[185] and who intentionally makes this contribution "in the knowledge of the intention of the group to commit the crime."[186]

Adopting this approach, of course, would require a significant alteration of the rule announced in *Perišić*. Indeed, it would appear to require a different disposition of that case itself, considering the Trial Chamber's finding that "the VRS's war strategy encompassed the commission of crimes."[187] Moreover, this understanding of specific direction places too much emphasis on the question of whether aid goes directly to a criminal enterprise. Suppose, for example, that only certain elements of the VRS formed a criminal enterprise, and that Perišić is aware that most, but not all, of the provided aid will fall under the control of these elements. Should it matter whether or not those elements are the direct recipients of aid, or whether or not Perišić happens to know whether the direct recipient is in fact a member of the criminal enterprise? In the end, what seems to matter is the foreseen use of the assistance, not the identity of the direct recipient per se.

3. Lawful and Unlawful Ends

A third question surrounding the exclusive direction interpretation concerns how one defines the boundaries between lawful and unlawful acts. One might argue, for example, that even assistance to the SS's combat functions was specifically directed toward crime because the SS was fighting an illegal war of aggression on behalf of Germany.[188] Similarly, one could argue that Taylor's support for the

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the commission of such a crime which in fact occurs or is attempted"), *with id.* at art. 25(3)(d) ("In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.").

185. *Id.* at art. 25(3)(d)(i).

186. *Id.* at art. 25(3)(d)(ii).

187. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 503 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

188. *See generally* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 186–226 (1947) (detailing Germany's war of aggression and setting forth the law criminalizing aggression).

RUF in Sierra Leone and Serbia's support for the VRS involved, if not the crime of aggression itself, at least a violation of the customary principle demanding non-intervention in the internal affairs of a sovereign state, thereby rendering all of the assistance unlawful.[189] Although this aspect of the assistance may not independently give rise to criminal responsibility, perhaps it should count as unlawful for purposes of the specific direction test, ensuring that the portion of the aid that does assist crimes remains specifically directed.

The problem with this response is that it breaches the *jus ad bellum*/*in bello* divide according to which criminal responsibility for the conduct of war is held separate from the legality of participants' respective war aims.[190] On this interpretation of specific direction, criminal responsibility for aiding and abetting war crimes and crimes against humanity would in many cases hinge on the validity of the war aims, effectively transforming these cases into prosecutions for the unlawful use of force.[191]

This is not to say that criminal culpability for aiding and abetting could never involve a rejection of war aims. One could imagine a scenario in which a party's sole war aim is the perpetration of a crime. For instance, a government seeking to perpetrate genocide might deploy armed forces into combat for the sole aim of defeating armed resistance to the genocide. By focusing on the ends, as I suggest above, rather than the means, one could treat all assistance to the

189. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 202–09, 229–45 (June 27) (outlining the customary law principle of non-intervention and finding "that the support given by the United States . . . to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention").

190. GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 21–22 (2008) ("The reason for adopting a rigorous distinction between jus ad bellum and jus in bello is the need for a bright-line cleavage . . . . Soldiers . . . know that, regardless of who started the conflict, certain means of warfare are clearly illegal.").

191. Pursuing this path would also raise questions of institutional competence, considering in particular that no international tribunal since World War II has had jurisdiction over the crime of aggression. *See* ICTY Statute, *supra* note 19 (no jurisdiction over aggression); ICTR Statute, *supra* note 19 (same); SCSL Statute, *supra* note 19 (same); ECCC Statute, *supra* note 19 (same); STL Statute, *supra* note 19 (same). In 2010, the States Parties of the ICC adopted a proposed amendment to the Rome Statute which would give the Court jurisdiction over the crime of aggression pending ratification by at least thirty States Parties and a further vote by the Assembly of States Parties no earlier than 2017. *See generally* Sean D. Murphy, *The Crime of Aggression at the International Criminal Court*, *in* THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 533 (Marc Weller ed., 2015).

government forces as specifically directed toward genocide. But such cases will be hard to come by. In actual historical cases, it is usually possible to identify a war aim—such as the expansion of German territory—that is analytically distinct from the perpetration of atrocities, however closely the two may be linked.[192]

There may also be cases in which an armed group that purports to pursue legitimate war aims in fact operates as nothing more than a roving band of criminals. Heller has invoked Taylor's assistance to the RUF and AFRC as an example of this structure, noting that "much of that assistance took place during phases of the conflict in Sierra Leone in which the RUF and AFRC were nothing more than criminal organizations."[193]

C. "Specific Enough" Direction

A final possibility is to abandon the insistence on exclusive direction. Instead, according to a less rigid interpretation, the concept of "specific enough" involves a sliding scale rather than a bright-line distinction. What matters on this account is the substantiality of the assistance that goes to criminal ends, including the portion of assistance going respectively to lawful and unlawful purposes. When a donor provides large sums to a group while knowing that a substantial portion of this funding will be diverted to crime, then the donor is on notice that the support is specifically directed to unlawful purposes. Instead of exclusive direction, this interpretation demands a significant, "specific enough" direction.

This way of conceiving specific direction is both textually plausible and, it would appear, sufficiently adaptable to answer *Perišić*'s critics. But it becomes so at the cost of indeterminacy, leaving unresolved the difficult question of how to assess when assistance has become substantial and specific enough to constitute criminal aiding and abetting. A more fatal problem, however, is the fact that this understanding appears redundant. Even prior to *Perišić*, international tribunal case law had established that aiders and abettors must make a substantial contribution to crime.[194] And as I argue in the next Part, the best understanding of this substantiality requirement already includes considerations concerning the specificity and directionality of assistance.

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192. *See generally* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 192–213 (1947) (detailing Germany's territorial conquests).

193. Heller, *supra* note 103.

194. *See supra* note 41 and accompanying text.

IV. SUBSTANTIAL CONTRIBUTION

For tribunals that have rejected both purpose and specific direction as elements of aiding and abetting, the primary protection against over-criminalization is the requirement of a substantial or significant contribution. Although this approach is most associated with the ad hoc tribunals, a similar framework has animated some early decisions concerning Article 25(3)(d) of the Rome Statute, which prohibits knowing contributions to crimes committed by a "group of persons acting with a common purpose."[195] The cases in-

195. The text of Article 25(3)(d) extends to one who "[*i*]*n any other way* contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." Rome Statute, *supra* note 28, at art. 25(3)(d) (emphasis added). A literal reading of this language raises the disturbing possibility that it includes contributions of any kind, including the sorts of remote, trivial, or neutral contributions that have not traditionally given rise to criminal responsibility. *See* Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 79 (2007) (observing that the effect of this provision is to criminalize the sale of basic, readily available services such as when "[m]erchants sell food, water and clothing to criminals; they sell cars and gasoline and repair their vehicles; they rent them office space, apartments and houses"). The meaning of this language remains unsettled pending an authoritative interpretation by the ICC Appeals Chamber. Lower chamber decisions in two cases have ruled that Article 25(3)(d) applies only to "significant" contributions. *See* Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute, ¶ 1632 (Mar. 7, 2014) ("[A] significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt."); Prosecutor v. Mbarushimana, ICC-01/04-01/10-465, Decision on the Confirmation of Charges, ¶ 283 (Dec. 16, 2001) ("[T]he Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and there is a threshold of significance below which responsibility under this provision does not arise."). In another case, the Pre-Trial Chamber found that Article 25(3)(d) is "satisfied by a less than 'substantial' contribution," but did not elaborate further on the possible limits of this finding. Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 354 (Jan. 23, 2012).

Finally, one Appeals Chamber judge, issuing a separate opinion to a judgment that did not address this particular issue, likewise reasoned that Article 25(3)(d) did not impose "a minimum level or threshold of contribution," but nevertheless acknowledged the problems associated with "so-called 'neutral' aid," such as the provision of "food or utilities to an armed group." Prosecutor v. Mbarushimana, ICC-01/04-01/10-514, Judgment on the Appeal of the Prosecutor Against the Decision of the Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges," Separate Opinion of Judge Silvia Fernández de Gurmendi, ¶ 12 (May 30, 2012). Without elaborating on specific criteria, Judge Fernández de Gurmendi maintained, "This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution." *Id.* As such, Judge Fernández de Gurmendi's position appears to reject a strictly quantitative threshold for contribution while nevertheless endorsing some qualitative metric. On these cases, see Ambos, *supra* note 176. On the

dicate significant uncertainty, however, on how courts should define and apply the material elements.

With respect to mens rea, the ICTY case law has maintained that the aider and abettor must provide knowing assistance to a crime, but has vacillated on the kind of knowledge required. In *Tadić*, the Appeals Chamber held, "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."[196] Read strictly, this language might preclude conviction even in a case like *Zyklon B* where the accused has general knowledge that his assistance will provide the means for the commission of mass atrocities, but does not have particular knowledge of particular crimes at the level of the individual perpetrators and victims. Other judgments have clarified that the aider or abettor need only "be aware of the type and the essential elements of the crime(s) to be committed," but need not "already foresee[] the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions . . . ."[197] So described, the type of knowledge embraced by the ICTY comports with the ICC's definition of knowledge in terms of "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[198]

Yet other judgments have described complicity's mental element in looser terms. In *Blaskić*, for instance, the ICTY Appeals Chamber ruled that criminal knowledge merely entailed awareness "that one of a number of crimes will probably be committed,"[199] leading critics to conclude that the ICTY had embraced a form of recklessness as sufficient for aiding and abetting.[200] In addition, the Appeals Chamber of the SCSL has explicitly found that *dolus eventualis*—the civil analogue to recklessness—is sufficient to punish aiding and abetting.[201] The justifiability of this broader approach to

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difficulties posed by Article 25(3)(d), see generally Randle C. DeFalco, *Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute*, 11 J. INT'L CRIM. JUST. 715 (2013).

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

197. Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 288 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006) (collecting cases).

198. Rome Statute, *supra* note 28, at art. 30(3).

199. Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

200. *See, e.g.*, FLAVIO NOTO, SECONDARY LIABILITY IN INTERNATIONAL CRIMINAL LAW 135 (2013) (arguing that the ICTY and ICTR "have implicitly acknowledged *dolus eventualis* or recklessness as a sufficient *mens rea* for aiding and abetting").

201. *See supra* note 24 and accompanying text.

complicity lies beyond the scope of this Article. As the debate over *Perišić* reveals, however, knowledge-based aiding and abetting can prove controversial even when the accused acted in full awareness that his assistance would enable crimes.

The concept of substantial assistance, meanwhile, remains rather vague. Indeed, it may be easier to begin by considering what is *not* substantial assistance. The case law has consistently distinguished the concept from that of causation. In *Furundžija*, for instance, the Trial Chamber rejected the proposition that "the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal."[202] Hence, the accomplice who stands as a lookout for a bank robber or provides other forms of critical assistance can be held criminally responsible even if the crime would have succeeded absent her assistance. This view accords with the prominent view of aiding and abetting outlined by Sanford Kadish, according to which a causation requirement attaches to principals but not accomplices.[203]

If, however, a causal relationship to a completed crime is not necessary for accomplice liability, it is also well recognized that a causal relationship is not sufficient to establish culpability either, as there will be many cases in which actors knowingly undertake acts which are necessary to the perpetration of crimes by principals yet do not plausibly give rise to criminal culpability.[204] Imagine that a head of state acts to commit her nation's military in support of an embattled allied state that is the victim of foreign aggression. International law permits the armed intervention as an exercise of collective self-defense,[205] and the head of state is committed to conducting hostilities in accordance with the rules of international humanitarian law.

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202. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

203. This point is uncontroversial. *See, e.g.*, Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73. CAL. L. REV. 323, 357 (1985) ("In causation, the requirement of a condition sine qua non assures this sense of success, since the requirement means that without the act the result would not have happened as it did. In complicity, however, a sine qua non relationship in this sense need not be established. It is not required that the prosecution prove, as it must in causation cases, that the result would not have occurred without the actions of the secondary party."); State v. Tally, 102 Ala. 25, 69 (1894) ("The assistance given . . . need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it.").

204. *See supra* note 114 and accompanying text.

205. U.N. Charter art. 51.

Nevertheless, the head of state is aware, as a matter of historical experience, that military engagements of this scale will inevitably involve the perpetration of isolated war crimes by individual soldiers, and there is virtual certainty that, despite every effort to prevent and punish, some of her own troops will commit crimes. Again, there is a necessary relationship between the decision to go to war and these subsequent crimes, but this is not the kind of relationship that is enough, without more, to render the head of state responsible for the resulting war crimes.

There is, however, another way of understanding causation that better fits the idea of substantiality. Michael Moore has argued that "a cause of a certain harm need not be a necessary condition of that harm's existence,"[206] and that the line between substantial and *de minimis* contributions "is not governed by counterfactual dependence."[207] He notes that "*X* can be a substantial cause of *Y* without *X* being necessary for *Y*—witness the fire that joins another fire of equal size, and the two together jointly burn down the victim's house."[208] At the same time, and consistent with my example above, "*X* can be a *de minimis* causal contributor even though *X* was necessary for *Y*—as where I remind you of how much you hate *V,* and (with that reminder) you go off and kill *V,* when otherwise you wouldn't have."[209]

Distinctions of this sort appear in various national criminal law doctrines that differentiate between different types of causal contributions. The concept of proximate or legal cause, for example, has assumed various guises. The Model Penal Code formulation precludes punishment for injury or harm that is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of the offense."[210] There is also Moore's favored "substantial factor" test, embraced by the American Law Institute's Restatement (Second) of Torts.[211] In German law, moreover, there is the concept of "objective attribution," which demands that "the offender's conduct must have created a wrongful risk of [the] specific

206. Michael S. Moore, *Causing, Aiding and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 406 (2007).

207. *Id.* at 421.

208. *Id.*

209. *Id.*

210. MODEL PENAL CODE § 2.03 (AM. LAW INST. 1962).

211. RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965); Moore, *supra* note 206, at 421 ("[W]e need only what the first and second iterations of the Restatement of Torts needed: to treat causation as a primitive—a 'factor'—save for one characteristic, namely that there can be more or less of it.").

result, and the result must be the product of this very risk."[212] Although these approaches differ from each other in ways that could in principle require different outcomes in particular cases,[213] they are all notoriously difficult to apply, leaving adjudicators with substantial discretion to exclude "causal contributions that are too remote, strange or unfair."[214] As the Supreme Court of New Jersey has observed in the context of the Model Penal Code standard, its open-ended causation standard inevitably relies on the application of community norms:

> [O]ur trust in juries to understand and apply the "not too remote" element "is indicative of a belief that the jury in a criminal prosecution serves as the conscience of a community and the embodiment of the common sense and feelings reflective of society as a whole." . . . "[A]nd law in the last analysis must reflect the general community sense of justice."[215]

At the international level as well, the requirement of a substantial contribution fails to provide a bright-line distinction between guilt and innocence, and the case law has provided relatively little guidance on the application of this standard. Many judgments fail to elucidate it at all,[216] whereas others have emphasized generally that the accomplice's contribution must increase the likelihood or ease of the crime.[217] Thus, as one author has noted, this approach leaves it to individual adjudicators to "decide on a case-by-case basis whether in

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212. DUBBER & HÖRNLE, *supra* note 114, at 301.

213. *See id.*

214. James G. Stewart, *The ICTY Loses its Way on Complicity—Part 1*, OPINIO JURIS (Apr. 3, 2013, 9:00 AM), http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1. On the importance of legal cause to international criminal cases, see generally Ambos, *supra* note 176.

215. State v. Maldonado, 645 A.2d 1165, 1181–82 (N.J. 1994); DUBBER & HÖRNLE, *supra* note 114, at 299 (quoting the same).

216. *See* Case Comment, *International Criminal Law—Accessory Liability—Special Court for Sierra Leone Rejects "Specific Direction" Requirement for Aiding and Abetting Violations of International Law—*Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013)*, 127 HARV. L. REV. 1847, 1853 n.65 (2014) [hereinafter Case Comment, SCSL] (observing that "[m]any chambers have declined to define the term altogether").

217. *See id.*; NOTO, *supra* note 200, at 94–96 (surveying case law); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 282 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006) (stating that a contribution must be "substantial and efficient enough to make the performance of the crime possible or at least easier"); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 1019 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010) (stating that an offense must have been "substantially less likely" absent contribution).

the particular circumstances the assistance should or should not properly be regarded as criminal."[218]

One consequence of this discretion is that it allows courts to accommodate the concerns about overbreadth that have led some to embrace the purposive approach or the specific direction standard. The examples considered in this Article indicate a range of qualitative and quantitative factors that impact assessments of blameworthiness and that could be said to bear upon the substantiality of contributions to crime.[219] I consider several of these factors below.

A. Mens Rea

One such factor is the mental state of the accused. Although mens rea is, of course, a distinct legal element, the actor's state of mind can also affect the substantiality of a contribution. Even if aiding and abetting does not require a strict purpose in the sense of a conscious object to bring about criminal harms, the existence of such a purpose simplifies the blameworthiness determination. Where an accomplice has consciously associated herself with a crime and has taken action to effect a criminal purpose, there is less need for legal protections at the level of the actus reus. Nevertheless, even purposeful contributions become problematic when they are too remote from or insignificant to the completed crime, raising concerns that punishment would amount to the criminalization of mere wishes.[220]

B. Significance, Specificity, and Direction

In addition, there are a number of factors having to do with the specificity and proximity of the assistance. There is, for instance, the quantitative question of how much an actor's assistance or encouragement has assisted the perpetration of a crime. The large sums at issue in the *Flick* case made a significant contribution to SS atroci-

218. NOTO, *supra* note 200, at 97.

219. Note that the SCSL recognized in *Taylor* that the required analysis is both quantitative and qualitative. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 517 (Sept. 26, 2013) ("Whether an accused's acts and conduct have a substantial effect on the crimes is to be assessed on a case-by-case basis in light of the evidence as a whole. The Appeals Chamber affirms the Trial Chamber's qualitative and quantitative assessment in light of the whole of its findings, the specific factual circumstances and the consequences established by the evidence.").

220. *See supra* Part II.A.

ties in a way that pocket change would not have.[221] The accomplice who instructs a burglar on how to deactivate a particular home alarm system makes a greater contribution than one who merely provides driving directions that the burglar would otherwise have easily accessed on his phone. Likewise, Nancy's handing of a live grenade to Sid at the moment he required it for murderous purposes makes a critical contribution to Sid's crime in a way that a store clerk's sale of a generic, generally available item, such as a screwdriver, typically will not.

There is also the question of how much the accomplice's acts take the form of assistance tailored to the crime itself rather than generalized support. I have already mentioned the relevance of this distinction to mens rea questions[222] and to the interpretation of the *Perišić* specific direction requirement,[223] yet this distinction also bears upon the question of substantiality. All else being equal, assistance that serves no function except to aid a crime presents a more substantial contribution than does general assistance, such as the parental provision of food, clothing, and monetary support, that aids an offender only in the sense of securing basic necessities of life that enable all of the recipient's productive activities, both nefarious and benign.

As the debate over specific direction reveals, moreover, the distinction between generalized and particular assistance can depend on the context, including the anticipated use of the assistance. General monetary aid to an armed group becomes easier to characterize as substantial assistance to crime when the donor realizes that the recipient is a criminal enterprise or that most or all of the funds will be directed by the recipient toward criminal ends.

Finally, where the provider of assistance is a collective entity, the assessment of individual blameworthiness must also look to the significance of the individual accused's role within the organizational effort. In the *Zyklon B* case, for instance, the Tribunal convicted the owner of the company and his second-in-command, but acquitted a third accused who had worked as a gassing technician.[224] With respect to this defendant, the Judge Advocate had instructed the Tribunal to consider "whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it," and further observed, "If he were not in such a position,

221. *See supra* note 56 and accompanying text.

222. *See supra* notes 119–21 and accompanying text.

223. *See supra* Part III.

224. *The Zyklon B Case*, *supra* note 8, at 93.

no knowledge of the use to which the gas was put could make him guilty."[225] The *Perišić* and *Taylor* cases likewise focused on senior officials who played instrumental roles in the policies at issue.[226]

C. Reasonable Precautions

An additional consideration concerns the precautions, if any, taken by an actor to prevent the criminal misuse of assistance that may appear more general in nature. This consideration is especially important in cases like *Taylor* and *Perišić* that involve crimes perpetrated by armed groups whose operations were critically dependent on outside support facilitated by the accused. The defense that this support was merely aimed at legitimate combat activities becomes less convincing in the absence of evidence that the accused took any effort whatsoever to prevent the misuse of that assistance, such as by conditioning future assistance on the effective implementation of measures to suppress and punish crime, or perhaps by considering alternate ways to advance the legitimate non-criminal purposes.[227] Especially where the recipients depend on the aid to carry out systematic atrocities, it becomes easier in this scenario to view the aid provider as engaged in substantial assistance even if much of the aid does support non-criminal purposes.

One might object here by invoking Duff's concern about omissions.[228] If substantial assistance can sometimes be established

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225. *Id.* at 102.

226. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 507–25 (Sept. 26, 2013) (summarizing Trial Chamber findings on Taylor's individual role); *id.* ¶ 526 ("[T]he Trial Chamber's conclusion that Taylor's acts and conduct of assistance, encouragement and moral support had a substantial effect on each and all of the crimes for which he was convicted."); Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 49–51 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (summarizing Perišić's role in supporting Bosnian Serb forces and emphasizing that the responsibility of a collective government body, the Supreme Defence Council, for these policies would not have exonerated Perišić of individual responsibility had "the policy he implemented involved providing assistance specifically linked to VRS crimes; he implemented a policy meant to aid the general VRS war effort in a manner that specifically directed assistance towards the VRS crimes; or, acting outside the scope of the SDC's official policy, he provided assistance specifically directed towards VRS crimes").

227. This consideration dovetails with one interpretation of English case law dictating that "clear disapproval of, or non-consent to, the principal's criminal act may negative the mental element required for accomplice liability." JAIN, *supra* note 124, at 162; *see also* I. H. Dennis, *The Mental Element for Accessories*, *in* CRIMINAL LAW: ESSAYS IN HONOR OF J.C. SMITH 40, 52 (Peter Smith ed., 1987).

228. *See supra* notes 119–21 and accompanying text.

by an actor's failure to take reasonable precautions, does this result not amount to punishment for mere omissions? This objection fails on at least two counts. In the first place, putting aside the question of inculpation, surely an actor's showing that she undertook serious efforts to prevent the use of her assistance toward criminal ends should count favorably toward exculpation. To hold otherwise would threaten imposing an aiding and abetting standard that is broader than the already-broadened standard applicable to military commanders who have a special duty to prevent and punish crimes committed by their subordinates. Although military commanders are sometimes held criminally responsible for crimes they failed to prevent, this duty is subject to a reasonableness standard. The Rome Statute, for instance, requires not only that "[t]he military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes," but also "[t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[229] Notwithstanding ambiguities and debate regarding the scope of this duty,[230] tribunals have not required commanders to maintain a risk-free environment. Nor has any court held that a general certainty that some subordinates will continue to commit crimes, notwithstanding a commander's best efforts to prevent and punish, is sufficient to preclude the commander from waging war.

Likewise, evidence that an actor has reasonably endeavored to prevent the misuse of assistance should serve a similar exculpating function in the aiding and abetting context, even if the actor is aware that these efforts will not be perfect. Consider again the case of assistance to rebels in Syria. There is an important moral difference between, on the one hand, a program to aid Syrian rebels that seeks to supply only moderate groups not engaged in systematic atrocities and to accompany that support with training in the rules of war and, on the other hand, a program that, without accompanying precautions, targets aid to groups that are engaged in systematic atrocities. This difference persists even if, in the first instance, there is a virtual

229. Rome Statute, *supra* note 28, at art. 28(a)(i)–(ii).

230. *See generally* Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELB. J. INT'L L. 1 (2012); Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001).

certainty that some of the aid will inevitably end up facilitating war crimes.[231]

The second point is one that I have already explored.[232] The analogy to omissions fares better when the actor's assistance takes the form of an ordinary course of business—such as the clerk's sale of screwdrivers to all paying customers—and the actor undertakes that course of business in the manner normally expected of law abiding citizens. But the analogy breaks down when the assistance lacks this routine, anonymous quality and assumes a more intimate quality, such as when a government has affiliated itself with the goals of an armed group and, toward that end, has reached a particularized decision to render aid to that group. In that scenario, it makes more sense to view the assistance an action, and when a government delivers aid to groups engaged in systematic atrocities, while taking no precautions to prevent the use of its aid to assist those atrocities, the absence of precautions speaks more to the manner in which the government has chosen to deliver the aid.

V. BETWEEN LAW AND MORALITY

This review of the competing approaches to aiding and abetting yields several conclusions. First, although the international debate regarding accomplice liability has focused largely on the differences between the approaches adopted by various international tribunals, there are equally, if not more, impactful questions surrounding interpretive choices within each approach and their application. Indeed, as I have argued, none of these approaches—taken at face value—provides straightforward answers to the dilemmas posed by foreign assistance cases such as *Perišić* and *Taylor*.

Second, a broad similarity exists across these approaches regarding the kinds of factors that are relevant to culpability. For instance, questions concerning the proximity and specificity of assistance are clearly relevant to the specific direction approach, yet they also arise when navigating the conduct/result distinction under the purposive approach,[233] when determining whether an actor has pro-

231. In this way, the substantial contribution standard can accommodate Heller's concern that the knowledge-based approach could require the conviction of someone who provides neutral assistance to an armed group "even if they do not intend to facilitate those acts, and even if they do everything in their power to prevent their facilitation." *See* Heller, *supra* note 34.

232. *See supra* Part II.C and accompanying text.

233. *See supra* Part II.B.

vided sufficiently substantial assistance,[234] and indeed when determining whether an actor can fairly be said to have provided assistance to a crime in the first instance.[235] Similarly, I have argued that an actor's precautions (or lack thereof) taken to prevent the use of assistance for criminal ends are a relevant factor in determining the substantiality of the actor's assistance.[236] At the same time, the failure to take readily available precautions falls among the factors that an adjudicator is likely to consider under a purposive approach when determining whether or not the actor shared the criminal goals of the principal perpetrators.[237]

Third, these common factors do not operate as bright-line rules that provide clear demarcations between guilt and innocence. Instead, they require the adjudicator to consider a range of factors that operate along a continuum. This is true especially with respect to the more plausible understandings of aiding and abetting. While both the strictest purposive approach and the strictest interpretation of specific direction as exclusive direction at least aspire toward relative certainty, they do so at the cost of an overly narrow and morally arbitrary approach. The more plausible approaches to aiding and abetting, on the other hand, draw a less determinate line between guilt and innocence.

This last point raises a problem for the adjudication of aiding and abetting cases. For instance, the substantial contribution analysis that I have outlined may well identify factors that are morally relevant to the determination of guilt. But there is a difference between moral relevance, on the one hand, and, on the other hand, a criminal legal standard that provides the kind of notice and predictability necessary to safeguard the liberty of the accused in a manner consistent with the principle of legality.[238] Highlighting this point, Flavio Noto has expressed the concern that the substantial contribution requirement invites an arbitrary determination, one reached only "*after* the blameworthiness of [a defendant's] conduct has been decided on."[239] While this risk may be most obvious in the context of substantial contribution, it also complicates the other competing approaches to

234. *See supra* Part IV.B.

235. *See supra* notes 143–44 and accompanying text.

236. *See supra* Part IV.C.

237. *See supra* Part II.D.

238. *See, e.g.*, Case Comment, SCSL, *supra* note 216, at 1851 ("The unique challenges of international criminal law enforcement demand clarity of those rules and standards that seek to limit complicity liability. Definite rules of law further the principle of legality by constraining discretion.").

239. NOTO, *supra* note 200, at 98.

aiding and abetting.[240] In the foreign assistance context, moreover, there is special need for certainty concerning the boundaries between legitimate and criminal efforts, as a vague standard could unduly deter valuable foreign aid programs that pursue important foreign policy goals based on concern that some of the aid will unavoidably fall into the wrong hands.[241]

Some uncertainty, of course, is endemic to criminal law. Consider, for instance, the "reasonable person" standard, which underlies the common law concepts of negligence and recklessness, as well as other criminal law doctrines.[242] To apply the Model Penal Code's influential definition of recklessness, for instance, the fact finder must determine whether the accused has consciously disregarded a risk that is both "substantial" and "unjustifiable" and that involves a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[243] The Code does not define the words "substantial" and "unjustifiable," nor does it specify what standard of conduct a law-abiding person would follow. These determinations are left to the judgment of the fact finder. Other concepts, such as the civil law *dolus eventualis*, the common law proximate cause, and the German objective attribution, are similarly, if not more, elusive.[244] And even elements which are relatively determinate in concept may be less so in the application, as will often be in the case when a fact finder, unable to read the accused's mind, ends up imputing a criminal purpose based on the circumstantial evidence.[245]

The issue, then, is not whether culpability for aiding and abetting will involve some indeterminacy. It will, and that fact is neither surprising nor, by itself, uniquely troubling. The more relevant issue

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240. *See supra* Parts II–III.

241. On a related point, one author has tied the desire for clarity to an international tribunal's need for a "strong legitimizing foundation." Case Comment, SCSL, *supra* note 216, at 1851 ("While judicial discretion is often accepted in domestic law, where the adjudication of criminal-law standards proceeds in the context of 'a mature political or legal system that lends legitimacy to [the domestic] criminal process,' the enforcement of international criminal law through international courts lacks such a strong legitimizing foundation.").

242. *See, e.g.*, Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 33 (2008) ("There is no more important criminal law concept than the 'reasonable man.' The law of murder, duress, provocation, and self-defense depend upon it.").

243. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985).

244. *See supra* notes 71, 210–15 and accompanying text.

245. *See supra* Part II.D.

is whether the law can manage that indeterminacy in a way that renders the assignment of criminal responsibility sufficiently predictable while also maintaining a normatively meaningful distinction between guilt and innocence. The above-referenced Model Penal Code provisions indicate one important way of managing such indeterminacy: by specifying that criminal recklessness and negligence each demand a "gross deviation" from the reasonable person's standard of conduct, the Code seeks to avoid the imposition of criminal responsibility in close cases, reserving punishment only for situations that are well past the line of what could be considered reasonable. Arguing along similar lines in the international context, Kai Ambos maintains that "criminal conduct should be limited to a significant deviation from standard social or commercial behaviour in order to capture really wrongful and blameworthy conduct."[246] Culpability for aiding and abetting should likewise focus on such cases where there is a clear separation between the accused's behavior and that expected of the reasonable, law-abiding citizen.

Even here the foreign assistance cases may raise difficulties not present in more run-of-the-mill cases. What, for instance, is the standard to be applied by a reasonable government official tasked with the disbursement of foreign aid in pursuit of vital foreign policy interests and perhaps with only limited ability to control how that aid will be employed? The conclusion that this determination must be left to the application of community norms provides scant reassurance where stakeholders lack consensus on the appropriate norm.

Nevertheless, the debate over questions such as this one need not preclude courts from agreement on clearer cases where the balance of factors overwhelmingly supports a finding of criminal guilt. And as I have explored, cases such as these need not entail evidence that the accused shared the criminal purposes of the principal perpetrators and extended significant support with the deliberate aim to further their crimes.[247] Nor must they be limited to situations where the accused provided aid exclusively directed toward criminal activity.[248] There is also a strong argument for criminal culpability in cases like *Taylor* and *Perišić* where the accused is found to have knowingly provided critical support to a group engaged in widespread or systematic atrocities while making no good faith effort to prevent the misuse of that support. Concerns about a slippery slope with respect to other, less clear cases should not derail agreement on cases like these.

246. Ambos, *supra* note 176, at 606.

247. *See supra* Part II.A.

248. *See supra* Part III.B.

By the same token, as I have argued, the law can promote the foreseeability of punishment by clearly distinguishing those actors who pursue legitimate policy objectives while taking affirmative precautions to prevent the use of their support for criminal purposes.[249] Where such precautions are pursued in good faith, the law should not demand a risk-free environment. Knowledge that some aid will inevitably, despite all reasonable precautions, find itself directed to criminal purposes is not the kind of knowing contribution the law should target.

An exhaustive exploration of such cases lies beyond the scope of this Article. My more modest point argues that the resolution of aiding and abetting cases requires a moral judgment that is not reducible to the recitation of elements debated by international tribunals. The result is an indeterminacy that is both inevitable and familiar to criminal law.

CONCLUSION

The challenge of aiding and abetting liability has presented international criminal tribunals with some of the most difficult questions concerning the scope of criminal responsibility. The foreign assistance cases pose moral dilemmas that have predictably divided courts and commenters.

In this Article, I have challenged two assumptions underlying the debate over these questions. First, I have contested the judicial assumption that the law of aiding and abetting can or should be determined by a precedential analysis that purports to identify customary standards in historical cases, which themselves do not reveal a consistent approach. The courts would do better to acknowledge that customary international law does not define complicity with sufficient particularity and that precedential analysis is no substitute for the normative analysis that the courts have generally declined to conduct.

Second, I have argued that the competing approaches to aiding and abetting fail to capture the critical moral distinctions underlying the foreign assistance cases. Instead, each of these approaches is subject to substantial variation of interpretation and application, with the most plausible understandings producing the greatest indeterminacy. This indeterminacy is hardly unique to international law, as the resolution of "ordinary" criminal law cases at the domestic level will

249. *See supra* Part IV.C.

often depend on the discretionary application of community norms. The special difficulty of these cases, however, lies in determining what those norms are. This difficulty demands judicial caution, but it need not paralyze the administration of justice in cases where a balance of factors strongly supports conviction.