

2008

A Comprehensive Study to Determine the Elements and Scope of Convictions for Aiding and Abetting, as Illustrated by Case Law from the International Criminal Tribunals

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: A COMPREHENSIVE STUDY TO DETERMINE THE ELEMENTS AND SCOPE OF CONVICTIONS FOR
AIDING AND ABETTING, AS ILLUSTRATED BY CASE LAW FROM THE INTERNATIONAL CRIMINAL
TRIBUNALS.

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FALL 2008

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Introduction

Accessory liability in international criminal law is predicated on a principal plan of action anticipated by a principal actor. However, the charge of aiding and abetting is brought against the individual who assists in the commission of this crime, and had a culpable mental state at the time he or she assisted the principal actor. Thus, the prosecution must show that the accused was involved to some degree in the perpetration of the crime, and they must also show that the accused was conscious of his or her contribution to the crime. In the hierarchy of accomplice liability in international law, aiding and abetting imposes the least burden upon the prosecution to prove its elements beyond a reasonable doubt.¹

I. Scope:

This memorandum will address the elements that are required to convict for aiding and abetting, as first established at the International Military Tribunals at Nuremberg (hereinafter “Nuremberg Tribunals”). These elements were later widely adopted in case law of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, (hereinafter “ICTY” and “ICTR,” respectively). This memorandum will

¹ The statutes of the International Criminal Tribunals list the following as modes of individual criminal responsibility: planning, ordering, committing, or otherwise aiding and abetting, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, (hereinafter “ICTY Statute”), adopted by U.N. Security Council on 25 May 1993, U.N. Docs. S/RES/827, Art. 7(1), *available at* <http://www.un.org/icty/>, Reproduced in accompanying notebook at Tab 2; *Statute of the International Criminal Tribunal for Rwanda*, (hereinafter “ICTR Statute”), adopted by Security Council 8 November 1994, U.N. Doc. S/RES/955 (1994), *available at* <http://www.icttr.org>. Reproduced in accompanying notebook at Tab 3.

also put forth a range of convictions for aiding and abetting taken from International Criminal jurisprudence, demonstrating the scope of this mode of accomplice liability.²

II. Summary Of Conclusions:

a. Basic elements of aiding and abetting include actus reus and mens rea

The basic elements of aiding and abetting require proof of conduct by the principal actor, proof of conduct by the accused who let assistance, and proof of the minimum “knowing” state of mind of the accused. The first two criteria may be consolidated into one actus reus for the crime, while the latter requirement constitutes the mens rea requirement.

b. The International Military Tribunals at Nuremberg set up a framework for convictions under accomplice liability

The Nuremberg Tribunals first defined accomplice liability in the international criminal sphere. These tribunals further established aiding and abetting as a mode of criminal accomplice liability with a fundamentally lesser degree of participation by the accomplice. According to decisions of the Nuremberg Tribunals, aiding and abetting a crime was characterized by knowledge of the principal crime and a corresponding intent to further the crime or allow its final execution.

c. International tribunals place aiding and abetting at the bottom of the accomplice liability hierarchy, requiring fewer elements to prove culpability

Within the hierarchy of accomplice liability, aiding and abetting requires the lowest burden of proof by the prosecution in order to secure a conviction. It is considered a lesser offense than co-perpetration and participation in joint criminal enterprise, and

² As per the request by the Extraordinary Chambers, this note covers “the legal elements and the scope of the term to “**aid and abet**” a crime under International Criminal Law.” Specifically, the Office of the Co-Prosecutors requested an exhaustive study of the issue and discussion of as many case examples as possible.

requires a lesser degree of intent than the other offenses enumerated within the jurisdiction of the ICTY and ICTR.

d. The cognitive elements of knowledge surrounding, or intent to assist, the principal crime is required in international criminal jurisprudence

The requirement that is consistent among all convictions for aiding and abetting is the cognitive element; the accused must have either known that his act would contribute to the principal crime, or he must have known that the crime itself would be committed. There are, however, different knowledge and intent requirements depending on the circumstances of the case, and aiding and abetting liability must be evaluated on a case-by-case basis. Case precedent from the International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”) drew largely from the decisions of the International Military Tribunals at Nuremberg, and created a framework for the actus reus and mens rea of aiding and abetting. Noteworthy cases established that the accused must have lent practical assistance, encouragement, or moral support to the principal offender.

e. The Accused’s actions must have had a substantial effect on the principal crime, according to international criminal jurisprudence

Seminal ICTY cases further require that an act or omission may constitute aiding and abetting when the accused’s act had a substantial effect. Judgments at the ICTY and other international criminal tribunals corroborated this element of aiding and abetting by omission, requiring that the accused acted intentionally with knowledge or awareness that his act or omission would lend assistance, encouragement, or moral support to the principal offender.

III. Factual Background:

The Extraordinary Chambers in the Courts of Cambodia (hereinafter “ECCC”) have indicted Kaing Guech Eav, alias “Duch,” for his responsibility in torturing and killing thousands of citizens. Duch was a high-ranking officer in the Khmer Rouge Regime, and the evidence against him allegedly includes orders to “‘purge,’ ‘smash,’ or ‘sweep aside’ prisoners and their families, including women and children.”³ Duch has been charged with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the 1956 Penal Code (including torture and homicide). The Co-Prosecutors argue that his liability for these crimes ranges from actual commission to aiding and abetting “at every stage of S-21’s operations and contribut[ing] substantially to the crimes described.”⁴

Jurisdiction for individual criminal responsibility is outlined in Article 29 of ECCC Law and extends to “any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8.”⁵ Under this umbrella, The Co-Prosecutors allege that Duch provided “practical assistance, encouragement, and support” through his “mere presence.”⁶ They further assert that Duch

³ Ali Lejmi, Mohamed. *Prosecuting Cambodian Genocide: Problems Caused by the Passage of Time since the Alleged Commission of Crimes*, 4 J. Int’l Crim. Just. 300, 305 (2006). Reproduced in accompanying notebook at Tab 34..

⁴ *Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias “Duch,”* (hereinafter “Final Submission by the Co-Prosecutors”), 002/14-08-2006/ECCC/OCP, 18 July 2008, ¶ 266. Reproduced in accompanying notebook at Tab 38.

⁵ Law on the Establishment of the Extraordinary Chambers, promulgated on 27 Oct. 2004, NS/RKM/1004/006, Art. 29. Reproduced in accompanying notebook at Tab 4, available at: <http://www.eccc.gov.kh/english/law.list.aspx>.

⁶ *Final Submission by the Co-Prosecutors*, ¶ 266, Reproduced in accompanying notebook at Tab 38.

knew of the crimes that were planned or were in the midst of completion, that he knew of the intent of the principal actors, and that he knew his authority would lend assistance and facilitate the crimes.⁷

IV. International Criminal Jurisprudence established aiding and abetting liability as imposing a lower burden on the prosecution to prove its elements:

The International Military Tribunals established the legal framework for complicity in murder and other international crimes. Case Law from the Nuremberg Tribunals set forth some of the first convictions for accomplice and principal liability in the commission of mass atrocities. The Charter of the International Military Tribunal said “Accomplices participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.”⁸ The Charter outlined leaders, organizers, instigators, and accomplices as individuals subject to criminal liability in connection with any of the crimes specified in the charter. Convictions were repeatedly handed down for individuals based on circumstantial evidence, such as the Trial of Bruno Tesch and Two Others, (hereinafter “Zyklon B Case”).

The three defendants in the Zyklon B Case each had varying levels of authority at a firm that supplied poison gas to the concentration camps, which was subsequently used to kill on a massive scale. The Court convicted Bruno Tesch and Karl Weinbacher, the

⁷ *Id.*

⁸ *Charter of the International Military Tribunal* (hereinafter “IMT Charter”), adopted 8 Aug. 1945, Art. 6 (1945), Reproduced in accompanying notebook at Tab 1.

firm's owner and the firm's "procurist,"⁹ respectively, after inferring that these individuals had sufficient knowledge of the use to which the poison gas would ultimately be put. It was also found that they had control over the distribution of the poison gas; thus the court held they were complicit in the deaths. Convictions based on circumstantial evidence became commonplace, and were indicative of the lower evidentiary threshold that prosecutors had to meet to secure convictions for accomplice liability.

The decision in the Trial of Martin Gottfried Weiss and Thirty-Nine Others, (hereinafter "The Dachau Concentration Camp Trial"), further established that actors who play a significant role in the principal crime (in this case, the widespread and systematic violations at the Dachau Concentration Camp) were individually liable for the crimes committed. The Court evaluated each individual's liability based on three factors:

1. "That there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges
2. That each accused was aware of the system
3. That each accused, by his conduct "encouraged, aided and abetted or participated" in enforcing this system."¹⁰

The Court suggested that leaders in the hierarchy of the Camps, such as camp commandants or sergeants, held enough influence and had enough knowledge of the illegality of the events at the Camps to prove guilt. Conversely, the Court suggested that employees of the camp who merely handled laundry or guarded the entrance were not

⁹ The court defined the position of "Procurist" as the individual who, "when Tesch was absent...was fully empowered and authorized to do all acts on behalf of his principal which his principal could have done." *Trial of Bruno Tesch and Two Others* (hereinafter "Zyklon B Case"), Case No. 9, British Military Court, 1946. Reproduced in accompanying notebook at Tab 27.

¹⁰ *Trial of Martin Gottfried Weiss and Thirty-Nine Others*, (hereinafter "Dachau Concentration Camp Case"), Vol. XI Law Reports 13 (1945). Reproduced in accompanying notebook at Tab 26.

guilty by way of their position. In such cases, the prosecution had to prove that these individuals used their relatively innocuous position to mistreat the detainees.¹¹

The IMT Decisions offered a basic legal framework for punishing individuals who were associated with and complicit in the atrocities committed throughout World War II. These judgments covered a wide spectrum of activities by secondary actors, but subsequent decisions in the ad hoc international tribunals applied and expounded upon the means of holding individuals accountable.

V. Elements of Aiding and Abetting set forth in ICTY Jurisprudence:

Case precedent from international tribunals has expanded the scope of aiding and abetting to include a broad range of ways in which a defendant can be held responsible; however, the legal framework established by early ICTY Judgments set the tone for subsequent convictions based on this charge. Under Article 7(1) of the Statute of the ICTY, individuals bear criminal responsibility for “planning, instigating, ordering, committing, or otherwise aiding and abetting in the preparation or commission of a crime” outlined in Articles 2 through 5 of the Statute.¹² The following four cases illustrate the elements of aiding and abetting liability, and provide an in depth analysis of the *actus reus*, *mens rea*, and other characteristic activity by the accused required for a conviction.

a. The Mens Rea Requirement: *Prosecutor v. Dusko Tadic*

The Trial Judgment against Dusko Tadic, drawing on case law from the Nuremberg Tribunal, established three elements for aiding and abetting in international

¹¹ *Id.*

¹² *ICTY Statute*, adopted by U.N. Security Council on 25 May 1993, U.N. Docs. S/RES/827, Art. 7(1), *available at*: <http://www.un.org/icty/>. Reproduced in accompanying notebook at Tab 2.

criminal law: intent, direct contribution, and significant degree of participation. The Court in Tadic said that the defendant was guilty of aiding and abetting in the mistreatment and killings of detainees at the Omarska Prison Camp. Throughout his tenure at the camp, Tadic participated in the torture and mistreatment of specific victims, as well as other violations of the customs of war for his participation in the crimes committed at the Omarska Camp. At all times, he was aware of the activities at the Camp that violated war customs because of his position as attendant at the facility.

The Court in Tadic referred to customary international law to determine its position in convicting based on accomplice liability. Article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (hereinafter “Torture Convention”), to which The Chamber referred, lists “complicity or participation in torture” as invoking liability.¹³

The Trial Chamber built upon this foundation by reference to *The Trial of Wagner and Six Others*, which specifically listed arms suppliers as actors who “wittingly aided or assisted the author or authors of the crime or offence,” when they distributed their wares with knowledge of the final crime toward which their goods would be used.¹⁴ The Chamber also cited the *Dachau Concentration Camp Trial*, charging defendants who

¹³ *Prosecutor v. Dusko Tadic*, (hereinafter “Tadic Judgment”), IT-94-1-T, Judgment 7 May 1997, ¶ 666, Reproduced in accompanying notebook at Tab 11; citing *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter “Torture Convention”), U.N.G.A. Resolution 39/46 (10 Dec. 1984). Reproduced in accompanying notebook at Tab 39.

¹⁴ *Tadic Judgment*, IT-94-1-T, Judgment 7 May 1997, ¶ 667, Reproduced in accompanying notebook at Tab 11; citing *Trial of Wagner and Six Others*, Vol. III Law Reports 24, 40-42, 94-95. Reproduced in accompanying notebook at Tab 28.

“willfully, deliberately and wrongfully aid[ed], abet[ted] and participate[d] in” the atrocities that were carried out at the concentration camps.¹⁵

1. Intent (Mens Rea) of the Accused

The Trial Chamber in Tadic put forth intent as the first requirement in showing that an individual aided and abetted the principal actor in committing the principal crime. The Court said that intent was comprised of awareness of the principal crime, as well the decision to participate in the criminal act.¹⁶ Drawing upon judgments of the Nuremburg Tribunals, the Tadic Trial Chamber concluded that intent is a key element in proving complicity, and “can be inferred from the circumstances,”¹⁷ as intent was inferred for members of the concentration camps who had knowledge and continued to participate in the killing. The Court did not require that the accused be a member of the principal plan, but only that he or she be privy to the “arrangement or agreement to take part in any particular behavior.”¹⁸ The situation at the Omarska Prison Camp, like the situation at the Dachau Concentration Camp, implicated the respective defendants because they worked at the facilities and had intimate knowledge of the activities that occurred therein.

2. Direct Contribution by the Accused

¹⁵ *Id.*, ¶ 668, citing *Trial of Martin Gottfried Weiss and 39 Others* Vol. XI Law Reports 5, Reproduced in accompanying notebook at Tab

¹⁶ *Id.*, ¶ 674.

¹⁷ *Id.*, ¶ 676, citing *Trial of Joseph Altstotter and Others* (hereinafter “the Justice Case”), Vol. VI Law Reports 88, Reproduced in accompanying notebook at Tab 29.

¹⁸ *Id.*, ¶ 677.

The Court in Tadic established a “deliberate act...directly affect[ing] the commission of the crime itself” as the second requirement in holding an accused responsible for aiding and abetting the principal crime.¹⁹ The Trial Chambers also put forth that any individual present at the scene of the crime and responsible for aiding and abetting the commission of the crime, is equivalent to a principal in the second degree.²⁰ The Court elaborated by saying that “It is not necessary that the party should be actually present...he is, in construction of law, present, aiding and abetting, with the intention of giving assistance, if he is near enough to afford it should occasion arise.”²¹ The Court further included within the definition of aiding and abetting “all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.”²²

3. Requisite participation by the Accused

The Court in Tadic held that the “substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime.”²³ The Court presented a clear-cut case of liability where the “accused is present and participates in the beating of one person and remains with the group when It moves on to beat another person.” In such a situation, the court said presence at the scene of the crime would have a sufficiently positive effect on the principal actor to constitute “encouraging” the

¹⁹ *Id.*, at ¶ 678, citing *The Justice Case*. Reproduced in accompanying notebook at Tab29.

²⁰ *Id.*, at ¶ 678, citing *The Trial of Franz Schonfeld and Nine Others*, Vol. XI Law Reports 69-70.

²¹ *Id.*

²² *Id.* at ¶ 689.

²³ *Id.* at ¶ 688.

principal crime. Thus, the accused would be guilty of aiding and abetting in the crime where they did not physically beat the victim.²⁴ Because Tadic was physically present throughout the course of the violations at the Omarska Camp, he was found criminally liable for the crimes that occurred there.

The mens rea element established in the Tadic Judgments was later expounded on in the Case of Anto Furundzija, who was found guilty of aiding and abetting torture and other violations of international humanitarian law.

b. The Actus Reus Requirement: *Prosecutor v. Anto Furundzija*

The Court in Furundzija determined that the accused was liable under Article 7(1) of the ICTY Statute for his “intent to participate” and for his contribution to violations of international humanitarian law as a commander in the Croatian Defense Council military policing unit (hereinafter “HVO Unit”).²⁵ During questioning of female witnesses, Furundzija used sexually explicit acts to coerce responses from his victims, and permitted other members of his unit to employ the same techniques. The HVO Unit also attacked villages under Furundzija’s command, which led the Court to convict him for complicit behavior when he wasn’t the primary perpetrator.

1. Actus Reus of the Accused

The first question the Trial Chambers asked in identifying actus reus was whether the accused could have given merely moral support, or if the assistance had to be

²⁴ Id. at ¶ 690.

²⁵ *Prosecutor v. Anto Furundzija*, (hereinafter “Furundzija Judgment”), IT-95-17/1-T, Judgment 10 Dec. 1998, ¶ 42. Reproduced in accompanying notebook at Tab

“tangible in nature” and have a “causal effect.”²⁶ To illustrate the actus reus, the Trial Chambers relied on the nature of the assistance proffered by the accused, and concluded that moral support and encouragement were adequate to establish liability.²⁷ The critical element in establishing the actus reus of accessory liability, the Chambers determined, was “giving ‘additional confidence to his companions.’”²⁸

The court applied a standard requiring evidence of the accused’s “practical assistance, encouragement, or moral support” in the perpetration of the principal crime to their determination of the actus reus of the crime. This standard, the Court said, had to be accompanied by the requisite mens rea. The Court inferred Furundzija’s knowledge, the minimum mental element required to secure a conviction for aiding and abetting, from his intent to obtain confessions from his victims. The accused attempted to get these confessions by physically and emotionally torturing his victims; the Court felt this underlying intent to inflict bodily harm was sufficient to prove complicity in the crimes. The court thus found all of the elements to prove aiding and abetting.

The Furundzija Trial Chambers drew analogies with the Dachau Concentration Camp Trial to define three elements of complicit behavior: A pre-arranged system, or plan, to commit the principal crime; the accused’s knowledge of this plan; and the accused’s active support or contribution to enforcing this plan. The Court referred to the United Nations War Crimes Commission in suggesting that the system may establish

²⁶ *Id.*, at ¶ 192.

²⁷ *Id.*, at ¶ 199.

²⁸ *Id.*, at ¶ 202.

guilt, and everyone who participated may be held liable, at every level of the hierarchy, so long as the sentencing varied according to degree of participation.²⁹

2. Implicating the Accused through their presence in a superior capacity

The Trial Chambers determined that the mere presence of an individual with superiority was the rough equivalent of that individual providing moral support, and thus was adequate to show actus reus of the principal crime.³⁰ In certain cases, this was inferred solely from an accused's position of authority. The Court in Furundzija cited specific examples of such authority positions, including Mayor of the Commune (as in the case of Prosecutor v. Akayesu),³¹ or long-time, high-ranking official in the military (as in the German Supreme Court decision in the *Synagogue Case*).³² The Court held that acts with "encouraging," in the case of a superior, or "substantial"³³ impact upon the principal crime were sufficient in proving liability for aiding and abetting. A notable illustration of the liability for providing substantial assistance was that of an individual accused in the *Trial of Otto Ohlendorf and Others* (hereinafter "Einsatzgruppen Case"). An interpreter was held liable for his assistance in "locating, evaluating, and turning over lists of Communist party functionaries to the executive of his organization," knowing all along that the names he proffered were in contention for execution.³⁴

²⁹ *Id.*, at ¶ 212.

³⁰ *Id.*, at ¶ 209.

³¹ *Id.* at ¶ 209.

³² *Id.*, at ¶ 205.

³³ *Id.*, at ¶ 221.

³⁴ *Id.*, at ¶ 217.

Perhaps the most famous case, which the Trial Chamber used to illustrate its “substantial” contribution requirement, was the Zyklon B Case. The accused in Zyklon B were found to be a direct link in the commission of the mass atrocities, because they supplied the poison gas for mass extermination of detainees at concentration camps. The technician was acquitted because his position did not afford him the knowledge of or influence over “the use to which the gas was put” enough to actually “make him guilty.”³⁵ While this position did not afford him sufficient power or knowledge to influence the distribution of the poison gas, the owner of the firm and his second-in-command did possess the necessary clout. As such, they were convicted for their complicity in the mass atrocities.

While the Courts in Tadic and Furundzija reconciled the mens rea and actus reus elements of aiding and abetting in international criminal law, the Case of Zlatko Aleksovski expounded on liability for aiding and abetting in cases of superior actors.

c. Superior Liability for Aiding and Abetting: *Prosecutor v. Zlatko Aleksovski*

Aleksovski was charged under Article 7(1) of the ICTY Statute, for his involvement as a member of the Croatian Defense Council (hereinafter “HVO”) Army who rose to become commander of the Kaonik and Heliodrom Prison facilities. Both the Trial Chamber and the Appeals Chamber agreed that the accused possessed a “discriminatory intent” to mistreat detainees outside of the Kaonik Prison.³⁶ The Trial

³⁵ *Furundzija Judgment*, ¶ 222, citing *The Trial of Bruno Tesch and Two Others*, (hereinafter “Zyklon B Case”), British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93. Reproduced in accompanying notebook at Tab 27.

³⁶ ICTY Press release, *Aleksovski Case: The Appeals Chamber Orders Aleksovski’s Return to Custody*, (9 Feb. 2000), <http://www.un.org/icty/pressreal/p469-e.htm>. Reproduced in accompanying notebook at Tab 40.

Chamber found that Aleksovski aided and abetted the inhumane treatment of prisoners by using them as “human shields” and “trench-diggers.”³⁷ The Trial Chamber discerned a discriminatory intent from Aleksovski’s actions, and his corresponding superior authority implicated him in their commission.³⁸

The Trial Chamber drew a distinction between Aleksovski’s culpability for crimes committed inside the prison compound, versus crimes committed outside the compound. The Court initially felt that the evidence was not sufficient to prove Aleksovski had the requisite control outside the prison compound, nor that he possessed the “discriminatory intent” because he didn’t have specific knowledge of the events occurring outside. In the cross appeal, the Prosecution asserted that Aleksovski aided and abetted the mistreatment of prisoners, both within and without the Prison confines.³⁹ The Appeals Chamber held that Aleksovski maintained superior responsibility according to the definition in the ICTY Statute,⁴⁰ and that his individual responsibility derived from his knowledge of the “use to which the prisoners were being put by the HVO soldiers.”⁴¹

The Appeals Chamber further expounded upon both Tadic and Furundzija in declaring the elements of aiding and abetting. On appeal it was decided that Aleksovski’s

³⁷ *Prosecutor v. Zlatko Aleksovski*, (hereinafter “Aleksovski Judgment”), IT-95-14/1-T, Judgment 25 June 1999, ¶ 138. Reproduced in accompanying notebook at Tab 5.

³⁸ *Id.*, at ¶ 215.

³⁹ *Prosecutor v. Zlatko Aleksovski*, (hereinafter “Aleksovski Appeal”), IT-95-14/1-A, Judgment 24 March 2000, ¶ 157. Reproduced in accompanying notebook at Tab 6.

⁴⁰ ICTY Statute, Art. 7(3), (describing superior criminal responsibility when the accused has knowledge of the criminal acts and fails to prevent such acts). Reproduced in accompanying notebook at Tab 2.

⁴¹ *Aleksovski Appeal*, at ¶ 157.

awareness “of the essential elements of the crime committed by the principal, (including [the principal’s] relevant mens rea),” was sufficient to establish a claim of aiding and abetting.⁴²

Aleksovski was convicted because he had knowledge of the mistreatment to which the prisoners were being subject, and he knew that this treatment was unlawful.⁴³ Furthermore, Aleksovski, as a superior to the HVO soldiers, routinely supervised the prisoners as they returned from their trench-digging labor, and as such had the opportunity to see the physical condition of the prisoners.⁴⁴ In considering whether Aleksovski’s actions established liability for aiding and abetting inhuman treatment of prisoners both within and without the confines of the prison, the Appeals Chamber looked at “all acts of assistance by words or acts that lend encouragement or support.”⁴⁵ The Appeals Chamber held that Aleksovski’s contribution had a “substantial effect” on the execution of the principal crime, and thus that he incurred liability under Article 7(1).⁴⁶

The Appeals Chamber held that the conviction for aiding and abetting mistreatment of prisoners within the confines of the prison was accurate, and that the actus reus and mens rea of the crime must be extended to the circumstances outside of the prison. The judgment by the Appeals Chamber did not alter the sentence for Aleksovski,

⁴² *Id.*, at ¶ 164.

⁴³ *Id.*, at ¶ 168.

⁴⁴ *Id.*

⁴⁵ *Id.*, at ¶ 164, citing *Aleksovski Judgment*, ¶ 61. Reproduced in accompanying notebook at Tab 5

⁴⁶ *Id.*

but lowered the threshold to include acts of which the accused had knowledge and over which he had some degree of control. It shifted the burden to superiors, to prevent or to halt the crimes of subordinates, and extended the liability under 7(1) of the statute to Article 7(3), governing superior liability.

d. The Four-Part Test for Intent: *Prosecutor v. Naser Oric*

While Tadic, Furundzija, and Aleksovski comprehensively defined liability for aiding and abetting when the accused “lent practical assistance, encouragement, or moral support to the principal offender,” and the accused’s intentional “act or omission had a substantial effect on the commission of the crime,”⁴⁷ the Case of Naser Oric formally introduced a four-part test to determine intent.

The Trial Chambers in Oric stated “as soon as the principal perpetrator is already prepared to commit the crime, but may still need or appreciate some moral support to pursue it or some assistance in performing the crime, any contributions making the planning, preparation or execution of the crime possible or at least easier may constitute aiding and abetting.”⁴⁸ The Trial Chambers further summarized its position in holding: “Aiding and abetting should not be limited to direct contributions, as long as the effect of facilitating the crime is the same, irrespective of whether produced directly or by way of indirect means or intermediaries, provided, of course, that the final result is covered by the participant's corresponding intent.”⁴⁹

⁴⁷ Dawson, Grant, and Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 Harv. Hum. Rts. J. 241, 260 (2008). Reproduced in accompanying notebook at Tab 37.

⁴⁸ *Prosecutor v. Naser Oric*, (hereinafter “Oric Judgment”), IT-03-68-T, Judgment 30 June 2006, ¶ 281. Reproduced in accompanying notebook at Tab 13.

⁴⁹ *Id.*, at ¶ 285.

The Court outlined four requirements in attempting to clarify and define the requisite mens rea of the accused:

1. "Aiding and abetting must be intentional,
2. The aider and abettor must have 'double intent', namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator,
3. The intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not, and
4. With regard to the contents of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed."⁵⁰

VI. Differences between later ICTR Case Law and ICTY Precedent:

- a. ICTR decisions presented separate and distinct definitions for aiding and abetting, unlike the integrated definition adopted in ICTY decisions:**
Prosecutor v. Jean Paul Akayesu

The Statute of the International Criminal Tribunal for Rwanda outlines individual criminal responsibility in Article 6(1), which says: "A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."⁵¹ The first formal indictment for aiding and abetting came in the case of *Prosecutor v. Akayesu*.⁵² The judgment in *Akayesu*

⁵⁰ *Id.*, at ¶ 288.

⁵¹ ICTR Statute, adopted by Security Council on 8 November 1994, U.N. Doc. S/RES/955 (1994), *available at* <http://www.ictt.org>. Reproduced in accompanying notebook at Tab 3.

⁵² Dawson, Grant, and Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 Harv. Hum. Rts. J. 241, 260 (2008). Reproduced in accompanying notebook at Tab 37.

contemplated aiding and abetting as though each represented a different mode of liability by the complicit actor.

The Trial Chamber declared that aiding was the equivalent of “giving assistance to someone,”⁵³ while abetting meant “facilitating the commission of an act by being sympathetic thereto.”⁵⁴ The Trial Chamber evaluated the liability of the accused where they were guilty of both of these acts, in accordance with the ICTR Statute, which specifies the two modes as one element of liability.

b. Early ICTR cases suggested that the accused must share the “specific intent” of the principal actor for liability to attach: *Prosecutor v. Jean Paul Akayesu*

Following from the separate and distinct definitions of aiding and abetting proffered by the Akayesu Judgment, the Court felt that aiding and abetting itself fell under the scope of Article 2 of the ICTR Statute.⁵⁵ When the Court suggested that aiding and abetting fell within the statutory definition of genocide, it also implied that any individual thereafter convicted for aiding and abetting genocide must possess the requisite specific intent. The court asserted that aiding and abetting:

“Constitute one of the crimes referred to in Articles 2 to 4 of the Statute, particularly, genocide. The Chamber is consequently of the opinion that when dealing with a person accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part.”⁵⁶

⁵³ *Prosecutor v. Jean-Paul Akayesu*, (hereinafter “Akayesu Judgment”), ICTR-96-4, Judgment 2 Sept. 1998, ¶ 484. Reproduced in accompanying notebook at Tab 20.

⁵⁴ *Id.*

⁵⁵ *Akayesu Judgment*, ¶ 485.

⁵⁶ *Id.*

According to the Statute, the specific intent for committing genocide includes the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁵⁷ The decision by the Court established a higher threshold and imposed a much greater burden on the prosecution to prove individual responsibility in aiding and abetting genocide.

c. Subsequent ICTR judgments resolved the “specific intent” discrepancy and further consolidated aiding and abetting into a single mode of liability: *Prosecutor v. Elizaphan and Gerard Ntakirutimana*

The Appeals Chamber convicted Elizaphan Ntakirutimana, upholding the Trial Chamber opinion and effectively overturning the Akayesu Judgment placing aiding and abetting mens rea at the same level as genocidal intent. On appeal, the Ntakirutimana court considered the mental state of both Elizaphan Ntakirutimana and his son, Gerard, when they transported attackers to Mugonero Complex with knowledge that they would massacre Tutsis therein. Providing transportation and identifying Tutsi refugees to known assailants, the Trial Court said, was sufficient to demonstrate the requisite intent to commit genocide.⁵⁸

The Ntakirutimana Appeal said that a “conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.”⁵⁹ The Court likewise said

⁵⁷ *ICTR Statute*, Art. 2 (1994). Reproduced in accompanying notebook at Tab 3.

⁵⁸ *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, (hereinafter “Ntakirutimana Judgment”), ICTR-96-10-T and ICTR-96-17-T, ¶ 830. Reproduced in accompanying notebook at Tab 21.

⁵⁹ *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, (hereinafter “Ntakirutimana Appeal”), ICTR-96-10-A, ICTR-96-17-A, Judgment 13 Dec. 2004, ¶ 501. Reproduced in accompanying notebook at Tab 22.

that the Trial Chambers were incorrect to suggest that aiding and abetting convictions require the same specific intent that is required of genocide convictions.

VII. Application and expansion of aiding and abetting framework to recent convictions in the international tribunals:

a. Liability for “aiding and abetting” among the hierarchy of complicity crimes in international law: *Prosecutor v. Milorad Krnojelac*

The Appeals Chambers in Krnojelac put forth the opinion that aiding and abetting was a less severe mode of complicity among the charges outlined in The ICTY Statute,⁶⁰ which imposed a lower burden of proof for the prosecution to show liability. The Court in Krnojelac said that an individual who aids and abets the commission of a crime need not share the intent to commit the principal crime. This holding distinguished the intent requirement for actors convicted for aiding and abetting from the intent requirement for actors in a joint criminal enterprise.

Krnojelac was a Captain in the Yugoslav National Army (hereinafter “JNA”), and later commanded one of the largest and most overcrowded prisons, the Foca Kazneni-Popravni Dom (hereinafter “KP Dom”), housing mostly men of Muslim and other non-Serbian ethnicities. The defendant was convicted for aiding and abetting persecution and inhumane treatment of detainees at the KP Dom. The Trial Chambers viewed widespread violations at the KP Dom, which was under Krnojelac’s effective control, as indicative of his intent to mistreat Muslim and Croat prisoners.

The Court in Krnojelac asserted “acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor...since a participant in a joint criminal

⁶⁰ The Statute of the ICTY enumerates the following as modes of accomplice liability, which accordingly merit individual responsibility by the assisting party under international criminal law: planning, instigating, ordering, committing, or aiding and abetting in the planning or commission of a crime. *ICTY Statute*, Art. 7 (2004). Reproduced in accompanying notebook at Tab 2.

enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent.”⁶¹ Joint criminal enterprise was distinguishable from aiding and abetting because the former required the accomplice to commit the crime with a “common design or purpose” intent. Whereas the actions undertaken by the defendant in Krnojelac demonstrated that he provided support or encouragement, thereby substantially effecting the commission of the crime, Krnojelac did not possess the requisite specific intent.

Drawing largely from the Judgment in Krnojelac, the Appeals Chamber in Kvocka et al. established aiding and abetting liability as a fundamentally less severe mode of accomplice liability. The Court evaluated the “effect of the assistance” and the “knowledge of the accused” to determine the extent of the guilty party’s culpability in the principal crime.⁶² The Appeals Chamber declared, “aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.”⁶³

These cases established that the liability for aiding and abetting requires a lesser degree of knowledge than the charges outlined in the ICTY Statute, all of which attach liability to the party lending assistance to the principal crime. The common thread among these cases is the element of knowledge possessed by the accused that warrants any

⁶¹ *Prosecutor v. Milorad Krnojelac*, (hereinafter “Krnojelac Appeal”), IT-97-25-A, Judgment 17 Sept. 2003, ¶ 75. Reproduced in accompanying notebook at Tab 17.

⁶² *Prosecutor v. Kvocka et al.* (hereinafter “Kvocka Appeal”), IT-98-30/1-A, Judgment 28 Feb. 2005, ¶ 90. Reproduced in accompanying notebook at Tab 18.

⁶³ *Kvocka Appeal*, ¶ 92.

manner of disciplinary action. For the prosecution to secure a conviction for aiding and abetting, the accused had to at least know of the crime or of its elements.

b. Scope of convictions for aiding and abetting genocide: *Prosecutor v. Blagojevic and Jokic*

The Trial Chamber in *Prosecutor v. Blagojevic and Jokic* (hereinafter “Blagojevic”) outlined three elements for applying the liability of an aider and abettor to the charge of genocide. The Court in Blagojevic asserted that the accused had to have offered practical assistance, encouragement or moral support to the principal that had a substantial effect; that the accused had knowledge that his acts assisted the principal offender in carrying out the crime; and finally that the accused knew the crime was committed with the specific intent to destroy.⁶⁴ The Trial Chamber put forth three criteria to establish liability in aiding and abetting genocide:

1. “The accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal that had ‘substantial effect’ on the commission of the crime,
2. The accused had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender, and
3. The accused knew that the crime was committed with specific intent.”⁶⁵

c. Scope of convictions for failing to act upon a duty; omission as aiding and abetting: *Prosecutor v. Tihomir Blaskic*

⁶⁴ Mundis, Daryl A. and Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 3 J. Int’l Crim. Just. 1134, 1141 (2005). Reproduced in accompanying notebook at Tab 35.

⁶⁵ Van Sliedregt, Elies, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. Int’l Crim. Just. 184, 194 (2007), Reproduced in accompanying notebook at Tab 30; citing *Prosecutor v. Blagojevic & Jokic* (hereinafter “Blagojevic Judgment”), IT-02-60-T, Judgment 17 Jan. 2005, ¶ 782. Reproduced in accompanying notebook at Tab 9.

The Case of Tihomir Blaskic set precedent for convictions for aiding and abetting where the accused had a duty to prevent and punish misdeeds of members of his charge, and failed to act thereupon. Blaskic was a leader of the Croatian Defense Council armed forces, who later rose to the position of Chief of Staff of the HVO and commanded the Central Bosnia Operative Zone of the HVO. The Court in Blaskic declared that “in the circumstances of a given case, an omission may constitute the actus reus of aiding and abetting.”⁶⁶ This followed from the Trial Chamber holding that “the actus reus of aiding and abetting may be perpetrated through an omission, ‘provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea.’”⁶⁷

The Trial Chamber in *Prosecutor v. Mpambara* later qualified the rule in Blaskic that attached complicit liability when an accused failed to act on a duty by which they were bound. Mpambara held that a person who holds authority, and is present at the scene, may be guilty for failing to act if his “inaction had an encouraging effect, the effect was substantial, and the accused knew of the likely effect of the perpetrator’s criminal intent.”⁶⁸ The court stated conclusively that an accused’s “culpability arises by...allowing another person to commit a crime that the accused has a duty to prevent or punish.”⁶⁹

⁶⁶ *Prosecutor v. Tihomir Blaskic*, (hereinafter “Blaskic Appeal”), IT-95-14-A, Judgment 29 July 2004, ¶ 47. Reproduced in accompanying notebook at Tab 8.

⁶⁷ *Prosecutor v. Tihomir Blaskic*, (hereinafter “Blaskic Judgment”), IT-95-14-T, Judgment 3 March 2000, ¶ . Reproduced in accompanying notebook at Tab 7.

⁶⁸ Rana, Rajat, *The Jean Mpambara Case: Outlining “Culpable Omissions” in International Criminal Law*, 6 Chinese J. Int’l L. 439 (2007), Reproduced in accompanying notebook at Tab 32; citing *Prosecutor v. Jean Mpambara*, (hereinafter “Mpambara Judgment”), ICTR 01-65-T, Judgment 11 Sept. 2006, ¶ 22. Reproduced in accompanying notebook at Tab 24.

⁶⁹ *Id.*, citing *Mpambara Judgment*, ¶ 25.

Prosecutor v. Musema was a notable case before the ICTR, because the accused was the director of a tea factory and had no established political influence. The accused was convicted of abetting in the commission of crimes against humanity and genocide for “fail[ing] to take the necessary and reasonable measures to prevent his employees from attacking Tutsis.”⁷⁰ The accused was in a position to influence his subordinates at his factory, and failed to take action when he knew of the crimes they were perpetrating, which made him liable for abetting, or “facilitating” the actions of his workers.⁷¹

Vincent Rutaganira was charged with one count of crimes against humanity for aiding and abetting attacks at Mubuga Church, where he held the position of Conseiller. The court felt that his position within the church gave him significant moral authority, to the extent that he could have acted to prevent the attacks at his church and to save Tutsi civilians.⁷² While he maintained his position of authority, Rutaganira influenced economic, social, and cultural issues in the community, and acted as a nexus between the political elite and the civilian population. The accused was charged with aiding and abetting the murderous acts of Hutu civilians against Tutsi refugees within his community.

In its judgment, The Court noted that Rutaganira did nothing to stop the charging Hutu civilians, with knowledge of their intent and their capacity to inflict harm upon the

⁷⁰ Torbey, Claudette, *The Most Egregious Arms Broker: Prosecuting Arms Embargo Violators in the International Criminal Court*, 25 Wis. Int'l L.J. 335, 355 (2007). Reproduced in accompanying notebook at Tab 33.

⁷¹ *Akayesu Judgment*, at ¶ 484. Reproduced in accompanying notebook at Tab 20.

⁷² Mundis, Daryl A. and Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 3 J. Int'l Crim. Just. 1134, 1138 (2005). Reproduced in accompanying notebook at Tab 35.

Tutsi refugees.⁷³ His failure to act on behalf of potential victims resulted in his conviction for aiding and abetting the extermination of Tutsi civilians. The court cited Rutaganira's "omission," or failure to act on his duty, as the primary factor in his conviction.

VIII. Scope of convictions for aiding and abetting by individuals acting in superior capacity:

a. Aiding and abetting by individuals with superior responsibility: *Prosecutor v. Karadzic and Mladic*

Article 7(1) of the ICTY Statute, relating to individual criminal responsibility, for a time was wholly distinct from Article 7(3), which addressed superior criminal responsibility. Under 7(3), culpability attached to the superior if "they knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."⁷⁴

The Prosecutor pursued charges under Article 7(1) and 7(3) of the ICTY Statute against Radovan Karadzic and Ratko Mladic. The 1996 decision to join their cases and consequently to issue the warrant for their arrest, suggested that the position of authority held by both defendants was strongly indicative of their individual criminal liability. The Court cited in particular their culpability in aiding and abetting the "ethnic cleansing" in Bosnia and Herzegovina, as well as the massacre at Srebrenica. Radovan Karadzic was found to have held "broad institutional powers [as] head of a political organization and of

⁷³ *Prosecutor v. Vincent Rutaganira* (hereinafter "Rutaganira Judgment"), 2005 WL 723948, Judgment Summary 14 Mar. 2005. Reproduced in accompanying notebook at Tab 23.

⁷⁴ *ICTY Statute*, Art. 7(3). Reproduced in accompanying notebook at Tab 2.

the armed forces...of Bosnia and Herzegovina.”⁷⁵ As such, he was instrumental in the coup of Bosnia and Herzegovina by Serbian Troops, which he commanded, and had thorough knowledge of international humanitarian obligations and United Nations resolutions condemning the situation therein.⁷⁶

The court pursued similar charges under Article 7(1) and 7(3) against Ratko Mladic, who was effectively Chief of Staff to Commander-in-Chief Karadzic; together the two defendants maintained full control over the Bosnian Serb Republic.⁷⁷ The Court felt there was sufficient evidence showing that Mladic had control over his subordinates in the army; as a leader he made tactical and administrative decisions for Bosnian Serb Republic that proved his knowledge of and influence over the offences. Mladic also controlled the situation for civilians in the region, through control of the detention facilities and the bombings of civilian gatherings in violation of international humanitarian law.⁷⁸ Finally, The Court held that Mladic’s “presence and behavior” at mass execution sites related to the Srebrenica tragedy, compounded by his “sway over the whole process” made him criminally liable for the events.⁷⁹ The Court indicted both defendants and subsequently issued an international warrant for their arrest on the following grounds:

⁷⁵ *Prosecutor v. Radovan Karadzic and Ratko Mladic*, (hereinafter “Karadzic Judgment”), IT-95-5/18 and IT-95-5/18-I, Judgment 11 July 1996, ¶ 70. Reproduced in accompanying notebook at Tab 19.

⁷⁶ *Karadzic Judgment*, at ¶ 71.

⁷⁷ *Karadzic Judgment*, ¶ 77.

⁷⁸ *Id.*, at ¶¶ 78-79.

⁷⁹ *Id.*, at ¶ 80.

“The uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of the Bosnian Serb-held territory, the movements of prisoners between the various camps, and the tenor of some of the accused's statements are strong indications tending to show that Radovan Karadzic and Ratko Mladic planned, ordered or otherwise aided and abetted in the planning, preparation or execution of the genocide perpetrated in the detention facilities [run by Serbian forces in Bosnia and Herzegovina].”⁸⁰

**b. Incorporating liability for aiding and abetting with superior responsibility:
*Prosecutor v. Radislav Krstic***

Recent ICTY decisions have specifically addressed the culpability of an actor who aids and abets genocide. Radislav Krstic was convicted on appeal for aiding and abetting genocide; the Court was confident that he gave “substantial assistance” with the requisite knowledge of the principal’s specific intent to commit genocide;⁸¹ these two criteria were later used and elaborated upon in the Blagojevic and Jokic Trial Judgment.

Radislav Krstic was Commander of the Bosnian Serb (hereinafter “VRS”) Drina Corps throughout the conflict in the Balkans. Krstic was a high-ranking official within the army, similar to Mladic, and as such was charged with complicity in genocide, extermination, murder, and persecution of Bosnian Muslims.⁸² The Court in Krstic asserted “where a commander participates in the commission of a crime through his subordinates, by ‘planning,’ ‘instigating’ or ‘ordering’ the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).”⁸³ While the Court in

⁸⁰ *Id.*, at ¶ 84.

⁸¹ Van Sliedregt, Elies, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. Int’l Crim. Just. 184, 193-194 (2007), Reproduced in accompanying notebook at Tab 30; citing *Prosecutor v. Radislav Krstic* (hereinafter “Krstic Appeal”), IT-98-33-A, Judgment 19 Apr. 2004.

⁸² *Prosecutor v. Radislav Krstic*, (hereinafter “Krstic Judgment”), IT-98-33-T, Judgment 2 Aug. 2001. Reproduced in accompanying notebook at Tab 15.

⁸³ *Id.*, at ¶ 605.

Krstic did not specify aiding and abetting as one of the modes of accomplice liability to which superior liability could be compared, it is one of the enumerated charges under 7(1), and thus merits equal consideration.

The Court in *Prosecutor v. Kordic and Cerkez* applied liability for aiding and abetting to actions overseen by a superior. The Trial Chambers integrated Articles 7(1) and 7(3), suggesting individual and superior liability is invoked “in cases where the...superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes.”⁸⁴ This type of situation, where the superior had such knowledge and contributed to the principal crime, should invoke liability under Article 7(1) of the Statute, according to the Kordic Judgment.⁸⁵

Vinko Martinovic, one half of the pair nicknamed “Tuta and Stela,” was charged with various counts of crimes against humanity, and convicted for “cruel treatment and willfully causing great suffering or serious injury to body or health” of one of the prisoners under his charge in violation of Article 7(1) of the Statute.⁸⁶ Evidence was presented against Martinovic that showed he “directly exposed” the prisoner for whom he was responsible to “great risk of injury and possible death.”⁸⁷ The evidence also was clear

⁸⁴ *Prosecutor v. Dario Kordic & Mario Cerkez*, (hereinafter “Kordic Judgment”), IT-95-14/2-T, Judgment 26 Feb. 2001, ¶ 371. Reproduced in accompanying notebook at Tab 14.

⁸⁵ *Id.*

⁸⁶ *Prosecutor v. Mladen Naletilic, aka Tuta, and Vinko Martinovic, aka Stela*, (hereinafter “Martinovic Judgment”), IT-98-34-T, Judgment 31 March 2003, ¶ 496. Reproduced in accompanying notebook at Tab 16.

⁸⁷ *Martinovic Judgment*, at ¶ 272.

that he made no effort to prevent the harm that his subordinates were inflicting on prisoners, or to punish anyone who was directly responsible.⁸⁸

c. Establishing criminal liability where a superior proffered substantial assistance: *Prosecutor v. Laurent Semanza*

Laurent Semanza was complicit in countless violations of international criminal law for his active participation in widespread and systematic attacks on Tutsi civilians; he contributed by gathering local militiamen (known as *Interahamwe*) and suggesting groups of Tutsis for these attackers to target.⁸⁹ Semanza was a prominent political leader (known as *Bourgmestre*) of a rural Rwandan community, and later a political appointee. He was charged with genocide and complicity in genocide for using his clout to influence the actions of the *Interahamwe*.⁹⁰

The Court found that Semanza “committed...acts that provided substantial assistance to the principal perpetrators.”⁹¹ Semanza took an active role in the massacre at Musha Church by appraising the situation prior to the *Interahamwe*’s arrival, recruiting additional soldiers to participate in the attacks, and specifying groups of Tutsi civilians for execution.⁹² The accused took measures to further arm soldiers at Mwulire Hill, effectively providing the required “substantial assistance” to the actual perpetrators and

⁸⁸ *Id.*

⁸⁹ *Prosecutor v. Laurent Semanza*, (hereinafter “Semanza Judgment”), ICTR-97-20-T, Judgment, 15 May 2003, ¶ 206. Reproduced in accompanying notebook at Tab 25.

⁹⁰ Weernink, Anne, *The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20, Judgment, Appeals Chamber (20 May 2005)*, 6 Chinese J. Int’l L. 115 (2007). Reproduced in accompanying notebook at Tab 36.

⁹¹ *Semanza Judgment*, at ¶ 427. Reproduced in accompanying notebook at Tab 25.

⁹² *Id.*, at ¶ 425.

with full knowledge of the perpetrators' ultimate objective.⁹³ The Trial Chamber summarized its conclusions:

“The Accused acted with the knowledge of the intent of the primary perpetrators who killed Tutsi at the following sites: Musha church, Mwulire Hill, and Mabare mosque. Accordingly, the Chamber finds that the Accused's actions at those sites were executed with the intent to aid and abet the principal perpetrators of the killings at those sites.”⁹⁴

The Appeals Chamber in Semanza put forth a distinction between liability for aiding and abetting a crime and liability for ordering a crime. The Appeals Chamber stated that “ordering is a mode of participation that generally yields a higher degree of individual criminal responsibility – and therefore a heavier sentence – than aiding and abetting.”⁹⁵ The Court handed down the conviction for aiding and abetting because of the knowledge Semanza had at the time the *Interahamwe* commenced their attacks, and because he knew of their intent to commit mass murder at the specified locations.

IX. Conclusions:

Case law of the international criminal tribunals establishes aiding and abetting as a form of individual liability that is invoked when the accused has either knowledge or intent of the principal crime, and acts in some way to facilitate or further the principal crime. These requirements correspond with the actus reus and mens rea of a principal crime. However, it is through acts or omissions that an individual accused of complicity in a crime demonstrates his or her intent to impact the principal crime.

⁹³ *Id.*, at ¶ 431.

⁹⁴ *Id.* at ¶ 428.

⁹⁵ Werle, Gerhard, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. Int'l Crim. Just. 953, 956 (2007), Reproduced in accompanying notebook at Tab 31; citing *Prosecutor v. Laurent Semanza*, ICTR-97-20-A, Judgment (AC) 20 May 2005.