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The Development of International Aiding Or Abetting Jurisprudence Since World War Two Specifically addressing the argument that high-up government officials may be held guilty for aiding or abetting crimes by omission, so long as such omission satisfies the basic elements of aiding or abetting.

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: THE DEVELOPMENT OF INTERNATIONAL AIDING OR ABETTING JURISPRUDENCE SINCE WORLD WAR TWO

SPECIFICALLY ADDRESSING THE ARGUMENT THAT HIGH-UP GOVERNMENT OFFICIALS MAY BE HELD GUILTY FOR AIDING OR ABETTING CRIMES BY OMISSION, SO LONG AS SUCH OMISSION SATISFIES THE BASIC ELEMENTS OF AIDING OR ABETTING.

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I. Introduction and Summary of Conclusions

A. Scope

This memorandum examines the development of international aiding or abetting jurisprudence.* The events over which the ECCC presides present unique issues regarding making use of international aiding and abetting precedent. Though this area of international law has seen a great deal of development since the Second World War, much of that development occurred after the events over which the ECCC has jurisdiction.[1] Though ostensibly, direct application of aiding and abetting case law under the ICTY and the ICTR would be *ex post facto*, this memorandum will argue that much of that case law is merely a codification of international natural law principles that existed long before the ICTY and the ICTR, and is therefore fairly and justly applicable to the defendants under the ECCC.[2] Further, this memorandum will argue that although

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* Discuss the status and development of the theory of aiding and abetting since World War 2, under international criminal law. Discuss it's usefulness in application to cases of individuals that do not directly commit or order the crimes but hold positions of high level political, government or military responsibility and are aware or had reason to be aware of the commission of the crimes by members of their government, police, army or civil service.

[1] See, The New York Times Online, http://query.nytimes.com/gst/fullpage.html?res=9F04E0D61631F930A35752C0A9629C8B63&st=cse&sq=khmer+rouge&scp=7 last accessed March 20th, 2008. (briefly outlines the time period during which the Khmer Rouge reigned over Cambodia – 1975 to 1979.) [reproduced in accompanying notebook at Tab 42]; See also, The ICTY Homepage, http://www.un.org/icty/glance-e/index.htm, (The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council resolution 827. This resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.)

[2] Black's Law Dictionary 626 (8th ed. 2004). ("*ex post facto* law: A law that impermissibly retroactively, esp. in a way that negatively affects a person's rights, as by

there are differences between the Nuremberg statute and the ICTY and ICTR statutes, with respect to aiding and abetting, the courts actually applied similar standards to aiders and abettors. By examining the process by which the ICTY and the ICTR traced the state of the law from Nuremberg to present day, we can develop an understanding of how that law is applicable to the ECCC.

Thus, this memorandum is broken into four over-arching sections. Section One outlines the basic findings of the memorandum. Section Two briefly discusses some of the factual background relevant to the discussion of aiding and abetting jurisprudence.

Section Three is broken up in to several sections. Subsection (A) examines the state of international law prior to Democratic Kampuchea. Subsection (B) outlines the circumstances under which a high-up government official may be held liable for aiding and abetting the commission of international crimes despite not directly ordering the commission of those crimes. Subsection (B) examines this question using only the law examined more generally in Subsection (A). Subsections (C), (D) and (E) compare the law regarding aiding and abetting under the ICTY and the ICTR to the law at Nuremberg, and discusses the extent to which the ICTY and ICTR merely codified already established international law, and the extent to which they created new law. Subsection (F) Discusses how the court selects aiding or abetting or command responsibility doctrine when they are both applicable. Subsection (G) summarizes and discusses whether a high-up government official may be held liable for aiding and abetting the commission of

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criminalizing an action that was legal when committed…")[reproduced in accompanying notebook at Tab 41].

international crimes despite not directly ordering the commission of those crimes under ICTY and ICTR law.

. Subsection (H) explains why applying the law from the ICTY and the ICTR tribunals is not *ex post facto* application of the law. Finally, Section Four summarizes and concludes the memorandum.

B. Summary of Conclusions.

i. Most of the substantive development of international aiding and abetting jurisprudence occurred under the Nuremberg Tribunals

Aiding or abetting Jurisprudence under the Nuremberg Tribunals is generally vague, but the International Military Tribunal Statute was interpreted very expansively, using general principals of law, in order to most effectively reach the higher-up officials. However, analysis of the case law does reveal a pattern, and the basic elements of aiding or abetting emerge. First, the aidor or abettor must know that the principal actor intended to commit a crime. Second, the aidor or abettor must know that his actions will assist or encourage the principal perpetrator. Third the aidor or abettor must, substantially effect the commission of the crime.

ii. The ICTY, and ICTR Statutes were not formed with the intention of creating new law.

The ICTY and ICTR Statutes were codified existing international humanitarian law. Indeed, aiding or abetting jurisprudence from the ICTY and ICTR closely resembles Nuremberg jurisprudence, and Nuremberg jurisprudence is cited heavily, especially in early ICTY cases.

iii. High up government officials can be held culpable for aiding or abetting a crime, even if they did not participate in the crime or directly order it.

Case law provides several examples of individuals who were held guilty of aiding or abetting a crime because they had the authority to stop or punish the principal actor, but did not do so. Though there are a few cases that appear to reject aiding and abetting liability in favor of superior responsibility, the court's analysis in those cases can be differentiated

iv. Criminal liability can be assigned for either aiding *or* abetting.

The Nuremberg Tribunals did not explicitly separate aiding and abetting, but their decisions implicitly distinguish them. The ICTR courts explicitly affirm this distinction.

v. Application of ICTY and ICTR jurisprudence to cases under the ECCC does not constitute an *ex post facto* application of law, as ICTY and ICTR are merely codifications of existing international law.

Because the Nuremberg tribunals interpreted the law so broadly, and because the ICTY and ICTR courts essentially apply pre-existing humanitarian law, defendants are on notice that their conduct was illegal according to international law.

C. Definition of Aiding and Abetting

Before proceeding, several important terms should be discussed. Most importantly, it is important that one understands the difference between "aiding" and "abetting" in international jurisprudence. Though this difference is first explicitly described under ICTR jurisprudence, various courts have implicitly differentiated between the acts now associated with the two terms.[3] Generally, "aiding" means

[3] *United States of America v. Friedrich Flick et al.* (1947) 6 L.R.T.W.C. 1 (Nuremberg). [reproduced in accompanying notebook at Tab 32].

providing tangible help, either by providing funding and resources are by directly contributing to the commission of a crime.[4] "Abetting," more typically refers to lending general moral support and encouragement to, or inciting, the commission of a crime.[5]

II. Factual Background:

"…[B]etween 1975 and 1979, as many as one-fourth of [Cambodia's] people [were killed.] Under the radical Communist government, Cambodia became a mass labor camp where people were executed or died from torture, starvation, disease and overwork."[6] The New York Times reported on January 3, 2004, that one of the Khmer Rouge leaders, Khieu Samphan, claimed that he had no knowledge of the atrocities that occurred during the Khmer Rouge's reign.[7] Khieu Samphan is not the first to claim ignorance as to the commission of crimes under his authority. The Nazi's frequently used this defense during the Nuremberg trials.[8] This memorandum therefore analyzes how much involvement, and how much knowledge a high-up government official must have before he can be held criminally liable for aiding or abetting a crime.

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[4] *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T) Judgment 2 September 1998, ¶ 484. [reproduced in accompanying notebook at Tab 10].

[5] *Id*, ¶ 484.

[6] The New York Times Online, http://query.nytimes.com/gst/fullpage.html?res=9F04E0D61631F930A35752C0A9629C8B63&st=cse&sq=khmer+rouge&scp=7 last accessed March 20th, 2008. [reproduced in accompanying notebook at Tab 42]

[7] The New York Times Online, http://query.nytimes.com/gst/fullpage.html?res=9F04E0D61631F930A35752C0A9629C8B63&st=cse&sq=khmer+rouge&scp=7 last accessed March 20th, 2008.

[8] *United Kingdom v. Tesch et al.* (1946) I L.R.T.W.C 93, 97n (British Military Court). ("Dr. Tesch stated that he had heard nothing and had known nothing of the human beings being killed…with prussic acid.")[reproduced in accompanying notebook at Tab 30].

III. Legal Discussion

A. Aiding and Abetting Law Prior to Democratic Kampuchea.

Much of the development of aiding and abetting jurisprudence in international law occurred during the Nuremberg trials.[9] The Statute of the International Military Tribunal, which is the statute that guided some of these Nuremberg trials, did not specifically use the words, "aiding," and, "abetting."[10] The Statute reads in pertinent part, "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." [11] Note that while it does not mention aiding and abetting directly, it does outlaw the acts that are typically taken to comprise engaging in aiding and abetting in present-day international jurisprudence.[12] Additionally, William A. Schabas observed that the judges presiding over the Nuremberg Trials interpreted the statute quite liberally, and incorporated "general principles of law," which had the effect of broadening the meaning of the statute.[13] As a result, the tribunal interpreted the statute broadly enough to incorporate as

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[9] See discussion, *infra*, pages 13 – 22. (discussion of Nuremberg aiding or abetting jurisprudence.)

[10] Article 6(c) of the Constitution of the International Military Tribunal (1945). [reproduced in accompanying notebook at Tab 1].

[11] Article 6(c) Constitution of the International Military Tribunal (1945).

[12] See discussion, *infra*, pages 13 – 16. (Discussion of Nuremberg case law, interpreting the statute.)

[13] Schabas, William A., *Enforcing International Humanitarian law: Catching the Accomplices.* IRRC June Vol 83, pp 439, 441. [reproduced in accompanying notebook at Tab 40].

many of the higher-up state and military officials as possible.[14] In fact, Nuremberg tribunals were unique at that time, in that they focused on punishing the complicitors rather than the "primary perpetrators" of each crime.[15]

i: U.S. v. Weis and the application "general principles of law" in expanding the Nuremberg Statute

The case of *United States v. Martin Gottfried Weis et. al* illustrated and reinforced just how expansively the Nuremberg Tribunals interpreted their statute to punish anyone and everyone who participated in the depraved treatment of concentration camp detainees. [16]

In *Weis*, Martin Weis and thirty-nine other defendants were convicted of "[W]illfully deliberately and wrongfully aid[ing], abet[ting], and participat[ing] in the subjugation of civilian nation." [17] Weis and his co-defendants were in charge of running the Daschau concentration camp.[18] In the Dauschau Concentration camp, prisoners were subjected to myriad forms of inhuman treatment, including long workdays with poor nutrition, cramped, inadequate, and disease-ridden sleeping conditions, often fatal

[14] *Schabas,* at 440. [reproduced in accompanying notebook at Tab 40].

[15] *Id.*

[16] *United States v. Martin Gottfried Weis, et al* (1945) 11 L.R.T.W.C. 5, 15 (Daschau). (Emphatically stating that anyone involved in the concentration camp activities would be held guilty)[reproduced in accompanying notebook at Tab 34]; *Schabas* at 440.(Observing that the Nuremberg Tribunals tended to interpret the law broadly.) [reproduced in accompanying notebook at Tab 34].

[17] *Weis,* at 5. (The Charges)[reproduced in accompanying notebook at Tab 34].

[18] *Id,* at 12. (See: the first paragraph under "*Questions of Substantive Law."*)

medical experimentation, and torture.[19] The *Weis* court relied heavily on language used in the *Mauthausen* Case[20] in rendering their judgment.[21]

> The court finds that the circumstances, conditions and the very nature of the Concentration Camp Mauthausen, combined with any and all of its by-camps, was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeines SS, a guard, or civilian, to be culpably and criminally responsible.
> The Court further finds that it was impossible for a governmental military or civil official, a guard or a civilian employee of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in…the aforesaid Concentration Camp…or all of its by-camps, at any time during its operation without having acquired a definite knowledge of the criminal practices and activities therein existing.
> The Court further finds that the irrefutable record of deaths by shooting, gassing, hanging, regulated starvation, and other heinous methods of killing, brought about through the deliberate conspiracy and planning of Reich officials, either of the Mauthausen Concentration Camp… or of the higher Nazi hierarchy was known to all of the above parties,… whether they be political, criminal, or military.
> The court therefore declares: 'That any official, governmental, military, or civil,... or any guard, or civil employee in any way in control of or stationed at or engaged in the operation of [the concentration camp] is guilty of a crime against the recognized laws, customs and practices of civilised nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished.[22]

The *Weis* court thus reaffirmed the Mauthausen court's enforcement of "the recognized laws, customs, and practices of civilized nations…,"[23] effectively increasing

[19] *Weis* at 5-7. [reproduced in accompanying notebook at Tab 34].

[20] *Id,* at 15. (The *Mauthesen* Case is cited extensively.)

[21] *Id,* at 8.

[22] *Weis,* at 15. (citations omitted). [reproduced in accompanying notebook at Tab 34.]

[23] *Id.* (citations omitted).

their reach beyond the mere words of the I.M.T Statute.[24] More importantly, the *Weis* court convicted Weis and his co-defendants even after finding that they could not have been engaged in a per se common plan or conspiracy to commit a crime.

> The evidence adduced by the prosecution seems to fall short of showing a conspiracy among the accused in the strictly technical sense of the term. There is no evidence that any two… of ever got together and agreed on a long-term policy… then put this plan into operation.[25]

Despite the absence of a conspiracy, the *Weis* court convicted the defendants using the following standard for what they called common plan: "(1) that there was in force at Daschau 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 the system."[26] Certainly, the willingness of *Weis* court to convict the defendants despite the fact that the prosecution had not established that they had engaged in a per se common plan to commit a crime demonstrates that the court was willing to consider other, less substantial forms of secondary responsibility.[27] These elements show that although the *Weis* court did not conceptualize aiding and abetting as its own crime, they certainly contemplated it as one way in which a person might participate in *other* crimes. Certainly these elements indicate that aiding and abetting was one way in which one could participate in the crime

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[24] Article 6, Constitution of the International Military Tribunal (1945). [reproduced in accompanying notebook at Tab 1].

[25] *Weis,* at 14.[reproduced in accompanying notebook at Tab 34].

[26] *Id,* at 13.

[27] *Weis,* at 8, (conviction); But See *Weis,* at 13. (No per se common plan). [reproduced in accompanying notebook at Tab 34].

of common design.[28] The test further establishes the *mens rea* requirement that the aider and abettor have knowledge that the common plan was in effect, and that they were in some way contributing to the common plan.[29]

ii: U.S. v. Flick and the *Mens Rea* Requirement for Aiding or Abetting

The requirement that an aider and abettor need to have the *mens rea* of knowledge was reaffirmed in the case of The *United States v. Friedrich Flick et. al.*[30] Friedrich Flick was the head of a conglomerate of industrial enterprises.[31] He became an integral leader for the military economy during World War Two, and was member of the official regulatory body overseeing the coal, iron, and steel industries, which contributed to the war effort.[32] He was charged with having been "an accessory to…or ordered or abetted…or taken a consenting part [in]." various atrocities under Control Council Law No. 10.[33] These charges were brought based on his involvement with a group called "Friends of Himmler,"[34] that provided financial aid to major branches of the Nazi

[28] *Weis,* at 5. [reproduced in accompanying notebook at Tab 34].

[29] *Id,* at 13.

[30] *United States of America v. Friedrich Flick et al.* (1947) 6 L.R.T.W.C. 1 (Nuremberg). [reproduced in accompanying notebook at Tab 32].

[31] *Id,* at 1.

[32] *Id,* at 1.

[33] Control Council Law No. 10. (Note also that all of the remaining Nuremberg cases discussed in this memorandum used Control Council Law No. 10). [reproduced in accompanying notebook at Tab 4].

[34] *Flick,* at 1-2.[reproduced in accompanying notebook at Tab 32].

Military.[35] The *Flick* court found that Flick and his co-defendants continued to provide financial support to the Nazi military even after it was common knowledge that much of the Nazi military's activity was illegal.[36] The *Flick* court further found that this knowledge, combined with the aid that they provided, was enough to hold them criminally culpable.[37] The Court further commented that, "[o]ne who knowingly, by his influence and money[,] contributes to the support thereof must, under settled legal principals, be deemed to be, if not a principal, certainly an accessory to such crimes."[38]

Thus, the *Flick* court and the Weis court both reaffirm the *mens rea,* requirement of aiding or abetting. Both courts require that the secondary actor have *knowledge* that the principal actor has committed, or will commit a crime.[39]

Equally important though, is is the fact that the court did not require the prosecution to demonstrate that Flick engage in both aiding *and* abetting.[40] Rather, only aiding in the commission of genocide was enough.[41] The *Flick* court took great pains to make note of the fact that, "Defendants did not approve, nor do they now condone the

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[35] *Flick,* at 1-2. [reproduced in accompanying notebook at Tab 32].

[36] *Id,* at 16.

[37] *Id,* at 29 (part (c) heading).

[38] *Id,* at 29

[39] *Id,* at 40; *Weis,* at 13. [reproduced in accompanying notebook at Tab 34.]

[40] *Flick,* at 30 (inferred – one who does not approve of an action likely has not encouraged it.)[reproduced in accompanying notebook at Tab 32].

[41] *Id,* at 30 (inferred – *Flick* was convicted for aiding Hitler despite being demonstrably *not* supportive Hitler.)

atrocities of the [Nazi military.]"[42] The Court further noted that Flick had even lent aid to the plot against Hitler's life.[43] Certainly then, reasonable analysis cannot conclude that Flick had abetted the Nazi military. To the contrary, he had only provided aid. The court only focuses on this differentiation under the context of mitigating punishment,[44] but it is nevertheless early evidence that aiding and abetting was really conceptualized as aiding *or* abetting, which is an idea that is later codified more explicitly under ICTR jurisprudence.[45] As such, aiding and abetting shall be referred to as aiding *or* abetting for the remainder of discussion.

iii: U.S. v. Krupp and Affirming the *Mens Rea* Requirement for Aiding or Abetting.

The case of *United States v. Alfred Felix Alwyn Krupp et al.* further explains the *mens rea* requirements for aiding in early international criminal law. Krupp was an German arms manufacturer who provided the majority of the "large caliber artillery, armour plate and other high quality armament." that the Nazi's used.[46] He was found *not guilty* of aiding or abetting the in preparation of an illegal war effort via his position of an arms manufacturer.[47] The indictment read,

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[42] *Flick,* at 30.[reproduced in accompanying notebook at Tab 32].

[43] *Id,* at 30.

[44] *Id,* at 29-30.

[45] *Akayesu*, ¶ 484.[reproduced in accompanying notebook at Tab 10].

[46] United States of America v. Alfried Krupp et al. (1948) 9 L.R.T.W.C. 69, 72 (Nuremberg). [reproduced in accompanying notebook at Tab 33].

[47] *Id,* at 70 – 71.

> [They,] through the high positions they held in the political, financial, industrial, and economic life of Germany[,] committed Crimes against Peace by having been principals in, accessories to, ordered, abetted, took a consenting part in, …groups,… connected with the commission of Crimes against Peace.[48]

The court seems to have been concerned with the fact that Krupp was not privy to the actual plans that Hitler had made, and therefore did not knowingly prepare for an illegal war.[49] As a result, he did not have the requisite *mens rea* necessary to be held liable for aiding.

iv: The Zyklon B Case, *Actus Reus*, and the Lack of a "Butfor" Requirement.

In the *Zyklon B* case,[50] the defendants, officials of a chemical supply company that provided the Nazi's with the poison used in there gas chambers, were tried for "complicity of German industrialists in the murder of interned allied civilians by means of poison gas."[51] The prosecution's case rested on the idea that knowingly providing a commodity to the Nazi's, who were using it to commit a war crime was itself a war crime.[52] The defense argued that the distributors of the Zyklon B gas did not know how it was being put to use.[53] However, the prosecution introduced evidence that the officials of

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[48] *Krupp,* at 71. [reproduced in accompanying notebook at Tab 33].

[49] *Id,* at 84 – 85. ("The evidence did not show…that the alleged 'Krupp conspiracy" involved a concrete plan to wage aggressive war…Thus it was clear from the evidence that the accused had not attended nor been informed about the decisions taken by Hitler…")

[50] *United Kingdom v. Tesch et al.* (1946) 1 L.R.T.W.C 93 (British Military Court). (*Zyklon B* Case.)[reproduced in accompanying notebook at Tab 30].

[51] *Zyklon B.,* at 93.[reproduced in accompanying notebook at Tab 30]

[52] *Id,* at 94.

[53] *Id,* at 97.

the distribution company were scrupulous and efficient business people, and that they had been extra careful about the shipments that went to the Nazi military.[54] Based on this information, the court ruled that said officials *must* have known how the gas was being used, and thus treated them as if they *did* know how the gas was being used.[55]

At the sentencing stage, the defense counsel argued that they had not significantly contributed to the gas chamber crimes because the Nazi's would have effectuated the same ends by some other means, if the defendants had not cooperated.[56] The court found that this argument did not constitute a mitigating factor, and sentenced the defendants to death.[57]

The *Zyklon B* Case further illustrates important points. First, it illustrates that to be guilty of aiding or abetting a crime, there need not be a butfor relationship between the accomplice's aiding or abetting activity and the commission of the primary crime.[58] Rather, the activity need only have substantially contributed to the commission of the crime.[59] Second, it illustrated that the court is willing to impute an individual's

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[54] *Zyklon B.,* at 101. [reproduced in accompanying notebook at Tab 30].

[55] *Id,* at 101. (See Part 9. Summing up for the Judge Advocate.)

[56] *Id.,* at 102.

[57] *Id,* at 102.

[58] *Zyklon B.,* at 102. (Defense argued in mitigation of sentence that if Tesch had not provided the chemical, another company would have. "Nevertheless…[he was] sentenced to death by hanging… The sentence [was] confirmed and carried into effect.")[reproduced in accompanying notebook at Tab 30].

[59] *Id,* at 102. (By inference, if the accomplice's activity does not need to be a *sine qua non* of the crime, it must still have impacted that crime in some way.)

knowledge of the principal's activity if the evidence shows that the individual must have known about it.[60] Indeed, by comparing *Krupp* and *Zyklon B.*, it can be inferred that the court imputed knowledge to Tesch based on the fact that he should have known that the poison gas was being put to an illegal use due to the quantity that had been purchased. By contrast, the court could not impute knowledge to Krupp, because as far as Krupp knew, the weapons purchased by Hitler could have been used for a completely legitimate purpose.

B: High Level Governmental Officials and Aiding or Abetting Under "Pre-Killing Fields" International Law Jurisprudence.

This section specifically contemplates whether a high-up Cambodian governmental official can be held criminal responsible for aiding or abetting a war crime using only the principles explored in Section One.

The following legal standards are gleaned from the case material and the I.M.T. statute, keeping in mind that Nuremberg tribunals applied the law expansively, applying "general principles of law."[61] The high-up government official must have been involved in, supported, or given practical aid to the principal actor to have aided or abetted the commission of a crime.[62] He must have had actual knowledge, which may be imputed by the circumstances of his case.[63] However, he need not have both aided and abetted the

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[60] *Zyklon B.,* at 101. (See Part 9. Summing up for the Judge Advocate.) [reproduced in accompanying notebook at Tab 30].

[61] *Schabas*, at 441.[reproduced in accompanying notebook at Tab 40].

[62] *Weis,* at 15. (citing the *Mauthausen* case, and describing the broad range of activity that would be held criminally culpable.) [reproduced in accompanying notebook at Tab 34].

[63] *Zyklon B,* at 101. [reproduced in accompanying notebook at Tab 30].

commission of a crime – only one is sufficient for conviction.[64] The action the official takes need not be illegal itself, outside of being such action aiding or abetting another crime.[65] It is no defense that the crime would have been committed without the official's action.[66]

C: Aiding or Abetting Under Current International Jurisprudence: The ICTY

The development of international aiding or abetting jurisprudence has largely taken the form of a "tidying up" of the law. Substantively, the aiding or abetting law has *not* developed, in the sense that the law has not changed much since the Nuremberg trials. However, there has been great development in the clarity of the law. Indeed, a look at early cases from the ICTY, and the discussion in the U.N. Security Council regarding the enactment of the ICTY's statute reveals that politicians and judges alike view the law applied by the ICTY as an extension of international humanitarian law, and the precedent set by the Nuremberg trials.[67]

The statute governing the ICTY was enacted by the U.N. Security Council on May 25, 1993, by unanimous vote. Discussion during the Security Council meeting

[64] *Flick, at 29*. (Inferred – donating money itself is not a crime, but Flick was held guilty for aiding or abetting when he donated money *to a criminal enterprise.*)[reproduced in accompanying notebook at Tab 32].

[65] See generally, *Flick. (*Note that donating money is not itself a crime.)

[66] *Zyklon B,* at 102. [*Zyklon B* case reproduced in accompanying notebook at Tab 30].

[67] See *infra,* notes 69 and 70, and accompanying text.

reveals that the international community was very careful to codify existing international law rather than create new law. [68] Mr. Aria, representing Venezuela, said,

> My delegation recognizes… that the Tribunal, as a subsidiary organ of the council, would not be empowered with – nor would the Council be assuming - the ability to set down norms of international law or to legislate with respect to those rights. *It simply applies existing international humanitarian law.*[69]

Thus, according to Mr. Aria, not only was the Security Council restricted to codifying existing humanitarian law, but the Tribunal created by the Council would be restricted to interpretation of international law only. The United States representative expressed similar statements, when she said, "There is an echo in this chamber today. The Nuremberg Principles have been affirmed. We have preserved the long-neglected compact. Made by the community of civilized nations 48 years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles."[70] Thus, it appears that the U.N. Security Council and Nuremberg tribunals drew upon the same international jurisprudence.

Article 7(1) of the ICTY Statute reads, "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or

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[68] See generally, provisional verbatim record of the Three Thousand Two Hundred and Seventeenth meeting, Reprinted in An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Morris, Scharf 1995, Transnational Publisher, Inc. [reproduced in accompanying notebook at Tab 43].

[69] Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth meeting, Reprinted in Reprinted in An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Morris, Scharf, pp 182 1995, Transnational Publisher, Inc. (emphasis added)

[70] Madeline Albright, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-fifth meeting, Reprinted in An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Morris, Scharf, pp 165, 1995, Transnational Publisher, Inc. [reproduced in accompanying notebook at Tab 43].

execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually, shall be individually responsible for the crime."[71] The statute differs significantly from the I.M.T. Statute in that it took greater care to codify and clarify international humanitarian law, but as will be discussed, the law under each of the statutes is actually extremely similar in effect.[72] Essentially, the only significant difference is that the ICTY statute clarifies existing law in greater detail than does the I.M.T. statute.[73]

i: *Tadic* and *Furundzija:* Early ICTY Cases Finding Basic Aiding or Abetting Law and Illustrating the Link Between Present and Past International Jurisprudence.

The ICTY statute has been further clarified through extensive case law. One of the most prominent cases is *Prosecutor v. Dusko Tadic.*[74] Tadic was accused of numerous crimes, but the offenses that gave rise to aiding or abetting charges stemmed from allegations that, he had participated in, or stood by and witnessed severe beatings, which lead to the deaths of many prisoners at the Omarska camp.[75] The *Tadic* court noted that Nuremberg courts did not explicitly rely on aiding or abetting principles, but nevertheless

[71] Article 7, Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (2007). [reproduced in accompanying notebook at Tab 7].

[72] See brief discussion of similarities in the case law, *infra,* page 40.

[73] Madeline Albright, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-fifth meeting, Reprinted in An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Morris, Scharf, pp 165, 1995, Transnational Publisher, Inc. [reproduced in accompanying notebook at Tab 43].

[74] *Prosecutor v. Tadic* (Case No. IT-94-1-T), Judgment, 7 July 1997. [reproduced in accompanying notebook at Tab 26].

[75] *Tadic,* ¶ 207-223. (Describing the atrocities at the Omarksa camp, and some of Tadic's participation in beatings and torture.)[reproduced in accompanying notebook at Tab 26].

relied heavily on such cases in interpreting their own statute, and discussing the proper legal standard.[76] Indeed, the Court noted that the concept of aiding or abetting was rooted in customary international law.[77] Based on this analysis, the Court found Tadic guilty beyond a reasonable doubt of aiding and abetting in the beating of the victims, because there was no evidence that he had participated directly in all of the beatings.[78] In rendering this judgment, the Court was careful to point out that Tadic's presence during the beatings, without more, was not enough to create culpability based on aiding or abetting the crime.[79] However, his proximity to the events as they occurred, the fact that he had participated in other beatings previously, and the fact that he had called some of the victims by name to come out onto the floor of the hangar where the beatings took

[76] *Tadic,* ¶ 674. (The most relevant sources…are the Nurnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined…a clear pattern does develop.") [reproduced in accompanying notebook at Tab 26]. *Tadic,* ¶ 675-693, (The court relied heavily on several Nuremberg cases, citing the following precedent); *See, Trial of Werner Rohde and Eight Others* (1946) 5 L.R.T.W.C. 54, 56. (British Military Court.) (*Tadic* relied on this precedent, finding generally that requisite mens rea for complicitous action is knowledge.) [reproduced in accompanying notebook at Tab 29].; *Zyklon B.,* at 101(again *Tadic* relied on this precedent, finding knowledge as necessary *mens rea*) [reproduced in accompanying notebook at Tab 30]; *Weis,* at 13. (*Tadic* precedent, stating that the accused must have taken some action effecting the crime.) [reproduced in accompanying notebook at Tab 34].

[77] *Tadic,* ¶ 666, (also noting several other sources of aiding and abetting jurisprudence). [reproduced in accompanying notebook at Tab 26]. *See,* Article 4(1) of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, [reproduced in accompanying notebook at Tab 3]. and *See* Article III of the International Convention on the Punishment and Prevention of the Crime of Apartheid. [reproduced in accompanying notebook at Tab 5]. (both are examples of material cited by *Tadic* to establish that aiding or abetting is part of customary international law.)

[78] *Tadic,* ¶ 204-239; *Tadic* at 735[reproduced in accompanying notebook at Tab 26].

[79] *Id,* ¶ 689. ("…presence a lone is not sufficient if it is an ignorant or unwilling presence…")

place, were all taken as evidence that his presence had a significant encouraging effect on the beatings. [80]

Thus, the *Tadic* Case provides further evidence that the ICTY merely interprets, but does not create or change any international jurisprudence. Further, the Court made several important findings of law in rendering its judgment. First, the Court found that in order to be held culpable for one's contribution to the crime, they must have contributed substantially.[81] In other words, the individual's actions must have had some effect on the contribution of the crime.[82] By this standard, Tadic was not held culpable merely because of his presence at the time of the crime, but because there was also evidence that he had participated in earlier crimes, and had called prisoners out to be beaten in such a way as to imply his approval of the inhuman treatment that they were being subject to. These facts gave rise to an inference that his presence had a direct and substantial impact on the commission of the crimes.[83] Generally then, this case establishes that a person can be held culpable for abetting a war crime if he is present when a crime is committed, and such presence contributed to, or encouraged the commission of the crime.[84]

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[80] *Tadic,* ¶ 207 – 239 (for eyewitness accounts of Tadic's presence); *Id* at 211; *Id* at 670; *Id* at 738. [reproduced in accompanying notebook at Tab 26].

[81] *Id,* ¶ 688.

[82] *Id,* ¶ 688 (again citing the I.L.C. Draft Code and explaining what it means to be have a substantial effect on the commission of a crime.)

[83] *Id,* ¶ 735.

[84] *Id,* ¶ 689.

Second, the Court stated that presence at the scene of the crime is not a *necessary* element of aiding or abetting.[85] The aider or abettor need not be present at the moment of the crime so long as he directly and substantially contributed to the crime at another time.[86] The Court noted that individuals who drove detainees to the woods to be killed, but did not actually participate in the killings, could still be held liable for aiding or abetting a crime, even tough they were not present when the principal offenders actually perpetrated the crime.[87]

Thus, the *Tadic* case draws on multiple sources of international law to establish that a person's presence at the scene of a crime may be taken as evidence that they have substantially supported or encouraged the commission of said crime.[88] Again though, such presence is not required to find that a person has aided or abetted the crime.[89]

Prosecutor v. Furundjiza is another ICTY case that outlined the link between Nuremberg aiding or abetting jurisprudence and present-day aiding or abetting

[85] *Tadic,* ¶ 691. [reproduced in accompanying notebook at Tab 26].

[86] *Id*, ¶ 691. (Noting that an aider or abettor might support the crime "before, during, or after the incident." However, not citing an example of how defendants supported crimes after the incident in this case.)

[87] *Id,* ¶ 691.

[88] Several other ICTY cases also affirm the requirement that a presence must have a significant "legitimizing" or encouraging effect. See, *Prosecutor v. Vasiljevic* (Case No. IT-98-32-T) 29 November 2002. ¶ 70.[reproduced in accompanying notebook at Tab 27]; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Mulsiu* (Case No. It-03-66-T) Judgment 30 November 2005. ¶ 517. [reproduced in accompanying notebook at Tab 17].

[89] *Tadic,* ¶ 689. [reproduced in accompanying notebook at Tab 26].

jurisprudence.[90] The Court held Furundjiza guilty of aiding and abetting the rape of a woman by relying on Common Article 3 of the Geneva Conventions of 1949.[91] The *Furindzija* court also made many findings of law that were consistent with Nuremberg tribunal findings of law.[92] First, the Court found that knowledge was the requisite *mens rea* for aiding or abetting.[93] Second, the Court found that the aider or abettor need not have the same intent to carry out the crime as the principal perpetrator.[94] Third, the Court found that defendant's actions must have a substantial effect on the perpetration of the crime.[95] Note that this is not inconsistent with other courts findings, that aiding or abetting must "consist of practical assistance or encouragement having a substantial influence on the commission of a crime."[96] Finally, the Court conducted an extensive

[90] See discussion of *Furundzija*, *infra,* page 32. (For discussion of the facts of *Furundzija*)

[91] *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998 ¶ 43-44 [reproduced in accompanying notebook at Tab 19].

[92] See *infra,* pages 28-29, notes 94 and 95.

[93] *Furundzija,* ¶ 245 [reproduced in accompanying notebook at Tab 19].; Compare to, *Zyklon B.,* at 94. [reproduced in accompanying notebook at Tab 30].

[94] *Furundzija,* ¶ 245[reproduced in accompanying notebook at Tab 19]; Compare to, *Flick*, at 30. [reproduced in accompanying notebook at Tab 32].

[95]*Furundzija*, ¶ 233.[reproduced in accompanying notebook at Tab 19]. (Citing the Zyklon B case, "[T]he suggestion made in the… Zyklon B cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility.)

[96] *Limaj,* ¶ 516. [reproduced in accompanying notebook at Tab 17].

analysis of international case law regarding the legal standards of aiding or abetting using Nuremberg jurisprudence.[97]

ii. *Aleksovski, Blaskic,* and *Furundzija*: Explaining International Aiding or Abetting Law as Applied to Person's in Positions of Authority

In *Prosecutor v. Aleksovski,* the ICTY further affirmed that an individual in a position of authority can be guilty of aiding or abetting the commission of a crime by being present but not using his authority to prevent the crime.[98]

In the *Aleksovski* trial, the Court held the commander of a prison camp guilty of aiding or abetting the mistreatment of prison detainees[99] Aleksovski had participated in the mistreatment of earlier detainees, and so his continued presence was taken as approval of the behavior of the prison guards who were actively and presently abusing the detainees. [100] However, the court did not find Aleksovski guilty of aiding or abetting the abuse of detainees who were first taken off prison premises.[101] The trial court reached this decision after noting that Aleksovski had authority over the activity at the prison camp, and was often present when soldiers selected prison camp detainees to use as

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[97] *Furundzija,* ¶ 192 – 242. [reproduced in accompanying notebook at Tab 19].

[98] *Prosecutor v. Aleksovski* (Case No. IT-95-14/1-T) Judgment, 25 June 1999, ¶ 64-65, (the court further explains that the rest of the factual circumstances must also be considered, but the accused's position of authority tended to show that his presence did lend encouragement.) [reproduced in accompanying notebook at Tab 11].

[99] *Id,* ¶ 88.

[100] *Id,* ¶ 88.

[101] *Id,* ¶ 130

human shields, and to generally mistreat.[102] Aleksovski did not use his authority to prevent the soldiers from using the detainees as human shields, but the court did not find him guilty of aiding and abetting a war crime.[103] In rendering its judgment, the Court found that an aidor or abettor's position of authority does not automatically "lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of a crime.[104] However, the Court noted that an accused's position of authority can provide some evidence that his inaction had an encouraging effect on the commission of the crime.[105]

Significantly, the Appeals Court reversed the Trial Court's ruling, holding Aleksovski guilty of aiding and abetting the mistreatment of prison camp detainees, even when those prisoners were not on camp premises.[106] In rendering judgment, the Appeals Court noted that there was evidence that Aleksovski had knowledge that the prisoners were being mistreated off camp premises, and he did not exercise his authority to protect them.[107] This Appeals Court case is especially significant because it can be read expansively to mean that a person of authority can be culpable for aiding and abetting a crime, so long as they have knowledge that the crime is being committed and do not act

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[102] *Alesksovski Trial*, ¶ 125. [reproduced in accompanying notebook at Tab 11].

[103] *Id* ¶ 129.

[104] *Id*,¶ 65.

[105]*Id*, ¶ 65.

[106] *Prosecutor v. Aleksovski* (Case No.: IT-95-14/1-A) Appeals Chamber 24 March 2000, ¶ 172.[reproduced in accompanying notebook at Tab 12].

[107] *Id*, at ¶169.

to prevent the crime. Further, *Aleksovski* is a clear example of an omission significantly effecting the commission of the crime through support or encouragement.

The *Blaskic* case affirms the findings of law from the *Aleksovski Case.* Indeed, the *Blaskic* court found that *Blaskic* could be held guilty of aiding or abetting war crimes, even though he did not positively order the commission of the crime.[108] The Court also found that he aided or abetted those crimes by omission, because he had responsibility to prevent the commission of these crimes due to his position of authority, but did not do so.[109]

Blaskic was commander of the Bosnian-Croat forces in central Bosnia.[110] The men under his command used captured Bosnian Muslim combatants as human shields.[111] The Trial Court found that he knew that these crimes were committed, but took no action to prevent or punish them.[112] Thus, a simplified explanation of *Blaskic* is that, under Article 7(1) of the ICTY statute, a person in an authoritative position can be held guilty of aiding or abetting a war crime if he knew or had reason to know that the crime

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[108] *Prosecutor v. Blaskic* (Case No. IT-95-14-A) Appeals Chamber Judgment, 29 July 2004, ¶ 670. [reproduced in accompanying notebook at Tab 16].

[109] *Blaskic Appeal*, ¶ 46-47 (If a person omission had a decisive effect on the commission of the crime, he or she can be guilty of aiding or abetting.) [reproduced in accompanying notebook at Tab 16]. Also See generally, *Blaskic Appeal 647-670.*

[110] *Prosecutor v. Blaskic* (Case No. IT-95-14-T)Judgment, 3 March 2000, ¶ 9. [reproduced in accompanying notebook at Tab 15].

[111] *Id*, ¶ 549. ("Once the HVO soldiers had taken control of the village, they took the residents of Ga~ice (247 Muslim civilians) on a forced march towards Vitez and forced them to sit opposite the Hotel Vitez as human shields, for about three hours").

[112] *Id*, ¶ 742 (Evidence that showed the court that Blaskic did in fact know that his men had committed crimes, because he was he could see the people lined up outside the building).

occurred, and does not take reasonable steps to discover the nature of the crime, and punish the perpetrators.[113]

Prosecutor v. Furundjiza is another case involving a defendant in a position of authority. Furundzija was found guilty of aiding or abetting the rape of a Croatian woman.[114] Furundzija, the leader of a military group calling themselves "The Jokers," arrested a woman from Vitez.[115] Furundjiza did nothing to prevent one of his soldiers from raping the woman while Furundjiza interrogated her.[116] The Court found that because Furundjiza knew that his soldier was committing a crime, and because he had the authority to stop the soldier but did not, his inaction legitimized and encouraged the soldier's actions[117] Thus, he had knowingly and substantially contributed to the perpetration of the crime of rape, meeting the requirements for aiding or abetting.[118]

[113] *Blaskic Appeal*, ¶ 647-670. [reproduced in accompanying notebook at Tab 16].

[114] *Furundzija*, ¶ 274, ¶ 275. [reproduced in accompanying notebook at Tab 19].

[115] *Id*, ¶ 39. (factual allegations).

[116] *Id*, ¶ 41,(factual allegations), ¶ 273

[117] *Id*, ¶ 232. (Finding that status must be such that it has a legitimizing or encouraging effect on the principal); *Id* ¶ 274 (finding the accused guilty)

[118] *Id* ¶ 273.

iii: *Blagojevic,* Use of the Articles of the Statutes, Complicity in Genocide Versus Aiding or Abetting Genocide.

The case of *Prosecutor v. Vidoje Blagojevic and Dragan Jokic* clarifies that the legal standard for aiding or abetting under Article 7(1) of the ICTY Statute is the same as the legal standard for aiding or abetting are Article 4(3) of the ICTY Statute. In *Balgojevic,* the defense argued that complicity in genocide is different from aiding or abetting genocide, in that complicity in genocide requires specific intent, and aiding or abetting merely requires knowledge of the principal actor's intent[119] The Court rejected this argument, stating that complicity is a concept that encompasses aiding or abetting, and that aiding or abetting only requires knowledge of the principle actor's intent.[120] The Court also found that complicity in genocide under Article 4(3) includes the "various forms of participation listed under Article 7(1)."[121] Thus, the *mens rea* standard for aiding or abetting genocide under Article 4(3) and general aiding or abetting under Article 7(1) is identical.[122]

iv: *Vasiljevic*, Mens Rea and Group Membership.

The case of *Prosecutor v. Vasilevic* further establishes that the aider or abettor must merely know that his actions will serve to support or encourage the commission of a

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[119] *Prosecutor v. Blagojevic and Jokic* (Case No. IT-02-60) Judgment, 17 January, 2005 ¶ 637. [reproduced in accompanying notebook at Tab 14]. *See also* Gallagher, Katherine, *International Criminal Tribunal for the Former Yugoslavia: The Second Srebrenica Trial: Prosecutor v. Vidoje Blagojevic and Dragan Jokic*., Leiden Journal of International Law, 18 (2005). (for an in depth discussion of this case and aiding or abetting issues therein.)[reproduced in accompanying notebook at Tab 36].

[120] *Id*, ¶ 777-779.

[121] *Id*, ¶ 778.

[122] *Id*, ¶ 778.

crime, and does not need to share the principal actor's intent to perpetrate a specific crime to be held criminally culpable.[123] However, an aider or abettor who does not share the principal actor's intent may be held to be less culpable than he would have been otherwise.[124] Additionally, *Vasilijevic* stands for the notion that an aider or abettor need not be part of the group he aids or abets to be culpable.[125]

Vasiljevic served as an informant for Milan Lukic, who was an officer in a paramilitary group. Lukic, had arrived in the Visegrad with the intent to target the Non-Serb population in the area with various crimes, ranging from rape, murder and looting.[126] Vasiljevic, though not a member of Lukic's group, provided information to Lukic regarding the location of the Muslim population of Visegrad, knowing that Lukic intended to commit crimes against them.[127] The *Vasiljevic* appeals court found him guilty of aiding or abetting the commission of war crimes despite finding that he lacked the intent to murder the individuals.[128] Thus, the *Vasiljevic* court's ruling indicates that an aider or abetter does not avoid criminal culpability because he lacked the specific criminal intent of the principal actor, or because he was not a member of the principal actor's group.

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[123] *Prosecutor v. Vasiljevic* (Case No. IT-98-32-T) 29 November 2002, ¶ 71. [reproduced in accompanying notebook at Tab 27].

[124] *Id*, ¶ 71.

[125] *Id*, ¶ 59.

[126] *Id*, ¶ 72-79.

[127] *Id*, ¶ 59.

[128] *Prosecutor v Vasiljevic* (Case No. IT-98-32-A) 25 Feb 2004. ¶ 135 [reproduced in accompanying notebook at Tab 28].

D: Aiding or Abetting Under Current International Jurisprudence: The ICTR

It is unsurprising that the aiding or abetting jurisprudence of the ICTR relates so closely to that of the ICTY, as with their statutes use precisely the same language to describe the crime.[129] The ICTR statute was adopted by the U.N Security Council Resolution 955 of November 8, 1994.[130]

Like the case law of the ICTY, the case law of the ICTR is striking because it clarifies and explains international humanitarian law, but remains true to Nuremberg jurisprudence.[131] Indeed, nearly all of the case law under the ICTR produces results entirely consistent with both the ICTY and the Nuremberg trials, providing further evidence that the state of the substantive law has not changed much at all since the 1940's.[132]

i: *Akayesu,* Aiding *or* Abetting, Clarifying *Mens Rea* for Genocide.

The case of *Prosecutor v. Akayesu* explicitly differentiates between aiding and abetting, and explains that, "[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally [culpable]."[133] Akayesu was held guilty of aiding and abetting

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[129] See, Article 2 and 6 State of the International Criminal Tribunal for Rwanda (ICTR) (2007) [reproduced in accompanying notebook at Tab 6].; Compare to, Articles 4 and 7 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (2007). [reproduced in accompanying notebook at Tab 7].

[130] The Security Council adopted the ICTR Court's Statute in Resolution 955 of 8 November 1994. [reproduced in accompanying notebook at Tab 9].

[131] *See,* brief comparison of jurisprudence, *infra,* page 40.

[132] Again, see comparison, *infra,* page 40.

[133] *Akayesu,* ¶ 484 [reproduced in accompanying notebook at Tab 10].

various crimes. Specifically, he encouraged the rape of various women near the communal area of his bureau.[134] He also ordered the civilians of his commune to capture and eventually kill three Tutsi brothers, aiding in this activity by blowing his whistle to alert the people to the brothers' attempted escape.[135] The court elaborated on the difference between aiding and abetting:

> Aiding is providing assistance to someone. Abetting… involve[s] facilitating an action by being sympathetic thereto.[136]

This principle is illustrated by the Court's ruling that he was guilty of rape as described above.[137] Indeed, it is notable that Akayesu never provided any actual assistance to the commission of the rapes, but was nevertheless held guilty for encouraging the rapes through his inaction.[138]

Prosecutor Eboe-Osuji noted that the *Akayesu* judgment also created some confusion regarding the requisite *mens rea* for aiding or abetting specifically in genocide, stating that the aider or abettor needed to have intended to lend aid or encouragement to the crime of genocide.[139] However, this result is inconsistent with the rest of the

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[134] *Akayesu,* ¶ 12B. (charges). [reproduced in accompanying notebook at Tab 10].

[135] *Id,* ¶ 18. (charges)

[136] *Id,* ¶ 484.

[137] *Id,* ¶ 696 - 706

[138] *Id,* ¶ 12B. (charges of his activity); ¶ 416. (witness testimony).

[139] Eboe-Osuji, Chile, '*Complicity in Genocide' Versus 'Aiding and Abetting Genocide' – Construing the Difference In The ICTR and ICTY Statutes.* Journal of International Criminal Justice, 56, 58 (2005) [reproduced in accompanying notebook at Tab 35]; *citing Akayesu,* ¶ 485, 540 and 544-547. [reproduced in accompanying notebook at Tab 10].

jurisprudence of the ad hoc tribunals, and was specifically rejected by the *Semanza* judgment.[140]

ii: *Kayishema and Ruzindana, Semanza,* and *Ngeze* Affirming that Encouragement (Abetting) is Sufficient for Guilt.

Several other ICTR cases affirm that abetting is enough for criminal culpability.[141] In *Prosecutor v. Kayishema and Ruzindana,* the court found that Kayishema, the prefect of Kibuye, was guilty beyond a reasonable doubt under Article 6(1) of the statute.[142] Kayishema's defense argued that, despite the *Akayesu* decision, the offenses under Article 6(1) should be read as cumulative.[143] The Court rejected the argument and affirmed the *Akayesu* interpretation of separate definitions and separate culpability for aiding and abetting.[144]

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[140] *Id* at, 61[reproduced in accompanying notebook at Tab 35]; *citing Prosecutor v. Semanza* (Case No. ICTR-97-20-T) Judgment 15 May 2003 ¶ 648. [reproduced in accompanying notebook at Tab 24].

[141] *Prosecutor v. Kayishema and Ruzindana* (Case No. ICTR-95-1-T) Judgment, 21 May 1999, ¶ 201[reproduced in accompanying notebook at Tab 20]; *Semanza,* ¶ 386. [reproduced in accompanying notebook at Tab 24].

[142] *Kayishema,* ¶ 499-500.[reproduced in accompanying notebook at Tab 20].

[143] *Id,* ¶ 194. (Likely, this argument was made because Kayishema had clearly committed most of the offenses listed under Article 6(1), but with a "cumulative" interpretation, his behavior may not have risen to culpability for aiding or abetting.)

[144] *Id,* ¶ 196. (Citing and affirming the *Akayesu* court.), ¶ 32-48 (Indictments for massacres).

In *Prosecutor v. Semanza,* Semanza was held guilty for abetting war crimes by serving as an "approving spectator" of the rape and murder of Tutsi women.[145] He was found guilty despite not having physically assisted or perpetrated the crime.[146]

In the case of *Prosecutor v. Nahimina, Barayagwiza, Ngeze,* Hazzan Ngeze was also held guilty of encouraging war crimes through publications in his newspaper.[147] Ngeze's actions can be distinguished from the three previously discussed cases because Ngeze was not immediately present for many of the crimes that he was guilty of aiding or abetting. Ngeze published disparaging propaganda in his newspaper, the *Kangura.*[148] The publications incited the Hutu people to commit crimes against the Tutsi people.[149] The Court found that the *Kangura* not only took a distinctly anti-Tutsu tone, but also published lists of Tutsi civilians, who were subsequently killed. [150]

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[145] *Semanza,* ¶ 386. (An authority figure who is present while the crime is committed and does nothing to stop it is an "approving spectator"), ¶ 481. (Semanza encouraged a crowd of people to rape a group of Tutsi women before murdering them.), ¶ 485 (Perpetrator, after receiving such encouragement, raped a Tutsi woman, and killed her – thus Semanza was guilty of instigating torture.)[reproduced in accompanying notebook at Tab 24].

[146] *Semanza,* ¶ 481.

[147] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hazzan Ngeze,* (ICTR-99-52-T) Judgment 3 December 2003, ¶ 977A, ¶ 1084. [reproduced in accompanying notebook at Tab 18].

[148] *Id,* ¶ 135. (establishing ownership of the *Kangura*).

[149] *Id,* ¶ 138-139. (Delineating Ngeze's views on the Tutsi's, disparaging them, The "Ten Hutu Commandments")

[150] *Id,* ¶ 152-182. (Establishing that he was not merely publishing the news, but that the tone of his paper was actually derogatory to the Tutsi.); *Ngeze,* ¶ 204.

iii. *Strugar,* and Selecting Aiding or Abetting or Command Responsibility.

The ad hoc tribunals have oscillated some on whether authorities in positions like Blaskic and Aleksovski should be held guilty under aiding or abetting, or under command responsibility. In *Prosecutor v. Strugar,* lieutenant-general Strugar was held guilty of command responsibility under Article 7(3) of the ICTY statute, but not for aiding or abetting under Article 7(1) of the statute.[151] The court found that Strugar had ordered the attack that gave rise to his culpability, but was unable to establish that he had specifically ordered the attack on the civilians residing in Old Town.[152] The court cited several reasons for not finding guilt under aiding or abetting jurisprudence. The most confusing reason was because of the lack of settled jurisprudence on when a person in position of authority can be held guilty for aiding or abetting by omission.[153] In fact, it would appear that several cases have clearly established the possibility of guilt for aiding or abetting by omission.[154] However, *Strugar* can be understood to be decided on other grounds as well. For example, the court was not convinced that, in this case, Strugar's failure to investigate and punish his soldiers actually had a direct and substantial effect on the

[151] Hina ,Silvek, *The Judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Pavle Strugar*. Leiden Journal of International Law, 19 (2006) pages, 481 – 482[reproduced in accompanying notebook at Tab 37], citing *Prosecutor v. Strugar* (Case no. IT-01-42-T) Judgment, 31 January 2005, ¶ 354 – 355. [reproduced in accompanying notebook at Tab 25].

[152] *Strugar,* ¶ 337-338.[reproduced in accompanying notebook at Tab 25].

[153] *Id* ¶ 355.

[154] *See* discussion of *Blaskic, Aleksovski, Furundzija, infra* at page 29.

commission of the crime.[155] Another explanation is simply that the court may exercise its discretion in determining whether guilt should be found under aiding or abetting, or command responsibility.[156] Note though, that some decisions have indicated that aiding or abetting culpability takes precedence over command responsibility culpability where convictions under both theories are possible.[157] In such a case an individual's status as an authority figure may be taken as an aggravating factor for the purposes of sentencing.[158]

E: Generally, The ICTR Decisions Mirror ICTY Decisions and Nuremberg Decisions.

Nuremberg, ICTR and ICTY jurisprudence are all virtually identical.[159] *Actus reus* standards across all three tribunals are the same.[160] *Mens rea* standards are similarly uniform.[161] Culpability can be found based on aiding or abetting.[162] Furthermore, the assistance or encouragement does not need to be *conditio sine qua non* to the crime.[163]

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[155] *Strugar* ¶ 354-355.[reproduced in accompanying notebook at Tab 25].

[156] *Hina*, at 483[reproduced in accompanying notebook at Tab 37], *citing*, Prosecutor *v. Krnojelac* (Case No. IT-97-25-T) Judgment, 15 March 2002 ¶ 173. [reproduced in accompanying notebook at Tab 22].

[157] *Hina*, at 483[reproduced in accompanying notebook at Tab 37]., *citing, Prosecutor v. Krstic* (Case No. IT-98-33-T) Judgment, 2 August 2001 ¶ 605. [reproduced in accompanying notebook at Tab 23].

[158] *Prosecutor v. Kordic and Cerkez* (Case No. IT-98-33-A) Judgment, 17 December 2003 ¶ 34. [reproduced in accompanying notebook at Tab 21].

[159] See *Reggio*, pages 629 – 647 (Another paper tracking the development of international aiding and abetting law) [reproduced in accompanying notebook at Tab 39].

[160] *Furundzija*, ¶ 257[reproduced in accompanying notebook at Tab 19]; *Semanza*, ¶ 381. ("proof is required of causal connection…")[reproduced in accompanying notebook at Tab 25], See also *Flick* at 29.[reproduced in accompanying notebook at Tab 32].

[161] *Blaskic Appeal*, ¶ 49[reproduced in accompanying notebook at Tab 16]; *Prosecutor v. Bagileshema* (Case No. ICTR-95-1A-T) Judgment, 7 June 2001, ¶ 32 (affirming

F: Summary of the Findings of Law and Discussion

Current international jurisprudence establishes the culpability of a high up government official who knew or had reason to know of the commission of crimes by those whom they have authority over. Indeed the case law shows that if a government official has the authority to put a halt to the commission of these crimes, he must do so, or he is guilty of aiding or abetting the crime by omission.[164] The ICTY has heard several cases that are directly on point in this matter. [165] The *Furundzija* case involved a situation wherein a military commander was in the same room as one of his soldiers raped a woman. Indeed, Furundzija had not issued an order for the soldier to rape the woman, however, he was found guilty of aiding and abetting because he made no move to stop the soldier.[166] The *Aleksovski* case involved similar facts, where the commander of a prison camp was held guilty of aiding and abetting by omission, even though the prisoners were taken away from his presence to be abused.[167] Again, *Aleksovski* did not

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knowledge requirement, but eventually acquitting). [reproduced in accompanying notebook at Tab 13]; See also, *Zyklon B,* at 101.[reproduced in accompanying notebook at Tab 30].

[162] *Akayesu*, ¶ 484[reproduced in accompanying notebook at Tab 10]*;* Compare to *Flick* at 30 (inferred – *Flick* was convicted for aiding Hitler despite being demonstrably *not* supportive Hitler.)[reproduced in accompanying notebook at Tab 32].

[163] *Blagojevic*, ¶ 726[reproduced in accompanying notebook at Tab 14]; Compare to *Zyklon B* at 102.[reproduced in accompanying notebook at Tab 30.]

[164] See Discussion of *Aleksovski, Blaskic, Furundzija, infra,* page 29.

[165] See Discussion of *Aleksovski, Blaskic, Furundzija, infra,* page 29.

[166] *Furundzija* ¶ 273. [reproduced in accompanying notebook at Tab 19].

[167] *Aleksovski, Appeal* ¶ 169, 172. (Admittedly, Aleksovski had already been found guilty of aiding or abetting of the prisoners *within* the prison by virtue of his presence. It is

order the mistreatment of the prisoners out of the camp, but failed to prevent it. Finally, the *Blaskic* case establishes that, not only must an authority figure take steps to prevent his soldiers from committing crimes, but he may also .[168] It is important to note that omission alone is not enough to establish guilt under aiding or abetting. Instead, such omission must also effectuate assistance or encouragement so as to have a significant impact on the commission of the crime.[169] Further, though *Furundzija, Aleksovski, and Blaskic* all find that knowledge, authority, and inaction may be enough to find guilt via aiding or abetting a crime, the *Tadic* case demonstrates that the case for aiding or abetting culpability appears much stronger if the authority figure has ordered or participated in crimes previously.[170] That is, the Court is much more likely to find that the authority figure substantially effected the commission of the *specific* crime via assistance or encouragement, if he has previously developed an observable pattern of behavior which generally indicates the he condones the type of actions of his subordinates.[171]

Several ICTR cases facilitate the findings in the ICTY cases by explaining that either aiding or abetting a lone is sufficient for culpability, making it still easier to

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unclear whether the conviction for aiding or abetting the mistreatment of the prisoners while outside the prison relied on this fact.)[reproduced in accompanying notebook at Tab 12].

[168] *Blaskic Appeal* ¶ 647-670. [reproduced in accompanying notebook at Tab 16].

[169] *Tadic* ¶ 698 (noting that acts need to lend encouragement or support, in the context of whether presence is sufficient to show aiding or abetting.)[reproduced in accompanying notebook at Tab 26].

[170] *Id* ¶ 690.

[171] *Id* ¶ 690.

convict.[172] The *Ngeze* case shows that abetting may take the form of blanket, public, inflammatory statements.[173] This is an important case because it illustrates that a person does not necessarily need to encourage a specific crime, but can simply encourage one group of people to unite for the purpose of rejecting another group of people

Reaching back to Nuremberg trials, the *Zyklon B* case gives illustration of conviction based solely on aiding a principal perpetrator.[174] It was not asserted that the distributors of the poison gas approved of the activities at Nazi prison camps, but they certainly provided practical aid.[175]

G: Application of the Law from the ICTY and the ICTR is not Ex Post Facto Application of the Law.

The events over which the ECCC presides ostensibly present unique challenges regarding the use of international precedent. Indeed, because the Khmer Rouge reigned from 1975 to 1979, but have not gone to trial until present-day, there are legitimate questions about whether the law from the ICTY and the ICTR can fairly be applied to the defendants under the ECCC.[176]

An examination of the circumstances under which the ICTY and ICTR, and their respective statutes were created reveals that initial concerns regarding ex post facto application of the law can be laid to rest. This is because statutes and case law of the

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[172] See discussion of Akayesu, Kayeishema, and Semanza *infra,* pages 35-37.

[173] See, discussion of *Ngeze, infra,* notes 147-150 and accompanying text.

[174] See generally, *Zyklon B.* (Owners of the gas distributing facility were hung, even though there is no indication throughout the case that the owners approved of the Nazi's crimes.)[reproduced in accompanying note book at Tab 30.]

[175] *Id.*

ICTY and the ICTR are merely a codification of pre-existing international humanitarian law.[177] Indeed there are three major indicators that ICTY and ICTR jurisprudence is actually the codification of existing international law.

First, the United Nations, who explicitly stated that the ICTY and the ICT statutes could only restate the status of the law. Indeed, the U.N. Security council meetings contained dialogue specifically indicating that they were careful not to create law, but merely codify the law from Nuremberg Statute and the Geneva Conventions.[178] In fact, large portions of ICTY and ICTR statutes are pulled directly from the Geneva Conventions. For example, Article 4 of the ICTY and Article 2 of the ICTR are verbatim reproductions of the Convention on the Prevention and Punishment off the Crime of Genocide.[179] Note that the "Genocide Convention" includes the crime of complicity in

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[177] See Nisbet, Colin, Memorandum For the Office f the Co-Prosecutor, ECCC. To what extent is there individual criminal responsibility for violations of the Vienna Convention on Diplomatic Relations (1961) under Article 8 and 29 of the ECCC law? If liability exists, what are the elements of such crimes?. Fall Semester, 2007. (For an extensive, parallel argument.)[Title page and Table of Contents reproduced in accompanying notebook at Tab 38].

[178] *See,* Madeline Albright, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-fifth meeting, Reprinted in An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Morris, Scharf, pp 165, 1995, Transnational Publisher, Inc. [reproduced in accompanying notebook at Tab 43].

[179] The ICTY Statute, Article 4[reproduced in accompanying notebook at Tab 7]; See Also, Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, Articles 2 and 3, [reproduced in accompanying notebook at Tab 2]:

> "2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.
> 3. The following shall be punishable.

genocide, which has ruled to comprise aiding or abetting as they are conceptualized under Article 7(1) of the ICTY statute and Article 6(1) of the ICTR Statute.[180] Note also that the Geneva Conventions were enacted in the late 1940's, well before Pol Pot and his followers committed their crimes, [181]

Second, the judicial decisions under the International Military Tribunal and the ICTY and ICTR are strikingly similar. They use the same standards of law, when holding high-up governmental officials liable for war crimes where they can. Indeed, the extent to which the ICTY and ICTR agree with Nuremberg jurisprudence is quite deliberate, as the present-day courts rely heavily on precedent from Nuremberg, Dauschau, and other courts.

Third, the individuals being tried under the ECCC are on notice that they can be held criminally culpable for their participation in the Killing Fields in Cambodia. Indeed under *United States v. Alstotter*, the court notes that the standard for avoiding *ex post facto* application of the law is,

> …proof before conviction that the accused knew or should have known that… he was guilty of participation in a…system of injustice shocking to the moral sense of mankind, and he knew or should have known that he would be [punished] if caught.[182]

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

[180] See discussion of Blagojevic and the application of the Statutes, *infra*, at 32.

[181] For example, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by Resolution 260 (III) A of the United Nations General Assembly in 9 December 1948. [reproduced in accompanying notebook at Tab 9].

[182] *United States of America v. Alstotter* (1948) 6 L.R.T.W.C. 1 (Nuremberg), page 43. [reproduced in accompanying notebook at Tab 31].

Further, it does not matter that the ICTY and ICTR courts may have further developed the case law through judicial decisions. The *Alstotter* court noted that, "it is sheer absurdity to suggest that the *ex post facto* rule…could be applied to… a common law decision of an international tribunal."[183] Thus, to the extent that the ad hoc tribunals have developed the law through judicial decisions, the *ex post facto* principle does not prevent those decisions from being applied to the ECCC.

In a sense, there has been no development of international aiding or abetting jurisprudence. There has been virtually no change in the substantive law. To the extent that there has been development in this area, it has been in the form of "tidying up" the law, so that it is easier, and more efficient to discuss.

Further, through the Nuremberg Tribunal's expansive interpretation and application of international law, the defendants under the ECCC are effectively put on notice, that the trend in international humanitarian law is to hold high-up governmental officials responsible for any atrocities that committed, and that they could control.

In conclusion, the law under the ICTY and ICTR is still highly instructive in interpreting the state on international law in the mid-1970's, because it is firmly rooted in past international humanitarian law.

IV: Summary and Conclusions

Despite the vague nature of international law in early international courts, it has now achieved great clarity with regard to aiding or abetting jurisprudence. The basic elements of aiding or abetting are clear. The aider or abettor must knowingly provide aid

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[183] *Alstotter*, at 41. [reproduced in accompanying notebook at Tab 31].

or encouragement to the principal actor, whom he knows intends to commit a crime. Such aid or encouragement must substantially effect the commission of he crime in the sense that it must have an impact on the way the crime is committed. Note though, that the aid or encouragement need not be *sine qua non* to the commission of the crime.

Further, either aiding or abetting alone is sufficient to find criminal culpability. A person who provides disapproving aid, or a person who communicates his moral support of the principal's activity without actually aiding the principal are both still guilty of aiding, or abetting respectively.

Aiding or abetting does not depend on the accessory actor and the principal actor both be part of the same group, and the accessory actor does not need to be present when the principal actor commits the crime.

The ad hoc tribunals further developed aiding or abetting jurisprudence, clarifying the required degree of involvement required to hold an authority figure guilty of aiding or abetting. When such an authority figure could have, but did not use his position to prevent or punish a crime committed someone beneath him, he can be held guilty for aiding or abetting. He need not have specifically ordered the crime, so long as his omission satisfies the basic requirements of aiding or abetting.

The courts have differed some on whether it is more appropriate to use aiding or abetting liability or command responsibility liability where they are both applicable, but generally speaking, the trend has been for aiding or abetting liability to incorporate command responsibility liability.

Finally, the jurisprudence of the ad hoc tribunals is applicable to the ECCC because it does not violate the *ex post facto* principle. This is because the defendants

under the ECCC were on notice that what their conduct violated international humanitarian law, and because the ad hoc tribunals merely codified existing international humanitarian law.

Thus, the aiding or abetting jurisprudence that is applicable to defendants under the ECCC is truly reminiscent of the phrase, "the long arm of the law." To the extent that any authority figure knowingly involved himself with events surrounding the Killing Fields, or any of the other crimes committed under the Khmer Rouge regime, the law clearly holds him criminally culpable.