

**CLARIFYING COMPLICITY UNDER ARTICLE III(E) OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT  
OF THE CRIME OF GENOCIDE TO MITIGATE GENOCIDE IN THE FUTURE**

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I. INTRODUCTION

In 2022, the International Criminal Court (“ICC” or “the Court”) began investigating the Russian invasion of Ukraine and other Russian crimes that date back to 2013.<sup>1</sup> This comes as no surprise, given that journalists and human rights observers have regularly documented what appears to be mass graves and civilian bodies of groups that Russian troops targeted in Ukraine.<sup>2</sup> Among the crimes the ICC is investigating is genocide,<sup>3</sup> a term defined as killing, serious bodily or mental harm, or conditions of life that may bring about destruction,<sup>4</sup> with the objective of destroying a group of people.<sup>5</sup> Genocide continues to occur in spite of the United Nations (UN) having adopted the Convention on the Prevention and Punishment of the Crime of Genocide more than fifty years ago (“the Convention”).<sup>6</sup> Unfortunately, it has only become more common since the Convention.<sup>7</sup>

The UN adopted the Convention in 1948, and by doing so, made genocide punishable under international law.<sup>8</sup> Article III(e) of the Convention begins: “The following acts shall be punishable,” and proceeds to list crimes including complicity in genocide.<sup>9</sup> Despite this strong language, international actors have responded weakly and often confused complicity with aiding and abetting.<sup>10</sup> Complicity encompasses “all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion” of a crime.<sup>11</sup> Alternatively, aiding and abetting occurs when “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime.”<sup>12</sup> Given the confusion between

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<sup>1</sup> *Ukraine: Situation in Ukraine*, INT’L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> (last visited Oct. 29, 2023).

<sup>2</sup> David J. Scheffer, *Can Russia Be Held Accountable for War Crimes in Ukraine?* COUNCIL ON FOREIGN RELATIONS (April 4, 2022, 4:30 pm EST), <https://www.cfr.org/article/can-russia-be-held-accountable-war-crimes-ukraine> (last visited Dec. 4, 2022) (noting the referral of over 40 member states and that Ukraine accepted the jurisdiction of the Court in spite of not being a member) (“The brutal discoveries in Bucha, where an estimated three hundred civilians were killed, and other cities recaptured by Ukrainian forces prompted U.S. President Joe Biden to call for a war crimes trial to impose accountability.”).

<sup>3</sup> *Id.*

<sup>4</sup> See International Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention]; see P Sean Morris, *Economic Genocide under International Law*, 82 UKJCL 18, 19 (2018).

<sup>5</sup> Rep. of the International Law Commission on the Work of Its Forty-Eighth Session, at 45, U.N. Doc. A/51/10 (1996) [hereafter Forty-Eighth Session]; Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2265 (1999).

<sup>6</sup> Symposium, *Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, 98 J. CRIM. L. & CRIMINOLOGY 921, 922 (2022) [hereinafter *Redefining International Criminal Law*]; See Matthew Lippman, *The 1948 Convention on The Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT’L & COMP. L.J. 1, 1 (1994) (discussing how the world is “witnessing a resurgence of mass repression”).

<sup>7</sup> *Redefining International Criminal Law*, *supra* note 6, at 922; Lippman, *supra* note 6, at 1 (discussing how the world is “witnessing a resurgence of mass repression”).

<sup>8</sup> Morris, *supra* note 4, at 18.

<sup>9</sup> Convention, *supra* note 4.

<sup>10</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 395 (May 15, 2003) (“[T]here is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1)”).

<sup>11</sup> *Redefining International Criminal Law*, *supra* note 6, at 925.

<sup>12</sup> U.N. Security Council, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (Nov. 8, 1994), <https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution->

these terms, there is a narrow scope to prosecute genocide. As a result, some have criticized the “never again” philosophy, or the consensus that genocide should never happen again,<sup>13</sup> and attempted to identify possible reasons for genocide’s prevalence.<sup>14</sup>

In the future, to mitigate genocide, the ICC should implement one *mens rea* from American criminal law, recklessness, to prosecute the crime of being complicit in genocide, as well as aiding and abetting in genocide. This would mean people (individuals and/or their state) could only be found guilty of complicity if they consciously disregarded a substantial risk that genocide was occurring.<sup>15</sup> Using one standard for aiding and abetting genocide and complicity in genocide will provide the clarity needed to prevent unjust results and reduce the prevalence of genocide in the future.

Part II of this Comment provides a background of the history of genocide, the role of the ICC, the Convention, and the Creation of Article III of the Convention. It also explores why the current standard for complicity is confusing. Part III proposes a solution to clarify the complexity of complicity. In the end, the Court should recognize the current confusion in genocide laws and draw upon the standard of recklessness in American criminal law to prosecute the crime of being complicit in genocide and aiding and abetting. Part IV will demonstrate why recklessness is the optimal standard for complicity in genocide.

## I. BACKGROUND

### A. *The History of Genocide*

The term genocide was revived and modernized because of the atrocities of the twentieth century. Raphael Lemkin, a Polish citizen of Jewish descent who fled to the United States, coined and reintroduced the word, genocide, during World War II in his 1944 work, *Axis Rule in Occupied Europe*.<sup>16</sup> Accordingly, his work articulates that genocide encompasses killing, serious bodily or mental harm, conditions of life that may bring about destruction, and measures to prevent birth or forcibly transfer children within a group in a society.<sup>17</sup>

When referring to genocide, the International Law Commission, a UN commission of experts that works on the development of international law and its codification,<sup>18</sup> notes that, “[t]he prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group.”<sup>19</sup> Scholars would suggest genocide can be broken into three elements: (1) the *actus reus*, the action necessary for a crime, of killing members of a group; (2) resulting harm regarding life conditions; and (3) the *mens rea*, the mental state necessary for a crime, of intending to commit genocide.<sup>20</sup>

In 1946, the UN recognized genocide as a crime under international law that warranted international concern in General Assembly Resolution 96(1).<sup>21</sup> Shortly thereafter, the 1948 Genocide Convention occurred in the wake of the Holocaust and the subsequent war trials ensued for crimes against humanity,<sup>22</sup> which convicted the

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persons [hereinafter Rwanda Tribunal Statute] (last visited Dec. 2, 2022) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime”); S.C. Res. 955, Art. 6 (November 8, 1994).

<sup>13</sup> Samantha Power, *Never Again: The World’s Most Unfulfilled Promise*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html> (last visited Dec. 7, 2022).

<sup>14</sup> *Redefining International Criminal Law*, *supra* note 6, at 922.

<sup>15</sup> MODEL PENAL CODE § 2.02(2)(C) (AM. L. INST. 2022).

<sup>16</sup> Greenawalt, *supra* note 5, at 2270.

<sup>17</sup> Convention, *supra* note 4; *see* Morris, *supra* note 4, at 18.

<sup>18</sup> *See About the Commission*, INT’L L. COMM’N (Jun. 19, 2023), <https://legal.un.org/ilc/work.shtml>.

<sup>19</sup> Forty-Eighth Session, *supra* note 5, at 45; Greenawalt, *supra* note 5, at 2265.

<sup>20</sup> *See* Morris, *supra* note 4, at 21.

<sup>21</sup> G.A. Res. 96 (I), at ¶ 3-4 (1946); Lippman, *supra* note 6, at 10.

<sup>22</sup> *Redefining International Criminal Law*, *supra* note 6, at 921; Greenawalt, *supra* note 5, at 2259 (noting “the post-World War II climate, haunted as it was by fresh memories of the Holocaust, produced an as-yet-unprecedented consensus in favor of vigorous international enforcement of human rights norms”); Paul Mysliwiec, *Accomplice to Genocide Liability: The Case for a Purpose Mens Rea Standard*, 10 CHI. J. INT’L L. 389, 390 (2009); Lippman, *supra* note 6, at 1 (“The Genocide Convention, to a great extent, was a reaction to the barbarities inflicted by the Third Reich.”).

Nuremberg Defendants.<sup>23</sup> The purpose of the Convention was to provide an avenue to punish genocide as a crime under international law.<sup>24</sup> The UN Economic and Social Council enlisted the assistance of the UN Secretariat to create a first draft.<sup>25</sup> However, after receiving little support, an ad hoc committee completed a second draft of the Convention that the General Assembly adopted in 1948.<sup>26</sup> The Convention represents the international standard that genocide is unlawful.<sup>27</sup>

The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) utilized the Convention to punish perpetrators of genocide.<sup>28</sup> In the 1990s, an impartial Commission of Experts confirmed that violations of international humanitarian law occurred in Yugoslavia; consequently, they recommended an ad hoc tribunal to address the matter.<sup>29</sup> Subsequently, the United Nations Security Council (“UNSC”) established the ITCY in May 1993<sup>30</sup> in Resolution 827 passed under Chapter VII of the Charter of the United Nations.<sup>31</sup> By doing so, the UNSC created the first ad hoc international criminal tribunal<sup>32</sup> and addressed the mass atrocities of the conflicts in Croatia, Bosnia, Kosovo, Serbia, and Macedonia.<sup>33</sup> From 1993 and 2017, the ICTY indicted 161 individuals and sentenced 90.<sup>34</sup>

Similarly, the ICTR was an international criminal tribunal created to handle the cases of genocide in Rwanda.<sup>35</sup> The ICTR originated when the UNSC passed Resolution 955 on November 8, 1994, to investigate the persons responsible for the Rwandan genocide.<sup>36</sup> In what is “the most unambiguous case of genocide since the Holocaust,” Hutus raped, maimed or massacred between 500,000 and 800,000 Tutsi and moderate Hutus.<sup>37</sup> Ultimately, the ICTR held that Jean-Paul Akayesu, a Rwandan bureaucrat, had a genocidal intent directed toward a group.<sup>38</sup> The ICTR ended up indicting ninety-three individuals for genocide and other violations of international

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<sup>23</sup> Lippman, *supra* note 6, at 5.

<sup>24</sup> Morris, *supra* note 4, at 20.

<sup>25</sup> *Id.*; G.A. Res. 96 (I), at ¶ 7 (1946) (requesting the Economic and Social Council draft the convention); Greenawalt, *supra* note 5, at 2273 (identifying the ad hoc committee as the ECOSOC Ad Hoc Committee on Genocide).

<sup>26</sup> Morris, *supra* note 4, at 20; *See* Convention, *supra* note 4 (In it, the U.N. designated the International Court of Justice as the arbiter of all disputes).

<sup>27</sup> Greenawalt, *supra* note 5, at 2261.

<sup>28</sup> *Redefining International Criminal Law*, *supra* note 6, at 923; Greenawalt, *supra* note 5, at 2261-62.

<sup>29</sup> *See* Santiago Villalpando, *The International Criminal Tribunal for The Former Yugoslavia*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 233, 234 (Eduardo Valencia-Ospina, et al. eds., 4th ed. 2012).

<sup>30</sup> Darryl Robinson, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, *AMERICAN JOURNAL OF INTERNATIONAL LAW* 57, 57 (1999).

<sup>31</sup> Villalpando, *supra* note 29, at 234.; U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace . . . or decide what measures shall be taken . . . to maintain or restore international peace and security.”)

<sup>32</sup> Villalpando, *supra* note 29, at 233.

<sup>33</sup> *International Criminal Tribunal for the Former Yugoslavia*, HOLOCAUST MEMORIAL DAY TRUST (2022), <https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/bosnia/international-criminal-tribunal-for-the-former-yugoslavia/> (last visited Dec. 4, 2022); *The Tribunal – Establishment*, UNITED NATIONS THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about/tribunal/establishment>.

<sup>34</sup> *International Criminal Tribunal*, *supra* note 33; *see Judgement List*, UNITED NATIONS THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/cases/judgement-list> (last visited Dec. 7, 2022).

<sup>35</sup> Morris, *supra* note 4, at 22.

<sup>36</sup> Robert D. Sloane, *The International Criminal Tribunal for Rwanda*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 261, 262 (Eduardo Valencia-Ospina, et al. eds., 4th ed. 2012).

<sup>37</sup> *Id.* at 261.

<sup>38</sup> *See* Morris, *supra* note 4, at 23.

law.<sup>39</sup> Subsequently, no tribunals occurred during the Cold War due to the strain on international relations,<sup>40</sup> so the Convention went largely unused.<sup>41</sup>

### B. *The Convention on the Prevention and Punishment of the Crime of Genocide*

The United Nations General Assembly (UNGA) is an organ of the UN comprised of all 193 Member States that have an equal vote and make policy.<sup>42</sup> The UNGA adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 11, 1948,<sup>43</sup> a Convention binding on all States.<sup>44</sup> Although not every resolution of the General Assembly is binding,<sup>45</sup> the Convention is binding because it has become international customary law.<sup>46</sup> A practice becomes customary international law when: (1) it is a general and consistent practice among a significant number of States; and (2) evidence suggests that the States follow the practice out of a legal obligation.<sup>47</sup> For example, international law is not binding in the U.S. unless the provision is customary international law or it is codified by the Legislature.<sup>48</sup> In short, customary law is binding on all countries once it is general and consistent practice followed out of a legal obligation.<sup>49</sup>

Article II of the Convention defines genocide, stating:

[G]enocide 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.<sup>50</sup>

Immediately following this definition, Article III criminalizes genocide.<sup>51</sup> Article III also allows for punishment of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>52</sup> The crime of genocide is so serious that it has universal jurisdiction, meaning that any State has the power to prosecute it in court.<sup>53</sup> Also, a number of States that have ratified the Convention have implemented the Convention's provisions into their penal codes.<sup>54</sup>

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<sup>39</sup> *International Criminal Tribunal for Rwanda*, HOLOCAUST MEMORIAL DAY TRUST (2023), <https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/rwanda/international-criminal-tribunal-for-rwanda/>.

<sup>40</sup> Morris, *supra* note 4, at 23

<sup>41</sup> Mysliwiec, *supra* note 22, at 389.

<sup>42</sup> *Workings of the General Assembly*, UNITED NATIONS, <https://www.un.org/en/ga/> (last visited Dec. 7, 2022).

<sup>43</sup> Lippman, *supra* note 6, at 1.

<sup>44</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, *The Convention on the Prevention and Punishment of the Crime of Genocide, 1948-2018, Appeal: Universal Ratification 2018*, [https://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet\\_final.pdf](https://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet_final.pdf) (last visited Dec. 2, 2022).

<sup>45</sup> See Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 THE EUR. J. OF INT'L LAW 879, 883 (2006).

<sup>46</sup> See Lori Lyman Bruun, *Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. 193, 211-12 (1993).

<sup>47</sup> See *id.* at 211.

<sup>48</sup> As a caveat, it can be self-executing (doesn't have to be codified by Congress). See *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008) (“What [the Supreme Court] mean[s] by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”)

<sup>49</sup> See *id.*; Bruun, *supra* note 46, at 211.

<sup>50</sup> Convention, *supra* note 4; Morris, *supra* note 4, at 21.

<sup>51</sup> See Convention, *supra* note 4; see also Morris, *supra* note 4, at 21.

<sup>52</sup> Convention, *supra* note 4.

<sup>53</sup> See Mysliwiec, *supra* note 22, at 393.

<sup>54</sup> *Id.*

### C. *The Creation of Article III of the Convention on the Prevention and Punishment of the Crime of Genocide*

Complicity is an idea derived from the principles of criminal law,<sup>55</sup> which appeared in many documents leading up to the passage of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>56</sup> as well as in the Convention itself.<sup>57</sup> In 1946, General Assembly Resolution 96(1) affirmed that genocide is a crime and ensured that both principals and accomplices are punishable, making it a revolutionary document.<sup>58</sup> Four years later, the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal that, “[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.”<sup>59</sup>

Similarly, Article III, one of the central parts of the Convention, lists punishable acts and mentions complicity.<sup>60</sup> Article III(e) in particular, criminalized complicity in genocide on the international stage.<sup>61</sup> Notably, during the drafting process, United States representative John Maktos understood complicity to mean accessoryship before and after the crime as well as aiding and abetting.<sup>62</sup> A representative from Venezuela agreed that complicity included actions before and after the crime.<sup>63</sup> Clearly, complicity is a longstanding idea and the Convention is not the first mention of it in international law.<sup>64</sup>

### D. *The Genesis of the International Criminal Council*

The UN General Assembly adopted the Rome Statute in 1998 to prosecute future perpetrators of genocide.<sup>65</sup> After more than sixty countries ratified it, the Rome Statute went into force on July 1, 2002, and thereby founded the International Criminal Council to prosecute atrocities including genocide.<sup>66</sup> One hundred twenty-three countries are now parties to the Rome Statute.<sup>67</sup> Others have signed the statute,<sup>68</sup> but their legislatures have not ratified it – including the United States.<sup>69</sup>

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<sup>55</sup> William A. Schabas, *Convention for The Prevention and Punishment of The Crime of Genocide*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), [https://legal.un.org/avl/pdf/ha/cppcg/cppcg\\_e.pdf](https://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf).

<sup>56</sup> See e.g. G.A. Res. 96 (1), ¶ 4 (Dec. 11, 1946).

<sup>57</sup> Convention, *supra* note 4.

<sup>58</sup> See G.A. Res. 96 (1), ¶ 4 (Dec. 11, 1946); see also William A. Schabas, *Genocide in International Law: The Crime of Crimes* 341-42 (2d ed. 2009) (During the drafting process of this resolution, the United Kingdom also attempted to add the word deliberate before complicity; however, the United Kingdom withdrew the amendment because many delegates assured the United Kingdom that complicity must be intentional.).

<sup>59</sup> U.N. General Assembly, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/7\\_1\\_1950.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf); Schabas, *supra* note 58, at 339.

<sup>60</sup> See Schabas, *supra* note 58, at 81-82; Convention, *supra* note 4.

<sup>61</sup> Convention, *supra* note 4.

<sup>62</sup> United Nations Economic and Social Council, Ad Hoc Committee on Genocide, Rep. of the Committee and Draft Convention Drawn up by the Committee, at 3, U.N. Doc. E/794 (5 April - 10 May 1948) (noting that John Maktos represented the United States in the Ad Hoc Committee on Genocide); See Lippman, *supra* note 6, at 47.

<sup>63</sup> See Lippman, *supra* note 6, at 47-48.

<sup>64</sup> E.g. G.A. Res. 96 (1), ¶ 4 (Dec. 11, 1946).

<sup>65</sup> Greenawalt, *supra* note 5, at 2262; see Claire Klobucista, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS, at 2 (March 28, 2022, 2:00 pm EST), <https://www.cfr.org/backgrounder/role-international-criminal-court> (last visited Dec. 7, 2022); see *International Criminal Court Fast Facts*, CNN (April 5, 2022, 11:14 AM EST), <https://www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html> (last visited Dec. 7, 2022) (identifying 137 states as signatories).

<sup>66</sup> See Klobucista, *supra* note 65, at 4 (noting four categories of crimes that the International Criminal Court has jurisdiction over).

<sup>67</sup> *Id.* at 1.

<sup>68</sup> See *International Criminal Court Fast Facts*, *supra* note 65 (identifying 137 states as signatories).

<sup>69</sup> Klobucista, *supra* note 65, at 1.

Although the Rome Statute created the ICC, the ICC now functions as an independent entity.<sup>70</sup> Therefore, the ICC does not need a special mandate from the UN.<sup>71</sup> Further, it is the “court of last resort”<sup>72</sup> because the Court prefers prosecution at the national level and cannot prosecute a crime already being investigated or prosecuted in a State Party with jurisdiction.<sup>73</sup> The ICC differs from the International Court of Justice (“ICJ”) because it can prosecute individuals.<sup>74</sup> This means that if there is an allegation of genocide between two States, the case would go to the ICJ, but if a person allegedly committed genocide, the ICC would try the case. The Court began operation in 2003 from its Hague headquarters and tries individuals for four crimes: genocide, crimes against humanity, war crimes, and acts of aggression.<sup>75</sup> To convict an individual, the prosecution must prove beyond a reasonable doubt that one is guilty of the accused crime before three trial judges.<sup>76</sup> If guilty, the judges then issue a sentence.<sup>77</sup>

The ICC has eighteen judges, each from a different member country and each elected by the Member States.<sup>78</sup> Cases at the ICC can begin in three ways: (1) a member country can refer a situation within its own territory; (2) the UNSC can refer a situation; (3) or a prosecutor can launch an investigation.<sup>79</sup> Also, the Court can investigate individuals from nonmember States if the offenses transpired in a Member State’s territory, if a nonmember State accepts the Court’s jurisdiction, or if the UNSC authorizes it.<sup>80</sup> For example, the UNSC referred the situation in Darfur in September 2004 under Resolution 1593, even though Sudan is not a party to the Rome Statute.<sup>81</sup>

#### E. *Why Complicity is Confusing*

Complicity in international law and in the Convention is often confused with aiding and abetting because courts in the past misused the terms.<sup>82</sup> Additionally, the elements are similar<sup>83</sup> and the definitions are almost identical.<sup>84</sup>

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<sup>70</sup> *International Criminal Court Fast Facts*, *supra* note 65.

<sup>71</sup> The International Criminal Court, *Understanding the International Criminal Court* 10 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (last visited Dec. 7, 2022) (“The ICC is an independent body whose mission is to try individuals for crimes within its jurisdiction without the need for a special mandate from the United Nations.”)

<sup>72</sup> *International Criminal Court Fast Facts*, *supra* note 65.

<sup>73</sup> David P. Stewart, *The International Criminal Court in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 191, 196 (Eduardo Valencia-Ospina, et al. eds., 4th ed. 2012).

<sup>74</sup> Klobucista, *supra* note 65, at 7.

<sup>75</sup> Stewart, *supra* note 73, at 192.

<sup>76</sup> International Criminal Court, *How the Court Works*, <https://www.icc-cpi.int/about/how-the-court-works#:~:text=Judges%20consider%20all%20evidence%2C%20then,Defence%20and%20by%20the%20Prosecutor>

<sup>77</sup> *Id.*

<sup>78</sup> Klobucista, *supra* note 65.

<sup>79</sup> Klobucista, *supra* note 65; *see International Criminal Court Fast Facts*, *supra* note 65 (“Cases are referred to the court by national governments or the United Nations Security Council”).

<sup>80</sup> Klobucista, *supra* note 65.

<sup>81</sup> Stewart, *supra* note 73, at 218.

<sup>82</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 394 (May 15, 2003) (“[T]here is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1)”).

<sup>83</sup> *Redefining International Criminal Law*, *supra* note 6, at 923-24; Grant Dawson & 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, 277 (2008).

<sup>84</sup> *Compare Redefining International Criminal Law*, *supra* note 6, at 925 (“all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion”) *with* Rwanda Tribunal Statute, *supra* note 12 (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime”).

i. International tribunals formerly confused aiding and abetting with complicity

Previously, international tribunals confused aiding and abetting with complicity.<sup>85</sup> Judge Emile Short noted that there is “an overlap between ‘complicity’ in Article 2(3)(e) and forms of accomplice liability in Article 6(1) of the [ICTR] Statute.”<sup>86</sup> Judge Short refers to Article 2(3)(e) of the statute providing for the prosecution of genocide in Rwanda (“ICTR Statute”), which established the substantive and procedural norms for the tribunal<sup>87</sup> and criminalized complicity in genocide.<sup>88</sup> He recognized that this is confusing when compared with Article 6(1) of the same document that criminalizes aiding and abetting: “[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.”<sup>89</sup> Article 2.3(e) of the ICTR Statute designates punishment for “complicity for genocide” and Article 6.1 for those who “otherwise aided and abetted” the commission of a crime; this is sometimes attributed to a drafting error, adding to the confusion.<sup>90</sup>

Additionally, a conviction for aiding and abetting has precluded a finding of complicity.<sup>91</sup> Due to the overlap Judge Short mentions<sup>92</sup> in the Judgement and Sentence for the ICTR Statute, the Tribunal declared, “there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1).”<sup>93</sup> The Judgement and Sentence also noted that the *mens rea* requirements are the same for aiding and abetting, complicity in committing genocide, and other forms of accomplice liability.<sup>94</sup> Altogether, the statements of the Tribunal indicate that the ICTR confused complicity and aiding and abetting.<sup>95</sup>

ii. The Courts’ definitions of complicity and aiding and abetting are similar

The similar definitions of complicity and aiding and abetting make them confusing.<sup>96</sup> UN Tribunals have defined complicity as, “all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion” of a crime.<sup>97</sup> This means that “the accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.”<sup>98</sup> As a result, Colonel Blagojević was acquitted of complicity by the ICTR during the Rwandan genocide because he did not have knowledge of the principal perpetrator’s intent.<sup>99</sup> Further, the Tribunals allow for punishment of those who aided or abetted or “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime.”<sup>100</sup> Exemplifying this, the ICTY convicted General Krstić of aiding and abetting in the genocide at Srebrenica because he had knowledge of the genocidal intent of others.<sup>101</sup> Aiding and abetting can take many forms, including material assistance, encouragement, or moral support.<sup>102</sup> Article 25(3)(c) of

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<sup>85</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T at ¶ 395 (“[T]here is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1)”).

<sup>86</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, ¶ 5 (May 23, 2006).

<sup>87</sup> ICTR, International Justice Resource Center, <https://ijrcenter.org/international-criminal-law/ictr/>.

<sup>88</sup> See Rwanda Tribunal Statute, *supra* note 12; *accord* Convention, *supra* note 4 (seeming notably similar to Article 3(e) of the Convention).

<sup>89</sup> See Rwanda Tribunal Statute, *supra* note 12; see Prosecutor v. Karemera, Case No. ICTR-98-44-T at ¶ 5.

<sup>90</sup> See *Redefining International Criminal Law*, *supra* note 6, at 927.

<sup>91</sup> Mysliwiec, *supra* note 22, at 396.

<sup>92</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-T at ¶ 5.

<sup>93</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 394 (May 15, 2003).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> Compare *Redefining International Criminal Law*, *supra* note 6, at 925 with Rwanda Tribunal Statute, *supra* note 12; S.C. Res. 955, Art. 6 (November 8, 1994).

<sup>97</sup> *Redefining International Criminal Law*, *supra* note 6, at 925.

<sup>98</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T at ¶ 395.

<sup>99</sup> See Schabas, *supra* note 58, at 98.

<sup>100</sup> Rwanda Tribunal Statute, *supra* note 12, at 7-8; S.C. Res. 955, Art. 6, at 5-6 (November 8, 1994).

<sup>101</sup> See Schabas, *supra* note 58, at 249.

<sup>102</sup> See Prosecutor v. Karemera, Case No. ICTR-98-44-T, Judgement and Sentence, ¶ 1429 (Int’l Crim. Trib. For Rwanda February 2, 2012).

the Rome Statute only furthered the confusion by defining an accessory as someone who “aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for commission.”<sup>103</sup> Conspiracy, another form of liability that was mentioned in Article 3(b) of the Convention,<sup>104</sup> is criminalized in the Charter of the International Military Tribunal along with participation in a common plan for the accomplishment of a crime.<sup>105</sup> In the end, the similar definitions of these forms of liability make it difficult to differentiate complicity from aiding and abetting.<sup>106</sup>

iii. *The elements of complicity and aiding and abetting are similar*

The similar elements of complicity and aiding and abetting also make the terms confusing. There are three requirements for complicity.<sup>107</sup> First, a crime must have been committed.<sup>108</sup> Second, one must have materially contributed to the commission of that crime.<sup>109</sup> Finally, the accomplices had to have an intention that the crime be committed or a reckless disregard for the potential of its commission.<sup>110</sup> To be found guilty of aiding and abetting, a person must first plan, instigate, order, commit, or otherwise aid and abet in the planning, preparation, or execution of a crime.<sup>111</sup> Additionally, the accused must know that his actions would assist the commission of the crime or be aware of the substantial likelihood that his acts would assist the perpetrator.<sup>112</sup> Both require an underlying crime, someone assisting the crime, and an awareness that one’s actions would help the crime or the perpetrator.<sup>113</sup> Altogether, the similar language used for the elements of these crimes has only made aiding and abetting and complicity more confusing.

F. *Attempts to Clarify the Standard for Complicity and Aiding and Abetting*

Previous scholarship set forward commendable theories to address and resolve the confusion surrounding the standard for complicity on the international stage. Nonetheless, despite the attempts by individuals and by the Court to clarify the standard, it remains unclear and problematic.

i. Previous scholarship

Scholars have previously attempted to clarify the difference between aiding and abetting and complicity.<sup>114</sup> One suggestion posits that the crime of aiding and abetting should require the specific intent to commit genocide or have the “specific intent specific motive nexus.”<sup>115</sup> Specific intent is the *mens rea* or the mental part of a crime, also

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<sup>103</sup> Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT’L L. 451, 465 (2012).

<sup>104</sup> Convention, *supra* note 4, at Art. III(b).

<sup>105</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6(a), signed August 8, 1945, 82 U.N.T.S. 280.

<sup>106</sup> *Compare Redefining International Criminal Law*, *supra* note 6, at 924-25, with Rwanda Tribunal Statute, *supra* note 12, at 7-8; S.C. Res. 955, Art. 6, at 955 (November 8, 1994).

<sup>107</sup> *Redefining International Criminal Law*, *supra* note 6, at 925-26.

<sup>108</sup> *Id.* at 925.

<sup>109</sup> *Id.* at 925-26.

<sup>110</sup> *Id.* at 926.

<sup>111</sup> See Rwanda Tribunal Statute, *supra* note 12, at 7-8; U.N. Security Council, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (May 25, 1993), <https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible> [hereinafter Yugoslavia Tribunal Statute] (last visited Dec. 7, 2022); Charles C. Jalloh, *Prosecutor v. Taylor*, 108 THE AMERICAN JOURNAL OF INT’L LAW 58, 60-61 (2014) (discussing the use of this standard in the Special Court for Sierra Leone).

<sup>112</sup> Jalloh, *supra* note 111, at 60-61.

<sup>113</sup> *Compare Redefining International Criminal Law*, *supra* note 6, at 925-26 with see Rwanda Tribunal Statute, *supra* note 12, at 7-8; Yugoslavia Tribunal Statute, *supra* note 111, at 7-8; Jalloh, *supra* note 111, at 60-61 (discussing the use of this standard in the Special Court for Sierra Leone).

<sup>114</sup> See *Redefining International Criminal Law*, *supra* note 6, at 924.

<sup>115</sup> See *Id.* at 924.

known as the *scienter* or criminal intent.<sup>116</sup> Those guilty of complicity under this theory would require a *mens rea* of “specific intent without specific motive,” meaning that malice and genocide were the foreseeable result of one’s actions.<sup>117</sup> Under this interpretation, aiding and abetting required intentionally committing genocide while conspiracy required one’s actions to foreseeably lead to genocide.<sup>118</sup>

Another proposed suggestion delineates the three types of *mens rea* as *dolus directus*, *dolus indirectus*, and *dolus eventualis*.<sup>119</sup> *Dolus directus* means the perpetrator foresaw and desired the consequences.<sup>120</sup> *Dolus indirectus* means the perpetrator foresaw the secondary or ultimate consequences.<sup>121</sup> The last, *dolus eventualis*, occurs when the perpetrator foresaw consequences other than those desired and still went ahead with the act.<sup>122</sup> Under this theory, *dolus directus* is the proposed *mens rea* required for genocide.<sup>123</sup> Thus, a court could convict a person if they were aware that their plan could result in unintended harm. Another suggestion is that the *mens rea* of knowledge should be all that is required to convict someone of genocide in certain situations.<sup>124</sup> These different theories have unsuccessfully attempted to clarify the standard for complicity, with confusion and applicability remaining present challenges in the courts.<sup>125</sup>

## ii. Clarification by the ICTR and ICTY

Adjudication in the ICTR and ICTY thus far confirms the need for distinguishing complicity from other crimes. *Prosecutor v. Akayesu* was the trial of Jean-Paul Akayesu, a participant in the Rwandan genocide who was later convicted of genocide, incitement to commit genocide, and numerous crimes against humanity.<sup>126</sup> The ICTR sentenced him to life in prison.<sup>127</sup> The Court in *Akayesu* attempted to differentiate between the *mens rea* required for aiding and abetting and the *mens rea* needed for complicity.<sup>128</sup> It held that aiding and abetting required specific intent which means the actor must intend the consequences of their action, but complicity had a lesser *mens rea* like malice.<sup>129</sup> However, the ICTY and ICTR each insist both aiding and abetting and complicity require a higher *mens rea* of intending to commit genocide.<sup>130</sup> The different approaches during trials have left the standard for complicity unclear.<sup>131</sup>

## G. A Comparison to American Criminal Law

Aiding and abetting and complicity are muddled in nation’s domestic laws, including the U.S., underscoring the confusing nature of these concepts.<sup>132</sup> The U.S. codified aiding and abetting in 18 U.S.C. § 2(a) by stating, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal or the person who committed the crime.”<sup>133</sup> This code is

<sup>116</sup> Wayne R. LaFave, 1 Subst. Crim. L. § 5.1 (3d ed. 2022).

<sup>117</sup> See *Redefining International Criminal Law*, *supra* note 6, at 924.

<sup>118</sup> *Id.*

<sup>119</sup> Johan D. Van der Vyver, *Prosecution and Punishment of The Crime of Genocide*, 23 FORDHAM INT’L L.J. 286, 306-09 (1999).

<sup>120</sup> *Id.* at 307.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 308.

<sup>124</sup> See Greenawalt, *supra* note 5, at 2259 (“principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions”).

<sup>125</sup> See *Redefining International Criminal Law*, *supra* note 6, at 924.

<sup>126</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, ¶ 123 (Int’l Crim. Trib. for Rwanda Jun. 1, 2001); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-S, Sentence, ¶ 13.

<sup>127</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-S, at ¶ 13 (Int’l Crim. Trib. for Rwanda Oct. 2, 1998).

<sup>128</sup> *Redefining International Criminal Law*, *supra* note 6, at 928.

<sup>129</sup> *Id.*

<sup>130</sup> See *Redefining International Criminal Law*, *supra* note 6, at 928; see Mysliwiec, *supra* note 22, at 392.

<sup>131</sup> See *Redefining International Criminal Law*, *supra* note 6, at 927.

<sup>132</sup> *E.g.* 18 U.S.C.A. § 2(a); 2 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 13.2(e) (Thomas Reuters ed., 3d ed. 2018).

<sup>133</sup> 18 U.S.C.A § 2(a).

supplemented by a common law doctrine.<sup>134</sup> To be guilty of aiding and abetting, the Supreme Court requires that the person in question, “in some sort associate[s] himself with the venture” and participated in it as in something that he wished to bring about, or make it succeed.<sup>135</sup> Judge Learned Hand of the Second Circuit adds that all words used “carry an implication of purposive attitude towards it.”<sup>136</sup> Therefore, individuals who provide knowing aid to people committing federal crimes in hopes of furthering that crime would be violating the law.<sup>137</sup> The Supreme Court also found that an accomplice is someone who took action with knowledge that they would promote or facilitate the commission of the crime.<sup>138</sup>

Complicity is another form of criminal liability, but it is confusing in American criminal law.<sup>139</sup> This may be because, similar to aiding and abetting, complicity is also covered by the same section of 18 U.S.C. § 2, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”<sup>140</sup> Colorado state law adds that complicity means a person is as legally accountable as a principal “for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.”<sup>141</sup> All things considered, in the United States, the elements of complicity are (1) intent to assist the principal and (2) intent regarding the target crime.<sup>142</sup>

Looking at aiding and abetting and complicity in the United States reveals the similarities. Both are forms of accessory liability that make one assisting a crime guilty for the offense itself. Complicity and aiding and abetting also both stem from the same section of a federal statute.<sup>143</sup> Even more, the definitions of complicity and aiding and abetting are confusingly similar in American criminal law. Aiding and abetting requires that one give knowing aid to people committing crimes.<sup>144</sup> Similarly, complicity requires that one aid, abet, advise, or encourage one committing an offense.<sup>145</sup> Because complicity and aiding and abetting are both forms of accessory liability and have similar definitions in American criminal law, it is not surprising that they are confusing.

In the U.S., the Model Penal Code attempts to clarify the *mens rea* of both aiding and abetting and complicity. The Model Penal Code identifies four different *mens rea* states: recklessness, knowledge, purpose, and negligence.<sup>146</sup> Recklessness is one “consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>147</sup> A person is reckless when they know something might occur as a result of their actions, but they proceed to act. Knowledge means one knows their conduct will cause a specific result.<sup>148</sup> Next, purpose is having a conscious object to engage in an offense or hoping circumstances of an offense exist.<sup>149</sup> Purpose occurs when one intends to commit a crime.<sup>150</sup> Finally, a person is negligent when they should be aware but grossly deviate from the standard of care of a reasonable person regarding a substantial and unjustifiable

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<sup>134</sup> Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (citing U. S. v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

<sup>135</sup> Peoni, 100 F.2d at 402; Nye & Nissen v. U.S., 336 U.S. 613, 619 (1949).

<sup>136</sup> Peoni, 100 F.2d at 402, aff’d 336 U.S. 613, 619 (1949).

<sup>137</sup> See Cent. Bank of Denver, N.A., 511 U.S. at 181 (1994) (citing Nye & Nissen, 336 U.S. at 619 (1949)).

<sup>138</sup> See Waddington v. Sarausad, 555 U.S. 179, 192 (2009).

<sup>139</sup> See Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135 (2015).

<sup>140</sup> 18 U.S.C.A. § 2(a); 1 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW § 10:14 (Thomas Reuters ed., 16th ed. 2023).

<sup>141</sup> Colo. Rev. Stat. Ann. § 18-1-603; People in Interest of B.D., 477 P.3d 143, 146 (Colo. 2020) (citing § 18-1-603).

<sup>142</sup> See Kinports, *supra* note 139, at 136.

<sup>143</sup> See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (citing Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)).

<sup>144</sup> Colo. Rev. Stat. Ann. § 18-1-603; People in Interest of B.D., 477 P.3d at 146.

<sup>145</sup> *Id.*

<sup>146</sup> Greenawalt, *supra* note 5, at 2267-68; MODEL PENAL CODE § 2.02(1) (Am. L. Inst. 2022).

<sup>147</sup> MODEL PENAL CODE § 2.02(2)(c) (Am. L. Inst. 2022).

<sup>148</sup> MODEL PENAL CODE § 2.02(2)(b)(i)-(ii) (Am. L. Inst. 2022).

<sup>149</sup> See MODEL PENAL CODE § 2.02(2)(a)(i)-(ii) (Am. L. Inst. 2022).

<sup>150</sup> Merrit v. Commonwealth of Virginia, 164 Va. 653, 662 (1935) (discussing how intent is “formed in a man’s mind, and is usually proved by his conduct, sometimes by his statements”).

risk.<sup>151</sup> There is common law that requires a purpose *mens rea* to find someone guilty of aiding and abetting;<sup>152</sup> in comparison, complicity requires purpose or knowledge.<sup>153</sup> This means that one is guilty of complicity when they know their conduct will lead to a specific result or intentionally aid a crime, but one is guilty of aiding and abetting only when they intend to help commit a crime. Overall, the Model Penal Code supplements the common law doctrines of conspiracy and aiding and abetting by attempting to clarify the differing *mens rea* requirements for these doctrines.

Despite these attempts to clarify conspiracy and aiding and abetting, the concepts remain unclear in American criminal law. Wharton's Criminal Law Treatise posits, "the common-law distinctions between principals and accessories have largely been abolished, although the pertinent statutes vary in form and substance."<sup>154</sup> There is still significant confusion regarding what an accomplice's mental state must be for him or her to be accountable for the offense of another.<sup>155</sup> One explanation is that the law is unclear regarding whether one should be guilty for a certain mental state, awareness of the principal's mental state, fault requirements for the offense committed, or a combination of these.<sup>156</sup> The definitions, elements and types of *mens rea* for conspiracy and aiding and abetting have evolved over time in American criminal law. Nevertheless, American criminal law reflects the confusing nature of these concepts.

#### H. An Italian Genocide Law Reflects the Confusion of Complicity

Several countries have codified the Rome Statute to corresponding national laws, but these laws also reflect the confusing nature of complicity.<sup>157</sup> For example, Italy enacted Law No. 962 in 1967 on the Prevention and Punishment of the Crime of Genocide. Similar to the Convention,<sup>158</sup> this statute declared that "[w]hoever, in order to destroy in whole or in part a national, ethnic, racial or religious group as such, commits acts aimed at causing serious personal injury to persons belonging to the group, is punished with imprisonment from ten to eighteen years."<sup>159</sup> On the topic of accessory liability it adds, "[i]f several people agree for the purpose of committing one of the crimes . . . and the crime is not committed, each of them is punishable, for the sole fact of the agreement, with imprisonment from one to six years."<sup>160</sup> Nevertheless, the law does not discuss complicity explicitly nor does it specify a *mens rea*.<sup>161</sup> Together, the laws provide that if one intends to or agrees to destroy a group and commits acts aimed at causing serious personal injury, it is illegal.<sup>162</sup> However, it is not clear whether aiming to cause serious personal injury requires a knowledge or purpose *mens rea*. It is not specified and, like international law, does not create a clear *mens rea* for complicity in genocide. As such, the Italian law indicates that even laws inspired by the Convention do little to clarify the standard for complicity.<sup>163</sup>

### III. LEGAL ANALYSIS

Given the danger of confusing aiding and abetting with complicity and providing an incorrect sentence, clarification from the ICC is necessary to ensure the Court can hold individuals responsible for complicity in

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<sup>151</sup> MODEL PENAL CODE § 2.02(2)(d) (Am. L. Inst. 2022).

<sup>152</sup> See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). *But see* Model Penal Code § 2.06(2) (Am. L. Inst. 2021) ("A person is legally accountable for the conduct of another person when: acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct").

<sup>153</sup> Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 140 (2015). *But see* *People in Interest of B.D.*, 477 P.3d 143, 146 (Colo. 2020).

<sup>154</sup> Ohlin, *supra* note 140, at § 10:7.

<sup>155</sup> See LAFAVE, *supra* note 134, at § 13.2(e); 18 U.S.C. § 2(a).

<sup>156</sup> *Id.*

<sup>157</sup> *Multinational Report: Crimes Against Humanity Statutes and Criminal Code Provisions*, LAW LIBRARY OF CONGRESS (April 2010), <https://tile.loc.gov/storage-services/service/l1/lglrd/2018298838/2018298838.pdf> (last visited Oct. 29, 2023).

<sup>158</sup> *Compare* Convention, *supra* note 4 with Legge 9 ottobre 1967, n.962, in G.U. Oct 30, 1967, n.272. (It.).

<sup>159</sup> Legge 9 ottobre 1967, n.962, in G.U. Oct 30, 1967, n.272. (It.).

<sup>160</sup> *Id.*

<sup>161</sup> *See generally id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See generally id.*

genocide. Moving forward, the ICC should utilize a recklessness standard of *mens rea* when trying complicity in genocide.<sup>164</sup>

#### A. *Confusion Regarding Complicity Is Dangerous*

Confusing complicity with aiding and abetting is unjust and problematic.<sup>165</sup> Aiding and abetting in genocide required the *mens rea* of committing genocide, whereas complicity has required that genocide is the foreseeable result of the actions of the perpetrator, the former requiring a higher standard of proof.<sup>166</sup> Because the ICC and ICTR initially discussed aiding and abetting as a separate crime from complicity, clarity is necessary.<sup>167</sup> If the ICC does not provide clarity, the *mens rea* will remain unclear and, like during the ICTR,<sup>168</sup> individuals and courts may misunderstand the two.

Misunderstanding aiding and abetting and complicity leads to unjust results. First, the current lack of clarity may mean judges are less likely to convict a perpetrator of complicity, and, this, thereby, weakens the Convention.<sup>169</sup> Jurors or judges might not understand that, as written, Article 6 of the ICTR Statute and Article 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“ICTY Statute”), which describes that aiding and abetting are ways that someone can be guilty of the crimes mentioned in Articles 2 through 4.<sup>170</sup> Nonetheless, complicity is a crime in itself in Article 2 of the ICTR Statute and Article 4 of the ICTY Statute.<sup>171</sup> If a judge or jury confuses the two, then the judge or jury may choose to acquit someone who has been complicit in genocide due to the confusion, which would be an unjust result.<sup>172</sup> A judge may also order a different sentence depending on whether he or she holds that one was complicit or aided and abetted.<sup>173</sup>

Further, confusing aiding and abetting and complicity is problematic for international criminal law. If jurors or judges are confused, it may permit perpetrators of complicity to remain unpunished.<sup>174</sup> This, in turn, leaves genocide unchecked and fails to protect the victims of these crimes because potential perpetrators *ex ante* are more likely to believe they may escape punishment and *ex post* are less likely to receive punishment.<sup>175</sup> This standard is unclear for potential perpetrators of genocide, but also for the system attempting to stop it. Individuals attempting to mitigate this crime cannot rely on a standard that is unclear. As a result, prosecutors would be less incentivized to bring complicity cases and may try fewer cases. Additionally, it may be more difficult for judges to decide complicity cases because an unclear standard is hard to apply. Altogether, the current state of complicity under international law is problematic and unjust.

#### B. *A Recklessness Standard Should Be Used for Complicity in Genocide*

The best option for the ICC is to use a recklessness standard for both complicity and aiding and abetting because it promotes justice and prevents confusion. To provide clarity, the ICC should create one standard that refers to all accomplice liability including aiding and abetting and complicity. Attempts have been made to rectify

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<sup>164</sup> Convention, *supra* note 4.

<sup>165</sup> See *Redefining International Criminal Law*, *supra* note 6, at 923–24; Michalowski, *supra* note 103, at 470 (explaining how aiding and abetting absolves commercial lenders from all complicity liability).

<sup>166</sup> See *Redefining International Criminal Law*, *supra* note 6, at 924; see generally Michalowski, *supra* note 103, at 459 (The Rome Statute also includes the *mens rea* of accessory, another type of accessory liability, as “requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”)

<sup>167</sup> See Mysliwicz, *supra* note 22, at 395; See Rwanda Tribunal Statute, *supra* note 12; Yugoslavia Tribunal Statute, *supra* note 111.

<sup>168</sup> See Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 394 (Int’l Crim. Trib. for Rwanda May 15, 2003).

<sup>169</sup> See *Redefining International Criminal Law*, *supra* note 6, at 925.

<sup>170</sup> Yugoslavia Tribunal Statute, *supra* note 111.

<sup>171</sup> See Rwanda Tribunal Statute, *supra* note 12; Yugoslavia Tribunal Statute, *supra* note 111.

<sup>172</sup> See *Redefining International Criminal Law*, *supra* note 6, at 925.

<sup>173</sup> How the Court Works, *supra* note 76.

<sup>174</sup> See *Redefining International Criminal Law*, *supra* note 6, at 925.

<sup>175</sup> *Id.*

the standard, but it remains confusing.<sup>176</sup> Trying to create a line between conspiracy and aiding and abetting has not worked and will not in the future, so one standard should be used.

Recklessness is the standard that is most appropriate. Those who believe that requiring intent places the bar too high are correct,<sup>177</sup> but knowledge is also too high a standard for accomplice liability cases of *genocide*. Genocide is different than other forms of accomplice liability and should be treated as such. When one has the purpose to commit genocide, he or she has the conscious objective to engage in genocide or to cause such a result or one believes, hopes, or is aware of circumstances of genocide.<sup>178</sup> One step down is knowledge. When an actor has knowledge of genocide, they know their conduct will cause such a result or is aware that their conduct is of a genocidal nature.<sup>179</sup> Following, an actor is reckless in cases of genocide when he or she consciously disregards a substantial and unjustifiable risk that the material element of genocide exists, or *genocide with the objective of destroying the group*<sup>180</sup> will result from his or her conduct.<sup>181</sup> Consciously disregarding a substantial and unjustifiable risk that genocide will result is not too low a bar. *Prosecutor v. Enver Hadžihasanović Amir Kubura* exemplifies this point.<sup>182</sup> Mr. Hadžihasanović was a senior officer in the Third Corps who stood trial for allegations of having ordered and exercised command over units that acted unlawfully against Bosnian Serbs and Bosnian Croats.<sup>183</sup> The ICC initially found that he failed to prevent crimes committed against non-Bosniaks in Central Bosnia.<sup>184</sup> However, the ICC found that to sustain a conviction, the prosecution would have to show that Hadžihasanović “had the material ability to prevent or punish the criminal conduct of its members,” which it failed to show.<sup>185</sup> Under a recklessness standard, one wonders if the Court would have decided differently and found he was reckless when it came to human life and consciously disregarded a substantial and unjustifiable risk that genocide was occurring.<sup>186</sup> This demonstrates that using a recklessness standard, a court could convict one for complicity if a person consciously disregards a risk that genocide is occurring.

Although using recklessness would make sections of text superfluous, this new standard would provide the needed clarity for courts moving forward. American criminal law is unclear about the *mens rea* required for complicity<sup>187</sup> and the Italian genocide law does not even address it.<sup>188</sup> If courts used the reckless standard, any State under universal jurisdiction<sup>189</sup> would be more likely to create cohesive precedent and statutes in countries like Italy would have clear standards to inspire their law. As international criminal law evolves, prohibiting reckless complicity in genocide in the next case before the ICC would be the most effective measure to clarify complicity and hold perpetrators accountable.

#### IV. CONCLUSION

The International Criminal Court has begun to investigate the Russian invasion of Ukraine.<sup>190</sup> Because Russia has used unauthorized forms of aggression, Russian force against Ukrainians on Ukrainian territory is

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<sup>176</sup> *E.g. Redefining International Criminal Law*, *supra* note 6, at 924.

<sup>177</sup> Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1, 10 (2014); Sarch, *supra* note 153, at 140.

<sup>178</sup> See MODEL PENAL CODE § 2.02(2)(a)(i)-(ii) (AM. L. INST. 2022).

<sup>179</sup> See *id.* at § 2.02(2)(b)(i)-(ii).

<sup>180</sup> Forty-Eighth Session, *supra* note 5, at 45; Greenawalt, *supra* note 5, at 2265 (Genocide here is not just a killing but requires the objective of destroying the group).

<sup>181</sup> See MODEL PENAL CODE, *supra* note 178, at § 2.02(2)(c).

<sup>182</sup> *Prosecutor v. Enver Hadžihasanović Amir Kubura*, Case No. IT-01-47-A, Judgement ¶ 231 (Int’l Crim. Trib. for the Former Yugoslavia April 22, 2008).

<sup>183</sup> *HADŽIHASANOVIĆ*, INTERNATIONAL JUSTICE RESOURCE CENTER, <https://ijrcenter.org/international-criminal-law/icty/case-summaries/hadzihasanovic/> (last visited Oct. 29, 2023).

<sup>184</sup> *Enver Hadžihasanović and Amir Kubura were sentenced today to 5 and 2 and a half years in prison, respectively*, VOICE OF AMERICA (March 15, 2006), <https://ba.voanews.com/a/a-29-2006-03-15-voa10-86112507/679078.html>.

<sup>185</sup> *Enver Hadžihasanović Amir Kubura*, *supra* note 182.

<sup>186</sup> See Model Penal Code § 2.02(2)(c) (Am. L. Inst. 2022).

<sup>187</sup> Sarch, *supra* note 153, at 140. *But see* *People in Interest of B.D.*, 477 P.3d 143, 146 (Colo. 2020).

<sup>188</sup> Italian Law 9 October 1967, n.962, PREVENT GENOCIDE INTERNATIONAL (May 27, 2000), <http://preventgenocide.org/it/legge.htm> (last visited Dec. 4, 2022).

<sup>189</sup> See Mysliwicz, *supra* note 22, at 394.

<sup>190</sup> Scheffer, *supra* note 1.

arguably illegal.<sup>191</sup> In addition, the Russian military has continued to commit a number of atrocity crimes, crimes which may have included war crimes, crimes against humanity, and genocide.<sup>192</sup> For example, the Russian military has aimed at civilian infrastructure including locations like apartment buildings, hospitals, factories, stores, churches, schools, and cultural sites.<sup>193</sup> Knowing that a strike will likely cause death or injury to civilians or damage to civilian structures and then proceeding to using disproportionate force against them is also a war crime.<sup>194</sup> Because of allegations of mass graves and bodies of civilians,<sup>195</sup> the ICC will also likely investigate crimes including genocide,<sup>196</sup> defined as killing, serious bodily or mental harm, or conditions of life that may bring about destruction,<sup>197</sup> with the objective of destroying the group.<sup>198</sup>

The Russian crimes and the tragedy in Ukraine invite the international community to revisit the Convention on the Prevention and Punishment of the Crime of Genocide and reflect particularly on Article III(e).<sup>199</sup> The lack of clarity regarding Article III(e)'s prohibition on complicity in genocide<sup>200</sup> has created challenges for courts attempting to interpret it.<sup>201</sup> Revisiting previous scholarship, looking at American law, and recognizing state laws like the Italian genocide law would likely prove useful in resolving the conflicting interpretations of complicity and aiding and abetting.

Moving forward, the next step is determining that recklessness is the *mens rea* for complicity in genocide. This step will provide the clarity needed to reduce genocide in the future and account for it in the past. A recklessness standard would clarify the *mens rea* for complicity, thereby preventing jury and judge confusion and potential unjust results. Thus, *ex post* individuals complicit in genocide would be held accountable. Also, a clear standard would help prevent genocide because *ex ante* potential perpetrators would be aware of the consequences of their actions. As a result, vulnerable individuals who may fall victim to perpetrators would be better protected in the future.

On the other hand, if the ICC does not utilize the reckless standard, the Court will continue excusing the actions of individuals who consciously disregard a substantial risk that genocide will result from their conduct.<sup>202</sup> Thus, to prevent genocide in the future and ensure this unjust result does not occur, a recklessness standard is necessary to address the confusion in Article III(e).<sup>203</sup> If this standard is applied in the future, jurors, judges, and all those working in international criminal law will have a clear and just standard to mitigate genocide.

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<sup>191</sup> *Id.* (“The primary charge against senior leaders of Nazi Germany at the Nuremberg trials and Japan at the Tokyo war crimes trials was “crimes against the peace,” meaning the initiation of a war of aggression.”).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (“The brutal discoveries in Bucha, where an estimated three hundred civilians were killed, and other cities recaptured by Ukrainian forces prompted U.S. President Joe Biden to call for a war crimes trial to impose accountability.”).

<sup>196</sup> Scheffer, *supra* note 1; *see generally* Convention, *supra* note 4 (holding that “The following acts shall be punishable” and includes “[c]omplicity in genocide”).

<sup>197</sup> *See* Convention, *supra* note 4; *see* Morris, *supra* note 4, at 18.

<sup>198</sup> Forty-Eighth Session, *supra* note 5, at 45; Greenawalt, *supra* note 5, at 2265.

<sup>199</sup> Scheffer, *supra* note 1.

<sup>200</sup> Convention, *supra* note 4.

<sup>201</sup> Mysliwicz, *supra* note 22, at 394.

<sup>202</sup> *See* Model Penal Code § 2.02(2)(c) (Am. L. Inst. 2022).

<sup>203</sup> Convention, *supra* note 4.