

2011

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Recommended Citation

Morrissey, James, "Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute" (2011). *Minnesota Journal of International Law*. 337.
<https://scholarship.law.umn.edu/mjil/337>

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Note

Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute

James Morrissey

I. INTRODUCTION

In 2001, the Presbyterian Church of Sudan and several individuals filed suit in United States Federal Court against Talisman Energy, Inc. (Talisman).¹ The plaintiffs alleged that Talisman was complicit in the Sudanese government's human rights abuses against largely non-Muslim Sudanese civilians living in the area of the company's oil concession.² The plaintiffs alleged that the Sudanese government orchestrated an armed campaign of murder, rape and massive civilian displacement in order to clear the way for oil exploration.³ On October 2, 2009, the U.S. Court of Appeals for the Second Circuit issued its opinion in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*⁴ Upholding the lower court's ruling of summary judgment in favor of defendant Talisman, the Second Circuit set a high bar for plaintiffs who seek to use the Alien Tort Statute (ATS) to

1. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 251 (2d Cir. 2009).

2. *See id.* at 248–51 (noting that civilians represented by plaintiff were living in areas of land proximate to Talisman's oil concession).

3. *See* David Glovin, *Talisman Court Upholds Genocide Suit Dismissal*, BLOOMBERG (Oct. 2, 2009, 14:20EDT), <http://www.bloomberg.com/apps/news?pid=20601082&sid=av47UyrplgEQ> (linking defendants' alleged human rights violations to oil exploration); BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Case Profile: Talisman Lawsuit (re Sudan)*, <http://www.business-humanrights.org/Categories/Lawlawsuits/LLawsuitsregulatoryactio/LawsuitsSelectedLaws/TalismanlawsuitreSudan> (last visited Jan. 12, 2010) (listing alleged human rights violations of Talisman).

4. *Talisman*, 582 F.3d at 244.

hold foreign defendants accountable for aiding and abetting violations of international law.⁵ The court determined that Talisman could not be held liable for aiding and abetting violations of international law committed by the Sudanese government unless the plaintiffs could prove that Talisman purposefully aided the government's alleged human rights violations.⁶

The pivotal issue in this case was determining the appropriate mens rea standard for aiding and abetting liability under customary international law, and therefore in ATS cases.⁷ The court's holding on this issue is particularly important because of the increasing use of the ATS as a means to bring civil actions against corporate defendants alleging that they have committed violations of international law in foreign nations.⁸

This Comment seeks to show that the Second Circuit incorrectly determined that aiding and abetting under customary international law requires a mens rea of purpose when, in fact, international law dictates that the requisite mens rea standard is knowledge. Part I explains the events that precipitated the plaintiffs' cause of action in Talisman and examines relevant sources of customary international law. Part II details the Second Circuit's decision and reasoning in Talisman. Finally, Part III analyzes relevant sources of international law and determines that customary international law dictates a mens rea standard of knowledge for aiding and abetting liability.

5. *See id.* at 247–48, 259.

6. *Id.* at 247–48.

7. *Cf. id.* at 256–60 (evaluating the mens rea standard for aiding and abetting in criminal liability and applying this analysis to international law norms).

8. *See generally id.* at 254–255 (noting that the ATS provided jurisdiction just once in the 170 years after its enactment, but has been used increasingly in recent decades).

II. BACKGROUND

A. FACTUAL BACKGROUND OF *PRESBYTERIAN CHURCH OF SUDAN* *V. TALISMAN ENERGY, INC.*

1. Conflict in the Sudan

The seeds of the turmoil in the Sudan—which ultimately led to the plaintiffs' claims in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*—were sown in 1956 when Sudan obtained its independence from Britain and Egypt.⁹ Almost immediately after achieving independence, civil war erupted between the Arab-dominated government based in the north and the non-Muslim African population of the south.¹⁰ In 1972, the two sides made a deal to apportion control and a period of relative peace ensued.¹¹ However, this peace was shattered in 1983 when hostilities erupted anew between the government and a southern rebel group named the Sudan People's Liberation Army (SPLA).¹² In 1991, the SPLA splintered into rival sects and fought the government as well as each other.¹³ Although the government and several of the southern rebel groups were able to broker a peace agreement in 1997, by the end of 2000 this agreement had collapsed and conflict resumed.¹⁴ It is beyond question that during the course of Talisman's work in Sudan, the amount of violence in southern Sudan substantially increased.¹⁵

2. Oil Development in the Sudan

In 1979, the petroleum company Chevron discovered a significant quantity of oil in southern Sudan.¹⁶ In order to develop this lucrative resource, the Sudanese government

9. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 248 (2d Cir. 2009).

10. *Talisman*, 582 F.3d at 248; see also *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman I)*, 453 F.Supp.2d 633, 643 (S.D.N.Y. 2006) (explaining in greater detail the civil wars after Sudan gained independence from Egypt), *aff'd* 582 F.3d 244 (2d Cir. 2009).

11. *Talisman*, 582 F.3d at 248.

12. See *Talisman I*, 453 F.Supp.2d at 643.

13. *Id.*

14. *Id.*

15. *Id.*

16. See *Talisman*, 582 F.3d at 248.

granted rights to several foreign companies to develop six “blocks” of territory.¹⁷ By 1996, four oil companies formed a consortium that conducted business through a corporation called the Greater Nile Petroleum Operating Company Limited (GNPOC).¹⁸ In 1998, Talisman, a Canadian oil exploration company, purchased one of these companies, Arakis Energy Corporation (Arakis), thus acquiring a 25% stake in GNPOC.¹⁹ However, before beginning operations in Sudan, the head of security for Arakis advised Talisman that its involvement would tip the military power balance in favor of the government.²⁰

3. *Security Arrangements for GNPOC*

From 1999 to 2003 the government military forces in Sudan coordinated with GNOPC to provide security for the concession area.²¹ Examples of GNOPC and government collaborative efforts in the concession area included: the construction of roads linking the concession areas to military bases,²² GNOPC allowing the military to open garrisons within the concession,²³ and GNOPC upgrading two airstrips on the concession named Heglig and Unity.²⁴ The military subsequently began using the Heglig airstrip as a “staging area”²⁵ for combat operations in the surrounding territory, including offensive helicopter and bomber attacks against civilians.²⁶ Furthermore, GNPOC personnel at both airports refueled military aircrafts, sometimes with

17. *Id.*; see also *Talisman I*, 453 F.Supp.2d at 643 (explaining in greater detail Sudan’s process for granting development rights on the territory in question).

18. See *Talisman*, 582 F.3d at 248.

19. *Id.* at 248–49. See generally *Talisman I*, 453 F.Supp.2d at 647 (providing relevant background information regarding the Talisman corporation).

20. *Talisman*, 582 F.3d at 249. The head of security for Arakis “advised Talisman that the oil fields were protected both by the military and by Government-sponsored militias” and “opined that, though Talisman’s assistance would greatly advance oil exploration, it would tip the military balance in favor of the Government.”) See *id.*

21. *Talisman I*, 453 F.Supp.2d at 649.

22. *Talisman*, 582 F.3d at 249.

23. *Talisman I*, 453 F.Supp.2d at 650 (noting further that when a garrison was constructed, local police forces were used and villages were abolished).

24. *Talisman*, 582 F.3d at 249–50.

25. *Talisman I*, 453 F.Supp.2d at 652.

26. See *Talisman*, 582 F.3d at 249–50 (noting that the airstrips were used by the government for offensive attacks in the area); see also *Talisman I*, 453 F.Supp.2d at 652 (stating that helicopters and bombers that refueled at Heglig were used by the government in civilian attacks).

GNPOC's own fuel.²⁷ In February of 2001, Talisman's CEO, Jim Buckee, wrote to the Sudanese Minister of National Defense warning that the bombings being staged from the airstrips were "universally construed as violations of international humanitarian law" but later withdrew his objection to the government's use of the airstrips after a missile attack on a GNPOC facility.²⁸

To further secure the oil field operations, the military created a "buffer zone" around GNPOC facilities by clearing key areas of civilian populations.²⁹ In order to create this buffer zone, the military "forced people to leave villages by attacking the villages with any means necessary, including small arms fire, artillery, helicopter gunships and bombers."³⁰ Additionally, the former chief of military intelligence for the Sudan People's Defense Force testified that the military "routinely attacked undefended civilian villages in the GNPOC oil concession to clear the area for oil exploration."³¹ Internal Talisman reports contain evidence that they were aware of these forced displacements.³²

In response to these forced displacements, those affected sought to hold Talisman accountable. The plaintiffs in Talisman are current and former residents of southern Sudan who claim that they were victims of human rights abuses resulting from these government attacks to secure the oil fields.³³ They brought suit against Talisman under the ATS,³⁴ alleging that Talisman aided and abetted the government in the perpetration of those abuses.³⁵

27. *Talisman*, 582 F.3d at 249–50.

28. *Id.* at 250 (stating that Buckee dropped his objections to the presence of military helicopter gunships at Heglig).

29. *Talisman I*, 453 F.Supp.2d at 650.

30. *Id.*

31. *Id.* (noting that the former chief of military intelligence for the Sudan People's Defense Force was also the former chief of military intelligence for the Southern Sudanese Defense Force).

32. *See Talisman*, 582 F.3d at 250 (noting a 2002 report by a Talisman subsidiary concerning the buffer zone that stated "[t]he area within the security ring road while not a sterile area as found on security operations elsewhere . . . is moving in that direction.").

33. *Id.* at 251.

34. *See id.* at 247. *See generally* Alien Tort Statute, 28 U.S.C. § 1350 (2006).

35. *Talisman*, 582 F.3d at 247–48 (noting that plaintiffs allege that Talisman aided and abetted or conspired with the government with respect to human rights abuses).

B. HOLDING CORPORATIONS LIABLE FOR AIDING AND ABETTING VIOLATIONS OF INTERNATIONAL LAW UNDER THE ATS

The First Congress of the United States enacted the ATS as part of the Judiciary Act in 1789.³⁶ The text of the ATS states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁷ However, this statute “quickly lapsed into desuetude.”³⁸ In fact, for over 170 years after its enactment it only provided jurisdiction in one case.³⁹

1. The Supreme Court’s Decision in *Sosa v. Alvarez-Machain*

The only time that the Supreme Court has construed the meaning of the ATS is in the case *Sosa v. Alvarez-Machain*.⁴⁰ In *Sosa*, a Mexican national brought a claim under the ATS against the United States and another Mexican national, Alvarez-Machain (Alvarez).⁴¹ The plaintiff alleged that Alvarez, in conjunction with the Drug Enforcement Agency (DEA), unlawfully abducted him from Mexico and transported him to the United States to stand trial for his alleged participation in the torture and murder of a DEA agent.⁴²

In determining the intention of the First Congress when it enacted the ATS, the Court looked to the historical context of the statute.⁴³ The Court surmised that the inability of the Continental Congress to “cause infractions of treaties or of the law of nations to be punished” was the primary impetus for the ATS.⁴⁴ Ultimately, the Court determined that the drafters

36. William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Tort Committed In Violation of the Law of Nations*, 18 CONN. L. REV. 467, 467 (1986).

37. 28 U.S.C. § 1350.

38. Casto, *supra* note 36, at 468.

39. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

40. *Talisman*, 582 F.3d at 255.

41. *See Sosa*, 542 U.S. at 697–698 (noting that the plaintiff brought suit against another Mexican national, five Mexican civilians, four Drug Enforcement Agency personnel and the United States).

42. *Id.*

43. *See id.* at 714–720 (discussing relevant historical happenings in foreign and domestic affairs prior to the enactment of the ATS).

44. *Id.* at 716–717 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)) (“[T]his class of cases was intensified by the so called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia.”).

understood the ATS to give federal courts jurisdiction over three types of offenses against the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."⁴⁵ However, the Court was open to the possibility of new causes of actions based on the "present day law of nations," so long as the claim is based on "a norm of international character accepted by the civilized world and defined with a specificity comparable [to the three causes of actions enumerated above]."⁴⁶ Ultimately, the Court concluded that "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."⁴⁷

2. *Khulumani v. Barclay National Bank Ltd.*⁴⁸

Although the Supreme Court's decision in *Sosa* made it clear that federal courts have authority to recognize causes of action based on modern interpretation of customary international law, the Court's decision offered little guidance as to whether a defendant could be held liable for aiding and abetting under the ATS.⁴⁹ Another significant issue left unresolved by the Court in *Sosa* was whether customary international law or federal common law provided the appropriate mens rea standard for aiding and abetting.⁵⁰ In *Khulumani v. Barclay National Bank Ltd.*, the Second Circuit attempted to resolve this very issue.⁵¹ The plaintiffs in *Khulumani* brought claims under the ATS against approximately fifty corporate defendants and hundreds of corporate "Does" alleging that the defendants collaborated with the government of South Africa in order to maintain the apartheid system.⁵²

The Second Circuit found in a per curium opinion that a corporation can be sued under the ATS based on a theory of aiding and abetting, and therefore denied the corporate

45. *Id.* at 724.

46. *Id.* at 725 (alteration in original).

47. *Sosa*, 542 U.S. at 729.

48. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

49. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring).

50. *Id.* ("*Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international represents the proper source from which to derive a standard of aiding and abetting liability under the [ATS].").

51. *Khulumani*, 504 F.3d at 275-77 (Katzmann, J., concurring).

52. *Id.* at 258 (per curium).

defendant's motion for summary judgment.⁵³ However, the panel split on which body of law, federal common law or customary international law, governs the standard for aiding and abetting.⁵⁴ Two of the circuit judges found that international law provided the standard for the scope of aiding and abetting liability,⁵⁵ while one judge determined that domestic aiding and abetting laws should apply.⁵⁶ In his concurring opinion, Judge Katzmann surveyed various sources of customary international law and concluded that there is "no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize imposition of such liability on a party who acts with the purpose of facilitating that violation."⁵⁷

Ultimately, a majority of the circuit panel in *Khulumani* supported the conclusions that: (1) the appropriate source of an aiding and abetting standard under the ATS is customary international law and (2) in order to be liable for aiding and abetting a violation of international law, it is necessary for a defendant to purposefully facilitate the commission of the crime.⁵⁸

C. CUSTOMARY INTERNATIONAL LAW AND ITS SOURCES

When the Supreme Court stated that a claim brought under the ATS must be based on a "norm of international character accepted by the civilized world and defined with a specificity comparable to the [18th century paradigms recognized by the Court in *Sosa*]," it was referring to customary international law.⁵⁹ Customary international law is law that "results from a general and consistent practice of States followed by them from

53. *Khulumani*, 504 F.3d at 260. See also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 320 (2008).

54. See Cassel, *supra* note 53, at 320–21 (explaining the schism between the circuit judges).

55. See *Khulumani*, 504 F.3d at 269 (Katzman, J., concurring); *id.* at 330 (Korman, J., concurring in part and dissenting in part).

56. *Id.* at 284 (Hall, J., concurring).

57. *Id.* at 277 (Katzman, J., concurring).

58. *Id.*

59. *Id.* at 267. See also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 (2d Cir. 2009) ("[W]e look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practices of States.") (quoting *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003)).

a sense of legal obligation.”⁶⁰ State practice can take many forms, including “treaties and executive agreements, decisions of international and national courts and tribunals and decisions, declarations and resolutions of international organizations.”⁶¹ Likewise, Article 38 of the Statute of the International Court of Justice articulates several sources of customary international law a court should consider in determining what constitutes international law.⁶² These sources of law are:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilized nations;

subject to the provisions of Article 59, judicial decision and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.⁶³

Therefore, in order to determine the appropriate mens rea standard for aiding and abetting, it is necessary to examine these sources of international law.⁶⁴

D. SOURCES OF CUSTOMARY INTERNATIONAL LAW REGARDING AIDING AND ABETTING LIABILITY

1. *International Tribunals*

a. Post World War II Trials at Nuremburg

Following World War II, the Allies established the International Military Tribunal at Nuremburg (Nuremburg Tribunal) and similar tribunals to hold those individuals responsible for violations of international law accountable.⁶⁵

60. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS PROCESS: A PROBLEM-ORIENTED APPROACH 78 (2d ed. 2006) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES).

61. *Id.* at 79.

62. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060.

63. *Id.*

64. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (citing *United States v. Smith*, 18 U.S. 153, 160–61 (1820)).

65. Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of*

The charter of the Nuremburg Tribunal was heralded as an authoritative statement of international law and the United Nations General Assembly later affirmed the principles of the charter and judgments of the Nuremburg Tribunal as definitive expressions of customary international law.⁶⁶

In addition to recognizing individual responsibility for complicity in war crimes,⁶⁷ Allied prosecutors also sought to hold corporate executives liable for their role as accomplices.⁶⁸ The most notable of these cases was the Zyklon B case in which German industrialists were held accountable as accomplices for selling insecticide used to kill prisoners held in concentration camps.⁶⁹ The Nuremburg Tribunal thus established the first notion that corporate officers could be held liable for the actions of the corporation as an accomplice to violations of international law and the appropriate standard for assessing guilt for such a crime.⁷⁰

b. The ICTY and ICTR

Following World War II there were few opportunities for an international tribunal to develop customary law regarding aiding and abetting liability.⁷¹ However, this changed when the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷² and the International Criminal Tribunal for Rwanda (ICTR)⁷³ in the early 1990s to address the serious violations of international law which occurred in these States. The tribunals' statutory provisions intended to "codify existing norms of customary

Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity, 56 A.F. L. REV. 167, 169–70 (2005).

66. *Id.* at 170.

67. See 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 572–73 (1949).

68. Jacobson, *supra* note 65, at 174–75.

69. Cassel, *supra* note 53, at 308.

70. See *id.* at 306–07.

71. Jacobson, *supra* note 65, at 200. See also Paul Mysliwiec, Comment, *Accomplice to Genocide Liability: The Case for a Purpose Mens Rea Standard*, 10 CHI. J. INT'L L. 389, 392 (2009) (describing how there were almost no prosecutions for genocide from the passage of the Genocide convention to the founding of the ICTY and ICTR).

72. U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 36, U.N. Doc. S/25704 (May 3, 1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (1993).

73. S.C. Res. 955, annex, U.N. Doc. S/RES/955 (Nov. 8, 1994).

international law” while the tribunals’ jurisdiction limited it to just enforcing these norms.⁷⁴ Both the ICTY and ICTR ascribe criminal liability for anyone who “aided and abetted in the planning, preparation or execution” of genocide, war crimes, or crimes against humanity.⁷⁵ Furthermore, both the ICTY and ICTR have produced decisions regarding the appropriate mens rea standard for aiding and abetting.⁷⁶

2. *International Instruments: The ILC Draft Code and the Rome Statute of the International Criminal Court*

The United Nations created the International Law Commission (ILC) in 1947 for the “promotion of the progressive development of international law and its codification.”⁷⁷ The members of the ILC are persons of “recognized competence in international law.”⁷⁸ In the 1996 Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code), the ILC clarifies what the international law standards are for “crimes under international law and punishable as such.”⁷⁹

The ICTY and ICTR were precursors to the International Criminal Court (ICC) created by the Rome Statute.⁸⁰ The

74. Cassel, *supra* note 53, at 307 (quoting The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993)). See also YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 3 (2004) (“[T]he ICTY and the ICTR have to apply the customary rules of international humanitarian law as far as the substantive law of the International Tribunal (in particular, the rules governing war crimes, the crime of genocide and crimes against humanity) are concerned.”).

75. *Id.* (citing U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, art.7.1, U.N. Doc. S/25704 (May 3, 1993); S.C. Res. 955, *supra* note 73, art. 7.1.)

76. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶236-49 (Dec.10, 1998), <http://www.unhcr.org/refworld/pdfid/40276a8a4.pdf>; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001.pdf>.

77. Statute of the International Law Commission, art. 1 (Nov. 21, 1947), http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf.

78. *Id.* at art. 2, ¶ 1.

79. Draft Code of Crimes Against the Peace and Security of Mankind, art. 1, ¶2 (1996), [hereinafter Draft Code], http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf.

80. United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 [Rome Statute].

purpose of the ICC is to ensure that “the most serious crimes of concern to the international community as a whole . . . not go unpunished.”⁸¹ The jurisdiction of the ICC is complementary to national courts. As such, it only has jurisdiction over a matter when “national justice systems are unwilling or unable to do so.”⁸² The Rome Statute specifically prescribes criminal responsibility for an individual who aids or abets a war crime, crime against humanity, or genocide.⁸³

3. *State Practice*

As discussed above, the general principals of law “recognized by civilized nations” play a crucial role in the formation of customary international law.⁸⁴ In order to determine the proper mens rea standard for aiding and abetting under international law, it is helpful to assess the practice of other States, especially those which ascribe aiding and abetting liability for violations of international law. This Comment will examine the practices of several States infra part III(D).

III. THE SECOND CIRCUIT DECISION IN PRESBYTERIAN CHURCH OF SUDAN V. TALISMAN ENERGY, INC.

In *Talisman*, the Second Circuit analyzed the various sources of customary international law discussed above in order to determine the appropriate mens rea standard for aiding and abetting liability.⁸⁵ According to the Second Circuit, the “decisive issue” was whether liability for aiding and abetting human rights violations “can be imposed absent a showing of purpose” under customary law and, hence, an action brought under the ATS.⁸⁶

The Second Circuit’s analysis of the appropriate mens rea standard relied primarily on the concurring opinion of Judge Katzmman in *Khulumani*.⁸⁷ The court quotes Judge Katzmman’s

81. *Id.* at Preamble.

82. Cassel, *supra* note 53, at 316 (citing Rome Statute, *supra* note 80 art. 17).

83. Rome Statute, *supra* note 80, at art. 25.

84. *See* Rome Statute, *supra* note 80, at art. 38.

85. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009) (finding that the Court’s decision in *Sosa* establishes the “principle that the scope of liability for ATS violations should be derived from international law”).

86. *Id.* at 255.

87. *Id.* at 255.

statement that his research revealed no source of international law that would not impose liability for a mens rea of purposeful assistance.⁸⁸ In reliance on Judge Katzmman's opinion, the Court observed that "the purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard,"⁸⁹ and ultimately, concluded that "the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge."⁹⁰

After deciding that the proper mens rea standard for aiding and abetting is purpose, the court applied this standard to the facts of the case.⁹¹ First, the court held that "[e]ven if Talisman built roads or improved the airstrips with the intention that the military would also be accommodated," the evidence of such coordination with the military "supports no inference of a purpose to aid atrocities."⁹² Second, the court held that the plaintiffs did not allege the forced displacement of populations to be a violation of international law.⁹³ The court further noted that such displacements may not constitute a violation of international law "because a government has power to regulate use of land and resources."⁹⁴

Furthermore, the court noted that it is "not enough for plaintiffs to establish Talisman's complicity in depopulating areas . . . plaintiffs must establish that Talisman acted with the purpose [of assisting] the Government's violations of customary international law."⁹⁵ Thus, because the court found that Talisman did not purposefully aid the government in the perpetration of crimes against humanity, it affirmed the district

88. *Id.* at 258.

89. *Id.* at 259 (citing *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring)). The Court explains "sporadic forays" by noting that "some international criminal tribunals have made overtures toward a knowledge standard" but the Rome Statute of the International Criminal Court adopts a purpose standard. *Id.*

90. *Id.* at 259.

91. *Id.* at 260-64.

92. *Id.* at 262. *See also id.* ("Talisman helped build all-weather roads and improved airports, notwithstanding awareness that this infrastructure might be used for attacks on civilians.").

93. *Id.* at 263. ("Plaintiffs . . . do not allege that such displacement in itself is a violation of international law.")

94. *Id.* Earlier in the opinion, however, the court accepts a definition of crimes against humanity as: "murder, enslavement, *deportation or forced transfer*, torture, rape or other inhumane acts, committed as part of a widespread [or] systematic attack directed against civilian populations." *Id.* at 257 (emphasis added) (quoting *Talisman I*, 453 F.Supp.2d at 670).

95. *Id.* at 263.

court's grant of summary judgment in favor of Talisman.⁹⁶

IV. ANALYSIS

A. INTERNATIONAL CRIMINAL LAW PROVIDES THE BASIS FOR DETERMINING INTERNATIONAL CUSTOMARY LAW FOR THE PURPOSES OF CIVIL PROCEEDINGS UNDER THE ATS

When ascertaining the scope of liability for a corporate defendant in a civil claim brought pursuant to the ATS, it is appropriate for courts to derive the applicable liability standard from international criminal law.⁹⁷ ATS case law does not support the proposition that sources of international criminal law must be ignored for purposes of establishing civil liability under the ATS.⁹⁸ To the contrary, several cases specifically look to international criminal norms to ascertain the scope of civil liability.⁹⁹ Furthermore, in international law there is not a “hermetic seal” between criminal and civil law.¹⁰⁰ Justice Breyer noted this fact in his concurring opinion in the *Sosa* case when he stated that “the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.”¹⁰¹ Additionally, because

96. *Id.* at 247–48.

97. *Compare* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 268–269 (Katzmann, J., concurring) (defining scope of liability under ATS by reference international law, rather than federal common law) *with id.* at 286 (Hall, J., concurring) (using federal common law to define ATS liability).

98. *See* *Khulumani*, 504 F.3d at 270 n.5 (criticizing the holding of the lower court that international criminal law was not a proper source for determining a civil standard under the ATS).

99. *See id.*; *see also* *Kadic v. Karadzic*, 70 F.3d 232, 241–243 (2d Cir. 1995) (relying upon a United Nations Declaration and other instruments stating that genocide was a crime under international law. The court also relies on the Nuremberg trials to establish individual liability for war crimes, notwithstanding that the Nuremberg trials were criminal proceedings); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–883 (2d Cir. 1980) (analyzing the Declaration on the Protection of All Persons from Being Subject to Torture, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034, at 91 (December 9, 1975), which requires states to initiate criminal proceedings if it appears that torture has been committed, in a case brought under the ATS).

100. *Khulumani*, 504 F.3d at 270 n.5. *See also* *Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002) (“International human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings.”), *vacated* 395 F.3d 978, *appeal dismissed per stipulation*, 403 F.3d 708.

101. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762–63 (Breyer, J., concurring).

customary international law is typically enforced through domestic legal regimes, it is the prerogative of the national legal system to decide whether to enforce this law “through criminal prosecutions, civil liability, or administrative remedies.”¹⁰² Therefore, customary international law norms of criminal law provide the appropriate basis upon which to base a standard for determining civil liability under the ATS.

B. DECISIONS OF INTERNATIONAL TRIBUNALS REGARDING AIDING AND ABETTING LIABILITY

1. *Nuremburg Trials*

In *Talisman*, the Second Circuit stated that “international law at the time of the Nuremburg trials recognized aiding and abetting liability only for purposeful conduct.”¹⁰³ However, this assertion is patently erroneous. In fact, the standard established in the cases prosecuting German war criminals at Nuremburg clearly establish, in aggregate, that liability for war crimes and genocide can result from “knowingly providing substantial assistance in the commission of these crimes.”¹⁰⁴ Moreover, this knowledge test was not merely limited to military defendants.¹⁰⁵

102. Brief of Amicus Curiae International Human Rights Organizations and Bar Associations in Support of Plaintiffs-Appellants at 23, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2141-cv) [hereinafter Brief Amicus Curiae International Rights Organizations] (citing Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002)). See also Brief Amicus Curiae of International Law Scholars Philip Alston et al. in Support of Appellants at 1-2, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2141-cv) [hereinafter Brief Amicus Curiae of International Law Scholars] (stating that “[i]nternational legal norms do not specify the means of their domestic enforcement . . . the cause of action under the [ATS] is a creature of the common law, not the law of nations *per se*.”).

103. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (citing *The Ministries Cases*). See *United States v. von Weizsaecker (The Ministries Cases)*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 622 (1949) (“[I]s it a crime to make a loan, knowing or having good reason to believe that the borrower will use [sic] the funds in financing enterprises which are employed in using labor in violation of . . . international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? . . . [W]e are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.”).

104. Brief Amicus Curiae of International Law Scholars, *supra* note 102, at 17.

105. See *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 LAW

The Nuremberg Tribunal clearly accepted a knowledge standard for corporate officers tried for their actions aiding the Nazis. This fact is demonstrated by three cases. First, in the trial against German industrialists who were in charge of the I.G. Farben chemical company, the Nuremberg Tribunal unambiguously adopted a knowledge standard.¹⁰⁶ In this case, the defendants were indicted on multiple charges, including crimes against peace, plunder of private property and crimes against humanity for their role in rearming the German army.¹⁰⁷ For both of these counts the Nuremberg Tribunal used personal knowledge as the touchstone in determining the liability of the defendants.¹⁰⁸ Although the Nuremberg Tribunal found that the defendants did not have sufficient knowledge of the German war plans to ascribe liability for crimes against peace,¹⁰⁹ it found that individuals in the company had knowingly participated in acts of plunder and spoliation.¹¹⁰ The

REPORTS OF TRIALS OF WAR CRIMINALS 101 (1947) (“The essential question was whether the accused knew of the purpose to which their gas was being put Prosecuting Counsel . . . concluded that, by supplying gas, knowing that it was to be used for murder, [the owner of the gas-supplying firm, his second in command, and the first gassing technician] had made themselves accessories before the fact to that murder.”).

106. Trial of Carl Krauch and Twenty Two Others (The I.G. Farben Trial), 10 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 52 (1948) (“[O]ne may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime.”)

107. See Jacobson, *supra* note 65, at 178–86.

108. See *id.* at 183 (“To be convicted, the corporate official that authorized an illegal action had to know those essential elements of the authorized act which give it its criminal character . . . this means positive knowledge that the owner is being deprived of his property against his will during military occupancy.”) (citation omitted); *id.* at 179; The I.G. Farben Trial, 10 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 36 (1948) (“[P]articipation in the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war.”) But see The I.G. Farben Trial, 10 Law Reports of Trials of War Criminals 44 (defining civilian plunderers under a military occupation as principals, not accessories, to a violation of international law) (“Where private individuals . . . exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law.”)

109. See The I.G. Farben Trial, 10 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 36–37 (1948) (“If we were trying military experts, and it was shown that they had knowledge of the extent of rearmament, such a conclusion might be justified.”); see also Jacobson, *supra* note 65 at 183.

110. See Jacobson, *supra* note 65 at 183.

Nuremburg Tribunal unequivocally stated that the basis of liability for aiding and abetting actions of the principal was knowledge that their actions furthered the atrocities that were committed when it stated that the acts of “Farben and its representatives . . . cannot be differentiated from the acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.”¹¹¹

Second, in *United States v. Flick*, commonly known as The Flick Case,¹¹² two German industrialists were charged with aiding the activities of the SS through monetary contributions to Himmler.¹¹³ The Nuremburg Tribunal, after first affirming the criminal character of the SS in light of its responsibility for atrocities, held that “[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”¹¹⁴ Thus, the Nuremburg Tribunal recognized aiding and abetting liability for merely contributing funds to an organization which the defendants knew was committing violations of settled international law.¹¹⁵

The Nuremburg Tribunal’s reasoning in the Zyklon B case is especially important in the context of ATS litigation, where a corporation is almost always the defendant.¹¹⁶ The Zyklon B

111. The I.G. Farben Trial, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 50 (1948).

112. *United States v. Flick (The Flick Case)*, 6 TRIAL OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1 (1952).

113. *Id.* at 1216, 1218–20.

114. *Id.* at 1217. The Nuremburg Tribunal then explained that “there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the SS they could not be liable because there had been no statute nor judgment declaring SS a criminal organization and incriminated those who were members or in other manner contributed to its support.” *Id.* at 1217. The defendants argued that they were not aware of such activities and that they believed that the funds they contributed to Himmler were used only to fund his “cultural hobbies.” *Id.* at 1219. Nevertheless, the Nuremburg Tribunal finds that the criminal character of the SS “must have been known.” *Id.* at 1220.

115. *See id.* at 1216–17, 1218–19.

116. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002), *vacated* 395 F.3d 978, *appeal dismissed per stipulation*, 403 F.3d 708; *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000). *But see* *Kiobel v. Royal Dutch Petroleum Co.*, No. 06–4800–cv, 2010 WL 3611392 (2d Cir. Sept., 17, 2010) (holding that corporations are *not liable* under the ATS)

case illustrates the inherent problem of using a purpose standard when assessing liability for defendants whose ultimate aim is profit, but this profit is pursued by aiding severe human rights abuses. In this case, the owner and two employees of a company that produced Zyklon B gas were charged with war crimes for supplying the poisonous gas which was used in the mass execution of people in concentration camps.¹¹⁷ The prosecution:

did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS . . . The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.¹¹⁸

The fact that two of the defendants in the Zyklon B case were ultimately convicted based on their knowledge of how of the gas was to be used is unequivocal evidence that the Nuremberg Tribunal accepted knowledge as an appropriate basis upon which aiding and abetting liability could be ascribed.¹¹⁹

Unfortunately, these cases are wholly overlooked by the Second Circuit in its *Talisman* decision despite the factual similarity of these cases and *Talisman*. For instance, it is arguable that allowing the government to use the corporation's airports as rally points in the orchestration of armed attacks against civilians and providing other support for such activities¹²⁰ is analogous to providing gas for use on prisoners in concentration camps or supporting an organization that is known to commit atrocities through monetary contributions. Additionally, as the reasoning of the Nuremberg Tribunal in *Zyklon B* seems to suggest, the use of a purpose mens rea standard for corporate defendants is unworkable because the ostensible purpose of a business will almost always be the pursuit of profits and not to aid the government in the

117. See Jacobson, *supra* note 65, at 193–96.

118. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 238 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *aff'd*, Case No. IT-95-17/1-A (July 21, 2001) (asserting without citation).

119. See Jacobson, *supra* note 65, at 195. *Contra id.* at 194–95 (quoting Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 107 (1947)) (“If [defendant] were not in such a position [“to influence the transfer of gas to Auschwitz or to prevent it”], no knowledge of the use to which the gas was being put could make him guilty.”).

120. See *supra* Part I.A.3.

commission of war crimes.¹²¹

Based on the foregoing examples, the Nuremburg Tribunal unambiguously ascribed aiding and abetting liability to both military and civilian defendants based on a knowledge standard, and even went as far as inferring knowledge of the principal's criminal intent in certain situations.¹²² Therefore, the Second Circuit patently erred in its finding that the Nuremburg Tribunal only recognized aiding and abetting liability for actions undertaken with the purpose of providing substantial assistance in accomplishing its criminal objective.¹²³

2. ICTY and ICTR Decisions

In his concurring opinion in *Khulumani*, Judge Katzmann acknowledged in a footnote that decisions of the ICTY and ICTR have accepted a mens rea standard of knowledge for aiding and abetting liability.¹²⁴ Nevertheless, Judge Katzmann argues that this standard has not reached the same "level of consensus as the 18th-century crimes identified by the Supreme Court in *Sosa*."¹²⁵ However, as demonstrated below, the great weight of ICTY and ICTR decisions on individual responsibility for aiding and abetting consistently find that the customary international

121. See Beth Stevens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 46 (2002) ("Profit-maximization, if not the *only* goal of all business activity, is certainly central to the endeavor. And the pursuit of profit is, by definition, an amoral goal — not necessarily immoral, but rather morally neutral.").

122. See *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 101 (1947) ("The essential question was whether the accused knew of the purpose to which their gas was being put . . . Prosecuting Counsel . . . concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder."); *The I.G. Farben Case*, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 16 (1948). ("In these circumstances the question arose whether the accused could be shown to have had *personal knowledge* of the criminal intentions of the German Government to wage aggressive wars and, if so, whether they were parties to the plan or conspiracy, or, knowing, of the plan, furthered its purpose and objective by participating in the preparation for aggressive war. The Prosecution in their attempt to prove the existence of such knowledge and active participation, drew attention to the high positions held by the accused as well as to a great number of facts and circumstances from which such knowledge and participation in their view may be inferred.").

123. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259.

124. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 276 n.12 (2d Cir. 2007).

125. *Id.* at 277 n.12.

law standard is knowledge, not purpose. Furthermore, because these tribunals are only empowered to apply standards that are indisputably part of customary international law, their judgments should be given significant deference in ascertaining appropriate aiding and abetting standards.¹²⁶

a. ICTY

In *Prosecutor v. Tadic*, the ICTY acknowledged that the scope of its power is limited to applying international law that is “beyond any doubt customary law.”¹²⁷ Pursuant to this mandate, the ICTY reviewed many different sources of customary international law to determine the appropriate standard for aiding and abetting liability.¹²⁸ Ultimately, the mens rea standard which the tribunal determined to be beyond any doubt customary law is conduct by the defendant when he “knowingly participated in the commission of an offense that violates international humanitarian law and his participation directly and substantially affected the commission of that offence . . . He will also be responsible for all that naturally results from the commission of the act in question.”¹²⁹

In *Prosecutor v. Furundzija*, the Trial Chamber was once more required to determine the appropriate mens rea for aiding and abetting liability.¹³⁰ In this case, the tribunal yet again reviewed pertinent international law¹³¹ and concluded that:

[I]t is not necessary for the accomplice to share the mens rea of the perpetrator in the sense of positive intention to commit the crime.

126. See Brief Amicus Curiae of International Law Scholars, *supra* note 102, at 18.

127. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of the Trial Chamber, ¶ 662 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (quoting U.N. Secretary-General, *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993)).

128. The tribunal finds the decisions of the Nuremburg tribunals to be particularly persuasive but also analyzes the *Code Penal*, used in the French war crimes trial after World War II, and the International Law Draft Code. *Id.* at ¶¶ 663–69, 668.

129. *Id.* at ¶ 692.

130. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 245 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *aff’d*, Case No. IT-95-17/1-A (July 21, 2001).

131. Here the Tribunal again finds the decisions of the Nuremburg tribunals to be persuasive and also takes into account the ILC’s Draft Code on Crimes and Offences Against Mankind and the Rome Statute of the International Criminal Court. *Id.* ¶ 236–243.

Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.¹³²

If, after reviewing the relevant sources of customary law, the ICTY determined that the “vast majority” of the sources impose liability for aiding and abetting based on a mens rea standard of knowledge, there seems to be little support for Judge Katzmann’s assertion that such a standard has not reached the same level of consensus as the 18th-century crimes identified in *Sosa* for the purpose of ATS litigation.¹³³

Likewise, in *Prosecutor v. Vasiljević*, the Appeals Chamber of the ICTY weighed in on the issue of the requisite mens rea for aiding and abetting liability.¹³⁴ The ICTY found that aiding and abetting the commission of a crime is typically considered a lesser degree of individual culpability than actually perpetrating the crime and thus a broader mens rea than purpose is appropriate.¹³⁵ Therefore, in the case of aiding and abetting, the “requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.”¹³⁶

The *Vasiljević* case confirms that the ICTY has conclusively adopted a knowledge standard for aiding and abetting, reflecting the ICTY’s belief that this standard is beyond any doubt the customary law standard. Furthermore, the *Vasiljević* case, along with several other ICTY cases adopting the mens rea standard of knowledge for aiding and abetting, were decided after the Rome Statute of the ICC was adopted.¹³⁷ In fact, the

132. *Id.* ¶ 245. *See also id.* ¶ 246 (“[I]t is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed.”).

133. *See Sosa v. Alvarez-Machain*, 542 U.S. 725 (2004) (“[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”)

134. *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeal Chamber Judgment, (Int’l Crim. Trib. For the Former Yugoslavia Feb 25, 2004).

135. *See id.* ¶102

136. *Id.*

137. *See id.*; *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Trial Chamber Judgment, ¶ 782 (Jan. 17, 2005) (“An individual may be held responsible for aiding and abetting genocide if it is shown that he assisted in the commission of the crime in the knowledge of the principle perpetrator’s specific intent.”); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶¶ 134-43 (Apr. 19, 2004) (vacating Krstić’s conviction for taking part in a joint criminal enterprise but imposing liability for aiding and abetting because “Krstić was aware of the intent to commit

tribunal specifically referenced the Rome Statute in Vasiljević.¹³⁸ This is significant because Judge Katzmann and the Second Circuit in Talisman rely heavily on the fact that the Rome Statute seemingly mandates a purpose standard for aiding and abetting liability.¹³⁹ However, the ICTY specifically rejected purpose as the required mens rea even after the Rome Statute's enactment.¹⁴⁰ This fact greatly undermines the Second Circuit's reliance on that instrument in Talisman.

b. ICTR

The ICTR also addressed the issue of the appropriate mens rea standard for aiding and abetting in *Prosecutor v. Akayesu*.¹⁴¹ There, the ICTR concluded that an individual can be held liable for aiding and abetting crimes against humanity if he “knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide.”¹⁴² Furthermore, the tribunal explained that aiding and abetting are two separate types of offenses and that a defendant can be held liable for either when it stated that “aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto . . . [E]ither aiding or abetting alone is sufficient to render the perpetrator criminally liable.”¹⁴³

Additionally, the aider and abettor would not need to knowingly provide aid with the desire that a crime occur in order to be held liable.¹⁴⁴ Even if the aider and abettor did not wish for the crime to occur, or even regrets that it has occurred,

genocide . . . and with that knowledge, he did nothing to prevent the use of the Drina Corps personnel and resources to facilitate those killings.”).

138. See *Vasiljević*, IT-98-32-A ¶ 102 (discussing how the Rome Statute of the International Criminal Court distinguishes between a common criminal plan or enterprise and aiding and abetting).

139. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (discussing the Rome Statute of the International Criminal Court).

140. See *Vasiljević*, IT-98-32-A ¶ 102.

141. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001.pdf>.

142. *Id.* ¶ 545.

143. *Id.* ¶ 484.

144. *Id.* ¶ 539 ([A]nyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”).

he or she is liable if they were willing to aid the principal for other motives.¹⁴⁵ This standard should be particularly applicable to corporations because the corporation may not wish for the violations of international law to occur but may be more willing to knowingly aid the principal in pursuit of profits or other favorable concessions.

3. *The ILC Draft Code and Rome Statute*

The ILC Draft Code, promulgated in 1996, was considered persuasive in several of the ICTY decisions in which the tribunal attempted to determine the appropriate mens rea standard for aiding and abetting liability in international law.¹⁴⁶ Moreover, the ICTY deemed the ILC Draft Code an “authoritative international instrument.”¹⁴⁷ The ILC Draft code specifically addresses the mens rea standard for aiding and abetting in Article 25.¹⁴⁸ Article 25 states that a person will be responsible for a violation of international law if that person “[k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.”¹⁴⁹ Despite the fact that the ILC Draft Code clearly lays out the requisite mens rea standard required for aiding and abetting liability and has had a significant authoritative influence, particularly in the ICTY, neither Judge Katzmann nor the Second Circuit even consider the Draft Code in their analysis.¹⁵⁰

Only two years after the ILC adopted a “knowingly” aids or abets standard in the Draft Code, in 1998 the Rome Statute seemingly adopted a purpose standard.¹⁵¹ Article 25(3)(c) states that an individual will be criminally responsible and liable for punishment if that person “for the purpose of facilitating the commission of a [crime within the jurisdiction of the court], aids, abets or otherwise assists in its commission or its attempted

145. Jacobson, *supra* note 65, at 205.

146. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment, ¶¶ 134–43 (Apr. 19, 2004); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 238 (Dec. 10 1998) at 242–244.

147. Furundžija, Case No. IT-95-17/1-T ¶ 227.

148. Draft Code of Crimes Against the Peace and Security of Mankind, art. 2, ¶ 3 (1996).

149. *Id.*

150. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 250–51 (2d Cir. 2009).

151. See Cassel, *supra* note 53, at 310.

commission, including providing the means for its commission.”¹⁵² Judge Katzmann and the Second Circuit rely heavily on this language as the basis for their conclusions that aiding and abetting under international law requires a mens rea of purpose.¹⁵³

However, Judge Katzmann and the Second Circuit fail to address a separate provision of Article 25 which provides an alternative basis of liability. Article 25(3)(d) concerns crimes committed by a “group of persons” acting with a “common purpose.”¹⁵⁴ It provides that anyone who contributes to the commission of a crime by this group of persons “with the aim of furthering the criminal activity” or with the “knowledge of the intention of the group to commit the crime” will be held criminally responsible.¹⁵⁵ Thus, the Rome Statute “embraces a ‘knowledge’ test as sufficient to impose criminal responsibility on one who aids and abets a group crime.”¹⁵⁶ Therefore, the reliance of the Second Circuit on the Rome Statute establishing the requisite expression of customary law to support a purpose mens rea for aiding and abetting in ATS cases is severely undermined.

4. *State Practice*

a. Australia

In Australia, as a result of laws adopted pursuant to its obligations under the Rome Statute, criminal accessory liability attaches to a corporation when it acts as an aider or abettor.¹⁵⁷ A similar standard of aiding and abetting applies to civil actions in Australia and liability extends to any person “besides the actual perpetrator . . . who ‘aid and abets,’ whether or not he actively intervenes. Knowingly assisting, encouraging or merely

152. Rome Statute, *supra* note 80, at art. 25.3(c). For a thorough discussion of the drafting and ratification history of the Rome Statute of the International Criminal Court see Cassel, *supra* note 53, at 310–14.

153. See *Talisman*, 582 F.3d at 258–59; *Talisman I*, 453 F.Supp.2d at 277 (Katzmann, J. concurring).

154. Rome Statute, *supra* note 80, at art. 25.3(d).

155. Rome Statute, *supra* note 80, at art. 25.3(c); see also Cassel, *supra* note 53, at 313.

156. Cassel, *supra* note 53.

157. See Adam McBeth, *Crushed by an Anvil: A Case Study of Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 127, 149–52 (2008).

being present as a conspirator at the commission of the wrong would suffice.”¹⁵⁸ Therefore, Australian civil law is plainly in accord with the customary international standard of applying a mens rea standard of knowledge for aiding and abetting liability.¹⁵⁹

b. United States

In Military Commission Instruction (MCI) No. 2, the United States recognized that international law specifically defines the scope of aiding and abetting liability. Although the jurisdiction of MCI No. 2 extends only to offenders who are triable in a military commission,¹⁶⁰ this articulation of aiding and abetting liability should be considered as persuasive by courts determining the scope of such liability under the ATS. The MCI constitutes a form of State practice and the document purports to be “declarative of the existing law” of armed conflict.¹⁶¹ Furthermore, because the actions at issue in the Talisman case occurred during a period of civil war in the Sudan,¹⁶² they occurred during a period of armed conflict, thus making the aiding and abetting standard enunciated in MCI No. 2 particularly relevant when assessing Talisman’s liability under the ATS.¹⁶³ According to MCI No. 2, aiding and abetting consists of “in any . . . way facilitating the commission” of an offense, with knowledge the act would aid or abet.¹⁶⁴ Hence, according to United States law, a showing of knowingly aiding and abetting would result in liability under Military Commission Instruction No. 2 and should also be sufficient to demonstrate liability under the ATS.¹⁶⁵

158. Lillian Manzella, EarthRights International, *The International Law Standard for Corporate Aiding and Abetting Liability* 8, available at <http://www.earthrights.org/publication/unsrg-international-law-standard-corporate-aiding-and-abetting-liability> at 16 (quoting J. Fleming, *THE LAW OF TORTS* 230).

159. See McBeth, *supra* note 157 at 139..

160. Military Commission Instruction No. 2, art. 3(a) (2003), available at <http://www.globalsecurity.org/security/library/policy/dod/d20030430milcominstno2.pdf>.

161. *See id.*

162. *See id.*, Part I.A.1.

163. *See id.* (as the law of armed conflict).

164. Military Commission Instruction No.2, art. 6(c)(1) (2003), available at <http://www.globalsecurity.org/security/library/policy/dod/d20030430milcominstno2.pdf>.

165. *Id.*

c. South Africa

The South African Truth and Reconciliation Commission recognized culpability for those that were complicit in the apartheid regime.¹⁶⁶ This Commission unequivocally extended culpability for the human rights violations that occurred under the apartheid system based on a mens rea of knowledge.¹⁶⁷ For example, the Commission found high-ranking government officials in the executive branch to be morally and politically responsible for the human rights violations committed under the apartheid system due to the “knowledge they had . . . or the knowledge they are presumed to have had . . . about the gross violations of human rights.”¹⁶⁸ Those companies that actively aided in the design and implementation of apartheid policies were guilty of the highest level of culpability.¹⁶⁹ However, those that knew that their products or services would be used for repression, such as banks and weapons manufacturers, were also found to be guilty of involvement in the apartheid regime and morally culpable for its atrocities.¹⁷⁰ Hence, in accord with the customary international law standard, the Commission held corporations culpable when they knowingly provided practical assistance, encouragement, or moral support to those principals who were engaged in violations of international law.¹⁷¹

V. CONCLUSION

In *Talisman*, the Second Circuit was called upon to determine the appropriate mens rea standard for aiding and abetting under the ATS. According to the Supreme Court’s decision in *Sosa*, causes of action brought under the ATS must be based on customary international law. Thus, the ATS provides federal courts with the jurisdiction to hear such disputes and customary international law provides the cause of action. Relying substantially on Judge Katzmann’s concurring

166. See 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT, § 5 ch. 2, ¶ 17 (2003) [hereinafter TRC REPORT].

167. *Id.* ¶ 17(b).

168. *Id.*

169. Manzella, *supra* note 158, at 9 (citing 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT, ch. 2 (1998) (noting that Commission classified different levels of culpability for businesses complicit in the apartheid regime)).

170. *Id.*

171. *Id.*

opinion in *Khulumani*, the Second Circuit came to the erroneous conclusion that aiding and abetting under international law requires a mens rea of purpose. In fact, customary international law dictates that a mens rea of knowledge is all that is required for aiding and abetting liability.

This conclusion is supported by the decisions of international tribunals, such as the Nuremburg Tribunals following World War II and the more recent ICTR and ICTY, in cases concerning both individual and corporate defendants. Additionally, international instruments such as the ILC Draft Code explicitly state that the appropriate mens rea is knowledge rather than purpose. Although the Rome Statute of the ICC purportedly endorses a purpose mens rea standard, a fact relied upon heavily by the Second Circuit, another section of the Rome Statute creates an alternative basis of liability for complicity based on knowledge. Furthermore, several of the States that have addressed the issue have concluded that knowledge is the appropriate mens rea standard for aiding and abetting. Ultimately, a mens rea standard of knowledge is established by customary international law as the requisite for aiding and abetting liability. Therefore, for the purposes of ATS litigation, courts should apply a knowledge mens rea when assessing liability for aiding and abetting.