An engineer for a company works with a team to construct a nuclear weapon release device. She is never told that such device will be used to deliver nuclear weapons, does not hope that the device will be used to release nuclear weapons, but knows that that is the only known use for such a device. Could she be a war criminal?

Beginning with the assumption that the use of nuclear weapons and therefore the threat of use of nuclear weapons is per se illegal, this paper argues that under such circumstances, the engineer previously discussed could be held liable under international criminal law for a war crime for aiding and abetting a threat to use nuclear weapons. Part I enumerates the various forums in which a person or entity may be tried for a war crime in violation of international criminal law, as well as the current statutes that they may be tried under. Part II discusses the precedent and statutes that allow for individuals to be tried for war crimes. Part III notes that corporations have not yet been tried for international criminal law violations but examines how the precedent has been set that they could and should be held liable. Part IV analyzes the actus reus required of a defendant in order for him to be culpable for aiding and abetting a war crime. Part V discusses the debate among scholars as to the proper mens rea for aiding and abetting and the practical consequences of such a distinction in the possible defendants that may be charged with a war crime for providing nuclear weapons technology to a government.

This paper is premised on several assumptions. First, we must assume (as it has been argued)\(^1\) that the use of nuclear weapons per se violates one or more of the rules of war that prohibits the use of poisoned weapons, the use of weapons calculated to cause unnecessary

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\(^1\) Charles J. Moxley, Jr., *Nuclear Weapons and International Law in the Post Cold War World* 61, 125, 145 (2000).
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suffering, the unnecessary destruction of an enemy’s property, the rule of discrimination, and/or the rule of controllability. Second, as the International Court of Justice stated in its Nuclear Weapons Advisory Opinion, if a particular weapon’s use is illegal, then any threat to use such a weapon must also be illegal. So we must assume that if the use of nuclear weapons violates the laws of war, then the threat to use nuclear weapons also violates the laws of war. Taking into account these assumptions, the question therefore arises: under what conditions may individuals or corporations be held liable for war crimes or face civil liability in U.S. courts for providing governments or government officials with nuclear weapons technology?

Part I
Trials for War Crimes

An entity that helps a country to develop or secure nuclear weapons could be prosecuted in the International Criminal Court or United States federal courts or sued civilly in U.S. federal courts. This part will analyze how such a defendant could be tried in each of these courts for violating the laws of war and the statutes under which they could be tried.

A defendant that has violated the laws of war may be tried in the International Criminal Court. The International Criminal Court (“ICC”) was created pursuant to the Rome Statute, a 1994 treaty to which 122 nations are a party. The ICC has jurisdiction over only the most serious violations of international law, namely genocide, crimes against humanity, crimes of

\[\text{References}\]

4 The discussion in this section is limited to the courts and statutes under which defendants that have violated the laws of war may be tried. For a discussion of the specifics of the war crimes for which defendants that assist a government in making an illegal nuclear weapons threat may be tried, including the proper mens rea and actus reus for these crimes, see Sections IV and V.
5 International Criminal Court, ICC at a Glance, available at <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance>.
aggression, and war crimes.\textsuperscript{6} The ICC has jurisdiction over individuals that are nationals of any nation that is party to this treaty, as well as those that are not parties to the Rome Statute.\textsuperscript{7} Any defendant, therefore, may be tried in the ICC. However, the ICC only has jurisdiction over a defendant if a crime committed under its jurisdiction is not investigated or prosecuted by a nation’s judicial system or if the Court deems the proceeding in which the defendant was tried not genuine.\textsuperscript{8} The ICC, therefore, may try any defendant for violating the laws of war but only if her country of nationality is unwilling or unable to try her in a meaningful proceeding.

If the use and threatened use of nuclear weapons is found to violate the laws of war, the ICC may try such crimes because the Rome Statute gives it jurisdiction to prosecute such acts. The Statute gives the court jurisdiction over “war crimes,” then goes on to define “war crimes” to include causing great suffering or serious injury, excessive destruction of property, and launching an attack that will cause loss of life or injury to civilians.\textsuperscript{9} If, as we assume, the use or threatened use of nuclear weapons violates international law that prohibits the use of poisoned weapons and requires proportionality, necessity, discrimination, and controllability, then the ICC may prosecute the use or threatened use of nuclear weapons as a war crime, subject to the limitations set forth above as to who may be tried in the ICC.


\textsuperscript{7} The Rome Statute states, “The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.” \textit{Id.} at art. 4(2). However, several nations, including the U.S., have argued that the ICC may not exercise jurisdiction over nationals of states that are not a party to this treaty. See, Madeline Morris, \textit{High Crimes and Misconceptions: The ICC and Non-Party States}, 64 L. \\& Contemp Probs 13, 60-66 (2001); David J. Scheffer, \textit{Staying the Course with the International Criminal Court}, 35 Cornell Int’l L. J. 47, 66 n 68 (2002).

\textsuperscript{8} See, International Criminal Court, \textit{supra} note 5.

\textsuperscript{9} \textit{Id.} at art. 8
It should be noted that the drafters of the Rome Statute considered including nuclear weapons on the list of prohibited weapons but declined to do so for fear that the Statute would not be widely ratified if it included such a prohibition. The Statute, likewise, does not specifically state that nuclear weapons are prohibited weapons whose use would constitute a war crime. Liability under the Rome Statute, therefore, for the threatened use of nuclear weapons would only be available if, as we assume, the use of nuclear weapons per se violates the laws of war like the prohibition on poisoned weapons and the rules of proportionality, necessity, discrimination, and controllability.

An individual that violates the laws of war may also be prosecuted under U.S. federal law. In 1996, Congress enacted the War Crimes Act, which allows for any person that is a member of the U.S. Armed forces or a U.S. national who commits a war crime to be punished. The Act further defines “war crime” to include those acts enumerated in Article 23(a) of the Geneva Convention of 1907, which prohibits the use of poison weapons, weapons calculated to cause unnecessary suffering, and destruction of property beyond what is “imperative to the necessities of war.” Since the use or threatened use of nuclear weapons, if prohibited under the

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11 E.g., art. (8)(2)(b)(17) prohibits “employing poison or poisoned weapons”; art. 8(2)(b)(4) prohibits “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”
laws of war, falls within those acts enumerated as war crimes under this statute, a person could
then be tried under the War Crimes Act for aiding a government in such a threat.

Another possible means of holding an individual liable for violating the laws of war is
through a civil suit under the Alien Tort Claims Act. The Alien Tort Claims Act (“ATCA”) states, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” While the ATCA is a civil remedy for a tort rather than a criminal prosecution, it still functions as a means of holding an individual liable for an international law violation because such a suit may only be maintained if the defendant caused the tort while violating the “law of nations or a treaty of the United States.” The Supreme Court has determined that an ATCA claim is viable if a defendant commits an act that violates a treaty to which the United States is a party or he violates an international norm that is “specific, universal, and obligatory.” If the threatened use of nuclear weapons violates the Geneva Convention of 1907 (as was previously suggested), any other treaty to which the United States is a party, or international customary law, an alien that was injured by such a threat could file a civil suit against a defendant that assisted a government in such a threat.

A defendant participating in the illegal use or threatened use of nuclear weapons could therefore face prosecution in the International Criminal Court for a war crime under the Rome Statute or in the United States for violating the War Crimes Statute. He may also face civil liability in the district courts for committing a breach of international law that causes injury to an alien.

Part II

Individual Liability for Violations of International Law

In order to determine the viability of a suit against one that assists a government in the unlawful threat or use of nuclear weapons, we must also consider which parties may be held liable for such a violation. Prior to the post-World War II Nuremberg trials, individuals were never prosecuted for international criminal law violations, but since these trials, it has become well established under international law that individuals may be held liable for international criminal law breaches.

The Nuremberg Trials were the first cases to establish that individuals may be prosecuted for war crimes. Following World War II, the Allies held a series of trials to determine various individuals’ culpability for war crimes, crimes against humanity, and aggressive war committed during World War II. These trials, the Nuremberg Trials, were held under the authority of Control Council Law No. 10. First, major military and political leaders were tried and many convicted in the International Military Tribunal, which established that war crimes, aggressive war, and crimes against humanity were all violations of international law. Following these military tribunals, various private individuals including industrialists, doctors, bankers, corporate executives, and other corporate officials were tried for such crimes in what are now known as the “Subsequent Nuremberg Trials.”

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17 Id. at 461.

Prior to the Nuremberg Trials, international law was thought to act exclusively on nations and bind them alone in their dealings with other nations.\textsuperscript{19} The Court in the Nuremberg Trials, however, affirmatively stated, “[I]nternational law imposes duties and liabilities upon individuals as well as upon states…International law, as such, binds every citizen just as does ordinary municipal law.”\textsuperscript{20} The Nuremberg Trials set a powerful precedent that individuals, as well as states, must follow international criminal law and that they are likewise subject to punishment for breaching international law.

The Subsequent Nuremberg Trials further set the precedent that individuals beyond government officials and military personnel could be tried and convicted of breaches like crimes against humanity and war crimes. Four trials specifically – Farben, Flick, Krupp, and Zyklon B – are of particular interest to this discussion because these proceedings all involved defendants that were charged with aiding a regime in committing war crimes. In \textit{United States v. Friedrich Flick}, all six defendants were top officials in an industrial enterprise that mined coal and iron and produced steel. Each was charged with war crimes committed while acting in their respective corporate positions, and the president and a senior director were ultimately convicted of such crimes.\textsuperscript{21} In \textit{United States v. Alfried Krupp, et al.}, likewise, each defendant was a member of the managing board of an industrial concern, or held a similar high-ranking position, and all but one of the defendants was convicted.\textsuperscript{22} Furthermore, in \textit{United States v. Carl Krauch, et al.} (“Farben”), the Court charged the entire board of directors of a chemical company with various

\textsuperscript{19} \textit{United States v. Flick (The Flick Case)}, in 6 \textit{Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10} at 1190-1192 (1949) (hereinafter “The Flick Case”).
\textsuperscript{20} \textit{Id.} at 1192.
\textsuperscript{21} \textit{Id.} at 1194-1199.
\textsuperscript{22} \textit{United States v. Krupp (The Krupp Case)}, in 9 \textit{Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10} at 1 (1949) (hereinafter “The Krupp Case”).
crimes relating to war crimes and crimes against humanity and convicted thirteen of the twenty-three defendants.\footnote{United States v. Krausch (The IG Farben Case), in 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 at 1-2 (1949) (hereinafter “The Farben Case”).} Furthermore, in Trial of Bruno Tesch and Two Others (“The Zyklon B Case”), the owner of a firm that supplied poison gas to the Nazis to be used in gas chambers and his second-in-command were each convicted of war crimes.\footnote{Trial of Bruno Tesch and Two Others (The Zyklon B Case), in Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol. I, London, HMSO at 101-02 (1947) (hereinafter “The Zyklon B Case”).} These cases established that individual directors, officers, and managers within a company could be convicted of war crimes for they actions they took while acting as employees of their respective companies.

Today, it is beyond refute that individuals may be convicted of war crimes. The Rome Statute specifically gives the Court jurisdiction to prosecute persons that have committed war crimes and other enumerated crimes.\footnote{The Rome Statute, art. 25(1).} The statutes for the two major international criminal tribunals since the Nuremberg trials, likewise, give the respective courts jurisdiction over “natural persons.”\footnote{International Criminal Tribunal for the Former Yugoslavia, Statute of the International Tribunal, art. 2(a) (Adopted May 25, 1993) (as amended 13 May 1998) <http://www.un.org/tfy/basic/statut/statute.htm> (hereinafter “the ICTY Statute”); International Criminal Tribunal for Rwanda, Statute of the International Tribunal, art. 2(1) (Adopted Nov. 8, 1994) (as amended 14 August 2002) < http://www2.ohchr.org/english/law/itr.htm> (hereinafter “The ICTR Statute”).} Furthermore, U.S. law dictates that individuals are liable for war crimes under the War Crimes Act. The War Crimes Act specifically mentions that a “person” may commit a war crime in violation of the Act and may therefore be prosecuted under the Act.\footnote{18 U.S.C. § 2441(b).}

Individuals may also be civilly sued in under the ATCA for torts that were the result of a defendant’s war crime. The ATCA, though a civil rather than criminal statute, allows a defendant to be held liable for a tort claim under the Act only if the defendant has committed an
international law violation. In deciding ATCA claims, U.S. courts look to international law to determine the scope of liability for international law violations, including which parties may be held liable for international law violations. While the ATCA does not specifically state who may be a defendant in an ATCA case, the Supreme Court has interpreted the statute to allow suits against individuals for their international law violations because international criminal law dictates that individuals may be prosecuted for international law violations. It is, therefore, a well-established rule of international law that individuals may be prosecuted for war crimes, so an individual involved in the illegal use or threatened use of nuclear weapons may certainly be held liable for a war crime.

Part III

Corporate Liability in International Criminal Law

While an individual involved in the illegal use or threatened use of nuclear weapons may undeniably be convicted of a war crime, the question of whether a corporation that commits the same act may be held liable for that same crime is, as of yet, uncertain. To date, no corporation has ever been prosecuted for violating international criminal law in an international criminal tribunal, and the U.S. circuit courts remain split as to whether corporations may be held liable for such a crime under the ATCA. However, in considering the precedent set by the Nuremberg cases and the fact that the practice of holding corporations criminally liable has potentially reached the level of a generally accepted principal of international law, corporations should, and may soon be, liable for international criminal law violations.

30 Id.
31 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132-37 (2nd Cir. 2010).
At present, no international criminal tribunal has yet prosecuted a corporation for a war
crime or any other international criminal law violation.\textsuperscript{32} Beginning with the Nuremberg trials
and continuing up through the present, only individuals have been tried in international criminal
tribunals. For example, pursuant to the jurisdiction conferred in the Nuremberg Trials under
Control Council Law No. 10, these trials charged only “persons” for violations of international
criminal law and war crimes.\textsuperscript{33} Likewise, the International Criminal Tribunal for the Former
Yugoslavia and the International Criminal Tribunal for Rwanda, the two main tribunals to try
international criminal law violations since the Nuremberg trials\textsuperscript{34}, have jurisdiction to try only
“natural persons.”\textsuperscript{35} Additionally, the jurisdiction of the ICC, pursuant to the Rome Statute,
extends only to “persons.”\textsuperscript{36} The drafting history of the statute indicates that corporations were
considered as potential parties to be tried under the ICC, but were excluded from the statute
because at the time that it was drafted, there was an “absence of international uniformity
regarding ‘acceptable definitions’ of corporate liability.”\textsuperscript{37} Likewise, the War Crimes Act,
though not specifically stating that only individuals may be tried, references that a “person
committing such a war crime” is the only circumstance under which one may be tried under the
Act.\textsuperscript{38} All previous and current international criminal tribunals, therefore, have declined to
prosecute corporations for war crimes and have excluded corporations as possible defendants.

\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Nuremberg Trials Final Report Appendix D: Control Council Law No. 10, Punishment of
Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 2.}
\textsuperscript{34} Kendra Magraw, \textit{Universally Liable? Corporate-Complicity Liability Under the Principle of
\textsuperscript{35} ICTY Statute at art. 6; ICTR Statute at art. 5.
\textsuperscript{36} Rome Statute, art. 25.
Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome,
\textsuperscript{38} 18 U.S.C. § 2441(2)(a).
Furthermore, it has been suggested that the fact that corporations have not been held liable for international law violations in any international criminal tribunals indicates that corporate liability for such violations is not a component of customary international law. Customary international law is based on the widely accepted rules and practices of nations worldwide and can be discerned through sources like international custom and conventions. Some argue that since no international tribunals have jurisdiction over corporate defendants, corporate liability for international law violations has not yet become customary international law.

However, other authority indicates that corporate criminal liability is, indeed, a part of international criminal law. Several decisions from the Nuremberg Trials indicate that that Court considered the corporations, as such, liable for the international law violations charged in each of the cases. In each of the Flick, Farben, and Krupp trials, individual corporate officers, directors, and other company employees were convicted of war crimes based on the actions of their respective corporations. The Krupp decision, for example, discusses the Krupp corporate entity as the prime actor and perpetrator of the crimes charged. Furthermore, the Farben decision specifically states that the offenses against property “were committed by Farben,” referring to the...
Farben corporation as the entity that committed the crime. Although the Court in these cases could not convict the corporations themselves for international law violations because they had no jurisdiction over corporations, the language of the decisions and the fact that officers, directors, and other individuals responsible for decisionmaking were convicted because of the actions of the corporation indicates that the Court considered the corporate entities liable for the atrocities committed in these cases. The Court even went so far as to punish Farben as a corporation. It ordered that the corporation be dissolved and its assets seized because of its violations of international law. If the Court did not consider the corporation itself liable for such violations, it seems highly unlikely that it would issue punishment against the corporate entity. The Nuremberg cases indicate, therefore, that although the Court could not convict corporations because they had no jurisdiction over such entities, the Court nonetheless considered corporations culpable for war crimes and set the precedent in international customary law that corporations are liable for war crimes.

Likewise, the generally accepted principles of international law also seem to dictate that corporations should be prosecuted for violating criminal law. Generally accepted principles of international law are a binding source of international law. A generally accepted principle of international law must be a practice that is widely accepted among “civilized nations,” and can be determined from the domestic laws of nations worldwide. Once a practice or principle is widely recognized among the domestic legislation throughout the world, it may be considered a

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45 Charles J. Moxley, Jr., Nuclear Weapons and International Law in the Post Cold War World 61, 125, 24 (2000).
generally accepted principle of international law and therefore binding as international law in itself.

Presently, the widespread belief among nations seems to be that corporations should be held liable under criminal law for criminal law violations. The vast majority of nations incorporate some sort of legislation that allows corporations to be prosecuted for criminal law violations. For example, the United States, United Kingdom, France, Australia, New Zealand, Japan, China, South Africa, Canada, Finland, Austria, Belgium, and Denmark all recognize that corporations can be held liable for criminal law violations. Even in many countries that do not prosecute corporations for criminal law violations, corporations still face administrative sanctions, fines, and other penalties for violating criminal laws. For example, Germany, Greece, Hungary, and Sweden each have an administrative sanction process that punishes corporations for violations. However, a number of countries, including Italy, Portugal, Spain, and Bulgaria, still do not recognize any corporate criminal liability. The wide acceptance of criminal liability for corporations among domestic legislation worldwide indicates that corporate liability for criminal law violations is a generally accepted principle of international law and is, as such, binding international law.

If corporate criminal liability is, indeed, a generally accepted principle of international law, it is highly likely that a corporation could be convicted for its part in the illegal use or


\[48\] See id.

\[49\] Id.
threatened use of nuclear weapons as a war crime.\textsuperscript{50} The ICC and U.S. courts both look to international law in determining whether to hold a defendant liable for an international criminal law violation, and if international law is interpreted to include such defendants, both courts are likely to hold corporate defendants liable for war crimes.

If corporate criminal liability is considered to be a generally accepted principle of international law, the Rome Statute could be read to include corporate defendants, thereby conferring jurisdiction to the ICC over corporate defendants that violate the laws of war. The Rome Statute states that “persons” may be held liable for crimes under the statute, and corporations were purposefully excluded from the statute at the time it was enacted.\textsuperscript{51} However, the Rome Statute further states, “The Court shall apply…where appropriate, applicable treaties and the principles and rules of international law.”\textsuperscript{52} This provision, in essence, states that Court should consider generally accepted principles of international law in interpreting the Rome Statute. If corporate criminal liability is currently a generally accepted principle of international law, the Rome Statute should be read to include it, if applicable. “Persons” could be read to include, as it is in many jurisdictions, corporations.

This approach would not go against the language or intent of the Rome Statute because the language of the statute reflects the state of international law at the time it was drafted, yet indicates that it should be interpreted in based on the evolving rules of international law. When the Rome Statute was written, corporate liability was not yet a generally accepted principle of international law and therefore was not included in the statute. The statute was drafted nearly fifteen years ago in 1998 and, since that time, many nations have changed their criminal codes to

\textsuperscript{50} The acts for which a corporation or individual may be held liable in relation to an illegal threat or use of nuclear weapons are discussed in Part IV.
\textsuperscript{51} See supra Note 36.
\textsuperscript{52} Rome Statute, art. 21(1)(B).
include liability for corporations.\textsuperscript{53} For example, Canada, Australia, Belgium, and the United Kingdom did not recognize corporate criminal liability until after the statute was passed.\textsuperscript{54} Reading liability for “persons” under the statute to include corporations seems to follow with the intent of Article 26, that the statute be interpreted in light of ever-changing international law.

Furthermore, it remains unclear whether corporations may be held liable for international law violations in U.S. Courts. The War Crimes Act, for example, for example, states that a “person” may commit a war crime in violation of the Act, yet does not define “person.”\textsuperscript{55} No case has yet been prosecuted under this statute, so it is difficult to predict whether the court would interpret the statute to include liability for corporations.\textsuperscript{56}

As far as the ATCA is concerned, the circuits are split as to whether a corporation may be held liable under the Act. As the Supreme Court noted in \textit{Sosa v. Alvarez-Machain}, 543 U.S. 692, 732 (2004), the viability of a claim under the ATCA must be determined based on the norms of customary international law. In the Second Circuit, the standard set forth in \textit{Kiobel v. Royal Dutch Petroleum Co.}, 621 F.3d 111 (2010) is the prevailing standard. In \textit{Kiobel}, the Court held that a corporation is not liable for violations of international criminal law under the ATCA, reasoning that customary international law does not recognize corporate criminal liability because no international criminal tribunal has ever held a corporation liable for such crimes.\textsuperscript{57} Conversely, both the Ninth Circuit and the Eleventh Circuit have held that corporations are proper defendants under the ATCA, also basing their decisions on the belief that customary

\textsuperscript{53} \textit{Supra} note 44.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} 18 U.S.C. § 2441.
\textsuperscript{57} \textit{Kiobel v. Royal Dutch Petroleum Co.}, 621 F.3d 111, 122 (2nd Circ. 2010).
international law dictates that corporations are liable for international law violations. The circuit split on corporate liability under the ATCA will soon be resolved, as Kiobel is currently before the Supreme Court.

This analysis of corporate liability for violations of international law shows that corporations are not currently prosecuted for such violations, either in international criminal tribunals or U.S. courts, and some commentators argue that this lack of acceptance of corporate criminal liability indicates that customary international law does not allow for corporate liability in such cases. But the precedent set by the Nuremberg cases and the growing acceptance of corporate criminal liability in domestic law worldwide indicate that corporations should, and may soon be, prosecuted for international criminal law violations.

Part IV

Aiding and Abetting Liability- Actus Reus

If a private individual or entity is to be held liable for a war crime for providing a government with nuclear weapons, it stands to reason that such an entity may be charged only with aiding and abetting a war crime. Under most circumstances, the illegal threat to use nuclear weapons must come from a nation or government, so the corporation or individual could only be liable for aiding and abetting such a war crime.

58 Daniel Prince, Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?, 8 Seton Hall Circuit Rev. 43, 77-78.
It has been widely established that aiding and abetting a war crime is a war crime in itself, specifically that providing weapons necessary to commit a war crime constitutes a war crime. For example, Control Council Law No. 10, the statute that created the Nuremberg trials, imposes criminal liability upon anyone who was “an accessory to the commission [of any of the enumerated crimes] or ordered or abetted the same.” In each of the Flick, Farben, Zyklon B, and Krupp trials, defendants were convicted of assisting the Nazi party in the commission of war crimes and/or crimes against humanity by providing them with the chemicals, weapons, and/or raw materials necessary for the regime to commit these crimes. Furthermore, each of the major international criminal tribunals since the Nuremberg trials has included aiding and abetting a war crime as an offense in itself. For example, the ICTY and ICTR statutes both include liability for those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of crime. The ICTR has interpreted aiding and abetting to include “procuring] weapons, instruments or any other means which are used in committing such action.” Additionally, the Rome Statute creates liability for a person who “for the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission including providing the means for its commission.” This statute specifically states that “aiding and abetting” is deemed to include providing the materials necessary for such a crime to be committed. In considering the requirements for aiding and abetting a war crime under ICTY, ICTR, ICC, and in the Nuremberg trials, it seems that it is

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61 See Flick Trial at 28-30; Krupp Trial at 7-36; Farben Trial at 81-97; Zyklon B Trial at 101-02.
62 ICTY Statute, art. 7; ICTR Statute, art. 6.
63 ICTR Statute, art. 91.
well recognized under international customary law that providing the materials necessary to commit a war crime constitutes a charge of aiding and abetting a war crime.

While “aiding and abetting” is the crime for which a defendant that assists a government in obtaining nuclear weapons for the illegal use or threatened use of such weapons may be convicted, we must further examine what the proper actus reus, or wrongful act that comprises the physical component of a crime, is for such a crime. This analysis centers largely on the level of aid or participation required for a defendant to be liable. For example, if a corporation creates a nuclear weapons delivery device for a government, is it sufficiently involved in the crime to create aiding and abetting liability? If the actus reus is that the crime could not be committed absent the aid, then the corporation may not be liable. If, however, the actus reus is a lesser level of involvement, such as a substantial contribution to the crime, the corporation may be liable.

The actual language of the Rome Statute, Control Council Law No. 10, the ICTY Statute, and the ICTR statute are each silent as to the level of involvement required for aiding and abetting. However, it has been widely acknowledged that an act must have a “substantial effect on the commission of the crime” in order to constitute aiding and abetting. The Nuremberg Court first stated that the actus reus for aiding and abetting a war crime is whether “in any substantial manner, they aided, abetted, or implemented [the principal crime].” The ICTY has adopted the same “substantial effect on the commission of the crime” standard, yet clarified that the crime of aiding and abetting should not be interpreted to require that the aider and

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64 Black’s Law Dictionary 950 (9th ed. 2009).
abettor’s action caused the illegal act of the principal, merely that it had a “substantial effect” on the commission of the crime.\textsuperscript{67} This “substantial effect” requirement is also broadly accepted as the aiding and abetting actus reus standard for international law in ATCS cases, which adopt the standards of international criminal law in determining whether a defendant committed an international law violation.\textsuperscript{68}

The proper actus reus standard for aiding and abetting liability is important to the question of whether a defendant may be tried for a war crime because it sets the standard for how involved one must be in the production and provision of nuclear weapons and their component parts to be liable for such a threat. Under the “substantial effect on the commission of a crime” standard, a corporation that provides the steel to build the container in which a reactor is held to a government would likely not be found to have a substantial effect on a government’s commission of a crime and therefore not liable for a war crime. On the other hand, a corporation that provided a nuclear reactor to the government certainly had a substantial effect on the government’s ability to carry out an illegal nuclear threat and therefore could be liable.

\textbf{Part V}

\textbf{Mens Rea}

For an individual or corporation to be held liable for aiding and abetting a war crime by providing a government with nuclear weapons, it must also have the proper mental state. The mens rea standard for aiding and abetting is particularly important because it could greatly


expand or limit the number of persons or corporations that could be tried for providing governments with the nuclear weapons that enable them to make illegal threats. Would a scientist paid by a government to create a nuclear warhead, intending for the government to use this warhead for a threat, be liable for a war crime? Would the same scientist be liable if she did not intend for the government to use the warhead but knew that it would? Would an employee that created a component part for a nuclear weapon, not specifically knowing that it would be used to create a nuclear weapon but knowing that that part is used exclusively to create nuclear weapons, be liable? The answers to each of these questions depend largely on the mens rea standard used.

Mens rea is the mental state that a defendant must have in the commission of the crime in order to be culpable for that crime. It can be broken down into two component parts—what the actor knew would happen and what the actor intended to happen. To determine whether an individual or corporation would be liable for providing a government with nuclear weapons that the government uses to make an illegal threat, the mens rea for aiding and abetting a crime, which may differ from the mens rea for the underlying crime, must be analyzed.

A. Knowledge

First, we must analyze what a defendant must have knowledge of in order to meet the knowledge requirement for aiding and abetting a war crime. Must he merely know that his action will aid and abet an act that constitutes a crime or must he know that the act he is aiding and abetting is a crime? Put in the context of aiding and abetting an illegal nuclear weapons threat, must he know that his action will assist in a government’s ability to make an illegal threat or must he also be aware that the government’s threat is illegal?

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69 Black’s Law Dictionary 950 (9th ed. 2009).
International criminal law indicates that in order for a defendant to meet the knowledge requirement of the *mens rea* standard, he must know that his action will further an act that constitutes a crime but need not know that that act is a crime. That is, the defendant must only know that he is assisting the underlying act but need not know of the illegality of that act. The Rome Statute, for example, indicates that a defendant is liable for a war crime whether or not he knew of the illegality of that act. The Statute further states that a defendant meets the mental element of a crime in the act if “the material elements are committed with intent and knowledge.” The Statute, therefore, dictates that the only knowledge required for the commission of an offense under the act is knowledge that he is committing the material elements of the offense. The Nuremberg cases have also followed this conception of knowledge. For example, the Court in *Flick* rejected the idea that a defendant may be excused from liability on the grounds that he was unaware that his action was a crime, while requiring proof that he knew that his act would assist the commission of the act that constitutes the war crime. Furthermore, the ICTR statute has been interpreted in a similar manner, stating that in order for a defendant to fulfill the knowledge requirement of the *mens rea* standard, it must only be proven that “his own conduct was with knowledge” and no proof of knowledge of the illegality of the principal’s act is required.

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70 “A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility.” Rome Statute, art. 32(2).
71 *Id.* at art. 30(1).
Thus, the “knowledge” prong of the mens rea standard for aiding and abetting a war crime requires only that the defendant have knowledge that his assistance would aid the commission of an illegal act and does not require that he know that the underlying act is illegal. This has important implications for which defendants may be held liable for aiding and abetting a nuclear threat by providing a government with nuclear technology to be used in that threat. A larger number of defendants may be convicted for providing nuclear weapons to a government because such defendants must only know that their actions assist the government in obtaining nuclear weapons and does not require that they know that the government’s use of weapons is illegal.

Furthermore, it is important to note that the “knowledge” prong of the mens rea is deemed to extend beyond actual knowledge to include constructive knowledge. “Actual knowledge” is defined as “direct and clear knowledge,” while “constructive knowledge” is defined as “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” In other words, actual knowledge is what an individual was aware of, while constructive knowledge is what the individual should have known.

International law dictates that the “knowledge” standard in aiding and abetting liability encompasses both actual and constructive knowledge. Case law under both the ICTY and ICTR indicates that both courts consider “knowledge” to include both actual and constructive knowledge. Likewise, the Rome Statute defines “knowledge” as “awareness that a

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74 Black’s Law Dictionary 950 (9th ed. 2009).
75 Id.
circumstance exists or a consequence will occur in the ordinary course of events.” This standard seems to be the equivalent of a “knew or should have known” standard and therefore includes actual and constructive knowledge. Furthermore, the Nuremberg Trials also seemed to interpret Control Council No. 10’s “knowledge” requirement to encompass constructive knowledge in addition to actual knowledge. In *Zyklon B*, for example, the prosecution offered no evidence that one of the defendants had actual knowledge that the poison gas that his company sold to the Nazis (which was also used as a pesticide) was being used in gas chambers, only evidence that he was given company reports of large amounts of the gas being delivered to concentration camps and a travel report that showed that the gas was used to poison human beings. Nonetheless, the defendant was convicted for aiding and abetting a war crime for providing poison gas to the Nazis that was used for murder*. *Zyklon B*, therefore, indicates that “knowledge” does not require that a defendant actually knew of the intended crime of the principal, but that a “should have known” standard will suffice to convict a defendant of aiding and abetting a war crime. Likewise, in *Flick*, two defendants were convicted for war crimes and crimes against humanity for providing financial support to the SS, despite the fact no proof was offered that they knew that the money would be used to commit war crimes. The Court reasoned that knowledge could be imputed to those defendants on the basis it was well known that the SS committed atrocities throughout the war*. In *Flick*, therefore, the knowledge *mens rea* standard included both actual and constructive knowledge.

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77 Rome Statute, art. 30(3).
78 *Zyklon B* Case, at 99-102.
It is important that “knowledge” encompasses both actual knowledge and constructive knowledge because a constructive knowledge standard allows for a much greater number of defendants to be convicted for aiding and abetting than an actual knowledge standard. There seem to be very few plausible situations in which a person will have actual knowledge that a device that he is constructing will be used to make an illegal threat. However, if a person is liable for aiding and abetting if he should have known that a device he sells will be used to make an illegal threat, this could potentially include any provision of nuclear weapons to a government. If any use or threatened use of nuclear weapons is illegal, it may be argued that nearly all provisions of nuclear weapons satisfies a “should have known” standard, since the only realistic uses for nuclear weapons is to use or threaten to use them. Therefore, under a “should have known” mens rea standard, any selling or production of nuclear weapons to a government could satisfy the mens rea standard for aiding and abetting a war crime.

B. Intent

The proper intent requirement for the mens rea for aiding and abetting violations of international law has been long debated. Whether the proper mens rea is limited to “purposely” or includes “recklessly” is still a hotly contested issue. Depending on how one reads the Nuremberg decisions or the Rome Statute regarding aiding and abetting mens rea, one can come to the conclusion that the intent prong of the mens rea requirement for aiding and abetting a war crime either includes a showing like recklessness or is limited to purposefulness. However, once the rulings of other international criminal tribunals, as well as the generally accepted

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80 See, e.g., Kiobel (holding that aiding and abetting, under international customary law, requires that the perpetrator have knowledge that the crime will be committed and intent that the crime be committed); Anthony J. Sebok, Taking Tort Law Seriously in the Alien Tort Statute, 33 Brook. J. INT’L L. 871, 875 (2008) (arguing that customary international law does not require intent for the crime of aiding and abetting); Angela Walker, The Hidden Flaw in Kiobel, 10 NW U. J. INT’L HUM. RTS. 119 (2011).
principles of nations are taken into consideration, it seems clear that the intent requirement for aiding and abetting under international criminal law requires a lesser showing than “purposely” and can be established if it is shown that a defendant acted recklessly.

The intent requirement for aiding and abetting a war crime is not limited to “purposely” but extends to encompass the concept of “recklessly” as these concepts exist in U.S. criminal law. Under the Model Penal Code, an actor acts “purposely” if it is her “conscious object to engage in conduct of that nature or to cause such a result.” Conversely, under the Code, an actor acts “recklessly” if “he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.” In essence, these two concepts differ in that “purposely” requires that an actor commit an act in the hopes that the crime will occur, while “recklessly” merely requires that an actor knows that there is a high likelihood that the crime will occur if he acts but acts anyway.

The Nuremberg cases offer an inconsistent view of the proper intent mens rea standard for aiding and abetting. In United States v. Ernst von Weizaecker (“The Ministries Case”), a bank official was accused of aiding and abetting war crimes and crimes against humanity by providing loans to businesses that used forced labor. The Court found that the accused had provided the loans, knowing they would be used to commit these crimes, yet acquitted him on the grounds that he had not given the loans with the purpose that the funds be used in this way. The mens rea standard set forth in this case seems to unequivocally state that an individual must

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81 Certainly multiple definitions of “purposely” and “recklessly” exist in various jurisdictions but this paper will use these terms as they are defined in in U.S. criminal law in the Model Penal Code.
82 Model Penal Code § 2.02(2)(a)(i).
83 Model Penal Code § 2.02(2)(c).
84 See Walker, supra note 80, citing States v. Von Weizsaecker (The Ministries Case) in 6 Trials Of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 at 853 (1949).
act with the purpose of aiding and abetting a war crime in order to be convicted of aiding and abetting an international law violation.

However, other Nuremberg trials set out a different mens rea standard for aiding and abetting. For example, in Flick, an industrialist was convicted for aiding and abetting based solely on his knowledge and approval of decisions to use slave labor, despite the fact that there was no evidence presented proving that he had desired that slave labor be used in his factories. The intent required in this case seems to be akin to a “reckless” standard rather than a “purposeful” standard since the defendant was convicted because he was aware that his approval of decisions would very likely lead to slave labor being used, despite the fact that he did not desire this result. Similarly, in Krupp, eleven of the defendants were convicted of deportation, exploitation, and abuse of slave labor, even though no evidence of their desire for such crimes to be committed was ever introduced.

Furthermore, in Zyklon B, a defendant was convicted for aiding and abetting a war crime for supplying the Nazi government with gas to be used in the gas chambers. The Court found that the defendant knew of the intended use for the gas but did not act with the purpose that it be used in this manner. Again, the intent standard used in this case seems to be a recklessness standard because the defendant did not wish that the gas be used to kill humans but continued to supply the gas, knowing that it would be used in this way. Since

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85 Sebok, supra note 80, at 880 citing United States v. Flick (The Flick Case) in 6 Trials Of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10, at 3 (1949).
87 Zyklon B case.
defendants in each of these three cases were convicted for aiding and abetting war crimes and crimes against humanity absent any showing of purposefulness, this indicates that recklessness rather than purpose satisfies the intent prong of the *mens rea* requirement for aiding and abetting an international criminal law violation.

Like the Nuremberg trials, there has been much debate over how the Rome Statute’s provisions on *mens rea* for aiding and abetting should be interpreted. Regarding *mens rea*, the text of the statute states, “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” The statute goes on to define “intent” in relation to a consequence as that the individual “means to cause that consequence or is aware that it will occur in the ordinary course of events.” This standard seems to suggest that purpose is not required but that recklessness as to the likelihood that a consequence will occur will suffice to meet the “intent” prong of the *mens rea* standard under the Rome Statute. Furthermore, the statute lays out a separate *mens rea* for a crime where the person “[c]ontributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.” The *mens rea* for such a crime is that 1) the contribution be intentional; and 2) the contribution be made with the intent of furthering the activity or be made with mere knowledge of the intention of the group to commit the crime. If this crime is interpreted to include the crime of aiding and abetting, the *mens rea* required would be intent to make the contribution, yet no purpose that the principal crime be committed. No matter which *mens rea* is

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89 Rome Statute, art. 30(1).
90 Rome Statute, art. 30(2)(b).
91 Rome Statute, art. 25(3)(d).
required under the Rome Statute for aiding and abetting, purpose that the underlying crime be committed does not seem to be required.

However, Judge Katzmann of the Second Circuit, in his concurring opinion in *Khulumani v. Barclay Nat. Bank Ltd.*, stated that the proper *mens rea* standard for aiding and abetting under the Rome Statute is found in Art. 25(3)(c). This provision states that a person may be held liable if, “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” He interprets this provision to require a *mens rea* of purpose in order to hold one liable for aiding and abetting a crime under international law. However, even in his opinion, Judge Katzmann points out that this provision of the Rome Statute has never been interpreted by the ICC or any other international criminal tribunal. Indeed, there is debate among scholars as to whether this provision creates a purpose requirement or whether the *mens rea* for such a crime may be met with the lesser standard of recklessness. Perhaps the point that can be taken away from an analysis of the Rome Statute is that it is unclear as to what the proper intent *mens rea* is for aiding and abetting a violation of international criminal law under this statute is.

Despite the confusion in determining the proper *mens rea* standard under the Rome Statute, two other international criminal courts have affirmatively stated that the intent *mens rea* for aiding and abetting encompasses both actions committed purposely and those committed recklessly. The ICTY Statute does not list a *mens rea* requirement, but decisions from the Court

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93 Rome Statute at art. 25(3)(c).
94 *Khulumani*, supra note 92 at 276.
95 Id. at 275.
have affirmatively stated that the proper *mens rea* for aiding and abetting a violation of the statute does not require that a defendant act with the purpose of aiding the commission of a crime. In *Prosecutor v. Stakic*, for example, the Court held that aiding and abetting requires only knowledge of the acts that constitute the elements of the crime and acceptance of the foreseeable course of events that would result from his support.\(^97\) The Court further clarified this standard in *Prosecutor v. Tadic*, stating that the *mens rea* required for aiding and abetting liability is “knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.”\(^98\) In each of these cases, sufficient intent is shown by the fact that a defendant was aware of the high likelihood that crime would be committed as the result of his actions and acted anyway, a standard that seems to be one of recklessness. Decisions from the ICTR Statute, likewise, indicate that a lesser showing of intent than “purposely” in order to convict a defendant of aiding and abetting an international law violation. For example, in *Prosecutor v. Akayesu*, the Court held that the mental element required for aiding and abetting is “that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.”\(^99\) The standard set out in *Akayesu*, therefore requires only knowledge that the person was assisting in committing the underlying offense and does not require that the person act with the purpose that such a crime be committed. The judgments by the ICTY and ICTR


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offer firm evidence, therefore, that the prevailing intent standard for aiding and abetting an international criminal law violation is less than “purpose” and akin to “recklessness”.

The U.S. Circuit Courts, furthermore, are split as to what intent is required for aiding and abetting an offense under the ATCA. For example, the prevailing standard in the Second Circuit is that a defendant accused of aiding and abetting an international criminal law violation must have the “purpose of facilitating the commission of a crime,” thereby establishing an purpose requirement. 100 The Court based its decision on its reading of international customary law (almost exclusively the Rome Statute) that it requires an intent of “purposely”. 101 Conversely, the Ninth Circuit has held that only intent required is knowledge that the aider and abettor’s actions would assist the principal in violating international criminal law suffices if the defendant continued with the action. 102 The Court based its decision on the fact that the decisions of the ICTY, ICTR, and Nuremberg Trials had established under customary international law that the mens rea for aiding and abetting does not require purpose.

In taking together these various interpretations of international criminal law, the standard for the intent prong of mens rea for aiding and abetting an international criminal law violation seems to include both “purposely” and “recklessly”. The only sources that state otherwise are one Nuremberg case stating that purpose is required (with several other Nuremberg trials stating the opposite) and a debatable interpretation of the Rome Statute. Multiple Nuremberg opinions, a more consistent reading of the Rome Statute, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, on the other hand, each

100 Presbyterian Church Of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (NY 2009).
101 Id.
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affirmatively state that a lesser standard than “purposely” is required for the intent prong of the mens rea standard for aiding and abetting an international criminal law violation.

The proper mens rea standard for aiding and abetting under international law has many practical consequences as to who may be held liable for providing nuclear weapons to a government that uses these weapons to make an illegal threat. If purpose is required, very few individuals and corporations are likely to be held liable for aiding and abetting a war crime. Of the hypothetical scientists listed at the beginning of this section, only the one that was paid by a government to make a nuclear warhead for it and intending that the government use this warhead to make an illegal threat would be liable. However, if the intent requirement of the mens rea standard includes the lesser standard of recklessness, either scientist that knew she was creating a warhead for a government that planned to use it for a threat would be liable, whether or not she intended such a use.

Conclusion

Under the current international and national legal framework, there a variety of possible defendants that could be convicted of committing a war crime for aiding and abetting a government in obtaining nuclear weapons technology. Individuals, and possibly corporations, could be prosecuted in the International Criminal Court or in U.S. courts under the War Crimes or sued civilly under the ATCA in some circumstances. Defendants could be tried for providing various levels of aid to governments, including designing a component part of the weapon and creating a nuclear delivery device, since individuals are culpable for aiding and abetting war crimes if their actions have a “substantial effect” on the government’s ability to make an illegal threat. A crucial issue that remains is what courts will hold to be the mens rea requirement for the crime of aiding and abetting an international law violation. It is generally well settled that
Aiding and abetting requires that a defendant must have actual or constructive knowledge that her act will assist in the commission of the underlying crime, but there is still some debate as to whether she must act with the purpose that she assist the crime or if recklessness will suffice. This is of tremendous practical importance because if aiding and abetting a nuclear weapons threat requires that a defendant act with the purpose that the government make such a threat, there are very few parties that can be shown to have developed weapons for a government with the purpose that they make such a threat. As it stands, international criminal law seems to require only recklessness rather than purpose.

Ultimately, a variety of actors that produce, design, or sell nuclear weapons to governments that use these weapons to make an illegal threat could be liable under international law for a war crime. If we return to the example of the engineer that works with a team to construct a nuclear weapon release device for a government, it is clear that she could be prosecuted for a war crime, even though she is never told that her device will be used as part of a nuclear weapons threat and does not intend that it be used in this way. She has committed a sufficient actus reus for a war crime, in that she substantially contributed to the government’s ability to make a nuclear weapons threat. She has the proper mens rea because she should have known that this device would be used for a threat because the only known use for such a device is to deliver nuclear weapons, and, though she did not act with the purpose of aiding a nuclear weapons threat, she was reckless as to that fact. Under current international criminal law, the engineer and many others like her could be liable for war crimes for aiding and abetting a nuclear threat.