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International Law Summary

Milestones in International Criminal Justice: Recent Legal Controversies at the UN Yugoslav Tribunal

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INTRODUCTION[1]

This is a summary of an event held at Doughty Street Chambers on 16 October 2013.The purpose of this meeting was to discuss recent developments at the International Criminal Tribunal for Yugoslavia (ICTY) and consider the impact these developments have had on the jurisprudence of the tribunal. Discussion focused primarily on the legal implications of the controversial acquittal in the *Perišić*[2] case, specifically the effect this decision has had on aiding and abetting liability and the requirement of specific direction. Additional discussion considered the *Gotovina & Markač* case, the future application of ICTY jurisprudence and also briefly touched upon the recusal of Judge Harhoff and the impact of his actions.

John R.W.D. Jones QC, of Doughty Street Chambers, provided a broad introduction to the relevant cases and the actions of Judge Frederik Harhoff, outlining the opposing opinions that have arisen in relation to each of these issues. His commentary was followed by a discussion of aiding and abetting liability by Kevin Jon Heller, of SOAS, University of London, which aimed to defend the requirement for specific direction, as applied by the Appeals Chamber in the *Perišić* case. Finally, aiding and abetting liability was further analysed by Elies Van Sliedregt, of Vrije Universiteit Amsterdam, who addressed the origin, application and value of the specific direction requirement.

The discussion concluded with questions from the audience. The meeting was held on the record.

CURRENT DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW

The period since November 2012 has been a particularly controversial one for international criminal law. A spate of widely debated acquittals at the ICTY, as well as the letter sent by the ICTY Danish judge, Frederik Harhoff, and its consequences, have ensured that, while the work of the tribunal is now coming to an end, controversy surrounding it has increased considerably.

Gotovina and Markač

The first case, which marked the beginning of this period of controversy for the ICTY, was the *Gotovina & Markač*[3] one. It concerned Ante Gotovina and Mladen Markač, two Croatian nationals who were charged with crimes against humanity and violations of the laws and customs of war for their role in Operation Storm. While initially the Trial Chamber had delivered a unanimous guilty verdict, on appeal, the two Croatian generals were acquitted of all charges and immediately released. The acquittal raised several key questions including whether the Appeals Chamber was right to overturn the decision, whether the Trial Chamber had got the case disastrously wrong, and whether the criticisms detailed in the dissenting opinion were at all justified.

The acquittal proved to be controversial for numerous reasons. First, there was considerable disagreement over the facts of the case, with both sides alleging that ethnic cleansing had taken place in the Krajina region at some time, either during Operation Storm itself, or in the preceding years when the Serbian forces had originally seized the territory. Second, there was huge disparity between the verdicts of the Trial Chamber and the Appeals Chamber. While the Trial Chamber convicted the defendants of crimes against humanity on the basis of joint criminal enterprise liability and sentenced them to 24 years and 18 years respectively, the Appeals Chamber acquitted the pair on all counts, quashed the sentences in their entirety and immediately released the defendants. Thirdly the 3:2 split of the Appeals Chamber proved controversial not least because of the unprecedented language of the dissenters who used phrases such as 'grotesque'[4] and 'contradicts any sense of justice'[5] when they spoke of the majority judgment.

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1 The summary of this meeting was prepared by Emma Beatty.
2 *Perišić* Case ICTY (IT-04-81).
3 Gotovina et al, ICTY (IT-06-90) "Operation Storm".
4 *Gotovina* Case (Appeal Judgment) p. 155, para 26.
5 Ibid, p. 20, para 39.

As regards the acquittal, commentators appear divided. On one side are those who agree with the Appeals Chamber majority and state that the generals' joint criminal enterprise conviction was based entirely on the flawed finding of unlawful shelling and the 200 metres standard that was applied by the Trial Chamber in spite of having no basis in the evidence.[6] On the opposite side are those who fundamentally disagree with the majority: they argue that while the Trial Chamber did err in applying the 200 metres standard, convictions for both defendants could still be upheld based on the remaining findings. This group includes former chief prosecutor, Carla del Ponte, who publicly condemned the Appeals Chamber judgment as well as Judge Harhoff, who saw the acquittal as an example of a plot, led by the United States and Israel, which aimed to influence the ICTY judiciary.

The opinion was expressed that it takes more judicial courage to acquit a case than to convict, that it is easy to convict those in leadership positions on the basis of joint criminal enterprise liability and command responsibility because of the extraordinary breadth of these doctrines and that an acquittal such as this, which is politically controversial, is as much evidence of an Appeals Chamber boldly eschewing politics and simply applying law to the facts, as it is evidence of a Chamber or Judges being unduly influenced by politics.

Judge Harhoff

The second controversy to arise at the ICTY concerned the letter issued by Judge Harhoff, to 56 of his close friends. In it he alleged, among other things, that a number of recent acquittals at the ICTY, including those of *Gotovina & Markač*, *Perišić* and *Stanišić & Simatović*[7], had come about as a result of the president of the ICTY, Judge Meron, putting pressure on other judges to acquit. The letter alleged that he had done this at the bidding of the United States and Israel, who feared that the ICTY case law was getting too tough on military leaders and might potentially rebound on their own forces.

The letter has raised many questions, including whether the allegations made by Judge Harhoff are true. However, an issue that was more immediately problematic was the allegation of judicial misconduct. For a judge to publicly defame his fellow judges in this manner and bring the ICTY into disrepute, has been said to raise doubts over his fitness for judicial office and his position as an ICTY judge. His involvement in earlier cases, such as the *Šešelj*[8] case, which had involved a six-year trial, and the *Rasim Delić*[9] case has been questioned and challenged by defence teams. In the former case Judge Harhoff has subsequently been disqualified because of the appearance of bias in favour of conviction that rebuts the presumption of impartiality.[10] On the other hand there are those who have labelled Harhoff as a courageous whistle-blower who has revealed the truth about what is happening behind the scenes at the ICTY.

Perišić

The final controversy to address is the *Perišić* acquittal. This case concerned the most senior officer in the Yugoslav Army, General Momčilo Perišić, who had, during the course of the conflict in the Former Yugoslavia, provided military and logistical aid to the Bosnian-Serb army. He was convicted of aiding and abetting crimes against humanity and war crimes, which were committed in Sarajevo and sentenced to 27 years imprisonment by the ICTY Trial Chamber. This decision was quashed on appeal on the basis that the Trial Chamber had failed to find that the aid that the

6 The 200-metre standard was a range of error applied by the Trial Chamber in relation to the shelling of the four towns that took place as part of Operation Storm. Any artillery projectiles that impacted within a 200-metre radius of an identified artillery target were deemed lawful by the Trial Chamber on the grounds that they were deliberately fired at said target. However any artillery projectiles that fell outside of a 200-metre radius of an identified artillery target were deemed to be unlawful by the Trial Chamber and were found to constitute an indiscriminate attack and unlawful attack on civilians and civilian objects.

7 *Stanišić & Simatović* Case ICTY (IT-03-69).

8 *Šešelj Case* ICTY (IT-03-67).

9 *Delić* Case ICTY (IT-04-83).

10 Ibid., 7 'Decision on Defence Motion for disqualification of Judge Frederik Harhoff and report to the Vice President', p.5, para 14. This motion was decided 2:1, Judge Liu dissenting.

defendant provided was specifically directed towards aiding the crimes that had been committed by the army of Republika Srpska (VRS). In reaching this decision the Appeals Chamber highlighted that specific direction had always been a requirement of aiding and abetting liability, dating back to the *Tadić*[11] case. As the Trial Chamber had made no finding on that basis the Appeals Chamber considered the case *de novo* and found that there was not sufficient evidence beyond a reasonable doubt that the aid had been specifically directed.

Opinions on the acquittal can again be divided into two distinct groups. On one side are those who are opponents of the specific direction requirement, who argue that ICTY jurisprudence has previously required only a substantial contribution to the crime, and knowing that the aid can assist a crime was enough to convict. This group includes members of the SCSL Appeals Chamber, who have rejected the specific direction requirement in the *Charles Taylor* case. On the other side are those who argue that specific direction has always been a requirement of aiding and abetting liability and the Appeals Chamber decision was correct.

11 *Tadić* Case ICTY (IT-94-1) "Prijedor".

KEVIN JON HELLER

A defence of the specific direction requirement

The *Perišić* case had important implications for the doctrine of aiding and abetting liability and discussed in detail the requirement of specific direction as an element of the doctrine. This specific direction requirement was a focus of Judge Harhoff's letter and fuelled his accusation that President Meron had engineered the acquittal.[12] This part of the discussion aimed to defend the specific direction requirement and to consider the implications it may have on future cases before the International Criminal Court (ICC).

Specific direction in context

In the *Perišić* case the majority addressed a very specific type of aiding and abetting- namely, where the assistance that had a substantial effect on the commission of international crimes could have been used for either lawful or unlawful activities. Such assistance is often described in domestic criminal law as neutral assistance, which can include the provision of fungible items such as money, weapons and personnel. It is in that context, and that context alone, that the majority held that in order to establish the *actus reus* of aiding and abetting, the prosecution must explicitly prove that the defendant 'specifically directed' his neutral assistance to unlawful activities. The key element of the judgment in relation to this point reads:

> The Appeals Chamber observes that in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary.[13]

According to the majority, the prosecution can establish the requisite specific direction in two different ways. The first is the most straightforward: specific direction can be established as a matter of law by proving that the defendant provided neutral assistance to 'an organization whose sole and exclusive purpose was the commission of such crimes.'[14] This method of establishing specific direction could have been applied in the *Stanišić & Simatović* case, where it would have been possible to argue that the Serbian Special Purpose Unit was an inherently criminal organization. The second way to establish specific direction, which was more relevant to the case of General Perišić as it applies in situations where the defendant provided neutral assistance to an organization that was not solely criminal, would be to prove that the defendant specifically directed his assistance to an organization's unlawful activities. In addition the majority also discussed potential factors that could be considered in establishing circumstantial evidence of specific direction. These included the magnitude of the defendant's assistance, the type of assistance provided by the defendant, any evidence that the defendant deviated from his own organization's policy of only supporting lawful activities and any evidence of the defendant's knowledge of the principal perpetrators' unlawful activities.

12 This opinion is articulated in the excerpt of the letter, which reads: 'Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction? We will probably never know. But reports of the same American presiding judge's tenacious pressure on his colleagues in the […] *Perišić* case makes you think he was determined to achieve an acquittal […] You may think this is just splitting hairs. But I am sitting here with a very uncomfortable feeling that the court has changed the direction of pressure from "the military establishments" in certain dominant countries'.
13 *Perišić* Case (Appeals Judgment) p. 17, para 44.
14 Ibid, p.20 para 52.

The legal foundation of specific direction

The accusation levelled in Judge Harhoff's letter is based on the opinion that specific direction is a radically new requirement that has marked a step back from ICTY set practice. However it can be argued that, based on the following points, this position is, in fact, untrue.

First, the specific direction requirement was articulated in the very first Appeals Chamber judgment in the *Tadić* case. Here the Appeals Chamber stated that:

> the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civil property, etc.) and this support has a substantial effect upon the perpetration of the crime.[15]

Second, as the majority in *Perišić* highlights, since *Tadić* there has been only one appeals judgment, from both the ICTY and ICTR, which has questioned the specific direction requirement. This occurred in the *Mrkšić*[16] case, which can be viewed as a questionable judgment. First, it dismissed the specific direction requirement in its discussion of the *mens rea* of aiding and abetting, not the *actus reus*. Second, when commenting on the fact that the requirement is not part of the *actus reus* the judgment cited only *Blagojević & Jokić*[17] - a case in which the Appeals Chamber had in fact specifically affirmed that the requirement was an element of *actus reus*. Thirdly, the majority did not even raise the specific direction requirement in the *Perišić* case *sua sponte*. Instead the analysis basically reproduced Judge Moloto's dissenting judgment in the Trial Chamber decision. Finally, the adoption of the specific direction requirement was also foreshadowed by the concurring opinions of Judge Güney and Judge Agius in the *Lukić*[18] case. Both affirmed the requirement here and criticized the position adopted by the Appeals Chamber in the earlier *Mrkšić* case; notably this criticism was based on the same grounds as the majority's reasoning in the *Perišić* case.

Specific direction and customary international law

An additional challenge to specific direction can be made on the grounds that the requirement has no basis in customary international law. It was this position which was adopted by the Special Court for Sierra Leone (SCSL) in the *Taylor*[19] case, where the judgment stated:

> The *Perišić* Appeals Chamber did not assert that specific direction is an element under customary international law. Its analysis was limited to its prior holdings and the holdings of the ICTR Appeals Chamber, which is the same body [...] In the absence of any discussion of customary international law, it is presumed that the ICTY Appeals Chamber in *Perišić* was only identifying and applying internally binding precedent.[20]

Two problems can be raised in relation to this position. To begin with the judgment directly accuses the majority of deliberately ignoring its own mandate because the ICTY is limited to applying 'the rules of international humanitarian law which are beyond any doubt part of customary law.'[21] Clearly the rationale for this limitation is the need for the ICTY to respect the principle of non-retroactivity.

15 *Tadić* Case (Appeals Judgment) p. 108, para 229.
16 *Mrkšić et al* ICTY (IT-95-31) "Vukovar Hospital".
17 *Blagojević & Jokić* ICTY(IT-02-60).
18 *Milan Lukić & Sredoje Lukić* ICTY (IT-98-32/1) "Višegrad".
19 *The Prosecutor vs. Charles Ghankay Taylor*, (SCSL 03-01-T).
20 Ibid, (Appeals Judgement) para 476.
21 UN Secretary-General's Report on Security Council Resolution 808.

This is made clear by the UN Secretary-General's Report on Security Council Resolution 808, which states:

> The application of the principle of *nullum crimen sine lege* requires that the Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.[22]

This in turn leads on to a more fundamental criticism of the SCSL's rationale for rejecting the specific direction requirement; the ICTY does not need to find a customary basis for a doctrine that narrows, rather than expands, a defendant's criminal responsibility. That is precisely what the specific direction requirement does; it ensures that it is harder to convict a defendant of aiding and abetting, not easier. The decision of the majority to adopt the requirement in *Perišić* does not implicate the *nullum crimen* principle, which makes the adequate basis of the requirement in customary international law, irrelevant. However the irrelevance of custom here does not mean that the majority should have adopted the requirement. It simply means that the issue is one of criminal law theory, not customary international law. The question that needs to be answered is: does the normative structure of aiding and abetting require adopting the specific direction requirement in the context of neutral assistance to an organization that is involved in both lawful and unlawful activities?

A justification of the specific direction requirement

In the opinion of both the speaker and the majority in the *Perišić* case, the answer was that 'yes', the normative structure of aiding and abetting does require adopting the specific direction requirement in such context. Before moving on to argue in favour of the specific direction requirement it was necessary to highlight that the issue raised within the *Perišić* case, namely the liability of a high ranking military commander accused of aiding and abetting the crimes of another state's army, was one of first impression for the Appeals Chamber. As Judge Moloto made clear in his Trial Chamber dissent:

> I underscore the novelty of this case in the application of aiding and abetting. It is true that 'never before have a commander and the Chief of Staff of General Staff of one army been criminally responsible for the crimes committed by members of the armed forces of another state or entity.' This case is also unique insofar as it is the first clear expression of a direct link between the FRY and the crimes committed in Srebrenica and Sarajevo.[23]

This, it was argued, is a critical aspect of the case, because it explains why critics are wrong to assume that the specific direction requirement emerged out of nowhere in *Perišić*. As the majority actually emphasized in the *Perišić* appeals judgment, specific direction had always been implicit in the *actus reus* of aiding and abetting. Those previous cases which had dealt with this type of liability had simply involved the kind of geographically and temporally proximate assistance which made explicit proof of specific direction unnecessary.

In presenting an argument in favour of the specific direction requirement it is necessary to acknowledge the central normative assumption of the requirement: namely, that is should not be illegal per se for an individual to provide neutral assistance to an organization involved in both lawful and unlawful activities simply because they are aware of the unlawful activities. If one rejects the specific direction requirement, the result would be that such neutral assistance is intrinsically illegal. To demonstrate this the following scenario was provided: a genuinely well-intentioned military commander, one who takes international humanitarian law seriously and who has no desire to assist in the commission of international crimes, could, as long as he is aware that he is providing assistance to an organization involved in both lawful and unlawful activities, be found guilty of aiding and abetting on the basis of factors, substantially or wholly beyond their control,

22 Ibid.
23 *Perišić* Case (Judgment) p. 9, para 31.

namely, whether their assistance does, ultimately, end up substantially contributing to unlawful activities. The commander would be criminally responsible regardless of whether; the organization was predominantly engaged in lawful activities, the commander intended to only assist the lawful activities and the commander did everything within their power to prevent the assistance from being used for unlawful activities. In such situation, the mere fact of knowing assistance combined with the bad luck that the assistance was misused, would make the commander a war criminal, or possibly a *genocidaire*. Is this outcome the right one? Should military commanders be told that they cannot engage in any way with any organization they know is committing unlawful acts? Assuming that the answer to this is no and the outcome discussed above is not the right one, that in fact assistance in this context should not be categorically prohibited, it is necessary to ask how the elements of aiding and abetting should be structured so as to fairly and reliably distinguish between permissible and impermissible forms of neutral assistance?

Three potential limiting factors can be considered here.

Under the first limitation it would be necessary to require that the prosecution proves that the defendant intended to assist an organization's unlawful activities. The fact that assistance is neutral on its face would obviously be irrelevant if the defendant subjectively desired to facilitate the commission of international crimes. This position is the approach that the Statute of the International Criminal Court, in Art. 25(3)(C), and many national systems, including in the United Kingdom and Australia, adopt in relation to aiding and abetting. In addition to this, in the Joint Separate Opinion in *Perišić*, Judges Meron and Aguis emphasized that they would have preferred this limiting principle as opposed to the specific direction requirement. However, they also pointed out that the Appeals Chamber has always held that the *mens rea* of aiding and abetting is knowledge rather than intent. Thus, it was concluded, that affirming the specific direction requirement, which had been a part of aiding and abetting since the *Tadić* case, was more consistent with the jurisprudence of the ICTY.

A second potential limiting principle, which also operates at the level of *mens rea*, would be to require the defendant to know that his assistance will be used to commit a specific crime, not just that it might be used for criminal activity in general. Even if a defendant does not intend to facilitate unlawful activity, there is no justification for him providing neutral assistance to an organization that he knows will be used to commit a specific crime. This limiting principle is not inherently inconsistent with ICTY jurisprudence. In fact, the Appeals Chamber explicitly adopted this position in early case law. For example in *Tadić* the Appeals Chamber stated: 'The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.'[24]

Thus, under this approach, a defendant acted with the necessary *mens rea* only if he was: virtually certain that the principal would commit a specific crime (the criminal object element) and virtually certain that their actions would assist in that crime if it was committed (the assistance element). The *Tadić* standard is a particularly high one which has since been modified. In the *Orić*[25] case, the Trial Chamber defined 'knowledge' for purposes of aiding and abetting in the sense of domestic criminal law, as 'virtual certainty' or 'practical certainty'. The Appeals Chamber too moved away from the *Tadić* standard in 2004 when it ruled on the *Blaškić*[26] case. Both within and since the *Blaškić* case, the Appeals Chamber has consistently adopted a much lower *mens rea* for aiding and abetting, which is the standard applied in *Perišić*. The relevant formulation from the *Blaškić* case read:

> It is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[27]

24 *Tadić* Case (Appeals Judgment) p. 109, para 229.
25 *Orić* ICTY (IT-03-68).
26 *Blaškić* ICTY (IT-95-14) ''Lašva Valley''.
27 Ibid. (Appeals Judgement) para 50.

Thus, under this lower standard, the defendant acted with the necessary *mens rea* as long as: they were aware that the principal would probably commit various unspecified crimes in the future and they were virtually certain that their actions would assist those crimes if they were committed. In these differing standards the assistance element is presumably the same. However, the criminal-object element is much easier to satisfy in the latter standard. The two basic differences are the defendant in the *Blaškić* standard: does not have to know that a crime will be committed but needs only have an awareness that it will probably be committed, and does not have to be aware that the principal will probably commit a specific crime but needs only have an awareness of the probable commission of any kind of crime. Essentially the *Blaškić* standard effectively lowers the criminal object *mens rea* of aiding and abetting from knowledge to recklessness.

This standard can be seen as problematic in any context but is especially problematic in the context of neutral assistance to organizations that are not inherently criminal. This is so because as long as the well-intentioned military commander discussed, knows someone in the organization will probably commit some kind of crime in the future, their neutral assistance will be criminal if it ends up, even despite their best efforts, having a substantial effect on whatever crime is actually committed.

The third possible limiting principle is the specific direction requirement that operates at the level of *actus reus*. This requirement provides a normatively satisfying solution to the dilemma faced in *Perišić*. As the majority noted, when dealing with neutral assistance to organizations that are not inherently criminal, the specific direction requirement provides the necessary culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.

The future of the specific direction requirement

There are very few cases remaining at the ICTY and the ICTR, while the SCSL has already rejected the requirement in the *Taylor* decision. Thus the future of the requirement will be based on whether or not the majority judgment in *Perišić* will have any effect on the jurisprudence of the ICC.

The relevant provision within the ICC Statute is Article 25(3)(d), which criminalizes assistance to a group 'when made in the knowledge of the group to commit the crime.' The relevant article reads:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person […] (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

Is the ICC likely to adopt the specific direction requirement in the future? At present it is hard to answer this, primarily because its aiding and abetting jurisprudence is in complete disarray.

In terms of *actus reus*, two Pre Trial Chambers (PTC) have disagreed with each other on this issue. In *Mbarushimana*[28], based on the jurisprudence of the ICTY, PTC I adopted a significant contribution test. However in contrast to this, in *Ruto and others*[29], PTC II specifically rejected the significant contribution test but they also failed to identify the minimum contribution required. Thus no alternative standard was articulated. If the ICC Appeals Chamber ultimately follows *Ruto and others*, it will need to consider adopting something like the specific direction requirement as it would

28 *The Prosecutor v. Callixte Mbarushimana*, ICC, ICC-01/04-01/10.
29 *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC, ICC-01/09-01/11.

be impossible to justify an *actus reus* of aiding and abetting that does not require either significant contribution or specific direction.

In terms of the *mens rea* of aiding and abetting the jurisprudence is similarly unsettled. Article 30 of the Rome Statute defines knowledge as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events.' This is generally interpreted by scholars to mean knowledge in the domestic criminal law sense of 'virtual certainty'. While the ICC Appeals Chamber has yet to rule on the issue, the lower chambers are, again, in disagreement. In both the *Bemba*[30] and *Ruto and others* cases, PTC II specifically affirmed that knowledge does require virtual certainty. However, in contrast, in the *Lubanga*[31] , *Katanga*[32] and *Ngudjolo*[33] cases, PTC I held that *dolus eventualis* (common law recklessness plus acceptance of the risk) satisfies Article 30's knowledge requirement. Notably the Trial Chamber also appears to have adopted the same position in *Lubanga*.

If the ICC Appeals Chamber ultimately adopts the *dolus eventualis* standard, in the context of contributions to group crimes, the specific direction requirement will be normatively necessary, as it was for the ICTY. As an indication of the position the ICC may potentially adopt on the specific direction requirement in the future, Judge Gurmendi's Separate Opinion in the *Mbarushimana* case it particularly interesting. Speaking in relation to the provision of neutral assistance to group crimes the opinion states:

> I am not persuaded that such contributions would be adequately addressed by adding the requirement that a contribution be significant. Depending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes by this group. In my view the real issue is that of the so-called 'neutral' contributions. This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution.[34]

It would seem that Judge Gurmendi is aware of the desirability of the specific direction requirement and, in referencing normative and causal links, appears to mean something closely akin to this standard.

This concluded the defence of the specific direction requirement but discussion remained focused on the requirement, assessing its origin and application in further detail.

30 *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, ICC-01/05 -01/08.
31 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, ICC-01/04-01/06.
32 *The Prosecutor v. Germain Katanga*, ICC, ICC-01/04-01/07.
33 *The Prosecutor v. Mathieu Ngudjolo Chui,* ICC, ICC-01/04-02/12.
34 *Mbarushimana* Case, ICC (Appeals Chamber), ICC-01/04-01/10-T-10 (May 2012).

ELIES VAN SLIEDREGT

The origin of specific direction as a component of aiding and abetting liability

The Appeals Chamber in *Perišić* traces specific direction back to the *Tadić* case. The *Tadić* Appeals Chamber, in its 1999 judgment, characterized aiding and abetting as assistance that is specifically directed to a specific crime with knowledge of such specific crime. The word specific was used to mark the difference between aiding and abetting and joint criminal enterprise liability, which instead makes culpable acts that are in some way directed to the furtherance of the common criminal design. By contrasting the two standards, the Appeals Chamber in *Tadić* managed to justify the need for joint criminal enterprise liability, a move that was particularly pertinent as, unlike aiding and ability, this mode of liability was not codified in the ICTY Statute but had instead been read in and subsumed under the notion of commission. In addition, differentiating the two standards ensured that joint criminal enterprise liability stood as the basis for convicting *Tadić* of crimes he had been acquitted of under aiding and abetting liability as no culpable link between *Tadić* and the crimes could be established.

Thus the insistence on specificity should be viewed in context – aiding and abetting was defined in such a way as to contrast this form of liability with joint criminal enterprise liability and this required a certain amount of exaggeration.

Notably in an earlier pre-*Tadić* ruling, made in the *Furundžija*[35] case, the ICTY defined the *actus reus* of aiding and abetting as an assistance that 'in some way has a substantial effect on the perpetration of the crime.'[36] In post-*Tadić* cases however, any reference made to the requirement was merely boilerplate repetition of the Appeals Chamber standard.

Over time the notion of 'specific' was diluted. With regard to the *mens rea*, knowledge of the specific crime does not mean that the aider and abettor must know the precise crime, instead it requires that they are aware of the essential elements of the crime that was ultimately committed by the principal. In turn, with regard to the *actus reus*, aiding and abetting has come to cover assistance, not to a specific crime, but to a 'programme of systemic violence' a 'specific unlawful policy' or the maintenance of a 'system of unlawful arrest and detention.'

Considering these subsequent developments, and the particular context surrounding the definition of aiding and abetting in the *Tadić* case, the broader applicability of specific direction can be questioned.

Why has specific direction surfaced now?

After many years of settled jurisprudence it is necessary to consider why the specific direction requirement has now surfaced as a component of aiding and abetting liability and also why it now seems to make a difference in the guilt or innocence of the defendant. According to the Appeals Chamber in *Perišić*, specific direction is an *actus reus* element of aiding and abetting liability in situations of remote assistance, namely those where an aider and abettor is remote in time and geographic location, from the action of the principal perpetrators. It is in these situations that specific direction is applied to avoid over-inclusiveness. It can be questioned if these situations of remote assistance warrant the application of specific direction. Returning to the *Tadić* formulation of aiding and abetting liability the link of specificity is provided for by the causation requirement; i.e. by requiring assistance that substantially affects the commission of a specific crime. Yet it is also possible to establish a culpable link in cases of remote assistance by proof of causation. The case of Dutch businessman Frans van Anraat provides an example of this. The defendant was convicted for aiding and abetting war crimes on the basis that he had sold chemicals to the regime of Saddam Hussein that were used to produce mustard gas, subsequently used against the Kurds in

35 *Furundžija* Case ICTY (IT-95-17/1) ''Lašva Valley''.
36 Ibid. (Trial Judgment).

Halabja. His culpability was, in the main part, based on the fact that the chemicals he had provided had been used by Saddam Hussein. Thus, as this case demonstrates, it is not necessarily in cases of remote assistance where specific direction adds value in restricting criminal responsibility as this can be done instead by causation.

Further it can be argued that the Appeal Chamber's pronouncement in *Perišić*, that aiding and abetting liability should be limited in situations of remote assistance, was misleading. Senior political and military leaders, often the architects of international crimes are, almost by definition, far removed from the scene of the crimes. Thus not only can it be argued that specific direction is not necessarily pertinent in situations of remote assistance, it can also be claimed that its application sends the wrong signals to those in senior positions.

The appropriate use of the specific direction requirement

It was discussed that where specific direction does have added value is in cases of neutral activity or general assistance that was defined as situations where assistance or support does not necessarily result in unlawful conduct but is capable of dual use, both lawful and unlawful. Considering *Perišić* as an example, the defendant provided weapons, financial support, training and personnel to the army of the Republika Srpska (VRS) that generally assisted in establishing and maintaining Serbian control over certain territory. However, this support was also used for murder, deportation and forcible transfer. This is where the *Perišić* case and the *Van Anraat* case differ. Within the latter dual use was explicitly excluded, while the defence claimed that the defendant sold the chemicals for use in the textile industry, the court rejected this after establishing that in fact no such industry existed in Iraq at the time of trading. However, within *Perišić*, the Appeals Chamber was unable to exclude the possibility that the aid provided to the VRS was not also used in the general war effort. Thus, the added value provided by specific direction can be seen in situations such as *Perišić*, as it allows for acquittal when it cannot be established that assistance was specifically directed to the commission of crimes.

It is in these situations of general assistance or normal duty-cases where specific direction has surfaced in ICTY jurisprudence. Alongside *Perišić*, the requirement also arose in the *Blagojević & Jokić* case and the *Stanišić & Simatović* case. In the former, Jokić, Chief of Engineering in the VRS, whose subordinates dug graves and facilitated murder, argued that he merely performed his normal or routine duties in an organized structure, his acts were not specifically directed to assist the perpetration of the crime. His defence was ultimately unsuccessful because the judges determined that he had done more than his normal duties. Alternatively in the *Stanišić & Simatović* case, which concerned two Serbian intelligence officers who had been involved in the formation, training, supporting and financing of Serbian units, the specific direction requirement was successfully relied upon by the defence. Here the majority in the Trial Chamber found that the acts of the defendants were not specifically directed to the commission of murder, deportation, forcible transfer and persecution and it could not be excluded that the assistance was used as part of a lawful operation.

Specific direction as an element of the mens rea

Discussion moved on to consider if the ICTY has applied specific direction not as an element of the *actus reus* of aiding and abetting but as the *mens rea*, essentially requiring assistance with a purpose to commit crimes. It was stated that this can be seen in the term itself, requiring assistance that is 'directed' means that it must be deliberately or consciously steered towards criminal activities. Thus *mens rea* can be inferred from the term 'direction'. In the *Tadić* case, while the requirement was categorized by the Appeals Chamber with other *actus reus* elements of aiding and abetting, it is a broader definition. When viewed in the context of that case, and bearing in mind the aforementioned desire to differentiate aiding and abetting liability with joint criminal enterprise, specific direction actually qualifies as an overarching requirement of culpable assistance that triggers aiding and abetting liability and contrasts with joint criminal enterprise.

Considering this, it is interesting to look at the application of specific direction in *Perišić*. In relation to the assistance provided by the defendant to personnel seconded to the VRS, the Appeals Chamber held that the assistance was not tailored to facilitate the commission of crimes. This can be seen as essentially meaning that the Appeals Chamber concluded that there was a lack of *mens rea* – that the assistance had not been given with the purpose of facilitating crimes.

As a general point, from a comparative law perspective, criminalising complicity in situations of neutral activity requires emphasizing the subjective or mental element. This makes sense, as causation is not the distinguishing feature between guilt and innocence because, as the assistance was of dual use, it is not possible to establish that it caused the commission of crimes. Thus, causation in these circumstances cannot be used to establish culpability.

The case law of the ICTY aligns with this. In cases of general assistance or lawful activities, the subjective bar has been emphasized or raised. In relation to aiding and abetting liability the move is made from knowledge to purpose in *Perišić*.

This insistence on *mens rea* can also be found in the *Stanišić & Simatović* case, this time within the context of joint criminal enterprise. Here the majority found that, with regard to joint criminal enterprise liability, there was no proof beyond reasonable doubt, that the accused had shared the intent to commit crimes of deportation, persecution and murder. That the defendants 'must have known' of these crimes was insufficient to convict them for these crimes, even under the broad standard of JCE III.

Change in position on aiding and abetting liability

The opinion was expressed that the ICTY has changed its position on aiding and abetting liability, and beyond that, the insistence in relation to the *mens rea* standard evidences a rigidity in approach that is new to the Tribunal. It was asked if this change in approach was necessary or if, in fact, the cases discussed could have been decided by applying the ordinary *mens rea* test for aiding and abetting, that of knowledge. For example if *Perišić* had known that his assistance facilitated the commission of crimes by seconding personnel and he continued to provide this support nevertheless, does this not establish a culpable link? Specific direction, described by the speaker as a veiled purpose test, appears to be more attractive for decreasing the risk of convictions for lawful activities. While some may adopt the position that there is not much difference between purpose and knowledge, in some jurisdictions both connote intent, purpose has a stronger volitional component and will make the conduct (from which *mens rea* is inferred) easier to identify as culpable assistance. Thus, the more tailored the assistance to the commission of crimes, the more 'purposive' the attitude of the aider and abettor and the less likely that the assistance concerns lawful activities.

How has and how should this purpose-test for aiding and abetting liability be greeted? It would appear that the debate in blogs, scholarly articles, Trial Chambers and Appeal Chambers, both inside and outside the ICTY, focuses on the desirability of such a test for aiding and abetting liability. From a position of culpability it was reasoned that one should not oppose a purpose-test. Over the years the law on aiding and abetting liability broadened to the extent that it began to put pressure on the principle of personal culpability. This broadening has also blurred the line between aiding and abetting and joint criminal enterprise liability. The requirement of specific direction has corrected this and returned the law to the theory of aiding and abetting. However it is important to note that this is not a fundamental change to aiding and abetting liability in its entirety, this application is confined to cases of general assistance only. On the other hand it was opined that, from a policy perspective, the requirement for specific direction and a purposive attitude for aiding and abetting is undesirable, especially if it applies to situations other than general assistance. For the purpose of crime prevention a lower *mens rea* threshold would be preferable, so as to ensure that people like Frans van Anraat do not go unpunished when they supply weapons and materials that fuel conflicts where crimes are committed.

Thus far the judgments discussed have not had an impact on aiding and abetting liability outside the ICTY. As discussed, the Appeals Chambers of the SCSL has rejected the *Perišić* ruling in the

Charles Taylor case, finding that the requirement of specific direction and a purpose test is not part of the law on aiding and abetting and has no basis in conventional and customary international law. This is interesting not least because the SCSL has committed itself to be guided by ICTY law. Commentators have been very critical on the approach to customary law adopted by the SCSL Appeals Chamber, but it can be argued that what the decision in the Taylor case seems to be saying is that domestic criminal law is divided on this matter; there is no clear trend that points to the acceptance of knowledge or a purpose-test. Here similarities can be seen with the survey on duress and murder charges which occurred in the *Erdemović*[37] case, where the Appeals Chamber also determined that no clear rule emerged from national law on this issue. This is true, there is no one rule, and instead the test which is applied will depend on concerns of individual autonomy and crime prevention. It can be argued that a knowledge-test is most appropriate for aiding and abetting international crimes, as it has basis in written and customary international law, is the better test from a policy point of view and contributes more towards ending impunity. However, were a knowledge test to be applied, it would need to be a rigid test that establishes a culpable link between an aider and abettor and the commission of a crime, that is after all the purpose of aiding and abetting liability.

This concluded the further analysis of aiding and abetting liability. The discussion then opened to questions directed to the panel from participants.

37 *Erdemović* Case ICTY(IT-96-22) "Pilica Farm".

DISCUSSION

One participant raised two issues with the panel. The first was that the current jurisprudence looks different from the earlier case law of the ICTY: could this be because the judges were revisiting standards with the influence of the ICC jurisprudence and the length of time which has passed since the conflict finished? Secondly, was knowledge of crimes to be committed the most suitable test for guilt in aiding and abetting liability?

In discussing the suitability of a knowledge test for aiding and abetting cases, the speaker expressed a preference for a test of knowledge of a specific crime. But because the ICTY had moved so far away from the original *Tadić* standard, specific direction had provided an imperfect but functional solution to the dilemma the ICTY had created for itself by diluting the *mens rea* of aiding and abetting.

As to the perceived change in jurisprudence, there has been a maturing process at the ICTY. Originally the Appeals Chamber's seniority was based on numbers: there were five appeal judges and three trial judges and there was, at this time, a fundamental lack of seniority in the system. However, over the years certain judges have gravitated towards the Appeals Chamber and have served the ICTY for many years; they thus now have a recognized seniority. This has created a genuine Appeals Chamber and has brought the confidence to provide the proper function of an Appeals Chamber, including the confidence to acquit.

A second question was raised over labelling organizations 'inherently unlawful'. One participant referred to the cases in World War II, where individuals signed deportation orders but claimed that, although such documents included numbers of women and children, they did not know that these people would be murdered. What makes an organization inherently unlawful and what is the definition of dual purpose organizations?

The panel provided the following example: if a person provides neutral assistance to an organization such as the SS, that would be inherently specifically directed, as there is nothing lawful about that organization. While there is room for debate on what qualifies as a criminal organization, one could argue that the VRS, an army that encircled Sarajevo, acted in sieges and propped up paramilitary groups, which in turn committed acts of ethnic cleansing, was systematically criminal. How criminal does an organization have to be? Turning to the example provided of the SS, perhaps the organization historically did engage in regular military activities, potentially at the end of World War II:, would that be enough to be an organization that commits both lawful and unlawful acts?

One participant requested an opinion from the panel in relation to the *Stanišić & Simat*ović case and the issue of joint criminal enterprise liability, where again the jurisprudence of the ICTY seems to have moved. A speaker commented that the verdict was surprising as the facts listed in the case would have previously qualified as, or would have been taken as an indication of the fact that, people were participating in a joint criminal enterprise. As with *Perišić* the case dealt with the type of general assistance that has been discussed and this may be the reason behind the cautious approach seen in the case. As the acts occurred within the context of general assistance, the Trial Chamber insisted on clear evidence of intent or shared intent, rather than the reckless knowledge that used to apply in the past. This case provides another example of the ICTY taking an adapted approach when crimes occur within the context of general assistance.

Another participant enquired about the implications the issues discussed may have on modern governments and whether the ICTY jurisprudence puts any pressure on them in relation to assistance they may provide to non-state actors? It was stressed that these issues need to be carefully discussed. Officials of a government providing weapons to non-state actors, who are aware that it is likely that some crime will be committed by those groups, may risk their criminal liability if their well-intentioned assistance falls into the wrong hands and has a substantial effect on a crime. With the ICTY now closing down, the relevant case law to look to is that of the ICC, and as previously explained by Kevin Heller, the ICC cases are not yet clear on the parameters of this form of liability.

Attention then turned to the *Taylor* Appeal judgment in the Special Court for Sierra Leone. The question was asked where, in terms of a fair and just decision on 'secondary liability', the *Taylor* Appeal stood in the panel's view? Would Charles Taylor have been acquitted if the *Perišić* standard had been applied? Additionally in relation to the earlier discussion about the SS, the participant asked if the Revolutionary United Front (RUF) of Sierra Leone would qualify as a criminal organization?

In terms of the nature of the RUF, it was stated that one could argue that it is an organization with an inherent criminal nature and this position has been expressed by commentators. On the *Taylor* case, it was stated that was not necessary to establish that the RUF was a criminal entity. Even if the requirement of specific direction had been applied in this case, the evidence was overwhelming that Charles Taylor specifically directed his assistance to the illegal activities of the RUF. The *Taylor* case serves as an excellent example of a situation where the circumstantial evidence was overwhelming that the defendant was not just supporting the war effort; he was supporting attacks on civilians and all the other crimes of the RUF/FRC. So even if the *Perišić* standard had been applied the conviction would still have stood.

The penultimate question to the panel concerned the *Šešelj* case, where the trial had been on-going for six years; is the ICTY is ill-equipped to handle someone like Šešelj? In response the panel noted that there were several issues. First there is the question of Judge Harhoff and his recusal. There cannot be a decision issued by a new judge who did not hear a single day of testimony and the ICTY cannot re-try a defendant who has been in custody for 10 years and on trial for six. If the ICTY had not taken such a long time to finish the case, which was partly the defendant's fault as he had been very disruptive over the years, the situation may be different, but as it stands there is really no alternative other than release. There is also the issue of self-representation, where Šešelj insisted from the start that he would be representing himself but continually used this for political ends, which the ICTY did little to prevent; this contributed to the length of the trial. As a general point, international trials do last for a long time in comparison to national trials and while mechanisms have been devised over the years to attempt to shorten trials this problems still persists. But the way in which the *Šešelj* case has been handled by the ICTY has certainly been far from perfect.