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SCSL-03-01-A
(10566-10738)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before:	Justice Shireen Avis Fisher, Presiding Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter Justice Jon M. Kamanda Justice Philip Nyamu Waki, Alternate Judge
Registrar:	Ms. Binta Mansaray
Date filed:	14 March 2013

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC
PROSECUTION MOTION FOR LEAVE TO FILE ADDITIONAL WRITTEN SUBMISSIONS REGARDING THE ICTY APPEALS JUDGEMENT IN *PERIŠIĆ*

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
Mr. Cóman Kenny

Office of the Principal Defender:
Ms. Claire Carlton-Hanciles

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. The Prosecution files this motion for leave to file additional written submissions in relation to the recent ICTY Appeal Judgement in the case of *Prosecutor v. Perišić*.[1] The Prosecution respectfully submits that additional submissions are within both the inherent discretion of the Appeals Chamber and the scope of Rules 106(C) and 73,[2] and that there is nothing in the SCSL's Rules or jurisprudence which would preclude such submissions. The Prosecution further submits that such submissions are appropriate in that the *Perišić* Appeal Judgement was delivered after the completion of submissions in this case; the Judgement directly addresses a question posed by the Appeals Chamber in this case;[3] and in light of Article 20(3) of the SCSL Statute. Accepting additional submissions relating to the *Perišić* Appeal Judgement will also ensure that the parties have an opportunity to address the issues therein, should they wish to do so, and will further inform the discussion regarding a mode of liability at issue in *Taylor*.

2. The Prosecution submits that the additional argument is appropriate in particular because, firstly, the Majority in the *Perišić* Appeal Judgement[4] deviated from established jurisprudence when it: (i) found that "specific direction" is a distinct element of aiding and abetting; (ii) in effect elevated the *mens rea* of aiding and abetting; (iii) found that if an accused's assistance is "remote" from the actions of the principal perpetrator, "specific direction" must be explicitly established; and, (iv) found that knowing and substantial assistance to the commission of crimes by a non-"purely criminal" organization is not <u>necessarily</u> specifically directed to the commission of such crimes. All of these deviations were based on flawed reasoning. Secondly, should this Appeals Chamber agree that "specific direction" does form a separate element of aiding and abetting, the factual findings of the Trial Chamber establish that Charles Taylor provided assistance that was specifically directed to the commission of crimes. Finally, facts that the *Perišić* Appeals

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[1] *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").
[2] Special Court for Sierra Leone Rules of Procedure and Evidence, amended on 31 May 2012 ("Rules").
[3] Scheduling Order, SCSL-03-01-A-1355, 30 November 2012.
[4] The majority consisted of Judges Meron (presiding), Agius, and Vaz ("*Perišić* Appeals Majority"). Judge Ramaroson issued a separate opinion disagreeing with the Majority on the issue of specific direction and finding that Perišić should have been acquitted on a different basis. Judge Liu issued a partially dissenting opinion dissenting on all the findings of the Majority relating to Perišić's liability for aiding and abetting.

Majority found relevant in reversing Perišić's aiding and abetting conviction can be distinguished from the facts in the *Taylor* case.

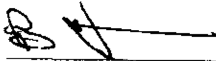
II. LEAVE TO EXCEED PAGE LIMIT

3. In the event that the additional submissions are deemed to form part of the Prosecution's appellate submissions, the Prosecution respectfully requests the Court's leave to exceed the page limit of its appellate submissions pursuant to Article 6(G) of the Practice Direction on dealing with Documents in The Hague – Sub-Office. The Prosecution submits that in light of the justifications for seeking to file its additional submissions set out herein, exceptional circumstances exist for requesting a page extension of twenty (20) pages.

III. CONCLUSION

4. For the reasons set out above, the Prosecution respectfully requests that the attached written submissions be accepted by the Appeals Chamber.

Filed in The Hague,
14 March 2013
For the Prosecution,



Brenda J. Hollis
The Prosecutor

List of Authorities

SCSL

Statute of the Special Court for Sierra Leone

Special Court for Sierra Leone Rules of Procedure and Evidence, amended on 31 May 2012

Practice Direction on dealing with Documents in The Hague – Sub-Office, adopted on 16 January 2008, amended 25 April 2008

Prosecutor v. Taylor, SCSL-03-01

Scheduling Order, SCSL-03-01-A-1355, 30 November 2012

ICTY

Prosecutor v. Perišić, IT-04-81-A, Judgement, 28 February 2013
http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf

SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 14 March 2013

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC
PROSECUTION ADDITIONAL WRITTEN SUBMISSIONS REGARDING THE ICTY APPEALS JUDGEMENT IN *PERIŠIĆ* WITH APPENDED BOOK OF AUTHORITIES

Office of the Prosecutor:
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Mr. Nicholas Koumjian
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Mr. Cóman Kenny

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Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
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I. INTRODUCTION

1. The Prosecution files these submissions addressing the recent ICTY Appeals Judgement in the case of *Prosecutor v. Perišić* with respect to "specific direction".[1] The Prosecution respectfully submits that the Majority Opinion in this Judgement (Judges Meron, Agius and Vaz)[2] deviated from settled ICTY/ICTR jurisprudence which has established that "specific direction" does not constitute a separate essential element of aiding and abetting.

2. Although there is no clear agreement among the Judges, it appears that the *Perišić* Majority deviated from established jurisprudence when it: (a) found that "specific direction" is a distinct element of aiding and abetting liability; (b) in effect elevated the *mens rea* of aiding and abetting; (c) found that if an accused's assistance is "remote" from the actions of the principal perpetrator, "specific direction" must be explicitly established;[3] and (d) found that knowing and substantial assistance to the commission of crimes by a non-"purely criminal" organisation is not <u>necessarily</u> specifically directed to the commission of such crimes. All of these deviations were based on flawed reasoning.

3. The Prosecution submits that these deviations were made without the "careful consideration" required for a departure from established jurisprudence and that there were no "cogent" reasons "in the interests of justice" to do so.[4] These deviations were unwarranted, as the previous standard ensured that only those who committed an act which substantially contributed to the commission of a crime, with the knowledge or awareness of the substantial likelihood that it would facilitate a crime, would be liable for aiding and abetting that crime. This standard established the requisite "culpable link between assistance provided by an accused individual and the crimes of principal perpetrators."[5] In contrast, if the Majority Opinion's new legal standard is followed, it would potentially preclude calling to account most "external actors", including those

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[1] *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").
[2] The Majority Opinion consisted of Judges Meron (presiding), Agius and Vaz. Judge Liu issued a partially dissenting opinion dissenting on all of the Majority's findings relating to Perišić's liability for aiding and abetting, affirming his conviction. Judge Ramarosan issued a separate opinion about the question of specific direction in which, although she agreed with the reversal of Perišić's conviction, she disagreed with the Majority that specific direction was an essential element of aiding and abetting to be analysed in the context of the *actus reus*. It is unclear on which of the underlying factual conclusions regarding specific direction Judge Ramarosan concurred with the Majority. Consequently, the Prosecution has defined the Majority as Judges Meron (presiding), Agius and Vaz ("Majority Opinion" or "*Perišić* Majority") throughout these submissions.
[3] *Perišić* Appeal Judgement, para. 73.
[4] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), paras. 107-109.
[5] *Perišić* Appeal Judgement, para. 37, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 4.

individuals most responsible and most culpable for fuelling atrocities from a distance, who acted with the requisite knowledge or awareness of the substantial likelihood that their assistance would facilitate such crimes. Such a preclusion cannot be in the interests of justice.

4. The Prosecution suggests that only a cogently reasoned, clear statement of the law should be afforded precedence in a situation such as this which departs from a long line of established jurisprudence, and that, therefore, the Majority Opinion should not be afforded precedential value on the issue of specific direction. In short, there is no clear agreement amongst the Judges themselves about the legal characterisation of specific direction, as reflected in the Majority Opinion, the joint separate opinion, the separate opinion and the dissenting opinion. The Majority Opinion places specific direction as an element of the *actus reus*.[6] In the Joint Separate Opinion, Judges Meron and Agius state that specific direction can reasonably be assessed in the context of either *actus reus* or *mens rea*.[7] However, they also state that it "logically fits within [the] current *mens rea* requirement",[8] and they consider it a separate element of *mens rea*.[9] While Judge Ramaroson concurs with the Majority Opinion reversing the convictions, she does not agree on the basis of specific direction. Rather, she considers that, to the extent it exists, specific direction is implicitly taken into account in the context of the *mens rea* standard of knowledge. Her view is that Perišić should be acquitted of the charges because the evidence did not show that he was aware his acts would facilitate the crimes.[10] In his dissenting opinion, Judge Liu does not agree that specific direction is a separate element of aiding and abetting. Rather, he is of the view that specific direction may be a pertinent factor in evaluating *mens rea* and is a "red herring" in the context of the *actus reus*.[11] Given this lack of clarity, the Majority Opinion is of little value in understanding the elements of aiding and abetting.

5. For all of these reasons, the Prosecution submits that the Judges of the SCSL Appeals Chamber should not be guided by the Majority Opinion.[12]

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[6] *Perišić* Appeal Judgement, para. 36.
[7] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, paras. 3-4.
[8] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 3.
[9] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 4.
[10] *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, paras. 2-6, 10.
[11] *Perišić* Appeal Judgement, Partially Dissenting Opinion of Judge Liu, para. 2 and fn. 7.
[12] Statute of the Special Court for Sierra Leone, Art. 20(3).

II. The Majority Opinion Deviated From Established Jurisprudence Based on Flawed Reasoning and Without Justification

6. The finding that "specific direction" establishes a "culpable link" between assistance provided by an accused and the crimes[13] is perhaps the basis for the deviations discussed below. While this "culpable link" is not defined, the Prosecution suggests that as a general matter, criminal culpability is established only after all elements have been proven beyond reasonable doubt. If the Majority Opinion language is in fact referring to a causative link, this deviates from settled jurisprudence which establishes that substantial contribution would be the causative link.[14] If the Majority Opinion language is in fact referring to the *mens rea* requirement, it is well established that knowledge or the requisite degree of awareness meets that requirement.[15]

A. The Majority Opinion deviated from established appellate jurisprudence when it found that "specific direction" is a distinct element of the *actus reus* of aiding and abetting and is based on flawed reasoning.

- *The finding deviates from established jurisprudence*

7. The position of the Majority Opinion that "specific direction" has been a distinct element of aiding and abetting liability since the *Tadić* Appeal Judgement[16] departs from established ICTY and ICTR appellate jurisprudence without the "cogent reasons" and "most careful consideration" required for such a departure.[17] As acknowledged by the *Perišić* Majority, the term "specific direction" was used in the *Tadić* Appeal Judgement to draw a distinction between the contribution required by an accused under the joint criminal enterprise mode of liability and that required under aiding and abetting.[18] However, as expressly noted in the *Aleksovski* Appeal Judgement, the formulation adopted in the *Tadić* Appeal Judgement was "in the context of contrasting" modes of liability and was not "a complete statement of the liability of the person

[13] *Perišić* Appeal Judgement, para. 37.
[14] *Aleksovski* Appeal Judgement, para. 162. There is no "but for" test of causality, *see Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 48.
[15] *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić & Šljivančanin* Appeal Judgement"), para. 159.
[16] *Perišić* Appeal Judgement, para. 73.
[17] *Aleksovski* Appeal Judgement, paras. 107-109.
[18] *Perišić* Appeal Judgement, para. 27.

charged with aiding and abetting".[19] In light of this, the *Aleksovski* Appeal Judgement defined the *actus reus* without any reference to specific direction.[20]

8. While specific direction *has* been mentioned in ICTY and ICTR jurisprudence after *Aleksovski*, it has not been set out as a separate element.[21] Where specific direction has been mentioned in relation to the *actus reus*, it has not been defined or applied consistently to the facts. The Appeals Chamber has not corrected the failure to set it out as a separate element, the failure to define it or to consistently apply it.[22] As stated by Judge Liu in his dissenting opinion in *Perišić*:[23]

> the cases cited by the Majority as evidence of an established specific direction requirement merely make mention of "acts directed at specific crimes"[24] as an element of the *actus reus* of aiding and abetting liability. *In the majority of these cases the Appeals Chamber simply restates language from the Tadić Appeal*

[19] *Aleksovski* Appeal Judgement, para. 163.
[20] *Aleksovski* Appeal Judgement, paras 162, 164.
[21] *Prosecutor v. Krnojelac*, IT-97-25, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 37; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 352.
[22] The Appeals Chamber did not correct the failure of the Trial Chambers which did not specifically refer to specific direction as a separate element of aiding and abetting liability in the following cases: *see, e.g., Blagojević & Jokić*; *Kvočka*; *Vasiljević*; *Krnojelac*; *Aleksovski*; *Kalimanzira*; *Muvunyi*; *Seromba*; *Muhimana*; *Ntagerura*; *Orić*. The *Blaškić* Appeal Judgement is a particularly apposite example, where the Appeals Chamber quoted with approval the *actus reus* definition used by the *Vasiljević* Appeal Judgement which includes the term 'specific direction', while the following paragraph quotes the *actus reus* definition used by the *Blaškić* Trial Chamber which does not make any reference to 'specific direction' and states that this was a correct pronouncement of the law. *See Blaškić* Appeal Judgement, paras 45-46.
[23] *Perišić* Appeal Judgement, Partially Dissenting Opinion of Judge Liu, para. 2 (emphasis added).
[24] As noted in the *Perišić* Appeal Judgement, this formulation varies slightly from case to case. For a list of cases using this or a similar formulation, *see Perišić* Appeal Judgement, fns. 70-74 *citing Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević & Jokić* Appeal Judgement"), para. 127; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 89; *Blaškić* Appeal Judgement, para. 45; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 102; *Krnojelac* Appeal Judgement, para. 33; *Prosecutor v. Zoran Kuprěškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), para. 254; *Aleksovski* Appeal Judgement, para. 163; *Kalimanzira v. The Prosecutor*, ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 74; *Muvunyi v. The Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement"), para. 79; *The Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement"), para. 139; *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 482; *Muhimana v. The Prosecutor*, ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement"), para. 189; *The Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement"), para. 370; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana & Ntakirutimana* Appeal Judgement"), para. 530; *Prosecutor v. Blagoje Simić*, IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement"), para. 85; *Prosecutor v. Orić*, IT-03-68-A, Judgment, 3 July 2008 ("*Orić* Appeal Judgement"), para. 43; *Ntawukulilyayo v. The Prosecutor*, ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement"), para. 214; *Rukundo v. The Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement"), para. 52; *Karera v. The Prosecutor*, ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement"), para. 321. (Original footnote, long form of Judgements added.)

> *Judgement without expressly applying the specific direction requirement to the facts of the case before it.*[25] Moreover, the jurisprudence of the Tribunal demonstrates that aiding and abetting liability may be established without requiring that the acts of the accused were specifically directed to a crime.[26]

- *The finding is based on flawed reasoning*

9. In reaching the conclusion that specific direction has *always* been a requirement of aiding and abetting liability,[27] the Prosecution respectfully submits, in agreement with Judges Ramaroson and Liu, that the *Perišić* Majority carried out a flawed analysis of previous jurisprudence.[28] First, it found that the express finding in *Mrkšić and Šljivančanin* that specific direction was not an essential ingredient of the *actus reus* of aiding and abetting, was ambiguous and mentioned only "in passing" and, therefore, it was not intended to depart from previous jurisprudence that specific direction was an element of aiding and abetting liability.[29] However, it is difficult to see how the statement, "[t]he Appeals Chamber has confirmed that *specific direction is not an essential ingredient* of the *actus reus* of aiding and abetting"[30] is in any way ambiguous. Moreover, that the confirmation was made in its discussion of the *mens rea* for aiding and abetting in no way diminishes its importance. The Majority Opinion seems to have overlooked that the statement was made in the context of rejecting Šljivančanin's assertion that aiding and abetting by omission requires a heightened *mens rea.*[31] Clearly, the statement was an essential part of the reasoning and not merely made "in passing".

10. Second, the implication of the Majority Opinion that the *Mrkšić and Šljivančanin* Appeal Judgement was an aberration is not supported by ICTY appellate jurisprudence. Rather, the

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[25] The express application of the specific direction requirement appears to have been limited to the *Vasiljević* case (*see Vasiljević* Appeal Judgement, para. 135). In my view, this tends to demonstrate that the Appeals Chamber accorded extremely limited importance to specific direction in previous cases. Moreover, I note that the specific direction "requirement" was first mentioned in the *Tadić* Appeal Judgement, which focused on JCE liability and only considered aiding and abetting liability by way of contrast (*see Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement") para. 229). Thus, subsequent cases have relied on language that was not intended to be a definitive statement of aiding and abetting liability. (Original footnote, long form of Judgements added.)

[26] *See Mrkšić & Šljivančanin* Appeal Judgement, para. 159; *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement (AC), 4 December 2012 ("*Lukić & Lukić* Appeal Judgement"), para. 424. *See by contrast Lukić & Lukić* Appeal Judgement, Separate and Partially Dissenting Opinions of Judge Mehmet Güney, paras 10-11 *and* Separate Opinion of Judge Agius (original footnote, long-form of Judgements added).

[27] *Perišić* Appeal Judgement, paras. 32-36, 41.

[28] *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, paras. 5-6; Partially Dissenting Opinion of Judge Liu, para. 2.

[29] *Perišić* Appeal Judgement, paras. 32, 36.

[30] *Mrkšić & Šljivančanin* Appeal Judgement, para. 159 (emphasis added).

[31] *Mrkšić & Šljivančanin* Appeal Judgement, paras. 157-159.

Mrkšić and Šljivančanin holding affirmed the *Blagojević and Jokić* Appeal Judgement.[32] The Majority Opinion's statement that the Appeals Chamber in *Blagojević and Jokić* "confirmed that specific direction does constitute an element of aiding and abetting liability"[33] directly contradicts the express finding of the unanimous *Blagojević and Jokić* Appeals Chamber that "while the *Tadić* definition has not been explicitly departed from, specific direction *has not always been included as an element of the actus reus of aiding and abetting.*"[34] The *Blagojević and Jokić* Appeals Chamber went on to state that:

> This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an *implicit* part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her "routine duties" will not exculpate the accused.[35]

11. Third, as recognised by the Majority Opinion, in the *Lukić and Lukić* Appeal Judgement rendered less than three months before *Perišić*, the ICTY Appeals Chamber found that there was "no cogent reason to depart from this [*Mrkšić and Šljivančanin* Appeal Judgement] jurisprudence" and affirmed that "specific direction *is not* an essential ingredient of the *actus reus* of aiding and abetting."[36] The *Perišić* Majority correctly interpreted this as illustrating that the *Mrkšić and Šljivančanin, Lukić and Lukić and Blagojević and Jokić* Appeal Judgements are not "antithetical" in their approach to specific direction, but then it inexplicably interpreted this as supporting the view that specific direction remains an element of aiding and abetting liability.[37] This is the exact opposite of what the Judgements quoted from are authority for. Consequently, it is clear that in order to reach the new position that "specific direction" has been a distinct element of aiding and abetting liability since the *Tadić* Appeal Judgement,[38] the Majority Opinion carried out a flawed analysis of previous appellate jurisprudence.

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[32] *Mrkšić & Šljivančanin* Appeal Judgement, para. 159, fn. 566 citing *Blagojević & Jokić* Appeal Judgement, para. 189.
[33] *Perišić* Appeal Judgement, para. 34.
[34] *Blagojević and Jokić* Appeal Judgement, para. 189 (emphasis added).
[35] *Blagojević and Jokić* Appeal Judgement, para. 189 (emphasis added).
[36] *Lukić & Lukić* Appeal Judgement, para. 424.
[37] *Perišić* Appeal Judgement, paras. 35-36.
[38] *Perišić* Appeal Judgement, para. 73.

B. The Majority Opinion deviated from established appellate jurisprudence by effectively elevating the *mens rea* standard to specific intent or its equivalent, at least for "remote" assistance, and is based on flawed reasoning.

- *Specific Direction as an element or additional component of mens rea*

12. The lack of clarity of the *Perišić* Judgement is perhaps most clearly demonstrated by the inconsistencies amongst the *Perišić* Judges about the legal characterisation of specific direction. Although the Majority Opinion states that it is an element of the *actus reus* of aiding and abetting, four of the five judges in the *Perišić* Appeals Chamber appended separate or dissenting opinions which suggest that specific direction should be considered in relation to *mens rea*.[39] Yet these judges refrained from stating that specific direction forms part of the *mens rea*, as to do so would have openly contradicted ICTY jurisprudence.

13. Regardless of whether it is characterised as part of the *actus reus* or *mens rea*, the effect of the Majority Opinion, at least in cases of "remote assistance", is that the long established *mens rea* standard of knowledge is insufficient for criminal liability. If this new statement of the law by the *Perišić* Majority is accepted, the *mens rea* of aiding and abetting will now require (at least in the case of those who are "remote") that assistance be specifically directed to the commission of crimes. This requirement, in effect, raises the *mens rea* standard in such instances to specific intent or its equivalent. Such a deviation from the accepted and established standard of *mens rea* was clear from the Majority Opinion's finding that rather than being specifically directed to VRS criminal activities, "Perišić's relevant actions were *intended* to aid the VRS's overall war effort."[40]

- *The deviation is based on flawed reasoning*

14. This redefinition of specific direction in a way that alters the *mens rea* conflicts with the well established jurisprudence in international criminal law, including the Judgments of the Appeals Chamber of this Court, that have long held that the *mens rea* for aiding and abetting is the accused's knowledge or awareness that his actions will facilitate the crime charged.[41] Further, the Appeals Chamber of the ICTY, having conducted an analysis of the customary

[39] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 3; Partially Dissenting Opinion of Judge Liu, fn. 7; Separate Opinion of Judge Ramaroson, para. 7.
[40] *Perišić* Appeal Judgement, para. 60 (emphasis added).
[41] *See Prosecutor v. Taylor*, SCSL-03-01-A-1350, Prosecution Respondent's Submissions with Confidential Annexes A and D, 23 November 2012, paras. 280 ("Prosecution Response").

international law of aiding and abetting, has expressly held that the *mens rea* of aiding and abetting is a knowledge standard.[42] The Majority Opinion offers no cogent reason to depart from the standard used by this Appeals Chamber, by all prior ICTY and ICTR Chambers since 1997, by the ECCC, and grounded in post World-War II jurisprudence.[43]

C. The new requirement that it is necessary to explicitly consider specific direction only in cases where the aider and abettor is "remote" from the actions of the principal perpetrator deviates from established jurisprudence and is based on flawed reasoning.

- *The finding deviates from established jurisprudence*

15. As recognised by Judges Liu and Ramaroson, the *Perišić* Majority further departed from existing ICTY/ICTR jurisprudence when it found that it is necessary to explicitly consider specific direction in cases where the aider and abettor is "remote" from the actions of the principal perpetrator.[44] Requiring that this "element" only need be specifically considered where the assistance is "remote" effectively creates two different standards within one mode of liability, thereby flouting the principle of equal application of the law.

16. The Majority Opinion found that where the relevant acts are "proximate" to the crimes of the perpetrators, specific direction may be implicitly demonstrated through the other elements of

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[42] *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, ("*Furundžija* Trial Judgement") para. 249.

[43] In footnote 115, the *Perišić* Majority misstates the holding in the Zyklon B case (Trial of Bruno Tesch and Two Others, 1 Law Reports of Trials of War Criminals 92-102 (1947)) by stating that the court convicted two of the Accused "after reviewing evidence that the defendants arranged for S.S. units to be trained in using this gas to kill human beings in confined spaces." In fact, the evidence mentioned came from only one witness who claimed to have seen a travel report written by Tesch in which he proposed to train the S.S. in this method. There was no evidence that the second Accused, Weinbacher, was involved or had ever seen this report and, despite this fact, he too was convicted and sentenced to death. The report of the case makes it abundantly clear that the Accused were convicted on the basis that they knew the gas they provided was being used to kill humans, not that they intended the gas to be used for this purpose or specifically directed the gas provided to these purposes. The Prosecuting Counsel in his closing address stated that "the essential question was whether the accused knew of the purpose to which their gas was being put." The Judge Advocate, in summing up the case, told the judges they needed to be sure of three facts to convict: "first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by Tesch and Stabenow; and thirdly, that the accused knew that the gas was to be used for the purposes of killing human beings." *See* Zyklon B case, pp. 100-102. *See also* Prosecution Response, paras 275-320.

[44] *Perišić* Appeal Judgement, paras. 38-40; Partially Dissenting Opinion of Judge Liu, para. 2; *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, para. 8.

aiding and abetting liability, such as substantial contribution.[45] However, where an accused aider and abettor carries out acts "remote" from the relevant crimes, the *Perišić* Majority found that other elements may not be sufficient to prove specific direction and explicit consideration is required.[46] Therefore, though two accused could have the same knowledge or awareness and make the same substantial contribution, the one who is "proximate" would be held responsible without explicit proof of specific direction, while the "remote" actor would not. The Prosecution respectfully submits that this is a deviation from established jurisprudence which cannot be correct.

17. In addition, under the jurisprudence of the ICTY/ICTR, the remoteness of an accused's actions from the crimes has not been determined to be dispositive in assessing the *actus reus* of aiding and abetting liability. Rather, the crucial consideration has been whether the acts of the aider and abettor had a substantial effect on the commission of the relevant crime. For example, in *Čelebići*, the Appeals Chamber expressly held that an aider and abettor's assistance may be removed in time and place from the relevant crimes, provided it contributed to or had an effect on the commission of the crime.[47] Similarly, in *Mrkšić and Šljivančanin*, the Appeals Chamber held that in the context of the *actus reus* of aiding and abetting, the location at which the *actus reus* takes place may be removed from the location of the principal crime.[48]

- *The finding is based on flawed reasoning*

18. Whether considered as part of the *actus reus* or *mens rea*, the reasoning establishing the Majority Opinion's remoteness standard is flawed. If it is considered as an element of the *actus reus*, how can remoteness be a factor in whether the assistance substantially contributes to the commission of the crimes? Further, what can be the basis in law or logic to hold that specific direction is an element of aiding and abetting which can be considered impliedly satisfied if the contribution to the crimes is substantial and "proximate", but not if the assistance is substantial and "remote"? Rather, whether the assistance substantially contributes to the commission of the crime is the crux of an aiding and abetting analysis. This core tenet remains the same whether the

[45] *Perišić* Appeal Judgement, para. 38. The Perisic Majority uses the example of physical presence during the commission of the crime as a situation in which specific direction can be implicitly demonstrated through other elements of aiding and abetting such as substantial contribution.
[46] *Perišić* Appeal Judgement, para. 39.
[47] *Čelebići* Appeal Judgement, para. 352. The *Perišić* Majority listed geographic and temporal remoteness as factors indicating that the acts of an accused aider and abettor are more remote from the crimes. *See Perišić* Appeal Judgement, para. 40.
[48] *Mrkšić & Šljivančanin* Appeal Judgement, para. 81. *See also Blaškić* Appeal Judgement, para. 48.

assistance was "proximate" or "remote". In addition, one who provides assistance "remotely" may specifically direct it toward the crimes, whereas one who provides assistance "proximately" may not. Why then would this additional element which the Majority Opinion claims to have been always part of aiding and abetting only be explicitly addressed in cases of "remote" assistance?

19. The reasoning is equally flawed if specific direction is to be considered as a separate element of *mens rea*, or as a factor to be considered in regard to knowledge. If the latter, the reasoning ignores that an accused can gain knowledge regarding the commission of atrocities committed by the principal perpetrator in numerous ways, including, as in the *Taylor* case, by radio transmissions, satellite phone conversations, personal contact with the accused or his intermediaries, as well as through news media and other reports. If it is to be considered a separate *mens rea* standard, as suggested in the Joint Separate Opinion, why then would "remoteness" be of consequence? As discussed above, specific direction can be lacking in "proximate" assistance as well as in "remote".

20. Finally, the new standard that specific direction need be explicitly considered only where the assistance is "remote" ignores the fundamental principle that all elements must be proven beyond reasonable doubt and so must always be considered. If specific direction *is* an element, it must always be addressed and cannot be implied from proof of other elements, whether the accused was "remote" or "proximate" to the crimes.

D. The finding that knowing and substantial assistance to a non-"purely criminal" organisation committing crimes does not necessarily fulfil the specific direction test of aiding and abetting liability is a deviation from established jurisprudence and based on flawed reasoning.

- *The finding deviates from established jurisprudence*

21. In aiding and abetting cases based on circumstantial evidence, the Majority Opinion deviates from established jurisprudence by distinguishing between assistance to an organisation that is "purely criminal" from that to organisations which are committing systematic crimes but are also engaged in lawful combat. In the latter scenario, an accused who provided assistance to the organisation knowing it would facilitate the crimes would not be found culpable even when that assistance made a substantial contribution to the crimes, unless it could be shown that the

accused directed his assistance specifically to the criminal acts. Under the Majority Opinion approach, even where a group undertakes military operations which are inextricably bound with the commission of crimes, an accused who knowingly provides assistance which substantially contributes to the commission of such crimes will not necessarily be held criminally liable if that group is not purely criminal, i.e., engaged in one hundred percent criminality.

22. This finding would seem to raise the standard of proof for circumstantial evidence from reasonableness to absolute certainty, excluding not only other *reasonable* alternatives to guilt but also all *possible* alternatives to guilt.

- *The finding is based on flawed reasoning*

23. This deviation from established jurisprudence, which imposes no such 100% criminality condition, redefines aiding and abetting in such as way as to provide impunity for many if not all individuals whose substantial assistance to the commission of atrocities is given with the requisite knowledge or awareness. It is hard to see how any organisation committing mass atrocities could be classified as "purely" criminal, as even genocidal regimes or militias can be said to have some political agenda or to be "waging war". Even the most notorious terrorist groups often engage in some lawful political, humanitarian, or combat activities. Where the organization is a State, how can it ever be said it is a "purely criminal" entity? And, under what reasoning can 100% criminality be required to establish a sufficiently culpable link where the assistance substantially contributes to the crime and is given with the requisite knowledge or awareness? The fact that these organisations are not "purely criminal" provides no comfort to the victims of their crimes, who look to international law to provide some deterrence to those who would provide arms or financing to make these crimes possible. It would be a grave regression should international law now be interpreted to allow individuals to knowingly and substantially contribute to the crimes of these non-"purely criminal" groups unless it can be proven that these individuals provided assistance "specifically directed" to particular criminal activities.[49]

[49] This would likely reverse the growing recognition of the responsibility of States not to contribute to such groups and the codification of the same in national and international legislation. *See, e.g.*, Council Common Position 2008/944/CFSP, Defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, 8 December 2008, Article 2(2) ("EU Common Position"); U.S. Public Law 106-429, Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2001, enacted 6 November 2000, Section 563 ("Leahy Amendment").

E. The Majority Opinion provided no cogent reasons for these deviations, which are not in the interests of justice.

24. The legal standard prior to the Majority Opinion—that the individual provided a substantial contribution to the crime charged with the knowledge or awareness that it would facilitate a crime—established the required culpable link and was stringent enough to ensure that not every individual giving assistance to an armed group would be liable simply because that group was committing crimes. The new Majority Opinion standard, if followed, would allow those whose acts are "remote" and contribute knowingly and substantially to crimes, to escape criminal liability unless proven that they "specifically directed" or intended to facilitate crimes. The Majority Opinion moved away from the established standard without any "cogent reason in the interests of justice" to do so and without the "careful consideration" required for such a departure. To protect those who meet the existing standard for aiding and abetting furthers no interest of justice, but, rather, extends impunity for those whose conscious and knowing acts substantially contribute to horrific crimes.

25. In addition, the Majority Opinion fails to define or fully explain the parameters of the deviations. For instance, the *Perišić* Majority offers no definition of "specific direction", aside from being a "culpable" or "direct" link, neither of which terms are defined. The *Perišić* Majority made clear that, in analysing remoteness, factors include but are not limited to temporal and geographic distance, yet did not indicate clearly where the boundary between remoteness and proximity might lie, only indicating it will depend on the circumstances of each case. These vague terms will lead to considerable uncertainties and difficulties in their application.

26. The Prosecution respectfully submits that the deviations from established jurisprudence discussed above were based on flawed reasoning and made without a demonstrated justification. Indeed, these deviations are contrary to the interests of justice. For all of the above reasons, the SCSL Appeals Chamber should not be guided by the Majority Opinion.

III. THE TRIAL CHAMBER'S FACTUAL FINDINGS ESTABLISH THAT TAYLOR'S ASSISTANCE WAS SPECIFICALLY DIRECTED TO THE COMMISSION OF CRIMES UNDER THE *PERIŠIĆ* TEST

27. Even under the new, and in the Prosecution's submission, erroneous, test set by the Majority Opinion, the factual findings in the *Taylor* case establish that Taylor aided and abetted the crimes charged in Counts 1-11 of the Indictment. The findings in the *Taylor* Judgement

establish the "culpable"[50] or "direct"[51] link between assistance provided by Taylor and the crimes of the RUF and AFRC/RUF that the Majority Opinion found constituted specific direction.

28. The factual findings of the *Taylor* Trial Chamber establish a much more direct and intentional link between his assistance to the crimes than that which was found in respect of Perišić. The Majority Opinion emphasised that while the crimes charged occurred in two specific geographical regions,[52] Perišić implemented a policy of VJ assistance which "was delivered to multiple areas within BiH to aid the general VRS war effort."[53] This is completely inapposite to the facts found by the *Taylor* Trial Chamber that Taylor provided assistance to a group involved in a criminal campaign of terror that spanned the territory of Sierra Leone.[54]

29. The *Taylor* Trial Chamber expressly found that the RUF and AFRC/RUF's strategy of conducting war was "based on a campaign of terror against the civilian population" of Sierra Leone.[55] The primary *modus operandi* for the rebel forces' military operations during the entire Indictment period was the deliberate use of terror against civilians.[56] Set against this context, Taylor provided assistance to the rebel forces which was used in military offensives,[57] the strategy and objectives of which were "inextricably linked" with "a campaign of crimes against the Sierra Leonean civilian population".[58]

30. Moreover, Taylor's assistance and the commission of crimes were temporally proximate. In addition to the large shipments of materiel facilitated by Taylor, he sent "small but regular supplies of arms and ammunition and other supplies" from 1997 to 1998 and "substantial amounts of arms and ammunition to the AFRC/RUF from 1998 to 2001",[59] all periods of time when crimes against civilians were ongoing.

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[50] *Perišić* Appeal Judgement, para. 37.
[51] *Perišić* Appeal Judgement, para. 44.
[52] *Perišić* Appeal Judgement, paras. 53, 60.
[53] *Perišić* Appeal Judgement, para. 66.
[54] *See, e.g.,* Judgement, paras. 1979, 2005-2006, 2048-2049, 2055-2056, 2192.
[55] Judgement, para. 6788.
[56] Judgement, para. 6790.
[57] Judgement, para. 6911.
[58] Judgement, para. 6905.
[59] Judgement, para. 6910.

31. Given that RUF and AFRC/RUF military operations encompassed "a policy and strategy of committing crimes against civilians in order to achieve military gains",[60] and that Taylor knew that he was providing assistance to these crimes and did so regardless,[61] there is unquestionably a direct and culpable link between Taylor's acts and the crimes committed by the RUF and AFRC/RUF.

IV. THE FACTS RELIED ON BY THE MAJORITY IN *PERIŠIĆ* ARE DISTINGUISHABLE FROM THE FACTS FOUND IN THE *TAYLOR* CASE

32. In the event that this Appeals Chamber is minded to adopt the new precedent of the Majority Opinion, the facts upon which the *Perišić* Majority based its conclusions can each be distinguished from the relevant findings in *Taylor*. In assessing whether the specific direction element of aiding and abetting had been met, the Majority Opinion looked at: (i) the accused's role in shaping and implementing the policy of assistance; and (ii) whether the accused either implemented the policy of assistance or took action to provide assistance in a manner that specifically directed the assistance to crimes.[62] In making these assessments, the *Perišić* Majority also looked at the state of mind of the accused and the magnitude of assistance provided.

A. Taylor had sole authority for the provision of assistance to the RUF and AFRC/RUF.

33. The Majority Opinion emphasised that Perišić was carrying out policies made by others, i.e., the SDC.[63] Perišić was subordinated to, and obligated to implement the decisions of, the Federal Republic of Yugoslavia's ("FRY") President. He had no ultimate authority over defence policy or operational priorities. Such decisions were made by political leaders.[64] While Perišić did have authority to administer assistance to the Army of the Republika Srpska ("VRS"), any such decisions he made as well as the policy of assistance itself was subject to review from higher authorities.[65] None of these findings are comparable to the facts relied upon in the *Taylor* Trial Judgement. Taylor exercised sole and ultimate authority for providing assistance to the RUF and AFRC/RUF. The assistance Taylor facilitated was not "military to military" but was

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[60] Judgement, para. 6905.
[61] Judgement, para. 6949.
[62] *Perišić* Appeal Judgement, para. 47.
[63] *Perišić* Appeal Judgement, paras. 49-50.
[64] *Perišić* Appeal Judgement, para. 49.
[65] *Perišić* Appeal Judgement, para. 50.

from Taylor to the rebel forces, and Taylor personally accrued the benefits of the arrangement.[66] Taylor took no guidance and accounted to no one for his decision to assist the rebel forces over a period of years and in numerous ways.

34. The Majority Opinion further emphasised that the practice of assistance to the VRS was already in place before Perišić became Chief of the Yugoslav Army ("VJ") General Staff. In contrast, Taylor nurtured the RUF in its infancy at his base in Camp Naama[67] and alone decided the timing and manner of assistance given to the RUF and AFRC/RUF. Taylor oversaw the assistance, utilising his position as head of the NPFL and President of Liberia.[68]

35. The extent of Perišić and Taylor's involvement in aiding the commission of crimes by assisting armed groups is also distinguishable. Perišić's role in the FRY Supreme Defence Council ("SDC") deliberations was held by the *Perišić* Majority to indicate that he "only supported the continuation of assistance to the general VRS war effort",[69] and that he "directed assistance towards the general VRS war effort within the parameters set by the SDC."[70] Independent of the SDC policy of assistance, he "refused requests for assistance submitted outside of official channels", and "urged the SDC to punish VJ personnel who provided such unauthorised assistance."[71]

36. By contrast, in addition to the assistance Taylor provided, the Trial Chamber found that Taylor was influential with the RUF and AFRC/RUF and participated in key tactical decisions on their military operations[72] which not only involved the commission of crimes but were also conducted within the context of a campaign of terror against civilians.[73] For example, Taylor twice instructed Johnny Paul Koroma to capture Kono,[74] which the AFRC/RUF successfully did by burning, killing, looting, raping, capturing and terrorising civilians.[75] Taylor later told Sam Bockarie to keep control over the area to maintain the trade of diamonds for arms and

[66] *See, e.g.*, Judgement, paras. 5874, 5948, 5990, 6057-6058.
[67] Judgement, paras. 27, 2378.
[68] *See, e.g.*, *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement"), para. 97.
[69] *Perišić* Appeal Judgement, para. 60.
[70] *Perišić* Appeal Judgement, para. 61.
[71] *Perišić* Appeal Judgement, para. 67.
[72] *See, e.g.*, Judgement, para. 6787.
[73] *See, e.g.*, Judgement, paras. 6788, 6790.
[74] Judgement, para. 2855.
[75] *Prosecutor v. Taylor*, SCSL-03-01-A-1325, Prosecution Appellant's Submissions with Confidential Sections D and E of the Book of Authorities, 1 October 2012, para. 44 ("Prosecution Response")

ammunition,[76] with the AFRC/RUF adopting a brutal strategy of making the area "fearful" in order to do so.[77] Taylor co-authored a plan with Bockarie that resulted in military attacks on Kono, Makeni and Freetown.[78] He told Bockarie "that the operation should be 'fearful'"[79] and that the forces should use "all means" to get to Freetown.[80] They did so, and the Trial Chamber described the operation as a campaign of "extreme violence"[81] against civilians.[82]

37. In sum, while the Majority Opinion determined that Perišić was mandated by virtue of his position in the state apparatus to continue a policy of assistance he had inherited and over which he did not have ultimate authority,[83] Taylor had sole responsibility and authority for the initial decision to assist the RUF and RUF/AFRC as well as for the continuance of such assistance through the entire Indictment period during which the rebel forces were engaged in a terror campaign against the civilian population of Sierra Leone.

B. Taylor's assistance to the RUF and AFRC/RUF was specifically directed to the commission of crimes.

38. When assessing whether Perišić's assistance was specifically directed to facilitating crimes, the Majority Opinion considered whether the VRS was an organisation whose purpose was the commission of crimes. It found that the SDC policy of assistance which Perišić implemented was not directed to the commission of crimes but was "focused on monitoring and modulating aid to the general VRS war effort".[84] Here, again, the difference between the *Perišić* and *Taylor* cases is clearly distinguishable.

39. The *Taylor* Trial Chamber made an express finding that the assistance Taylor provided was to a group engaged in a criminal campaign of terror against civilians.[85] There was no such finding in the *Perišić* case, rather, the Majority Opinion "underscore[d] that the VRS was participating in lawful combat activities".[86] In *Taylor*, from the beginning of the Indictment

[76] Judgement, para. 6942.
[77] Prosecution Response, para. 47.
[78] Judgement, paras. 3129, 6961, 6962, 6967-6968.
[79] Judgement, para. 3117. *See also* Judgement, paras. 3130, 3449, 3611(vii).
[80] Judgement, paras. 3117, 3130, 3449, 3611(vii), 3615.
[81] Judgement, para. 6967.
[82] Judgement, para. 788.
[83] *Perišić* Appeal Judgement, paras. 49-51.
[84] *Perišić* Appeal Judgement, para. 55.
[85] *See, e.g.*, Judgement, paras. 6788, 6790.
[86] *Perišić* Appeal Judgement, paras 57, 69.

period, the rebel forces had adopted a war strategy "based on a campaign of terror against the civilian population".[87] The Trial Judgement findings show that after 'Operation Stop Election' and during the remainder of the civil war, the RUF and AFRC/RUF deliberately used terror against the civilian population "as a primary *modus operandi*".[88] Indeed, the inherently criminal nature which defined the heinous operations conducted by the rebels is clearly demonstrated in the Trial Chamber's finding that "*any* assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[89] While there were in fact military operations conducted by the RUF and AFRC/RUF against lawful combatants such as ECOMOG, the Trial Chamber's findings show that such operations took place within the context of a campaign of terror being waged by the rebels against the civilian population.[90] It is also clear from the Trial Judgement that those operations which *were* against lawful combatants were unlawful in that they were conducted using the active participation of children under the age of 15[91] and used forced labour to carry arms and ammunition and other loads.[92] Thus, all of the assistance Taylor provided to the RUF and AFRC/RUF furthered crimes as even the operations against lawful combatants resulted in crimes charged in the Indictment.[93]

C. The only reasonable inference from Taylor's *mens rea* and the magnitude of aid he provided is that his assistance was specifically directed to crimes.

40. When assessing Perišić's state of mind in providing assistance,[94] the Majority Opinion noted that while Perišić may have known of VRS crimes, the assistance he provided "was directed towards the VRS's general war effort rather than VRS crimes."[95] The difference between Perišić and Taylor in this regard is manifestly clear. The findings in the *Taylor* Judgement regarding Taylor's knowledge of the commission of crimes not only demonstrate Taylor's awareness as to what his assistance was facilitating, but arguably also show an intention

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[87] Judgement, para. 6788.
[88] *See, e.g.*, Judgement, para. 6790.
[89] Judgement, para. 6905 (emphasis added).
[90] Judgement, para. 6788.
[91] Judgement, para. 1605.
[92] *See, e.g.*, Judgement, paras. 1664, 1687-1688, 1764, 1769, 1822-1823, 1839, 1857-1864.
[93] *See, e.g.*, Judgement, paras. 6915, 6924, 6936, 6946.
[94] *Perišić* Appeal Judgement, para. 48.
[95] *Perišić* Appeal Judgement, para. 69.

on Taylor's part.[96] For example, Taylor himself admitted that by April 1998, anyone providing support to the AFRC/RUF "would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone".[97] Tellingly, Taylor himself also said that there was "no one on this planet that would not have heard through international broadcasts or [...] discussions about what was going on in Sierra Leone".[98]

41. In relation to the magnitude of aid provided,[99] the Majority Opinion found that the SDC "directed large-scale military assistance to the general VRS war effort, not to the commission of VRS crimes".[100] The *Taylor* Trial Chamber found that during a military campaign of terror against civilians,[101] Taylor directly facilitated two of the three main sources of arms and ammunition for the RUF and AFRC/RUF,[102] by means of the "very large"[103] Magburaka shipment in 1997 and the Burkina Faso shipment in 1998 which was "unprecedented in volume".[104] The Trial Chamber also found that Taylor's assistance was causally critical to the attainment of the third main source of materiel of the rebels.[105] In addition, the Trial Judgement is replete with findings of supplies provided directly by Taylor and indirectly through intermediaries and subordinates throughout the Indictment.[106]

42. In light of the notoriety of the events in Sierra Leone, the Trial Chamber's findings, and Taylor's own admissions regarding his knowledge of atrocities, coupled with the extent of the aid Taylor provided to the RUF and AFRC/RUF, the sole reasonable inference is that Taylor specifically directed his assistance to the commission of crimes.

43. The findings upon which the Majority Opinion based its conclusions can each be clearly distinguished from the factual findings in the *Taylor* case. Therefore, though the Prosecution submits that the findings and reasoning set down in *Perišić* regarding specific direction should not be followed by this Appeals Chamber, were it to do so, the *Taylor* Trial Judgement patently

[96] Judgement, para. 6949.
[97] Judgement, para. 6884.
[98] Taylor, Trial Transcript, 14 July 2009 p. 24329.
[99] *Perišić* Appeal Judgement, para. 56.
[100] *Perišić* Appeal Judgement, para. 57.
[101] *See, e.g.*, Judgement, paras. 6788, 6790.
[102] Judgement, paras. 5809, 5830.
[103] Judgement, para. 5409.
[104] Judgement, para. 5525.
[105] Judgement, para. 5830.
[106] *See, e.g.*, Judgement, paras. 4845, 4943, 5026, 5029, 5031, 5089, 5094-5096, 5128, 5163, 5194, 5219, 5221, 5250, 5722, 6910.

shows that Taylor knowingly provided assistance specifically directed to the commission of all of the Indictment crimes, and that his assistance had a substantial effect on the commission of all of those crimes.

V. CONCLUSION

44. For all of the foregoing reasons, the Prosecution submits that the Trial Chamber's conviction of Taylor for aiding and abetting crimes in Sierra Leone should be upheld and Taylor's appeal dismissed.

Filed in The Hague,
14 March 2013
For the Prosecution,

Brenda J. Hollis
The Prosecutor

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Council Common Position 2008/944/CFSP, Defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, 8 December 2008, Article 2(2) **135**

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U.S. Public Law 106-429, Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2001, enacted November 6, 2000, Sect. 563 .... **140**

Zyklon B case
Trial of Bruno Tesch and Two Others, 1 Law Reports of Trials of War Criminals 92-102 (1947) **143**

SCSL Authorities

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

Article 3
Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

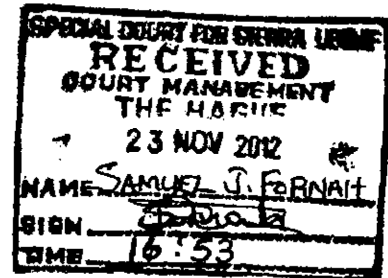
1350)

SCSL-03-01-A
(6975-9531)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before:	Justice Shireen Avis Fisher, Presiding Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter Justice Jon M. Kamanda Justice Philip Nyamu Waki, Alternate Judge
Registrar:	Ms. Binta Mansaray
Date filed:	23 November 2012



THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC PROSECUTION RESPONDENT'S SUBMISSIONS
WITH CONFIDENTIAL ANNEXES A AND D

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny
Ms. Leigh Lawrie
Mr. Alain Werner
Ms. Kathryn Howarth
Ms. Ann Ellefsen-Tremblay

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

times "indispensable"[763] to the RUF and AFRC, and substantially contributed to the crimes for which he was convicted.[764]

GROUND 16: The Trial Chamber correctly defined the *mens rea* for aiding and abetting

(i) Overview

275. None of the alleged errors relied on by Taylor under this Ground establish that the Trial Chamber relied on an incorrect standard for *mens rea*. Taylor's assertions that the Trial Chamber erred by failing to apply the 'purpose requirement' of facilitating the principal crimes, misapplied the standard of knowledge for the *mens rea*, and failed to define the *mens rea* in relation to the *actus reus*, are incorrect in law. Taylor's submissions fail to demonstrate any error by the Trial Chamber which would serve to invalidate the decision and warrant appellate intervention.

276. The Trial Chamber correctly applied the elements of the mode of liability of aiding and abetting developed in the jurisprudence of this Appeals Chamber. This standard is consistent with customary international law and the fundamental principles of criminal law. Taylor fails to demonstrate any reason to alter these elements as he proposes or to adopt his position that providing assistance to an insurgency with knowledge that the group utilises an operational strategy of terror against civilians is the "prerogative of states."

(ii) The Trial Chamber properly defined the mens rea for aiding and abetting

277. The Trial Chamber properly set out the *mens rea* for aiding and abetting as:

> i. The Accused performed an act with the knowledge that it would assist the commission of a crime or underlying offence or that he was aware of the substantial likelihood that his acts would assist the commission of [sic] underlying offence; and
>
> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.[765]

278. The Trial Chamber added that while the *conduct* of the accused that amounts to the assistance must itself be *intentional*, it is not required that the accused intend the crime or underlying offence. Rather, it is only required that the accused had *knowledge* that his acts assist the commission of the crime or the underlying offence.[766]

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[763] Judgement, para. 6914.
[764] Judgement, para. 6915.
[765] Judgement, para. 486 (footnotes omitted).
[766] Judgement, para. 487.

279. The Trial Chamber applied the correct elements of the *mens rea* for aiding and abetting. The jurisprudence of this Appeals Chamber as well as of the *ad hoc* tribunals establishes that the *mens rea* for aiding and abetting does not require that the accused's assistance be provided for the "purpose" of facilitating the principal's crimes. Rather, the act must be done with knowledge or awareness of the substantial likelihood that it will facilitate the underlying offence.[767]

(iii) The Trial Chamber's standard comports with SCSL jurisprudence

280. In the *Brima et al.* (*AFRC*) Appeal, Kamara challenged the Trial Chamber standard for the *mens rea* for aiding and abetting. This Appeals Chamber found that the Trial Chamber was correct in applying the following definition, which was subsequently applied in the Appeal Judgments in *RUF* and *CDF*:

> The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[768]

(iv) Customary international law is consistent with the knowledge standard

281. Taylor attacks the settled law of this Court and that of the *ad hoc* tribunals by asserting that under customary international law, knowledge is insufficient to establish the *mens rea* for aiding and abetting. Rather, Taylor argues that it must be shown that the *actus reus* was performed with "purpose",[769] which he equates with conduct "specifically directed" or "specifically aimed" to assist, encourage or lend moral support to a particular crime.[770] Taylor's claim that the entire *corpus* of jurisprudence of the ICTR, ICTY and SCSL is flawed because customary international law never accepted the knowledge standard is without merit.

282. The United Nations and its Member States have recognised that post-Second World War cases are evidence of state practice at the time.[771] These cases repeatedly applied the knowledge standard as the required *mens rea* for aiding and abetting. In the *Zyklon B* case, a

[767] *Contra* Taylor Appeal, para. 319.
[768] *AFRC* AJ, paras. 242-43. The same definition was repeated by the Appeals Chamber in both the *CDF* AJ (para. 366) and *RUF* AJ (para. 546).
[769] Taylor Appeal, p. 112, sub-title (b).
[770] Taylor Appeal, paras. 354-55.
[771] The United Nations General Assembly unanimously affirmed the principles of international law recognised by the Nuremberg tribunals. See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal. Also, the United Nations War Crimes Commission ("UNWCC") said that cases before British military courts are declaratory of the state of the law and illustrative of actual state practice. See UNWCC Report I, p. 110. The UNWCC reported on at least 89 cases, e.g. UNWCC Report XV, p. xvi. The UNWCC's reports also support a knowledge standard, see UNWCC Report VII, p. 71 ("This condition is fulfilled if circumstance constituting complicity are present e.g. the [Accused] knew that his action would lead to the commission of a war crime and either intended this consequence or was recklessly indifferent with regard to it").

British military court sentenced two industrialists who supplied poison gas to the Nazis to death because they "*knew* that the gas was to be used for the purpose of killing human beings."[772]

283. The Nuremberg Military Tribunal ("NMT") in the United States occupied zone applied a knowledge standard in the twelve subsequent Nuremberg trials held pursuant to Control Council Law No. 10. In *United States v. Flick*, the Tribunal convicted two defendants for knowingly assisting Nazi crimes. Flick was convicted because he knew of the widespread crimes of the SS and nevertheless contributed money critical to its operations. The Tribunal found that "[o]ne who *knowingly* by his influence and money contributes to the support [of war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes".[773]

284. The French Appellate Tribunal confirmed the conviction of Hermann Roechling, an industrialist, for the inhumane use of forced labour in his factories noting that the *mens rea* for war crimes under the jurisprudence developed by the NMT allowed convictions solely on the basis of knowledge of the criminal activity.[774] The Appellate Tribunal noted that Roechling "knew in what way such foreign workers were supplied."[775] The Appellate Tribunal also found the president of the Board of Directors of the Roechling company, von Gemmingen-Hornberg, guilty of war crimes as he knew of the inhumane treatment of workers in the plant and had authority to change it but failed to act.[776]

285. In *The Einsatzgruppen Case*, Klingelhoefer was convicted for forwarding lists of Communist party functionaries "aware [they] would be executed",[777] and Fendler was convicted because he failed to stop summary executions although he knew of them.[778] In *Schonfeld*, a British military court acquitted defendants Karl Brendle and Eugen Rafflenbeul, as despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.[779]

[772] *The Zyklon B Case*, p. 101 (emphasis added); see also *Furundžija* TJ, para. 238 discussing *The Zyklon B Case*.
[773] *The Flick Case*, p. 1217.
[774] *Roechling* AJ, p. 1106.
[775] *Roechling* AJ, p. 1130.
[776] *Roechling* AJ, p. 1136.
[777] *The Einsatzgruppen Case*, p. 569.
[778] *The Einsatzgruppen Case*, p. 572.
[779] See *Furundžija* TJ, para. 239.

286. The ICTY was mandated to apply rules of international humanitarian law "which are beyond any doubt part of customary law".[780] The Trial Chamber in *Furundžija* correctly determined after an analysis of these cases that under customary international law, knowledge is sufficient to establish the *mens rea*.[781] Taylor wrongly asserts that the analysis in *Furundžija* was incomplete.[782] "*The Ministries Case*" cited by Taylor actually confirms the knowledge standard.[783] In seeking only to rely on *Rasche*, Taylor disregards the fact that the court based Rasche's acquittal not on the lack of proof of his *mens rea*, but on the finding that no *actus reus* was shown, as the court held that the provision of a loan for the purposes of an unlawful enterprise was not a violation of international law.[784] For other accused, the NMT in the *Ministries Case* confirmed the knowledge standard. In *Puhl*'s conviction, the NMT acknowledged that selling valuables of Holocaust victims "was probably repugnant to [Puhl]",[785] but convicted him because he *knew* that the property was stolen.[786] Likewise, while the NMT accepted that *Von Weizsaecker* and *Woermann* might not have approved of the deportation of Jews, the proper question was "whether they knew of the program".[787]

287. The 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission ("ILC Draft Code") provides further evidence that customary international law at the time of the Indictment period provided for aiding and abetting liability based on the knowledge standard. As noted by the *Furundžija* Trial Chamber, the Draft Code was the work of a body of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly.[788] Article 2(3)(d) of the Draft Code imposes criminal responsibility upon an individual who "*knowingly* aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission" (emphasis added).

288. Taylor's analysis of the jurisprudence overlooks that the *Tadić* Trial Chamber at the ICTY also concluded, on the basis of its review of post-World War II cases, that an individual who "knowingly participated in the commission of an offence that violates international

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[780] 1993 Secretary General Res. 808 Report, para. 34.
[781] *Furundžija* TJ, paras. 245, 249.
[782] *Contra* Taylor Appeal, para. 352.
[783] *Contra* Taylor Appeal, para. 353.
[784] See *The Ministries Case*, pp. 621-22; see also Talisman Amicus, p. 11 "[t]hus, Rasche's acquittal resulted from inadequate evidence to establish the *actus reus*, not a *mens rea* of purpose."
[785] *The Ministries Case*, pp. 620-621.
[786] *The Ministries Case*, p. 620.
[787] *The Ministries Case*, p. 478.
[788] *Furundžija* TJ, para. 227.

humanitarian law and his participation directly and substantially affected the commission of that offence" will be found criminally culpable.[789]

289. Further, Ambassador Scheffer, who was relied on in Taylor's submissions, opined that post-World War II jurisprudence from both national military courts and the Nuremberg Military Tribunals consistently applied a knowledge standard of *mens rea* for aiders and abettors, concluding that "[c]ustomary international law applies the knowledge standard for aiding and abetting as a mode of participation."[790]

290. Taylor attacks the jurisprudence of the Special Court and the *ad hoc* tribunals, arguing that customary international law requires that in order to attach liability for aiding and abetting, at a minimum it must be shown that the *actus reus* was performed with "purpose,"[791] which he also equates with the conduct being "specifically directed" or "specifically aimed" to assist, encourage or lend moral support to a particular crime.[792] Taylor's arguments conflate jurisprudence that uses the terms "specifically directed" or "specifically aimed" in discussing the requirement for the *actus reus*. A large body of jurisprudence from the Special Court, the *ad hoc* tribunals, and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the Special Tribunal for Lebanon ("STL") holds that the knowledge of the accused that his conduct will assist a crime, and awareness of the essential elements of the crime, are sufficient to establish the mental elements of aiding and abetting.[793]

(v) The mens rea standard does not require that assistance be "specifically directed" or "specifically aimed" to the commission of crimes

291. The *actus reus* of aiding and abetting is satisfied when it is proven that the accused provided practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the crime.[794] Some of the jurisprudence from the *ad hoc* tribunals defined the elements of aiding and abetting as requiring proof that the accused's conduct was "specifically directed" or "specifically aimed" at assisting, encouraging or morally supporting the perpetration of a crime, but this was always in reference to the *actus reus*, not the *mens rea*. As illustrated below, the concept was meant to express the requirement that conduct must

[789] *Tadić* TJ, para. 692.
[790] *Royal Dutch Petroleum Co.*, Scheffer Supplemental Brief, p. 33.
[791] Taylor Appeal, p. 112, sub-title (b).
[792] Taylor Appeal, paras. 354-55.
[793] See, e.g., *Tadić* AJ, para. 229(iv); *Mrkšić* AJ, para. 159; *Ntawukilityayo* AJ, para. 222; *Duch* TJ, para. 535; STL Applicable Law Decision, para. 227.
[794] Judgement, para. 482.

be sufficiently connected with the crime of the principal to constitute assistance, encouragement or moral support.[795]

292. The House of Lords case of *Gillick v. West Norfolk and Wisbech Health Authority* ("*Gillick*") contains an example of an act not sufficiently connected with the crime of the principal to constitute assistance, encouragement or moral support to a crime. According to Taylor's submission, in this case the court "applied a purpose standard to acquit a person where he had a lawful purpose for his action, despite an awareness of a probability that a crime might be therefore be assisted."[796] In fact, no one was acquitted in *Gillick*, as it was a civil action where a parent sought to prevent a medical clinic from giving advice or treatment for contraception to girls under 16 years of age. The House of Lords held that a doctor who provided advice or treatment for contraception to a girl under 16 was not committing an offence as the doctor was in fact treating girls who were the victims, not the perpetrators, of the crime of unlawful sexual intercourse with a minor.

293. The term "specifically directed" first appeared in the *Tadić* Appeal Judgement when distinguishing the *actus reus* of aiding and abetting from joint criminal enterprise.[797] However, in relation to *mens rea*, the *Tadić* Appeals Chamber stated that "the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime".[798]

294. In *Blagojević and Jokić*, the Appeals Chamber reviewed the history of the "specifically directed" language and explained its meaning in relation to *actus reus*, stating that the conduct or omission of the aider and abettor must contribute to the crime charged:

> The Appeals Chamber observes that while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime.[799]

295. In *Mrkšić*, the ICTY Appeals Chamber squarely addressed the "specific direction" issue and stated that "the Appeals Chamber has confirmed that 'specific direction' is not an

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[795] In the *RUF* TJ, the *actus reus* for aiding and abetting was defined as when an accused "perpetrates an act or an omission specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime and that this act or omission of the aider and abettor must have a substantial effect upon the perpetration of the crime" (para. 276). In contrast, the *mens rea* was defined as "knowledge that the acts performed by the Accused assist the commission of the crime" (para. 280).

[796] Taylor Appeal, para. 363.

[797] *Tadić* AJ, para. 229(iii).

[798] *Tadić* AJ, para. 229(iv).

[799] *Blagojević & Jokić* AJ, para. 189.

essential ingredient of the *actus reus* of aiding and abetting".[800] *Mrkšić* reiterated that the *mens rea* requirements for aiding and abetting are knowledge that the acts performed assist in the commission of the offence, and awareness of the essential elements of the crime.[801] The Appeals Chamber recalled that it had previously rejected an elevated *mens rea* standard, "namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct".[802]

296. ICTR jurisprudence is consistent, holding "[t]he requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal".[803] While jurisprudence defining the *actus reus* of the offence often includes language suggesting that the conduct of the accused must be "specifically aimed" at a crime, meaning it must make a substantial contribution to the crime, ICTR cases have consistently held that the *mens rea* required is simply knowledge that the conduct assists the crime. In *Ntawukulilyayo*, the ICTR Appeals Chamber held "the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime".[804] A few paragraphs later the Judgement states, "The Appeals Chamber recalls that the *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator".[805]

297. In discussing the substantial effect requirement, the *Kalimanzira* Appeals Chamber held that the aider and abettor must commit acts "specifically aimed" at assisting a crime, but reiterated "[T]he requisite mental element ... is knowledge that the acts performed assist the

[800] *Mrkšić* AJ, para. 159, citing *Blagojević & Jokić* AJ, paras. 188 and 189. Taylor Appeal, para. 356, mischaracterises the decision as being made with one dissent on this point. The dissent of Judge Vaz is unequivocal—her disagreement with the majority was on whether it was proven that Sljivančanin possessed the required *mens rea* for aiding and abetting murder by omission. Judge Vaz stated that the *mens rea* test would be whether "Šljivančanin knew that (i) killings of the prisoners of war were likely to take place at Ovčara and that (ii) his failure to take action in this regard would assist the commission of the murders." (para. 2 of Dissent of Judge Vaz). Notably, the test as articulated by Judge Vaz does not include specific direction.

[801] *Mrkšić* AJ, para. 159.

[802] *Mrkšić* AJ, para. 159, citing *Blaškić* AJ, para. 49 and *Vasiljević* AJ, para. 102. See also *Ntakirutimana* AJ, paras. 501, 508.

[803] *Ntagerura* AJ, para. 370. See also *Karera* AJ, para. 321 ("the *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abetter assist in the commission of the crime by the principal").

[804] *Ntawukulilyayo* AJ, para. 214, citing *Karera* AJ, para. 321, *Nahimana* AJ, para. 482.

[805] *Ntawukulilyayo* AJ, para. 222 citing *Kalimanzira* AJ, para. 86, *Rukundo* AJ, para. 53, *Nahimana* AJ, para. 482.

commission of the specific crime of the principal perpetrator".[806] The *Rukundo* Appeal Judgement defined the *actus reus* for aiding and abetting identically (acts "specifically aimed at assisting")[807] but reiterated that "the requisite mental element is knowledge that the acts performed assist the commission of the specific crime of the perpetrator".[808]

298. The ECCC's Trial Chamber has held that "[l]iability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed ... and that the accused was aware that his conduct assisted the commission of that crime".[809] The STL's Appeals Chamber affirmed a "knowledge" standard in customary international law and emphasised that "aiding and abetting does not presuppose that the accomplice shares a common plan or purpose with the principal perpetrator or his criminal intent".[810]

299. Therefore, the jurisprudence from all of the international courts is consistent – knowledge or awareness of the substantial likelihood that the accused's conduct will assist the crime is the standard for the *mens rea* of aiding and abetting, and no further showing of a higher mental state, intent or purpose, is required. This jurisprudence reflects customary international law as it existed prior to the Indictment period in *Taylor*. The ICTY deals with serious violations of international law in the former Yugoslavia since 1991. The ICTR mandate covers such crimes in Rwanda 1994. The ECCC mandate covers the years 1975-1979. Thus all of these courts deal with crimes committed before the start of the Indictment period in *Taylor*, 30 November 1996.

(vi) Article 25(3)(c) of the ICC Statute does not codify the elements on aiding and abetting under ICL

300. Taylor wholly relies on the ICC Statute to argue that, with regards to the *mens rea* for aiding and abetting, customary international law requires a standard higher than mere knowledge of the perpetrator's intended crime and awareness that his assistance facilitates the crimes. His argument that the minimum standard for aiding and abetting under customary international law is reflected in Article 25(3)(c) of the ICC Statute, which makes criminally responsible those who "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission",[811] is fundamentally flawed.

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806 *Kalimanzira* AJ, para. 86.
807 *Rukundo* AJ, para. 52.
808 *Rukundo* AJ, para. 53.
809 *Duch* TJ, para. 535.
810 STL Applicable Law Decision, paras. 227, 206, 225, 211-12 (explaining its analysis of CIL).
811 Taylor Appeal, paras. 319, 338 *et seq.*

301. First, the ICC Statute in general, and the modes of liability scheme in particular, were never meant to codify customary international law.[812] The ICC has itself stated that whether the Statute conforms to customary international law is irrelevant for the purposes of its interpretation. In the *Katanga* Confirmation Decision, the Pre-Trial Chamber noted that the ICTY Appeals Chamber had expressly found in *Stakić* that co-perpetratorship is not a mode of liability under international customary law, but:

> since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court.[813]

302. Secondly, no case at the ICC has yet defined the elements of Article 25(3)(c) liability. The confirmation hearing in *Mbarishimana*, cited by Taylor, merely referred to the article in passing as *Mbarishimana* was not charged under 25(3)(c).[814] Taylor quotes Ambassador Scheffer stating that the "purpose" language was a compromise reached during negotiations for the Rome Statute between those favouring wording with "knowledge" and those favouring "intention."[815] But Scheffer himself makes the point that "the Statute never defines 'purpose' and the legislative history provides no guidance."[816]

303. Third, Taylor's attempt to depict Article 25(3)(c) of the ICC Statute as identical to aiding and abetting in Article 6(1) of the SCSL Statute is misguided. The ICC has its own unique scheme of individual criminal responsibility and is still in the early stages of developing these modes in its jurisprudence. "Planning", for example, is not mentioned in the ICC Statute although it is a recognised mode of liability under international criminal law. Under the ICC scheme, acts that assist or encourage a crime are not limited to paragraph (c) of Article 25(3) but would also be covered by paragraph (d) of the same provision.[817]

304. While Article 25(3)(d) uses the term "common purpose", it is very different from joint criminal enterprise liability as the accused need not be part of the criminal plan nor intend any

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[812] See *Orić* AJ, Judge Shomburg Opinion, para. 20: the Rome Statute is specific to the jurisdiction of the ICC and "was not intended to codify existing customary rules"; see also *Exxon Mobil*, p. 42: "The Rome Statute which created the International Criminal Court ("ICC") is properly viewed in the nature of a treaty and not as customary international law."

[813] *Katanga* Confirmation Decision, para. 508.

[814] *Mbarishimana* Confirmation Decision, para. 8.

[815] Taylor Appeal, para. 341.

[816] See Talisman Amicus, p. 20.

[817] Article 25(3)(d) provides that a person is criminally responsible for crimes under the Rome Statute if he "[i]n 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 aim 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." (Emphasis added.)

crime.[818] Because ICC jurisdiction is "limited to the most serious crimes of concern to the international community",[819] it is highly probable that every case at the ICC will concern crimes committed by a group of persons acting with a common purpose as such crimes could not be committed by individuals acting alone. Article 25(3)(d) makes an individual responsible for providing any assistance to a crime within the ICC's jurisdiction when the contribution is "made in the knowledge of the intention of the group to commit the crime." Thus, exactly contrary to Taylor's submission,[820] the ICC Statute does indeed hold responsible those who contribute to a crime with mere knowledge of the intention of the perpetrators to commit the offence. Taylor's argument that state practice is reflected in the ICC Statute and rejects criminal responsibility for contributing to a crime with mere knowledge, is untenable in light of Article 25(3)(d), which holds persons criminally responsible who are not themselves part of a common plan, but who contribute with knowledge of the intention of the group to commit crimes.

305. What is clear is that the scheme of modes of liability in the ICC Statute is distinct from that of the SCSL and the *ad hoc* tribunals and does not, and never was intended to, reflect customary international law. Therefore, the ICC Statute is not helpful in understanding Article 6(1) of the SCSL Statute and provides no reason to reverse the jurisprudence of this Court in defining the elements of aiding and abetting liability.

(vii) Awareness of a "substantial likelihood" satisfies the knowledge test

306. The Trial Chamber correctly stated that the aider and abettor must possess the knowledge *or* be "aware of the substantial likelihood" that his acts would assist the commission of the underlying offence.[821] This Appeals Chamber has endorsed the "substantial likelihood" standard in *AFRC*,[822] *CDF*,[823] and *RUF*.[824] Appeals Chambers are bound to follow their previous decision absent cogent reasons that mandate a different holding in the interest of justice.[825] Taylor has failed to demonstrate the existence of any such reason to alter the jurisprudence of the Special Court, which is consistent with that of the Appeals

[818] *Mbarushimana* Confirmation Decision, para. 282.
[819] Rome Statute, Art. 5.
[820] Taylor Appeal, para. 319.
[821] Judgement, para. 486.
[822] *AFRC* AJ, paras. 242, 243.
[823] *CDF* AJ, para. 366.
[824] *RUF* AJ, para. 546.
[825] *Aleksovski* AJ, paras. 108-11, 125. Instances of situations where cogent reasons in the interests of justice requires a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or where a previous decision has been given *per incuriam*, that is the judicial decision that has been wrongly decided, usually because the judges were ill-informed about the applicable law.

Chambers of the *ad hoc* tribunals by which it "shall be guided".[826] The standard articulated by this Appeals Chamber for the *mens rea* for aiding and abetting is proper, represents the standard test under customary international law, is consistent with the jurisprudence of other international tribunals and should not be disturbed.

307. The STL Appeals Chamber cited the *AFRC* definition of *mens rea* which included the "substantial likelihood" language, with approval, stating:

> This accords with fundamental principles of criminal law: if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate.[827]

308. The findings in the *Taylor* case, and Taylor's own testimony, show that the RUF was worse than a "well known thug." It was an organisation with a notorious operational strategy of terrorising innocent civilians, of which Taylor himself was well aware when he gave the group guns and ammunition that fueled its terror campaign. The STL Appeals Chamber noted the *Van Anraat* case before the Hague Court of Appeal relevant to the same principle of awareness of a probability of the commission of a crime:

> The accused had provided to Iraq, between 1980 and 1988, the chemical raw material TDG ... necessary for the manufacture of the mustard gas that the Iraqi Government had then used against the Kurds in 1987-88. The Court applied Dutch law ... [t]he Court first found that the accused knew that the quantity of TDG he provided could only be used to produce mustard gas and then found that the accused was aware of the high risk of the mustard gas in war, particularly given the 'unscrupulous character of the then Iraqi regime.'[828]

309. Taylor incorrectly submits that the ICTY never accepted that knowledge can include "awareness of a probability."[829] The *Blaškić* Appeals Chamber endorsed the statement made by the *Blaškić* and *Furundžija* Trial Chambers to the effect that:

> it is not necessary that the aider and abettor ... 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.[830]

310. Taylor's submission misreads paragraph 49 of *Blaškić*, which did not overturn the probability standard.[831] Rather, the *Blaškić* Appeals Chamber fully endorsed the principle that

[826] SCSL Statute, Art. 20(3).
[827] STL Applicable Law Decision, para. 227.
[828] STL Applicable Law Decision, fn. 345 (internal references omitted).
[829] Taylor Appeal, para. 371.
[830] *Blaškić* AJ, para. 50 (emphasis added).
[831] *Blaškić* AJ, para. 49.

the knowledge test is satisfied when it is shown that the aider and abettor was "aware that one of a number of crimes will *probably* be committed."[832] This probability standard has been consistently applied at the ICTY.[833]

311. Taylor's submission incorrectly asserts that the *Haradinaj* and *Blagojević* Appeal Judgements rejected the "awareness of a probability" standard.[834] In both *Haradinaj* and *Blagojević*, the Appeals Chamber found that the respective Trial Chambers did not impose a standard of 'certainty' but, rather, acquitted on the basis that the evidence did not show "to any standard" that the accused were aware their acts would assist the commission of a crime.[835]

312. ICTR jurisprudence also supports the principle that the knowledge element of *mens rea* is satisfied by evidence that the accused is aware a crime will probably be committed.[836] In *Karera*, the ICTR Appeals Chamber found that "[i]f an accused 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."[837]

(viii) Taylor fails to show that the mens rea standard is "actual knowledge"

313. Taylor is mistaken in law in asserting that unless the assister can be said to have "actual knowledge" of the criminal intention of the principal, then the assistance is too remote.[838] No jurisprudence using the term "actual knowledge" is cited, nor does Taylor offer a definition of the term. If the term is meant to distinguish constructive knowledge, *i.e.*, a "should have known" standard, there is no relevance to this appeal as the Trial Chamber did not utilise a "should have known" standard.[839] In the event that Taylor suggests that by "actual knowledge" the aider or abettor must know for a "certainty" that the crimes will be committed, this is an incorrect statement of the law. When dealing with future events, no one can have absolute certainty. Regardless of how much information one possesses about past behaviour and declarations of intent, it is always possible that an individual or group will act to the contrary. Moreover, it would make no sense to impose a certainty standard for aiding and abetting when the test for instigating, ordering and planning is awareness of a substantial

[832] *Blaškić* AJ, para. 50 (emphasis added).
[833] *Simić* AJ, para. 86; *Furundžija* TJ, para. 246; *Brđanin* TJ, para. 272; *Strugar* TJ, para. 350.
[834] Taylor Appeal, paras. 370-71.
[835] *Haradinaj* AJ, para. 59; *Blagojević & Jokić* AJ, para. 223.
[836] *Ndindabahizi* AJ, para. 122 ("aiding and abetting a crime with awareness that a crime will *probably* be committed").
[837] *Karera* AJ, para. 321.
[838] Taylor Appeal, para. 385.
[839] Judgement, paras. 6878-79, 6886, 6947-52.

likelihood.[840] The correct *mens rea* standard is that which was articulated by this Appeals Chamber in three prior judgments and applied by the Trial Chamber in this case: the accused must know or be aware of the substantial likelihood that his conduct would assist the commission of the underlying offence.

(ix) There is no right of heads of states to aid and abet atrocities

314. Taylor's argument that the Trial Chamber's *mens rea* standard risks interfering with well-established prerogatives of states conflates state responsibility with international criminal responsibility.[841] Taylor in effect argues that Heads of State should be immune from criminal charges for aiding and abetting atrocity crimes because states have a right to provide assistance to insurgencies even with the knowledge that there is a substantial likelihood such acts will facilitate the commission of atrocities. No such principle exits in international law.

315. States have no right to assist crimes against humanity or war crimes. The International Court of Justice has held that Article 16 of the International Law Commission's Articles on State Responsibility reflects customary international law.[842] The Article provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

316. Taylor's reliance on the International Court of Justice decision in the *Nicaragua* case as establishing a right of States to support insurgencies in other countries is misplaced.[843] The holding in *Nicaragua* provides no support for Taylor's argument that he had a right to support the RUF as part of his foreign policy, as the Decision found no such right under international law, deciding:

> that the United States by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.[844]

317. Taylor argues that the effect of the precedent in the *Taylor* case would be to criminalise assistance to any foreign group because there are reports that some of their forces have committed crimes. This argument ignores the fundamental findings of the Trial Chamber

[840] *Blaškić* AJ, paras. 42 and 166 for ordering; *Kordić & Čerkez* AJ, paras. 30-32 and 112 for ordering, instigating and planning.
[841] Taylor Appeal, paras. 388-93.
[842] *Bosnia v. Serbia*, para. 420.
[843] See Taylor Appeal, paras. 388-90.
[844] *Nicaragua* Judgment, para. 292.

in this case about the notorious reputation of the RUF which distinguishes this case from any of the scenarios in Taylor's submission. There are over 500 pages in the Trial Judgement containing findings about the crimes committed by the RUF and its allies.[845] The Chamber found that "[t]hese crimes were inextricably linked to the strategy and objectives of the military operations themselves"[846] and that "[t]hroughout the Indictment period, the operational strategy of the RUF and AFRC was characterised by a campaign of crimes against the Sierra Leonean civilian population, including murders, rapes, sexual slavery, looting, abductions, forced labour, conscription of child soldiers, amputations and other forms of physical violence and acts of terror."[847] Taylor "knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and of their propensity to commit crimes"[848] and "knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes".[849]

318. Heads of State should not and do not enjoy immunity for acts that constitute crimes under international law.[850] This Appeals Chamber has already denied Taylor's claim to such immunity.[851] Under Taylor's argument, providing explosives to Al Qaeda knowing of their attacks targeting civilians, or providing guns to the Lord's Resistance Army, knowing of their well-documented practice of abducting children during military operations to serve in their forces, would be legal if the individuals providing this assistance were acting on behalf of a State. Fortunately, this is not the law. There is no principle in international law that grants officials of States the right to provide support to foreign groups that substantially assist crimes, aware of the substantial likelihood that the assistance will facilitate atrocity crimes. No principle of "state prerogative" grants immunity to Charles Taylor, who knew his assistance would lead to more enslavement, more amputations, rapes and the murders of thousands of innocent civilians in Sierra Leone.

(x) The mens rea need not be defined "in relation" to the actus reus

319. Taylor argues that the *mens rea* for aiding and abetting should be that the accused not only was aware he was contributing to the crime but was aware that his actions constituted a substantial contribution.[852] This contradicts all of the jurisprudence cited above from this

[845] Judgement Section VII, pp. 210-755.
[846] Judgement, para. 6905.
[847] Judgement, para. 6905.
[848] Judgement, para. 6947.
[849] Judgement, para. 6949.
[850] See, e.g., ICTR Statute, Art. 6(2); Rome Statute, Art. 27.
[851] Decision on Immunity from Jurisdiction, pp. 2, 26.
[852] Taylor Appeal, paras. 394-96.

Appeals Chamber, the ICTR, ICTY, ECCC and STL defining the *mens rea* for aiding and abetting. Taylor bases his argument on the premise that *mens rea* "always requires as a minimum that the accused know the character of the *actus reus*,"[853] but cites no authority for this assertion. There is no rule in international criminal law or state practice that an accused must always know before taking an action that all the elements of the *actus reus* will result. To take an example from common law, the *actus reus* for murder is the killing of a person but the *mens rea* is malice aforethought which is satisfied when it is shown the accused possessed the intent to kill *or* to cause grievous bodily harm.

320. Taylor argues that Article 30 of the ICC Statute articulates this principle,[854] but Article 30 merely provides that a person may be held criminally responsible "only if the material elements are committed with intent and knowledge." The Trial Chamber applied this standard, holding that "the lending of practical assistance, encouragement, or moral support must itself be *intentional*"[855] and that it must be shown that the accused performed the act with awareness of the substantial likelihood that the act would assist the commission of the underlying offence.[856]

(xi) Conclusion

321. The elements of *mens rea* for aiding and abetting are established by the jurisprudence of this Appeals Chamber and were correctly applied by the Trial Chamber in this case. There is no support in international criminal law jurisprudence for the elements proposed by Taylor – that the accused must act with something more than knowledge and must be certain of the future actions of the perpetrator. The standard proposed by Taylor would grant heads of states the prerogative to provide military assistance with the awareness of the substantial likelihood it will facilitate atrocity crimes against neighbours. Such a principle would be a very regrettable step backward in efforts to protect victims of atrocity crimes under international criminal law.

322. Contrary to Taylor's assertions, the Trial Chamber applied the correct standard of *mens rea* for aiding and abetting. Taylor's appeal under this Ground should be dismissed as it fails to demonstrate any error that would serve to invalidate the Judgement.

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[853] Taylor Appeal, para. 395.
[854] Taylor Appeal, para. 396.
[855] Judgement, para. 487 (emphasis added).
[856] Judgement, para. 486.

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SCSL-03-01-A
(258 - 1214)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 1 October 2012

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC PROSECUTION APPELLANT'S SUBMISSIONS

WITH CONFIDENTIAL SECTIONS D & E OF THE BOOK OF AUTHORITIES

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
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Ms. Ula Nathai-Lutchman
Mr. James Pace
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Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

SPECIAL COURT FOR SIERRA LEONE
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COURT MANAGEMENT
THE HAGUE
01 OCT 2012
NAME SAMUEL J. FORNAH
SIGN
TIME 15:55

47. To comply with Mr. Taylor's instruction, Bockarie and the AFRC/RUF commanders adopted a brutal strategy: to maintain control of Kono, they would make the area "fearful" to discourage civilians and the enemy from staying in or returning to Kono.[118] As a result, the AFRC/RUF forces inflicted a campaign of terror on the civilians in Kono District that became one of the bloodiest chapters in the Sierra Leone conflict.

48. The Judgement is replete with findings of the crimes perpetrated by AFRC/RUF forces after the Intervention in accordance with orders given by Bockarie and other AFRC/RUF commanders to make the area fearful and/or to keep civilians and the enemy away.[119] A reading of the findings and the evidence makes clear that such orders were given by the AFRC/RUF commanders to carry out Mr. Taylor's instruction to maintain control of Kono. For example, the findings establish that junta forces killed civilians at Hill Station,[120] Koidu Town (including 101 men at Igbaleh),[121] Bumpe[122] and Tombodu[123] to prevent civilians and ECOMOG from staying in or returning to the area. The findings also establish that AFRC/RUF perpetrators intentionally targeted civilians in Kono District by: burning homes, killing indiscriminately and amputating in Koidu Geiya;[124] hacking civilians to death in Koidu Buma;[125] burning houses, killing civilians and displaying dead bodies and human heads on sticks in Yengema;[126] killing civilians and looting property in Paema;[127] attacking civilians asleep in their homes, killing and

[118] Note that shortly after JPK recaptured Kono, he left for Kailahun district and Bockarie became the leader of the RUF/AFRC.
[119] *See, e.g.*, Judgement, paras. 646, 2008-2009, 2017.
[120] Judgement, paras. 652 (13 civilians shot by Superman), 658, 660, 663.
[121] Judgement, paras. 661, 670, 672, 2006. *See also* Judgement, paras. 1993, 1994, 1998.
[122] Judgement, paras. 682-684 (an unknown number of civilians were killed in accordance with orders given by Kallay, Bangura, Superman, Bockarie, Kallon, CO Rocky and others), 2017. *See also* Judgement, paras. 676, 677, 679, 681, 2008, 2014-16 detailing the burning of houses with civilians inside, amputations and putting heads on sticks.
[123] Judgement, paras. 686-687 (more than 20 civilians were massacred in March or April), 691-692 (Savage's forces, with the approval of Superman and Bomb Blast, killed about 63 civilians around April 1998), 697-698 (on Staff Alhaji's orders, 53 civilians were burned inside a building and 3 died from amputations), 703-704.
[124] Judgement, paras. 709-710.
[125] Judgement, paras. 712-713. *See also* Judgement, para. 711.
[126] Judgement, paras. 715-16.
[127] Judgement, paras. 729-730.

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SCSL-03-01-T
(43136-43175)

SPECIAL COURT FOR SIERRA LEONE

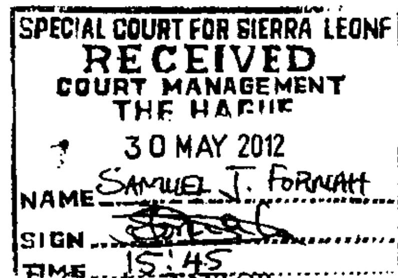
TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding Judge
Justice Teresa Doherty
Justice Julia Sebutinde

Registrar: Binta Mansaray

Date: 30 May 2012

Case No.: SCSL-03-01-T



PROSECUTOR v. Charles Ghankay TAYLOR

SENTENCING JUDGEMENT

Office of the Prosecutor:

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Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
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Logan Hambrick

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2.6. Aggravating Factors

95. The Prosecution argues that Mr. Taylor's "willing and enthusiastic participation" in the crimes constitutes an aggravating factor, citing his detailed knowledge of the crimes that were committed.[163] The Defence contends that to consider this an aggravating factor would amount to "double counting" elements of the offences for which Mr. Taylor was convicted.[164] The Trial Chamber agrees that Mr. Taylor's knowledge of the crimes is an element of his conviction and cannot be considered an aggravating factor.

96. The Prosecution argues that Mr. Taylor's leadership role, as President of Liberia and as a member of the ECOWAS Committee of Five, imbued him with inherent authority, which he abused to "fan the flames of conflict".[165] The Defence contends that this argument fails the pleading requirement and cites jurisprudence which the Trial Chamber has considered in its discussion of Applicable Law.[166] The Trial Chamber notes that the precedents cited state, more broadly than suggested by the Defence, that aggravating circumstances are "those circumstances directly related to the commission of the offence charged".[167] As the leadership role of Mr. Taylor during the Indictment period is directly related to the commission of the offences with which he was charged, the Trial Chamber has considered this role as an aggravating factor.

97. The Trial Chamber notes that as President of Liberia, Mr. Taylor held a position of public trust, with inherent authority, which he abused in aiding and abetting and planning the commission of the crimes for which he has been convicted. As a Head of State, and as a member of the ECOWAS Committee of Five and later the Committee of Six, Mr. Taylor was part of the process relied on by the international community to bring peace to Sierra Leone. But his actions undermined this process, and rather than promote peace, his role in supporting the military operations of the AFRC/RUF in various ways, including through the supply of arms and ammunition, prolonged the

[163] Prosecution Sentencing Brief, paras 79-81.

[164] Defence Sentencing Brief, para. 107.

[165] Prosecution Sentencing Brief, paras 83-84.

[166] See Applicable Law, *supra* para. 28.

conflict. The lives of many more innocent civilians in Sierra Leone were lost or destroyed as a direct result of his actions. As President and as Commander-in-Chief of the Armed Forces of Liberia, Mr. Taylor used his unique position, including his access to state machinery and public resources, to aid and abet the commission of crimes in Sierra Leone, rather than using his power to promote peace and stability in the sub-region. The Trial Chamber finds that Mr. Taylor's special status, and his responsibility at the highest level, is an aggravating factor of great weight. There is no relevant sentencing precedent for Heads of State who have been convicted of war crimes and crimes against humanity, but as Mr. Taylor himself told the Trial Chamber "I was President of Liberia. I was not some petty trader on the streets of Monrovia".[168]

98. The Trial Chamber notes that the actions of Mr. Taylor, then President of Liberia, caused and prolonged the harm and suffering inflicted on the people of Sierra Leone, a neighbouring country not his own. While Mr. Taylor never set foot in Sierra Leone, his heavy footprint is there, and the Trial Chamber considers the extraterritoriality of his criminal acts to be an aggravating factor.

99. The Trial Chamber found that there was a continuous supply by the AFRC/RUF of diamonds mined from areas in Sierra Leone to Mr. Taylor, often in exchange for arms and ammunition. Mr. Taylor repeatedly advised the AFRC/RUF to capture Kono, a diamondiferous area, and to hold Kono and to recapture Kono, so that they would have access to diamonds which they could use to obtain from and through him the arms and ammunition that were used in military operations to target civilians in a campaign of widespread terror and destruction. Mr. Taylor benefited from this terror and destruction through a steady supply of diamonds from Sierra Leone. His exploitation of the conflict for financial gain is, in the view of the Trial Chamber, an aggravating factor.

100. The Trial Chamber notes that although the law of Sierra Leone provides for the sentencing of an accessory to a crime on the same basis as a principal, the jurisprudence of this Court, as well as the ICTY and ICTR, holds that aiding and abetting as a mode of

[167] *Delalić* Appeal Judgement, para. 763; *Kunarac* Trial Judgement, para. 850.

[168] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T-1280, Statement of Dakhpannah Dr. Charles Ghankay Taylor, 18 May 2012, Annex A, para 36.

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 14 JULY 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Mr Gregory Townsend Ms Advera Nsiima Kamuzora Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Stephen Rapp Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard Mr James Supuwood Ms Salla Moilanen
For the Office of the Principal Defender:	Ms Claire Carlton-Hanciles

1 common enemy, happening to be ULIMO, we withdrew our men and
2 ceased all, and I mean all, cooperation with the RUF.
3 Q. Did you thereafter provide any military assistance to the
4 RUF?
09:45:55 5 A. None whatsoever.
6 Q. Were you thereafter aware of atrocities being committed in
7 Sierra Leone?
8 A. Well, I put it this way: There is no one on this planet
9 that would not have heard through international broadcasts or
09:46:29 10 probably discussions about what was going on in Sierra Leone. I
11 would be the first to say yes, we did hear of certain actions
12 that were going on in Sierra Leone that we - that were a little
13 strange to us because those things did not occur in Liberia.
14 Q. What things?
09:46:51 15 A. Well, we heard that people were getting killed, women were
16 getting raped and different things, and we couldn't understand
17 it. I could not understand it, because these are things that we
18 did not tolerate in Liberia and so for me it was unacceptable.
19 But then again we had no way of verifying whether, you know,
09:47:17 20 these were true because we did not have anyone in there to tell
21 us because, you know, these days when you see reports on
22 television - I'm seeing on television this morning that I ordered
23 people to cannibalise people in Sierra Leone, and when you begin
24 to look at the different slants in the news, well, you hear them,
09:47:37 25 you cannot verify them, and it was not in my - it was not my duty
26 to verify them, but I would say we did hear about those things in
27 Sierra Leone.
28 Q. And had you ordered the RUF or any other group in Sierra
29 Leone to carry out such actions?

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WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 24324

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 24324

ICTR Authorities

UNITED NATIONS
NATIONS UNIES

Tribunal pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Judgement of: 20 October 2010

CALLIXTE KALIMANZIRA

v.

THE PROSECUTOR

Case No. ICTR-05-88-A

JUDGEMENT

Counsel for Callixte Kalimanzira:

Mr. Arthur Vercken
Ms. Anta Guissé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alphonse Van
Ms. Charity Kagwe-Ndungu
Mr. François-Xavier Nsanzuwera
Ms. Florida Kabasinga
Ms. Jane Mukangira

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D. Alleged Errors Relating to the Inauguration of Élie Ndayambaje (Ground 5)

72. The Trial Chamber convicted Kalimanzira for aiding and abetting genocide, in part, based on his presence at the 22 June 1994 inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune, Butare Prefecture, during which Ndayambaje instigated the killing of Tutsis.[194] The Trial Chamber found that, by his presence, Kalimanzira offered moral support to Ndayambaje's call to kill Tutsis during the ceremony and thereby aided and abetted subsequent killings.[195] In making these findings, the Trial Chamber relied on Witnesses BBB and BCA, who attended the ceremony, observed Kalimanzira's presence, and testified about subsequent killings.[196]

73. Kalimanzira submits that the Trial Chamber erred in convicting him in relation to this incident.[197] In this section, the Appeals Chamber will consider whether the Trial Chamber erred in the assessment of the evidence of the killings. In this respect, Kalimanzira contends that there is insufficient evidence demonstrating that killings in fact followed the ceremony.[198] The Prosecution responds generally that Kalimanzira's arguments lack merit, but does not address the sufficiency of the evidence relating to the killings.[199]

74. The Appeals Chamber recalls that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[200] The Appeals Chamber has explained that "[a]n accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime."[201] Where this form of aiding and abetting has been a basis of a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[202]

75. In view of Kalimanzira's position as *directeur de cabinet* of the Ministry of Interior, it was reasonable for the Trial Chamber to determine that his silent presence during Ndayamabaje's

[194] Trial Judgement, paras. 291-293, 739.
[195] Trial Judgement, paras. 292, 293.
[196] Trial Judgement, para. 291.
[197] Kalimanzira Notice of Appeal, paras. 23-29; Kalimanzira Appeal Brief, paras. 92-161.
[198] Kalimanzira Appeal Brief, paras. 117-119, 135, 136.
[199] Prosecution Response Brief, paras. 75-90. *See also* T. 14 June 2010 pp. 32-37.
[200] *Muvunyi* Appeal Judgement, para. 79. *See also Seromba* Appeal Judgement, para. 44; *Blagojevi} and Joki}* Appeal Judgement, para. 127.
[201] *Br|anin* Appeal Judgement, para. 273. *See also Br|anin* Appeal Judgement, para. 277.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Judgement of: 2 February 2009

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-A

JUDGEMENT

Counsel for the Appellant

Ms. Carmelle Marchessault
Mr. Alexandre Bergevin
Mr. Christian Deslauriers, Assistant

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Dior Sow Fall
Mr. Abdoulaye Seye
Mr. François-Xavier Nsanzuwera
Mr. Alfred Orono Orono
Ms. Florida Kabasinga
Ms. Béatrice Chapaux

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the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[727]

318. Contrary to the Appellant's contention, the specific identification of the perpetrators, who were identified in the Trial Judgement as *Interahamwe*, was not required for a finding that the Appellant instigated the killing of Gakuru. In any event, the Trial Chamber did identify the perpetrators. It is implicit, but certain, in the Trial Judgement that the Trial Chamber found that Gakuru was killed by the *Interahamwe* who were informed by the Appellant that Gakuru was an "*Inyenzi*" and who received his order to arrest him. The Trial Chamber found that "[b]y doing so, Karera left him [Gakuru] in the hands of *Interahamwe*" and that "[u]nder the prevailing circumstances, he must have understood that Gakuru would be killed".[728] That the Trial Chamber made such a finding is implicit in its recollection of the evidence of Witnesses BMO and BMN.[729] While it would have been preferable for the Trial Chamber to explicitly state that it identified the perpetrators of Gakuru's murder as being the *Interahamwe* to whom the Appellant indicated that Gakuru was an "*Inyenzi*" and who received the order to arrest him, this omission does not amount to an error.

319. However, based on the Trial Chamber's factual findings, the Trial Chamber could not have reasonably concluded that the Appellant prompted the perpetrators to kill Gakuru. The Trial Chamber made no factual findings supporting such a conclusion. It merely concluded that the Appellant had informed the *Interahamwe* who later killed Gakuru that he was an "*Inyenzi*" and ordered them to arrest him. The Trial Chamber should have further explained how, on the basis of these factual findings, it inferred that the Appellant had prompted the *Interahamwe* to kill Gakuru. In the absence of such an explanation, the Appeals Chamber finds that the Trial Chamber erred in convicting the Appellant for instigating Gakuru's murder.

320. The Appeals Chamber now turns to the Appellant's submission that the Trial Chamber erred in entering a conviction for aiding and abetting murder as a crime against humanity.

321. The *actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime.[730] The *mens rea* for aiding and abetting is knowledge that acts

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[727] *Nahimana et al.* Appeal Judgement, para. 480; *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27.
[728] Trial Judgement, para. 456.
[729] *See* Trial Judgement, paras. 445, 447.
[730] *Nahimana et al.* Appeal Judgement, para. 482.

performed by the aider and abettor assist in the commission of the crime by the principal.[731] It is well established that it is not necessary for an accused to know the precise crime which was intended and which in the event was committed, but he must be aware of its essential elements.[732] If an accused 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.[733]

322. The Trial Chamber found that the Appellant told the *Interahamwe* that Gakuru was an "*Inyenzi*" and that he ordered his arrest by the *Interahamwe*, which he must have understood would result in his murder.[734] On the basis of these findings, it was reasonable for the Trial Chamber to conclude that the Appellant aided and abetted the murder of Gakuru.[735] By instructing the *Interahamwe* to arrest Gakuru and telling them that Gakuru was an "*Inyenzi*", it was reasonable to conclude that the Appellant substantially contributed to the commission of his murder through specifically assisting and providing moral support to the principal perpetrators. Furthermore, in light of the evidence adduced, the Appeals Chamber finds no error in the Trial Chamber's finding that the Appellant had the requisite *mens rea*.

323. For the foregoing reasons, the Appeals Chamber grants this sub-ground of appeal in part and reverses the Appellant's conviction for instigating murder as a crime against humanity based on this event. The Appellant's conviction for aiding and abetting murder as a crime against humanity based on the killing of Gakuru is upheld.

F. Conclusion

324. The Appeals Chamber grants the Appellant's First Ground of Appeal and reverses the Appellant's conviction for aiding and abetting genocide and extermination as a crime against humanity, based on the alleged weapons distribution in Rushashi commune.

325. The Appeals Chamber further grants the Seventh Ground of Appeal, in part, and reverses the Appellant's conviction for instigating murder as a crime against humanity based on the killing of Gakuru.

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[731] *Nahimana et al.* Appeal Judgement, para. 482.
[732] *Nahimana et al.* Appeal Judgement, para. 482.
[733] *See Stakić* Appeal Judgement, para. 50; *Nahimana et al.* Appeal Judgement, para. 482.
[734] Trial Judgement, para. 456.
[735] Trial Judgement, para. 560.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**21 May 2007**

MIKAELI MUHIMANA

v.

THE PROSECUTOR

Case No. ICTR-95-1B-A

JUDGEMENT

Counsel for Mikaeli Muhimana:

Prof. Nyabirungu mwene Songa
Mr. Kazadi Kabimba
Mr. Mathias Sahinkuye

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. François Xavier Nsanzuwera

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subordinate relationship between him and Mugonero.[430] He submits that the Trial Chamber was required to establish his position of authority in order to show that he used his authority to "persuade or force another person to commit a crime."[431]

189. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and that this support has a substantial effect on the perpetration of the crime.[432] The requisite mental element of aiding and abetting is knowledge that the acts assist the commission of the specific crime of the principal perpetrator.[433] For an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator.[434]

190. The Appeals Chamber is not convinced that the Trial Chamber erred in convicting the Appellant for abetting the rape of Witness BG when he gave permission to Mugonero to "take away" Witness BG. The Trial Chamber concluded that the Appellant was a well-known and influential person in his community.[435] The Trial Chamber further found that the Appellant knew that Mugonero wanted to rape the witness.[436] The Appeals Chamber considers that a reasonable trier of fact could find that the Appellant's actions in such circumstances amounted to encouragement which had a substantial affect on Mugonero's subsequent rape of Witness BG. In the *Semanza* Appeal Judgement, the Appeals Chamber reached a similar conclusion in respect of an "influential" accused who encouraged the rape of Tutsi women by giving "permission" to rape them.[437]

191. Accordingly, this sub-ground of appeal is dismissed.

E. Conclusion

192. In view of the foregoing, this ground of appeal is dismissed in its entirety.

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[430] Appellant's Brief, paras. 275, 285-290.
[431] Appellant's Brief, paras. 285, 290.
[432] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[433] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[434] *Cf. Semanza* Appeal Judgement, para. 257 (referring to instigation).
[435] Trial Judgement, para. 604.
[436] Trial Judgement, para. 323.
[437] *Semanza* Appeal Judgement, paras. 256, 257, quoting *Semanza* Trial Judgement, para. 478.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 29 August 2008

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles
Mr. Dorian Cotlar

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

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analysis the evidence of Witness MO38 in favour of Witness TQ who had been accused of genocide.[162]

78. The Prosecution responds that the Trial Chamber correctly inferred that Muvunyi tacitly approved of the participation of ESO Camp soldiers in the attack at the *Groupe scolaire* from the order given to save the Bicunda family, his attempts to save a child of this family who was mistakenly taken, his refusal to come to the assistance of the other refugees, and his overall conduct in allowing a contingent of armed soldiers to leave the camp to participate in the attack.[163] The Prosecution contends that Muvunyi has not demonstrated that it was unreasonable to rely on the evidence of Witness TQ.[164] The Prosecution also notes that the Trial Chamber's conclusion that Muvunyi knew about the attack is reasonable in light of the proximity of the camp to the *Groupe scolaire* and the repeated nature of the attacks.[165]

79. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[166] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[167]

80. An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[168] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused's conduct amounted to official sanction of the crime and thus substantially contributed to it.[169] The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.[170]

81. The Trial Chamber refers only to limited circumstantial evidence suggesting that Muvunyi tacitly approved the criminal conduct of the principal perpetrators. It is well established that, as a

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[162] Muvunyi Appeal Brief, para. 63.
[163] Prosecution Response Brief, para. 142.
[164] Prosecution Response Brief, paras. 143, 144.
[165] Prosecution Response Brief, para. 149.
[166] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[167] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[168] *Brđanin* Appeal Judgement, paras. 273, 277.
[169] *Brđanin* Appeal Judgement, para. 277
[170] *Blagojevi} and Joki}* Appeal Judgement, para. 134.

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(*Appellants*)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

Counsel for Ferdinand Nahimana
Jean-Marie Biju-Duval
Diana Ellis

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Donald Herbert
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Counsel for Hassan Ngeze
Bharat B. Chadha
Dev Nath Kapoor

The Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart
Neville Weston
George Mugwanya
Abdoulaye Seye
Linda Bianchi
Alfred Orono Orono

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order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Bla[ki]* Appeal Judgement, para. 42.
[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.
[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.
[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.
[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.
[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.
[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.
[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.
[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart

Counsel for André Ntagetura
Benoît Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

Translation certified by LSS, ICTR

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them to do so".[735] The Prosecution submits that the *actus reus* of aiding and abetting in this instance is established by Imanishimwe's omission to prevent his soldiers from going to Gashirabwoba, and that this omission had a decisive effect on their ability to participate in the attack.[736] It further contends that Imanishimwe possessed the requisite knowledge to be an aider and abettor in the Gashirabwoba massacre,[737] given that the Trial Chamber found that he knew or should have known about the participation of his soldiers in the attack.[738]

368. The Appeals Chamber notes that the Trial Chamber did not expressly rule on the issue as to whether Imanishimwe could have incurred criminal responsibility for aiding and abetting the crimes committed at the Gashirabwoba football field on 12 April 1994. This notwithstanding, the Appeals Chamber does not conclude that the Trial Chamber failed to consider this form of responsibility. It indeed transpires from the legal findings made by the Trial Chamber that this form of responsibility was considered and even accepted when the facts lent themselves to it. The Appeals Chamber understands the Trial Chamber's silence with respect to aiding and abetting as an indication that it was not established that the Accued's conduct could in this particular instance be characterized as aiding and abetting.[739]

369. Accordingly, the issue is for the Appeals Chamber to inquire into whether this finding is one which a reasonable trier of fact could have made.

370. To establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support[740] for the perpetration of a specific crime, and that the said support had a substantial effect on the perpetration of the crime. The Appeals Chamber adds that the *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.[741] The requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal.[742]

371. In the instant case, the Trial Chamber considered that it was not established that the Accused had ordered or was present during the attack launched at Gashirabwoba on 12 April 1994.[743] On the other hand, it found that the soldiers responsible for the attack could not have

[735] *Ibid.*, para. 407.
[736] *Ibid.*, para. 408. In support of its line of reasoning, the Prosecution cites the *Blaškić* Trial Judgement, para. 284: "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea.*" (footnote omitted).
[737] Prosecution Appeal Brief, paras. 409-410, referring to *Tadić* Appeal Judgement, para. 229 and *Krstić* Appeal Judgement, para. 140.
[738] *Ibid.*, para. 410, citing Trial Judgement, para. 654.
[739] See *supra*, para. 359.
[740] The Appeals Chamber notes that the phrase "assist, encourage or lend no support" originally used by the Appeals Chamber in the *Tadić* (para. 229), *Aleksovski* (para. 163), *Vasiljević* (para. 102) and *Blaškić* (para. 45) Appeal Judgements has been translated as "*aider, encourager ou fournir un soutien moral*" in the French versions of the said Judgements. The Appeals Chamber considers that this translation may mislead the reader, given that "aided and abetted" is rendered in the French text of the Statute by "*aidé et encourage*".
[741] See *Blaskić* Appeal Judgement, para. 47.
[742] *Vasiljević* Appeal Judgement, para. 102; *Blaskić* Appeal Judgement, para. 45; *Kvočka et al.* Appeal Judgement, paras. 89-90, 188.
[743] Trial Judgement, paras. 439 and 653.

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor MERON, Presiding** **Judge Florence MUMBA** **Judge Mehmet GÜNEY** **Judge Wolfgang SCHOMBURG** **Judge Inés Mónica WEINBERG DE ROCA**
Registrar:	**Mr. Adama Dieng**
Date:	**13 December 2004**

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

Counsel for the Prosecution

Mr. James Stewart
Ms. Linda Bianchi
Ms. Michelle Jarvis
Mr. Mathias Marcussen

Counsel for the Defence

Mr. David Jacobs
Mr. David Paciocco
Mr. Ramsey Clark

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530. The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused "only" killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.

531. The Appeals Chamber will next determine whether the above error invalidates the verdict. As already stated, the Appeals Chamber has quashed a number of the Trial Chamber's factual findings for lack of notice.[908] Accordingly, the Appeals Chamber must determine whether the remaining factual findings are sufficient to support a finding of criminal responsibility of the Accused for the crime of extermination.

532. With respect to Elizaphan Ntakirutimana, the remaining findings are: one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill,[909]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests";[910] one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was part of a convoy which included attackers;[911] and sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church.[912]

533. These findings are sufficient to sustain the Trial Chamber's finding of criminal responsibility on the part of Elizaphan Ntakirutimana for aiding and abetting the crime of genocide. The Appeals Chamber is satisfied that in carrying out these acts Elizaphan Ntakirutimana assisted,

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[908] *Supra*, section II. A.1.(b).
[909] Trial Judgement, para. 579.
[910] *Id.*, para. 594.
[911] *Id.*, para. 661.
[912] *Id.*, para. 691.

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Arlette Ramaroson** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**14 December 2011**

Dominique NTAWUKULILYAYO

v.

THE PROSECUTOR

Case No. ICTR-05-82-A

JUDGEMENT

Counsel for Dominique Ntawukulilyayo:

Maroufa Diabira
Dorothée Le Fraper du Hellen

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Alphonse Van
Ousman Jammeh
Priyadarshini Narayanan
Deo Mbuto

his prior good conduct is inconsistent with any possible moral support or encouragement, and that his presence at Kabuye hill would therefore have been of no consequence to the assailants.[529]

212. The Prosecution responds that the elements of aiding and abetting were clearly established beyond reasonable doubt, and that prior good conduct is not a relevant factor.[530]

213. In reply, Ntawukulilyayo contends that, contrary to the Trial Chamber's finding, Kabuye hill was not an isolated area, and that its conclusion that the transfer of refugees provided a "tactical advantage" was therefore purely speculative.[531]

214. The Appeals Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[532] Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime."[533]

215. The Trial Chamber found beyond reasonable doubt that, in the early afternoon of Saturday, 23 April 1994, Ntawukulilyayo directed mostly Tutsi refugees at Gisagara market to go to Kabuye hill, promising them food and protection there, and that the refugees complied with his instructions.[534] The Trial Chamber further found that Ntawukulilyayo arrived at Kabuye hill later that day, and left shortly after dropping off soldiers who, along with others, subsequently attacked the civilian refugees at the hill.[535] As discussed above, the Appeals Chamber has found no error in the Trial Chamber's factual findings regarding Ntawukulilyayo's instructions to refugees at Gisagara market, and his arrival at Kabuye hill with soldiers.[536] Ntawukulilyayo has also failed to demonstrate error in the Trial Chamber's conclusion that the soldiers who accompanied him, along with others, attacked the refugees.[537] As regards the number of soldiers, the Appeals Chamber observes that the Trial Chamber did not rely on the specific number of soldiers who accompanied Ntawukulilyayo but on Ntawukulilyayo's contribution to the killings by bringing armed reinforcements.[538] Ntawukulilyayo's arguments that no reasonable trier of fact could determine with

[529] Appeal Brief, para. 252, *referring to ibid.*, paras. 190-202; Reply Brief, para. 103.
[530] Response Brief, paras. 192-206.
[531] Reply Brief, para. 100.
[532] *See, e.g.*, *Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482.
[533] *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 52; *Blagojevi} and Joki}* Appeal Judgement, para. 134.
[534] Trial Judgement, paras. 12, 263, 424, 453.
[535] Trial Judgement, paras. 18, 303, 453.
[536] *See supra*, Sections III, IV.
[537] *See supra*, para. 159.
[538] *See* Trial Judgement, para. 454.

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **20 October 2010**

EMMANUEL RUKUNDO

v.

THE PROSECUTOR

Case No. ICTR-2001-70-A

JUDGEMENT

Counsel for Emmanuel Rukundo:

Ms. Aïcha Condé
Mr. Benoît Henry

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Christine Graham
Mr. Abubacarr Tambadou
Mr. Ousman Jammeh
Mr. Shamus Mangan

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other forms of responsibility pleaded in the Indictment. In the course of doing so, the Appeals Chamber will consider whether there was a sufficient nexus between Rukundo's acts, which he disputes under this ground of appeal, and the perpetration of the crimes as required by the relevant form of responsibility.

51. In determining Rukundo's role in the murder of Madame Rudahunga and the beating of the four others, the Trial Chamber noted that all four of the Prosecution witnesses who testified about this event connected him to the attacks.[107] It found that Rukundo was at the scene of the abduction and that he followed the vehicle carrying Madame Rudahunga and the soldiers who abducted her.[108] It further found that these same soldiers returned to Saint Joseph's College about 20 minutes later and abducted her children and two other Tutsi civilians.[109] Rukundo's car was also observed in the area of Madame Rudahunga's house after the killing and the beatings.[110] Furthermore, the Trial Chamber noted that Witness BLC attested to hearing him boast that "[w]e entered in Rudahunga's Inyenzi's house, we killed the wife and the children, but the idiot managed to get away",[111] while Witness CCH stated that Rukundo told her that Louis Rudahunga had to be killed.[112] The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that this evidence was sufficient to support a finding that Rukundo was involved in the killing of Madame Rudahunga and the beatings of the four others.

52. The Appeals Chamber has explained that an "aider and abettor commitFsğ acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime."[113] It recalls that there is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime nor that such conduct served as a condition precedent to the commission of the crime.[114] It is sufficient for the aider and abettor's assistance or encouragement to have had a substantial effect on the realisation of that crime,[115] the establishment of which is a "fact-based

[106] *See supra* Section III.A (Ground 1: Alleged Error Relating to the Pleading of Commission).
[107] Trial Judgement, para. 165.
[108] Trial Judgement, paras. 165, 171.
[109] Trial Judgement, para. 171.
[110] Trial Judgement, para. 166.
[111] Trial Judgement, para. 167.
[112] Trial Judgement, para. 168.
[113] *Seromba* Appeal Judgement, para. 44. *See also Karera* Appeal Judgement, para. 321; *Mrk{i} and [ljivan~anin* Appeal Judgement, para. 81; *Blagojevi} and Joki}* Appeal Judgement, para. 127.
[114] *Mrk{i} and [lijivan~anin* Appeal Judgement, para. 81; *Blagojevi} and Joki} Appeal* Judgement, para. 134; *Blaškić* Appeal Judgment, para. 48.
[115] *Mrk{i} and [ljivan~anin* Appeal Judgement, para. 81; *Ori}* Appeal Judgement, para. 43; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojevi} and Joki}* Appeal Judgement, para. 134.

inquiry".[116] The Appeals Chamber is satisfied that the Trial Chamber's findings on Rukundo's role in the attacks, as set out above, demonstrate that his acts substantially contributed to the commission of the crimes.

53. With regard to the *mens rea* required for aiding and abetting, the Appeals Chamber has held that "Ftğhe requisite mental element F...ğ is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[117] Specific intent crimes such as genocide also require that "the aider and abettor must know of the principal perpetrator's specific intent."[118]

54. Bearing in mind the Trial Chamber's findings that these attacks formed part of a larger campaign of ethnic violence in the area and country,[119] the Appeals Chamber is convinced that the perpetrators acted with both genocidal intent and knowledge of the widespread and systematic attack against Tutsi civilians. In his consultation with the assailants prior to the crimes, his presence during the abduction of Madame Rudahunga, and his subsequent boasting of the killing, Rukundo would have been aware of his role in the crimes and the perpetrators' *mens rea*. Consequently, the Appeals Chamber finds that Rukundo's actions aided and abetted genocide and murder as a crime against humanity.

(c) *Chapeau* Elements of Crimes Against Humanity

55. Rukundo challenges his conviction for murder as a crime against humanity on the basis that Madame Rudahunga did not belong to a political group and it was not proven that he was aware of the existence of a widespread or systematic attack on a civilian population.[120]

56. Article 3 of the Statute requires that the crimes be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." In the present case, the Trial Chamber found that the killing of Madame Rudahunga, a Tutsi, was part of a widespread and systematic attack against Tutsi civilians on ethnic grounds.[121]

[116] *Blagojevi} and Joki}* Appeal Judgement, para. 134.
[117] *Muvunyi* Appeal Judgement, para. 79. *See also Karera* Appeal Judgement, para. 321; *Mrk{i} and [ljivan~anin* Appeal Judgement, para. 49.
[118] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Blagoje Simi}* Appeal Judgement, para. 86.
[119] Trial Judgement, paras. 565-568, 581-582.
[120] Rukundo Appeal Brief, paras. 75, 76.
[121] Trial Judgement, paras. 581, 582. The Appeals Chamber also recalls that the individual victim's membership in a national, political, ethnic, racial or religious group is not required for a conviction for crimes against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population. *See, e.g., Muhimana* Appeal Judgement, paras. 172-174 (upholding a conviction for the rape as a crime against humanity of two women whose ethnicity was unknown but which was found to be part of a widespread and systematic attack on ethnic grounds against Tutsis). *See also Mrk{i} and [ljivan~anin*

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
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IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 12 March 2008

THE PROSECUTOR

v.

ATHANASE SEROMBA

Case No. ICTR-2001-66-A

JUDGEMENT

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Dior Fall
Ms. Amanda Reichman
Mr. Abdoulaye Seye
Mr. Alfred Orono Orono

Counsel for Athanase Seromba:

Mr. Patrice Monthé
Ms. Sarah Ngo Bihegué

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bulldozer driver to demolish the church and stresses that he did not speak with him prior to the destruction of the church.[335]

138. The Prosecution responds that Athanase Seromba merely relies on his previous arguments regarding alleged erroneous factual findings and argues that he has failed to identify any error of law allegedly committed by the Trial Chamber.[336]

139. The Appeals Chamber recalls that the *actus reus* for aiding and abetting extermination as a crime against humanity comprises of acts specifically directed to assist, encourage, or lend moral support to the perpetration of this crime and that such support must have a substantial effect upon the perpetration of the crime.[337] In the present case, the Trial Chamber found that Athanase Seromba held discussions with the communal authorities and accepted their decision to destroy the church.[338] Moreover, the Trial Chamber found that Athanase Seromba encouraged the bulldozer driver to destroy the church and that he indicated its fragile side to the driver.[339] In support of this ground of appeal, Athanase Seromba refers to his arguments which challenged these factual findings.[340] The Appeals Chamber recalls its finding that it was not unreasonable for the Trial Chamber to rely on the testimonies of Witnesses CBJ, CBK, CDL, and CBR,[341] and that the Trial Chamber did not err in rejecting the testimony of Witness FE32 when making the impugned factual findings.[342] The Appeals Chamber has therefore already found that Athanase Seromba's challenge to the underlying factual findings is without merit.[343]

140. The Appeals Chamber considers that the finding of the Trial Chamber, which characterized Athanase Seromba's conduct as aiding and abetting the crime of extermination, is also subject to an appeal by the Prosecution and for practical reasons will be discussed there. Given that the Prosecution appeal on this point is granted, Athanase Seromba's arguments cannot succeed. Accordingly this sub-ground is dismissed.

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[335] Seromba's Appellant's Brief, para. 294.
[336] Prosecution's Respondent's Brief, paras. 187, 188.
[337] *Ntakirutimana* Appeal Judgement, para. 530.
[338] Trial Judgement, para. 364. The Appeals Chamber notes that the Trial Chamber used the words "approved" and "accepted" interchangeably to describe Athanase Seromba's conduct. *See* Trial Judgement, paras. 239, 268, 334, 264, 367, 382.
[339] Trial Judgement, para. 364. The Appeals Chamber notes that while the English translation of the Trial Judgement reads "Seromba even gave advice to the bulldozer driver concerning the fragile side of the church", the French text states that Seromba indicated (in the sense of providing information about) the fragile side of the church ("*Seromba a même donné des indications au conducteur du bulldozer sur le côté fragile de l'église*") (emphasis added). *See also* Trial Judgement, para. 269.
[340] Seromba's Appellant's Brief, para. 294.
[341] *See supra* Athanase Seromba's Ground of Appeal 7.
[342] *See supra* Athanase Seromba's Ground of Appeal 7.
[343] *See supra* Athanase Seromba's Ground of Appeal 7.

ICTY Authorities

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14/1-A

Date: 24 March 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

> Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions, but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *Temple of Preah Vihear* and the *Barcelona Traction* cases towards the 1959 decision in the Aerial Incident case are illustrative of this process, and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work).[245]

104. The right of appeal is a component of the fair trial requirement[246] set out in Article 14 of the ICCPR, and Article 21(4) of the Statute. The right to a fair trial is, of course, a requirement of customary international law.[247]

105. An aspect of the fair trial requirement is the right of an accused to have like cases treated alike, so that in general, the same cases will be treated in the same way and decided as Judge Tanaka said, "possibly by the same reasoning."[248]

106. The right to a fair trial requires and ensures the correction of errors made at trial. At the hearing of an appeal, the principle of fairness is the ultimate corrective of errors of law and fact, but it is also a continuing requirement in any appeal in which a previous decision of an appellate body is being considered.

107. The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.

108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[249]

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[245] Rosenne, *The Law and Practice of the International Court* (1985), p. 613.
[246] Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993) comments that the bundle of rights which constitute the right to a fair trial are those set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") (*ibid.*, Article 14, para. 19).
[247] *See* Article 6 of the 1949 European Convention on Human Rights, Article 8 of the 1969 American Convention on Human Rights and Article 7 of the 1981 African Charter on Human and People's Rights.
[248] *See* footnote 243, Judge Tanaka's Separate Opinion.
[249] *Black's Law Dictionary* (7th ed., 1999).

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.

110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.

111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.

2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers

112. Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated:

> ... it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.[250]

113. The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

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[288] *See* para. 168, *infra*.
[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.
[294] *Furund'ija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadic* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

[296] *Ibid.*, para. 245.
[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundžija*, and of the Appeals Chamber in *Tadic*.
[298] *Tadi}* Judgement, para. 229.

164. The Trial Chamber in the present case relied upon the *Furundžija* Judgement, amongst other decisions at first instance within the Tribunal (the *Tadi}* Judgement of the Appeals Chamber was given after the Trial Chamber had given its judgement).[299] The Trial Chamber expressed itself in various ways, but identified what it saw to be the two essential elements which had to be established in order to demonstrate liability for the acts of others, in these terms:

> The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that lend encouragement or support" constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had [a] "substantial effect" on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate". If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.[300]

The absence of any reference to an awareness by the aider and abettor of the essential elements of the crime committed by the principal (including his relevant *mens rea*) detracts from that passage as a reasonably accurate statement of the law, but that flaw did not disadvantage the Appellant in the circumstances of this case, where the relevant state of mind on the part of the HVO soldiers was obvious from the nature of the injuries seen by him.

165. The Prosecution must, of course, establish the acts of the principal or principals for

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[299] *Aleksovski* Judgement, para. 60.

[300] *Ibid*, para. 61. The citations of authority have been omitted.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No.: IT-02-60-A

Date: 9 May 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **9 May 2007**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
AND
DRAGAN JOKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Antoinette Issa
Ms. Marie-Ursula Kind
Mr. Matteo Costi

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

Counsel for Dragan Jokić:

Mr. Peter Murphy
Ms. Chrissa Loukas

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G. Alleged Errors relating to Aiding and Abetting (Ground 7)

125. The Trial Chamber determined that Blagojević permitted the use of the Bratunac Brigade's resources, including personnel, to facilitate the commission of the crimes for which he was convicted.[338] The Trial Chamber considered that aiding and abetting constituted the most appropriate form of participation under Article 7(1) of the Statute to describe his criminal responsibility.[339] Under this ground of appeal, Blagojević raises four errors of law and fact in connection with his conviction for aiding and abetting, including an alleged legal error in the definition of aiding and abetting and alleged factual errors related to his knowledge of the underlying crimes, whether he made Bratunac Brigade resources available, and whether this constituted substantial assistance.[340]

1. Alleged Error in Defining Aiding and Abetting

126. Initially, Blagojević submits that the Trial Chamber erred in law in setting forth the elements of aiding and abetting.[341]

127. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[342] The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[343] The Appeals Chamber has also determined that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[344] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[345] In cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent.[346]

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[338] Trial Judgement, paras. 747, 749, 755, 757, 759-760, 784, 794-796.
[339] Trial Judgement, para. 796.
[340] Blagojević Notice of Appeal, paras. 26, 27; Blagojević Appeal Brief, paras. 8.1-8.18. In addition, Blagojević makes additional arguments concerning his conviction for complicity in genocide. These arguments overlap to some extent with those raised under Ground 6 and are dealt with there.
[341] Blagojević Appeal Brief, paras. 8.1, 8.2.
[342] *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370.
[343] *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.
[344] *Krstić* Appeal Judgment, paras. 137, 138, 144.
[345] *Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 370.
[346] *Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgment, paras. 140, 141.

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referenced statement in relation to the aider and abettor carrying out acts which are specifically directed to assist.[492]

187. In the *Blaškić* Appeal Judgement, the Appeals Chamber considered whether the *actus reus* of aiding and abetting requires causation between the act of the accused and the act of the principal, or in other words, whether the contribution "must have a direct and important impact on the commission of the crime."[493] The Appeals Chamber found that "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required."[494] However, the Appeals Chamber reiterated that one of the requirements for the *actus reus* of aiding and abetting is that the support of the aider and abettor have a substantial effect upon the perpetration of the crime.[495]

188. In reaching this conclusion, in the *Blaškić* Appeal Judgement the Appeals Chamber referenced the definition of aiding and abetting in the *Vasiljević* Appeal Judgement, which is identical to that set out in the *Tadić* Appeal Judgement, and which, in specifying that the assistance given by an aider and abettor must be specifically directed, also contrasted aiding and abetting liability with that of joint criminal enterprise.[496] However, in the *Blaškić* Appeal Judgement the Appeals Chamber also found that the Trial Chamber correctly held that the standard for the *actus reus* was that set out in the *Furundžija* Trial Judgement: "consist[ing] of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[497]

189. The Appeals Chamber observes that while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting.[498] This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation

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[492] *Aleksovski* Appeal Judgement, para. 163(ii).
[493] *Blaškić* Appeal Judgement, para. 43.
[494] *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85.
[495] *Blaškić* Appeal Judgement, para. 48.
[496] *Vasiljević* Appeal Judgement, para. 102.
[497] *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283 (quoting *Furundzija* Trial Judgement, para. 249).
[498] *Krnojelac* Appeal Judgement, para. 37, citing *Tadić* Appeal Judgment, para. 229; *Čelebići* Appeal Judgement, para. 345, citing *Tadić* Trial Judgement, para 688 (where the opposition is drawn between culpability where the accused "intentionally commits" a crime or where he "*knowingly* aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime" (emphasis added)). *But see Čelebići* Appeal Judgement, para. 352.

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substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her "routine duties" will not exculpate the accused.

190. Jokić seeks to rely on the statement of the Appeals Chamber in the *Čelebići* Appeal Judgement that it "would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians."[499] On this basis, Jokić argues that "while the work of camp guards directly contributed to the unlawful confinement of prisoners within the camp, the Appeals Chamber accepted, as a matter of law, that such contribution alone was too insignificant or insubstantial to constitute aiding and abetting that crime."[500] From this, Jokić extrapolates that "where a person holds a position within an organized structure to which certain lawful duties attach, the mere performance by that person of their routine duties will not of itself constitute aiding and abetting crimes that may be committed by others within that organized structure."[501]

191. The Appeals Chamber considers it unreasonable to compare Jokić's position within the Zvornik Brigade to that of a camp guard in the *Čelebići* case. At issue in the *Čelebići* case was the ability of the accused, Zejnil Delalić and Hazim Delić, to affect the continued detention of the civilians in the camp.[502] The Appeals Chamber considers that it was reasonable for the Trial Chamber in this case to find, with respect to the three execution sites, that Jokić's role, whether as duty officer or Chief of Engineering, went beyond that of merely relaying orders up and down the chain of command.[503] The Trial Chamber's findings make it clear that Jokić's ability to affect the commission of the crime was substantial. In particular, the Trial Chamber found that, while Jokić did not directly issue orders in his capacity as Chief of Engineering, he assisted in carrying out the orders of the Brigade Commander which were based on his advice and proposals.[504]

192. Finally, Jokić's attempt to ground his argument in its apparent consistency with the principle that a person convicted of aiding and abetting "is convicted *of the crime itself*, in the same way as the principal perpetrator who actually commits the crime"[505] and thus must be specifically directed, is fundamentally misguided. The Appeals Chamber recalls that Article 7(1) of the Statute deals not only with individual responsibility by way of direct or personal participation in the criminal act but

[499] *Čelebići* Appeal Judgement, para. 364.
[500] Jokić Appeal Brief, para. 94.
[501] Jokić Appeal Brief, para. 95.
[502] *Čelebići* Appeal Judgement, paras. 336-369.
[503] Trial Judgement, paras. 761-770.
[504] Trial Judgement, para. 519.
[505] Jokić Appeal Brief, para. 100.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Florence Ndepele Mwachande Mumba** **Judge Mehmet Güney** **Judge Wolfgang Schomburg** **Judge Inés Mónica Weinberg de Roca**
Registrar:	**Mr. Hans Holthuis**
Judgement of:	**29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

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of law."[81] He states that this standard was set out at the beginning of the Trial Judgement and pervades the entire analysis that followed.[82]

44. The Prosecution submits that the Appellant's claim that the *mens rea* adopted by the Trial Chamber in relation to aiding and abetting — "possible and foreseeable consequence of the conduct" — was too low is unsupported by any "standard" or authority. Nor did the Appellant, according to the Prosecution, indicate any instance where the application of such a standard would have impacted upon his conviction thereby possibly enabling him to claim prejudice.[83] The Prosecution further submits that the Trial Chamber did not apply a negligence standard in the instant case but that, if it had, it would have been completely appropriate to do so.[84] Finally, the Prosecution rejects the Appellant's unsupported assertion that aiding and abetting liability requires an element of causation between the act of the accused and the act of the principal.[85]

45. In *Vasiljević*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:

> (i) 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. [...]
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [...][86]

The Appeals Chamber considers that there are no reasons to depart from this definition.

46. In this case, the Trial Chamber, following the standard set out in *Furundžija*, held that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[87] It further stated that the *mens rea* required is "the knowledge that these acts assist the commission of the offense."[88] The Appeals Chamber considers that the Trial Chamber was correct in so holding.

[81] Brief in Reply, para. 115.
[82] Brief in Reply, para. 116.
[83] Respondent's Brief, para. 5.67.
[84] Respondent's Brief, paras. 5.68-5.69.
[85] Respondent's Brief, paras. 5.71-5.75.
[86] *Vasiljević* Appeal Judgement, para. 102.
[87] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).
[88] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).

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47. The Trial Chamber further stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*."[89] It considered:

> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.[90]

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.

48. The Trial Chamber in this case went on to state:

> Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required. Furthermore, participation may occur before, during or after the act is committed and be geographically separated therefrom.[91]

The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime.

49. In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."[92] However, as previously stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation.[93] In this respect, the Trial Chamber erred.

50. The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor...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,

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[89] Trial Judgement, para. 284 (footnote omitted).
[90] Trial Judgement, para. 284 (footnote omitted).
[91] Trial Judgement, para. 285 (citing *Furundžija* Trial Judgement, para. 233; *Aleksovski* Trial Judgement, para. 61).
[92] Trial Judgement, para. 286.
[93] *Vasiljević* Appeal Judgement, para. 102.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

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352. The Trial Chamber therefore correctly interpreted Count 48 of the Indictment and the supporting paragraph as charging the three accused generally with participation in the unlawful confinement of civilians pursuant to Article 7(1) of the Statute, as well as with responsibility as superiors pursuant to Article 7(3) of the Statute.[556] The Trial Chamber had earlier defined aiding and abetting as:

> [including] all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence.[557]

The Prosecution does not challenge that definition. Subject to the observation that the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime, the Appeals Chamber also accepts the statement as accurate.[558]

353. As noted above, in its conclusions in relation to the liability of Delalic and Delic under Article 7(1) for the offence of unlawful confinement, the Trial Chamber referred to its earlier findings made in the context of its consideration of their liability as superiors pursuant to Article 7(3) of the Statute. Although those findings were being made for the primary purpose of determining whether superior responsibility was being exercised, it is clear that they involved a broad consideration by the Trial Chamber of the nature of the involvement of the two accused in the affairs of the Celebici camp. The Prosecution indeed contends that the findings made by the Trial Chamber provided an adequate basis on which to determine Delalic's liability for aiding and abetting.

354. The Trial Chamber considered the evidence in relation to the placing of civilians in detention at the camp, but it made no finding that Delali} participated in their arrest or in placing them in detention in the camp.[559] The Prosecution advances no argument that the Trial Chamber erred in this respect.

355. However, the Prosecution argues that Delali} participated in the continued detention of civilians as an aider and abettor. The Trial Chamber found that there was "no evidence that the Celebici prison-camp came under Delalic's authority by virtue of his appointment as co-ordinator".[560] The Trial Chamber found that the primary responsibility of Delalic in his position

[556] Trial Judgement, para 1125.
[557] Trial Judgement, para 327.
[558] *Tadi}* Appeal Judgement, para 229.
[559] Trial Judgement, para 1131.
[560] Trial Judgement, para 669.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-17/1-T

Date: 10 December 1998

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Antonio Cassese
Judge Richard May

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **10 December 1998**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

<u>**The Office of the Prosecutor**</u>:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

<u>**Counsel for the Accused**</u>:

Mr. Luka Miseti}
Mr. Sheldon Davidson

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have known that the purpose of the trip was an unlawful execution, he would be acquitted.

246. Moreover, 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.

247. Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of *mens rea* in customary international law. This is the standard adopted by this Tribunal in the *Tadi} Judgement*, although sometimes somewhat misleadingly expressed as "intent".[267]

248. One exception to this requirement of knowledge is the *Rohde* case, which appears to require no *mens rea* at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the *Hechingen Deportation* case, which required that the accomplice share the *mens rea* of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.

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3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

[267] Case No. IT-94-1-T, paras. 675-677.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.:	IT-97-25-A
Date:	17 September 2003
	English
Original:	French

IN THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Judgement of: 17 September 2003

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:
Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:
Mr Mihajlo Bakrač
Mr Miroslav Vasić

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the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[42]

2. Differences between participating in the joint criminal enterprise as a co-perpetrator and aiding and abetting

33. Also in the *Tadić* Appeals Judgement, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime.

> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
>
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
>
> (iii) 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
>
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.[43]

[42] *Ibid.*, para. 228.
[43] *Ibid.*, para. 229.

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37. The Appeals Chamber will first examine the merits of this sub-ground in relation to imprisonment and then to the living conditions. The Appeals Chamber considers this sub-ground an allegation of insufficient reasoning for the *actus reus* of aiding and abetting. As a preliminary observation, it notes that, by his acts or omissions, the aider and abettor must assist, encourage or lend moral support to the principal perpetrator of the crime and this support must have a substantial effect upon the perpetration of the crime.[45]

(a) <u>Imprisonment</u>

38. Krnojelac holds that the Trial Chamber established only that he was present at the scene of the crime, whereas the Judgment states that presence alone cannot constitute aiding and abetting.[46] He contends that the Trial Chamber omitted to state clearly and unequivocally the concrete acts and omissions by which he made a significant contribution to the perpetration of the crime of persecution based on imprisonment. The Prosecution responds that, on the contrary, the Trial Chamber meticulously analysed Krnojelac's duties as prison warden and clearly noted that, by discharging his duties, he assisted the principal perpetrators of the crimes in maintaining an unlawful system. The Prosecution also submits that Krnojelac failed to show that the finding was unreasonable.[47] It further argues that it was legally permissible for the Trial Chamber to find that Krnojelac had become an aider and abettor to the crime by omission - for example by failing to prevent it - if such an omission had a direct and significant effect on the perpetration of the crime.[48]

39. The Appeals Chamber notes that the text of the Judgment is at odds with Krnojelac's assertion that the Trial Chamber failed to specify by which acts or omissions he assisted, encouraged or lent moral support to the principal perpetrators of the crime of persecution based on the imprisonment of the non-Serb civilian detainees which had a substantial effect on the perpetration of the crime by those perpetrators. The Appeals Chamber notes specifically that, in the chapter of the Judgment dealing with Krnojelac's position as prison warden, the Trial Chamber found that he "held the position of warden, as that term is generally understood,"[49] and stated that the "position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs."[50] The Trial Chamber further established that Krnojelac had voluntarily accepted the post and resigned only in June 1993.[51] It examined the nature of his duties

[45] See *Tadić* Appeals Judgment, para. 229.
[46] Defence Brief, paras. 124 to 131.
[47] Prosecution Response, paras. 3.5 to 3.11.
[48] *Ibid.*, paras. 3.12 to 3.16.
[49] Judgment, para. 107.
[50] *Ibid.*, para. 97.
[51] *Ibid.*, paras. 99 and 100.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovi}, Mr. Tomislav Pasari} for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Glumac, Ms. Desanka Vranjican for Mirjan Kupre{ki}
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupre{ki}
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

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concerning either the definition of persecution or of aiding and abetting applied by the Trial Chamber.

252. The arguments made by Vlatko Kupre{ki} fall into two general categories:[411]

1. The Trial Chamber erred in finding Vlatko Kupreškic guilty of count 1 of the Amended Indictment on the basis of the tenuous evidence presented by the Prosecution; and

2. The Trial Chamber did not hear relevant and credible evidence (i.e., that of Witness ADA, Witness ADB, Witness ADC, Miro Lazarevi} and Witness AT) that would have met, rebutted, and cast reasonable doubt upon the Prosecution evidence on count 1. Had this evidence been available to the Trial Chamber, he argues, it might very well have substantially changed the Trial Chamber's assessment of the case against him. Vlatko Kupreškic therefore contends that his conviction is unsafe and has occasioned a miscarriage of justice.

253. The Appeals Chamber will now consider these arguments so as to determine whether there has been an "error of fact which has occasioned a miscarriage of justice". In doing so, the Appeals Chamber will carry out its assessment based on all the evidence before it -- both the record on appeal and the additional evidence, rather than carrying out an initial assessment as to whether the evidence before the Trial Chamber was factually sufficient to sustain the persecution conviction, and then considering the impact of the additional evidence at a separate stage.[412] As enunciated in the general issues section of this Judgement,[413] the applicable standard, in view of the additional evidence admitted on appeal, is whether Vlatko Kupreškic has established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appellate proceedings.

B. Review of the evidence before the Appeals Chamber

254. To convict Vlatko Kupreškic of aiding and abetting the offence of persecution, the Trial Chamber had to be satisfied beyond reasonable doubt that the elements of the offence had been fulfilled. From the Trial Chamber's unchallenged definitions, it follows that aiding and abetting the perpetration of persecution requires proof that Vlatko Kupreškic carried out acts specifically directed to assisting, encouraging or lending moral support to the perpetration of the offence of

[411] *See* Vlatko Kupreškic Supplemental Document, para. 11.

[412] In adopting such an approach, account is taken of Rule 117(A) of the Rules, requiring the Appeals Chamber to pronounce the judgement on appeal on the basis of the record on appeal together with such additional evidence as has been presented. During the Appeal Hearing, counsel for Vlatko Kupreškic indicated that the second ground was to be considered as an alternative to the first ground of appeal. *See* Appeal Transcript, 924.

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persecution which, in this case, consisted of the deliberate and systematic killing of Bosnian Muslim civilians; the comprehensive destruction of Bosnian Muslim homes and property; and the organised detention and expulsion of the Bosnian Muslims from Ahmici-Santici and its environs. Further, his support must have a substantial effect on the perpetration of the persecutory acts, and he must have known that the acts performed by him assisted the commission of a persecution by others.

255. In a section of the Trial Judgement entitled "Legal Findings", the Trial Chamber set out its findings as to how the elements of the offence of persecution as a crime against humanity were fulfilled.[414] It held:

> 796. ... In 1992-1993, Vlatko Kupreškic was a member of the police, namely an "Operations Officer for the Prevention of Crimes of Particular State Interest", with the rank of Inspector 1st class. The accused was not merely concerned to make inventories of supplies for the police, as he instead claims. He was unloading weapons from a car in front of his house in October 1992.
>
> 797. With regard to the evidence of the accused that he did not return to Ahmici on 15 April until the evening when he got back from the trip to Split, the Trial Chamber accepts the prosecution evidence that he was seen in Ahmici during the morning of 15 April, at the Hotel Vitez and during the afternoon and in the early evening in the vicinity of soldiers who were at his house.
>
> 798. The Trial Chamber also accepts the testimony given by the prosecution witnesses in relation to the troop activity in and around the accused's house on the evening of 15 April, which is also confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreškic houses.
>
> 799. Vlatko Kupreškic was involved in the preparations for the attack in his role as police operations officer and as a resident of the village. He allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before.
>
> [...]
>
> 801. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, of the accused being in the vicinity of Suhret Ahmic's house at about 5.45 a.m., and shortly after the latter was murdered. The Trial Chamber finds that this identification was correct and that Vlatko Kupreškic was in the vicinity shortly after the attack on Suhret Ahmic's house. There is no further evidence as to what the accused was doing there, but he was present, ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge.
>
> 802. The evidence of the accused and his witnesses as to non-participation is not credible.
>
> 803. Vlatko Kupreškic helped to prepare and support the attack carried out by the other accused, the HVO and Military Police, by unloading weapons in his store and by agreeing to the use of his house as a strategic point and staging area for the attacking troops. His role is thus not quite as prominent as that of the other accused, so he merely supported the actions of others, conduct which must be subsumed under aiding and abetting and not under co-perpetration. Vlatko Kupreškic had the requisite *mens rea*, as he was aware that his actions would substantially and effectively assist the attackers in their activities, that he would help them in carrying out their

[413] *See* the discussion *supra* para. 75.

[414] Trial Judgement, para. 795-804.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.	IT-98-30/1-A
Date:	28 February 2005
Original:	English

IN THE APPEALS CHAMBER

Before:

Judge Mohamed Shahabuddeen, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Hans Holthuis

PROSECUTOR

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

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88. The Trial Chamber considered that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and actively furthers the enterprise. An aider or abettor, on the other hand, need not necessarily share the intent of the other participants; he need only be aware that his contribution assists or facilitates a crime committed by the other participants. The Trial Chamber held that the shared intent may be inferred from the knowledge of the criminal nature of the enterprise and the continued significant participation therein. It acknowledged that there may be difficulties in distinguishing between an aider or abettor and a co-perpetrator, in particular in the case of mid-level accused who did not physically commit crimes. When, however, an accused participated in a crime that advanced the goals of the criminal enterprise, the Trial Chamber considered him more likely to be held responsible as a co-perpetrator than as an aider or abettor.[201]

89. The Appeals Chamber notes that in the *Vasiljević* Appeal Judgement, the Appeals Chamber discussed the correct distinction between co-perpetration by means of a joint criminal enterprise and aiding and abetting:

> (i) 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.[202]

90. Applying the *Vasiljević* definition, the Appeals Chamber considers that whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused. The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons. Furthermore, the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however,

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[201] Trial Judgement, para. 284.
[202] *Vasiljević* Appeal Judgement para. 102; *see* also *Tadić* Appeal Judgement, para. 229; *Krnojelac* Appeal Judgement paras 31-33.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-32/1-A

Date: 4 December 2012

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Carmel Agius
Judge Fausto Pocar
Judge Liu Daqun
Judge Howard Morrison

Registrar: **Mr. John Hocking**

Judgement of: **4 December 2012**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

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Ms. Virginie Monchy
Mr. Matthias Schuster
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of the laws or customs of war, other inhumane acts as a crime against humanity, and murder as both a violation of the laws or customs of war and a crime against humanity; and (iii) finding that he aided and abetted the crime of persecutions as a crime against humanity.[1276] The Prosecution submits that the Trial Chamber erred in acquitting Sredoje Lukić of having aided and abetted the crime of extermination as a crime against humanity.[1277]

(a) Alleged errors in relation to the applicable law on aiding and abetting

422. The Trial Chamber set out the *actus reus* of aiding and abetting as "rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime provided for in the Statute".[1278] It further stated that practical assistance "may occur before, during or after the principal crime has been committed" and considered that "tacit approval of an accused who is physically present at the scene and in a position of authority may amount to encouragement and thus meet the *actus reus* of aiding and abetting".[1279]

423. Sredoje Lukić argues that the *actus reus* of aiding and abetting, as articulated by the Trial Chamber, was "incomplete and artificially construed".[1280] He asserts that the Trial Chamber omitted the requirement that his conduct was "specifically directed" towards assisting the perpetrators,[1281] and failed to acknowledge that aiding and abetting by practical assistance requires physical presence at the scene of the crimes.[1282]

424. The Appeals Chamber has previously considered within the discussion of the *actus reus* of aiding and abetting the finding that an act or omission of an aider or abettor be "specifically directed" toward the furtherance of the crimes of the principal perpetrators.[1283] The Appeals Chamber recalls, however, that "specific direction has not always been included as an element of the *actus reus* of aiding and abetting."[1284] It further recalls its conclusion that such a finding of specific direction "will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the

[1275] Trial Judgement, para. 1035.
[1276] Sredoje Lukić's third through sixth, eleventh, and twelfth grounds of appeal. Sredoje Lukić Appeal Brief, paras 142, 145-153, 155-157, 159, 161-162, 165-168, 178-180, 185-186, 191-196, 204-205, 208-210, 286, 288-296; Sredoje Lukić Reply Brief, paras 50, 53, 59, 65, 67-69; Appeal Hearing, AT. 136, 140-141 (14 September 2011).
[1277] Prosecution's first ground of appeal. Prosecution Appeal Brief, paras 4-5, 7.
[1278] Trial Judgement, para. 901.
[1279] Trial Judgement, para. 901.
[1280] Sredoje Lukić Appeal Brief, paras 142, 146, 191.
[1281] Sredoje Lukić Appeal Brief, paras 155-156.
[1282] Appeal Hearing, AT. 136 (14 September 2011).
[1283] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras 45-46; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229. *See also Rukundo* Appeal Judgement, para. 210; *Ntagerura et al.* Appeal Judgement, para. 370; *Muvunyi I* Appeal Judgement, para. 79; *Seromba* Appeal Judgement, para. 139.
[1284] *Blagojević and Jokić* Appeal Judgement, para. 189.

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crime".[1285] In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified "that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting"[1286] and finds that there is no "cogent reason"[1287] to depart from this jurisprudence.

425. The Appeals Chamber notes that the physical presence of an aider and abettor at or near the scene of the crime may be a relevant factor in cases of aiding and abetting by tacit approval.[1288] Further, the *actus reus* of aiding and abetting may be fulfilled remotely.[1289] It is also well established that the *actus reus* of aiding and abetting may be fulfilled before, during, or after the principal crime has been perpetrated.[1290] Thus, Sredoje Lukić's submission that the Trial Chamber erroneously construed the *actus reus* of aiding and abetting is dismissed.

426. The Trial Chamber articulated the *mens rea* of aiding and abetting as follows:

> The *mens rea* for aiding and abetting is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence. [...] The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including of his state of mind.[1291]

427. Sredoje Lukić submits that the Trial Chamber misstated the applicable *mens rea*.[1292] He argues that in addition to knowledge of the crimes, an aider and abettor must have "intended" to aid and abet the occurrence and completion of the subsequent crimes.[1293] He further submits that the Trial Chamber did not correctly identify the requirements of an aider and abettor's "knowledge" of the crimes.[1294]

428. It is well established that the *mens rea* of aiding and abetting requires that an aider and abettor know that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the "essential elements" of the crime.[1295] It does not require that he shares the intention of the principal perpetrator of such crime, as Sredoje Lukić submits. Thus, Sredoje

[1285] *Blagojević and Jokić* Appeal Judgement, para. 189.
[1286] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, confirming *Blagojević and Jokić* Appeal Judgement, para. 189.
[1287] *Aleksovski* Appeal Judgement, para. 107.
[1288] *Brđanin* Appeal Judgement, paras 273, 277. *See also Kayishema and Ruzindana* Appeal Judgement, paras 201-202.
[1289] *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.
[1290] *Blagojević and Jokić* Appeal Judgement, para. 132. *See also Blaškić* Appeal Judgement, para. 48; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.
[1291] Trial Judgement, para. 902 (footnotes omitted).
[1292] Sredoje Lukić Appeal Brief, paras 171, 198; Sredoje Lukić Reply Brief, para. 51.
[1293] Sredoje Lukić Appeal Brief, paras 175, 202; Sredoje Lukić Reply Brief, paras 51-52, 57, 60. At the Appeal Hearing, he also argued that an aider and abettor must have been found to have a "common purpose" with the principal perpetrators (Appeal Hearing, AT. 133 (14 September 2011)).
[1294] *See* Sredoje Lukić Appeal Brief, paras 182-184, 199-200.
[1295] *Blagojević and Jokić* Appeal Judgement, para. 221; *Aleksovski* Appeal Judgement, para. 162. *See also Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Rukundo* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 321.

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XV. SEPARATE AND PARTIALLY DISSENTING OPINIONS OF JUDGE MEHMET GÜNEY

A. Pionirska Street Incident

1. The Appeals Chamber, by majority, upheld the Trial Chamber's finding that Sredoje Lukić was present during the Pionirska Street Incident, both at the Memić House and the Transfer.[1] Consequently, Sredoje Lukić's convictions for aiding and abetting the crimes of murder and cruel treatement as violations of the laws or customs of war, as well as murder, persecutions and other inhumane acts as crimes against humanity were maintained.[2] Unfortunately, though I joined the Majority as to the events that occurred at the Memić House, I am unable to concur with the Majority's opinion concluding that the Trial Chamber did not err when finding that Sredoje Lukić was present at the Transfer.[3] I believe the Trial Chamber committed an error of law when it made contradictory findings as to the credibility of witnesses VG084 and VG038 throughout the Pionirska Street Incident.[4] Also, I believe the Majority's analysis contains contradictions that, in my view, show how unreasonable the Trial Chamber's findings are in relation to supporting the relevant convictions.

2. In concluding that Sredoje Lukić was armed and present at the Memić House, the Trial Chamber relied on the evidence of VG018, VG084, VG038 and Huso Kurspahić.[5] I believe the Trial Chamber acted reasonably in its overall assessment when it limited the credibility and reliability of the witnesses to establishing Sredoje Lukić's presence at the Memić House only.[6] As stressed several times by the Majority, and used as a basis to dismiss Sredoje Lukić's arguments, the whereabouts and actions of Sredoje Lukić at the Memić House are unknown.[7] The number of perpetrators participating in the events is also unknown.[8] This does not detract from the

[1] Appeal Judgement, para. 418.
[2] Appeal Judgement, paras. 467.
[3] *See* Appeal Judgement, para. 418.
[4] *See* Appeal Judgement, paras. 410-414.
[5] Trial Judgement, para. 593.
[6] Trial Judgement, paras. 585, 588, 590.
[7] Appeal Judgement, paras. 385 ("[i]t accepted that evidence only to the extent that it placed Sredoje Lukić at the Memić House, and not as a basis for establishing his specific acts or location"), 388 ("[m]oreover, the Appeals Chamber notes that the Trial Chamber did not rely on the evidence of VG038 and VG084 to establish Sredoje Lukić's conduct or location during the Pionirska Street Incident"), 389 ("[i]n this context, the Trial Chamber specifically limited the weight of VG038's testimony to account for Sredoje Lukić's presence at the Memić House"),
[8] Appeal Judgement, paras. 402 ("[i]n this context, the Appeals Chamber notes that the number of perpetrators present at the Memić House is unknown"), 403 ("[t]he Trial Chamber did not make a specific finding on the number of perpetrators present at the Memić House"), 411 ([h]owever, the Trial Chamber made no finding as to the precise number of perpetrators who were present at the Memić House or during the Transfer." Also, I note the testimony of Huso Kurspahić, naming the alleged perpetrators of the Pionirska Street Incident and numbering them at seven (see T. 879, 1 September 2008).

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B. Aiding and Abetting

10. At paragraph 424 of the Appeals Judgement, the Majority states that:

> In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified "that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting" and finds that there is no 'cogent reason' to depart from this jurisprudence."[30]

As a separate opinion, I am not convinced by the Majority's analysis on this issue. In I believe that, in this case, the finding that the armed presence of Sredoje Lukić was specifically directed to provide practical assistance to the principal perpetrators which had a substantial effect on the commission of the crimes at the Memić House[31] was implicit. It is therefore a non-issue in this context. However, when taking into consideration the jurisprudence as a whole in which: (i) the "specific direction" criterion is included in the definition of aiding and abetting in the *Tadic* Appeal Judgement,[32] *Vasiljević* Appeal Judgement,[33] *Simić* Appeal Judgement,[34] *Blajojević and Jokić* Appeal Judgement,[35] *Kalimanzira* Appeal Judgement,[36] *Rukundo* Appeal Judgement,[37] and *Ntawukulilyayo* Appeal Judgement;[38] (ii) the *Mrkšić* case remains the only case that departs from the jurisprudence without providing any cogent reasons for doing so, and, in any case, it should be considered as an *obiter dictum* which is not binding under the *stare decisis* doctrine;[39] (iii) the element of "specific direction" is likely implicit even without being express in the definition.

11. For the foregoing, I cannot agree with the reasons offered by the Majority for not departing from the *Mrkšić* Appeal Judgement, however, since it is a non-issue in this case for the reasons stated above, I believe this Judgement does not provide the proper circumstances to decide whether the element of "specific direction" should be excluded from the definition of aiding and abetting or not.

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[30] Appeals Judgement, para. 424, citing *Mrkšić and Šljivančanin* Appeal Judgement, para. 159, and *Blagojević and Jokić* Appeal Judgement, paras. 188-189.
[31] Appeals Judgement, para. 437.
[32] *Tadić* Appeal Judgement, para. 229.
[33] *Vasiljević* Appeal Judgement, para. 102.
[34] *Simić* Appeal Judgement, para. 85.
[35] *Blajojević and Jokić* Appeal Judgement, paras. 184–193.
[36] *Kalimanzira* Appeal Judgement, paras. 74–75; 86–87.
[37] *Rukundo* Appeal Judgement, para. 52.
[38] *Ntawukulilyayo* Appeal Judgement, paras. 214, 216.
[39] *Black's Law Dictionary* 126 (9th ed. 2009), "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."

XVI. SEPARATE OPINION OF JUDGE AGIUS

1. I wish to clarify very briefly my own position in relation to the issue of "specific direction" within the context of aiding and abetting. I refer to paragraph 424 of the Appeal Judgement, which states that:

> The Appeals Chamber has previously considered within the discussion of the *actus reus* of aiding and abetting the finding that an act or omission of an aider or abettor be "specifically directed" toward the furtherance of the crimes of the principal perpetrators. The Appeals Chamber recalls, however, that "specific direction has not always been included as an element of the *actus reus* of aiding and abetting." It further recalls its conclusion that such a finding of specific direction "will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime". In *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified "that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting" and finds that there is no "cogent reason" to depart from this jurisprudence.[1]

2. My disagreement is with the last sentence of this paragraph. In my opinion, while the *Mrkšić and Šljivančanin* Appeal Judgement categorically stated that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting",[2] it did not "clarify" the situation at all. Rather, in my view, it appeared to represent a departure from the existing Appeals Chamber jurisprudence regarding specific direction.[3]

3. The Appeals Chamber in *Mrkšić and Šljivančanin* referred to the *Blagojević and Jokić* Appeal Judgement as its legal basis for stating that "the Appeals Chamber has confirmed" that specific direction is not an essential ingredient.[4] However, in so doing, it failed to explain how its conclusion could be based on the *Blagojević and Jokić* Appeal Judgement, which in fact did not confirm that specific direction is *not* an essential element of the *actus reus* of aiding and abetting.[5]

4. Indeed, the *Blagojević and Jokić* Appeal Judgement affirmed that the *Tadić* definition of aiding and abetting, which includes the notion of specific direction as an essential element, had never been explicitly departed from.[6] Further, the Appeals Chamber in *Blagojević and Jokić* explained that the reason why specific direction had not always been referred to as an element of the *actus reus* of aiding and abetting in the jurisprudence, was that it is "often implicit" in the conclusion "that the accused has provided practical assistance to the principal perpetrator which had

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[1] Appeal Judgement, para. 424 (internal citations omitted).
[2] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.
[3] *See Orić* Appeal Judgement, para. 43; *Blagojević and Jokić* Appeal Judgement, paras 127, 184-189; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para 45; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229. *See also Seromba* Appeal Judgement, para. 44; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana* Appeal Judgement, para 530.
[4] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159, fn. 566, citing *Blagojević and Jokić* Appeal Judgement, paras 189, and referring also to *Blagojević and Jokić* Appeal Judgement, para. 188.
[5] *See Blagojević and Jokić* Appeal Judgement, paras 184-189. *See also Blagojević and Jokić* Appeal Judgement, para. 127.

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a substantial effect on the commission of the crime".[7] In addition, in an earlier part of the same judgement, the Appeals Chamber stated that:

> The Appeals Chamber has explained that an aider and abettor carries out acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[8]

In my view, therefore, *Blagojević and Jokić* does not stand for the categorical principle stated in *Mrkšić and Šljivančanin.*

5. For these reasons, I find myself unable to agree with the final part of the summary of the jurisprudence regarding specific direction contained in paragraph 424, or to consider that the *Mrkšić and Šljivančanin* Appeal Judgement does not at least require a thorough examination and further clarification.

6. However, in the circumstances of the present case, I am nonetheless satisfied that, although specific direction was not explicitly addressed by the Trial Chamber, such a finding is implicit – in a most obvious way – in its conclusions that Sredoje Lukić had provided practical assistance to the principal perpetrators which had a substantial effect on the commission of the crimes.[9]

Done in English and French, the English text being authoritative.

Done this fourth day of December 2012,
at The Hague,
The Netherlands.

Judge Carmel Agius

[Seal of the Tribunal]

[6] *Blagojević and Jokić* Appeal Judgement, para. 189.
[7] *Blagojević and Jokić* Appeal Judgement, para. 189.
[8] *Blagojević and Jokić* Appeal Judgement, para. 127 (emphasis added).
[9] *See* Trial Judgement, paras 932-934, 984-986, 1027-1035.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-13/1-A
	Date:	5 May 2009
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Acting Registrar: **Mr. John Hocking**

Judgement of: **5 May 2009**

PROSECUTOR
V.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

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20 November 1991.[276] In light of these findings the Appeals Chamber turns to consider whether Šljivančanin's failure to act upon learning of the order to withdraw the JNA troops from Ovčara substantially contributed to the murder of the prisoners of war by the TOs and paramilitaries.

81. Bearing in mind that the basic elements of the mode of liability of aiding and abetting apply regardless of whether this form of liability is charged as "omission",[277] the Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts or omissions[278] which assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[279] There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of the crime.[280] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[281] Accordingly, in order to determine whether Šljivančanin possessed the requisite *actus reus* for aiding and abetting murder, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has demonstrated that Šljivančanin substantially contributed to their killing by his inaction[282] and that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Šljivančanin's guilt has been eliminated.[283]

(a) Šljivančanin's ability to act

82. The Appeals Chamber further recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act but failed to do so.[284] In order to determine whether Šljivančanin had the ability to act but failed to do so, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has provided sufficient evidence concerning which means were available to Šljivančanin to fulfil his continuing duty towards the prisoners of war.[285]

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[276] *See supra* para. 62.
[277] *Orić* Appeal Judgement, para. 43. *See supra* para. 49.
[278] *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.
[279] *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370, fn. 740; *Blaškić* Appeal Judgement, paras 45, 48; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229.
[280] *Blaškić* Appeal Judgment, para. 48.
[281] *Blaškić* Appeal Judgment, para. 48.
[282] *Cf. Ntagerura et al.* Appeal Judgement, para. 321.
[283] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 13.
[284] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. *See* also *infra* para. 154.
[285] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. (Where the Appeals Chamber also held that the Prosecution had not indicated which possibilities were open to Bagambiki to fulfil his duties under the Rwandan domestic law).

(e) The *mens rea* of aiding and abetting by omission

157. Šljivančanin submits that "aiding and abetting requires an intentional act on the part of the [a]ccused, which can only be matched by a culpable omission, a concept that goes beyond the basic elements of aiding and abetting as defined by the Appeals Chamber".[556] He argues that since the omission would have to be "specifically directed to assist, encourage or lend moral support"[557] to the perpetration of the crime, "only the wilful failure to discharge a duty, which implies the culpable intent of the accused, can lead to individual criminal responsibility, pursuant to Article 7(1) of the Statute".[558] In this regard, Šljivančanin submits that "mere knowledge" that the conduct facilitates the commission of the crime is insufficient to establish aiding and abetting by omission[559] and that the applicable *mens rea* standard must include, at a minimum, proof beyond reasonable doubt that he consciously decided not to act, which amounts to consent.[560] He argues that failure on the part of the Trial Chamber to establish that his omission was intentional and deliberate amounts to a finding of strict liability.[561]

158. The Prosecution responds that Šljivančanin attempts to elevate the mental element of aiding and abetting to a kind of special intent, which has already been specifically rejected by the Appeals Chamber.[562] It submits that the correct test is knowledge in the sense of "awareness of a probability" that the crime will be committed and that the acts or omissions will assist or facilitate in the commission of the crime,[563] and that, in any event, the facts as found by the Trial Chamber would fulfil his proposed criteria.[564]

159. The Appeals Chamber considers that Šljivančanin misapprehends the *mens rea* standard applicable to aiding and abetting. The fact that an "omission must be directed to assist, encourage or lend moral support to the perpetration of a crime" forms part of the *actus reus* not the *mens rea* of aiding and abetting.[565] In addition, the Appeals Chamber has confirmed that "specific direction" is

556 Šljivančanin Appeal Brief, para. 212.
557 Šljivančanin Appeal Brief, para. 211, citing *Orić* Appeal Judgement, para. 43. *See* also *Nahimana et al.* Appeal Judgement, para. 482.
558 Šljivančanin Appeal Brief, para. 214.
559 Šljivančanin Appeal Brief, para. 245.
560 *See* Šljivančanin Supplemental Brief in Reply, para. 53. Šljivančanin further contends that the Trial Chamber should have applied the following additional criteria: (i) that he had knowledge of his ability to act; (ii) that he was aware of the essential elements of the crime ultimately committed by the principal; and (iii) that he had knowledge that taking action would obstruct the commission of the crime (*see* Šljivančanin Appeal Brief, para. 247(e)).
561 Šljivančanin Supplemental Brief in Reply, para. 52.
562 Prosecution Supplemental Respondent's Brief, para. 13, citing *Blaškić* Appeal Judgement, para. 49. *See* also Prosecution Supplemental Respondent's Brief, paras 12, 14.
563 Prosecution Supplemental Respondent's Brief, para. 31. *See* also AT. 169, citing *Ndindabahizi* Appeal Judgement, para. 122.
564 Prosecution Supplemental Respondent's Brief, para. 33. *See* also AT. 172.
565 *Orić* Appeal Judgement, para. 43.

not an essential ingredient of the *actus reus* of aiding and abetting.[566] It reiterates its finding that the required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal.[567] While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[568] The Appeals Chamber further recalls that it has previously rejected an elevated *mens rea* requirement for aiding and abetting, namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[569] Accordingly, Šljivančanin's arguments are dismissed.

4. Conclusion

160. In light of the foregoing, Šljivančanin's second ground of appeal is dismissed in its entirety.

C. Third Ground of Appeal: Šljivančanin's Legal Duty to Protect the Prisoners of War at Ovčara by Virtue of his Responsibility for the Evacuation of the Vukovar Hospital

161. The Trial Chamber convicted Šljivančanin for aiding and abetting the torture of over 200 prisoners of war held at Ovčara on 20 November 1991.[570] In reaching this conclusion, the Trial Chamber found that Šljivančanin was under a duty to protect the prisoners of war by reason of his responsibility for the evacuation of the Vukovar hospital, and his failure to prevent the commission of crimes against the prisoners of war amounted to a breach of that duty.[571]

162. Šljivančanin argues that the Trial Chamber erred in finding that Mrkšić put him in charge of the evacuation of the Vukovar hospital and thereby entrusted him with a legal duty to protect the prisoners of war at Ovčara.[572] He avers that the Trial Chamber committed the following errors: (1) the Trial Chamber erred in finding that he testified that Mrkšić ordered him to ensure the

[566] *Blagojević and Jokić* Appeal Judgement, para. 189; *see* also *Blagojević and Jokić* Appeal Judgement para. 188.
[567] *See supra* para. 146.
[568] *Simić* Appeal Judgement, para. 86, citing *Blaškić* Appeal Judgement, para. 50. *See* also *Nahimana et al.* Appeal Judgement, para. 482; *Ndindabahizi* Appeal Judgement, para. 122; *Furundžija* Trial Judgement, para. 246.
[569] *Blaškić* Appeal Judgement, para. 49, citing *Vasiljević* Appeal Judgement, para. 102. *See* also *Blagojević and Jokić* Appeal Judgement, para. 222.
[570] Trial Judgement, paras 674, 689, 715.
[571] Trial Judgement, para. 669. *See* also Trial Judgement, paras 391, 668, 670.
[572] Šljivančanin Notice of Appeal, para. 17; Šljivančanin Appeal Brief, paras 257-259, citing Trial Judgement, para. 400. *See* also AT. 148-150, 200-201.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-03-68-A

Date: 3 July 2008

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Wolfgang Schomburg, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Hans Holthuis**

Judgement of: **3 July 2008**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Michelle Jarvis
Ms. Christine Dahl
Mr. Paul Rogers
Ms. Laurel Baig
Ms. Nicole Lewis
Ms. Najwa Nabti

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

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superior could possibly be held responsible under Article 7(3) in relation to his subordinate's criminal responsibility under the same article.[90]

40. The Trial Chamber did consider, however, that an accused may be held responsible under Article 7(3) of the Statute for a subordinate's commission by omission[91] and aiding and abetting.[92] With respect to aiding and abetting, the Trial Chamber further held that this mode of liability may take the form of encouragement or approval, as well as omission.[93]

41. The Appeals Chamber considers that the Trial Chamber did not hold Atif Krdžić criminally responsible for commission by omission. At a minimum, the *actus reus* of commission by omission requires an elevated degree of "concrete influence".[94] Such was not the case here, where the Trial Chamber merely found that Atif Krdžić's absence from the detention facilities "coincide[d] with more killings and more maltreatment".[95] Furthermore, the Trial Chamber clearly distinguished Atif Krdžić from the principal perpetrators who physically committed the crimes.[96]

42. Turning to whether the Trial Chamber applied the theory of aiding and abetting by tacit approval and encouragement, the Appeals Chamber notes that in cases where this theory has been applied, the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[97] Here, the Trial Chamber did not find that Atif Krdžić was present at the scene of the crimes. Rather, it focused on his "conspicuous absence" from the detention facilities, and how it "coincide[d] with more killings and more maltreatment."[98] Similarly, the Trial Chamber emphasised the absence of evidence "of any supervision over the guards, of any disciplinary measures against them, or of any visit by Atif Krdžić, or a person assigned by him, for that matter at any time."[99] The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by tacit approval and encouragement.

43. The Prosecution submits that the Trial Chamber found Atif Krdžić responsible for aiding and abetting by omission.[100] The Appeals Chamber recalls that omission proper may lead to

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[90] *See* Trial Judgement, paras. 299-301.
[91] Trial Judgement, para. 302.
[92] Trial Judgement, para. 301.
[93] Trial Judgement, paras. 283, 303.
[94] *See Blaškić* Appeal Judgement, para. 664.
[95] Trial Judgement, para. 496.
[96] *See supra*, paras. 24, 25, 27-30.
[97] *Brđanin* Appeal Judgement, para. 273, with references at fns. 553, 555. *See also Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.
[98] Trial Judgement, para. 496.
[99] Trial Judgement, para. 495.
[100] Prosecution Response Brief, para. 126, 151; Prosecution Written Submissions of 25 March 2008, paras. 1-4; AT. 1 April 2008, pp. 9-11. Orić disputes the existence of a notion of aiding and abetting by "pure omission" in international

individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[101] The Appeals Chamber has never set out the requirements for a conviction for omission in detail.[102] However, at a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (*actus reus*).[103] The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator[104] and must be aware of the essential elements of the crime which was ultimately committed by the principal (*mens rea*).[105]

44. The Trial Chamber found a legal duty to act on the part of Atif Krdžić as Commander of the Military Police, and that his omissions "coincide[d] with more killings and more mistreatment".[106] However, it does not follow from the fact that Atif Krdžić's omissions "coincided" with an increase in crimes that his omissions had a "substantial effect" thereupon, as required for liability for aiding and abetting to incur. The Trial Chamber remained silent on the issue.

45. Regarding Atif Krdžić's *mens rea*, the Trial Chamber found that "there is no reason why Atif Krdžić [...] should not have become aware of the crimes committed, except for wilful blindness".[107] Atif Krdžić was thus found to have been aware of the crimes committed by the principal perpetrators. However, the Trial Chamber made no finding on whether Atif Krdžić knew that his omissions assisted in the crimes. In this regard, the Appeals Chamber notes that the Trial Chamber's finding regarding Atif Krdžić's "conspicuous absence" from the detention facilities[108] refers not to his *mens rea*, but to his failure to comply with his duty to care for the prisoners.[109] The Prosecution understands this finding in the same way.[110]

46. The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by omission.

humanitarian law and that a superior can be held responsible for subordinates who aid and abet by omission: AT. 1 April, pp. 60-62, 131-136.

[101] *Brđanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Ntagerura et al.* Appeal Judgement, paras. 334, 370; *Blaškić* Appeal Judgement, para. 663.

[102] *Cf. Simić* Appeal Judgement, para. 85, fn. 259; *Blaškić* Appeal Judgement, para. 47.

[103] *See, e.g., Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, para. 85.

[104] *See* for the general definition of aiding and abetting, *e.g., Seromba* Appeal Judgement, para. 56; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127.

[105] *Cf. Simić* Appeal Judgement, para. 86; *Aleksovski* Appeal Judgement, para. 162.

[106] Trial Judgement, paras. 490, 495, 496.

[107] Trial Judgement, para. 496.

[108] Trial Judgement, para. 496.

[109] *See* Trial Judgement, para. 495.

[110] *See* AT. 1 April 2008, p. 10.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-04-81-A

Date: 28 February 2013

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Judgement of: **28 February 2013**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Ms. Barbara Goy
Ms. Elena Martin Salgado
Ms. Bronagh McKenna

Counsel for Momčilo Perišić
Mr. Novak Lukić
Mr. Gregor Guy-Smith

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only towards the VRS's legitimate war efforts.[65] Finally, the Prosecution contends that Perišić's personal motives with respect to VRS crimes are irrelevant to a determination of his criminal liability in this regard, as he knew that the assistance provided to the VRS would probably facilitate the commission of crimes.[66]

2. Analysis

(a) Specific Direction as a Component of Aiding and Abetting Liability

25. Perišić contends that both the Trial Judgement and the *Mrkšić and Šljivančanin* Appeal Judgement erroneously held that specific direction is not an element of the *actus reus* of aiding and abetting.[67] Before turning to Perišić's contention, the Appeals Chamber considers it appropriate to review its prior aiding and abetting jurisprudence.

26. The Appeals Chamber recalls that the first appeal judgement setting out the parameters of aiding and abetting liability was the *Tadić* Appeal Judgement, rendered in 1999, which described the *actus reus* of criminal liability for aiding and abetting as follows:

> 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.[68]

27. In defining the elements of aiding and abetting liability, the *Tadić* Appeal Judgement contrasted aiding and abetting with JCE, distinguishing these modes of liability on the basis of specific direction. The Appeals Chamber underscored that, while the *actus reus* of JCE requires only "acts that *in some way* are directed to the furthering of the common plan or purpose", the *actus reus* of aiding and abetting requires a closer link between the assistance provided and particular criminal activities: assistance must be "specifically" – rather than "in some way" – directed towards relevant crimes.[69]

28. To date, no judgement of the Appeals Chamber has found cogent reasons to depart from the definition of aiding and abetting liability adopted in the *Tadić* Appeal Judgement. Moreover, many subsequent Tribunal and ICTR appeal judgments explicitly referred to "specific direction" in

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[65] Response, para. 84. *See also* Response, paras 83, 85; AT. 30 October 2012 pp. 59-60. The Prosecution further maintains that whether some of Perišić's assistance may have been supplied to VRS units not involved in perpetrating crimes is "irrelevant" and does not undermine his criminal responsibility for the crimes charged. *See* Response, para. 73. *See also* Response, paras 75-76.
[66] Response, para. 86.
[67] Appeal, paras 41-44. *See also* AT. 30 October 2012 pp. 18-19.
[68] *Tadić* Appeal Judgement, para. 229 (emphasis added).
[69] *Tadić* Appeal Judgement, para. 229 (emphasis added).

enumerating the elements of aiding and abetting, often repeating verbatim the *Tadić* Appeal Judgement's relevant holding.[70]

29. The Appeals Chamber notes that, while certain appeal judgements rendered after the *Tadić* Appeal Judgement made no explicit reference to specific direction, several of these employed alternative but equivalent formulations. In particular, the *Simić* Appeal Judgement defined the *actus reus* of aiding and abetting as "acts *directed* to assist, encourage or lend moral support to the perpetration of a certain *specific* crime".[71] Similarly, the *Orić* Appeal Judgement, discussing aiding and abetting in the context of omission liability, explained that the "omission must be *directed* to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime".[72] The ICTR's *Ntawukulilyayo* and *Rukundo* Appeal Judgements referred to acts that are "specifically aimed" towards relevant crimes.[73] Finally, the ICTR's *Karera* Appeal Judgement stated that the "*actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a *specific*

[70] *See Blagojević and Jokić* Appeal Judgement, para. 127 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime"); *Kvočka et al.* Appeal Judgement, para. 89 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Blaškić* Appeal Judgement, para. 45 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Vasiljević* Appeal Judgement, para. 102 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime"); *Krnojelac* Appeal Judgement, para. 33 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Kupreškić et al.* Appeal Judgement, para. 254 (stating that "aiding and abetting the perpetration of persecution requires proof that [an accused] carried out acts specifically directed to assisting, encouraging or lending moral support to the perpetration of the offence of persecution"); *Aleksovski* Appeal Judgement, para. 163 (stating that "[i]t must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal"). *See also Kalimanzira* Appeal Judgement, para. 74 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Muvunyi* Appeal Judgement, para. 79 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime"); *Seromba* Appeal Judgement, para. 139 (stating that "the *actus reus* for aiding and abetting extermination as a crime against humanity comprises of acts specifically directed to assist, encourage, or lend moral support to the perpetration of this crime"); *Nahimana et al.* Appeal Judgement, para. 482 (stating that "[t]he *actus reus* of aiding and abetting is constituted by acts or omissions aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime") (internal citations omitted); *Muhimana* Appeal Judgement, para. 189 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime"); *Ntagerura et al.* Appeal Judgement, para. 370 (stating that "[t]o establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the [ICTR] Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support for the perpetration of a specific crime") (internal citation omitted); *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 530 (stating that "[t]he *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime").
[71] *Simić* Appeal Judgement, para. 85 (emphasis added).
[72] *Orić* Appeal Judgement, para. 43 (emphasis added).
[73] *Ntawukulilyayo* Appeal Judgement, para. 214 (stating that "the *actus reus* of aiding and abetting is constituted by acts or omissions *specifically aimed* at assisting, encouraging, or lending moral support to the perpetration of a specific crime") (emphasis added); *Rukundo* Appeal Judgement, para. 52 (stating that "an aider and abettor commit[s] acts *specifically aimed* at assisting, encouraging, or lending moral support for the perpetration of a specific crime") (emphasis added) (internal quotations omitted).

crime".[74] The Appeals Chamber considers that these judgements effectively included specific direction as an element of the *actus reus* of aiding and abetting.

30. The Appeals Chamber further notes that although other Tribunal and ICTR appeal judgements neither refer to specific direction nor provide an equivalent formulation, these judgements do not offer a comprehensive definition of the elements of aiding and abetting liability. In particular, the *Haradinaj et al.*, *Limaj et al.*, *Furundžija*, *Renzaho*, *Nchamihigo*, *Zigiranyirazo*, *Ndindabahizi*, *Gacumbitsi*, *Semanza*, and *Rutaganda* Appeal Judgements focused, as relevant, *only* on particular elements of aiding and abetting liability or questions of fact, rather than providing an exhaustive review of aiding and abetting as a whole.[75] Similarly, the *Gotovina and Markač*, *Krajišnik*, *Brđanin*, and *Krstić* Appeal Judgements did not explicitly set out *all* the elements of aiding and abetting liability. Insofar as these appeal judgements referred to the elements of aiding and abetting liability, however, they cited to previous appeal judgements that explicitly discussed specific direction.[76]

31. By contrast to the judgements discussed above, the 2001 *Delalić et al.* Appeal Judgement endorsed a definition of the *actus reus* of aiding and abetting that neither refers to specific direction nor contains equivalent language – the only appeal judgement of the Tribunal or the ICTR to do so.[77] However, the Appeals Chamber explained in the 2007 *Blagojević and Jokić* Appeal Judgement that "the *Tadić* [Appeal Judgement's] definition [of aiding and abetting liability has] not been explicitly departed from".[78] The Appeals Chamber reasoned that in cases where specific direction is not "included as an element of the *actus reus* of aiding and abetting", findings on specific direction "will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the

[74] *Karera* Appeal Judgement, para. 321 (emphasis added).
[75] *See Haradinaj et al.* Appeal Judgement, paras 57-62; *Limaj et al.* Appeal Judgement, paras 84, 92, 121-123, 132; *Furundžija* Appeal Judgement, paras 124-127; *Renzaho* Appeal Judgement, paras 253-338, 345-379; *Nchamihigo* Appeal Judgement, paras 67-83; *Zigiranyirazo* Appeal Judgement, paras 53-74; *Ndindabahizi* Appeal Judgement, para. 117; *Gacumbitsi* Appeal Judgement, paras 118-125, 140; *Semanza* Appeal Judgement, paras 225-279, 316; *Rutaganda* Appeal Judgement, paras 294-295.
[76] *See Gotovina and Markač* Appeal Judgement, para. 127 (noting that the Appeals Chamber was addressing the elements of aiding and abetting liability "as relevant"), *citing Blagojević and Jokić* Appeal Judgement, para. 127 (including specific direction in its discussion of elements of aiding and abetting liability); *Krajišnik* Appeal Judgement, para. 662 (noting differences between aiding and abetting and JCE liability), *citing Kvočka et al.* Appeal Judgement, paras 89-90 (including specific direction in its analysis of aiding and abetting liability), *Vasiljević* Appeal Judgement, para. 102 (explicitly referring to specific direction in its discussion of the elements of aiding and abetting liability); *Brđanin* Appeal Judgement, para. 151 (referring to some elements of aiding and abetting liability but explicitly indicating that this recitation was not exhaustive), *citing Tadić* Appeal Judgement, para. 229 (establishing that specific direction is an element of the *actus reus* of aiding and abetting); *Krstić* Appeal Judgement, para. 137, *citing Krnojelac* Appeal Judgement, para. 52, *Vasiljević* Appeal Judgement, para. 102 (explicitly including specific direction in its discussion of the elements of aiding and abetting liability). The Appeals Chamber notes that, while paragraph 52 of the *Krnojelac* Appeal Judgement does not explicitly refer to specific direction, paragraph 33 does.
[77] *See Delalić et al.* Appeal Judgement, para. 352.

crime."[79] Moreover, the *Blagojević and Jokić* Appeal Judgement expressly considered the *Delalić et al.* Appeal Judgement in both its analysis of cases that did not explicitly refer to specific direction, and its conclusion that such cases included an implicit analysis of specific direction.[80]

32. Mindful of the foregoing, the Appeals Chamber now turns to the 2009 *Mrkšić and Šljivančanin* Appeal Judgement, and Perišić's contention that this judgement erroneously departed from settled jurisprudence by stating that specific direction is not an element of the *actus reus* of aiding and abetting.[81] In discussing the *mens rea* of aiding and abetting, the *Mrkšić and Šljivančanin* Appeal Judgement stated, in passing, that "the Appeals Chamber has confirmed that 'specific direction' is not an *essential ingredient* of the *actus reus* of aiding and abetting."[82] This statement may be read to suggest that specific direction is not an element of the *actus reus* of aiding and abetting. However, the Appeals Chamber, Judge Liu dissenting, is not persuaded that the *Mrkšić and Šljivančanin* Appeal Judgement reflected an intention to depart from the settled precedent established by the *Tadić* Appeal Judgement.[83]

33. At the outset, the Appeals Chamber observes that the *Mrkšić and Šljivančanin* Appeal Judgement's reference to specific direction not being an "essential ingredient" is found in a section of the judgement analysing the *mens rea* rather than *actus reus* of aiding and abetting.[84] In the context of rejecting Šljivančanin's assertion that aiding and abetting by omission requires a heightened *mens rea*,[85] the Appeals Chamber explained that Šljivančanin's reference to specific direction as part of "the *mens rea* standard applicable to aiding and abetting" was erroneous because specific direction "forms part of the *actus reus* not the *mens rea* of aiding and abetting."[86] The Appeals Chamber then stated that specific direction was "not an essential ingredient" of the *actus reus* of aiding and abetting.[87] The only authority cited to support this latter conclusion was the *Blagojević and Jokić* Appeal Judgement's holding that specific direction *is* a requisite element of

[78] *Blagojević and Jokić* Appeal Judgement, para. 189.
[79] *Blagojević and Jokić* Appeal Judgement, para. 189. The Appeals Chamber notes that the *Blagojević and Jokić* Appeal Judgement also used this logic to explain other apparent inconsistencies in the Appeals Chamber's application of specific direction. *See Blagojević and Jokić* Appeal Judgement, paras 188, 189 n. 498.
[80] *Blagojević and Jokić* Appeal Judgement, para. 189, *citing, inter alia, Delalić et al.* Appeal Judgement, para. 352.
[81] *See supra*, para. 18.
[82] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159 (emphasis added), *citing Blagojević and Jokić* Appeal Judgement, paras 188-189.
[83] *Tadić* Appeal Judgement, para. 229.
[84] *See Mrkšić and Šljivančanin* Appeal Judgement, p. 67.
[85] *See Mrkšić and Šljivančanin* Appeal Judgement, paras 157-159.
[86] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.
[87] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

aiding and abetting liability, albeit one that may at times be satisfied by an implicit analysis of substantial contribution.[88]

34. The Appeals Chamber recalls its settled practice to only "depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts."[89] The *Mrkšić and Šljivančanin* Appeal Judgement's passing reference to specific direction does not amount to such "careful consideration". Had the Appeals Chamber found cogent reasons to depart from its relevant precedent, and intended to do so, it would have performed a clear, detailed analysis of the issue, discussing both past jurisprudence and the authorities supporting an alternative approach.[90] Instead, the relevant reference to specific direction: was made in a section and paragraph dealing with *mens rea* rather than *actus reus*; was limited to a single sentence not relevant to the Appeals Chamber's holding; did not explicitly acknowledge a departure from prior precedent; and, most tellingly, cited to only one previous appeal judgement, which in fact confirmed that specific direction does constitute an element of aiding and abetting liability.[91] These indicia suggest that the formula "not an essential ingredient" was an attempt to summarise, in passing, the *Blagojević and Jokić* Appeal Judgement's holding that specific direction can often be demonstrated implicitly through analysis of substantial contribution, rather than abjure previous jurisprudence establishing that specific direction is an element of aiding and abetting liability.[92]

35. Appeal judgements rendered after the *Mrkšić and Šljivančanin* Appeal Judgement confirm that the Appeals Chamber in that case neither intended nor attempted a departure from settled precedent.[93] The 2012 *Lukić and Lukić* Appeal Judgement approvingly quoted the *Blagojević and Jokić* Appeal Judgement's conclusion that a finding of specific direction can be implicit in an analysis of substantial contribution. In the same paragraph, the *Lukić and Lukić* Appeal Judgement found that there were no cogent reasons to deviate from the holding of the *Mrkšić and Šljivančanin* Appeal Judgement with respect to specific direction.[94] The *Lukić and Lukić* Appeal Judgement thus confirms that the *Blagojević and Jokić* and *Mrkšić and Šljivančanin* Appeal Judgements are not

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[88] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *citing Blagojević and Jokić* Appeal Judgement, paras 188-189.
[89] *Aleksovski* Appeal Judgement, para. 109. *See also Aleksovski* Appeal Judgement, paras 107-108, 110-111.
[90] *See Kordić and Čerkez* Appeal Judgement, paras 1040-1041; *Aleksovski* Appeal Judgement, para. 109.
[91] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *citing Blagojević and Jokić* Appeal Judgement, paras 188-189. *See also Mrkšić and Šljivančanin* Appeal Judgement, p. 67.
[92] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.
[93] *See Lukić and Lukić* Appeal Judgement, para. 424; *Gotovina and Markač* Appeal Judgement, para. 127. *See also Ntawukulilyayo* Appeal Judgement, para. 214; *Kalimanzira* Appeal Judgement, para. 74; *Rukundo* Appeal Judgement, para. 52.
[94] *Lukić and Lukić* Appeal Judgement, para. 424, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *Blagojević and Jokić* Appeal Judgement, para. 189.

antithetical in their approach to specific direction.[95] In addition, the Appeals Chamber recalls that several ICTR appeal judgements rendered after the *Mrkšić and Šljivančanin* Appeal Judgement explicitly refer to specific direction or equivalent language in enumerating the elements of the *actus reus* of aiding and abetting.[96]

36. Accordingly, despite the ambiguity of the *Mrkšić and Šljivančanin* Appeal Judgement, the Appeals Chamber, Judge Liu dissenting, considers that specific direction remains an element of the *actus reus* of aiding and abetting liability. The Appeals Chamber, Judge Liu dissenting, thus reaffirms that no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly.[97]

(b) Circumstances in which Specific Direction Must be Explicitly Considered

37. At the outset, the Appeals Chamber, Judge Liu dissenting, recalls that the element of specific direction establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.[98] In many cases, evidence relating to other elements of aiding and abetting liability[99] *may* be sufficient to demonstrate specific direction and thus the requisite culpable link.

38. In this respect, the Appeals Chamber notes that previous appeal judgements have not conducted extensive analyses of specific direction. The lack of such discussion may be explained by the fact that prior convictions for aiding and abetting entered or affirmed by the Appeals Chamber involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of principal perpetrators.[100] Where such proximity is present, specific direction

[95] Indeed, the *Lukić and Lukić* Appeal Judgement specifically noted this relationship in its citation to the *Mrkšić and Šljivančanin* Appeal Judgement's reference to specific direction: "*Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *confirming Blagojević and Jokić* Appeal Judgement, para. 189." *See Lukić and Lukić* Appeal Judgement, para. 424 n. 1286 (emphasis added).
[96] *See Ntawukulilyayo* Appeal Judgement, para. 214; *Kalimanzira* Appeal Judgement, para. 74; *Rukundo* Appeal Judgement, para. 52.
[97] *See Blagojević and Jokić* Appeal Judgement, para. 189. *See also Tadić* Appeal Judgment, para. 229. The Appeals Chamber recalls that specific direction may be addressed implicitly in the context of analysing substantial contribution. *See Blagojević and Jokić* Appeal Judgement, para. 189.
[98] *See supra*, paras 26-27; *Blagojević and Jokić* Appeal Judgement, para. 189; *Tadić* Appeal Judgement, para. 229. *See also Rukundo* Appeal Judgement, paras 48-52. The Appeals Chamber recalls that proof of specific direction does not require that relevant acts are the proximate cause of a charged crime: it is well-settled in the Tribunal's and ICTR's jurisprudence that it is not necessary to prove a causal nexus between an aider and abettor and the actions of principal perpetrators. *See Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgment, para. 48; *Rukundo* Appeal Judgement, paras 50-52.
[99] These other elements of aiding and abetting liability are substantial contribution, knowledge that aid provided assists in the commission of relevant crimes, and awareness of the essential elements of these crimes. *See Lukić and Lukić* Appeal Judgement, paras 422, 428.
[100] *See Lukić and Lukić* Appeal Judgement, paras 437-451 (Sredoje Lukić provided practical assistance through his armed presence during the commission of cruel treatment and inhumane acts against unarmed Muslim civilians and was present during the forced transfer of unarmed civilians to a house that was subsequently locked and set on fire); *Mrkšić*

may be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution. For example, an individual accused of aiding and abetting may have been physically present during the preparation or commission of crimes committed by principal perpetrators and made a concurrent substantial contribution.[101] In such a case, the existence of specific direction, which demonstrates the culpable link between the accused aider and abettor's assistance and the crimes of principal perpetrators, will be self-evident.

39. However, not all cases of aiding and abetting will involve proximity of an accused individual's relevant acts to crimes committed by principal perpetrators. Where an accused aider

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and Šljivančanin Appeal Judgement, paras 5, 104, 193, p. 169 (Šljivančanin witnessed and failed to prevent torture of prisoners of war he was responsible for); *Limaj et al.* Trial Judgement, paras 631-632, 656, 658; *Limaj et al.* Appeal Judgement, paras 122-123 (Bala was present during the torture and cruel treatment of civilians at a prison camp); *Blagojević and Jokić* Appeal Judgement, paras 3-4, 69, 75, 79, 112, 125-135, 150-157, 164-175, 180, 196-200 (Blagojević, a colonel in the Bratunac Brigade, was present at Brigade headquarters and allowed the Brigade's resources and personnel to be used in committing murder, persecutions, mistreatment, and forcible transfer of Muslim men detained in Bratunac; Jokić, a major in the Zvornik Brigade, committed Brigade resources to dig mass graves and otherwise facilitate murder, extermination, and persecutions at nearby sites); *Brđanin* Appeal Judgement, paras 2, 227-228, 311-320, 344-351 (as President of the Autonomous Region of Krajina Crisis Staff, Brđanin aided the commission of crimes by Bosnian Serb forces in the region under his authority); *Simić* Appeal Judgement, paras 3, 114-118, 132-137, 148-159, 182-191 (Simić assisted persecutions of non-Serb civilians in Bosanski Šamac municipality, where he was the highest ranking civilian official); *Naletilić and Martinović* Appeal Judgement, paras 489-538 (Martinović assisted the murder of a detainee by encouraging the detainee's mistreatment, preventing the detainee from returning from Martinović's unit to prison, actively covering up the detainee's disappearance, and giving direct orders to his soldiers regarding disposal of the detainee's corpse); *Kvočka et al.* Appeal Judgement, paras 562-564 (Žigić led a prisoner to a room in which he was tortured); *Krstić* Appeal Judgement, paras 61-62, 135-144 (Krstić permitted troops and other resources under his control to assist in killings of Bosnian Muslims); *Vasiljević* Appeal Judgement, paras 134-135, 143, 147 (Vasiljević personally guarded seven Muslim men and prevented them from escaping); *Furundžija* Appeal Judgement, paras 124-127 (Furundžija assisted criminal acts through his presence and personal interrogation of prisoners); *Aleksovski* Appeal Judgement, paras 36, 165-173 (Aleksovski, a prison warden, assisted in the mistreatment of detainees in and around his prison facility). *See also Ntawukulilyayo* Appeal Judgement, paras 208-217, 226-229, 243, 246 (Ntawukulilyayo assisted criminal acts by personally encouraging refugees to seek shelter at Kabuye Hill and then transporting soldiers to help kill these refugees); *Kalimanzira* Appeal Judgement, paras 81, 126, 243 (Kalimanzira encouraged refugees to seek shelter at Kabuye Hill and subsequently accompanied armed individuals who killed some of these refugees); *Renzaho* Appeal Judgement, paras 2, 68, 75, 84-85, 93, 99-100, 104, 108, 253-255, 336-338, 622 (in his capacity as Prefect of Kigali-Ville, Renzaho aided various crimes in Kigali including murder by, *inter alia*, facilitating weapons distribution and supporting roadblocks); *Rukundo* Appeal Judgement, paras 3, 39, 51-54, 92, 115, 176-177, 218, 269-270 (Rukundo assisted the killings of Tutsis by, *inter alia*, identifying victims to principal perpetrators who then committed genocide and extermination); *Karera* Appeal Judgement, paras 298, 322-323 (Karera, while at a roadblock, instructed principal perpetrators that a man he identified as a Tutsi be detained and taken away; the man was subsequently murdered); *Seromba* Appeal Judgement, paras 77, 183-185, 206, 240 (Seromba assisted the murder of Tutsis by expelling them from his parish); *Nahimana et al.* Appeal Judgement, paras 668-672, 965-968 (Ngeze set up, manned, and supervised roadblocks, assisting in identification of Tutsi civilians who were then killed); *Muhimana* Appeal Judgement, paras 148, 165-177, 185-192 (Muhimana personally encouraged principal perpetrators to rape Tutsi women); *Ndindabahizi* Appeal Judgement, para. 4, p. 48 (Ndindabahizi transported attackers to a crime site and distributed weapons used to kill Tutsis); *Gacumbitsi* Trial Judgement, paras 286-287, 314; *Gacumbitsi* Appeal Judgement, paras 83-98, 123-125, 207 (Gacumbitsi personally encouraged principal perpetrators to massacre Tutsis and expelled two Tutsi tenants who were subsequently killed); *Semanza* Appeal Judgement, paras 263-279, 310 (Semanza was present during, participated in, and directed others to participate in mass killings of Tutsis); *Ntakirutimana and Ntakirutimana* Appeal Judgement, paras 524-537, p. 187 (Elizaphan and Gérard Ntakirutimana assisted attacks on Tutsis by, *inter alia*, providing transport to attackers and shooting weapons); *Rutaganda* Appeal Judgement, paras 294-295, 308-341 (Rutaganda aided killings of Tutsis by, *inter alia*, distributing weapons to principal perpetrators); *Kayishema and Ruzindana* Appeal Judgement, paras 188-190, 201-202, 242-247, 251-262, 372 (Ruzindana and Kayishema were present at massacres of Tutsis which they, *inter alia*, orchestrated and directed).

[101] *See, e.g., Lukić and Lukić* Appeal Judgement, paras 419-461; *Kvočka et al.* Appeal Judgement, paras 563-564; *Furundžija* Appeal Judgement, paras 124-127. *See also Kayishema and Ruzindana* Appeal Judgement, paras 201-202.

and abettor is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction. In such circumstances, the Appeals Chamber, Judge Liu dissenting, holds that explicit consideration of specific direction is required.[102]

40. The factors indicating that acts of an accused aider and abettor are remote from the crimes of principal perpetrators will depend on the individual circumstances of each case. However, some guidance on this issue is provided by the Appeals Chamber's jurisprudence. In particular, the Appeals Chamber has previously concluded, in discussing aiding and abetting liability, that significant temporal distance between the actions of an accused individual and the crime he or she allegedly assisted decreases the likelihood of a connection between that crime and the accused individual's actions.[103] The same rationale applies, by analogy, to other factors separating the acts of an individual accused of aiding and abetting from the crimes he or she is alleged to have facilitated. Such factors may include, but are not limited to, geographic distance.

(c) The Trial Chamber's Analysis of Aiding and Abetting in this Case

41. In assessing Perišić's culpability and defining the legal standard for aiding and abetting, the Trial Chamber relied on the *Mrkšić and Šljivančanin* Appeal Judgement to find that specific direction was not an element of aiding and abetting liability, and did not consider, either explicitly or implicitly, whether Perišić's acts were specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.[104] However, as explained above, while the relevant phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement is misleading, that appeal judgement did not deviate from prior well-settled precedent that specific direction is a necessary element of aiding and abetting liability.[105] Accordingly, the Appeals Chamber, Judge Liu dissenting, considers that the Trial Chamber's holding that specific direction is not an element of the *actus reus* of aiding and abetting was an error of law.

42. The Appeals Chamber observes that Perišić's assistance to the VRS was remote from the relevant crimes of principal perpetrators.[106] In particular, the Trial Chamber found that the VRS was

[102] The Appeals Chamber underscores that the requirement of explicit consideration of specific direction does not foreclose the possibility of convictions in cases of remoteness, but only means that such convictions require explicit discussion of how evidence on the record proves specific direction. *Cf. Mrkšić and Šljivančanin* Appeal Judgement, para. 81 (finding that in the context of the *actus reus* of aiding and abetting, substantial contribution may be geographically and temporally separated from crimes of principal perpetrators).

[103] *See Kupreškić et al.* Appeal Judgement, paras 275-277 (finding that a six-month delay between an appellant being observed unloading weapons and a subsequent attack reduced the likelihood that these weapons were directed towards assisting in this attack).

[104] *See* Trial Judgement, para. 126, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also* Trial Judgement, paras 1582-1627.

[105] *See supra*, paras 32-36.

[106] Judge Liu dissents from the analysis in this paragraph.

independent from the VJ,[107] and that the two armies were based in separate geographic regions.[108] In addition, the Trial Chamber did not refer to any evidence that Perišić was physically present when relevant criminal acts were planned or committed.[109] In these circumstances,[110] the Appeals Chamber, Judge Liu dissenting, further considers that an explicit analysis of specific direction would have been required in order to establish the necessary link between the aid Perišić provided and the crimes committed by principal perpetrators.

43. The Appeals Chamber emphasises that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement.[111] However, the Appeals Chamber's duty to correct legal errors remains unchanged.[112] Accordingly, the Appeals Chamber will proceed to assess the evidence relating to Perišić's convictions for aiding and abetting *de novo* under the correct legal standard, considering whether Perišić's actions were specifically directed to aid and abet the VRS Crimes in Sarajevo and Srebrenica.[113]

44. The Appeals Chamber notes that previous judgements have not provided extensive analysis of what evidence may prove specific direction. However, the Appeals Chamber recalls again that the *Tadić* Appeal Judgement indicated that specific direction involves finding a closer link between acts of an accused aider and abettor and crimes committed by principal perpetrators than is necessary to support convictions under JCE.[114] The types of evidence required to establish such a link will depend on the facts of a given case. Nonetheless, 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.[115] 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.

[107] *See* Trial Judgement, paras 2-3, 205-210, 235-237, 262-266.
[108] *See* Trial Judgement, paras 183-184, 195-196, 235-236, 262-263.
[109] *See, e.g.*, Trial Judgement, paras 1592-1627.
[110] *See supra*, paras 37-40.
[111] Judge Liu dissents from the findings and analysis in this paragraph.
[112] *See supra*, para. 9; Statute, Article 25. *Cf.* Statute, Article 21.
[113] *See supra*, para. 9; *Gotovina and Markač* Appeal Judgement, para. 64; *Zigiranyirazo* Appeal Judgement, para. 43. While consideration of specific direction may be implicit (*see Blagojević and Jokić* Appeal Judgement, para. 189), in the context of correcting a legal error of the Trial Chamber, the Appeals Chamber will undertake an explicit examination.
[114] *See supra*, paras 26-27.
[115] *Cf.* Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), British Military Court Hamburg 1946, *in* United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 93-102 (1947) (finding two defendants guilty of assisting killings of concentration camp detainees by providing poison gas, despite arguments that the gas was to be used for lawful purposes, after reviewing evidence that defendants arranged for S.S. units to be trained in using this gas to kill humans in confined spaces).

(d) The Extent to which Perišić Specifically Directed Assistance to VRS Crimes

45. In order to determine whether the assistance facilited by Perišić was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica, the Appeals Chamber will now review and assess *de novo* relevant evidence, taking into account, where appropriate, the Trial Chamber's findings.

46. As a preliminary matter, the Appeals Chamber recalls that the Trial Chamber did not find the VRS *de jure* or *de facto* subordinated to the VJ.[116] In particular, the Trial Chamber found that the VRS had a separate command structure: the President of the Republika Srpska served as Commander-in-Chief of the VRS, with a Commander of the VRS Main Staff assuming delegated authorities.[117] Broader questions of VRS military strategy were addressed by the Republika Srpska's Supreme Command, composed of the Republika Srpska's President, Vice President, Speaker of the Assembly, and Ministers of Defence and Interior.[118] While the Trial Chamber noted that the VRS received support from the VJ, the Trial Chamber also identified sources of support other than the FRY.[119] In addition, the Trial Chamber found that Perišić was not proved beyond reasonable doubt to have exercised effective control over VJ troops seconded to the VRS.[120] Finally, the Trial Chamber observed that Ratko Mladić, the Commander of the VRS Main Staff, refused to accept peace plans urged by the VJ and FRY leadership.[121] The Appeals Chamber, having considered this evidence in its totality, agrees with the Trial Chamber's determination that the evidence on the record suggests that "the VRS and the VJ [were] separate and independent military entities".[122]

47. Having reaffirmed the Trial Chamber's conclusion that the VRS was independent of the VJ, the Appeals Chamber will now consider whether VJ assistance to the VRS, which Perišić acknowledged having facilitated, was specifically directed towards VRS crimes.[123] In particular, the Appeals Chamber will assess: (i) Perišić's role in shaping and implementing the FRY policy of supporting the VRS; (ii) whether the FRY policy of supporting the VRS was specifically directed towards the commission of crimes by the VRS; and (iii) whether Perišić either implemented the SDC policy of assisting the VRS in a way that specifically directed aid to the VRS Crimes in Sarajevo and Srebrenica, or took action to provide such aid outside the context of SDC-approved

[116] *See* Trial Judgement, paras 262-293, 1770-1779.
[117] *See* Trial Judgement, para. 265.
[118] Trial Judgement, para. 267.
[119] *See* Trial Judgement, paras 1012-1231.
[120] *See* Trial Judgement, paras 1770-1779.
[121] Trial Judgement, paras 1365-1369, 1772. *See also* Trial Judgement, para. 266.
[122] Trial Judgement, para. 1772.

assistance. The Appeals Chamber considers that the relevant evidence in this case is circumstantial and thus can only support a finding of specific direction if this is the sole reasonable interpretation of the record.[124]

48. The Appeals Chamber underscores that the parameters of its inquiry are limited and focus solely on factors related to Perišić's individual criminal liability for the VRS Crimes in Sarajevo and Srebrenica, not the potential liability of States or other entities over which the Tribunal has no pertinent jurisdiction.[125] The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*. In this regard, the Appeals Chamber acknowledges that specific direction may involve considerations that are closely related to questions of *mens rea*. Indeed, as discussed below, evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes.[126] However, the Appeals Chamber recalls again that the *mens rea* required to support a conviction for aiding and abetting is knowledge that assistance aids the commission of criminal acts, along with awareness of the essential elements of these crimes.[127] By contrast, as set out above, the long-standing jurisprudence of the Tribunal affirms that specific direction is an analytically distinct element of *actus reus*.[128]

(i) Perišić's Role in Shaping and Implementing the SDC Policy of Supporting the VRS

49. The Appeals Chamber recalls that, as the Trial Chamber noted, Perišić served as Chief of the VJ General Staff, and was thus the most senior officer of the VJ, from 26 August 1993 to 24 November 1998.[129] In this capacity, Perišić was responsible for ensuring combat readiness and organising VJ operations.[130] Perišić was subordinated to the FRY President, whose "'enactments'" Perišić was obligated to implement.[131] Ultimate authority over defence policy and operational priorities for the VJ rested with the SDC.[132] While SDC meetings were attended by many

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[123] Appeal, para. 57.
[124] *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.
[125] Statute, Articles 6-7. *See also Tadić* Appeal Judgement, para. 186; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 53 ("An important element in relation to the competence *ratione personae* (personal jurisdiction) of the [Tribunal] is the principle of individual criminal responsibility."). *Cf. Gotovina and Markač* Croatia Decision, paras 12-13.
[126] *See infra*, paras 68-69, 71.
[127] *Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also Orić* Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 49.
[128] *See supra*, paras 25-36. Judge Liu dissents from the analysis in this sentence.
[129] Trial Judgement, para. 3.
[130] *See* Trial Judgement, paras 206-207. *See also* Trial Judgement, paras 208-209.
[131] Trial Judgement, para. 208. *See also* Trial Judgement, paras 205-207.
[132] *See* Trial Judgement, para. 199.

individuals, including Perišić, final SDC decisions were taken by political leaders: the President of the FRY and the Presidents of the Republics of Serbia and Montenegro.[133]

50. The decision to provide VJ assistance to the VRS was adopted by the SDC before Perišić was appointed Chief of the VJ General Staff,[134] and the SDC continued to support this policy during Perišić's tenure in this position.[135] Perišić regularly attended and actively participated in meetings of the SDC,[136] and the SDC granted him the legal authority to administer assistance to the VRS.[137] However, the SDC retained and exercised the power to review both particular requests for assistance and the general policy of providing aid to the VRS.[138]

51. The Appeals Chamber recalls that the SDC's responsibility for adopting the policy of assisting the VRS does not, in itself, exempt Perišić from individual criminal liability.[139] The Appeals Chamber considers that, in view of the circumstances of this case, Perišić could still be found to have provided assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica if: the policy he implemented involved providing assistance specifically linked to VRS crimes; he implemented a policy meant to aid the general VRS war effort in a manner that specifically directed assistance towards the VRS crimes; or, acting outside the scope of the SDC's official policy, he provided assistance specifically directed towards VRS crimes.[140] To assess whether evidence on the record supports any such conclusions, the Appeals Chamber will first consider Trial Chamber findings and evidence regarding the parameters of the SDC policy of providing assistance to the VRS, and will then evaluate evidence regarding Perišić's individual actions.

(ii) The SDC Policy of Providing Support to the VRS

52. The Appeals Chamber considers that two inquiries are relevant to assessing whether SDC assistance to the VRS was specifically directed to facilitate the latter's criminal activities. The first inquiry assesses whether the VRS was an organisation whose sole and exclusive purpose was the commission of crimes. Such a finding would suggest that assistance by the VJ to the VRS was specifically directed towards VRS crimes, including the VRS Crimes in Sarajevo and Srebrenica. The second inquiry assesses whether the SDC endorsed a policy of assisting VRS crimes; such a

[133] *See* Trial Judgement, paras 198-200.
[134] *See* Trial Judgement, paras 761-763, 948, 1595.
[135] *See* Trial Judgement, paras 962-988, 1622.
[136] *See* Trial Judgement, paras 198, 962, 1008. *See also* Trial Judgement, paras 963-986.
[137] Trial Judgement, paras 965-967, 988, 1007.
[138] *See* Trial Judgement, paras 962-974.
[139] *See Boškoski and Tarčulovski* Appeal Judgement, para. 167, *citing* Statute, Article 7(4).
[140] *Cf. Boškoski and Tarčulovski* Appeal Judgement, para. 167.

finding would again suggest that the assistance from the VJ to the VRS was specifically directed towards, *inter alia*, the VRS Crimes in Sarajevo and Srebrenica.

53. With respect to the first inquiry, the Appeals Chamber recalls that the Trial Chamber did not characterise the VRS as a criminal organisation; indeed, it stated that "Perišić is not charged with helping the VRS wage war *per se*, which is not a crime under the Statute."[141] Having reviewed the evidence on the record, the Appeals Chamber agrees with the Trial Chamber that the VRS was not an organisation whose actions were criminal *per se*; instead, it was an army fighting a war.[142] The Appeals Chamber notes the Trial Chamber's finding that the VRS's strategy was "inextricably linked to" crimes against civilians.[143] However, the Trial Chamber did not find that all VRS activities in Sarajevo or Srebrenica were criminal in nature. The Trial Chamber limited its findings to characterising as criminal only certain *actions* of the VRS in the context of the operations in Sarajevo and Srebrenica.[144] In these circumstances, the Appeals Chamber considers that a policy of providing assistance to the VRS's general war effort does not, in itself, demonstrate that assistance facilitated by Perišić was specifically directed to aid the VRS Crimes in Sarajevo and Srebrenica.

54. Turning to the second inquiry, the Appeals Chamber first observes that the Trial Chamber discussed evidence indicating SDC approval of measures to secure financing for the VJ's assistance to the VRS[145] and to increase the effectiveness of this assistance by systematising the secondment of VJ personnel and the transfer of equipment and supplies.[146] The Trial Chamber determined that this evidence "conclusively demonstrate[s] that the SDC licensed military assistance to the VRS".[147] However, the Trial Chamber did not identify any evidence that the SDC policy directed aid towards VRS criminal activities in particular.[148]

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[141] Trial Judgement, para. 1588. *See also* Trial Judgement, paras 172-194, 262-293.
[142] *See, e.g.*, Prosecution Exhibits 348, 375 (expert reports on aspects of the conflict in, *inter alia*, the BiH); T. 4 February 2009 pp. 3165-3232 (testimony by Prosecution Witness Martin Bell, a journalist covering the conflict in BiH). *See also* Adjudicated Facts Motion, para. 40, Annex A (proposing, *inter alia*, adjudicated facts involving the structure and combat abilities of BiH forces); Decision on Adjudicated Facts, para. 28 (taking judicial notice of, *inter alia*, certain adjudicated facts related to the structure and combat abilities of BiH forces as proposed in the Adjudicated Facts Motion). The Appeals Chamber notes that where exhibits are originally in B/C/S, all citations herein refer to the English translation as admitted at trial.
[143] Trial Judgement, para. 1588. *See also* Trial Judgement, paras 184-185, 1589-1591, 1621-1625.
[144] *See* Trial Judgement, paras 303-563, 598-760, 1588-1591. *See also* Adjudicated Facts Motion, Annex A (proposing, *inter alia*, adjudicated facts involving the structure and combat abilities of BiH forces); Decision on Adjudicated Facts, para. 28 (taking judicial notice of, *inter alia*, certain adjudicated facts related to the combat abilities and structure of BiH forces as proposed in the Adjudicated Facts Motion).
[145] *See* Trial Judgement, paras 963, 970.
[146] *See* Trial Judgement, paras 763-771, 780-787, 966-967, 974.
[147] Trial Judgement, para. 974.
[148] *See generally* Trial Judgement.

55. The Appeals Chamber's *de novo* review of the evidentiary record also reveals no basis for concluding that it was SDC policy to specifically direct aid towards VRS crimes.[149] Instead, the SDC focused on monitoring and modulating aid to the general VRS war effort.[150] For example, SDC discussions addressed difficulties in providing particular levels of assistance requested by the VRS;[151] salaries of VJ personnel seconded to the VRS;[152] and instances where members of the VJ provided supplies to the VRS without official approval.[153]

56. The Appeals Chamber notes the Prosecution's suggestion that the magnitude of VJ aid provided to the VRS is sufficient to prove Perišić's *actus reus* with respect to the VRS Crimes in Sarajevo and Srebrenica.[154] However, the Appeals Chamber observes that while the Trial Chamber considered evidence regarding volume of assistance in making findings on substantial contribution,[155] this analysis does not necessarily demonstrate specific direction, and thus such evidence does not automatically establish a sufficient link between aid provided by an accused aider and abettor and the commission of crimes by principal perpetrators.[156] In the circumstances of this case, indicia demonstrating the magnitude of VJ aid to the VRS serve as circumstantial evidence of specific direction; however, a finding of specific direction must be the sole reasonable inference after a review of the evidentiary record as a whole.[157]

57. The Appeals Chamber underscores that the VRS was participating in lawful combat activities and was not a purely criminal organisation.[158] In addition, as explained above, other evidence on the record does not suggest that SDC policy provided that aid be specifically directed towards VRS crimes.[159] In this context, the Appeals Chamber, Judge Liu dissenting, considers that a reasonable interpretation of the evidence on the record is that the SDC directed large-scale military assistance to the general VRS war effort, not to the commission of VRS crimes. Accordingly, specific direction of VJ aid towards VRS crimes is not the sole reasonable inference

[149] *See, e.g.*, Defence Exhibit 344, p. 5 (excerpt from Mladić's notebook, dated 12 August 1994, in which Perišić notes that FRY policy is more general than the policy of the Republika Srpska); Prosecution Exhibit 230, p. 2 (minutes of meeting of FRY and Republika Srpska political and military leaders held on 25 August 1995 in which Slobodan Milošević warns the Republika Srpska leadership not to take action that could trigger NATO retaliation); Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).
[150] *See generally* Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).
[151] *See* Prosecution Exhibit 776, pp. 38-45 (transcript of SDC meeting on 7 June 1994).
[152] *See* Prosecution Exhibit 794, pp. 45-48 (transcript of SDC meeting on 18 January 1995).
[153] *See* Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994).
[154] *See supra*, para. 24.
[155] *See* Trial Judgement, paras 1580-1627.
[156] *See supra*, paras 37-40.
[157] *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.
[158] *See* Trial Judgement, para. 1588 (noting that the VRS strategy included "military warfare against BiH forces").
[159] *See supra*, paras 52-55.

that can be drawn from the totality of the evidence on the record, even considering the magnitude of the VJ's assistance.

58. In view of the foregoing, the Appeals Chamber, Judge Liu dissenting, concludes that the SDC policy of assisting the VRS was not proved to involve specific direction of VJ aid towards VRS crimes, as opposed to the general VRS war effort. In these circumstances, insofar as Perišić faithfully executed the SDC policy of supporting the VRS, the aid Perišić facilitated was not proved to be specifically directed towards the VRS's criminal activities.

(iii) Perišić's Implementation of SDC Policy and Other Actions

59. The Appeals Chamber now turns to consider whether Perišić implemented the SDC policy of assisting the VRS war effort in a manner that redirected aid towards VRS crimes, or took actions separate from implementing SDC policy to the same effect. In this regard, the Appeals Chamber will consider Perišić's role in SDC deliberations, the nature of the assistance Perišić provided to the VRS, and the manner in which this aid was distributed. All of these indicia can serve as circumstantial evidence of whether the aid he facilitated was specifically directed towards VRS crimes. Finally, the Appeals Chamber will consider whether Perišić took actions, independent of his efforts to implement the SDC policy, which would indicate that aid he facilitated was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

60. The Appeals Chamber notes that the Trial Chamber found that Perišić supported continuing the SDC policy of assisting the VRS.[160] During meetings of the SDC, Perišić argued both for sustaining aid to the VRS and for adopting related legal and financial measures that facilitated such aid.[161] However, the Trial Chamber did not identify evidence demonstrating that Perišić urged the provision of VJ assistance to the VRS in furtherance of specific criminal activities. Rather, the Trial Chamber's analysis of Perišić's role in the SDC deliberations indicates that Perišić only supported the continuation of assistance to the general VRS war effort.[162] Having reviewed the relevant evidence, the Appeals Chamber, Judge Liu dissenting, also finds no proof that Perišić supported the provision of assistance specifically directed towards the VRS's criminal activities.[163] Instead, evidence on the record suggests that Perišić's relevant actions were intended to aid the VRS's overall war effort. For example, Perišić explained to the SDC the overall costs of providing

[160] *See* Trial Judgement, paras 962-988.
[161] *See* Trial Judgement, paras 963-974.
[162] *See* Trial Judgement, paras 1007-1009.
[163] *See, e.g.,* Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).

assistance to the VRS;[164] advised the SDC of broad-based VRS requests for assistance;[165] and criticised general "mistakes" of the Republika Srpska leadership that resulted in international criticism of the broader VRS war effort.[166]

61. The Appeals Chamber observes that Perišić had considerable discretion in providing assistance to the VRS, including the power to deny requests for aid not submitted through official channels.[167] While it is possible that Perišić could have used this power to direct SDC-approved aid specifically towards VRS criminal activities, the Trial Chamber did not make any findings to that effect,[168] and the Appeals Chamber's review of relevant evidence also suggests that Perišić directed assistance towards the general VRS war effort within the parameters set by the SDC.[169] In particular, as discussed below, neither the nature of the aid which Perišić oversaw nor the manner in which it was distributed suggests that the assistance he facilitated was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

62. The Appeals Chamber recalls that indicia demonstrating the nature and distribution of VJ aid could also serve as circumstantial evidence of specific direction. The Appeals Chamber notes in this regard that the Trial Chamber classified the assistance provided by the VJ to the VRS in two broad categories: first, secondment of personnel,[170] and, second, provision of military equipment, logistical support, and military training.[171]

63. With respect to the secondment of VJ soldiers to the VRS, the Appeals Chamber recalls that the Trial Chamber found that Perišić persuaded the SDC to create the 30th PC, a unit of the VJ that served as the administrative home of VJ soldiers and officers seconded to the VRS and which was used to increase and institutionalise the support already provided to seconded VJ soldiers and

[164] Prosecution Exhibit 791, p. 5 (transcript of SDC meetings on 10 and 13 January 1994).
[165] Prosecution Exhibit 776, pp. 38-39 (transcript of SDC meeting on 7 June 1994); Prosecution Exhibit 2716, pp. 1-2 (proposal by Perišić to the FRY President, dated 15 September 1995, urging the adoption of widespread measures to support the VRS).
[166] Prosecution Exhibit 763, p. 2 (minutes of SDC meeting on 29 July 1995).
[167] *See* Trial Judgement, paras 948-952.
[168] *See* Trial Judgement, paras 941-1009.
[169] *See, e.g.*, Prosecution Exhibit 791, pp. 4-5 (transcript of SDC meetings on 10 and 13 January 1994 at which Perišić set out the overall scope and costs of assistance to the VRS); Prosecution Exhibit 734 (VJ General Staff instructions issued by Perišić on 8 December 1993, concerning operation of, *inter alia*, the 30th Personnel Centre ("PC")); Prosecution Exhibit 709, pp. 32-33 (transcript of SDC meeting on 11 October 1993 at which Perišić discussed organising secondments of VJ personnel to the VRS and the importance of making these secondments more compatible with the legal framework of the FRY); Prosecution Exhibit 776, p. 38 (transcript of SDC meeting on 7 June 1994 at which Perišić advocated assisting, *inter alia*, VRS combat operations on the basis that the VRS would otherwise lose territory to opposing forces); Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994 at which Perišić discussed taking action against VJ personnel who provided assistance to the VRS outside official channels); Defence Exhibit 452 (letter from the Office of the Chief of the VJ General Staff, dated 29 October 1993, denying a request for assistance).
[170] *See* Trial Judgement, paras 761-940.
[171] *See* Trial Judgement, paras 1010-1154, 1232-1237.

does not necessarily demonstrate specific direction,[190] finds that evidence regarding the nature of assistance provided by the VJ does not establish that this assistance was specifically directed towards VRS crimes.

66. The manner in which Perišić distributed VJ aid to the VRS also does not demonstrate specific direction.[191] The Trial Chamber determined that part of this assistance was sent to certain VRS units involved in committing crimes.[192] However, the Appeals Chamber, Judge Liu dissenting, considers that neither the Trial Chamber's analysis[193] nor the Appeals Chamber's *de novo* review identified evidence that aid was provided to the VRS in a manner directed at supporting its criminal activities. Evidence on the record instead suggests that Perišić considered the VRS's requests as a whole and that VJ assistance was delivered to multiple areas within BiH to aid the general VRS war effort.[194]

67. The Appeals Chamber also finds that evidence on the record does not prove that Perišić took steps to assist VRS crimes outside his role of implementing the SDC's general aid policy. Indeed, Perišić refused requests for assistance submitted outside of official channels[195] and urged the SDC to punish VJ personnel who provided such unauthorised assistance.[196] While Perišić appears to have ordered VJ units to support certain VRS combat operations, neither the Trial Chamber's analysis[197] nor the Appeals Chamber's review of relevant evidence establish that this assistance was directed at supporting criminal activities of the VRS.[198] In this regard, the Appeals

[189] *See* Response, paras 46, 106, 108; AT. 30 October 2012 pp. 60-61.
[190] *See supra*, paras 37, 56.
[191] Judge Liu dissents from the assessment in this paragraph.
[192] *See, e.g.*, Trial Judgement, paras 1035-1037, 1067, 1237, 1594.
[193] *See* Trial Judgement, paras 943-1154.
[194] *See, e.g.*, Prosecution Exhibit 1258, pp. 1-2 (VJ General Staff order of 27 December 1993 in which Perišić gave himself the power to approve or deny requests for assistance to the VRS); Prosecution Exhibit 791, p. 5 (transcript of SDC meetings on 10 and 13 January 1994 at which Perišić detailed the total cost of providing assistance to the VRS); Prosecution Exhibit 75, p. 4 (witness statement of Đorđe Đukić dated February 1996, indicating that trucks carrying supplies provided by the VJ went to a variety of VRS bases); Prosecution Exhibit 2716, p. 1 (proposal by Perišić to the FRY President, dated 15 September 1995, urging the provision of aid to "Northwest Bosnia"); T. 3 March 2009 pp. 3886-3887 (testimony by Prosecution Witness Mladen Mihajlović that requests from the VRS were sent through the VRS Main Staff).
[195] *See, e.g.*, Trial Judgement, para. 949, *citing* Defence Exhibit 452 (letter from the Office of the Chief of the VJ General Staff dated 29 October 1993, noting that a request for assistance from the Republika Srpska's Ministry of the Interior did not fall within VJ authority); Prosecution Exhibit 1258, pp. 1-2 (VJ General Staff Order of 27 December 1993, prohibiting the provision of aid from the VJ that was not approved by Perišić).
[196] *See, e.g.*, Trial Judgement, para. 951; Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994 at which Perišić discussed taking action against VJ personnel who provided assistance to the VRS outside official channels).
[197] *See* Trial Judgement, paras 1319-1351.
[198] *See, e.g.*, Prosecution Exhibit 782, pp. 55-60 (transcript of SDC meeting on 7 February 1994); Prosecution Exhibit 2933, pp. 1-2 (excerpt from Mladić's notebook on 13 December 1993); Prosecution Exhibit 2934, p. 3 (excerpt from Mladić's notebook on 14 December 1993); Defence Exhibit 521, p. 2 (report of VRS Commander Stanislav Galić to the VRS Main Staff dated 22 December 1993); T. 15 September 2009 pp. 8951-8952 (testimony by Prosecution Witness MP-11); T. 16 September 2009 pp. 9006-9007 (testimony by Witness MP-11); T. 4 March 2009 pp. 3962-3963 (testimony by Witness Mihajlović stating that he was not aware of Perišić having bypassed official procedures for

Chamber notes that the Prosecution was unable to identify evidence on the record suggesting that Perišić specifically directed assistance towards the VRS Crimes in Sarajevo and Srebrenica.[199]

68. Finally, the Appeals Chamber notes that the Trial Chamber considered extensive evidence suggesting that Perišić knew of crimes being committed by the VRS, especially with respect to Sarajevo.[200] However, the Appeals Chamber, Judge Liu dissenting, recalls that evidence regarding knowledge of crimes, alone, does not establish specific direction, which is a distinct element of *actus reus*, separate from *mens rea*.[201] Indicia demonstrating that Perišić knew of the VRS Crimes in Sarajevo and Srebrenica *may* serve as circumstantial evidence of specific direction; however, a finding of specific direction must be the sole reasonable inference after a review of the evidentiary record as a whole.[202]

69. The Appeals Chamber recalls again that the VRS undertook, *inter alia*, lawful combat activities and was not a purely criminal organisation.[203] In this context, the Appeals Chamber, Judge Liu dissenting, considers that a reasonable interpretation of relevant circumstantial evidence is that, while Perišić may have known of VRS crimes, the VJ aid he facilitated was directed towards the VRS's general war effort rather than VRS crimes. Accordingly, the Appeals Chamber, Judge Liu dissenting, holds that Perišić was not proved beyond reasonable doubt to have facilitated assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

(e) Conclusions from *De Novo* Review of Evidence on the Record

70. The Appeals Chamber, Judge Liu dissenting, has clarified that, in view of the remoteness of Perišić's actions from the crimes of the VRS, an explicit analysis of specific direction was required.[204] As detailed above, the Appeals Chamber's review of the Trial Chamber's general evidentiary findings and *de novo* assessment of evidence on the record do not demonstrate that SDC

providing aid to the VRS); T. 13 April 2010 pp. 11468-11469 (testimony by Defence Witness Borivoje Jovanić indicating that ammunition from the VJ war reserves could only be provided to the VRS by decision of the SDC). The Appeals Chamber notes that a report entitled "Military Help from the So-Called FRY (Serbia and Montenegro) to the So-Called Republika Srpska /RS/", dated August 1995 and attributed to the BiH Ministry of Foreign Affairs, claims that Perišić controlled all VRS activities, especially attacks on Srebrenica in July 1995. *See* Prosecution Exhibit 1830. The Appeals Chamber notes, however, that the Trial Chamber did not address this report (*see generally* Trial Judgement) and that the record also includes statements by Perišić indicating that he did not command the VRS in Srebrenica. *See* Prosecution Exhibit 2202, pp. 2-3. In the absence of any corroborating evidence, the Appeals Chamber does not consider that the report's allegations that Perišić generally controlled VRS operations or commanded attacks in Srebrenica prove beyond reasonable doubt that he specifically directed aid towards VRS crimes.

199 AT. 30 October 2012 p. 55.

200 *See* Trial Judgement, paras 1390-1579, 1628-1648.

201 *See supra*, paras 37, 48. The Appeals Chamber, Judge Liu dissenting, recalls that specific direction establishes a culpable link between an accused aider and abettor and relevant crimes. *See supra*, para. 37.

202 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

203 *See supra*, para. 53.

204 *See supra*, para. 42.

policy provided for directing VJ aid towards VRS crimes. Similarly, the Trial Chamber's conclusions and evidence on the record do not suggest that Perišić's implementation of SDC policy specifically directed aid towards VRS crimes, or that Perišić took other actions to that effect.

71. The Appeals Chamber has already noted that the Trial Chamber identified evidence of the large scale of VJ assistance to the VRS, as well as evidence that Perišić knew of VRS crimes.[205] However, having considered these Trial Chamber findings alongside its *de novo* analysis of the record, the Appeals Chamber, Judge Liu dissenting, is not convinced that the only reasonable interpretation of the totality of this circumstantial evidence is that Perišić specifically directed aid towards VRS crimes. Instead, a reasonable interpretation of the record is that VJ aid facilitated by Perišić was directed towards the VRS's general war effort rather than VRS crimes. Accordingly, the Appeals Chamber, Judge Liu dissenting, is not convinced that the VJ aid which Perišić facilitated was proved to be specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

72. As demonstrated above, the Appeals Chamber considers that assistance from one army to another army's war efforts is insufficient, in itself, to trigger individual criminal liability for individual aid providers absent proof that the relevant assistance was specifically directed towards criminal activities.[206] The Appeals Chamber underscores, however, that this conclusion should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts. If an ostensibly independent military group is proved to be under the control of officers in another military group, the latter can still be held responsible for crimes committed by their puppet forces.[207] Similarly, aid from one military force specifically directed towards crimes committed by another force can also trigger aiding and abetting liability. However, as explained above, a sufficient link between the acts of an individual accused of aiding and abetting a crime and the crime he or she is charged with assisting must be established for the accused individual to incur criminal liability. Neither the findings of the Trial Chamber nor the evidence on the record in this case prove such a link with respect to Perišić's actions.

B. Conclusion

73. The Appeals Chamber, Judge Liu dissenting, recalls that specific direction is an element of the *actus reus* of aiding and abetting liability, and that in cases like this one, where an accused individual's assistance is remote from the actions of principal perpetrators, specific direction must

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[205] *See supra*, paras 56-57, 64, 68-69.
[206] *Cf. supra*, para. 53. Judge Liu dissents with respect to the specific direction requirement.
[207] Relevant forms of liability, in addition to aiding and abetting, could include JCE and superior responsibility.

be explicitly established.[208] After carefully reviewing the evidence on the record, the Appeals Chamber, Judge Liu dissenting, concludes that it has not been established beyond reasonable doubt that Perišić carried out "acts specifically directed to assist, encourage or lend moral support to the perpetration of [the] certain specific crime[s]" committed by the VRS.[209] Accordingly, Perišić's convictions for aiding and abetting must be reversed on the ground that not all the elements of aiding and abetting liability have been proved beyond reasonable doubt.

74. For the foregoing reasons, the Appeals Chamber, Judge Liu dissenting, grants Perišić's Second and Third Grounds of Appeal in part, insofar as they relate to his convictions for aiding and abetting, and reverses his convictions under Counts 1, 2, 3, 4, 9, 10, 11, and 12 of the Indictment. In view of this finding, Perišić's remaining arguments in his First through Twelfth Grounds of Appeal are dismissed as moot.

[208] *See supra*, paras 37-40, 42.
[209] *Tadić* Appeal Judgement, para. 229. *See also supra*, paras 70-72.

VII. JOINT SEPARATE OPINION OF JUDGES THEODOR MERON AND CARMEL AGIUS

1. While we agree with the analysis and conclusions of the Appeal Judgement, we write separately to address the issue of whether specific direction should be considered as part of the *actus reus* or *mens rea* of aiding and abetting.

2. Starting with the 1999 *Tadić* Appeal Judgement, the Appeals Chamber has always approached specific direction as an element of the *actus reus* of aiding and abetting.[1] We observe, however, that whether an individual commits acts directed at assisting the commission of a crime relates in certain ways to that individual's state of mind. In this regard, we note that, as set out in the Appeal Judgement, proof of specific direction will often be found in evidence that may also be illustrative of *mens rea*.[2] Thus, for example, Perišić's comments to the SDC, which directly relate to his mental state, are considered in the Appeal Judgement as circumstantial evidence relevant to whether his subsequent acts were specifically directed towards VRS crimes.[3]

3. We also note that the *mens rea* standard of aiding and abetting – knowledge that aid provided assists in the commission of the relevant crime and awareness of the essential elements of the crime[4] – would not preclude consideration of issues relevant to specific direction. Indeed, in our view, whether an individual specifically aimed to assist relevant crimes logically fits within our current *mens rea* requirement.

4. Accordingly, were we setting out the elements of aiding and abetting outside the context of the Tribunal's past jurisprudence, we would consider categorising specific direction as an element of *mens rea*. However, we are satisfied that specific direction can also, as the Appeal Judgement's analysis demonstrates, be reasonably assessed in the context of *actus reus*.[5] The critical issue raised by the requirement of specific direction, regardless of whether it is considered in the context of *actus reus* or *mens rea*, is whether the link between assistance of an accused individual and actions of principal perpetrators is sufficient to justify holding the accused aider and abettor criminally responsible for relevant crimes. In these circumstances, we do not believe that cogent reasons justify departure from the Tribunal's precedent of considering specific direction in the context of *actus reus*.[6] Such departures from established precedent should, in our view, generally be limited to

[1] *See* Appeal Judgement, paras 25-36.
[2] *See* Appeal Judgement, para. 48.
[3] *See* Appeal Judgement, paras 59-60.
[4] *See Lukić and Lukić* Appeal Judgement, para. 428.
[5] *See* Appeal Judgement, paras 45-74.
[6] *See Aleksovski* Appeal Judgement, para. 109. *See also Aleksovski* Appeal Judgement, paras 107-108, 110-111.

untenable situations, such as a holding which is logically impossible or is demonstrated to be contrary to customary international law.

Done in English and French, the English text being authoritative.

Judge Theodor Meron | Judge Carmel Agius

Dated this 28th day of February 2013,

At The Hague,

The Netherlands.

[Seal of the Tribunal]

VIII. PARTIALLY DISSENTING OPINION OF JUDGE LIU

1. In this Judgement, the Majority reverses Perišić's convictions for aiding and abetting murder, inhumane acts, and persecution as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war.[1] This reversal is predicated on the finding that the Trial Chamber erred in holding that specific direction is not a required element of the *actus reus* of aiding and abetting liability.[2] The Majority then conducts a *de novo* review of the evidence and concludes that it was insufficient to prove that the aid Perišić provided was specifically directed towards the criminal activities of the VRS in Sarajevo and Srebrenica.[3] I respectfully disagree with the Majority's reasoning and its conclusion in this regard.

2. While I recognise that the specific direction requirement has been *mentioned* in the relevant jurisprudence, I note that it has not been applied consistently. Indeed, the cases cited by the Majority as evidence of an established specific direction requirement merely make mention of "acts directed at specific crimes"[4] as an element of the *actus reus* of aiding and abetting liability. In the majority of these cases the Appeals Chamber simply restates language from the *Tadić* Appeal Judgement without expressly applying the specific direction requirement to the facts of the case before it.[5] Moreover, the jurisprudence of the Tribunal demonstrates that aiding and abetting liability may be established without requiring that the acts of the accused were specifically directed to a crime.[6] In these circumstances, I am not persuaded that specific direction is an essential

[1] Appeal Judgement, paras 73-74, 122.
[2] Appeal Judgement, paras 25-36. *See also* Appeal Judgement, paras 37-74.
[3] Appeal Judgement, paras 45-72.
[4] As noted in the Appeal Judgement, this formulation varies slightly from case to case. For a list of cases using this or a similar formulation, *see* Appeal Judgement, nn. 70-74, *citing Blagojević and Jokić* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 89; *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 254; *Aleksovski* Appeal Judgement, para. 163; *Kalimanzira* Appeal Judgement, para. 74; *Muvunyi* Appeal Judgement, para. 79; *Seromba* Appeal Judgement, para. 139; *Nahimana et al.* Appeal Judgement, para. 482; *Muhimana* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 530; *Simić* Appeal Judgement, para. 85; *Orić* Appeal Judgement, para. 43; *Ntawukulilyayo* Appeal Judgement, para. 214; *Rukundo* Appeal Judgement, para. 52; *Karera* Appeal Judgement, para. 321.
[5] The express application of the specific direction requirement appears to have been limited to the *Vasiljević* case (*see Vasiljević* Appeal Judgement, para. 135). In my view, this tends to demonstrate that the Appeals Chamber accorded extremely limited importance to specific direction in previous cases. Moreover, I note that the specific direction "requirement" was first mentioned in the *Tadić* Appeal Judgement, which focused on JCE liability and only considered aiding and abetting liability by way of contrast (*see Tadić* Appeal Judgement, para. 229). Thus, subsequent cases have relied on language that was not intended to be a definitive statement of aiding and abetting liability.
[6] *See Mrkšić and Sljivančanin* Appeal Judgement, para. 159; *Lukić and Lukić* Appeal Judgement, para. 424. *See by contrast Lukić and Lukić* Appeal Judgement, Separate and Partially Dissenting Opinions of Judge Mehmet Güney, paras 10-11 *and* Separate Opinion of Judge Agius.

element of the *actus reus* of aiding and abetting liability[7] – or that it is necessary to explicitly consider specific direction in cases where the aider and abettor is remote from the relevant crimes.[8]

3. Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability.[9] This shift risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts. The present appeal is a case in point.

4. The Trial Chamber held Perišić responsible for facilitating the criminal acts of the VRS in Sarajevo and Srebrenica. Although the Trial Chamber did not characterise the VRS as a wholly criminal organisation,[10] it nonetheless found that the crimes committed by the VRS were "inextricably linked to the war strategy and objectives of the VRS leadership."[11] It further found that the VRS "wag[ed] a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective."[12] In this regard, the Trial Chamber found that the siege of Sarajevo was instrumental to the implementation of a VRS objective and that the "systematic and widespread sniping and shelling of civilians in Sarajevo by the VRS over a period of three years demonstrate[d] that the VRS's leading officers relied on criminal acts to further the siege."[13] With regard to Srebrenica, the Trial Chamber found that the VRS pursued a strategic objective "aimed at establishing a corridor in the Drina River valley and eliminating the Drina River as a border between the Serbian states."[14] It concluded that "this goal was implemented through the plan of 'plunging the Bosnian Muslim population into a humanitarian crisis and ultimately eliminating the enclave'."[15]

5. As the highest ranking officer of the VJ, Perišić oversaw a system which provided considerable practical assistance to the VRS.[16] In his capacity as Chief of the VJ General Staff,

[7] In my view, specific direction may be a pertinent factor in evaluating the *mens rea* of an aider and abettor. However, I believe that specific direction is a red herring when considered in the context of the *actus reus* of aiding and abetting liability.

[8] The remoteness of an accused from the crimes is not dispositive in assessing the *actus reus* of aiding and abetting liability. In this context, I believe that the crucial consideration is whether the acts of the aider and abettor had a substantial effect on the commission of the relevant crime. *See Delalić et al.* Appeal Judgement, para. 352.

[9] If specific direction is indeed part of the *actus reus* of aiding and abetting liability, it could be argued that there is little difference between aiding and abetting and certain forms of commission. *See Seromba* Appeal Judgement, para. 171.

[10] *See* Trial Judgement, paras 262-293, 1588.

[11] Trial Judgement, para. 1588. *See also* Trial Judgement, para. 1602 ("the crimes charged in the Indictment were an integral part of the VRS's war strategy").

[12] Trial Judgement, para. 1621.

[13] Trial Judgement, para. 1590. *See also* Trial Judgement, para. 1589.

[14] Trial Judgement, para. 1591.

[15] Trial Judgement, para. 1591.

[16] Trial Judgement, para. 1594.

IX. OPINION SÉPARÉE DU JUGE RAMAROSON SUR LA QUESTION DE LA *VISÉE SPÉCIFIQUE* DANS LA COMPLICITÉ PAR AIDE ET ENCOURAGEMENT

A. Introduction

1. La Chambre d'appel acquitte ce jour Perišić et infirme sa condamnation notamment au titre de la complicité par aide et encouragement pour les crimes d'assassinat, actes inhumains et persécutions comme crimes contre l'humanité de même que pour les crimes d'assassinat et d'attaques contre des civils comme violation des lois et coutumes de la guerre[1]. Je souscris à la conclusion dégagée dans l'arrêt. Toutefois, je ne partage pas le point de vue exprimé par la majorité selon lequel la *visée spécifique*[2] constitue un élément essentiel de la complicité par aide et encouragement et devant être exclusivement analysé dans le cadre de *l'actus reus*.

B. La *visée spécifique* n'est pas un critère explicite de la complicité par aide et encouragement

2. Le présent arrêt soutient que la *visée spécifique* constitue une composante requise de la complicité par aide et encouragement, ce qui, à mon humble avis, est une conclusion erronée se basant sur le postulat selon lequel l'arrêt *Tadić* considère la *visée spécifique* comme étant un élément de la complicité par aide et encouragement[3]. En effet, la Chambre d'appel prend comme point de départ l'affaire *Tadić*, laquelle a défini la complicité par aide et encouragement en opposition avec l'entreprise criminelle commune[4]. Le fait que cette définition inclut les termes « qui visent spécifiquement à » indiquerait selon la majorité que la *visée spécifique* constitue une composante de la complicité par aide et encouragement[5]. Or, cette définition est de nature purement

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[1] Ces crimes correspondent aux chefs 1, 2, 3, 4, 9, 10, 11 et 12 de l'acte d'accusation.

[2] *Visée spécifique* est une traduction non officielle de *specific direction*, cette traduction se basant sur les termes *qui visent spécifiquement* utilisés dans l'Arrêt *Tadić*.

[3] Voir Arrêt, par. 26-28 et par. 32 : « (...) the settled precedent established by the *Tadić* Appeal Judgement ».

[4] Le paragraphe 229 de l'Arrêt *Tadić* indique : « Compte tenu de ce qui précède, il convient à présent *de faire la distinction* entre, d'une part, un acte visant à réaliser l'objectif ou dessein commun de commettre un crime et, d'autre part, le fait d'aider ou d'encourager la perpétration d'un crime. (...) Le complice commet des actes *qui visent spécifiquement à* aider, encourager ou fournir un soutien moral en vue de la perpétration d'un crime spécifique (meurtre, extermination, viol, torture, destruction arbitraire de biens civils, etc.), et ce soutien a un effet important sur la perpétration du crime. *En revanche*, dans le cas d'actes commis en vertu d'un objectif ou dessein commun, il suffit que la personne qui y participe commette des actes *qui visent d'une manière ou d'une autre* à contribuer au projet ou objectif commun. » [non soulignés dans l'original] Je note que les termes soulignés démontrent que les termes « *qui visent spécifiquement à* » servent à établir une comparaison. « *Qui visent spécifiquement à* » s'oppose à cet égard aux termes « *qui visent d'une manière ou d'une autre* » employés pour l'entreprise criminelle commune. Or, *la visée d'une certaine manière* n'est pas devenue un critère de l'entreprise criminelle commune. Sur la nature contextuelle de cette définition, voir les Arrêts *Blagojević et Jokić*, par. 185 et *Aleksovski*, par. 163.

[5] Arrêt, par. 25-36.

contextuelle car elle était destinée à établir une comparaison entre la complicité par aide et encouragement et l'entreprise criminelle commune, sans établir une description complète de la responsabilité pénale du complice[6].

3. La Chambre d'appel affirme ensuite que la jurisprudence postérieure ne s'est jamais écartée de la définition fournie dans l'arrêt *Tadić*[7], l'amenant ainsi à conclure que la *visée spécifique* est une condition requise de l'*actus reus* pour établir la complicité par aide et encouragement, conclusion à laquelle je ne puis souscrire[8]. En effet, la *visée spécifique* n'a jamais été isolée en tant que telle, tant d'un point de vue légal que factuel.

4. D'un point de vue légal, les arrêts postérieurs n'ont fait que reprendre, pour la grande majorité de façon *verbatim*[9], la définition énoncée dans l'affaire *Tadić*, certains d'entre eux ayant utilisé des synonymes[10]. Je note par ailleurs que la Chambre d'appel, en évoquant *la visée spécifique* sous une forme substantivée, dénote en ce sens qu'elle érige un nouveau critère. D'un point de vue factuel, je constate que la jurisprudence n'a jamais caractérisé ce critère en l'appliquant expressément aux faits de l'espèce[11]. La plupart des affaires n'en font pas mention tandis que certaines l'incluent de façon implicite à travers l'effet substantiel[12].

5. J'en conclus que la Chambre de première instance n'a pas commis d'erreur de droit[13] en indiquant que : « l'élément matériel de l'aide et l'encouragement *n'exige pas* que l'aide apportée par le complice "vise expressément à faciliter les crimes" »[14]. Elle fonde à juste titre cette conclusion sur le paragraphe 159 de l'arrêt *Mrkšić et Šljivančanin* et les paragraphes 182, 185 à 189

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[6] Arrêt *Aleksovski*, par. 163.

[7] Je note à titre additionnel que le paragraphe 229 de l'arrêt *Tadić* dont le but est de distinguer l'aide et l'encouragement de l'entreprise criminelle commune survient après un long développement consacré à l'entreprise criminelle commune et à son caractère coutumier (voir les par. 185 à 228). Ce développement est compris à cet égard dans une sous-section intitulée : « L'article 7.1) du Statut et la notion de but commun ». La complicité par aide et encouragement ne constitue donc pas le cœur du raisonnement.

[8] Arrêt, par. 36.

[9] Arrêt, note de bas de page 70.

[10] Arrêt, par. 29 se référant aux Arrêts *Simić*, par. 85 et *Orić*, par. 43.

[11] Voir par exemple les affaires *Simić, Blaškić, Lukić et Lukić, Orić, Mrkšić et Šljivančanin, Kvočka et al., Krnojelac, Furundžija, Kordić et Čerkez, Delalić et al., Gotovina et Markač, Krajišnik, Brđanin, Krstić, Seromba, Nahimana et al., Kalimanzira, Rukundo, Muvunyi, Muhimana, Ntakirutimana et Ntakirutimana, Nchamihigo, Zigiranyirazo, Ndindabahizi, Gacumbitsi*, et *Semanza*. Je note par ailleurs que la seule affaire qui tendrait à apprécier cet élément serait l'affaire *Kupreškić* (voir Arrêt *Kupreškić et al.*, par. 283 : « Cependant, la simple présence de l'accusé devant l'hôtel Vitez ne saurait être assimilée à un acte visant précisément à aider, encourager ou soutenir moralement les auteurs de persécutions. »)

[12] Voir par exemple l'Arrêt *Ntagerura et al.*, par. 375. Je note à cet égard la phrase suivante : « La Chambre d'appel considère que les constatations de la Chambre de première instance ne permettent pas d'établir que l'omission d'Imanishimwe visait spécifiquement à offrir à ses soldats la possibilité d'aller perpétrer le massacre, ni qu'il avait connaissance de l'assistance qu'il leur apportait. » Voir également les Arrêts *Ntawukulilyayo*, par. 215-216 ; *Vasiljević*, par. 134-135 ; *Blagojević et Jokić*, par. 194-199 ; *Karera*, par. 322 ; *Renzaho*, par. 337.

[13] Arrêt, par. 41.

[14] Jugement, par. 126.

de l'arrêt *Blagojević et Jokić*[15]. L'arrêt *Mrkšić et Šljivančanin* indique qu'il ne s'agit pas d'un « ingrédient essentiel » tandis que l'arrêt *Blagojević et Jokić* affirme que ce critère peut être pris en compte de façon implicite dans une analyse fondée sur l'effet substantiel. A mon avis, ces deux affirmations ne se contredisent pas. L'arrêt *Lukić et Lukić* rendu le 4 décembre 2012 a également statué de la sorte, tout en indiquant que l'arrêt *Mrkšić et Šljivančanin* « a *clarifié* "que la visée spécifique n'est pas un ingrédient essentiel de l'*actus reus* de la complicité par aide et encouragement" »[16]. Or, le présent arrêt juge que l'arrêt *Mrkšić et Šljivančanin* a employé une formulation pouvant induire en erreur[17]. Il s'agit là d'une nette contradiction avec la jurisprudence antérieure[18]. La conclusion de la Chambre de première instance me paraît à ce titre fondée en droit.

6. En conséquence, je ne partage pas la conclusion légale dégagée par la majorité en vertu de laquelle *la visée spécifique*, à défaut d'être implicite dans l'effet substantiel, a été l'immuable position jurisprudentielle et doit constituer une condition requise de l'*actus reus* pour établir la complicité par aide et encouragement[19]. Au regard de l'état des lieux de la jurisprudence, cette affirmation catégorique[20] de la Chambre d'appel me semble constituer un revirement de jurisprudence. Il s'agit également de la première fois que la *visée spécifique* est appliquée de façon explicite aux faits de l'espèce[21].

C. Les implications de la *visée spécifique*

7. Je considère que l'idée d'une *visée spécifique* est implicitement prise en compte dans le cadre de la *mens rea*. Orienter un acte, le viser est à mon sens subjectif et implique nécessairement une analyse de la *mens rea* du complice. Cependant, la jurisprudence a traité la question de la *visée spécifique* à travers l'*actus reus*[22]. En effet, elle a considéré que la *visée spécifique* pouvait être

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[15] Jugement, note de bas de page 258. La Chambre de première instance, en se référant également à l'Arrêt *Blagojević et Jokić*, a donc bien noté que la *visée spécifique* pouvait s'analyser de façon implicite à travers l'effet substantiel même si elle en a conclu à juste titre que cet élément n'était pas *exigé* de façon explicite.
[16] Arrêt *Lukić et Lukić*, par. 424 (traduction non officielle).
[17] Arrêt, par. 41 (« while the relevant phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement is misleading »).
[18] A titre additionnel, je note que l'Arrêt *Gotovina et Markač*, lequel est un arrêt récent, ne mentionne aucunement la *visée spécifique* alors qu'il indique les éléments pertinents (« as relevant ») de la complicité par aide et encouragement, à savoir l'effet substantiel et la *mens rea* requise (*cf.* par. 127 : « The Appeals Chamber first recalls, as relevant, that for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime » [notes de bas de page omises]). De même, l'Arrêt *Brđanin* montre dans le cadre de son analyse que l'effet substantiel et la *mens rea* sont les deux éléments à considérer dans le cadre de la complicité par aide et encouragement (*cf.* par. 496). De même, l'Arrêt *Delalić et al.* ne mentionne aucunement la *visée spécifique* (par. 352).
[19] Arrêt, par. 36.
[20] Arrêt, par. 32 et 35, « settled precedent », voir également par. 36 « remains » et « reaffirms » et par. 48 « long-standing jurisprudence ».
[21] Voir les paragraphes correspondant à l'examen *de novo* des éléments du dossier. Arrêt, par. 43, 45-69.
[22] Voir les Arrêts *Orić* par. 43 ; *Mrkšić et Šljivančanin*, par. 159 ; *Blagojević et Jokić* par. 189. Je note cependant que l'affaire *Blagojević et Jokić* n'a pas entièrement exclu des considérations de *mens rea*. Voir par. 189 : « La Chambre d'appel considère également que, dans la mesure où cette finalité de l'aide fait implicitement partie intégrante de

implicite à travers l'effet substantiel[23], lequel fait partie de l'*actus reus*. Toutefois, comme la frontière avec la *mens rea* me parait ténue[24], je ne puis souscrire à l'affirmation selon laquelle la *visée spécifique* est un élément requis de l'*actus reus*, séparé de la *mens rea*[25]. Je note par ailleurs que la façon dont la Chambre d'appel applique ce critère comprend des éléments relatifs au lien de causalité[26], lien qui n'est pourtant pas requis en tant que tel par notre jurisprudence[27]. A mon sens, le lien de causalité est pris en compte à travers l'effet substantiel[28].

8. La Chambre d'appel précise les circonstances d'application de la *visée spécifique* et affirme la nécessité de la considérer de façon explicite lorsque l'accusé est loin de la scène de crime[29], pour établir un lien entre les actes de l'accusé et les actions des auteurs principaux[30]. Or, la jurisprudence indique que les actes de complicité peuvent être commis en un endroit éloigné du lieu de sa commission sans pour autant exiger la *visée spécifique*[31]. En conséquence, la Chambre d'appel introduit à mon sens une distinction nouvelle dans le droit de l'aide et l'encouragement en affirmant que dans les cas où l'accusé se trouve loin de la scène de crime, la *visée spécifique* doit être analysée de façon explicite. En vertu du principe *ubi lex non distinguit*, je ne peux souscrire au raisonnement de la Chambre d'appel sur ce point.

9. Prenant acte de l'absence de développements factuels relatifs à la *visée spécifique* dans la jurisprudence antérieure, la Chambre d'appel justifie ce point au motif que l'accusé se trouvait à proximité de la scène de crime[32]. Cela démontre à mon sens que le cœur du problème n'est point la question d'une *visée spécifique*, conditionnée à l'éloignement ou non de l'accusé, mais celle de sa

l'élément matériel de la complicité par aide et encouragement, lorsque l'accusé a *sciemment* pris part à un crime et que sa participation a eu un effet important sur sa perpétration (...) » [non souligné dans l'original].

[23] Arrêt *Blagojević et Jokić*, par. 189.

[24] A titre d'exemple, il convient de noter que le présent arrêt fait état de la *manière* dans laquelle Perišić a distribué l'aide de la VJ à la VRS, ce qui implique nécessairement une analyse de la *mens rea*. Arrêt, par. 66 : « The manner in which Perišić distributed VJ aid to the VRS also does not demonstrate specific direction ». Voir également Arrêt, par. 59 et 61.

[25] Arrêt, par. 68 : « However, the Appeals Chamber, Judge Liu dissenting, recalls that evidence regarding knowledge of crimes, alone, does not necessarily establish specific direction, which is a distinct element of *actus reus*, separate from *mens rea* ». Voir également Arrêt, par. 48 : « The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus* » et « (...) the long-standing jurisprudence of the Tribunal affirms that specific direction is an analytically distinct element of *actus reus* ».

[26] Voir par exemple Arrêt, par. 63 : « However, the record contains no evidence suggesting that the benefits provided to seconded soldiers and officers – including VJ-level salaries, housing, and educational and medical benefits – were tailored to facilitate the commission of crimes. » Voir également Arrêt, par. 65 : « In addition, the Appeals Chamber notes that the Trial Chamber found that bullets and shells recovered from crime sites in Sarajevo and Srebrenica were not proved beyond reasonable doubt to have originated from the VJ (...) » [notes de bas de page omises].

[27] Voir les Arrêts *Mrkšić et Šljivančanin*, par. 81 ; *Simić*, par. 85 ; *Blaškić*, par. 48 ; *Blagojević et Jokić*, par. 187 ; *Rukundo*, par. 52 ; *Aleksovski*, par. 164.

[28] Voir par exemple les Arrêts *Gacumbitsi*, par. 140 ; *Ndindabahizi*, par. 117 ; *Blaškić*, par. 48.

[29] Arrêt, par. 39 et 70.

[30] Arrêt, par. 42.

[31] Arrêt *Simić*, par. 85, Arrêt *Blaškić*, par. 48.

[32] Arrêt, par. 38.

mens rea. En effet, lorsque l'accusé se trouve à proximité de la scène de crime, la *mens rea* peut se déduire aisément des actes mêmes de l'accusé. Or, il est plus difficile de l'établir quand l'accusé est éloigné de la scène de crime, plus spécifiquement s'agissant du deuxième volet de la *mens rea* qui est la conscience que l'aide fournie assiste les crimes commis[33].

D. La *mens rea* de Perišić

10. La Chambre d'appel indique qu'elle n'a pas trouvé de preuve démontrant que Perišić soutenait la fourniture d'une aide spécifiquement dirigée vers les activités criminelles de la VRS et qu'au contraire, de par ses actes, Perišić voulait soutenir[34] l'effort de guerre général de la VRS[35]. Cela suggère à mon sens que la Chambre d'appel a considéré que Perišić n'avait pas la *mens rea* requise, à savoir qu'il n'avait pas conscience que ses actes assistaient la commission des crimes commis à Sarajevo et Srebrenica[36]. A mon humble avis, si les actes de Perišić *ne visaient pas spécifiquement à*, cela signifie qu'il n'avait pas conscience que, par ses actes, il assistait à la commission des crimes commis à Sarajevo et Srebrenica. Pour cette raison, je me rallie à la majorité et souscris à l'acquittement de Perišić car je considère que la Chambre d'appel a inclus de façon implicite dans son analyse de la *visée spécifique*, celle de la *mens rea* de Perišić. Cependant, je l'aurais exprimée dans le cadre d'une analyse explicite relative à la *mens rea* car l'acquittement de Perišić prononcé sur la base d'un critère qui ne constitue pas un précédent établi dans notre jurisprudence, ne me paraît pas fondé en droit.

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[33] La *mens rea* comprend deux volets, à savoir la connaissance par l'accusé des crimes commis par les auteurs principaux (ou de la probabilité qu'ils se commettent) et la connaissance que les actes de l'accusé assistent la commission des crimes. Voir Arrêt *Mrkšić et Šljivančanin*, par. 159 : « The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator. »; Arrêt *Blaškić*, par. 49 : « Le fait que le complice sache que ses actes contribuent à la perpétration d'un crime par l'auteur principal suffit à établir l'élément moral de la complicité. » Voir les Arrêts *Haradinaj*, par. 57 : « The aider and abettor must have knowledge that his or her acts assist in the commission of the crime of the principal perpetrator. » ; *Gotovina et Markač*, par. 127 : « The Appeals Chamber first recalls, as relevant, that for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime. » ; *Blagojević et Jokić*, par. 127 : « L'élément moral de la complicité par aide et encouragement s'analyse comme le fait pour le complice de savoir que les actes qu'il accomplit contribuent à la perpétration d'un crime précis par l'auteur principal. Dans le cas de crimes supposant une intention spécifique comme la persécution ou le génocide, le complice doit connaître celle de l'auteur principal. »

[34] Traduction de « Perišić's relevant actions *were intended*. »

[35] Arrêt, par. 60 : « Having reviewed the relevant evidence, the Appeals Chamber, Judge Liu dissenting, also finds no proof that Perišić supported the provision of assistance specifically directed towards the VRS's criminal activities. Instead, evidence on the record suggests that Perišić's relevant actions *were intended* to aid the VRS's overall war effort. » [non souligné dans l'original].

[36] Voir Arrêt, par. 60 et 61.

The ICTY has not yet issued an official English translation of the Separate Opinion of Judge Ramaroson which was rendered in French. Attached is an unofficial translation.

I. SEPARATE OPINION OF JUDGE RAMAROSON ON THE QUESTION OF SPECIFIC DIRECTION IN AIDING AND ABETTING

A. Introduction

1. The Appeals Chamber reverses Perišić's convictions for the aiding and abetting the crimes of murder, inhumane acts, and persecutions as crimes against humanity, and for murder and attacks on cvilians as violations of the laws or customs of war. I agree with the conclusion reached in the judgment. However, I do not share the view expressed by the majority that *specific direction* is an essential element of aiding and abetting and exclusively to be analyzed in the context of the *actus reus*.

B. *Specific direction* is not an explicit criterion for aiding and abetting

2. The judgment asserts that *specific direction* is a required component of aiding and abetting, which in my humble opinion, is an erroneous conclusion based on the assumption that the Tadić judgment considers *specific direction* as an element of aiding and abetting. Indeed, the Appeals Chamber takes as its starting point the Tadić case, which had defined aiding and abetting in contrast to joint criminal enterprise. The fact that this definition includes the terms "specifically intended to" according to the majority, indicates that *specific direction* is a component of aiding and abetting. However, this definition is purely contextual because it was designed to establish a comparison between aiding and abetting and joint criminal enterprise, without establishing a complete description of the criminal liability of an accomplice.

3. The Appeals Chamber further asserts that subsequent jurisprudence has never deviated from the definition provided in the judgment Tadić, causing it to conclude that *specific direction* is a requirement of the *actus reus* to establish aiding and abetting, a conclusion with which I can not agree. Indeed, specific direction was never considered as such, either from a legal standpoint or factual.

4. From a legal point of view, the subsequent judgments have repeated, the vast majority of which verbatim, the definition in the Tadić case, some of them having used synonymous terms. I also note that the Appeals Chamber, by evoking *specific direction* in a substantive form, indicates that it is creating a new criterion. From a factual point of view, I find that the law has never characterized this criterion by applying it specifically to the facts of a case. Most cases do not mention it, while some include it implicitly through substantial effect.

5. I conclude that the Trial Chamber did not err in law by stating that "the *actus reus* of aiding and abetting does not require aid from the accomplice "specifically aimed to facilitate crimes."" It rightly based this conclusion on paragraph 159 of the *Mrkšić and Šljivančanin* judgment and paragraphs 182, 185 to 189 of the *Blagojević and Jokić* judgement. *Mrkšić and Šljivančanin* indicates that it is not an "essential ingredient" while *Blagojević and Jokić* argues that this criterion can be taken into account implicitly in an analysis of the substantial effect. In my opinion, these two statements are not contradictory. *Lukić and Lukić* delivered on 4 December 2012 also ruled this way, while indicating that the *Mrkšić and Šljivančanin* judgment clarified "that *specific direction* is not an essential ingredient the *actus reus* of aiding and abetting." However, this judgment considers that the *Mrkšić and Šljivančanin* judgment used a misleading formulation. This is a clear contradiction with previous case law. The conclusion of the Trial Chamber appears to me as correct in law.

6. Accordingly, I do not share the legal conclusion of the majority under which *specific direction*, in the absence of being implicit in substantial effect, which was the immutable precedential position, must constitute a requirement of the *actus reus* to establish aiding and abetting. In view of the current state of the law, the categorical statement of the Appeals Chamber seems to be a departure from precedent. It is also the first time that the specific direction is explicitly applied to the facts of the case.

C. The implications of the *specific direction*

7. I think that the notion of *specific direction* is implicitly taken into account in the context of *mens rea*. Directing an act, the aim to my mind necessarily implies an analysis of the *mens rea* of the accomplice. However, case law has addressed the issue of the specific direction through the *actus reus*. Indeed, it considered that *specific direction* could be implied through substantial effect, which is part of the *actus reus*. However, as the border with the *mens rea* seems tenuous to me, I can not agree with the assertion that the specific direction is a required element of the *actus reus*, separate from *mens rea*. I also note that the way the Appeals Chamber applied this criterion includes issues relating to causation, a link which is however not required as such by our jurisprudence. In my view, causation is taken into account through the substantial effect.

8. The Appeals Chamber clarifies the circumstances under which an application of *specific direction* needs to considered explicitly are when the accused is far from the crime scene, to establish a link between the acts of the accused and the actions of the principal authors. However, the case law indicates that aiding and abetting may be committed in a place away from the place of its commission without requiring *specific direction*. Accordingly, the Appeals Chamber in my view introduces a new distinction in the law of aiding and abetting by stating that in cases where the accused is far from the crime scene, *specific direction* must be analyzed explicitly. Under the principle *ubi lex non distinguit*, I can not agree with the reasoning of the Appeals Chamber on this point.

9. Noting the absence of factual developments relating to *specific direction* in the earlier cases, the Appeals Chamber justifies this on the grounds that the accused was near the crime scene. This demonstrates to me that the heart of the problem is not the question of *specific direction*, depending on the remoteness or otherwise of the accused, but that of his *mens rea*. Indeed, when the accused is found near the crime scene, the *mens rea* may be inferred easily acts of the accused themselves. However, it is more difficult to establish when the accused is removed from the crime scene, specifically with regard to the second part of the *mens rea*, awareness that his assistance assists crimes.

D. The *mens rea* of Perišić

10. The Appeals Chamber said it found no evidence that Perišić supported the provision of aid specifically directed towards criminal activities of the VRS, on the contrary, by his actions, Perišić wanted to support the war effort of the VRS. This suggests to me that the Appeals Chamber considered that Perišić had no *mens rea*, that he was not aware that his acts assisted the commission of crimes in Sarajevo and Srebrenica. In my humble opinion, if the acts of Perišić were not specifically aimed, it means that he did not realize that, by his actions, he attended the commission of crimes in Sarajevo and Srebrenica. For this reason, I agree with the majority and agree to the aquittal of Perišić because I believe that the Appeals Chamber implicitly included in its analysis of *specific direction*, the *mens rea* of Perišić. However, I would have expressed it within an analysis of the *mens rea*, because acquittal of Perišić is based on a criterion which does not constitute a precedent established in our jurisprudence, and does not appear to me to be based in law.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-9-A
	Date:	28 November 2006
	Original:	English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Judgement of: 28 November 2006

PROSECUTOR

v.

BLAGOJE SIMIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Barbara Goy
Mr. Steffen Wirth

Counsel for the Appellant:

Mr. Igor Pantelić
Mr. Peter Murphy

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acknowledges that he presented a defence against an allegation of aiding and abetting.[257] In addition, the question of whether the Appellant's responsibility could be characterized as that of an aider and abettor was extensively litigated on appeal.[258] For these reasons, the Appeals Chamber finds it appropriate to ascertain whether the Trial Chamber's findings support the Appellant's responsibility for persecutions under Count 1 of the Fifth Amended Indictment as that of an aider and abettor pursuant to Article 7(1) of the Statute.

B. Applicable Law

85. The Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and which have a substantial effect upon the perpetration of the crime.[259] It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime.[260] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[261]

86. The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator.[262] The aider and abettor must be aware of the essential elements of the crime which was ultimately committed by the principal.[263] In relation to the crime of persecutions, an offence with a specific intent, he must thus be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.[264] However, it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and

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[257] Appeal Brief, para. 20. *See* also, *ibid.*, para. 26.
[258] *See* Order Re-scheduling Appeal Hearing, p. 3 paras 4-5; AT. 77-78, 119-126, 138.
[259] *Blaškić* Appeal Judgement, para. 48; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229. In the *Blaškić* case the Appeals Chamber left "open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting": *Blaškić* Appeal Judgement, para. 47.
[260] *Blaškić* Appeal Judgment, para. 48.
[261] *Blaškić* Appeal Judgment, para. 48.
[262] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgment, para. 45.
[263] *Aleksovski* Appeal Judgement, para. 162.
[264] *Krnojelac* Appeal Judgement, para. 52; *Aleksovski* Appeal Judgement, para. 162.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

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circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-98-32-A

Date: 25 February 2004

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

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crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*"[179] – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

2. Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

102. Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) 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 civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

B. Alleged errors of law

1. Alleged errors of law related to the concept of joint criminal enterprise

103. Before turning to the alleged errors of law of the Trial Chamber concerning the concept of joint criminal enterprise and persecution, the Appeals Chamber will first determine under which category of joint criminal enterprise the Drina River incident falls.

[178] *Ibid*, paras 202, 220 and 228.
[179] *Ibid*, para. 228. *See* also paras 204 and 220.

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3. Aiding and abetting

133. The Appeals Chamber has found above that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men. The Appellant argues under his fourth ground of appeal that his actions do not in fact amount to aiding and abetting, as he did not facilitate the commission of the crime. He submits that Milan Lukić and the two unidentified men did not need any help from the Appellant at the Vilina Vlas Hotel or at the Drina River,[223] since they had managed to detain the seven Muslim men on the hill of Bikavac by themselves, despite the fact that the seven Muslim men could have resisted.[224] The Appellant infers from this that it would not be logical to conclude that Milan Lukić and his men needed the assistance of the Appellant at the Vilina Vlas Hotel or at the Drina River as the risk that the seven Muslim men might resist was less important at this stage.[225]

134. The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant's actions had a "substantial effect upon the perpetration of the crime."[226]

135. The Appeals Chamber finds that the acts of the Appellant were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes. The Appeals Chamber therefore finds the Appellant guilty for aiding and abetting murder pursuant to Article 3 of the Statute (Count 5). Further, the Appeals Chamber finds the Appellant guilty as an aider and abettor for murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6). However, the Appellant is not convicted of the murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6) in accordance with the Tribunal's jurisprudence on cumulative convictions.[227]

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[223] Defence Appeal Brief, para. 216, which refers to the Appellant's arguments in paras 205-212.
[224] *Ibid*, para. 206.
[225] *Ibid*, paras 206-212.
[226] *Tadić* Appeals Judgement, para. 229.
[227] *See* paras 145-147 below.

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Other Authorities

III

(Acts adopted under the EU Treaty)

ACTS ADOPTED UNDER TITLE V OF THE EU TREATY

COUNCIL COMMON POSITION 2008/944/CFSP
of 8 December 2008
defining common rules governing control of exports of military technology and equipment

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty of the European Union, and in particular Article 15 thereof,

Whereas:

(1) Member States intend to build on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992, and on the European Union Code of Conduct on Arms Exports adopted by the Council in 1998.

(2) Member States recognise the special responsibility of military technology and equipment exporting States.

(3) Member States are determined to set high common standards which shall be regarded as the minimum for the management of, and restraint in, transfers of military technology and equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.

(4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.

(5) Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP).

(6) Complementary measures have been taken against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms.

(7) The Council adopted on 12 July 2002 Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons [1].

(8) The Council adopted on 23 June 2003 Common Position 2003/468/CFSP [2] on the control of arms brokering.

(9) The European Council adopted in December 2003 a strategy against the proliferation of weapons of mass destruction, and in December 2005 a strategy to combat illicit accumulation and trafficking of SALW and their ammunition, which imply an increased common interest of Member States of the European Union in a coordinated approach to the control of exports of military technology and equipment.

(10) The UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted in 2001.

(11) The United Nations Register of Conventional Arms was established in 1992.

(12) States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter.

(13) The wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort is acknowledged.

(1) OJ L 191, 19.7.2002, p. 1.
(2) OJ L 156, 25.6.2003, p. 79.

(14) The strengthening of a European defence technological and industrial base, which contributes to the implementation of the Common Foreign and Security Policy, in particular the Common European Security and Defence Policy, should be accompanied by cooperation and convergence in the field of military technology and equipment.

(15) Member States intend to strengthen the European Union's export control policy for military technology and equipment through the adoption of this Common Position, which updates and replaces the European Union Code of Conduct on Arms Exports adopted by the Council on 8 June 1998.

(16) On 13 June 2000, the Council adopted the Common Military List of the European Union, which is regularly reviewed, taking into account, where appropriate, similar national and international lists [1].

(17) The Union must ensure the consistency of its external activities as a whole in the context of its external relations, in accordance with Article 3, second paragraph of the Treaty; in this respect the Council takes note of the Commission proposal to amend Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual use items and technology [2],

HAS ADOPTED THIS COMMON POSITION:

Article 1

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

2. The export licence applications as mentioned in paragraph 1 shall include:

— applications for licences for physical exports, including those for the purpose of licensed production of military equipment in third countries,

— applications for brokering licences,

— applications for 'transit' or 'transhipment' licences,

— applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Member States' legislation shall indicate in which case an export licence is required with respect to these applications.

Article 2

Criteria

1. Criterion One: Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence shall be denied if approval would be inconsistent with, *inter alia*:

(a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;

(b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

(c) the commitment of Member States not to export any form of anti-personnel landmine;

(d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

2. Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

— Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

(a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

(b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;

[1] Last amended 10 March 2008, OJ C 98, 18.4.2008, p. 1.
[2] OJ L 159, 30.6.2000, p. 1.

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

— Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

(c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

3. Criterion Three: Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

4. Criterion Four: Preservation of regional peace, security and stability.

Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim. When considering these risks, Member States shall take into account *inter alia*:

(a) the existence or likelihood of armed conflict between the recipient and another country;

(b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

(c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;

(d) the need not to affect adversely regional stability in any significant way.

5. Criterion Five: National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

Member States shall take into account:

(a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;

(b) the risk of use of the military technology or equipment concerned against their forces or those of Member States and those of friendly and allied countries.

6. Criterion Six: Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.

Member States shall take into account, *inter alia*, the record of the buyer country with regard to:

(a) its support for or encouragement of terrorism and international organised crime;

(b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;

(c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion One.

7. Criterion Seven: Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

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In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, the following shall be considered:

(a) the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;

(b) the technical capability of the recipient country to use such technology or equipment;

(c) the capability of the recipient country to apply effective export controls;

(d) the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;

(e) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;

(f) the risk of reverse engineering or unintended technology transfer.

8. Criterion Eight: Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.

Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

Article 3

This Common Position shall not affect the right of Member States to operate more restrictive national policies.

Article 4

1. Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an explanation of why the licence has been denied. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it shall first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

2. The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or export of the military technology or equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

3. Member States shall keep such denials and consultations confidential and not use them for commercial advantage.

Article 5

Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination. When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user.

Article 6

Without prejudice to Regulation (EC) No 1334/2000, the criteria in Article 2 of this Common Position and the consultation procedure provided for in Article 4 are also to apply to Member States in respect of dual-use goods and technology as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country. References in this Common Position to military technology or equipment shall be understood to include such goods and technology.

Article 7

In order to maximise the effectiveness of this Common Position, Member States shall work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of exports of military technology and equipment.

Article 8

1. Each Member State shall circulate to other Member States in confidence an annual report on its exports of military technology and equipment and on its implementation of this Common Position.

2. An EU Annual Report, based on contributions from all Member States, shall be submitted to the Council and published in the 'C' series of the *Official Journal of the European Union*.

3. In addition, each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology and equipment, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of this Common Position as stipulated in the User's Guide.

Article 9

Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position.

Article 10

While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria.

Article 11

Member States shall use their best endeavours to encourage other States which export military technology or equipment to apply the criteria of this Common Position. They shall regularly exchange experiences with those third states applying the criteria on their military technology and equipment export control policies and on the application of the criteria.

Article 12

Member States shall ensure that their national legislation enables them to control the export of the technology and equipment on the EU Common Military List. The EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

Article 13

The User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position.

Article 14

This Common Position shall take effect on the date of its adoption.

Article 15

This Common Position shall be reviewed three years after its adoption.

Article 16

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 8 December 2008.

For the Council

The President

B. KOUCHNER

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COMMITTEE ON INTERNATIONAL RELATIONS
COMMITTEE ON FOREIGN RELATIONS

Legislation on Foreign Relations Through 2002

JULY 2003

VOLUME I–A
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CURRENT LEGISLATION AND
RELATED EXECUTIVE ORDERS

U.S. HOUSE OF REPRESENTATIVES

U.S. SENATE

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[106th Congress Public Law 429]
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[[Page 114 STAT. 1900]]

Public Law 106-429
106th Congress

An Act

Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2001, and for other purposes. <<NOTE: Nov. 6, 2000 - [H.R. 4811]>>

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 101. <<NOTE: Incorporation by reference.>> (a) The provisions of H.R. 5526 of the 106th Congress, as introduced on October 24, 2000, are hereby enacted into law.

(b) <<NOTE: Publication. 1 USC 112 note.>> In publishing this Act in slip form and in the United States Statutes at Large pursuant to section 112 of title 1, United States Code, the Archivist of the United States shall include after the date of approval at the end an appendix setting forth the text of the bill referred to in subsection (a) of this
section.

Approved November 6, 2000.

LEGISLATIVE HISTORY--H.R. 4811 (S. 2522):

HOUSE REPORTS: No. 106-720 (Comm. on Appropriations) and No. 106-997 (Comm. of Conference).
SENATE REPORTS: No. 106-291 accompanying S. 2522 (Comm. on Appropriations).
CONGRESSIONAL RECORD, Vol. 146 (2000):
July 12, 13, considered and passed House.
July 18, considered and passed Senate, amended, in lieu of S. 2522.
Oct. 25, House and Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 36 (2000):
Nov. 6, Presidential statement.

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(1) a natural person who is a citizen or national of the United States; or

(2) a corporation, partnership, or other legal entity organized under the United States or any State, territory, possession, or district of the United States.

haiti coast guard

Sec. 561. The Government of Haiti shall be eligible to purchase defense articles and services under the Arms Export Control Act (22 U.S.C. 2751 et seq.), for the Coast Guard: Provided, That the authority provided by this section shall be subject to the regular notification procedures of the Committees on Appropriations.

limitation on assistance to the palestinian authority

Sec. 562. (a) Prohibition of Funds.--None of the funds appropriated by this Act to carry out the provisions of chapter 4 of part II of the Foreign Assistance Act of 1961 may be obligated or expended with respect
to providing funds to the Palestinian Authority.

(b) Waiver.--The prohibition included in subsection (a) shall not apply if the President certifies in writing to the Speaker of the House of Representatives and the President pro tempore of the Senate that waiving such prohibition is important to the national security interests
of the United States.

(c) Period of Application of Waiver.--Any waiver pursuant to subsection (b) shall be effective for no more than a period of 6 months at a time and shall not apply beyond 12 months after the enactment of this Act.

limitation on assistance to security forces

Sec. 563. None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of
the security forces unit to justice: Provided, That nothing in this section shall be construed to withhold funds made available by this Act from any unit of the security forces of a foreign country not credibly alleged to be involved in gross violations of human rights: Provided further, That in the event that funds are withheld from any unit pursuant to this section, the Secretary of State shall promptly inform the foreign government of the basis for such action and shall, to the maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice.

restrictions on assistance to countries providing sanctuary to indicted war criminals

Sec. 564. (a) Bilateral Assistance.--None of the funds made

CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST–8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

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document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest,

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due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : " Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? "

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In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. " But the Prosecution," said the Judge Advocate, " ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.
Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that " among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

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