

Of Fragmentation and Precedents in International Criminal Law

Possible Lessons from Recent Jurisprudence on Aiding and Abetting Liability

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Abstract

Following highly divergent approaches taken by judges in the Perišić, Taylor and Šainović judgments, the dispute over the application of the standard of 'specific direction' as an element of actus reus of aiding and abetting liability appears to have been settled within the subsequent jurisprudence of the ad hoc international criminal tribunals. Yet the various legal issues raised by the judgments continue to vex: viewing this particular line of cases as mere instances of 'fragmentation' of international criminal law (ICL) would be a superficial exercise. After discussing the notion of 'fragmentation' and the value of using the metaphor in the context of ICL, the author turns to substantive criminal law to try and determine the correct actus reus of aiding and abetting liability in contemporary ICL, and to ask whether 'specific direction' has any role to play therein. He then addresses the more general problem of determining the role of coherence and consistency in the development of ICL, the function of precedents within and across international courts and tribunals, and the evolving role and function of customary international law in contemporary ICL to draw lessons for the International Criminal Court.

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1. Introduction

In less than a year, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) reached two opposite conclusions on the same legal issue. In *Perišić* (judgment of 28 February 2013),¹ it held that ‘specific direction’ is a constitutive element of the *actus reus* of ‘aiding and abetting’ liability and that, therefore, a conviction under this mode of liability could be entered only if it is proven that the conduct of the aider and abettor is specifically directed to the commission of a crime.² By contrast, in *Šainović* (judgment of 23 January 2014),³ the ICTY Appeals Chamber (in a partially different composition)⁴ determined that ‘specific direction’ is not an element of the *actus reus* of aiding and abetting liability.⁵

Amidst this unprecedented jurisprudential U-turn stood the Appeals Chamber of the Special Court for Sierra Leone (SCSL), which in the *Taylor* case was required to determine whether or not to adhere to the *Perišić* precedent.⁶ Under Article 20(3) of the SCSL Statute, which provides that the judges of the SCSL Appeals Chamber ‘shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda’, the SCSL Appeals Chamber was entitled (if not required) to adhere to the *Perišić* precedent.⁷ However, in a remarkable display of judicial independence, it chose not to do so. Rather than follow the *Perišić* precedent, the SCSL

- 1 Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011 (*‘Perišić Trial Judgment’*). For an analysis of the judgment, see N. Koumjian and C. Kenny, ‘Specific Direction: The ICTY’s “Novel” Attempt to Regulate State Action’, 8 *Irish Yearbook of International Law* (2013) 3, at 6; M.J. Ventura, ‘Farewell ‘Specific Direction’: Aiding and Abetting War Crimes and Crimes Against Humanity in *Perišić*, Taylor, *Šainović* et al., and US Alien Tort Statute Jurisprudence’, in S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (Oxford University Press, 2014) 511, at 513–517.
- 2 Judgment, *Perišić* (IT-04-81-A), Appeals Chamber, 28 February 2013, §§ 25–36 (*‘Perišić Appeal Judgment’*). On 6 September 2011, *Perišić* — former Chief of the General Staff of the Yugoslav Army until 1998 — was found guilty of war crimes and crimes against humanity and sentenced to 27 years imprisonment. Finding that the available evidence was not sufficient to prove the requirement of ‘specific direction’ on 28 February 2013, the Appeals Chamber acquitted him of all charges. See *Perišić Trial Judgment*, *ibid.*, §§ 45–74.
- 3 Judgment, *Šainović et al.* (IT-05-87-A), Appeals Chamber, 23 January 2014 (*‘Šainović Appeal Judgment’*).
- 4 The judges composing the Appeals Chamber in the *Perišić* Appeal Judgment case were: Meron, Agius, Liu, Ramarossion, Vaz. The judges composing the Appeals Chamber in the *Šainović* Appeal Judgment were: Liu, Güney, Pocar, Ramarossion, Tuzmukhamedov. Judges Liu and Ramarossion sat in both cases.
- 5 *Šainović* Appeal Judgment, *supra* note 3, §§ 1626–1651.
- 6 Judgment, *Taylor* (SCSL-03-01-A), Appeals Chamber, 26 September 2013 (*‘Taylor Appeal Judgment’*).
- 7 On the notion of precedent, see G. Acquaviva and F. Pocar, ‘Stare Decisis’, in M. Planck (ed.), *Encyclopedia of Public International Law* (Oxford University Press, 2008), available online at <http://www.mpepil.com> (visited 16 January 2016). On the role of ‘precedents’ in the field of ICL, see also A. Zammit Borda, ‘How Do International Judges Approach Competing Precedent? An Analysis of the Practice of International Criminal Courts and Tribunals in Relation to Substantive Law’, 15 *International Criminal Law Review (ICLR)* (2015) 124–146.

Appeals Chamber backed the SCSL Trial Chamber's conclusion that the 'substantial contribution' to the commission of a crime by the aider and abettor is sufficient to establish his criminal responsibility.⁸ As mentioned above, only a few months later, the *Šainović* Appeals Chamber came to the same conclusion and overruled the *Perišić* precedent.

Subsequently, the ICTY Appeals Chamber has upheld the conclusion reached in *Šainović* concerning specific direction in the cases *Popović et al.*⁹ and *Stanišić and Simatović*.¹⁰ At this point, therefore, the dispute over the application of the standard of 'specific direction' within the ICTY jurisprudence appears to be settled.¹¹ Yet the various legal issues that this line of cases raised are not. As they affect the application and development of international criminal law (ICL), they require careful consideration. From a substantive criminal perspective, it needs to be determined what the correct *actus reus* of aiding and abetting liability in contemporary ICL should be, and whether the notion of specific direction has any role to play therein.¹² From a more general and

8 *Taylor* Appeal Judgment, *supra* note 6, § 481.

9 Judgment, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 1758 ('*Popović* Appeal Judgment'). The judges sitting in this case were: Robinson, Sekule, Pocar, Ramarosson, Niang.

10 Judgment, *Stanišić and Simatović* (IT-03-69-A), Appeals Chamber, 9 December 2015, §§ 103–107 ('*Stanišić and Simatović* Appeal Judgment'). The judges sitting in this case were: Pocar, Agius, Liu, Ramarosson, Afande. Judge Agius and Judge Afande appended dissenting opinions. See 'Separate and Dissenting Opinion of Judge Agius', §§ 6–7 and 'Dissenting Opinion of Judge Afande', §§ 22–31.

11 See in this regard J.G. Stewart, 'Judicial Rejection of "Specific Direction" Is Widespread', Blogpost, 23 December 2015, §§ 1–4, available online at <http://jamesgstewart.com/judicial-rejection-of-specific-direction-is-widespread/> (visited 16 January 2016). It is a separate question whether the jurisprudence of the ad hoc tribunals is binding on the Mechanism for International Criminal Tribunals (MICT). Security Council Resolution 1966 (2010), which set up the MICT, does not contain a provision on the point. An affirmative answer could be based on § 4 of Resolution 1966, which appears to frame the MICT as the successor of the ICTY and ICTR when it provides that 'the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR'. That said, the absence in the statute of the MICT of a specific provision dedicated to the relevance of the ICTY and ICTR jurisprudence for the MICT would probably make it necessary for a MICT Chamber to articulate the reason(s) for adhering (or not) to the jurisprudence of its predecessor.

12 This article does not take a position on the substantive question of whether 'specific direction' or 'substantial contribution' should be the correct standard for aiding and abetting liability in ICL. See on this issue the dissenting opinion of Judge K.K.A. Afande appended to the *Stanišić and Simatović* Appeal Judgment, *supra* note 10, §§ 22–31. For scholarly analyses, see J. Trahan and E.K. Lovall, 'The ICTY Appellate Chamber's Acquittal of Momčilo Perišić: The Specific Direction Element of Aiding and Abetting Should Be Rejected or Modified to Explicitly Include a "Reasonable Person" Due Diligence Standard', 40 *Brooklyn Journal of International Law* (2014) 172–206; L.N. Sadat, 'Can the ICTY *Šainović* and *Perišić* Cases Be Reconciled?', 108 *American Journal of International Law* (2014) 475, 485; A. Coco and T. Gal, 'Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in *Perišić*', 12 *Journal of International Criminal Justice (JICJ)* (2014) 345–366; Koumjian and Kenny, *supra* note 1, at 22; M. Aksenova, 'The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law', 4 *Cambridge Journal of International and Comparative Law* (2015) 88, at 103–106; and Ventura, *supra* note 1, at 525–553.

theoretical perspective, the problem arises of determining the role of coherence and consistency in the development of ICL;¹³ the function of precedents within and across international courts and tribunals;¹⁴ and the evolving role and function of customary international law (CIL) in contemporary ICL, particularly given the consolidation of the International Criminal Court's (ICC) regime.¹⁵ It is to the analysis of this second set of issues that this article hopes to contribute.

The fluctuating jurisprudence in the *Perišić*, *Taylor* and *Šainović* judgments — which could have been even more puzzling had the SCSL Appeals Chamber embraced the soon-to-be overturned *Perišić* precedent — unveils a rather alarming truth. More than 20 years after the establishment of the ICTY and the ICTR, and more than 10 years since the coming into force of the ICC Statute and the establishment of the SCSL (2002), there are norms of ICL the content of which appears uncertain and volatile, notwithstanding their frequent application.¹⁶ This diverging jurisprudence is not the result of differently worded provisions in the texts of the Statutes of different courts, which

The matter has also been discussed, from various perspectives and touching different issues, in the blogosphere. See, among others, K.J. Heller, 'More Misdirection on Specific Direction', *Opinio Juris*, 13 August 2013, available online at <http://opiniojuris.org/2013/08/13/yet-more-specific-direction-misdirection/> (visited 16 January 2016) and by the same author, 'Why the ICTY's "Specifically Directed" Requirement is Justified', *Opinio Juris*, 2 June 2013 available online at <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/> (visited 13 January 2016); J. Stewart, '“Specific Direction” is Unprecedented: Results from Two Empirical Studies', *EJIL: Talk!*, 4 September 2013, available online at <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/> (visited 16 January 2016) and also by the same author, '“Specific Direction” is Indefensible: A Response to Heller on Complicity', *Opinio Juris*, 12 June 2013, available online at <http://opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity/> (visited 16 January 2016); J.D. Ohlin, 'Specific Direction Again', *Opinio Juris*, 17 December 2015, available online at <http://opiniojuris.org/2015/12/17/specific-direction-again/> (visited 16 January 2016).

- 13 See G. Acquaviva, 'Aiding and Abetting International Crimes and the Value of Judicial Consistency: Reflections Prompted by the *Perišić*, *Taylor* and *Sainović* Verdicts', 3 *Questions of International Law (QIL)* (2014) 3–21; J.N. Clark, '“Specific Direction” and the Fragmentation of International Jurisprudence on Aiding and Abetting: *Perišić* and Beyond', 15 *ICLR* (2015) 411–451. In the blogosphere see, among others, M. Milanovic, 'The Self-Fragmentation of the ICTY Appeals Chamber', *EJIL: Talk!*, 23 January 2014, available online at <http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/> (visited 13 January 2016).
- 14 See, generally, Zammit Borda, *supra* note 7.
- 15 On this matter, see D. Jacobs, 'The Mythical Unities of International Criminal Law: Some Thoughts on *Perišić*, *Taylor* and *Sainović*', 3 *QIL* (2014) 23, 29–31; L. van den Herik, 'The Decline of Customary International Law as a Source of International Criminal Law', in C. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2015) 230–252.
- 16 The uncertainty of the Appeals Chamber is made evident by Judges Meron and Agius's Separate Opinion, when, rather openly, they state: '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.' See the Joint Separate Opinion of Judges Theodor Meron and Carmel Agius in *Perišić* Appeal Judgment, *supra* note 1, § 4.

were, in fact, the same. Rather, as discussed below, it reflects methodological and interpretative differences over the ascertainment of the content of the applicable law between differently composed judicial benches.¹⁷

One could argue that normative conflicts are part of the physiology of international criminal justice, given that 'even within well-structured and hierarchized domestic systems, there are often discrepancies in the interpretation of the law between appeal chambers or even between different decisions of the Supreme Court'.¹⁸ However, the discrepancies at hand extend beyond 'business as usual'. Nor do they concern an uncharted area of ICL, where disagreements may occur as a matter of course due to the novelty of an issue. These disagreements pertain to the core issues of everyday international criminal justice — the definition of a constitutive element of a mode of liability routinely employed to convict international offenders. Therefore, they cast a shadow over the credibility of international criminal justice as a normative regime at a time when such credibility is most needed.¹⁹

These discrepancies may be attributed to the limits of an unwritten and under-inclusive ICL based on CIL, which could be tackled through codification, such as the ICC Statute has sought to do.²⁰ As codification is difficult to achieve, however, leaving the clarification of the applicable law to this means alone is insufficient. It falls on judges, as part of their duty to exercise the judicial function fairly and effectively, to ensure a reasonable degree of stability and predictability in the application and development of ICL.

Upon review of the approaches followed by the judges in the *Perišić*, *Taylor* and *Šainović* judgments, this article argues that viewing these cases as mere instances of 'fragmentation' may be a superficial exercise. Among these cases, in fact, the *Taylor* and *Šainović* judgments are to be singled out as they sought to rein in diverging streams of jurisprudence in order to achieve a reasonable degree of stability and predictability in the context of the applied law. After discussing the notion of 'fragmentation' and the value of using the fragmentation metaphor in the context of ICL, this article enquires as to what could be learnt from these cases in terms of countering fragmentation, specifically whether CIL can be a tool for limiting fragmentation within ICL.

17 Art. 6(1) SCSLSt. (individual criminal responsibility) reads: '1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime'. Art. 7(1) ICTYSt. (individual criminal responsibility) provides '1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime'.

18 Jacobs, *supra* note 15, at 37.

19 According to L. Sadat, 'International criminal justice is in its infancy and is not yet accepted as either useful or relevant by many, not just the defendants being tried. Powerful governments, distinguished scholars, and learned jurists have forcefully and persistently argued that international criminal justice is neither legitimate nor appropriate as a response to mass atrocities.' Sadat, *supra* note 12, at 485.

20 Jacobs, *supra* note 15, 27–33.

2. The Concept of ‘Fragmentation’ in the Field of ICL

The noun ‘fragmentation’ refers to the ‘action of breaking something into fragments.’²¹ In the field of international law, this term has been used in connection with two trends seen as dangerous by advocates of the unity of international law: the emergence of self-contained regimes and the proliferation of international courts and tribunals.²²

Albeit part of international law, ICL is a distinct legal regime with its own aspirations and exigencies. Hence, the term ‘fragmentation’ should not be understood within the regime of ICL in the same way as in the system of international law writ large. In the field of ICL, the term ‘fragmentation’ may be useful from a descriptive, if not a metaphoric, perspective to draw attention to processes that could make ICL less clear than it should be. That term has, in fact, enough depth to convey the sense of precariousness, or of broken expectations, that result when the content of the applicable law — which is expected, as a *condicio sine qua non* for its existence and authority, to be reasonably clear and predictable — becomes blurred. A blurred law is unable to do what is expected: to provide guidance to those it addresses.

It would be inaccurate, however, to use the term ‘fragmentation’ to imply the breaking of a unity that ICL never had.²³ ICL is a pluralist legal regime²⁴ resulting from the unsystematic conflation of norms originating from public international law (and its various branches, such as international humanitarian and human rights law) and domestic criminal laws.²⁵ The terminology of fragmentation, however, can still serve a useful purpose in such a pluralist regime. In fact, pluralism, as noted by Elies van Sliedregt, does imply and require a certain degree of ‘commonness.’²⁶ Remove something that glues together a pluralist regime and it would remain ‘pluralist’, but it would stop being a ‘regime’ as there would be nothing regimenting it. What appears to be gluing ICL together

21 See the entry ‘Fragmentation’, in *Shorter Oxford Dictionary English Dictionary*, Vol. I (5th edn., Oxford University Press, 2012), at 1026.

22 See, in particular, C. Stahn and L. van den Herik, ‘Fragmentation, Diversification and “3D” Legal Pluralism: International Criminal Law as the Jack-In-The Box’, in C. Stahn and L. van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012) 21, 56; see also, among others, T. Treves, ‘Fragmentation of International Law: The Judicial Perspective’, 27 *Agenda Internacional* (2009) 213, 214; R. Higgins, ‘A Babel of Judicial Voices? Rumination from the Bench’, in R. Higgins (ed.), *Themes and Theories* (Oxford University Press, 2009) 1255–1256; and G. Gaja, ‘Relationship of the ICJ with Other International Courts and Tribunals’, in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice* (Oxford University Press, 2012), at 533.

23 E. van Sliedregt and S. Vasiliev, ‘Pluralism: A New Framework for International Criminal Justice’, in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014) 3, 16.

24 *Ibid.*, at 15–20.

25 *Ibid.*; see also C. Steer, ‘Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law’, in van Sliedregt and Vasiliev (eds), *supra* note 23, at 55–56.

26 E. van Sliedregt, ‘Pluralism in International Criminal Law’, 25 *Leiden Journal of International Law (LJIL)* (2012) 847, at 851.

and justifying its growth is the shared aspiration of the international community of states — though with varying degrees of commitment — to ensure the effective and fair prosecution of international crimes.²⁷

It is this ‘commonness’ that needs to be protected against fragmentation through appropriate mechanisms. Fragmentation stands in the way of achieving that aspiration, as it could make the applicable law less stable and predictable than it should be. Such stability and predictability is necessary to ensure that: (i) the parties — especially accused — are informed of the content of the applicable law so that they can adequately prepare; and that (ii) like cases are treated alike, so that the guilt or innocence of an individual does not depend on the identity of the judges before whom one happens to stand accused.²⁸ Moreover, it is only by being reasonably predictable and stable (though not necessarily static) that ICL can act as a deterrent for future offenders and provide guidance to national courts that are required to apply customary ICL.

Asserting the need for a stable and predictable ICL is not to ask for full uniformity in its doctrine and practice. Not only are there differences between international and domestic jurisdictions, but the plurality of international judicial institutions operating within the field of international criminal justice is also an opportunity for cross-fertilization and a space for the debate and contestation of different views.²⁹ That said, caution is necessary. If those called to administer ICL do not appreciate the importance of a coherent normative regime and search for it through appropriate choices and techniques, then the risk that, because of fragmentation, ICL’s healthy and dynamic pluralism

27 R. Cryer et al., *An Introduction to International Criminal and Procedure* (3rd edn., Cambridge University Press, 2014), at 28–46.

28 Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber 24 March 2000, §§ 104–107 (*Aleksovski Appeal Judgment*). In §§ 104, 105 and 107 of this judgment, the ICTY Appeals Chamber stated:

104. The right of appeal is a component of the fair trial requirement 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.

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’ [emphasis added].

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 [emphasis added].

29 For an outline of the benefits of a pluralist international law, see N. Krisch, *Beyond Constitutionalism* (Oxford University Press, 2010), at 69–89. To be precise, Krisch’s analysis does not discuss ICL; however, I believe that some of the arguments he develops on the advantages of a pluralist international law can, *mutatis mutandis*, be pertinent also with regard to the regime of ICL.

will be replaced by particularism, if not anarchy, is at its zenith.³⁰ The worrisome scenario of fragmentation may occur (i) in the practice of a single judicial body, as it would blur the content of the applicable law and impede the formation of a reasonably clear and coherent body of jurisprudence; and (ii) across different courts and tribunals whenever they apply the same norms of ICL.

True, there is no rule of international precedent, whereby one tribunal is required to adhere to the holdings of law or fact of another tribunal. Moreover, each international tribunal is required to apply primarily its Statute, the content of which differs from one tribunal to another. Nevertheless, there may be instances in which different courts or tribunals are to apply the same norms because they face the same or similar factual scenario. This may happen when the wording in their Statutes happens to be identical, such as in the cases under examination here. It may also occur when different courts and tribunals have to turn — in the absence of specific provisions in their Statutes — to the same body of law, such as CIL on matters of human rights and international humanitarian law and on issues of general international law. Without expecting absolute uniformity of interpretations, I believe that in such scenarios the legitimate quest for change, development and refinement of the applicable law should be accompanied (and hence balanced) by judicial caution³¹ and restraint³² to ensure a coherent application and development of ICL: in other words, to ensure that ICL is one law only and not many.

30 Giovanni Tarello, an Italian scholar of the history of modern law, spoke of *particolarismo giuridico* (juridical particularism) to indicate the lack of unity and coherence of the applicable law in a given spatial–temporal framework where one would expect to find unity and coherence of the applicable law. In using this expression, Tarello was describing the situation that existed for centuries in several European countries before the advent of the penal and civil law codes. However, I submit that this characterization is also pertinent to illustrate the perils associated with processes of fragmentation in a contemporary perspective, and particularly in the field of ICL. G. Tarello, *Storia della cultura giuridica moderna* (Il Mulino, 1976), at 29.

31 On the concept of ‘judicial caution’, see H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger Publisher, 1958), at 75–84.

32 An example of judicial restraint can be found in Judge Shahabuddeen’s Declaration appended to *Orić* (Judgment (IT-03-68-A), Appeals Chamber, 3 July 2008), especially at §§ 13–15. Faced with the question of whether to agree to reverse the interlocutory appeal decision of the Appeals Chamber in the *Hadžihasanović* case (16 July 2003) in that part that, under Art. 7(3) ICTYST., had denied the responsibility of a commander for the conduct of his subordinates prior to his assumption of office, the learned judge refrained from doing so even though he had expressly dissented from the conclusion of the majority of the Appeals Chamber in that case. He dissented, considering that ‘A decision to reverse turns upon more than theoretical correctness; it turns upon larger principles concerning the maintenance of the jurisprudence, judicial security and predictability. Included in those principles is, I believe, a practice for a judge to observe restraint in upholding his own dissent.’ He added: ‘Thus, I do not assert that a dissenting judge can never form part of a subsequent majority upholding his earlier dissent, but I think that the preferred lesson of the cases is that he is expected to do so with economy.’ He came to the following conclusion: ‘Since I was one of the two dissenting judges in the earlier case (the other has since demitted office in the ICTY), I consider that, in the circumstances of the present case, a reversal should await such time when a more solid majority shares the views of those two judges. Meanwhile, the decision in *Hadžihasanović* continues to stand as part of the law of the Tribunal.’

3. Prompting Fragmentation: *The Perišić Appeal Judgment*

The *Perišić* Appeals Chamber purported to follow the *Tadić* Appeal Judgment of 15 July 1999³³ in finding that the assistance provided by the aider and abettor had to be ‘specifically’ directed to the commission of one or more crimes, rather than merely connected to them ‘in some way’.³⁴ In doing so, it presented the *Tadić* Appeal Judgment as a ‘well-settled precedent’ that indicated that ‘specific direction is a necessary element of aiding and abetting liability’.³⁵ The overall effort of the *Perišić* Appeals Chamber to treat the jurisprudence of the ICTY as consistent is unconvincing, however, as diverging approaches had emerged over the years.

Although recognizing that ‘certain appeal judgements rendered after the *Tadić* Appeal Judgement made no explicit reference to specific direction’, the *Perišić* Appeals Chamber opined that some of these judgments had nonetheless used ‘alternative but equivalent formulations’ to that of ‘specific direction’.³⁶ The Appeals Chamber also asserted that ‘no judgment of the Appeals Chamber has found cogent reasons to depart from the definition of “aiding and abetting liability” adopted in the *Tadić* Appeal Judgement’,³⁷ but it questioned the persuasiveness of other judgments merely on the basis that they had taken different approaches. Thus with regard to the *Mrkšić and Šljivančanin* Appeal Judgment, the *Perišić* Appeals Chamber stated that this judgment had erroneously departed from settled jurisprudence when ‘stating that specific direction is not an element of the *actus reus* of aiding and abetting’.³⁸ It remarked — rather pointedly — that, even if it is correct to say that the *Mrkšić and Šljivančanin* Appeal Judgment had taken a different approach from the *Tadić* Appeal Judgment, this did not reflect an ‘intention to depart

33 In *Tadić* (Judgment (IT-94-I-A), Appeals Chamber, 15 July 1999 (*‘Tadić Appeal Judgment’*) § 229), the ICTY Appeals Chamber stated:

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 [emphasis added].

34 *Perišić* Appeal Judgment, *supra* note 1, § 27.

35 *Ibid.*, § 41.

36 *Ibid.*, § 29.

37 *Ibid.*, § 28.

38 *Ibid.*, § 32.

from the settled precedent established by the *Tadić* Appeal Judgement.³⁹ But what was for the *Perišić* Appeals Chamber to assess, it may be suggested, was not the intention of the ICTY *Mrkšić and Šljivančanin* Appeals Chamber, but the more concrete question of whether this latter judgment had, in fact, departed from the *Tadić* Appeal Judgment and if this departure was erroneous or not. If such a departure had occurred and if it was erroneous, it fell on the *Perišić* Appeals Chamber to explain why it was so in order to validate its reasoning and conclusions.

Further, the *Perišić* Appeals Chamber's reliance on the *Tadić* Appeal Judgment for the adoption of 'specific direction' was flawed by what James Stewart aptly calls 'a misreading of casual language in *Tadić*'.⁴⁰ The *Perišić* Appeals Chamber adhered uncritically to the conclusion reached in that judgment without discussing the *ratio decidendi* underlying it, which was, in fact, missing. This circumstance should have cautioned the *Perišić* Appeals Chamber against embracing that 'precedent'. Nor did the Appeals Chamber contemplate the possibility that the holding in *Tadić* could be a mere *obiter dictum* — as it was — made *in passim* in the context of a section of the judgment exclusively concerned with defining and setting the boundaries of the mode of liability of joint criminal enterprise. In short, it took out of context a *dictum* of the Appeals Chamber and conferred the status of leading precedent to a section of a judgment that did not enjoy it (as the differing attitude towards it of other Chambers — both at trial and in appeal — had made evident). Moreover, by questioning the persuasiveness of other judgments rendered by the ICTY Appeals Chamber merely on the basis that they had taken a different approach, the *Perišić* Appeals Chamber entrenched existing divisions within the ICTY practice, missing an opportunity to unite its jurisprudence under a common denominator. Due in part to these flaws, the *Perišić* Appeal Judgment was not followed by other courts and was quickly reversed.

4. Preventing Fragmentation: the *Taylor* Appeal Judgment

While acknowledging the requirement contained in Article 20(3) of its Statute that it be 'guided by' the decisions of the ICTR and ICTY Appeals Chamber, the SCSL Appeals Chamber took the view that when 'applying the Statute and customary international law', it is itself the 'final arbiter of the law for this

39 *Ibid.* Moreover, as Manuel Ventura has observed, the *Perišić* Appeals Chamber did not discuss the fact that another bench of the ICTY Appeals Chamber in *Lukić and Lukić* (judgment of 4 December 2012) had adhered to the *Mrkšić and Šljivančanin* Appeal Judgment in stating that 'specific direction is not an essential element of aiding and abetting liability'. Ventura, *supra* note 1, at 518.

40 Stewart, *supra* note 11, at 2. For Jens Ohlin, the reasoning of the *Perišić* Appeals Chamber amounts to a 'house of cards built upon a strained reading of three words that were originally drafted, *as dicta*, in the original *Tadić* opinion'. Ohlin, *supra* note 12.

Court⁴¹ and that, therefore, 'decisions of other courts are only persuasive, not binding, authority'.⁴² By so reasoning,⁴³ the SCSL Appeals Chamber was able to bypass Article 20(3), to depart from the precedent set in the *Perišić* Appeal Judgment, and to engage in a critical review of the practice of the ICTY.

The *Taylor* Appeals Chamber was quick to note that 'it is presumed that the ICTY Appeals Chamber in *Perišić* was only identifying and applying internally binding precedent'.⁴⁴ It criticized the *Perišić* Appeal Judgment for having limited its analysis 'to its prior holdings and the holdings of the ICTR Appeals Chamber, which is the same body' and for overlooking that the *Tadić* Appeal Judgment 'did not ... canvas customary international law regarding the elements for aiding and abetting liability',⁴⁵ with its reasoning being instead 'confined to explaining the differences between aiding and abetting liability and joint criminal enterprise liability'.⁴⁶ The *Taylor* Appeals Chamber also looked to other ICTY case law. Unlike the *Perišić* Appeals Chamber, the SCSL Appeals Chamber found that the *Mrkšić and Šljivančanin* Judgment had correctly stated the applicable law when finding that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting.⁴⁷ It also noted that the subsequent *Lukić and Lukić* Appeal Judgment had taken the same approach as the *Mrkšić and Šljivančanin* Appeal Judgment.⁴⁸ It concluded by stating that the 'essential question is whether the acts and conduct of an accused can be said to have had a substantial effect on the commission of the crime charged'.⁴⁹ Therefore, even before the *Šainović* Appeal Judgment, the SCSL Appeals Chamber had concluded that the approach of the *Perišić* Appeals Chamber was not only unpersuasive, but also flawed.

41 *Taylor* Appeal Judgment, *supra* note 6, § 472.

42 *Ibid.*

43 This interpretation accords with earlier jurisprudence of the SCSL Appeals Chamber, but such a departure from Art. 20(3) of the SCSL Statute would seem to require — if that provision is taken literally — a higher test than that of the mere lack of 'persuasiveness'. See in Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for non-Public Disclosure, *Norman* (SCSL-2003-08-PT), 23 May 2003, § 11, in which Judge Thomson, sitting as single judge, stated: 'Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY, it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court.' See also Decision on Amendment of the Consolidated Indictment, *Norman* (SCSL-04-14-AR73), Appeals Chamber, 16 May 2005, § 46.

44 *Taylor* Appeal Judgment, *supra* note 6, § 476.

45 *Ibid.*, § 478.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*, § 479.

49 *Ibid.*, §§ 368, 389, 491.

It is difficult to imagine that judicial review by the SCSL of the practice of ICTY is what the drafters of Article 20(3) of the Statute had in mind. On the face of it, therefore, the attitude of the SCSL favoured fragmentation in that it countenanced the challenging of precedent that it was supposed to follow, thus creating uncertainty. At a closer look, however, this argument is not persuasive. The approach of the SCSL Appeals Chamber enabled it to maintain consistency within the practice of the SCSL, which had never relied on the standard of ‘specific direction’. Moreover, the SCSL Appeals Chamber went on to demonstrate the coherence of that practice by turning to CIL. Following a review of the Nuremberg case law, the ICC Statute and other materials, it concluded that ‘the *actus reus* of aiding and abetting liability’ under both ‘Article 6(1) of the Statute and customary international law’ is satisfied when a given ‘conduct of assistance, encouragement and/or moral support’ has ‘a *substantial effect* on the commission of a crime, not when specifically directed to it.’⁵⁰

By so reasoning, rather than rigidly adhering to Article 20(3) of its Statute, the SCSL Appeals Chamber was able to confirm the validity of the practice followed by the SCSL Chambers and, indirectly, provide a reasonable justification for Charles Taylor’s conviction notwithstanding the Trial Chamber’s reliance on a standard lower than that of ‘specific direction’. Moreover, as elaborated in the following section, the choice of the SCSL Appeals Chamber paved the way for the two Appeals Chambers of the SCSL and the ICTY to come to a common and coherent conclusion on the content of the applicable CIL.

5. Halting Fragmentation: the *Šainović* Appeal Judgment and the Subsequent Jurisprudence

Less than a year later, the *Šainović* Appeals Chamber took an altogether different approach from the *Perišić* Appeals Chamber. It found that the approach followed in *Perišić* was ‘in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law’.⁵¹ It recognized that the ICTY’s case law was neither united nor consistent, contrary to what the *Perišić* Appeals Chamber had recorded. It characterized the case law of the ICTY as divided between, on the one hand, the ‘*Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgements’, which had used the standard of ‘substantial contribution’, and on the other hand, the *Perišić* Appeal Judgment, which had employed the stricter standard of ‘specific direction’.⁵² It also criticized the *Perišić* Appeals Chamber for relying on the ‘flawed premise that the *Tadić* Appeal Judgement established a precedent with regard to specific direction’.⁵³ This reliance was erroneous, said the *Šainović* Appeals Chamber, because the ‘delineation of accessory

50 *Ibid.*, § 481.

51 *Ibid.*, § 1650.

52 *Šainović* Appeal Judgment, *supra* note 3, §§ 1620–1622.

53 *Ibid.*, § 1623.

liability' made in the *Tadić* Appeal Judgment only served the purpose of 'contrasting JCE [i.e. joint criminal enterprise] liability with that of aiding and abetting' and did not amount to 'a comprehensive statement of aiding and abetting liability'.⁵⁴ Furthermore, it underlined that already the *Čelebići* Appeal Judgment (20 February 2001) — a decision not discussed by the *Perišić* Appeals Chamber — had 'explicitly endorsed a definition of aiding and abetting liability that neither refers to specific direction nor contains equivalent language'.⁵⁵

The *Šainović* Appeals Chamber tackled these discrepancies by relying on a methodology that the *Aleksovski* Appeal Judgment had devised more than 10 years earlier.⁵⁶ In that case, the ICTY Appeals Chamber had, with considerable foresight, devised a precedential mechanism, under which — 'in the interests of certainty and predictability' — decisions rendered by the Appeals Chamber were binding on Trial Chambers and on future Appeals Chambers,⁵⁷ although leaving open the possibility for an Appeals Chamber to depart from a precedent 'for cogent reasons in the interests of justice'.⁵⁸ Moreover, it had also outlined the procedure to be followed by an Appeals Chamber facing divisions within the jurisprudence of the ICTY.⁵⁹ In accordance with this mechanism, the *Šainović* Appeals Chamber set as its task (i) to 'determine which decision it will follow' in cases of divergences, or (ii) to depart from 'both decisions for cogent reasons in the interests of justice'.⁶⁰ Aptly, the Appeals Chamber remarked that this task flowed from 'its duty to act in the interests of legal certainty and predictability while ensuring that justice is done in all cases'.⁶¹

By doing so, the *Šainović* Appeals Chamber assumed a task that can be considered akin to that of a 'Supreme Court'. It took the responsibility of deciding which of the two views matured in the case law was correct. Most aptly from the perspective of avoiding fragmentation, the *Šainović* Appeals Chamber justified its approach in the name of 'legal certainty and predictability'. In agreement with the Appeals Chamber judgments in the cases *Mrkšić and Šljivančanin* and *Lukić and Lukić*, and departing from *Perišić*, the *Šainović* Appeals Chamber concluded that 'specific direction' was not an element of aiding and abetting liability.⁶²

Moreover, the Appeals Chamber discussed the content of CIL in the matter of aiding and abetting to 'ascertain where the law stands on the issue of specific direction'⁶³ and to 'dispel any doubt' on the subject.⁶⁴ The Appeals Chamber

54 *Ibid.*

55 *Ibid.*

56 See *Aleksovski* Appeal Judgment, *supra* note 28, §§ 89–114.

57 *Ibid.*, § 107.

58 *Ibid.*

59 § 111 of the *Aleksovski* Appeal Judgment reads: '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.'

60 *Šainović* Appeal Judgment, *supra* note 3, § 1622.

61 *Ibid.*

62 *Ibid.*, § 1649.

reviewed several post-World War II cases, including (but not limited to) cases tried by the Nuremberg International Military Tribunal and under Control Council Law No. 10,⁶⁵ concluding that ‘substantial contribution to and knowledge of criminal activities were sufficient to establish the mode of liability of aiding and abetting.’⁶⁶ It also discussed various international instruments, such as the ICC Statute, and the practice of the ‘major legal systems of the world’ by discussing the normative provisions governing aiding and abetting in numerous national jurisdictions.⁶⁷

On the basis of this review, which spans several pages of judgment, it set aside the *Perišić* precedent by concluding that: (i) specific direction ‘is not an essential ingredient of the *actus reus* of aiding and abetting’⁶⁸; and (ii) the *Perišić* Appeal Judgment was ‘in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability’ as well as ‘with customary international law in this regard’.⁶⁹

As noted in Section 1, the subsequent ICTY Appeals Chamber judgments adhered to the ruling in *Šainović*. One might query whether such adherence was at the expense of the accused. This issue emerged in the appeal hearing of the *Stanišić and Simatović* case. Counsel for *Simatović* stated that ‘if the jurisprudence or the law changed with regard to the interpretation of specific direction, the interpretation which is the most favourable to him must be applied in accordance with the principle of the *lex mitior*’.⁷⁰ The Appeals Chamber, however, rejected this argument. For the Appeals Chamber ‘this principle [of *lex mitior*] applies to situations where there is a change in the concerned applicable law’.⁷¹ The Appeals Chamber underscored that ‘specific direction has never been a part of the element of aiding and abetting liability under customary international law, which the Tribunal has to apply’.⁷² What the Appeals Chamber appears to have determined, in effect, was that the standard of ‘specific direction’ had never been valid law within the ICTY, for it was not part of the law ‘which the Tribunal has to apply’. If this determination is correct, then the Appeals Chamber was logically correct in deducing that the principle of *lex mitior* would not be applicable as there had not been a change in the applicable law.

63 *Ibid.*, § 1622.

64 *Ibid.*, § 1626.

65 *Ibid.*, §§ 1627–1642.

66 *Ibid.*, §§ 1628–1640.

67 *Ibid.*, § 1643. The Appeals Chamber discussed the legislation and, in some cases, judicial practice of 32 countries (Algeria, Australia, Belgium, Bulgaria, Cambodia, Canada, China, Democratic Republic of Congo, England, Germany, India, Indonesia, Israel, Japan, Luxemburg, Madagascar, Malaysia, Mali, Mauritania, Mexico, Morocco, New Zealand, Senegal, Singapore, South Africa, Tunisia, USA). *Ibid.*, §§ 1618–1624.

68 *Ibid.*, §§ 1625–1650.

69 *Ibid.*, § 1650.

70 *Stanišić and Simatović* Appeal Judgment, *supra* note 10, § 119.

71 *Ibid.*, § 128.

72 *Ibid.*

The problem with this conclusion is, however, the implication that can be drawn from it — namely that *Perišić* was acquitted (and remains so) because of a law that had never been valid within the ICTY. Yet, the standard of ‘specific direction’ was formally ‘valid law’ in 2013, even if it later turned out to be legally flawed: the effect of its application was the acquittal of *Perišić*. That being so, it may be asked whether the *lex mitior* principle applies not only when there are changes in the positive law applicable at the time in which a crime is committed, but also in the presence of jurisprudential developments. True, both positive law and jurisprudence display normative effects and thus arguably no distinction may be drawn between the two as concerns the application of the principle of *lex mitior*. However, if the principle of *lex mitior* would apply whenever there are changes in the jurisprudence of a given judicial body, it would mean that any prior ruling by a judicial body that is more favourable to an accused would automatically prevail over any subsequent and less favourable (to the accused) development. This approach is not convincing. It would tilt the balance in favour of the accused excessively. It would do so to the point of divesting the Appeals Chamber of its main function to clarify, interpret, and correct the applicable law, which is essential to the prevention of fragmentation. This function is not without its limits, however. One such limit is the principle of finality. It is this principle that — apart from review proceedings under Article 26 of the ICTY Statute — precludes disturbing the acquittal of *Perišić*, even though the law applied to him turned out to be erroneous.⁷³

6. The Role of CIL as an Anti-fragmentation Measure

A distinctive trait of the jurisprudence just examined is that the SCSL and ICTY Appeals Chambers were able to clarify the applicable law and thus rein in fragmentation by adopting a common methodology: they both turned to CIL. The commonality of the approach employed and the outcome reached by the two Appeals Chambers reveal the benefit of a methodology that relies on CIL to extrapolate coherent normative approaches by different international courts operating within the common regime of ICL. In this way, CIL operates as the common language of international criminal justice. It gives solidity to the normative solution identified by a judicial bench, and does so in a manner that is not only constructively open to scrutiny and challenge, but also, if thoroughly and comprehensively ascertained, potentially authoritative. These considerations suggest that reliance on custom is apt out of respect for the principle of legality, as a gap-filling measure, and as an anti-fragmentation measure.

73 See, in this regard, S. Vasiliev, ‘Consistency of Jurisprudence, Finality of Acquittals, and Ne Bis in Idem – Comments Occasioned by the Šainović et al. Appeal Judgment and the OTP Motion for Reconsideration of the Perišić Appeal Judgment’, SSRN, 8 February 2014, 1–16. See also Decision on Motion for Reconsideration, *Perišić* (IT-04-81-A), Appeals Chamber, 20 March 2014 at 2–3, which makes reference to the principle of finality, albeit in a very succinct way.

These arguments in support of reliance on CIL must be tested against somewhat sceptical, but by no means peregrine, concerns that have been voiced about the proper role of CIL within the field of ICL, particularly in recent years with the coming to prominence of the ICC regime. Albeit raised mainly in the context of discussing the function of CIL as a source of ICL, such concerns deserve attention also from the perspective of fragmentation. Particularly with reference to some of the early judgments of the ICTY, it has been observed that CIL determinations, albeit canvassed in positivist and consequential language, were in fact puzzling as they reflected more the preferences of the interpreter than the available data, and thus amounted to a sort of judge-made law in disguise.⁷⁴

Without entering into the details of this criticism, I would argue that such criticism would not fit the cases discussed in this article. Quite the opposite, in fact: it was not the application of CIL, but the disagreement among the ICTY judges, which had already emerged even before the *Perišić* Appeal Judgment, that had caused fragmentation. These contradictory approaches could have also generated confusion within the practice of the SCSL had it not been for the bold approach taken by its own Appeals Chamber. As the cases at hand show, CIL — if correctly and thoroughly ascertained — does have a role to play in preventing or reining in fragmentation by curbing the different views, often very strongly held, among judges. CIL requires judges to search for common approaches and normative solutions emerging internationally or domestically, regardless of their own specific normative preferences.

An early example of reliance on CIL as an anti-fragmentation measure may be found in the judgment of the ICTY Appeals Chamber in the *Stakić* case.⁷⁵ While adhering to the factual determinations of the Trial Chamber, the Appeals Chamber departed from the mode of liability (co-perpetratorship) adopted by the Trial Chamber and replaced it with that of joint criminal enterprise. This replacement was neither due to analysis of the merits of each specific mode of liability, nor to a comparative analysis of their benefits from a criminal law perspective. It was due to the circumstance that the mode of liability employed by the Trial Chamber in the way it had been 'defined and applied by the Trial Chamber' had no 'support in customary international law or in the settled jurisprudence of this Tribunal'.⁷⁶ In fact, the analysis of the Trial Chamber did not draw on an analysis of the practice of countries belonging to different legal systems (as a finding of CIL would require), but was

74 W. Schabas, *Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals* (Martinus Nijhoff Publishers, 2009) 77–101; J. D'Aspremont and J. de Hemptinne, *Droit international humanitaire* (Pedone, 2012), at 33–35; Y. Ronen, 'International Humanitarian Law', in J. D'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-modern World* (Cambridge University Press, 2014) 488–495.

75 Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, §§ 58–63. See in this regard, van Sliedregt and Vasiliev (eds), *supra* note 23, at 26.

76 *Ibid.*, § 62.

based mainly on the German scholar Claus Roxin's well-known theory of co-perpetration as 'joint control over the act'.⁷⁷

Moreover, the ICTY Appeals Chamber pointed out that the mode of liability used by the *Stakić* Trial Chamber was not the one 'under which the Appellant was charged in the Indictment and to which he responded at trial'.⁷⁸ Importantly, the same Chamber made clear that 'the introduction of new modes of liability could generate uncertainty, if not confusion, in the determination of the law by the parties to cases before the trial';⁷⁹ it was concerned about 'ensur[ing] respect for the values of consistency and coherence in the application of the law'.⁸⁰ These passages show that the ICTY Appeals Chamber had taken seriously the problem of fragmentation. Reliance on CIL, in this instance, limited judicial activism in favour of consistency within the practice of the ICTY.

A second strand of criticism that has been voiced against reliance on CIL relates to the 'uncertain nature of the content of customary international law', due to it being unwritten law that requires a law-applying authority to ascertain the existence of a given customary rule.⁸¹ This criticism is an apt reminder to avoid over-reliance on CIL, to recognize its limits and to pursue a more codified ICL, as the Rome Statute has sought to do. It becomes excessive, however, if it amounts to a plea for the marginalization of CIL unless (and until) a comprehensive and widely accepted written instrument is available. CIL remains a primary source of ICL. This is not only because it is within CIL that one finds the notion of individual criminal responsibility, the concept of international crime and the concept of fair trial — but also because CIL is binding on all states, including those most hostile towards the ICC. The latter is a fundamental consideration to be factored in, given that universal ratification of the ICC Statute is not in sight.

The cases discussed in this article show how CIL can provide sufficiently accurate and precise answers, despite its limits, if the inquiry into its content is specific and comprehensive enough to lead to objectively verifiable results,⁸² meaning that the results could be confirmed by an external observer upon a review of the evidence supporting them. The analysis conducted by the *Taylor* Appeals Chamber and even more so by the *Šainović* Appeals Chamber met these standards.⁸³ The analysis of the *Šainović* Appeals Chamber was not limited to the Nuremberg jurisprudence, or to the practice of a few countries. It amounted to a copious analysis — perhaps unprecedented in the practice of the ICTY — of numerous judicial decisions and the legislation and practice of a large number of states belonging to different legal traditions, and it openly

77 Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, §§ 431–442.

78 *Stakić* Appeal Judgment, *supra* note 75, § 62.

79 *Ibid.*, § 59.

80 *Ibid.*

81 Jacobs, *supra* note 15, 33.

82 See, generally, Y. Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared', in Stahn and van den Herik (eds), *supra* note 22, at 154–161.

83 Sadat, *supra* note 12, at 485.

discussed the findings over several pages of judgment.⁸⁴ Therefore, rather than reflecting judges' normative preferences as to what the content of the law should be, that analysis offers plenty of externally verifiable examples as to what the practice of states is. In this way, the ICTY Appeals Chamber showed that the role CIL can play within the field of ICL is directly proportional to the thoroughness of the analysis of its content. The utility and persuasiveness of the analysis increases when, as in *Šainović*, the search for the applicable law covers and benefits from the experiences gained by domestic jurisdictions belonging to different legal traditions. That said, it should be also recognized that in some cases CIL may be inadequate insofar as it does not provide a clear answer to relevant issues. In such instances, the application of other sources of ICL (in particular treaty law and general principles of law) should be required and turned to without hesitation.

In light of these considerations, two distinct but connected questions arise concerning the relationship between the ICC regime and fragmentation. The first is whether CIL can be an anti-fragmentation measure within the ICC regime. The second is if the 'ICC Judges should align their jurisprudence with customary international law to avoid the fragmentation of international criminal law and its decreased legitimacy', as suggested by Leyla Sadat and Jarod Jolly.⁸⁵ Some thoughts on this latter question are proffered in the concluding section of this article.

As to the first of these questions, the process of applying CIL in ICC cases is directed, framed and limited by Article 21 and other norms of the ICC Statute such as Article 22.⁸⁶ The unspoken purpose of Article 21 is to subordinate judicial discretion through a clear and predictable framework, in order to reduce instances of judicial law making.⁸⁷ While clearly giving primacy to the norms written into the Statute, however, Article 21 did not create a self-contained regime.⁸⁸ It enables the subsidiary application of sources of ICL external to the Statute, which includes CIL.⁸⁹ The cases discussed in this article offer some

84 *Ibid.*

85 L.N. Sadat and J.M. Jarrod, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot', 27 *LJIL* (2014) 755, at 761.

86 For a detailed analysis of Art. 21's content and role, see G. Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 411.

87 See, in this regard, J. Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on the Sources of Law and Interpretative Technique', in Stahn (ed.), *ibid.*, 444, at 445–454.

88 A. Pellet, 'Applicable Law', in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1053–1056; D. Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges', 2 *JICJ* (2004) 56, at 69; L. Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', 21 *European Journal of International Law (EJIL)* (2010) 543.

89 See, among others, L.N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute', 49 *DePaul Law Review* (2000) 909, at 918; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford

'food for thought' on the possibility of using CIL as an anti-fragmentation measure within the ICC framework.

To begin with, the number of criticisms and perplexities that have arisen in respect to the fragmented ICTY jurisprudence is a reminder of how fragmentation, far from being a matter of mere academic interest, can damage the reputation of a judicial institution. The vocabulary of fragmentation is a valuable indicator that the practice of a given court or tribunal may lose clarity in its sense of direction and ultimately credibility. CIL is only one way to address fragmentation — other sources, depending on the issues, can contribute as well. Yet the importance of CIL as an anti-fragmentation measure cannot be overlooked. If correctly ascertained and interpreted, CIL necessitates the finding of normative solutions that have widespread acceptance and thus are less likely to fragment into streams of different views. Such ascertainment hinges on the identification of a correct and common methodology among different Chambers (and judges), a problem the ad hoc tribunals have struggled with for years. The cases at hand highlight the need for identifying a correct, non-superficial methodology to assess the content of ICL so as to arrive at credible determinations that can withstand critical scrutiny. Accurate and abundantly reasoned determinations of CIL, far from being judge-made law in disguise, help ensure a consistent and persuasive development of the applied law among different Chambers and across ICL.⁹⁰

7. Concluding Thoughts

This article has argued that the vocabulary and metaphor of fragmentation is a useful tool in the field of ICL. It brings necessary attention to processes that render the applicable law unclear for the actors operating within it. Fragmentation happens when legal norms are blurred or applied in a contradictory manner, often because of a lack of agreement among the judges called to interpret and define its content. Processes of fragmentation affect not only unitary systems, but also a pluralist regime such as ICL. Fragmentation processes unsettle the law applied by a given court or tribunal and undo processes of harmonization (such as the forming of a settled jurisprudence) across the various units that compose ICL. True, 'fragmentation' is not necessarily a pathology. It may also be an avenue for transformation, paving the way for change and improvement in the jurisprudence of a given court or across courts. It is for the international judges to strike the appropriate balance between the concern for change and also justice in a specific case, with the overall need for

University Press, 2010), at 391; G. Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute', 12 *JICJ* (2014) 665, at 668–679.

90 On the role of custom as an aid to interpretation of the elements of crimes contained in the ICC Statute, see L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014), at 220–320.

the jurisprudence of a given court, and more generally of ICL, to be reasonably clear and predictable.

Certainly, expecting full clarity and predictability in the applicable law is unrealistic as interpretation is a human activity, not a mechanic enterprise. It is not unrealistic, however, to expect judges to fulfil the duty stemming from the judicial function to administer the law in a way that makes it useful — to make it as harmonious as reasonably possible rather than fragmented. Far from being neutral actors, international judges have an important role in promoting stability and predictability within the jurisprudence of their own institutions and, when necessary, within ICL. They should strive to do so. No court of law can maintain authority as a finder and shaper of the content of the applicable law if such content changes randomly and quickly.

Formalistic adherence to precedent is not useful in this respect as it may prompt fragmentation. The *Perišić* Appeals Chamber failed in this regard. The SCSL Appeals Chamber did not. Had the SCSL Appeals Chamber followed Article 20(3) of its Statute literally and thus adhered to the *Perišić* precedent, the jurisprudence of the SCSL would have been rather contradictory to the eventual jurisprudence of the other tribunals. It would have been in conflict with the subsequent ICTY case law (*Šainović*), thus adding to the lack of clarity as to the content of the *actus reus* of aiding and abetting liability. This circumstance alerts us to the limits of normative formulations requiring a court to be guided by the precedent set by another court, even if it considers that external precedent to have been wrongly decided. This does not mean that a norm of coordination, such as Article 20(3) of the SCSL Statute, should not be inserted again into the text of the Statute of a future ad hoc court or tribunal. It is suggested that the rigour of these kinds of norms — which are unquestionably useful from the perspective of preventing fragmentation — should leave open the possibility of departing from an otherwise controlling precedent in the ‘interests of justice’, subject of course to the provision of cogent reasons as to why departure is necessary.

Finally, yet importantly, reliance by the ICTY on CIL as an anti-fragmentation measure highlights the crucial problem (from the perspective of fragmentation) of the relationship between the two normative strands that are gradually consolidating within the field of ICL. One strand is anchored in CIL (at least as it stood at the time of the commission of the crimes over which jurisdiction is exercised), while the other is developing based on the application and interpretation of the ICC Statute irrespectively of CIL. This phenomenon may be worrisome because the presence of these two strands makes it difficult to gauge the content of contemporary customary ICL by all those required to apply and obey it, beginning with the judges sitting in domestic jurisdictions and states involved in hostilities.

On one hand, there appears to be a consolidation of an ICL built primarily on CIL, as identified and interpreted through the case law of the ad hoc tribunals and hybrid tribunals. The fact that those tribunals and courts may soon cease to exist, or as in the case of the SCSL have already done so, is of limited relevance. Their copious jurisprudence will survive them. Domestic jurisdictions

required to apply customary ICL — international crimes divisions established within national jurisdictions, and future ad hoc courts or tribunals (and the ICC itself) — may naturally turn to that jurisprudence for reference and guidance given its quantity, its accessibility and its efforts to adhere to and build upon internationally recognized standards. ICL may thus remain a substantially pluralist regime, even if international criminal justice might have in the near future only one international actor. The peculiarity of that jurisprudence, and its limit, is that it applied CIL only as it stood at the time in which the crimes were committed (1992–1995 as concerns the ICTY) and thus it should not be applied automatically to current cases. Therefore, it falls on all courts required to apply customary ICL to ascertain how subsequent developments in the practice of states, beginning with the adoption of the ICC Statute, have affected its content.

On the other hand, the ICC, albeit a permanent international court having the ‘potential to reach ICL offenses committed anywhere in the world’,⁹¹ and not an ad hoc court, seems to place limited value in adhering to and setting standards of universal acceptance and application — the distinctive feature of the gallant case law of the ad hoc tribunals. The impression one receives from reading the growing practice of the ICC is that this court is adopting a rather inward-looking attitude rather than a universalistic one.⁹² This inward-looking attitude carries the risk of having judges concerned with reading (or over-reading) into the ICC Statute their own normative preferences rather than subjecting them to international scrutiny via Article 21 of the Statute. It is almost as if the ICC is trying to set its own standards as to what the content of ICL should be. In so doing, however, it behaves more as a multinational (as opposed to international) court responding — through quite close adherence to the ICC Statute — only to the states that drafted its Statute (and their normative preferences), instead of seeking validation from those that are not party to it and more generally from the whole international community. True, on the face of it, there is nothing wrong with the cautious approach followed by the ICC judges.⁹³ And yet, if the ‘ICC is not just an agent of its parties’,⁹⁴ then the approach emerging in the ICC jurisprudence ought to be mulled over more in depth than it has been done so far, with consideration given to the

91 *Ibid.*, at 1079.

92 In her ‘Concurring Opinion of Judge Christine Van den Wyngaert’, appended to Judgment pursuant to Art. 74 of the Statute, *Ngudjolo Chui* (ICC-01/04-02/12), Trial Chamber, 18 December 2012, § 5. Judge Van der Wyngaert stated: ‘The control over the crime theory is primarily based on German legal doctrine and on the writings of Claus Roxin. I agree with Judge Fulford that this direct import from the German legal system is problematic. *Considering its universalist mission, the Court should refrain from relying on particular national models, however sophisticated they may be.*’ (Emphasis added.) See also ‘Separate Opinion of Judge Fulford’ attached to Judgment pursuant to Art. 74, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, §§ 8–10.

93 See, generally, V. Nerlich, ‘The Role of the Appeals Chamber’, in Stahn (ed.), *supra* note 86, 963–980.

94 See also R. Cryer, ‘Royalism and The King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Criminal Law Review* (2009) 390, at 394.

role the ICC seeks for itself within the international community. Arguably, one of the possible risks associated with this trend is that the ICC may lose ‘gravitational pull’ towards non-party states. Those states may feel less inclined to submit their territory and citizens to the jurisdiction of an institution that speaks a ‘different language’ and is keen to continue doing so.

Overall, my concern is that unless the ICC Statute succeeds in establishing itself as a new code of ICL by receiving a higher number of ratifications by states, which could render the law applied by the ICC a sort of new customary ICL, ICL may find itself divided into two parallel normative strands.⁹⁵ This division, even if one takes it as the unavoidable feature of a pluralist ICL, carries the negative consequence of making it more difficult to grasp the content of ICL by those called to apply it and obey it, beginning with national jurisdictions. It also makes it more difficult to impose and justify the systematic prosecution of international crimes relying on the authority of ICL as the law of the international community of states as a whole.⁹⁶

95 For some pertinent observations in this regard, see A.K.A. Greenwalt, ‘The Pluralism of International Criminal Law’, 86 *Indiana Law Journal* (2011) 1080–1813. Antonio Cassese expressed a similar concern in respect of the ICCSt. when stating that ‘Thus, the Statute itself seems to postulate the future existence of two possible regimes or corpora of international criminal law, one established by the Statue and the other laid down in general international criminal law.’ A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *EJIL* (1999) 144, at 157.

96 With foresight, James Stewart has suggested that ‘instead of continuing to embrace the radical doctrinal heterogeneity that, in large part, produces the disarray in modes of participation for international crimes, we should promulgate a universal set of standards that resolves these issues once and for all. We have treaties for international crimes such as genocide, war crimes, and soon crimes against humanity, but not for forms of participation in these crimes that very much colour what it means to be responsible for an international offence.’ J.G. Stewart, ‘Ten Reasons for Adopting a Universal Concept of Participation in Atrocity’, in van Sliedregt and Vasiliev (eds), *supra* note 23, at 321.