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Prosecuting Generals for War Crimes The Shifting Sands of Accomplice Liability in International Criminal Law

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ARTICLE

PROSECUTING GENERALS FOR WAR CRIMES: THE SHIFTING SANDS OF ACCOMPLICE LIABILITY IN INTERNATIONAL CRIMINAL LAW

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I. INTRODUCTION

In February 2013, in *Prosecutor v. Perišić,*[1] an Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) reopened an issue that some thought had been settled[2] when it held that "specific direction" was an element of the *actus reus* of aiding and abetting in international criminal law.[3] The Appeals Chamber acquitted the highest-ranking Serbian official to have been prosecuted

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[1] Prosecutor v. Perišić, Case No. IT-04-81-A Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

[2] *See, e.g.*, Barbara Goy, *Individual Criminal Responsibility Before the International Criminal Court: A Comparison with the Ad Hoc Tribunals*, 12 Int'l Crim. L. Rev. 1, 61 (2012).

[3] Prosecutor v. *Perišić* , Case No. IT-04-81-A, Judgment, ¶ 39.

by the Tribunal, which caused some to question the legitimacy and credibility of the ICTY.[4] Within a year, in *Prosecutor v. Šainović*[5] a different Appeals Chamber came to the opposite conclusion, "unequivocally reject[ing]" the Appeals Chamber's holding in *Perišić*[6] and convicting another Serbian general on facts nearly identical to those in *Perišić*.

As the divergent results in these cases demonstrate, the stakes are high when it comes to the resolution of this doctrinal dispute. Aiding and abetting is an important weapon in the prosecutor's arsenal. One of the difficulties in such cases is striking the proper balance between convicting those who deserve criminal punishment, while at the same time not overextending criminal sanctions to those who play only marginal roles.[7] Judge Moloto, who dissented in the Trial Chamber in *Perišić,* argued that without appropriate safeguards, such liability could be virtually limitless:

> If we are to accept the Majority's conclusion based solely on the finding of dependence, as it is in casu, without requiring that such assistance be specifically directed to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting.[8]

Because *Perišić* requires a "direct link between the aid provided by an accused individual and the relevant crimes committed by the principal perpetrators," *i.e.*, "specific direction,"[9] it will make convicting generals and political leaders who provided logistical aid to a distant conflict "practically impossible."[10] By contrast, *Šainović*

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[4] *See, e.g., Two Puzzling Judgments in The Hague*, Economist (June 1, 2013), http://www.economist.com/node/21578846/print.

[5] Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

[6] *Id.* ¶ 1650.

[7] *See* Gehard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. Int'l Crim. Justice 953, 957 (2007) (observing that, because international crimes involve large numbers of persons, "the need to determine the degree of individual culpability in international criminal law is even more imperative than in national legal systems").

[8] Prosecutor v. *Perišić*, Case No. IT-04-81-T, Dissenting Opinion of Judge Moloto, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) [hereinafter Perišić Trial Chamber Judgment].

[9] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

[10] Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EJIL: TALK! (Mar. 11, 2013), http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/.

requires only that the aid or assistance have a "substantial effect" on the commission of the crime;[11] that is, "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed."[12] This is a demonstrably easier standard to meet.

The International Criminal Court (ICC) Statute presents a third alternative – a *mens rea* test for limiting liability for aiding and abetting. Article 25 (c) (3) of the ICC Statute provides that the aider and abettor (accomplice) must purposely facilitate the commission of the crime committed by the principal.[13] This definition of aiding and abetting was borrowed from the U.S. Model Penal Code (MPC).[14] Since the ICC Statute departs dramatically from either approach taken by the ICTY, at first blush it is difficult to see how the ICTY's case law could be a source of interpretive guidance for the ICC.[15] Nonetheless, a recent Trial Chamber judgment of the ICC indicated, in *dictum,* that "substantial effect" is an element of aiding and abetting.[16]

It is clear that the ICTY's reputation has been damaged by its inability to set a limit on the proper scope of aiding and abetting liability. Because the ICC's mission is "to guarantee lasting respect for the enforcement of international justice,"[17] it must find a standard for attributing individual criminal responsibility that avoids this pitfall.

This article will analyze the three different approaches to aiding and abetting found in *Perišić, Šainović* and the ICC Statute. It will consider whether the ICC can look to the ICTY's jurisprudence for interpretive guidance, as its nascent case law suggests it might, or whether the language of its Statute compels it to adopt a standard heretofore unknown in international criminal law. Part II of this article

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11 Prosecutor v. *Šainović*, Case No. IT-05-87-A, Judgment, ¶ 1626.

12 Prosecutor v. *Tadić*, Case No. IT-94-1-T, Judgment ¶ 688 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 1997).

13 *See* Rome Statute of the International Criminal Court, art. 25(c)(3) (July 17, 1998), 2187 U.N.T.S. 3 [hereinafter Rome Statute].

14 Kai Ambos, *Article 25, Individual Criminal Responsibility, in* Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 760 (2d ed. 2008).

15 Art. 21 of the Rome Statute allows the ICC to use "the principles and rules of international law" and "general principles of law derived by the Court from national laws and legal systems of the world" in interpreting its statute. Rome Statute, *supra* note 13, at arts. 21 (b) & (c).

16 In its first Trial Chamber Judgment, the ICC implicitly recognized the customary law status of "substantial effect" as an "objective" element of aiding and abetting. Prosecutor. v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 997 (Mar. 14, 2012) (quoting, *inter alia,* Tadić Trial Chamber Judgment). This statement by the *Lubanga* Trial Chamber is obviously *obiter dictum* because it was not faced with the issue of interpreting the Rome Statute's definition of aiding and abetting. *See id.*

17 Rome Statute, *supra* note 13, at Preamble.

will follow the evolution of the term "specific direction" from its roots in the ICTY's first appellate decision to its emergence as an independent element of aiding and abetting. Part III will dissect the *Perišić* and *Šainović* decisions. Part IV will consider whether "specific direction" is an element of the customary international law definition of aiding and abetting. Part V will point out some of the difficulties the ICC will have to overcome in order to include a "substantial effect" element in its definition of aiding and abetting. Part VI will analyze the *mens rea* approach to aiding and abetting, and Part VII will offer my conclusions.

II. THE EVOLUTION OF "SPECIFIC DIRECTION"

"Specific direction" finds its roots in the ICTY's first Appeals Chamber decision in *Prosecutor v. Tadić*.[18] Aiding and abetting was not an issue before the Tadić Appeals Chamber. Rather, the Appeals Chamber's focus was on Joint Criminal Enterprise (JCE). However, the Chamber distinguished the *actus reus* of aiding and abetting from that of JCE when it observed:

> 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* on the perpetration of the crime. [19]

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[18] *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[19] *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added). This statement by the Appeals Chamber was unaccompanied by any analysis or citation of authority. By contrast, the Tadić Trial Chamber Judgment after discussing a number of the post-WWII cases, stated:

> The I.L.C. Draft Code [of Crimes against the Peace and Security of Mankind] draws on these cases from the Nürnberg war crimes trials and other customary law, and concludes that an accused may be found culpable if it is proved that he "intentionally commits such a crime" or, inter alia, if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime . . . ." The commentary to the I.L.C. Draft Code provides that the "accomplice must knowingly provide assistance to the perpetrator of the crime.
>
> The Trial Chamber further observed that:
>
> > While there is no definition of "substantially", it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.

Tellingly, the *Tadić* Appeals Chamber did not refer to the earlier Trial Chamber judgment in *Furundžija*.[20] The *Furundžija* Trial Chamber, after a thorough analysis of the post-World War II cases, held that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[21]

Some subsequent Trial and Appellate Chambers cited the language from *Tadić*,[22] others cited *Furundžija*.[23] Several cases treated the definitions as interchangeable, citing both cases as authority for one definition or the other.[24] Consequently, whether specific direction was or was not an element of the *actus reus* of aiding and abetting was of little significance until a defendant challenged his conviction because the prosecutor failed to prove that his acts were directed specifically to assist the crimes with which he had been charged.[25] The *Blagojević and*

Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 688 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 1997).

20 *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

21 *Id.* ¶ 235.

22 *See, e.g.*, Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 772 (Int'l Crim. Trib. for the Former Yugoslavia January 14, 2000); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 254 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

23 *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 283 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Kovčka et al., Case No. IT-98-30/1-T, Judgment, ¶ 253 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Vasilijević, Case No. IT-98-32-T, Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

24 *See, e.g.*, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment, ¶ 252 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (not mentioning specific direction but quoting "substantial effect" language in Tadić Appeals Chamber Judgment); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶'s 391-392 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (citing both cases but referring specifically only to "substantial effect"); Prosecutor v. Kordić and Čerkez, IT-95-14/2, Judgment, ¶ 400 n. 556 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (noting that *Furundžija*, which extensively analyzed the *actus reus* elements of aiding and abetting was "essentially consistent with the Tadić Appeals Chamber's findings in this regard."); Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (citing Tadić Appeal Judgment for "substantial contribution" but not mentioning "specific direction"); Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 161 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

25 *See* Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgment, ¶ 182 (Int'l Crim. Trib. for the Former Yugoslavia May 27, 2007) [hereinafter Blagojević and Jokić Appeals Chamber Judgment]:

> Jokić submits that the Trial Chamber erred in law by holding that his acts, as found, constituted the *actus reus* of aiding and abetting. While Jokić expressly does not

Jokić Appeals Chamber found that:

> [W]hile 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. 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.[26]

Subsequently, the Appeals Chamber quoted the appeal chamber judgment in *Aleksovski*,[27] which concluded, "the *Tadić* Appeal Judgement 'does not purport to be a complete statement of the liability of the person charged with aiding and abetting.'"[28] Thus, while the *Blagojević and Jokić* Appeals Chamber Judgment did not repudiate the specific direction language from *Tadić*, it did suggest that *Tadić's* precedential value was limited because of its cursory approach to the issue, and that specific direction is satisfied by a finding that the accused's acts had a substantial effect on the principal's commission of the crime.[29]

> challenge the Trial Chamber's definition of the *actus reus* of aiding and abetting, he argues that "[s]ome aspects of this definition need to be established in greater detail in order to enable them to be applied to the particular facts found by the Trial Chamber in this case." Jokić posits as a legal element of the *actus reus* of aiding and abetting that the practical assistance given to the perpetrators, in addition to having a substantial effect on the commission of the crime, must be specifically or sufficiently directed to this end.

The Trial Chamber defined the *actus reus* of aiding and abetting without mentioning "specific direction" as: "the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal." Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, Judgment, ¶ 726 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005). Interestingly, in support of its definition of aiding and abetting, the Trial Chamber cited the *Tadić and Vasiljević* Appeal Judgments, both of which included the specific direction language. *See id.* ¶ 726 n. 2175.

26 Blagojević and Jokić Appeals Chamber Judgment, ¶ 189.

27 Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

28 Blagojević and Jokić Appeals Chamber Judgment, ¶ 186 (quoting Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 163).

29 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Prosecutor's Reply Brief, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 11, 2012) (arguing that "specific direction is already implicit in the requirement that the accused's conduct have a substantial effect on the crime.")

Two years later, the Appeals Chamber in *Mrkšić and Šlijvančanin*[30] interpreted the Appeals Chamber Judgment in *Blagojević and Jokić* as confirming that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."[31] Subsequent Trial Chambers either defined aiding and abetting without referencing "specific direction" or they explicitly endorsed *Mrkšić and Šlijvančanin's* conclusion that "specific direction" was not an element.[32] In a judgment handed down just three months before the decision in *Perišić*, the *Lukić and Lukić* Appeals Chamber read *Mrkšić and Šlijvančanin* as an unequivocal rejection of specific direction: "In *Mrkšić and Šljivančanin*, the Appeals Chamber 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.'"[33]

Nonetheless, for some of the appeals chamber judges, this issue had not been put to rest. Judge Güney, in his "Separate and Partially Dissenting Opinion" in *Lukić and Lukić*, argued that the greater weight of authority favored the specific direction criterion, and that 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. . . ."[34] In a separate opinion from the same case, Judge Aigus opined:

> [W]hile the *Mrkšić and Šljivančanin* Appeal Judgement categorically stated that 'specific direction is not an essential ingredient of the actus reus of aiding and abetting', it did not 'clarify' the situation at all. Rather, in my view, it appeared to represent a departure from the existing Appeals Chamber

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30 Prosecutor v. Mrkšić and Šljivančanin, Case No. IT-95-13/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009).

31 *Id.* ¶ 159.

32 *See* Lukić and Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 901 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) (omitting specific direction); Prosecutor v. Popovic et al., Case No. IT-05-88-T, Judgment, ¶ 1014 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010) (reading *Blagojević and Jokić* as confirming "that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."); Prosecutor v. Dordević, Case No. IT-05-87/1-T, Judgment, ¶ 1873 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011) (omitting specific direction); Prosecutor v. Perišić, IT-04-81-T, Judgment, ¶ 126 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) (endorsing *Mrkšić and Šljivančanin*).

33 Lukić & Lukić, Case No. IT-98-32/1-A, Judgment, ¶ 424 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) (quoting Prosecutor v. Mrkšić and Šljivančanin, Case No. IT-95-13/1-A, Judgment, ¶ 159 and Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 107).

34 Lukić & Lukić, Case No. IT-98-32/1-A, Separate and Partially Dissenting Opinion of Judge Mehmet Güney, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009).

jurisprudence regarding specific direction.[35]

Judge Aigus read the *Blagojević and Jokić* Appeal Judgment as affirming "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."[36] Thus, the stage was set for the issue to be raised again in *Perišić*.

III. SPECIFIC DIRECTION OR NO SPECIFIC DIRECTION?

A. Perišić

Momčilo Perišic was the Chief of the Yugoslav Army (VJ) General Staff from August 1993 until November 1995.[37] As such, he was the VJ's highest ranking officer.[38] He was charged with various crimes[39] that occurred in Sarajevo and Srebrenica based on his role "in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS")."[40] The prosecution alleged that he was responsible for these crimes under two different theories – aiding and abetting and superior responsibility.[41]

By a two to one vote, the Trial Chamber convicted Perišić of twelve counts in the indictment.[42] As to the counts where the defendant's individual responsibility was predicated on aiding and abetting, the Trial Chamber expressly applied a standard that did not include specific direction.[43] Judge Moloto vigorously dissented, arguing that to convict Perišić would "criminalize the waging of war" which is not a crime.[44] He also asserted that no superior had ever been prosecuted by the Tribunal merely for providing soldiers with weapons that they used to commit war crimes, and that "if a superior who

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35 *Id.*, Separate Opinion of Judge Aigus, ¶ 2.

36 *Id.* ¶ 4.

37 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

38 *See id.*

39 The crimes included "murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war." *Id.* at ¶ 3.

40 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

41 *See id.;* U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 7(1) and 7(3), U.N. Doc. S/res/827 (1993) [hereinafter ICTY Statute].

42 *See* Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment, ¶¶ 1837-1839.

43 *See id.* at ¶ 126 ("The Appeals Chamber expressly stated that 'specific direction' is not a requisite element of the *actus reus* of aiding and abetting.")

44 *Id.*, Dissenting Opinion of Judge Moloto on Counts 1- 4 and 9 - 12, ¶ 3.

supplies his soldiers is not charged, Perišić, who supplied a different army, should not be charged."[45]

The Appeals Chamber found that the Trial Chamber erred as a matter of law by "holding that specific direction is not an element of the *actus reus* of aiding and abetting."[46] And, while this error was "understandable given the particular phrasing of the *Mrksic and Slijvancanin* Appeal Judgement, ... [T]he Appeals Chamber will proceed to assess the evidence relating to Perišić's convictions for aiding and abetting *de novo* under the correct legal standard."[47] The correct standard, according to the Court, requires "explicit consideration of specific direction" when a defendant charged as an aider and abettor is remote from the crime.[48] The result of the *Perišić* Appeals Chamber's *de novo* review and assessment of the evidence was its conclusion that the evidence did not establish beyond a reasonable doubt that Perišić's acts were specifically directed at aiding and abetting crimes committed by the VRS.[49]

The *Perišić* Appeals Chamber premised its conclusion that specific direction is an element of the *actus reus* of aiding and abetting on several factors. First, the *Tadić* Appeals Chamber Judgment clearly defined the *actus reus* of aiding and abetting as including the specific direction element, and no other Appeals Chamber had "found cogent reasons to depart from [that] definition."[50] Next, those post-*Tadić* cases that did not mention specific direction do not offer "a comprehensive definition of the elements of aiding and abetting liability."[51] Instead, those cases involved situations where the accomplice was physically proximate to the principal perpetrator of the crime and, thus, where specific direction is "self-evident."[52] Finally, the *Mrkšić & Šljivančanain* Appeals Chamber Judgment did not really depart from established precedent "by stating that specific direction is not an element of the *actus reus* of aiding and abetting" because: 1) its statement to that effect was made "in passing";[53] 2) its conclusion was in a section of the judgment which discussed "*mens rea* and not *actus*

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45 *Id.*

46 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 41 (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

47 *Id.* at ¶ 43.

48 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 39 (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

49 *Id.* at ¶ 73.

50 *Id.* at ¶ 28.

51 *Id.* at ¶ 30.

52 *Id.* at ¶ 38.

53 *Id.* at ¶ 32.

reus;"[54] 3) its cited authority was the *Blagojević and Jokić* Appeals Chamber Judgment, which did not reject the *Tadić* standard, but rather simply stated the obvious when it observed that specific direction is often implicit in a finding of substantial effect;[55] and 4) its "passing reference" to specific direction did not amount to the "most careful consideration" required when departing from established precedent.[56]

B. Šainović

Less than a year later, the Appeals Chamber revisited the specific direction issue in *Prosecutor v. Šainović, et al.*[57] This case focused on the armed conflict in Kosovo in 1999.[58] Vladimir Lazarević, a General[59] in the Serbian army, was Commander of the Priština Corps until December 1999 when he was promoted to Chief of Staff of the 3rd Army.[60] The Trial Chamber did not hold Lazarević individually responsible for the crimes charged in the indictment as a member of a JCE because the prosecution had not proved beyond a reasonable doubt that Lazarević shared the intent of the members of the JCE.[61] The Court also did not find that "planning, instigating or ordering most accurately describe[d] the conduct of Lazarević" and it therefore did not find him guilty pursuant to those modes of individual responsibility.[62] The prosecution's remaining theory was that Lazarević had aided and abetted the deportations and forcible displacements that occurred in Kosovo from March to June 1999.[63] In that regard, the Trial Chamber concluded:

> [Lazarević's] acts and omissions provided a substantial contribution to the commission of the crimes that the Chamber has found to have been committed by VJ [Yugoslav Army] members, as specified below, as they provided assistance in terms of soldiers on the ground

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54 *Id.* at ¶ 33.

55 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 33 (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

56 *Id.* at ¶ 34.

57 *See* Prosecutor v. Šainović et al., Case No. IT-05-87-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

58 *See* Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, Vol. 1, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

59 Ironically, it was Perišić who suggested that Lazarević be promoted to General. *See id.* at ¶ 797.

60 *See id.* at Vol. 3, ¶ 791.

61 *See id.* at Vol. 3, ¶ 919.

62 *Id.* at ¶ 920.

63 *See* Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, Vol. 1, ¶ 922 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

> to carry out the acts, the organisation and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts. Furthermore, Lazarević's acts and omissions provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes by VJ members. As the Commander of the Priština Corps, Lazarević knew that his conduct would assist the implementation of the campaign to forcibly displace Kosovo Albanians.[64]

The Trial Chamber, whose definition of aiding and abetting did not include specific direction,[65] found Lazarević guilty without explicit consideration of specific direction, as required by the Appeals Chamber's decision in *Perišić*.

On appeal, Lazarević challenged the Trial Chamber's failure to make an explicit finding that "his alleged acts and omissions were specifically directed to assist the commission of deportation and forcible transfer. . . ."[66] Although the Trial Chamber had based its decision in part on Lazarević's presence in Kosovo during the time that the crimes were committed, it "did not find that he was physically present at the crime sites during the commission of the crimes by members of the VJ."[67] Therefore, the Appeals Chamber could not circumvent the specific direction issue by ruling that this was a case of physical proximity where the finding of specific direction is implicit in the finding of substantial contribution.[68]

Initially, the *Šainović* Appeals Chamber disagreed with the *Perišić* Appeals Chamber's characterization of *Mrkšić and Šljivančanain's* consideration of the specific direction issue as being merely "in passing," and with its assertion that *Lukić and Lukić* merely confirmed that *Mrkšić and Šljivančanain* was not really "antithetical [to *Tadić*] in its approach to specific direction."[69] For the *Šainović* Appeals Chamber, *Perišić* was "at odds with a plain reading" of the two other cases.[70] Thus, *Mrkšić and Šljivančanain* and *Lukić and Lukić* "diverge"

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64 Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, Vol. 3, ¶ 926. (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

65 *See* Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, Vol.1 ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

66 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1617 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

67 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1622 n. 5220. (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014)

68 *See id.*

69 *Id.* at ¶ 1620.

70 *Id.* at ¶ 1621.

from *Perišić* "on the issue of specific direction."[71] Therefore, it was incumbent on the *Šainović* Appeals Chamber to decide which approach to follow.[72]

The Appeals Chamber began by opining that *Perišić's* reliance on *Tadić* was based "on the flawed premise that the *Tadić* Appeal Judgement established a precedent with respect to specific direction," given that *Tadić* did not purport to be a "comprehensive statement of aiding and abetting liability."[73] Next, it disputed *Perišić's* conclusion that, other than *Mrkšić and Šljivančanain*, no Tribunal cases had explicitly rejected specific direction as an element of the *actus reus* of aiding and abetting.[74] Instead it was the *Perišić* decision, which was the outlier because, "prior to the *Perišić* Appeal Judgement, no independent specific direction requirement was applied by the Appeals Chamber to the facts of any case before it."[75] By contrast, determining the "substantial contribution of the accused has consistently been an element of the *actus reus* of aiding and abetting liability."[76]

The *Šainović* Appeals Chamber also contended that the *Perišić* holding was not reflective of customary international law.[77] Instead, the *Furundžija* Trial Chamber's formulation of aiding and abetting, which does not include specific direction and which was based on a careful and thorough analysis of customary international law, correctly defines aiding and abetting.[78] Nevertheless, in order to "dispel any doubt in this regard," the *Šainović* Appeals Chamber undertook its own review of the cases, starting with the post-World War II cases,[79] and concluded that "[t]he criteria employed in these cases were . . . whether the defendants substantially and knowingly contributed to relevant crimes."[80]

The Appeals Chamber then looked to national law,[81] which it found contained "no clear common principle" regarding the *actus reus* of aiding and abetting.[82] It was, however, able "to discern that requiring 'specific direction' for aiding and abetting liability is not a general,

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71 *Id.* at ¶ 1621,

72 *See id.* at ¶ 1622.

73 *Id.* at ¶ 1623.

74 *See id.* at ¶¶ 1624-25.

75 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1625 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

76 *Id.*

77 *See id.* at ¶¶ 1626-42.

78 *See id.* at ¶ 1626.

79 *Id.* at ¶¶ 1627-42.

80 *Id.* at ¶ 1642.

81 *Id.* at ¶¶ 1643-46.

82 *Id.* at ¶ 1644.

uniform practice in national jurisdictions."[83]

Finally, the Appeals Chamber considered two other international instruments – The International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind*[84] and the Rome Statute of the International Criminal Court (ICC Statute).[85] The former provides that one who "knowingly aids, abets or otherwise assists directly and substantially" in the commission of a crime is criminally responsible as an aider and abettor.[86] The ILC's Commentary explains that this means that an accomplice's participation must "facilitate the commission of a crime in some significant way."[87] According to the *Šainović* Appeals Chamber, this statement conforms to the post-WWII cases and the *Furundžija* Trial Chamber's correct interpretation of those cases.[88]

The ICC Statute requires that the aider and abettor act with "the purpose of facilitating the commission of . . . a crime . . . ."[89] How the ICC will interpret this provision, which may differ from customary international law, "remains to be seen," but adoption of the treaty "does not necessarily prove that the states consider the content of that treaty to express customary international law."[90] In other words, the ICC Statute is not evidence of a new customary international law definition of aiding and abetting.[91]

In conclusion, the *Šainović* Appeals Chamber endorsed the *Furundžija* Trial Chamber's definition of aiding and abetting as a correct statement of customary international law and "unequivocally" rejected the *Perišić* Appeals Chamber's approach.[92]

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83 *Id.* at ¶ 1646.

84 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1647 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).; Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996, art. 2 (d), http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf [hereinafter ILC Draft Code].

85 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1648 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Rome Statute, *supra* note 13.

86 ILC Draft Code, *supra* note 84, at art. 2(d).

87 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1647; ICL Draft Code, *supra* note 84, at art. 2 (d) cmt. 11, at 21.

88 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1647.

89 *Id.* at 1648; Rome Statute, *supra* note 13, at art. 25(3)(c).

90 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1649.

91 The ICC definition was not intended to reflect customary international law. The "for the purpose of facilitating" language in the ICC Statute was borrowed from the U.S. Model Penal Code and was not meant to be reflective of the jurisprudence of the ICTY and ICTR. Kai Ambos, *Article 25, Individual Criminal Responsibility*, *in* Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 760 (2d ed. 2008).

92 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1650.

C. The Vote Count

Of the five judges in *Perišić*,[93] only Judge Vaz, apparently endorsed, without qualification, the proposition that specific direction is an element of the *actus reus* of aiding and abetting.[94] Judges Meron and Aigus wrote separately to express their opinions that specific direction is more appropriately viewed as an element of the *mens rea* of aiding and abetting, but they nonetheless joined in the final judgment, because specific direction can be "reasonably assessed in the context of the *actus reus*."[95] Judge Daqun dissented because he did not think that specific direction is an element of aiding and abetting.[96] Although Judge Ramaroson agreed with Judge Daqun, she joined the judgment.[97] There was considerably more unity in *Šainović*, where four of the judges, including Judges Daqun and Ramaroson, joined the Majority's opinion on the specific direction issue without qualification.[98] Judge Tuzmukhamedov would have distinguished *Perišić*, rather than departing from it, because Lasarević's assistance was not remote, and therefore the failure to make an explicit finding regarding specific direction was not a fatal error. [99]

IV. Is Specific Direction Customary International Law?

The *Perišić* Appeals Chamber did not purport to determine whether specific direction is customary international law. The fact that it discussed only one of the post-World War II cases makes this apparent.[100] Instead, its task was "to review [the ICTY's] prior aiding

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93 Both Appeals Chambers consisted of five judge panels. Judges Daqun and Ramaroson sat on both panels.

94 I use the term "apparently" because Judge Vaz is the only judge in *Perišić* who did not write separately on the issue. She is no longer a member of the Tribunal. *About the Judges*, U.N. ICTY, http://www.icty.org/sid/10572.

95 Prosecutor v. Perišić, Case No. IT-04-81-A, Separate Opinion of Judges Meron and Aigus, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

96 *See id.* Dissenting Opinion of Judge Daqun, at ¶ 2.

97 *See id.* Separate Opinion of Judge Ramaroson, at ¶ 1.

98 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1649 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

99 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Dissenting Opinion of Judge Tuzmukhamedov, ¶¶ 43-45 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

100 The Perišić Appeals Chamber cited the *Zyklon B* case to support its conclusion that "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." *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 n. 115 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

and abetting jurisprudence."[101] Thus, from the outset the Appeals Chamber's approach was flawed because, even if specific direction were found in the Tribunal's jurisprudence, it should be incorporated into the definition of aiding and abetting only if it also is a rule of customary international law. This fundamental principle was established in the *Tadić*, where the Court held that reference to customary international law was necessary in order to determine *actus reus* and *mens rea* elements, which were not defined by the Tribunal's Statute.[102] The *Šainović* Appeals Chamber's thorough and exacting analysis of the pre-Tribunal cases stands in stark contrast, and its conclusion that specific direction was not a feature of customary international law is presumably correct on that ground alone.[103]

Moreover, the *Perišić* Appeals Chamber fails to make the case that specific direction is a feature of the Tribunal's jurisprudence. It proceeds from the premise that the *Tadić* Appeals Chamber articulated a precedential rule that should be departed from only when there are "cogent reasons" to do so based upon "the most careful consideration."[104] This seems wrong for at least two reasons: 1) the *Tadić* Appeals Chamber's definition of aiding and abetting was unnecessary to its decision and was therefore *obiter dictum*,[105] and 2) the *Tadić* Appeals Chamber's definition of aiding and abetting was unsupported by citation to any authority.[106] Furthermore, the *Tadić* Appeals Chamber Judgment did not refer to the *Furundžija* Trial Chamber's earlier decision, which thoroughly considered the pre-Tribunal case law and defined aiding and abetting without a specific direction element.[107] If that were not enough, *Tadić's* reference to specific direction was either ignored by subsequent Trial and Appeals Chambers, or its definitions of aiding and abetting were regarded as

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101 *Id.* at ¶ 25.

102 *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); *see also* Goy, *supra* note 2, at 3 ("The jurisprudence of the ICTY/ICTR on modes of liability can be considered an expression of international law because these tribunals apply customary international law and refer to general principles of law.").

103 The *Šainović* Appeals Chamber's analysis of the post-World War II cases covers ten pages of the judgment. *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶¶ 1627-42.

104 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 26-27, 34 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

105 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1624 (observing that "the *Tadić* Appeal Judgement, which focused on JCE liability, does not purport to be a comprehensive statement of aiding and abetting liability").

106 *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229.

107 *See supra* note 75 and accompanying text.

interchangeable.[108] Thus, an objective analysis of the Tribunal's post-*Tadić* jurisprudence reveals that the specific direction element was not treated as controlling precedent, and that the first case that ruled squarely on the issue was *Mrkšić and Šljivančanain*, which rejected specific direction as an element of aiding and abetting.[109]

It is also telling that the *Perišić* Appeals Chamber misread the only post-World War II, pre-Tribunal case referred to in its opinion. In the *Zyklon B* case,[110] a British military court considered whether the owner and certain employees of the firm that manufactured the gas used by the Nazis in the concentration camps had aided and abetted the killings that took place in the gas chambers. The defense argued that the defendants "did not know the use to which the gas was to be put."[111] The *Perišić* Appeals Chamber cited *Zyklon B* to support its conclusion that specific direction requires more than "general assistance, which could be used for both lawful and unlawful activities."[112] According to the Appeals Chamber, the prosecution was able to overcome this hurdle in *Zykon B* because, in addition to providing the poison gas, that legitimately could have been used to exterminate vermin, there was evidence "that defendants arranged for S.S. [*Schutzstaffel*, a Nazi paramilitary organization] units to be trained in using this gas to kill humans in confined spaces."[113] While such evidence existed with regard to Tesch, the owner of the firm,[114] there was no direct evidence that Weinbacher, the other defendant who ran the firm in Tesch's absence, knew the purpose to which the gas was put.[115] Instead, the inference that

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108 *See supra* notes 22-24 and accompanying text.

109 *See supra* note 31 and accompanying text.

110 *The Zyklon B, Case, Trial of Bruno Tesch and Two Others*, *in* LAW REPORTS OF TRIALS OF WAR CRIMINALS: SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION 93 (1947-1949), *available at* http://www.worldcourts.com/ildc/eng/decisions/1946.03.08_United_Kingdom_v_Tesch.pdf [hereinafter *The Zyklon B, Case*].

111 *Id.* The third defendant, a lower level employee, also argued that he was not guilty because he had no control over the supply of the gas. He was acquitted on that ground.

112 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

113 *Id.* at ¶ 44 n. 115.

114 *The Zyklon B, Case*, *supra* note 110, at 95; *see also* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1628 n. 5346. Specifically referring to the *Perišić* Appeals Chamber's reliance on *Zyklon B*, the *Šainović* Appeals Chamber stated:

> However, although there was evidence concerning the provision of such training for S.S. units, this pertained only to one of the two convicted defendants. This and the Judge Advocate's instructions . . . clearly indicate that the evidence concerning the provision of such training was not dispositive of the case.

Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1628 n. 5346.

115 *The Zyklon B, Case*, *supra* note 110, at 102.

Weinbacher knew to what use the gas was put was based on "the general atmosphere and conditions of the firm itself."[116] Weinbacher was convicted and sentenced to death because he was in a position to control the deliveries of gas and he knew that the gas was used to execute Jews in the concentration camps. As to him, there was no evidence of specific direction and it was not the "basis for [his] conviction."[117] Thus, *Zyklon B* supported neither the *Perišić* Appeals Chamber's position that specific direction was an element of aiding and abetting, nor its contention that aiding and abetting could not be established if there existed another–lawful–purpose to which the aid could be put.[118]

The work of commentators is also important in determining whether a rule is customary international law.[119] Because the late Judge/Professor Antonio Cassese was a member of the Trial Chamber that decided *Furundžija* and the Appeals Chamber that decided *Tadić*, it is notable that he did not include specific direction as an element of aiding and abetting in his influential treatise on international criminal law.[120] Professor Cassese did say that the subjective element (*mens rea*) requires that the "aider and abettor must willingly aim to help or encourage another person in the commission of a crime; in this respect, *intent* is therefore required."[121] In other words, the accomplice must

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116 *Id.*

117 Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1628 ("The analysis [in *Zyklon B*] therefore focused on whether each defendant had influence over the supply of gas and knew of the unlawful use of the gas despite the stated lawful purposes, such as disinfecting buildings. Whether the defendants specifically directed the supply of gas to the extermination was not a basis for the conviction.")

118 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

119 The Statute of the International Court of Justice provides that "the teachings of the most highly qualified publicists of the various nations [is a] subsidiary means of for the determination of rules of law." U.N. Charter, art. 38(1)(d). The U.S. Supreme Court has also described the role scholars play in the determining the customary status of a rule: "Such works [of jurists and commentators] are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquette Habana, 175 U.S. 677, 700 (1900).

120 ANTONIO CASSESE, International Criminal Law 214 (2d ed. 2008) ("In aiding and abetting, the objective element is constituted by practical assistance, encouragement, or moral support, by the accessory to the principal [namely the author of the main crime]; in addition such assistance, support, etc. must have a substantial effect on the perpetration of the crime.") There is no authority cited for this definition. In the section of the treatise dealing with aiding and abetting, the Tadić Appeals Chamber Judgment is cited twice: first, for the proposition that the principal need not know of the accomplice's contribution, and second for the proposition that the accomplice must know that his actions assist the perpetrator. *Id.* at 214-15 n. 2.

121 *Id.* at 217. Again, the Tadić Appeals Chamber Judgment is not cited.

intentionally, not recklessly or negligently, aid or influence the principal's commission of the crime.[122]

Obviously this statement regarding the *mens rea* of the aider and abettor does not provide support for the argument that specific direction is an element of the *actus reus* of aiding and abetting. It merely states the familiar principle that the aider and abettor's conduct must be intentional.[123] Thus, aiding and abetting liability has two *mens rea* elements: intentional conduct and "awareness that the principal will be using, is using or has used the assistance for the purpose of engaging in criminal conduct."[124]

The specific direction element required by the *Perišić* Appeals Chamber has nothing to do with the accomplice's intent to commit the act. Specific direction, according to *Perišić*, "establish[es] a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators."[125] In this regard, Professor Cassese argued that *Tadić's* requirement of a specific direction element should not be read "literally," as the *Perišić* Appeals Chamber apparently did, because it would stand the distinction between aiding and abetting and co-perpetration "on its head," as it would mean that the aider and abettor's contribution to the commission of the crime had to be greater than that of the co-perpetrator.[126]

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122 *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 346 (1985).

123 *See id.* (The accomplice "must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime.")

124 Cassese, *supra* note 120, at 215.

125 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013). "Substantial effect" also insures that there is a sufficiently close nexus between the accomplice's conduct and the resulting crime. *See* Kai Ambos, *Article 25, Individual Criminal Responsibility*, *in* Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 756-57 (2d ed. 2008) ("'Substantial' means that the contribution has an effect on the commission; in other words, it must – in one way or another – have a causal relationship with the result.").

126 Antonio Cassese, *The Proper Limits of Individual Responsibility*, 5 J. Int'l Crim. Just. 109, 115-16 (2007); Kai Ambos has made an almost identical argument:

> In fact, if one takes the objective distinction of the [Tadić] Appeals Chamber seriously, an aider and abettor would do more than a co-perpetrator [via JCE III]: the former carries out substantial acts "specifically directed" at assisting the perpetration of the (main) crime, while the latter must only perform acts (of any kind) that "in some way" are directed to the furthering of the common plan or purpose. This turns the traditional distinction between co-perpetration and aiding and abetting, i.e. the distinction with regard to the weight of the contribution, which must be more substantial in the case of co-perpetration, on its head.

Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch"*, 20 Crim. L.F. 353, 365 (2009).

Kai Ambos, another prolific and influential commentator on international criminal law, described the *Furudzija* Trial Chamber's definition of aiding and abetting as the "more sophisticated view."[127] Later in the same work, he rejected the specific direction element when he concluded that "the only limiting element [in the *Furundžija* definition of aiding and abetting] is the 'substantial effect' requirement."[128] And Professor Ambos apparently did not think that the *Tadić* Appeals Chamber Judgment had the seminal force the *Perišić* Appeals Chamber attributed to it since he did not even cite *Tadić*.[129]

Finally, the ILC's Draft Code, a non-binding instrument, which provides evidence of the rules of customary international law,[130] does not include specific direction in its definition of aiding and abetting. The ILC Draft Code commentary indicates that its definition is "consistent with . . . the statute of the International Criminal Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1)."[131] Moreover, it is also consistent with the Nüremberg Principles, Principle VII, which was adopted by the U.N. General Assembly as reflective of the rules of customary law found in the Nuremberg Judgment.[132]

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127 Ambos, *supra* note 125, at 757.

128 *Id.* at 759.

129 The research for this article did not disclose a commentator who included specific direction as an element of the definition of aiding and abetting. *See* Goy, *supra* note 2, at 59 ("Under customary international law, aiding and abetting consists of practical assistance, encouragement or moral support to the principal provided there is a substantial effect on the commission of the crime." (citing the Furundžija Trial Chamber Judgment and the Blaškić Appeals Chamber Judgment)); William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1019 (2002-03); Gehard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute,* 5 J. INT'L CRIM. JUST. 953, 955 (2007) ("The denomination of a mode of participation as a form of accessory liability suggests that a person's act had a substantial effect on the commission of a crime by someone else . . . ."); Jose Doria, *The Relationship Between Complicity Modes of Liability and Specific Intent Crimes in the Law and Practice of the ICTY, in* The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko 150 (Jose Doria et al., eds. 2009) (stating that the *actus reus* of aiding and abetting is "having substantially contributed to the commission of the offence by another person"); Richard Barrett and Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy in International Tribunals*, 88 Minn. L. Rev. 30, 40, n. 43 (2003); Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 Eyes on the ICC 49, 58 (2008) ("There are two objective elements of aiding and abetting. First, aiding/abetting requires acts rendered 'to assist, encourage or lend moral support' to the commission of a concrete offence. Second, such acts must have a 'substantial effect' on the commission of the crime . . . .")

130 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶ 1647.

131 ILC Draft Code, *supra* note 84, at art. 2(d) cmt 11, 21.

132 *See id.;* Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal (1950), *available at* https://www.icrc.org/ihl/INTRO/390.

In order for a rule to be deemed customary international law, there must be substantial agreement (in the form of state practice) regarding its status as a legal rule (*opinio juris et necessitatis*).[133] The decisions of international tribunals like the ICTY can, of course, be evidence of the content of such rules.[134] But where, as here, there are conflicting decisions from a single tribunal regarding an element of a rule,[135] it is not reasonable to deem that aspect of the rule as customary international law, even if there is some support in the case law.[136] When there is no support for that element of the rule among the commentators or in the highly influential ILC Draft Code, it is clear that the customary legal definition of aiding and abetting does not include specific direction.

V. IS SUBSTANTIAL EFFECT A FEATURE OF THE ICC STATUTE'S APPROACH TO AIDING AND ABETTING?

Unlike specific direction, the requirement that an accomplice's act must have a substantial effect on the commission of the crime by the principal perpetrator is well-established in the case law of the ICTY.[137] Moreover, after a thorough review of the pre-Tribunal case law, the *Furundžija* Trial Chamber concluded that "[t]he position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime."[138] In its first Trial Chamber Judgment, the ICC implicitly recognized the customary legal status of "substantial effect" as an "objective" element of aiding and abetting when it observed:

> [P]rincipal liability "objectively" requires a greater contribution than accessory liability. If accessories must have had "a substantial effect on the commission of the crime" to be held liable, then co-perpetrators must have had . . . more than a substantial effect.[139]

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133 *See* IAN BROWNLIE, Principles of Public International Law 5-9 (4th ed. 1990).

134 *See id.* at 5.

135 Even in *Perišić* itself there was no consensus among the judges regarding the status of specific direction. Two of the five judges did not agree that specific direction was an element of aiding and abetting, while two others thought it was more properly characterized as a *mens rea* element. *See, supra* pp. 16-17.

136 *See* The Case of the S.S. "Lotus," 1927 P.C.I.J. (Ser. A) No. 10, at 28-29 (observing that where decisions of municipal tribunals were divided, it was not possible to conclude that a rule of customary international law exists).

137 *See* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶1625 ("By contrast [with specific direction], the substantial contribution of the accused has consistently been an element of the *actus reus* of aiding and abetting liability.")

138 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 234.

139 Prosecutor. v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 997 (quoting *inter alia*

Despite this statement, when faced squarely with the issue of interpreting its statute, the ICC will encounter serious obstacles to including such an element in Article 25 (c)(3).

The drafters of the ICC Statute were undoubtedly aware of the ILC's Draft Code, which provides that the acts of the aider and abettor must contribute "directly and substantially" to the commission of a crime,[140] and the early case law of the ICTY and ICTR to the same effect.[141] These factors led Professor Schabas to speculate that: "The absence of words like 'substantial' in the Rome Statute and the failure to follow the International Law Commission draft, may suggest that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague and Arusha."[142] In the end, the language in the ICC Statute that emerged from the Rome Conference was:[143]

> 3. [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission . . . .[144]

In his authoritative commentary on Article 25, Professor Ambos writes that the "'for the purpose of facilitating' language was borrowed from the Model Penal Code" and that "the word 'facilitating' confirms that a direct and substantial assistance is not necessary . . . ."[145]

Yet, without some requirement that the aid or assistance actually contributes in a meaningful way to the commission of the crime, there is the possibility that liability could be imposed for actions "so minor or remote that it appears unjustified to attribute it to the accomplice."[146]

Prosecutor v. Tadić, Case No. IT-94-1-T). This statement by the *Lubanga* Trial Chamber is obviously *obiter dictum* because it was not faced with the issue of interpreting the Rome Statute's definition of aiding and abetting. *Id.* ¶¶ 996-97.

140 *See* Per Saland, *International Criminal Law Principles*, *in* The International Criminal Court: The Making of the Rome Statute 198 (Roy S. Lee, ed. 1999); ILC Draft Code, *supra* note 84, at art. 2(d).

141 *See* William A. Schabas, An Introduction to the International Criminal Court 81-82 (2001).

142 Schabas, *supra* note 141, at 82.

143 WILLIAM A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute 435 (2010) ("The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation.").

144 Rome Statute, *supra* note 13, at art. 25(c)(3).

145 Ambos, *supra* note 125, at 760; *see also* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 231 ("The wording [of the Rome Statue] is less restrictive than the ILC Draft Code, which limits aiding and abetting to assistance which 'facilitate[s] in some significant way', or 'directly and substantially' assists, the perpetrator.").

146 1 The Rome Statute of the International Criminal Court: A Commentary, 800 (Cassese et

This apparent *lacuna* in the Rome Statute might tempt the ICC to borrow from the case law of the *ad hoc* Tribunals in order to read a substantiality requirement into its statute.[147] Nonetheless, such a substantiality requirement would be inconsistent with the *mens rea* approach to aiding and abetting adopted by the ICC Statute.

VI. THE *MENS REA* APPROACH TO AIDING AND ABETTING

The language in Article 25 (3)(c) of the ICC Statute and Section 2.06 (3)(a)(ii) of the MPC are functional equivalents.[148] The *mens rea* of both is with (or for) the purpose of facilitating the commission of a crime.[149] The MPC defines "purposely" as having a "conscious object to engage in conduct of that nature,"[150] *i.e.*, to promote or facilitate the commission of an offense.[151]

The ICC Statute does not define purpose in relation to conduct.[152] Article 30,[153] however, defines "intent" as "the person means to engage in that conduct."[154] Since purpose is undefined in Article 25 (3) (c) the ICC Statute, the ICC may look to Article 30,[155] and in turn the MPC,[156]

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al., eds. 2002).

147 *See* Werle, *supra* note 7, at 969 ("The wording of Article 25(3)(c) does not require that the assistance has a substantial effect on the commission of the crime. However, within the ICC Statute's framework of modes of participation, it is reasonable to interpret the *actus reus* of assistance in this way."); Goy, *supra* note 2, at 62-63 (opining that a substantial effect requirement "seems to be consistent with the structure of Article 25(3) ICC Statute. . ."); 1 The Rome Statute of the International Criminal Court: A Commentary 800 (Casesse, et al. eds. 2002) ("[T]he formulation of aiding and abetting in the Rome Statute might be interpreted in the same way [to include 'directly and substantially']. Still hopes should not be raised too high.").

148 *Compare* Rome Statute, *supra* note 13, at art. 25 (3)(c) ("a person shall be criminally responsible . . . if that person: (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission") *with* MPC § 2.06 (3)(a)(ii) ("A person is an accomplice of another person in the commission of the offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it . . . .").

149 *See id.*

150 MPC, *supra* note 148, at § 2.02 (a)(i).

151 *Id.* at § 2.06 (3)(a). This means that the accomplice's conscious object must be to facilitate the principal's commission of a crime. For example, an accomplice who drives a robber to the location where the robbery is committed is guilty only if she does so knowing that the principal intends to commit the robbery. Joshua Dressler, Understanding Criminal Law 490, § 30.09 [2][a] (6th ed. 2012).

152 *See* Markus D. Dubber, *Criminalizing Complicity*, 5 J. Int'l Crim. Justice 977, 1000 (2007); *see also* William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute 435 (2010).

153 Rome Statute, *supra* note 13, at art. 30.

154 *Id.* at art. 30(2)(a).

155 In this regard, it is significant that "[t]he text [of Article 25] was also burdened with

for guidance when it is faced with defining the term.[157] If that eventuates, the similarity in the language used in the MPC and the ICC Statute makes the two approaches virtually indistinguishable;[158] *i.e.*, the accomplice must act with the conscious object (mean) to facilitate the commission of a criminal offense.[159] More importantly, it is clear when it comes to aiding and abetting the ICC Statute has raised the *mens rea* bar because, unlike in the ICTY, "knowing assistance" will not be a sufficient basis for imputation of liability from principal to accomplice.[160]

The MPC also contains a specific provision regarding the *mens rea* of an accomplice where "causing a particular result is an element of an offense."[161] In such cases, the accomplice must act "with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."[162] For all intents and purposes, that means that the accomplice must act either purposely, knowingly or recklessly, as those terms are defined by the Code.[163] This does not, however, mean that the accomplice must "share" the principal's intent with regard to the result. Indeed, it is possible that the accomplice and the principal could be convicted of different crimes, if, for example, the principal committed an intentional homicide and the accomplice was reckless as

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references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text [of Article 30]." Per Saland, *supra* note 140, at 198.

156 Like Article 25 (3)(c), Article 30 also was influenced by the MPC. *See* Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 Leiden J. Int'l Law 715, 717 (2009).

157 *See* Dubber, *supra* note 152, at 1000; *see also* MPC § 1.13 ("General Definitions . . . (12) 'intentionally' or 'with intent' means purposely . . . .").

158 Purposely is used in the MPC to distinguish the two slightly different mental states that were included in the common law term "intent." MPC, *supra* note 148, at cmt. § 2.02 ("In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, one of the elements of ambiguity in legal usage of the term 'intent.'").

159 *See* 1 The Rome Statute of the International Criminal Court 801 ("[H]e must know as well as wish that his assistance shall facilitate the commission of the crime.").

160 Dubber, *supra* note 152, at 117 ("knowing assistance doesn't qualify for complicity'); Ambos, *supra* note 125, at 760 ("While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge."); 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 810 ("In sum, while the objective requirements of aiding, abetting, and assisting are relatively low, the criminal responsibility of aiders and abettors contains certain restrictions by means of higher subjective requirements.").

161 MPC, *supra* note 148, at ¶ 2.06(4). It should be noted that the most of the crimes within the jurisdiction of the ICC fall into this category. Thus, in the majority of cases this element will have to be satisfied.

162 *Id.*

163 *See* MPC, *supra* note 148, at §§ 2.02 (2) (a)-(c). The MPC disfavors negligence as a basis for criminal liability and thus "it should be excluded as a basis unless explicitly prescribed." MPC, *supra* note 148, at cmt. § 2.02 (5).

to that result. In that situation, the principal would be guilty of murder while the accomplice is guilty of manslaughter.[164]

The ICC Statute does not contain a specific provision regarding the accomplice's *mens rea* vis à vis the result. Accordingly, Article 30 of the ICC Statute applies, since it specifies the mental state required for the commission of an offense, "[u]nless otherwise provided."[165] Article 30 defines "intent" with regard to the consequence element as: "the person means to cause that consequence or is aware that it will occur in the ordinary course of events." Thus, Article 30 would permit conviction even if the principal and accomplice had slightly different *mentes reae*, *i.e.*, intent and knowledge;[166] however, proof of either *is sufficient for conviction.*[167]

Given the *Perišić-Šainović* split over the specific direction element and the evident similarities between the MPC and Articles 25 (3)(c) and 30 of the ICC Statute, the interpretive task facing the ICC will be challenging. In the next section, I will suggest what course the ICC should follow.

VII. CONCLUSION

The ICC will have to confront the issue of imposing appropriate limits on the reach of accomplice liability. The ICTY case law and the ICC Statute adopt radically different solutions to the problem. The former imposes control objectively by requiring knowing assistance that *substantially effects* the commission of the crime. The latter takes the subjective approach – the accomplice must *purposely facilitate* the commission of the crime. A third alternative, *Perišić*'s specific direction test, contains elements of both. Thus, the accomplice must specifically direct the aid or assistance toward commission of the crime to the exclusion of any other purpose, and the aid or assistance must also have a substantial effect on the commission of the crime.

A simple hypothetical involving a reluctant accomplice and a forgetful principal will illustrate the differences in outcome, depending

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164 *See* Dubber, *supra* note 152, at 118-19.

165 Rome Statute, *supra* note 13, art. 30 (1).

166 *See* Rome Statute, *supra* note 13, at art. 30(2)(b). Defining knowledge as "awareness that . . . a consequence will occur in the ordinary course of events."

167 An unresolved question is whether Article 30, and specifically the phrase "aware that a [consequence] will occur in the ordinary course of events," includes *dolus eventualis* (advertent recklessness). ICC Pre-Trial Chambers have split on this question. *See* Goy, *supra* note 2, at 23. The ICC's only trial chamber judgment rejected the argument that the language in Article 30 encompasses *dolus eventualis*. Prosecutor. v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 1101.

upon which of the three approaches is used. In the first case, a would-be bank robber begs his wife to get him a gun. She, the reluctant accomplice, gives it to him, hoping and praying that he decides not to rob the bank. Under the "substantial effect" test, she is guilty as an accomplice if her husband robs the bank using the gun.[168] The opposite is true if the "purposely facilitates" formula is applied because, in order for her to be guilty as an accomplice, she must want the bank robbery to occur, rather than hoping it does not.[169]

In the second case, the wife fervently wants the bank robbery to succeed because she needs the money to feed her hungry children. Unfortunately, her husband, the forgetful principal, leaves the gun behind and ends up robbing the bank by giving the teller a note demanding the money. If the "purposely facilitates" test is applied to these facts, the wife is guilty as an accomplice because it is irrelevant that her aid had no effect on the commission of the crime.[170] If, on the other hand, a "substantial effect" on the crime is necessary, she is not guilty because her aid played no role in the outcome, despite her desire that it be used to commit the crime.[171]

If the *Perišić* "specific direction" test is applied, there is accomplice liability in neither case. The reluctant accomplice has not specifically directed her aid toward successful completion of the crime.[172] According to *Perišić*, "the element of specific direction establishes a culpable link between the assistance provided by an accused individual and the crimes of principal perpetrators."[173] Because the reluctant accomplice hoped that there would be no crime, she lacks a culpable mental state with regard to it.[174] Likewise, the accomplice, no

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168 *See supra* note 12 and accompanying text ("[T]he criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.")

169 *See* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 801 ("[H]e must know as well as wish that his assistance shall facilitate the commission of the crime.").

170 *See supra* note 145 and accompanying text.

171 Kai Ambos, *Article 25, Individual Criminal Responsibility*, *in* Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 756-57 (2d ed. 2008) ("'Substantial' means that the contribution has an effect on the commission; in other words, it must – in one way or another – have a causal relationship with the result."). *See also* Kai Ambos, *The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 Int'l Crim. L. Rev. 137, 147 (2012) (observing that "causality is a basic unwritten requirement of any result crime").

172 *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 37.

173 Culpability is the mental state (*mens rea*), which the defendant must have with regard to each material element of the offense. Dressler, *supra* note 151, at 139, § 10.07 [A].

174 Under the ICC Statute, she must either mean to cause the crime or know that it "will occur in the ordinary course of events." Rome Statute, *supra* note 13, at art. 30 2(b) and 3. Since the

matter how enthusiastically she wishes that the crime will take place, will not be guilty if there is a forgetful principal who is not influenced by her proffered aid, since in those circumstances the aid did not have a substantial effect on the commission of the crime.[175]

The question remains which of these models is best-suited to the ICC, and, given the limitations in its statute, which could (should) be adopted by it? The *Perišić* approach–requiring both specific direction and substantial effect–would too narrowly restrict attribution of liability, particularly in cases involving military or political leaders. This approach would insulate them from liability when it could not be proven that they wanted the aid to be used to commit a crime. Consequently, the result would be impunity in cases where the aid could be used for another (legitimate) purpose.[176] The result would also be impunity in those cases where the commander's aid, no matter how fervently he desired the result, had no substantial effect on the commission of the crime.[177]

The ICTY and ICC formulas, while less restrictive, deal with the issue of culpability quite differently. The ICTY approach puts greater emphasis on outcome, so that the accomplice who is aware of, but does not intend, the result is punished if the result comes to pass, so long as his contribution to it is substantial. This method of attributing liability has a greater deterrent effect because commanders risk criminal punishment if they provide the weapons, ammunition, or personnel used

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accomplice cannot know whether the principal will actually commit the offense, the requisite knowledge would be very difficult to prove. *See* Kadish, *supra* note 122, at 344 (observing that "the acts the principal does toward the commission of the crime represent his own choices").

175 In common law jurisdictions where any degree of influence or assistance suffices, it is possible that an unsuccessful attempt to aid the commission of the offense might provide enough encouragement to result in liability. As Professor Kadish explains:

> There is no accomplice liability where the attempted contribution demonstrably failed to achieve its purpose because it never reached its target. . . . The secondary party may be liable if the principal is aware of the proffered aid, since knowledge of the efforts of another to give help may constitute sufficient encouragement to hold the secondary actor liable. But it is well accepted that the secondary actor may not be held liable where his demonstrably ineffective effort to aid is unknown to the primary actor.

Kadish, *supra* note 122, at 359. It is highly unlikely that a soldier in the field who is the principal perpetrator of a war crime would be aware of the logistical support provided by senior officers like Perišić and Šainović.

176 *See supra* note 118 and accompanying text.

177 For example, dissenting Judge Moloto disputed the *Perišić* Trial Chamber's finding that the assistance the defendant provided to the Bosnian Serb forces had a "substantial effect" on the crimes committed at Srebrenica because out of the 3,644 bullet casings that were recovered only 378 could be traced to the Serbian manufacturing facility.*See* Prosecutor v. Perišić, Case No. IT-04-81-T, Dissenting Opinion of Judge Moloto, ¶ 12.

to commit war crimes, even if that aid had other legitimate military uses. By contrast, the ICC Statute requires that the accomplice must act with the intention of facilitating the commission of a crime (the result). This approach should alleviate the concerns of those who fear that an overly aggressive prosecutor could use aiding and abetting to expand criminal liability beyond the bounds of personal culpability. But it would not reach indifferent commanders, like Perišić, who continue to supply troops committing crimes, even after the use to which the aid is put is known.

Since purposeful facilitation is an explicit requirement of the ICC Statute, the Court must find that that element has been satisfied. It should not, however, impose the additional requirement that the accomplice's aid or assistance must have a substantial effect on the commission of the crime. To do so would not only make it incredibly difficult to convict, but it would also be unnecessary, because both purposeful facilitation and substantial effect place meaningful limits on extensions of criminal liability.

Moreover, there are significant impediments to reading "substantial effect" into Article 25 (c)(3) of the ICC Statute. First, there is no textual support for a substantial effect element in the ICC Statute. And, despite its status as customary international law, reading such a requirement into the statute would be inconsistent with the MPC approach to aiding and abetting. Clearly, the MPC is not a source for "general principals of law derived . . . from national laws and legal systems of the world," and therefore cannot be applied directly by the ICC to interpret Article 25 (c)(3) of its statute. Nevertheless, the Court should not ignore Article 25 (c)(3)'s roots in the MPC, which do not require a "substantial effect."

Purposeful facilitation may turn out not to be the best choice for international criminal law. It almost certainly will pose difficult problems of proof since establishing a subjective element, like purpose, is always more difficult than proving an objective element, like substantial effect. This will be especially true in cases involving military and political leaders whose participation in the crime is far removed from the battlefield. The substantial effect test may also be better suited to international criminal law because of its potentially greater deterrent effect. Nonetheless, the stricter limits that purposeful facilitation will place on accomplice liability may, in the long run, bolster the credibility of international criminal law by ensuring that only those who are truly culpable are punished.