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Judging Leaders Who Facilitate Crimes by a Foreign Army: International Courts Differ on a Novel Legal Issue

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Judging Leaders Who Facilitate Crimes by a Foreign Army: International Courts Differ on a Novel Legal Issue

*Mugambi Jouet**

ABSTRACT

In one of the most significant cases in the history of international criminal law, Prosecutor v. Perišić, the International Criminal Tribunal for the Former Yugoslavia (ICTY) effectively addressed an issue of first impression: may a military or political leader be convicted for knowingly facilitating crimes by another state's army? The influential tribunal answered this question in the negative—knowledge that the recipients of military assistance are perpetrating crimes is essentially irrelevant absent evidence that the facilitator specifically intended that crimes occur. The ICTY Appeals Chamber thus acquitted Serbian General Momčilo Perišić, who had been convicted at trial of knowingly aiding and abetting atrocities by the Bosnian Serb army in Sarajevo and Srebrenica between 1993 and 1995. The record suggests that certain judges were concerned that convicting individuals like Perišić could potentially disrupt international relations by casting too wide a net for convicting leaders whose provision of military aid facilitates crimes by a foreign army.

The Special Court for Sierra Leone subsequently held that the controversial Perišić precedent did not comport with customary international law, and therefore affirmed the conviction of Charles Taylor, the former Liberian President, for knowingly assisting atrocities by rebel forces during the Sierra Leone Civil War. In an even more striking development, a different ICTY appellate panel thereafter reversed the Perišić legal standard on the ground that it neither comported with

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ICTY jurisprudence nor customary international law. This Article analyzes this historic turn of events and explores the appropriate legal standard to convict leaders who enable atrocities by a foreign army.

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I. INTRODUCTION

Two international courts have effectively addressed an issue of first impression: whether military or political leaders may be convicted for knowingly facilitating crimes by foreign armed forces not under their direct control. Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) examined this intricate question in the cases of prominent defendants accused of aiding and abetting atrocities—Momčilo Perišić, a Serbian General, and Charles Taylor, the former Liberian President.

*Prosecutor v. Perišić*¹ and *Prosecutor v. Taylor*² are among the most significant cases in the history of international criminal law not only because they raised novel legal issues, concerned mass atrocities, and involved high-profile defendants. These cases also stand out because both international courts impliedly, and at times overtly, weighed how international relations could be affected by a precedent

1. *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) [hereinafter *Perišić Appellate Judgment*]; *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) [hereinafter *Perišić Trial Judgment*].

2. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgement (Sept. 26, 2013) [hereinafter *Taylor Appellate Judgment*]; *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement (May 18, 2012) [hereinafter *Taylor Trial Judgment*].

under which a top official is convicted for providing military assistance to a foreign military force responsible for war crimes. Yet, the courts initially reached vastly different conclusions.

In *Perišić*, the ICTY Appeals Chamber deemed that a facilitator's knowledge that the recipients of military assistance are perpetrating crimes is essentially irrelevant, absent proof that the facilitator's actions were "specifically directed" to assist crimes³—a requirement tantamount to proof that the facilitator specifically intended the crimes to occur. The Appeals Chamber consequently acquitted General Perišić, who had been sentenced to twenty-seven years in prison at trial for knowingly aiding and abetting crimes perpetrated by the Bosnian Serb army against Bosnian Muslims in Sarajevo and Srebrenica during the Bosnian War (1992–95).⁴ General Perišić was responsible for managing Serbia's provision of considerable military assistance to its Bosnian Serb allies during most of the war.⁵ The ICTY Trial Chamber had found that General Perišić had facilitated the Bosnian Serb army's military operations despite knowing that they encompassed systematic attacks on Muslim civilians.⁶ The Appeals Chamber nonetheless proceeded to acquit him on the ground that the hitherto obscure element of "specific direction" was not established, thereby significantly raising the legal standard to convict a prominent official of knowingly facilitating atrocities.⁷

Conversely, in *Taylor*, the SCSL explicitly refused to follow the precedent set by the ICTY Appeals Chamber in *Perišić* by emphasizing that proof of "specific direction" is not required under customary international law, as it is sufficient that the facilitator provided substantial assistance with the knowledge that the recipient armed forces were committing crimes.⁸ The SCSL hence affirmed the conviction and fifty-year sentence of Charles Taylor, who had been convicted at trial of aiding and abetting crimes by rebel forces in Sierra Leone's civil war, which coerced child soldiers and murdered,

3. See *Perišić Appellate Judgment*, *supra* note 1, ¶¶ 73–74 (requiring proof of "acts specifically directed to assist, encourage or lend moral support to [crimes]").

4. See *id.* ¶¶ 1815–17, 1820–22, 1840–41 (pronouncing the Trial Chamber's verdict and sentence).

5. See *id.* pt. VI.B, ¶ 1007 (concluding that Perišić "oversaw the administration of logistical assistance for the military needs" of the VRS).

6. See *Perišić Trial Judgment*, *supra* note 1, ¶¶ 1466–68, 1588–91, 1639–47 (finding that systematic attacks on civilians were "inextricably linked to the war strategy and objectives of the VRS leadership").

7. See *Perišić Appellate Judgment*, *supra* note 1, ¶¶ 73–74 (reversing Perišić's conviction on the ground that "specific direction" is an essential element of aiding and abetting that was not conclusively established in this case).

8. See *Taylor Appellate Judgment*, *supra* note 2, ¶¶ 472–81, 486, 708 (holding that the *Perišić* appellate judgment "omitted any discussion of customary international law" and advanced unreasonable "novel elements in its articulation of specific direction").

raped, mutilated, and amputated civilians on a vast scale.⁹ Taylor thus became the first former head of state convicted by a modern international court.

In a striking turn of events, a different panel of judges on the ICTY Appeals Chamber subsequently reversed the legal standard set in *Perišić* less than a year earlier. That decision in *Prosecutor v. Šainović et al.*—otherwise known as the *Milutinović* case¹⁰—held that the *Perišić* appellate judgment deviated from both ICTY jurisprudence and customary international law. The *Šainović* panel therefore pointedly announced that it “unequivocally reject[ed]” the *Perišić* standard since “specific direction” is not a requisite element of aiding and abetting,¹¹ thereby siding with the SCSL’s holding in *Taylor*.¹² Given the extraordinary developments precipitated by the ICTY Appeals Chamber’s highly controversial decision in *Perišić*, this Article will particularly focus on how this decision set an extremely high legal standard to convict a top official for facilitating atrocities from a remote location.

Commentary on the Appeals Chamber’s contentious holding in *Perišić* has focused on its legal reasoning, especially its decision to deviate from prior jurisprudence and customary international law by demanding proof of “specific direction.”¹³ Far less attention has been

9. See Taylor Appellate Judgment, *supra* note 2, ¶¶ 260, 280, 518–21 (discussing the Trial Chamber’s findings regarding crimes against civilians and Taylor’s role therein).

10. Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, ¶ 1 & n.1 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) [hereinafter *Šainović* Appellate Judgment]. This case involving multiple defendants is also commonly identified as the *Milutinović* case after Milan Milutinović, who was acquitted at trial. The prosecution did not challenge Milutinović’s acquittal on appeal. *Id.*

11. See *id.* ¶ 1650 (“[T]he Appeals Chamber . . . unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.”).

12. See *id.* ¶ 1649 nn.5430–31 (citing, *inter alia*, Taylor Appellate Judgment, *supra* note 2, ¶¶ 436, 471–81).

13. See, e.g., Manuel 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 THE WAR REPORT: ARMED CONFLICT IN 2013 (Geneva Academy of International Humanitarian Law and Human Rights ed., forthcoming Dec. 2014) (calling into question the legal reasoning of the *Perišić* appellate judgment); Antonio Coco & Tom Gal, *Losing Direction: The ICTY Appeals Chamber’s Controversial Approach to Aiding and Abetting in Perišić*, 12 J. INT’L CRIM. JUST. 345 (2014) (criticizing the *Perišić* appellate judgment and arguing that it neither comported with ICTY jurisprudence nor customary international law); Patrick W. Hayden & Katerina I. Kappos, *Current Developments at the Ad Hoc International Criminal Tribunals*, 11 J. INT’L CRIM. JUST. 899, 903–07 (2013) (calling into question the *Perišić* appellate judgment); Christopher Jenks, *Prosecutor v. Perišić*, 107 AM. J. INT’L L. 622, 622–26 (2013) (same); Leila Nadya Sadat, *Can the ICTY Šainović and Perišić Cases Be Reconciled?*, 109 AM. J. INT’L L. (forthcoming July 2014) (calling into question the legal reasoning of the *Perišić* appellate decision); Case Review: *Special Court for Sierra Leone Rejects “Specific Direction” Requirement for Aiding and Abetting*

devoted to how the Appeals Chamber disregarded critical factual evidence when holding that no “link” existed between General Perišić’s actions and war crimes.¹⁴ As we will see, its judgment made no reference to how the beleaguered Bosnian Serb army heavily depended on Serbian support to conduct its operations, which encompassed systematic attacks on civilians pursuant to an ethnic cleansing plan.

Unlike General Perišić, who was technically accused of supporting the army of a foreign state, the Bosnian Serb Republic

Violations of International Law—Prosecutor v. Taylor, 127 HARV. L. REV. 1847, 1847, 1854 (2014) (arguing that the SCSL properly rejected the “specific direction” requirement set in *Perišić* since it did not comport with customary international law); Christopher P. Eby, Comment, *Aid “Specifically Directed” to Facilitate War Crimes: The ICTY’s Anomalous Actus Reus Standard for Aiding and Abetting*, 15 CHI. J. INT’L L. 256, 267–68, 270–75, 278–86 (2014) (calling into question the *Perišić* appellate judgment); Owen Bowcott, *Hague War Crimes Ruling Threatens to Undermine Future Prosecutions*, THE GUARDIAN (Aug. 13, 2013, 13:55 EDT), <http://www.theguardian.com/law/2013/aug/13/hague-war-crimes-ruling-prosecutions-serb> [<http://perma.cc/A2HU-TNGD>] (archived Sept. 7, 2014) (describing the controversy over the *Perišić* legal standard); Eric Gordy, *What Happened to the Hague Tribunal?*, N.Y. TIMES, June 2, 2013, <http://www.nytimes.com/2013/06/03/opinion/global/what-happened-to-the-hague-tribunal.html?pagewanted=all> [<http://perma.cc/WFD6-MMJ9>] (archived Sept. 7, 2014) (criticizing the *Perišić* appellate judgment); Kenneth Roth, *A Tribunal’s Legal Stumble*, N.Y. TIMES, July 9, 2013, <http://www.nytimes.com/2013/07/10/opinion/global/atribunals-legal-stumble.html> [<http://perma.cc/NU3G-GMFZ>] (archived Sept. 7, 2014) (criticizing the *Perišić* appellate judgment); Marlise Simons, *Court Overturns War Crimes Conviction of Former Chief of Yugoslav Army*, N.Y. TIMES, Feb. 28, 2013, http://www.nytimes.com/2013/03/01/world/europe/court-overturns-war-crimes-conviction-of-former-chief-of-yugoslav-army.html?_r=1 [<http://perma.cc/TME2-362R>] (archived Sept. 7, 2014) (noting that experts were “baffled” by the *Perišić* appellate judgment); James G. Stewart, *“Specific Direction” is Unprecedented: Results from Two Empirical Studies*, EJIL: TALK! (Sept. 4, 2013), <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/> [<http://perma.cc/4PGN-DM3L>] (archived Sept. 7, 2014) (presenting two multi-year empirical studies on aiding and abetting incidents and academic scholarship on complicity, and concluding that “‘specific direction’ has no basis in customary international law or scholarly thought.”); James G. Stewart, *The ICTY Loses Its Way on Complicity – Part 1*, OPINIO JURIS (Apr. 3, 2013, 09:00 EDT), <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/> [<http://perma.cc/CH6H-BLKK>] (archived Sept. 7, 2014) (describing how the *Perišić* legal standard is at odds with the views of numerous experts, including “a dozen of the best criminal theorists in the English-speaking world”).

While an apparent solid majority of experts disagree with the requirement of “specific direction,” certain experts have defended it. *See, e.g.*, Kai Ambos & Ousman Njikam, *Charles Taylor’s Criminal Responsibility*, 11 J. INT’L CRIM. JUST. 789, 804–08 (2013) (expressing support for the “specific direction” standard set out in the *Perišić* appellate judgment); Kevin Jon Heller, *Why the ICTY’s “Specifically Directed” Requirement Is Justified*, OPINIO JURIS (June 2, 2013, 04:00 EDT), <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/> [<http://perma.cc/A8PA-W3ZE>] (archived Sept. 7, 2014) (“[A]s long as aiding and abetting’s *mens rea* requires no more than knowledge, the specific-direction requirement is a necessary and useful element of aiding and abetting’s *actus reus*.”).

14. *See Perišić Appellate Judgment, supra* note 1, ¶¶ 70–72 (concluding, based upon a *de novo* review of the evidence, that “[n]either the findings of the Trial Chamber nor the evidence on the record” proved a “sufficient link” between General Perišić’s actions and the crimes he was accused of assisting).

(Republika Srpska), Charles Taylor was accused of buttressing rebel forces in Sierra Leone's civil war.¹⁵ But the issues in these two cases were so closely related that many experts considered *Perišić* the death knell of criminal responsibility for the likes of Taylor.¹⁶ While Taylor was convicted at trial for having knowingly aided and abetted atrocities in the Sierra Leone Civil War, he would plausibly have been acquitted on appeal if the SCSL had not explicitly declined to follow the legal standard set in *Perišić*.

This Article will accordingly explore the impact that *Perišić* might have on international relations if other courts opt to follow this precedent, such as by considering the political repercussions of their decisions. The record suggests that several judges at the ICTY were concerned that convicting individuals like General *Perišić* could potentially disrupt international relations by casting too wide a net for convicting leaders who knowingly facilitate the crimes of a foreign army by providing substantial operational support. We will therefore examine whether requiring additional proof that a defendant's actions were "specifically directed" to assist crimes would be reasonable under these circumstances or create an unprecedented hurdle for convicting leaders who enable atrocities by a foreign army.

II. THE LANDMARK *PERIŠIĆ* TRIAL

As the highest-ranking military officer in Serbia during most of the Bosnian War,¹⁷ General *Perišić* was responsible for managing Serbia's provision of considerable military assistance to its Bosnian Serb allies. Given that Slobodan Milošević died in 2006 while facing trial, General *Perišić*'s case came closest to determining the responsibility of Serbian leadership for war crimes. Unlike defendants in other ICTY aiding and abetting cases, General *Perišić* mainly acted from Belgrade, a relatively distant location from the crime scenes.

General *Perišić* was subordinate to the Supreme Defense Council of the Federal Republic of Yugoslavia (FRY), whose most influential member was Milošević, then the President of Serbia.¹⁸ Yugoslavia

15. See Taylor Appellate Judgment, *supra* note 2, ¶¶ 260, 280, 518–21.

16. See, e.g., Prosecutor v. Taylor, Case No. SCSL-03-01-A, Prosecution Motion for Leave to File Additional Written Submissions Regarding the ICTY Appeals Judgment in *Perišić*, ¶¶ 2, 7–8 (Mar. 14, 2013) [hereinafter Taylor Motion] (arguing that the Special Court for Sierra Leone should not follow the precedent set in *Perišić* because it deviated from established jurisprudence and reflected errors of reasoning); Bowcott, *supra* note 13 (describing the debate spurred by General *Perišić*'s acquittal).

17. See *Perišić* Trial Judgment, *supra* note 1, ¶ 3. General *Perišić* was appointed Chief of General Staff of the Yugoslav Army on August 26, 1993, and served until November 24, 1998. *Id.*

18. See *id.* ¶¶ 205, 962 (discussing the order of subordination within the FRY and finding that "[l]ogistical assistance to the VRS was regularly discussed and agreed

was by then a largely Serbian entity due to the secession of Slovenia, Macedonia, Croatia, and Bosnia. Ethnic strife was especially severe in Bosnia, which was divided between Bosnian Muslim, Bosnian Serb, and Bosnian Croat factions. General Perišić was responsible for overseeing the extensive military assistance provided by the Army of Yugoslavia (*Vojska Jugoslavije* or VJ) to the Bosnian Serb military force, the Army of Republika Srpska (*Vojska Republike Srpske* or VRS).¹⁹ However, General “Perišić’s role went beyond administering the logistical assistance process,” as he “recurrently encouraged the [Supreme Defense Council] to maintain this assistance.”²⁰

Yugoslavia already provided logistical assistance to the Bosnian Serb army prior to General Perišić’s appointment,²¹ yet logistical assistance became more structured during his tenure.²² General Perišić notably met and conferred with General Mladić, the Bosnian Serb military commander, about his army’s needs in weaponry.²³ General Perišić also strove to regularize the status of over 2,500 VJ officers fighting in Bosnia under the banner of the VRS, thereby allowing them to retain their salaries and benefits as VJ members.²⁴ These officers included Mladić and several top officers later convicted of war crimes.²⁵

General Perišić was charged with aiding and abetting war crimes and crimes against humanity perpetrated by the VRS in Sarajevo and Srebrenica, Bosnia, between 1993 and 1995.²⁶ The Trial Chamber found that grave crimes had indeed occurred on the ground—an unsurprising conclusion given that atrocities in the

upon at FRY Supreme Defence Council meetings attended by Perišić, as well as Slobodan Milošević, President of Serbia”).

19. See *id.* pt. VI.B, ¶ 1007 (concluding that “Perišić, as Chief of the VJ General Staff, oversaw the administration of logistical assistance for the military needs of the VRS”).

20. *Id.* ¶ 1008.

21. See *id.* ¶ 1595 (“[A]lthough the VJ was providing logistical assistance to the VRS even before Perišić became Chief of the VJ General Staff, he helped to efficiently continue this policy.”).

22. See *id.* ¶ 948 (finding, for example, that “[i]n order to avoid unauthorised transfers of ammunition and equipment, an agreement was entered into between Perišić and Mladić according to which VRS units would submit logistical assistance requests to the VRS Main Staff’s Logistics Sector, which would review all requests, and relay them to the VJ General Staff to obtain Perišić’s approval”).

23. See, e.g., *id.* ¶¶ 943–47 (describing how General Perišić held monthly meetings in Belgrade where Mladić “gave presentations explaining the situation in [Bosnia]” and asked Perišić “to assist with the needs of the VRS;” and quoting witness explaining that “[m]aking the presentation to Perišić was necessary because ‘nothing could have been done without his knowledge. He couldn’t have been bypassed.’”).

24. See *id.* ¶¶ 793, 1607–09 (discussing the transfer of Yugoslav Army (VJ) officers to the VRS and noting that “all of the military personnel serving in the VRS through the 30th PC [Personnel Centre] remained members of the VJ”).

25. See *id.* ¶ 1608–09. Mladić was arrested on May 26, 2011, and was being tried by the Yugoslavia tribunal at the time of writing. See generally Colum Lynch, *Serbia Arrests Ratko Mladic on War Crimes Charges*, WASH. POST, May 26, 2011.

26. In addition, General Perišić was charged with failing to prevent or punish crimes perpetrated by subordinates, although the present Article will not address these separate allegations. See Perišić Trial Judgment, *supra* note 1, ¶¶ 6–7.

Bosnian War have been well documented. The VRS conducted a lengthy campaign of shelling and sniping in Sarajevo causing the deaths of hundreds of civilians and the wounding of thousands of others.²⁷ Moreover, after the VRS invaded Srebrenica, a Muslim enclave that the UN had designated as a safe haven for civilians, the VRS forcibly removed and massacred thousands of Muslim civilians and war prisoners.²⁸

While the evidence did not establish whether General Perišić had condoned the Bosnian Serb army's crimes or intended them to occur, it unequivocally showed that he willfully buttressed the Bosnian Serb army throughout the conflict despite being regularly notified of grave allegations of crimes targeting Bosnian Muslims.²⁹ In particular, he knew of UN Security Council Resolutions and media reports mentioning regular attacks by Bosnian Serbs on Sarajevo civilians,³⁰ which were a focal point of diplomatic affairs and global news coverage at the time. At a Supreme Defense Council session on June 7, 1994, General Perišić notably said that the Yugoslav army could not dispatch its Muslim military students to the Bosnian Serb army because "if we send the Muslims there . . . they'll kill them,"³¹ thereby demonstrating his awareness that the Bosnian Serb army was inclined to gratuitously attack Muslims. General Perišić was likewise aware that the international community had taken an extraordinary step in creating a war crimes tribunal in The Hague to judge atrocities occurring in Bosnia. For example, on August 30, 1994, he was briefed by Colonel Branko Krga, his chief of intelligence, about how the international community was highly concerned by "the issue of human rights" and Serbia's "readiness to cooperate with the International War Crimes Tribunal."³² Nevertheless, General Perišić

27. See, e.g., *id.* ¶¶ 291, 319–22, 549, 1630 ("Mladić – described by a witness as the 'strategist' of the siege – stated that he held 'the city in his palm.' . . . No civilian activity and no area of Sarajevo seemed to be safe from sniping or shelling attacks from [the Bosnian Serb army].").

28. See, e.g., *id.* ¶¶ 1526, 1591, 1630 ("[T]he attack of Srebrenica involved the removal of the Bosnian Muslim civilian population and was followed by the organised mass execution and burial of thousands of Bosnian Muslim civilians and/or persons not taking an active part in hostilities, as well as the commission of other abuses on a very wide scale.").

29. See *id.* ¶¶ 1632–48 (finding that Perišić continued to support the Bosnian Serb army even though he "knew that his conduct assisted in the commission of [its] crimes" in Sarajevo and Srebrenica); see also ¶¶ 1390–1437 (discussing Perišić's access to information).

30. See, e.g., *id.* ¶¶ 1478, 1496–1519 (citing, *inter alia*, evidence that "[t]hroughout the war, the FRY Mission to the UN sent numerous diplomatic cables to the FRY leadership in Belgrade to inform them about discussions held and resolutions adopted by the [UN Security Council]. Perišić was copied directly on several of those cables concerning shelling and sniping incidents in Sarajevo, as well as the VRS attack on Srebrenica.").

31. *Id.* ¶ 1459.

32. *Id.* ¶ 1476.

kept providing support to the Bosnian Serb army even after learning of the enormous massacre in Srebrenica in the summer of 1995.³³

The Trial Chamber convicted General Perišić after finding that he had knowingly provided practical assistance having a substantial effect on crimes by the Bosnian Serb army.³⁴ While the Trial Chamber found General Perišić guilty of aiding and abetting various counts of murder, attacks on civilians, persecution, and inhumane acts in Sarajevo and Srebrenica, it acquitted him of aiding and abetting the crime of extermination in Srebrenica.³⁵ Extermination, under the tribunal's statute, "is the act of killing on a large scale."³⁶ (Genocide was not charged in this case.) The evidence at trial showed that General Perišić "knew that it was very probable that the VRS would forcibly transfer Bosnian Muslims and commit some acts of mistreatment and killings with discriminatory intent once Srebrenica had fallen under their control."³⁷ Yet, "none of the information provided to Perišić on the VRS's criminal conduct alerted him to the fact that the VRS intended to commit a crime on the scale of the one that occurred in Srebrenica in July 1995," when approximately 8,000 Muslims were systematically slaughtered.³⁸

The verdict of the three-judge Trial Chamber was not unanimous. Judges Pedro David of Argentina and Michèle Picard of France voted to convict General Perišić, whereas Judge Bakone Justice Moloto of South Africa dissented on various factual and legal grounds. By majority vote, the Trial Chamber sentenced General Perišić to twenty-seven years in prison.³⁹

The ICTY Appeals Chamber subsequently acquitted General Perišić by concluding that his assistance to the Bosnian Serb army was not "specifically directed" to assist crimes.⁴⁰ Liu Daqun of China was the sole member of the five-judge appellate panel to dissent. Theodor Meron of the United States, Carmel Agius of Malta, Arlette

33. *Id.* ¶¶ 1544, 1826.

34. *See id.* ¶¶ 1597–1602, 1621–23, 1627, 1631, 1649 (concluding, *inter alia*, that "Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective").

35. *Id.* ¶¶ 1636, 1638, 1647–48.

36. *Id.* ¶ 106 (defining the crime of extermination); *see also* Updated Statute of the International Criminal Tribunal of the Former Yugoslavia, art. 5(b).

37. Perišić Trial Judgment, *supra* note 1, ¶ 1637.

38. *Id.* ¶¶ 1640, 1647; *see also* Dan Bilefsky & Marlise Simons, *Netherlands Held Liable for 300 Deaths in Srebrenica Massacre*, N.Y. Times, July 16, 2014, <http://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html> [<http://perma.cc/HAA8-RAFE>] (archived Sept. 13, 2014) (stating that "roughly 8,000 Muslim men and boys [were] massacred at Srebrenica").

39. *See* Perišić Trial Judgment, *supra* note 1, ¶¶ 1815–22, 1835–41.

40. *See* Perišić Appellate Judgment, *supra* note 1, ¶¶ 73–74 (concluding that "it has not been established beyond reasonable doubt that Perišić carried out 'acts specifically directed to assist, encourage or lend moral support to the perpetration of [the] [sic] certain specific crime[s]' committed by the VRS.").

Ramaroson of Madagascar, and Andrésia Vaz of Senegal were in the majority. As we will now see, the Appeals Chamber arrived at its conclusions by disregarding critical evidence and adopting a questionable interpretation of the law.

III. HOW THE ICTY APPEALS CHAMBER SET A TROUBLING PRECEDENT IN *PERIŠIĆ*

A. Ignoring Critical Evidence

General Perišić's acquittal has proven highly controversial, yet virtually all commentators have solely focused on the legal reasoning of the ICTY Appeals Chamber while disregarding its factual analysis. The majority of experts have especially called into question the Appeals Chamber's decision to require explicit proof that, in aiding and abetting cases, the defendants' actions were "specifically directed" to assist crimes.⁴¹ However, commentators have seldom remarked upon how the Appeals Chamber ignored critical factual evidence. This oversight is striking given the historical significance of the *Perišić* case. The case essentially presented an issue of first impression—whether a military or political leader may be convicted for knowingly facilitating the crimes of another state's army. In addition, the case addressed issues of considerable importance in the Bosnian War, arguably the worst conflict to affect Europe since World War II.

In particular, the Appeals Chamber deemed that no "link" existed between General Perišić's actions and the Bosnian Serb army's crimes since he had only provided general military assistance.⁴² Given the alleged absence of such a "link," the Appeals Chamber implied that the Trial Chamber had adopted a strict liability standard whereby any assistance from one army to another would trigger liability if the recipient army committed crimes.⁴³ In reality, the Trial Chamber had found that a significant link existed between General Perišić's actions and the Bosnian Serb army's crimes in light of two key factors.

Firstly, extensive evidence showed that the beleaguered Bosnian Serb military force heavily depended on aid from Serbia to function as an army and conduct its operations, as it had limited weaponry, qualified personnel, and financial resources.⁴⁴ General Perišić

41. See *supra* note 13 and accompanying text.

42. Perišić Appellate Judgment, *supra* note 1, ¶ 72.

43. See *id.* ("[T]he Appeals Chamber considers that assistance from one army to another army's war efforts is insufficient, in itself, to trigger individual criminal liability for individual aid providers absent proof that the relevant assistance was specifically directed towards criminal activities.")

44. See Perišić Trial Judgment, *supra* note 1, ¶¶ 1597–1602, 1621.

managed this support and recurrently urged the Supreme Defense Council to maintain it.⁴⁵ “[W]e can’t leave them to their own devices,” he underlined.⁴⁶ Other influential figures agreed that the Bosnian Serb army significantly relied on Serbian aid to conduct its operations. Slobodan Milošević stressed that “everything that has been made [in Bosnia] was made thanks to Serbia and the army.”⁴⁷ Ratko Mladić, the Commander of the Bosnian Serb army, admitted that “we would not be able to live” without Serbian support.⁴⁸ Radovan Karadžić, the Bosnian Serb political leader, concurred that “nothing would happen without Serbia. We do not have those resources and we would not be able to fight.”⁴⁹ Moreover, the Bosnian Serb army’s reports described its material and financial predicament in the following terms: “grave,” “catastrophic,” “alarming,” and “extremely poor.”⁵⁰ Dependence on Serbian military aid “was exacerbated by” how “the great bulk of military supplies was given free of charge” and how the Bosnian Serb army “was otherwise frequently unable to pay whenever payment was demanded.”⁵¹ Yet, not a single reference to this dependence appears in the appellate judgment acquitting General Perišić.

Secondly, conclusive evidence showed that the strategy and objectives of the Bosnian Serb army encompassed systematic attacks on Bosnian Muslim civilians as part of an ethnic cleansing plan.⁵² It laid siege to Sarajevo to ultimately separate it into Serb and Muslim sectors.⁵³ Sniping and shelling Sarajevo civilians advanced this objective by aiming to force Bosnian Muslims to capitulate.⁵⁴ “Civilians were targeted during funerals, in ambulances, in hospitals, on trams, on buses, when driving or cycling, at home, while tending gardens or fires or clearing rubbish in the city, in gathering points, such as markets, sports events or while queuing for food and water.”⁵⁵ The shelling of Sarajevo “was indiscriminate and resulted in

45. See *id.* ¶¶ 962–74, 1594–96, 1599.

46. *Id.* ¶ 968.

47. *Id.* ¶ 1599.

48. *Id.* ¶ 1598.

49. *Id.*

50. *Id.* ¶ 1597.

51. *Id.*

52. See, e.g., *id.* ¶¶ 305, 598, 605–07, 1589–91 (describing, *inter alia*, the objectives of “Operational Directive 7” issued by Radovan Karadžić to the VRS and of a subsequent order entitled “Krivaja 95” issued by the Commander of the Drina Corps (a VRS unit), both of which encompassed the perpetration of ethnic cleansing of the Bosnian Muslim population in territory sought by the VRS).

53. See *id.* ¶¶ 305, 1589 (“One of the six strategic objectives of the Bosnian Serb leadership was to partition Sarajevo into Serbian and Muslim sectors and establish a separate state authority for each sector.”).

54. See *id.* ¶¶ 305, 1589–90 (explaining that the VRS sniping and shelling of Sarajevo civilians was “designed to intimidate the population of Sarajevo and break its morale and spirit, as well as to destabilise [Bosnia and Herzegovina] as a country.”).

55. *Id.* ¶ 320.

mostly civilian victims.”⁵⁶ The Bosnian Serb army fired over one hundred shells on Sarajevo on a daily basis—a total of over two million shells throughout the siege.⁵⁷ “Shelling targets generally had no clear military value and included apartment blocks, schools, hospitals, food queues and historical buildings,” the Trial Chamber underlined.⁵⁸ By the same token, “frequent and indiscriminate” sniper attacks led to heavy civilian casualties on the streets of Sarajevo.⁵⁹ Overall, “[t]he Sarajevo State Hospital received more than 100 patients every day” throughout the siege, “and the ratio of civilian to military patients was about 4:1.”⁶⁰

Eliminating the Muslim enclave of Srebrenica was another major part of the Bosnian Serb leadership’s ethnic cleansing plan.⁶¹ On March 8, 1995, Radovan Karadžić illustratively issued a directive outlining the Bosnian Serb army’s strategic objectives, which entailed “creat[ing] an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa.”⁶² The Bosnian Serb army ultimately tried to eliminate the Muslim enclave of Srebrenica by removing or killing its population, which led to mass atrocities, including the execution of thousands of Muslims.⁶³

In sum, the Trial Chamber found that a consequential link existed between General Perišić’s actions and the alleged crimes since the Bosnian Serb army heavily *depended* on operational support to commit its crimes. In its view, it was no defense for General Perišić to argue that he merely provided general military assistance since warfare by the Bosnian Serb army *encompassed* grave crimes licensed by its leaders, including top officers on Serbia’s payroll.⁶⁴

56. *Id.* ¶ 326.

57. *See id.* ¶ 323.

58. *Id.* ¶ 326 (footnotes omitted).

59. *See id.* ¶ 330 (noting “that between September 1992 and August 1994, civilians were shot nearly every day as VRS gunners fired indiscriminately into the city.”).

60. *Id.* ¶ 320.

61. *See id.* ¶¶ 598–600, 605–07, 1523, 1591 (noting, *inter alia*, that the third strategic goal outlined by Radovan Karadžić at the 16th Session of the Assembly of the Serbian people “related to the areas of Srebrenica and Žepa, its aim being to establish a corridor in the Drina River valley and eliminate the Drina River as a border between the Serbian states.”).

62. *Id.* ¶ 605. Žepa was another Muslim enclave. *Id.* ¶ 16.

63. *See id.* ¶¶ 607, 1591 (explaining that the Bosnian Serb army aimed to “reduce the ‘safe area’ of Srebrenica to its urban centre . . . plunge the Bosnian Muslim population into a humanitarian crisis and ultimately eliminate[e] the enclave,” which “involved the removal of the Bosnian Muslim civilian population” and “the organised mass execution and burial of thousands of Bosnian Muslim civilians”).

64. *See id.* ¶¶ 1588, 1593, 1602 (“[T]he crimes charged in the Indictment were an integral part of the VRS’s war strategy. Hence, the evidence leads the Majority to the only reasonable conclusion that by providing vital logistical and technical assistance to the VRS during the war, including to the specific units that perpetrated the crimes, Perišić facilitated the commission of those crimes.”).

Yet, the Appeals Chamber examined the Bosnian Serb army's crimes out of context by disregarding the most critical evidence adduced at trial. Its judgment acquitting General Perišić made essentially no mention of the Bosnian Serb army's ethnic cleansing plan or its strategic objectives in Sarajevo and Srebrenica.⁶⁵ In particular, the Appeals Chamber stressed that "the Trial Chamber did not find that all VRS activities in Sarajevo or Srebrenica were criminal in nature"⁶⁶ but that "*only certain actions* of the VRS in the context of the operations in Sarajevo and Srebrenica" were criminal.⁶⁷ This euphemistic characterization overlooked several basic facts: (i) an ethnic cleansing plan was among the Bosnian Serb army's central objectives in the war; (ii) the siege of Sarajevo and the takeover of Srebrenica were major operations of this ethnic cleansing plan; (iii) these operations largely consisted of gratuitous attacks on civilians; and (iv) these operations resulted in several thousand victims.⁶⁸ The Appeals Chamber's analysis nonetheless suggested that the siege of Sarajevo and the takeover of Srebrenica were side events that were not central to the Bosnian Serb army's war plans and the conflict as a whole.

By intent or design, the omissions of the Appeals Chamber had profound implications. Once one ignores or overlooks how the crimes in question were wide scale atrocities licensed by the Bosnian Serb military leadership, one can come to see them as isolated crimes perpetrated by rogue soldiers acting independently. Under these circumstances, it becomes far more doubtful that General Perišić could be responsible as an aider and abettor. After all, if a few rogue soldiers murder a limited number of civilians, how could the foreign military leader who oversaw general operational support be criminally responsible?

The appended diagram illustrates how crimes perpetrated by rogue soldiers fall outside of warfare approved by a nation's military leadership. If the crimes perpetrated by the Bosnian Serb army in Sarajevo and Srebrenica had fallen in that category, and if they had occurred on a small scale, General Perišić's responsibility would arguably have been minimal. However, the diagram pinpoints how war plans by a nation's military leadership can encompass attacks on

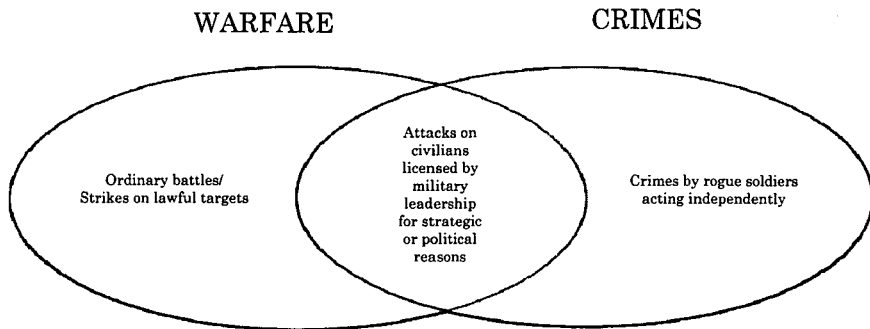
65. An introductory paragraph in the Appeals Chamber judgment mentioned in passing that the Trial Chamber made findings regarding the strategy of the Bosnian Serb army, although no details are provided. See Perišić Appellate Judgment, *supra* note 1, ¶ 14. This issue was not addressed at all in the section of the appellate judgment presenting the court's reasoning. The Appeals Chamber only tangentially alluded to the issue when briefly mentioning "the Trial Chamber's finding that the VRS's strategy was 'inextricably linked to' crimes against civilians." *Id.* ¶ 53.

66. *Id.* ¶ 53.

67. *Id.* (emphasis added).

68. See, e.g., Perišić Trial Judgment, *supra* note 1, ¶¶ 305, 320, 326, 330, 598–600, 605–07, 1523, 1589–91 (documenting evidence regarding key dimensions of the ethnic cleansing campaign pursued by the Bosnian Serb army).

civilians. Given that crimes by the Bosnian Serb army fell in that overlapping category and were of an enormous magnitude, General Perišić could be held responsible as an aider and abettor.



The Appeals Chamber tangentially addressed this issue when it noted that General Perišić had provided “general assistance which could be used for both lawful and unlawful activities”⁶⁹ and argued that the evidence against Perišić was therefore entirely “circumstantial.”⁷⁰ Yet, even assuming that the case was wholly circumstantial, one may conclude that the only reasonable inference was that General Perišić’s actions had a “substantial effect” on the Bosnian Serb army’s ethnic cleansing campaign.⁷¹ It is doubtful that an individual can heavily buttress a dependent and beleaguered army without having a “substantial effect” on its operations.⁷² If attacks on civilians are a major part of these operations, the person who orchestrated substantial operational support should be convicted of aiding and abetting these crimes if he was aware of them.

B. Raising the Legal Standard for Conviction

The ICTY Appeals Chamber not only ignored critical evidence in its decision acquitting General Perišić, it also raised the legal standard to convict top officials of aiding and abetting atrocities by

69. Perišić Appellate Judgment, *supra* note 1, ¶ 44.

70. *Id.* ¶ 47.

71. Under the applicable legal standard, the aider’s actions must have a “substantial effect” on the commission of the crime. *Id.* ¶ 26; accord Perišić Trial Judgment, *supra* note 1, ¶ 126; Taylor Appellate Judgment, *supra* note 2, ¶ 362.

72. Under ICTY jurisprudence, the prosecution does not have the burden of proving that the crimes would not have occurred but for the aider’s actions. See Perišić Trial Judgment, *supra* note 1, ¶ 1626 (“The Majority also recalls that there is neither a requirement of a cause-effect relationship between Perišić’s conduct as an aider and abettor and the commission of the crimes, nor a requirement that his actions served as a condition precedent to the commission of the crimes, nor a requirement that his actions have been the cause *sine qua non* of the crimes.”) (footnotes omitted).

requiring proof that support was “specifically directed” to assist crimes, especially when the defendant provided support from a remote location.⁷³

Only passing references to the concept of “specific direction” were previously made in the bulk of the ICTY’s aiding and abetting jurisprudence. The concept remained obscure until the Appeals Chamber’s decision in *Perišić*. As underlined in Judge Liu’s dissenting opinion, “specific direction has not been applied in past cases with any rigor.”⁷⁴ A concurring opinion by Judge Ramaroson agreed that “specific direction” was not applied in former cases.⁷⁵ The majority opinion itself acknowledged that “previous appeal judgements have not conducted extensive analyses of specific direction.”⁷⁶

The first ICTY appellate judgment where the concept appeared was *Tadić*,⁷⁷ which stated:

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.⁷⁸

It is unlikely that the appellate panel in *Tadić* interpreted the phrase “specifically directed” in the same way as the distinct appellate panel in *Perišić* interpreted it fourteen years later. The single reference to “specifically directed” acts in *Tadić* lacked explanatory analysis.⁷⁹ References to “specific direction” in subsequent cases were cursory and often appear to have been simply copied and pasted from *Tadić*. Judge Liu’s dissent from the *Perišić* appellate judgment similarly observed that most cases cited by the majority “simply restate[d] language from the *Tadić* Appeal Judgement without expressly applying the specific direction requirement.”⁸⁰ Judge Ramaroson concurred that most prior cases reiterated the *Tadić* language “verbatim” and “never” applied “specific direction” to the facts of these cases.⁸¹

73. See *Perišić* Appellate Judgment, *supra* note 1, pt. III, ¶¶ 42, 73–74.

74. *Id.* pt. VIII, ¶ 3 (Liu, J., dissenting).

75. See *id.* pt. IX, ¶¶ 3–4 (Ramaroson, J., concurring).

76. *Id.* pt. III, ¶ 38.

77. See *id.* ¶ 26 (“The Appeals Chamber recalls that the first appeal judgement setting out the parameters of aiding and abetting liability was the *Tadić* Appeal Judgement, rendered in 1999.”).

78. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgement, ¶ 229(iii) (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added).

79. See Case Review, *supra* note 13, at 1852 (arguing that the reference to “specifically directed” actions in *Tadić* was mere “obiter dictum”).

80. See *Perišić* Appellate Judgment, *supra* note 1, pt. VIII, ¶ 2 (Liu, J., dissenting).

81. See *id.* pt. IX, ¶ 4 (Ramaroson, J., concurring).

One may conclude that the reason why “specific direction” was barely discussed in prior cases was because it is not an indispensable element of aiding and abetting. That is indeed what the Appeals Chamber had held in a precedent, namely *Mrkšić and Šlijvančanin*, where “specific direction” was discussed in somewhat greater detail.⁸² The Appeals Chamber dismissed Šlijvančanin’s defense that he should be acquitted because “specific direction” had not been proved.⁸³ It rejected this rationale and explicitly held that “‘specific direction’ is *not an essential ingredient* of the *actus reus* of aiding and abetting.”⁸⁴ Nevertheless, in *Perišić*, the Appeals Chamber argued that it never really meant what it held in *Mrkšić and Šlijvančanin*, and asserted that “specific direction” is an indispensable element of aiding and abetting under the tribunal’s jurisprudence.⁸⁵ The Appeals Chamber still conceded that its holding in *Mrkšić and Šlijvančanin* reflected “ambiguity” about the need to establish “specific direction.”⁸⁶

Additional ambiguity about the meaning of “specific direction” is palpable in the *Perišić* appellate judgment, which not only spawned a dissenting opinion but concurring opinions by three judges. Judge Ramaroson’s concurrence stressed that “specific direction” has been miscategorized under *actus reus* and is best understood as a *mens rea* element.⁸⁷ A joint separate opinion by Judges Meron and Agius also posited that “specific direction” truly is a *mens rea* concept, yet oddly maintained that the applicable *mens rea* for aiding and abetting remains “knowledge.”⁸⁸ A knowledge standard is actually incompatible with the much higher specific intent standard implied by “specific direction.” These two judges’ positions therefore suggested an inclination to raise the threshold for conviction, which is precisely what the majority opinion accomplished.

82. See, e.g., Prosecutor v. Mrkšić & Šlijvančanin, Case No. IT-95-13/1-A, Judgement, ¶ 159 (Int’l Crim. Trib. for the Former Yugoslavia May 5, 2009) [hereinafter *Mrkšić and Šlijvančanin Appellate Judgment*].

83. *Id.* ¶¶ 157, 159.

84. *Id.* ¶ 159 (emphasis added). This holding was affirmed in a subsequent case. Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-A, Judgement, ¶¶ 424–25 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012) [hereinafter *Lukić and Lukić Appellate Judgment*].

85. See *Perišić Appellate Judgment*, *supra* note 1, pt. III, ¶¶ 32–36 (arguing that the Appeals Chamber in *Mrkšić and Šlijvančanin* “neither intended nor attempted a departure from settled precedent” regarding the element of “specific direction”).

86. *Id.* ¶ 36.

87. See *id.* pt. IX, ¶ 7 (Ramaroson, J., concurring). Unlike the three other judges in the majority, Judge Ramaroson’s decision to acquit General Perišić did not focus on “specific direction” but on the separate ground that he lacked knowledge that his comprehensive assistance to the Bosnian Serb army facilitated its crimes. *Id.* ¶¶ 5, 10. Her concurrence featured only a single sentence on this point, and made no reference to extensive contrary evidence in the trial judgment. *Id.* ¶ 10; see, e.g., *Perišić Trial Judgment*, *supra* note 1, pt. VI.I (describing Perišić’s access to information about crimes by Bosnian Serb troops).

88. See *Perišić Appellate Judgment*, *supra* note 1, pt. VII, ¶¶ 3–4 (Meron, J. & Agius, J., joint separate opinion).

In practice, the interpretation of “specific direction” advanced by the Appeals Chamber in *Perišić* amounts to de facto specific intent. Under its narrow and exacting interpretation of the concept, it is insufficient that General Perišić willfully provided substantial assistance specifically to the VRS, an army that systematically targeted civilians as part of an ethnic cleansing campaign.⁸⁹ It is equally immaterial that General Perišić willfully sent substantial assistance to specific VRS units responsible for systematically sniping and shelling civilians in Sarajevo.⁹⁰ By the same token, evidence that General Perišić knew that the VRS perpetrated grave crimes is insufficient.⁹¹ According to the Chamber, the element of “specific direction” was not satisfied because “Perišić’s relevant actions were *intended* to aid the VRS’s overall war effort” but not its crimes.⁹² This reference to what General Perišić “intended” confirms that the Appeals Chamber effectively changed the applicable *mens rea* from knowledge to intent for aiding and abetting.

The Appeals Chamber had the discretion to interpret the opaque and malleable concept of “specific direction” differently, although it adopted a narrow and exacting standard. As Judge Liu’s dissent pointedly stated, “to insist on such a requirement now effectively raises the threshold for aiding and abetting liability.”⁹³ Furthermore, the de facto specific intent standard promulgated by the Appeals Chamber blurs the distinction between aiding and abetting and direct perpetration. A person who intentionally perpetrates atrocities may be charged as a principal. Aiding and abetting is technically a lower degree of criminal responsibility,⁹⁴ which is precisely why it hitherto required a *mens rea* of knowledge instead of intent. If the Appeals Chamber deemed that lack of evidence of criminal intent lessened General Perišić’s responsibility, it had the option of reducing his

89. See *Perišić Trial Judgment*, *supra* note 1, ¶¶ 1466–68, 1588–91, 1639–47 (finding that systematic crimes against civilians were “inextricably linked to the war strategy and objectives of the VRS leadership”).

90. See *Perišić Appellate Judgment*, *supra* note 1, pt. III, ¶ 66 (holding that there is no proof of “specific direction” notwithstanding the fact that military assistance overseen by General Perišić was notably “sent to certain VRS units involved in committing crimes”); *Perišić Trial Judgment*, *supra* note 1, ¶¶ 1237, 1594, 1602, 1619 (finding that part of the comprehensive logistical assistance overseen by General Perišić “was given to VRS units involved in perpetrating the charged crimes: the Drina Corps, Krajina Corps and [Sarajevo-Romanija Corps]”).

91. See *Perišić Trial Judgment*, *supra* note 1, ¶¶ 1632–40 (analyzing General Perišić’s knowledge of the VRS’s crimes); see also *id.* pt. VI.I (describing Perišić’s access to information).

92. See *Perišić Appellate Judgment*, *supra* note 1, ¶ 60 (emphasis added).

93. *Perišić Appellate Judgment*, *supra* note 1, pt. VIII, ¶ 3 (Liu, J., dissenting).

94. See, e.g., Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. INT’L CRIM. JUST. 837, 842–44 & n.54 (2013) (noting that aiding and abetting is generally considered a lower form of individual criminal responsibility than direct perpetration under international law, as illustrated by shorter prison sentences).

twenty-seven year sentence accordingly rather than raising the requisite level of proof.

The Appeals Chamber's holding not only strayed from its own jurisprudence, but from customary international law.⁹⁵ For example, in the aftermath of World War II, a British military court in Hamburg convicted two German industrialists for supplying large quantities of Zyklon B—a gas designed to kill vermin—to the Nazi S.S. even though the industrialists “*knew* that the gas was to be used for the purpose of killing human beings.”⁹⁶ Similarly, the Nuremberg Military Tribunal held that “[o]ne who *knowingly* by his influence and money contributes to the support [of atrocities against Jews] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”⁹⁷ David J. Scheffer, a reputable expert who formerly served as U.S. Ambassador-at-Large for War Crimes Issues, has underlined that “[c]ustomary international law applies the *knowledge* standard for aiding and abetting as a mode of participation.”⁹⁸

In light of the influential nature of the Yugoslavia tribunal's precedents, the newfound standard advanced by its Appeals Chamber in *Perišić* alarmed numerous experts in international criminal law.⁹⁹ A different panel of ICTY appellate judges ultimately chose to emphatically reverse the *Perišić* legal standard when issuing their judgment in the *Šainović* case, which held that *Perišić* had been wrongly decided and should be “unequivocally reject[ed]” as a precedent.¹⁰⁰ It is rather extraordinary for an appellate court to reverse itself less than a year after issuing a major decision, although this turn of events is partly explainable by the fact that ICTY appellate panels can vary from case to case. The only two judges from the *Perišić* appellate panel also on the bench in *Šainović* were Judges Liu and Ramarosan.

The *Šainović* panel determined that *Perišić* had raised the standard for conviction by requiring proof of “specific direction.” At

95. The ICTY appellate panel in *Šainović* found that “specific direction” is not a requisite element of aiding and abetting under customary international law. See, e.g., *Šainović* Appellate Judgment, *supra* note 10, ¶¶ 1626–42, 1649–50; Taylor Appellate Judgment, *supra* note 2, ¶¶ 417–37, 474–76 (reaching the same conclusion). By way of further illustration, an empirical study indicates that there is no precedent for “specific direction” being an indispensable element of aiding and abetting in international criminal law. See Stewart, “*Specific Direction*,” *supra* note 13.

96. U.N. WAR CRIMES COMMISSION, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 101–02 (1947) (emphasis added).

97. United States v. Flick, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1217 (1952) (emphasis added).

98. Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of the Petitioners at 33, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (emphasis added).

99. See generally *supra* note 13 and accompanying text.

100. *Šainović* Appellate Judgment, *supra* note 10, ¶¶ 1621, 1649–50.

the outset, it emphasized that *Perišić*'s reliance on the reference to "specific direction" in the *Tadić* precedent was misplaced since that case "focused on [Joint Criminal Enterprise] liability" and "does not purport to be a comprehensive statement of aiding and abetting liability."¹⁰¹ The *Šainović* panel's review of ICTY jurisprudence confirmed that proof of "specific direction" had never been demanded before the *Perišić* appellate judgment¹⁰² and that such a requirement had actually been dismissed in two prior cases.¹⁰³ The *Šainović* panel's supplementary review of customary international law likewise led to the conclusion that "specific direction" is not a binding element of aiding and abetting.¹⁰⁴

The *Šainović* decision came on the heels of the SCSL decision in the case of Charles Taylor, the former Liberian President. The prosecution at that court had predictably urged its appellate division to disregard the *Perišić* holding, which could have served as a precedent to overturn Taylor's trial conviction for aiding and abetting atrocities by rebel forces in the Sierra Leone Civil War.¹⁰⁵ The appellate division of the SCSL eventually decided that *Perišić* was only an internal precedent for the Yugoslavia tribunal¹⁰⁶ and declined to follow its standard on "specific direction," thereby affirming Taylor's conviction.¹⁰⁷ The SCSL held that *Perišić* omitted "any discussion of customary international law"¹⁰⁸ and introduced questionable "novel elements in its articulation of specific direction."¹⁰⁹

101. *Id.* ¶ 1623.

102. *See id.* ¶ 1625.

103. *Id.* ¶¶ 1618–21 (citing Mrkšić and Šlijančanin Appellate Judgment, ¶ 159; Lukić and Lukić Appellate Judgment, ¶ 424).

104. *See id.* ¶¶ 1626, 1649 (holding that "'specific direction' is not an element of aiding and abetting liability under customary international law").

105. *See* Taylor Motion, *supra* note 16, ¶¶ 2, 7–23 (arguing that the ICTY Appeals Chamber's holding in *Perišić* deviated from established jurisprudence, disregarded customary international law, and reflected errors of reasoning).

106. *See* Taylor Appellate Judgment, *supra* note 2, ¶ 476.

107. *Id.* ¶¶ 472–81, 486, 708.

108. *Id.* ¶ 476.

109. *Id.* ¶ 480. Kevin Jon Heller has argued that it is incorrect to focus on whether "specific direction" has a basis under customary international law. *See* Kevin Jon Heller, *The SCSL's Incoherent—and Selective—Analysis of Custom*, OPINIO JURIS (Sept. 27, 2013), <http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/> [<http://perma.cc/38QD-XDFA>] (archived Aug. 30, 2014). In Heller's view, customary international law is only relevant to decisions that expand criminal responsibility because custom ensures that such decisions will not run afoul of the legality principle (*nullum crimen sine lege*), which provides that people cannot be convicted for conduct that was not criminalized by law at the time of commission. To Heller, customary international law enables ICTY judges to narrow criminal responsibility in any way they wish, such as by imposing a requirement of "specific direction." Heller adds that this does not signify that requiring proof of "specific direction" is reasonable *per se* but that customary international law is irrelevant in this situation. Heller's argument is undoubtedly thoughtful, although it seems to represent a minority position among scholars. For instance, Manuel Ventura, the Director of the

Had the SCSL followed the precedent set in *Perišić*, it would plausibly have acquitted Taylor. Indeed, under the *Perišić* standard, it would be nearly impossible to convict a top military or political official of knowingly facilitating mass atrocities from a remote location. *Perišić* held that “specific direction,” namely a higher degree of proof, is *especially* required when an accused was remotely located from the scene of a crime.¹¹⁰ The *Perišić* panel argued that the reason why “specific direction” was hardly discussed in prior ICTY aiding and abetting cases was because they involved acts “not remote from” the principal perpetrators’ crimes.¹¹¹ In its view, “specific direction” was “self-evident” and “demonstrated implicitly” in these cases because the aider and abettor was “physically present during the perpetration or commission of crimes committed by principal perpetrators.”¹¹² Conversely, the Appeals Chamber required explicit proof of “specific direction” in General Perišić’s case because he mainly operated from Belgrade while the crimes occurred in Bosnia. By the same token, Taylor mainly operated from a location remote from the crime scenes in Sierra Leone.¹¹³

The SCSL affirmed Taylor’s conviction partly by concluding that whether a defendant aided and abetted crimes from a remote location is essentially irrelevant and that proof of “specific direction” is not needed under these circumstances.¹¹⁴ The SCSL added that “the requirement that the accused’s acts and conduct have a substantial effect on the commission of the crime ensures that there is a *sufficient causal link* between the accused and the commission of the crime.”¹¹⁵ The SCSL thus distanced itself from the ICTY Appeals Chamber’s

Peace and Justice Initiative, has suggested that Heller’s position could give ICTY judges the discretion to improperly narrow criminal responsibility as they idiosyncratically see fit, regardless of customary international law. Manuel Ventura, *Thoughts on Kevin Jon Heller’s Two Thoughts of my Critique of Specific Direction*, SPREADING THE JAM (International Law Blog) (Jan. 20, 2014), <http://dovjacobs.com/2014/01/20/guest-post-thoughts-on-kevin-jon-hellers-two-thoughts-of-my-critique-of-specific-direction/> [<http://perma.cc/ZUJ8-6W5L>] (archived Aug. 30, 2014). As we saw above, multiple other experts have concluded that customary international law is relevant to whether judges should demand proof of “specific direction.” See generally *supra* note 13 and accompanying text. That was also the conclusion of the appellate judges in the *Taylor* and *Sainović* cases. See *Taylor Appellate Judgment*, *supra* note 2, ¶ 476; *Sainović Appellate Judgment*, *supra* note 10, ¶¶ 1618–21, 1649–50.

110. See *Perišić Appellate Judgment*, *supra* note 1, ¶¶ 38–39 (stating, *inter alia*, that “[w]here an accused aider and abettor is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction[]” and that “[i]n such circumstances . . . explicit consideration of specific direction is required”).

111. *Id.* ¶ 38.

112. *Id.*

113. See *Taylor Appellate Judgment*, *supra* note 2, ¶ 540.

114. See *id.* ¶¶ 478–80 (emphasizing that “specific direction” is not a requisite element of aiding and abetting and rejecting “the *Perišić* Appeals Chamber’s treatment of the accused’s physical proximity to the crime as a decisive consideration distinguishing between culpable and innocent conduct” in aiding and abetting cases).

115. *Id.* ¶ 480 (emphasis added).

decision in *Perišić*, which had insisted that no “link” could be established between remote assistance and crimes absent proof of “specific direction.”¹¹⁶

Among numerous other sources, the ICTY Appeals Chamber’s holding in *Šainović* cited the *Taylor* judgment in its decision reversing the *Perišić* standard.¹¹⁷ Yet, the fluctuating nature of appellate panels at the ICTY suggests that its Appeals Chamber might someday revisit the issue and reinstitute the *Perišić* standard. Other international courts might ultimately opt to follow *Perišić* as well. Because it is too early to tell if *Perišić* will become a defunct precedent or eventually gain traction, we will now examine the potential impact of the *Perišić* legal standard if other courts adopt it.

C. *Would the Perišić Standard Foster Impunity?*

As we have seen, the ICTY Appeals Chamber’s decision in *Perišić* ignored critical factual evidence and raised the legal threshold to convict top officials of facilitating atrocities from a remote location. However, the most remarkable aspect of this precedent may be the conclusions reached by the court when combining both its factual and legal analyses.

The Appeals Chamber advanced a two-pronged standard to assess whether General Perišić’s assistance to the Bosnian Serb army was “specifically directed” to facilitate crimes.¹¹⁸ Under its rationale, General Perišić would have been properly convicted if either one of these two standards had been satisfied.

Firstly, the Appeals Chamber examined whether the Bosnian Serb army was “an organisation whose sole and exclusive purpose was the commission of crimes.”¹¹⁹ The Appeals Chamber predictably concluded that the VRS did not fit this definition.¹²⁰ This newfound standard would be nearly impossible to prove because virtually no national or pseudo-national military force would fall under that exceedingly narrow definition. Not even Hitler’s Nazi army during World War II could be described as “an organisation whose *sole and exclusive purpose* was the commission of crimes.” That is because warfare is not a crime *per se* under international criminal law. Besides the atrocities the Nazis perpetrated against Jews and other

116. See *Perišić* Appellate Judgment, *supra* note 1, ¶¶ 37–38 (arguing that the lack of analysis of “specific direction” in prior cases may be explained by the fact that they concerned acts in “proximity” to the crime scenes).

117. See *Šainović* Appellate Judgment, *supra* note 10, ¶ 1649 (citing *Taylor* Appellate Judgment, ¶¶ 436, 471–81) (holding “that ‘specific direction’ is not an element of aiding and abetting liability under customary international law”).

118. See *Perišić* Appellate Judgment, *supra* note 1, pt. III, ¶¶ 52–54.

119. *Id.* ¶¶ 52–53.

120. *Id.* ¶ 53 (holding that “the VRS was not an organisation whose acts were criminal *per se*”).

victims, they also fought battles against the Allies that were not technically illegal. By the same token, the Bosnian Serb army was a pseudo-national military force that engaged in ordinary battles besides committing regular attacks on civilians. To overlook its atrocities on the ground that not every single one of its operations was criminal reflected a remarkable absence of discernment by the Appeals Chamber.

Secondly, the Appeals Chamber assessed whether the Supreme Defense Council of the Federal Republic of Yugoslavia had a “policy of assisting VRS crimes.”¹²¹ The Appeals Chamber determined that no evidence indicates the existence of such a policy.¹²² This reasoning ignored that the SDC *did* provide practical assistance enabling the VRS’s crimes, notwithstanding the lack of an official policy to that effect. Absent proof of intent, this requirement cannot be satisfied regardless of the magnitude of the aid provided and the knowledge that the recipient army commits extremely grave crimes.

This peculiar rationale not only led to General Perišić’s acquittal but also could lead to the acquittal of people responsible for facilitating worse atrocities. Let us consider the following theoretical example to illustrate the implications of this development in international criminal law. Imagine that the Nazi army under Hitler’s totalitarian rule had depended on comprehensive logistical assistance from Country X to function as a military force and commit mass atrocities in the process. The officials of Country X responsible for orchestrating that logistical assistance would probably be acquitted under the *Perišić* standard regardless of their knowledge of the Nazis’ atrocities. Firstly, the officials of Country X could convincingly argue that the Nazi army was not “an organisation whose sole and exclusive purpose was the commission of crimes.”¹²³ Secondly, the officials of Country X could plausibly argue that they did not have an official policy of assisting Nazi crimes. On that basis, they would be acquitted on the ground that their assistance was not “specifically directed” to assist Nazi crimes. It would be insufficient to prove that they gave substantial aid to the Nazi army in full knowledge of its systematic attacks on civilians.

To insist upon a higher degree of proof in cases where an accused is remotely located, as the ICTY Appeals Chamber did in *Perišić*, comes across as a peculiar rationale at the dawn of the twenty-first century. The world has never been smaller due to the advent of modern technology, which has made it possible for information to flow freely from one side of the globe to the other. Even in pre-modern

121. *Id.* ¶¶ 52, 54–55.

122. *See id.* ¶¶ 52, 54–55, 58 (noting that the Trial Chamber did not identify evidence that the Yugoslav Supreme Defense Council had the policy of specifically directing aid toward VRS criminal activities).

123. *Id.* ¶ 52.

times, military lines of communication were well developed and enabled high-ranking officials to commit crimes without being near the scene. To elevate an accused's remote geographic location to an effective defense to a charge of aiding and abetting, unless a higher degree of proof is met, would undoubtedly undermine efforts to prosecute military or political leaders responsible for knowingly facilitating mass atrocities.

IV. IMPLICATIONS FOR INTERNATIONAL RELATIONS

Certain voices have alleged that political pressure from the United States and other powers led the ICTY Appeals Chamber to adopt a quasi-unattainable threshold for convicting political and military leaders of aiding and abetting crimes in *Perišić*.¹²⁴ However, "extraordinary claims require extraordinary evidence," as Carl Sagan, the late astronomer, once said.¹²⁵ No proof has been advanced to support these extraordinary allegations against the fundamental integrity of the tribunal and its judges.

The logical principle known as Occam's razor posits that between two competing theories the simplest explanation is usually the most accurate.¹²⁶ By this standard, it is more likely that the Appeals Chamber's decision in *Perišić* reflects its judges' own views rather than covert directives from higher powers. While important political interests are obviously at stake in international criminal law, that does not signify that judges are merely puppets responding to orders as conspiracy theorists claim.

The decisive role of judges serving on international criminal courts is often overlooked. Tellingly, academics and journalists have not studied the individual judicial philosophies of the various judges on international courts in remotely the same detail as, say, the judicial philosophies of each of the nine Justices on the U.S. Supreme Court. Overlooking the individual judicial philosophies of

124. See generally Marlise Simons, *Judge at War Crimes Tribunal Faults Acquittal of Serb and Croat Commanders*, N.Y. TIMES, June 14, 2013, <http://www.nytimes.com/2013/06/14/world/europe/hague-judge-faults-acquittals-of-serb-and-croat-commanders.html?pagewanted=all> [<http://perma.cc/HA6Z-29MY>] (archived Sept. 13, 2014) (noting that certain experts reckon that recent ICTY rulings sent a message to potential war criminals that "they do not need to be as frightened of international justice as they might have been four or five years ago").

125. Lawrence M. Krauss, *Pope John Paul II and the Trouble with Miracles*, L.A. TIMES, July 8, 2013, <http://articles.latimes.com/2013/jul/07/opinion/la-oe-krauss-pope-miracle-sainthood-20130708> [<http://perma.cc/AM7Y-TB35>] (archived Sept. 13, 2014).

126. See Christopher R. Leslie, *Cutting Through Tying Theory with Occam's Razor: A Simple Explanation of Tying Arrangements*, 78 TUL. L. REV. 727, 729 (2004) (describing how under Occam's razor "the most simple explanation is the one most likely to be correct").

international judges helps foster conspiracy theories whereby higher powers are believed to simply dictate the outcomes of cases. Conspiracy theories are less common when it comes to the U.S. Supreme Court partly because each Justice is understood to have his or her own judicial philosophy.

No evidence of political pressure has been advanced in *Perišić*, although the record suggests that various judges were mindful that the verdict reached in this case would set an important precedent for future conflicts. That was not an improper consideration *per se*, as the potential repercussions of a legal precedent are arguably among the relevant factors that judges may take into account in their decision-making process in any given case. The significant implications of the *Perišić* case were apparent in the Appeals Chamber's judgment, which offered an atypical disclaimer by stating that General Perišić's acquittal "should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts."¹²⁷

During oral arguments before the Appeals Chamber, Judge Meron asked a related question to the appellate prosecutor, Barbara Goy:

Judge Meron: Now, assume that [Country A supplies] the entire military aid to a warring party in the neighbouring country B [where] there is a war going on and the recipient engages both in lawful military activities but also in large-scale shelling of civilian towns. Would without more the Chief of Staff of country A be criminally liable?

Ms. Goy: The answer to the question depends on whether all the requirements of aiding and abetting are met . . . The question is then how much did the Chief of Staff know when providing—

Judge Meron: Assume it is known but nothing more than known.

Ms. Goy: [I]f the Chief of Staff is aware of both, that there is not only a small or remote risk that crimes will be committed, but there is the awareness of a probability of crimes, and he is aware that the assistance provided will probably be used for the commission of these crimes, then from our point of view the requirements of aiding and abetting are fulfilled.

Judge Meron: Thank you.¹²⁸

While these questions raised hypotheticals, one possible interpretation is that they reflected concern that knowledge would be too low a standard to convict someone of aiding and abetting under these circumstances. In particular, an objective observer may infer

127. See *Perišić Appellate Judgment*, *supra* note 1, pt. III, ¶ 72 (adding that, "[i]f an ostensibly independent military group is proven to be under control of officers in another military group, the latter can still be held responsible for crimes committed by [its] puppet forces").

128. Transcript of Appeals Hearing at 62–63, *Perišić Appellate Judgment* (Oct. 30, 2012), available at <http://www.icty.org/x/cases/perisic/trans/en/121030ED.htm> [<http://perma.cc/WW8E-BPW7>] (archived Aug. 31, 2014).

that the remarks “without more” and “known but nothing more than known” implied that a higher level of proof might be preferable, namely intent, as convicting the likes of General Perišić could disrupt international relations by casting too wide a net for aiding and abetting the crimes of another state’s army.¹²⁹

A similar concern was conveyed more straightforwardly in Judge Moloto’s dissenting opinion at trial, which argued that General Perišić’s conviction would have problematic implications for international relations:

[O]ne cannot simply ignore the reality that relations between states are often reinforced by the provision of significant military aid. Many foreign armies are dependent, to various degrees, upon such assistance to function. In this context, I am mindful that in many conflict zones around the world, the provision of military aid is aimed at supporting mutual interests such as the deterrence of war, the promotion of regional and global peace, stability and prosperity and other objectives.

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.¹³⁰

Judge Moloto may deserve credit for being the only judge, at either the trial or appellate stage, to have explicitly addressed the potential impact of the *Perišić* case on future conflicts. Even though “the finding of dependence” was not the sole basis for convicting General Perišić, as Judge Moloto affirmed, he raised a key question: Would General Perišić’s conviction have created an overly broad standard for aiding and abetting?

During the trial’s closing arguments, Judge Moloto asked Mark Harmon, a lead prosecutor, questions about whether top officials from America and its NATO allies could be held responsible for crimes by U.S. troops in Afghanistan under the prosecution’s theory in *Perišić*:

Judge Moloto: Let me paint you an analogous scenario and get your comment on it. A war began in Afghanistan in 2001 and it is generally known that there are allegations of crime having been committed at least since 2002 to date. Does that make the commanders of the various NATO armies that are jointly participating in that war guilty of the crimes that are alleged to have been committed and are still being committed, like detentions in Guantanamo, in Bagram, in Kabul and all these places?

129. *Id.* As noted above, the Appeals Chamber suggested that the Trial Chamber had essentially adopted a strict liability standard in convicting General Perišić. See *Perišić Appellate Judgment*, *supra* note 1, ¶¶ 70–72 (holding that no “link” existed between General Perišić’s actions and the crimes he was accused of assisting; and that “assistance from one army to another army’s war efforts is insufficient, in itself, to trigger individual criminal liability”).

130. *Perišić Trial Judgment*, *supra* note 1, pt. XII, ¶¶ 32–33 (Moloto, J., dissenting in part).

Mr. Harmon: Your Honour, you are asking me obviously, an explosive political question.

Judge Moloto: No, no. It's a legal question.

Mr. Harmon: I would like to answer your question. The objectives, as I understand, of the NATO forces isn't to ethnically cleanse parts of Afghanistan. It is to be engaged in a military campaign against the Taliban. It is—

Judge Moloto: Mr. Perisic is not charged with ethnically cleansing. He is charged with murders . . .

Mr. Harmon: Your Honour, he is charged in count in -- in respect of the crimes in Srebrenica he is charged with inflicting inhumane acts one of which is the forcible transfer of the population from Srebrenica. That is, in our view and our respectful submission, forcibly transferring 25 to 35,000 people out of an area where they were living is ethnic cleansing.

Judge Moloto: Okay. I concede that, but still my question still stands. . . on the analogy that I've drawn because all the other commanders of the NATO nations that are involved in Afghanistan are aware of the kind of crimes that have been committed there and are still continuing with that war. It's not a political question, it's an analogous situation to this one.

Mr. Harmon: [W]here I make my distinction is the purpose in objectives. The objectives of Bosnian Serbs, in part from strategic objective number 1, was to ethnically cleanse. . .

Judge Moloto: [A]ll I'm saying is there are also other crimes charged against the accused in this case which like the murders, you know, which were committed in combat or while they were there. These are similar crimes as the crimes that are being committed in the Afghanistani war.

[C]ommanders of the remaining NATO countries that are participating in Afghanistan are aware of the fact that crimes have been committed, crimes against humanity have been committed, and yet those commanders are still continuing to participate in that war, are they then guilty of those crimes that are being committed?¹³¹

What is of greater relevance here is the nature of the questioning rather than the prosecutor's answers, as it reflected the concerns of a distinguished international judge about the implications that a conviction in *Perišić* may have for future cases, including those concerning major powers. Judge Moloto subsequently asked additional questions about Afghanistan to Bronagh McKenna, a co-prosecutor:

Judge Moloto: Now that you were the one talking about the law, Madam McKenna, would you please apply that law to the question that I put to Mr. Harmon about the Afghanistani war.

131. Transcript of Prosecution Closing Statement at 14657–60, *Perišić* Trial Judgment, available at <http://www.icty.org/x/cases/perisic/trans/en/110328ED.htm> [<http://perma.cc/GUB2-CDMM>] (archived Aug. 31, 2014).

Ms. McKenna: Your Honour, I wouldn't like to go further than what Mr. Harmon said, other than to say that on the applicable law before this Tribunal, the jurisprudence provides the mens rea and actus reus are as I have just set out.

Judge Moloto: But I would like to see how this would operate in the situation in Afghanistan, because as we have agreed, the situations are identical¹³². . . there is substantial provisional arms and ammunition and soldiers by the various NATO commanders in Afghanistan, crimes are committed there, they don't have the intention to commit crimes, they don't supply the assistance with the intention to commit crimes, but nonetheless crimes are committed, and therefore every commander should be held responsible for whatever crimes are committed in Afghanistan, all of them.

Ms. McKenna: Your Honour, I would submit that the underlying crimes with which Perisic is charged are part of a widespread and systematic attack against the civilian population or a violation of the laws and customs of war. Once again, if in hypothetical situation—

Judge Moloto: I have painted no hypothetical situation. I've given you a situation that is existing on the ground in Afghanistan. It's not a hypothetical.¹³³

The answers of the two prosecuting attorneys essentially stood for the proposition that America has not deliberately targeted Afghan civilians on a wide scale like Bosnian Serb troops did. Murders of Afghan civilians by U.S. soldiers have indeed been perpetrated by a few rogue elements, some of whom have faced prosecution.¹³⁴ To be sure, an appreciable number of Afghan civilians have also died as “collateral damage” due to negligence or recklessness by U.S. troops and their leadership.¹³⁵ While “collateral damage” is undoubtedly a serious humanitarian problem, it is distinguishable from the actions of an army that intentionally kills scores of civilians pursuant to an ethnic cleansing plan, as the Bosnian Serb army did in Sarajevo and Srebrenica.

132. In fact, the prosecution disputed Judge Moloto's argument that these two situations were largely “identical,” as the prosecutors argued that, unlike in Bosnia, alleged crimes by U.S. soldiers in Afghanistan “would not be part of a widespread and systematic attack against a civilian population” pursuant to an “ethnic cleans[ing]” campaign. *Id.* at 14657–59, 14673–74.

133. *Id.* at 14673–75.

134. See, e.g., Kirk Johnson, *Guilty Plea by Sergeant in Killing of Civilians*, N.Y. TIMES, June 5, 2013, <http://www.nytimes.com/2013/06/06/us/sergeant-robert-bales-testimony.html> [<http://perma.cc/A5LV-BWDN>] (archived Sept. 13, 2014) (describing the court hearing in which Robert Bales, an American Staff Sergeant, pled guilty to murdering sixteen Afghan civilians).

135. See, e.g., Richard A. Opiel, Jr., *U.S. Concedes Afghan Attack Mainly Killed Civilians*, N.Y. TIMES, Feb. 21, 2009, <http://www.nytimes.com/2009/02/22/world/asia/22afghan.html> [<http://perma.cc/8QS-ZS6J>] (archived Sept. 13, 2014) (describing a U.S. airstrike that killed 13 civilians and 3 suspected Taliban fighters and indicating that hundreds of civilian deaths have been “attributed to American, NATO and Afghan forces”).

The thoughtful suggestion behind Judge Moloto's questioning about Afghanistan apparently was that the tribunal should not create a strict liability standard whereby any crime committed by any soldier would entail responsibility by top officials on the ground that they had facilitated the crime by providing operational support. However, the now-defunct *Perišić* trial judgment did not create such a catchall. The Trial Chamber followed established jurisprudence by requiring proof that the defendant provided substantial assistance to the principal perpetrators despite knowing of their crimes. Not any aid and not any crime would satisfy that standard. The aid must have been influential and international criminal law generally focuses on the worst atrocities, not isolated acts of wrongdoing. Besides, the factual circumstances of the *Perišić* case are not extremely common. Relatively few armies deliberately kill civilians on a wide scale like the Bosnian Serb army did in Sarajevo and Srebrenica as part of an ethnic cleansing campaign.

While murders by rogue U.S. soldiers in Afghanistan are distinguishable from ethnic cleansing by the Bosnian Serb army, certain high-ranking American officials have licensed other kinds of crimes in the "War on Terror." For instance, President George W. Bush personally authorized the use of torture in terrorism cases.¹³⁶ If the officials of allied countries knowingly facilitated this abuse, such as by transferring individuals into U.S. custody despite knowing that they would likely be tortured, they may indeed be held criminally liable for their assistance.¹³⁷

In other words, when national leaders knowingly facilitate grave crimes by a foreign army, these leaders should be prosecuted regardless of whether they represent a powerful nation. To disagree with this proposition may suggest "a fear of too much justice," to

136. See Scott Shane, *U.S. Engaged in Torture After 9/11, Review Concludes*, N.Y. TIMES, Apr. 16, 2013, <http://www.nytimes.com/2013/04/16/world/us-practiced-torture-after-9-11-nonpartisan-review-concludes.html?pagewanted=all> [<http://perma.cc/U3XS-2TJ2>] (archived Sept. 13, 2014) (stating that "[a] nonpartisan, independent review of interrogation and detention programs" determined that the United States resorted to "torture" in interrogations following the 9/11 terrorist attacks); R. Jeffrey Smith, *In New Memoir, Bush Makes Clear He Approved Use of Waterboarding*, WASH. POST, Nov. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308082.html> [<http://perma.cc/87F2-VVTQ>] (archived Sept. 13, 2014) (noting that, in his memoir, Bush stated that he personally approved the use of waterboarding).

137. Italy's former military intelligence chief was notably sentenced to ten years in prison by an Italian court for his complicity with "extraordinary renditions," in contrast to American officials who never faced prosecution in the United States. See Gaia Pianigiani, *Italy Jails Ex-Officials for Rendition*, N.Y. TIMES, Feb. 12, 2013, <http://www.nytimes.com/2013/02/13/world/europe/former-italian-military-officials-sentenced-in-abduction-of-abu-omar.html> [<http://perma.cc/3ZCM-Z2TB>] (archived Sept. 13, 2014).

borrow words from William Brennan, the late U.S. Supreme Court Justice.¹³⁸

V. CONCLUSION

Evidence introduced during the *Perišić* trial provided a powerful reminder of the international community's shortcomings in responding to the carnage in Bosnia. Not only did UN peacekeepers notoriously fail to prevent mass atrocities from occurring, especially in Srebrenica—considerable weaponry was also sent across the Serb border to the Bosnian Serbs by easily evading UN border monitors.¹³⁹ Belgrade's substantial military aid to its Bosnian Serb allies undoubtedly facilitated their criminal operations.

The UN ICTY nonetheless achieved a measure of justice when its Trial Chamber convicted General Perišić for his role in helping enable these atrocities. Its Appeals Chamber reversed and set a troubling precedent by raising the threshold of proof and disregarding the most critical evidence adduced at trial.

Following his acquittal, General Perišić flew from The Hague back to Belgrade on a Serbian government plane. He then gave a press conference where he argued that his acquittal was “a modest contribution towards removing the anathema from the Serb people about the alleged violations of the customs of war.”¹⁴⁰ These remarks must be understood in the context of Serbian public opinion, which perceives the tribunal in The Hague as an institution biased against Serbs. But it was General Perišić, not “the Serb people,” who had been convicted at trial. One of the objectives of international criminal law, at least in principle, is to individualize criminal responsibility and do away with the notion that entire nations are responsible for war crimes.

138. In *McCleskey*, the U.S. Supreme Court held that statistical proof of systemic racial discrimination in the administration of the death penalty is irrelevant. A defendant must instead prove intent of racial discrimination in his own case, which is almost impossible to prove without considering systemic patterns. The majority expressed concern that accepting proof of systemic racial discrimination in capital cases would open the door to many other challenges to racial discrimination. Such a concern evinced “a fear of too much justice,” as Justice Brennan famously wrote in his dissenting opinion. See *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

139. See, e.g., *Perišić Trial Judgment*, *supra* note 1, pt. V, ¶¶ 604, 608–12, 956–61, 1052 (describing the failure of the UN Protection Force to protect Srebrenica civilians and stop the delivery of logistical assistance from Serbia to the Bosnian Serb army).

140. *Ex-General Says His Acquittal Was “Contribution to Serbia”*, B92 MEDIA (Mar. 1, 2013), http://www.b92.net/eng/news/crimes.php?yyyy=2013&mm=03&dd=01&nav_id=84942 [<http://perma.cc/U2C5-DRXA>] (archived Aug. 31, 2014).

The evidence at trial did not establish whether General Perišić condoned the Bosnian Serb army's crimes or intended them to occur, although the evidence proved that he kept buttressing that army despite having notice that it perpetrated extremely serious crimes. Nevertheless, General Perišić's acquittal and triumphant return to Belgrade suggested that his actions were not criminal in nature.

War is a recurrent problem and it is doubtful that international criminal law will be able to preempt hostilities from occurring altogether. But international criminal law can help develop standards under which, at a minimum, civilians will not be deliberately targeted and massacred. However, the standard advanced by the ICTY Appeals Chamber in *Perišić* might provide an incentive for political and military leaders to close their eyes to criminal ways of warfare. Under this standard, leaders who buttress an allied army while condoning its crimes may enjoy impunity. Some would plausibly rationalize their actions by shrugging their shoulders and thinking "bad things unfortunately happen in war" or "every side commits crimes during wartime." Further, national leaders who not only condone their allies' atrocities but intend them to occur might take comfort in the fact that it may be virtually impossible to convict them even of aiding and abetting, which technically implies a lower degree of criminal responsibility than direct perpetration. That is among the reasons why the *mens rea* for aiding and abetting should be simply knowledge, as opposed to the higher standard of intent typically required for direct perpetration—a distinction blurred by *Perišić*.

Thus far, the standard set by the ICTY Appeals Chamber in *Perišić* has been reversed by *Šainović*, where a distinct ICTY appellate panel emphatically declared that *Perišić* had been wrongly decided. The ICTY Appeals Chamber may revisit the issue in a future case. An appeal is notably pending in the case of Jovica Stanišić and Franko Simatović, who were acquitted by an ICTY Trial Chamber of aiding and abetting charges partly based on the *Perišić* standard.¹⁴¹ Stanišić and Simatović served in the Serbian State Security Service and were accused of facilitating crimes by special units targeting non-Serbs in Croatia and Bosnia.¹⁴²

The future of *Perišić* as a precedent may ultimately depend on whether the permanent International Criminal Court and other courts decide to follow its rationale. The SCSL declined to do so by emphasizing that *Perišić* was solely an internal precedent for the ICTY and by affirming Charles Taylor's conviction for facilitating

141. See Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, Judgment, Vol. II, ¶¶ 1254, 1260, 2360–63 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013) (concluding that the accused's assistance was not specifically directed toward the commission of a crime).

142. See *id.* Vol. I, ¶¶ 1–6 (explaining the charges and allegations against Stanišić and Simatović).

mass atrocities absent proof of “specific direction.”¹⁴³ The most remarkable aspect of this landmark decision may have been a concurrence by Judge Shireen Avis Fisher of the United States, who dismissed Taylor’s claim that he should have been acquitted since the leaders of influential nations engage in similar conduct. “[S]uggesting that the Judges of this Court would be open to the argument that we should change the law or fashion our decisions in the interests of officials of States that provide support for this or any international criminal court is an affront to international criminal law and the judges who serve it,” Judge Fisher underscored.¹⁴⁴

While judges at both the ICTY and SCSL have struck a blow to *Perišić*, other judges might rule differently by weighing the political implications of their decisions. If courts ultimately decide to treat *Perišić* as a valid precedent, it might be due to a willingness to raise the threshold of proof so as not to disrupt international relations by casting too wide a net for convicting leaders who facilitate crimes by a foreign army. Such a consideration would particularly protect leaders of powerful states, which are more likely to have the means to provide substantial assistance to foreign armies.

“A fear of too much justice”¹⁴⁵ is palpable behind concern that legal standards crafted by international courts might someday serve as precedents to challenge disturbing aspects of international relations and convict officials from major powers. The rapidly growing field of international criminal law will lack credibility unless it rejects the notion that knowingly facilitating atrocities is not a crime.

143. Taylor Appellate Judgment, *supra* note 2, ¶ 476.

144. *Id.* ¶ 717 (Fisher, J. concurring). Judge Renate Winter of Austria joined Judge Fisher’s concurrence. *Id.* ¶ 721.

145. *McCleskey*, 481 U.S. at 339; *see also supra* note 135 and accompanying text.
