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Aid “Specifically Directed” to Facilitate War Crimes: The ICTY’s Anomalous Actus Reus Standard for Aiding and Abetting

Christopher P. Eby*

Abstract

The question of whether international criminal law sweeps too wide in a globalized world is dramatized in the context of accomplice liability, where aiding and abetting may embrace many forms of culpable activity—including even “encouragement.” To the extent that modern industrialized states legitimize the United Nations, their defense industries and goods exporters would likely prefer culpability standards excluding their activity altogether from the universe of complicity (in crimes against humanity, genocide, and the like). Until recently, there was little doubt that international criminal tribunals operating under the aegis of the UN had yielded no such bright line formulations. Provided they knew their assistance would be used ultimately to commit crimes against civilians, all purveyors whose assistance contributed meaningfully can be convicted as accomplices. Nevertheless, 2013 witnessed a phenomenon in the jurisprudence of one such tribunal that reflected the implicit pull these arguments possess. Adopting the dictum of its predecessor appellate court, the International Criminal Tribunal for the Former Yugoslavia (ICTY) derived from customary international law a culpability formulation for the actus reus of aiding and abetting: that the accused’s acts of assistance be “specifically directed” to facilitate commission of one of the crimes punishable under the ICTY Statute. As the phrase connotes, and as subsequent interpretations crystallized it, specific direction limits what forms of activity can be criminal—yet with a peculiar limiting principle in cases where the accused operated geographically near to the principal. This Comment will argue that specific direction is inconsistent with ICTY precedent and customary international law, that it calls for assumptions at odds with governing treaties, and that its potential normative merits cannot mitigate these critiques.

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I. INTRODUCTION

In May 2013, the International Criminal Tribunal for Crimes Committed in the Former Yugoslavia (“ICTY”) acquitted two former heads of the Serbian State Security Service of aiding and abetting the war crimes of, as well as conspiring with, a special unit of the Serbian State Security Service known as the Red Berets.¹ The defendants, Simatović and Stanišić, interacted with a contingent of the Serbian Volunteer Guard known as Arkan’s men—training, supplying, and financing them under continuous communication with Slobodan Milosević.² In separate proceedings, the Trial Chamber found the Red Berets, Arkan’s men, Milesović, and members of the Bosnian Serb Army guilty of crimes against humanity for participation both in the murder and persecution of non-Serbs and in their deportation and forcible transfer from Bosnia-Herzegovina and Croatia.³ Yet it acquitted Simatović and Stanišić despite their elite status within the Serbian security apparatus, their establishment and operation of a Red Beret training camp, and evidence that Stanišić, assuring Simatović, said “we’ll exterminate them completely.”⁴

To arrive at this result, the ICTY invoked a *sui generis* requirement that the prosecution prove the accused’s acts of assistance were “*specifically directed* towards charged crimes.”⁵ In other words, the ICTY announced a shift away from presuming *actus reus* when acts of assistance substantially contributed to a crime’s commission (with the attendant burden on the defendant(s) to rebut the presumption), to requiring that the prosecution prove the acts of assistance themselves tend only or predominantly to effectuate the crimes in question. The ultimate effect was to decriminalize entire categories of conduct—making proof of *actus reus* non-consequentialist and importing a further “intent” requirement as to the acts themselves.⁶ Indeed, one prominent peer tribunal expressed alarm

¹ The Red Berets were responsible for many of the worst atrocities at Srebrenica and Sarajevo. Facts drawn from Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-T, Trial Judgment (May 30, 2013) [hereinafter Stanišić Judgment]. All documents and cases of the ICTY cited herein are available at its website, <http://www.icty.org> (last visited May 8, 2014).

² For an in-depth study of Arkan and his volunteer army, see CHRISTOPHER S. STEWART, HUNTING THE TIGER: THE FAST LIFE AND VIOLENT DEATH OF THE BALKANS’ MOST DANGEROUS MAN (Thomas Dunne Books, 1st ed. 2008).

³ Stanišić Judgment, *supra* note 1.

⁴ Stanišić quoted in Eric Gordy, *What Happened to the Hague Tribunal?*, N.Y. TIMES (June 2, 2013), available at <http://www.nytimes.com/2013/06/03/opinion/global/what-happened-to-the-hague-tribunal.html> (last visited May 3, 2014).

⁵ Stanišić Judgment, *supra* note 1, ¶ 1264 (emphasis added).

⁶ One commentator posited that the ICTY’s new standard would have acquitted the Zyklon B defendants, who sold to S.S. functionaries poisonous gas used to commit genocide during the

at the ICTY's novel formulation, rebutting it with the language of the Rome Statute.⁷ "the actus reus of aiding and abetting liability under Article 6(1) of the [Rome] Statute and customary international law is that the accused's acts and conduct of assistance, encouragement, and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible."⁸

This Comment argues that the ICTY's jurisprudence in this and its predecessor case is at odds with the weight of its own precedent, as well as that of its peer tribunals, and likely contravenes generally accepted principles of customary law governing UN Security Council tribunals. Section II of this Comment outlines the background and development of the specific direction standard, tracking the emergence of the phrase as dictum through its adoption by the ICTY as binding law. Section III examines whether the standard is consistent with international law principles and precedent (whether customary or treaty-derived), arguing ultimately that it marks a vivid departure from them. Section IV then explores whether justifications for limiting the actus reus of accomplice liability—such as insulating from vast liabilities large bureaucratic nations that transfer weapons, materials, and other goods to unstable states or factions—outweigh harms imposed on international efforts to police and prosecute violators. While such a conclusion might seem to depend on operating assumptions about the worthiness of certain forms of international trade, this Section argues that concerns of legal efficacy, institutional competence, and the continued proliferation of the bureaucratic state militate against accepting the standard as a normative matter. Section V concludes with a call for sustained scrutiny of specific direction or reconsideration of the decision at the heart of the controversy, and with the realization that, going forward, guidance from The Hague as to the authority tribunals are to accord one another's decisional law would alleviate the underlying jurisprudential problem.

Holocaust. See James G. Stewart, Comments to Kevin Jon Heller, *More Misdirection on Specific Direction*, OPINIO JURIS (Aug. 13, 2013, 8:39 PM), <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1> (last visited April 26, 2014); see also this paper's discussion, *infra*.

⁷ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 21, art. 17 [hereinafter Rome Statute].

⁸ Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, ¶ 481 (Sept. 26, 2013) [hereinafter Taylor Appeals Judgment].

II. THE DEVELOPMENT OF SPECIFIC DIRECTION

In a recent line of cases, the ICTY derived from international humanitarian law, applied in the case before it, and adopted as binding, a proof requirement effectively limiting as a matter of law the sorts of activities that can aid and abet genocide, a war crime, or crime against humanity. A United Nations court tasked with prosecuting crimes that occurred in the Balkans during the 1990s, the ICTY proceeds on the basis of universal jurisdiction.⁹ Established with unanimous approval of the United Nations Security Council,¹⁰ the tribunal garnered the early support of many academics who thought it would enhance the credibility and effectiveness of international law.¹¹ As with the ICTY's sister tribunals—the International Criminal Tribunal for Rwanda (“ICTR”)¹² and the Special Court for Sierra Leone (“SCSL”)¹³—the Security Council invoked Chapter VII of the UN Charter to address the threat to international security posed by widespread ethnic cleansings, mass killings, and forcible transfer in the region.¹⁴ These tribunals' operating statutes, although identical in most respects, contain enough variance to allow them to approach certain crimes differently.¹⁵

Crucially, however, all three statutes contain the same accomplice liability language and incorporate customary international law, opting for a suggestion-and-adoption regime under which judges are to consider proposals submitted

⁹ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanities Law Committed in the Territory of the Former Yugoslavia since 1991, *adopted* May 25, 1993, *as amended by* S.C. Res. 1660, U.N. Doc. S/RES/1660 (Feb. 28, 2006), UN Doc. S/25705, art. 9.2 (providing that the tribunal may formally request that national courts defer to its competence) [hereinafter ICTY Statute].

¹⁰ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. U.N. Doc. S/RES/827 art. 1, (May 25, 1993) [hereinafter Resolution 827].

¹¹ See, for example, Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 AM. J. INT'L. L. 76, 78–79 (1994).

¹² See Statute of the International Criminal Tribunal for Rwanda, *adopted* Nov. 8, 1994, *as amended by* U.N.S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002), U.N. Doc. S/RES/955 [hereinafter ICTR Statute].

¹³ See Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; Resolution 1315 S/RES/1315 (August 14, 2000) [hereinafter SCSL Statute].

¹⁴ *Id.*

¹⁵ The ICTY has shown a willingness to proscribe offenses without reference to existing authority, whereas the ICTR tends to interpret expansively treaty-based definitions of war crimes and the like. Compare, for instance, ICTR Statute, *supra* note 12, art. 4 (referring to “rape, enforced prostitution and any form of sexual assault” as violations of Article 3 of the Geneva Convention), with ICTY Statute, *supra* note 9, art. 5(g) (refraining from classifying rape as a violation of the Geneva Convention, but defining it as a crime against humanity). The SCSL, on the other hand, has the unique authority to prosecute individuals for violations of Sierra Leonean law. See SCSL Statute, *supra* note 13, art. 5.

from UN member nations on evidentiary standards and substantive crime definition.¹⁶ Judges are not, however, instructed to adopt particular proposals, which predominantly come from individuals advocating criminalization of entire categories of conduct, not scholars proposing causation axioms or appropriate standards of culpability.¹⁷ If ICTY judges choose not to adopt, say, Serbia's suggestion to incorporate its national criminal law standards into the tribunal's war crimes prosecutions, then the tribunal is left with recourse only to treaty principles, its own case law, and customary law—including the particularly relevant decisions of its peer tribunals. One anomalous holding might come to have far greater precedential significance than it would in the context of a comprehensive statute with which decisional law must comport.

A. *Prosecutor v. Tadić*¹⁸

Duško Tadić was the president of the Kozarac board of the Serb Democratic Party, yet his involvement in the commission of atrocities was not purely bureaucratic. During an attack on Kozarac, located in what is now Bosnia and Herzegovina, he participated in the collection and forced transfer of civilians to detention camps; as part of a group of Serbs, he beat and kicked one victim until he was unconscious, threatened another victim with a knife and stabbed him, and participated in the killing of five men in Jaskići (a village near Prijedor); and he personally killed two Muslim policemen in Kozarac in 1992.¹⁹ At trial, he was convicted under Article 7(1) of the ICTY Statute on the basis of his individual criminal responsibility for crimes against humanity and violations of the laws and customs of war; his participation in a common design to rid the Prijedor region of its non-Serb population constituted the *actus reus*.²⁰ Although it found that this

¹⁶ Compare Resolution 827, *supra* note 10, ¶ 3 (requiring “the Secretary-General submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15” of the statute), with ICTY Statute, *supra* note 9, art. 15 (providing that judges shall “adopt rules of procedure and evidence . . . and other appropriate matters”).

¹⁷ See The Hon. Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 280 (2002) (describing being “inundated” with letters from “many people, and particularly women” in the “United States, Canada, and many of the western European nations” who took “the trouble to put into their own words . . . their concern about rape being either ignored once again or not receiving adequate attention from the Tribunal”).

¹⁸ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999) [hereinafter *Tadić Appeals Judgment*].

¹⁹ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, ¶¶ 397, 261, 211, 389, 397 (May 7, 1997) [hereinafter *Tadić Trial Judgment*].

²⁰ *Id.* ¶¶ 688–93, 714.

common purpose of forcible transfer and deportation of non-Serbs did not include intent to commit murder—largely because the initial takeover of the region had been bloodless—the Trial Chamber held that, at the very least, Tadić was complicit in the murders, since “aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.”²¹

The Appeals Chamber added nine counts of principal violation, declined to follow the lower court’s aiding and abetting analysis, and opted instead to find Tadić guilty on grounds of conspiracy (or joint criminal enterprise). This gave the tribunal the chance to distinguish acting in pursuance of a common purpose or design (used interchangeably with conspiracy) from aiding and abetting.²² It was clear to the court that Article 7(1) of the ICTY Statute, which holds aiders and abettors criminally responsible as individuals, was designed to criminalize a broad swath of conduct beyond physical perpetration of the *actus reus*. The nature of many international crimes committed in wartime dictated this realization, particularly in the absence of guidance as to what *conduct* is within the reach of accomplice liability.²³ “To hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators *all those who in some way made it possible* for the perpetrator physically to carry out that criminal act.”²⁴ Indeed, the court went on to state, “international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.”²⁵ The Appeals Chamber in *Tadić*, therefore, sought at the outset to construe broadly the portion of the statute concerning derivative liability, which makes no distinction between conspiracy and aiding and abetting, but what followed was a wholesale retreat from these first principles.

Recognizing that “the Tribunal’s Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality,” the Appeals Chamber proceeded to identify them.²⁶ It observed that the notion of common purpose or joint criminal

²¹ *Id.* ¶¶ 689, 688, 691 (finding also that assistance is “substantial” if the accused’s acts were a but-for cause of the commission of the crime(s) and that “actual physical presence when the crime is committed is not necessary”).

²² *Tadić Appeals Judgment*, *supra* note 18, ¶ 191.

²³ *See id.*

²⁴ *Id.* ¶ 192 (emphasis added).

²⁵ *Id.* ¶ 193.

²⁶ *Id.* ¶ 194 (“Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.”).

enterprise under customary international law could be found in three distinct categories of cases: those where all co-defendants, acting pursuant to a common design, shared the same criminal intention or mens rea to perpetrate a crime; concentration camp cases, with the accused's position of authority within the camp hierarchy and knowledge of the perpetration of crimes therein satisfying actus reus and mens rea, respectively; and, finally, those cases where co-defendants shared a common design or purpose, and one of the perpetrators committed a crime that, while outside the scope of this design, was nevertheless a natural and foreseeable result of it.²⁷ It was this last category into which Tadić fell, and "criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."²⁸ The Trial Chamber, by implication, did not need complicity to hold Tadić responsible for crimes outside the common design, because of the foreseeability of the murders within the context of the forced transfer conspiracy.

Had the *Tadić* court stopped here, the course of subsequent cases may have been quite different. Yet the court decided not only to clarify the doctrine of conspiracy but to contrast it with aiding and abetting liability, announcing in dictum:

In the case of aiding and abetting . . . the principal may not even know about the accomplice's contribution. The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a *substantial effect* upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to furthering the common plan or purpose. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required ([for example], either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes . . . were likely to be committed).²⁹

In other words, the court sought to make it much more difficult for the prosecution to prove the actus reus of aiding and abetting than of conspiracy; whereas an accomplice's acts must be specifically directed to assist a perpetrator

²⁷ See *id.* ¶¶ 195–220 (citing case law from British, Italian, and US jurisdictions for the proposition that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal").

²⁸ *Id.* ¶ 204.

²⁹ *Id.* ¶ 229 (emphasis added).

and have a substantial effect, a conspirator's need only be "in some way directed" to furthering the conspiracy. The discriminating reader of *Tadić* is left with the following doctrinal matrix:

<i>Tadić</i>	Actus reus	Mens rea
Conspiracy (or joint criminal enterprise)	Aid or acts of assistance provided need only be of a type that <i>sometimes</i> accompanies the commission of the crime.	(a) specific intent to perpetrate the principal's crime; OR (b) intent to pursue the common criminal design and "foresight" that crimes outside its scope were "likely" to follow.
Aiding and abetting	Aid or acts of assistance must have a substantial effect on the perpetration of the crime AND must be of a type that accompanies, or is "specifically directed towards," commission of the particular crime.	Knowledge that acts of assistance indeed assist the principal's commission of the crime.

This seems the only reading of *Tadić* that preserves mens rea and actus reus as distinct concepts and proof elements; indeed, one could interpret specific direction as collapsing them into one and remain faithful to the opinion. There are certainly good arguments on both sides of the mens rea debate;³⁰ but the actus reus prescriptions in *Tadić* would almost certainly be under-inclusive—sweeping in only conduct that the relevant observer would associate with ICTY-punishable crimes ostensibly *without regard to factual context or circumstances*. The language of the opinion suggests that, if a given act has a plausible, non-criminal explanation, it would be insulated as a basis for accomplice liability, regardless of the substantiality of its effect on the commission of a war crime. Implicitly realizing this, the court subsequently attempted to square the novel *Tadić* doctrine with precedent.

³⁰ See generally Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304 (2008) (arguing that, while aiding and abetting liability for corporate entities has long carried an actus reus of "substantial assistance," there is little case law on point consistently selecting a mens rea standard as between purpose and knowledge).

B. *Prosecutor v. Blagojević*³¹

Several years after it heard *Tadić*, the Appeals Chamber considered the conviction of Blagojević, a commander of the Bosnian Serb Army (“VRS”), for aiding and abetting genocide and crimes against humanity. His role in the events surrounding the infamous Srebrenica massacre³² was one of oversight and instruction: he supervised the forced transfer of refugees by members of his brigade and coordinated such efforts against Muslim Serbs.³³ The Trial Chamber held expressly that aiding and abetting, not conspiracy, was the appropriate theory under both Article 7(1) of the ICTY Statute governing individual criminal responsibility and the command responsibility provisions of Article 7(3).³⁴ Finding that Blagojević rendered substantial assistance to the primary perpetrators, the Trial Chamber convicted him of aiding and abetting genocide, despite the prosecution’s failure to establish that he had knowledge of the executions (at Srebrenica) when he rendered assistance.³⁵ However, because he undoubtedly had knowledge of his inferiors’ “cruel and inhumane” acts towards and torture of the refugees, and because his assistance was “practical,” the Trial Chamber agreed that genocidal intent could be inferred from evidence of other culpable acts systematically targeting the same group.³⁶ Grounding its conviction in “general principles of criminal law,” the Trial Chamber made explicit its past and present recourse to definitions of complicity prevailing in “France, England, and Germany.”³⁷

The Appeals Chamber nonetheless took the view that no trier of fact could find beyond a reasonable doubt that, without knowledge of the mass killings, Blagojević’s awareness of the other facts relating to the forcible transfer operation

³¹ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Judgment (May 9, 2007) [hereinafter *Blagojević Appeals Judgment*].

³² For a book-length study of the Srebrenica Massacre, see DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE’S WORST MASSACRE SINCE WORLD WAR II* (1998). For scholarly articles, see H. Brunborg, T.H. Lyngstad & H. Urdal, *Accounting for Genocide: How Many Were Killed in Srebrenica?*, 19 EUR. J. OF POPULATION 229 (2003); Jasmina Besirevic Regan, *Genocide Studies Program: Former Yugoslavia*, YALE UNIV. ONLINE (retrieved Mar. 16, 2008), http://yale.edu/gsp/former_yugoslavia/index.html.

³³ *See generally* *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment (Jan. 17, 2005) [hereinafter *Blagojević Trial Judgment*].

³⁴ *Id.* ¶¶ 682–83.

³⁵ *Blagojević Appeals Judgment*, *supra* note 31, ¶ 123 (summarizing the Trial Chamber’s analysis).

³⁶ *Blagojević Trial Judgment*, *supra* note 33, ¶¶ 755–59.

³⁷ *Id.* ¶ 776 & n.2208 (looking even to Chinese and Argentinian law after endorsing the proposition that applicable complicity law in the ICTY ought to reflect developed-world jurisprudence).

satisfied the mens rea for complicity in genocide.³⁸ The fact of his command responsibility did not override the necessity of proving his particular mens rea (knowledge) concerning the acts themselves. In the portion of the opinion most germane for our purposes, the court addressed the confusion *Tadić* had engendered:

[W]hile the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the actus reus of aiding and abetting. This may be explained by the fact that such a finding will often be implicit where the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime [T]he fact that his or her participation amounted to no more than his or her “routine duties” will not exculpate the accused.³⁹

Thus, the Appeals Chamber held that specific direction ought not constitute the focus, because, far from a stand-alone proof requirement, it had effectively served as a proxy for practical assistance having a substantial effect on commission of the crime. Indeed, *Blagojević* seems to harmonize with the weight of customary law, just as it explains subsequent decisions (such as *Prosecutor v. Brđanin*)⁴⁰ in which specific direction played no part in upholding convictions for aiding and abetting detention camp killings.

Echoing Western principles of complicity and declaring substantiality of aid the lodestar, the Appeals Chamber in *Brđanin* held that “Brđanin’s inactivity and openly *laissez-faire* attitude towards the camps and detention facilities, coupled with his failure ‘to take a stand’ against the events in the camps, had a substantial effect on the commission of torture, and, as a result, encouraged and supported the perpetrators of the crime.”⁴¹ Inactivity and an indifferent attitude could hardly be “specifically directed” toward facilitating the commission of detention camp killings, precisely because that sort of (in)activity is just as suggestive of innocence as guilt. Therein lay the problem to which the *Brđanin* court was responding—that of conditioning the actus reus of complicity on some observable character of the assistance itself.

³⁸ See *Blagojević Appeals Judgment*, *supra* note 31, ¶ 123.

³⁹ *Id.* ¶ 189.

⁴⁰ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Appeals Judgment (April 3, 2007) [hereinafter *Brđanin Appeals Judgment*].

⁴¹ *Id.* ¶ 452.

C. *Prosecutor v. Perišić*⁴²

The *Blagojević* decision notwithstanding, specific direction conceived as an essential element of the actus reus of aiding and abetting returned to the ICTY’s complicity jurisprudence. Perišić, a trusted V.R.S. general of Slobodan Milošević, was convicted at trial of aiding and abetting crimes committed in Sarajevo and Srebrenica. The Appeals Chamber reversed his conviction on questions of law—namely, the actus reus of aiding and abetting.⁴³ The same judge who had presided over the *Brđanin* appeal resuscitated the literal text of *Tadić*, but he did so with one eye on *Blagojević*. “No conviction,” the *Perišić* Appeals Chamber held, “for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, *either explicitly or implicitly*.”⁴⁴ At first blush, this language might preserve *Blagojević*, where an “implicit” finding of specific direction was held to inhere whenever the accused accomplice provided to the principal practical assistance having a substantial effect on commission of the crime. By the same token, an “explicit” finding of specific direction might be necessary only if assistance did not have a substantial effect (or, at the extreme end of textual reductionism, was not “practical”). The Trial Chamber found, however, that Perišić’s assistance *did* have a substantial effect on the commission of war crimes, and, as such, it refrained from engaging in a specific direction inquiry.⁴⁵ What grounds, then, did the Appeals Chamber enunciate for overturning the trial court’s findings of fact?

Arguing that precedent demanded independent proof of specific direction, the Appeals Chamber posited two potential aiding and abetting scenarios. First, where acts of assistance were geographically proximate to the principal’s acts, proximity itself satisfies specific direction. Second, in the case of *Perišić*, where assistance was *not* geographically proximate, the prosecution sufficiently proves specific direction only “if the V.R.S. was an organization whose sole and exclusive purpose was the commission of crimes,” *or* if Perišić “endorsed a policy of assisting [their] crimes.”⁴⁶ Putting aside for now the geographic proximity test, the court’s “sole and exclusive” prong for what we might call remote assistance

⁴² *Prosecutor v. Momcilo Perišić*, Case No. IT-04-81-A, Appeals Judgment (Feb. 28, 2013) [hereinafter *Perišić* Appeals Judgment].

⁴³ *Id.* ¶ 34.

⁴⁴ *Id.* ¶ 36 (emphasis added).

⁴⁵ *See* *Prosecutor v. Momcilo Perišić*, Case No. IT-04-81-T, Trial Judgment, ¶ 1627 (Sept. 6, 2011) (finding that Perišić’s “logistical assistance and personnel assistance, individually and cumulatively, had a substantial effect on the crimes perpetrated . . . in Sarajevo and Srebrenica”) [hereinafter *Perišić* Trial Judgment].

⁴⁶ *Perišić* Appeals Judgment, *supra* note 42, ¶ 52.

preserves some distinction between mens rea and actus reus by restricting the latter domain. The second inquiry, on the other hand, seems to combine the two by folding “endorsement” into the actus reus—and this regardless of potential evidentiary differences between intent as a mens rea concept and “endorsement” as an element of the actus reus.⁴⁷ Defending its novel holding, the court asserted that “previous appeal judgments had not conducted extensive analyses of specific direction” because “prior convictions for aiding and abetting entered or affirmed by the Appeals Chamber involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of principal perpetrators.”⁴⁸

The majority opinion, then, admits of two possible culpability formulations: (a) the assisted organization or persons must not be lawful actors in any significant sense, foreclosing convictions of those who assist criminal organizations with any shred of legitimacy, or (b) a defendant’s mental state or intent and degree of physical assistance are equally probative on the actus reus. Judge Liu acknowledged as much in dissent, arguing that conviction for aiding and abetting should attain on the basis of the trial court’s findings that Perišić had institutionalized the provision of assistance; that he possessed the power to approve or deny requests; that the assistance “sustained the very life line of the [Bosnian Serb Army]”; that Perišić did not believe it had “another significant source of assistance”; and that he was aware from the outset of its “propensity to commit criminal acts.”⁴⁹

After *Tadić*’s insertion of specific direction into ICTY complicity law, the *Blagojević* gloss, and the Appeals Chamber’s judgment in *Perišić*, the ICTY’s complicity jurisprudence assumed the following form:

⁴⁷ For instance, “endorsement” might be satisfied by evidence of general political or religious beliefs expressed outside the events in question. Yet it should be noted that “endorsement” thus conceptualized might well lower the threshold for probative evidence and result in over-conviction. Surely there is a meaningful step between endorsing in theory a policy of ethnic cleansing to aiding and abetting ethnic cleansing; but, combined with “general assistance which could be used for both lawful and unlawful activities,” such “endorsement” might sustain a conviction for aiding and abetting war crimes by satisfying the second prong of the specific direction test for remote assistance.

⁴⁸ Perišić Appeals Judgment, *supra* note 42, ¶ 38.

⁴⁹ See Christopher Jenks, *International Decisions: Prosecutor v. Perišić*, 107 AM. J. INT’L. L. 622, 623–24 & n.11 (July 2013) (citing Perišić Appeals Judgment, *supra* note 42 (J. Liu, dissenting), ¶¶ 9, 7, 6 & n.24, 8 [hereinafter Liu Dissent]).

Actus reus	Proximate Assistance	Assistance Not Geographically Proximate
Aiding and abetting	Assistance has a substantial effect on the perpetration of the principal's crime, and specific direction is satisfied <i>implicitly</i> , if aid or assistance was "geographically or otherwise proximate to" the crimes of the principal(s).	Specific direction must be satisfied <i>explicitly</i> (1) by a finding that the aid rendered is not "general assistance which could be used for both lawful and unlawful activities," but is rather of a type that almost always attends the commission of punishable crimes; OR (2) where aid could be "general assistance for lawful means," by a finding that: (a) the sole purpose of the assisted organization is the commission of crimes; OR (b) the accused "endorse[d] a policy of assisting the organization's crimes."

D. *Prosecutor v. Stanišić*⁵⁰

Invoking *Tadić* and *Perišić*, the Trial Chamber in *Stanišić* acquitted the defendants of aiding and abetting war crimes on the grounds that "the Accused were not physically present together with the Unit during these two operations," which allowed for the "reasonable conclusion that the Accused's assistance . . . was not specifically directed towards the commission of the crimes of murder, deportation, forcible transfer, or persecution."⁵¹ They could have been just as easily "directed to establishing and maintaining Serb control over [large areas of Croatia and Bosnia-Herzegovina]."⁵²

Attempting faithfully to apply the "endorsement" prong of the *Perišić* framework, and recalling evidence introduced as to the military (rather than paramilitary) character of the defendants' training of the Red Berets, a majority of the Appeals Chamber judges could not conclude that the only reasonable inference from the evidence concerning *Stanišić's* actions was that he shared the intent to remove forcibly and permanently non-Serbs from these areas.⁵³ In other words, the court in its actus reus inquiry looked to specific direction "in assessing whether [defendants' assistance] had a substantial effect on the perpetration of the crimes," and, with the exception of the dissenting Judge Picard, found a lack of

⁵⁰ *Stanišić* Judgment, *supra* note 1.

⁵¹ *Id.* ¶ 2360.

⁵² *Id.*

⁵³ *Id.*

specific intent to dictate a finding of no substantial effect.⁵⁴ Thus, aiding and abetting liability could not attach to the defendants' acts of assistance because (a) they were not geographically proximate to the principals' crimes; nor were they specifically directed, because (b) evidence of defendants' *intent* did not support a finding of *substantial effect* (nor, presumably, "endorsement" of the Bosnian Serb Army's crimes), and (c) the military objectives of the Army were not solely and exclusively the commission of crimes punishable under the ICTY Statute.

Perhaps because it concretized the sort of jurisprudence specific direction requires, *Stanišić* sparked strong reactions, yet the outcome was hardly surprising in light of *Perišić*.⁵⁵ More to the point, *Stanišić* demonstrates that the lower chambers of the ICTY regard as established law the *Tadić* dictum, adopted in *Perišić*, requiring a stand-alone finding of specific direction for the prosecution to prove the *actus reus* of complicity.

III. CONSISTENCY OF THE DOCTRINE

Evaluating the consistency of the *Perišić/ Stanišić* line of cases, in which specific direction has been invigorated as a stand-alone *actus reus* proof element, necessarily requires a referent: consistent with respect to what? The two referents this Comment explores are (a) international treaty and case law and (b) the ICTY's own case law.

A. With International Treaty and Case Law

Because a UN resolution established the ICTY, the Secretary-General had only the authority to announce that the tribunal's statute was meant to "codify existing norms of customary international law" and to submit suggestions received from States about rules of procedure and evidence to tribunal judges for

⁵⁴ *Id.* To satisfy the majority's insistence on proof of specific direction, Judge Picard would have used the "implicit" route enunciated in the Blagojević Appeals Judgment, *supra* note 31, whereby aid that is practical and substantial is presumptively "specifically directed." See *id.* ¶ 2405 (J. Picard, dissenting) (expressing distaste for the "overly restrictive" character of the *Perišić* jurisprudence, but nonetheless arguing that "the 'specific direction' requirement can be inferred from the Accused's actions").

⁵⁵ See, for example, Gordy, *supra* note 4; Kenneth Roth, *A Tribunal's Legal Stumble*, N.Y. TIMES (July 9, 2013), available at <http://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html> (last visited May 3, 2014); Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EUR. J. OF INT'L L. BLOG (March 11, 2013), <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/> (last visited Feb. 13, 2014).

discretionary adoption.⁵⁶ Put differently, the statute charges the tribunal with prosecuting war crimes and the like but does not provide culpability standards or guidance as to the weight to accord different forms of proof.⁵⁷ Concerning derivative liability of accomplices, it provides only that criminal responsibility be imposed individually on any person “who aided and abetted in the planning, preparation, or execution” of any of the relevant crimes.⁵⁸ Despite this statutory paucity, the ICTY has incorporated some extant laws expressly, such as the ILC’s 1996 Draft Code of Crimes against the Peace and Security of Mankind (“Draft Code”),⁵⁹ which it deemed “an authoritative international instrument” and which closely tracks a traditional complicity doctrine based on substantiality of aid.⁶⁰ Further, judges have looked to the Rome Statute of the International Criminal Court (ICC) for substantiation, doing so even before it entered into force.⁶¹

This does not mean, however, that judges invoke these authorities free from confusion. For instance, the *Tadić* Appeals Chamber agreed with the *Furundžija* Trial Chamber’s assessment of the Draft Code as authoritative, and it also cited with approval that earlier court’s description of the Rome Statute as of “significant legal value.”⁶² Yet it then proclaimed these instruments’ formulation of accomplice liability—although good law, rightly embraced in *Furundžija*, and consistent with the proper authority of the court—“distinct from aiding and abetting.”⁶³ While the lack of concrete prescriptions of substantive law may not appear inherently problematic, it becomes so in the presence of inconsistent outcomes in factually apposite cases and when peer institutions—sharing or incorporating relevant law

⁵⁶ The U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993). See also ICTY Statute, *supra* note 9, art. 15; this Comment’s discussion, *supra*.

⁵⁷ See generally ICTY Statute, *supra* note 9.

⁵⁸ *Id.* art. 7.1.

⁵⁹ See Cassel, *supra* note 30, at 307 (citing Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeals Judgment, ¶ 227 (July 21, 2000) [hereinafter *Furundžija* Appeals Judgment]).

⁶⁰ The Draft Code imposes criminal responsibility on an individual who “knowingly aids, abets or otherwise assists, directly and substantially, in the commission [of war crimes, crimes against humanity, or genocide], including providing the means for its commission.” *Draft Code of Crimes against the Peace and Security of Mankind*, (1996) 2 Y.B. INT’L L. COMM’N, arts. 2(3)(d), 17, 18, 20, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part II), available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

⁶¹ See, for example, *Tadić* Appeals Judgment, *supra* note 18, ¶ 223 (ICTY); Taylor Appeals Judgment, *supra* note 8, ¶ 383, n.1208 (listing as authorities the Rome Statute and the Genocide, Torture, and Geneva Conventions) (SCSL).

⁶² *Tadić* Appeals Judgment, *supra* note 18, ¶ 223.

⁶³ *Id.* ¶ 221.

and prosecuting the same crimes—sharply diverge on the issue.⁶⁴ The SCSL, for example, recently convicted Charles Taylor for aiding and abetting war crimes committed in Sierra Leone.⁶⁵ The case is important to the analysis here because it both signals the SCSL’s understanding that it shares a space under customary international law with the ICTY, and underscores specific direction’s novelty and potential affront to retributive goals.⁶⁶

The SCSL Trial Chamber’s opinion in *Taylor* eschews specific direction or any heightened actus reus standard, despite citing heavily to ICTR and ICTY precedent for the proposition that settled international law controlled the actus reus issue *between and regardless of fora*.⁶⁷ With respect to aiding and abetting, that court perceived the relevant law to be sufficiently codified in the Rome Statute and applied in *Mrkšić* and *Furundžija*. Indeed, the SCSL Trial Chamber cited to the *Perišić* trial judgment to define the two requirements for finding an accused guilty of aiding and abetting: “(i) the Accused provided practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offence and (ii) such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offence.”⁶⁸ Until 2013, then, not only did the ICTY perceive the relevant *Tadić* language as dictum (or otherwise non-binding), but so too the SCSL. Rejecting the notion that geographic proximity has any bearing on actus reus, the SCSL invoked *Perišić* as a foil position for its own, finding no “cogent reasons to depart from its holding that the *actus reus* of aiding and abetting liability . . . is that the accused’s acts and conduct . . . had a substantial effect on the commission of each charged crime for which he is to be held responsible.”⁶⁹ It emphatically concluded its analysis with the absolutist stance “that ‘specific direction’ is not an element of the *actus reus* of

⁶⁴ It becomes troubling not just for reasons of fair notice, but because of disruption to international comity, to the accused’s repose, to retributive justice norms and goals, etc.

⁶⁵ For an argument that the facts in *Perišić* were identical to those in *Taylor*, see Manuel Ventura, *Guest Post: What the ICTY Appeal Judgment in Perišić Means for the SCSL Appeals Chamber in Taylor*, SPREADING THE JAM (March 11, 2013), <http://dovjacobs.com/2013/03/11/guest-post-what-the-icty-appeal-judgment-in-perisic-means-for-the-scsl-appeals-chamber-in-taylor/> (last visited May 3, 2014).

⁶⁶ Note that the SCSL Statute differs somewhat from the others’ in that it directs the Appeals Chamber, when not interpreting Sierra Leonean law, to “be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda.” SCSL Statute, *supra* note 13, art. 20(3). If anything, this makes the *Taylor* court’s rejection of *Perišić* even more notable, just as it casts further aspersions on the wisdom of specific direction.

⁶⁷ See *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Judgment, ¶¶ 79–83, 100–8 (May 18, 2012) [hereinafter *Taylor Trial Judgment*].

⁶⁸ *Id.* ¶¶ 482–86.

⁶⁹ See *Taylor Appeals Judgment*, *supra* note 7, ¶ 481.

aiding and abetting liability under Article 6(1) of the Statute or customary international law.”⁷⁰

Inconsistency with the law of peer tribunals is at least noteworthy and at most problematic, given similarities in time, docket, and jurisdiction.⁷¹ Also of note is the further irreconcilability of specific direction with ICTR case law; just as the SCSL’s direct rejection of specific direction erodes its consistency and appeal, so too are ICTR cases concerning remote assistance to principal perpetrators seemingly irreconcilable with the jurisprudence underlying *Perišić* and *Stanišić*.⁷²

Were these tribunals faced with a binary choice between following canonical post-World War II decisions or those of peer UN Security Council tribunals, the latter course would seem sounder. The ICTR, after all, was established and operates in near identical fashion to the ICTY—under Chapter VII of the UN Charter.⁷³ Further, the Security Council, suggesting a certain equivalence among these three tribunals, granted the Secretary-General power to determine “whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda.”⁷⁴ Only the SCSL Statute mentions the other tribunals, but even it does not circumscribe the authority accorded them;⁷⁵ all punish the same crimes, incorporate customary law, and define offenses with reference to the same treaties.⁷⁶ These circumstances, combined with the fact that the statutes of these

⁷⁰ *Id.*

⁷¹ See, for example, Donald Francis Donovan & Anthea Roberts, Comments and Notes, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 143 (2006) (describing, as the modern rationale for universal criminal jurisdiction, the fact that some crimes are so heinous that every state has an interest in prosecuting them, while also discussing the emergence of universal *civil* jurisdiction); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 137 (2001) (defining “pure” universal jurisdiction as the exercise of jurisdiction over a perpetrator who has no contacts with the forum state).

⁷² See, for example, Prosecutor v. Barayagwiza, Case No. ICTR 99-52-T, Trial Chamber I (Dec. 3, 2003) (holding a radio station liable for inciting genocide); Musema v. Prosecutor, Case No. ICTR 96-13-A, Appeals Chamber (Nov. 16, 2001) (extending accomplice responsibility to a corporate director of a tea factory for his role in Rwandan genocide and attendant crimes against humanity).

⁷³ See Resolution 827, *supra* note 10 (chartering the ICTY under Chapter VII powers); accord S.C. Res. 955, U.N. SCOR, 52d Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (I.C.T.R.) [hereinafter Resolution 955]; accord S.C. Res. 1315, U.N. SCOR, Emer. Sess., 4186th mtg. at 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (S.C.S.L.) [hereinafter Resolution 1315].

⁷⁴ Resolution 1315, *supra* note 73, ¶ 8(d).

⁷⁵ It instructs the SCSL only “to be guided by” the decisions of the other Appeals Chambers, not to be bound by it. See the explanation in note 66, *supra*.

⁷⁶ See generally ICTY Statute, *supra* note 9; ICTR Statute, *supra* note 12; SCSL Statute, *supra* note 13.

tribunals often incorporate law only by reference, undoubtedly lead to confusion as to the source and weight of precedent.⁷⁷ Yet in a broad sense, these institutions clearly perceive a *de facto* relationship of shared authority, as suggested by the manner in which the *Taylor* appellate opinion speaks directly to and rejects *Perišić*.⁷⁸

B. With ICTY Case Law

Before *Perišić* and *Stanišić*, the general practice among judges and scholars was to overlook the *Tadić* complicity language entirely and invoke the case solely as a conspiracy, or joint criminal enterprise, case.⁷⁹ For example, Professor James G. Stewart has canvassed international complicity case law and found that, prior to the *Tadić* judgment, there was only one reference to specific direction; that in over 98 percent of all aiding and abetting cases, specific direction is either not mentioned at all or referenced casually in a single sentence, unelaborated, and unapplied; and that, prior to *Perišić*, there were no acquittals either nationally or internationally on the basis of specific direction.⁸⁰ Judges were not alone in disregarding the complicity formulation in *Tadić*. Doug Cassel, in a thoughtful 2009 article on corporate liability for aiders and abettors, wrote that “there is little controversy in international criminal law that the *actus reus* [of aiding and abetting] . . . consists of rendering ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’”⁸¹ This accord between judicial and scholarly perspective finds support in a sensible reading of international case law, which is notably silent on, or takes a decidedly antithetical posture toward, limiting the *actus reus* of accomplice liability.

⁷⁷ In the ICTY context, see The Secretary-General, *Report*, *supra* note 56, ¶ 29 (stating that the ICTY statute was intended to “codify existing norms of customary international law”); Resolution 827, *supra* note 10, ¶ 3. Compare ICTY Statute, *supra* note 9, art. 11–34 (establishing detailed procedural rules governing the structure of the Chambers, qualifications and appointment of judges, appeal rights, reporting, etc.), with ICTY Statute, *supra* note 9, art. 2–10 (describing as substantive law only the Geneva Convention of 1949, the “laws and customs of war,” and “international humanitarian law”).

⁷⁸ See *Taylor Appeals Judgment*, *supra* note 8, ¶¶ 481–82 (explicitly addressing recent ICTY law and considering it an affront).

⁷⁹ See, for example, *Furundzija Appeals Judgment*, *supra* note 59, ¶ 119 (rejecting an appeal from a convicted co-perpetrator on grounds that *Tadić* does not require “a plan, design, or purpose to have been previously arranged or formulated”).

⁸⁰ See James G. Stewart, “*Specific Direction*” Is Unprecedented: Results from Two Empirical Studies, EUR. J. OF INT’L L. BLOG (Sept. 4, 2013), <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/> (last visited April 28, 2014).

⁸¹ Cassel, *supra* note 30, at 308 (grounding this assertion in the “widely cited language of the ICTY Trial Chamber Judgment in *Furundzija*”); accord Stewart, *supra* note 80 (highlighting also the absence of references to specific direction in academic literature).

In addition to cases already discussed, consider the 2009 case of *Prosecutor v. Mrkšić*,⁸² in which the ICTY Appeals Chamber rejected the proposition that specific direction is a stand-alone element of aiding and abetting for the prosecution to prove at trial. Citing employment of that phrase in *Tadić* as inessential to the court’s holding, the *Mrkšić* court invalidated the defendant’s invocation of that case. “The Appeals Chamber,” it wrote, “has confirmed that ‘specific direction’ is not an essential ingredient of the actus reus of aiding and abetting.”⁸³ To the defendant’s argument in the alternative that aiding and abetting ought to entail a heightened mens rea showing, the Appeals Chamber responded that it “has previously rejected an elevated mens rea requirement for aiding and abetting, namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.”⁸⁴ When the *Perišić* court dismissed the *Mrkšić* court’s reasoning, it therefore contravened two holdings of the latter court. It instituted a requirement of specific direction, of course, but by merging mens rea with actus reus, it also erected a heightened mens rea showing for the prosecution to surmount.⁸⁵

The landmark *Brđanin* case, discussed *supra*, bolsters this reading of customary international law. There, the Appeals Chamber held that the trial court’s finding of substantial effect on the commission of torture “equally applies to an assessment of Brđanin’s actus reus for the crime of aiding and abetting wilful [sic] killing in camps and detention facilities.”⁸⁶ That court stressed that “no distinction can be drawn between mistreatment resulting in torture and mistreatment resulting in death, since some detainees died as a result of the torture they suffered in the camps and detention facilities.”⁸⁷ This statement elides a reductionist problem specific direction faces: how to treat acts that might be specifically directed to further a common criminal design yet have a substantial result on the perpetration of even more serious crimes.

⁸² *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-A, Appeals Judgment (May 5, 2009) [hereinafter *Mrkšić Appeals Judgment*].

⁸³ *Id.* ¶ 159 (citing *Blagojević Appeals Judgment*, *supra* note 31).

⁸⁴ *Id.*

⁸⁵ The *Perišić* court argued that *Mrkšić* treated specific direction only “in passing” and not with the sort of “careful consideration” necessary to justify departure from *Tadić*. See *Perišić Appeals Judgment*, *supra* note 42, ¶¶ 33–34. Yet the *Tadić* court devoted roughly the same page space to propounding specific direction, citing no authority for actus reus restrictions. Compare *Tadić Appeals Judgment*, *supra* note 18, ¶ 229, with *Mrkšić Appeals Judgment*, *supra* note 82, ¶ 159. See Jenks, *Perišić*, *supra* note 49, at 623.

⁸⁶ *Brđanin Appeals Judgment*, *supra* note 40, ¶ 452.

⁸⁷ *Id.*

IV. NORMATIVE EVALUATION

As an attempt to limit the potential class of defendants who may be held criminally responsible for aiding and abetting, specific direction might have some merit. A sound answer to the question of whether the test's merits outweigh its demerits or mitigate concerns about its departure from case law, entails two inquiries: first, whether the system of "common-law" criminal jurisprudence that has produced specific direction is sound; second, whether the ICTY's specific direction requirement is defensible in itself. This Comment briefly touches on the first inquiry but, in light of the given fact of judge-made criminal law in this context, devotes the bulk of its analysis to the second.

A. Process Concerns

Doubtless, many observers are uncomfortable with imposition of criminal punishment without prescriptions from an authoritative institution as to the weight of evidence, the sufficiency of proof, and the elements of the offense. Too robust a rate of conviction smacks of "victor's justice"; an anemic prosecutorial or judicial apparatus, on the other hand, likely means problematic under-inclusion. In tribunals that proceed on the basis of universal jurisdiction, little codified law controls; an accused individual may be convicted if he violates "a rule of international humanitarian law," whether treaty-based or customary/decisional.⁸⁸ Before World War II, codification would have been indispensable and incorporation of international law (whether by reference or otherwise) meaningless: states were thought competent to discipline their own citizens, and crimes committed by a government against its people were not punishable under international law until the Nuremberg trials.⁸⁹ That the customary law of derivative liability is often culled from Nuremberg or other post-World War II cases⁹⁰ invites the question of what shared treaty or statutory law *ought* to control.

The closest thing to shared statutory law is the body of international treaties and conventions criminalizing certain forms of activity: for example, the 1946

⁸⁸ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Judgment, ¶ 66 (Jun. 12, 2002).

⁸⁹ See Anna Triponel, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 857–58 (2008); Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases?*, 33 GEO. WASH. INT'L L. REV. 363, 366 (2001) (arguing that many of the problems the Allies faced in attempting to legitimize the Nuremberg Tribunals flowed from the fact that international law had not theretofore recognized crimes committed by a sovereign against its own subjects).

⁹⁰ See, for example, Tadić Appeals Judgment, *supra* note 18, ¶¶ 196–220, 229 (citing only pre-1950 cases as decisional authority in deriving the customary forms of joint criminal enterprise liability, and then citing no cases whatsoever in deriving culpability formulations for complicity).

Genocide Convention,⁹¹ the 1949 Geneva Convention,⁹² the 1984 Torture Convention,⁹³ the International Convention for the Suppression of Terrorist Bombing.⁹⁴ In light of scant substantive guidance in the operating statutes, which incorporate the crimes defined in those treaties but simultaneously allow deference to national standards and suggestions, tribunal judges effectively possess wide latitude to craft the applicable law by decision. Even the International Criminal Court, empowered by universal jurisdiction to prosecute crimes of international law wherever they occur, has not taken substantive definition of international crimes out of the hands of individual judges.⁹⁵

Tribunal judges are tasked, therefore, with applying customary law gleaned from mid-century cases to unique, contemporary facts, while bearing in mind suggestions from the UN Secretary-General, generally adhered-to national criminal law doctrine, and meritorious suggestions or proposals from national actors. This is no easy task. But whether this system of what amounts to judge-made criminal law is justifiable or normatively salvageable is a question for another paper.⁹⁶ Depending on one's temporal or teleological conception of these

⁹¹ See Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (defining genocide as a crime under international law and obligating the parties to "prevent and punish" it, but cabining the duty to prosecute genocide to the forum in which it occurred).

⁹² See I.C.R.C. Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Signatures, Ratifications, Accessions and Successions as of 31 December 1993, 10 (1993) (grounding universal jurisdiction over individuals in the right and obligation of all nations, not just signatories, to prosecute and extradite those suspected of war crimes, crimes against humanity, or genocide).

⁹³ See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (obligating all parties to make torture an offense under national law and adding it to the list of violations for which parties are obligated to extradite; refusing to clarify, however, how parties to the Convention might structure their national torture statutes).

⁹⁴ See Tadić Appeals Judgment, *supra* note 18, ¶¶ 221–22 (citing, in the absence of controlling statutory authority, the Terrorist Bombing Treaty).

⁹⁵ This is largely because ICC jurisdiction is hybridized, bestowing preference to adjudicate first on a state with a traditional interest in prosecuting the crime (that is, the state where it occurred or the state whose citizen perpetrated it). See Rome Statute, *supra* note 7, pmb. & art. 17. See also Cassel, *supra* note 30, at 316. Jurisdiction vests in the ICC via the principle of complementarity only when such a state is unable or unwilling to prosecute the violator.

⁹⁶ It might examine, for example, whether circumstances exist in international law that reduce the concerns about notice, lenity, over-inclusion, and *ex post facto* laws that have motivated a trend away from common-law crimes in Australia, Canada, New Zealand, Great Britain, and the US. It might also examine whether the undesirable sociological consequences of common-law crimes in Western countries, see generally Michael J. Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOCIO. REV. 93 (Feb. 1978) (arguing that the very lack of a statutory apparatus has led to far

tribunals, a system of common law jurisprudence could be beneficial or destructive—beneficial, because such back and forth exchanges between courts might in the long run develop sound doctrine, but destructive if one thinks the purpose of these tribunals is to predictably and consistently remedy evils through generally accepted principles of treaty and case law.

This Comment suggests only that the ease with which the ICTY jettisoned prevailing *actus reus* and causation formulations and distorted internal and external precedent, elides the peril of a legal system that demands fealty neither to codified culpability requirements nor a hierarchical authority structure. Reducing the risk of under-conviction and under-prosecution requires either a statutory overhaul geared towards concrete and comprehensive codification of culpability requirements, or at least clear guidance as to the weight and incorporative value of national doctrine, international treaties, and sister tribunal case law.⁹⁷ For our purposes, it is enough to note that even if concerns about over-inclusive common law prosecutions are less relevant in the international sphere,⁹⁸ the ICTY's specific direction standard makes the opposite mistake: it is under-inclusive.

B. Specific Direction

Irrespective of setting or forum, aiding and abetting is often poorly suited to proof by direct evidence, a realization reflected in the ICTY's relatively low *mens rea* threshold of knowledge (that acts of assistance in fact facilitate the principal's violations).⁹⁹ Yet there are also as-applied problems with the way it has demanded

more prosecutions of blacks than whites for common-law crimes), are somehow attenuated in the international context.

⁹⁷ For an argument that the jurisprudence of the ICTY reflects a basic philosophical uncertainty about whether to establish coercive central institutions or refrain from a sanction-based system of international law, see generally Lucas W. Andrews, Comment, *Sailing around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471 (Fall 1997).

⁹⁸ In the international context, an accused's acts might necessarily meet some threshold level of gravity and invite sufficiently searching international scrutiny to lay to rest concerns about over-inclusion. Since individuals are unlikely to be indicted in these tribunals in the absence of a critical evidentiary mass, this argument might assert, a common-law approach to international tribunal jurisprudence—notwithstanding the problems of authority, confusion, and inconsistent application—is less objectionable if erring on the side of breadth.

⁹⁹ There is some debate about whether knowledge or intent is or ought to be the test in the context of corporate complicity. See generally Cassel, *supra* note 30 (calling for clarification of the standard); Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers"*, 9 TEMP. INT'L & COMP. L.J. 173 (1995). It should be noted, however, that the Rome Statute as amended heightens the *mens rea* for accomplice liability, resolving the dispute between knowledge and intent by making criminally responsible one who aids and abets "for the purpose of facilitating the commission" of the crime. See Rome Statute, *supra* note 7, art. 25(3)(c). The weight of the international case law, as the ICTY seems to conceive it, requires only a knowledge standard for a complicity conviction. See,

appellate review of the Trial Chamber’s fact finding. Trial judges have not only resisted the *ex ante* imposition of limitations on culpable forms of conduct but have also witnessed specific direction take the place of, or serve as a proxy for, substantial assistance, a fact-based inquiry on which the record of the trial court controls.¹⁰⁰ When the Appeals Chamber has acquitted for want of proof of specific direction, it has supplanted the trial record—under the guise of *de novo* review of an issue of law—with a shorter version of facts relevant to specific direction. In *Perišić*, for example, the Appeals Chamber reviewed the evidence *de novo*, according little weight to the trial court’s factual findings regarding the accused’s effective control and adopting instead “an alternative reasonable interpretation of the record.”¹⁰¹ “Consequently,” one commentator observed, “an appeals judgment of fewer than fifty pages now serves as the factual record instead of a trial judgment of almost six hundred pages.”¹⁰² The ICTY claims as an accomplishment establishing a record of the crimes committed in the former Yugoslavia, but “substituting appellate factual findings so disproportionately inferior in scope and detail for the trial chamber’s factual findings” eviscerates the historical record.¹⁰³

Even if we suspend everything up to this point, there is a real authority-based objection to be levied against the on-off switch of geographic proximity the standard prescribes. It seems inimical to prevailing, geographically neutral conceptions of universal jurisdiction, to why the court is competent to hear argument in these cases at all. After all, the ICC grounds its jurisdiction on the assumption that another state will have a sufficient interest in prosecuting the suspected war criminal if the state where the crime was committed is unwilling or unable to do so.¹⁰⁴ The geographic proximity test is truly the low-hanging fruit of specific direction, chiefly because the only role played by geography in the ICTY’s case law is to strengthen or weaken proof of *mens rea*, not define forms of punishable activity.¹⁰⁵ Since the barriers of geographic proximity are not a factor

for example, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 218, 249 (Dec. 10, 1998).

¹⁰⁰ Blagojević Appeals Judgment, *supra* note 31, ¶ 134.

¹⁰¹ Perišić Appeals Judgment, *supra* note 42, ¶ 117.

¹⁰² Jenks, *supra* note 49, at 626.

¹⁰³ *Id.*

¹⁰⁴ See Rome Statute, *supra* note 7, arts. 12–14.

¹⁰⁵ See, for example, Brđanin Appeals Judgment, *supra* note 40, ¶¶ 226–28, 430 (finding geography relevant only to define the scope of the criminal purpose for conspiracy liability); accord *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment, ¶¶ 64–67 (Mar. 22, 2006); accord Blagojević Appeals Judgment, *supra* note 31 (holding that the defendant’s knowledge of criminal activities in a

in the jurisdictional, let alone the substantive, analysis, how should we think about the *Perišić* court's distinction of prior holdings on a basis so increasingly inconsequential in international law?

The geographic proximity prong of specific direction is not its only bright-line aspect that poses problems. In his *Perišić* dissent, Judge Liu foresaw many of the complications endemic to the majority's decision, namely that it eradicated the difference between liability as an accomplice and liability as a principal.¹⁰⁶ While a favorable interpretation, on the other hand, would defend imposition of specific direction as an attempt to fill an even more vexing void in the international law of war crimes,¹⁰⁷ arguments cutting the other way suggest that this incarnation of such an attempt is unsatisfying.

Proponents argue that the ICTY's relatively lax mens rea requirement of knowledge for aiding and abetting liability might, in the absence of some limitation, criminalize a broad swath of routine international arms trading and therefore needs a limiting principle.¹⁰⁸ One might look, for example, to the recent crisis in Syria to ground the objection that the British government and the U.S. Central Intelligence Agency, so long as they do everything in their power to assist only "lawful" rebel actions, should not be held responsible for aiding and abetting any international crimes their munitions dealing substantially and knowingly facilitates.¹⁰⁹ Another version of the argument might assert that, while a consistent legal standard that threatens over-inclusion comports with the realities of small or marginal states (like those involved in the Yugoslav conflict), it threatens the flexibility of more powerful states likely to be involved in future conflicts by ignoring the layers of intervening bureaucracy that should serve to limit subjective culpability.¹¹⁰

town near Srebrenica *was insufficient* to support the conclusion that he knew of the crimes against humanity perpetrated in Srebrenica).

¹⁰⁶ See Jenks, *supra* note 49, at 625 (citing Liu Dissent, *supra* note 49, ¶ 3 & n.9).

¹⁰⁷ Tribunals often must strain for relevant guiding authority, and most have found and cited only the Rome Statute when substantively defining crimes. See generally Taylor Appeals Judgment, *supra* note 8 (rejecting ICTY precedent on point and citing instead ICC case law and the Rome Statute).

¹⁰⁸ In contrast, it should be noted that the Rome Statute explicitly adopted a "purpose" mens rea for most crimes of complicity. See Rome Statute, *supra* note 7, art. 25.3(c).

¹⁰⁹ For a proponent of this argument, see Kevin Jon Heller, *Why the ICTY's 'Specifically Directed' Requirement is Justified*, OPINIO JURIS (June 2, 2013, 4:00 AM), <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified> (last visited May 8, 2014).

¹¹⁰ This might excavate accusations leveled in 2013 that "the US and Israeli governments applied improper pressure on the tribunal to ensure military commanders could never be convicted of war crimes." Owen Bowcott, *Hague War Crimes Ruling Threatens to Undermine Future Prosecutions*, THE

A first response might argue that, even if some limitation is justified, morphing mens rea into actus reus¹¹¹ would provide an escape hatch, since an accused violator operating at some geographic remove would in every conceivable case point to state bureaucracy to undermine proof of mens rea. Indeed, a state could easily erect defined and insular cadres within a military decision-making apparatus, and indeed would even be incentivized to do so, thereby limiting the potential for its officials to police misconduct ex ante or be found guilty ex post. In any case, *Perišić* might constitute a fairly singular case, failing “to concern a single instance of remotely provided military assistance that was used by third parties, unknowingly to the provider, to perpetrate crimes for which the provider was then held liable.”¹¹² (This assessment, however, contrasts markedly with contemporaneous conceptions: the questions Presiding Judge Moloto put to the prosecutor at Perišić’s trial implied that finding Perišić guilty as an accomplice would raise thorny questions about the complicity of NATO in unlawful detentions at Guantanamo and crimes in Bagram and Kabul.¹¹³) But the more persuasive objection to this argument is to impugn its premises. Besides mandating acceptance of the notion that arms trading, and particularly weapons exchanges with nations openly engaged in committing atrocities, is socially valuable (or at least an activity for which there is a non-criminal, lawful purpose), the argument does not exclude alternative approaches or explain why they would not feasibly cabin responsibility. One could concede the equivalence of NATO’s and Perišić’s assistance yet still distinguish conviction in the latter case from acquittal in the (hypothetical) former by recourse to a heightened mens rea standard for complicity or to notions of proximate cause—or even some combination of the two, as in the Model Penal Code.¹¹⁴

GUARDIAN (Aug. 13, 2013), available at <http://www.theguardian.com/law/2013/aug/13/hague-war-crimes-ruling-prosecutions-serb> (last visited April 28, 2014).

- ¹¹¹ Note that two judges hearing the *Perišić* appeal preferred specific direction to condition the mens rea, not actus reus, of complicity for precisely this reason. See *Perišić* Appeals Judgment, *supra* note 42 (JJ. Meron, Agius, concurring), ¶¶ 1–3. Ultimately, however, they thought specific direction could also “be reasonably assessed in the context of actus reus.” *Id.* ¶ 4.
- ¹¹² Jenks, *Perišić*, *supra* note 49, at 625; but see Ventura, *supra* note 65 (arguing that the facts of *Taylor* and *Perišić* were identical).
- ¹¹³ For a transcript of the judge’s questions, see Ventura, *supra* note 65.
- ¹¹⁴ See ALI’s Model Penal Code, which provides for a finding of complicity where the accomplice acts with the purpose of furthering the principal’s commission of crimes (§ 2.06(3)) or, distinguishing between complicity in conduct (that is, forcible transfer) that causes a result-defined crime (that is, genocide) and assisting the end crime itself, where the accused “acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense” (§ 2.06(6)). The Code also prohibits from classification as an accomplice one who assists an offense defined such that “his conduct is inevitably incident to its commission,” which might in effectively causal terms

Beyond process concerns in general, and beyond particular objections to specific direction's geographic proximity test and propensity to erode the integrity of the historical record of crimes, the weight of customary law suggests that the mere fact of a large national bureaucracy should not condition the actus reus, at least where assistance is substantial and a mens rea of knowledge proven. Adolf Eichmann sought to defend on these grounds, and Germany was unquestionably an industrialized state with varying cadres of involvement among party functionaries. Eichmann's chief defense, which Hannah Arendt christened the "banality of evil" argument,¹¹⁵ was that his actions did not amount either primarily or derivatively to war crimes. They were, he argued, merely the sorts of actions anyone in his position would undertake in the interests of staying employed, actions not themselves suggestive of criminality (for example, pushing buttons, signing authorizations, etc.).¹¹⁶

The question on which his guilt turned was a common one in cases of duress: whether orders from Hitler and the Nazis "disturb[ed] his conscience, so that he acted under compulsion from which he saw no escape," or whether he acted "with inner indifference like an obedient automaton," identifying implicitly with the contents of orders.¹¹⁷ If indifference would lead to guilt, then knowledge of the substantial effect of one's actions on the perpetration of the crime(s) combined with inaction would constitute indifference. Like Perišić, Eichmann knew his assistance facilitated the commission of grave crimes and failed to act, not because of duress, but because of either indifference or internal agreement. Explicitly rejecting Eichmann's defense, the Jerusalem District Court held that abdicating one's conscience is not a defense to war crimes or crimes against humanity.¹¹⁸

Proponents of specific direction might respond to the above with the suggestion that the prosecution ought to proceed under conspiracy rather than aiding and abetting, so as to circumvent the "specific direction" requirement altogether. Yet this is no answer, only mere avoidance, and the efficacy of such an approach is doubtful. First, the defendants in *Stanišić* were charged with conspiracy

insulate those who vend weapons to volatile states or factions. *See generally* David J. Karp, Note, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249 (Oct. 1978).

¹¹⁵ *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (classifying the Eichmann trial as evidence that great evils of human history owe less to fanatics or sociopaths and more to ordinary people who participated under the assumption that their actions were normal).

¹¹⁶ Attorney General of the Gov't of Israel v. Adolf Eichmann, Trial Judgment, ¶ 222, *available at* http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf (last visited Nov. 13, 2013) [hereinafter Eichmann Trial Judgment].

¹¹⁷ *Id.*

¹¹⁸ *See generally id.*

(participation in a joint criminal enterprise) in addition to aiding and abetting, and the Trial Chamber acquitted them of those charges as well.¹¹⁹ Second, conspiracy, as the *Tadić* Appeals Chamber held, requires a heightened showing of mens rea—either of specific intent or of intent to participate in some common criminal design connected to the crimes.¹²⁰ (Recall the suggestion, *supra*, that specific direction effectively imported this heightened showing into the aiding and abetting context.) As a matter of policy, and in contrast to plea bargaining where the accused admits guilt, conviction for lesser offenses of those who do not admit guilt tends, in general, to undermine respect for legal process, poorly retribute for victims, and reduce deterrence at the margins (if violators know they can shield themselves at least from complicity by steering clear of certain acts).¹²¹

After *Stanišić*, many chroniclers of international law argued that mandating a stand-alone showing of specific direction where the alleged aiding and abetting was not geographically near to the crimes' principal perpetration, "demands a type of evidence that no major criminals have ever produced in any conflict: documentation indicating specific instructions that crimes be committed."¹²² Requiring such a showing seems to swallow the purpose of accountability regimes and even "lessen or confuse the ICTY's accomplishments in establishing a historical record of war crimes in the Balkans in the 1990s."¹²³ Criticizing specific direction, one commentator even posed the question of whether the group of German industrialists who sold to Nazis unprecedented amounts of the poison gas used in concentration camps, would have been acquitted under such a proof

¹¹⁹ "[K]nowledge and acceptance of the risk that crimes would be committed [is] insufficient for the first form of [joint criminal enterprise] liability." *Stanišić* Judgment, *supra* note 1, ¶ 2332. Squaring this with the *Tadić* holding regarding the third instantiation of conspiracy requires the tribunal to find the risk of death other than "likely." *See Tadić* Appeals Judgment, *supra* note 18, ¶ 229 (making guilt, in the absence of specific intent, depend on intent to pursue the criminal design and "foresight" that other crimes were "likely" to follow). But the Trial Chamber found that, even if the crimes were reasonably foreseeable, the prosecution had not proven *Stanišić's* intent to pursue the common criminal design, only his desire to "establish[] and maintain[] Serb control over large areas of Croatia and Bosnia-Herzegovina." *Stanišić* Judgment, *supra* note 1, ¶ 2326.

¹²⁰ *See Tadić* Appeals Judgment, *supra* note 18, ¶ 229.

¹²¹ It is bound to be much harder to prove specific intent to perpetrate genocide than to show such intent to participate in a shared scheme of, for example, deportation, which engendered purportedly unforeseen atrocities. Suspected violators are unlikely to acknowledge this intent in any fixed medium, and it is often unnecessary for those in positions of bureaucratic power to justify their orders at all.

¹²² Gordy, *supra* note 4. *See* Roth, *supra* note 55; Bowcott, *supra* note 110.

¹²³ Jenks, *Perišić*, *supra* note 49, at 624 (also asserting that the decision serves as a reminder of the "lack [of] a coherent and consistent answer" in this area, even about "threshold questions on the elements of forms of liability").

standard.¹²⁴ In the famous case, known as *Bruno Tesch*,¹²⁵ three corporate officers argued that they supplied Zyklon B to Nazis for lawful extermination purposes. While there were undoubtedly sanitary problems within concentration camps, the justification rang hollow to the Hamburg Court.¹²⁶

Applying specific direction to the facts of *Tesch*, it is clear that the defendants' geographic proximity would not meet the first prong of the test as applied in *Perišić*, where a matter of several miles was insufficient to avoid the specific direction inquiry.¹²⁷ Aid would, therefore, fulfill the actus reus proof requirement only if Tesch's assistance were specifically directed, meaning: (1) the group assisted was "an organization whose sole and exclusive purpose was the commission of crimes"; or (2) the defendant "endorsed a policy of assisting [the group's] crimes."¹²⁸ The endorsement prong was obviously susceptible to proof problems and remains so today: private employers, as well as modern liberal governments, are unlikely to utilize extensive monitoring and exploit technological innovations in eavesdropping unless minimizing the "omnipresent, unquantifiable risk of making a lower profit than . . . otherwise."¹²⁹ And because the Nazis were a political party for whom the commission of crimes, however ubiquitous, was only one objective among other, sometimes lawful ones, Tesch and his co-defendants would presumably have been acquitted under *Perišić*.¹³⁰

Regardless of the hypothetical *Tesch* outcome, the susceptibility of heads of state to criminal responsibility owes much to an abandonment of the presumption

¹²⁴ See Stewart, Comments to Kevin Jon Heller, *supra* note 6.

¹²⁵ See Case No. 9: The Zyklon B Case, Trial of Bruno Tesch and Two Others, before The British Military Court in Hamburg, Germany (March 1946), http://www.worldcourts.com/ildc/eng/decisions/1946.03.08_United_Kingdom_v_Tesch.pdf (last visited Nov. 13, 2013).

¹²⁶ But consider William B. Lindsey, *Zyklon B, Auschwitz, and Bruno Tesch*, 4 J. HIST. REV. 261, 263 (Fall 1983) (arguing that the case represents an instance of victor's or "new" justice and that Dr. Tesch's conviction was unjustified).

¹²⁷ Perišić Trial Judgment, *supra* note 45, ¶¶ 1–21 (describing the geographic proximity of the accused to Srebrenica).

¹²⁸ Perišić Appeals Judgment, *supra* note 42, ¶ 52.

¹²⁹ Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2032–33 (2001).

¹³⁰ Besides carrying out the analogy, my only addition to Stewart's provocative argument about specific direction applied to the *Tesch* case is to suggest that a creative specific direction court might have found "endorsement" satisfied simply in the Herculean quantity of poison gas sold: it was surely well out of proportion to any pest control sales Tesch and the others, or any legitimate enterprise, had theretofore engaged in.

that leaders' official activities always pursue a legitimate state purpose.¹³¹ The case against Augusto Pinochet supposedly constituted an effective end to the erstwhile exemption they enjoyed.¹³² Under a specific direction-like standard, the higher up in a state's hierarchy a suspected violator is, the harder it becomes for prosecutors to prove an accused's endorsement of "a policy of assisting" crimes or provision of support to an organization whose sole and exclusive purpose is the commission of crimes.¹³³ Specific direction, then, seems normatively irreconcilable: with the notion of the ICC and universal jurisdiction—that every state has an interest in prosecuting war atrocities; with the need to criminalize aiding and abetting in large and bureaucratic as well as small and insular states alike; with the Pinochet command responsibility paradigm shift (that is, no one enjoys immunity by virtue of his position within the state apparatus); with the need for enforcement to be sufficiently effectual and frequent so as to carry a deterrent effect, however marginal, on the commission of such crimes; and, finally—as a behavioral and procedural consideration—with the need to elicit witness testimony.¹³⁴

V. CONCLUSION

Hannah Arendt largely misread Eichmann, or perhaps she drew conclusions too quickly on the basis of selective evidence.¹³⁵ Certainly, she made light of certain

¹³¹ See generally Michael Byers, *The Law and Politics of the Pinochet Case*, 10 *DUKE J. COMP. & INT'L L.* 415 (2000); Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 *GA. J. INT'L & COMP. L.* 495 (2006).

¹³² See Byers, *supra* note 131, at 416–18.

¹³³ Even al-Qaeda is not solely and exclusively dedicated to unlawful activity, and US courts have struggled with separating assistance or aid to lawful purposes from aiding and abetting terrorism. See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

¹³⁴ Recent scholarship has described problems of intimidation and lack of witness anonymity in international tribunals. See Andrew Trotter, *Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused*, 44 *GEO. WASH. INT'L L. REV.* 521, 522–25 (2012). Increasing reluctance to testify has followed, and under-conviction would seem to exacerbate the problem of witness incentives. *But see* Monroe Leigh, Editorial Comment, *The Yugoslav Tribunal: Use of Unnamed Witnesses*, 90 *AM. J. INT'L L.* 235 (1996) (arguing on grounds of due process against withholding several witnesses' names from Tadić and his defense counsel).

¹³⁵ For adherents of this view, see, for example, Lionel Abel, *The Aesthetics of Evil: Hannah Arendt on Eichmann and the Jews*, 30 *PARTISAN REV.* 211, 224 (Spring 1963) ("Arendt's judgment of Eichmann as an insignificant and commonplace official will be seen to be perverse and arbitrary."); Gertrude Ezorsky, *Hannah Arendt Against the Facts*, 2 *NEW POL.* 52, 52–53 (1963) (quoting the results of a psychiatric study, which found that Eichmann was "a man obsessed with a dangerous and insatiable urge to kill," and thus concluding that "Arendt's tale that Eichmann was without fanatical hatred of Jews seems initially implausible"); Michael A. Musmanno, *Man with an Unspotted Conscience*, N.Y. *TIMES* (May 19, 1963) ("The disparity between what Miss Arendt states, and what the ascertained

of his statements outside of court—for example, “I will gladly jump into my grave in the knowledge that five million enemies of the Reich have already died like animals”—in favor of his self-serving testimony.¹³⁶ Yet her broader commentary about human nature and her disabusing us of the belief that accomplices to serious crimes constitute the Other, ring true and remain particularly relevant today. How one evaluates Arendt’s broader claim, irrespective of whether Eichmann was its correct antecedent, might parallel one’s impression of the ICTY’s attempt to limit the *actus reus* of accomplice liability so as to sweep in only acts of assistance that overtly display an individual’s culpability.

This Comment has implicitly taken her observation as meaningful and maintained that, consonant with most Western complicity doctrine (but not specific direction), assistance of war crime perpetrators is equally culpable regardless of the observable form it takes—assuming the equality of other relevant factors, such as knowledge and substantiality of aid. It has argued that specific direction qua an importation of *mens rea* into *actus reus* is at odds with the customary law of international treaties, conventions, and cases—a realization borne out in responses, judicial and journalistic, to its intrusion onto the ICTY landscape. Additionally, this Comment has assessed the normative consequences of specific direction that, far from ameliorating or superseding these problems, make specific direction still less desirable. In the way of immediate practical application, it has suggested the need for the ICTY Appeals Chamber to clarify aiding and abetting so as to bring it in line with customary law and the law of its peers, reject the *Perišić* adoption of the *Tadić dictum*, re-consider the *Perišić* case, and proceed in the *Stanišić* appeal to reverse on matters of law the Trial Chamber’s acquittal.¹³⁷

facts are, occurs with such disturbing frequency in her book that it can hardly be accepted as an authoritative historical work.”)

¹³⁶ Quote drawn from David Cesarani, *Adolf Eichman: The Mind of a War Criminal*, BBC NEWS SERV. (Feb. 17, 2011), available at http://www.bbc.co.uk/history/worldwars/genocide/eichmann_01.shtml (last visited March 8, 2014).

¹³⁷ Note that the Mechanism for International Criminal Tribunals (MICT) will be tasked with performing many of the functions of the ICTY, including appeals hearings and re-trials, once the latter’s mandate expires. Instructed to apply the law of the tribunal, MICT practitioners represent another potential audience to whom this Comment may prove relevant.