Aiding and abetting international crimes
- In the light of International Legal Pluralism

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ABSTRACT

International Criminal Law has traditionally been viewed as a uniform body of law. However, the lack of authoritative interpretations in combination with the variety of courts - international, hybrid and domestic - adjudicating International Criminal Law is bringing an increased pluralism to the field. The current development is seen by some as detrimental to the supposed universality of International Criminal Law and a threat to legal certainty and predictability. Others view it as an opportunity to spark innovation and create a stronger bond between the courts and the affected communities. This thesis will explore whether uniformity or pluralism is the preferred path of development for International Criminal Law. The issue will also be explored in a more practical sense with an analysis of three cases that have caused fragmentation in the area of aiding and abetting liability.
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ABBREVIATIONS

ACHPR African Court on Human and Peoples' Rights
ECCC Extraordinary Chambers in the Courts of Cambodia (also known as the Khmer Rouge Tribunal)
ECHCR European Court of Human Rights
IACHR Inter-American Court of Human Rights
ICC International Criminal Court
ICJ International Court of Justice
ICL International Criminal Law
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
ILC International Law Commission
JCE Joint Criminal Enterprise
MPC Model Penal Code
SCSL Special Court for Sierra Leone
UDHR Universal Declaration of Human Rights
VCLT Vienna Convention on the law of Treaties
VRS Bosnian Serb Army
1. Introduction

1.1 Problem

In February 2013 the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber considered the Perisic Appeal. The focus of the case was the actus reus of aiding and abetting an international crime. The Appeals Chamber found that in order to reach a conviction it must be proven beyond reasonable doubt that the act of assistance had been “specifically directed” at the crime. This applies especially to those cases where the aider and abettor was remote from the crime when it was committed.

In September 2013 the Special Court for Sierra Leone (SCSL) Appeals Chamber faced the same question in the Taylor Appeal. Despite the fact that the court - according to its own statute - was supposed to be “guided” by the decisions of the ICTY Appeals Chamber, it came to a different conclusion. The SCSL Appeals Chamber concluded that “specific direction” is not an element of the actus reus and stated that it is sufficient to prove that the assistance provided by the aider and abettor has had a “substantial effect” on the crime committed.

In January 2014 the ICTY Appeals Chamber once again faced the same question in the Sainovic et al. Appeal. This time the Appeals Chamber was composed of different judges than in the Perisic case. The Appeals Chamber established that “specific direction” was not an element of the actus reus and agreed with the conclusion in the Taylor Appeal judgement stating that it is enough to prove “substantial effect” to reach a conviction.

The outcome of these three cases has caused a fragmentation of the law that some view as detrimental to the supposed universality of International Criminal Law (ICL). However, others claim that diversity in the application of the law could be beneficial for the future development of ICL and that uniformity is not necessarily something to strive for. When fragmentation is viewed from this perspective it is better described as pluralism. Furthermore, the Perisic Appeal judgement has caused some controversy regarding the definition of the actus reus of aiding and abetting liability and some aspects of the judgement are questionable.
1.2 Purpose

The purpose of this thesis is to investigate the concepts of fragmentation and pluralism and whether diversity in the application of ICL is a problem or a necessity. Furthermore the thesis aims to investigate the legality of the arguments with which the SCSL neglected to seek guidance in the Perisic Appeal. Although the SCSL has since then been officially closed, the analysis serves to explore the relationship between the different courts and the legitimacy of the decisions in the Perisic and Taylor Appeal judgements. In addition, this thesis seeks to provide an analysis of the “specific direction” requirement, its relation to “substantial effect” and whether the requirement should be considered an element of the actus reus or the mens rea of aiding and abetting. A discussion regarding the remoteness of the aider and abettor and the meaning of “neutral assistance” will be included as part of this analysis.

1.3 Questions at issue

This thesis will seek to answer two main questions:

1. Is uniformity in ICL a necessity?

In order to answer this question the following subissues will be examined:
- Do any issues arise when different tribunals reach different conclusions on the same matter?
- What advantages does a pluralist view offer?
- Should the courts follow each other’s precedents?
- What issues arise with self-fragmentation? Are there any solutions?

2. Is “specific direction” an element of aiding and abetting liability? Should and will other courts follow the Perisic precedent?

The following subissues will be examined:
- If “specific direction” is part of aiding and abetting liability, does it belong to the actus reus or the mens rea?
- What is the meaning of article 20(3) of the SCSL Statute?
- Should the SCSL have followed the Perisic precedent?
- Are there any indications on how the ICC will handle the question of aiding and abetting liability?
1.4 Scope of Study

The focus of this thesis is international criminal law. Domestic legislation will therefore not be studied unless it is relevant for a comparison with, as an element of or an influence on international law. Focus will lie on the most well developed courts including the ICTY, ICTR, SCSL and ICC. Other courts will only be mentioned briefly where they can serve as examples relevant to the discussion.

1.5 Method

This thesis will be written as a comparative study where different jurisdictions will be explored and compared. This method is appropriate because international law is ultimately a diverse construct with many different components and partly separate regimes. The analysis will be based on books, articles and electronic sources written by lawyers and scholars. The aspects discussed as part of the fragmentation/pluralism debate are not exhaustive and it would be possible to explore the matter from more angles. However the demarcation will allow a deeper analysis of these particular arguments. The discussion does not only aim to describe the law as is (de lege lata) but also explore what it should be (de lege ferenda). The de lege ferenda perspective is necessary in order to determine whether pluralism is in fact something to strive for. There is, of course, an element of subjectivity in determining what the law should be, however by applying different theories to the facts it is possible to find indications as to what would be the most appropriate course of development. For this purpose guidance can be sought in the different legal traditions, mainly the civil and the common law tradition. The difficulty of combining these two traditions is inherent in the structure of international law and inevitably extends to the pluralism/uniformity debate. Guidance can also be sought in theories of law. The natural law theory has played a major role in the development of ICL and is therefore of relevance. Other theories such as legal positivism and sociology of law can be used to contrast conclusions based on natural law. Regarding aiding and abetting two theories - the derivative and the non-derivative - will be used to analyze the concept of liability in order to better understand the crime. The facts will be analyzed throughout the entire paper and will not be divided in one “fact” part and one “analysis” part.
1.6 Outline

Chapter Two focuses on the pluralism/uniformity debate. It begins with an introduction to ICL. The sources of international law is presented in order to review the complicated legal status of precedents. Following this introduction, the different forms of pluralism/fragmentation is examined before the matter is explored further at the horizontal - i.e. the international - level. The main arguments for each theory will be presented with the purpose of giving the reader a brief overview of the issue. Thereafter the different legal traditions and theories of law will be used to analyze the current state, as well as the desired future development, of ICL. This chapter is written in general terms and does not focus specifically on aiding and abetting.

In Chapter Three pluralism/fragmentation is explored in a more practical sense with a focus on the Perisic and the Taylor Appeal judgements. The focus still lies on fragmentation at the horizontal level. The controversy surrounding the “specific direction” requirement is analyzed as well as the decision by the SCSL not to follow this precedent. The background and purpose of Article 20(3) of the SCSL statute is explored in order to establish the correctness of this decision. A short review of how the ICC has handled the question of aiding and abetting liability is also provided.

Chapter Four explores the issue of self-fragmentation - i.e. fragmentation at the institutional level. The Sainovic et al. Appeal judgement is presented and the consequences of it are analyzed. The need to accomplish a substantively correct result is weighed against the risks inherent in a diverging jurisprudence. The possibility of installing a new mechanism for solving similar problems in the future is explored. Lastly the risk of political pressure is examined in order to illuminate the issue of forces trying to affect the content of ICL. A fourth case - the Gotovina case - which bears similarities to the controversial Perisic Appeal judgement is presented. A short analysis of the identity of ICL and the causes for fragmentation will be made in order to explain why fragmentation occurs.
2. Fragmentation or pluralism?

2.1 Introduction

2.1.1 ICL - A diverse construct

ICL is a diverse construct that draws on international humanitarian law, human rights and criminal law. This may at times lead to conflicting interests. While human rights and humanitarian law focus on maximizing protection for victims, criminal law is also concerned with protecting the accused from a state’s coercive power.¹ The two can be described as opposing forces and judges are naturally prone to lean towards one or the other. Lawyers who believe in a strong enforcement of criminal law principles may believe that human rights lawyers have a bias for conviction. Such concerns have in fact been raised and it has been pointed out that while the domestic system may be oriented towards the idea that it is better to let ten guilty persons go free than to convict one innocent, ICL literature often express fears of the accused “escaping conviction”. Another issue that has been raised is that convictions are often conceived as “the fulfilment of the victims’ human right to a remedy”.² This may make a reliance on human rights standards inappropriate as ICL - unlike human rights law - seeks to punish individuals. Finally, it has been pointed out that the proclamation of the Taylor Appeal judgement as a “victory for justice” contradicts the idea of the system being overall fair since, logically, even an acquittal should be considered “a victory for justice”.³ On the other hand a strong emphasis on criminal law standards may ultimately lead to impunity for those responsible of giving illegal orders. A broad scope of liability puts generals and high-commanders at risk of being convicted and may serve as a motivation to make sure that no crimes are committed under their watch.⁴ Furthermore, a strict reliance on criminal law standards may be used to mask attempts to limit the restraints on warfare. Such concerns have been raised in relation to the Perisic and the Gotovina Appeal judgements and will be discussed below in section 4.2 along with a continued analysis of the human rights vs criminal law logic.

² Ibid 930-931.
⁴ Darryl Robinson, supra note 1, p. 937
2.1.2. Sources of ICL and the meaning of precedents

ICL is a branch of public international law. As such, the sources of law relevant to it can be defined by looking at the international law in general. These sources can be found in Article 38 of the International Court of Justice (ICJ) Statute and are bound by a hierarchical order. The primary sources of law relevant to ICL are treaties and customary international law. The secondary source has been defined as the principles of international law and ultimately, as a subsidiary source of law are the general principles of law recognized by the civilized nations.\(^5\)

The jurisprudence of the international criminal courts is not a source of law and each court is considered to be its own entity. However, in practice precedents from other courts can often provide guidance on the interpretation of the law and it is not uncommon for courts to make references to each other’s decisions. In fact, such interpretations may at times be warranted through a contextual interpretation in accordance with Article 31(1) of the Vienna Convention on the law of Treaties (VCLT) given the similarities that often exist between the different statutes. Furthermore, the ICTY and the ICTR are closely linked and their the Appeals Chamber of the two courts are in fact made up of the same judges. In addition, the Statute of the SCSL includes a provision establishing that the court must seek guidance in the ICTY and ICTR jurisprudence. Although the courts are independent they are inevitably linked to one another.

Within each institution precedents provide important guidance when establishing the content of substantive ICL. There are no provisions in the ICTY or the ICTR Statute binding the courts to their prior decisions and rules have instead been established in the ICTY jurisprudence. In the Aleksovski Appeal judgement the Appeals Chamber concluded that “...in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice”. Situations where “cogent reasons” require a departure from a previous decision were described as cases where the previous decision has been “decided on the basis of a wrong legal principle” or cases where the decision has been “wrongly decided, usually because the judge or judges were ill-informed about the applicable law”. The Aleksovski Appeals

Chamber stressed the importance of following prior decisions and concluded that "it will only depart from a previous decision after the most careful consideration has been given to it".\textsuperscript{6} This approach was later confirmed by the ICTR Appeals Chamber in the \textit{Semanza Appeal} judgement and seems to have also become the applicable standard in the SCSL.\textsuperscript{7} Unlike the Statutes of the \textit{ad hoc} tribunals and the SCSL, the Rome Statute of the International Criminal Court (hereinafter referred to as “the Rome Statute”) Article 21.2. provides that the court “may apply principles and rules of law as interpreted in its previous decisions”. It has been argued that this approach is closer to the civil law approach which rejects a strict reliance on precedents.\textsuperscript{8}

2.2. Uniformity vs Pluralism

2.2.1 General aspects

Unlike domestic courts there is no hierarchy among the international courts. The jurisprudence of the different courts can therefore at times be contradicting or incoherent. This phenomenon has since long been recognized as fragmentation of the law. Lately the terminology has begun to change and instead of “fragmentation” the word “pluralism” is sometimes used. However, the words are not interchangeable and although they are used to describe the same phenomenon the two have different meanings.\textsuperscript{9} The shift from “fragmentation” to “pluralism” can be seen as more than just a semantic replacement and has been described as a “paradigm shift”.\textsuperscript{10}

2.2.2. Different forms of fragmentation/pluralism

The fragmentation discussed in this chapter can be defined as \textit{horizontal fragmentation/pluralism}. The practical implications of this will be explored in further depth

\textsuperscript{8} Mark Klamberg, \textit{Evidence in international criminal trials: confronting legal gaps and the reconstruction of disputed events}, Martinus Nijhoff Publishers, 2013, p.38.
\textsuperscript{9} Elies van Sliedregt and Sergey Vasiliev, \textit{Pluralism in international criminal law}, OUP Oxford, 2 October 2014, p.16-17.
\textsuperscript{10} Ibid, p.66.
in the next chapter through an analysis of the Perisic and Taylor Appeal judgements. However, the law can be fragmented in more than one way. Another form of fragmentation is vertical fragmentation/pluralism. Based on territory, nationality or universal jurisdiction a domestic court can sometimes be responsible for processing an international crime. Domestic courts may be warranted to incorporate the exact definition of a crime established in international law however the general part of criminal law is usually considered as belonging to the domestic sphere. Furthermore, international jurisprudence may serve as guidance but domestic courts are not bound by the interpretations deriving from international courts. The issue inevitably leads to fragmentation caused by differences in the application of the law in international and domestic courts. The issue raises questions about hierarchy of norms and the extent to which international law should be applied in domestic courts. A third form of fragmentation is self-fragmentation. It occurs when the same court delivers contradicting decisions in similar cases. The jurisprudence of the court thus becomes contradicting and the law becomes harder to interpret. Since the Perisic, Taylor and Sainovic cases were all processed by international courts vertical fragmentation is not entirely relevant to the topic discussed in this report. Self-fragmentation on the other hand became a very real issue after the Sainovic et al. case was decided.

2.2.3. Fragmentation

When the word fragmentation is used to describe the diverging jurisprudence it is often viewed as something negative. Something that ought to be uniform and clear has become fragmented and hard to interpret. Fragmentation is viewed as something that threatens the uniformity and predictability of ICL. It can also be seen as posing a threat to “the right to equality before the law”, codified in Article 7 of the Universal Declaration of Human Rights (UDHR). Two people who have committed the same crime in different parts of the world might see different outcomes simply depending on what courts jurisdiction they’re under, as

13 Elies Van Sliedregt, supra note 9, p.14.
was the case with Perisic and Taylor. It can seem arbitrary to let geographical location rather than the crime itself be decisive of a person’s guilt.

2.2.4. Pluralism

Pluralism on the other hand carries a more positive tone towards the phenomenon. ICL is not considered to be uniform enough to be fragmentated and diversity in the application and interpretation of the law is seen as part of the development. A parallel can be drawn to the *margin of appreciation* - established by the European court of Human Rights (ECHR) - which allows for practical differences in the application of the European Convention on Human Rights. A pluralist system that allows for a diversity in the application of the law would likely be better able to take local needs and conditions as well as political constraints into account. The courts would also be better able to take legal traditions into account allowing, for example, a court based in continental Europe to consider civil law values when deciding the outcome of a case. These advantages could lead to the courts gaining more support among the population and in doing so strengthening its legitimacy. In order to achieve some of the advantages mentioned above proximity to the victims is necessary and it can be questioned whether purely international courts is the most effective means of international law enforcement.

2.3. Aspects on Fragmentation

2.3.1. Natural law

After World War II the judicial process for war crimes and the legal basis for international criminal courts was heavily influenced by the renaissance of natural law. Natural law is the idea that there are certain rights and values that apply regardless of the written law. These rights are universal. They are not confined by time and space and apply equally to everyone, at all times, everywhere in the world. The idea can be traced back to ancient Greece and the

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14 Ibid, p.16.
meaning of these rights has been discussed ever since. There are many theories and while some claim that the rights have a divine foundation, others claim it is simply a question of moral.\textsuperscript{17} The natural law is not meant to replace the written law that derives from a state legislator, it is rather meant to legitimize and give legal force to the written law which is in accordance with it. Consequently the law that is not in accordance with these natural rights does not bind legal force.\textsuperscript{18} This means that even if an act is not regarded as a crime in the state where it was committed and at the time of its commission it can still be “wrong” according to natural law. The classic example is Nazi Germany where the law allowed mass atrocities to take place. Despite these atrocities being formally legal according to German law they were considered “wrong” according to natural law and many of the perpetrators were later convicted of their crimes.

The concept of natural law can easily be used to support the view that ICL ought to be uniform. The natural, or human, rights that derive from natural law are meant to be universal and apply equally to everyone, everywhere in the world regardless of sex, religion, ethnicity, sexual orientation or other factors. The fact that fragmentation is causing the law, which is supposedly built on objective values from a “higher power”, to be applied differently in different courts could call into question the whole foundation of these rights. Thus, an analysis of the background of the ICL and ideas with which it developed suggests that a uniform application of the law is desirable.

\textbf{2.3.2. Legal traditions}

\textbf{2.3.2.1. General aspects}

Another way of viewing fragmentation is though an analysis of the different legal traditions. ICL is not based on only one legal tradition but a blend of many, and most constituent instruments of the international courts stipulate that the principal legal systems of the world need to be represented.\textsuperscript{19} The most prominent systems are the civil and common law traditions. It is worth noticing that not all countries strictly belong to the common or the civil

\begin{footnotesize}
\begin{enumerate}
\item[Ibid, p.88]
\item[Ibid, p.87]
\item[Statute of the International Tribunal for Rwanda, 8 November 1994, Article 12.3.c; Statute of the International Tribunal for the former Yugoslavia, 25 May 1993, Article 13 bis.1.c; Rome Statute of the International Criminal Court, 1 July 2002, Article 36.8.a.(i)]
\end{enumerate}
\end{footnotesize}
law tradition and variations of the two exist. However, in order to contrast the two and illuminate the difficulties of combining them the stricter versions of the two will be explored.

2.3.2.2. Civil Law

Legal certainty is important in both traditions and is based on the idea that an individual must be able to adapt his or her conduct to avoid obstructing the law. The concept is defined somewhat differently in the two traditions and is not as important in common law as it is in civil law. In civil law legal certainty is the grounding value that guides all application of the law. It is a value that judges should always strive to achieve and is defined in terms of maximum predictability of officials’ behaviour.\(^{20}\) Legal certainty is often used as an argument for uniformity in ICL and unsurprisingly the strongest advocates for the development of a general ICL are civil law lawyers and scholars.\(^{21}\) Legal expert Matti Koskenniemi wrote in a UN report that one of the main issues with fragmentation is that it diminishes legal certainty and threatens the predictability.\(^ {22}\) The argument is clearly based on civil law values.

Another feature of civil law, and what most sets it apart from common law, is that its main source of law is codification. The role of the judge is merely to apply the codes to the facts of the case and precedents are not given much thought. This approach to the law is based on the concept of legal formalism and serves to ensure that similar cases are treated equally. In France and Germany - which are two strict civil law countries - the doctrine of *jurisprudence constante* is followed. This means that a long line of precedents all pointing in the same direction can be given a persuasive value, however specific cases are not usually cited.\(^ {23}\) Even though all international courts have their own statutes these documents are in many ways similar and often contain similar (sometimes identical) articles. They have also been created by the same legislator: The UN. Aside from the statutes, all international courts are bound by the same rules in the form of customary international law, general principles and conventions


\(^{21}\) Elies Van Sliedgret, supra note 9, p.22.


like the Geneva Convention which is often referred to in the different statutes. The fact that the courts in large abide by the same rules makes a pluralist view hard to reconcile with the civil law tradition where the laws are meant to cover all eventualities and limit judicial discretion. It also makes it hard to see the law as anything but a whole. Seen from a civil law perspective it can be argued that the fragmentation caused by the Perisic and Taylor Appeal judgements is undesirable as it diminishes the authority of the law and enhances judicial discretion.

Because these values are of a civil law character the arguments can be seen as rather one-sided. However the civil law tradition seems to have had a great influence on international law in regards to its sources. While statutes are cited as a primary source of law, precedents - i.e. the main source of law in the common law tradition - has been given no official status as a source of law.

2.3.2.3. Common Law

The common law tradition is less concerned with codification, instead it is mainly built on precedents. If a similar case has been decided before, a judge must follow the precedent established in that case. The judicial discretion is greater in common than in a civil law jurisdictions and the system is described as being more flexible. Judges are often able to mold the result of a case to the requirements of the facts to achieve substantial justice. This applies to some extent even to those cases which requires the application of a statute. The focus on substantial justice and the power of the judge to tweak the law so that it produces a “fair” result makes it is easier to motivate different outcomes in similar cases. Demanding that all cases be treated alike could serve to ensure the formal justice sought by civil law scholars but could on the other hand threaten the substantive justice preferred in the common law system.

It has been suggested by ICJ judge Mohamed Bennouna that in order to achieve uniformity in ICL the UN should consider the formation of an expert body “for the purposes of coordination”. This would, according to judge Bennouna, “ensure the progressive

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development of international law and its codification”. Indeed, without such a body achieving uniformity within the current legal framework seems like a challenge. Because the law is imperfect and leaves room for different interpretations, precedents from other courts would need to be taken into consideration in order to avoid fragmentation. Although the courts are already cross-referencing each other this would have to be done to a further extent in order to ensure uniformity in the application of the law in *all* international criminal courts. However, this would indirectly elevate precedents to a source of law which is contrary to the rules established by the ICJ Statute.

Because the common law system does not expect the law to cover all eventualities it is possible to view ICL as several bodies of law working within the same framework. With a pluralist view on ICL each jurisdiction would, just as today, be seen as its own entity and precedents established in other jurisdictions would be irrelevant. By not strictly enforcing formal justice on a global scale, substantive justice may more easily be achieved. Based on the common law values it would seem like a pluralist approach to ICL is preferable.

### 2.3.3. Globalization and Sociology of Law

Another aspect that could be used to argue for a uniform application of ICL is globalization. The world is rapidly becoming more globalized and the differences between our societies are becoming less prominent. Through the internet we are able to connect with people across the world, travel has made it easy to experience other cultures first hand and through migration our cultures are merging together. Many societies are moving in a western direction and the term “Americanization” has since long been coined. It is not unthinkable that we in the future will have only one culture, one language and common ideals. No matter if that’s where we ultimately end up cultural unity is arguably part of the current global development. Thus, it could seem odd to argue for a pluralist view that puts emphasis on the differences rather than the similarities of our societies. Because the law and the society are closely knit together the two should reasonably be moving in the same direction.

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25 Guido Acquaviva, supra note 12, [accessed 17 March 2016].
Another aspect of globalization is globalization of the law. The concept has been addressed within the field of *sociology of law* and has been described as a nearly imperialistic spread of western ideals. Claims of the universality of the law and a global modernization process are often seen as an excuse to give premium to western law.\textsuperscript{26} Research has shown that globalization should not be conceived simply as a movement towards a one-world culture, rather it is to be seen as the reconfiguration of the interrelationships between national and international law.\textsuperscript{27} When put into the context of human rights the globalization of law as the formation of a homogenized culture has been described as being:

“...unmasked as a power struggle whereby the imposition of a supposedly universal “one size fits all” style of law is critiqued as being detrimental to the fulfillment of justice on a local scale.”\textsuperscript{28}

Although the concept of globalization can be used to support the idea that the ICL ought to be uniform a deeper analysis reveals the complexity of the issue. Within the context of sociology of law the idea of a universal ICL is easily critiqued and a pluralist approach is seemingly preferable.

### 2.4. Aspects on Pluralism

#### 2.4.1. Western influence on Natural and International Law

The concept of natural law has clear benefits. As opposed to *legal positivism* which can be used to legitimate totalitarian regimes, it provides a safety net for abuse of power and a minimum humanitarian standard.\textsuperscript{29} It can be used to counteract the principle of sovereignty which, when drawn to the extreme, could justify a state to commit atrocities against its own citizens. However, there is no scientific way of determining these natural rights and values and in reality it is often the most powerful states who preside over its content. After World War II the allied forces (US, USSR, UK and France) gathered in Nürnberg, Germany to


\textsuperscript{27} Ibid, p.269.

\textsuperscript{28} Ibid, p.270.

\textsuperscript{29} Irisi Topalli, supra note 16, p.88.
prosecute war criminals in the first international criminal court ever established.\textsuperscript{30} These trials had a great impact on the development of international law that followed, in particular human rights.\textsuperscript{31} Although human rights is a different body of law than ICL the two are interrelated and ICL was developed in response to mass violations of human rights.

In 1948 the UDHR was adopted by the UN. The drafting process was mainly carried out by people from western Europe and the Americas or were non-europeans educated in the west.\textsuperscript{32} Although the west (Western Europe and the Americas) is culturally diverse it is similar enough to allow generalizations. The concept of individual rights is based on democratic and libertarian values that can be directly traced to western Europe and the United States.\textsuperscript{33} With a strong emphasis on individual rights, the concept of communal and group rights has been neglected even though many non-western societies are based on a sense of community rather than individualism.\textsuperscript{34} To many in the third world the concept of human rights can seem alien and is often seen by the former colonies as an excuse for the west to override the principle of sovereignty and interfere in their internal affairs. However, criticism against the western influence has also been used to justify human rights violations.\textsuperscript{35}

In the area of ICL the ICC has received criticism for seemingly targeting African countries. Given the fact that all cases processed by the ICC have revolved around crimes committed in Africa, there could be something to it. However, four out of the nine states in which these crimes were committed, have voluntarily referred the cases to the ICC and as of 2016 an investigation into the events in South Ossetia, Georgia in 2008 has been opened.\textsuperscript{36} Consequently, the issue might not be as clear cut as it would seem at a first glance. More telling are the cases that have not been investigated by the court. Despite allegations of war crimes former UK prime minister Tony Blair has not yet been investigated for his actions

\textsuperscript{30} Ibid, p.90-91.
\textsuperscript{31} Ibid, p.95-96.
\textsuperscript{33} Adamantia Pollis and Peter Schwab, Human Rights Cultural and Ideological Perspectives, Praeger, 1980, p.8.
\textsuperscript{34} Ibid, p.9.
\textsuperscript{35} Abdullahi Ahmed An-naim, supra note 32, p.16.
\textsuperscript{36} The International Criminal Court, Situations and Cases, <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> [accessed 7 April 2016].
during the war in Iraq. The issue has been highlighted by social rights activist and Nobel peace prize winner Desmond Tutu who has called for Blair to be tried by the ICC.\textsuperscript{37} Logically, former US president George W. Bush should be tried alongside Mr. Blair. However the ICC lacks jurisdiction over the case due to the fact that neither the United States nor Iraq have ratified the Rome Statute. A referral from the Security Council is highly unlikely given the US permanent seat and accompanying veto power. Due to the imbalance of power inherent in the structure of the Security Council the referrals are bound to be bias. This, and the fact that western state leaders in practice seem to be immune to prosecution despite falling under ICC jurisdiction is causing the legitimacy of the court to be questioned and in Kenya there is an ongoing discussion on whether the country should leave the Rome Statute.\textsuperscript{38}

\textbf{2.4.2. Defining Natural Rights}

Because it is physically impossible to prove the content of natural law it could be argued that the truth is yet to be found. ICL is still in the early stages of its development, historically speaking. The Nürnberg trials took place less than a 100 years ago and the International criminal court has not been in effect for even 15 years. A pluralist view on ICL would allow it to develop more freely. In the US, legal pluralism is motivated by the idea that each state within the federation can be viewed as a “laboratory for democracy”. Diversity in the decision-making is seen as something that promotes innovation and the creation of new solutions. The best solutions can spread through the system while local conditions allows for variations.\textsuperscript{39} There is nothing to suggest that the same arguments cannot be applied to international law. By demanding that all international criminal courts interpret the law in the same way we could be putting constraints on the development of ICL. Although human rights are seen by many as an incorporation of natural law it can be argued that these rights are neither universal nor objective due to the western influence that has dominated its creation and development. The simple fact that other bodies of law exist and are justified in the same

\textsuperscript{37} Max du Plessis, Tiyanjana Maluwa and Annie O’Reilly, \textit{Africa and the International Criminal Court}, Chatham House, July 2013, available at:  
\textsuperscript{38} Ibid, p.6.  
\textsuperscript{39} Paul Schiff Berman, \textit{Federalism and International Law Through the Lens of Legal Pluralism}, GW Law Faculty Publications & Other Works, 2008, p.1149-1150.
way as the concept of natural law (being objective and true, deriving from something beyond human conception) is contradicting the idea that we have already found a universal and static truth. Sharia law which is practiced in a number of muslim countries is based on the supposed will of Allah and the Pope derives his power from that same source of divinity. However some values can be justified simply on the basis of being objectively and morally wrong. Regardless of whether we believe in a higher power or not there are certain values that most of us believe to be true. Most of us would agree that murder is wrong, regardless of what the law says. This is a value we share as human beings and it is not culturally bound. It would therefore be hard to argue against the criminalization of the core international crimes (genocide, war crimes and crimes against humanity). However we might disagree on what constitutes a defence, how long the sentence should be and what should be considered mitigating or aggravating circumstances.

Allowing diversity in the application of the law in the different courts could be a way of minimizing western influence. This in turn could lead to the formation of a stronger bond between the courts and the affected communities, something that is likely to increase the perception of the courts as legitimate.\textsuperscript{40} However, the courts are not always geographically proximate to the affected communities. While the above reasoning might hold true for the SCSL which, before its termination, was located in Freetown, Sierra Leone it might not for the ICTY or for that matter the Lebanon Tribunal which are both located in The Hague, Netherlands and thus far away from where the crimes were perpetrated. The problem can be demonstrated by a survey made in Croatia in August 2000 in which a high percentage of Croats expressed concerns about the ICTY being bias and wanting to criminalize a just war. Furthermore, as many as 78% said that Croatia should not allow the Tribunal to extradite its citizens.\textsuperscript{41}

\textbf{2.4.3. Domestic law}

A strong emphasis on uniformity might risk creating a different kind of fraction, namely a fraction between national and international law. Because the two are different bodies of law

\textsuperscript{41} Ibid, p.736.
the word fragmentation is not an appropriate term to describe the problem. The issue arises because a perpetrator might see different outcomes of his or her case depending on whether it is captured by international or domestic law. This problem has been noted in relation to the Erdemovic case. Mr. Erdemovic had participated in a firing squad guilty of executing hundreds of Bosnian Muslims in Srebrenica, Bosnia. He was convicted by the ICTY Trial Chamber but appealed his case and claimed duress as his defence. The situation had not previously been thoroughly investigated and the Appeals Chamber faced a challenge in deciding whether to accept Mr. Erdemovic defence. The Appeals Chamber ultimately, although not unanimously, came to the conclusion that duress was not a complete defence for murder. However, according to the law in former Yugoslavia, duress did constitute a complete defence to murder.\(^4\) Had Mr. Erdemovic been judged for mass murder within the domestic sphere he would most likely have been acquitted.\(^5\) It can be argued that the number of victims makes the case of Mr. Erdemovic a clear violation of international law. However, it is not always clear where to draw the line between domestic and international crimes.\(^6\) Acts such as rape and murder are criminalized both domestically and internationally and - as has been established in the Furundzija case - even a single rape of one individual can constitute a violation of international humanitarian law.\(^7\) Even when it is clear that a crime is not international in nature, the similarity between that crime and one that is deemed a violation of international law, eg. a mass murder, could make it seem arbitrary to let the two be judged by different courts, ruled by different laws and potentially delivering different results.\(^8\)

Some form of fraction within or between different bodies of law is in other words inevitable. A pluralist view on international law would allow the international courts to take domestic law into account to a further extent. This could provide guidelines for the court when faced with an unanswered question and uniformity in cases originating from the same state, regardless of their national or international character. The value of having a uniform


\(^{43}\) Ibid, p.1078.

\(^{44}\) Ibid, p.1088-1089.


\(^{46}\) Alexander K.A. Greenawalt, supra note 42, p.1088-1089.
application of the law can thus be used to argue in favor for both pluralism and uniformity, depending on whether domestic or global uniformity is emphasized.

2.4.4. International, domestic or hybrid courts?

For the idea of pluralism to be effective as a means of taking local differences into account and strengthening the legitimacy of the courts - discussed above in section 2.4.2 - the process would need to take place close to the affected community. Bringing the process closer to the crimes could also serve as a means to achieve restorative justice for the victims, something that cannot be done when the process is far removed. Restorative justice has been described by Desmond Tutu as seeking “not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people”.47 While the ICC and the ad hoc tribunals have the advantage of being independent and impartial they have received criticism for being both physically and psychologically distant from the crimes.48 The issue was considered at the creation of the ICC and the Rome Statute does allow for the ICC to sit elsewhere than at its seat in the Hague. Likewise The Rules of Procedure and Evidence for the ICTY and the ICTR respectively provides that the ad hoc tribunals may exercise their functions away from the seats of the courts. However, this is rarely done in practice.49

ICL does not need to be processed by international courts. National courts sometimes have jurisdiction based on territory or citizenship of the accused or the victim. In regards to the most serious crimes such as genocide, war crimes and crimes against humanity national courts can claim universal jurisdiction and thus process an accused regardless of the accused’s nationality and where the crime was committed. Although litigation in a domestic court may feature what the international courts lack (being physically and psychologically closer to the victims) the risk of bias is undoubtedly greater. The trial of former dictator Saddam Hussein before the Iraqi Supreme Court in mid 2000 is a good example. The chief judge was an ethnic kurd from the town of Halabja which was the scene of infamous 1988

47 William W. Burke-White, supra note 40, p.735
48 Ibid, p.734.
Halabja gas attack ordered by Saddam. The judge made statements indicating that he considered Saddam guilty and that he should be executed without a trial. Furthermore Saddam was not allowed to choose his own defence lawyers and the communication between them was restricted. He was also not allowed to meet with his lawyers in private. The trial was obviously equipped to take into consideration the local conditions, the domestic law tradition and was geographically close to the affected community. However the flaws of the trial were so fundamental it is fair to argue that like cases should contain some degree of international involvement.

Aside from the purely international and domestic courts there is a third kind of court that can best be described as a mix of the two. These courts are often referred to as hybrid courts. The SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC) can be mentioned as two examples of such courts. The courts have been established through agreements between the UN and the local governments. They are made up of both local and international judges and apply a mix of domestic and international law. The hybrid courts are meant to strike a balance between the advantages and disadvantages of international and domestic courts. By involving domestic law and judges the hybrid courts can also help strengthen the domestic judicial capacity. The solution is by no means perfect and issues may arise regarding which laws to apply to specific cases. There may also be situations in which the content of domestic law is ambiguous. However, by being situated in the middle of two extremes it does provide the best solution yet. Furthermore, the costs for hybrid courts are significantly lower than for the ad hoc tribunals which by themselves consumed almost 10% of the total UN budget when they were both active - the ICTR has recently been closed.

The development in ICL is moving towards more domestic solutions. The establishment of hybrid courts has promoted the incorporation of domestic law into ICL and the Rome Statute expressly gives preference to domestic litigation. Through the current development ICL is

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51 William W. Burke-White, supra note 15, p. 975-976
53 Greenawalt, supra note 42, p.1105-1106.
54 William W. Burke-White, supra note 40, p.738-739
undoubtedly becoming more pluralistic. Although the value of uniformity is inevitably overlooked in a pluralist system the application of general rules such as the VCLT, customary international law and the general principles of law recognized by civilized nations does guarantee some level of coherence.\footnote{Matti Koskenniemi, supra note 22, para. 492}

2.5. Conclusions

While embracing a pluralistic view requires nothing more than accepting the current state of ICL which is processed by a variety of courts, both international and domestic, delivering different results in no hierarchical order, achieving uniformity would require an act. This act would most likely be the installment of an expert body with the purpose of delivering authoritative interpretations of the law. Motivating uniformity should thus require stronger arguments than does pluralism. However, with the UN seemingly pushing for domestic or hybrid solutions it can be argued that the international community is indeed acting for increased pluralism in ICL.

While an expert body may bring uniformity to ICL the issues of disproportionate western influence, the inability to provide restorative justice for the victims and the mistrust felt by many in the affected communities would still remain. It may seem unfair that two people can see different outcomes in their cases, despite the similarities, simply depending on which court’s jurisdiction they’re under. However based on what has been presented above the advantages of a pluralist ICL seem to outweigh the disadvantages. Consequently it is hard to argue that uniformity is a necessity. In fact, a development towards a pluralist ICL seems preferable. It is important to note that in a pluralist system the definition of the crimes would still remain universal. As mentioned above, most of us would agree on the criminalization of the most heinous crimes such as genocide, war crimes and crimes against humanity. The fact that these values (eg. murder is wrong) are not culturally bound suggests that the crimes are indeed, to some extent, universal and objective. However, even if we believe in natural law as the foundation for these crimes we need to question to what extent the law justifies giving supremacy to one interpretation over another. To argue for a uniform application of the law is to suggest that there is in fact a right answer to questions that would otherwise be up for
discussion. This was indeed argued by famous US scholar Ronald Dworkin in his “right answer thesis” however as with anything that cannot be physically proven caution is warranted. The imbalance of power in the world further puts into question the impartiality of supposed “universal” solutions. As for the threat to equality before the law it can be noted that crimes such as murder and rape which are criminalized under most domestic laws (and thus have a universal character) are subject to a great variety of rules regarding for example definitions, defences, sentencing and mitigating/aggravating circumstances without breaking Article 7 of the UDHR. In fact, emphasis is usually put on equality within, not across national jurisdictions. Pluralism in ICL should not pose a bigger problem.

Another aspect of the pluralism/uniformity debate are the actual courts. Although the ad hoc tribunals have played an important role in the development of ICL they are not a lasting solution. Financially they are too costly and if such courts were to be set up for all conflicts the UN would soon be ruined. Hybrid courts provide a feasible solution to the disadvantages of the ad hoc tribunals, however they do undoubtedly move ICL in the direction of pluralism. As has been presented above, a pluralist approach to ICL is not without its advantages. Allowing diversity in the application of the law would allow it to develop more freely and could spur innovation and the creation of new approaches to legal issues. Furthermore, if local conditions and laws are taken into consideration a pluralist approach could serve as a means to counteract what can be viewed as an disproportionate western influence on ICL. This in turn could lead to the courts gaining a stronger relationship with the affected communities. To be truly effective in this respect the courts should be located close to where the crimes were committed. The development towards hybrid and domestic solutions is therefore welcomed. Meanwhile the ICC works as a safeguard against domestic show trials or a lack of will to prosecute. In conclusion, the demand for uniformity in ICL seems misguided. Not only is uniformity not a necessity but it seems like the international community has a lot to gain from allowing diversity in the application and interpretation of the law. The current development is leading us onto a path towards a pluralist ICL, it seems like hindering this development would be a mistake.
3. Aiding and abetting

3.1. What is aiding and abetting?

3.1.1 Introduction

As stated in the beginning of this thesis the definition of the *actus reus* of aiding and abetting has caused some controversy in ICL and the issue serves as a great example of fragmentation/pluralism. Aiding and abetting is a form of secondary liability that imposes individual criminal responsibility. The crime can be committed either by an act or by an omission. The articles in the ICTY, ICTR and the SCSL statutes imposing criminal responsibility for aiding and abetting are identical and read as follows:

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime (...) shall be individually responsible for the crime.”

In the Rome Statute the crime has been formulated somewhat differently. Article 25.3(c) of the Rome Statute imposes individual criminal responsibility for aiding and abetting. It reads as follows:

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;”

Compared to the formulation of the crime in the *ad hoc* tribunals the article seems to suggest that aiding and abetting should be considered separately and not as one unit. Whether that is in fact the case will not be known until the ICC has tried its first case of aiding and abetting, something that it is yet to do. Furthermore the phrase “otherwise assists” seems to lower the objective threshold for the crime by including other forms of assistance besides aiding and

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56 ICTY Statute, Article 7 and ICTR Statute, Article 6, supra note 19 and the Statute of the Special Court for Sierra Leone (SCSL Statute), 16 January 2002 Article 6
abetting.\textsuperscript{57} Even though there is - theoretically - a difference between \textit{aiding} (physical assistance) and \textit{abetting} (psychological assistance), the two are often referred to in conjunction and most courts use the term \textit{aiding and abetting} as one.\textsuperscript{58} In the following text no difference will be made between the two and the crime will be referred to as “aiding and abetting”.

There are two main theories on the nature of liability for aiding and abetting; the \textit{non-derivative} and the \textit{derivative theory}. The former attaches liability to the \textit{act of the aider and abettor}. According to this theory liability for aiding and abetting is invoked the moment the aider and abettor commits his or her crime (eg. hands over a gun to the principal perpetrator) and it is irrelevant whether the principal perpetrator actually commits the intended crime (eg. shoots someone). The culpability lies in the decision to support the crime.\textsuperscript{59} The second theory attaches liability to the \textit{act of the principal perpetrator}. If no principal crime is committed an aider and abettor will not be held responsible for his or her acts. According to this theory the culpability lies in contributing to the harm done by the principal perpetrator.\textsuperscript{60}

\textit{The derivative theory} is the one that has gained the most support, in civil as well as common law states.\textsuperscript{61} However, when the Appeals Chamber of the SCSL briefly touched upon the subject in the \textit{Taylor Appeal} judgement in September 2013 it concluded that Article 6(1) of the SCSL Statute “establishes individual criminal liability in terms of the accused’s relationship to the crime, not to the physical actor”. It came to the conclusion through a textual as well as a contextual interpretation of the statute and referred to the plain language of the article and a comparison with Article 6(3) which “clearly establishes individual liability deriving from the criminal acts of another person”.\textsuperscript{62} As mentioned above, this

\begin{flushleft}
\textsuperscript{60} Ibid, p.15.
\textsuperscript{61} Ibid, p.15.
\textsuperscript{62} Prosecutor v. Charles Ghankay Taylor, supra note 7, para.366-367.
\end{flushleft}
interpretation has no binding legal force on other courts, however it can provide guidance for future decisions, even outside the jurisdiction of the SCSL.

Both theories are backed by strong arguments however the question can be raised if “substantial effect”, which will be discussed below, can in fact be proven if the principal crime never took place. It seems illogical to claim that an act of aiding and abetting would have an “effect” on a crime that never happened. The “effect” would then be purely theoretical. This view gives weight to *the derivative theory*. In addition, it is interesting to note that according to ICTY jurisprudence, it does not have to be proven that the crime would not have been committed, had it not been for the assistance provided by the aider and abettor.  

3.1.2. The *actus reus* and *mens rea* of aiding and abetting

In ICL two elements have to be proven beyond reasonable doubt in order to convict someone of a crime. These elements are called the *actus reus* and the *mens rea*. The *actus reus* is the “criminal act” (the physical element) while the *mens rea* constitutes the “criminal intent” (the mental element). In terms of aiding and abetting the *actus reus* was defined in the *Furundzija* case as “practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime”. The *mens rea* was defined as “the knowledge that these acts assist the commission of the offence”. The definitions have come to reflect customary international law however as will be discussed below it has been argued that the definition of the *actus reus* includes yet an element: “specific direction”.

3.1.3. What is “substantial effect”? 

Because the “substantial effect” criteria has played a major role in the definition of the *actus reus* of aiding and abetting in the *ad hoc* tribunals and the SCSL it is of importance to

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63 *Prosecutor v. Tihomir Blaškić*, ICTY Appeals Chamber, IT-95-14-A, 29 July 2004, para.48;  
determine what the phrase really means. The term was first established in the ICTY as an element of the *actus reus* in the *Tadic* case and subsequently affirmed in *Furundzija* case. The conclusion was based on post WWII cases and the 1996 International Law Commission (ILC) Draft Code. However no clear definition of the term was provided. According to ICTY jurisprudence the analysis of “substantial effect” requires a fact-based-inquiry. In the *Furundzija* Trial Chamber the question of *authority and influence* was the decisive factor. The Chamber concluded that presence combined with authority could constitute moral support sufficient to attract criminal responsibility. This conclusion was supported by a number of post WWII cases as well as the ICTR case *Akayesu*. Another way to determine “substantial effect” is through the *magnitude of the aid* provided. This was affirmed in the *Perisic Appeal* judgement - discussed in depth further below - in which the Appeals Chamber stated that the scale of aid provided could be enough to prove that a “substantial contribution” had been made. A third way of reasoning, which was demonstrated in the recent *Sainovic et al.* and *Popovic et al.* Appeal judgements was that the commission of the crime would have been *substantially less likely* had the aider and abetter not acted the way he or she did. In the *Brdanin Trial* judgement the accused was convicted, not because the effect of his actions in each case was substantial but because the *cumulative effect* of all cases combined amounted to “substantial effect”.

3.2. The Perisic Appeal judgement

3.2.1. Introducing “Specific Direction”

In February 2013 the ICTY Appeals Chamber considered the case of Momčilo Perisic, the former chief of the Yugoslav army, who was on trial for aiding and abetting crimes against humanity and war crimes committed in the Bosnian towns Srebrenica and Sarajevo. He was accused of having provided large-scale logistical assistance to the Bosnian Serb Army (VRS)

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67 *Prosecutor v. Anto Furundzija*, ICTY Trial Chamber, IT-95-17/1-T, 10 December 1998, para.233
69 *Prosecutor v. Momcilo Perisic*, ICTY Appeals Chamber, IT-04-81-A, 28 February 2013, para.56.
which in turn had committed the relevant crimes. When defining the elements of the *actus reus* the Appeals Chamber relied on the *Tadic Appeal* judgement which described aiding and abetting as:

“...acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and this support has a substantial effect upon the perpetration of the crime.”

The Appeals Chamber concluded that according to the *Tadic* case the assistance provided by the aider and abettor must be specifically (rather than just in some way) directed at the commission of the crime. It also noted that no judgement since the *Tadic* case had found “cogent reasons” to depart from that definition and found that many subsequent ICTY and ICTR judgements had explicitly referred to “specific direction” as an element of the *actus reus*. Furthermore the Appeals Chamber noted that there were a number of cases in which no reference to “specific direction” had been made. It reasoned that in such cases “specific direction” will often be implicit as part of the analysis of the “substantial effect” requirement.

However, it is important to note that the Appeals Chamber also concluded that “specific direction” is analytically distinct from “substantial effect”.

The Appeals Chamber went on to discuss the *Mrkic and Siljivancanin* case which had stated that “...‘specific direction’ is not an essential ingredient of the *actus reus* of aiding and abetting”. The Appeals Chamber noted that the comment was made in a section dealing with the *mens rea* rather than the *actus reus* and that it was limited to a single sentence. It stated that if the *Mrkic and Siljivančanin* judgement had meant to depart from previous precedent it would have included a clear and detailed analysis of the issue and that the judgement did not expressly acknowledge a departure from the definition established in the *Tadic* case. The Appeals Chamber therefore drew the conclusion that the sentence was an attempt to summarize the *Blagojevic and Jokic Appeal* judgement’s holding - to which the

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74 Ibid, para.31.
75 Ibid, para.48.
76 Ibid, para.33.
Mrkic and Siljivancanin Appeals Chamber had made a reference - that specific direction can be demonstrated implicitly and that the judgement was not meant as a departure from prior precedent established in the Tadic case. The Appeals Chamber concluded that no conviction for aiding and abetting may be entered if the element of “specific direction” is not established beyond reasonable doubt, either explicitly or implicitly. The Appeals Chamber went on to state that although “specific direction” may be demonstrated implicitly, where an accused aider and abettor is remote from relevant crimes, explicit consideration of “specific direction” is required.

3.2.2. Previous Case-Law

The phrasing of the Mrkic and Siljivancanin Appeals judgement establishing that “…’specific direction’ is not an essential ingredient of the actus reus” seems like an obvious stance. The arguments of the Perisic Appeals Chamber undermining that stance are far from convincing. The fact that the phrase is found in a section on mens rea could cause some confusion, however the phrase itself makes it very clear that the Mrkic and Siljivancanin Appeals Chamber refers “specific direction” to the actus reus, not the mens rea. How this, or the fact that the comment was limited to a single sentence, could deprive the phrase of its textual meaning is not clearly argued for in the Perisic Appeal judgement. Furthermore the holding of the Mrkic and Siljivancanin Appeals chamber was confirmed by the Lukic and Lukic Appeal judgement. In that case the Appeals chamber stated that it found no reason to depart from the Mrkic and Siljivancanin holding that specific direction is not an essential ingredient of the actus reus of aiding and abetting. The Perisic Appeals Chamber's conviction that no judgement had previously departed from the definition made in the Tadic case can therefore easily be questioned. The VCLT clearly gives preference to textual interpretations in regards to treaties and analogously it is easy to assume that the same should apply when interpreting case law.

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77 Ibid, para 34.
78 Ibid, para 36.
The conclusion that the *Mrkic and Siljivancanin* judgement did not contain a clear and detailed analysis of the issue is well founded. The analysis of “specific direction” was indeed limited to a single sentence. However the reasoning could be seen as somewhat contradicting. As noted later in the Taylor case: “the ICTY jurisprudence does not contain a clear, detailed analysis of the authorities supporting the conclusion that ‘specific direction’ is an element of the *actus reus* of aiding and abetting liability under customary international law”.

In fact, the definition in the *Tadic Appeal* judgement that the Perisic Appeals Chamber relied on in its interpretation of the *actus reus* of aiding and abetting was merely meant as a contrast to Joint Criminal Enterprise (JCE) and was never applied in the *Tadic* case. This makes the definition in the Tadic case an *obiter dictum* (something beside the scope of the case) and as such it does not have the same precedential value as a *ratio decidendi* (something directly relevant to the outcome of the case).

### 3.2.3. Remoteness and neutral assistance

It has been established in the ICTY jurisprudence that an act of aiding and abetting can be committed in a place remote from the actual crime. Several judgements of the ICTY Appeals Chamber have also concluded that the act of aiding and abetting can occur before, during or after the principal crime. The *Perisic Appeal* judgement did not contest this. However, as has been pointed out by scholar Janine Natalya Clark, it is somewhat unclear why the Perisic Appeals Chamber considered there to be a difference between cases where the aider and abettor is close versus remote from the crime. In fact there is nothing in the ICTY jurisprudence suggesting that a difference should be made between remote and proximate assistance. Furthermore it can be noted that in previous judgements from the ICTY Appeals Chamber, such as the *Brdjanin and Krstic* case, convictions have been entered for aiding and abetting, without any mention of specific direction, even though the accused was physically remote from the crime. Another aspect that puts into question the conclusion

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83 Dov Jacobs, supra note 3, [accessed 16 April 2016].
86 Janine Natalya Clark, supra note 84, p.416.
87 Guido Acquaviva, supra note 12, [accessed 15 March 2016].
of the Perisic Appeals Chamber is technological development. Modern day technology has made it possible for perpetrators to commit crimes without even being present at the scene of the crime. Drones can be sent to bomb civilians and instructions and aid can be given, through the internet or over the phone, from almost any location in the world. The reasoning in the Perisic Appeal judgement is in stark contrast to this development as physical proximity is becoming less (not more) important when committing a crime.

The Appeals Chamber noted that while the magnitude of aid provided by an aider and abettor may prove that the accused has made a substantial contribution to the principal crime it does not necessarily prove “specific direction” and therefore does not provide a sufficient link between the aid and the commission of the crime. In regards to Mr. Perisic the Appeals Chamber concluded that the aid provided had been directed at the general VRS war effort. It underscored that the VRS was participating in lawful combat and was not per se a criminal organization.\(^8\) However, the Appeals Chamber did acknowledge that “the VRS’s strategy was inextricably linked to crimes against civilians” and indirectly cited the Perisic Trial Chamber’s finding that they “deliberately made no distinction between civilian and military, but targeted the civilian population in preference to military targets”. As pointed out by Clark this inevitably causes the line between lawful and unlawful actions to become blurred.\(^9\) The fact that the army itself was not a criminal organization or the fact that they took part in lawful activity cannot deprive the actions of their illegal character. Furthermore there was extensive evidence suggesting that Mr. Perisic knew of the crimes being committed.\(^9\) He thus met the requisite mens rea. How assistance that is large-scale and, as implied by the Appeals Chamber, constitutes a substantial contribution to the crime (in other words has had a “substantial effect” on the crime) and is given with knowledge of the crimes being committed can be considered insufficient to impose criminal liability is remarkable. Indeed, as noted by judge Lui in his dissenting opinion, even when considering “specific direction” as part of the actus reus, the acquittal of Mr. Perisic is hard to justify given the “magnitude, critical importance, and continued nature of the assistance Perisic provided to the VRS”.\(^9\) The demand for “specific direction” clearly undermines the “substantial effect” requirement

\(^8\) Prosecutor v. Momcilo Perisic, supra note 69, para.56-58.
\(^9\) Janine Natalya Clark, supra note 84, p.421-422.
\(^9\) Prosecutor v. Momcilo Perisic, supra note 69, para.68.
\(^9\) Ibid (Partially dissenting opinion of judge Lui), para.9.
and causes the difference between conviction and acquittal to depend on the remoteness of the aider and abettor rather than the actions of that individual. The “substantial effect” requirement in conjunction with the requisite mens rea arguably provides a sufficient culpable link between the perpetrator and his or her actions.

3.2.4. Can “specific direction” be implicit or self-evident?

Aside from pointing out that the “specific direction” requirement can be proven implicitly the Perisic Appeals Chamber also stated that there are cases in which it would be self-evident. The example given in the judgement was that an individual has been physically present during the preparation or commission of the crime and has made a “concurrent substantial contribution”. The reasoning was addressed by the Appeals Chamber of the SCSL in the Taylor case:

“That a finding necessary to a conviction and one that must be proved beyond a reasonable doubt can be ‘implicit’ or ‘self-evident’, would appear to be inconsistent with the standard of proof beyond a reasonable doubt and the presumption of innocence”.

The SCSL Appeals Chamber makes an important point. It seems crucial that an element that imposes criminal liability is explicitly considered. In not doing so the legality of the decision could be questioned. Legal certainty could also be jeopardized.

3.2.5. Is “Specific Direction” part of the actus reus or mens rea?

Another question that was addressed in the Perisic Appeal judgement is whether the “specific direction” requirement is an element of the the actus reus or the mens rea. The Appeals Chamber explicitly stated that the “specific direction” requirement was part of the actus reus, not the mens rea and cited the Mrkic and Siljivančanin Appeal judgement in support of its conclusion. However, the Appeals Chamber also stated that the evidence suggested that Perisic’s actions were intended to aid the VRS’s overall war effort, not the specific crimes.

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92 Ibid, para.38
93 Ibid, para.479.
94 Ibid, para.33.
95 Ibid, para.60.
This conclusion went towards proving that the acts of Mr. Perisic had not been “specifically directed” at the crime. By focusing on the intention when discussing the actus reus the line between the actus reus and the mens rea becomes very diffuse. The reasoning suggests that “specific direction” should be viewed as part of the mens rea (the mental element) rather than the actus reus (the physical element). The issue was addressed by judges Meron and Agius who, in a joint separate opinion, recognized the existence of the “specific direction” criteria but held that it should be categorized as an element of the mens rea and as such fitted within the current requirement (knowledge). However they also recognized that according to the jurisprudence of the Tribunal “specific direction” was an element of the actus reus and that there were no “cogent reasons” to depart from this precedent.

3.3. The Taylor Appeal judgement

3.3.1. Rejecting “Specific Direction”

In September 2013, a couple of months after the Perisic Appeal judgement, the SCSL Appeals Chamber faced the question of aiding and abetting liability in the Taylor case. Former Liberian president Charles Taylor was charged with 11 counts of aiding and abetting crimes, including crimes against humanity, acts of terrorism and violence to life, health and physical or mental well-being of persons. The crimes had been perpetrated in six different districts in Sierra Leone. Mr Taylor was convicted by the Trial Chamber and sentenced to 50 years of imprisonment.

The Taylor Appeals Chamber reviewed customary international law to establish the actus reus of aiding and abetting liability. It came to the conclusion that the essential question was whether the acts of an accused could be said to have had a “substantial effect” on the commission of the crimes. The Appeals Chamber also concluded that an act of aiding and abetting can occur at any stage of the crime. It recognized that according to Article 20(3) of its own Statute:

96 Janine Natalya Clark, supra note 84, p.414.
97 Prosecutor v. Momcilo Perisic (Joint separate opinion of judges Theodor Meron and Carmel Agius), supra note 69, para. 4.
98 Prosecutor v. Charles Ghankay Taylor, supra note 7, para.4-14.
99 Ibid, para.368.
“The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia and for Rwanda.”\(^{100}\)

However, the court concluded that “the decisions of other courts are only persuasive, not binding, authority”\(^ {101}\). The court then went on to review the Perisic Appeals Chamber’s holding that “specific direction” is part of the actus reus. Firstly, it stated that the Perisic Appeals Chamber had not asserted that “specific direction” was an element under customary international law and that the analysis was limited to its prior holdings and the holdings of the ICTR Appeals Chamber. The Appeals Chamber therefore concluded that the Perisic Appeals Chamber was only “identifying and applying internally binding precedent”.\(^ {102}\) The Appeals Chamber was further not convinced by the reasoning in the Perisic judgement and ultimately established that “specific direction” is not an element of the actus reus, neither according to its statute nor customary international law.\(^ {103}\)

**3.3.2. The meaning of Article 20(3) of the SCSL Statute**

While an overarching Appeals Chamber was considered in order to guarantee a coherent interpretation and application of the law in the SCSL, the ICTR and the ICTY, it was concluded that an institution of that sort would be both financially and administratively constrained. The UN Secretary General at the time, Kofi Annan - who conducted a report on the establishment of the SCSL in year 2000 - concluded that in practice the same result could be achieved by linking the jurisprudence of the SCSL to that of the International Tribunals.\(^ {104}\)

It is clear from the report that Article 20(3) of the SCSL Statute was meant to ensure a uniform application of the law. However a textual interpretation of the article contradicts the idea that the SCSL was supposed to be bound by ICTY jurisprudence as it only states that the SCSL “shall seek guidance” in its decisions. The SCSL has previously held that it does not consider itself bound by the decisions of the ad hoc tribunals. It has also stated that the court

\(^{100}\) Statute of the SCSL, supra note 56, Article 20(3).

\(^{101}\) *Prosecutor v. Charles Ghankay Taylor*, supra note 7, para.472.

\(^{102}\) Ibid, para.476.

\(^{103}\) Ibid, para.481.

should not give ICTY and ICTR precedents the same meaning the courts would give their own precedents (to only depart when there are “cogent reasons in the interests of justice”).

Because there is no expert body or international supreme court, the body best equipped to interpret the SCSL Statute would be the SCSL itself. However, it can be argued that because the purpose of article 20(3) was to achieve a uniform application of the law without creating a unified Appeals Chamber it would have been prudent for the SCSL to give ICTY and ICTR precedents the same weight as the courts themselves would.

The SCSL Appeals Chamber would most likely have been able to argue that there were “cogent reasons” to depart from the precedent established in the Perisic Appeals judgement. This was in fact later done by the Sainovic et al. Appeals Chamber. In doing so it would have given the ICTY precedent the consideration it was arguably meant to according to Article 20(3) considering the legislative intent. At the same time it could have rejected the “specific direction” requirement on a firm legal basis (there were indeed “cogent reasons”). The Appeals Chamber would then ultimately have reached the same decision, but in a more appropriate way. Entering a conviction for Mr. Taylor (if found guilty when applying the “substantial effect” criteria) was important in order to avoid a situation similar to the one in the ICTY following the Sainovic et al. case. Even though Mr. Perisic has been acquitted it is clear that many still view him as guilty and he has been described as being “lucky enough to get away”.

3.3.3. The SCSL view on the Perisic Appeal judgement

The Taylor Appeal judgement has, just like the Perisic Appeal judgement, received some criticism. According to scholar Kevin Jon Heller the Taylor Appeals Chamber failed to understand that “specific direction” did not expand criminal liability beyond custom, it narrowed it. Because the scope of liability was narrowed the decision did not fall foul of the nullum crimen sine lege principle and there was, according to Heller, no need to find a

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customary foundation for the “specific direction” requirement.\textsuperscript{107} The decision was in other words formally correct. The reasoning is illustrated with a figure below. If Heller’s argument is accepted it would mean that a decision can be rejected because it is \textit{not in accordance with} customary international law, but not because it is \textit{not based on} it. The reasoning with which the SCSL refused to “seek guidance” in the \textit{Perisic Appeal} judgement is therefore questionable. However, assuming that “specific direction” is not based on customary international law it raises the question of what source of law the decision is based on. Heller’s argument seems to accept a decision not based on any source of law at all. The \textit{Taylor} Appeals Chamber further concluded that the \textit{Perisic} Appeals Chamber was only “identifying and applying internally binding precedent”. This appears to be an attempt to circumvent the issue of having to seek guidance in the \textit{Perisic} case. As has been pointed out by scholar Marko Milanovic, it is highly unlikely if an “internally binding precedent” could be considered a source of law binding on individuals and doubtful if this is the source of law that the \textit{Perisic} Appeals Chamber thought it was applying.\textsuperscript{108} Furthermore, the ICTY is bound by its mandate to apply “only those legal principles that are beyond doubt part of customary international law”, the SCSL is in other words implying that the \textit{Perisic} Appeals Chamber simply ignored its own mandate.\textsuperscript{109} It seems safe to assume that the \textit{Perisic} Appeals Chamber at least thought that it was applying customary international law. Had the \textit{Taylor} Appeals Chamber’s recognized this, the decision could have been rejected on a firmer basis.


\textsuperscript{109} Kevin Jon Heller, supra note 107, [accessed 16 March 2016].
The scope of liability:

The figure shows Heller’s argument on how the scope of liability is narrowed when the “specific direction” requirement is added as an element of the actus reus of aiding and abetting. Note that “specific direction” is not an element of “substantial effect” but analytically distinct from it.

Another issue that has been discussed in regards to the Taylor Appeal judgement is its interpretation of the 1996 ILC Draft Code. The ILC Draft code was never adopted by the General Assembly and is not binding, however it is considered an authoritative instrument. Parts of it may “constitute evidence of customary international law, clarify customary rules, or, at the very least, be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.” Article 2.3(d) states that:

“An individual shall be responsible for a crime... if that individual: Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

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The meaning of the word “directly” is not explained in regards to aiding and abetting liability in the commentary to the Draft Code. However the phrase “directly and substantially” is described as “assistance which facilitates the commission of a crime in some significant way”. The word “directly” is also used to describe liability for planning or conspiring to commit a crime and for that an explanation can be found in the commentary. It says that the word “directly” is used to indicate “that the individual must in fact participate in some meaningful way…”. According to Heller, quoting the comment on a different mode of participation is a “willful misreading” of the Draft Code that is used to simply “wish the word ‘directly’ out of existence”. However, because there is no clear explanation of the word “directly” attributed to aiding and abetting in the commentary a contextual interpretation seems logical. The similarity between the two descriptions further indicates that the interpretation is correct. Heller’s critique therefore seems unfounded. Furthermore Heller is negative of the Taylor Appeals Chamber’s reference to the Furundžija Trial judgement which stated that “the term ‘direct’ in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime”. According to Heller the comment is completely unrelated to the issue at hand. However, a glance at the Perisic Appeal judgement reveals that the “specific direction” requirement was established in order to provide a “culpable link” between the act of the aider and abettor and the principle crime. It seems obvious that the question of causation cannot be considered to be “completely unrelated” to the establishment of a “culpable link”. In fact, the two are arguably very closely related. Heller’s critique is once again questionable.

3.4. Aiding and abetting and the ICC

3.4.1. The Actus Reus

The ICC has not yet tried any cases of aiding and abetting but there are indications and speculations on how the court will handle such cases in the future. In 2012 the Lubanga Trial Chamber addressed the actus reus of aiding and abetting in an obiter dictum by contrasting it

\[112\] Kevin Jon Heller, supra note 107, [accessed 18 May 2016].
\[113\] Ibid, [accessed 18 May 2016].
\[114\] Prosecutor v. Momčilo Perisic, supra note 69, para.37.
to the requirements for a principal perpetrator under article 25.3(a) of the Rome Statute. It held that if accessories must have had “a substantial effect on the commission of the crime to be held liable, then co-perpetrators must have had … more than a substantial effect”. This implies that the ICC would indeed apply the “substantial effect” criteria to cases of aiding and abetting presented before the court. However, the comment was, as mentioned, made as an obiter dictum and is therefore of persuasive, not binding authority. Furthermore the issue was given no attention when the case reached the Appeals Chamber. If “substantial effect” would be applied there is reason to question whether the formulation in fact lowers the threshold as the requirement would need to be applied to all forms of assistance, including those captured by the umbrella term “otherwise assist”. It can also be argued that aiding and abetting is already sufficiently broad to include all forms of assistance.

3.4.2. The Mens Rea

If the objective threshold is considered to have been lowered, it is possible that it has been compensated by a heightened subjective threshold. Some scholars have interpreted the word “purpose” in Article 25.3(c) as establishing a higher mens rea. However, this view has been contested and it has been pointed out that such an interpretation could undermine the use of the article as it would be nearly impossible to prove that someone who has provided the means necessary to commit the crime has done so for other than financial reasons. A problem with this reasoning is that the VCLT, as mentioned above, gives preference to textual interpretation. Although it is disputable whether or not “purpose” should be considered the requisite mens rea in the ICC the formulation can make it hard to claim that “knowledge” should be the required standard. However, it is possible to argue that “knowledge” in combination with the assistance rendered is proof of the aider and abettors commitment to the crime. This reasoning is similar to that sometimes applied in domestic criminal law as well as in the Kvocka case from the ICTY. Furthermore, a comparison can be made with article 2.06 of the United States Model Penal Code (MPC) which is generally regarded as being the

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115 Kirsten Bowman, supra note 57, [accessed 18 May 2016]
117 Ibid, [accessed 24 April 2016]
basis for Article 25.3(c). While some MPC jurisdictions do in fact enforce “purpose” as the requisite standard, these are usually jurisdictions “granting no punishment discount to accessories” or “barring the jury to lower the sentence for minor involvement in a crime”. These rules may motivate a higher subjective threshold. The Rome Statute on the other hand contains no such rules and the requirement may therefore be considered to be inappropriate when put into the context of the ICC. There are also MPC jurisdictions in which “knowledge” in practice is sufficient to meet the mens rea for the more serious crimes. However, it is questionable whether the MPC should really serve as guidance on the interpretation of the Rome Statute.\textsuperscript{118} The two work within completely different frameworks and going back to the discussion on fragmentation and pluralism it can be easy to draw the conclusion that a reliance on the US MPC would be inappropriate from a cultural perspective. ICL is after all meant to be a blend of different legal systems and universally representative. Basing and interpreting provisions in accordance with legal documents and practices deriving from a state that already has an disproportionate influence on law and politics in the world raises all the same questions that were raised in Chapter Two. It becomes even more controversial when the fact that the US is yet to ratify the Rome Statute is considered.

3.5. Conclusions

As noted in the Sainovic et al. and the Taylor Appeal judgements very little points towards “specific direction” being part of customary international law. Although it can be argued (as was done by Heller) that the decision in the Perisic Appeal judgement did not expand liability beyond custom and was formally correct, this reasoning seems to approve of decisions not based on any source of law at all and is therefore unconvincing. The Perisic Appeals Chamber seems to have over-emphasized the importance of the definition in the Tadic case which did not purport to establish a precedent for aiding and abetting liability. Furthermore, it completely overlooked the textual meaning of the Mrkic and Siljivancanin Appeal judgement which clearly stated that “specific direction” was not an element of the actus reus of aiding and abetting. In doing so the Appeals Chamber itself departed from a precedent without there being “cogent reasons” to do so. Regarding the substantive aspect of the decision the emphasis on remote assistance is seemingly unmotivated and moves focus from the actions of

\textsuperscript{118} Ibid, [accessed 24 April 2016]
the aider and abettor to his or her proximity to the crime. Even more questionable is the discussion on neutral assistance. If the fact that the VRS was participating in legal combat and was not a criminal organization per se can affect the question of liability to the extent that someone who has knowingly provided assistance to the degree that it has undoubtedly had a “substantial effect” on the commission of the crime can go free it seems the threshold for liability has become almost impossible to reach. Because the requirement does not have a customary foundation and the reasoning in the Perisic Appeal judgement is far from convincing it seems like “specific direction” should not be considered to be an element of the actus reus. The requirement as such logically fits within the mens rea, however it is highly doubtful if it at all should be considered an element of aiding and abetting liability.

The unwillingness to follow the precedent established in the Perisic Appeal judgement is understandable. The questionable reasoning combined with the importance that ICTY decisions are given illuminates the risk of demanding uniformity in ICL. Put into the context of the pluralism/uniformity debate it can seem like the decision in the Taylor Appeals judgement - to reject the precedent established by the Perisic Appeals Chamber - would be indisputable. However, statutes are a primary source of international law and Article 20(3) can therefore not be ignored. The legislative intent seems to have been to create uniformity in the jurisprudence of the ad hoc tribunals and the SCSL. It therefore seems reasonable to think that the SCSL should have given the ICTY precedent the same consideration as the ICTY would have given its own precedent. This does not mean that the SCSL should have applied the “specific direction” requirement but by acknowledging the importance of Article 20(3) of its statute and the fact that the Perisic Appeals Chamber thought that it was applying customary international law the analysis and the rejection of the requirement would have been made on a firmer basis. The fact that there were indeed “cogent reasons” (which will be discussed below in regards to the Sainovic et al. Appeal judgement) means that the SCSL could have ultimately come to the same conclusion. While the discussion is irrelevant for the SCSL which by now has been effectively terminated and transitioned to a residual mechanism, it does have a value for future courts which statutes may contain similar articles.

As for the ICC it seems unlikely that the “specific direction” requirement will ever become part of the court’s jurisprudence. However “substantial effect” might. The “substantial effect”
requirement has been a part of the *actus reus* of aiding and abetting since the post WWII trials. It has been affirmed and developed by a variety of courts including the *ad hoc* Tribunals and the SCSL. It is well developed and there are plenty of cases that can serve as guidance on interpretation. It establishes a culpable link between the aider and abettor and the principle crime and is considered by many to be a reflection of customary international law. At the same time there is nothing in the Rome Statute that implies that “substantial effect” must be proven in order to convict someone of aiding and abetting. The ICC is not bound by previous decisions from other courts and customary international law is considered a secondary source of law according to the Rome Statute. Regardless of whether the requirement is implemented or not the court is likely to face the same challenges that have been discussed in regards to uniformity - e.g. disproportionate western influence and the accompanying mistrust towards the institution. In fact, it is possible to argue that incorporating the “substantial effect” requirement - which can be traced back to the trials held by the winning powers in WWII - into the ICC would be yet another example of how western values and ideas are allowed to shape a mechanism that is meant to be *universal*. ICC jurisprudence is still in the early stages of its development and the court could choose another path than the one previously established. Truly universal solutions to the legal issues that may arise will be hard, if not impossible, to find. The court must therefore aim to find solutions that best represent the majority
4. Self-fragmentation and causes for fragmentation

4.1. Self-fragmentation

4.1.1. The Sainovic et al. Appeal judgement

After the *Taylor Appeal* judgement, the ICTY Appeals Chamber once again faced the question of aiding and abetting liability in the Sainovic et al. case. The Appeals Chamber considered the issue and found the jurisprudence of the ICTY to be conflicting. The Appeals Chamber came to the conclusion that the *Perisic Appeal* judgement was based on a misinterpretation of previous case law, in particular the *Tadic* case. It also criticized the judgement for diverting from the plain meaning of the *Mrkic and Siljivancanin Appeal* judgement and noted that primary consideration should always be given the textual meaning.

In addition, the Appeals Chamber noted that “substantial effect” had consistently been an element of aiding and abetting liability and that the definition made in the *Furundzija* case (which contained no reference to “specific direction”) was a reflection of customary international law. A review of “the general principles of law recognized by nations” was also conducted in order to determine if “specific direction” was an element of the *actus reus* of aiding and abetting in a majority of national legislations. It was not found to be the case. In fact, the different legal systems were found to be quite varied on the question of liability. The Appeals Chamber thus came to the conclusion that “specific direction” is not part of the *actus reus* of aiding and abetting.

4.1.2. Problems and solutions

4.1.2.1. ICTY jurisprudence

The decision undoubtedly caused a rupture in the jurisprudence of the court which at the time was pointing in two completely different directions in regards to aiding and abetting liability. A motion to reconsider the *Perisic* case was turned in, however it was denied by the ICTY

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120 Ibid, para.1625-1626.
121 Ibid, para.1643-1644.
122 Ibid, para.1649.
Appeals Chamber which held that it had no power to reconsider prior judgements according to its statute. While the decision to overturn the Perisic Appeals Chamber’s holding on “specific direction” has been welcomed by many, the self-fragmentation caused by the decision in the Sainovic et al. Appeal judgement has been the source of some concern. The situation has been described as being “detrimental for legal certainty and uniformity of jurisprudence and unacceptable in a properly functioning judicial system”. Concerns have also been raised questioning if the ICTY can live up to the label of a “respectable and authoritative judicial institution”. It has been suggested that the court might have done greater damage to its reputation by coming to two conflicting conclusions within such a short period of time than it would have by simply letting a controversial decision become part of the set jurisprudence of the court.

Although the self-fragmentation caused by the Sainovic et al. Appeal judgement is problematic it would seem contradictory to the ideal of justice to uphold a decision found to be based on a “misinterpretation of the law” simply to save the reputation of the court. The court's reputation is indeed important as it serves to strengthen its legitimacy and support for its decisions among the population in former Yugoslavia. When the Gotovina Trial judgement was overturned by the Appeals Chamber in a similar fashion to the Perisic Trial judgement the Croats saw the judgement as “conclusive evidence that the war they fought with the Serbs was not only defensive and just, but also pure and unsullied”. In Serbia the judgement confirmed the already established view that “the ICTY and the international community never really cared about crimes against Serbs”. However, to determine the law to be something contrary to the belief of the sitting judges or to simply accept a precedent without a thorough investigation of the matter would highly call into question the ethics of the court. Even though the decision caused a rupture in the jurisprudence of the court, letting

124 Elies Van Sliedregt, supra note 9, p. 4.
the reputation of the court outweigh the result of a factual analyze of the “specific direction” requirement would truly have amounted to an error of law.

4.1.2.2. Peace and stability

The question of guilt should obviously not depend entirely upon who the sitting judges are. The law cannot change from one case to another and similar acts must be judged in a similar way. There is no need for pluralism within an institution and diverging decisions are far more problematic at the institutional than the international level. The accused must be able to foresee what laws will be applied in order to be able to argue his or her case. Furthermore, because of the tension between the different ethnic groups in the region it is important that the court enforces the value of “equality before the law”. Another order would hardly promote peace and stability in the region which are two of the grounding values upon which the court was founded. However, the different chambers can at times have different views on what the law actually is. As mentioned above it would hardly be a desirable solution to demand that a chamber enforces an interpretation that they believe to be wrong - without there being any authoritative interpretations.

4.1.2.3. An en banc appellate review system

As pointed out by the ICTY Appeals Chamber in the motion for reconsideration of the Perisic case, there is nothing in the ICTY Statute that allows the court to change a decision once it’s been made. The prosecutor argued that the power to reconsider prior decisions asies from the court’s “inherent responsibility to administer justice and to ensure that its conclusions do not cause prejudice to the parties”. He also argued that there was a need to “rectify the miscarriage of justice” and that this need outweighed Perisic's interest in finality of proceedings. Had the ICTY approved the motion, the legal basis for it could easily have been questioned. The ICTY Statute only allows the Appeals Chamber to review cases that have already been decided if a new fact is discovered that has the potential to alter the

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127 Dov Jacobs, supra note 3, [accessed 17 March 2016].
128 Prosecutor v. Momcilo Perisic (Decision on motion for reconsideration), supra note 123, p.1
decision. It is reasonable to think that the power to reconsider must derive from explicit legislation and should not be created through an interpretation of the objectives of the court.

It has been suggested that future courts of ICL should contain an en banc appellate review system in order to ensure legal certainty and jurisprudential consistency. A similar system already exists in the ICC where each appeal judgement is reviewed by all judges of the Appeals Chamber. This ensures uniformity in the court’s jurisprudence and clearly sets out the rules by which the defendant will be judged. By introducing a similar mechanism in future courts, self-fragmentation like that caused by the Perisic and Sainovic cases can be avoided. However the system has its shortcomings. The most obvious being reduced judicial efficiency. With a heavy caseload it might not be a practical solution and the system could also pose a threat to the “right to be tried within a reasonable time”. Another issue would be the money. While it might seem harsh to discuss the financial aspect when talking about the creation of a system that would be better equipped to provide fair and equal rulings, it is a practical problem that would not easily be solved.

A suggested solution to these problems is to limit the number of cases being forwarded. The suggested criteria for forwarding cases was sought in the “Rules of Court” of the ECHR which establishes that a pending case should be forwarded if it “raises a serious question affecting the interpretation of the Convention”. Another rule states that the same applies “where the resolution of a question raised in a case before the Chamber might have a result inconsistent with the Court’s case-law”. The need for a mechanism as the one suggested is quite obvious in regards to the dilemma caused by the “specific direction” requirement. However clear guidelines is a must since the divergence might not be as obvious in all cases. Furthermore it would help to keep the caseload to a minimum and make sure that the mechanism is only used when necessary. This would promote both financial and administrative efficiency. The mechanism discussed was specifically suggested based on the

129 ICTY Statute, supra note 19, Article 26
131 Ibid, p.6.
132 Ibid, p.6
133 Ibid, p.6.
problems of diverging case-law arising from the ICTY jurisprudence. In creating said mechanism for a court based in Europe it would seem natural to seek guidance in the rules of the ECHR. However, for courts established in other parts of the world it might be more natural to seek guidance in other statutes such as that of the African Court on Human and Peoples’ Rights (ACHPR) or (if a war tribunal or hybrid court would ever to be established in the Americas) the Inter-American Court of Human Rights (IACHR).

4.1.2.4. Conflicting interests

If a review mechanism would be created there would, just as with the motion for reconsideration of the Perisic case, be an issue of conflicting interests where the “right to finality of proceedings” must be weighed against the need to harmonize the law. A possible solution to this problem would be to reconsider only the legal issue without applying it to the specific case. A review of the case would not necessarily entail a change of verdict. However it could be provocative in the eyes of the public to let an offender go free after establishing a precedent that points to his or her guilt. It could also be considered to go against the purpose of the court which is to hold accountable those found guilty of committing crimes according to its statute. To promote a system where all defendants are treated equally the review system should have the means to convict someone who has previously been acquitted if the acquittal is found to have been based on a misinterpretation of the law.

4.1.3. The “Specific Direction” controversy finally settled?

Following the Sainovic et al. Appeal judgement the ICTY Appeals Chamber has faced two other cases in which aiding and abetting liability has been the question at issue. In the Stanisic and Simatovic case the Trial Chamber acquitted the two defendants since it could not be proven that the two had “specifically directed” their actions towards the commission of the crimes.134 The decision was based on the precedent established in the Perisic Appeal judgement. When the case reached the Appeals Chamber an analysis was made based on the Sainovic et al. and the subsequent Popovic et al. Appeal judgements which had both

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confirmed that “specific direction” is not part of the actus reus of aiding and abetting. The Appeals Chamber concluded that the Trial Chamber had erred in law by requiring the act to be “specifically directed” at the commission of the crime. Due to this decision and the decision in the Popovic et al. Appeal judgement the ICTY jurisprudence is now leaning towards “specific direction” not being part of the actus reus of aiding and abetting.

However, the decision in the Stanisic and Simatovic Appeal judgement was not unanimous and two out of the five judges expressed dissenting opinions requiring “specific direction” to be considered when assessing aiding and abetting liability. It has been pointed out that if the Appeals Chamber would have been composed differently the case could have easily had a different outcome. Indeed, the original bench was changed before the trial when judge Meron replaced judge Khan who had not yet expressed his view on the issue of “specific direction” with judge Ramaroson who had previously rejected “specific direction” as a dissenting judge in the Perisic Appeal judgement. Two of the other judges on the case (judge Lui and judge Pocar) had both previously rejected “specific direction” as an element of the actus reus and their opinions were therefore already known. By changing the composition of the bench president Meron had secured a judgement rejecting “specific direction”. Although this helped prevent a further fraction within the court it is somewhat disturbing that the court president would change the composition in order to achieve a certain result. If he was meant to have that power he would have arguably been the only judge in the Appeals Chamber. The “specific direction” controversy seems to have been settled as more precedents now point in the same direction as the Sainovic et al. Appeals judgement, however the risk of diverging decisions still remains for future.

135 Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Radivoje Miletic, Vinko Pandurevic, supra note 70, para.1759.
137 Ibid para.6 and 30.
4.2. Causes for fragmentation

4.2.1 Political pressure?

The question has been raised whether there were any ulterior motives behind the controversial decision in the *Perisic Appeal* judgement. In June 2013 a “private” letter written by ICTY judge, judge Harhoff, to a number of friends and colleagues became public. In the letter judge Harhoff accused judge Meron of pressuring his fellow colleagues in the ICTY to achieve acquittals in both the *Perisic* and the *Gotovina Appeal* judgements - which will be presented below. The reason, according to Harhoff, was that judge Meron - an Israeli/American national - had been influenced by the US and Israel who had become concerned with the current practice under which their own political leaders and high-ranking officers could ultimately risk being held responsible for crimes committed in other countries.

Furthermore, a WikiLeaks cable dated 27 July 2003 reveals a conversation between judge Meron - then serving his first term as president of the court - and an unnamed US ambassador in which Meron suggested that the US should oppose the renewal of Swiss Chief Prosecutor Carla del Ponte’s mandate. The motivation was that under her command the Office of the Prosecutor was bringing cases to trial that were too broad in scope and lead to “unnecessarily lengthy and resource consuming trials”. This was seemingly part of a US and Russian plan to finish the work of the Tribunal as soon as possible due to the high costs of maintaining it. As noted by Heller, judge Meron’s suggestion is completely unacceptable and contrary to the ICTY Statute article 16.2 which states that “the Prosecutor shall act independently as a separate organ of the International Tribunal”.

4.2.1.1. The Gotovina Appeal judgement

Like the *Perisic Appeal* judgement the *Gotovina Appeal* judgement has been the object of some criticism. The accused - Croatian nationals Ante Gotovina and Mladen Markac - had

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141 Martin Burcharth, supra note 139, [accessed 19 May 2016].

142 Kevin Jon Heller, supra note 140, [accessed 24 April 2016].
been convicted by a unanimous Trial Chamber of JCE of crimes against humanity and war crimes committed in Serbia during the war. They were accused of having participated in the bombing of four towns. The Trial Chamber applied a “200 meter standard” which meant that any bombs that had fallen more than 200 meters away from a legitimate target were “presumptively considered as evidence of an unlawful indiscriminate attack”.143 The majority of the Appeals Chamber (3 to 2) considered the application of this standard to be erroneous however they never explained whether they considered it to be an “error of law” or an “error of fact”. If it was considered an error of law the Appeals Chamber would have been obligated to construct a new standard for trying the facts, something that it completely failed to do. Furthermore an error of law would not have motivated the de novo review of the facts that it chose to undertake. Such a review should only have been undertaken if the error committed was an error of fact. In order to undertake a de novo review the Appeals Chamber would have had to consider the totality of the evidence and only conduct the review if “no reasonable trier of fact could have made the relevant finding on the strength of the record”. Instead the erroneous application of the “200 meter standard” was used to undo the entire Trial Chamber judgement despite evidence clearly indicating that the attacks had not been lawful.144 All of the above was pointed out by dissenting judge Agius who described the fact that the over 1300 pages of evidence in the Trial Chamber’s judgement had been reviewed and the decision overturned in just three paragraphs as “staggering” and considered it to be “unfairly dismissive of the Trial Chamber’s findings”.145 It is interesting to note that in total - counting both the Trial and the Appeals Chamber - 5 judges voted to convict and only 3 voted to acquit.146 It is astonishing that the majority of the Appeals Chamber seemingly ignored the rules for overturning a previous decision that have since long been established in the ICTY jurisprudence. It is also astonishing how the use of an erroneous legal standard could undermine the evidence, listed by judge Agius in his dissenting opinion, which clearly pointed to the attacks being indiscriminate and unlawful.147

142 Marko Milanovic, supra note 126, [accessed 24 April 2016].
144 Ibid, [accessed: 24 April 2016].
146 Marko Milanovic, supra note 126, [accessed 25 April 2016].
147 Prosecutor v. Ante Gotovina and Mladen Markac (Dissenting opinion of Judge Carmel Agius), supra note 145, para.23.
4.2.1.2. The aftermath of the accusations

After judge Harhoff’s letter became public he has been forced to leave the ICTY. According to the court judge Harhoff had “demonstrated an unacceptable appearance of bias in favour of conviction”. As pointed out by Heller there was a lack of evidence to prove the accusations made in the letter.\textsuperscript{148} The lack of evidence was addressed by judge Harhoff himself in the letter where he said that the public would probably never know to what extent his suspicions were true.\textsuperscript{149} However, the fact that the issue has at all been raised (by a sitting judge nonetheless) in combination with the content of the WikiLeaks cable does put Merons credibility at stake. \textit{If} - hypothetically - the accusations would turn out to be true, it would provide a very practical example of how the influence of powerful states can affect the content of the law and the risks of centralizing the power.

The main concern regarding the controversial acquittals is not the fact that the accused went free despite much pointing to guilty verdicts - even though it is in itself very grave. The main concern is that the seemingly new legal standard will serve as a precedent that could have implications in future cases involving command responsibility. The judgements have been criticized by human rights lawyers for contributing to “an already perverse balance in favor of impunity for those who make illegal policy and give illegal orders...” and for being “inconsistent with the theory of command responsibility that has been in effect since the Tokyo and Nürnberg trials”.\textsuperscript{150} Despite the “specific direction” controversy being (hopefully) settled there may still be forces out there seeking to limit the constraints on warfare at the cost of diminished human rights. In fact, a former UN senior official has confirmed certain states were worried about the low threshold applied by the ICTY.\textsuperscript{151}

\textsuperscript{150} Martin Burcharth, supra note 139, [accessed 17 May 2016].
\textsuperscript{151} Ibid, [accessed 17 May 2016].
4.2.2. Human Rights vs. Criminal Law

Even without undue influence there is bound to be a struggle between those who believe in a strong enforcement of criminal law principles and those who believe in a more victim-oriented ICL - as presented in section 2.1.1. Heller’s argument that “specific direction” did not fall foul of the nullum crimen sine lege is a typical example of the former.

Judges are entitled to have different opinions and it is natural for some to be more prone to acquit than others. The difference of opinion between judge Harhoff and judge Meron may be explained using this logic. The letter written by judge Harhoff suggests that he supports a more victim-oriented approach to ICL. In the letter he expressed disappointment with the acquittals in the Perisic and Gotovina Appeal judgements and called the new practice a “back-track”. There was indeed - as pointed out in section 2.1.1 - an underlying fear of commanders “escaping conviction”. Looking at the judgements on the other hand, the reasoning suggests that judge Meron is more focused on criminal law standards. Both the application of “specific direction” and the refusal to apply the “200-meter standard” can be described as providing a strong protection for the accused while basing the arguments on the question of legality. The two judges seem to reside on opposite sides of the line illustrated below and the disagreement is arguably rooted in the perceived identity of ICL rather than just the particular cases. The conflicting values influencing ICL and the difficulty of determining the true nature of the field has been described by scholar Darryl Robinson as an “identity crisis” of ICL.¹⁵²

The above is an illustration of the different components of ICL and the values in focus of each field. These conflicting interests that may at times cause judges to disagree.

¹⁵² Darryl Robinson, supra note 1.
4.3. Conclusions

4.3.1. Self-fragmentation

The cultural, political and other aspects motivating pluralism at the international level are not strong enough to motivate pluralism at the institutional level. Although some societies are heterogenized and people with different languages, cultures and beliefs live beside each other they all abide by the same laws at the domestic level. Something that is worth noticing as we are heading towards more domestically influenced mechanisms. To allow pluralism at the institutional level would make it hard for the accused to know on what basis to argue his or her case and risk leading to arbitrary decisions. Furthermore these crimes are not rarely accompanied by an instability at the domestic level where tension between different ethnic and religious groups may remain for years (sometimes whole life-times) after the war has ended. This aspect is not present at the international level and while tension between Bosnians, Serbs and Croats (or Muslims and Christians in those regions) may still exist no such tension can be found between the people of Former Yugoslavia and the people of Sierra Leone. Arbitrariness within an institution established to promote peace and stability could risk enhancing rather than calming this tension and thus be counterproductive in unifying the society. For the support and legitimacy of the courts, as well as their decisions, to remain or increase it is important that all people, regardless of nationality, ethnicity and other factors abide by the same rules when judged by the same institution.

Because the international courts often lack review mechanisms for questions of law these issues are bound to arise. The solution to the issue presented by the ICC is effective in maintaining uniformity in the jurisprudence of the court but imposes financial and administrative challenges that are not easily overcome. With a heavy case-load such a mechanism may pose a threat to the right to be tried within a reasonable time. Letting the president of the court alter the composition of the chamber in order to achieve certain results seems like an even less viable solution and it is unlikely that this is how the president’s powers were meant to be used. The best solution for future courts seems to be the creation of en banc appellate review systems to which only a limited number of cases would be forwarded. This way the issue of fragmentation could easily be solved while the limitation on the cases being brought forward would make the process efficient. Whether or not such a
mechanism should hold the power to alter a previous acquittal is disputable however in the light of the purpose of these courts, which is to hold offenders accountable for their crimes and to promote peace and stability, it can be argued that they should.

4.3.2. Causes for fragmentation

As for the accusations aimed at judge Meron the public will probably never know to what extent they are true. Regardless, they illuminate an issue that is otherwise often kept hidden from the public eye. Despite these organizations being formally independent there is always a risk of undue influence from powerful states. By enforcing legal pluralism at the international level and decentralizing the power, the risk of such influence being determinative for setting legal standards globally will be limited. The legal standards since long established in the post WWII cases and reaffirmed by the ICTY - such as the “substantial effect” requirement being enough for a conviction - should not be easily tampered with as they are a reflection of customary international law. Furthermore, the west needs to hold itself to the same standard as it holds others. The crimes of which the Germans and the Japanese were convicted after WWII must equally apply to Americans or Europeans being convicted today.

Even without undue influence there is bound to be a struggle between those who believe in a strong enforcement of criminal law principles and those who believe in a more victim-oriented ICL. The theory can easily be applied to the disagreement between judge Harhoff and judge Meron. Neither approach is legally incorrect and it is beyond the scope of this thesis to investigate thoroughly to what extent ICL should draw on different bodies of law. The reflection serves more than anything as an attempt to understand the causes for fragmentation and the complexity of the field. Nonetheless, the reasoning in the Perisic and the Gotovina Appeal judgements remains questionable.
5. Summary and final remarks

5.1. The future of aiding and abetting liability

The discussion regarding aiding and abetting liability has so far focused mainly on the ad hoc Tribunals and the SCSL. However both the SCSL and the ICTR have by now been closed and the ICTY will as well one day since it is not meant to be permanent. In fact, because of the financial aspect (with the court consuming a big portion of the budget) “the United Nations is understandably anxious to bring to closure the ICTY…”.

The fact that two of the courts that have been in focus of the above discussion have now been closed and the ICTY at some point will be could raise the question of how relevant the above analysis really is. However, just as the post WWII cases have been used by the ad hoc tribunals in order to determine the content of customary international law, the jurisprudence of the tribunals will in the future be used for the same purpose. The above discussion therefore provides an insight to how these issues may be considered in the future and what challenges lies ahead.

5.2. Summary

This thesis has established that uniformity is not a necessity and that a move towards domestic solutions is preferable. It has also established that the current development is moving towards more domestic solutions and that we are likely to see an increase of pluralism in ICL. While the problem of disproportionate western influence is likely to remain an issue in the ICC a move towards domestic or hybrid solutions is an improvement. The principle of complementary gives preference to domestic litigation and the ICC will only investigate a crime if it is not done domestically. This means that if a country is worried about the ICC being used as a tool for powerful states to intervene in domestic affairs it need only conduct the investigation itself. At the same time it is important that domestic trials are under international scrutiny and that the ICC works as a safety net to avoid situations such as the one with Saddam Hussein in Iraq. A move towards domestic solutions should not come at the cost of the rights of the accused.

A weakness in the system is that the ICC may sometimes be reluctant to react. The power imbalance inherent in the complex world hierarchy inevitably affects all areas of international

\(^{153}\) William W. Burke-White, supra note 40, p.738.
law. The fact that previous heads of state George W. Bush and Tony Blair have avoided prosecution - or even a proper investigation - despite allegations of war crimes is a great example thereof. The Security Council is not likely to refer cases to the court that are contrary to the interest of one of its five permanent members. It is also able to adopt resolutions to block investigations if for renewable 12-month periods.\textsuperscript{154} If no such resolution is adopted the prosecutor is free to open an investigation. However, there seems to be some level of arbitrariness in choosing what situations to investigate. Nevertheless this is a problem that is greater than the scope of this thesis and it will neither be solved nor made worse through an increased pluralism in ICL.

As for self-fragmentation there are clearly reasons to avoid it. Pluralism at the institutional level may worsen the ethnic tension that is often present in post-conflict states. The accused have often been on opposing sides in the conflict and by not applying the same reasoning to all, the court could be seen as favoring one side over another. In order to be successful in unifying the society and maintaining peace and stability the court's decisions must be seen as fair and equal. This is best achieved through a uniform application of the law. It also gives the accused a chance to know on what basis to argue his or her case. To avoid fragmentation at the institutional level authoritative interpretations must somehow be provided. This may be done effectively through an \textit{en banc} appellate review mechanism to which complicated questions of law may be forwarded. Although it is certainly too late to install said mechanism in the ICTY - which has mainly been in focus of this thesis - future courts may benefit from it. Whether or not this review mechanism should be able to convict someone who has previously been acquitted is disputable however in the interest of justice in can be argued that it should be.

Lastly, the courts are meant to be independent but there is always a risk of political pressure. By enforcing legal pluralism at the international level and decentralizing the power, the risk of such influence being determinative for setting legal standards globally will be limited. Regardless of such pressure there are bound to be disagreements between judges. Because ICL draws on different bodies of law with conflicting values the occurrence of fragmentation

\textsuperscript{154} Rome Statute, supra note 19, Article 16.
is inevitable. A deeper analysis of this “identity crisis” would however require a thesis of its own.
BIBLIOGRAPHY


Janine Natalya Clark, ‘Specific Direction’ and the Fragmentation of International Jurisprudence on Aiding and Abetting: Perišić and Beyond, Brill Nijhoff, 2015


Karim A. A. Khan, Caroline Buisman and Christopher Gosnell, Principles of Evidence in International Criminal Justice, Oxford University Press, 2010


Mark Klambreg, Evidence in international criminal trials: confronting legal gaps and the reconstruction of disputed events, Martinus Nijhoff Publishers, 2013


Martin Burchardt, *Did a supporter of International criminal law turn into a stooge of the US?*, Information, 18 June 2013, available at: [https://www.information.dk/indland/2013/06/did-a-supporter-of-international-criminal-law-turn-into-a-stooge-of-the-us]


Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, GW Law Faculty Publications & Other Works, 2008


Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 16 December 2010

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The International Criminal Court, *Situations and Cases*,
[https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)


**CASES**

**ICTY**

*Decision on motion for reconsideration Prosecutor v. Momcilo Perisic*, ICTY Appeals Chamber, IT-04-S1-A, 20 March 2014

*Prosecutor v. Ante Gotovina and Mladen Markac - Dissenting opinion of Judge Carmel Agius*, ICTY Appeals Chamber, IT-06-90-A, 16 November 2012

*Prosecutor v. Anto Furundzija*, ICTY Trial Chamber, IT-95-17/1-T, 10 December 1998


*Prosecutor v. Jovika Stanisic and Franko Simatovic*, ICTY Trial Chamber, IT-03-69-T, 30 May 2013

*Prosecutor v. Jovika Stanisic and Franko Simatovic*, ICTY Appeals Chamber, IT--03-69-A, 9 December 2015

*Prosecutor v. Milan Lukic and Sredoje Lukic*, ICTY Appeals Chamber, IT-98-32/1-A, 4 December 2012

*Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, ICTY, Appeals Chamber, IT-95-13/1-A, 5 May 2009

*Prosecutor v. Momcilo Perisic*, ICTY Appeals Chamber, IT-04-81-A, 28 February 2013

64

Prosecutor v. Tihomir Blaškić, ICTY Appeals Chamber, IT-95-14-A, 29 July 2004

Prosecutor v. Vidoje Blagojevic and Dragan Jokic, ICTY Appeals Chamber, IT-02-60-A, 9 May 2007


Prosecutor v. Zlatko Aleksovski, ICTY Appeals Chamber, IT-95-14/1-A, 24 March 2000

SCSL

Prosecutor v. Charles Ghankay Taylor, SCSL Appeals Chamber, SCSL-03-01-A, 26 September 2013

ICTR

Prosecutor v. Semanza (Decision), ICTR Appeals Chamber, ICTR-97-20-A, 31 May 2000

TREATIES AND OTHER DOCUMENTS


Rome Statute of the International Criminal Court, 1 July 2002

Statute of the International Tribunal for Rwanda, 8 November 1994

Statute of the International Tribunal for the former Yugoslavia, 25 May 1993

Statute of the Special Court for Sierra Leone, 16 January 2002

Vienna Convention on the law of treaties, United Nations, 23 May 1969