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SCSL-03-01-A
(10566-10738)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before:	Justice Shireen Avis Fisher, Presiding Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter Justice Jon M. Kamanda Justice Philip Nyamu Waki, Alternate Judge
Registrar:	Ms. Binta Mansaray
Date filed:	14 March 2013

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC
PROSECUTION MOTION FOR LEAVE TO FILE ADDITIONAL WRITTEN SUBMISSIONS REGARDING THE ICTY APPEALS JUDGEMENT IN *PERIŠIĆ*

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
Mr. Cóman Kenny

Office of the Principal Defender:
Ms. Claire Carlton-Hanciles

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

I. INTRODUCTION

1. The Prosecution files this motion for leave to file additional written submissions in relation to the recent ICTY Appeal Judgement in the case of *Prosecutor v. Perišić*.[1] The Prosecution respectfully submits that additional submissions are within both the inherent discretion of the Appeals Chamber and the scope of Rules 106(C) and 73,[2] and that there is nothing in the SCSL's Rules or jurisprudence which would preclude such submissions. The Prosecution further submits that such submissions are appropriate in that the *Perišić* Appeal Judgement was delivered after the completion of submissions in this case; the Judgement directly addresses a question posed by the Appeals Chamber in this case;[3] and in light of Article 20(3) of the SCSL Statute. Accepting additional submissions relating to the *Perišić* Appeal Judgement will also ensure that the parties have an opportunity to address the issues therein, should they wish to do so, and will further inform the discussion regarding a mode of liability at issue in *Taylor*.

2. The Prosecution submits that the additional argument is appropriate in particular because, firstly, the Majority in the *Perišić* Appeal Judgement[4] deviated from established jurisprudence when it: (i) found that "specific direction" is a distinct element of aiding and abetting; (ii) in effect elevated the *mens rea* of aiding and abetting; (iii) found that if an accused's assistance is "remote" from the actions of the principal perpetrator, "specific direction" must be explicitly established; and, (iv) found that knowing and substantial assistance to the commission of crimes by a non-"purely criminal" organization is not necessarily specifically directed to the commission of such crimes. All of these deviations were based on flawed reasoning. Secondly, should this Appeals Chamber agree that "specific direction" does form a separate element of aiding and abetting, the factual findings of the Trial Chamber establish that Charles Taylor provided assistance that was specifically directed to the commission of crimes. Finally, facts that the *Perišić* Appeals

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[1] *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").
[2] Special Court for Sierra Leone Rules of Procedure and Evidence, amended on 31 May 2012 ("Rules").
[3] Scheduling Order, SCSL-03-01-A-1355, 30 November 2012.
[4] The majority consisted of Judges Meron (presiding), Agius, and Vaz ("*Perišić* Appeals Majority"). Judge Ramaroson issued a separate opinion disagreeing with the Majority on the issue of specific direction and finding that Perišić should have been acquitted on a different basis. Judge Liu issued a partially dissenting opinion dissenting on all the findings of the Majority relating to Perišić's liability for aiding and abetting.

Majority found relevant in reversing Perišić's aiding and abetting conviction can be distinguished from the facts in the *Taylor* case.

II. LEAVE TO EXCEED PAGE LIMIT

3. In the event that the additional submissions are deemed to form part of the Prosecution's appellate submissions, the Prosecution respectfully requests the Court's leave to exceed the page limit of its appellate submissions pursuant to Article 6(G) of the Practice Direction on dealing with Documents in The Hague – Sub-Office. The Prosecution submits that in light of the justifications for seeking to file its additional submissions set out herein, exceptional circumstances exist for requesting a page extension of twenty (20) pages.

III. CONCLUSION

4. For the reasons set out above, the Prosecution respectfully requests that the attached written submissions be accepted by the Appeals Chamber.

Filed in The Hague,
14 March 2013
For the Prosecution,

Brenda J. Hollis
The Prosecutor

List of Authorities

SCSL

Statute of the Special Court for Sierra Leone

Special Court for Sierra Leone Rules of Procedure and Evidence, amended on 31 May 2012

Practice Direction on dealing with Documents in The Hague – Sub-Office, adopted on 16 January 2008, amended 25 April 2008

***Prosecutor v. Taylor*, SCSL-03-01**

Scheduling Order, SCSL-03-01-A-1355, 30 November 2012

ICTY

Prosecutor v. Perišić, IT-04-81-A, Judgement, 28 February 2013
http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf

SPECIAL COURT FOR SIERRA LEONE
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Registrar: Ms. Binta Mansaray

Date filed: 14 March 2013

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC
PROSECUTION ADDITIONAL WRITTEN SUBMISSIONS REGARDING THE ICTY APPEALS JUDGEMENT IN *PERIŠIĆ* WITH APPENDED BOOK OF AUTHORITIES

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Mr. Eugene O'Sullivan
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Ms. Magda Karagiannakis

I. INTRODUCTION

1. The Prosecution files these submissions addressing the recent ICTY Appeals Judgement in the case of *Prosecutor v. Perišić* with respect to "specific direction".[1] The Prosecution respectfully submits that the Majority Opinion in this Judgement (Judges Meron, Agius and Vaz)[2] deviated from settled ICTY/ICTR jurisprudence which has established that "specific direction" does not constitute a separate essential element of aiding and abetting.

2. Although there is no clear agreement among the Judges, it appears that the *Perišić* Majority deviated from established jurisprudence when it: (a) found that "specific direction" is a distinct element of aiding and abetting liability; (b) in effect elevated the *mens rea* of aiding and abetting; (c) found that if an accused's assistance is "remote" from the actions of the principal perpetrator, "specific direction" must be explicitly established;[3] and (d) found that knowing and substantial assistance to the commission of crimes by a non-"purely criminal" organisation is not necessarily specifically directed to the commission of such crimes. All of these deviations were based on flawed reasoning.

3. The Prosecution submits that these deviations were made without the "careful consideration" required for a departure from established jurisprudence and that there were no "cogent" reasons "in the interests of justice" to do so.[4] These deviations were unwarranted, as the previous standard ensured that only those who committed an act which substantially contributed to the commission of a crime, with the knowledge or awareness of the substantial likelihood that it would facilitate a crime, would be liable for aiding and abetting that crime. This standard established the requisite "culpable link between assistance provided by an accused individual and the crimes of principal perpetrators."[5] In contrast, if the Majority Opinion's new legal standard is followed, it would potentially preclude calling to account most "external actors", including those

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[1] *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").
[2] The Majority Opinion consisted of Judges Meron (presiding), Agius and Vaz. Judge Liu issued a partially dissenting opinion dissenting on all of the Majority's findings relating to Perišić's liability for aiding and abetting, affirming his conviction. Judge Ramarosan issued a separate opinion about the question of specific direction in which, although she agreed with the reversal of Perišić's conviction, she disagreed with the Majority that specific direction was an essential element of aiding and abetting to be analysed in the context of the *actus reus*. It is unclear on which of the underlying factual conclusions regarding specific direction Judge Ramarosan concurred with the Majority. Consequently, the Prosecution has defined the Majority as Judges Meron (presiding), Agius and Vaz ("Majority Opinion" or "*Perišić* Majority") throughout these submissions.
[3] *Perišić* Appeal Judgement, para. 73.
[4] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), paras. 107-109.
[5] *Perišić* Appeal Judgement, para. 37, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 4.

individuals most responsible and most culpable for fuelling atrocities from a distance, who acted with the requisite knowledge or awareness of the substantial likelihood that their assistance would facilitate such crimes. Such a preclusion cannot be in the interests of justice.

4. The Prosecution suggests that only a cogently reasoned, clear statement of the law should be afforded precedence in a situation such as this which departs from a long line of established jurisprudence, and that, therefore, the Majority Opinion should not be afforded precedential value on the issue of specific direction. In short, there is no clear agreement amongst the Judges themselves about the legal characterisation of specific direction, as reflected in the Majority Opinion, the joint separate opinion, the separate opinion and the dissenting opinion. The Majority Opinion places specific direction as an element of the *actus reus*.[6] In the Joint Separate Opinion, Judges Meron and Agius state that specific direction can reasonably be assessed in the context of either *actus reus* or *mens rea*.[7] However, they also state that it "logically fits within [the] current *mens rea* requirement",[8] and they consider it a separate element of *mens rea*.[9] While Judge Ramaroson concurs with the Majority Opinion reversing the convictions, she does not agree on the basis of specific direction. Rather, she considers that, to the extent it exists, specific direction is implicitly taken into account in the context of the *mens rea* standard of knowledge. Her view is that Perišić should be acquitted of the charges because the evidence did not show that he was aware his acts would facilitate the crimes.[10] In his dissenting opinion, Judge Liu does not agree that specific direction is a separate element of aiding and abetting. Rather, he is of the view that specific direction may be a pertinent factor in evaluating *mens rea* and is a "red herring" in the context of the *actus reus*.[11] Given this lack of clarity, the Majority Opinion is of little value in understanding the elements of aiding and abetting.

5. For all of these reasons, the Prosecution submits that the Judges of the SCSL Appeals Chamber should not be guided by the Majority Opinion.[12]

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[6] *Perišić* Appeal Judgement, para. 36.
[7] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, paras. 3-4.
[8] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 3.
[9] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 4.
[10] *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, paras. 2-6, 10.
[11] *Perišić* Appeal Judgement, Partially Dissenting Opinion of Judge Liu, para. 2 and fn. 7.
[12] Statute of the Special Court for Sierra Leone, Art. 20(3).

II. THE MAJORITY OPINION DEVIATED FROM ESTABLISHED JURISPRUDENCE BASED ON FLAWED REASONING AND WITHOUT JUSTIFICATION

6. The finding that "specific direction" establishes a "culpable link" between assistance provided by an accused and the crimes[13] is perhaps the basis for the deviations discussed below. While this "culpable link" is not defined, the Prosecution suggests that as a general matter, criminal culpability is established only after all elements have been proven beyond reasonable doubt. If the Majority Opinion language is in fact referring to a causative link, this deviates from settled jurisprudence which establishes that substantial contribution would be the causative link.[14] If the Majority Opinion language is in fact referring to the *mens rea* requirement, it is well established that knowledge or the requisite degree of awareness meets that requirement.[15]

A. The Majority Opinion deviated from established appellate jurisprudence when it found that "specific direction" is a distinct element of the *actus reus* of aiding and abetting and is based on flawed reasoning.

- *The finding deviates from established jurisprudence*

7. The position of the Majority Opinion that "specific direction" has been a distinct element of aiding and abetting liability since the *Tadić* Appeal Judgement[16] departs from established ICTY and ICTR appellate jurisprudence without the "cogent reasons" and "most careful consideration" required for such a departure.[17] As acknowledged by the *Perišić* Majority, the term "specific direction" was used in the *Tadić* Appeal Judgement to draw a distinction between the contribution required by an accused under the joint criminal enterprise mode of liability and that required under aiding and abetting.[18] However, as expressly noted in the *Aleksovski* Appeal Judgement, the formulation adopted in the *Tadić* Appeal Judgement was "in the context of contrasting" modes of liability and was not "a complete statement of the liability of the person

[13] *Perišić* Appeal Judgement, para. 37.
[14] *Aleksovski* Appeal Judgement, para. 162. There is no "but for" test of causality, *see Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 48.
[15] *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić & Šljivančanin* Appeal Judgement"), para. 159.
[16] *Perišić* Appeal Judgement, para. 73.
[17] *Aleksovski* Appeal Judgement, paras. 107-109.
[18] *Perišić* Appeal Judgement, para. 27.

charged with aiding and abetting".[19] In light of this, the *Aleksovski* Appeal Judgement defined the *actus reus* without any reference to specific direction.[20]

8. While specific direction *has* been mentioned in ICTY and ICTR jurisprudence after *Aleksovski*, it has not been set out as a separate element.[21] Where specific direction has been mentioned in relation to the *actus reus*, it has not been defined or applied consistently to the facts. The Appeals Chamber has not corrected the failure to set it out as a separate element, the failure to define it or to consistently apply it.[22] As stated by Judge Liu in his dissenting opinion in *Perišić*:[23]

> the cases cited by the Majority as evidence of an established specific direction requirement merely make mention of "acts directed at specific crimes"[24] as an element of the *actus reus* of aiding and abetting liability. *In the majority of these cases the Appeals Chamber simply restates language from the Tadić Appeal*

[19] *Aleksovski* Appeal Judgement, para. 163.
[20] *Aleksovski* Appeal Judgement, paras 162, 164.
[21] *Prosecutor v. Krnojelac*, IT-97-25, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 37; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 352.
[22] The Appeals Chamber did not correct the failure of the Trial Chambers which did not specifically refer to specific direction as a separate element of aiding and abetting liability in the following cases: *see, e.g., Blagojević & Jokić*; *Kvočka*; *Vasiljević*; *Krnojelac*; *Aleksovski*; *Kalimanzira*; *Muvunyi*; *Seromba*; *Muhimana*; *Ntagerura*; *Orić*. The *Blaškić* Appeal Judgement is a particularly apposite example, where the Appeals Chamber quoted with approval the *actus reus* definition used by the *Vasiljević* Appeal Judgement which includes the term 'specific direction', while the following paragraph quotes the *actus reus* definition used by the *Blaškić* Trial Chamber which does not make any reference to 'specific direction' and states that this was a correct pronouncement of the law. *See Blaškić* Appeal Judgement, paras 45-46.
[23] *Perišić* Appeal Judgement, Partially Dissenting Opinion of Judge Liu, para. 2 (emphasis added).
[24] As noted in the *Perišić* Appeal Judgement, this formulation varies slightly from case to case. For a list of cases using this or a similar formulation, *see Perišić* Appeal Judgement, fns. 70-74 *citing Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević & Jokić* Appeal Judgement"), para. 127; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 89; *Blaškić* Appeal Judgement, para. 45; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 102; *Krnojelac* Appeal Judgement, para. 33; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), para. 254; *Aleksovski* Appeal Judgement, para. 163; *Kalimanzira v. The Prosecutor*, ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 74; *Muvunyi v. The Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement"), para. 79; *The Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement"), para. 139; *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 482; *Muhimana v. The Prosecutor*, ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement"), para. 189; *The Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement"), para. 370; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana & Ntakirutimana* Appeal Judgement"), para. 530; *Prosecutor v. Blagoje Simić*, IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement"), para. 85; *Prosecutor v. Orić*, IT-03-68-A, Judgment, 3 July 2008 ("*Orić* Appeal Judgement"), para. 43; *Ntawukulilyayo v. The Prosecutor*, ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement"), para. 214; *Rukundo v. The Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement"), para. 52; *Karera v. The Prosecutor*, ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement"), para. 321. (Original footnote, long form of Judgements added.)

> *Judgement without expressly applying the specific direction requirement to the facts of the case before it.*[25] Moreover, the jurisprudence of the Tribunal demonstrates that aiding and abetting liability may be established without requiring that the acts of the accused were specifically directed to a crime.[26]

- *The finding is based on flawed reasoning*

9. In reaching the conclusion that specific direction has *always* been a requirement of aiding and abetting liability,[27] the Prosecution respectfully submits, in agreement with Judges Ramaroson and Liu, that the *Perišić* Majority carried out a flawed analysis of previous jurisprudence.[28] First, it found that the express finding in *Mrkšić and Šljivančanin* that specific direction was not an essential ingredient of the *actus reus* of aiding and abetting, was ambiguous and mentioned only "in passing" and, therefore, it was not intended to depart from previous jurisprudence that specific direction was an element of aiding and abetting liability.[29] However, it is difficult to see how the statement, "[t]he Appeals Chamber has confirmed that *specific direction is not an essential ingredient* of the *actus reus* of aiding and abetting"[30] is in any way ambiguous. Moreover, that the confirmation was made in its discussion of the *mens rea* for aiding and abetting in no way diminishes its importance. The Majority Opinion seems to have overlooked that the statement was made in the context of rejecting Šljivančanin's assertion that aiding and abetting by omission requires a heightened *mens rea*.[31] Clearly, the statement was an essential part of the reasoning and not merely made "in passing".

10. Second, the implication of the Majority Opinion that the *Mrkšić and Šljivančanin* Appeal Judgement was an aberration is not supported by ICTY appellate jurisprudence. Rather, the

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[25] The express application of the specific direction requirement appears to have been limited to the *Vasiljević* case (*see Vasiljević* Appeal Judgement, para. 135). In my view, this tends to demonstrate that the Appeals Chamber accorded extremely limited importance to specific direction in previous cases. Moreover, I note that the specific direction "requirement" was first mentioned in the *Tadić* Appeal Judgement, which focused on JCE liability and only considered aiding and abetting liability by way of contrast (*see Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement") para. 229). Thus, subsequent cases have relied on language that was not intended to be a definitive statement of aiding and abetting liability. (Original footnote, long form of Judgements added.)

[26] *See Mrkšić & Šljivančanin* Appeal Judgement, para. 159; *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement (AC), 4 December 2012 ("*Lukić & Lukić* Appeal Judgement"), para. 424. *See by contrast Lukić & Lukić* Appeal Judgement, Separate and Partially Dissenting Opinions of Judge Mehmet Güney, paras 10-11 *and* Separate Opinion of Judge Agius (original footnote, long-form of Judgements added).

[27] *Perišić* Appeal Judgement, paras. 32-36, 41.

[28] *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, paras. 5-6; Partially Dissenting Opinion of Judge Liu, para. 2.

[29] *Perišić* Appeal Judgement, paras. 32, 36.

[30] *Mrkšić & Šljivančanin* Appeal Judgement, para. 159 (emphasis added).

[31] *Mrkšić & Šljivančanin* Appeal Judgement, paras. 157-159.

Mrkšić and Šljivančanin holding affirmed the *Blagojević and Jokić* Appeal Judgement.[32] The Majority Opinion's statement that the Appeals Chamber in *Blagojević and Jokić* "confirmed that specific direction does constitute an element of aiding and abetting liability"[33] directly contradicts the express finding of the unanimous *Blagojević and Jokić* Appeals Chamber that "while the *Tadić* definition has not been explicitly departed from, specific direction *has not always been included as an element of the actus reus of aiding and abetting.*"[34] The *Blagojević and Jokić* Appeals Chamber went on to state that:

> This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an *implicit* part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her "routine duties" will not exculpate the accused.[35]

11. Third, as recognised by the Majority Opinion, in the *Lukić and Lukić* Appeal Judgement rendered less than three months before *Perišić*, the ICTY Appeals Chamber found that there was "no cogent reason to depart from this [*Mrkšić and Šljivančanin* Appeal Judgement] jurisprudence" and affirmed that "specific direction *is not* an essential ingredient of the *actus reus* of aiding and abetting."[36] The *Perišić* Majority correctly interpreted this as illustrating that the *Mrkšić and Šljivančanin, Lukić and Lukić and Blagojević and Jokić* Appeal Judgements are not "antithetical" in their approach to specific direction, but then it inexplicably interpreted this as supporting the view that specific direction remains an element of aiding and abetting liability.[37] This is the exact opposite of what the Judgements quoted from are authority for. Consequently, it is clear that in order to reach the new position that "specific direction" has been a distinct element of aiding and abetting liability since the *Tadić* Appeal Judgement,[38] the Majority Opinion carried out a flawed analysis of previous appellate jurisprudence.

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[32] *Mrkšić & Šljivančanin* Appeal Judgement, para. 159, fn. 566 citing *Blagojević & Jokić* Appeal Judgement, para. 189.
[33] *Perišić* Appeal Judgement, para. 34.
[34] *Blagojević and Jokić* Appeal Judgement, para. 189 (emphasis added).
[35] *Blagojević and Jokić* Appeal Judgement, para. 189 (emphasis added).
[36] *Lukić & Lukić* Appeal Judgement, para. 424.
[37] *Perišić* Appeal Judgement, paras. 35-36.
[38] *Perišić* Appeal Judgement, para. 73.

B. The Majority Opinion deviated from established appellate jurisprudence by effectively elevating the *mens rea* standard to specific intent or its equivalent, at least for "remote" assistance, and is based on flawed reasoning.

- *Specific Direction as an element or additional component of mens rea*

12. The lack of clarity of the *Perišić* Judgement is perhaps most clearly demonstrated by the inconsistencies amongst the *Perišić* Judges about the legal characterisation of specific direction. Although the Majority Opinion states that it is an element of the *actus reus* of aiding and abetting, four of the five judges in the *Perišić* Appeals Chamber appended separate or dissenting opinions which suggest that specific direction should be considered in relation to *mens rea*.[39] Yet these judges refrained from stating that specific direction forms part of the *mens rea*, as to do so would have openly contradicted ICTY jurisprudence.

13. Regardless of whether it is characterised as part of the *actus reus* or *mens rea*, the effect of the Majority Opinion, at least in cases of "remote assistance", is that the long established *mens rea* standard of knowledge is insufficient for criminal liability. If this new statement of the law by the *Perišić* Majority is accepted, the *mens rea* of aiding and abetting will now require (at least in the case of those who are "remote") that assistance be specifically directed to the commission of crimes. This requirement, in effect, raises the *mens rea* standard in such instances to specific intent or its equivalent. Such a deviation from the accepted and established standard of *mens rea* was clear from the Majority Opinion's finding that rather than being specifically directed to VRS criminal activities, "Perišić's relevant actions were *intended* to aid the VRS's overall war effort."[40]

- *The deviation is based on flawed reasoning*

14. This redefinition of specific direction in a way that alters the *mens rea* conflicts with the well established jurisprudence in international criminal law, including the Judgments of the Appeals Chamber of this Court, that have long held that the *mens rea* for aiding and abetting is the accused's knowledge or awareness that his actions will facilitate the crime charged.[41] Further, the Appeals Chamber of the ICTY, having conducted an analysis of the customary

[39] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 3; Partially Dissenting Opinion of Judge Liu, fn. 7; Separate Opinion of Judge Ramaroson, para. 7.
[40] *Perišić* Appeal Judgement, para. 60 (emphasis added).
[41] *See Prosecutor v. Taylor*, SCSL-03-01-A-1350, Prosecution Respondent's Submissions with Confidential Annexes A and D, 23 November 2012, paras. 280 ("Prosecution Response").

international law of aiding and abetting, has expressly held that the *mens rea* of aiding and abetting is a knowledge standard.[42] The Majority Opinion offers no cogent reason to depart from the standard used by this Appeals Chamber, by all prior ICTY and ICTR Chambers since 1997, by the ECCC, and grounded in post World-War II jurisprudence.[43]

C. The new requirement that it is necessary to explicitly consider specific direction only in cases where the aider and abettor is "remote" from the actions of the principal perpetrator deviates from established jurisprudence and is based on flawed reasoning.

- *The finding deviates from established jurisprudence*

15. As recognised by Judges Liu and Ramaroson, the *Perišić* Majority further departed from existing ICTY/ICTR jurisprudence when it found that it is necessary to explicitly consider specific direction in cases where the aider and abettor is "remote" from the actions of the principal perpetrator.[44] Requiring that this "element" only need be specifically considered where the assistance is "remote" effectively creates two different standards within one mode of liability, thereby flouting the principle of equal application of the law.

16. The Majority Opinion found that where the relevant acts are "proximate" to the crimes of the perpetrators, specific direction may be implicitly demonstrated through the other elements of

[42] *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, ("*Furundžija* Trial Judgement") para. 249.

[43] In footnote 115, the *Perišić* Majority misstates the holding in the Zyklon B case (Trial of Bruno Tesch and Two Others, 1 Law Reports of Trials of War Criminals 92-102 (1947)) by stating that the court convicted two of the Accused "after reviewing evidence that the defendants arranged for S.S. units to be trained in using this gas to kill human beings in confined spaces." In fact, the evidence mentioned came from only one witness who claimed to have seen a travel report written by Tesch in which he proposed to train the S.S. in this method. There was no evidence that the second Accused, Weinbacher, was involved or had ever seen this report and, despite this fact, he too was convicted and sentenced to death. The report of the case makes it abundantly clear that the Accused were convicted on the basis that they knew the gas they provided was being used to kill humans, not that they intended the gas to be used for this purpose or specifically directed the gas provided to these purposes. The Prosecuting Counsel in his closing address stated that "the essential question was whether the accused knew of the purpose to which their gas was being put." The Judge Advocate, in summing up the case, told the judges they needed to be sure of three facts to convict: "first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by Tesch and Stabenow; and thirdly, that the accused knew that the gas was to be used for the purposes of killing human beings." *See* Zyklon B case, pp. 100-102. *See also* Prosecution Response, paras 275-320.

[44] *Perišić* Appeal Judgement, paras. 38-40; Partially Dissenting Opinion of Judge Liu, para. 2; *Perišić* Appeal Judgement, Separate Opinion of Judge Ramaroson, para. 8.

aiding and abetting liability, such as substantial contribution.[45] However, where an accused aider and abettor carries out acts "remote" from the relevant crimes, the *Perišić* Majority found that other elements may not be sufficient to prove specific direction and explicit consideration is required.[46] Therefore, though two accused could have the same knowledge or awareness and make the same substantial contribution, the one who is "proximate" would be held responsible without explicit proof of specific direction, while the "remote" actor would not. The Prosecution respectfully submits that this is a deviation from established jurisprudence which cannot be correct.

17. In addition, under the jurisprudence of the ICTY/ICTR, the remoteness of an accused's actions from the crimes has not been determined to be dispositive in assessing the *actus reus* of aiding and abetting liability. Rather, the crucial consideration has been whether the acts of the aider and abettor had a substantial effect on the commission of the relevant crime. For example, in *Čelebići*, the Appeals Chamber expressly held that an aider and abettor's assistance may be removed in time and place from the relevant crimes, provided it contributed to or had an effect on the commission of the crime.[47] Similarly, in *Mrkšić and Šljivančanin*, the Appeals Chamber held that in the context of the *actus reus* of aiding and abetting, the location at which the *actus reus* takes place may be removed from the location of the principal crime.[48]

- *The finding is based on flawed reasoning*

18. Whether considered as part of the *actus reus* or *mens rea*, the reasoning establishing the Majority Opinion's remoteness standard is flawed. If it is considered as an element of the *actus reus*, how can remoteness be a factor in whether the assistance substantially contributes to the commission of the crimes? Further, what can be the basis in law or logic to hold that specific direction is an element of aiding and abetting which can be considered impliedly satisfied if the contribution to the crimes is substantial and "proximate", but not if the assistance is substantial and "remote"? Rather, whether the assistance substantially contributes to the commission of the crime is the crux of an aiding and abetting analysis. This core tenet remains the same whether the

[45] *Perišić* Appeal Judgement, para. 38. The Perisic Majority uses the example of physical presence during the commission of the crime as a situation in which specific direction can be implicitly demonstrated through other elements of aiding and abetting such as substantial contribution.
[46] *Perišić* Appeal Judgement, para. 39.
[47] *Čelebići* Appeal Judgement, para. 352. The *Perišić* Majority listed geographic and temporal remoteness as factors indicating that the acts of an accused aider and abettor are more remote from the crimes. *See Perišić* Appeal Judgement, para. 40.
[48] *Mrkšić & Šljivančanin* Appeal Judgement, para. 81. *See also Blaškić* Appeal Judgement, para. 48.

assistance was "proximate" or "remote". In addition, one who provides assistance "remotely" may specifically direct it toward the crimes, whereas one who provides assistance "proximately" may not. Why then would this additional element which the Majority Opinion claims to have been always part of aiding and abetting only be explicitly addressed in cases of "remote" assistance?

19. The reasoning is equally flawed if specific direction is to be considered as a separate element of *mens rea*, or as a factor to be considered in regard to knowledge. If the latter, the reasoning ignores that an accused can gain knowledge regarding the commission of atrocities committed by the principal perpetrator in numerous ways, including, as in the *Taylor* case, by radio transmissions, satellite phone conversations, personal contact with the accused or his intermediaries, as well as through news media and other reports. If it is to be considered a separate *mens rea* standard, as suggested in the Joint Separate Opinion, why then would "remoteness" be of consequence? As discussed above, specific direction can be lacking in "proximate" assistance as well as in "remote".

20. Finally, the new standard that specific direction need be explicitly considered only where the assistance is "remote" ignores the fundamental principle that all elements must be proven beyond reasonable doubt and so must always be considered. If specific direction *is* an element, it must always be addressed and cannot be implied from proof of other elements, whether the accused was "remote" or "proximate" to the crimes.

D. The finding that knowing and substantial assistance to a non-"purely criminal" organisation committing crimes does not necessarily fulfil the specific direction test of aiding and abetting liability is a deviation from established jurisprudence and based on flawed reasoning.

- *The finding deviates from established jurisprudence*

21. In aiding and abetting cases based on circumstantial evidence, the Majority Opinion deviates from established jurisprudence by distinguishing between assistance to an organisation that is "purely criminal" from that to organisations which are committing systematic crimes but are also engaged in lawful combat. In the latter scenario, an accused who provided assistance to the organisation knowing it would facilitate the crimes would not be found culpable even when that assistance made a substantial contribution to the crimes, unless it could be shown that the

accused directed his assistance specifically to the criminal acts. Under the Majority Opinion approach, even where a group undertakes military operations which are inextricably bound with the commission of crimes, an accused who knowingly provides assistance which substantially contributes to the commission of such crimes will not necessarily be held criminally liable if that group is not purely criminal, i.e., engaged in one hundred percent criminality.

22. This finding would seem to raise the standard of proof for circumstantial evidence from reasonableness to absolute certainty, excluding not only other *reasonable* alternatives to guilt but also all *possible* alternatives to guilt.

- *The finding is based on flawed reasoning*

23. This deviation from established jurisprudence, which imposes no such 100% criminality condition, redefines aiding and abetting in such as way as to provide impunity for many if not all individuals whose substantial assistance to the commission of atrocities is given with the requisite knowledge or awareness. It is hard to see how any organisation committing mass atrocities could be classified as "purely" criminal, as even genocidal regimes or militias can be said to have some political agenda or to be "waging war". Even the most notorious terrorist groups often engage in some lawful political, humanitarian, or combat activities. Where the organization is a State, how can it ever be said it is a "purely criminal" entity? And, under what reasoning can 100% criminality be required to establish a sufficiently culpable link where the assistance substantially contributes to the crime and is given with the requisite knowledge or awareness? The fact that these organisations are not "purely criminal" provides no comfort to the victims of their crimes, who look to international law to provide some deterrence to those who would provide arms or financing to make these crimes possible. It would be a grave regression should international law now be interpreted to allow individuals to knowingly and substantially contribute to the crimes of these non-"purely criminal" groups unless it can be proven that these individuals provided assistance "specifically directed" to particular criminal activities.[49]

[49] This would likely reverse the growing recognition of the responsibility of States not to contribute to such groups and the codification of the same in national and international legislation. *See, e.g.*, Council Common Position 2008/944/CFSP, Defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, 8 December 2008, Article 2(2) ("EU Common Position"); U.S. Public Law 106-429, Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2001, enacted 6 November 2000, Section 563 ("Leahy Amendment").

E. The Majority Opinion provided no cogent reasons for these deviations, which are not in the interests of justice.

24. The legal standard prior to the Majority Opinion—that the individual provided a substantial contribution to the crime charged with the knowledge or awareness that it would facilitate a crime—established the required culpable link and was stringent enough to ensure that not every individual giving assistance to an armed group would be liable simply because that group was committing crimes. The new Majority Opinion standard, if followed, would allow those whose acts are "remote" and contribute knowingly and substantially to crimes, to escape criminal liability unless proven that they "specifically directed" or intended to facilitate crimes. The Majority Opinion moved away from the established standard without any "cogent reason in the interests of justice" to do so and without the "careful consideration" required for such a departure. To protect those who meet the existing standard for aiding and abetting furthers no interest of justice, but, rather, extends impunity for those whose conscious and knowing acts substantially contribute to horrific crimes.

25. In addition, the Majority Opinion fails to define or fully explain the parameters of the deviations. For instance, the *Perišić* Majority offers no definition of "specific direction", aside from being a "culpable" or "direct" link, neither of which terms are defined. The *Perišić* Majority made clear that, in analysing remoteness, factors include but are not limited to temporal and geographic distance, yet did not indicate clearly where the boundary between remoteness and proximity might lie, only indicating it will depend on the circumstances of each case. These vague terms will lead to considerable uncertainties and difficulties in their application.

26. The Prosecution respectfully submits that the deviations from established jurisprudence discussed above were based on flawed reasoning and made without a demonstrated justification. Indeed, these deviations are contrary to the interests of justice. For all of the above reasons, the SCSL Appeals Chamber should not be guided by the Majority Opinion.

III. THE TRIAL CHAMBER'S FACTUAL FINDINGS ESTABLISH THAT TAYLOR'S ASSISTANCE WAS SPECIFICALLY DIRECTED TO THE COMMISSION OF CRIMES UNDER THE *PERIŠIĆ* TEST

27. Even under the new, and in the Prosecution's submission, erroneous, test set by the Majority Opinion, the factual findings in the *Taylor* case establish that Taylor aided and abetted the crimes charged in Counts 1-11 of the Indictment. The findings in the *Taylor* Judgement

establish the "culpable"[50] or "direct"[51] link between assistance provided by Taylor and the crimes of the RUF and AFRC/RUF that the Majority Opinion found constituted specific direction.

28. The factual findings of the *Taylor* Trial Chamber establish a much more direct and intentional link between his assistance to the crimes than that which was found in respect of Perišić. The Majority Opinion emphasised that while the crimes charged occurred in two specific geographical regions,[52] Perišić implemented a policy of VJ assistance which "was delivered to multiple areas within BiH to aid the general VRS war effort."[53] This is completely inapposite to the facts found by the *Taylor* Trial Chamber that Taylor provided assistance to a group involved in a criminal campaign of terror that spanned the territory of Sierra Leone.[54]

29. The *Taylor* Trial Chamber expressly found that the RUF and AFRC/RUF's strategy of conducting war was "based on a campaign of terror against the civilian population" of Sierra Leone.[55] The primary *modus operandi* for the rebel forces' military operations during the entire Indictment period was the deliberate use of terror against civilians.[56] Set against this context, Taylor provided assistance to the rebel forces which was used in military offensives,[57] the strategy and objectives of which were "inextricably linked" with "a campaign of crimes against the Sierra Leonean civilian population".[58]

30. Moreover, Taylor's assistance and the commission of crimes were temporally proximate. In addition to the large shipments of materiel facilitated by Taylor, he sent "small but regular supplies of arms and ammunition and other supplies" from 1997 to 1998 and "substantial amounts of arms and ammunition to the AFRC/RUF from 1998 to 2001",[59] all periods of time when crimes against civilians were ongoing.

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[50] *Perišić* Appeal Judgement, para. 37.
[51] *Perišić* Appeal Judgement, para. 44.
[52] *Perišić* Appeal Judgement, paras. 53, 60.
[53] *Perišić* Appeal Judgement, para. 66.
[54] *See, e.g.*, Judgement, paras. 1979, 2005-2006, 2048-2049, 2055-2056, 2192.
[55] Judgement, para. 6788.
[56] Judgement, para. 6790.
[57] Judgement, para. 6911.
[58] Judgement, para. 6905.
[59] Judgement, para. 6910.

31. Given that RUF and AFRC/RUF military operations encompassed "a policy and strategy of committing crimes against civilians in order to achieve military gains",[60] and that Taylor knew that he was providing assistance to these crimes and did so regardless,[61] there is unquestionably a direct and culpable link between Taylor's acts and the crimes committed by the RUF and AFRC/RUF.

IV. THE FACTS RELIED ON BY THE MAJORITY IN *PERIŠIĆ* ARE DISTINGUISHABLE FROM THE FACTS FOUND IN THE *TAYLOR* CASE

32. In the event that this Appeals Chamber is minded to adopt the new precedent of the Majority Opinion, the facts upon which the *Perišić* Majority based its conclusions can each be distinguished from the relevant findings in *Taylor*. In assessing whether the specific direction element of aiding and abetting had been met, the Majority Opinion looked at: (i) the accused's role in shaping and implementing the policy of assistance; and (ii) whether the accused either implemented the policy of assistance or took action to provide assistance in a manner that specifically directed the assistance to crimes.[62] In making these assessments, the *Perišić* Majority also looked at the state of mind of the accused and the magnitude of assistance provided.

A. Taylor had sole authority for the provision of assistance to the RUF and AFRC/RUF.

33. The Majority Opinion emphasised that Perišić was carrying out policies made by others, i.e., the SDC.[63] Perišić was subordinated to, and obligated to implement the decisions of, the Federal Republic of Yugoslavia's ("FRY") President. He had no ultimate authority over defence policy or operational priorities. Such decisions were made by political leaders.[64] While Perišić did have authority to administer assistance to the Army of the Republika Srpska ("VRS"), any such decisions he made as well as the policy of assistance itself was subject to review from higher authorities.[65] None of these findings are comparable to the facts relied upon in the *Taylor* Trial Judgement. Taylor exercised sole and ultimate authority for providing assistance to the RUF and AFRC/RUF. The assistance Taylor facilitated was not "military to military" but was

[60] Judgement, para. 6905.
[61] Judgement, para. 6949.
[62] *Perišić* Appeal Judgement, para. 47.
[63] *Perišić* Appeal Judgement, paras. 49-50.
[64] *Perišić* Appeal Judgement, para. 49.
[65] *Perišić* Appeal Judgement, para. 50.

from Taylor to the rebel forces, and Taylor personally accrued the benefits of the arrangement.[66] Taylor took no guidance and accounted to no one for his decision to assist the rebel forces over a period of years and in numerous ways.

34. The Majority Opinion further emphasised that the practice of assistance to the VRS was already in place before Perišić became Chief of the Yugoslav Army ("VJ") General Staff. In contrast, Taylor nurtured the RUF in its infancy at his base in Camp Naama[67] and alone decided the timing and manner of assistance given to the RUF and AFRC/RUF. Taylor oversaw the assistance, utilising his position as head of the NPFL and President of Liberia.[68]

35. The extent of Perišić and Taylor's involvement in aiding the commission of crimes by assisting armed groups is also distinguishable. Perišić's role in the FRY Supreme Defence Council ("SDC") deliberations was held by the *Perišić* Majority to indicate that he "only supported the continuation of assistance to the general VRS war effort",[69] and that he "directed assistance towards the general VRS war effort within the parameters set by the SDC."[70] Independent of the SDC policy of assistance, he "refused requests for assistance submitted outside of official channels", and "urged the SDC to punish VJ personnel who provided such unauthorised assistance."[71]

36. By contrast, in addition to the assistance Taylor provided, the Trial Chamber found that Taylor was influential with the RUF and AFRC/RUF and participated in key tactical decisions on their military operations[72] which not only involved the commission of crimes but were also conducted within the context of a campaign of terror against civilians.[73] For example, Taylor twice instructed Johnny Paul Koroma to capture Kono,[74] which the AFRC/RUF successfully did by burning, killing, looting, raping, capturing and terrorising civilians.[75] Taylor later told Sam Bockarie to keep control over the area to maintain the trade of diamonds for arms and

[66] *See, e.g.*, Judgement, paras. 5874, 5948, 5990, 6057-6058.
[67] Judgement, paras. 27, 2378.
[68] *See, e.g., Prosecutor v. Taylor,* SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement"), para. 97.
[69] *Perišić* Appeal Judgement, para. 60.
[70] *Perišić* Appeal Judgement, para. 61.
[71] *Perišić* Appeal Judgement, para. 67.
[72] *See, e.g.*, Judgement, para. 6787.
[73] *See, e.g.*, Judgement, paras. 6788, 6790.
[74] Judgement, para. 2855.
[75] *Prosecutor v. Taylor,* SCSL-03-01-A-1325, Prosecution Appellant's Submissions with Confidential Sections D and E of the Book of Authorities, 1 October 2012, para. 44 ("Prosecution Response")

ammunition,[76] with the AFRC/RUF adopting a brutal strategy of making the area "fearful" in order to do so.[77] Taylor co-authored a plan with Bockarie that resulted in military attacks on Kono, Makeni and Freetown.[78] He told Bockarie "that the operation should be 'fearful'"[79] and that the forces should use "all means" to get to Freetown.[80] They did so, and the Trial Chamber described the operation as a campaign of "extreme violence"[81] against civilians.[82]

37. In sum, while the Majority Opinion determined that Perišić was mandated by virtue of his position in the state apparatus to continue a policy of assistance he had inherited and over which he did not have ultimate authority,[83] Taylor had sole responsibility and authority for the initial decision to assist the RUF and RUF/AFRC as well as for the continuance of such assistance through the entire Indictment period during which the rebel forces were engaged in a terror campaign against the civilian population of Sierra Leone.

B. Taylor's assistance to the RUF and AFRC/RUF was specifically directed to the commission of crimes.

38. When assessing whether Perišić's assistance was specifically directed to facilitating crimes, the Majority Opinion considered whether the VRS was an organisation whose purpose was the commission of crimes. It found that the SDC policy of assistance which Perišić implemented was not directed to the commission of crimes but was "focused on monitoring and modulating aid to the general VRS war effort".[84] Here, again, the difference between the *Perišić* and *Taylor* cases is clearly distinguishable.

39. The *Taylor* Trial Chamber made an express finding that the assistance Taylor provided was to a group engaged in a criminal campaign of terror against civilians.[85] There was no such finding in the *Perišić* case, rather, the Majority Opinion "underscore[d] that the VRS was participating in lawful combat activities".[86] In *Taylor*, from the beginning of the Indictment

[76] Judgement, para. 6942.
[77] Prosecution Response, para. 47.
[78] Judgement, paras. 3129, 6961, 6962, 6967-6968.
[79] Judgement, para. 3117. *See also* Judgement, paras. 3130, 3449, 3611(vii).
[80] Judgement, paras. 3117, 3130, 3449, 3611(vii), 3615.
[81] Judgement, para. 6967.
[82] Judgement, para. 788.
[83] *Perišić* Appeal Judgement, paras. 49-51.
[84] *Perišić* Appeal Judgement, para. 55.
[85] *See, e.g.*, Judgement, paras. 6788, 6790.
[86] *Perišić* Appeal Judgement, paras 57, 69.

period, the rebel forces had adopted a war strategy "based on a campaign of terror against the civilian population".[87] The Trial Judgement findings show that after 'Operation Stop Election' and during the remainder of the civil war, the RUF and AFRC/RUF deliberately used terror against the civilian population "as a primary *modus operandi*".[88] Indeed, the inherently criminal nature which defined the heinous operations conducted by the rebels is clearly demonstrated in the Trial Chamber's finding that "*any* assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[89] While there were in fact military operations conducted by the RUF and AFRC/RUF against lawful combatants such as ECOMOG, the Trial Chamber's findings show that such operations took place within the context of a campaign of terror being waged by the rebels against the civilian population.[90] It is also clear from the Trial Judgement that those operations which *were* against lawful combatants were unlawful in that they were conducted using the active participation of children under the age of 15[91] and used forced labour to carry arms and ammunition and other loads.[92] Thus, all of the assistance Taylor provided to the RUF and AFRC/RUF furthered crimes as even the operations against lawful combatants resulted in crimes charged in the Indictment.[93]

C. The only reasonable inference from Taylor's *mens rea* and the magnitude of aid he provided is that his assistance was specifically directed to crimes.

40. When assessing Perišić's state of mind in providing assistance,[94] the Majority Opinion noted that while Perišić may have known of VRS crimes, the assistance he provided "was directed towards the VRS's general war effort rather than VRS crimes."[95] The difference between Perišić and Taylor in this regard is manifestly clear. The findings in the *Taylor* Judgement regarding Taylor's knowledge of the commission of crimes not only demonstrate Taylor's awareness as to what his assistance was facilitating, but arguably also show an intention

[87] Judgement, para. 6788.
[88] *See, e.g.*, Judgement, para. 6790.
[89] Judgement, para. 6905 (emphasis added).
[90] Judgement, para. 6788.
[91] Judgement, para. 1605.
[92] *See, e.g.*, Judgement, paras. 1664, 1687-1688, 1764, 1769, 1822-1823, 1839, 1857-1864.
[93] *See, e.g.*, Judgement, paras. 6915, 6924, 6936, 6946.
[94] *Perišić* Appeal Judgement, para. 48.
[95] *Perišić* Appeal Judgement, para. 69.

on Taylor's part.[96] For example, Taylor himself admitted that by April 1998, anyone providing support to the AFRC/RUF "would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone".[97] Tellingly, Taylor himself also said that there was "no one on this planet that would not have heard through international broadcasts or [...] discussions about what was going on in Sierra Leone".[98]

41. In relation to the magnitude of aid provided,[99] the Majority Opinion found that the SDC "directed large-scale military assistance to the general VRS war effort, not to the commission of VRS crimes".[100] The *Taylor* Trial Chamber found that during a military campaign of terror against civilians,[101] Taylor directly facilitated two of the three main sources of arms and ammunition for the RUF and AFRC/RUF,[102] by means of the "very large"[103] Magburaka shipment in 1997 and the Burkina Faso shipment in 1998 which was "unprecedented in volume".[104] The Trial Chamber also found that Taylor's assistance was causally critical to the attainment of the third main source of materiel of the rebels.[105] In addition, the Trial Judgement is replete with findings of supplies provided directly by Taylor and indirectly through intermediaries and subordinates throughout the Indictment.[106]

42. In light of the notoriety of the events in Sierra Leone, the Trial Chamber's findings, and Taylor's own admissions regarding his knowledge of atrocities, coupled with the extent of the aid Taylor provided to the RUF and AFRC/RUF, the sole reasonable inference is that Taylor specifically directed his assistance to the commission of crimes.

43. The findings upon which the Majority Opinion based its conclusions can each be clearly distinguished from the factual findings in the *Taylor* case. Therefore, though the Prosecution submits that the findings and reasoning set down in *Perišić* regarding specific direction should not be followed by this Appeals Chamber, were it to do so, the *Taylor* Trial Judgement patently

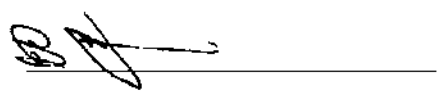
[96] Judgement, para. 6949.
[97] Judgement, para. 6884.
[98] Taylor, Trial Transcript, 14 July 2009 p. 24329.
[99] *Perišić* Appeal Judgement, para. 56.
[100] *Perišić* Appeal Judgement, para. 57.
[101] *See, e.g.*, Judgement, paras. 6788, 6790.
[102] Judgement, paras. 5809, 5830.
[103] Judgement, para. 5409.
[104] Judgement, para. 5525.
[105] Judgement, para. 5830.
[106] *See, e.g.*, Judgement, paras. 4845, 4943, 5026, 5029, 5031, 5089, 5094-5096, 5128, 5163, 5194, 5219, 5221, 5250, 5722, 6910.

shows that Taylor knowingly provided assistance specifically directed to the commission of all of the Indictment crimes, and that his assistance had a substantial effect on the commission of all of those crimes.

V. CONCLUSION

44. For all of the foregoing reasons, the Prosecution submits that the Trial Chamber's conviction of Taylor for aiding and abetting crimes in Sierra Leone should be upheld and Taylor's appeal dismissed.

Filed in The Hague,
14 March 2013
For the Prosecution,



Brenda J. Hollis
The Prosecutor

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SCSL

***Prosecutor v. Taylor*, SCSL-03-01**

ICTR

ICTY

OTHER

SCSL Authorities

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

Article 3
Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

1350)

SCSL-03-01-A
(6975-9531)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 23 November 2012

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC PROSECUTION RESPONDENT'S SUBMISSIONS
WITH CONFIDENTIAL ANNEXES A AND D

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny
Ms. Leigh Lawrie
Mr. Alain Werner
Ms. Kathryn Howarth
Ms. Ann Ellefsen-Tremblay

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

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times "indispensable"[763] to the RUF and AFRC, and substantially contributed to the crimes for which he was convicted.[764]

GROUND 16: The Trial Chamber correctly defined the *mens rea* for aiding and abetting

(i) Overview

275. None of the alleged errors relied on by Taylor under this Ground establish that the Trial Chamber relied on an incorrect standard for *mens rea*. Taylor's assertions that the Trial Chamber erred by failing to apply the 'purpose requirement' of facilitating the principal crimes, misapplied the standard of knowledge for the *mens rea*, and failed to define the *mens rea* in relation to the *actus reus*, are incorrect in law. Taylor's submissions fail to demonstrate any error by the Trial Chamber which would serve to invalidate the decision and warrant appellate intervention.

276. The Trial Chamber correctly applied the elements of the mode of liability of aiding and abetting developed in the jurisprudence of this Appeals Chamber. This standard is consistent with customary international law and the fundamental principles of criminal law. Taylor fails to demonstrate any reason to alter these elements as he proposes or to adopt his position that providing assistance to an insurgency with knowledge that the group utilises an operational strategy of terror against civilians is the "prerogative of states."

(ii) The Trial Chamber properly defined the mens rea for aiding and abetting

277. The Trial Chamber properly set out the *mens rea* for aiding and abetting as:

> i. The Accused performed an act with the knowledge that it would assist the commission of a crime or underlying offence or that he was aware of the substantial likelihood that his acts would assist the commission of [sic] underlying offence; and
>
> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.[765]

278. The Trial Chamber added that while the *conduct* of the accused that amounts to the assistance must itself be *intentional*, it is not required that the accused intend the crime or underlying offence. Rather, it is only required that the accused had *knowledge* that his acts assist the commission of the crime or the underlying offence.[766]

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[763] Judgement, para. 6914.
[764] Judgement, para. 6915.
[765] Judgement, para. 486 (footnotes omitted).
[766] Judgement, para. 487.

279. The Trial Chamber applied the correct elements of the *mens rea* for aiding and abetting. The jurisprudence of this Appeals Chamber as well as of the *ad hoc* tribunals establishes that the *mens rea* for aiding and abetting does not require that the accused's assistance be provided for the "purpose" of facilitating the principal's crimes. Rather, the act must be done with knowledge or awareness of the substantial likelihood that it will facilitate the underlying offence.[767]

(iii) The Trial Chamber's standard comports with SCSL jurisprudence

280. In the *Brima et al. (AFRC)* Appeal, Kamara challenged the Trial Chamber standard for the *mens rea* for aiding and abetting. This Appeals Chamber found that the Trial Chamber was correct in applying the following definition, which was subsequently applied in the Appeal Judgments in *RUF* and *CDF*:

> The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[768]

(iv) Customary international law is consistent with the knowledge standard

281. Taylor attacks the settled law of this Court and that of the *ad hoc* tribunals by asserting that under customary international law, knowledge is insufficient to establish the *mens rea* for aiding and abetting. Rather, Taylor argues that it must be shown that the *actus reus* was performed with "purpose",[769] which he equates with conduct "specifically directed" or "specifically aimed" to assist, encourage or lend moral support to a particular crime.[770] Taylor's claim that the entire *corpus* of jurisprudence of the ICTR, ICTY and SCSL is flawed because customary international law never accepted the knowledge standard is without merit.

282. The United Nations and its Member States have recognised that post-Second World War cases are evidence of state practice at the time.[771] These cases repeatedly applied the knowledge standard as the required *mens rea* for aiding and abetting. In the *Zyklon B* case, a

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[767] *Contra* Taylor Appeal, para. 319.
[768] *AFRC* AJ, paras. 242-43. The same definition was repeated by the Appeals Chamber in both the *CDF* AJ (para. 366) and *RUF* AJ (para. 546).
[769] Taylor Appeal, p. 112, sub-title (b).
[770] Taylor Appeal, paras. 354-55.
[771] The United Nations General Assembly unanimously affirmed the principles of international law recognised by the Nuremberg tribunals. See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal. Also, the United Nations War Crimes Commission ("UNWCC") said that cases before British military courts are declaratory of the state of the law and illustrative of actual state practice. See UNWCC Report I, p. 110. The UNWCC reported on at least 89 cases, e.g. UNWCC Report XV, p. xvi. The UNWCC's reports also support a knowledge standard, see UNWCC Report VII, p. 71 ("This condition is fulfilled if circumstance constituting complicity are present e.g. the [Accused] knew that his action would lead to the commission of a war crime and either intended this consequence or was recklessly indifferent with regard to it").

British military court sentenced two industrialists who supplied poison gas to the Nazis to death because they "*knew* that the gas was to be used for the purpose of killing human beings."[772]

283. The Nuremberg Military Tribunal ("NMT") in the United States occupied zone applied a knowledge standard in the twelve subsequent Nuremberg trials held pursuant to Control Council Law No. 10. In *United States v. Flick*, the Tribunal convicted two defendants for knowingly assisting Nazi crimes. Flick was convicted because he knew of the widespread crimes of the SS and nevertheless contributed money critical to its operations. The Tribunal found that "[o]ne who *knowingly* by his influence and money contributes to the support [of war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes".[773]

284. The French Appellate Tribunal confirmed the conviction of Hermann Roechling, an industrialist, for the inhumane use of forced labour in his factories noting that the *mens rea* for war crimes under the jurisprudence developed by the NMT allowed convictions solely on the basis of knowledge of the criminal activity.[774] The Appellate Tribunal noted that Roechling "knew in what way such foreign workers were supplied."[775] The Appellate Tribunal also found the president of the Board of Directors of the Roechling company, von Gemmingen-Hornberg, guilty of war crimes as he knew of the inhumane treatment of workers in the plant and had authority to change it but failed to act.[776]

285. In *The Einsatzgruppen Case*, Klingelhoefer was convicted for forwarding lists of Communist party functionaries "aware [they] would be executed",[777] and Fendler was convicted because he failed to stop summary executions although he knew of them.[778] In *Schonfeld*, a British military court acquitted defendants Karl Brendle and Eugen Rafflenbeul, as despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.[779]

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[772] *The Zyklon B Case*, p. 101 (emphasis added); see also *FurundŽija* TJ, para. 238 discussing *The Zyklon B Case*.
[773] *The Flick Case*, p. 1217.
[774] *Roechling* AJ, p. 1106.
[775] *Roechling* AJ, p. 1130.
[776] *Roechling* AJ, p. 1136.
[777] *The Einsatzgruppen Case*, p. 569.
[778] *The Einsatzgruppen Case*, p. 572.
[779] See *FurundŽija* TJ, para. 239.

286. The ICTY was mandated to apply rules of international humanitarian law "which are beyond any doubt part of customary law".[780] The Trial Chamber in *Furundžija* correctly determined after an analysis of these cases that under customary international law, knowledge is sufficient to establish the *mens rea*.[781] Taylor wrongly asserts that the analysis in *Furundžija* was incomplete.[782] "*The Ministries Case*" cited by Taylor actually confirms the knowledge standard.[783] In seeking only to rely on *Rasche*, Taylor disregards the fact that the court based Rasche's acquittal not on the lack of proof of his *mens rea*, but on the finding that no *actus reus* was shown, as the court held that the provision of a loan for the purposes of an unlawful enterprise was not a violation of international law.[784] For other accused, the NMT in the *Ministries Case* confirmed the knowledge standard. In *Puhl*'s conviction, the NMT acknowledged that selling valuables of Holocaust victims "was probably repugnant to [Puhl]",[785] but convicted him because he *knew* that the property was stolen.[786] Likewise, while the NMT accepted that *Von Weizsaecker* and *Woermann* might not have approved of the deportation of Jews, the proper question was "whether they knew of the program".[787]

287. The 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission ("ILC Draft Code") provides further evidence that customary international law at the time of the Indictment period provided for aiding and abetting liability based on the knowledge standard. As noted by the *Furundžija* Trial Chamber, the Draft Code was the work of a body of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly.[788] Article 2(3)(d) of the Draft Code imposes criminal responsibility upon an individual who "*knowingly* aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission" (emphasis added).

288. Taylor's analysis of the jurisprudence overlooks that the *Tadić* Trial Chamber at the ICTY also concluded, on the basis of its review of post-World War II cases, that an individual who "knowingly participated in the commission of an offence that violates international

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[780] 1993 Secretary General Res. 808 Report, para. 34.
[781] *Furundžija* TJ, paras. 245, 249.
[782] *Contra* Taylor Appeal, para. 352.
[783] *Contra* Taylor Appeal, para. 353.
[784] See *The Ministries Case*, pp. 621-22; see also Talisman Amicus, p. 11 "[t]hus, Rasche's acquittal resulted from inadequate evidence to establish the *actus reus*, not a *mens rea* of purpose."
[785] *The Ministries Case*, pp. 620-621.
[786] *The Ministries Case*, p. 620.
[787] *The Ministries Case*, p. 478.
[788] *Furundžija* TJ, para. 227.

humanitarian law and his participation directly and substantially affected the commission of that offence" will be found criminally culpable.[789]

289. Further, Ambassador Scheffer, who was relied on in Taylor's submissions, opined that post-World War II jurisprudence from both national military courts and the Nuremberg Military Tribunals consistently applied a knowledge standard of *mens rea* for aiders and abettors, concluding that "[c]ustomary international law applies the knowledge standard for aiding and abetting as a mode of participation."[790]

290. Taylor attacks the jurisprudence of the Special Court and the *ad hoc* tribunals, arguing that customary international law requires that in order to attach liability for aiding and abetting, at a minimum it must be shown that the *actus reus* was performed with "purpose,"[791] which he also equates with the conduct being "specifically directed" or "specifically aimed" to assist, encourage or lend moral support to a particular crime.[792] Taylor's arguments conflate jurisprudence that uses the terms "specifically directed" or "specifically aimed" in discussing the requirement for the *actus reus*. A large body of jurisprudence from the Special Court, the *ad hoc* tribunals, and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the Special Tribunal for Lebanon ("STL") holds that the knowledge of the accused that his conduct will assist a crime, and awareness of the essential elements of the crime, are sufficient to establish the mental elements of aiding and abetting.[793]

(v) The mens rea standard does not require that assistance be "specifically directed" or "specifically aimed" to the commission of crimes

291. The *actus reus* of aiding and abetting is satisfied when it is proven that the accused provided practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the crime.[794] Some of the jurisprudence from the *ad hoc* tribunals defined the elements of aiding and abetting as requiring proof that the accused's conduct was "specifically directed" or "specifically aimed" at assisting, encouraging or morally supporting the perpetration of a crime, but this was always in reference to the *actus reus*, not the *mens rea*. As illustrated below, the concept was meant to express the requirement that conduct must

[789] *Tadić* TJ, para. 692.
[790] *Royal Dutch Petroleum Co.*, Scheffer Supplemental Brief, p. 33.
[791] Taylor Appeal, p. 112, sub-title (b).
[792] Taylor Appeal, paras. 354-55.
[793] See, e.g., *Tadić* AJ, para. 229(iv); *Mrkšić* AJ, para. 159; *Ntawukililyayo* AJ, para. 222; *Duch* TJ, para. 535; STL Applicable Law Decision, para. 227.
[794] Judgement, para. 482.

be sufficiently connected with the crime of the principal to constitute assistance, encouragement or moral support.[795]

292. The House of Lords case of *Gillick v. West Norfolk and Wisbech Health Authority* ("*Gillick*") contains an example of an act not sufficiently connected with the crime of the principal to constitute assistance, encouragement or moral support to a crime. According to Taylor's submission, in this case the court "applied a purpose standard to acquit a person where he had a lawful purpose for his action, despite an awareness of a probability that a crime might be therefore be assisted."[796] In fact, no one was acquitted in *Gillick*, as it was a civil action where a parent sought to prevent a medical clinic from giving advice or treatment for contraception to girls under 16 years of age. The House of Lords held that a doctor who provided advice or treatment for contraception to a girl under 16 was not committing an offence as the doctor was in fact treating girls who were the victims, not the perpetrators, of the crime of unlawful sexual intercourse with a minor.

293. The term "specifically directed" first appeared in the *Tadić* Appeal Judgement when distinguishing the *actus reus* of aiding and abetting from joint criminal enterprise.[797] However, in relation to *mens rea*, the *Tadić* Appeals Chamber stated that "the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime".[798]

294. In *Blagojević and Jokić*, the Appeals Chamber reviewed the history of the "specifically directed" language and explained its meaning in relation to *actus reus*, stating that the conduct or omission of the aider and abettor must contribute to the crime charged:

> The Appeals Chamber observes that while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime.[799]

295. In *Mrkšić*, the ICTY Appeals Chamber squarely addressed the "specific direction" issue and stated that "the Appeals Chamber has confirmed that 'specific direction' is not an

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[795] In the *RUF* TJ, the *actus reus* for aiding and abetting was defined as when an accused "perpetrates an act or an omission specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime and that this act or omission of the aider and abettor must have a substantial effect upon the perpetration of the crime" (para. 276). In contrast, the *mens rea* was defined as "knowledge that the acts performed by the Accused assist the commission of the crime" (para. 280).
[796] Taylor Appeal, para. 363.
[797] *Tadić* AJ, para. 229(iii).
[798] *Tadić* AJ, para. 229(iv).
[799] *Blagojević & Jokić* AJ, para. 189.

essential ingredient of the *actus reus* of aiding and abetting".[800] *Mrkšić* reiterated that the *mens rea* requirements for aiding and abetting are knowledge that the acts performed assist in the commission of the offence, and awareness of the essential elements of the crime.[801] The Appeals Chamber recalled that it had previously rejected an elevated *mens rea* standard, "namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct".[802]

296. ICTR jurisprudence is consistent, holding "[t]he requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal".[803] While jurisprudence defining the *actus reus* of the offence often includes language suggesting that the conduct of the accused must be "specifically aimed" at a crime, meaning it must make a substantial contribution to the crime, ICTR cases have consistently held that the *mens rea* required is simply knowledge that the conduct assists the crime. In *Ntawukulilyayo*, the ICTR Appeals Chamber held "the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime".[804] A few paragraphs later the Judgement states, "The Appeals Chamber recalls that the *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator".[805]

297. In discussing the substantial effect requirement, the *Kalimanzira* Appeals Chamber held that the aider and abettor must commit acts "specifically aimed" at assisting a crime, but reiterated "[T]he requisite mental element ... is knowledge that the acts performed assist the

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[800] *Mrkšić* AJ, para. 159, citing *Blagojević & Jokić* AJ, paras. 188 and 189. Taylor Appeal, para. 356, mischaracterises the decision as being made with one dissent on this point. The dissent of Judge Vaz is unequivocal—her disagreement with the majority was on whether it was proven that Šljivančanin possessed the required *mens rea* for aiding and abetting murder by omission. Judge Vaz stated that the *mens rea* test would be whether "Šljivančanin knew that (i) killings of the prisoners of war were likely to take place at Ovčara and that (ii) his failure to take action in this regard would assist the commission of the murders." (para. 2 of Dissent of Judge Vaz). Notably, the test as articulated by Judge Vaz does not include specific direction.

[801] *Mrkšić* AJ, para. 159.

[802] *Mrkšić* AJ, para. 159, citing *Blaškić* AJ, para. 49 and *Vasiljević* AJ, para. 102. See also *Ntakirutimana* AJ, paras. 501, 508.

[803] *Ntagerura* AJ, para. 370. See also *Karera* AJ, para. 321 ("the *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abetter assist in the commission of the crime by the principal").

[804] *Ntawukulilyayo* AJ, para. 214, citing *Karera* AJ, para. 321, *Nahimana* AJ, para. 482.

[805] *Ntawukulilyayo* AJ, para. 222 citing *Kalimanzira* AJ, para. 86, *Rukundo* AJ, para. 53, *Nahimana* AJ, para. 482.

commission of the specific crime of the principal perpetrator".[806] The *Rukundo* Appeal Judgement defined the *actus reus* for aiding and abetting identically (acts "specifically aimed at assisting")[807] but reiterated that "the requisite mental element is knowledge that the acts performed assist the commission of the specific crime of the perpetrator".[808]

298. The ECCC's Trial Chamber has held that "[l]iability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed ... and that the accused was aware that his conduct assisted the commission of that crime".[809] The STL's Appeals Chamber affirmed a "knowledge" standard in customary international law and emphasised that "aiding and abetting does not presuppose that the accomplice shares a common plan or purpose with the principal perpetrator or his criminal intent".[810]

299. Therefore, the jurisprudence from all of the international courts is consistent – knowledge or awareness of the substantial likelihood that the accused's conduct will assist the crime is the standard for the *mens rea* of aiding and abetting, and no further showing of a higher mental state, intent or purpose, is required. This jurisprudence reflects customary international law as it existed prior to the Indictment period in *Taylor*. The ICTY deals with serious violations of international law in the former Yugoslavia since 1991. The ICTR mandate covers such crimes in Rwanda 1994. The ECCC mandate covers the years 1975-1979. Thus all of these courts deal with crimes committed before the start of the Indictment period in *Taylor*, 30 November 1996.

(vi) Article 25(3)(c) of the ICC Statute does not codify the elements on aiding and abetting under ICL

300. Taylor wholly relies on the ICC Statute to argue that, with regards to the *mens rea* for aiding and abetting, customary international law requires a standard higher than mere knowledge of the perpetrator's intended crime and awareness that his assistance facilitates the crimes. His argument that the minimum standard for aiding and abetting under customary international law is reflected in Article 25(3)(c) of the ICC Statute, which makes criminally responsible those who "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission",[811] is fundamentally flawed.

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[806] *Kalimanzira* AJ, para. 86.
[807] *Rukundo* AJ, para. 52.
[808] *Rukundo* AJ, para. 53.
[809] *Duch* TJ, para. 535.
[810] STL Applicable Law Decision, paras. 227, 206, 225, 211-12 (explaining its analysis of CIL).
[811] Taylor Appeal, paras. 319, 338 *et seq*.