INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

International criminal law—Special Court for Sierra Leone—individual criminal responsibility—modes of liability—aiding and abetting—planning

PROSECUTOR v. TAYLOR. Case No. SCSL-03-01-A. *At* http://www.sc-sl.org.
Special Court for Sierra Leone Appeals Chamber, September 26, 2013.

On September 26, 2013, the appeals chamber (Chamber) of the United Nations–backed Special Court for Sierra Leone (SCSL) unanimously upheld the conviction of former Liberian president Charles Ghankay Taylor on all eleven counts in the indictment for crimes against humanity, war crimes, and other serious violations of international humanitarian law committed during the latter half of the Sierra Leonean civil war.[1] Taylor's conviction is significant. He is the first former African president to have been indicted, fully tried, and then convicted by an international penal tribunal for involvement in the commission of atrocity crimes in a neighboring state.

The trial chamber had found Taylor guilty, on April 26, 2012, of *aiding and abetting* and *planning* murder, rape, sexual slavery, enslavement, and other inhumane acts; acts of terrorism, violence to life, health, and physical or mental well-being of persons; outrages upon personal dignity, cruel treatment, pillage; and conscripting or enlisting children under fifteen into armed forces or groups or using them to participate actively in hostilities.[2] Taylor did not personally commit the crimes. They were carried out throughout Sierra Leone by members of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) between November 30, 1996, and January 18, 2002—specifically, in the Bombali, Kailahun, Kenema, Kono, and Port Loko Districts, in addition to the Western Area and the capital Freetown (paras. 12–13). The appellate court also upheld Trial Chamber II's sentence of Taylor to a single term of fifty years' imprisonment on May 30, 2012.[3] The sixty-five-year-old Taylor has since been transferred to Belmarsh Prison, where he will serve out his punishment under an enforcement-of-sentence agreement between the SCSL and the United Kingdom.[4]

[1] Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment (Spec. Ct. Sierra Leone Sept. 26, 2013) [hereinafter Appeals Judgment]. The SCSL decisions and court documents cited here are available online at http://www.sc-sl.org.

[2] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Judgment, para. 12 (Spec. Ct. Sierra Leone Apr. 26, 2012) [hereinafter Trial Judgment] (reported by Triestino Mariniello at 107 AJIL 424 (2013)).

[3] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Spec. Ct. Sierra Leone May 30, 2012) [hereinafter Sentencing Judgment] (reported by Mariniello, *supra* note 2, together with the trial judgment).

[4] Prosecutor v. Taylor, Case No. SCSL-03-01-ES-1391, Order Designating State in Which Charles Ghankay Taylor Is to Serve His Sentence (Spec. Ct. Sierra Leone Oct. 4, 2013); SCSL Press Release, Charles Taylor Transferred to the UK for the Enforcement of His Sentence (Oct. 15, 2013), *at* http://www.sc-sl.org/PRESSROOM/RegistryPressReleases/2013/tabid/235/Default.aspx.

The defense alleged that forty-five errors of law and fact had resulted in a miscarriage of justice. The Chamber's judgment divided Taylor's appeal, half of which related to the merits of the case, into six categories and considered each in turn. In the main, the appellant contested the assessment of the evidence by the trial chamber: its determination that the RUF/AFRC's operational strategy, which was known to the appellant and conceived with substantial help by him, was characterized by a deliberate campaign of crimes against the civilian population of Sierra Leone; its interpretation and application of the law of individual criminal responsibility; its commission of irregularities in the judicial process, implying that the appellant had not received a fair trial; its entry of cumulative convictions for the separate crimes against humanity of rape and sexual slavery; and, finally, its approach to the calculation of Taylor's sentence, which the defense claimed was manifestly unreasonable (paras. 15–22).

The prosecution alleged four errors: (1) and (2) that the trial chamber had failed to find that, in addition to aiding and abetting and planning crimes, Taylor had *ordered* and *instigated* the commission of crimes in Sierra Leone; (3) that the trial chamber had incorrectly held that the locations of certain crimes had been improperly pleaded in the indictment (para. 23); and (4) that the sentence should be increased because fifty years did not adequately reflect the gravity and totality of the appellant's criminal conduct and overall culpability (para. 586).

The bulk of the 349-page appeals judgment focused on Taylor's appeal. Before turning to the merits, the Chamber briefly examined the applicable standard of review. It observed that each appellant had the burden of establishing any alleged procedural errors, any errors on a question of law invalidating the decision, and any alleged errors of fact that had led to a miscarriage of justice. Errors of law must be precisely described, must show how the particular error invalidates the decision, and would not be taken into account unless they would affect the outcome of the trial. As to errors of fact, because the trial judges were best placed to assess the witnesses and evidence, their factual findings would enjoy a margin of deference. Their legal and factual conclusions would therefore be overturned only where no reasonable trier of fact could not have accepted them (paras. 24–31).

The Chamber then turned to the core of the defense's appeal: that is, the alleged errors in the trial chamber's evidentiary evaluation. The appellate judges rejected the defense's submission that Taylor's conviction was essentially based on hearsay and uncorroborated evidence (para. 91). The trial court had correctly relied upon a combination of direct and circumstantial evidence, supplemented by properly assessed hearsay evidence, which can itself be sufficient for a conviction in international criminal trials. The appeals judges also found no error in the lower court's findings regarding the use of adjudicated facts (paras. 116–18) or in the specific factual findings regarding certain incidents as related by twenty-two witnesses, as well as in the trial chamber's assessment of the credibility of accomplices who allegedly received some type of payment or benefit after testifying. The trial judges had correctly articulated the law, which gave them broad discretion to evaluate the totality of the evidence, including as regards a reasonable inference of innocence and in keeping with ensuring the general fairness of the proceedings. They had thoroughly considered the parties' submissions, weighed the credibility and reliability of witness and documentary evidence, and ultimately applied the correct standard of proof of guilt beyond a reasonable doubt to justify each of the convictions. The trial court's cautious approach to the application of the standard of proof had resulted in reasonable factual findings (paras. 143, 180, 237). The evidentiary complaints of the defense therefore lacked any merit.

The trial chamber had found that the RUF/AFRC's principal modus operandi was to target and terrorize Sierra Leonean civilians (paras. 253–59). That campaign, which was linked to the military strategy and the commission of the crimes charged in the indictment, was connected with the rebels' political and other strategic objectives. The defense claimed that, on the evidence adduced at trial, no reasonable trial chamber would have found that the RUF/AFRC war strategy was directed at committing crimes. The Chamber disagreed. It perceived a consistent pattern of widespread and systematic attacks against civilians throughout the various phases of the Sierra Leonean conflict, which had involved the commission of many crimes, including killings, enslavement, physical and sexual violence, rape, and looting—all of them crimes that shocked the "conscience of mankind" (para. 297). The findings confirmed that the pattern of violence was organized, ordered, directed, and committed by RUF/AFRC leaders, such as certain commanders and Taylor associates like Sam Bockarie, Johnny Paul Koroma, Issay Sesay, and Alex Tamba Brima. Bockarie had worked closely with Taylor in planning particular attacks and was among those who had encouraged his subordinates to commit the heinous acts, among others, of killing, mutilating, raping, abducting, and enslaving men, women, and children, and burning homes and settlements (paras. 275, 278, 281). Finally, the extreme violence that had made the Sierra Leonean war notorious was used to achieve various, even if sometimes changing, RUF/AFRC goals throughout the conflict, such as to force the government to the negotiating table.

Turning to Taylor's acts, conduct, and mental state, the Chamber again affirmed the trial chamber's rulings. It reasoned that the defendant had, both directly and indirectly, supplied arms and ammunition to the RUF/AFRC rebels, as well as to military personnel known as Liberian fighters. He engaged in supplying weapons from 1997 to 1998, and then from 1999 through 2001, and even occasionally facilitated large arms shipments from third states like Burkina Faso. In addition to providing the rebels with communications, food, safe haven, and logistical and other material support, Taylor regularly consulted with their leadership and offered operational and strategic advice, moral support, and encouragement. In sum, his assistance to the rebels, in return for which he received diamonds, substantially enhanced their capacity to implement their operational strategy and to carry out attacks against the local civilian population (paras. 303–43).

Although the first part of the appeals judgment is dominated by discussion of the alleged evidentiary errors, Taylor's most significant grounds of appeal did not relate to the facts; they related to the two modes of liability connecting him to the crimes for which he was convicted. The defense alleged that the trial chamber had erred in its articulation of the *actus reus* (conduct) and *mens rea* (intent) of individual criminal responsibility under Article 6(1) of the SCSL Statute. In particular, it argued that the legal tests applied by the trial judges for (1) *aiding and abetting*, and (2) *planning* liability were erroneous.

First, on *aiding and abetting*, the defense claimed, with regard to the conduct element, that the trial court should have shown that Taylor had provided assistance to the perpetrators who committed the actual crimes, and that the assistance he gave was directly used to engage in specific offenses. Following a detailed review of existing law and precedents from the SCSL, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and other post–World War II tribunals, the Chamber dismissed this claim. It found that, in accordance with the Statute and customary international law, trial judges must consider whether, by assisting, encouraging, or supporting the planning, preparation, or execution of a plan, an accused's acts and

conduct had a substantial effect on some or all of the crimes committed in furtherance of that strategy (paras. 349, 352). This crucial element linked the appellant to the crimes. The trial judges had determined that Taylor, especially during his time as president of Liberia, had offered various types of logistical, operational, and other support. He did so knowing that the rebels' strategy was to commit crimes against Sierra Leonean civilians. Thus, it had been properly established beyond a reasonable doubt that his acts and conduct consisted of practical assistance, encouragement, or moral support, which "had a substantial effect on the commission of the crimes" (paras. 370, 395).

Second, the defense argued that the trial chamber's statement of the law of aiding and abetting had violated the principles of personal culpability because it criminalized any assistance provided to a party to an armed conflict, failed to account for the apparently neutral character of some assistance, and effectively imposed criminal responsibility on Taylor for his membership in a criminal organization (para. 346). The Chamber rejected all these arguments. It reiterated that, in conformity with the principles of personal culpability, which had not been violated, an accused's acts and conduct must have a substantial effect on the commission of the offenses for that person to be held criminally responsible for them under the theory of aiding and abetting liability. This threshold was sufficient to distinguish between those who may have had an effect on *noncriminal* activity and those who had had a substantial effect on the commission of crimes (paras. 367–68, 392, 395, 399). When this reasoning was properly applied to the facts of a given case, as the trial judges had done, no reversible error was made (para. 400).

On the criminal intent required for aiding and abetting, the defense submitted a three-pronged argument that the trial court had erred in using a "knowledge" instead of a "purpose" mental standard to assess whether Taylor was aware of the likely consequences of his acts (para. 408). The Chamber dismissed the submission. It determined, after canvassing the authorities from other ad hoc international tribunals and customary international law, that *knowing* participation in the commission of offenses establishes individual criminal responsibility (para. 438). The trial court had correctly stated the test, which requires that either the accused "*knew* that his acts would assist the commission of the crime by the perpetrator," or alternatively, "that he was aware of the substantial likelihood" that his acts would assist the perpetrator in committing the crime (para. 414).[5] Taylor was not found guilty of providing some general and benign assistance to the RUF/AFRC but, rather, of specific assistance, encouragement, and moral support under circumstances where he knew of the rebels' operational strategy and their intention to commit crimes, was aware of the essential elements of those offenses, and intended that his contributions assist in their commission (para. 445).

The Chamber declined the defense's invitation to adopt instead the recent ICTY jurisprudence, most notably in the *Perišić* judgment, which had adjudged that "specific direction" was an element of aiding and abetting.[6] Under that theory, where the accused neither is a part of an organization whose exclusive purpose is to commit crimes nor endorses a policy pertaining to their commission, individual criminal responsibility will not accrue except when the relevant assistance was specifically directed toward the commission of the criminal activities. The SCSL judges considered the ICTY appeals chamber's precedent and found that it was not supported

[5] Quoting Prosecutor v. Brima, Case No. SCSL-2004-16-A, Appeals Judgment, para. 242 (Feb. 22, 2008) (emphasis added).

[6] Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgment, para. 36 (Feb. 28, 2013) (reported by Christopher Jenks at 107 AJIL 622 (2013)).

by authoritative analysis. Thus, there was no reason to depart from the established SCSL case law under which, for aiding and abetting liability to be established, it suffices for the prosecution to show that the accused's acts of assistance and encouragement had a "substantial effect on the commission" of the various charged crimes such as those for which Taylor had been found guilty (paras. 480–81).

Regarding *planning* as a mode of liability, the three-part defense challenge asserted that the trial chamber had erred when it found as proved beyond a reasonable doubt that Taylor had planned "concrete crimes" in Freetown, Makeni, and Kono (para. 488). The principal issue turned on the link between the "Taylor-Bockarie Plan" for the attack on Freetown in January 1999 and crimes committed by Bockarie's subordinates during and after the attack, and whether that specific plan could be said to have contributed substantially to the commission of those crimes. According to the Chamber, the correct test for the *actus reus* of planning "is that an accused participated in designing an act or omission and thereby had a substantial effect on the commission of the crime" (para. 494).[7] To incur criminal responsibility for planning an offense, an accused need not design the plan alone; nor must he even be the "originator of the design or plan" (*id.*). Applying this standard to the evidence, the Chamber found it reasonable to conclude that Taylor had instructed Bockarie, with whom he had collaborated in hatching the Freetown attack, to make it "fearful" (para. 524). Extensive evidence confirmed that Bockarie's subordinates had subsequently received directives to implement that specific order. The communications between them, and among the respective RUF/AFRC commanders, repeated that instruction and demonstrated Taylor's intention that crimes be committed in Freetown. Consequently, the Chamber upheld the conviction for planning crimes committed during the January 1999 invasion of Freetown and the related attacks on Makeni (but not for those on Kono, which the trial chamber had not substantiated and for which the verdicts were accordingly overturned) (paras. 565, 572).

In the last part of its consideration of Taylor's appeal, the Chamber rejected the alleged errors relating to the entry of cumulative convictions for rape and sexual slavery as crimes against humanity. These were defensible conclusions, because each of those offenses required proof of materially distinct elements, which had been independently established on the facts (paras. 575–78). The appellate judges then disposed of the remaining arguments by Taylor that his fair trial rights had been violated because the trial bench (1) was improperly constituted and lacked independence; (2) had failed to deliberate in reaching its judgment on his guilt; (3) had engaged in several irregularities regarding the alternate judge; and (4) had failed to give the appellant a *public* trial (para. 596). But Taylor had enjoyed a public trial, to which he was entitled under Article 17(2) of the SCSL Statute. Furthermore, the claim that the three-member trial chamber had not deliberated was untenable, especially given its lengthy judgment, as was the assertion that the independence of one of the three trial judges, who had been appointed to the bench of the International Court of Justice, was compromised. Finally, the defense had not proved prejudice to Taylor as a result of the trial chamber's removal of the alternate judge's name from the judgment after he expressed, contrary to the rules, his personal views on the appellant's innocence as a "dissenting opinion" (paras. 611, 621, 625, 635).[8]

[7] Emphasis added; footnote omitted.

[8] See, for more on this controversy, the op-eds by Charles C. Jalloh, *The Verdict(s) in the* Charles Taylor *Case*, JURIST (May 14, 2012), *at* http://jurist.org/forum/2012/05/charles-jalloh-taylor-verdict.php, and *Why the Special*

The Chamber, having addressed most of the defense's arguments, turned to the prosecution's appeals. The prosecution submitted that, on the basis of the evidence before them, the trial judges should have additionally convicted Taylor of *ordering* or *instigating* crimes committed by RUF/AFRC forces. Noting that the triers of fact must be guided by the interests of justice and the accused's rights, the Chamber affirmed that the modes of liability of "ordering" and "instigating" were "inadequate characterisations" of the appellant's conduct (para. 593). The trial court had "extensively considered Taylor's authority and leadership role" (para. 590), and the Chamber accordingly found that aiding and abetting "fully captures Taylor's numerous 'interventions' " over a five-year period (para. 594),[9] the variety of assistance he had provided to the RUF/AFRC leadership in the implementation of its terroristic war strategy, and the cumulative impact of his actions on the "tremendous suffering caused by the commission of the crimes" (*id.*).[10]

The prosecution also contested the trial chamber's finding that aiding and abetting generally warrants a lesser sentence than the other forms of criminal participation. Here the Chamber agreed. A sentence should be based on the convicted person's actual conduct and on an assessment of the totality of its gravity (para. 663). The plain text of the SCSL Statute did not establish any hierarchy in forms of liability, which would deviate from the mandatory individualized assessments of sentences, the principle of individual culpability, and the rights of the accused. Consequently, the trial judges' holding that there was a general presumption that aiding and abetting liability warrants a lesser sentence was unfounded under the Statute, the rules of court, and customary international law (para. 670). This finding was therefore reversed.

The Chamber dealt with the defense's arguments on sentencing in this section of the judgment, which were fivefold: (1) that the trial chamber had erred in considering and giving weight to three aggravating factors that the prosecution did not raise; (2) that the judges had wrongly invoked the stature of Taylor as a head of state when the crimes were committed and their extraterritorial nature as aggravating factors to increase his sentence; (3) that they had failed to account for his expressions of remorse in mitigation; (4) that they had not acted consistently with the tribunal's sentencing practice for those convicted only of aiding and abetting; and (5) that his sentence of fifty years was simply unreasonable in view of his important peacekeeper role, the fact that he would serve his sentence in a foreign country, and his age (paras. 672–96).

The Chamber dismissed all of these appeals. According to the appellate judges, it was within the discretion of the trial court to consider additional aggravating factors and to decline to factor into its calculation of the sentence what it deemed to be Taylor's insincere expressions of remorse. In sum, having regard to the totality of the circumstances, including the gravity of his offenses, his conduct, and his individual circumstances, the appellant's fifty-year sentence was held fair and reasonable (paras. 707–08).

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Although several symbolic, political, and other factors make the trial remarkable, from an international criminal lawyer's perspective the *Taylor* appeals judgment will probably be best

Court for Sierra Leone Should Establish an Independent Commission to Address Alternate Judge Sow's Allegation in the Charles Taylor *Case*, JURIST (Oct. 1, 2012), *at* http://jurist.org/forum/2012/10/charles-jalloh-sow-scsl.php.

[9] Quoting Sentencing Judgment, *supra* note 3, para. 76.

[10] Quoting *id.*, para. 71.

remembered for the legal standard of aiding and abetting liability that it upheld to maintain the appellant's conviction. Because the defense had essentially argued that "specific direction" is an element of aiding and abetting, as the ICTY appeals chamber had ruled in the *Perišić* case in February 2013,[11] the SCSL Chamber had to confront the question whether that standard is "an element of the *actus reus* of aiding and abetting liability under *customary international law* prevailing during the Indictment Period" between November 30, 1996, and January 18, 2002, to make it potentially applicable to Taylor (para. 473, emphasis added). If so, it would mean that the trial chamber had applied the wrong test by holding that "[t]he *actus reus* of aiding and abetting does not require 'specific direction'" (para. 466).[12] The guilty findings entered for aiding and abetting, which constituted the bulk of Taylor's convictions, would then have had to be reversed. On the other hand, if the specific direction standard was inapplicable as not required under customary international law, by implication the trial chamber's convictions of the appellant were on solid ground and could stand.

After canvassing the parties' submissions in detail and the findings reached by the trial judges regarding the *actus reus* of aiding and abetting liability, the Chamber clarified that the "*Perišić* Appeals Chamber did not assert that 'specific direction' is an element under customary international law" (para. 476). The SCSL judges reasoned that the appeals chamber of the ICTY and that of the International Criminal Tribunal for Rwanda (ICTR), which were basically the same body, were merely identifying and applying internally binding precedent in their court instead of purporting to locate customary international law more broadly. As the SCSL was not bound by ICTY authority, even though Article 20(3) of the Statute directs them to be "guided" by it, the Chamber would adopt its position only if the reasoning was found persuasive. It was not (paras. 477–78). After carrying out an independent review of the various authorities, including prior tribunal case law, the work of the International Law Commission, and state practice, the Chamber concluded that the better view of the current law was that aiding and abetting liability is established by acts and conduct of the accused with a substantial effect on the commission of the crimes rather than the particular way he assisted in the commission of the crimes. Such assistance should be evaluated on a case-by-case basis and against the totality of the evidence. To deviate from that standard would require careful analysis of past jurisprudence and the marshalling of reasons warranting a departure from existing law (paras. 475, 482–86).

The Chamber's conclusion in the *Taylor* case was a victory for the SCSL prosecution, while for the defense it was clearly a disappointment. Outside the tribunal, legal commentators are also divided. Some scholars side with the SCSL position that customary international law does not, as of now, require a showing that specific direction is an element of the *actus reus* of aiding and abetting. For example, James Stewart has argued that the novel test that the ICTY introduces in *Perišić* was not only unnecessary and inconsistent with that court's own prior jurisprudence, but also "without equivalent in any national law," seemingly "inconsistent with foundational principles of criminal law," and in many ways "seriously disrupti[ve]" of the international law of complicity.[13] Moreover, he—as well as others such as Christopher Jenks—has

[11] *See* text at note 6 *supra*.

[12] Quoting Trial Judgment, *supra* note 2, para. 484.

[13] James G. Stewart, *The ICTY Loses Its Way on Complicity—Part 1*, OPINIO JURIS (Apr. 3, 2013, 9:00 AM EDT), *at* http://opiniojuris.org.

wondered whether, in the context of its recent statements of the law of aiding and abetting liability, the ICTY may be drawing several distinctions that in practice are untenable, both from the point of view of establishing proof and for inattention to the diverse ways that powerful persons may aid and abet atrocity crimes in modern conflicts.[14]

On the other hand, other commentators have dismissed the Chamber's findings in the *Taylor* case as irrelevant obiter dicta. Yet others have sharply criticized the SCSL for allegedly offering an "incoherent" and "selective" analysis of the customary international law of aiding and abetting. For instance, while disclaiming endorsement of the *Perišić* conception of the specific direction requirement, Kevin Heller claims that the SCSL failed to explain why that threshold must have a customary foundation, and that it misread certain authorities and ignored others whose position was contrary to its own.[15] Yet a fair reading of the judgment shows that the Chamber had to address the point because it was central to Taylor's appeal. Moreover, the judges explicitly set out that it is only if the specific direction standard is found to exist at custom that its applicability to that case could arise.[16] As to misreading some authorities, Heller suggests that the judges misconstrued the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which in Article 2(3)(d) states that "[a]n individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual . . . (*d*) [k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission."[17] He faults the SCSL for ignoring "directly," perhaps assuming that the Chamber quoted the draft code itself instead of the numerous cases from the ad hoc tribunals ultimately tracing back to the ICTY, which uses that language.[18] He ignores factual findings in the judgment where the judges felt that Taylor "directly" (and "indirectly" through intermediaries) supplied weapons and other crucial logistics to the RUF/AFRC and thus "substantially" contributed to the commission of crimes in Sierra Leone. Moreover, even the ILC document was clear that liability for aiding and abetting would follow where the support supplied by a perpetrator includes "providing the means for its commission," which on the facts of *Taylor*, is what a total of eight SCSL judges unanimously agreed upon, as Judge Fisher pointed out in her separate concurring opinion (sep. op., para. 720). Finally, Heller argues that the Chamber adopted recklessness as the *mens rea* required for aiding and abetting liability. That is simply not the case. The judges observed, consistently with prior jurisprudence from both the SCSL and other ad hoc international tribunals, that the accused must either know or have awareness of the substantial likelihood that crimes will result. The judges stated unequivocally that knowledge was the basis for the trial chamber's conviction of the appellant, which it ultimately upheld (paras. 415, 431–38, 445).

One of the more troubling aspects of the *Perišić*, and now the *Taylor*, appeals judgments is that there seems to be a split in the international criminal tribunal jurisprudence over the legal

[14] *See* Jenks, *supra* note 6, at 625–27.

[15] Kevin Jon Heller, *The SCSL's Incoherent—and Selective—Analysis of Custom*, OPINIO JURIS (Sept. 27, 2013, 12:30 AM EDT), *at* http://opiniojuris.org/author/kevinjonheller/page/4/.

[16] See Appeals Judgment, para. 473, and more broadly, paras. 457–65, 474–80.

[17] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 2(3)(d), *in* Report of the International Law Commission on the Work of Its Forty-Eighth Session 17, 18, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/57/10 (1996).

[18] *See, e.g.*, Appeals Judgment, paras. 368 & nn.1136–39; 432.

ingredients required for the basic mode of aiding and abetting liability. The first of these two incompatible standards is articulated in the recent ICTY jurisprudence and asserts that the *actus reus* of aiding and abetting requires proof of specific direction; and the second, articulated by the SCSL, states that specific direction is not required in addition to proof that the accused substantially contributed to the commission of the crimes. The former, itself an apparent departure from the prior ICTY precedent now espoused by the SCSL, seems less in accordance with the practice of national criminal courts.[19] It is also probably unrealistic in terms of the threshold it requires for modern types of conflict and the wide range of assistance that political and military leaders are capable of providing to others, such as rebel groups, to fuel heinous atrocities. Conversely, the latter appears more in accordance with the threshold typically required for proof of accomplice liability in criminal law. As Beth van Schaak has explained, the stricter *Perišić* standard makes it more difficult to prosecute individuals who knowingly furnish assistance to rebel and other nonstate groups that engage in the commission of international crimes.[20]

Finally, the judicial and scholarly debate on the proper customary international law standard for the *actus reus* of aiding and abetting liability is not purely academic. It has tremendous practical implications. Indeed, though the judgments of the ICTY and ICTR appeals chamber have contributed vastly to the development of international criminal law, the string of high-profile acquittals on technical legal points over the past two years risks undoing this important jurisprudential legacy built since 1993. That case law could be useful to the International Criminal Court, which will be the last such court standing once the ad hoc tribunals close down. One hopes that the ICTY appeals chamber will take the opportunity presented by the *Taylor* appeals judgment to clarify its position on aiding and abetting liability in one of its upcoming appeals.[21]

CHARLES CHERNOR JALLOH
Florida International University College of Law

[19] James G. Stewart, *"Specific Direction" Is Unprecedented: Results from Two Empirical Studies*, EJIL:TALK! (Sept. 4, 2013), *at* http://www.ejiltalk.org.

[20] Beth van Schaak, *The* Charles Taylor *Appeal and the Scope of Accomplice Liability,* JUST SECURITY (Oct. 22, 2013, 1:00 PM), *at* http://justsecurity.org/tag/charles-taylor/.

[21] After this report was finished and about to go to press, the ICTY appeals chamber issued a significant clarification of aiding and abetting liability in international criminal law. In *Prosecutor v. Šainović*, Case No. IT-05-87-A, paras. 1617–25 (Jan. 23, 2014), the appeals chamber explicitly rejected the *Perišić* position on specific direction, which had led to material confusion in the law. For that reason, and given the need for legal certainty and predictability of the criminal law, it was necessary to revisit the jurisprudence and the customary international law status of aiding and abetting liability. The appeals chamber's careful subsequent review of national and international authorities amply showed that specific direction was never a legal ingredient of the *actus reus* of aiding and abetting. Thus, much like the SCSL appeals chamber's conclusion in *Taylor* (but notably with only cursory footnote references to it), the ICTY appeals chamber's *Šainović* judgment confirmed that, in terms of the oft-debated conduct element, aiding and abetting requires only the provision of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," a standard that also "reflects customary international law" (*id.*, paras. 1626, 1649). This welcome clarification, from the bench presided over by the partially dissenting judge in *Perišić* (Liu Daqun), helps to repair the recent fragmentation of the law on aiding and abetting in the ad hoc tribunals.