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Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors

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Abstract
Despite the general consistency in the treatment of international humanitarian law by international courts and tribunals, recent decisions have seen significant disagreement regarding the scope of indirect responsibility for individuals and States for the provision of aid or assistance to non-State actors that perpetrate war crimes. The divisions at the international criminal tribunals with regard to the "specific direction" element of aiding and abetting are reminiscent of the divergence between the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia on the question of State responsibility for supporting or assisting non-State actors that engage in violations of international law. This article analyzes this jurisprudence on individual and State responsibility for the provision of support to non-State actors that breach

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international humanitarian law, and considers the interaction and interrelationship between these related but distinct forms of responsibility.

Keywords: war crimes, non-State actors, individual responsibility, aiding and abetting, specific direction, State responsibility, direction, overall control, effective control.

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International humanitarian law (IHL), and especially the law of war crimes, has enjoyed a renaissance in recent years. This is due in large part to the work of the various international criminal tribunals established during the 1990s, most prominently the International Criminal Tribunal for the former Yugoslavia (ICTY), as well as to the establishment of the permanent International Criminal Court (ICC). While the creation of international courts with jurisdiction over war crimes has been an important development in terms of the enforcement of humanitarian law, the jurisprudence of the tribunals has also considerably advanced the substantive content of the law applicable in situations of armed conflict. Theodor Meron, the current president of the ICTY, wrote as early as 1998 that international humanitarian law developed more in the early years of the *ad hoc* tribunals "than in the half-century following Nuremberg".[1] There is little doubt that ICTY case law has contributed greatly to the elaboration of the scope and content of humanitarian law, as well as addressing the customary international law status of its rules and the question of criminal liability for its most serious breaches.[2] Its pronouncements on various aspects of war crimes have proved especially influential in shaping the Rome Statute and in guiding some of the ICC's early decisions.[3] International courts and tribunals have been generally consistent over the past two decades in their treatment of matters of IHL, but they have not always been in agreement with regard to the precise parameters of international responsibility for war crimes.

The current crop of international criminal courts are specifically tasked with assessing the criminal liability of individuals for international offences and have accordingly devoted considerable attention to adjudicating upon the elements of specific war crimes, as well as determining responsibility for those crimes.[4] The question of responsibility has proven particularly challenging at times, given the usual focus by international prosecutors on senior officials who

1 Theodor Meron, "The Hague Tribunal: Working to Clarify International Humanitarian Law", *American University International Law Review*, Vol. 13, 1998, p. 1512.

2 See generally Robert Cryer, *The Development of International Humanitarian Law by the International Criminal Tribunals*, Oxford University Press, Oxford, 2015; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2014; Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi Judicial Bodies*, TMC Asser Press, The Hague, 2014.

3 See, for example, ICC, *Prosecutor* v. *Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber 1), 29 January 2007, paras 210–211 and 277–281; ICC, *Prosecutor* v. *Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber 1), 14 March 2012, para. 541.

4 See generally Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005; William A. Schabas, *The UN International Criminal Tribunals*, Cambridge University Press, Cambridge, 2006.

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may have been remote from the actual perpetration of offences. This is especially so in the context of war crimes physically carried out by individuals or groups that are not directly subordinate to an accused, but to whom some form of aid or assistance has been provided. Recent decisions from the *ad hoc* tribunals have created uncertainty regarding the law on complicity, despite almost twenty years of concerted judicial application of the rules regarding international responsibility for war crimes. This jurisprudence has been fractured in relation to the requirements for individual criminal responsibility in cases of aid or assistance, with the "specific direction" element of aiding and abetting as a mode of criminal liability proving particularly controversial.

The ICTY has recently entered the completion phase of its activities – the Hague Branch of the Mechanism for International Criminal Tribunals has been operational since July 2013 – yet the Tribunal has found itself in the midst of a legal and political storm, in large part because of Appeals Chamber disputes concerning the contours of complicity. There have been acquittals of several high-level defendants, a departure from ICTY case law by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) and, somewhat remarkably, the forceful rejection by the ICTY Appeals Chamber of its own previous jurisprudence on aiding and abetting. This episode may harm the legacy of these tribunals, and feeds into concerns regarding the risks of fragmentation of international law arising from the proliferation of international tribunals.[5] It is also reminiscent of, and potentially related to, the difference of opinion that emerged between the International Court of Justice (ICJ) and the ICTY regarding the required level of State control over non-State actors for State responsibility to arise for violations of IHL. The ICTY considered the issue of control when assessing how a non-international armed conflict might become "internationalized", but also took the opportunity to pronounce on broader issues of State responsibility. For a number of years, a judicial spat rumbled along between the two institutions regarding the rules of attribution for State responsibility, and there remains a degree of uncertainty in relation to the appropriate level of control required for international responsibility to be triggered because of State assistance to culpable groups. The precise contours of individual criminal responsibility in the context of providing aid or assistance to the commission of war crimes are also somewhat unclear.

This article seeks to untangle and analyze this international jurisprudence concerning individual and State responsibility for complicity in war crimes and violations of IHL. There are clear parallels between the judicial attempts to clarify and apply appropriate standards for these two distinct yet complementary forms of responsibility under international law. In the first section, individual responsibility for war crimes is examined, focusing in particular on the treatment of aiding and abetting as a mode of criminal liability by the ICTY. State

5 See, for example, Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?", *Leiden Journal of International Law*, Vol. 14, 2001, p. 267; Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", *International and Comparative Law Quarterly*, Vol. 55, 2006, p. 791; Fausto Pocar, "The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community", *Journal of International Criminal Justice*, Vol. 2, No. 2, 2004, p. 304.

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responsibility for war crimes is addressed in the second section, specifically for violations of IHL committed by individuals or groups that have received some form of aid or assistance from a State. In the third section, the article looks at the overlap and interaction between these forms of responsibility, and considers whether the attempted narrowing of individual criminal liability under aiding and abetting through the insistence on a "specific direction" element can be seen as an attempt to offset the more expansive approach to the scope of State responsibility that the ICTY's overall control standard would entail. It also touches on new and existing obligations under IHL to prevent violations by others, including non-State actors. The current conflicts in Syria and Iraq, with their multitude of parties and participants, serve to underline the importance of indirect responsibility for both individuals and States as a means of addressing violations of IHL committed by non-State actors.[6] The interaction between international courts and the role of judicial creativity in the context of accountability for war crimes is addressed in the final section.

Individual responsibility

In the flurry of international treaty-making following the Second World War, the existence of individual criminal responsibility for war crimes was expressly confirmed, but its exact parameters were left undefined.[7] The post-war trials had provided precedents, but in the context of codifying the laws of war, the focus was mainly on setting down the primary rules, rather than clarifying in any great detail secondary rules concerning individual responsibility. The grave breaches provisions of the 1949 Geneva Conventions, for example, refer only to those persons "committing or ordering to be committed" serious violations of those treaties.[8] At the 1949 Diplomatic Conference in Geneva, it was explained that modes of criminal liability and related matters were not the concern of the delegates:

> These should be left to the judges who would apply the national laws. The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years.[9]

Amongst treaties of IHL, therefore, Additional Protocol I stands as something of an exception in that it specifically includes superior responsibility as a distinct form of

6 Regarding non-State actors, see generally International Institute of International Humanitarian Law, *Non-State Actors and International Humanitarian Law*, FrancoAngeli, Milan, 2010; Liesbeth Zegveld, *Accountability and Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 271–316.

7 See, for example, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/1317 (1950).

8 See e.g., Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 50.

9 Fourth report drawn up by the Special Committee of the Joint Committee, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Federal Political Department, Berne, 12 July 1949, Section B, p. 115.

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criminal liability for war crimes.[10] When the United Nations (UN) Security Council established a number of international criminal tribunals beginning in the early 1990s, superior responsibility was included alongside various other modes of criminal liability, thus casting a wide net for criminal responsibility. The statutes of the *ad hoc* tribunals provide that those persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" are liable to prosecution.[11] In contrast, the Rome Statute of the ICC provides a more detailed treatment of the various forms of individual criminal responsibility in Articles 25 and 28.[12]

In deciphering the scope of individual criminal responsibility, the *ad hoc* international tribunals have interpreted their own constitutive documents with reference to customary international law. This has often have served as a euphemism for drawing on the (at times) limited practice of the post-Second World War trials, as exemplified in the ICTY's jurisprudence on joint criminal enterprise liability.[13] Customary international law has also featured in the recent jurisprudence concerning aiding and abetting, although it was not mentioned in the first brief discussion of this mode of liability in *obiter dictum* of the ICTY Appeals Chamber in the seminal *Tadić* case. The Appeals Chamber explained that aiding and abetting involves the carrying out of "acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime … and this support has a substantial effect upon the perpetration of the crime".[14] According to *Tadić*, an aider and abettor must know that his or her acts assist the commission of a specific crime.[15] This form of liability is of particular relevance to persons who may supply the means to commit war crimes, or who contribute in other ways to such commission. While joint criminal enterprise and superior responsibility have attracted considerable judicial and scholarly attention, and a certain degree of infamy,[16] aiding and abetting proved to be

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 86.

11 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/827, 25 May 1993 (ICTY Statute), Art. 7(1); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between January 1, 1994 and December 31 1994, UN Doc. S/RES/955, 8 November 1994 (ICTR Statute), Art. 6 (1). See also Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002), UN Doc. S/2002/246 (SCSL Statute), Appendix II, Art. 6(1).

12 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9 (Rome Statute).

13 ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 172–233.

14 *Ibid*., para. 229.

15 *Ibid*.

16 See, for example, Mohamed Shahabuddeen, "Judicial Creativity and Joint Criminal Enterprise", in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010, pp. 184–203; Allison Marston Danner and Jennifer S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", *California Law Review*, Vol. 93, 2005, pp. 75–169.

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relatively uncontroversial at the *ad hoc* tribunals. This form of accomplice liability was cast into the spotlight, however, when it featured to varying degrees in a series of ICTY judgments that saw the acquittal of several high-ranking accused individuals, most notably Momčilo Perišić, the former chief of the general staff of the Yugoslav Army – the highest-ranking military officer in that army.[17] The spotlight's glare became even more intense when the Appeals Chamber of the ICTY, in an unprecedented turn of events, "unequivocally" rejected the aiding and abetting standard that it had previously endorsed and applied in *Perišić*.[18]

In *Perišić*, the ICTY Appeals Chamber overturned the Trial Chamber's conviction and twenty-seven-year sentence on the basis that the necessary ingredients for the modes of liability pleaded had not been met; for superior responsibility, it was not shown that Perišić exercised the necessary effective control over his subordinates, while for aiding and abetting, the majority concluded that it had not been proven that the assistance provided had been "specifically directed" to the commission of crimes as per *Tadić*.[19] The Yugoslav Army had put into effect the policy of the Supreme Defence Council of the Federal Republic of Yugoslavia of providing large-scale military assistance, including equipment, logistics and training, to the Army of the Republika Srpska, which had been responsible for war crimes in Sarajevo, Srebrenica and other locations in Bosnia.[20] Echoing the dissenting opinion of Judge Moloto at the trial stage,[21] the Appeals Chamber held that "assistance from one army to another army's war efforts is insufficient, in itself, to trigger individual criminal liability for individual aid providers absent proof that the relevant assistance was specifically directed towards criminal activities".[22]

Perišić had supported and implemented the policy of providing aid and may have known of the crimes committed by the Army of the Republika Srpska, but nevertheless he could not be liable for aiding and abetting as the assistance was directed towards the "general war effort" rather than specific crimes.[23] The type of aid provided by the Yugoslav Army was not seen as being "incompatible with lawful military operations", and although it may have considerably facilitated the commission of crimes, the Appeals Chamber held that "proving substantial contribution does not necessarily demonstrate specific direction".[24] Judge Liu, dissenting, was of the opinion that the Appeals Chamber had raised

17 ICTY, *Prosecutor* v. *Perišić*, Case No. IT-04-81-A, Judgment (Appeals Chamber), 28 February 2013. Other noteworthy acquittals (where aiding and abetting was not prominent) include ICTY, *Prosecutor* v. *Haradinaj et al.*, Case No. IT-04-84-T, Retrial Judgment (Trial Chamber), 29 November 2012; ICTY, *Prosecutor* v. *Gotovina and Markač*, Case No. IT-06-90-A, Judgment (Appeals Chamber), 16 November 2012.

18 ICTY, Prosecutor v. *Šainović et al.*, Case No. IT-05-87-A, Judgment (Appeals Chamber), 23 January 2014, para. 1650.

19 *Perišić*, above note 17, paras 72 and 119.

20 *Ibid*., paras 50–57.

21 ICTY, *Prosecutor* v. *Perišić*, Case No. IT-04-81-T, Judgment (Trial Chamber), 6 September 2011, Dissenting Opinion of Judge Moloto on Counts 1 to 4 and 9 to 12, paras 3–34.

22 *Perišić*, above note 17, para. 72.

23 *Ibid*., paras 60, 68–69.

24 *Ibid*., para. 65.

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the threshold for aiding and abetting by insisting on specific direction, and by doing so risked undermining its very purpose, as it was "allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts".[25]

Both the *Perišić* majority and Judge Liu in dissent had noted inconsistency in prior ICTY jurisprudence on the question of specific direction.[26] The Appeals Chamber, for example, had previously held that specific direction was "not an essential ingredient" of the *actus reus* for aiding and abetting.[27] Nonetheless, the Appeals Chamber considered that the requirement that acts of assistance be specifically directed to the commission of crimes was now the "settled precedent".[28] It is also interesting to note judicial views regarding the designation of specific direction as an *actus reus* element, given that it would logically seem to relate more to the mental element. The Appeals Chamber did accept that "specific direction may involve considerations that are closely related to questions of *mens rea*", and held that evidence relating to an accused's state of mind could serve as circumstantial evidence of specific direction as an *actus reus* element.[29] Judges Meron and Agius, in their Joint Separate Opinion, asserted that "whether an individual commits acts directed at assisting the commission of a crime relates in certain ways to that individual's state of mind", and stated that were they to set out the elements afresh, they would include specific direction as a *mens rea* element.[30] Either way, they asserted, the key issue is "whether the link between assistance of an accused individual and actions of principal perpetrators is sufficient to justify holding the accused aider and abettor criminally responsible for relevant crimes".[31] Within months of the *Perišić* appeal, an ICTY Trial Chamber relied upon the Appeals Chamber's holdings concerning aiding and abetting to acquit two Serbian police officials, Stanišić and Simatović, who had been charged with war crimes and crimes against humanity. The assistance provided by the accused in the form of organization, training and financing had "assisted the commission of the crimes", but it had not been specifically directed toward those crimes and in some instances, the Chamber felt, it could be reasonably concluded that it was directed towards seemingly lawful efforts to establish and maintain Serb control over certain areas.[32] While the requirements for other modes of liability had also not been met,[33] the judgment served to demonstrate that the approach of the *Perišić* Appeals Chamber to aiding and abetting was impacting the jurisprudence as a binding precedent for the lower

25 *Ibid*., Partially Dissenting Opinion of Judge Liu, para. 3.
26 *Perišić*, above note 17, paras 26–36; Partially Dissenting Opinion of Judge Liu, paras 2–3.
27 ICTY, *Prosecutor* v. *Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgment (Appeals Chamber), 5 May 2009, para. 159.
28 *Perišić*, above note 17, paras 26–36.
29 *Ibid*., para. 48.
30 *Ibid*., Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, paras 2–3.
31 *Ibid*., para. 4.
32 ICTY, *Prosecutor* v. *Stanišić and Simatović*, Case No. IT-03-69-T, Judgment (Trial Chamber), 30 May 2013, paras 2359–2360.
33 *Ibid*., paras 2305–2355.

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chamber.[34] This was despite the protestations of Judge Picard, who felt that the failure to secure conviction because of the application of this "overly restrictive" standard meant that "we have come to a dark place in international law indeed".[35]

Perišić and other ICTY acquittals gave rise to considerable political and scholarly criticism.[36] Specific direction itself was seen as a conscious raising of liability standards that could render accountability for international crimes more difficult; for Kenneth Roth of Human Rights Watch, it "could cripple future efforts to prosecute senior officials responsible for human rights crimes".[37] In an unprecedented turn of events, a Danish trial judge at the ICTY, Frederik Harhoff, voiced his concerns in a private letter that was subsequently published by a Danish newspaper. He suspected that the Tribunal had changed its approach to the requirements for individual criminal responsibility under "pressure from 'the military establishments' in certain dominant countries".[38] He also alleged that the ICTY president, Theodor Meron, had put "tenacious pressure" on his fellow judges, such that "you [would] think he was determined to achieve an acquittal" in *Perišić*.[39] It is a breach of the Tribunal's rules, and almost unheard of, for a sitting judge to disclose the substance of judicial deliberations, let alone to make such publicly critical comments about a colleague. Ultimately, Judge Harhoff was disqualified from the *Šešelj* case in which he sat as a trial judge.[40] Judicial propriety aside, the incident certainly serves to emphasize the division engendered by the requirement of specific direction as an element of aiding and abetting.

While the ICTY Appeals Chamber may have considered specific direction to be part of the "settled precedent" at the ICTY, the Tribunal's jurisprudence only holds persuasive value for other international tribunals, as the SCSL was to so emphatically confirm. In one of the most high-profile international prosecutions to date, that of former Liberian president Charles Taylor, the Appeals Chamber of the Special Court expressly departed from the *Perišić* decision concerning specific direction as an *actus reus* element of aiding and abetting. Much of the case against Charles Taylor rested upon finding him criminally responsible for the assistance he provided, including various quantities of arms and ammunition, to the rebel groups fighting and committing war crimes in the civil war in Sierra Leone. The Trial Chamber considered that this aid amounted to practical assistance to the commission of crimes, being indispensable to military offensives

34 *Ibid*., para. 1264.

35 *Ibid*., Dissenting Opinion of Judge Michèle Picard, paras 2405–2406.

36 See, for example, Julian Borger, "War Crimes Convictions of Two Croatian Generals Overturned", *The Guardian*, 16 November 2012; Marlise Simmons, "U.N. Court Acquits 2 Serbs of War Crimes", *New York Times*, 30 May 2013; Thomas Escritt and Fatos Bytici, "Kosovo Ex-Premier Haradinaj Cleared of War Crimes Again", *Reuters*, 29 November 2012; Owen Boycott, "Hague War Crimes Ruling Threatens to Undermine Future Prosecutions", *The Guardian*, 13 August 2013.

37 Kenneth Roth, "A Tribunal's Legal Stumble", *New York Times*, 9 July 2013.

38 E-mail from Judge Harhoff, 6 June 2013, p. 3, available at: www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf (all Internet references were accessed in December 2014).

39 *Ibid*., p. 4.

40 ICTY, *Prosecutor* v. *Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President (Chamber Convened by the Order of the Vice-President), 28 August 2013, para. 14.

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in certain instances, and having an overall substantial effect on the commission of the crimes charged.[41] The Appeals Chamber emphasized that the essential requirement for aiding and abetting is that the acts of an accused have "a substantial effect on the commission of the crime charged", and it agreed with the ICTY that it was not necessary to establish that an accused "had any power to control those who committed offences".[42] The need for a causal link would ensure that persons would not be "unjustly" held responsible for the acts of others, even if they had only provided the means for those crimes.[43] An accused person must know or be aware of the "substantial likelihood" that his or her acts would assist the commission of crimes.[44] The SCSL was not convinced, however, that specific direction was required under customary international law, and considered that the absence of any discussion of custom by the ICTY Appeals Chamber in *Perišić* meant that the latter was "only identifying and applying internally binding precedent".[45] That said, the SCSL was not persuaded by the analysis in *Perišić* and went so far as to assert that the standard espoused might be contrary to the presumption of innocence and the requirement of proof of guilt beyond reasonable doubt.[46] Although this was a stern admonition by another international tribunal, a potentially more devastating blow to the standing of *Perišić* soon followed, this time from the ICTY Appeals Chamber itself.

In *Šainović et al.*, the ICTY Appeals Chamber returned to aiding and abetting in the context of an appeal by the appellant Lazarević, who had been convicted in part for having provided various forms of support and assistance to soldiers of the Yugoslav Army involved in forcible displacement in Kosovo.[47] The case did not concern "remote assistance" to non-State actors, but is nonetheless especially relevant as regards the prevailing standard for aiding and abetting. The appellant claimed that the Trial Chamber had failed to show, as required by the Tribunal's jurisprudence (particularly *Perišić*), that his acts or omissions were specifically directed to the commission of the crimes for which he was convicted.[48] A majority of the Appeals Chamber considered that the interpretation by the *Perišić* Appeals Chamber was "at odds" with previous jurisprudence that had plainly found that specific direction was not an "essential ingredient" of aiding and abetting, and it had relied upon a "flawed premise" that *Tadić* had established a precedent on this matter.[49] The Chamber reviewed international and national case law on specific direction and aiding and abetting, and found that no common legal principle existed in national practice, while

41 SCSL, *Prosecutor* v. *Taylor*, Case No. SCSL-03-1-T, Judgment (Trial Chamber II), 26 April 2012, paras 6912–6914.
42 SCSL, *Prosecutor* v. *Taylor*, Case No. SCSL-03-1-A, Judgment (Appeals Chamber), 26 September 2013, paras 368–370.
43 *Ibid*., para. 391.
44 *Ibid*., para. 415.
45 *Ibid*., paras 471–478.
46 *Ibid*., para. 479.
47 *Šainović et al.*, above note 18, para. 1615.
48 *Ibid*., para. 1617.
49 *Ibid*., paras 1621 and 1623.

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post-Second World War cases required that "defendants substantially and knowingly contributed to relevant crimes".[50] Coupled with a brief look at relevant international instruments, principally the Rome Statute, the majority of the Appeals Chamber came to the "compelling conclusion" that specific direction is not an element of aiding and abetting under customary international law.[51] In the sort of language that is often reserved for strong individual dissenting opinions,[52] the Appeals Chamber majority stated that it "unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting and with customary international law in this regard".[53] In making this finding, the Appeals Chamber exposed fundamental divisions amongst the judges regarding the scope of aiding and abetting.[54] This development can be seen to undermine the Tribunal's reputation and judicial legacy, as it generates conflicting rather than definitive and authoritative judicial statements regarding criminal liability for those who provide assistance to the commission of war crimes.

Although a doctrine of binding precedent does not exist under international law, the desirability of consistency both within and between courts has been emphasized.[55] The ICTY Appeals Chamber noted an important rationale when it made it clear that its decisions are binding on ICTY Trial Chambers:

> The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.[56]

The same could be said for the Appeals Chamber itself, which has held that it should follow its own decisions "in the interests of certainty and predictability".[57] However, the Appeals Chamber considered that it could depart exceptionally from earlier decisions "for cogent reasons in the interests of justice".[58] These might include instances where prior decisions were decided on a "wrong legal principle" or the judges were "ill-informed" on the applicable law.[59] The *Šainović* Appeals

50 *Ibid*., paras 1642–1644.
51 *Ibid*., para. 1649.
52 See, for example, Göran Sluiter, "Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY", in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 215–216.
53 Note that Judge Ramaroson sided with the majority in *Sainović* on the issue of specific direction, as she had done in *Perišić*, even though both majorities came to different conclusions.
54 See also *Šainović et al*., above note 18, Dissenting Opinion of Judge Tuzmukhamedov, para. 40.
55 See, for example, T. Buergenthal, above note 5, p. 274; R. Higgins, above note 5, p. 791; Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, Cambridge, 1996.
56 ICTY, *Prosecutor* v. *Aleksovski*, Case No. IT-95-14/1-A, Judgment (Appeals Chamber), 24 March 2000, para. 113.
57 *Ibid*., para. 106.
58 *Ibid*., para. 107.
59 *Ibid*.

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Chamber felt that the divergence in the earlier jurisprudence regarding specific direction and the inadequate analysis conducted in *Perišić* was a cogent reason to depart from the requirement of specific direction in the *actus reus* of aiding and abetting.[60]

The need for jurisprudential consistency was also touched upon by Judge Tuzmukhamedov in his *Šainović* dissent, in which he argued that the question of specific direction should have been left to a case where it was more clearly relevant on the facts. On the subject of consistency, he wrote:

> It may not be possible to completely avoid disagreement between differently constituted benches of the Appeals Chamber over certain legal or factual issues, especially in the absence of a higher unified instance. However, it would be prudent to exercise some restraint in addressing such rifts in the jurisprudence of a respectable and authoritative judicial institution so as to preserve as much as possible, judicial harmony in the case law that impacts the development of international criminal law and international humanitarian law, as well as legal certainty, stability and predictability, in particular, for the benefit of the parties to proceedings before the Tribunal.[61]

No doubt, the majority would consider that they were realigning the jurisprudence, following the divergent path taken by *Perišić*. While this has been seen as helping "repair the recent fragmentation of the law on aiding and abetting",[62] an Appeals Chamber composed of different judges could depart from *Šainović* in the future, provided they give cogent reasons for doing so.[63] An air of uncertainty thus surrounds the law on aiding and abetting at the ICTY.[64] The *Taylor* and *Šainović* appeals judgments, together with a subsequent Trial Chamber judgment from the Extraordinary Chambers in the Courts of Cambodia,[65] may possess sufficient force to dissuade any further divergence.[66] It is worth noting that a slightly differently constituted Appeals Chamber denied a prosecution motion in *Perišić* to overturn the former general's acquittal in light of *Šainović*, considering that

60 *Šainović et al.*, above note 18, para. 1622.

61 *Ibid*., Dissenting Opinion of Judge Tuzmukhamedov, paras. 45–46.

62 Charles Chernor Jalloh, "Prosecutor v. Charles Taylor", *American Journal of International Law*, Vol. 108, No. 1, 2014, fn. 21.

63 William A. Schabas, "Prosecutor Applies to Reverse Final Acquittal of Perišić", *PhD Studies in Human Rights* blog, 7 February 2014, available at: http://humanrightsdoctorate.blogspot.com.au/2014/02/prosecutor-applies-to-reverse-final.html.

64 See Marko Milanovic, "The Self-Fragmentation of the ICTY Appeals Chamber", *EJIL Talk!* blog, 23 January 2014; Sergey Vasiliev, "Consistency of Jurisprudence, Finality of Acquittals and Ne Bis In Idem", Centre for International Criminal Justice, 2014, available at: http://cicj.org/?page_id=1608. See also Jens David Ohlin, "The Specific-Direction Smackdown", 28 January 2014, *Lieber Code*, available at: www.liebercode.org/2014/01/the-specific-direction-smackdown.html.

65 Extraordinary Chambers in the Courts of Cambodia, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014, paras 707–710.

66 See Manuel J. Ventura, "Farewell 'Specific Direction': Aiding and Abetting War Crimes in *Perišić, Taylor* and *Šainović et al.*, and US Alien Tort Statute Jurisprudence", in Stuart Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, Oxford University Press, Oxford, 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435515; Leila Nadya Sadat, "Can the ICTY *Šainović* and *Perišić* Cases Be Reconciled?", *American Journal of International Law*, Vol. 108, No. 3, 2014, pp. 475–485.

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there were no cogent reasons for it to depart from its earlier jurisprudence regarding reconsideration of final judgments.[67]

It is quite rare for an Appeals Chamber to depart from its own earlier jurisprudence, especially in an apparent climate of acrimony, or for other tribunals to reject precedent so forcefully. In the modern era there has been a notable degree of consistency in the case law regarding IHL within and across the various international judicial bodies.[68] Such an approach was exemplified at the Tokyo Tribunal:

> In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.[69]

The SCSL Statute sought to promote such consistency by setting out that "[t]he 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".[70] But the SCSL Appeals Chamber, as it made explicit in *Taylor*, "is the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority".[71] International courts have, it bears noting, taken different views at times over procedural issues, such as the permissibility of witness proofing,[72] as well as with regard to the applicability of certain modes of criminal liability, specifically joint criminal enterprise.[73] Where the statutory basis is unclear, such divergences are often based in differing interpretations of customary international law. Until the SCSL rejected the *Perišić* finding regarding specific direction, the most obvious example of disagreement between courts has been that between the ICJ and the ICTY on

67 ICTY, *Prosecutor* v. *Perišić*, Case No. IT-04-81-A, Decision on Motion for Reconsideration (Appeals Chamber), 20 March 2014.

68 See generally S. Darcy, above note 2.

69 Judgment of the International Military Tribunal for the Far East, in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal*, Oxford University Press, Oxford, 2008, p. 81.

70 SCSL Statute, Art. 20(3).

71 *Taylor*, above note 42, para. 472.

72 Compare International Criminal Tribunal for Rwanda (ICTR), *Prosecutor* v. *Karemera et al*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (Appeals Chamber), 11 May 2007; with ICC, *Prosecutor* v. *Lubanga Dyilo*, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber 1), 8 November 2006. See, however, ICC, *Prosecutor* v. *Muthaura and Kenyatta*, Case No. ICC-01/09-02/11, Decision on Witness Preparation (Trial Chamber V), 2 January 2013; *Prosecutor* v. *Ruto and Sang*, Case No. ICC-01/09-01/11, Decision on Witness Preparation (Trial Chamber V), 2 January 2013.

73 Compare *Tadić*, above note 13, paras 172–233; and Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras 236–249; with Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007/ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (Pre-Trial Chamber), 20 May 2010, and Case No. 002/19-09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise (Trial Chamber), 12 September 2011.

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the question of the required degree of control over non-State actors for State responsibility to ensue, as explored in detail in the next section. Before turning to that judicial dispute, some consideration should be given to some potential implications of this judicial disharmony concerning aiding and abetting.

An obvious question is whether specific direction will feature in the aiding and abetting standard at the ICC. At first glance, the Court's judges may not need to take sides on this clearly divisive issue, given the greater level of detail in the Rome Statute and related instruments when compared to the statues of the *ad hoc* tribunals. Antonio Cassese considered this to have been deliberate on the part of the drafters, because of a fear at the Rome Conference of the so-called "Cassese approach" of judges "overdoing it".[74] With regard to aiding and abetting, the Rome Statute provides in Article 25(3)(c) that criminal liability may arise for an individual who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[75] There is no reference to specific direction, although the formulation does seem to require that the accused acted purposively, perhaps requiring a specific intent rather than mere knowledge.[76] William Schabas has suggested that this might be deduced from the acts of the accused,[77] and it would likely be satisfied where assistance was specifically directed towards criminal acts, although such specific direction may not be essential. The requirement of purpose falls within the *mens rea* standard, and at the ICTY, knowledge has been accepted as the appropriate mental element for aiding and abetting, with specific direction having been viewed as part of the required *actus reus*, albeit with some obvious judicial discomfort.[78] Elies van Sliedregt has said that specific direction at the ICTY has amounted to the introduction of "a veiled purpose test".[79] It may be that the ICC's requirement of a purposive approach for aiding and abetting will see specific direction treated as evidence of an accused's state of mind in that regard, rather than as an *actus reus* requirement.

Specific direction might also arise in the context of Article 25(3)(d) of the Rome Statute, which foresees criminal responsibility for an individual who intentionally contributes to the commission of a crime by a group acting with a common purpose. The contribution must have been made "with the aim of

74 Heikelina Verrjin Stuart and Marlise Simons, *The Prosecutor and the Judge*, Pallas Publications/ Amsterdam University Press, 2009, pp. 52–53.
75 Rome Statute, Art. 25(3)(c).
76 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2011, pp. 435–436. See, however, Joanna Kyriakakis, "Developments in International Criminal Law and the Case of Business Involvement in International Crimes", *International Review of the Red Cross*, Vol. 94, No. 887, 2012, pp. 998–1000; Andrew Clapham, "Weapons and Armed Non-State Actors", in Stuart Casey-Maslen (ed.), *Weapons Under International Human Rights Law*, Cambridge University Press, Cambridge, 2014, p. 18, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156408.
77 W. A. Schabas, above note 76, p. 436.
78 *Perišić*, above note 17, para. 48.
79 Elies van Sliedregt, in *Milestones in International Criminal Justice: Recent Legal Controversies at the UN Yugoslav Tribunal*, International Law Summary, Chatham House, 16 October 2013, p. 13.

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furthering the criminal activity or criminal purpose of the group" or "in the knowledge of the intention of the group to commit the crime".[80] In *Katanga*, the accused was convicted under this provision, and Judge Van den Wyngaert noted the relevant *ad hoc* tribunals' jurisprudence on specific direction, offering the following view:

> I do consider that, when assessing the significance of someone's contribution, there are good reasons for analysing whether someone's assistance is specifically directed to the criminal or non-criminal part of a group's activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e. contributions that, by their nature, could equally have contributed to a legitimate purpose – are criminal or not.[81]

This was especially relevant, she felt, given the "extremely low" *mens rea* and *actus reus* thresholds under Article 25(3)(d). Although she stopped short of insisting on specific direction, Judge Van den Wyngaert noted that without such a requirement, there might otherwise "be almost no criminal culpability to speak of in cases when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose".[82] The Trial Chamber convicted Katanga for having knowingly provided weapons to a group with a policy of targeting civilians, without seemingly having insisted that such provision be specifically directed to such crimes.[83] Emphasis was, however, placed on the need for the contribution to be substantial and have a "significant influence on the commission of those crimes".[84] This reflects the fact that aiding and abetting jurisprudence from the *ad hoc* tribunals and the SCSL has always underscored that the assistance provided must have had a substantial effect on the commission of crimes. As regards specific direction at the ICC, the jurisprudence to date has simply not addressed this matter in any great detail.[85]

The jurisprudence of the international criminal tribunals also carries weight before national courts, and the treatment of aiding and abetting is of particular relevance in the context of corporate responsibility for complicity in human rights violations. The UN Guiding Principles on business and human rights, unanimously endorsed by the Human Rights Council in 2011, state that "[t]he weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or

80 Rome Statute, Art. 25 (3)(e).

81 ICC, *Prosecutor* v. *Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, para. 287.

82 *Ibid*.

83 "Germain Katanga Found Guilty of Four Counts of War Crimes and One Count of Crimes Against Humanity Committed in Ituri, DRC", ICC-CPI-20140307-PR986, press release, 7 March 2014. An English version of the trial judgment was not available at the time of writing.

84 See also ICC, "Summary of Trial Chamber II's Judgment of 7 March 2014, Pursuant to Article 74 of the Statute in the Case of *The Prosecutor* v. *Germain Katanga*", paras 76–84.

85 Kevin Jon Heller, "A Defence of the Specific Direction Requirement", in *Milestones in International Criminal Justice*, above note 79, pp. 9–10.

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encouragement that has a substantial effect on the commission of a crime".[86] In the United States, courts adjudicating civil claims under the Alien Torts Statute have considered the criminal liability standard of aiding and abetting. There has been some disagreement over whether mere knowledge and a substantial contribution are required, or whether purpose is needed, in that the accomplice purposefully provided the assistance.[87] This would raise the bar for the *mens rea* requirement. For example, the purpose of selling arms to an armed group would more likely be to make a profit, rather than to commit war crimes.[88] In *Doe* v. *Nestle USA*, the United States Court of Appeal for the Ninth Circuit took note of the *Taylor* and *Perišić* jurisprudence but declined to take a position on specific direction, although noting that there is now "less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime".[89] Manuel Ventura considers that the "specific direction saga" will also play out in Alien Torts Statute cases before the United States courts, and that it is likely that such an element will be introduced into an already uncertain jurisprudence.

Distinguishing principal perpetrators and accomplices carries an implied suggestion that the latter are somehow less blameworthy than the former. When the ICTY Appeals Chamber introduced joint criminal enterprise in *Tadić*, it stated that treating as aiders and abettors those that "in some way made it possible for the perpetrator physically to carry out that criminal act … might understate the degree of their criminal responsibility".[90] While criminal law might treat the facilitator more leniently than the physical perpetrator, the former's role should not be neglected in the context of war crimes. Aiding and abetting is aimed at those who knowingly provide assistance, which has a substantial effect on the commission of crimes. Its requirement of knowledge is a lower *mens rea* standard – Article 30 of the Rome Statute sets "intent and knowledge" as the general standard – although under superior responsibility, for example, military commanders can be criminally responsible for subordinate crime of which they "should have known".[91] This form of liability, however, is "predicated upon the power of the superior to control or influence the acts of

86 See John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, A/HRC/17/31, 21 March 2011, p. 17.

87 Compare, for example, United States Court of Appeal for the District of Columbia Circuit, *John Doe* v. *Exxon Mobil Corporation*, Case No. 09-7125, 8 July 2011; with United States Court of Appeal for the Second Circuit, *The Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, Case No. 07-0016, 2 October 2009. See further Angela Walker, "The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting is Knowledge", *Northwestern Journal of International Human Rights*, Vol. 10, 2011, pp. 119–145.

88 See Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 374.

89 United States Court of Appeal for the Ninth Circuit, *Doe et al.* v. *Nestle USA et al.*, Case No. 10-56739, Order and Opinion, 4 September 2014, p. 27.

90 *Tadić*, above note 13, para. 192.

91 Rome Statute, Art. 28(a)(i).

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subordinates",[92] whereas for aiding and abetting, it is not necessary to show that an accused "had any power to control those who committed offences".[93] The emphasis is instead on the significant influence that the assistance has on the commission of crimes. It is debated amongst scholars as to whether requiring specific direction provides a more appropriate reflection of the principle of personal culpability.[94] For Charles Cherner Jalloh, this is "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".[95] While such leaders may be liable as individuals under international criminal law, their actions may also give rise to State responsibility for violations of IHL perpetrated by such armed groups. There are clear parallels between the judicial divergence that exists regarding the scope of individual responsibility for such assistance to international crimes and the disagreement between international courts that arose in relation to the appropriate standard for holding States responsible for similarly contributing to violations by non-State actors during situations of armed conflict.

State responsibility

A particularly exacting standard must be met for a State to be responsible under international law for providing or facilitating assistance to those engaging in war crimes, notwithstanding some judicial disagreement as to how stringent that standard should be. The general standard has some similarities to that applying to individuals under international criminal law, even though States themselves are not criminally liable or subject to criminal sanctions under international law.[96] According to the International Law Commission's (ILC) Articles on State Responsibility, a State will be responsible for the internationally wrongful conduct of individuals or groups, absent acknowledging or adopting such conduct as its own, if those persons are "acting on the instructions of, or under the direction or

92 ICTR, *Prosecutor* v. *Bagilishema*, Case No. ICTR-95-1A-T, Judgment (Trial Chamber I), 7 June 2001, para. 37.

93 ICTY, *Prosecutor* v. *Simić*, Case No. IT-95-9-A, Judgment (Appeals Chamber), 28 November 2006, para. 103.

94 Compare K. J. Heller, above note 85, pp. 5–10, with James G. Stewart, "The ICTY Loses Its Way on Complicity – Part 1", *Opinio Juris*, 3 April 2013, available at: http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/.

95 C. C. Jalloh, above note 62, p. 66. See also Antonio Coco and Tom Gal, "Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in *Perišić*", *Journal of International Criminal Justice*, Vol. 12, No. 2, March 2014, pp. 345–366, available at: http://jicj.oxfordjournals.org/content/12/2/345.abstract.

96 See generally Gabriella Blum, "The Crime and Punishment of States", *Yale Journal of International Law*, Vol. 38, 2013, pp. 57–122; Nina H. B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, Oxford, 2000; Joseph H. H. Weiler, Antonio Cassese and Marina Spinedi, *International Crimes of State: A Critical Analysis of the ILC's Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.

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control of,that State in carrying out the conduct".[97] A similar article addresses State responsibility for the wrongful conduct of another State:

> A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State.[98]

A State will also be responsible if it "aids or assists another State in the commission of an internationally wrongful act" while also fulfilling the two latter requirements of the above quoted paragraph.[99] Absent the direction and control of another State in the commission of a wrongful act, a State can be responsible for knowingly providing aid or assistance to the commission of an international wrong by another State. The Articles thus envisage different standards for when a State is implicated in violations committed by an individual or group, compared to when those are perpetrated by another State. For a State to be responsible for providing aid or assistance to non-State groups that commit war crimes, the Articles require that such groups were instructed, directed or controlled by the State in relation to the specific conduct. A State could also be responsible in the absence of such aid or assistance, if the unlawful conduct is carried out under its instruction, direction or control. Considerable judicial attention has been paid to the precise meaning of "control" in this context, leading to a fractious divergence between the ICJ and the ICTY.

In *Nicaragua* v. *United States*, the ICJ had to assess the nature of the relationship between the United States and the *contras*, the armed opposition fighting against the Nicaraguan state, in order to determine whether the latter's unlawful acts could be attributed to the United States for purposes of State responsibility.[100] The judgment explained the nature of the assistance provided, saying that it included:

> logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States.[101]

Although the United States had "largely financed, trained, equipped, armed and organized the FDN", an armed *contras* group, this would not justify treating such

97 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83 2001, Arts 8, 11.
98 *Ibid*., Art. 17.
99 *Ibid*., Art. 16.
100 ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua* v. *United States of America*), Judgment, *ICJ Reports 1986*, para. 109.
101 *Ibid*., para. 106.

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an entity as having acted on its behalf.[102] For the internationally wrongful acts of the *contras* to be attributed to the United States, the Court required that it be shown that the latter exercised "effective control" over the military or paramilitary operations of the *contras*.[103] The involvement and general control exercised by the United States "would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law".[104] While the United States was found to have breached the norm of non-intervention in the internal affairs of another State by its assistance to the *contras*, the Court did not find it responsible for their unlawful acts. The Court did reprimand the United States for producing and disseminating a military manual to the *contras* which was seen to encourage violations of humanitarian law, and thus was contrary to the obligation to ensure respect for international humanitarian law.[105]

The ICTY addressed this "effective control" standard in a different context: determining when a non-international armed conflict might become "internationalized" through the provision of aid or assistance by an outside State to a non-State armed party to the conflict. Tadić had been charged with grave breaches under Article 2 of the ICTY Statute, war crimes which can only apply as a matter of law in international armed conflicts. Although not concerned directly with State responsibility, the *Tadić* Appeals Chamber described the approach in *Nicaragua* as unpersuasive and instead advocated a less stringent "overall control" test.[106] State responsibility for internationally wrongful acts, it asserted, could arise where these were committed by "individuals who make up organised groups subject to the State's control … regardless of whether or not the State has issued *specific instructions* to those individuals".[107] The Trial Chamber had previously held that a relationship of dependence between the Bosnian Serb forces in Bosnia and the Federal Republic of Yugoslavia (FRY) was insufficient to internationalize the conflict,[108] although Judge McDonald, presiding, felt that a relationship of effective control had existed. She felt that "the appropriate test of agency from *Nicaragua* is one of 'dependency and control' and a showing of effective control is not required".[109] The *Čelebići* Trial Chamber considered the conflict in question to be international as the FRY "remained in fact the controlling force behind the Bosnian Serbs".[110]

102 *Ibid*., paras 108–109.
103 *Ibid*., para. 115.
104 *Ibid*.
105 *Ibid*., para. 220. See also Dissenting Opinion of Judge Schwebel, para. 259.
106 *Tadić*, above note 13, para. 120. See also ICTY, *Prosecutor* v. *Rajic*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, paras 22–26.
107 *Tadić*, above note 13, para. 123 (emphasis in original).
108 ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 588.
109 *Ibid*., Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, p. 288.
110 ICTY, *Prosecutor* v. *Delalić et al*., Case No. IT-96-21-T, Judgment (Trial Chamber), 18 November 1998, para. 228–235.

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When the matter was addressed before the *Tadić* Appeals Chamber, a distinction was drawn between the ICJ's concern with State responsibility and its own focus on individual criminal responsibility. Nevertheless, the Appeals Chamber felt that the test for establishing when an individual could be treated as the *de facto* organ of a State could be the same for both.[111] The law of State responsibility was so devised because "States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law".[112] Where the group receiving assistance is organized, the Appeals Chamber felt it sufficient that the group as a whole be under the overall control of the State.[113] The applicable test was set out thus:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[114]

Although there was some disagreement at the ICTY with this approach,[115] the Appeals Chamber's findings have held sway at the Tribunal.[116] It has also proven to be a persuasive precedent for the ICC, where armed conflicts must also be classified in light of the distinctions within Article 8 of the Rome Statute.[117] The *Lubanga* Trial Chamber held, without much explanation, that the overall control test is the "correct approach" in determining when a non-international armed conflict has become internationalized.[118]

The ICJ took issue with the ICTY's approach in *Tadić* and firmly reasserted its position regarding the appropriate standard for State responsibility for violations by non-State groups. With regard to rebel groups in Congo that had been provided training and support by Uganda, the Court did not find sufficient evidence to hold that they were acting "on the instructions of, or under the direction or control" of the latter.[119] It was in *Bosnia* v. *Serbia* that the Court specifically addressed the ICTY's overall control test, stating squarely that it was "unable to subscribe to

111 *Tadić*, above note 13, paras 101–104.
112 *Ibid*., para. 117.
113 *Ibid*., paras 117 and 120.
114 *Ibid*., para. 131.
115 See, for example, *ibid*., Separate Opinion of Judge Shahabuddeen, para. 5.
116 See, for example, *Aleksovski*, above note 56, para. 134; ICTY, *Prosecutor* v. *Delalić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 26.
117 See, for example, *Lubanga*, Confirmation of Charges, above note 3, paras 210–211.
118 *Lubanga*, Trial Chamber Judgment, above note 3, para. 541.
119 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, *ICJ Reports 2005*, para. 160.

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the Chamber's view".[120] In its opinion, the ICTY was not required to consider State responsibility and had accordingly addressed an issue which was "not indispensable" for the exercise of its jurisdiction.[121] Although the ICJ endorsed the Tribunal's legal and factual findings regarding individual criminal responsibility, it stated that:

> The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.[122]

The *Tadić* test, in the Court's view, "stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".[123] The Court's vice-president, Judge Al-Khasawneh, on the other hand, expressed support for the ICTY approach, saying that:

> to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.[124]

The Court took issue not with the ICTY applying its overall control test to the question of the classification of armed conflicts, but rather with its assertion that such a test might also be applied in the context of State responsibility. It felt that differing tests could apply to these related yet distinguishable issues "without logical inconsistency".[125] The "judicial diplomacy" exercised by the ICJ in *Bosnia* v. *Serbia*,[126] however, could not mask the divergence between its views and those of the ICTY regarding the concept of control in the context of State responsibility.

In light of this article's focus, it is worth examining the ICJ's treatment in *Bosnia* v. *Serbia* of Article 8 of the Articles on State Responsibility, as well as the concept of "complicity in genocide", as found in the 1948 Genocide Convention. Article 8, in the Court's view, embodies customary international law and provides that a State is responsible for the internationally wrongful acts of persons or groups "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The Court's interpretation is such that the person or group must essentially be the vehicle through which the crime is committed; it needed to be shown in this case that organs of the FRY had

120 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, *ICJ Reports 2007*, para. 403.
121 *Ibid*.
122 *Ibid*.
123 *Ibid*., para. 406.
124 *Ibid*., Dissenting Opinion of Vice-President Al-Khasawneh, para. 39.
125 *Bosnia* v. *Serbia*, above note 120, para. 405.
126 Bruno Simma, "Universality of International Law from the Perspective of a Practitioner", *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 280.

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"originated the genocide".[127] For the wrongful acts to be attributable, there needed to be effective control exercised, or instructions given, "in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken".[128] Although the Court found that genocide was committed at Srebrenica, it had not been proven that instructions were issued from organs of the FRY to commit those massacres or that the relevant perpetrators were under its effective control.[129]

The Court also turned to "complicity in genocide", an act for which individuals may be punished under the 1948 Genocide Convention. There was no doubt that this concept included "the provision of means to enable or facilitate the commission of the crime".[130] While complicity *per se* is not known in the law of State responsibility, the Court turned to the customary rule in the Articles on State Responsibility regarding the provision of aid or assistance to another State in order to address this.[131] Although addressed to interactions between States and "not directly related" to the case at hand, the Court nevertheless applied the article and asked whether Serbia and Montenegro, or persons acting on its instructions or under its direction or effective control, had provided aid or assistance to the commission of the Srebrenica genocide.[132] As noted above, a State that provides aid or assistance to another State need not direct or control that State, whereas the Court here seemed to blend Article 8's requirements of instructions, direction or control with those of Article 16 requiring the knowing provision of aid or assistance. For complicity to arise, the Court put it, the aid or assistance had to be provided "knowingly", with the person or organ being aware of the specific intent of the perpetrator to commit genocide.[133] As regards the contribution made, the Court found that there was:

> little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.[134]

Despite this, the Court found that the requirements for complicity in genocide were not met, as it had not been shown that assistance was given to the perpetrators "in full awareness that the aid supplied would be used to commit genocide".[135] The decision to commit genocide was taken relatively quickly by the relevant Bosnian Serbs, and it was not conclusively shown that the authorities in Belgrade were made aware of it at the time.[136] But even if they possessed such knowledge, the

127 *Bosnia* v. *Serbia*, above note 120, para. 397.
128 *Ibid*., para. 400.
129 *Ibid*., para. 413.
130 *Ibid*., paras 419.
131 See generally Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, Cambridge, 2013, pp. 358–364.
132 *Bosnia* v. *Serbia*, above note 120, para. 420.
133 *Ibid*., para. 421.
134 *Ibid*., para. 422.
135 *Ibid*., para. 423.
136 *Ibid*.

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Court's formulation for complicity seemed to require that the persons or group also acted on its instructions, or under its direction or control. This would effectively bring the question back to State responsibility for genocide itself, although when the Court refers to complicity later in the judgment, it speaks of organs of a State with "full knowledge of the facts" providing aid and assistance to perpetrators enabling or facilitating the commission of crimes.[137] The Court may have seen complicity in the context of genocide as somehow different from State involvement in other breaches of international law, and thereby giving rise to responsibility for knowingly aiding and assisting. As the Court's analysis did not go beyond the knowledge element, this remains something of an open question.

Returning to the required standard of control, the ICJ sought to reconcile the different approach of the *Tadić* Appeals Chamber with its own by treating these two approaches as being addressed to the separate and distinct issues of attribution for the purposes of State responsibility and the classification of armed conflicts respectively. Antonio Cassese, however, subsequently confirmed that the ICTY had indeed sought to assert the existence of a different control requirement for attributing the conduct of organized armed groups for purposes of State responsibility.[138] As Ventura notes, it may be superficially attractive to consider that these are different tests, but ultimately they are both concerned with the imputation of the acts of non-State actors to States, albeit for different legal purposes.[139] Despite the Court's stance, two of its former presidents seem to be at odds as to whether the difference is real or perceived.[140] The International Law Commission also sought to treat the differing approaches as relating to two separate matters,[141] although it later described the divergence as an example of "fragmentation through conflicting interpretations of general law".[142] While the ICC has relied upon the overall control standard in its conflict classification analysis, Judge Van den Wyngaert suggested that the test enunciated by the ICTY requires "a new justification" in light of its rejection by the ICJ.[143] At the very least, it is clear that the law of State responsibility requires more than the mere

137 *Ibid*., para. 432.

138 Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, 2007, pp. 655–658.

139 Manuel J. Ventura, "Two Controversies in the *Lubanga* Trial Judgment of the ICC: The Nature of Co-perpetration's Common Plan and the Classification of the Armed Conflict", in Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, p. 488.

140 Compare Judge Gilbert Guillaume, "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order", speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000; with Judge Rosalyn Higgins, speech to the Legal Advisers of the Ministries of Foreign Affairs, 20 October 2007, both available at www.icj-cij.org.

141 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001 (Draft Articles), pp. 47–48.

142 ILC, Fragmentation *of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, report of the Study Group of the International Law Commission Finalized by Martii Koskenniemi, UN Doc. A/AC.4/L.682, 13 April 2006, paras 49–52. See also Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals", in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 266.

143 *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, above note 81, fn. 382.

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provision of aid or assistance to non-State actors for the providing State to be liable for violations committed by such groups. The internationally wrongful acts must have been committed under the instructions or direction of the State, or the group was under the State's control, be it "effective" or "overall". Such a standard does not apply in the case of knowingly providing aid or assistance to law-breaking States, nor, as the previous section demonstrated, is it necessary that an individual aider and abettor issued instructions to or exercised control over the direct perpetrators of war crimes in order to be held criminally liable. The following section considers the overlap and interaction between State and individual responsibility for providing aid or assistance to non-State actors, as well as additional norms of international humanitarian law that are relevant to such conduct.

Synchronizing responsibilities?

State responsibility and individual criminal responsibility for breaches of international law are independent but not mutually exclusive, and can arise simultaneously for acts amounting to war crimes.[144] Similarly, the holding to account of persons or entities that assist or encourage the commission of international crimes is not an alternative to pursuing the direct perpetrators of those violations. A multitude of persons and entities can bear responsibility for the various contributions they might have made to transgressions of the laws of armed conflict. It has been said that a great majority of violations of IHL could not happen "without the assistance of arms dealers, diamond traders, bankers and financiers".[145] Such persons, as well as States and their officials, have undoubtedly contributed to breaches of IHL, including war crimes, by non-State armed groups. It is interesting to compare and contrast individual and State responsibility in such instances. Based on the foregoing analysis of the current state of the law on complicity, it would seem that a State official could be criminally liable for authorizing aid and assistance to non-State actors that commit war crimes, whereas those violations might not be attributed to the State itself in the absence of instructions to, or direction or control being exercised over, the armed group in question. It may be that an effort to synchronize the requirements of both forms of responsibility lay at the heart of *Perišić*, even if this meant raising the threshold requirement for individual responsibility. It would seem logical that a State should also be responsible for acts of its officials which attract liability under international criminal law. Before turning to this matter, some general observations are merited on the interaction between individual and State responsibility for violations of IHL.

144 See generally Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*, Martinus Nijhoff, Leiden/Boston, 2009.
145 William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", *International Review of the Red Cross*, Vol. 83, No. 842, 2001, p. 441.

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State and individual responsibility under international law share a common subject matter in the context of armed conflict, namely war crimes, which comprise "serious violations of international humanitarian law".[146] The International Law Commission has observed that "[w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them".[147] Such serious breaches give rise to "aggravated State responsibility" according to the Commission,[148] although a State can also be responsible for other violations which amount to internationally wrongful acts.[149] Where serious violations do occur, State officials can no longer claim the protection of the "act of State" doctrine.[150] As the Nuremberg Tribunal famously declared, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[151] Conversely, individuals can also be held responsible irrespective of State involvement; it is not necessary to show that a war crime was:

> part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act [was] in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law.[152]

Nevertheless, there is considerable common ground between both forms of responsibility in the context of war crimes.

The question of fault is relevant in the context of international responsibility, and has different consequences for States and individuals. While mistake of fact is a recognized defence for individuals in international criminal law,[153] State responsibility would still arise for a mistaken violation of IHL, such as attacking a civilian object in the wrongful belief that it comprised a legitimate military target. For example, the United States accepted its responsibility and issued a formal apology for having "mistakenly hit" the Chinese embassy in Belgrade during NATO's military operations in Kosovo.[154] The committee set up

146 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, p. 568.
147 Draft Articles, above note 141, p. 142.
148 *Ibid*., p. 113.
149 B. I. Bonafè, above note 144, p. 28.
150 See, for example, ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(2); SCSL Statute, Art. 6(2); Rome Statute, Art. 27(1).
151 International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, reprinted in *American Journal of International Law*, Vol. 41, No. 1, 1947, p. 221.
152 *Tadić*, Trial Chamber Judgment, above note 108, para. 573.
153 See, for example, Rome Statute, Art. 32(1).
154 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000, paras 80–85. See, however, Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia", *European Journal of International Law*, Vol. 12, 2001, p. 525.

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by the ICTY prosecutor to review NATO's bombing campaign was criticized for not recommending "parallel criminal responsibility",[155] although it explained that the aircrew "should not be assigned any responsibility for the fact they were given the wrong target", and it would be "inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency".[156] Facts aside, this is one instance where State and individual responsibility are not synonymous when breaches of IHL occur.

As a general observation, simultaneous individual and State responsibility will not arise where breaches of the laws of armed conflict are committed by non-State armed groups without any State involvement. Individuals belonging to such forces can obviously be prosecuted internationally for their actions, as exemplified by the first convictions before the ICC,[157] but a corresponding corporate responsibility of the non-State armed group remains undeveloped in international law. Nonetheless, as the foregoing sections and contemporary conflicts demonstrate, non-State armed groups are rarely fully autonomous entities and very often receive military and financial assistance from States. The civil war in Syria and the conflict involving Islamic State have seen various forms of support provided to certain non-State parties by outside States.[158] In September 2014, for example, the US Senate authorized President Obama's plan to provide training and arms to "moderate Syrian rebels".[159] Given that war crimes have been committed by non-State parties to these conflicts,[160] questions of State and individual responsibility for the provision of such aid or assistance to these groups continue to be of particular import, and, – in light of recent international jurisprudence – the extent to which these forms of responsibility are aligned.

Comparing the legal requirements for complicity for State and individual responsibility under international law reveals both similarities and differences. In terms of the culpable provision of aid or assistance, for individuals, they must know that their acts assist the commission of a specific crime and have a substantial effect on its commission, while similarly, for States that knowingly provide aid or assistance to another State, it must be shown that:

> the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that

155 *Ibid*., pp. 525–526.

156 *Final Report to the Prosecutor*, above note 154, para. 85.

157 *Lubanga*, Trial Chamber Judgment, above note 3; *Katanga*, Trial Chamber Judgment, above note 81.

158 See Tom Ruys, "Of Arms, Funding and 'Non-Lethal Assistance': Issues Surrounding Third-State Intervention in the Syrian Civil War", *Chinese Journal of International Law*, Vol. 13, 2014, pp. 13–53.

159 Patricia Zengerle and Richard Cowan, "U.S House Votes to Arm Syrian rebels, but Questions Remain", *Reuters*, 17 September 2014, available at: www.reuters.com/article/2014/09/17/us-iraq-crisis-congress-idUSKBN0HC28120140917.

160 See, for example, Human Rights Watch, *"You Can Still See Their Blood": Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Lakatia Countryside*, 11 October 2013.

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> the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.[161]

Where the wrongful acts were perpetrated by individuals or groups, it must be shown that they acted under the instructions, direction or control of the State "in carrying out the conduct" in order for the State to be responsible.[162] The ILC stresses the need for a "real link" with the State, explaining that a State will not be responsible for "conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control".[163] While control over a crime, subordinates or an organization is a feature of other modes of liability in international criminal law, it is not a requirement for individual responsibility under aiding and abetting; instead, there is an insistence on the substantial effect that the aid or assistance has on the criminal conduct. This is not referred to by the ILC in the context of State responsibility for wrongful acts committed by individuals or groups and which might be attributed to the State, where the focus is largely on the presence of instructions, direction or control over the group violating international law. The ICJ's understanding of "effective control" requires that breaches were "directed or enforced" by the State, whereas the ICTY posited that "overall control" involving a contribution to the general planning of the group's activity would suffice. The *Tadić* Appeals Chamber eschewed the need for a State to have given instructions for the commission of specific violations in order for that State to be responsible. Such a standard would arguably place a due diligence obligation upon States to ensure that their aid or assistance is not used to commit war crimes.

The emphasis on "specific direction" by the ICTY Appeals Chamber in *Perišić* did not require that the accomplice directed the crimes of the actual perpetrators, but rather that the assistance itself was directed towards those crimes. It entailed a raising of the aiding and abetting standard by insisting on a purposive element, one which has not been accepted in subsequent jurisprudence, although it is arguably required by the Rome Statute. *Perišić* might be interpreted as an attempted counter-balance of the more expansive approach taken by the *Tadić* Appeals Chamber to attribution for State responsibility, which sought to eliminate the need for specific instructions or directions for the commission of offences. By insisting on specific direction, was the Appeals Chamber trying to bring the standard for individual responsibility for war crimes closer to that for State responsibility as set out by the ICJ? It certainly would have brought them closer, bearing in mind that the legal requirements remain distinct. By way of an example, in the context of the Syrian civil war, Tom Ruys concludes that the application of the specific direction element would serve to prevent the assistance given to State and non-State armed groups from giving rise to aiding and

161 Draft Articles, above note 141, p. 66. On military support to other States, see H.P. Aust, above note 131, pp. 129–145.

162 Draft Articles, above note 141, Art. 8.

163 *Ibid*., p. 47.

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abetting liability for officials of third States.[164] Were his analysis to be revised in light of current jurisprudence, which does not require specific direction, it would suggest that criminal liability could arise, given that the knowledge and substantial effects requirements are seemingly satisfied.[165] Yet the legal requirements are not satisfied for the States that are providing such aid or assistance to be internationally responsible for the war crimes perpetrated by the relevant non-State actors.[166] This leads to an incongruity in the law of international responsibility whereby State officials can be individually responsible for an outcome of actions conducted for the State, but the State itself cannot.

In her detailed study of the relationship between State and individual responsibility, Beatrice I. Bonafè has referred to "the need to establish some form of co-ordination between these two regimes of international responsibility, which cannot be achieved by relying too rigorously on the principle of individual criminal liability alone".[167] *Perišić* might be seen as having been an unsuccessful example of this, if the current jurisprudence prevails. Bonafè notes that reliance on modes of criminal liability, such as joint criminal enterprise, which focus on the collective nature of international crimes "has the effect of establishing individual criminal liability in a way which is increasingly similar to the assessment of aggravated state responsibility for the same internationally prohibited conduct".[168] There is, however, no "direct legal connection" between the two forms of international responsibility.[169] In the *Taylor* appeal, defence counsel sought to argue that the Court's jurisprudence on aiding and abetting effectively criminalized conduct viewed as lawful, and that States "have the right to supply materiel to parties to an armed conflict even if there is evidence that those parties are engaged in the regular commission of crimes".[170] The SCSL Appeals Chamber was not persuaded by the evidence put forth, holding that no statement was provided of a State claiming "the right to assist the commission of widespread and systematic crimes against a civilian population".[171] It focused on individual criminal responsibility, and found "no evidence of state practice indicating a change in customary international law from the existing parameters of personal culpability for aiding and abetting the commission of serious violations of international humanitarian law".[172] If States wished to change the scope of individual criminal responsibility because of "policy considerations", they possessed the necessary means to do so, the Appeals Chamber claimed. It would not "usurp that role" and act as legislator.[173]

164 T. Ruys, above note 158, pp. 20–22.
165 *Ibid*.
166 *Ibid*., pp. 22–26.
167 B. I. Bonafè, above note 144, p. 138.
168 *Ibid*., p. 189.
169 *Ibid*.
170 *Taylor*, above note 42, para. 453.
171 *Ibid*., para. 459.
172 *Ibid*., para. 464.
173 *Ibid*., paras 464–465.

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While international courts do not formally legislate, their jurisprudence carries significant weight in shaping the contours of international law. In the charged context of international responsibility, the relevant jurisprudence has been fragmented and has led to some uncertainty regarding when individuals and States might be indirectly responsible for war crimes perpetrated by non-State actors. In addressing such conduct, the law of international responsibility is only part of the puzzle, for IHL is as much concerned with preventing violations as it is with holding States or individuals responsible for breaches. This is evident in the obligation of High Contracting Parties to the Geneva Conventions and Protocol I to "ensure respect" for these treaties "in all circumstances".[174] The ICJ, it will be recalled, found that the United States had breached its obligation to ensure respect for IHL by preparing and disseminating a military manual seen to encourage violations by the *contras*. In the Advisory Opinion on the *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ addressed the meaning of the obligation under the Fourth Geneva Convention, noting that "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with".[175] The Court held that States should not recognize as lawful the unlawful situation created by the construction of the wall by Israel, nor give any aid or assistance that would contribute to its maintenance.[176] This interpretation of the duty to "ensure respect" corresponds with previous interpretations by the International Committee of the Red Cross and organs of the UN.[177] A contemporary and meaningful interpretation of the duty to ensure respect can also be addressed to the provision of aid or assistance to non-State actors who may engage in war crimes.[178]

Of particular relevance to the prevention of violations of IHL is the adoption by the UN General Assembly in April 2013 of a treaty to regulate "the international trade in conventional arms" and to prevent and eradicate the "illicit trade" in such weapons and ammunition.[179] One of the key provisions of the Arms Trade Treaty touches on the obligations of States in relation to allowing arms to be supplied to the perpetrators of international crimes:

> A State Party shall not authorize any transfer of conventional arms … if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or

174 Common Art. 1 to the 1949 Geneva Conventions; AP I, Article 1(1).

175 ICJ, *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, *ICJ Reports 2004*, paras 157–158.

176 *Ibid*., para. 159.

177 See, for example, Jean Pictet (ed.), *Commentary: IV Geneva Convention, Relative to the Protection of Civilian Person in Times of War*, ICRC, Geneva, 1958, p. 16; UN Security Council Res. 681, 20 December 1990, para. 5 (SC/RES/681); UN General Assembly Res. 57/125, 24 February 2003 (A/RES/57/125).

178 See, for example, T. Ruys, above note 158, pp. 26–31.

179 Arms Trade Treaty, 27 March 2013, UN Doc. A/CONF.217/2013/L.3 (entered into force 24 December 2014), Art. 1.

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> civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[180]

The Arms Trade Treaty also requires States Parties to assess whether arms exports could be used to "commit or facilitate a serious violation of international humanitarian law", and to refrain from authorizing any such transfer if there is an "overriding risk" of such.[181] The treaty entered into force in December 2014, creating a legal obligation for States Parties not to allow arms to be provided to those committing international crimes, even if such persons are not acting under the instructions, direction or control of the authorizing State. This obligation is arguably based on the customary duty to ensure respect for humanitarian law,[182] although it bears noting that a failure to fulfil the obligation does not render authorizing States responsible for the crimes in question solely on the basis of having authorized the transfer of arms. Nonetheless, as the Appeals Chamber of the SCSL noted in *Taylor*, this represents an indication of "developing attitudes amongst States that the international community has an obligation to ensure that civilian populations are protected from genocide, war crimes, ethnic cleansing and crimes against humanity".[183]

Conclusion

Notable parallels exist between the judicial treatment of individual criminal responsibility and State responsibility for the provision of aid or assistance to non-State groups that commit war crimes. The jurisprudence in both contexts has been characterized by differences of opinion between international courts and by tensions arising from the pursuit of interpretations of the law of international responsibility that are viewed as either overly expansive or restrictive. The absence of a clear and unambiguous conventional legal standard for aiding and abetting applicable to all of the international criminal tribunals, and of a precise definition for the concept of control in the context of attributing the acts of non-State actors to States, has allowed international judges to elaborate their own understandings as to the relevant tests and elements for each. Differing interpretations may have been motivated by an intention to progressively develop IHL, whereas others may have sought to remain faithful to existing laws as has been expressly agreed by States. Antonio Cassese, for example, admitted to having "exploited the *Tadić* case to draw as much as possible from a minor defendant to launch new ideas, and be creative".[184] For another ICTY president, Gabrielle Kirk McDonald, "the immovable rock of State sovereignty" meant that

180 *Ibid*., Art. 6(3).
181 *Ibid*., Art. 7.
182 T. Ruys, above note 158, p. 29.
183 *Taylor*, above note 42, para. 462.
184 "To Be an International Criminal Court Judge: Conversation with Antonio Cassese", Distinguished Fellows Lecture Series, 4 September 2003, Hauser Global Law School Program, NYU School of Law, p. 15, reprinted in *European Journal of International Law*, Vol. 22, No. 4, 2011, p. 942.

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the law of armed conflict did not match developments in war itself, and "[w]here before we chiseled at the rock, the ICTY is a drill, the ICC a wrecking ball".[185] In contrast, the ICJ stated squarely in the *Nuclear Weapons* Advisory Opinion that it "states the existing law and does not legislate".[186] The Court has "no purely legislative competence", according to former president Robert Jennings, and it must decide difficult cases using "the building materials available in already existing law".[187] Such materials would include customary international law, the dynamic nature of which has allowed for reasonable disagreement as to its precise content.

When the statutes for the *ad hoc* tribunals were being adopted, a representative at the UN Security Council considered that exceptional international criminal justice initiatives "may not be the best way to promote the consistent, balanced and effective application of international humanitarian law".[188] While this article has demonstrated the at times inconsistent approach to responsibility for war crimes amongst international courts and tribunals, it should be emphasized that such inconsistencies are far fewer and more obvious than the innumerable instances of judicial harmony. For one international judge, the concerns regarding fragmentation have been "overstated",[189] while for another, this may be an acceptable by-product of the strengthening of the enforcement mechanisms of IHL: according to ICTY President Fausto Pocar, who sat on the Appeals Chamber in *Šainović*,

> Although unity of international legal principles, and customary international law in particular, is important for the proper implementation of international criminal law, it is not the most pressing consideration. International proliferation of criminal jurisdictions unites international law in the struggle against impunity for the commission of war crimes, crimes against humanity and genocide, which remains more influential and important than the possible accompaniment of the fragmentation of certain legal principles.[190]

The various *ad hoc* tribunals will eventually cease to exist and it remains unlikely that similar temporary international criminal tribunals will be created again, at least on the scale of the ICTY or ICTR. With the ICC becoming the focal point for the international prosecution of war crimes, the scope for further

185 Gabrielle Kirk McDonald, "The Changing Nature of the Laws of War", *Military Law Review*, Vol. 156, 1998, p. 51.

186 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 18.

187 Robert Y. Jennings, "The Role of the International Court of Justice", *British Yearbook of International Law*, Vol. 68, No. 1, 1997, p. 43.

188 Representative of Brazil, Provisional Verbatim Record, S/PV.3453, 8 November 1994, reprinted in Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Rwanda*, Vol. 2, Transnational Publishers, New York, 1998, p. 303.

189 B. Simma, above note 126, p. 289.

190 Fausto Pocar, "The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law", in Holger P. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity; Libor Amicorum Rüdiger Woflrum*, Vol. 2, Martinus Nijhoff, The Hague, 2012, p. 1724.

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fragmentation may diminish, although the ICJ will of course have cause occasionally to address IHL.

After two decades of significantly contributing to the growth and consolidation of IHL, the recent divergent decisions on aiding and abetting by the Appeals Chamber have cast an unfortunate shadow on the legacy of the ICTY regarding responsibility for war crimes. This jurisprudence is reminiscent of the disagreement between the ICTY and the ICJ in the context of indirect State responsibility for violations by non-State actors, and as has been suggested in this article, the narrowing of the scope of individual criminal responsibility in *Perišić* can be read as an attempt to synchronize State and individual responsibility in that context. While perfect alignment is neither desirable nor feasible given the fundamentally different underpinnings of State and individual responsibility, this recent international case law has shown that in certain instances indirect responsibility might arise for a State official who aids or abets a non-State armed group engaging in war crimes, but not for the State on whose behalf such an official acts. This apparent anomaly highlights the separate development of both legal regimes, but also suggests either that the standard applied to individuals may be too low, or that the rules of attribution for State responsibility are set too high. The latter must be understood, however, in light of the coexisting duty of all States to ensure respect for IHL, an obligation that has been given considerable substance with the adoption of the Arms Trade Treaty. As to individual criminal responsibility, the absence of a hierarchy amongst international courts means that the growing consensus regarding the scope of aiding and abetting can bring some – but not absolute – certainty as to the requirements of this form of liability.

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