INTRODUCTORY NOTE TO PROSECUTOR V. PERIŠIĆ (ICTY)

BY CHRIS JENKS*

[February 28, 2013]
+Cite as 52 ILM 1065 (2013)+

Introduction

What are the requisite elements to convict an individual of aiding and abetting international crimes committed by an organization? This form of liability question was the principal issue the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) addressed in its February 28, 2013 judgment overturning the 2011 conviction of General Momčilo Perišić, the former head of the Army of Yugoslavia (VJ), for aiding and abetting war crimes in Bosnia-Herzegovina and Croatia.[1]

The *Perišić* judgment is controversial[2] and serves as a reminder of the still-unsettled nature of international criminal law's jurisprudence, given that even threshold questions lack consistent and coherent answers. Even more troubling is that the Appeals Chamber of a different tribunal, the Special Court for Sierra Leone, has already affirmatively rejected the *Perišić* formulation of aiding and abetting liability,[3] leading one commentator to claim that "[t]he fragmentation of international criminal law is well and truly upon us."[4]

Background

Perišić's conviction in 2011 marked the ICTY's first judgment against a VJ official for crimes committed in Bosnia-Herzegovina.[5] Beginning in 1993, Perišić served as Chief of the VJ General Staff, the most senior VJ officer in the Federal Republic of Yugoslavia. Between 1993 and 1995, the VJ provided military and logistical assistance to the Army of Republika Srpska (VRS) in Bosnia-Herzegovina.

The Trial Chamber, with Judge Moloto dissenting, found Perišić guilty, as an aider and abettor, of VRS crimes in Sarajevo and Srebrenica,[6] including murder, inhumane acts (injuring and wounding civilians), inflicting serious injuries, wounding, forcible transfer and persecutions as crimes against humanity, as well as murder and attacks on civilians as violations of the laws and customs of war.[7] Again with Judge Moloto dissenting, it also found Perišić guilty, as a superior, for failing to punish Serbian Army of the Krajina (SVK) crimes in Zagreb, including murder and inhumane acts (injuring and wounding civilians) as crimes against humanity, and for murder and attacks on civilians as violations of the laws of customs of war.[8] The Trial Chamber sentenced Perišić to a single term of twenty-seven years of imprisonment.

The Appeals Chamber Judgment

On appeal, the majority largely followed Judge Moloto's approach in his dissent in the Trial Judgment and acquitted Perišić for the VRS offenses in Bosnia and Herzegovina on a point of law and for the SVK offenses in Croatia following a *de novo* factual review.[9] Judge Liu dissented, arguing for Perišić's guilt along the lines taken by the Trial Chamber majority.

It is the point of law—the elements necessary to convict Perišić of aiding and abetting international crimes committed by the VRS—which has engendered controversy. The Trial Chamber had determined that the *actus reus* of Perišić's aiding and abetting was "prove[n] based on the finding that VJ assistance 'had a substantial effect on the crimes perpetrated by the VRS. . . .'"[10] In other words, the Trial Chamber did not require proof that the VJ's actions in providing military support were specifically directed towards assisting the VRS crimes.

The Appeals Chamber disagreed, relying on *Prosecutor v. Tadić*, the first ICTY appeal judgment to address the scope of aiding and abetting liability. The *Perišić* Appeals Chamber noted that *Tadić* had emphasized that "[t]he aider and abettor carries out 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."[11] The Appeals Chamber wrote that "[t]o date, no judgment of the Appeals Chamber has found cogent reasons to depart from the definition of aiding and abetting liability adopted in the *Tadić* Appeal Judgment."[12]

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The Appeals Chamber acknowledged that other ICTY appellate judgments addressing aiding and abetting liability did not analyze the issue of specific direction, but found that those cases involved actions proximate to the crimes of the principal perpetrators. The majority held that Perišić's assistance to the VRS had been remote from their crimes, that the VRS and the VJ were independent of each other and located in different geographic regions, and that there was no evidence that Perišić had been present when the VRS planned or committed criminal acts.[13] As a result, the Appeals Chamber held that "explicit consideration of specific direction is required."[14]

Conclusion

For some, the majority's statement that its ruling "should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts" rings hollow.[15] At its core, however, *Perišić* re-examines the line between culpable and non-culpable assistance to a crime.[16] Renewing reliance on specific direction may be a problematic way to draw this line, but critics should consider the ramifications of its removal before dismissing specific direction as too high a bar. What if instead of General Perišić providing assistance to the VRS, the issue was of military assistance to Syrian rebel groups known to have committed war crimes?[17]

ENDNOTES

1 Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013) [hereinafter *Appeals Judgment*].

2 The controversy has several origins. One is that following on the heels of *Prosecutor v. Gotovina and Markać, Perišić* is the latest in a series of high profile ICTY appellate acquittals. *See* Prosecutor v. Gotovina and Markać, Case No. IT-06-90-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 2012). Also, following *Perišić*, on May 30, 2013 an ICTY trial chamber, applying the specific direction requirement, ordered the release of the former Chief of Serbian State Security Service and a former employee of that service. *See* Prosecutor v. Stanišić and Simatović, Case No. IT-03-69, Judgment (Int'l Crim. Trib. for the former Yugoslavia May 30, 2013).

3 The Appeals Chamber of the Special Court for Sierra Leone, in upholding the conviction of Charles Taylor, the former President of Liberia, claimed that "[a]lthough the Perišić Appeal Judgment introduces novel elements in its articulation of 'specific direction' [to aiding and abetting liability], which may perhaps be developed in time, this Appeals Chamber is not persuaded that there is good reason to depart from settled principles of law at this time." Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 480 (Special Ct. for Sierra Leone Sep. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8%3d&tabid=53.

4 Marko Milanovic, *SCSL Appeals Chamber Affirms Charles Taylor's Conviction*, EJIL: TALK! (Sep. 26, 2013), http://www.ejiltalk.org/scsl-appeals-chamber-affirms-charles-taylors-conviction/.

5 Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Sep. 6, 2011) [hereinafter *Trial Judgment*].

6 The 1995 VRS attack of Srebrenica led to the mass murder of some 8,000 Bosniaks, in what then-UN Secretary-General Kofi Annan labeled the worst crime to be committed on European soil since World War II. *See* Press Release, Secretary-General, 'May We All Learn and Act on the Lessons of Srebrenica', Says Secretary-General, in Message to Anniversary Ceremony, U.N. Press Release SG/SM/9993 (Nov. 7, 2005), http://www.un.org/News/Press/docs/2005/sgsm9993.doc.htm. The International Court of Justice later ruled that the attack constituted genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 43 (Feb. 26), www.icj-cij.org/docket/files/91/13685.pdf.

7 *Trial Judgment*, *supra* note 5, ¶¶ 1815, 1820, 1838.

8 *Id.* ¶¶ 1818, 1839.

9 The *de novo* factual review was of an issue of the doctrine of command responsibility, which this Introductory Note does not address.

10 *Appeals Judgment*, *supra* note 1, ¶ 17 (referring to *Trial Judgment*, supra note 5, ¶ 1627).

11 *Id.* ¶ 26 (referring to *Tadić* Appeals Judgment ¶ 229) (emphasis in original).

12 *Id.* ¶ 28.

13 Judge Liu reasoned that Perišić "facilitated the large-scale crimes of the VRS through the provision of considerable and comprehensive aid" constituting "a prime example of conduct to which aiding and abetting liability should attach." *Appeals Judgment*, *supra* note 1, ¶ 9 (Liu, J., partially dissenting). Judge Liu persuasively referred to points from the Trial Judgment, including that Perišić institutionalized the provision of assistance to the VRS, that he had the power to approve or deny requests, that the assistance "sustained the very life line of the VRS", that Perišić "did not believe that the VRS had another significant source of assistance," and that from early stages of the war Perišić was aware of "the VRS' propensity to commit criminal acts." *Id.* ¶¶ 6-7, 8.

14 *Id.* ¶ 39.

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15 *Id.* ¶ 72; Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EJIL: TALK! (Mar. 11, 2013), http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/.

16 *See* Kevin Jon Heller, *Why the ICTY's "Specifically Directed" Requirement is Justified*, OPINIO JURIS (June 2, 2013), http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/.

17 *Id.*; *see also* HUMAN RIGHTS WATCH, SYRIA: ARMED OPPOSITION GROUPS COMMITTING ABUSES END KIDNAPPINGS, FORCED CONFESSIONS, AND EXECUTIONS (Mar. 20, 2012), http://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses.

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PROSECUTOR V. PERIŠIĆ (ICTY)*
[February 28, 2013]
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UNITED NATIONS

	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	Case No.	IT-06-90-A IT-04-81-A
		Date:	
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Judgement of: **28 February 2013**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Ms. Barbara Goy
Ms. Elena Martin Salgado
Ms. Bronagh McKenna

Counsel for Momčilo Perišić
Mr. Novak Lukić
Mr. Gregor Guy-Smith

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1. The Appeals Chamber 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal by Momčilo Perišić ("Perišić") against the Judgement rendered by Trial Chamber I of the Tribunal ("Trial Chamber") on 6 September 2011 in the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. The underlying events giving rise to this case took place in the territory of Bosnia and Herzegovina ("BiH" or "Bosnia") and the Republic of Croatia ("Croatia") in the period between August 1993 and November 1995.[2] Starting on 26 August 1993 and through the rest of this period, Perišić served as Chief of the Yugoslav Army ("VJ") General Staff, a position that made him the VJ's most senior officer.[3]

3. Perišić was charged with aiding and abetting crimes in the Bosnian towns of Sarajevo and Srebrenica for his role in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS"). In this regard, the Indictment alleged that Perišić was responsible for the crimes of murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war.[4] The Indictment further alleged that Perišić had superior responsibility for crimes committed in Sarajevo, Srebrenica, and the Croatian town of Zagreb. In particular, the Indictment alleged that Perišić failed to prevent or punish the crimes of murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war.[5] The Office of the Prosecutor of the Tribunal ("Prosecution") subsequently chose not to pursue allegations that Perišić bore superior responsibility for failing to prevent crimes committed in Zagreb.[6]

4. The Trial Chamber, Judge Moloto dissenting, found Perišić guilty, as an aider and abettor, of the following crimes that took place in Sarajevo and Srebrenica: murder, inhumane acts (injuring and wounding civilians, inflicting serious injuries, wounding, forcible transfer), and persecutions as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war.[7] The Trial Chamber, Judge Moloto dissenting, also found Perišić guilty as a superior for failing to punish the following crimes related to events in Zagreb: murder and inhumane acts (injuring and wounding civilians) as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war.[8] The Trial Chamber sentenced Perišić to a single term of 27 years of imprisonment.[9]

B. The Appeal

5. Perišić submits seventeen grounds of appeal challenging his convictions and sentence.[10] He requests that the Appeals Chamber overturn all of his convictions or, in the alternative, that his sentence be reduced.[11] The Prosecution responds that Perišić's appeal should be dismissed in its entirety.[12]

6. The Appeals Chamber heard oral submissions regarding this appeal on 30 October 2012.[13]

II. STANDARD OF REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews only errors of law that have the potential to invalidate the decision of the trial chamber and errors of fact that have occasioned a miscarriage of justice.[14] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[15]

8. Regarding errors of law, the Appeals Chamber has stated:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the alleged error invalidates the decision. An allegation of an error of

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> law which has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[16]

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[17] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[18] It is necessary for any appellant claiming an error of law on the basis of lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.[19]

10. Regarding errors of fact, the Appeals Chamber will apply a standard of reasonableness.[20] It is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber:

> In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own findings for that of the trial chamber when no reasonable trier of fact could have reached the original decision. [. . .] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber.[21]

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[22] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[23]

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[24] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[25] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[26]

III. AIDING AND ABETTING (GROUNDS 1-12)

13. The Trial Chamber, Judge Moloto dissenting, found Perišić guilty, *inter alia*, for aiding and abetting: murder, inhumane acts (injuring and wounding civilians, inflicting serious injuries, wounding, and forcible transfer), and persecutions on political, racial, or religious grounds as crimes against humanity (Counts 1, 3, 9, 11, and 12); and murder and attacks on civilians as violations of the laws or customs of war (Counts 2, 4, and 10).[27] All of these convictions related to crimes unanimously found to have been committed by the VRS in Sarajevo and Srebrenica (collectively, "VRS Crimes in Sarajevo and Srebrenica").[28]

14. The Trial Chamber considered a broad range of evidence in assessing whether Perišić aided and abetted the VRS Crimes in Sarajevo and Srebrenica. This evidence included, *inter alia*, the war strategy of the VRS leadership. The Trial Chamber, specifically making reference to VRS objectives involving Sarajevo and Srebrenica, found that this strategy encompassed the systematic perpetration of crimes against civilians as a military objective.[29] The Trial Chamber also reviewed evidence regarding Perišić's role in implementing the Federal Republic of Yugoslavia's ("FRY") policy of having the VJ provide logistical assistance to the VRS, including the supply of weapons, ammunition, fuel, and various other types of support.[30] Finally, the Trial Chamber considered Perišić's role in facilitating the secondment of VJ personnel to the VRS, including the payment of salaries to and provision of benefits for these soldiers, some of whom served as high-ranking VRS officers.[31]

15. The Trial Chamber further found, *inter alia*, that Perišić was informed about "acts of violence against Bosnian Muslims perpetrated in the BiH theatre of war [that] made Perišić aware of the VRS's propensity to commit crimes";[32] was aware of the essential elements of the VRS Crimes in Sarajevo and Srebrenica; and was aware that his actions provided practical assistance to these crimes.[33]

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16. Perišić contends that the Trial Chamber erred by holding that acts of an aider and abettor need not be specifically directed towards assisting crimes of principal perpetrators.[34] He further contends that the Trial Chamber committed a number of additional errors with respect to his convictions for aiding and abetting.[35]

A. Specific Direction

17. The Trial Chamber, Judge Moloto dissenting, concluded that the *actus reus* of aiding and abetting was proved based on the finding that VJ assistance "had a substantial effect on the crimes perpetrated by the VRS in Sarajevo and Srebrenica".[36] In assessing Perišić's liability as an aider and abettor, the Trial Chamber stated that "'specific direction' is not a requisite element of the *actus reus* of aiding and abetting", citing the *Mrkšić and Šljivančanin* Appeal Judgement.[37] Relying on that appeal judgement, the majority of the Trial Chamber did not consider whether aid from the VJ to the VRS was specifically directed to the commission of crimes.[38]

1. Submissions

18. Perišić asserts, *inter alia*, that the Trial Chamber erred in law by convicting him for aiding and abetting without requiring proof that his acts were specifically directed towards assisting the crimes of principal perpetrators.[39] In particular, Perišić avers that the Trial Chamber relied on the *Mrkšić and Šljivančanin* Appeal Judgement to support its finding that specific direction was not an element of aiding and abetting liability.[40] However, he submits that the *Mrkšić and Šljivančanin* Appeal Judgement erroneously interpreted the *Blagojević and Jokić* Appeal Judgement in holding that a conviction for aiding and abetting did not require proof of specific direction.[41] Perišić contends that specific direction was included as an element of the *actus reus* of aiding and abetting in the *Tadić* Appeal Judgement, and that this element distinguishes aiding and abetting from liability for participation in a Joint Criminal Enterprise ("JCE"), a mode of liability that does not require specific direction.[42] He also maintains that the specific direction element of aiding and abetting liability is distinct from the "substantial effect" element.[43]

19. Perišić further asserts that specific direction was included as an element of aiding and abetting in appeal judgements of the Tribunal prior to the *Mrkšić and Šljivančanin* Appeal Judgement, and in appeal judgements of the International Criminal Tribunal for Rwanda ("ICTR") both before and after the *Mrkšić and Šljivančanin* Appeal Judgement.[44] He maintains that the *Mrkšić and Šljivančanin* Appeal Judgement's approach to specific direction is thus "strikingly inconsistent with the Tribunal's jurisprudence and should be rejected."[45] Moreover, even if the Appeals Chamber affirms the *Mrkšić and Šljivančanin* Appeal Judgement's approach to specific direction, Perišić asserts that in cases such as this, where "remote conduct" is at issue, specific direction should be a requirement in order to establish the *actus reus* for aiding and abetting.[46] He maintains that the Trial Chamber's approach effectively "amounts to a form of strict liability" where "to in any way assist the VRS in their conduct of hostilities was to aid and abet their criminal acts."[47]

20. Perišić submits that his acts were not specifically directed towards providing VJ aid to the VRS crimes. He contends that, although he facilitated the provision of aid to the VRS, this was general assistance directed towards a war effort[48] and that, in any event, he could not have stopped the flow of assistance.[49] He maintains, *inter alia*, that the Trial Chamber could not link his support of the VRS with the specific weapons used to commit relevant crimes[50] and that all but three individuals who held key positions within the VRS held those positions prior to his appointment as Chief of the VJ General Staff.[51] Perišić requests that the Appeals Chamber "reverse the Trial Chamber's judg[e]ment and enter an acquittal."[52]

21. The Prosecution responds, *inter alia*, that the Trial Chamber did not err in setting out the parameters of Perišić's liability and that it correctly found that specific direction was not a required element of aiding and abetting.[53] In particular, the Prosecution asserts that conduct is directed towards a crime if it facilitates or causes this crime. In this context, the Prosecution contends that specific direction has no independent meaning and is part of the substantial effect requirement.[54] The Prosecution also suggests that specific direction has no independent meaning even in cases where an aider and abettor is remote from actions of principal perpetrators.[55]

22. The Prosecution submits that while specific direction "emanates" from the *Tadić* Appeal Judgement, the latter did not provide a complete description of aiding and abetting liability.[56] It maintains that even judgements

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referring to specific direction focus exclusively on substantial contribution in addressing the *actus reus* of aiding and abetting.[57] The Prosecution also maintains that caselaw in other jurisdictions does not require specific direction in cases where an aider and abettor's conduct is remote from relevant crimes.[58]

23. The Prosecution suggests that the proximity of an alleged aider and abettor to crimes committed by the principal perpetrators is one factor that a trial chamber may consider in determining whether substantial contribution is established.[59] However, in this regard, the Prosecution submits that the *Delalić et al.* Appeal Judgement held that an aider and abettor's assistance may be removed in time and space from relevant crimes[60] and asserts that a trial chamber may take into account factors other than geographic proximity in determining substantial contribution, including duration, frequency, and intensity of interactions with principal perpetrators or assistance to their crimes.[61]

24. The Prosecution underscores the extensive nature of assistance provided by the VJ to the VRS in this case, suggesting that the scale of this aid alone gives rise to aiding and abetting liability.[62] In this regard, the Prosecution asserts that Perišić knew of VRS crimes but nonetheless "voluntarily provided indispensable, massive, and consistent personnel and logistical assistance" to the VRS, interacted regularly with "VRS perpetrators" of crimes, "visited the war zone several times",[63] and "continuously and actively lobbied the [FRY Supreme Defence Council ("SDC")] to ensure that the VRS's ability to wage war in [Bosnia] was sustained".[64] The Prosecution further asserts that attacks against civilians, including those in Sarajevo and Srebrenica, were so central to the VRS's overall military strategy that it "was not possible" for Perišić to direct military assistance only towards the VRS's legitimate war efforts.[65] Finally, the Prosecution contends that Perišić's personal motives with respect to VRS crimes are irrelevant to a determination of his criminal liability in this regard, as he knew that the assistance provided to the VRS would probably facilitate the commission of crimes.[66]

2. Analysis

(a) Specific Direction as a Component of Aiding and Abetting Liability

25. Perišić contends that both the Trial Judgement and the *Mrkšić and Šljivančanin* Appeal Judgement erroneously held that specific direction is not an element of the *actus reus* of aiding and abetting.[67] Before turning to Perišić's contention, the Appeals Chamber considers it appropriate to review its prior aiding and abetting jurisprudence.

26. The Appeals Chamber recalls that the first appeal judgement setting out the parameters of aiding and abetting liability was the *Tadić* Appeal Judgement, rendered in 1999, which described the *actus reus* of criminal liability for aiding and abetting as follows:

> The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.[68]

27. In defining the elements of aiding and abetting liability, the *Tadić* Appeal Judgement contrasted aiding and abetting with JCE, distinguishing these modes of liability on the basis of specific direction. The Appeals Chamber underscored that, while the *actus reus* of JCE requires only "acts that *in some way* are directed to the furthering of the common plan or purpose", the *actus reus* of aiding and abetting requires a closer link between the assistance provided and particular criminal activities: assistance must be "specifically" – rather than "in some way" – directed towards relevant crimes.[69]

28. To date, no judgement of the Appeals Chamber has found cogent reasons to depart from the definition of aiding and abetting liability adopted in the *Tadić* Appeal Judgement. Moreover, many subsequent Tribunal and ICTR appeal judgments explicitly referred to "specific direction" in enumerating the elements of aiding and abetting, often repeating verbatim the *Tadić* Appeal Judgement's relevant holding.[70]

29. The Appeals Chamber notes that, while certain appeal judgements rendered after the *Tadić* Appeal Judgement made no explicit reference to specific direction, several of these employed alternative but equivalent formulations. In particular, the *Simić* Appeal Judgement defined the *actus reus* of aiding and abetting as "acts *directed*

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to assist, encourage or lend moral support to the perpetration of a certain *specific* crime".[71] Similarly, the *Orić* Appeal Judgement, discussing aiding and abetting in the context of omission liability, explained that the "omission must be *directed* to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime".[72] The ICTR's *Ntawukulilyayo* and *Rukundo* Appeal Judgements referred to acts that are "specifically aimed" towards relevant crimes.[73] Finally, the ICTR's *Karera* Appeal Judgement stated that the "*actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a *specific* crime".[74] The Appeals Chamber considers that these judgements effectively included specific direction as an element of the *actus reus* of aiding and abetting.

30. The Appeals Chamber further notes that although other Tribunal and ICTR appeal judgements neither refer to specific direction nor provide an equivalent formulation, these judgements do not offer a comprehensive definition of the elements of aiding and abetting liability. In particular, the *Haradinaj et al.*, *Limaj et al.*, *Furundžija*, *Renzaho*, *Nchamihigo*, *Zigiranyirazo*, *Ndindabahizi*, *Gacumbitsi*, *Semanza*, and *Rutaganda* Appeal Judgements focused, as relevant, *only* on particular elements of aiding and abetting liability or questions of fact, rather than providing an exhaustive review of aiding and abetting as a whole.[75] Similarly, the *Gotovina and Markač*, *Krajišnik*, *Brđanin*, and *Krstić* Appeal Judgements did not explicitly set out *all* the elements of aiding and abetting liability. Insofar as these appeal judgements referred to the elements of aiding and abetting liability, however, they cited to previous appeal judgements that explicitly discussed specific direction.[76]

31. By contrast to the judgements discussed above, the 2001 *Delalić et al.* Appeal Judgement endorsed a definition of the *actus reus* of aiding and abetting that neither refers to specific direction nor contains equivalent language – the only appeal judgement of the Tribunal or the ICTR to do so.[77] However, the Appeals Chamber explained in the 2007 *Blagojević and Jokić* Appeal Judgement that "the *Tadić* [Appeal Judgement's] definition [of aiding and abetting liability has] not been explicitly departed from".[78] The Appeals Chamber reasoned that in cases where specific direction is not "included as an element of the *actus reus* of aiding and abetting", findings on specific direction "will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime."[79] Moreover, the *Blagojević and Jokić* Appeal Judgement expressly considered the *Delalić et al.* Appeal Judgement in both its analysis of cases that did not explicitly refer to specific direction, and its conclusion that such cases included an implicit analysis of specific direction.[80]

32. Mindful of the foregoing, the Appeals Chamber now turns to the 2009 *Mrkšić and Šljivančanin* Appeal Judgement, and Perišić's contention that this judgement erroneously departed from settled jurisprudence by stating that specific direction is not an element of the *actus reus* of aiding and abetting.[81] In discussing the *mens rea* of aiding and abetting, the *Mrkšić and Šljivančanin* Appeal Judgement stated, in passing, that "the Appeals Chamber has confirmed that 'specific direction' is not an *essential ingredient* of the *actus reus* of aiding and abetting."[82] This statement may be read to suggest that specific direction is not an element of the *actus reus* of aiding and abetting. However, the Appeals Chamber, Judge Liu dissenting, is not persuaded that the *Mrkšić and Šljivančanin* Appeal Judgement reflected an intention to depart from the settled precedent established by the *Tadić* Appeal Judgement.[83]

33. At the outset, the Appeals Chamber observes that the *Mrkšić and Šljivančanin* Appeal Judgement's reference to specific direction not being an "essential ingredient" is found in a section of the judgement analysing the *mens rea* rather than *actus reus* of aiding and abetting.[84] In the context of rejecting Šljivančanin's assertion that aiding and abetting by omission requires a heightened *mens rea*,[85] the Appeals Chamber explained that Šljivančanin's reference to specific direction as part of "the *mens rea* standard applicable to aiding and abetting" was erroneous because specific direction "forms part of the *actus reus* not the *mens rea* of aiding and abetting."[86] The Appeals Chamber then stated that specific direction was "not an essential ingredient" of the *actus reus* of aiding and abetting.[87] The only authority cited to support this latter conclusion was the *Blagojević and Jokić* Appeal Judgement's holding that specific direction *is* a requisite element of aiding and abetting liability, albeit one that may at times be satisfied by an implicit analysis of substantial contribution.[88]

34. The Appeals Chamber recalls its settled practice to only "depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts."[89] The *Mrkšić and Šljivančanin* Appeal Judgement's passing reference to specific direction does not amount to such "careful consideration". Had the Appeals Chamber found cogent reasons to depart from its relevant precedent, and

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intended to do so, it would have performed a clear, detailed analysis of the issue, discussing both past jurisprudence and the authorities supporting an alternative approach.[90] Instead, the relevant reference to specific direction: was made in a section and paragraph dealing with *mens rea* rather than *actus reus*; was limited to a single sentence not relevant to the Appeals Chamber's holding; did not explicitly acknowledge a departure from prior precedent; and, most tellingly, cited to only one previous appeal judgement, which in fact confirmed that specific direction does constitute an element of aiding and abetting liability.[91] These indicia suggest that the formula "not an essential ingredient" was an attempt to summarise, in passing, the *Blagojević and Jokić* Appeal Judgement's holding that specific direction can often be demonstrated implicitly through analysis of substantial contribution, rather than abjure previous jurisprudence establishing that specific direction is an element of aiding and abetting liability.[92]

35. Appeal judgements rendered after the *Mrkšić and Šljivančanin* Appeal Judgement confirm that the Appeals Chamber in that case neither intended nor attempted a departure from settled precedent.[93] The 2012 *Lukić and Lukić* Appeal Judgement approvingly quoted the *Blagojević and Jokić* Appeal Judgement's conclusion that a finding of specific direction can be implicit in an analysis of substantial contribution. In the same paragraph, the *Lukić and Lukić* Appeal Judgement found that there were no cogent reasons to deviate from the holding of the *Mrkšić and Šljivančanin* Appeal Judgement with respect to specific direction.[94] The *Lukić and Lukić* Appeal Judgement thus confirms that the *Blagojević and Jokić* and *Mrkšić and Šljivančanin* Appeal Judgements are not antithetical in their approach to specific direction.[95] In addition, the Appeals Chamber recalls that several ICTR appeal judgements rendered after the *Mrkšić and Šljivančanin* Appeal Judgement explicitly refer to specific direction or equivalent language in enumerating the elements of the *actus reus* of aiding and abetting.[96]

36. Accordingly, despite the ambiguity of the *Mrkšić and Šljivančanin* Appeal Judgement, the Appeals Chamber, Judge Liu dissenting, considers that specific direction remains an element of the *actus reus* of aiding and abetting liability. The Appeals Chamber, Judge Liu dissenting, thus reaffirms that no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly.[97]

(b) Circumstances in which Specific Direction Must be Explicitly Considered

37. At the outset, the Appeals Chamber, Judge Liu dissenting, recalls that the element of specific direction establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.[98] In many cases, evidence relating to other elements of aiding and abetting liability[99] *may* be sufficient to demonstrate specific direction and thus the requisite culpable link.

38. In this respect, the Appeals Chamber notes that previous appeal judgements have not conducted extensive analyses of specific direction. The lack of such discussion may be explained by the fact that prior convictions for aiding and abetting entered or affirmed by the Appeals Chamber involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of principal perpetrators.[100] Where such proximity is present, specific direction may be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution. For example, an individual accused of aiding and abetting may have been physically present during the preparation or commission of crimes committed by principal perpetrators and made a concurrent substantial contribution.[101] In such a case, the existence of specific direction, which demonstrates the culpable link between the accused aider and abettor's assistance and the crimes of principal perpetrators, will be self-evident.

39. However, not all cases of aiding and abetting will involve proximity of an accused individual's relevant acts to crimes committed by principal perpetrators. Where an accused aider and abettor is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction. In such circumstances, the Appeals Chamber, Judge Liu dissenting, holds that explicit consideration of specific direction is required.[102]

40. The factors indicating that acts of an accused aider and abettor are remote from the crimes of principal perpetrators will depend on the individual circumstances of each case. However, some guidance on this issue is provided by the Appeals Chamber's jurisprudence. In particular, the Appeals Chamber has previously concluded,

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in discussing aiding and abetting liability, that significant temporal distance between the actions of an accused individual and the crime he or she allegedly assisted decreases the likelihood of a connection between that crime and the accused individual's actions.[103] The same rationale applies, by analogy, to other factors separating the acts of an individual accused of aiding and abetting from the crimes he or she is alleged to have facilitated. Such factors may include, but are not limited to, geographic distance.

(c) The Trial Chamber's Analysis of Aiding and Abetting in this Case

41. In assessing Perišić's culpability and defining the legal standard for aiding and abetting, the Trial Chamber relied on the *Mrkšić and Šljivančanin* Appeal Judgement to find that specific direction was not an element of aiding and abetting liability, and did not consider, either explicitly or implicitly, whether Perišić's acts were specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.[104] However, as explained above, while the relevant phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement is misleading, that appeal judgement did not deviate from prior well-settled precedent that specific direction is a necessary element of aiding and abetting liability.[105] Accordingly, the Appeals Chamber, Judge Liu dissenting, considers that the Trial Chamber's holding that specific direction is not an element of the *actus reus* of aiding and abetting was an error of law.

42. The Appeals Chamber observes that Perišić's assistance to the VRS was remote from the relevant crimes of principal perpetrators.[106] In particular, the Trial Chamber found that the VRS was independent from the VJ,[107] and that the two armies were based in separate geographic regions.[108] In addition, the Trial Chamber did not refer to any evidence that Perišić was physically present when relevant criminal acts were planned or committed.[109] In these circumstances,[110] the Appeals Chamber, Judge Liu dissenting, further considers that an explicit analysis of specific direction would have been required in order to establish the necessary link between the aid Perišić provided and the crimes committed by principal perpetrators.

43. The Appeals Chamber emphasises that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement.[111] However, the Appeals Chamber's duty to correct legal errors remains unchanged.[112] Accordingly, the Appeals Chamber will proceed to assess the evidence relating to Perišić's convictions for aiding and abetting *de novo* under the correct legal standard, considering whether Perišić's actions were specifically directed to aid and abet the VRS Crimes in Sarajevo and Srebrenica.[113]

44. The Appeals Chamber notes that previous judgements have not provided extensive analysis of what evidence may prove specific direction. However, the Appeals Chamber recalls again that the *Tadić* Appeal Judgement indicated that specific direction involves finding a closer link between acts of an accused aider and abettor and crimes committed by principal perpetrators than is necessary to support convictions under JCE.[114] The types of evidence required to establish such a link will depend on the facts of a given case. Nonetheless, the Appeals Chamber observes that in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators.[115] In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary.

(d) The Extent to which Perišić Specifically Directed Assistance to VRS Crimes

45. In order to determine whether the assistance facilited by Perišić was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica, the Appeals Chamber will now review and assess *de novo* relevant evidence, taking into account, where appropriate, the Trial Chamber's findings.

46. As a preliminary matter, the Appeals Chamber recalls that the Trial Chamber did not find the VRS *de jure* or *de facto* subordinated to the VJ.[116] In particular, the Trial Chamber found that the VRS had a separate command structure: the President of the Republika Srpska served as Commander-in-Chief of the VRS, with a Commander of the VRS Main Staff assuming delegated authorities.[117] Broader questions of VRS military strategy were addressed by the Republika Srpska's Supreme Command, composed of the Republika Srpska's President, Vice President, Speaker of the Assembly, and Ministers of Defence and Interior.[118] While the Trial Chamber noted that the VRS received support from the VJ, the Trial Chamber also identified sources of support other than the FRY.[119]

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In addition, the Trial Chamber found that Perišić was not proved beyond reasonable doubt to have exercised effective control over VJ troops seconded to the VRS.[120] Finally, the Trial Chamber observed that Ratko Mladić, the Commander of the VRS Main Staff, refused to accept peace plans urged by the VJ and FRY leadership.[121] The Appeals Chamber, having considered this evidence in its totality, agrees with the Trial Chamber's determination that the evidence on the record suggests that "the VRS and the VJ [were] separate and independent military entities".[122]

47. Having reaffirmed the Trial Chamber's conclusion that the VRS was independent of the VJ, the Appeals Chamber will now consider whether VJ assistance to the VRS, which Perišić acknowledged having facilitated, was specifically directed towards VRS crimes.[123] In particular, the Appeals Chamber will assess: (i) Perišić's role in shaping and implementing the FRY policy of supporting the VRS; (ii) whether the FRY policy of supporting the VRS was specifically directed towards the commission of crimes by the VRS; and (iii) whether Perišić either implemented the SDC policy of assisting the VRS in a way that specifically directed aid to the VRS Crimes in Sarajevo and Srebrenica, or took action to provide such aid outside the context of SDC-approved assistance. The Appeals Chamber considers that the relevant evidence in this case is circumstantial and thus can only support a finding of specific direction if this is the sole reasonable interpretation of the record.[124]

48. The Appeals Chamber underscores that the parameters of its inquiry are limited and focus solely on factors related to Perišić's individual criminal liability for the VRS Crimes in Sarajevo and Srebrenica, not the potential liability of States or other entities over which the Tribunal has no pertinent jurisdiction.[125] The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*. In this regard, the Appeals Chamber acknowledges that specific direction may involve considerations that are closely related to questions of *mens rea*. Indeed, as discussed below, evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes.[126] However, the Appeals Chamber recalls again that the *mens rea* required to support a conviction for aiding and abetting is knowledge that assistance aids the commission of criminal acts, along with awareness of the essential elements of these crimes.[127] By contrast, as set out above, the long-standing jurisprudence of the Tribunal affirms that specific direction is an analytically distinct element of *actus reus*.[128]

(i) Perišić's Role in Shaping and Implementing the SDC Policy of Supporting the VRS

49. The Appeals Chamber recalls that, as the Trial Chamber noted, Perišić served as Chief of the VJ General Staff, and was thus the most senior officer of the VJ, from 26 August 1993 to 24 November 1998.[129] In this capacity, Perišić was responsible for ensuring combat readiness and organising VJ operations.[130] Perišić was subordinated to the FRY President, whose "'enactments'" Perišić was obligated to implement.[131] Ultimate authority over defence policy and operational priorities for the VJ rested with the SDC.[132] While SDC meetings were attended by many individuals, including Perišić, final SDC decisions were taken by political leaders: the President of the FRY and the Presidents of the Republics of Serbia and Montenegro.[133]

50. The decision to provide VJ assistance to the VRS was adopted by the SDC before Perišić was appointed Chief of the VJ General Staff,[134] and the SDC continued to support this policy during Perišić's tenure in this position.[135] Perišić regularly attended and actively participated in meetings of the SDC,[136] and the SDC granted him the legal authority to administer assistance to the VRS.[137] However, the SDC retained and exercised the power to review both particular requests for assistance and the general policy of providing aid to the VRS.[138]

51. The Appeals Chamber recalls that the SDC's responsibility for adopting the policy of assisting the VRS does not, in itself, exempt Perišić from individual criminal liability.[139] The Appeals Chamber considers that, in view of the circumstances of this case, Perišić could still be found to have provided assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica if: the policy he implemented involved providing assistance specifically linked to VRS crimes; he implemented a policy meant to aid the general VRS war effort in a manner that specifically directed assistance towards the VRS crimes; or, acting outside the scope of the SDC's official policy, he provided assistance specifically directed towards VRS crimes.[140] To assess whether evidence on the record supports any such conclusions, the Appeals Chamber will first consider Trial Chamber findings and evidence regarding the parameters of the SDC policy of providing assistance to the VRS, and will then evaluate evidence regarding Perišić's individual actions.

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(ii) The SDC Policy of Providing Support to the VRS

52. The Appeals Chamber considers that two inquiries are relevant to assessing whether SDC assistance to the VRS was specifically directed to facilitate the latter's criminal activities. The first inquiry assesses whether the VRS was an organisation whose sole and exclusive purpose was the commission of crimes. Such a finding would suggest that assistance by the VJ to the VRS was specifically directed towards VRS crimes, including the VRS Crimes in Sarajevo and Srebrenica. The second inquiry assesses whether the SDC endorsed a policy of assisting VRS crimes; such a finding would again suggest that the assistance from the VJ to the VRS was specifically directed towards, *inter alia*, the VRS Crimes in Sarajevo and Srebrenica.

53. With respect to the first inquiry, the Appeals Chamber recalls that the Trial Chamber did not characterise the VRS as a criminal organisation; indeed, it stated that "Perišić is not charged with helping the VRS wage war *per se*, which is not a crime under the Statute."[141] Having reviewed the evidence on the record, the Appeals Chamber agrees with the Trial Chamber that the VRS was not an organisation whose actions were criminal *per se*; instead, it was an army fighting a war.[142] The Appeals Chamber notes the Trial Chamber's finding that the VRS's strategy was "inextricably linked to" crimes against civilians.[143] However, the Trial Chamber did not find that all VRS activities in Sarajevo or Srebrenica were criminal in nature. The Trial Chamber limited its findings to characterising as criminal only certain *actions* of the VRS in the context of the operations in Sarajevo and Srebrenica.[144] In these circumstances, the Appeals Chamber considers that a policy of providing assistance to the VRS's general war effort does not, in itself, demonstrate that assistance facilitated by Perišić was specifically directed to aid the VRS Crimes in Sarajevo and Srebrenica.

54. Turning to the second inquiry, the Appeals Chamber first observes that the Trial Chamber discussed evidence indicating SDC approval of measures to secure financing for the VJ's assistance to the VRS[145] and to increase the effectiveness of this assistance by systematising the secondment of VJ personnel and the transfer of equipment and supplies.[146] The Trial Chamber determined that this evidence "conclusively demonstrate[s] that the SDC licensed military assistance to the VRS".[147] However, the Trial Chamber did not identify any evidence that the SDC policy directed aid towards VRS criminal activities in particular.[148]

55. The Appeals Chamber's *de novo* review of the evidentiary record also reveals no basis for concluding that it was SDC policy to specifically direct aid towards VRS crimes.[149] Instead, the SDC focused on monitoring and modulating aid to the general VRS war effort.[150] For example, SDC discussions addressed difficulties in providing particular levels of assistance requested by the VRS;[151] salaries of VJ personnel seconded to the VRS;[152] and instances where members of the VJ provided supplies to the VRS without official approval.[153]

56. The Appeals Chamber notes the Prosecution's suggestion that the magnitude of VJ aid provided to the VRS is sufficient to prove Perišić's *actus reus* with respect to the VRS Crimes in Sarajevo and Srebrenica.[154] However, the Appeals Chamber observes that while the Trial Chamber considered evidence regarding volume of assistance in making findings on substantial contribution,[155] this analysis does not necessarily demonstrate specific direction, and thus such evidence does not automatically establish a sufficient link between aid provided by an accused aider and abettor and the commission of crimes by principal perpetrators.[156] In the circumstances of this case, indicia demonstrating the magnitude of VJ aid to the VRS serve as circumstantial evidence of specific direction; however, a finding of specific direction must be the sole reasonable inference after a review of the evidentiary record as a whole.[157]

57. The Appeals Chamber underscores that the VRS was participating in lawful combat activities and was not a purely criminal organisation.[158] In addition, as explained above, other evidence on the record does not suggest that SDC policy provided that aid be specifically directed towards VRS crimes.[159] In this context, the Appeals Chamber, Judge Liu dissenting, considers that a reasonable interpretation of the evidence on the record is that the SDC directed large-scale military assistance to the general VRS war effort, not to the commission of VRS crimes. Accordingly, specific direction of VJ aid towards VRS crimes is not the sole reasonable inference that can be drawn from the totality of the evidence on the record, even considering the magnitude of the VJ's assistance.

58. In view of the foregoing, the Appeals Chamber, Judge Liu dissenting, concludes that the SDC policy of assisting the VRS was not proved to involve specific direction of VJ aid towards VRS crimes, as opposed to the

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general VRS war effort. In these circumstances, insofar as Perišić faithfully executed the SDC policy of supporting the VRS, the aid Perišić facilitated was not proved to be specifically directed towards the VRS's criminal activities.

(iii) Perišić's Implementation of SDC Policy and Other Actions

59. The Appeals Chamber now turns to consider whether Perišić implemented the SDC policy of assisting the VRS war effort in a manner that redirected aid towards VRS crimes, or took actions separate from implementing SDC policy to the same effect. In this regard, the Appeals Chamber will consider Perišić's role in SDC deliberations, the nature of the assistance Perišić provided to the VRS, and the manner in which this aid was distributed. All of these indicia can serve as circumstantial evidence of whether the aid he facilitated was specifically directed towards VRS crimes. Finally, the Appeals Chamber will consider whether Perišić took actions, independent of his efforts to implement the SDC policy, which would indicate that aid he facilitated was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

60. The Appeals Chamber notes that the Trial Chamber found that Perišić supported continuing the SDC policy of assisting the VRS.[160] During meetings of the SDC, Perišić argued both for sustaining aid to the VRS and for adopting related legal and financial measures that facilitated such aid.[161] However, the Trial Chamber did not identify evidence demonstrating that Perišić urged the provision of VJ assistance to the VRS in furtherance of specific criminal activities. Rather, the Trial Chamber's analysis of Perišić's role in the SDC deliberations indicates that Perišić only supported the continuation of assistance to the general VRS war effort.[162] Having reviewed the relevant evidence, the Appeals Chamber, Judge Liu dissenting, also finds no proof that Perišić supported the provision of assistance specifically directed towards the VRS's criminal activities.[163] Instead, evidence on the record suggests that Perišić's relevant actions were intended to aid the VRS's overall war effort. For example, Perišić explained to the SDC the overall costs of providing assistance to the VRS;[164] advised the SDC of broad-based VRS requests for assistance;[165] and criticised general "mistakes" of the Republika Srpska leadership that resulted in international criticism of the broader VRS war effort.[166]

61. The Appeals Chamber observes that Perišić had considerable discretion in providing assistance to the VRS, including the power to deny requests for aid not submitted through official channels.[167] While it is possible that Perišić could have used this power to direct SDC-approved aid specifically towards VRS criminal activities, the Trial Chamber did not make any findings to that effect,[168] and the Appeals Chamber's review of relevant evidence also suggests that Perišić directed assistance towards the general VRS war effort within the parameters set by the SDC.[169] In particular, as discussed below, neither the nature of the aid which Perišić oversaw nor the manner in which it was distributed suggests that the assistance he facilitated was specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

62. The Appeals Chamber recalls that indicia demonstrating the nature and distribution of VJ aid could also serve as circumstantial evidence of specific direction. The Appeals Chamber notes in this regard that the Trial Chamber classified the assistance provided by the VJ to the VRS in two broad categories: first, secondment of personnel,[170] and, second, provision of military equipment, logistical support, and military training.[171]

63. With respect to the secondment of VJ soldiers to the VRS, the Appeals Chamber recalls that the Trial Chamber found that Perišić persuaded the SDC to create the 30th PC, a unit of the VJ that served as the administrative home of VJ soldiers and officers seconded to the VRS and which was used to increase and institutionalise the support already provided to seconded VJ soldiers and officers.[172] The Trial Chamber also found that the establishment of the 30th PC constituted practical assistance to the VRS, as the 30th PC helped sustain soldiers already seconded to the VRS and facilitated the secondment of additional personnel.[173] However, the record contains no evidence suggesting that the benefits provided to seconded soldiers and officers – including VJ-level salaries, housing, and educational and medical benefits[174] – were tailored to facilitate the commission of crimes. Rather, evidence on the record indicates that such benefits were structured to mirror those offered by the VJ and thus provide seconded soldiers and officers with the same level of support as they received prior to secondment.[175] In addition, the evidence on the record does not suggest that VJ soldiers and officers were seconded in order to specifically assist VRS criminal acts.[176] In the Appeals Chamber's view, the fact that VJ soldiers seconded to the VRS may have been involved in criminal acts after secondment[177] does not, alone, prove that their secondments were specifically directed to

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supporting these criminal acts.[178] In sum, the Appeals Chamber, Judge Liu dissenting, finds that neither the Trial Chamber's analysis[179] nor the Appeals Chamber's *de novo* review of evidence on the record[180] provides a basis for concluding that Perišić's facilitation of secondments was directed to assist VRS crimes rather than the general VRS war effort.

64. With respect to the second category of assistance provided by the VJ to the VRS, the Appeals Chamber recalls the Trial Chamber's finding that the VJ supplied the VRS with "comprehensive" logistical aid,[181] often not requiring payment for this assistance.[182] In particular, the Trial Chamber concluded that the VJ provided the VRS with military equipment and supplies on a large scale, including semi-automatic rifles, machine guns, pieces for machine-gun barrels, cannons, bullets, grenades, rocket launchers, mortar ammunition, mines, rockets, anti-aircraft ammunition, and mortar shells.[183] The Trial Chamber further concluded that the VJ offered military training to VRS troops[184] and assisted with military communications.[185] The Appeals Chamber's review of evidence on the record also demonstrates that, pursuant to the overall policy of the FRY, as expressed in decisions of the SDC, Perišić administered and facilitated the provision of large- scale military assistance to the VRS.[186]

65. The Appeals Chamber considers that the types of aid provided by the VJ to the VRS do not appear incompatible with lawful military operations.[187] In addition, the Appeals Chamber notes that the Trial Chamber found that bullets and shells recovered from crime sites in Sarajevo and Srebrenica were not proved beyond reasonable doubt to have originated from the VJ,[188] and further notes that the Prosecution does not challenge this finding on appeal.[189] In these circumstances, the Appeals Chamber, Judge Liu dissenting, recalling that evidence proving substantial contribution does not necessarily demonstrate specific direction,[190] finds that evidence regarding the nature of assistance provided by the VJ does not establish that this assistance was specifically directed towards VRS crimes.

66. The manner in which Perišić distributed VJ aid to the VRS also does not demonstrate specific direction.[191] The Trial Chamber determined that part of this assistance was sent to certain VRS units involved in committing crimes.[192] However, the Appeals Chamber, Judge Liu dissenting, considers that neither the Trial Chamber's analysis[193] nor the Appeals Chamber's *de novo* review identified evidence that aid was provided to the VRS in a manner directed at supporting its criminal activities. Evidence on the record instead suggests that Perišić considered the VRS's requests as a whole and that VJ assistance was delivered to multiple areas within BiH to aid the general VRS war effort.[194]

67. The Appeals Chamber also finds that evidence on the record does not prove that Perišić took steps to assist VRS crimes outside his role of implementing the SDC's general aid policy. Indeed, Perišić refused requests for assistance submitted outside of official channels[195] and urged the SDC to punish VJ personnel who provided such unauthorised assistance.[196] While Perišić appears to have ordered VJ units to support certain VRS combat operations, neither the Trial Chamber's analysis[197] nor the Appeals Chamber's review of relevant evidence establish that this assistance was directed at supporting criminal activities of the VRS.[198] In this regard, the Appeals Chamber notes that the Prosecution was unable to identify evidence on the record suggesting that Perišić specifically directed assistance towards the VRS Crimes in Sarajevo and Srebrenica.[199]

68. Finally, the Appeals Chamber notes that the Trial Chamber considered extensive evidence suggesting that Perišić knew of crimes being committed by the VRS, especially with respect to Sarajevo.[200] However, the Appeals Chamber, Judge Liu dissenting, recalls that evidence regarding knowledge of crimes, alone, does not establish specific direction, which is a distinct element of *actus reus*, separate from *mens rea*.[201] Indicia demonstrating that Perišić knew of the VRS Crimes in Sarajevo and Srebrenica *may* serve as circumstantial evidence of specific direction; however, a finding of specific direction must be the sole reasonable inference after a review of the evidentiary record as a whole.[202]

69. The Appeals Chamber recalls again that the VRS undertook, *inter alia*, lawful combat activities and was not a purely criminal organisation.[203] In this context, the Appeals Chamber, Judge Liu dissenting, considers that a reasonable interpretation of relevant circumstantial evidence is that, while Perišić may have known of VRS crimes, the VJ aid he facilitated was directed towards the VRS's general war effort rather than VRS crimes. Accordingly, the Appeals Chamber, Judge Liu dissenting, holds that Perišić was not proved beyond reasonable doubt to have facilitated assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

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(e) Conclusions from *De Novo* Review of Evidence on the Record

70. The Appeals Chamber, Judge Liu dissenting, has clarified that, in view of the remoteness of Perišić's actions from the crimes of the VRS, an explicit analysis of specific direction was required.[204] As detailed above, the Appeals Chamber's review of the Trial Chamber's general evidentiary findings and *de novo* assessment of evidence on the record do not demonstrate that SDC policy provided for directing VJ aid towards VRS crimes. Similarly, the Trial Chamber's conclusions and evidence on the record do not suggest that Perišić's implementation of SDC policy specifically directed aid towards VRS crimes, or that Perišić took other actions to that effect.

71. The Appeals Chamber has already noted that the Trial Chamber identified evidence of the large scale of VJ assistance to the VRS, as well as evidence that Perišić knew of VRS crimes.[205] However, having considered these Trial Chamber findings alongside its *de novo* analysis of the record, the Appeals Chamber, Judge Liu dissenting, is not convinced that the only reasonable interpretation of the totality of this circumstantial evidence is that Perišić specifically directed aid towards VRS crimes. Instead, a reasonable interpretation of the record is that VJ aid facilitated by Perišić was directed towards the VRS's general war effort rather than VRS crimes. Accordingly, the Appeals Chamber, Judge Liu dissenting, is not convinced that the VJ aid which Perišić facilitated was proved to be specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.

72. As demonstrated above, the Appeals Chamber considers 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.[206] The Appeals Chamber underscores, however, that this conclusion should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts. If an ostensibly independent military group is proved to be under the control of officers in another military group, the latter can still be held responsible for crimes committed by their puppet forces.[207] Similarly, aid from one military force specifically directed towards crimes committed by another force can also trigger aiding and abetting liability. However, as explained above, a sufficient link between the acts of an individual accused of aiding and abetting a crime and the crime he or she is charged with assisting must be established for the accused individual to incur criminal liability. Neither the findings of the Trial Chamber nor the evidence on the record in this case prove such a link with respect to Perišić's actions.

B. Conclusion

73. The Appeals Chamber, Judge Liu dissenting, recalls that specific direction is an element of the *actus reus* of aiding and abetting liability, and that in cases like this one, where an accused individual's assistance is remote from the actions of principal perpetrators, specific direction must be explicitly established.[208] After carefully reviewing the evidence on the record, the Appeals Chamber, Judge Liu dissenting, concludes that it has not been established beyond reasonable doubt that Perišić carried out "acts specifically directed to assist, encourage or lend moral support to the perpetration of [the] certain specific crime[s] " committed by the VRS.[209] Accordingly, Perišić's convictions for aiding and abetting must be reversed on the ground that not all the elements of aiding and abetting liability have been proved beyond reasonable doubt.

74. For the foregoing reasons, the Appeals Chamber, Judge Liu dissenting, grants Perišić's Second and Third Grounds of Appeal in part, insofar as they relate to his convictions for aiding and abetting, and reverses his convictions under Counts 1, 2, 3, 4, 9, 10, 11, and 12 of the Indictment. In view of this finding, Perišić's remaining arguments in his First through Twelfth Grounds of Appeal are dismissed as moot.

IV. SUPERIOR RESPONSIBILITY (GROUND 13)

75. The Trial Chamber, Judge Moloto dissenting, convicted Perišić under Article 7(3) of the Statute for failing to punish VJ soldiers who were responsible for crimes perpetrated during the shelling of Zagreb on 2 and 3 May 1995 ("Zagreb Perpetrators"), namely murder and attacks on civilians as violations of the laws or customs of war (Counts 6 and 8); and murder and inhumane acts as crimes against humanity (Counts 5 and 7) (collectively, "Zagreb Crimes").[210]

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76. Perišić submits, *inter alia*, that the Trial Chamber erred in law and fact in determining that he was in a superior-subordinate relationship with the Zagreb Perpetrators at the time the Zagreb Crimes took place.[211] Accordingly, Perišić requests that the Appeals Chamber reverse his convictions as a superior under Article 7(3) of the Statute.[212]

A. Background

77. The Trial Chamber's finding of superior responsibility was based in part on Perišić's position as a senior officer of the VJ.[213] More specifically, the Trial Chamber found that some members of the VJ, including the Zagreb Perpetrators, were seconded to assist war efforts of the Republic of Serbian Krajina ("RSK"). These seconded VJ members served in the Serbian Army of the Krajina ("SVK").[214] VJ soldiers were seconded to the SVK through administrative assignment to a unit of the VJ named the 40th PC,[215] which provided their salaries, housing, and educational and medical benefits during secondment.[216]

78. The Trial Chamber found that soldiers seconded through the 40th PC "held all the key commanding positions in the SVK."[217] For example, Milan Čeleketić, an officer seconded through the 40th PC, served as Chief of the SVK Main Staff from 22 February 1994 until mid-May 1995.[218] His replacement, Mile Mrkšić, was also a VJ member seconded to the SVK.[219] The Trial Chamber concluded that the SVK operated pursuant to parallel chains of command, one led by Milan Martić as President of the RSK and Supreme Commander of the SVK, and the other by Perišić, the most senior officer of the VJ, and other members of the FRY leadership.[220] The Trial Chamber found that both chains of command could issue binding orders to seconded VJ members, including the Zagreb Perpetrators.[221]

79. The Trial Chamber concluded that the fall of the RSK in August 1995 curtailed the scope of SVK operations.[222] The Trial Chamber also noted witness testimony that SVK forces, including VJ soldiers seconded through the 40th PC, effectively operated as members of the VJ after August 1995.[223]

B. Submissions

80. Perišić asserts that the Trial Chamber erred in finding that he: (i) was the *de jure* superior of the Zagreb Perpetrators;[224] and (ii) had effective control over VJ soldiers seconded through the 40th PC as demonstrated by his ability to discipline and issue binding orders to its members.[225] With respect to *de jure* authority, Perišić asserts that the law of the VJ defined a "superior" as a person who "*commands a military unit or military institution, or individuals* serving in a military unit or military institution".[226] In this regard, Perišić submits that VJ soldiers seconded through the 40th PC were part of a chain of command separate from his own authority and that any authority he possessed over the 40th PC was solely administrative and too circumscribed to make him a *de jure* superior.[227]

81. Perišić further contends, *inter alia*, that evidence on the record does not prove that he possessed the material ability to discipline the Zagreb Perpetrators at the time of the shelling of Zagreb in early May 1995.[228] He submits that the Trial Chamber's findings to the contrary failed to adequately account for: (i) evidence of divergences between the goals of the VJ and the SVK that would have impeded his ability to discipline VJ soldiers seconded through the 40th PC;[229] (ii) the fall of the RSK in the months following the shelling of Zagreb, which then enabled Perišić to discipline soldiers and officers seconded through the 40th PC;[230] and (iii) the Prosecution's decision not to pursue charges of "failure to prevent", by which, Perišić contends, the Prosecution effectively conceded Perišić's lack of effective control over the Zagreb Perpetrators.[231] More broadly, Perišić submits that the Trial Chamber failed to assess a key indicator of superior responsibility: whether he and the Zagreb Perpetrators acted as though they were in a superior-subordinate relationship.[232] Perišić further submits that the Trial Chamber did not sufficiently consider the testimony of Prosecution Witness Rade Rašeta, who stated that Perišić did not possess disciplinary power over soldiers and officers seconded to the SVK through the 40th PC.[233] Perišić also contends that the Trial Chamber erred by failing to understand that his power to "verif[y] " promotions of VJ soldiers seconded through the 40th PC did not give him the ability to control these soldiers' actions.[234]

82. Perišić submits that the Trial Chamber erred in finding that Martić and Perišić each controlled VJ soldiers seconded to the SVK through separate chains of command. He submits that even if such a "bifurcated" command

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structure existed, it would nonetheless have negated effective control by one chain of command, given the high risk of conflicting orders from the two command chains.[235] In any case, Perišić maintains that the Trial Chamber erred in concluding that he possessed the power to issue orders to VJ soldiers seconded through the 40th PC and serving in the SVK during the shelling of Zagreb.[236] In this regard, he underscores the "paucity of orders" he "allegedly issued" to VJ soldiers seconded through the 40th PC[237] and the fact that these orders were not always executed.[238] Perišić further underscores Čeleketić's refusal to cease shelling Zagreb despite Perišić's explicit request to that effect.[239] Finally, Perišić maintains that the Trial Chamber: (i) erred by identifying as non-administrative ("command") orders documents emanating from outside his chain of command or constituting requests, administrative orders, or attempts to influence;[240] (ii) did not sufficiently consider relevant testimony from, *inter alia*, Witness Rašeta and Prosecution Witness Rade Orlić to the effect that Perišić did not issue command orders to the SVK;[241] and (iii) erroneously inferred from orders he issued after the shelling of Zagreb that he had been able to issue command orders during the shelling.[242]

83. The Prosecution responds, *inter alia*, that it did not concede Perišić's lack of effective control over VJ soldiers seconded through the 40th PC when it decided not to pursue "failure to prevent" charges against him.[243] The Prosecution maintains that the Trial Chamber reasonably concluded that Perišić exercised effective control over the Zagreb Perpetrators.[244] The Prosecution also asserts that Perišić "confuses 'effective control' with 'ability to control the acts of the perpetrators'". It submits that in determining whether an individual possessed effective control, the relevant inquiry is whether he or she had the ability to prevent or punish acts of subordinates.[245]

84. More specifically, the Prosecution contends that Perišić fails to demonstrate that the Trial Chamber erred in concluding that Perišić was the *de jure* superior of the Zagreb Perpetrators.[246] The Prosecution submits that the Trial Chamber reasonably relied upon Perišić's initiation of disciplinary proceedings against key officers of the 40th PC as an especially relevant indicator of effective control.[247] The Prosecution adds that Perišić fails to cite any evidence of "new command and control relationships" after the fall of the RSK,[248] and it rejects Perišić's claims that the VJ's goals diverged from those of the SVK during the shelling of Zagreb.[249] Moreover, the Prosecution maintains that the Trial Chamber acted within the scope of its discretion in preferring evidence of Perišić's "actual exercise of disciplinary powers" over "ostensible structures and overt declarations of the belligerents".[250] The Prosecution also asserts that the Trial Chamber acted reasonably in considering that "Perišić's ability 'to make independent recommendations with respect to the verification of promotions' militate[d] 'in favour of effective control.'"[251]

85. The Prosecution further contends that the Trial Chamber reasonably considered evidence on the record in concluding that the VJ and SVK operated pursuant to parallel chains of command and that Perišić could nonetheless exercise effective control.[252] In particular, the Prosecution maintains that command orders issued by Perišić indicated his effective control over the Zagreb Perpetrators.[253] The Prosecution submits that the Trial Chamber reasonably discounted testimony by Witnesses Rašeta and Orlić about Perišić's inability to issue command orders.[254] Finally, the Prosecution suggests that Perišić did not issue many command orders because of his seniority and the concurrence of VJ and SVK goals,[255] and denies that the limited evidence of compliance with Perišić's orders undermined the Trial Chamber's relevant conclusions.[256]

C. Analysis

86. The Appeals Chamber recalls that a conviction pursuant to Article 7(3) of the Statute requires:

i. The existence of a superior-subordinate relationship;

ii. the superior knew or had reason to know that the criminal act was about to be or had been committed; and

iii. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[257]

87. The Appeals Chamber recalls that a superior cannot be held criminally liable under Article 7(3) of the Statute unless he or she exercised effective control over his or her subordinates.[258] Indicators of effective control are "more

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a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish".[259] The Appeals Chamber further recalls that an accused may not be held liable under Article 7(3) of the Statute for failure to punish crimes that were committed by a subordinate before the accused assumed command over the subordinate.[260]

88. As a threshold matter, the Appeals Chamber first addresses Perišić's assertion that, by not pursuing charges for his failure to prevent the Zagreb Crimes, the Prosecution conceded that he lacked effective control over the Zagreb Perpetrators.[261] The Appeals Chamber recalls that the duty to prevent is distinct from the duty to punish, involving different conduct committed at different times.[262] In addition, the ability to prevent a crime is not necessarily a prerequisite to proving effective control.[263] In these circumstances, the Appeals Chamber is not persuaded that the Prosecution conceded that Perišić lacked effective control over the Zagreb Perpetrators.

89. The Appeals Chamber also notes Perišić's submission that the Trial Chamber did not sufficiently consider relevant testimony by Witnesses Rašeta and Orlić.[264] Before turning to the specifics of Perišić's relationship with the Zagreb Perpetrators, the Appeals Chamber will consider whether the Trial Chamber committed an error in this regard.

1. The Testimony of Witnesses Rašeta and Orlić

90. The Appeals Chamber recalls that the Trial Chamber's conclusions on effective control were premised on its finding that at relevant times, Perišić had the ability to discipline or issue binding command orders to the SVK, but that in the context of a "bifurcated" command structure, wherein the SVK also answered to Martić, Perišić generally chose not to exercise these powers.[265] The Trial Chamber relied on its finding in this regard to explain both the absence of any evidence that Perišić took disciplinary actions against VJ soldiers seconded to the SVK prior to the shelling of Zagreb,[266] and the limited evidence of binding command orders issued by Perišić to VJ soldiers seconded through the 40th PC during the same period.[267] In finding that Perišić exercised effective control over seconded VJ soldiers, the Trial Chamber also noted evidence that, after the fall of the RSK, Perišić initiated disciplinary proceedings against VJ soldiers seconded through the 40th PC[268] and identified evidence suggesting that Perišić could influence promotions and terminations of seconded VJ soldiers.[269] In addition, the Trial Chamber considered Perišić's involvement in paying salaries to seconded officers and soldiers, the general support provided by the VJ to the SVK, and reports on SVK activities sent to the VJ.[270]

91. In reviewing evidence regarding effective control, the Trial Chamber summarised the relevant testimony of Witness Rašeta, a VJ officer who testified that he did not participate in the VJ chain of command after he was seconded to the SVK,[271] and that prior to the shelling of Zagreb, Perišić did not possess immediate disciplinary powers over VJ soldiers seconded through the 40th PC.[272] The Trial Chamber also summarised the relevant evidence of Witness Orlić, a VJ officer seconded to the SVK, who testified that he did not receive any command orders from the VJ while serving in the SVK.[273] The testimony of these two witnesses suggested that Perišić did not have the authority to issue command orders or discipline members of the VJ seconded to the SVK, and thus that he did not exercise effective control over the Zagreb Perpetrators at the time the Zagreb Crimes were committed.[274] However, while the Trial Chamber noted this testimony from Witnesses Rašeta and Orlić when summarising relevant evidence, it concluded that Perišić exercised effective control over VJ soldiers and officers seconded through the 40th PC without discounting or addressing the testimony of either of these two witnesses.[275]

92. The Appeals Chamber acknowledges that a trial chamber is entitled to rely on the evidence it finds most convincing.[276] The Appeals Chamber, nevertheless, recalls that:

> a [t]rial [c]hamber need not refer to the testimony of every witness or every piece of evidence on the trial record, 'as long as there is no indication that the [t]rial [c]hamber completely disregarded any particular piece of evidence.' Such disregard is shown 'when evidence which is clearly relevant [. . .] is not addressed by the [t]rial [c]hamber's reasoning.'[277]

The Appeals Chamber also recalls that "not every inconsistency which the [t]rial [c]hamber failed to discuss renders its opinion defective";[278] what constitutes a reasoned opinion depends on the specific facts of a case.[279] However, in certain circumstances, insufficient analysis of evidence on the record can amount to a failure to provide a reasoned

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opinion.[280] Such a failure constitutes an error of law requiring *de novo* review of evidence by the Appeals Chamber.[281]

93. Turning to the particulars of this appeal, the Appeals Chamber recalls that in the months prior to the shelling of Zagreb, Witnesses Rašeta and Orlić occupied senior positions within the SVK: Witness Rašeta served as Chief of the SVK Main Staff Security Department, while Witness Orlić served as Chief of the SVK Intelligence Department.[282] The Trial Chamber cited Witness Rašeta's testimony that he was in daily contact with the VJ General Staff and that this contact included reports on individuals seconded from the VJ.[283] The Trial Chamber also noted Witness Orlić's testimony that the SVK Intelligence Department, which he headed, coordinated closely with its counterparts in the VJ.[284] Because of their official roles, each witness interacted with both the VJ and the SVK chains of command and was in position to experience first-hand the relationship between the VJ and SVK; Witness Rašeta, in particular, filed reports about VJ personnel seconded to the SVK.[285] These two witnesses would thus have an informed perspective as to whether VJ soldiers seconded through the 40th PC participated in the VJ's chain of command, as well as Perišić's relevant disciplinary powers. In this context, their testimony was clearly relevant to the Trial Chamber's analysis of effective control.

94. The Trial Chamber did not make any explicit findings as to potential deficiencies in the testimony of Witnesses Rašeta or Orlić.[286] To the contrary, the Trial Chamber explicitly discussed Witness Rašeta's testimony in at least 11 paragraphs of the Trial Judgement with respect to other issues[287] and cited to Witness Rašeta's testimony in at least 17 additional paragraphs, not directly related to Perišić's effective control over seconded VJ soldiers.[288] Several of these references rely on Witness Rašeta's testimony without corroboration.[289] The Trial Chamber also explicitly discussed testimony by Witness Orlić in at least two paragraphs of the Trial Judgement[290] and cited to Witness Orlić's testimony in at least eight additional paragraphs, not directly related to Perišić's effective control over seconded VJ soldiers.[291] This extensive reliance, without corroboration in some cases,[292] suggests that the Trial Chamber considered these witnesses' testimony to be credible.

95. The Appeals Chamber considers that the analysis undertaken by the Trial Chamber with respect to Perišić's effective control might be regarded as "reasoned" in itself. However, in the Appeals Chamber's view, an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion. In the context of this case, the Trial Chamber's failure to explicitly discuss and analyse the evidence of Witnesses Rašeta and Orlić constituted a failure to provide a reasoned opinion. The Appeals Chamber acknowledges that a trial chamber's failure to explicitly refer to specific witness testimony will often not amount to an error of law, especially where there is significant contrary evidence on the record.[293] However, the Appeals Chamber underscores that, as explained above, the testimony of Witnesses Rašeta and Orlić was clearly relevant, relied upon in other sections of the Trial Judgement, and not explicitly discounted in whole or in part.[294] The Appeals Chamber also notes that the Trial Chamber acknowledged the comparatively limited evidence on the record regarding Perišić's ability to issue orders to or discipline VJ soldiers seconded through the 40th PC.[295] In these circumstances – *i.e.* given the paucity of relevant evidence, and the credible testimony contrary to the Trial Chamber's conclusions – the Appeals Chamber is not satisfied that, merely by noting its existence,[296] the Trial Chamber adequately addressed the testimony of Witnesses Rašeta and Orlić.[297]

96. Accordingly, the Appeals Chamber concludes that the Trial Chamber's failure to address the relevant portions of this testimony in its analysis of Perišić's superior responsibility constituted a failure to provide a reasoned opinion, an error of law.[298] In view of the Trial Chamber's legal error, the Appeals Chamber will proceed to assess the evidence relevant to Perišić's exercise of effective control *de novo*. As detailed below, the evidence relating to Perišić's effective control is circumstantial and thus can only support a finding of effective control if this is the sole reasonable interpretation of the record.[299]

2. Perišić's Ability to Exercise Effective Control over the 40th PC

97. In order to determine whether Perišić exercised effective control over VJ officers and soldiers seconded through the 40th PC at the time of the Zagreb Crimes, the Appeals Chamber will review and assess *de novo* relevant evidence on the record, taking into account, as appropriate, the Trial Chamber's findings.[300] In particular, the Appeals Chamber will consider: (i) Perišić's instruction that Zagreb not be shelled; (ii) whether Perišić could issue

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command orders to soldiers seconded through the 40th PC; (iii) whether Perišić could exercise disciplinary authority over VJ soldiers seconded through the 40th PC; and (iv) other indicia of Perišić's ability to control VJ soldiers seconded through the 40th PC, including his influence over promotions and terminations.[301]

(a) Perišić's Instruction that Zagreb not be Shelled

98. The Appeals Chamber recalls that the Trial Chamber found that SVK forces under Čeleketić's command began to shell Croatian targets on 1 May 1995, and that this shelling encompassed the Zagreb area on 2 May 1995.[302] The shelling of Zagreb continued until 3 May 1995, resulting in deaths and injuries of civilians.[303] According to the Trial Chamber, Čeleketić ordered that this shelling take place on the basis of instructions from Martić, the RSK President.[304]

99. The Trial Chamber also found that during the SVK attacks in Croatia, Perišić instructed Čeleketić not to shell Zagreb.[305] However, these instructions were not obeyed, and Perišić explained to Milošević that Čeleketić had continued shelling Zagreb pursuant to Martić's orders and in complete disregard of Perišić's own instructions to the contrary.[306] Though Perišić told Milošević that he forced Čeleketić to stop the shelling,[307] the attack on Zagreb continued for two days, after Perišić's initial instructions on 1 May 1995.[308]

100. The Appeals Chamber notes that intercepted conversations between Perišić and Milošević suggest neither was convinced that Perišić was able to exercise effective control over Čeleketić. In one such intercept, when asked why he could not instruct Čeleketić to ignore Martić's orders, Perišić explained that Čeleketić was obedient to Martić.[309] In the Appeals Chamber's view, this intercept suggests that Perišić did not believe Čeleketić to be under his effective control, and that Milošević considered Perišić able to influence but not command Čeleketić.

101. The Appeals Chamber recalls that the crimes Perišić was found responsible for failing to punish occurred during the shelling of Zagreb in early May 1995.[310] Any indicia of Perišić's effective control over the SVK at that specific time are thus particularly significant.[311] The Appeals Chamber observes that during this period, the evidence described above demonstrates that, when Martić and Perišić endorsed directly conflicting courses of action, Čeleketić chose to obey orders from Martić and ignore Perišić's explicit instructions.[312] In addition, the phone intercepts identified by the Trial Chamber suggest that neither Perišić nor Milošević perceived Čeleketić as effectively controlled by Perišić.[313] On its face, Perišić's inability to control significant actions by Čeleketić, an important VJ officer seconded through the 40th PC during the shelling of Zagreb, and apparent acknowledgement that he lacked such power, is inconsistent with exercise of effective control over the Zagreb Perpetrators.

(b) Evidence Regarding Perišić's Ability to Issue Command Orders to Soldiers Seconded Through the 40th PC

102. As set forth above, two witnesses whom the Trial Chamber considered credible,[314] and who served as senior SVK officers, testified that Perišić did not issue command orders to them while they were serving in the SVK. Witness Rašeta stated that he was no longer part of the VJ's chain of command after being assigned to the 40th PC, while Witness Orlić testified that he received no command orders from Perišić after his secondment.[315]

103. In addition, the Trial Chamber noted evidence of Prosecution Witness MP-80, who testified that Perišić did not issue command orders to Čeleketić[316] and further noted that VJ communications to the SVK prior to the shelling of Zagreb, which raised issues such as weapons handling and material for meetings, used terms associated with encouragement rather than coercion, such as "please".[317] The Trial Chamber also referred to reports by Perišić that Dušan Lončar, a VJ officer seconded through the 40th PC and Commander of the SVK 11th Corps, "accepted" approaches Perišić had advocated.[318] The Appeals Chamber considers that the use of non-coercive terms suggests that Perišić did not exercise effective control over VJ soldiers seconded through the 40th PC.

104. The Appeals Chamber notes that Perišić transmitted an order from Milošević to, *inter alia*, the SVK on 7 December 1994, several months prior to the shelling of Zagreb ("7 December Order"), ordering the SVK to facilitate the passage of United Nations aid.[319] However, the text of the 7 December Order does not demonstrate that it constituted an order by Perišić to individuals falling within the VJ chain of command. First, the 7 December Order was addressed to both Čeleketić,[320] who was a seconded VJ officer, and RSK President Martić, who was not.[321] Given that the RSK President was not formally linked to the VJ,[322] the Appeals Chamber considers that Martić's

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inclusion in the 7 December Order suggests that the order was not an instruction issued to soldiers falling within the VJ's chain of command. Second, the 7 December Order invokes Milošević's personal authority as President of Serbia and makes no apparent reference to the VJ's chain of command other than using Perišić as a conduit to pass on the order.[323] Finally, the Appeals Chamber notes that Čeleketić responded to the 7 December Order by addressing Milošević directly,[324] thereby bypassing Perišić and the VJ chain of command entirely. In these circumstances, the Appeals Chamber does not consider that the 7 December Order establishes Perišić's ability to issue command orders to VJ soldiers seconded through the 40th PC.

105. The Appeals Chamber also notes that Perišić issued an order on 24 March 1995, prior to the shelling of Zagreb, establishing a group of coordinating staff to aid activities of the 40th PC ("24 March Order").[325] Perišić ordered that this coordinating staff be composed of a mixed group that included VJ members, VJ members seconded to the SVK, a retired VJ officer, and a member of the RSK's Ministry of Defence.[326] The Appeals Chamber observes that certain individuals to whom the order referred, including the retired officer and the member of the RSK's Ministry of Defence, were not subject to Perišić's authority.[327] In addition, the Trial Chamber noted the absence of any evidence that the 24 March Order was actually obeyed.[328] In these circumstances, the Appeals Chamber does not consider that the 24 March Order is capable of supporting the inference that Perišić could issue command orders to soldiers seconded through the 40th PC.

106. Finally, the Appeals Chamber notes evidence on the record indicating that *after* the shelling of Zagreb, and after Čeleketić was replaced by Mrkšić in mid-May 1995, Perišić issued instructions to soldiers and officers seconded through the 40th PC.[329] Nevertheless, evidence on the record suggests that Perišić had a better relationship with Mrkšić than with Čeleketić, and that Mrkšić's compliance with Perišić's instructions marked a departure from the chain of command obeyed by Čeleketić.[330] The personal relationship between Perišić and Mrkšić could plausibly account for Perišić's increased influence over the SVK after Čeleketić ceased serving as SVK commander. In any event, however, this evidence does not in any way demonstrate that Perišić exercised effective control over the Zagreb Perpetrators at the time of the shelling of Zagreb.

107. In sum, the Appeals Chamber is not convinced that Perišić could issue command orders to soldiers seconded through the 40th PC at the time of the shelling of Zagreb. While some evidence does suggest the existence of such power,[331] this interpretation of the record is not the only reasonable one, especially given credible direct evidence from Witnesses Rašeta and Orlić that VJ soldiers seconded through the 40th PC were not within Perišić's chain of command.[332]

(c) Evidence Regarding Perišić's Ability to Discipline VJ Members Seconded to the SVK

108. The Appeals Chamber recalls that Witness Rašeta, a senior SVK officer, testified that Perišić did not possess immediate disciplinary powers over soldiers seconded through the 40th PC while they served in the SVK.[333] The Appeals Chamber considers that Witness Rašeta's testimony is supported by the Trial Chamber's acknowledgement that evidence on the record did not demonstrate that Perišić initiated any disciplinary proceedings against soldiers seconded through the 40th PC before, during, or immediately after the Zagreb Crimes.[334]

109. The Trial Chamber considered evidence suggesting that in the months *after* the fall of the RSK in August 1995,[335] Perišić was involved in disciplinary proceedings against individuals seconded through the 40th PC, and that these proceedings involved actions taken during service with the SVK.[336] One reasonable interpretation of this evidence is that Perišić always possessed dormant disciplinary powers but only exercised them after the fall of the RSK.[337] However, the Appeals Chamber notes evidence that SVK forces came under direct VJ control after the fall of the RSK.[338] In the Appeals Chamber's view, an equally reasonable interpretation is that Perišić acquired disciplinary powers over VJ members seconded to the SVK after the Zagreb Crimes were committed.

110. The Appeals Chamber notes the possibility that Perišić could have punished the Zagreb Perpetrators after they rejoined the VJ chain of command following the fall of the RSK. The Appeals Chamber recalls, however, that an accused may not be held liable under Article 7(3) of the Statute for failure to punish crimes committed by a subordinate before the accused assumed command over the subordinate.[339] Thus, the fact that, *after* the shelling of Zagreb, Perišić may eventually have acquired the power to punish the Zagreb Perpetrators does not expose him to liability for failure to punish the Zagreb Crimes.

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111. In these circumstances the Appeals Chamber does not consider that evidence of Perišić's involvement in disciplinary activities proves that he exercised effective control over the Zagreb Perpetrators at the time of the Zagreb Crimes.

(d) Other Evidence

112. The Appeals Chamber notes the existence of evidence that Perišić had some control over promotions and terminations of service for VJ soldiers serving in the SVK.[340] In particular, Perišić had an extensive role in the "verification" of promotions granted by the SVK to VJ personnel seconded through the 40th PC.[341] In addition, even though Perišić's power to terminate the careers of VJ soldiers seconded through the 40th PC was circumscribed by law, he possessed a "certain amount of discretion" over this process.[342] The Appeals Chamber is thus satisfied that Perišić exercised influence over the professional development of VJ soldiers and officers seconded to the SVK. The Appeals Chamber also notes that the Trial Chamber reviewed evidence indicating that Perišić was heavily involved in SVK operations through his influence over VJ aid.[343]

113. The Appeals Chamber is satisfied that evidence relating to Perišić's power over the careers of VJ members seconded to the SVK, as well as evidence regarding Perišić's involvement in broader SVK operations, demonstrates his influence over VJ soldiers serving in the SVK at the time of the Zagreb Crimes. The Appeals Chamber will consider this evidence in conjunction with the totality of evidence on the record to determine whether effective control is proved.

(e) The Totality of the Evidence

114. Having assessed different types of evidence relevant to Perišić's effective control, the Appeals Chamber will now consider whether this evidence, assessed in its totality, proves that Perišić possessed effective control over the Zagreb Perpetrators at the time of the Zagreb Crimes. The Appeals Chamber again notes the circumstantial nature of the relevant evidence;[344] in these circumstances, a finding of effective control is possible only if that is the sole reasonable inference from this evidence.[345]

115. Some evidence is consistent with Perišić possessing effective control over soldiers seconded through the 40th PC, including the Zagreb Perpetrators, at the time of the Zagreb Crimes. At the time Zagreb was shelled, Perišić could influence promotions and terminations of seconded VJ soldiers, and, more broadly, the operations of the SVK.[346] In addition, there is evidence that Perišić was able to issue orders to soldiers seconded through the 40th PC after the Zagreb Crimes.[347] Finally, following the fall of the RSK, Perišić was involved in disciplinary proceedings related to actions by VJ soldiers seconded to the SVK.[348]

116. Other evidence on the record, however, suggests that during the shelling of Zagreb, Perišić did not possess effective control over VJ soldiers serving in the SVK. Most importantly, the Appeals Chamber notes that Čeleketić, a VJ officer seconded through the 40th PC, ignored Perišić's instruction not to shell Zagreb and instead complied with the contrary orders of RSK President Martić.[349] Considered in isolation, this failure to obey Perišić's instruction might be dismissed as an exceptional instance of disobedience or rebellion. Yet no evidence proves beyond reasonable doubt that Perišić *ever* issued a command order to a VJ soldier serving in the SVK prior to the shelling of Zagreb. Similarly, there is no conclusive evidence that Perišić ever disciplined a VJ soldier seconded through the 40th PC prior to the fall of the RSK.[350]

117. In this context, the Appeals Chamber considers that a reasonable alternative interpretation of the record is that Perišić could influence, but did not possess effective control over, the Zagreb Perpetrators at the time of the shelling of Zagreb. Months after the Zagreb Crimes, Perišić may have acquired effective control over VJ soldiers seconded to the SVK. However, this is of no consequence for purposes of command responsibility under Article 7(3) of the Statute. An accused superior may not be held liable for failure to punish crimes committed by subordinates before he or she assumed command over them.[351]

118. Accordingly, a finding that Perišić exercised effective control over the Zagreb Perpetrators at the time of the Zagreb Crimes is not the sole reasonable inference from the totality of the circumstantial evidence in this case. Thus, Perišić's effective control has not been established beyond reasonable doubt.

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3. Conclusion

119. Absent a finding of effective control over subordinates, superior responsibility cannot be established.[352] Thus, the Appeals Chamber reverses the Trial Chamber's finding that Perišić was liable for failing to punish the Zagreb Perpetrators for their actions during the shelling of Zagreb. Perišić's remaining submissions regarding superior responsibility are therefore moot and need not be addressed.

120. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in convicting Perišić for failing to punish the Zagreb Perpetrators. Accordingly, the Appeals Chamber grants Perišić's Thirteenth Ground of Appeal and reverses his convictions under Counts 5, 6, 7, and 8 of the Indictment.

V. SENTENCING (GROUNDS 14-17)

121. The Trial Chamber, Judge Moloto dissenting, sentenced Perišić to 27 years of imprisonment.[353] Perišić appeals against his sentence[354] The Appeals Chamber recalls, however, that it has reversed all of Perišić 's convictions.[355] Accordingly, Perišić's contentions in his Fourteenth through Seventeenth Grounds of Appeal are dismissed as moot

VI. DISPOSITION

122. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 30 October 2012;

SITTING in open session;

GRANTS, Judge Liu dissenting, Momčilo Perišić's Second and Third Grounds of Appeal, in part;

REVERSES, Judge Liu dissenting, Momčilo Perišić's convictions for murder, inhumane acts, and persecutions as crimes against humanity, and for murder and attacks on civilians as violations of the laws or customs of war; and **ENTERS**, Judge Liu dissenting, a verdict of acquittal under Counts 1, 2, 3, 4, 9, 10, 11, and 12 of the
Indictment;

GRANTS Momčilo Perišić's Thirteenth Ground of Appeal; **REVERSES** Momčilo Perišić's convictions for murder and inhumane acts as crimes against humanity, and for murder and attacks on civilians as violations of the laws or customs of war; and **ENTERS** a verdict of acquittal under Counts 5, 6, 7, and 8 of the Indictment;

DISMISSES, Judge Liu dissenting, as moot Momčilo Perišić's remaining grounds of appeal; and

ORDERS, in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Momčilo Perišić, and **DIRECTS** the Registrar to make the necessary arrangements.

Done in English and French, the English text being authoritative.

Judge Theodor Meron, Presiding

Judge Carmel Agius

Judge Liu Daqun

Judge Arlette Ramaroson

Judge Andrésia Vaz

Judges Theodor Meron and Carmel Agius append a joint separate opinion.

Judge Liu Daqun appends a partially dissenting opinion.

Judge Arlette Ramaroson appends a separate opinion.

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Dated this 28th day of February 2013,

At The Hague, The Netherlands.

[Seal of the Tribunal]

ENDNOTES

1 For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.

2 *See* Trial Judgement, paras 9-21.

3 Trial Judgement, para. 3.

4 *See* Indictment, paras 8-33, 40-46, 55-62; Trial Judgement, paras 6, 9-11, 16-21.

5 *See* Indictment, paras 34-62; Trial Judgement, paras 7-21.

6 *See* Trial Judgement, para. 15.

7 Trial Judgement, paras 1815, 1820, 1838.

8 Trial Judgement, paras 1818, 1839.

9 Trial Judgement, para. 1840.

10 Notice of Appeal, paras 19-69; Appeal, para. 7.

11 Notice of Appeal, para. 70; Appeal, paras 417, 429, 452, 492-493.

12 Response, para. 333.

13 AT. 30 October 2012 p. 10.

14 *Lukić and Lukić* Appeal Judgement, para. 10; *Gotovina and Markač* Appeal Judgement, para. 10. *See also Gatete* Appeal Judgement, para. 7.

15 *Lukić and Lukić* Appeal Judgement, para. 10; *Gotovina and Markač* Appeal Judgement, para. 10.

16 *Lukić and Lukić* Appeal Judgement, para. 11 (internal citations omitted). *See also Gotovina and Markač* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 8.

17 *Lukić and Lukić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 12. *See also Gatete* Appeal Judgement, para. 9.

18 *Lukić and Lukić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 12. *See also Gatete* Appeal Judgement, para. 9.

19 *Lukić and Lukić* Appeal Judgement, para. 11; *Gotovina and Markač* Appeal Judgement, para. 12.

20 *Lukić and Lukić* Appeal Judgement, para. 13; *Gotovina and Markač* Appeal Judgement, para. 13.

21 *Lukić and Lukić* Appeal Judgement, para. 13 (internal citations omitted). *See also Gotovina and Markač* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 10.

22 *Gotovina and Markač* Appeal Judgement, para. 14; *Boškoski and Tarčulovski* Appeal Judgement, para. 16. *See also Gatete* Appeal Judgement, para. 11.

23 *Gotovina and Markač* Appeal Judgement, para. 14; *Boškoski and Tarčulovski* Appeal Judgement, para. 16. *See also Gatete* Appeal Judgement, para. 11.

24 Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, paras 1(c)(iii)-(iv), 4(b)(i)-(ii). *See also Gotovina and Markač* Appeal Judgement, para. 15; *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *Gatete* Appeal Judgement, para. 12.

25 *Gotovina and Markač* Appeal Judgement, para. 15; *Boškoski and Tarčulovski* Appeal Judgement, para. 17. *See also Gatete* Appeal Judgement, para. 12.

26 *Gotovina and Markač* Appeal Judgement, para. 15; *Boškoski and Tarčulovski* Appeal Judgement, para. 17. *See also Gatete* Appeal Judgement, para. 12.

27 Trial Judgement, para. 1838.

28 *See* Trial Judgement, paras 556-563, 729-760. *See also* Trial Judgement, paras 1580-1650.

29 Trial Judgement, paras 1588-1591, 1621.

30 Trial Judgement, paras 1594-1602.

31 Trial Judgement, paras 1607-1619.

32 Trial Judgement, para. 1631.

33 Trial Judgement, paras 1628-1648. *See also* Trial Judgement, paras 1588-1589, 1620.

34 Notice of Appeal, paras 22-24; Appeal, paras 38-64. *See also* Appeal, paras 105-109.

35 Notice of Appeal, paras 19-21, 25-54; Appeal, paras 16-37, 65-314.

36 Trial Judgement, para. 1627. *See also* Trial Judgement, paras 1580-1626.

37 Trial Judgement, para. 126, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

38 *See generally* Trial Judgement.

39 *See* Appeal, para. 40. *See also* Appeal, para. 108; AT. 30 October 2012 pp. 17-18.

40 Appeal, para. 42.

41 Appeal, paras 41-44. *See also* AT. 30 October 2012 pp. 18-19.

42 *See* Appeal, paras 41, 52-54. *Cf.* Reply, paras 8-12.

43 Reply, para. 16. *See also* AT. 30 October 2012 pp. 24-33.

44 *See* Appeal, paras 41 n. 34 (*citing*, *inter alia*, *Tadić* Appeal Judgement, para. 229, *Ntagerura et al.* Appeal Judgement, para. 370), 45 (*citing*, *inter alia*, *Kalimanzira* Appeal Judgement, para. 74), 55 (*citing*, *inter alia*, *Kupreškić et al.* Appeal Judgement, paras 277, 283). *See also* Appeal, para. 46; AT. 30 October 2012 pp. 19-20. Perišić further asserts that trial judgements of the Special Court for Sierra Leone have required evidence of specific direction. *See* Appeal, para. 47.

45 Appeal, para. 46.

46 Appeal, para. 49. *See also* Appeal, para. 48; Reply, paras 18-19.

47 Appeal, para. 24. *See also* Appeal, para. 21.

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48 Appeal, paras 57, 61. *See also* Appeal, paras 98, 108-109.

49 AT. 30 October 2012 p. 78.

50 Appeal, paras 58-59. *See also* Appeal, paras 124-133.

51 Appeal, para. 60.

52 Appeal, para. 64.

53 Response, paras 21-41. *See also* AT. 30 October 2012 pp. 48-53.

54 Response, paras 27-32. *See also* AT. 30 October 2012 pp. 46, 54.

55 *See* Response, para. 33. *See also* AT. 30 October 2012 p. 51.

56 Response, para. 31.

57 *See* Response, paras 26, 30. *See also* AT. 30 October 2012 pp. 48-50.

58 Response, paras 37-38.

59 *See* Response, para. 34.

60 *See* Response, para. 35.

61 See Response, para. 36.

62 *See* Response, paras 45-47.

63 Response, para. 45.

64 Response, para. 48.

65 Response, para. 84. *See also* Response, paras 83, 85; AT. 30 October 2012 pp. 59-60. The Prosecution further maintains that whether some of Perišić's assistance may have been supplied to VRS units not involved in perpetrating crimes is "irrelevant" and does not undermine his criminal responsibility for the crimes charged. *See* Response, para. 73. *See also* Response, paras 75-76.

66 Response, para. 86.

67 Appeal, paras 41-44. *See also* AT. 30 October 2012 pp. 18-19.

68 *Tadić* Appeal Judgement, para. 229 (emphasis added).

69 *Tadić* Appeal Judgement, para. 229 (emphasis added).

70 *See Blagojević and Jokić* Appeal Judgement, para. 127 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime"); *Kvočka et al.* Appeal Judgement, para. 89 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Blaškić* Appeal Judgement, para. 45 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Vasiljević* Appeal Judgement, para. 102 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime"); *Krnojelac* Appeal Judgement, para. 33 (stating that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Kupreškić et al.* Appeal Judgement, para. 254 (stating that "aiding and abetting the perpetration of persecution requires proof that [an accused] carried out acts specifically directed to assisting, encouraging or lending moral support to the perpetration of the offence of persecution"); *Aleksovski* Appeal Judgement, para. 163 (stating that "[i]t must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal"). *See also Kalimanzira* Appeal Judgement, para. 74 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime") (internal quotation omitted); *Muvunyi* Appeal Judgement, para. 79 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime"); *Seromba* Appeal Judgement, para. 139 (stating that "the *actus reus* for aiding and abetting extermination as a crime against humanity comprises of acts specifically directed to assist, encourage, or lend moral support to the perpetration of this crime"); *Nahimana et al.* Appeal Judgement, para. 482 (stating that "[t]he *actus reus* of aiding and abetting is constituted by acts or omissions aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime") (internal citations omitted); *Muhimana* Appeal Judgement, para. 189 (stating that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime"); *Ntagerura et al.* Appeal Judgement, para. 370 (stating that "[t]o establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the [ICTR] Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support for the perpetration of a specific crime") (internal citation omitted); *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 530 (stating that "[t]he *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime").

71 *Simić* Appeal Judgement, para. 85 (emphasis added).

72 *Orić* Appeal Judgement, para. 43 (emphasis added).

73 *Ntawukulilyayo* Appeal Judgement, para. 214 (stating that "the *actus reus* of aiding and abetting is constituted by acts or omissions *specifically aimed* at assisting, encouraging, or lending moral support to the perpetration of a specific crime") (emphasis added); *Rukundo* Appeal Judgement, para. 52 (stating that "an aider and abettor commit[s] acts *specifically aimed* at assisting, encouraging, or lending moral support for the perpetration of a specific crime") (emphasis added) (internal quotations omitted).

74 *Karera* Appeal Judgement, para. 321 (emphasis added).

75 *See Haradinaj et al.* Appeal Judgement, paras 57-62; *Limaj et al.* Appeal Judgement, paras 84, 92, 121-123, 132; *Furundžija* Appeal Judgement, paras 124-127; *Renzaho* Appeal Judgement, paras 253-338, 345-379; *Nchamihigo* Appeal Judgement, paras 67-83; *Zigiranyirazo* Appeal Judgement, paras 53-74; *Ndindabahizi* Appeal Judgement, para. 117; *Gacumbitsi* Appeal Judgement, paras 118-125, 140; *Semanza* Appeal Judgement, paras 225-279, 316; *Rutaganda* Appeal Judgement, paras 294-295.

76 *See Gotovina and Markač* Appeal Judgement, para. 127 (noting that the Appeals Chamber was addressing the elements of aiding and abetting liability "as relevant"), *citing Blagojević and Jokić* Appeal Judgement, para. 127 (including specific direction in its discussion of elements of aiding and abetting liability); *Krajišnik* Appeal Judgement, para. 662 (noting differences between aiding and abetting and JCE liability), *citing Kvočka et al.* Appeal Judgement, paras 89-90 (including specific direction in its analysis of aiding and abetting liability), *Vasiljević* Appeal Judgement, para. 102 (explicitly referring to specific direction in its discussion of the elements of aiding and abetting liability);

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Brđanin Appeal Judgement, para. 151 (referring to some elements of aiding and abetting liability but explicitly indicating that this recitation was not exhaustive), *citing Tadić* Appeal Judgement, para. 229 (establishing that specific direction is an element of the *actus reus* of aiding and abetting); *Krstić* Appeal Judgement, para. 137, *citing Krnojelac* Appeal Judgement, para. 52, *Vasiljević* Appeal Judgement, para. 102 (explicitly including specific direction in its discussion of the elements of aiding and abetting liability). The Appeals Chamber notes that, while paragraph 52 of the *Krnojelac* Appeal Judgement does not explicitly refer to specific direction, paragraph 33 does.

77 *See Delalić et al.* Appeal Judgement, para. 352.

78 *Blagojević and Jokić* Appeal Judgement, para. 189.

79 *Blagojević and Jokić* Appeal Judgement, para. 189. The Appeals Chamber notes that the *Blagojević and Jokić* Appeal Judgement also used this logic to explain other apparent inconsistencies in the Appeals Chamber's application of specific direction. *See Blagojević and Jokić* Appeal Judgement, paras 188, 189 n. 498.

80 *Blagojević and Jokić* Appeal Judgement, para. 189, *citing*, *inter alia*, *Delalić et al.* Appeal Judgement, para. 352.

81 *See supra*, para. 18.

82 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159 (emphasis added), citing *Blagojević and Jokić* Appeal Judgement, paras 188-189.

83 *Tadić* Appeal Judgement, para. 229.

84 *See Mrkšić and Šljivančanin* Appeal Judgement, p. 67.

85 *See Mrkšić and Šljivančanin* Appeal Judgement, paras 157-159.

86 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

87 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

88 *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *citing Blagojević and Jokić* Appeal Judgement, paras 188-189.

89 *Aleksovski* Appeal Judgement, para. 109. *See also Aleksovski* Appeal Judgement, paras 107-108, 110-111.

90 *See Kordić and Čerkez* Appeal Judgement, paras 1040-1041; *Aleksovski* Appeal Judgement, para. 109.

91 *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *citing Blagojević and Jokić* Appeal Judgement, paras 188-189. *See also Mrkšić and Šljivančanin* Appeal Judgement, p. 67.

92 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

93 *See Lukić and Lukić* Appeal Judgement, para. 424; *Gotovina and Markač* Appeal Judgement, para. 127. *See also Ntawukulilyayo* Appeal Judgement, para. 214; *Kalimanzira* Appeal Judgement, para. 74; *Rukundo* Appeal Judgement, para. 52.

94 *Lukić and Lukić* Appeal Judgement, para. 424, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *Blagojević and Jokić* Appeal Judgement, para. 189.

95 Indeed, the *Lukić and Lukić* Appeal Judgement specifically noted this relationship in its citation to the *Mrkšić and Šljivančanin* Appeal Judgement's reference to specific direction: "*Mrkšić and Šljivančanin* Appeal Judgement, para. 159, *confirming Blagojević and Jokić* Appeal Judgement, para. 189." *See Lukić and Lukić* Appeal Judgement, para. 424 n. 1286 (emphasis added).

96 *See Ntawukulilyayo* Appeal Judgement, para. 214; *Kalimanzira* Appeal Judgement, para. 74; *Rukundo* Appeal Judgement, para. 52.

97 *See Blagojević and Jokić* Appeal Judgement, para. 189. *See also Tadić* Appeal Judgment, para. 229. The Appeals Chamber recalls that specific direction may be addressed implicitly in the context of analysing substantial contribution. *See Blagojević and Jokić* Appeal Judgement, para. 189.

98 *See supra*, paras 26-27; *Blagojević and Jokić* Appeal Judgement, para. 189; *Tadić* Appeal Judgement, para. 229. *See also Rukundo* Appeal Judgement, paras 48-52. The Appeals Chamber recalls that proof of specific direction does not require that relevant acts are the proximate cause of a charged crime: it is well-settled in the Tribunal's and ICTR's jurisprudence that it is not necessary to prove a causal nexus between an aider and abettor and the actions of principal perpetrators. *See Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgment, para. 48; *Rukundo* Appeal Judgement, paras 50-52.

99 These other elements of aiding and abetting liability are substantial contribution, knowledge that aid provided assists in the commission of relevant crimes, and awareness of the essential elements of these crimes. *See Lukić and Lukić* Appeal Judgement, paras 422, 428.

100 *See Lukić and Lukić* Appeal Judgement, paras 437-451 (Sredoje Lukić provided practical assistance through his armed presence during the commission of cruel treatment and inhumane acts against unarmed Muslim civilians and was present during the forced transfer of unarmed civilians to a house that was subsequently locked and set on fire); *Mrkšić and Šljivančanin* Appeal Judgement, paras 5, 104, 193, p. 169 (Šljivančanin witnessed and failed to prevent torture of prisoners of war he was responsible for); *Limaj et al.* Trial Judgement, paras 631-632, 656, 658; *Limaj et al.* Appeal Judgement, paras 122-123 (Bala was present during the torture and cruel treatment of civilians at a prison camp); *Blagojević and Jokić* Appeal Judgement, paras 3-4, 69, 75, 79, 112, 125-135, 150-157, 164-175, 180, 196-200 (Blagojević, a colonel in the Bratunac Brigade, was present at Brigade headquarters and allowed the Brigade's resources and personnel to be used in committing murder, persecutions, mistreatment, and forcible transfer of Muslim men detained in Bratunac; Jokić, a major in the Zvornik Brigade, committed Brigade resources to dig mass graves and otherwise facilitate murder, extermination, and persecutions at nearby sites); *Brđanin* Appeal Judgement, paras 2, 227-228, 311-320, 344-351 (as President of the Autonomous Region of Krajina Crisis Staff, Brđanin aided the commission of crimes by Bosnian Serb forces in the region under his authority); *Simić* Appeal Judgement, paras 3, 114-118, 132-137, 148-159, 182-191 (Simić assisted persecutions of non-Serb civilians in Bosanski Šamac municipality, where he was the highest ranking civilian official); *Naletilić and Martinović* Appeal Judgement, paras 489-538 (Martinović assisted the murder of a detainee by encouraging the detainee's mistreatment, preventing the detainee from returning from Martinović's unit to prison, actively covering up the detainee's disappearance, and giving direct orders to his soldiers regarding disposal of the detainee's corpse); *Kvočka et al.* Appeal Judgement, paras 562-564 (Žigić led a prisoner to a room in which he was tortured); *Krstić* Appeal Judgement, paras 61-62, 135-144 (Krstić permitted troops and other resources under his control to assist in killings of Bosnian Muslims); *Vasiljević* Appeal Judgement, paras 134-135, 143, 147 (Vasiljević personally guarded seven Muslim men and

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prevented them from escaping); *Furundžija* Appeal Judgement, paras 124-127 (Furundžija assisted criminal acts through his presence and personal interrogation of prisoners); *Aleksovski* Appeal Judgement, paras 36, 165-173 (Aleksovski, a prison warden, assisted in the mistreatment of detainees in and around his prison facility). *See also Ntawukulilyayo* Appeal Judgement, paras 208-217, 226-229, 243, 246 (Ntawukulilyayo assisted criminal acts by personally encouraging refugees to seek shelter at Kabuye Hill and then transporting soldiers to help kill these refugees); *Kalimanzira* Appeal Judgement, paras 81, 126, 243 (Kalimanzira encouraged refugees to seek shelter at Kabuye Hill and subsequently accompanied armed individuals who killed some of these refugees); *Renzaho* Appeal Judgement, paras 2, 68, 75, 84-85, 93, 99-100, 104, 108, 253-255, 336-338, 622 (in his capacity as Prefect of Kigali-Ville, Renzaho aided various crimes in Kigali including murder by, *inter alia*, facilitating weapons distribution and supporting roadblocks); *Rukundo* Appeal Judgement, paras 3, 39, 51-54, 92, 115, 176-177, 218, 269-270 (Rukundo assisted the killings of Tutsis by, *inter alia*, identifying victims to principal perpetrators who then committed genocide and extermination); *Karera* Appeal Judgement, paras 298, 322-323 (Karera, while at a roadblock, instructed principal perpetrators that a man he identified as a Tutsi be detained and taken away; the man was subsequently murdered); *Seromba* Appeal Judgement, paras 77, 183-185, 206, 240 (Seromba assisted the murder of Tutsis by expelling them from his parish); *Nahimana et al.* Appeal Judgement, paras 668-672, 965-968 (Ngeze set up, manned, and supervised roadblocks, assisting in identification of Tutsi civilians who were then killed); *Muhimana* Appeal Judgement, paras 148, 165-177, 185-192 (Muhimana personally encouraged principal perpetrators to rape Tutsi women); *Ndindabahizi* Appeal Judgement, para. 4, p. 48 (Ndindabahizi transported attackers to a crime site and distributed weapons used to kill Tutsis); *Gacumbitsi* Trial Judgement, paras 286-287, 314; *Gacumbitsi* Appeal Judgement, paras 83-98, 123-125, 207 (Gacumbitsi personally encouraged principal perpetrators to massacre Tutsis and expelled two Tutsi tenants who were subsequently killed); *Semanza* Appeal Judgement, paras 263-279, 310 (Semanza was present during, participated in, and directed others to participate in mass killings of Tutsis); *Ntakirutimana and Ntakirutimana* Appeal Judgement, paras 524-537, p. 187 (Elizaphan and Gérard Ntakirutimana assisted attacks on Tutsis by, *inter alia*, providing transport to attackers and shooting weapons); *Rutaganda* Appeal Judgement, paras 294-295, 308-341 (Rutaganda aided killings of Tutsis by, *inter alia*, distributing weapons to principal perpetrators); *Kayishema and Ruzindana* Appeal Judgement, paras 188-190, 201-202, 242-247, 251-262, 372 (Ruzindana and Kayishema were present at massacres of Tutsis which they, *inter alia*, orchestrated and directed).

101 *See, e.g., Lukić and Lukić* Appeal Judgement, paras 419-461; *Kvočka et al.* Appeal Judgement, paras 563-564; *Furundžija* Appeal Judgement, paras 124-127. *See also Kayishema and Ruzindana* Appeal Judgement, paras 201-202.

102 The Appeals Chamber underscores that the requirement of explicit consideration of specific direction does not foreclose the possibility of convictions in cases of remoteness, but only means that such convictions require explicit discussion of how evidence on the record proves specific direction. *Cf. Mrkšić and Šljivančanin* Appeal Judgement, para. 81 (finding that in the context of the *actus reus* of aiding and abetting, substantial contribution may be geographically and temporally separated from crimes of principal perpetrators).

103 *See Kupreškić et al.* Appeal Judgement, paras 275-277 (finding that a six-month delay between an appellant being observed unloading weapons and a subsequent attack reduced the likelihood that these weapons were directed towards assisting in this attack).

104 *See* Trial Judgement, para. 126, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also* Trial Judgement, paras 1582-1627.

105 *See supra*, paras 32-36.

106 Judge Liu dissents from the analysis in this paragraph.

107 *See* Trial Judgement, paras 2-3, 205-210, 235-237, 262-266.

108 *See* Trial Judgement, paras 183-184, 195-196, 235-236, 262-263.

109 *See, e.g.*, Trial Judgement, paras 1592-1627.

110 *See supra*, paras 37-40.

111 Judge Liu dissents from the findings and analysis in this paragraph.

112 *See supra*, para. 9; Statute, Article 25. *Cf.* Statute, Article 21.

113 *See supra*, para. 9; *Gotovina and Markač* Appeal Judgement, para. 64; *Zigiranyirazo* Appeal Judgement, para. 43. While consideration of specific direction may be implicit (*see Blagojević and Jokić* Appeal Judgement, para. 189), in the context of correcting a legal error of the Trial Chamber, the Appeals Chamber will undertake an explicit examination.

114 *See supra*, paras 26-27.

115 *Cf.* Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), British Military Court Hamburg 1946, *in* United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 93-102 (1947) (finding two defendants guilty of assisting killings of concentration camp detainees by providing poison gas, despite arguments that the gas was to be used for lawful purposes, after reviewing evidence that defendants arranged for S.S. units to be trained in using this gas to kill humans in confined spaces).

116 *See* Trial Judgement, paras 262-293, 1770-1779.

117 *See* Trial Judgement, para. 265.

118 Trial Judgement, para. 267.

119 *See* Trial Judgement, paras 1012-1231.

120 *See* Trial Judgement, paras 1770-1779.

121 Trial Judgement, paras 1365-1369, 1772. *See also* Trial Judgement, para. 266.

122 Trial Judgement, para. 1772.

123 Appeal, para. 57.

124 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

125 Statute, Articles 6-7. *See also Tadić* Appeal Judgement, para. 186; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 53 ("An important element in relation to the competence *ratione personae* (personal jurisdiction) of the [Tribunal] is the principle of individual criminal responsibility."). *Cf. Gotovina and Markač* Croatia Decision, paras 12-13.

126 *See infra*, paras 68-69, 71.

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127 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also Orić* Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 49.

128 *See supra*, paras 25-36. Judge Liu dissents from the analysis in this sentence.

129 Trial Judgement, para. 3.

130 *See* Trial Judgement, paras 206-207. *See also* Trial Judgement, paras 208-209.

131 Trial Judgement, para. 208. *See also* Trial Judgement, paras 205-207.

132 *See* Trial Judgement, para. 199.

133 *See* Trial Judgement, paras 198-200.

134 *See* Trial Judgement, paras 761-763, 948, 1595.

135 *See* Trial Judgement, paras 962-988, 1622.

136 *See* Trial Judgement, paras 198, 962, 1008. *See also* Trial Judgement, paras 963-986.

137 Trial Judgement, paras 965-967, 988, 1007.

138 *See* Trial Judgement, paras 962-974.

139 *See Boškoski and Tarčulovski* Appeal Judgement, para. 167, *citing* Statute, Article 7(4).

140 *Cf. Boškoski and Tarčulovski* Appeal Judgement, para. 167.

141 Trial Judgement, para. 1588. *See also* Trial Judgement, paras 172-194, 262-293.

142 *See, e.g.,* Prosecution Exhibits 348, 375 (expert reports on aspects of the conflict in, *inter alia*, the BiH); T. 4 February 2009 pp. 3165-3232 (testimony by Prosecution Witness Martin Bell, a journalist covering the conflict in BiH). *See also* Adjudicated Facts Motion, para. 40, Annex A (proposing, *inter alia*, adjudicated facts involving the structure and combat abilities of BiH forces); Decision on Adjudicated Facts, para. 28 (taking judicial notice of, *inter alia*, certain adjudicated facts related to the structure and combat abilities of BiH forces as proposed in the Adjudicated Facts Motion). The Appeals Chamber notes that where exhibits are originally in B/C/S, all citations herein refer to the English translation as admitted at trial.

143 Trial Judgement, para. 1588. *See also* Trial Judgement, paras 184-185, 1589-1591, 1621-1625.

144 *See* Trial Judgement, paras 303-563, 598-760, 1588-1591. *See also* Adjudicated Facts Motion, Annex A (proposing, *inter alia*, adjudicated facts involving the structure and combat abilities of BiH forces); Decision on Adjudicated Facts, para. 28 (taking judicial notice of, *inter alia*, certain adjudicated facts related to the combat abilities and structure of BiH forces as proposed in the Adjudicated Facts Motion).

145 *See* Trial Judgement, paras 963, 970.

146 *See* Trial Judgement, paras 763-771, 780-787, 966-967, 974.

147 Trial Judgement, para. 974.

148 *See generally* Trial Judgement.

149 *See, e.g.*, Defence Exhibit 344, p. 5 (excerpt from Mladić's notebook, dated 12 August 1994, in which Perišić notes that FRY policy is more general than the policy of the Republika Srpska); Prosecution Exhibit 230, p. 2 (minutes of meeting of FRY and Republika Srpska political and military leaders held on 25 August 1995 in which Slobodan Milošević warns the Republika Srpska leadership not to take action that could trigger NATO retaliation); Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).

150 *See generally* Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).

151 *See* Prosecution Exhibit 776, pp. 38-45 (transcript of SDC meeting on 7 June 1994).

152 *See* Prosecution Exhibit 794, pp. 45-48 (transcript of SDC meeting on 18 January 1995).

153 *See* Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994).

154 *See supra*, para. 24.

155 *See* Trial Judgement, paras 1580-1627.

156 *See supra*, paras 37-40.

157 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

158 *See* Trial Judgement, para. 1588 (noting that the VRS strategy included "military warfare against BiH forces").

159 *See supra*, paras 52-55.

160 *See* Trial Judgement, paras 962-988.

161 *See* Trial Judgement, paras 963-974.

162 *See* Trial Judgement, paras 1007-1009.

163 *See, e.g.,* Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts of SDC meetings documenting decisions taken there).

164 Prosecution Exhibit 791, p. 5 (transcript of SDC meetings on 10 and 13 January 1994).

165 Prosecution Exhibit 776, pp. 38-39 (transcript of SDC meeting on 7 June 1994); Prosecution Exhibit 2716, pp. 1-2 (proposal by Perišić to the FRY President, dated 15 September 1995, urging the adoption of widespread measures to support the VRS).

166 Prosecution Exhibit 763, p. 2 (minutes of SDC meeting on 29 July 1995).

167 *See* Trial Judgement, paras 948-952.

168 *See* Trial Judgement, paras 941-1009.

169 *See, e.g.*, Prosecution Exhibit 791, pp. 4-5 (transcript of SDC meetings on 10 and 13 January 1994 at which Perišić set out the overall scope and costs of assistance to the VRS); Prosecution Exhibit 734 (VJ General Staff instructions issued by Perišić on 8 December 1993, concerning operation of, *inter alia*, the 30th Personnel Centre ("PC")); Prosecution Exhibit 709, pp. 32-33 (transcript of SDC meeting on 11 October 1993 at which Perišić discussed organising secondments of VJ personnel to the VRS and the importance of making these secondments more compatible with the legal framework of the FRY); Prosecution Exhibit 776, p. 38 (transcript of SDC meeting on 7 June 1994 at which Perišić advocated assisting, *inter alia*, VRS combat operations on the basis that the VRS would otherwise lose territory to opposing forces); Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994 at which Perišić discussed taking action against VJ personnel who provided assistance to the VRS outside official channels); Defence Exhibit 452 (letter from the Office of the Chief of the VJ General Staff, dated 29 October 1993, denying a request for assistance).

170 *See* Trial Judgement, paras 761-940.

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171 *See* Trial Judgement, paras 1010-1154, 1232-1237.

172 *See* Trial Judgement, paras 763-766, 1607-1611. *See also* Trial Judgement paras 793, 795.

173 *See* Trial Judgement, paras 1607-1619.

174 *See* Trial Judgement, paras 866-915.

175 *See, e.g.,* Prosecution Exhibit 791, pp. 52-53 (transcript of SDC meetings on 10 and 13 January 1994); Prosecution Exhibit 1871, p. 1 (order by Perišić dated 17 August 1994 stating that housing for, *inter alia*, soldiers seconded through the 30th PC should be "dealt with in the same manner as all other members of the [VJ]"); T. 5 March 2010 p. 10520 (testimony by Defence Witness Stamenko Nikolić, explaining that salaries from FRY soldiers who were seconded to, *inter alia*, the VRS continued to receive their salaries from the FRY in a way that the "cycle was never broken"). *See also* Trial Judgement, paras 867-889; T. 5 March 2010 pp. 10543-10544, 10559, 10587-10588 (testimony by Witness Nikolić, explaining that the establishment of, *inter alia*, the 30th PC aimed to ensure that officers of the VRS were able to exercise the rights they were entitled to as members of the VJ). The Appeals Chamber recalls that the Trial Chamber concluded that Perišić did not possess effective control over VJ soldiers seconded to the VRS who perpetrated crimes during their secondment, despite the fact that the VJ provided these benefits. *See* Trial Judgement, paras 1770-1779.

176 *See, e.g.,* Prosecution Exhibit 785, p. 19 (transcript of SDC meeting on 21 July 1994); Prosecution Exhibit 731 (order dated 10 November 1993 establishing, *inter alia*, the 30th PC); Prosecution Exhibit 734 (VJ General Staff instructions dated 8 December 1993 on operation of, *inter alia*, the 30th PC); Prosecution Exhibit 2722 (document dated 31 May 1995 from Mladić to Perišić, requesting expert assistance from the VJ); Prosecution Exhibit 2518 (request by the VRS dated 23 May 1995 for secondment of specific officers); Prosecution Exhibit 2725 (request by the VRS dated 12 June 1995 for secondment of 292 officers); T. 22 March 2010 pp. 11213-11215; T. 23 March 2010 pp. 11317-11318 (testimony by Defence Witness Stojan Malčić, indicating that when VJ members who were born in Bosnia requested leave to serve in the VRS, their requests were favourably received).

177 *See, e.g.,* Trial Judgement, para. 562.

178 *Cf. supra*, para. 46.

179 *See* Trial Judgement, paras 761-940, 1607-1619.

180 *See, e.g.,* Prosecution Exhibit 709, pp. 32-37 (transcript of SDC meeting on 11 October 1993); Prosecution Exhibit 780, pp. 18-24 (transcript of SDC meeting on 10 November 1993); Prosecution Exhibit 785, pp. 1-21 (transcript of SDC meeting on 21 July 1994); Prosecution Exhibit 794, p. 45 (transcript of SDC meeting on 18 January 1995); Prosecution Exhibit 731 (order dated 10 November 1993 establishing, *inter alia*, the 30th PC); Prosecution Exhibit 734 (VJ General Staff instructions, issued by Perišić on 8 December 1993, on operation of, *inter alia*, the 30th PC); T. 8 March 2010 pp. 10635-10642, 10663 (testimony by Witness Nikolić, indicating that the 30th PC was established to provide a legal basis to dispatch VJ personnel outside of the FRY).

181 Trial Judgement, para. 1594. *See also* Trial Judgement, paras 1234-1237.

182 Trial Judgement, paras 1035, 1597. *See also* Trial Judgement, paras 1116-1134.

183 *See* Trial Judgement, paras 1034-1069.

184 Trial Judgement, paras 1135-1154.

185 Trial Judgement, paras 1352-1358.

186 *See, e.g.,* Prosecution Exhibit 1009 (1994 order of the FRY President delegating to Perišić the power to regulate the provision of VJ assistance to the VRS); Prosecution Exhibit 1258, pp. 1-2 (VJ General Staff order of 27 December 1993 in which Perišić gave himself the power to approve or deny requests for assistance to, *inter alia*, the VRS); Prosecution Exhibit 791, pp. 5, 56 (transcript of SDC meetings dated 10 and 13 January 1994 in which Perišić set out the cost of providing assistance to the VRS and advocated provision of this assistance); Prosecution Exhibits 1265-1267, 1270-1272 (VJ orders dated between 31 March and 11 July 1994 providing ammunition to the VRS); Prosecution Exhibit 1214, pp. 19-21 (VRS annual financial statement, dated 17 February 1995, indicating assistance received from the VJ).

187 *See, e.g.,* Prosecution Exhibits 1265-1267, 1270-1272 (VJ orders dated between 31 March and 11 July 1994 providing ammunition to the VRS); Prosecution Exhibit 1214, pp. 19-21 (VRS annual financial statement, dated 17 February 1995, indicating assistance received from the VJ); Prosecution Exhibit 877 (VJ decision dated 28 December 1993 providing various types of assistance to the VRS including grenades, shells, mines, rockets, rocket launchers, and fuses); Prosecution Exhibit 1269 (VJ order dated 19 November 1993 providing the VRS with, *inter alia*, rifle grenades and rocket launchers); Prosecution Exhibits 708-726, 731-734, 737-741, 743-800 (transcripts, minutes, and other evidence related to SDC meetings and decisions taken there); Prosecution Exhibit 1232 (report from a VRS unit dated 31 January 1994 informing the VRS Main Staff that the FRY had supplied equipment including semi-automatic and automatic rifles, sub-machine guns, sniper rifles, pistols, rocket launchers, and radio sets); Prosecution Exhibit 2716, p. 1 (proposal by Perišić to the FRY President, dated 15 September 1995, noting that the Republika Srpska authorities had requested, *inter alia*, "help in arms, equipment and foodst[u]ffs," and deployment of VJ brigades "for the stabilisation of the front"); Prosecution Exhibit 2766 (message from Radovan Karadžić to Perišić, dated 15 May 1994, discussing equipment shortages); T. 12 May 2009 pp. 6056-6057 (testimony by Prosecution Witness Milomir Kovačević about his participation in delivering VJ military supplies to the VRS); T. 17 February 2009 pp. 3559, 3564-3565, 3568-3570 (testimony by Prosecution Witness MP-14, attesting to VJ provision of anti-artillery rockets, grenades, rounds for machine guns and sniper-rifles, and universal rounds to the VRS).

188 *See* Trial Judgement, paras 1291-1302, 1624.

189 *See* Response, paras 46, 106, 108; AT. 30 October 2012 pp. 60-61.

190 *See supra*, paras 37, 56.

191 Judge Liu dissents from the assessment in this paragraph.

192 *See, e.g.,* Trial Judgement, paras 1035-1037, 1067, 1237, 1594.

193 *See* Trial Judgement, paras 943-1154.

194 *See, e.g.,* Prosecution Exhibit 1258, pp. 1-2 (VJ General Staff order of 27 December 1993 in which Perišić gave himself the power to approve or deny requests for assistance to the VRS); Prosecution Exhibit 791, p. 5 (transcript of SDC meetings on 10 and 13 January 1994 at which Perišić detailed the total cost of providing assistance to the VRS);

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Prosecution Exhibit 75, p. 4 (witness statement of Đorđe Đukić dated February 1996, indicating that trucks carrying supplies provided by the VJ went to a variety of VRS bases); Prosecution Exhibit 2716, p. 1 (proposal by Perišić to the FRY President, dated 15 September 1995, urging the provision of aid to "Northwest Bosnia"); T. 3 March 2009 pp. 3886-3887 (testimony by Prosecution Witness Mladen Mihajlović that requests from the VRS were sent through the VRS Main Staff).

195 *See, e.g.,* Trial Judgement, para. 949, *citing* Defence Exhibit 452 (letter from the Office of the Chief of the VJ General Staff dated 29 October 1993, noting that a request for assistance from the Republika Srpska's Ministry of the Interior did not fall within VJ authority); Prosecution Exhibit 1258, pp. 1-2 (VJ General Staff Order of 27 December 1993, prohibiting the provision of aid from the VJ that was not approved by Perišić).

196 *See, e.g.,* Trial Judgement, para. 951; Prosecution Exhibit 779, pp. 55-65 (transcript of SDC meeting on 2 November 1994 at which Perišić discussed taking action against VJ personnel who provided assistance to the VRS outside official channels).

197 *See* Trial Judgement, paras 1319-1351.

198 *See, e.g.,* Prosecution Exhibit 782, pp. 55-60 (transcript of SDC meeting on 7 February 1994); Prosecution Exhibit 2933, pp. 1-2 (excerpt from Mladić's notebook on 13 December 1993); Prosecution Exhibit 2934, p. 3 (excerpt from Mladić's notebook on 14 December 1993); Defence Exhibit 521, p. 2 (report of VRS Commander Stanislav Galić to the VRS Main Staff dated 22 December 1993); T. 15 September 2009 pp. 8951-8952 (testimony by Prosecution Witness MP-11); T. 16 September 2009 pp. 9006-9007 (testimony by Witness MP-11); T. 4 March 2009 pp. 3962-3963 (testimony by Witness Mihajlović stating that he was not aware of Perišić having bypassed official procedures for providing aid to the VRS); T. 13 April 2010 pp. 11468-11469 (testimony by Defence Witness Borivoje Jovanić indicating that ammunition from the VJ war reserves could only be provided to the VRS by decision of the SDC). The Appeals Chamber notes that a report entitled "Military Help from the So-Called FRY (Serbia and Montenegro) to the So-Called Republika Srpska /RS/", dated August 1995 and attributed to the BiH Ministry of Foreign Affairs, claims that Perišić controlled all VRS activities, especially attacks on Srebrenica in July 1995. *See* Prosecution Exhibit 1830. The Appeals Chamber notes, however, that the Trial Chamber did not address this report (*see generally* Trial Judgement) and that the record also includes statements by Perišić indicating that he did not command the VRS in Srebrenica. *See* Prosecution Exhibit 2202, pp. 2-3. In the absence of any corroborating evidence, the Appeals Chamber does not consider that the report's allegations that Perišić generally controlled VRS operations or commanded attacks in Srebrenica prove beyond reasonable doubt that he specifically directed aid towards VRS crimes.

199 AT. 30 October 2012 p. 55.

200 *See* Trial Judgement, paras 1390-1579, 1628-1648.

201 *See supra*, paras 37, 48. The Appeals Chamber, Judge Liu dissenting, recalls that specific direction establishes a culpable link between an accused aider and abettor and relevant crimes. *See supra*, para. 37.

202 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

203 *See supra*, para. 53.

204 *See supra*, para. 42.

205 *See supra*, paras 56-57, 64, 68-69.

206 *Cf. supra*, para. 53. Judge Liu dissents with respect to the specific direction requirement.

207 Relevant forms of liability, in addition to aiding and abetting, could include JCE and superior responsibility.

208 *See supra*, paras 37-40, 42.

209 *Tadić* Appeal Judgement, para. 229. *See also supra*, paras 70-72.

210 *See* Trial Judgement, paras 585, 591-596, 1658-1660, 1769, 1784, 1839.

211 Notice of Appeal, paras 55-57; Appeal, paras 315-384.

212 Appeal, para. 384.

213 *See supra*, para. 2.

214 *See* Trial Judgement, paras 761-772, 1658-1660.

215 Trial Judgement, paras 770-772.

216 *See* Trial Judgement, paras 867-914.

217 Trial Judgement, para. 1757.

218 Trial Judgement, para. 1659.

219 Trial Judgement, paras 297, 1729.

220 Trial Judgement, paras 3, 295, 1763.

221 *See* Trial Judgement, paras 1761-1769.

222 *See* Trial Judgement, paras 171, 1733.

223 *See* Trial Judgement, para. 1734.

224 Appeal, paras 319, 333-340. *See also* AT. 30 October 2012 pp. 33-35.

225 Appeal, paras 321, 341-376.

226 Appeal, para. 334 (emphasis in original), *citing* Prosecution Exhibit 197 (FRY law on the VJ).

227 Appeal, paras 335-340. *See also* Reply, paras 92-95; AT. 30 October 2012 pp. 33-37.

228 Appeal, paras 342-353.

229 Appeal, para. 347. *See also* Reply, para. 98.

230 Appeal, paras 345-346; Reply, para. 97.

231 Appeal, paras 379-382.

232 Appeal, paras 318, 323-327.

233 Appeal, para. 352.

234 Appeal, para. 339. *See also* Appeal, para. 331 n. 407.

235 Appeal, para. 372. *See also* Appeal, paras 373-375.

236 Appeal, paras 354-371.

237 Appeal, para. 356. *See also* Reply, paras 101-102.

238 Appeal, para. 357.

239 Appeal, para. 370. *See also* AT. 30 October 2012 pp. 39, 74-75.

240 Appeal, paras 358-361.

241 *See* Appeal, paras 362, 365.

242 Appeal, paras 364-365.

243 Response, paras 276-278.

244 Response, paras 242, 244-245, 247-250.

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245 Response, para. 246.

246 Response, paras 251-253. *See also* AT. 30 October 2012 pp. 63-65.

247 Response, paras 255-256, 258.

248 Response, para. 257 (internal quotations omitted).

249 Response, para. 258.

250 Response, para. 259 (internal quotation omitted).

251 Response, para. 273. *See also* Response, paras 274-275.

252 *See* Response, paras 268-270.

253 Response, paras 260-272. *See also* AT. 30 October 2012 pp. 66-67.

254 Response, para. 272.

255 Response, para. 261.

256 Response, paras 263-267.

257 *Halilović* Appeal Judgement, para. 59.

258 *See, e.g., Orić* Appeal Judgement, para. 20; *Halilović* Appeal Judgement, para. 59. *See also Nahimana et al.* Appeal Judgement, para. 484.

259 *Strugar* Appeal Judgement, para. 254, *citing Blaškić* Appeal Judgement, para. 69.

260 *See Halilović* Appeal Judgement, para. 67; *Hadžihasanović et al.* Appeal Decision on Jurisdiction, para. 51.

261 *See supra*, para. 81.

262 *Blaškić* Appeal Judgement, para. 83.

263 *Cf. Strugar* Appeal Judgement, para. 254 (holding that "indicators of effective control are more a matter of evidence than of substantive law" (internal quotation omitted)).

264 *See supra*, paras 81-82.

265 Trial Judgement, para. 1763. *See also* Trial Judgement, paras 1757-1762, 1764-1769.

266 Trial Judgement, paras 1758-1759.

267 *See* Trial Judgement, paras 1701-1719, 1761-1762.

268 *See* Trial Judgement, paras 1758-1760.

269 Trial Judgement, paras 1743-1749.

270 *See* Trial Judgement, paras 1739-1742, 1750, 1752.

271 Trial Judgement, para. 1720, *citing* T. 11 May 2009 p. 5969.

272 Trial Judgement, para. 1678, *citing* T. 7 May 2009 p. 5924.

273 Trial Judgement, para. 1720, *citing* T. 29 April 2009 pp. 5740, 5762-5763.

274 *See* Trial Judgement, paras 1678, 1720.

275 *See* Trial Judgement, paras 1758-1769.

276 *Kvočka et al.* Appeal Judgement, para. 23.

277 *Limaj et al.* Appeal Judgement, para. 86 (internal citations omitted).

278 *Kvočka et al.* Appeal Judgement, para. 23.

279 *See Kvočka et al.* Appeal Judgement, para. 24. The Appeals Chamber notes, for example, that a trial chamber's failure to discuss witness testimony has not been deemed a failure to provide a reasoned opinion when disregarded testimony was confusing, biased, or contradicted by substantial and credible contrary evidence. *See Kvočka et al.* Appeal Judgement, paras 483-484, 487, 582-583.

280 *See, e.g., Zigiranyirazo* Appeal Judgement, paras 44-46; *Muvunyi* Appeal Judgement, paras 144, 147 n. 321, *citing Simba* Appeal Judgement, para. 143 (finding that a trial chamber's failure to explain its treatment of witness testimony, in context, constituted an error of law).

281 *See, e.g., Kalimanzira* Appeal Judgement, paras 195-201; *Zigiranyirazo* Appeal Judgement, paras 44-46; *Simba* Appeal Judgement, paras 142-143. *Cf. Limaj et al.* Appeal Judgement, para. 86; *Kalimanzira* Appeal Judgement, paras 99-100; *Muvunyi* Appeal Judgement, paras 144, 147 n. 321.

282 Trial Judgement, para. 299. Witness Rašeta remained in this position in the SVK during and after the shelling of Zagreb. *See* T. 7 May 2009 p. 5903. *See also* T. 29 April 2009 pp. 5743-5744.

283 Trial Judgement, para. 1426.

284 Trial Judgement, paras 1399, 1431.

285 Trial Judgement, para. 1426.

286 *See generally* Trial Judgement.

287 *See* Trial Judgement, paras 302, 573, 582-583, 792, 847, 883, 887, 910, 1252, 1426. The Appeals Chamber notes that the Trial Chamber also discussed Witness Rašeta's testimony in additional paragraphs, which either established particular facts about himself, or were directly relevant to effective control. *See* Trial Judgement, paras 299, 1678, 1720.

288 *See* Trial Judgement, paras 297 n. 727, 298 n. 728, 300 n. 733, 565 n. 1647, 566 n. 1648, 781 nn. 2166-2167, 805 n. 2272, 832 n. 2345, 843 n. 2372, 845 n. 2378, 867 n. 2439, 876 n. 2466, 881 n. 2488, 1250 n. 3574, 1403 n. 4014, 1428 n. 4071, 1435 nn. 4089-4090.

289 *See* Trial Judgement, paras 300 n. 733, 876 n. 2466, 883, 887, 1250 n. 3574, 1435 nn. 4089-4090.

290 *See* Trial Judgement, paras 887, 1431. The Appeals Chamber notes that the Trial Chamber also discussed Witness Orlić's testimony in additional paragraphs, which either established particular facts about himself or were directly relevant to effective control. *See* Trial Judgement, paras 299, 1720.

291 *See* Trial Judgement, paras 294 n. 719, 297 n. 725, 300 n. 734, 781 nn. 2166, 2168, 867 n. 2439, 924 n. 2613, 1399 n. 4004, 1659 n. 4595.

292 *See supra*, para. 94 n. 289.

293 *See, e.g., Kvočka et al.* Appeal Judgement, paras 23, 483-484, 487, 582-583. *See also Simba* Appeal Judgement, paras 143, 152, 155.

294 *See supra*, paras 93-94.

295 *See supra*, para. 90.

296 *See* Trial Judgement, paras 1678, 1720. *Cf.* Trial Judgement, paras 1758-1764.

297 *Cf. Limaj et al.* Appeal Judgement, para. 86; *Kvočka et al.* Appeal Judgement, para. 23.

298 *Cf. Kalimanzira* Appeal Judgement, paras 99-100, 195-199; *Muvunyi* Appeal Judgement, para. 148.

299 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

300 *See Gotovina and Markač* Appeal Judgement, para. 64.

301 *Cf. Blaškić* Appeal Judgement, para. 69 (holding that "indicators of effective control are more a matter of evidence than substantive law").

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302 Trial Judgement, paras 566-567.

303 Trial Judgement, paras 568-572.

304 Trial Judgement, para. 585.

305 *See* Trial Judgement, paras 1721-1722, 1763.

306 Trial Judgement, para. 1726, *citing* Prosecution Exhibit 1286, p. 3 (undated intercepted telephone conversation between Perišić and Milošević which the Trial Chamber dated to 3 May 1995). *See also* Trial Judgement, paras 1725, 1727, 1763.

307 Trial Judgment, para. 1728, *citing* Prosecution Exhibit 1286, p. 5 (undated intercepted telephone conversation between Perišić and Milošević which the Trial Chamber dated to 3 May 1995).

308 *See* Trial Judgement, paras 567-572, 1721.

309 *See* Trial Judgement, para. 1726, *citing* Prosecution Exhibit 1286, p. 3 (undated intercepted telephone conversation between Perišić and Milošević which the Trial Chamber dated to 3 May 1995). *See also* Trial Judgement, para. 1727, *citing* Prosecution Exhibit 1321, pp. 2-3 (undated intercepted conversation between Milošević and RSK Prime Minister Borislav Mikelić which the Trial Chamber dated to 3 May 1995).

310 *See supra*, para. 75.

311 *Halilović* Appeal Judgement, para. 67; *Hadžihasanović et al.* Appeal Decision on Jurisdiction, para. 51 (holding that criminal liability as a superior does not attach where crimes occurred prior to assumption of effective control).

312 *See supra*, paras 98-99.

313 *See supra*, para. 100.

314 *See supra*, para. 94.

315 *See supra*, para. 91.

316 Trial Judgement, para. 1714.

317 *See* Trial Judgement, paras 1716, *citing* Prosecution Exhibit 1138 (correspondence dated 19 July 1994 on weapons disassembly from Perišić to SVK Main Staff), 1717, *citing* Prosecution Exhibit 2177 (letter dated 11 May 1994 from VJ General Staff to SVK Main Staff). *See also* Trial Judgement, paras 1710, 1715, 1718.

318 Trial Judgement, para. 1723, *citing* Prosecution Exhibit 1303, pp. 3-4 (undated intercepted telephone conversation, which the Trial Chamber dated to 1 May 1995, between Perišić and a security guard of Milošević). *See also* Trial Judgement, para. 1724, *citing* Prosecution Exhibit 1373, p. 2 (undated intercepted telephone conversation between Perišić and Milošević).

319 Trial Judgement, para. 1712, *citing* Prosecution Exhibit 1800 (the 7 December Order).

320 The Appeals Chamber notes that the 7 December Order is addressed to, *inter alia*, Major General Milan Oleketić, but considers this to be a typographical error and is satisfied that the 7 December Order was sent to Čeleketić.

321 *See* Trial Judgement, paras 1712, 1763; 7 December Order.

322 *See, e.g.,* Trial Judgement, para. 1763.

323 *See* 7 December Order (making reference to Milošević's authority as President of Serbia).

324 Trial Judgement, para. 1712, *citing* Prosecution Exhibit 2857 (report from Čeleketić dated 7 December 1994 referring to 7 December Order).

325 Trial Judgement, para. 1711; Prosecution Exhibit 1925 (24 March Order).

326 Trial Judgement, para. 1711; 24 March Order, pp. 1-3.

327 *See* Trial Judgement, para. 1711, *citing* T. 8 June 2009 p. 6762 (testimony by Prosecution Witness Miodrag Starčević).

328 Trial Judgement, para. 1711.

329 *See* Trial Judgement, paras 1730-1734, 1764; Prosecution Exhibit 1340, p. 3 (undated telephone intercept in which Perišić confirms that Mrkšić is not taking orders from Martić). *See also* Prosecution Exhibit 2412, p. 1 (document dated 20 June 1995 responding to an order from Perišić).

330 *See* Trial Judgement, paras 1725-1730, 1764. *See also* Prosecution Exhibit 1340, p. 3 (undated telephone intercept in which Perišić confirms that Mrkšić is not taking orders from Martić).

331 *See supra*, paras 104-106.

332 *See supra*, paras 91, 93-94.

333 *See supra*, para. 91.

334 *See* Trial Judgement, paras 1674-1689.

335 Trial Judgement, para. 171.

336 *See* Trial Judgement, paras 1675-1689.

337 *See* Trial Judgement, para. 1759.

338 *See* Trial Judgement, para. 1734. *See also* Trial Judgement, para. 294.

339 *See Halilović* Appeal Judgement, para. 67; *Hadžihasanović et al.* Appeal Decision on Jurisdiction, para. 51.

340 *See* Trial Judgement, paras 866, 933, 1768.

341 *See* Trial Judgement, paras 841-866, 1743-1745. *See also* Trial Judgement, para. 1768.

342 Trial Judgement, para. 1749. *See also* Trial Judgement, para. 1768.

343 *See* Trial Judgement, paras 763-802, 1238-1263, 1750.

344 *See* Trial Judgement, paras 1672-1689, 1701-1752, 1755-1769.

345 *See Krajišnik* Appeal Judgement, para. 202; *Stakić* Appeal Judgement, para. 219.

346 *See supra*, paras 112-113.

347 *See supra*, para. 106; Trial Judgment, paras 1733-1734.

348 *See supra*, para. 109.

349 *See supra*, paras 98-101.

350 *See supra*, paras 108-111.

351 *See Halilović* Appeal Judgement, para. 67; *Hadžihasanović et al.* Appeal Decision on Jurisdiction, para. 51.

352 *See supra*, para. 87.

353 Trial Judgement, para. 1840.

354 Notice of Appeal, paras 58-69; Appeal, paras 385-492.

355 *See supra,* paras 74, 120.

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VII. JOINT SEPARATE OPINION OF JUDGES THEODOR MERON AND CARMEL AGIUS

1. While we agree with the analysis and conclusions of the Appeal Judgement, we write separately to address the issue of whether specific direction should be considered as part of the *actus reus* or *mens rea* of aiding and abetting.

2. Starting with the 1999 *Tadić* Appeal Judgement, the Appeals Chamber has always approached specific direction as an element of the *actus reus* of aiding and abetting.[1] We observe, however, 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. In this regard, we note that, as set out in the Appeal Judgement, proof of specific direction will often be found in evidence that may also be illustrative of *mens rea*.[2] Thus, for example, Perišić's comments to the SDC, which directly relate to his mental state, are considered in the Appeal Judgement as circumstantial evidence relevant to whether his subsequent acts were specifically directed towards VRS crimes.[3]

3. We also note that the *mens rea* standard of aiding and abetting – knowledge that aid provided assists in the commission of the relevant crime and awareness of the essential elements of the crime[4] – would not preclude consideration of issues relevant to specific direction. Indeed, in our view, whether an individual specifically aimed to assist relevant crimes logically fits within our current *mens rea* requirement.

4. Accordingly, were we setting out the elements of aiding and abetting outside the context of the Tribunal's past jurisprudence, we would consider categorising specific direction as an element of *mens rea*. However, we are satisfied that specific direction can also, as the Appeal Judgement's analysis demonstrates, be reasonably assessed in the context of *actus reus*.[5] The critical issue raised by the requirement of specific direction, regardless of whether it is considered in the context of *actus reus* or *mens rea*, 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. In these circumstances, we do not believe that cogent reasons justify departure from the Tribunal's precedent of considering specific direction in the context of *actus reus*.[6] Such departures from established precedent should, in our view, generally be limited to untenable situations, such as a holding which is logically impossible or is demonstrated to be contrary to customary international law.

Done in English and French, the English text being authoritative.

Judge Theodor Meron

Judge Carmel Agius

Dated this 28th day of February 2013,

At The Hague,

The Netherlands.

[Seal of the Tribunal]

ENDNOTES

1 *See* Appeal Judgement, paras 25-36.

2 *See* Appeal Judgement, para. 48.

3 *See* Appeal Judgement, paras 59-60.

4 *See Lukić and Lukić* Appeal Judgement, para. 428.

5 *See* Appeal Judgement, paras 45-74.

6 *See Aleksovski* Appeal Judgement, para. 109. *See also Aleksovski* Appeal Judgement, paras 107-108, 110-111.

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VIII. PARTIALLY DISSENTING OPINION OF JUDGE LIU

1. In this Judgement, the Majority reverses Perišić's convictions for aiding and abetting murder, inhumane acts, and persecution as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war.[1] This reversal is predicated on the finding that the Trial Chamber erred in holding that specific direction is not a required element of the *actus reus* of aiding and abetting liability.[2] The Majority then conducts a *de novo* review of the evidence and concludes that it was insufficient to prove that the aid Perišić provided was specifically directed towards the criminal activities of the VRS in Sarajevo and Srebrenica.[3] I respectfully disagree with the Majority's reasoning and its conclusion in this regard.

2. While I recognise that the specific direction requirement has been *mentioned* in the relevant jurisprudence, I note that it has not been applied consistently. Indeed, the cases cited by the Majority as evidence of an established specific direction requirement merely make mention of "acts directed at specific crimes"[4] as an element of the *actus reus* of aiding and abetting liability. In the majority of these cases the Appeals Chamber simply restates language from the *Tadić* Appeal Judgement without expressly applying the specific direction requirement to the facts of the case before it.[5] Moreover, the jurisprudence of the Tribunal demonstrates that aiding and abetting liability may be established without requiring that the acts of the accused were specifically directed to a crime.[6] In these circumstances, I am not persuaded that specific direction is an essential element of the *actus reus* of aiding and abetting liability[7] – or that it is necessary to explicitly consider specific direction in cases where the aider and abettor is remote from the relevant crimes.[8]

3. Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability.[9] This shift risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts. The present appeal is a case in point.

4. The Trial Chamber held Perišić responsible for facilitating the criminal acts of the VRS in Sarajevo and Srebrenica. Although the Trial Chamber did not characterise the VRS as a wholly criminal organisation,[10] it nonetheless found that the crimes committed by the VRS were "inextricably linked to the war strategy and objectives of the VRS leadership."[11] It further found that the VRS "wag[ed] a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective."[12] In this regard, the Trial Chamber found that the siege of Sarajevo was instrumental to the implementation of a VRS objective and that the "systematic and widespread sniping and shelling of civilians in Sarajevo by the VRS over a period of three years demonstrate[d] that the VRS's leading officers relied on criminal acts to further the siege."[13] With regard to Srebrenica, the Trial Chamber found that the VRS pursued a strategic objective "aimed at establishing a corridor in the Drina River valley and eliminating the Drina River as a border between the Serbian states."[14] It concluded that "this goal was implemented through the plan of 'plunging the Bosnian Muslim population into a humanitarian crisis and ultimately eliminating the enclave'."[15]

5. As the highest ranking officer of the VJ, Perišić oversaw a system which provided considerable practical assistance to the VRS.[16] In his capacity as Chief of the VJ General Staff, Perišić institutionalised the provision of logistical assistance to the VRS[17] and had the power to approve or deny aid requests from the VRS.[18] The Trial Chamber noted that Perišić refused aid requests that did not comply with his procurement procedure and that his decisions in this regard were final.[19] Moreover, the Trial Chamber considered that "Perišić's role went beyond administering the logistical assistance process" and noted that Perišić "*recurrently encouraged* the SDC to maintain this assistance, thereby helping craft the FRY's policy to aid these armies."[20]

6. The Trial Chamber found that Perišić presided over "a system providing *comprehensive* military assistance to the VRS".[21] It noted that this assistance included "considerable quantities of weaponry comprising a very large part of the VRS's munition requirements"[22] and the transfer of a number of VJ officers and key personnel to the VRS.[23] The Trial Chamber carefully assessed the magnitude of the logistical aid Perišić directed towards the VRS and found that "[w]ithout the regular supply of considerable quantities of ammunition and other weaponry, as well as fuel, technical expertise, repair services and personnel training, the VRS would have been hampered in conducting its operations in Sarajevo and Srebrenica."[24] Significantly, the Trial Chamber established that "important logistical

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and technical support was provided to the units involved in perpetrating the charged crimes" in Sarajevo and Srebrenica.[25]

7. This comprehensive assistance was crucial to the VRS's continued existence.[26] The Trial Chamber found that the assistance provided by Perišić "sustained the *very life line* of the VRS and created the conditions for it to implement a war strategy that encompassed the commission of crimes against civilians."[27] Without this aid, the Trial Chamber concluded, the VRS could not have operated effectively as an army.[28] It consequently found that "Perišić's logistical assistance and personnel assistance, individually and cumulatively, had a substantial effect on the crimes perpetrated by the VRS in Sarajevo and Srebrenica".[29]

8. The Trial Chamber also reviewed extensive evidence in finding that Perišić was aware of the VRS's propensity to commit criminal acts. It found that, from the early stages of the war, "Perišić was provided with information, from a variety of sources, of the VRS's criminal behaviour and discriminatory intent. This information related to acts of violence against Bosnian Muslims perpetrated in the BiH theatre of war and made Perišić aware of the VRS's propensity to commit crimes."[30] The Trial Chamber concluded that Perišić knew "of the VRS criminal intent in the implementation of its war strategy" and nonetheless provided assistance to the VRS war effort in the Sarajevo campaign.[31] It further found that Perišić "knew that individual crimes committed by the VRS before the attack on Srebrenica would probably be followed by more crimes committed by the VRS after the takeover of the enclave in July 1995" and that "Perišić had contemporaneous knowledge of allegations that the VRS was committing crimes in Srebrenica."[32]

9. Having carefully reviewed Perišić's submissions on appeal,[33] I am satisfied that the Trial Chamber did not err in its assessment of the evidence on the record or in its analysis of aiding and abetting liability. Perišić's acts, which facilitated the large-scale crimes of the VRS through the provision of considerable and comprehensive aid, constitute a prime example of conduct to which aiding and abetting liability should attach. Moreover, even assuming specific direction were a required element of aiding and abetting liability, I am not convinced that an acquittal would be justified given the magnitude, critical importance, and continued nature of the assistance Perišić provided to the VRS.

10. In these circumstances, I would have upheld Perišić's convictions for aiding and abetting the crimes committed by the VRS in Sarajevo and Srebrenica.

Done in English and French, the English text being authoritative.

Judge Liu Daqun

Dated this 28th day of February 2013

At The Hague,

The Netherlands.

[Seal of the Tribunal]

ENDNOTES

1 Appeal Judgement, paras 73-74, 122.

2 Appeal Judgement, paras 25-36. *See also* Appeal Judgement, paras 37-74.

3 Appeal Judgement, paras 45-72.

4 As noted in the Appeal Judgement, this formulation varies slightly from case to case. For a list of cases using this or a

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similar formulation, *see* Appeal Judgement, nn. 70-74, *citing Blagojević and Jokić* Appeal Judgement, para. 127; *Kvočka et al*. Appeal Judgement, para. 89; *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 254; *Aleksovski* Appeal Judgement, para. 163; *Kalimanzira* Appeal Judgement, para. 74; *Muvunyi* Appeal Judgement, para. 79; *Seromba* Appeal Judgement, para. 139; *Nahimana et al.* Appeal Judgement, para. 482; *Muhimana* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 530; *Simić* Appeal Judgement, para. 85; *Orić* Appeal Judgement, para. 43; *Ntawukulilyayo* Appeal Judgement, para. 214; *Rukundo* Appeal Judgement, para. 52; *Karera* Appeal Judgement, para. 321.

5 The express application of the specific direction requirement appears to have been limited to the *Vasiljević* case (*see Vasiljević* Appeal Judgement, para. 135). In my view, this tends to demonstrate that the Appeals Chamber accorded extremely limited importance to specific direction in previous cases. Moreover, I note that the specific direction "requirement" was first mentioned in the *Tadić* Appeal Judgement, which focused on JCE liability and only considered aiding and abetting liability by way of contrast (*see Tadić* Appeal Judgement, para. 229). Thus, subsequent cases have relied on language that was not intended to be a definitive statement of aiding and abetting liability.

6 *See Mrkšić and Sljivančanin* Appeal Judgement, para. 159; *Lukić and Lukić* Appeal Judgement, para. 424. *See by contrast Lukić and Lukić* Appeal Judgement, Separate and Partially Dissenting Opinions of Judge Mehmet Güney, paras 10-11 *and* Separate Opinion of Judge Agius.

7 In my view, specific direction may be a pertinent factor in evaluating the *mens rea* of an aider and abettor. However, I believe that specific direction is a red herring when considered in the context of the *actus reus* of aiding and abetting liability.

8 The remoteness of an accused from the crimes is not dispositive in assessing the *actus reus* of aiding and abetting liability. In this context, I believe that the crucial consideration is whether the acts of the aider and abettor had a substantial effect on the commission of the relevant crime. *See Delalić et al.* Appeal Judgement, para. 352.

9 If specific direction is indeed part of the *actus reus* of aiding and abetting liability, it could be argued that there is little difference between aiding and abetting and certain forms of commission. *See Seromba* Appeal Judgement, para. 171.

10 *See* Trial Judgement, paras 262-293, 1588.

11 Trial Judgement, para. 1588. *See also* Trial Judgement, para. 1602 ("the crimes charged in the Indictment were an integral part of the VRS's war strategy").

12 Trial Judgement, para. 1621.

13 Trial Judgement, para. 1590. *See also* Trial Judgement, para. 1589.

14 Trial Judgement, para. 1591.

15 Trial Judgement, para. 1591.

16 Trial Judgement, para. 1594.

17 Trial Judgement, para. 948.

18 Trial Judgement, paras 948-949, 956. *See* Trial Judgement, paras 943 (at a meeting on 27 September 1993, Perišić announced that "'[s]upply of material and technical equipment to the [VRS and SVK] should be realised in accordance with the real possibilities and only upon the authorization of the Chief of the General Staff of the Yugoslav Army'", *i.e.* only upon Perišić's own authorisation (internal reference omitted)), 967 ("the evidence conclusively establishes that the SDC granted Perišić authority over the logistical assistance process"). *See also* Trial Judgement, paras 965-966.

19 Trial Judgement, paras 949-950, 956. *See also* Trial Judgement, paras 952-953.

20 Trial Judgement, para. 1008 (emphasis added). *See also* Trial Judgement, paras 964 (at the SDC meeting held on 10 January 1994 to discuss funding "Perišić stated that 522 million dollars and 307 million dollars were respectively required for the needs of the VRS and SVK. He subsequently pled: 'We cannot abandon Ratko and others – they are asking for extremely expensive ammunition they use to fire on land targets. Why? Because it is very effective [. . .]'" (internal references omitted)), 968 ("[o]n 7 June 1994, Perišić personally advised the SDC that logistical assistance to the VRS and SVK was necessary and must continue [and] recommended that the SDC approve the grant of ammunition and spare parts to the VRS and SVK" (internal reference omitted)), 970 (on 21 July 1994, "Perišić did not propose discontinuing military assistance to the VRS and SVK, instead urging the SDC to increase the VJ's budget: '[I]t is not possible to send supplies across the Drina river out of these reserves. *But that leads to the conclusion that a budget of additional funds for this purpose should be considered*.' Slobodan Milošević and Zoran Lilić agreed with Perišić that the VJ's budget should be raised accordingly, and the SDC went on to reach that conclusion" (emphasis in Trial Judgement) (internal references omitted)), 972 ("[o]n 7 June 1995, Perišić again encouraged the SDC to keep on authorising the VJ's assistance to the VRS and SVK: 'Allow us, as has been the case so far, to offer certain help to the [Republika Srpska ("RS")] and the [RSK], primarily with spare parts and whatever we can give that will not have an impact on FRY's combat readiness'" (internal reference omitted)). *See also* Trial Judgement, para. 1622 ("Perišić urged the FRY SDC to continue its policy of assisting the VRS. He notably oversaw the provision of wide-ranging logistical and technical assistance to the VRS").

21 Trial Judgement, para. 1234 (emphasis added). *See also* Trial Judgement, paras 1594-1595. The Trial Chamber also noted "unequivocal" evidence that Perišić sought to provide assistance to the VRS and the SVK regardless of the United Nations Security Council's ("UNSC") resolutions. *See* Trial Judgement, para. 1005 (at a meeting with a delegation of leaders from the Serbian Orthodox Church, Perišić had said that "'*despite the unfair sanctions imposed by the international community* the FRY has been assisting RS and the RSK in every respect (humanitarian, *military*, etc.) in order for the Serbian people to successfully defend itself [sic] and survive on its [sic] territory'. 'Perišić promised to do everything within his power to continue helping the Serbian people'" (emphasis in Trial Judgement) (internal references omitted)).

22 Trial Judgement, para. 1234.

23 Trial Judgement, paras 793, 795.

24 Trial Judgement, para. 1622. *See also* Trial Judgement, para. 1613 (by seconding high-level officers to the VRS, Perišić "created the conditions" for them "to wage a war that

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encompassed systematic criminal actions without impediments"). In addition, the Trial Chamber noted that Perišić himself did not believe that the VRS had another significant source of assistance. *See* Trial Judgement, para. 1165 ("'They rely *solely on us* and come to us with demands.' In an interview conducted after the war, Perišić said, while referring to the FRY, RS and RSK, that there was 'one single army' that 'was getting its logistics support mostly from the Federal Republic of Yugoslavia'" (emphasis in Trial Judgement) (internal references omitted)).

25 Trial Judgement, para. 1237. *See* Trial Judgement, para. 1594. *See also* Trial Judgement, 1595 ("although the VJ was providing logistical assistance to the VRS even before Perišić became Chief of the VJ General Staff, he helped to efficiently continue this policy. Perišić recurrently urged the SDC to continue providing the VRS with extensive logistical and technical assistance free of charge, and oversaw this process in practice" (internal reference omitted)).

26 *See* Trial Judgement, paras 1597-1602. The Trial Chamber noted that "Karadžić admitted that 'nothing would happen without Serbia. We do not have those resources and we would not be able to fight'. Mladić too reckoned that 'we would not be able to live' if the FRY suspended its assistance. At the end of the war, Mladić addressed a letter to Milošević, copying Perišić, to express his gratitude for the 'invaluable' assistance that the VRS had received from FRY authorities. Mladić acknowledged that:

> It would be difficult to imagine the course of events if it had not been for that assistance. It was comprehensive and basically timely. We would like to emphasize that it had always come at the right moment and was precious when we needed it most. This is well known, especially among the VRS which will remain forever grateful."

See Trial Judgement, para. 1598 (internal references omitted).

27 Trial Judgement, para. 1623 (emphasis added).

28 *See* Trial Judgement, para. 1622.

29 Trial Judgement, para. 1627.

30 Trial Judgement, para. 1631 (internal references omitted).

31 Trial Judgement, para. 1620. The Trial Chamber based its conclusions regarding Perišić's knowledge of the Sarajevo crimes on evidence which included, *inter alia*, diplomatic cables, some of which copied Perišić, discussing the international community's views of shelling and sniping incidents in Sarajevo; UNSC Resolutions and international reports detailing VRS crimes, as well as related discussions by the FRY leadership; and detailed international media reports and intelligence information gathered by FRY intelligence and security organs which were presented to Perišić (*see* Trial Judgement, paras 1450-1456, 1461-1485, 1489-1494, 1496-1516, 1518-1521, 1633; *see also* Trial Judgement, paras 1390-1437).

32 Trial Judgement, para. 1579. With regard to Srebrenica, the Trial Chamber noted diplomatic cables to the FRY leadership detailing serious allegations of crimes by VRS forces in Srebrenica, some directly copying Perišić (*see* Trial Judgement, paras 1526, 1547-1553). In this context, the Trial Chamber also considered UNSC resolutions in April and June 1993, and April 1994, which noted that VRS forces were committing crimes against civilians in areas including Srebrenica; VRS and VJ intelligence reports; evidence of meetings between Perišić and VRS members; and media reports on crimes committed by VRS forces in Srebrenica (*see* Trial Judgement, paras 1526, 1529, 1532, 1534-1540, 1547-1556, 1567-1577). Significantly, the Trial Chamber noted that Perišić continued to provide the VRS with assistance after the crimes had been committed in Srebrenica. *See, e.g.,* Trial Judgement, para. 973 ("[o]n 29 July 1995, pursuant to another briefing by Perišić, the SDC decided to '[c]ontinue to extend certain assistance to the Armies of [RS] and the [RSK] within limits that do not jeopardise the combat readiness of the [VJ]'. The SDC agreed that it was 'immediately' necessary to 'continue extending material and expert assistance to the VRS and SVK, to the extent of VJ abilities'" (internal references omitted)).

33 Appeal, paras 16-314.

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IX. OPINION SÉPARÉE DU JUGE RAMAROSON SUR LA QUESTION DE LA *VISÉE SPÉCIFIQUE* DANS LA COMPLICITÉ PAR AIDE ET ENCOURAGEMENT

A. Introduction

1. La Chambre d'appel acquitte ce jour Perišić et infirme sa condamnation notamment au titre de la complicité par aide et encouragement pour les crimes d'assassinat, actes inhumains et persécutions comme crimes contre l'humanité de même que pour les crimes d'assassinat et d'attaques contre des civils comme violation des lois et coutumes de la guerre[1]. Je souscris à la conclusion dégagée dans l'arrêt. Toutefois, je ne partage pas le point de vue exprimé par la majorité selon lequel la *visée spécifique*[2] constitue un élément essentiel de la complicité par aide et encouragement et devant être exclusivement analysé dans le cadre de *l'actus reus*.

B. La *visée spécifique* n'est pas un critère explicite de la complicité par aide et encouragement

2. Le présent arrêt soutient que la *visée spécifique* constitue une composante requise de la complicité par aide et encouragement, ce qui, à mon humble avis, est une conclusion erronée se basant sur le postulat selon lequel l'arrêt *Tadić* considère la *visée spécifique* comme étant un élément de la complicité par aide et encouragement[3]. En effet, la Chambre d'appel prend comme point de départ l'affaire *Tadić*, laquelle a défini la complicité par aide et encouragement en opposition avec l'entreprise criminelle commune[4]. Le fait que cette définition inclut les termes « qui visent spécifiquement à » indiquerait selon la majorité que la *visée spécifique* constitue une composante de la complicité par aide et encouragement[5]. Or, cette définition est de nature purement contextuelle car elle était destinée à établir une comparaison entre la complicité par aide et encouragement et l'entreprise criminelle commune, sans établir une description complète de la responsabilité pénale du complice[6].

3. La Chambre d'appel affirme ensuite que la jurisprudence postérieure ne s'est jamais écartée de la définition fournie dans l'arrêt *Tadić*[7], l'amenant ainsi à conclure que la *visée spécifique* est une condition requise de l'*actus reus* pour établir la complicité par aide et encouragement, conclusion à laquelle je ne puis souscrire[8]. En effet, la *visée spécifique* n'a jamais été isolée en tant que telle, tant d'un point de vue légal que factuel.

4. D'un point de vue légal, les arrêts postérieurs n'ont fait que reprendre, pour la grande majorité de façon *verbatim*[9], la définition énoncée dans l'affaire *Tadić*, certains d'entre eux ayant utilisé des synonymes[10]. Je note par ailleurs que la Chambre d'appel, en évoquant *la visée spécifique* sous une forme substantivée, dénote en ce sens qu'elle érige un nouveau critère. D'un point de vue factuel, je constate que la jurisprudence n'a jamais caractérisé ce critère en l'appliquant expressément aux faits de l'espèce[11]. La plupart des affaires n'en font pas mention tandis que certaines l'incluent de façon implicite à travers l'effet substantiel[12].

5. J'en conclus que la Chambre de première instance n'a pas commis d'erreur de droit[13] en indiquant que : « l'élément matériel de l'aide et l'encouragement *n'exige pas* que l'aide apportée par le complice "vise expressément à faciliter les crimes "»[14]. Elle fonde à juste titre cette conclusion sur le paragraphe 159 de l'arrêt *Mrkšić et Šljivančanin* et les paragraphes 182, 185 à 189 de l'arrêt *Blagojević et Jokić*[15]. L'arrêt *Mrkšić et Šljivančanin* indique qu'il ne s'agit pas d'un « ingrédient essentiel » tandis que l'arrêt *Blagojević et Jokić* affirme que ce critère peut être pris en compte de façon implicite dans une analyse fondée sur l'effet substantiel. A mon avis, ces deux affirmations ne se contredisent pas. L'arrêt *Lukić et Lukić* rendu le 4 décembre 2012 a également statué de la sorte, tout en indiquant que l'arrêt *Mrkšić et Šljivančanin* « a *clarifié* "que la visée spécifique n'est pas un ingrédient essentiel de l'*actus reus* de la complicité par aide et encouragement" »[16]. Or, le présent arrêt juge que l'arrêt *Mrkšić et Šljivančanin* a employé une formulation pouvant induire en erreur[17]. Il s'agit là d'une nette contradiction avec la jurisprudence antérieure[18]. La conclusion de la Chambre de première instance me paraît à ce titre fondée en droit.

6. En conséquence, je ne partage pas la conclusion légale dégagée par la majorité en vertu de laquelle *la visée spécifique*, à défaut d'être implicite dans l'effet substantiel, a été l'immuable position jurisprudentielle et doit constituer une condition requise de l'*actus reus* pour établir la complicité par aide et encouragement[19]. Au regard de l'état des lieux de la jurisprudence, cette affirmation catégorique[20] de la Chambre d'appel me semble constituer un revirement de jurisprudence. Il s'agit également de la première fois que la *visée spécifique* est appliquée de façon explicite aux faits de l'espèce[21].

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C. Les implications de la *visée spécifique*

7. Je considère que l'idée d'une *visée spécifique* est implicitement prise en compte dans le cadre de la *mens rea*. Orienter un acte, le viser est à mon sens subjectif et implique nécessairement une analyse de la *mens rea* du complice. Cependant, la jurisprudence a traité la question de la *visée spécifique* à travers l'*actus reus*[22]. En effet, elle a considéré que la *visée spécifique* pouvait être implicite à travers l'effet substantiel[23], lequel fait partie de l'*actus reus*. Toutefois, comme la frontière avec la *mens rea* me parait ténue[24], je ne puis souscrire à l'affirmation selon laquelle la *visée spécifique* est un élément requis de l'*actus reus*, séparé de la *mens rea*[25]. Je note par ailleurs que la façon dont la Chambre d'appel applique ce critère comprend des éléments relatifs au lien de causalité[26], lien qui n'est pourtant pas requis en tant que tel par notre jurisprudence[27]. A mon sens, le lien de causalité est pris en compte à travers l'effet substantiel[28].

8. La Chambre d'appel précise les circonstances d'application de la *visée spécifique* et affirme la nécessité de la considérer de façon explicite lorsque l'accusé est loin de la scène de crime[29], pour établir un lien entre les actes de l'accusé et les actions des auteurs principaux[30]. Or, la jurisprudence indique que les actes de complicité peuvent être commis en un endroit éloigné du lieu de sa commission sans pour autant exiger la *visée spécifique*[31]. En conséquence, la Chambre d'appel introduit à mon sens une distinction nouvelle dans le droit de l'aide et l'encouragement en affirmant que dans les cas où l'accusé se trouve loin de la scène de crime, la *visée spécifique* doit être analysée de façon explicite. En vertu du principe *ubi lex non distinguit*, je ne peux souscrire au raisonnement de la Chambre d'appel sur ce point.

9. Prenant acte de l'absence de développements factuels relatifs à la *visée spécifique* dans la jurisprudence antérieure, la Chambre d'appel justifie ce point au motif que l'accusé se trouvait à proximité de la scène de crime[32]. Cela démontre à mon sens que le cœur du problème n'est point la question d'une *visée spécifique*, conditionnée à l'éloignement ou non de l'accusé, mais celle de sa *mens rea*. En effet, lorsque l'accusé se trouve à proximité de la scène de crime, la *mens rea* peut se déduire aisément des actes mêmes de l'accusé. Or, il est plus difficile de l'établir quand l'accusé est éloigné de la scène de crime, plus spécifiquement s'agissant du deuxième volet de la *mens rea* qui est la conscience que l'aide fournie assiste les crimes commis[33].

D. La *mens rea* de Perišić

10. La Chambre d'appel indique qu'elle n'a pas trouvé de preuve démontrant que Perišić soutenait la fourniture d'une aide spécifiquement dirigée vers les activités criminelles de la VRS et qu'au contraire, de par ses actes, Perišić voulait soutenir[34] l'effort de guerre général de la VRS[35]. Cela suggère à mon sens que la Chambre d'appel a considéré que Perišić n'avait pas la *mens rea* requise, à savoir qu'il n'avait pas conscience que ses actes assistaient la commission des crimes commis à Sarajevo et Srebrenica[36]. A mon humble avis, si les actes de Perišić *ne visaient pas spécifiquement à*, cela signifie qu'il n'avait pas conscience que, par ses actes, il assistait à la commission des crimes commis à Sarajevo et Srebrenica. Pour cette raison, je me rallie à la majorité et souscris à l'acquittement de Perišić car je considère que la Chambre d'appel a inclus de façon implicite dans son analyse de la *visée spécifique*, celle de la *mens rea* de Perišić. Cependant, je l'aurais exprimée dans le cadre d'une analyse explicite relative à la *mens rea* car l'acquittement de Perišić prononcé sur la base d'un critère qui ne constitue pas un précédent établi dans notre jurisprudence, ne me paraît pas fondé en droit.

Fait en français et en anglais, la version française faisant foi.

Juge Arlette Ramaroson

Le 28 février 2013

La Haye (Pays-Bas)

[Sceau du Tribunal]

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ENDNOTES

1 Ces crimes correspondent aux chefs 1, 2, 3, 4, 9, 10, 11 et 12 de l'acte d'accusation.

2 *Visée spécifique* est une traduction non officielle de *specific direction*, cette traduction se basant sur les termes *qui visent spécifiquement* utilisés dans l'Arrêt *Tadić*.

3 Voir Arrêt, par. 26-28 et par. 32 : « (. . .) the settled precedent established by the *Tadić* Appeal Judgement ».

4 Le paragraphe 229 de l'Arrêt *Tadić* indique : « Compte tenu de ce qui précède, il convient à présent *de faire la distinction* entre, d'une part, un acte visant à réaliser l'objectif ou dessein commun de commettre un crime et, d'autre part, le fait d'aider ou d'encourager la perpétration d'un crime. (. . .) Le complice commet des actes *qui visent spécifiquement à* aider, encourager ou fournir un soutien moral en vue de la perpétration d'un crime spécifique (meurtre, extermination, viol, torture, destruction arbitraire de biens civils, etc.), et ce soutien a un effet important sur la perpétration du crime. *En revanche*, dans le cas d'actes commis en vertu d'un objectif ou dessein commun, il suffit que la personne qui y participe commette des actes *qui visent d'une manière ou d'une autre* à contribuer au projet ou objectif commun. » [non soulignés dans l'original] Je note que les termes soulignés démontrent que les termes « *qui visent spécifiquement à* » servent à établir une comparaison. « *Qui visent spécifiquement à* » s'oppose à cet égard aux termes « *qui visent d'une manière ou d'une autre* » employés pour l'entreprise criminelle commune. Or, *la visée d'une certaine manière* n'est pas devenue un critère de l'entreprise criminelle commune. Sur la nature contextuelle de cette définition, voir les Arrêts *Blagojević et Jokić*, par. 185 et *Aleksovski*, par. 163.

5 Arrêt, par. 25-36.

6 Arrêt *Aleksovski*, par. 163.

7 Je note à titre additionnel que le paragraphe 229 de l'arrêt *Tadić* dont le but est de distinguer l'aide et l'encouragement de l'entreprise criminelle commune survient après un long développement consacré à l'entreprise criminelle commune et à son caractère coutumier (voir les par. 185 à 228). Ce développement est compris à cet égard dans une sous-section intitulée : « L'article 7.1) du Statut et la notion de but commun ». La complicité par aide et encouragement ne constitue donc pas le cœur du raisonnement.

8 Arrêt, par. 36.

9 Arrêt, note de bas de page 70.

10 Arrêt, par. 29 se référant aux Arrêts *Simić*, par. 85 et *Orić*, par. 43.

11 Voir par exemple les affaires *Simić, Blaškić, Lukić et Lukić, Orić, Mrkšić et Šlijvanćanin, Kvočka et al., Krnojelac, Furundžija, Kordić et Čerkez, Delalić et al., Gotovina et Markač, Krajišnik, Brđanin, Krstić, Seromba, Nahimana et al., Kalimanzira, Rukundo, Muvunyi, Muhimana, Ntakirutimana et Ntakitutimana, Nchamihigo, Zigiranyirazo. Ndindabahizi, Gacumbitsi,* et *Semanza*. Je note par ailleurs que la seule affaire qui tendrait à apprécier cet élément serait l'affaire *Kupreškić* (voir Arrêt *Kupreškić et al.*, par. 283 : « Cependant, la simple présence de l'accusé devant l'hôtel Vitez ne saurait être assimilée à un acte visant précisément à aider, encourager ou soutenir moralement les auteurs de persécutions. »)

12 Voir par exemple l'Arrêt *Ntagerurera et al.*, par. 375. Je note à cet égard la phrase suivante : « La Chambre d'appel considère que les constatations de la Chambre de première instance ne permettent pas d'établir que l'omission d'Imanishimwe visait spécifiquement à offrir à ses soldats la possibilité d'aller perpétrer le massacre, ni qu'il avait connaissance de l'assistance qu'il leur apportait. » Voir également les Arrêts *Ntawukulilyayo*, par. 215-216; *Vasiljević*, par. 134-135; *Blagojević et Jokić*, par. 194-199; *Karera*, par. 322; *Renzaho*, par. 337.

13 Arrêt, par. 41.

14 Jugement, par. 126.

15 Jugement, note de bas de page 258. La Chambre de première instance, en se référant également à l'Arrêt *Blagojević et Jokić*, a donc bien noté que la *visée spécifique* pouvait s'analyser de façon implicite à travers l'effet substantiel même si elle en a conclu à juste titre que cet élément n'était pas *exigé* de façon explicite.

16 Arrêt *Lukić et Lukić*, par. 424 (traduction non officielle).

17 Arrêt, par. 41 (« while the relevant phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement is misleading »).

18 A titre additionnel, je note que l'Arrêt *Gotovina et Markač*, lequel est un arrêt récent, ne mentionne aucunement la *visée spécifique* alors qu'il indique les éléments pertinents (« as relevant ») de la complicité par aide et encouragement, à savoir l'effet substantiel et la *mens rea* requise (*cf*. par. 127 : « The Appeals Chamber first recalls, as relevant, that for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime » [notes de bas de page omises]). De même, l'Arrêt *Brđanin* montre dans le cadre de son analyse que l'effet substantiel et la *mens rea* sont les deux éléments à considérer dans le cadre de la complicité par aide et encouragement (*cf*. par. 496). De même, l'Arrêt *Delalic et al.* ne mentionne aucunement la *visée spécifique* (par. 352).

19 Arrêt, par. 36.

20 Arrêt, par. 32 et 35, « settled precedent ». voir également par. 36 « remains » et « reaffirms » et par. 48 « long-standing jurisprudence ».

21 Voir les paragraphes correspondant à l'examen *de novo* des éléments du dossier. Arrêt, par. 43, 45-69.

22 Voir les Arrêts *Orić* par. 43; *Mrkšić et Šlijvanćanin,* par. 159; *Blagojević et Jokić* par. 189. Je note cependant que l'affaire *Blagojević et Jokić* n'a pas entièrement exclu des considérations de *mens rea*. Voir par. 189 : « La Chambre d'appel considère également que, dans la mesure où cette finalité de l'aide fait implicitement partie intégrante de l'élément matériel de la complicité par aide et encouragement, lorsque l'accusé a *sciemment* pris part à un crime et que sa participation a eu un effet important sur sa perpétration (. . .) » [non souligné dans l'original].

23 Arrêt *Blagojević et Jokić*, par. 189.

24 A titre d'exemple, il convient de noter que le présent arrêt fait état de la *manière* dans laquelle Perišić a distribué l'aide de la VJ à la VRS, ce qui implique nécessairement une analyse de la *mens rea*. Arrêt, par. 66 : « The manner in

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which Perišić distributed VJ aid to the VRS also does not demonstrate specific direction ». Voir également Arrêt, par. 59 et 61.

25 Arrêt, par. 68 : « However, the Appeals Chamber, Judge Liu dissenting, recalls that evidence regarding knowledge of crimes, alone, does not necessarily establish specific direction, which is a distinct element of *actus reus*, separate from *mens rea* ». Voir également Arrêt, par. 48 : « The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus* » et « (. . .) the long-standing jurisprudence of the Tribunal affirms that specific direction is an analytically distinct element of *actus reus* ».

26 Voir par exemple Arrêt, par. 63 : « However, the record contains no evidence suggesting that the benefits provided to seconded soldiers and officers – including VJ-level salaries, housing, and educational and medical benefits – were tailored to facilitate the commission of crimes. » Voir également Arrêt, par. 65 : « In addition, the Appeals Chamber notes that the Trial Chamber found that bullets and shells recovered from crime sites in Sarajevo and Srebrenica were not proved beyond reasonable doubt to have originated from the VJ (. . .) » [notes de bas de page omises].

27 Voir les Arrêts *Mrkšić et Šljivančanin*, par. 81; *Simić*, par. 85; *Blaškič*, par. 48; *Blagojević et Jokić*, par. 187; *Rukundo*, par. 52; *Aleksovski*, par. 164.

28 Voir par exemple les Arrêts *Gacumbitsi,* par. 140; *Ndindabahizi,* par. 117; *Blaškić*, par. 48.

29 Arrêt, par. 39 et 70.

30 Arrêt, par. 42.

31 Arrêt *Simić*, par. 85, Arrêt *Blaškić*, par. 48.

32 Arrêt, par. 38.

33 La *mens rea* comprend deux volets, à savoir la connaissance par l'accusé des crimes commis par les auteurs principaux (ou de la probabilité qu'ils se commettent) et la connaissance que les actes de l'accusé assistent la commission des crimes. Voir Arrêt *Mrkšič et Šlijvanćanin*, par. 159 : « The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator. »; Arrêt *Blaškić*, par. 49 : « Le fait que le complice sache que ses actes contribuent à la perpétration d'un crime par l'auteur principal suffit à établir l'élément moral de la complicité. » Voir les Arrêts *Haradinaj*, par. 57 : « The aider and abettor must have knowledge that his or her acts assist in the commission of the crime of the principal perpetrator. »; *Gotovina et Markać,* par. 127 : « The Appeals Chamber first recalls, as relevant, that for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime. »; *Blagojević et Jokić,* par. 127 : « L'élément moral de la complicité par aide et encouragement s'analyse comme le fait pour le complice de savoir que les actes qu'il accomplit contribuent à la perpétration d'un crime précis par l'auteur principal. Dans le cas de crimes supposant une intention spécifique comme la persécution ou le génocide, le complice doit connaître celle de l'auteur principal. »

34 Traduction de « Perišić's relevant actions *were intended*. »

35 Arrêt, par. 60 : « Having reviewed the relevant evidence, the Appeals Chamber, Judge Liu dissenting, also finds no proof that Perišić supported the provision of assistance specifically directed towards the VRS's criminal activities. Instead, evidence on the record suggests that Perišić's relevant actions *were intended* to aid the VRS's overall war effort. » [non souligné dans l'original].

36 Voir Arrêt, par. 60 et 61.

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X. ANNEX A – PROCEDURAL HISTORY

1. The Trial Chamber rendered the Trial Judgement in this case on 6 September 2011. The main aspects of the appeal proceedings are summarised below.

A. Notice of Appeal and Briefs

2. On 13 September 2011, Perišić filed a motion requesting an extension of time to file his notice of appeal,[1] which the Prosecution did not oppose.[2] Perišić's motion was granted on 16 September 2011, providing him an extension of 30 days.[3] Perišić filed his notice of appeal on 8 November 2011.[4] On 21 November 2011, Perišić filed a motion requesting an extension of time to file his appellant's brief,[5] which the Prosecution did not oppose.[6] Perišić's motion was granted on 24 November 2011, providing him an extension of 14 days.[7] On 25 January 2012, Perišić filed a motion requesting an 8,000 word extension to the word limit of his appellant's brief,[8] which the Prosecution did not oppose.[9] Perišić's motion was granted on 30 January 2012, and both he and the Prosecution were granted an 8,000 word extension to the word limits applicable to, respectively, the appellant's brief and the Prosecution response.[10] Perišić filed his appellant's brief on 6 February 2012.[11] The Prosecution responded to Perišić's appeal on 19 March 2012.[12] Perišić filed his reply brief on 3 April 2012.[13]

B. Assignment of Judges

3. On 14 September 2011, the President of the Tribunal assigned the following Judges to hear the appeal: Judge Mehmet Güney; Judge Liu Daqun; Judge Andrésia Vaz; Judge Theodor Meron; and Judge Carmel Agius.[14] Pursuant to Rule 22(B) of the Rules, Judge Meron was elected the Presiding Judge in the case.[15] On 16 September 2011, Judge Meron designated himself as Pre-Appeal Judge.[16] On 7 March 2012, the President of the Tribunal replaced Judge Mehmet Güney with Judge Khalida Rachid Khan.[17] On 23 May 2012, the President of the Tribunal replaced Judge Khalida Rachid Khan with Judge Arlette Ramaroson.[18]

C. Status Conferences

4. In accordance with Rule 65*bis*(B) of the Rules, status conferences were held on 7 March 2012 and 5 July 2012.[19]

D. Request to Allow Legal Consultant to Appear Before the Appeals Chamber

5. On 29 October 2012, Perišić sought leave for Mr. Stéphane Bourgon to appear before the Appeals Chamber during the Appeal Hearing.[20] The Appeals Chamber granted Perišić's request in a decision delivered orally at the start of the Appeal Hearing.[21]

E. Appeal Hearing

6. On 24 September 2012, the Appeals Chamber issued a scheduling order for the Appeal Hearing in this case.[22] On 15 October 2012, the Appeals Chamber issued an addendum inviting the parties to address several specific issues at the Appeal Hearing.[23] The Appeal Hearing was held on 30 October 2012 in The Hague.

ENDNOTES

1 Motion for an Extension of Time to File a Notice of Appeal, 13 September 2011, para. 14.

2 Prosecution Response to Defence Motion for Extension of Time, 15 September 2011, para. 2.

3 Decision on Momčilo Perišić's Motion for an Extension of Time to File a Notice of Appeal, 16 September 2011, pp. 1-2.

4 Notice of Appeal of Momčilo Perišić, 8 November 2011. *See also* Corrigendum to Mr. Perišić's Notice of Appeal, 7 February 2012.

5 Mr. Perišić's Request for an Extension of Time to File his Appeal Brief, 21 November 2011, para. 8.

6 Prosecution Response to Defence Motion for Extension of Time to File Appeal Brief, 22 November 2011, para. 2.

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7 Decision on Momčilo Perišić's Motion for an Extension of Time to File his Appeal Brief, 24 November 2011, pp. 1-2.

8 Mr. Perišić's Motion for Leave to Exceed the Word Limit for the Appeal Brief, 25 January 2012, paras 1, 6, 13.

9 Response to Defence Motion to Exceed Word Limit for Appeal Brief, 26 January 2012, para. 1.

10 Decision on Momčilo Perišić's Motion for Leave to Exceed the Word Limit for the Appeal Brief, 30 January 2012, pp. 2-3.

11 Appeal Brief of Momčilo Perišić, 6 February 2012 (confidential). A final public redacted version was filed on 10 April 2012. *See also* Book of Authorities for the Appeal Brief of Momčilo Perišić, 6 February 2012.

12 Prosecution Response to Momčilo Perišić's Appeal Brief, 19 March 2012 (confidential). A public redacted version was filed on 12 April 2012. *See also* Book of Authorities *to* Prosecution Response to Momčilo Perišić's Appeal Brief, 19 March 2012.

13 Reply of Momčilo Perišić to Prosecution's Response Brief, 3 April 2012 (confidential). A public redacted version was filed on 7 November 2012. *See also* Book of Authorities for the Reply Brief of Momčilo Perišić, 3 April 2012.

14 Order Assigning Judges to a Case Before the Appeals Chamber, 14 September 2011, p. 2.

15 *See* Order Designating a Pre-Appeal Judge, 16 September 2011, p. 1.

16 Order Designating a Pre-Appeal Judge, 16 September 2011, p. 1.

17 Order Replacing a Judge in a Case Before the Appeals Chamber, 7 March 2012, p. 1.

18 Order Replacing a Judge in a Case Before the Appeals Chamber, 23 May 2012, p. 1.

19 The parties agreed that certain status conferences need not be held.

20 Motion on Behalf of Momčilo Perišić Seeking Permission for a Legal Consultant to Appear Before the Appeals Chamber During the 30 October 2012 Appeal Oral Hearing, 29 October 2012 (public with confidential annexes), paras 1, 5.

21 AT. 30 October 2012 p. 11.

22 Scheduling Order for Appeal Hearing, 24 September 2012, p. 1.

23 *Addendum* to the Scheduling Order for Appeal Hearing, 15 October 2012, pp. 1-2.

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XI. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan JokiĆ, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

DELALIĆ *ET AL.*

Prosecutor v. Zejnil Delalič, Zdravko Mucič (aka "Pavo"), Hazim Delič, and Esad Landžo (aka "Zenga"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement").

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GOTOVINA AND MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012 ("*Gotovina and Markač* Croatia Decision").

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HADŽIHASANOVIĆ *ET AL.*

Prosecutor v. Enver Hadžihasanović, Mehmed Alagić, and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Appeal Decision on Jurisdiction").

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović Appeal Judgement").*

HARADINAJ *ET AL.*

Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 21 July 2010 ("*Haradinaj et al.* Appeal Judgement").

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement").

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KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement").

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUPREŠKIĆ *ET AL.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA *ET AL.*

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LIMAJ *ET AL.*

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Trial Judgement").

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement").

LUKIĆ AND LUKIĆ

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

MRKŠIĆ AND ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

PERIŠIĆ

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, Second Defence Motion for Judicial Notice of Adjudicated Facts, with Public Annex A, 16 June 2010 ("Adjudicated Facts Motion").

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, Decision on Second Defence Motion for Judicial Notice of Adjudicated Facts, 2 August 2010 ("Decision on Adjudicated Facts").

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, Judgement, 6 September 2011 (public with confidential Annex C) ("Trial Judgement").

SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

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STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 Feburary 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

GACUMBITSI

The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, 17 June 2004 (the English translation of the French original was filed on 24 January 2005) ("*Gacumbitsi* Trial Judgement").

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement").

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement").

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 19 July 2001 (the English translation of the French original was filed on 4 December 2001) ("*Kayishema and Ruzindana* Appeal Judgement").

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement").

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement").

NAHIMANA *ET AL.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (the English translation of the French original was filed on 16 May 2008) ("*Nahimana et al.* Appeal Judgement").

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

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NDINDABAHIZI

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement").

NTAGERURA *ET AL.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 (the English translation of the French original was filed on 29 March 2007) ("*Ntagerura et al.* Appeal Judgement").

NTAKIRUTIMANA AND NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana and Ntakirutimana* Appeal Judgement").

NTAWUKULILYAYO

Dominique Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement").

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal Judgement").

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (the English translation of the French original was filed on 9 February 2004) ("*Rutaganda* Appeal Judgement").

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement").

ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement").

3. Other Jurisdictions

TESCH

Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), British Military Court Hamburg 1946, *in* United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 93-1-2 (1947).

https://doi.org/10.5305/intelegamate.52.5.1065 Published online by Cambridge University Press

B. Other Sources

Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002.

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

C. List of Defined Terms and Abbreviations

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular the plural, and vice versa.

7 December Order	Prosecution Exhibit 1800, Order from Milošević to, *inter alia*, the SVK, transmitted by Perišić on 7 December 1994
24 March Order	Prosecution Exhibit 1925, Order from Perišić to, *inter alia*, members of the SVK dated 24 March 1995
30th PC	30th Personnel Centre which involved VJ staff seconded to the VRS
40th PC	40th Personnel Centre which involved VJ staff seconded to the SVK
Appeal	Public Redacted Version of the Appeal Brief of Momčilo Perišić, 10 April 2012
Appeal Hearing	Oral submissions in the present case, held in The Hague on 30 October 2012
Appeals Chamber	Appeals Chamber of the Tribunal
AT.	Appeal Hearing Transcript
BiH or Bosnia	*Bosna i Hercegovina* – Bosnia and Herzegovina
Čeleketić	Milan Čeleketić, VJ officer seconded through the 40th PC and Chief of the SVK Main Staff from 22 February 1994 until mid- May 1995
Cf.	Compare with
command orders	Non-Administrative Orders
Croatia	Republic of Croatia
Defence Exhibit	Defence Exhibits in the present case (where Defence exhibits are originally in B/C/S, all citations herein refer to the English translation as admitted at trial)
FRY	Federal Republic of Yugoslavia
ICTR	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 Serious Violations of International Humanitarian Law Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
Indictment	*The Prosecutor of the Tribunal v. Momčilo Perišić*, Case No. IT-04-81-PT, Second Amended Indictment, 5 February 2008
JCE	Joint Criminal Enterprise
Martić	Milan Martić, president of the RSK and Supreme Commander of the SVK

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Milošević	Slobodan Milošević, President of Serbia
Mladić	Ratko Mladić, Commander of the VRS Main Staff
Mrkšić	Mile Mrkšić, VJ officer seconded through the 40th PC who became Chief of the SVK Main Staff in mid-May 1995
n. (nn.)	Footnote(s)
Notice of Appeal	Notice of Appeal of Momčilo Perišić, 8 November 2011
p. (pp.)	Page(s)
para. (paras)	Paragraph(s)
PC	Personnel Centre
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution Exhibit	Prosecution Exhibits in the present case (where Prosecution exhibits are originally in B/C/S, all citations herein refer to the English translation as admitted at trial)
Reply	Reply of Momčilo Perišić to Prosecution's Response Brief, 7 November 2012 (public redacted version)
Response	Prosecution Response to Momčilo Perišić's Appeal Brief, 12 April 2012 (public redacted version)
RSK	*Republika Srpska Krajina* – Republic of Serbian Krajina
Rules	Rules of Procedure and Evidence of the Tribunal
SDC	Supreme Defence Council of the FRY
Statute	Statute of the Tribunal
SVK	*Srpska Vojska Krajine* – Serbian Army of Krajina
T.	Trial Hearing Transcript
Trial Chamber	Trial Chamber I of the Tribunal
Trial Judgement	*Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Judgement, 6 September 2011
Tribunal	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
VJ	*Vojska Jugoslavije* – Army of Yugoslavia
VRS	*Vojska Republike Srpske* – Army of the Republika Srpska
VRS Crimes in Sarajevo and Srebrenica	VRS crimes in BiH that the Trial Chamber found Perišić aided and abetted
Zagreb Crimes	SVK crimes in Zagreb that the Trial Chamber found Perišić failed to punish
Zagreb Perpetrators	VJ soldiers seconded to the SVK who were responsible for crimes perpetrated during the shelling of Zagreb on 2 and 3 May 1995

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