Prosecutor v. Taylor: Is the SCSL's Rejection of the Specific-Direction Enigma Enough To End Debate Between the Ad Hoc Tribunals?

I. OVERVIEW

As a result of an eight-month-old decision issued by a criminal tribunal half a world away, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) suddenly faced the novel question of whether assistance must be specifically directed toward a crime in order to find Charles Ghankay Taylor, the former president of Liberia, guilty of "aiding and abetting" crimes against humanity during the Sierra Leone Civil War.[1] The concept of specific direction as a part of "aiding and abetting" liability had been widely dismissed as an ancillary, albeit unaddressed, issue for some time, such that the concept was not raised at trial or as a particular submission of error on appeal.[2] However, the

1. *See* Prosecutor v. Taylor (*Taylor I*), Case No. SCSL-03-1-T, Judgment, OXFORD REP. ON INT'L L. (Apr. 26, 2012), http://opil.ouplaw.com/view/10.1093/law:icl/936scs/12.case.1/law-icl-936scs/12 (subscription required); *see also* Marlise Simons & Alan Cowell, *50-Year Sentence Upheld for Ex-President of Liberia*, N.Y. TIMES, Sept. 27, 2013, at A3. Former Liberian President Charles Taylor was arrested on March 26, 2006, while in exile in Nigeria and was charged with eleven counts of war crimes and crimes against humanity punishable under articles 2, 3, and 4 and of the SCSL Statute. *Taylor I*, Case No. SCSL-03-1-T, ¶ 9. The Trial Chamber found that Taylor assisted Sierra Leone's Revolutionary United Front and the Armed Forces Revolutionary Council (RUF/AFRC) rebel forces in his capacity as president between 1998 and 2000 by providing logistical, financial, military, and technical support, including providing arms in exchange for diamonds, to the RUF/AFRC that contributed to murder, rape, the use of child soldiers, the mutilation of civilians, and other atrocities committed during the Sierra Leon Civil War. *Id.* ¶¶ 76, 80, 146.

2. Prosecutor v. Taylor (*Taylor II*), Case No. SCSL-03-01-A, Judgment, ¶ 467 (Sept. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=107 (explaining that

Appeals Chamber considered the question relevant after the International Criminal Tribunal for the former Yugoslavia (ICTY) acquitted General Momčilo Perišić because his acts aiding Bosnian Serb forces had not been specifically directed at the alleged crimes to a sufficient degree, but had only been directed at the general war effort during the Yugoslav Wars.[3] The Appeals Chamber for the SCSL *held* that (1) the actus reus standard for aiding and abetting liability under article 6(1) of the Statute of the SCSL (SCSL Statute) and customary international law was that an accused's acts or conduct of assistance, encouragement, and/or moral support had to have a substantial effect on the commission of the crimes charged; (2) knowledge was the culpable mens rea for aiding and abetting under the SCSL Statute and customary international law; and (3) specific direction was not an element of the actus reus of aiding and abetting under the SCSL Statute or customary international law. *Prosecutor v. Taylor* (*Taylor II*), Case No. SCSL-03-01-A, Judgment (Sept. 26, 2013), http://www.sc-s1.org/LinkClick.aspx?fileticket=t14fjFPjJ8=&tabid=107.

II. BACKGROUND

The ICTY and the SCSL share a common bond in the history and jurisprudence of modern international criminal law. The tribunals were each created to restore international peace and security pursuant to chapter VII of the United Nations Charter.[4] The United Nations Security Council established the ICTY in response to the widespread violence following the breakup of the Socialist Federal Republic of Yugoslavia,[5] while establishing the SCSL through an agreement between the United

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the defense tied the issue of specific direction to ground sixteen of the Notice of Appeal at oral argument because they had not had the opportunity to address the issue within their brief).

3. Prosecutor v. Perišić (*Perišić II*), Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf. Momčilo Perišić was appointed Chief of the General Staff of the Yugoslav People's Army in August of 1993. General Perišić, in his capacity as general of the army, was charged with aiding and abetting war crimes and crimes against humanity perpetrated in Sarajevo and Srebrenica, Bosnia during the Yugoslav Wars by the Army of Republika Srpska, known as the VRS. The Yugoslav army provided assistance through supplying weaponry, salaries, and benefits to VRS soldiers and officers during the conflict period.

4. *International Criminal Tribunal for the Former Yugoslavia*, PROJECT ON INT'L CTS. & TRIBUNALS, http://www.pict-pcti.org/courts/icty.html (last visited Apr. 6, 2014); Press Release, Special Court for Sierra Leone (SCSL) Office of the Prosecutor, Prosecutor Welcomes UN Security Council Resolution Granting the United Nations Mission in Liberia (UNMIL) Chapter VII Powers to Arrest Charles Taylor (Nov. 14, 2005), http://www.sc-sl.org/LinkClick.aspx?fileticket=bOPxFQrJBdo%3D&.

5. *The Conflicts*, INT'L CRIM. TRIB. FOR FORMER YUGOSLAVIA (ICTY), http://www.icty.org/sid/322 (last visited Apr. 6, 2014).

Nations and Sierra Leone following its own ten-year civil war.[6] The tribunals' statutes are structured similarly in that they provide only for a basic framework of the subject matter under their jurisdiction, so that adjudicating courts must apply "rules of international humanitarian law which are beyond any doubt part of customary law" to provide further detail to the definition of crimes.[7] Perhaps most importantly, the ICTY and the SCSL are among just a few international bodies charged with exercising jurisdiction over individuals for international crimes, making them each extremely important authorities on the development of international criminal law as a part of customary international law.[8]

Through their statutes and case law,[9] the ICTY and SCSL have incorporated and developed aiding and abetting liability into their own jurisprudence, firmly establishing a precedent in customary international law that criminal liability may "extend to those who participate in and contribute to a crime . . . when such participation is sufficiently connected to the crime."[10] Originally, however, modern international criminal tribunals integrated aiding and abetting liability into customary international law by incorporating principles of secondary liability[11] derived from the case law of the original forums of post-World War II

6. *Legacy Overview*, SCSL, http://www.sc-sl.org/LEGACY/tabid/224/Default.aspx (last visited Apr. 6, 2014); *see* The Special Court Agreement Ratification Act, U.N.-Sierra Leone, Mar. 7, 2002, http://www.sc-sl.org/LinkClick.aspx?fileticket=3dwfHVBc5VA%3D&.

7. U.N. Secretary-General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (explaining that the principle of *nullum crimen sine lege* requires only the court to apply principles that are beyond doubt a part of customary international law so that the "adherence of some but not all States . . . does not arise"); *see* RULES OF PROCEDURE & EVIDENCE OF THE SPECIAL COURT FOR SIERRA LEONE 72*bis* (amended May 31, 2012).

8. *Cf.* Theodor Meron, *The Hague Tribunal: Working to Clarify International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1511, 1512 (1998) (stating that international humanitarian law has developed more significantly and rapidly since the establishment of ad hoc tribunals than in the half-century following the Nuremburg trials).

9. *Compare* U.N. Secretary-General, *supra* note 7, ¶ 59, *and* S.C. Res. 955, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994), *with* Statute of the Special Court for Sierra Leone art. 6(1) (2000).

10. Prosecutor v. Brima, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 276 (Mar. 31, 2006), http://www.sc-sl.org/LinkClick.aspx?fileticket=CR6ODLk2IfA=&tabid=157 (citing Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 373 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001)).

11. See BLACK'S LAW DICTIONARY 998 (9th ed. 2009), which defines "secondary liability" as "[l]iability that does not arise unless the primarily liable party fails to honor its obligation."

international criminal justice, the Nuremburg Military Tribunals (NMTs).[12]

Following the Second World War, the NMTs took place to prosecute lower-ranking Nazi leaders.[13] Because the purpose of the NMTs was to hold Nazi leaders and other perpetrators, such as German industrialists, criminally responsible under international law for the organized commission of crimes on a massive scale, the resulting judgments demonstrate how a person could be found culpable of crimes through secondary liability.[14] It is worthwhile to note that though the controlling law of the NMTs contemplated abetting and similar forms of liability,[15] individual tribunals generally did not differentiate between the listed forms of criminal participation within their judgments, forcing successive courts to appraise each case through the facts and their outcome.[16]

One of the most striking cases of the NMTs regarding the issue of aiding and abetting liability comes from the prosecution of Karl Rasche in *United States v. Weizsaecker* (*Ministries Case*).[17] Rasche was a banker who knowingly provided large loans to fund various Schutzstaffel (SS) enterprises, such as Nazi slave labor and resettlement programs.[18] The NMTs charged Rasche with abetting, but acquitted him on the basis that "[a] bank sells money or credit in the same manner as the merchandiser

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12. *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/ (last visited Apr. 6, 2014).

13. 8 ENCYCLOPAEDIA BRITANNICA 834 (15th ed. 2002).

14. *Taylor II*, Case No. SCSL-03-01-A, Judgment, ¶ 377 (Sept. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=107; Brief of *Amici Curiae* Nuremberg Scholars at 5, Doe v. Nestle USA, Inc., 738 F.3d 1048 (9th Cir. 2013) (No.2:05-cv-05133-SVW-JTL), *available at* http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/AmicusBrief ofNurembergScholars7.1.11.pdf.

15. *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, MIL. GOV'T GAZETTE-GER.: BRITISH ZONE OF CONTROL, 1946, at 46 [hereinafter *Control Council Law No. 10*]; *see Taylor II*, Case No. SCSL-03-01-A, ¶ 377 n.1193 ("British military tribunals described the liability of those who did not perform the *actus reus* of the crime in terms of 'aiding and abetting,' being an 'accessory' to and/or 'being concerned in' the commission of the crime.").

16. *Cf. Taylor II*, Case No. SCSL-03-01-A, ¶ 377 n.1193. The Appeals Chamber emphasized it was satisfied that article 6(1) of the SCSL Statute was substantially consistent with article II(2)(a)-(d) of Control Council Law No. 10 "*as applied by tribunals operating under that law*." *Id.* Furthermore, the Appeals Chamber specifically characterized the defense's submissions in support of purpose as the mens rea standard as "facile characterizations of the holdings" in the case law, emphasizing the importance of contextual reading. *Id.*

17. 14 Trials War Crim. Before Nuernberg Mil. Tribunals Under Control Council L. No. 10, at 1, 621 (Nuernberg Mil. Tribunals 1946-49).

18. *Id.*

of any other commodity [and such a] transaction can hardly be said to be a crime."[19] Unlike Rasche's acquittal in the *Ministries Case*, the British Military Court found in the *Zyklon B Case* that two defendants, Tesch and Weinbacher, were guilty as accessories to murder for knowingly supplying Zyklon-B poison to the Auschwitz concentration camp.[20] The prosecuting Judge Advocate asserted in the *Zyklon B Case* that three facts must be satisfied to establish guilt: (1) "that Allied nationals had been gassed by means of Zyklon B," (2) "that this gas had been supplied by Tesch," and (3) "that the accused knew that the gas was to be used for the purpose of killing human beings."[21] Similarly, the tribunal in the *I.G. Farben Case* acquitted company executives for supplying large shipments of Zyklon B to the Nazis because willingly shipping such large quantities of gas to concentration camps alone did not lead to a reasonable inference of knowledge regarding "the criminal purposes to which this substance was being put."[22] The holdings in the *Zyklon B Case* and the *I.G. Farben Case* have generally been used to support the proposition that knowledge was the required mens rea for NMT jurisprudence.[23] To further muddle matters, the United Nations War Crimes Commission summarized a series of postwar-French criminal tribunals by concluding that an informer becomes an accomplice when "his action . . . either *intended* to bring about this consequence or was recklessly indifferent with regard to it."[24] In light of the multitude and variety of tribunal case law following the Second World War, efforts to codify international criminal law began to gain support in the post-World War II era.[25]

The United Nations attempted to make international criminal law more precise and uniform following the conclusion of the NMTs by establishing the International Law Commission (ILC) in 1947.[26] Pursuant to U.N. General Assembly Resolution 177, the ILC was mandated to formulate and codify "the principles of international law"

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19. *Id.* at 622.

20. 1 L. Rep. Trials War Crim. 93, 93 (Brit. Mil. Ct. 1946).

21. *Id.* at 101. The tribunal also noted that the Judge Advocate was of the opinion that the court did not need any direction on points of law and omitted any discussion dedicated to specific standards of law. *Id.*

22. 8 Trials War Crim. Before Nuernberg Mil. Tribunals Under Control Council L. No. 10, at 1, 1169 (Nuernberg Mil. Tribunals 1946-49).

23. *See Taylor II*, Case No. SCSL-03-01-A, Judgment, ¶ 426 (Sept. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=107; *see also* MOHAMED ELEWA BADAR, THE CONCEPT OF *MENS REA* IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH 252 (2013) (introducing the *I.G. Farben Case* as an example of a rebuttal of knowledge because the defendants *reasonably believed* the gas was being used for lawful purposes).

24. BADAR, *supra* note 23, at 252 (emphasis added) (citation omitted).

25. *Id.* at 268.

26. *Id.*

reflected in the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter), Control Council Law No. 10, and the judgments of the NMTs.[27] Subsequently, the ILC formulated the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles) in 1950,[28] completed the first Draft Statute for an International Criminal Court (Draft ICC Statute) in 1994,[29] and, most recently, drafted the Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code of Crimes) in 1996.[30] While the Draft ICC Statute does not address individual criminal responsibility[31] and principle VII of the Nuremberg Principles includes the term, but does not define "complicity,"[32] the Draft Code of Crimes recognizes a form of secondary liability in article 2(3)(d):

> An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual . . . [k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.[33]

By including article 2(3)(d) in the Draft Code of Crimes, the ILC made the statement that aiding and abetting liability is an identifiable part of customary international law.[34] Although the NMTs and the ILC helped provide the foundational elements of aiding and abetting liability under customary international law, the ad hoc tribunals played a key role in further clarifying and expanding the Nuremberg Principles by distinguishing the different modes of secondary liability.[35]

In the first case before an international criminal tribunal since the NMTs concluded in 1947, the Appeals Chamber of the ICTY sought to

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27. *Id.*; *see also Origin and Background of the Development and Codification of International Law*, INT'L LAW COMM'N, http://www.un.org/law/ilc/ (follow "Introduction" hyperlink) (last visited Apr. 6, 2014).

28. *See Documents of the Second Session Including the Report of the Commission to the General Assembly*, [1950] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

29. *Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session*, [1994] 2 Y.B. Int'l L. Comm'n 20, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (pt. 2).

30. *See Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session*, [1996] 2 Y.B. Int'l L. Comm'n 17, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (pt. 2).

31. *See Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session*, *supra* note 29, at 20.

32. *Documents of the Second Session Including the Report of the Commission to the General Assembly*, *supra* note 28, at 13.

33. *Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session*, *supra* note 30, at 18.

34. *Origin and Background of the Development and Codification of International Law*, *supra* note 27.

35. *See* Meron, *supra* note 8, at 1512.

further define "aiding and abetting liability" in *Prosecutor v. Tadić* by distinguishing it from "joint criminal enterprise" liability.[36] The *Tadić* Appeals Chamber highlighted that, unlike joint criminal enterprise liability, a common concerted plan was not needed for aiding and abetting liability, but the assistance must be specifically directed to the crime.[37] The *Tadić* Appeals Chamber further distinguished the two by stating:

> 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. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that *in some way* are directed to the furthering of the common plan or purpose.[38]

Since *Tadić*, a number of ICTY decisions have clearly cited this passage and incorporated its language within their decisions,[39] yet relatively few have addressed the language in a rigorous, methodological way.[40]

Despite the use of the language "specifically directed" in *Tadić*, aiding and abetting liability within the jurisprudence of the SCSL and the ICTY appeared congruent and somewhat consistent with each other up until the recent past.[41] As recently as 2009, the ICTY Appeals Chamber in *Prosecutor v. Mrkšić* confirmed that specific direction is not an

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36. Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

37. *Id.* ¶ 228.

38. *Id.* ¶ 229 (emphasis added).

39. *See* Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf; *Perišić II*, Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

40. *See Blagojević*, Case No. IT-02-60-A, ¶ 189 (asserting the proposition that most chambers have not addressed specific direction because the element was self-evident and thus implicit within any discussion of knowledge and substantial effects).

41. *Compare* Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007), http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf, *and* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf, *with* Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRfNF7M%3D&tabid=218 (omitting an analysis of aiding and abetting liability from any discussion of specific direction). Prior to 2013, no international criminal tribunal had issued an acquittal on the basis of specific direction. James Stewart, *"Specific Direction" Is Unprecedented: Results from Two Empirical Studies*, EJIL: TALK! (Sept. 4, 2013), http://www.ejitalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/.

"essential ingredient of the *actus reus* of aiding and abetting."[42] Furthermore, the Trial Chamber of the ICTY in *Prosecutor v. Perišić* (*Perišić I*) held that aiding and abetting liability was established by "acts or omissions directed at providing practical assistance, encouragement or moral support to the perpetration of the crime, which have a substantial effect on the perpetration of the crime" and expressly held that specific direction was not a requisite element of its actus reus.[43] The ICTY Appeals Chamber in *Prosecutor v. Perišić* (*Perišić II*) nonetheless found a reasonable basis within past precedent to overturn the Trial Chamber's finding, holding that assistance must be specifically directed to the perpetration of a crime beyond a reasonable doubt in order to incur aiding and abetting liability.[44]

The ICTY Appeals Chamber in *Perišić II* began its analysis of whether specific direction was a required element of the actus reus of aiding and abetting liability by addressing the original source of the particular language within *Tadić*.[45] *Perišić II* interpreted the *Tadić* judgment as stating that, while the actus reus of joint criminal enterprise liability "requires only 'acts that *in some way* are directed to the furthering of the common plan,'" aiding and abetting liability requires a closer link such that it must be directed specifically toward a crime.[46] This alone was evidence of an explicit judicial standard; therefore, absent any case law expressly and cogently departing from such an interpretation, specific direction remained a required element of the aiding and abetting actus reus.[47] Notably, *Perišić II* adopted the position of the ICTY Appeals Chamber in *Prosecutor v. Blagojević*, stating that specific direction will often be implicit, affirming that specific direction was nonetheless a part of aiding and abetting liability.[48] In the Appeals Chamber's view in *Perišić II*, judgments that had not expressly rejected

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42. Case No. IT-95-13/1-A, Judgment, ¶ 159 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009), http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf.

43. *See* Prosecutor v. Perišić (*Perišić I*), Case No. IT-04-81-T, Judgment, ¶ 126 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011), http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf.

44. *See* Case No. IT-04-81-A, Judgment, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

45. *Id.*

46. *Id.* (quoting Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 229 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999)).

47. *Id.* ¶¶ 27-28.

48. *Id.* ¶ 31; *see also* Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf.

specific direction within its reasoning had implicitly satisfied the specific-direction requirement.

On the other hand, *Perišić II* found that judgments that had expressly rejected the specific-direction requirement, namely the *Mrkšić* appeals judgment, did not actually intend to depart from settled precedent, because it had not given the issue the "most careful consideration."[49] On the contrary, *Perišić II* regarded *Mrkšić*'s statement that specific direction was not an "essential ingredient . . . of aiding and abetting"[50] as merely affirming *Blagojević*'s reasoning that specific direction could be implicit in the holding.[51]

In light of the holding that specific direction may be implicit, *Perišić II* identified circumstances and scenarios in which specifically directed assistance must be discussed in order to satisfy the actus reus of aiding and abetting liability.[52] After an extensive review of the ICTY case law, *Perišić II* found that if significant geographic or temporal distance existed between the actions of an accused and the crime that was allegedly assisted, there was a corresponding decrease in the likelihood of "a connection between that crime and the accused individual's actions."[53] In circumstances where such a disconnect exists, the specific-direction analysis is required.[54]

Finally, *Perišić II* made clear that the specific-direction inquiry was actually an inquiry into the actus reus of aiding and abetting liability.[55] Specific direction, the court noted, could nonetheless be demonstrated implicitly through discussion of other elements of aiding and abetting liability, "such as substantial contribution[s]."[56] *Perišić II* noted that this was not limited to the actus reus elements, but indicated that elements demonstrating the mens rea of an actor could serve as circumstantial evidence of specific direction.[57]

In applying these new principles, *Perišić II* made clear that it considered assistance from one armed group to another, without more, to be insufficient to incur individual criminal liability for aiding and

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49. *Perišić II*, Case No. IT-04-81-A, ¶¶ 34-35.

50. Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Judgment, ¶ 159 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009), http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf.

51. *Perišić II*, Case No. IT-04-81-A, ¶ 32.

52. *Id.* ¶¶ 37-40.

53. *Id.* ¶ 40 (adding that the same rationale applied to other factors that separated the principal's crime from the accused's acts).

54. *Id.* ¶¶ 37-40.

55. *Id.* ¶ 68.

56. *Id.* ¶ 38.

57. *Id.* ¶ 68.

abetting.[58] A sufficient link between the acts of the accused and the crime of the principal must be established through assistance being specifically directed towards that crime.[59]

Foreshadowing the SCSL Appeals Chamber's *Taylor II* judgment, Judge Liu dissented from the majority opinion of *Perišić II*. Significantly, Judge Liu pointed out that the addition of specific direction undermined the purpose of aiding and abetting liability by allowing perpetrators of assistance to evade any judicial consequence for their crimes.[60] Despite the ICTY Trial Chamber's finding that General Momčilo Perišić assisted a group whose crimes were "inextricably linked to [its] war strategy and objectives"[61] and, in fact, knew of the group's propensity to commit crimes,[62] the ICTY Appeals Chamber's new requirement nonetheless necessitated Perišić's acquittal.[63] Following this controversial holding by the ICTY, the eyes of the international law community turned to the SCSL to see whether it would adopt or reject the seemingly new concept of specific direction in its appellate judgment of Charles Ghankay Taylor.[64]

III. THE COURT'S DECISION

In the noted case, the Appeals Chamber for the SCSL definitively affirmed that the respective actus reus and mens rea elements of aiding and abetting liability under the SCSL statute and customary international law were satisfied by an accused's assistance to a principal that (1) substantially effected the commission of a crime with (2) knowledge of the consequence of such assistance.[65] The court further reiterated that, unlike *Perišić II*'s conclusions, the actus reus of aiding and abetting liability does not require specific direction, either expressly or implicitly.[66]

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58. *Id.* ¶ 72.
59. *Id.*
60. *Id.* ¶ 3 (Liu, D., dissenting).
61. *Id.* ¶ 4 (citations omitted) (internal quotation marks omitted).
62. *Id.* ¶ 8.
63. *Id.* ¶ 74.
64. *Taylor I*, Case No. SCSL-03-1-T, Judgment, OXFORD REP. ON INT'L L. ¶¶ 177-181 (Apr. 26, 2012), http://opil.ouplaw.com/view/10.1093/law:icl/936scs/12.case.1/law-icl-936scs/12 (subscription required).
65. *Taylor II*, Case No. SCSL-03-01-A, Judgment, ¶¶ 482-483 (Sept. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=107; *see also id.* ¶ 471 (explaining that despite the defense's amended appeal being denied, the Appeals Chamber was aware that *Perišić II* was "relevant jurisprudence" to the case at hand).
66. *Id.* ¶ 479.

The Appeals Chamber articulated that the defense provided four primary grounds for finding legal error in the Trial Chamber's conviction of Taylor for aiding and abetting liability, namely: (1) it failed to generally apply the actus reus of aiding and abetting liability correctly,[67] (2) it improperly applied knowledge as the mens rea standard as opposed to purpose, [68] (3) its application of aiding and abetting liability criminalized sovereigns' lawful rights,[69] and (4) it failed to apply the element of specific direction within the actus reus of aiding and abetting liability contrary to ICTY and the International Criminal Tribunal for Rwanda (ICTR) jurisprudence.[70] Though ultimately interrelated,[71] the Appeals Chamber analyzed each issue separately and successively in relation to the SCSL Statute and its views of customary international law,[72] beginning with the general application of the actus reus for aiding and abetting liability.[73]

A. Actus Reus of Aiding and Abetting Liability

The Appeals Chamber, despite finding the submission defective on appeal,[74] addressed the issue as to whether the Trial Chamber was required to find that Taylor's assistance was "to *the crime*, as such," where the assistance was actually used in perpetration of that crime.[75] In a flat rejection of the defense's view, the Appeals Chamber held that assistance, encouragement, or moral support that substantially effected

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67. *Id.* ¶ 354.
68. *Id.* ¶¶ 407-408.
69. *Id.* ¶ 453.
70. *Id.* ¶ 467.
71. *See id.* ¶¶ 359, 363, 467.
72. *See id.* ¶ 352 (explaining that because the SCSL Statute does not establish the actus reus and mens rea elements of any of the five forms of criminal participation listed in article 6(1), it must look towards customary international law and general rules of law in defining elements for aiding and abetting in accordance with Rule 72*bis* of the SCSL Rules of Procedure and Evidence).
73. *Id.* ¶ 354.
74. *Id.* ¶¶ 355-356. The Appeals Chamber noted that no coherent arguments were provided within the defense's brief to support ground thirty-four of its submissions, which stated, "[T]he Trial Chamber erred in law and fact in failing to require a showing that the assistance was to the crimes as such, and that is was substantial." *Id.* ¶ 355 (citations omitted) (internal quotation marks omitted). Nonetheless, the Appeals Chamber requested the parties to address the issue in their oral arguments, considering the subject "an important issue of law," and proceeded to address ground thirty-four in the Judgment. *Id.* ¶ 356.
75. *Id.* ¶¶ 357-358 & n.1113 (recognizing the defense's observation pointed out that under the Trial Chamber's findings, if an actor does anything to perpetuate the existence of an organization that it knows, "in part, aside from many other activities," engages in criminal behavior, then that would be sufficient to find that actor guilty of aiding and abetting all crimes committed by that organization).

the commission of a crime establishes the actus reus of aiding and abetting liability, "not the manner in which an accused assisted the commission of [any] crimes."[76] In support of its conclusion, the Appeals Chamber found that statutory construction,[77] past ad hoc tribunal case law,[78] and post-World War II case law[79] all supported and established the substantial effects test as the proper standard.[80] Additionally, the Appeals Chamber found the defense's arguments to be particularly flawed in reasoning.[81]

Throughout the opinion, the Appeals Chamber emphasized that the defense had "mistaken issues of fact for issues of law" regarding its submissions of specific cases,[82] essentially claiming that the defense had incorrectly interpreted the outcome of cases as supporting its conclusions, while those facts merely demonstrated the degree by which the aider's assistance could be said to have substantially effected the crime.[83] The Appeals Chamber also pointed out that aiding and abetting liability, unlike joint criminal enterprise liability, is only incurred for an actor's own contributions to the commission of the crimes, so the distinction between the two does not contemplate mutually exclusive factual circumstances, just separate legal elements that must be met and could overlap in certain scenarios.[84] Overall, the Appeals Chamber found that the manner in which assistance is rendered was a factor within the calculation of the substantial effect element of the actus reus requirement, not a distinct requirement on its own.[85] Having affirmed that the actus reus of aiding and abetting liability is established by assistance that has a substantial effect on the crime, the Appeals Chamber turned its attention

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76. *Id.* ¶ 385.
77. *Id.* ¶ 366.
78. *Id.* ¶ 368.
79. *Id.* ¶ 377.
80. *Id.* ¶ 385.
81. *Id.* ¶ 382.
82. *Id.* ¶ 370. The defense asserted that the case law of both the ICTY and ICTR showed that the actus reus of aiding and abetting liability involves criteria such as "the directness of the aider's involvement in the crime itself . . . [t]he strength of the demonstrable causal connection [to] the crime, . . . or, in the alternative, the lapse of time." *Id.* ¶ 359 (first alteration in original) (citation omitted) (internal quotation marks omitted).
83. *Id.* ¶ 370.
84. *Id.* ¶ 382. "Joint criminal enterprise, as a unique form of . . . common purpose liability, is particularly characterised by the legal requirement of a common criminal purpose" and thus contemplates distinct legal elements rather than distinct factual circumstances. *Id.* The defense argued that unless a more narrow interpretation of assistance was applied so as to require aid being directed to the principal, aiding and abetting liability would amount to organizational liability, or a form of joint criminal enterprise. *Id.* ¶ 359.
85. *See id.* ¶ 385.

to the issue of the applicable mens rea requirement under the SCSL Statute and customary international law.[86]

B. Mens Rea of Aiding and Abetting Liability

In regard to the mens rea requirement of Aiding and Abetting Liability, the Appeals Chamber identified three primary arguments advanced by the defense contending that the Trial Chamber's application of the knowledge standard was an error of law and subsequently found that each argument was insufficient to support a standard greater than knowledge under customary international law.[87] First, the Appeals Chamber found that the NMTs and ad hoc tribunals had consistently applied knowledge as the mens rea standard of aiding and abetting and rejected the notion that the question of the requisite mens rea standard was a matter of first impression.[88] While reviewing post-World War II jurisprudence, the Appeals Chamber addressed whether the *Ministries Case* was evidence of a greater mens rea requirement.[89] The issue there, in the Appeals Chamber's view, did not hinge on whether the defendant demonstrated a knowing or purposeful mens rea, but whether the crime in question, knowingly making loans to fund Nazi slave labor camps, was "a crime."[90] The Appeals Chamber also noted, in support of its conclusions, that the ILC's 1996 Draft Code of Crimes applied a knowledge standard of mens rea to its definition of aiding and abetting liability.[91]

Next, the Appeals Chamber addressed the contention of whether article 25(3)(c) of the Rome Statute of the International Criminal Court (Rome Statute) demonstrated an absence of state practice and *opinio juris* supporting knowledge as the mens rea standard for aiding and abetting liability.[92] The Appeals Chamber dismissed the idea that article 25(3)(c) was the equivalent provision to article 6(1) of the SCSL Statute and placed serious reservations as to whether the purpose standard within article 25 of the Rome Statute represented a statement of customary international law.[93] Accordingly, the Appeals Chamber found that the

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86. *See id.* ¶¶ 401-406.
87. *Id.* ¶¶ 408, 446.
88. *Id.* ¶ 414.
89. *Id.* ¶ 424.
90. *See id.* ¶ 423 n.1325 (internal quotation marks omitted) (giving background on Rasche's acquittal and highlighting that the inquiry made by tribunal did not question knowledge as the culpable standard of aiding and abetting liability).
91. *Id.* ¶ 428.
92. *Id.* ¶ 408.
93. *Id.* ¶ 451.

Rome Statute, being a treaty, did not reflect the mens rea standards of aiding and abetting liability under international law.[94] Although the Appeals Chamber satisfied itself that the application of the knowledge standard as the requisite aiding and abetting mens rea was consistent with the SCSL Statute and customary international law, issues of state practice and judicial policy remained at large.[95]

C. Contrary State Practice

Although briefly addressed in the submissions regarding the general application of the actus reus and mens rea, the Appeals Chamber found it necessary to independently analyze the question of whether the Trial Chamber's legal application of aiding and abetting liability was contrary to current state practice and *opinio juris*.[96] Specifically, the defense submitted that the application of knowledge as the mens rea standard and substantial effect as the actus reus standard for aiding and abetting liability criminalized innocent state behavior, i.e., supplying or generally supporting parties to an armed conflict.[97] The Appeals Chamber found that the Trial Chamber's application of aiding and abetting liability was consistent with customary international law and, likewise, found that the defense's argument was insufficiently supported to a "level of mere assertion."[98] In the Appeals Chamber's view, principles of international criminal liability for individuals and the behavior of states could not be conflated with each other, as the act of state doctrine cannot be offered as a defense under international criminal law.[99] The Appeals Chamber pointed out that, rather than contrary to state practice, "the right to assist the commission of widespread and systematic crimes against . . . civilian population[s]" has never been supported as a state's position of international law.[100] In the Appeals Chamber's views, the rules regarding aiding and abetting liability are well established and no evidence was

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94. *Id.* ¶ 435.
95. *Id.* ¶ 452.
96. *See id.* ¶¶ 452-465. The issues of organizational liability and contrary state practice were central issues in the defense's submissions and, as such, were briefly addressed by the Appeals Chamber as related issues in the analysis of both the actus reus and mens rea standards of aiding and abetting liability. *Id.*
97. *Id.* ¶¶ 359, 381, 452-455. Although the defense also considered the implications that the Trial Chamber's application would have on distinguishing joint criminal enterprise from aiding and abetting liability, the organizational liability was also articulated as problematic because any actor would then be liable for criminal activities of a party by merely assisting in ways recognized as legal state practice. *Id.* ¶¶ 359, 366.
98. *Id.* ¶ 456.
99. *See id.* ¶¶ 452-458.
100. *Id.* ¶ 459.

found to support that customary international law had changed in that regard.[101]

D. Specific Direction

The Appeals Chamber began its discussion on specific direction by noting that the concepts of "purpose," "cause," and "specifically directed" are necessarily related.[102] However, it also noted that although the SCSL is guided by decisions of the ICTR and ICTY, the "final arbiter" of the law is the SCSL itself.[103]

Due to the interrelated issues, the Appeals Chamber used much of the same analysis in which it addressed both the application of the actus reus and the mens rea of aiding and abetting liability.[104] The Appeals Chamber concluded that its review of post-World War II jurisprudence did not require an actus reus element of specific direction and reiterated that the key component of the actus reus for aiding and abetting liability remained a substantial effect on the commission of crimes.[105] In the Appeals Chamber's view, the ICTY Appeals Chamber in *Perišić* had not discussed whether specific direction was an actus reus element under customary international law, but had only surveyed its own jurisprudence and case law for consistency in applicability.[106] Therefore, the SCSL Appeals Chamber did not find evidence that *Perišić II*'s holding was relevant to customary international law.[107] Furthermore, the SCSL Appeals Chamber took particular issue with the assertion that the ICTY could implicitly find specific direction as an element of the aiding and abetting actus reus, while also requiring this element be proven "beyond a reasonable doubt."[108] The result of such an application would result in an affront to justice and the presumption of evidence.[109] Accordingly, the SCSL Appeals Chamber concluded that specific direction could not be an element of the actus reus of aiding and abetting liability under article

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101. *Id.* ¶ 464.

102. *Id.* ¶ 467. The Appeals Chamber also satisfied itself that the issue of specific direction had, in fact, been raised by the defense in its submissions when it recognized the close relationship of the ICTY's concepts of "specifically directed" and "specifically aimed" with "purpose." *Id.* It appears the Appeals Chamber viewed that by addressing the issue of knowledge, the defense had also brought up the issue of specific direction.

103. *Id.* ¶ 472.

104. *See id.* (avoiding a detailed assessment of post-World War II jurisprudence in addressing specific direction, but satisfying itself with reviews already executed).

105. *Id.* ¶¶ 474-475.

106. *Id.* ¶ 477.

107. *See id.*

108. *Id.* ¶ 479.

109. *Id.*

6(1) of the SCSL Statute or customary international law.[110] The SCSL, being satisfied that aiding and abetting is an act that substantially affects the commission of a crime in conjunction with a knowing mens rea, affirmed Taylor of eleven counts of aiding war crimes and crimes against humanity and summarily affirmed his sentence of fifty years in prison.[111]

IV. ANALYSIS

At first glance, one would be hard-pressed to find that the SCSL came to the incorrect conclusion in the noted case. The concept of specific direction, as detailed and applied by the ICTY Appeals Chamber in *Perišić*, seems to set a much narrower standard for incurring aiding and abetting liability than had previously been applied under customary international law.[112] Furthermore, the application of specific direction in case law and academic scholarship in at least one empirical study suggests that, even when language related to specific direction is mentioned within judicial writing, the concept itself is almost never applied to the facts of a case.[113] Despite these glaring inconsistencies, the judgment rendered in the noted case may be unlikely to change the minds within the halls of the ICTY in the near future.[114]

Among the most glaring issues that *Taylor II* failed to address sufficiently is the language found in *Tadić*. The ICTY Appeals Chamber's decision in *Tadić*, as the first international criminal case tried since the Nuremberg Trials in 1947, holds a special place in the world of international criminal law for both its holdings and precedent.[115] Within its opinion, *Tadić* specifically distinguished aiding and abetting liability with joint criminal enterprise liability.[116] *Tadić* pointed out that acts of assistance for aiding and abetting liability must be specifically directed,

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110. *Id.* ¶ 481.

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

112. *Perišić II*, Case No. IT-04-81-A, Judgment, ¶¶ 3-4 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (Liu, D., dissenting), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf. Despite the Trial Chamber's finding, Perišić knew to an almost certain extent that his assistance would be helping a group engaged in crimes against humanity. *See id.*

113. Stewart, *supra* note 41.

114. *See How Will Taylor's Judgment Affect Stanisic and Simatovic?*, SENSE TRIBUNAL (Oct. 7, 2013), http://www.sense-agency.com/icty/how-will-taylor%E2%80%99s-judgment-affect-stanisic-and-simatovic.29.html?cat_id=1&news_id=15381 (explaining that both the prosecution and the defense agreed that the *Taylor II* ruling on specific direction was obiter).

115. Michael P. Scharf, The Prosecutor v. Dusko Tadić*: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 861-65 (1996-97).

116. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 291 (2005).

whereas joint criminal enterprise liability merely requires that actions be in some form directed.[117] *Tadić* further clarified that the requisite aiding and abetting mens rea is knowledge, whereas joint criminal enterprise liability requires intent to pursue a common purpose.[118] In the noted case, the SCSL Appeals Chamber did address whether the factual circumstances required for aiding and abetting liability are mutually exclusive to those of joint criminal enterprise liability, but did not give a detailed analysis of the *Tadić* language itself and whether it could be reconciled with past case law.[119] Because the defense's submissions ultimately asserted that an additional element was needed within the actus reus to provide for a closer link between the assistance and a specific crime committed, the ultimate issue was whether the *Tadić* distinction called for such an analysis.[120] It should seem clear that *Tadić* did not see aiding and abetting liability as just a broader form of joint criminal enterprise liability that did not need a common purpose, but rather it has other, stricter aspects to its elements that make it unique.[121] The Appeals Chamber in the noted case largely ignored the underlying issue.

Indicative from its treatment of *Tadić*, it seems clear that the noted case has gone to great lengths to define the actus reus and mens rea of aiding and abetting liability in a formalist manner, while disavowing other realist aspects within past case law. For instance, in its discussion of mens rea, the SCSL Appeals Chamber rejected the notion that NMT case law, particularly the *Ministries Case*, provided for any required standards other than knowledge and substantial effects.[122] In both the *Ministries Case* and the *Zyklon B Case*, there existed knowledge and substantial effects, yet one resulted in an acquittal and the other in a

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117. *Id.*

118. *Id.*

119. *Taylor II*, Case No. SCSL-03-01-A, Judgment, ¶¶ 381-385 (Sept. 26, 2013), http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=107.

120. *Id.* ¶ 363; *cf. Perišić II*, Case No. IT-04-81-A, Judgment, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf (explaining that the distinction provided in *Tadić* was meant to require a closer link between assistance and particular criminal activities).

121. *Cf.* Chile Eboe-Osuji, *'Complicity in Genocide' versus 'Aiding and Abetting Genocide*,*'* 3 J. INT'L CRIM. JUST. 56, 57 (2005). There exist other examples of this type of trade-off within elements. Similarly, aiding and abetting genocide, a specific-intent crime, requires a common purpose, whereas complicity in genocide only requires knowledge. *Id.* at 58. However, complicity in genocide requires a positive act, while aiding and abetting genocide does not. *Id.*

122. *Taylor II*, Case No. SCSL-03-01-A, ¶ 417-427.

guilty conviction.[123] The noted case acknowledges that a difference in outcomes between the providing a loan in the *Ministries Case* and providing poisonous gas in the *Zyklon B Case* stemmed not from differing mens rea standards, but rather a deficiency within the actus reus.[124] Notably, the Appeals Chamber went on to highlight that the *Ministries Case* merely thought that it was not "a crime to make a loan," yet the Appeals Chamber did not clarify how this view could be reconciled with modern formal elements.[125] At least one scholar has pointed out that the determining factor between the differing outcomes was a kind of "causal closeness of the accessory's conduct to the principal crime."[126] If this is true, then the Appeals Chamber failed to consider whether other factors intrinsic to the making of a loan created the deficiency within the actus reus other than substantial effects, rather than just using the *Ministries Case* as evidence of knowledge as the proper mens rea. Likewise, the Appeals Chamber also used the 1996 ILC Draft Code of Crimes as evidence of a consensus for knowledge as the requisite mens rea,[127] but blatantly failed to consider the phrase "directly and substantially" that is present in the ILC's actus reus definition.[128]

Despite its detailed and adamant rejection of specific direction, the SCSL Appeals Chamber may have also misunderstood the basic concept of both *Perišić II*'s articulation of the concept and *Taylor II* altogether. The SCSL Appeals Chamber stated that *Perišić II*'s take on specific direction, that it could be implicit or self-evident in a given case, appeared "to be inconsistent with the standard of proof beyond a reasonable doubt and the presumption of innocence."[129] As one scholar has pointed out, this would not make sense because requiring specific direction for aiding and abetting liability narrows, not broadens, liability

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123. *See Ministries Case*, 14 Trials War Crim. Before Nuernberg Mil. Tribunals Under Control L. No. 10, at 1, 621 (Nuernberg Mil. Tribunals 1946-49); Zyklon B Case, 1 L. Rep. Trials War Crim. 93, 93 (Brit. Mil. Ct. 1946).

124. *Taylor II*, Case No. SCSL-03-01-A, ¶ 423 n.1325.

125. *Id. But see* Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90. It may be possible the conclusion in the *Ministries Case* could be related to the modern concepts such as admissibility.

126. Günther Handl, *In Re South African Apartheid Litigation and Beyond: Corporate Liability for Aiding and Abetting Under the Alien Tort Statute*, 53 GER. Y.B. INT'L L. 425, 450 (2010).

127. *Taylor II*, Case No. SCSL-03-01-A, ¶ 428.

128. Kevin Jon Heller, *The SCSL's Incoherent—and Selective—Analysis of Custom*, OPINIO JURIS (Sept. 27, 2013, 12:32 AM EDT), http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/.

129. *Taylor II*, Case No. SCSL-03-01-A, ¶ 479 (footnotes omitted).

for the accused.[130] The concept of *nullum crimen sine lege* should, theoretically, be upheld by a directness requirement.[131] Furthermore, the Trial Chamber had already held that "any assistance towards these military operations of the RUF [Revolutionary United Front] and the RUF/ARFC [Armed Forces Revolutionary Council] constitutes *direct* assistance to the commission of crimes by these groups."[132] The Appeals Chamber then cited the same paragraph and concluded that the RUF's criminal activities were inextricably linked to its general purpose.[133] When considering the circumstances surrounding *Perišić II* and the noted case, the fact that General Perišić was not geographically near the crimes and that the Yugoslav Army was involved in both lawful and unlawful forces would likely warrant consideration of the directness of the assistance. However, because of the Trial Chamber's determination that any assistance to the RUF would be directed toward the crimes, no analysis would be needed.[134] Therefore, the specific-direction analysis may not be relevant and, in fact, be obiter.[135]

V. CONCLUSION

The bottom line of the noted case seems clear: the actus reus of aiding and abetting liability under the SCSL Statute and customary international law is satisfied by assistance to the physical actor of a crime that has a substantial effect on the commission of that crime.[136] The SCSL Appeals Chamber's holding has created a stark and dramatic contrast in interpretations of customary international law within the field of international criminal law that may not be reconciled anytime soon. Because of the unwillingness of the Appeals Chamber to delve into the more nuanced issues that were propelled and presented by *Tadić* and *Perišić II*, the ICTY is unlikely to find *Taylor II* persuasive enough to remove the specific-direction enigma from its jurisprudence.[137] Considering that *Taylor II* was the last case to be heard by the SCSL and that words

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130. Alex Fielding, *Charles Taylor Appeal: Why Its Rejection of 'Specific Direction' Doesn't Matter*, BEYOND THE HAGUE (Sept. 30, 2013), http://beyondthehague.com/2013/09/30/charles-taylor-appeal-why-its-rejection-of-specific-direction-doesnt-matter/.

131. Heller, *supra* note 128.

132. Fielding, *supra* note 130 (emphasis added) (citing *Taylor I*, Case No. SCSL-03-1-T, Judgment, OXFORD REP. ON INT'L L. (Apr. 26, 2012), http://opil.ouplaw.com/view/10.1093/law:icl/936scs/12.case.1/law-icl-936scs/12 (subscription required)).

133. *Taylor II*, Case No. SCSL-03-01-A, ¶ 399.

134. Fielding, *supra* note 130.

135. *See id.*

136. *Taylor II*, Case No. SCSL-03-01-A, ¶ 482.

137. *See How Will Taylor's Judgment Affect Stanisic and Simatovic?*, *supra* note 114.

such as irrelevant and obiter are beginning to appear within the dialogue surrounding the noted case,[138] specific direction may indeed have a continued life, albeit with uncertainty surrounding its final form.

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138. *See* Fielding, *supra* note 130.

* © 2014 Don. F. Shaw. J.D. candidate 2014, Tulane University Law School; B.A. 2010, Loyola University—New Orleans. I would like to dedicate this Recent Development to the memory of my mother, Mary Margaret Lianza. Her adventurous spirit continues to inspire me to challenge myself in all my endeavors.